THE ELEPHANT IN THE CLASSROOM: A PROPOSED FRAMEWORK FOR APPLYING VIEWPOINT NEUTRALITY TO STUDENT SPEECH IN THE SECONDARY SCHOOL SETTING

*Alexis Zouhary**

Introduction

In *Morse v. Frederick*,[1] the Supreme Court's latest (and, some might say, futile) foray into student speech rights, Justice Stevens chastised the majority for creating a jurisprudential test that "invites stark viewpoint discrimination"[2] in violation of a "cardinal First Amendment principle[]."[3] However, just as quickly as Stevens condemned the Court's abandonment of viewpoint neutrality, he conceded that, in light of the special characteristics of the school environment, "it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting."[4] Stevens' dissent, which held tightly to the notion that viewpoint discrimination is a most "egregious"[5] constitutional violation, but seemed inclined to loosen its grip in the school setting, epitomizes the uncertainty characterizing the Court's application of viewpoint neutrality to student speech.

---

* Candidate for Juris Doctor, Notre Dame Law School, 2009; B.A., University of Notre Dame, 2006. Special thanks to Professor Richard W. Garnett for his guidance and insight throughout the writing process.

1 127 S. Ct. 2618 (2007).

2 *Id.* at 2645 (Stevens, J., dissenting). Although the Court has never precisely defined "viewpoint discrimination," according to Daniel Farber:

> Presumably, the idea is that some perspectives on a topic are allowed while opposing views are not. . . . [One] problem is deciding what counts as an *opposing* viewpoint, because this depends on how we conceptualize the relevant debate. The easiest picture involves one person affirming and the other denying a proposition. A statute that distinguishes between a statement and its negation is clearly viewpoint-based.

Daniel A. Farber, The First Amendment 30–31 (2d ed. 2003).

3 *Morse*, 127 S. Ct. at 2644 (Stevens, J., dissenting).

4 *Id.* at 2646.

5 *Id.* at 2644.

Despite *Morse*'s ostensibly disparate 5–4 opinion, most Justices agreed that a "school's . . . interest in protecting its students"[6] warrants a viewpoint-based restriction of illegal drug advocacy.[7] But by carving out a narrow, fact-specific exception to otherwise protected speech, the decision only adds to the confusion and complexity characterizing the First Amendment's role in the school setting. Indeed, after *Morse*, the elephant in the classroom—the First Amendment's viewpoint-neutrality requirement—remains. The Court's latest opinion, in conjunction with the current circuit split over viewpoint-based regulations as applied to school-sponsored speech,[8] proves the controversy really is too big to ignore.

Particularly in the last forty years, courts have decided a wide range of First Amendment claims arising in the secondary school context. In fact, some might say that students today are too quick to sound "the First Amendment bugle"[9] in response to administrators' restrictions of their speech. Although students' free speech rights are often taken for granted, the First Amendment's application to public education is actually quite paradoxical. The First Amendment operates to constrain governmental control of citizens' thoughts and beliefs, yet public schools are government-run institutions essentially established to do just that.[10] The possible incompatibility marking the relationship between the First Amendment and the educational enterprise comes to the fore when the Court confronts the issue of viewpoint neutrality in student speech cases.

The "special characteristics" of the school setting have prompted the Supreme Court to identify two categories of student expression: school-sponsored speech—speech occurring in an educational context that "members of the public might reasonably perceive to bear

---

6 *Id.* at 2646.

7 *Id.* at 2645. The primary disagreement in *Morse* stemmed from divergent interpretations of the specific banner at issue. According to the dissent, "BONG HiTS 4 JESUS" is correctly categorized as a "silly," "nonsense message," not advocacy of illegal drug use. *Id.* at 2649.

8 *Compare* Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 926–28 (10th Cir. 2002) (holding that Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988), allows viewpoint discrimination), *and* Ward v. Hickey, 996 F.2d 448, 452–54 (1st Cir. 1993) (same), *with* Peck *ex rel.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 631–33 (2d Cir. 2005) (holding that *Hazelwood* prohibits viewpoint discrimination), *and* Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817, 827–28 (9th Cir. 1991) (en banc) (same).

9 *Morse*, 127 S. Ct. at 2629.

10 *See generally* Richard W. Garnett, *Can There Really Be 'Free Speech' in Public Schools?*, 12 LEWIS & CLARK L. REV. 45 (2008) (questioning whether the freedom of speech can be meaningfully imported into government-run schools).

the imprimatur of the school"[11]—and independent student speech—"personal expression that happens to occur on the school premises."[12] This distinction provides a framework through which the Court should import viewpoint neutrality into the secondary public school setting. Specifically, there are two situations in which the government should be authorized to make viewpoint-based restrictions of student speech: (1) in the realm of school-sponsored speech, when justified by a school's pedagogical interests; and (2) in the realm of independent student speech, when necessary to prevent a serious disruption of the school environment.

To set the stage for this argument, Part I traces the judicial system's condemnation of viewpoint discrimination in various First Amendment contexts and examines its hazy categorization as a specific type of content discrimination. Part II analyzes how the Supreme Court has applied (or neglected to apply) the doctrine of viewpoint neutrality in the so-called "trilogy of student speech"[13]—*Tinker*, *Fraser*, and *Hazelwood*. Part III highlights the confusion characterizing viewpoint neutrality's application to student speech, summarizing the circuit split *Hazelwood* engendered and exploring the Court's equivocal treatment of the issue in its most recent student speech case, *Morse*. Finally, Part IV proposes that courts should draw on the doctrinal framework of *Tinker* and *Hazelwood*, balancing the government's interest as educator with students' expressive interests as citizens, when applying viewpoint neutrality to student speech in the secondary school setting. In light of the proposed framework, this Part concludes that *Morse*, which created a new category of permissible viewpoint-based restrictions, was decided incorrectly.

I. The Doctrine of Viewpoint Neutrality: A Fixed Star in the "Constitutional Constellation" of Free Speech

In *Morse*, the dissent voiced its discomfort with an opinion upholding a "punishment meted out on the basis of a listener's disagreement with her understanding . . . of the speaker's viewpoint."[14] Such sensitivity and discomfort should be expected in light of the Court's historical commitment to viewpoint neutrality.[15] For years, the prohibition against viewpoint discrimination has been a "fixed star

11 *Hazelwood*, 484 U.S. at 271.

12 *Id.*

13 *Hazelwood*, 484 U.S. 260; Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

14 *Morse*, 127 S. Ct. at 2645 (Stevens, J., dissenting).

15 *See infra* text accompanying notes 22–35.

in [America's] constitutional constellation."[16] Indeed, disapproval of viewpoint discrimination and the "jurisprudential pursuit of its converse, 'viewpoint neutrality,'" stem from the values enshrined in the First Amendment's free speech guarantees.[17] These values include the pursuit of truth through the free exchange of ideas,[18] the proper functioning of a democracy,[19] and the fulfillment of self-expression.[20] Although the restriction of speech on the basis of viewpoint has the potential to undermine all of these values, it particularly threatens the marketplace of ideas, "pos[ing] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas . . . or manipulate the public debate through coercion rather than persuasion."[21]

The principle of viewpoint neutrality can be traced to *Hague v. Committee for Industrial Organization*,[22] which declared an ordinance governing the issuance of permits to speak on public streets invalid because it could "be made the instrument of arbitrary suppression of free expression of views."[23] Interestingly, however, the Court's heightened concern for viewpoint neutrality was first made explicit in the school setting.[24] In *West Virginia State Board of Education v. Barnette*,[25] a case heard while the nation was in the midst of World War II, the Court found a public school's mandatory flag salute unconstitutional,

---

16 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

17 *See* Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 100 (1996).

18 *See* JOHN STUART MILL, ON LIBERTY 36–71 (John Gray & G.W. Smith eds., 1991) (1859); *see also, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

19 *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 27 (1960) ("[C]itizens may not be barred [from speaking] because their views are thought to be false or dangerous. No plan of action should be outlawed because someone in control thinks it unwise, unfair, un-American. No speaker may be declared 'out of order' because we disagree with what he intends to say. And the reason for this equality of status in the field of ideas lies deep in the very foundations of the self-governing process. . . . The principle of freedom of speech springs from the necessities of the program of self-government.").

20 *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 994 (1978) ("To engage voluntarily in a speech act is to engage in self-definition or expression."); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (arguing that the freedom of speech ultimately serves only one value: "individual self-realization").

21 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

22 307 U.S. 496 (1939); *see* Heins, *supra* note 17, at 105.

23 *Hague*, 307 U.S. at 516 (opinion of Roberts, J.).

24 *See* Heins, *supra* note 17, at 105.

25 319 U.S. 624 (1943).

asserting that no official could "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[26] *Barnette* recognized the government's unique pedagogical interests in the school setting,[27] but the "compulsion"[28] of students to declare a particular belief triggered its heightened totalitarian alarm. In powerful, poignant rhetoric, Justice Jackson warned that "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters."[29] Although the Court found the student's refusal to salute the flag to be "harmless to others" and "the State,"[30] it hinted that viewpoint neutrality must perdure even when expressions pose a greater threat.[31]

In the years following *Barnette*, courts continued to adhere to the principle of viewpoint neutrality, affirming its application in a variety of contexts. For example, they struck down laws denying government benefits to citizens on the basis of their speech[32] and "invalidate[d] licensing and other benefit schemes" providing government officials with "opportunities for discriminatory decisionmaking."[33] Moreover, the Supreme Court held that even when the government regulates an unprotected category of speech, such as "fighting words," it still may

26 *Id.* at 642.

27 *See id.* at 631 ("[T]he State may 'require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country.'" (quoting Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 604 (1940) (Stone, J., dissenting), *overruled by Barnette*, 319 U.S. 624 (1943))).

28 *Id.* at 631.

29 *Id.* at 641.

30 *Id.* at 642.

31 *See id.* ("[The] freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom."). *But see* Lisa Shaw Roy, *Inculcation, Bias, and Viewpoint Discrimination in Public Schools*, 32 PEPP. L. REV. 647, 655 (2005) ("One could argue that the real proscription in *Barnette* is not based on the lofty constellation of abstract principles, but one based on practical concerns. Put in today's language, we could add an explanatory line in *Barnette* stating that . . . Muslim children should not come home as Christians, or based on the facts of *Barnette*, children who are Jehovah's Witnesses should not come home as mainstream Protestants who show their patriotism in a 'normal' or acceptable way.").

32 *See* Heins, *supra* note 17, at 108; *see also, e.g.*, Speiser v. Randall, 357 U.S. 513, 519 (1958) (striking down a California law requiring a loyalty oath as a qualifying condition for a tax exemption because it was "'aimed at the suppression of dangerous ideas'" (quoting Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 402 (1950))).

33 Heins, *supra* note 17, at 108; *see, e.g.*, Niemotko v. Maryland, 340 U.S. 268, 271–73 (1951) (holding a municipality's standardless permit requirement, which granted officials "limitless discretion" in enforcement, unconstitutional and concluding that the "use of the park was denied because of the City Council's dislike for or disagreement with the Witnesses or their views").

not "target disfavored messages."[34] Thus, regardless of the method of governmental action—whether it be forced speech, "manipulation of benefit and subsidy programs," or direct suppression—the doctrine of viewpoint neutrality applies.[35]

While the Court was reifying the principle of viewpoint neutrality during the second half of the twentieth century, it was also developing a broader, "parallel line of precedent" condemning content-based discrimination by government.[36] Indeed, although the emergence of the distinction between content-based and content-neutral regulations is a relatively recent phenomenon, it now comprises "a core principle of free speech analysis."[37] The Court first relied on a content-based distinction in *Police Department v. Mosley*,[38] striking down an ordinance that permitted certain types of picketing based on subject matter.[39] According to *Mosley*: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[40]

Under First Amendment doctrine, content-based regulations must meet strict scrutiny—that is, they must be "narrowly tailored to serve a compelling state interest"[41]—while content-neutral regula-

34 Heins, *supra* note 17, at 109. In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court struck down a hate speech law because it specifically "proscribed fighting words . . . that communicat[ed] messages of racial, gender, or religious intolerance." *Id.* at 393–94.

35 *See* Heins, *supra* note 17, at 109.

36 *See id.* at 110.

37 *See* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 53 (2000). The explanation for this distinction is that the First Amendment is not only concerned with "the extent to which a law reduces the total quantity of communication, but also—and perhaps even more fundamentally—with the extent to which the law distorts public debate." Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 198 (1983). *But see* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 113 (1981) (attacking the content distinction as "both theoretically questionable and difficult to apply"). Redish makes a valid and meaningful critique of this judicially constructed distinction, as content-neutral restrictions sometimes reduce the quality and quantity of speech more than their more suspect, content-based counterparts. *See id.* at 128–30.

38 408 U.S. 92 (1972).

39 *Id.* at 95 ("The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited.").

40 *Id.*

41 *See, e.g.*, Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 657–71 (1990) (upholding restrictions on corporate political expenditures under strict scrutiny).

tions, which merely control the "time, place, and manner" of speech, are subjected to a less rigorous intermediate scrutiny test.[42] According to courts, "Content is a spacious concept that embraces whole subjects of discourse regardless of the 'viewpoint' expressed."[43] Thus, while content-based restrictions regulate a "subject matter, a topic, or a category of speech," viewpoint-based restrictions regulate "'one's opinion, judgment, or position' within the subject matter, topic or category."[44]

Given that content-based restrictions pass constitutional muster if they survive strict scrutiny, presumably, the same doctrinal rule would apply to viewpoint-based regulations, which are, after all, a subcategory of content-based restrictions. However, drawing on the Court's unforgiving rhetoric concerning viewpoint discrimination,[45] some have suggested that viewpoint-based restrictions are "per se unconstitutional."[46] Indeed, although "the Court has never specifically faced this question," it has "hinted that the rule for viewpoint-based restrictions may be more stringent than for content-based restrictions."[47] For example, in *Members of the City Council v. Taxpayers for Vincent*,[48] the Court stated that "there are some purported interests—such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate the rule."[49] And in *Boos v. Barry*,[50] the Court, while classifying the content-based regulation at issue as viewpoint neutral, asserted that a viewpoint-based regulation carries a "label with potential First Amendment ramifications of its own."[51]

---

42 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. . . . In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny . . . ." (citations omitted)).

43 Heins, *supra* note 17, at 101.

44 Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights:* Hill v. Colorado*, the Vanishing Public Forum, and the Need for an Objective Speech Discrimination Test*, 51 AM. U. L. REV. 179, 194–95 (2005) (internal quotation marks and citations omitted).

45 *See infra* text accompanying notes 48–51.

46 Eugene Volokh, *Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2425 n.44 (1996).

47 *Id.*

48 466 U.S. 789 (1984).

49 *Id.* at 804.

50 485 U.S. 312 (1988).

51 *Id.* at 319.

Despite misleading statements like those in *Members of the City Council* and *Boos*, the Court has applied strict scrutiny to viewpoint-based regulations.[52] In fact, according to Professor Eugene Volokh, although an absolute ban on viewpoint-based restrictions "might be an appealing principle . . . it is [not] the doctrine."[53] For example, in *Capitol Square Review & Advisory Board v. Pinette*,[54] the Court applied strict scrutiny to a restriction based on religious advocacy;[55] significantly, on that very day, in *Rosenberger v. Rector & Visitors of University of Virginia*,[56] the Court held the same type of restriction to be viewpoint-based.[57] Ultimately, while the method of analysis for viewpoint-based restrictions still remains a bit unclear, even if strict scrutiny is applied, a finding of viewpoint discrimination essentially ends the inquiry.[58]

Uncertainty clouds not only the determination of what level of judicial scrutiny applies to viewpoint-based restrictions, but also the determination of what distinguishes a viewpoint-based restriction from a content-based restriction. Due to judicial "linguistic imprecision"[59] and the admitted difficulty of differentiating between the closely entwined, overlapping concepts,[60] the Court has often conflated the two.[61] Line-drawing difficulties particularly arise when a point of view represents a philosophy or system of beliefs. The disagreement between the majority and the dissent in *Rosenberger*, regard-

52 *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 392–94 (1992) (applying strict scrutiny to a viewpoint-based regulation); Texas v. Johnson, 491 U.S. 397, 412 (1989) (applying strict scrutiny to a Texas statute prohibiting flag desecration).

53 *See* Volokh, *supra* note 46, at 2425 n.44.

54 515 U.S. 753 (1995).

55 *See id.* at 761.

56 515 U.S. 819 (1995).

57 *See id.* at 830–31.

58 *See* Chemerinsky, *supra* note 37, at 56 ("As the law has developed, subject-matter restrictions on speech have been upheld, at times, but viewpoint restrictions have never been upheld.").

59 Heins, *supra* note 17, at 110; *see also, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (merging the concepts of content and viewpoint, stating that the Court's "precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content").

60 *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 737 (2000) (Souter, J., concurring) ("There is always a correlation with subject and viewpoint when the law regulates conduct that has become the signature of one side of a controversy."); *Rosenberger*, 515 U.S. at 831 (acknowledging that "the distinction [between content and viewpoint] is not a precise one").

61 *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.").

ing whether a university's refusal to fund a religious student organization's publication constituted impermissible viewpoint discrimination, illustrates this complexity.[62]

Content-based regulations, though always viewed skeptically through a First Amendment lens, are not always required to meet strict scrutiny. When speech takes place on government property, the level of judicial scrutiny applied to content-based restrictions varies according to the type of forum at issue.[63] In traditional public fora—those places "which have immemorially been held in trust for the use of the public,"[64] such as parks and sidewalks—content-based restrictions will be upheld only if they pass strict scrutiny.[65] In limited public fora, defined as those places "the State has opened for expressive activity by part or all of the public," the same restrictions binding the government in public fora govern;[66] however, the government may limit the forum to the purpose for which it was created, even if this means restricting speakers or subjects.[67] In contrast, in nonpublic fora, those government-owned places that are "not by tradition or designation a forum for public communication,"[68] the government may make content-based restrictions on speech provided that such regulations are both reasonable and viewpoint neutral.[69] Notably, even in nonpublic fora, where the greatest content-based restrictions are permissible, viewpoint discrimination is forbidden.[70] Indeed, the only

62 *See Rosenberger*, 515 U.S. at 831 ("Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications."); *cf. id.* at 898 (Souter, J., dissenting) (contending that "the Court's decision equating a categorical exclusion of both sides of the religious debate with viewpoint discrimination" essentially "eviscerated the line between viewpoint and content").

63 *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) ("The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.").

64 Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (opinion of Roberts, J.).

65 *See Perry*, 460 U.S. at 45.

66 Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992).

67 *See Perry*, 460 U.S. at 46.

68 *Id.*

69 Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (asserting that restrictions on access to a nonpublic forum must be "reasonable in light of the purpose served by the forum and . . . viewpoint neutral").

70 *See, e.g.*, *Perry*, 460 U.S. at 46 (asserting that the state, as proprietor of a nonpublic forum, may "reserve the forum for its intended purposes, communicative or

area in which the government may unequivocally make viewpoint-based distinctions is when it is the speaker.[71]

II. The "Trilogy's" Treatment of Viewpoint Neutrality

Despite the Supreme Court's application and enforcement of the principle of viewpoint neutrality throughout various First Amendment contexts,[72] it has never clearly articulated when the requirement should be imposed on restrictions of student speech.[73] However, the Court has clearly articulated two well-settled principles that frame any constitutional inquiry into the First Amendment rights of secondary public school students.[74] First, "[s]tudents . . . are 'persons' under [the] Constitution"[75] and possess free speech rights while at school.[76] Second, these rights "are not automatically coextensive with the rights of adults in other settings."[77] While most agree that students' free speech rights should be shaped by the nature of the school enterprise, exactly how and why they should differ in the school setting remains far from settled. The current conflict over viewpoint neutrality's place in public schools is a paradigmatic example of the difficulties faced when applying First Amendment principles to the specialized institution of public education.

Before *Morse* was decided in 2007, a trilogy of Supreme Court cases—*Tinker v. Des Moines Independent Community School District*,[78] *Bethel School District No. 403 v. Fraser*,[79] and *Hazelwood School District v.*

---

otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view" (citation omitted)). However, the prohibition on viewpoint-based restrictions in nonpublic fora appears to be "a 'presum[ptive]' ban." Volokh, *supra* note 46, at 2426 n.44 (alteration in original) (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831 (1995)). For example, in *Lamb's Chapel v. Center Moriches Union School District*, 508 U.S. 384 (1993), the Court was "willing to consider a claim that a viewpoint-based restriction on speech in a nonpublic forum passes muster under strict scrutiny." Volokh, *supra* note 46, at 2426 n.44.

71 *See Rosenberger*, 515 U.S. at 833.

72 *See supra* notes 32–35 and accompanying text.

73 *See* Roy, *supra* note 31, at 648.

74 *See* Garnett, *supra* note 10, at 49 (describing the "[t]wo principles, or maxims, fram[ing] the Justices' analysis in *Morse*").

75 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

76 *See id. But see* Morse v. Frederick 127 S. Ct. 2618, 2634 (2007) (Thomas, J., concurring) ("As originally understood, the Constitution does not afford students a right to free speech in public schools.").

77 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

78 393 U.S. 503.

79 478 U.S. 675.

Kuhlmeier[80]—provided the foundation for evaluating the free speech claims of public school students. Collectively, the cases reveal that the Court's silence regarding the First Amendment's prohibition of viewpoint discrimination does not evince a lack of concern for the dangers it implicates. In fact, the Court's desire to provide some protection against viewpoint discrimination clearly animated all three of its opinions.

A. Tinker v. Des Moines Independent Community School District

Tinker, the so-called foundation of modern student speech jurisprudence, affirmed that students do not "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate."[81] In *Tinker*, a school district suspended five high school students who donned black armbands to voice their political opposition to the United States' military action in Vietnam.[82] Recognizing self-expression as an integral part of the educational process, the Court found the suspensions unconstitutional.[83] According to *Tinker*, the First Amendment protects a student's right to express his opinions, even on "controversial subjects," unless the speech "'materially and substantially'" disrupts the educational mission of the school or invades the rights of others.[84]

Particularly sensitive to the unpopular viewpoint at issue, *Tinker* underscored the fact that the school district did not seek to prohibit all politically controversial symbols, but only those armbands opposing the Vietnam War.[85] In fact, much of the Court's opinion relied on the theoretical basis for the doctrine of viewpoint neutrality: the fear that too much governmental control will reduce the diversity of ideas in the marketplace, distorting the search for truth.[86]

Tinker is widely regarded as an expansive free speech decree[87] and, in many respects, it certainly is. However, Justice Fortas' liberta-

80 484 U.S. 260 (1988).

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

82 *See id.* at 504.

83 *See id.* at 514.

84 *Id.* at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

85 *See id.* at 510–11.

86 *See id.* at 512 (stating that the "'robust exchange of ideas,'" not "'authoritative selection,'" will facilitate the search for truth (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967))).

87 *See, e.g.*, Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 201 (2007) (noting that "numerous commentators and scholars" describe *Tinker* as the "'high water mark' of student speech rights" (internal citation omitted)).

rian tone causes some to overlook the Court's intimation that certain viewpoint-based regulations may be constitutionally valid in the school setting. While *Tinker* struck down the regulation at issue because "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression,"[88] it simultaneously sanctioned viewpoint-based regulations where there is a showing that the expression would materially and substantially interfere with the educational process. Indeed, by stating "[i]n order for the State . . . to justify prohibition of a particular expression of opinion,"[89] the Court presumptively concedes that, in certain circumstances, the state *can* regulate speech on the basis of viewpoint.

B. Bethel School District No. 403 v. Fraser

Although *Tinker* recognized "the special characteristics of the school environment,"[90] it "did not explore in great detail . . . the implications" that the mission of public education might have on students' free speech rights[91] and, namely, why such rights might be altered in the school setting. Subsequent cases have confronted these implications and, in so doing, significantly curtailed the reach of *Tinker*.[92] For example, the Court, in *Fraser*, granted schools wide latitude in regulating "vulgar," "lewd, indecent, or offensive speech," maintaining that it is a "highly appropriate function of public school education"[93] to inculcate "habits and manners of civility" in students.[94]

Fraser upheld a high school's suspension of a student for delivering a speech at an assembly that contained "an elaborate, graphic, and explicit sexual metaphor,"[95] despite the fact that lower courts found it caused no disruption and, therefore, could not be regulated under *Tinker*.[96] The Court acknowledged that the student's speech was, in Justice Brennan's words, "far removed from the very narrow class of obscene speech" designated as unprotected by the First Amendment.[97] However, according to *Fraser*, more restrictive rules for the

88 *Tinker*, 393 U.S. at 508.

89 *Id.* at 509.

90 *Id.* at 506.

91 *See* Garnett, *supra* note 10, at 53.

92 See *infra* Parts II.B–C, III.B.

93 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

94 *Id.* at 681 (internal citation omitted).

95 *Id.* at 678

96 *See id.* at 686–87.

97 *Id.* at 688 (Brennan, J., concurring) (internal citations and quotation marks omitted). Normally, in order to qualify as obscene, speech must satisfy the three-

school setting are appropriate because "the State has interests in teaching high school students how to conduct civil and effective public discourse and in avoiding disruption of educational school activities."[98]

Although *Fraser* did not apply the *Tinker* standard, "[t]he mode of analysis [it] employed" remains somewhat of a mystery, and courts continue to disagree on the scope of its proper application.[99] But while *Fraser*'s method of analysis may have been ambiguous, the Court was clear that the regulation it upheld pertained to the *manner* of the student's expression—not its *viewpoint*.[100] Indeed, in his concurring opinion, Justice Brennan reinforced that there was no suggestion that school officials attempted to regulate Fraser's "speech because they disagreed with the views he sought to express."[101]

C. Hazelwood School District v. Kuhlmeier

That the speech at issue in *Fraser* was given at an official school assembly factored into the majority's decision, but the Court's holding focused more on the lewd nature of the student's speech than the context in which the speech was given. However, the circumstances surrounding student speech became critical to the constitutional inquiry after *Hazelwood*, which marked a sea change in deference given to school administrators. In *Hazelwood*, the Court again eschewed a *Tinker* analysis, this time in upholding a school's decision to excise two articles from the school newspaper because of content deemed "inappropriate" for publication.[102]

The first newspaper article censored by the school described the experiences of three pregnant students. Although the students' identities were ostensibly protected through the use of pseudonyms, the

---

prong test advanced in *Miller v. California*, 413 U.S. 15 (1973): (1) "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest"; (2) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and (3) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24 (internal citations and quotation marks omitted).

98 *Fraser*, 478 U.S. at 688 (Brennan, J., concurring).

99 Morse v. Frederick, 127 S. Ct. 2618, 2626 (2007). Although *Fraser* is generally understood to "support the school's power to restrict vulgar speech by its students," it can also be interpreted "as being limited to the speech of students who are participating in school-endorsed events." EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES 377 (2d ed. 2005).

100 *See Fraser*, 478 U.S. at 683.

101 *Id.* at 689 (Brennan, J., concurring).

102 *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 263 (1988).

principal feared they would be identifiable nonetheless.[103] According to the principal, privacy concerns and the article's references to sexual activity and birth control—topics he deemed inappropriate for younger students—motivated his decision to delete the article.[104] The second article discussed the impact of divorce on students and included critical remarks from a named student about her father.[105] The principal cited similar privacy concerns for this article's deletion.[106]

Deviating from the Court's approach in *Tinker* and *Fraser*, *Hazelwood* began with a forum analysis.[107] Since *Perry Educational Ass'n v. Perry Local Educators' Ass'n*[108] was decided in 1983, forum analyses often constitute a court's initial step in First Amendment jurisprudence when the expression at issue takes place on government property.[109] Public schools are usually considered nonpublic fora; in fact, in order for a school to be categorized as a limited or public forum, school authorities must have opened the facilities for "'indiscriminate use by the general public,' or by some segment of the public, such as a student organization."[110] Because the school paper in *Hazelwood* was published in connection with journalism classes and school officials maintained control over its publication, the Court concluded that it was intended to be a "supervised learning experience for journalism students," not a forum available for indiscriminate use.[111] Thus, according to the forum doctrine, the school's censorship was to be tested on the basis of reasonableness.[112] *Hazelwood* asserted that it was "this standard, rather than . . . *Tinker*, that govern[ed] [the] case."[113]

The Court's distinction between a *Tinker* inquiry, which governs the realm of independent student speech and asks whether the First Amendment requires a school to "tolerate" speech, and a *Hazelwood* inquiry, which governs the realm of "school-sponsored speech" and asks whether a school must "affirmatively . . . promote" student

---

103 *See id.*

104 *See id.*

105 *See id.*

106 *See id.* at 263–64.

107 *See id.* at 267 ("We deal first with the question of whether [the newspaper] may appropriately be characterized as a forum for public expression.").

108 460 U.S. 37 (1983).

109 *See, e.g.*, *id.* at 46; *see also* Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 76 (2004) ("*Perry* . . . originated the forum analysis approach.").

110 *Hazelwood*, 484 U.S. at 267 (citation omitted) (quoting *Perry*, 460 U.S. at 47).

111 *Id.*

112 *See id.* at 270.

113 *Id.*

speech, was crucial to its holding.[114] According to *Hazelwood*, school-sponsored speech encompasses those "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[115] In carving out this new category of speech, the Court emphasized that

> [e]ducators are entitled greater control over . . . [school-sponsored speech] to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.[116]

Returning to the forum analysis that opened the opinion, *Hazelwood* held that school officials may regulate school-sponsored student speech "so long as their actions are reasonably related to legitimate pedagogical concerns."[117]

Although viewpoint neutrality was not an issue presented to the Court, as the school district took for granted that its decisions must be viewpoint neutral,[118] some courts and commentators read *Hazelwood* as implicitly authorizing viewpoint discrimination in the realm of school-sponsored speech so long as the restrictions stem from pedagogical concerns.[119] The text of the decision clearly gives educators control over "the style and content" of school-sponsored speech.[120] However, in clarifying what kind of content-based restrictions a school could make, the Court stated that administrators must have the power "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.'"[121] As Professor R. George Wright observed, this logic "[i]nescapably . . . authorizes speech regulations based on viewpoint"[122] because what a public school deems inconsistent with the "shared values of a civilized social order" will often hinge on a viewpoint-based judgment.

---

114 *Id.* at 270–71.

115 *Id.* at 271.

116 *Id.*

117 *Id.* at 273.

118 *See infra* text accompanying notes 130–34.

119 *See infra* notes 142–43, 191 and accompanying text.

120 *See Hazelwood*, 484 U.S. at 273.

121 *Id.* at 272 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

122 *See* R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. Ill. U. L.J. 175, 186 (2007).

Yet, despite seemingly opening the door for viewpoint-based regulations, the *Hazelwood* majority failed to address the First Amendment's longstanding commitment to viewpoint neutrality at all. In light of the forum analysis that frames the opinion[123] and Justice Brennan's dissent,[124] this omission seems all the more conspicuous. When *Hazelwood* was decided, Supreme Court precedent clearly prohibited governmental viewpoint discrimination in any type of forum, nonpublic or public.[125] Moreover, although the school setting is a nonpublic forum with a special purpose—implementing an educational mission—"cases requiring viewpoint-neutrality already recognize[d] that non-public fora . . . have special purposes that must be judicially respected."[126]

While the majority neglected to discuss the First Amendment's viewpoint-neutrality requirement, Justice Brennan made it a focus of his fiery dissent. Brennan contended that the material excised by the high school was "objectionable because of the viewpoint it expressed," and accused the school and the Court of "camouflauge[d] viewpoint discrimination."[127] Concerned with the "'diversity of ideas that is fundamental to the American system,'"[128] he would have found the school's censorship unconstitutional under *Tinker*. According to Brennan, although the state has a "vital . . . mandate to inculcate moral and political values," it "is not a general warrant to act as 'thought police' stifling discussion of all but state-approved topics and advocacy of all but the official position."[129]

Justice Brennan was not alone in his concern for viewpoint neutrality; the parties' briefs and the oral argument transcript reveal that neither the attorneys nor the Justices ignored the doctrine. Interestingly, the school district's brief assumed and even emphasized that "[t]he First Amendment strictures against viewpoint discrimination."[130] Relying on past precedent, it took for granted that, regardless of the forum, viewpoint discrimination is "always subject to the

123 *See supra* note 107 and accompanying text.

124 *See infra* text accompanying notes 127–29.

125 *See supra* text accompanying notes 63–70; *see also, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 682 (1998) ("[T]he exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property." (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985))).

126 Wright, *supra* note 122, at 183–84.

127 *Hazelwood*, 484 U.S. at 288 (Brennan, J., dissenting).

128 *Id.* at 290 (quoting Bd. of Educ. v. Pico, 457 U.S. 853, 880 (1982) (Blackmun, J., concurring in part and concurring in the judgment)).

129 *Id.* at 285–86.

130 Brief for the Petitioners at 45, *Hazelwood*, 484 U.S. 260 (No. 86-836).

most stringent First Amendment scrutiny."[131] Framing its argument in accordance with nonpublic forum doctrine, the school district argued that the principal's control over the publication could "'be based on subject matter and speaker identity so long as the distinctions drawn [were] reasonable in light of the purpose served by the forum and [were] viewpoint neutral.'"[132] Thus, it did not contend that viewpoint discrimination by school administrators should be permitted in certain circumstances, but that the censorship did not constitute viewpoint discrimination at all.[133] Indeed, according to the school district, the articles were excised based on "the form of expression—the use of quotes and profiles of identifiable subjects—not the topics per se or any particular viewpoints on them."[134]

Perhaps more significantly, the oral argument transcript shows a Court that was preoccupied with how viewpoint neutrality factored into the jurisprudential equation. The Justices' questions targeted the issue, their hypotheticals revealing misgivings with the Catch-22 that a viewpoint-neutrality requirement might impose on schools. Justice Scalia candidly asked counsel for the school district to "talk about viewpoint discrimination," stating:

> The principal could not exclude an article that discussed teenage sexuality and pregnancy of some of his students, and portray the whole thing in a favorable light in effect sanctioning promiscuity by the students, but would permit an article that discussed the same topic but seemed to frown upon that kind of activity . . . . If he allows sexuality to be talked about, he has to allow both the pros and the cons of adolescent sex to be set forth, is that right?[135]

Later, he probed: "Are you categorical that the principal or whoever has the last word cannot exercise that last word on the basis of some value judgments that discriminate between various positions on particular issues?"[136] While questioning counsel for respondents, the Court returned to Justice Scalia's hypothetical, substituting marijuana use for promiscuity. The Court queried why, if a school could presumably

131 *Id.* at 42.

132 *Id.* at 32 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).

133 *See id.* at 42 ("There has been no suggestion in this case—by the court of appeals or by respondents—that deletion of the two pages of [the newspaper] constituted any form of viewpoint discrimination. The district court found that not only did [the principal] not have any objection to any views expressed in the articles, but he had no objection to the general topics themselves.").

134 *Id.* at 43.

135 Transcript of Oral Argument at 21, *Hazelwood*, 484 U.S. 260 (No. 86-836).

136 *Id.* at 22.

teach students of the dangers of illegal drug use in the classroom without presenting the opposing view, it could not establish a newspaper that did the same thing.[137] In response, counsel for respondents differentiated between the school's right to control curricular content and a student's right to self-expression.[138]

Ultimately, the oral argument transcript suggests that several Justices seemed dissatisfied with the Catch-22 implications a viewpoint-neutrality requirement on school-sponsored speech would entail. In particular, they worried that such a requirement would force a school either to have a school paper containing articles endorsing marijuana use or to have no paper at all.[139] However, perhaps unsure of the ramifications that an explicit abandonment of viewpoint neutrality for school-sponsored speech might engender—perhaps adhering to the philosophy of judicial restraint—the majority opinion did not address the issue.

III. Viewpoint Neutrality's Confusion Crescendos

In *Hazelwood*'s aftermath, jurisprudence on viewpoint neutrality's application to student speech has been marked by confusion. Because the Court failed to explicitly address the applicability of viewpoint neutrality to school-sponsored speech specifically, or to student speech in general, judges have been left to interpret *Hazelwood*'s intent for themselves. Their interpretations have diverged—with some holding that the Court authorized viewpoint-based restrictions and others holding that it did not.[140] *Morse*, the Supreme Court's subsequent student speech case, has only muddled the field further.

A. *The Resulting Circuit Split*

The Court's ambiguous position on viewpoint neutrality's application to school-sponsored speech, rather predictably, spawned a cacophony of lower court opinions. Indeed, the issue is a certifiably

137 *See id.* at 29 ("What about teaching in the school, I presume that you could try to teach the students that smoking pot is no good or could you, would you have to have a teacher come up and give the other side and say on the other hand maybe smoking pot is good? . . . Why can the school enforce a point of view in the one case and not in the other?").

138 *See id.* ("I do not think that you can pair a newspaper with what they teach in social studies.").

139 *See id.* at 37.

140 *See infra* Part III.A.

stamped "circuit split."[141] While the First[142] and Tenth[143] Circuits have explicitly permitted viewpoint-based restrictions, the Second,[144] Ninth,[145] and Eleventh[146] Circuits have refused to abandon the viewpoint-neutrality requirement without specific direction from the Supreme Court.[147] Interestingly, although the Third and Sixth Circuits initially ventured to interpret *Hazelwood*, both "ultimately retracted their opinions on other grounds."[148]

In 1993, the First Circuit became the first to interpret *Hazelwood* as permitting viewpoint-based regulations of speech. In *Ward v. Hickey*,[149] a nontenured teacher alleged that the school failed to

---

141 *See* Chiras v. Miller, 432 F.3d 606, 615 n.27 (5th Cir. 2005) ("A split exists among the Circuits on the question of whether *Hazelwood* requires viewpoint neutrality.").

142 *See, e.g.*, Ward v. Hickey, 996 F.2d 448, 452–54 (1st Cir. 1993).

143 *See, e.g.*, Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 926–27 (10th Cir. 2002) ("'*Hazelwood* clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored activities so long as those restrictions are reasonably related to legitimate pedagogical concerns.'") (quoting C.H. *ex rel.* Z.H. v. Oliva, 195 F.3d 167, 172–73 (3d Cir. 1999), *aff'd in part by an equally divided court en banc, vacated in part*, 226 F.3d 198 (3d Cir. 2000)).

144 *See, e.g.*, Peck *ex rel.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 629–33 (2d Cir. 2005).

145 *See, e.g.*, Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817, 827–30 (9th Cir. 1991) (en banc); *see also* Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1011 (9th Cir. 2000) (stating that if it had not classified the speech at issue as government speech, the court would have been "compelled by *Planned Parenthood* to review [the school district]'s actions through a viewpoint neutrality microscope").

146 *See, e.g.*, Searcey v. Harris, 888 F.2d 1314, 1319 n.7, 1325 (11th Cir. 1989); *see also* Bannon v. Sch. Dist. of Palm Beach County, 387 F.3d 1208, 1215 (11th Cir. 2004) (citing *Searcey* and reaffirming the viewpoint-neutrality requirement). *But see id.* at 1217 (Black, J., concurring specially) (asserting that *Hazelwood* allows "viewpoint-based discrimination against school-sponsored student expression").

147 Although courts refer to a literal constitutional prohibition of viewpoint-based restrictions, presumably such restrictions would be "strongly disfavored and . . . subject to strict scrutiny." *See* Wright, *supra* note 122, at 191 n.118; *see also supra* text accompanying notes 52–58 (noting that while the Court's analytical framework for viewpoint-based restrictions is ambiguous, it is fatal in practice).

148 Emily Gold Waldman, *Returning to* Hazelwood*'s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 90 n.204 (2008). *See, e.g.*, C.H. *ex rel.* Z.H. v. Oliva, 195 F.3d 167, 173 (3d Cir. 1999), *aff'd in part by an equally divided court, en banc, vacated in part*, 226 F.3d 198 (3d Cir. 2000) (interpreting *Hazelwood* to allow viewpoint-based restrictions); Kincaid v. Gibson, 191 F.3d 719, 727 (6th Cir. 1999), *vacated*, 197 F.3d 828 (6th Cir. 1999) (interpreting *Hazelwood* to prohibit viewpoint-based restrictions).

149 996 F.2d 448 (1st Cir. 1993).

rehire her due to a discussion in her biology class concerning the abortion of Down's Syndrome fetuses.[150] Although the relevant speech was a teacher's, not a student's, the First Circuit classified the speech at issue as "school-sponsored" and conducted a *Hazelwood* analysis.[151] Rejecting the applicability of a nonpublic forum's viewpoint-neutrality requirement, the court asserted that *Hazelwood* "[does] not require that school regulation of school-sponsored speech be viewpoint neutral."[152]

In *C.H. ex rel. Z.H. v. Oliva*,[153] which, unlike *Ward*, involved student speech, a Third Circuit panel endorsed the First Circuit's reading of *Hazelwood*, upholding a school's restriction of an elementary student's religious speech, finding it to be related to a pedagogical purpose.[154] According to the panel: "*Hazelwood* clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical concerns."[155]

Although *Oliva* was affirmed en banc, the court was "equally divided on . . . the First Amendment claim,"[156] and declined to address the issue. However, current Supreme Court Justice Alito, then sitting on the Third Circuit, authored an impassioned First Amendment defense of the student's religious speech in which he explicitly addressed viewpoint neutrality's application to the school setting. According to Alito, "[V]iewpoint discrimination is prohibited even in a nonpublic forum if strict scrutiny cannot be satisfied."[157] Fearing that the panel's understanding would lead to "disturbing results" in which students would be prohibited from expressing their views by school officials alleging "a pedagogical purpose," he admonished that "[s]uch a regime is antithetical to the First Amendment and the form of self-government that it was intended to foster."[158]

Like Alito in *Oliva*, several circuits have refused to abandon the viewpoint-neutrality requirement. In 1989, in *Searcey v. Harris*,[159] the Eleventh Circuit held that *Hazelwood* permitted school officials to dis-

150 *See id.* at 450.
151 *See id.* at 453.
152 *Id.* at 454.
153 195 F.3d 167.
154 *See id.* at 175.
155 *Id.* at 172–73.
156 C.H. *ex rel.* Z.H. v. Oliva, 226 F.3d 198, 200 (3d Cir. 2000) (en banc).
157 *Id.* at 211 (Alito, J., dissenting).
158 *Id.* at 214.
159 888 F.2d 1314 (11th Cir. 1989).

criminate based on content, but not viewpoint.[160] Later, in *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*,[161] the Ninth Circuit held that a high school's refusal to accept Planned Parenthood's advertisements in its newspapers, yearbooks, and athletic programs had to be both reasonable and viewpoint neutral.[162]

The Second Circuit issued the most recent circuit-level decision requiring viewpoint-neutral restrictions of school-sponsored speech. In *Peck ex rel. Peck v. Baldwinsville Central School District*,[163] the court reversed a grant of summary judgment, finding a genuine issue of material fact regarding the school district's motivation for censoring a poster created for a school project.[164] According to *Peck*, "[T]he district court overlooked evidence that [the student's] poster was censored . . . because it offered a religious perspective on the topic of how to save the environment."[165] Although the court acknowledged that "*Hazelwood*'s discussion of the proper role of school officials in making curricular judgments seems to suggest that viewpoint-based judgments would be permissible," it found significant that *Cornelius* and *Perry*, the cases *Hazelwood* cited as authority, both required viewpoint neutrality.[166] Ultimately, the court was reluctant to "conclude that the Supreme Court would, without discussion and indeed totally *sub silentio*, overrule *Cornelius* and *Perry*—even in the limited context of school-sponsored speech."[167]

B. Morse v. Frederick

With the circuit split simmering among the lower courts, the Supreme Court granted certiorari in *Morse*. But instead of bringing clarity to viewpoint neutrality's place in public schools, the Court's most recent student speech case only makes the doctrine's applicability more questionable and confusing. In *Morse*, a high school princi-

160 *Id.* at 1319 n.7, 1325. In *Searcey*, the Atlanta Peace Alliance sued after the Atlanta School Board denied the organization access to "career day." *See id.* at 1316. According to the Eleventh Circuit, "[a]lthough *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*," it does not permit "educators to discriminate based on viewpoint." *Id.* at 1325.

161 941 F.2d 817 (9th Cir. 1991) (en banc).

162 *Id.* at 829. Interestingly, the Ninth Circuit concluded that the school's refusal to publish Planned Parenthood advertisements in the newspaper was, in fact, both reasonable and viewpoint neutral. *Id.* at 829–30.

163 426 F.3d 617 (2d Cir. 2005).

164 *See id.* at 625.

165 *Id.* at 630.

166 *Id.* at 632.

167 *Id.* at 633.

pal suspended a student for displaying a banner with the phrase "BONG HiTS 4 JESUS" on a sidewalk across the street from the high school while the Olympic Torch Relay passed by.[168] The Supreme Court agreed with the Ninth Circuit that, although the relay took place during school hours and under faculty supervision, the banner did not constitute school-sponsored speech under *Hazelwood* because it was unrelated to the curriculum and there was no appearance of school sponsorship.[169] However, instead of analyzing the case under *Tinker*, as the Ninth Circuit did,[170] the Supreme Court carved out a new, viewpoint-based doctrinal standard for drug-specific student speech. According to the majority in *Morse*, because students' First Amendment rights may be modified in the school setting, schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as advocating illegal drug use.[171]

Chief Justice Roberts, who authored the opinion, highlighted the government's established interest in deterring drug use, writing that "'educat[ing] students about the dangers of illegal drugs and . . . discourag[ing] their use'" comprise part of a school's educational mission.[172] Moreover, according to the majority, the "severe and permanent damage" drugs cause to the health of students justified its holding.[173] However, cognizant that *Tinker* requires more than an abstract fear of harm to suppress student speech and, in fact, was perhaps intended to prevent the kind of viewpoint-based restriction the Court was sanctioning, the majority insisted that the danger here "is far more serious and palpable" than the armbands that were then before the Court.[174]

Justice Alito, commonly identified as a free speech libertarian,[175] concurred in the judgment. In light of his commitment to viewpoint

---

168 *See* Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007).

169 *See id.* at 2627 ("[N]o one would reasonably believe that Frederick's banner bore the school's imprimatur."); Frederick v. Morse, 439 F.3d 1114, 1119 (9th Cir. 2006) ("*Kuhlmeier* does not control the case at bar, however, because Frederick's pro-drug banner was not sponsored or endorsed by the school, nor was it part of the curriculum . . . .").

170 *See Frederick*, 439 F.3d at 1120.

171 *See Morse*, 127 S. Ct. at 2628–29.

172 *Id.* at 2623 (quoting Petition for Writ of Certiorari at 61a–62a, *Morse*, 127 S. Ct. 2618 (No. 06-278)).

173 *Id.* at 2628.

174 *Id.* at 2629.

175 *See, e.g.*, Jonathan D. Glater & Adam Liptak, *Bush's Conservative Judge Harbors Libertarian Streak*, N.Y. TIMES, Nov. 12, 2005, at A10 ("Judge Samuel A. Alito Jr. has vigorously defended freedom of expression, adopting a stance that places him among a group of conservative judges with a libertarian streak.").

neutrality in the school setting,[176] his concurrence is initially quite shocking. However, for Alito, the potential harms caused by drug use merit an exception to the rule;[177] and he went to great lengths to limit the holding as such. Justice Alito's narrow, two-pronged concurrence, which provides the controlling rule, first holds that "a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use."[178] However, the second prong maintains that *Morse* "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue," including speech on issues such as the legalization of marijuana.[179] Thus, by most interpretations, the second prong emasculates the first.

Justice Alito also severely limited the scope of the decision by emphasizing that the opinion did not authorize any grounds for regulating student speech "that are not already recognized in the holdings of this Court."[180] Moreover, although he recognized these "other holdings," it is, at the very least, debatable whether his concurrence places a viewpoint-neutral gloss on them, significantly cutting back on prior precedent. On its face, the unequivocal second-prong assertion that student speech commenting on social and political issues cannot be regulated conflicts with the Court's holding in *Tinker*, which expressly permitted regulation of a political viewpoint that materially and substantially disrupts the educational process, as well as the viewpoint-based reading of *Hazelwood* that some adopt.

Justice Thomas also concurred in the judgment. Although he *agreed* with the *Morse* majority that a public school may prohibit speech advocating illegal drug use, his opinion evinces his fundamental *disagreement* with all eight of his fellow Justices that the Constitution grants students any First Amendment rights at all.[181] Employing classic originalist methodology, Thomas reviewed the history of public education and concluded that "the First Amendment, as originally

---

176 *See supra* text accompanying notes 157–58. While sitting on the Third Circuit, Alito reinforced that "viewpoint discrimination is prohibited" in public schools and narrowly defined "school-sponsored speech" to exclude student views expressed during curricular activities. C.H. *ex rel.* Z.H. v. Oliva, 226 F.3d 198, 211 (3d Cir. 2000) (en banc) (Alito, J., dissenting).

177 *See Morse*, 127 S. Ct. at 2638 (Alito, J., concurring).

178 *Id.* at 2636.

179 *Id.*

180 *Id.* at 2637.

181 *See id.* at 2629–30 (Thomas, J., concurring).

understood, does not protect student speech in public schools."[182] Thus, he advocated the overruling of *Tinker*.

While the simplicity of Thomas' approach might be appealing, it is inconsistent with nearly forty years of precedent affirming *Tinker*'s proclamation that "students . . . [*do not*] shed their constitutional rights to freedom of speech . . . at the schoolhouse gate."[183] In fact, not one Justice felt compelled to respond to his argument. Ultimately, Thomas' denial of free speech rights to students is amiss, but his criticism of the Court's creation of a new judicial exception to *Tinker*[184] is right on the mark.

IV. Applying the Doctrine of Viewpoint Neutrality to Student Speech in the Secondary School Setting

Although the Supreme Court has had several opportunities to clarify viewpoint neutrality's place in public schools,[185] it has chosen not to do so, denying certiorari to several cases explicitly inviting the Court to resolve the circuit split concerning viewpoint-based restrictions of school-sponsored speech.[186] Most recently, in *Morse*, the

---

182 *Id.* at 2630. According to Thomas, early public schools were not places where students engaged in "freewheeling debates" or explored "competing ideas," but bastions of order and discipline where teachers "commanded and students listened." *Id.* Citing nineteenth- and early twentieth-century cases, he asserted that schools were seen as operating under the principle of *in loco parentis* and that courts "routinely preserved the rights of teachers to punish speech that the school or teacher thought was contrary to the interests of the school and its educational goals." *Id.* at 2632. Ultimately, Thomas concluded that because nineteenth-century teachers did not recognize students' free speech rights (under state free speech provisions or, after 1868, the First Amendment) and courts did not enforce them, the First Amendment should not apply in the school setting. *See id.* at 2634–35.

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

184 *See Morse*, 127 S. Ct. at 2634 (Thomas, J., concurring) ("Today, the Court creates another exception. In doing so, we continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not.").

185 *See, e.g.*, Petition for Writ of Certiorari at 17, Baldwinsville Cent. Sch. Dist. v. Peck *ex rel.* Peck, 547 U.S. 1097 (2006) (No. 05-899) ("This Court should grant certiorari to resolve the conflict in the courts of appeals over the question whether viewpoint-based restrictions on school-sponsored speech are, prima facie, unconstitutional, even if reasonably related to legitimate pedagogical concerns."); Petition for Writ of Certiorari at 17, Fleming v. Jefferson County Sch. Dist. R-1, 537 U.S. 1110 (2003) (No. 02-732) ("Certiorari should be granted to resolve the conflicting views among the circuit courts regarding whether *Hazelwood* permits public school officials to impose viewpoint-based restrictions on speech that is deemed "school-sponsored.").

186 *Peck*, 547 U.S. 1097; *Fleming*, 537 U.S. 1110.

Court had another opportunity to set the record straight. The Supreme Court's reluctance to renounce viewpoint neutrality is not surprising in light of the competing interests implicated by the doctrine's application to the school setting. On one hand, a public school is a vehicle for the "maintenance of a democratic political system"[187] and must not only teach students about the value of free speech, but also how to function in a democracy dominated by a marketplace of ideas. On the other hand, a school must inculcate a state-specific set of values and advance a state-prescribed curriculum—tasks which inevitably limit the marketplace of ideas and constrict First Amendment principles.

Tinker and *Hazelwood*'s bifurcation of the realm of student speech provides a means through which viewpoint neutrality can be imported into secondary schools. In *Hazelwood*, the Court distinguished between school-sponsored speech—speech related to an educational activity that might reasonably be perceived "to bear the imprimatur of the school"—and independent student speech—speech that merely "happens to occur on the school premises."[188] Although neither *Tinker* nor *Hazelwood* explicitly rejected the viewpoint-neutrality requirement, both opinions implicitly authorize viewpoint-based restrictions under specific circumstances. This Note argues that courts should permit viewpoint-based restrictions in these two discrete situations.

Hazelwood set forth a low threshold for viewpoint-based restrictions of school-sponsored speech to meet constitutional muster—viewpoints can be restricted when the school has a legitimate pedagogical reason for restricting them. In contrast, *Tinker* set forth a high threshold for viewpoint-based restrictions of independent student speech—viewpoints can be restricted only when a school can prove that the speech would materially and substantially disrupt classwork. By "aligning the degree of school authority over student speech with the level of school sponsorship"[189]—giving administrators greater control over curricular activities in which the school's own speech is at stake, but less control over the personal expression of students taking place outside of a curricular context—the *Tinker*/*Hazelwood* doctrinal framework appropriately responds to the duality inherent in student speech cases. Ultimately, while viewpoint neutrality should not be required for speech that can be regulated under *Hazelwood* and

187 Ambach v. Norwick, 441 U.S. 68, 77 (1979).

188 *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

189 Waldman, *supra* note 148, at 102.

Tinker, the requirement should remain intact for all speech falling outside of these two categories.

A. *The Court Should Allow Viewpoint-Based Restrictions of School-Sponsored Speech Comporting with* Hazelwood

The viewpoint-neutrality requirement should be relaxed in the realm of school-sponsored speech. Several courts[190] and commentators[191] have interpreted the text of *Hazelwood* as authorizing school officials to make viewpoint-based restrictions if such restrictions have a *pedagogical purpose*. While this textual argument is a sound one, other factors also counsel in favor of such a rule. Specifically, an analysis of the *pedagogical purpose* of the government as educator, in conjunction with the policy rationales and free speech values that underlie it, demonstrates that viewpoint neutrality should not be required for restrictions of school-sponsored speech comporting with *Hazelwood*. However, analogizing school-sponsored speech to government speech presents perhaps the easiest doctrinal justification for allowing viewpoint-based restrictions under *Hazelwood* because when the government speaks, it may express its own viewpoint.[192]

1. *Hazelwood*: Textual Evidence Evincing the Court's Intent

The text of *Hazelwood* presents convincing evidence of a purposeful abandonment of viewpoint neutrality for school-sponsored speech restrictions reasonably related to legitimate pedagogical concerns.[193] Although the Court did not explicitly disavow the viewpoint-neutrality requirement, the "specific reasons" it proffered as justifying educators' greater control over school-sponsored speech suggest its

---

190 *See supra* Part III.A.

191 *See, e.g.*, Wright, *supra* note 122, at 214 ("[T]he school's own speech is hardly free where a demanding strict scrutiny test, requiring viewpoint neutrality, discourages the school from presenting a clear and consistent stand on significant educational and cultural matters."); Janna J. Annest, Note, *Only the News That's Fit to Print: The Effect of* Hazelwood *on the First Amendment Viewpoint-Neutrality Requirement in Public School-Sponsored Forums*, 77 WASH. L. REV. 1227, 1247 (2002) ("Under *Hazelwood*, public schools should not be required to maintain viewpoint-neutrality when regulating school-sponsored speech for legitimate pedagogical reasons.").

192 *See infra* Part IV.A.5.

193 *See supra* text accompanying notes 115–21; *see also* Samuel P. Jordan, Comment, *Viewpoint Restrictions and School-Sponsored Student Speech: Avenues for Heightened Protection*, 70 U. CHI. L. REV. 1555, 1556 (2003) ("If a constitutional exception permitting restrictions on student points of view is not compelled by *Hazelwood*, it is at least arguably consistent with a fair reading of the decision.").

sanction of viewpoint-based restrictions.[194] For example, *Hazelwood* insisted that a school must "retain the authority" to refuse to sponsor student speech advocating illegal drug use or promiscuous sex or speech contradicting other "'shared values.'"[195] Regardless of whether one interprets this statement as granting a school "'the authority . . . to associate itself with any position other than neutrality,' or 'the authority to refuse . . . to associate itself with any position other than neutrality . . . ,' the import remains the same—a school must 'retain the authority' to decide with which positions it will associate itself."[196] Moreover, in a footnote, the majority criticized the dissent's opinion, which it interpreted as requiring schools to publish the counterpoint of viewpoints, even if those viewpoints are "sexually explicit, racially intemperate, or personally insulting."[197] Articulating the Catch-22 concern that animated parts of the oral argument,[198] the majority concluded that the viewpoint-neutral approach advocated by the dissent would cause schools to "dissolve" newspapers rather than print such material.[199]

In addition, a Court well-versed in applying the forum doctrine would not merely forget to finish the analysis. *Hazelwood*'s emphasis on "reasonableness" and omission of "viewpoint neutrality" was intentional. Judge Ebel's decision in *Fleming v. Jefferson County School District R-1*, a Tenth Circuit case concerning the constitutionality of viewpoint-based restrictions of a school-sponsored art project,[200] bolsters this proposition:

> If *Hazelwood* required viewpoint neutrality, then it would essentially provide the same analysis as under a traditional nonpublic forum case: the restriction must be reasonable in light of its purpose (a legitimate pedagogical concern) and must be viewpoint neutral. In light of the Court's emphasis on the "special characteristics of the school environment," and the deference to be accorded to school administrators about pedagogical interests, it would make no sense

194 *See* Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 928 (10th Cir. 2002).

195 *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

196 *Fleming*, 298 F.3d at 928 n.8 (alterations in original) (quoting *Hazelwood*, 484 U.S. at 272).

197 *Hazelwood*, 484 U.S. at 276 n.9.

198 *See supra* text accompanying notes 135–37.

199 *See Hazelwood*, 484 U.S. at 276 n.9.

200 *See Fleming*, 298 F.3d at 920–22.

to assume that *Hazelwood* did nothing more than simply repeat the traditional nonpublic forum analysis in school cases.[201]

Based on Hazelwood's viewpoint-infused examples of what might constitute a legitimate pedagogical reason for restricting school-sponsored speech, its wariness of the implications a viewpoint-neutrality requirement might impose on schools, and the modified forum analysis it conducts, the Court's authorization of viewpoint-based restrictions for school-sponsored speech seems an implicit—but inevitable—conclusion.

2. The Special Capacity of Government as Educator

Hazelwood's relaxation of the viewpoint-neutrality requirement for school-sponsored speech can be attributed to the Court's recognition of the government's special capacity of educator. Adaptability is a hallmark of First Amendment doctrine, which imposes different constraints on government "depending on the activity at issue, or on the capacity—regulator, subsidizer, property manager, employer . . . —in which the government acts."[202] Applying the First Amendment to the government's capacity as educator is a particularly paradoxical endeavor. The freedom of speech rests on the democratic notion that "government may not dictate what individuals may say or believe."[203] Yet, "[t]o a certain age, children are required by law to receive [a] governmentally prescribed education, during which time they are taught what government officials have deemed to be the truth about those subjects."[204]

Although "[v]alue inculcation . . . has been the tradition of public education since the beginning of the American republic,"[205] this

201 *Id.* at 926 (citations and internal quotation marks omitted). *But see supra* notes 159–67 and accompanying text (discussing how various circuits asserted that it would be even stranger for the Court to abandon the longstanding requirement without doing so explicitly).

202 Garnett, *supra* note 10, at 50; *see also, e.g.*, Buckley v. Valeo, 424 U.S. 1, 290–91 (1976) (Rehnquist, J., concurring in part and dissenting in part) ("The limits imposed by the First and Fourteenth Amendments on governmental action may vary in their stringency depending on the capacity in which the government is acting.").

203 Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 63 (2002).

204 *Id.* at 64.

205 David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 499 (1981). For the Founding Fathers, schools instilled a "republican character in the nation's youth" and assured "the perpetuation of democracy and its governmental institutionalization." Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the*

tradition plainly conflicts with the doctrine of viewpoint neutrality. In fact, "from one point of view, the public schools embody in all their aspects the denial of first amendment rights."[206] Selection of curricular topics and textbooks inherently implies certain choices as to social, moral, or political values.[207] Moreover, schools are not merely concerned with conveying specific information, but with "indoctrinating the participants with the correct notions about information."[208] As Martin Redish and Kevin Finnerty note:

> Agents of the state—whether they be government bureaucrats, school principals, or the individual teachers—determine . . . whether students will be taught that Columbus was a hero or that he was a genocidal murderer . . . whether the United States treated Native Americans fairly in the course of the nation's western expansion . . . [and] whether the New Deal will be presented as a legitimate political and economic advance . . . .[209]

Expecting schools to implement a viewpoint-based curriculum in a viewpoint-neutral manner is—in one word—impossible. In order to effectuate an educational mission, a school must be able to ensure that "participants learn whatever lessons [an] activity is designed to teach."[210] Exercising such control over a viewpoint-based curriculum will often require officials to make viewpoint-based judgments.[211] If a school were forced to sponsor messages contradicting the curriculum, its educational mission would be constantly undermined.

In *Board of Education v. Pico*,[212] a case probing the constitutionality of a school district's decision to remove certain books from the school library,[213] then-Justice Rehnquist authored his dissenting opinion with the "differentiated roles of government in mind."[214] In analyzing the case, he found it "helpful to assess the role of government as educator, as compared with the role of government as sover-

---

Public Schools, 70 NOTRE DAME L. REV. 769, 774 (1995). And in later years, the nation's "[g]eographic expansion, industrialization" and influx of immigrants "impressed upon . . . education leaders the need [to] imbue[] children with . . . republican values . . . and unify an increasingly diverse and scattered population." *Id.* at 775.

206 Diamond, *supra* note 205, at 497.

207 *See* Redish & Finnerty, *supra* note 203, at 84.

208 Diamond, *supra* note 205, at 497.

209 Redish & Finnerty, *supra* note 203, at 65.

210 *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

211 *See, e.g.*, Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 928 (10th Cir. 2002) ("*Hazelwood* entrusts to educators these decisions that require judgments based on viewpoint.").

212 457 U.S. 853 (1982).

213 *See id.* at 857–59 (plurality opinion).

214 *Id.* at 909 (Rehnquist, J., dissenting).

eign."[215] For Rehnquist, "when government plays the role of educator at the elementary and secondary levels, it necessarily and ideally inculcates values and engages in 'the selective conveyance of ideas.'"[216] Moreover, Rehnquist highlighted that "actions by the government as educator do not raise the same First Amendment concerns as actions by the government as sovereign."[217] Unlike when the government proscribes speech for the citizenry in general, when the government acts as educator, it simply determines that such speech "will not be included in the curriculum."[218] Thus, when the school is not advancing its state-defined curriculum, students may still have access to those ideas.

When the government acts as educator, the theoretical basis for the First Amendment's viewpoint-neutrality requirement loses force. In *Abrams v. United States*,[219] Justice Holmes advanced the marketplace of ideas theory, writing that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[220] This principle has gained acceptance, with subsequent courts affirming that "the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[221] The marketplace of ideas theory reflects a reasoned distrust in enabling government to dictate what thoughts are "good" or "true." Yet, when the government acts as educator this is precisely its task. Although *Tinker* suggested that "[t]he classroom is peculiarly the 'marketplace of ideas,'"[222] it clearly is not. Rather, in the classroom, teachers are entrusted with teaching students a delineated set of state-defined values, concepts, and ideas.

The judicial tradition of granting deference to local authorities also counsels against a viewpoint-neutrality requirement for school-sponsored speech.[223] Just as the tradition of public education has been value inculcative, so too has it "always been under local political control."[224] Indeed, these two precepts go hand in hand, as "insofar as public schools are value inculcators for creating the proper citizen

---

215 *Id.*

216 *See* Bitensky, *supra* note 205, at 811 (quoting *Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting)).

217 *Pico*, 457 U.S. at 910 (Rehnquist, J., dissenting).

218 *Id.*

219 250 U.S. 616 (1919).

220 *Id.* at 630 (Holmes, J., dissenting).

221 Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

222 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

223 *See* Diamond, *supra* note 205, at 497–98.

224 *Id.* at 498.

for the community, the community has been defined as a local one";[225] and "the needs of that community are best perceived" by a local school board, not a judge.[226] In addition, because school board members are elected by the people, they may not exercise unchecked discretion.[227] Ultimately, it seems wise to defer to those "trained and experienced in the pedagogical needs of students."[228]

3. Avoiding the Viewpoint-Based, Content-Based Controversy

Allowing educators to make viewpoint-based judgments reasonably related to legitimate pedagogical concerns also avoids the line-drawing difficulties implicated by the imprecise, and often illusory, distinction between viewpoint-based and content-based restrictions.[229] Under *Hazelwood*, courts may already invalidate content-based school regulations that discriminate against a viewpoint if the regulation lacks a legitimate pedagogical purpose.[230] Moreover, a distinction that has proven unwieldy for judges[231] will also prove unwieldy for schools. School officials will not have time to scrutinize the application of a regulation to determine whether it is content-based or viewpoint-based, thus forcing them to act without knowing the constitutionality of their decisions. Avoiding this "problematic endeavor"[232] is not a reason, in and of itself, to permit viewpoint-based restrictions of school-sponsored speech, but its ancillary benefit is worth acknowledging.

---

225 *Id.* at 509.

226 *Id.*

227 *See id.*; *see also* Bd. of Educ. v. Pico, 457 U.S. 853, 889 (1982) (Burger, J., dissenting) ("In order to fulfill its function, an elected school board must express its views on the subjects which are taught to its students. In doing so those elected officials express the views of their community; they may err, of course, and the voters may remove them. It is a startling erosion of the very idea of democratic government to have this Court arrogate to itself the power the plurality asserts today." (emphasis omitted)).

228 Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools,* 65 GEO. WASH. L. REV. 49, 102 (1996).

229 *See supra* notes 59–62 and accompanying text.

230 *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

231 *See supra* notes 59–62 and accompanying text.

232 Peck *ex rel.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 630 (2d Cir. 2005).

4. Subjecting Viewpoint-Based Restrictions of School-Sponsored Speech to Strict Scrutiny Is Cost-Prohibitive

Other policy considerations also tilt the scales in favor of allowing viewpoint-based restrictions in the realm of school-sponsored speech. Subjecting viewpoint-based regulations of school-sponsored speech to strict scrutiny would be too costly—literally, in terms of litigation defense and, figuratively, in terms of the speech-chilling effect on a school's regulatory efforts and undermining of a school's educational mission. Strict scrutiny, a rigorous judicial test still perceived by many to be "fatal in fact," would be nearly impossible to satisfy. While a school would have no problem putting forth a compelling interest, its regulations would almost certainly fail to clear the additional hurdles of underinclusiveness and narrow tailoring.[233] Consequently, the number of frivolous lawsuits filed "against our already overburdened and cash-strapped public schools" would increase.[234]

Moreover, the application of strict scrutiny would not chill independent, *Tinker*-type student speech, but the speech of the school itself—robbing teachers of the "appropriate and necessary control of their classrooms."[235] Faced with the prospect of expensive, protracted litigation, schools would be dissuaded from regulating school-sponsored speech, even if they had legitimate and reasonable pedagogical reasons for doing so. Thus, "[t]o the extent that strict scrutiny in general inhibits sensible viewpoint-based regulation of at least apparently school-sponsored speech," schools' own free speech interests would "suffer."[236]

5. School-Sponsored Speech Is Tantamount to Government Speech

The text of *Hazelwood*, the special capacity of the government as educator, and policy considerations suggest that the "special characteristics of the school environment" warrant abandoning an ironclad viewpoint-neutrality requirement in the realm of school-sponsored speech. However, the answer might be even simpler—found in the viewpoint neutrality doctrine itself. It is well-established that when the government speaks, "it need not ensure viewpoint diversity and can

233 *See* Wright, *supra* note 122, at 212.

234 Petition for Writ of Certiorari at 16, Baldwinsville Cent. Sch. Dist. v. Peck *ex rel.* Peck, 547 U.S. 1097 (2006) (No. 05-899).

235 *Id.*

236 Wright, *supra* note 122, at 213.

simply express its own viewpoint."[237] Thus, "when [a public school] determines the content of the education it provides, it is the [state] speaking" and it may "regulate the content of what is or is not expressed."[238]

The constitutionality of viewpoint-based decisions extends beyond the government's own literal speech. When the state enlists private actors or entities to "convey its own message," viewpoint neutrality is not required.[239] School-sponsored speech, according to *Hazelwood*, includes all those expressive activities that "are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[240] Thus, during a curricular activity, regardless of who speaks, whether teacher, student, parent, or participant, the speaker is the school. Accordingly, it may decide what content and viewpoint are appropriate in order to advance its pedagogical interests. *Hazelwood* also deems speech "that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" to be school sponsored.[241] This category, which encompasses speech that could be construed to be the school's, can also be fairly categorized as akin to government speech. When school-sponsored speech is viewed as analogous to "government speech," abandoning the forum doctrine's viewpoint-neutrality requirement does not defy doctrine, but adheres to it.

The public employee speech cases provide an instructive analogy to the classification of school-sponsored speech as tantamount to government speech. Similar to student speech jurisprudence, in which courts must balance the interests of the student as citizen with the interests of the state as educator, in implementing a prescribed curriculum, in the realm of employee-speech jurisprudence, courts must balance the interests of the employee as citizen and "the interest[s] of the State, as . . . employer, in promoting the efficiency of the public services it performs through its employees."[242] In its recent decision in *Garcetti v. Ceballos*,[243] the Court "address[ed] the constitutional status of a public employee's speech made in furtherance of employment

237 Make the Rd. by Walking, Inc. v. Turner, 378 F.3d 133, 151 (2d Cir. 2004); *see also* Rust v. Sullivan, 500 U.S. 173, 194 (1991) (stating that the government may make viewpoint-based decisions when promoting its own policies through its own speech).

238 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

239 *See id.*

240 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

241 *Id.*

242 Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

243 126 S. Ct. 1951 (2006).

duties."[244] According to the Court, when public employees speak "pursuant to [their] official duties," they do not speak "as citizens for First Amendment purposes."[245] Indeed, courts have recognized that "[w]hile acting as a business, a government agency is charged with maintaining an efficient workplace, and therefore has an interest in censoring speech that could be counterproductive to its operations."[246] Just as governmental employees are subject to the constraints of the government as employer in matters concerning the workplace's effective operation, so too are students, who "have been committed to the temporary custody of the State as schoolmaster,"[247] subject to the constraints of the government as educator concerning the school's effective implementation of its curriculum.

6. The Proper, Restrictive, Application of *Hazelwood*

Sanctioning viewpoint-based regulations under *Hazelwood* is not to be done without pause and a bit of apprehension. Courts have consistently regarded viewpoint-based regulations as presenting the "greatest danger to liberty of expression."[248] Such strong disapproval cannot be easily overlooked. Thus, although an exception should be made for school-sponsored speech, in cases in which *Hazelwood* is appropriate, courts should nonetheless ensure that the "legitimate pedagogical" reasons set forth by school officials are not merely a pretext for suppressing a viewpoint with which they disagree.[249]

Moreover, if viewpoint-based restrictions are permitted, the scope of "school-sponsored speech" must be narrow and well-defined.[250]

244 Patrick M. Garry, *The Constitutional Relevance of the Employer-Sovereign Relationship: Examining the Due Process Rights of Government Employees in Light of the Public Employee Speech Doctrine*, 81 ST. JOHN'S L. REV. 797, 811 (2007).

245 *Garcetti*, 126 S. Ct. at 1960.

246 Bryan M. Schwartz, *Education: Balancing the Interests of Schools, Students, and the Community*, 75 DENV. U. L. REV. 801, 809–10 (1998).

247 Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995).

248 Kent Greenawalt, *Viewpoints from Olympus*, 96 COLUM. L. REV. 697, 698 (1996).

249 *See* Roy, *supra* note 31, at 668; *see also, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1293 (10th Cir. 2004) (reversing a district court's grant of summary judgment, finding a genuine issue of material fact as to whether a university's speech restriction "was truly pedagogical or whether it was a pretext for religious discrimination"). In *Axson-Flynn*, the court said: "Although we do not second-guess the pedagogical wisdom or efficacy of an educator's goal, we would be abdicating our judicial duty if we failed to investigate whether the educational goal or pedagogical concern was pretextual." *Id.* at 1292–93 (emphasis omitted).

250 Because courts accord significant deference to restrictions classified as "school-sponsored," a broad construction of the category would grant a school potentially limitless latitude to regulate student speech.

Hazelwood deference should not be accorded to speech merely implicating a pedagogical concern,[251] but to speech tantamount to the government's own speech. Thus, when students are called upon to communicate their own views pursuant to a class discussion or assignment, restrictions must be viewpoint-neutral (unless such speech can be regulated under *Tinker*) because the expression does not "bear the imprimatur of the school" and does not represent the school's own curricular speech.[252] Ultimately, while a school has the right to determine the content of its curriculum and transmit curricular messages clearly, once a teacher invites the personal views of students, principles of viewpoint neutrality must govern.

B. *The Court Should Prohibit Viewpoint-Based Restrictions of Independent Student Speech Falling Outside the Scope of* Tinker

While Part IV.A considered viewpoint neutrality's application to school-sponsored speech, this subpart examines viewpoint neutrality's application to independent student speech. Viewpoint neutrality does not apply to the state's own speech; but in the realm of independent student speech, where the government is not determining and transmitting "the content of the education it provides,"[253] viewpoint neutrality is essential, as it enables students to express themselves freely and gain exposure to a variety of views. Thus, for viewpoint-based restrictions of independent student speech to pass constitutional muster, administrators must meet *Tinker*'s high "material and substantial" disruption standard.[254] Under this doctrinal framework, *Morse*, which upheld a viewpoint-based restriction of independent student speech falling outside the scope of *Tinker*,[255] comes out wrong.

1. Pedagogical Interests Present, but Not Pressing

A public school acting in the special capacity of educator is entitled, indeed commanded, to convey a specific curriculum and inculcate specific values. The ability to make viewpoint-based restrictions

251 *See, e.g.*, Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 925 (10th Cir. 2002); Bruce C. Hafen, Hazelwood School District *and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 693–94.

252 Justice Alito advanced a similar argument in *Oliva*, stating: "Things that students express in class or in assignments when called upon do not 'bear the imprimatur of the school.'" *See* C.H. *ex rel.* Z.H. v. Oliva, 226 F.3d 198, 214 (3d Cir. 2000) (en banc) (Alito, J., dissenting) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988)).

253 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

254 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

255 *See supra* Part III.B.

reasonably related to pedagogical concerns is necessary so that it may execute its educational mission in an unadulterated manner. However, when the school is not speaking—that is, when it is not actively advancing a curricular message—pedagogical concerns may be present, but are not nearly as pressing.

Hazelwood's deferential standard for school-sponsored speech, which permits viewpoint-based restrictions with a pedagogical purpose,[256] ensures the state's ability to effectively *convey* an educational message. However, outside of the school-sponsored realm, a viewpoint-neutrality requirement would function to *protect* the state's message from being challenged. The curricular/noncurricular dichotomy established by *Tinker* and *Hazelwood* enables a school to implement its curriculum without silencing the individual expression of students.

Some, like Justice Thomas, might argue that pedagogical interests should always take precedence inside the schoolhouse gate.[257] But in *Tinker*, Justice Fortas correctly observed that the mission of public schools—to implement a formal curriculum—does not and *should not* preclude students from expressing their opinions.[258] Fortas cautioned that students must not become "closed-circuit recipients" of the state;[259] and the stringent *Tinker* standard, which places a heavy burden on the state to justify restrictions of independent student speech, ensures that they will not be confined to state-sanctioned viewpoints. Ultimately, by recognizing that pedagogical concerns are less pressing in the realm of independent student speech and lowering the threshold for viewpoint-based restrictions accordingly, the *Tinker/Hazelwood* doctrinal framework serves to reconcile the so-called "democratic-educational paradox."[260]

2. Marketplace of Ideas Theory Applicable to Independent Student Speech

While the marketplace of ideas theory seems misplaced when a school acts in the capacity of educator and aims to inculcate a specific

256 *See supra* Part IV.A.1.

257 *See* Morse v. Frederick, 127 S. Ct. 2618, 2630–32 (2007) (Thomas, J., concurring).

258 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

259 *See id.*

260 *See generally* Redish & Finnerty, *supra* note 203, at 66 ("[I]f, as liberal democratic theory assumes, democracy requires widespread education of the electorate in order to function properly, one is left with a seemingly intractable paradox: the very process that is essential to the success of democracy threatens the fundamental preconditions of democracy." (footnote omitted)).

value or advance a specific message, it is highly relevant to the realm of independent student speech. Indeed, it is in the "cradle of our democracy"[261] that students first gain "exposure to [the] robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[262] In the halls, the cafeteria, and on the playground, the school community, a microcosm of society at large, represents a mini-marketplace of ideas. Thus, during non-instructional time, students, as "'persons' under our Constitution,"[263] may exercise their First Amendment rights and express their (nondisruptive) personal views. Students should not be shielded from the diversity of opinions they will inevitably encounter in the democratic marketplace.

Speech restrictive theories have been rejected by countless courts outside of the student-speech arena.[264] "[A]gainst the background of a profound national commitment to the principle that debate on public issues should be uninhibited,"[265] the Supreme Court has resoundingly stated that the solution to problematic speech is more speech, not less.[266] Thus, in the secondary school environment,[267] just like in the real world, "bad" speech can be countered by "good" speech.[268] In fact, topics freely discussed by students will result in increased

---

261 Adler v. Bd. of Educ., 342 U.S. 485, 508 (1952) (Douglas, J., dissenting), *overruled in part by* Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

262 *Tinker*, 393 U.S. at 512 (quoting *Keyishian*, 385 U.S. at 603 (first alteration added)).

263 *Id.* at 511.

264 *See, e.g.*, Cohen v. California, 403 U.S. 15, 25 (1971) ("Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. . . . [W]hile the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric."); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

265 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

266 *See, e.g.*, Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression."), *overruled in part by Brandenburg*, 395 U.S. 444.

267 Unlike at the elementary level, secondary level students possess the maturity necessary to independently evaluate speech.

268 *See* Susannah Barton Tobin, Note, *Divining* Hazelwood*: The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217, 243 (2004).

administrative awareness of potentially "harmful" topics and thus pose less danger to students than an insidious culture of silence.[269]

The advancement of a state-prescribed curriculum is inherently at odds with the concept of a marketplace of ideas and some might argue that it has no application to the school environment at all. But although American society now seems far removed from the totalitarian fears that animated the *Tinker* opinion, history reveals that the right to dissent from the majority has not always been preserved.[270] Thus, while schools inherently advance certain viewpoints in the confines of the curriculum and consequently might need to restrict conflicting viewpoints, outside of this instructional context students must be permitted to freely explore varied social, political, and religious viewpoints.

3. Teaching Tolerance

Free speech in public schools is particularly essential in order to foster tolerance in future generations. Instead of silencing students, it is "[f]ar better to teach them . . . about why we tolerate divergent views."[271] Schools are vehicles of socialization and some social values, like tolerance, cannot simply be taught within the confines of a classroom. According to Lee Bollinger, "[F]ree speech involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters."[272] Thus, free speech in schools will teach students to "understand and control the 'impulse toward intolerance' that is present in everyone—an impulse that . . . if unchecked, can have devastating consequences for society."[273] Ultimately, while a viewpoint-neutrality requirement applied to restrictions of school-sponsored speech would *hinder* a school from advancing the state's curriculum, outside of the curricu-

269 *See id.*

270 *See* Redish & Finnerty, *supra* note 203, at 116–17 ("It would defy reality . . . to assume that the right to dissent from widely shared public values has been uniformly preserved throughout American history. Indeed, from the Alien and Sedition Acts to the suppression of dissent during the Civil War to the compelled patriotism of the World War I period to the Red Scares of both post-world war periods, the United States has often refused to tolerate substantial dissent from widely held political views.").

271 Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1299 (7th Cir. 1993).

272 LEE C. BOLLINGER, THE TOLERANT SOCIETY 10 (1986).

273 David A. Strauss, *Why Be Tolerant?*, 53 U. CHI. L. REV. 1485, 1486 (1986) (book review).

lar context, a viewpoint-neutrality requirement would *facilitate* the inculcation of social values such as tolerance.

4. The Pre-*Morse* Constitutional Framework Strikes the Proper Balance

If viewpoint-based restrictions are freely permitted in the realm of independent student speech, students' free speech rights will be severely compromised. Indeed, *Tinker* acknowledged that a student's views may cause a disturbance, but insisted that "our Constitution says we must take this risk."[274] Those arguing against viewpoint neutrality maintain that the risk is too great—namely, that allowing students to contradict the teachings of the school, for example, on issues such as illegal drugs and sex, diminishes the school's effectiveness and endangers students.[275] But the "constitutionally permissible ways of regulating student speech provide ample means of ensuring that student expression does not interfere with the effective operation of the schools or cause harm to other students."[276] Under *Fraser*, a school may restrict speech that is lewd or vulgar[277] and, under *Tinker*, it may restrict speech (even on the basis of viewpoint) that causes a material disruption of class (or has the potential to have such an effect).[278] Thus, if "the expression of a . . . [student's] viewpoint, such as one espousing racial hatred, creates a sufficient threat, school authorities may intervene."[279] Further, a school may presumably restrict speech on the basis of viewpoint if it can satisfy strict scrutiny.

The danger that schools will invoke the material and substantial disruption justification as a pretext for viewpoint-based disagreement with student speech exists under *Tinker* just as the same pretextual danger exists under *Hazelwood*. While the risk of pretextual restrictions is present, it is outweighed by the greater risk of a significant, perhaps even violent, disruption of the school. Ultimately, the *Tinker/Hazelwood* framework strikes the proper balance between a school's pedagogical and safety interests and the countervailing free speech interests of students.

---

274 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

275 The argument proceeds from the assumption that students are impressionable and unable to make decisions for themselves.

276 *See, e.g.*, C.H. *ex rel.* Z.H. v. Oliva, 226 F.3d 198, 212 (3d Cir. 2000) (en banc) (Alito, J., dissenting).

277 *See supra* Part II.B.

278 *See supra* Part II.A.

279 *See, e.g.*, *Oliva*, 226 F.3d at 212 (Alito, J., dissenting).

5. *Morse*'s Slippery Slope

The Court, in *Morse*, ill-advisedly "invent[ed] out of whole cloth a special First Amendment rule"[280] permitting viewpoint-based restrictions of illegal drug advocacy. Ironically, the Court created this new exception despite internal disagreement regarding whether the speech at issue was even viewpoint-based to begin with.[281] However, although the dissent quibbled over the meaning of the banner, ultimately, all of the Justices, except Justice Breyer, appeared to endorse viewpoint-based restrictions of some pro-drug advocacy.[282]

Unlike his fellow jurists, Breyer decided *Morse* on qualified immunity grounds.[283] Citing the narrow, fact-specific question at issue, he contended that reaching the merits of the First Amendment question was both "unwise and unnecessary."[284] He was right. The Court's viewpoint-based holding "raise[s] a host of serious concerns."[285] Breyer briefly touched on the most serious of these concerns when he critiqued the Court's rationale for the restriction. According to Breyer: "To say that illegal drug use is harmful to students, while surely true, does not itself constitute a satisfying explanation because there are many such harms."[286] Paradoxically, the Justice who did not decide the First Amendment question provided the most accurate analysis of the issue.

In *Morse*, the Supreme Court opened Pandora's Box by eschewing viewpoint neutrality on account of the "threat to student safety" posed by illegal drug advocacy.[287] The Court's holding might appear limited; however, the primary justification Chief Justice Roberts invoked to reach the decision—that illegal drug use is "harmful" to students—is *harmful* to First Amendment principles. Indeed, as

280 Morse v. Frederick, 127 S. Ct. 2618, 2650 (2007) (Stevens, J., dissenting).

281 *See supra* note 7.

282 For Justice Thomas, because students' speech is not protected by the First Amendment, no viewpoint-based exception would be necessary. *See supra* note 182 and accompanying text.

283 *Morse*, 127 S. Ct. at 2638 (Breyer, J., concurring in the judgment and dissenting in part) ("This Court need not and *should not* decide this difficult First Amendment issue on the merits. Rather, I believe that it should simply hold that qualified immunity bars the student's claim for monetary damages and say no more." (emphasis added)). According to Breyer, the Court should abandon the rigid *Saucier v. Katz*, 533 U.S. 194 (2001), "order-of-battle rule," which requires courts to determine whether a constitutional right was violated before considering whether an official is entitled to qualified immunity. *Morse*, 127 S. Ct. at 2641.

284 *Morse*, 127 S. Ct. at 2638.

285 *Id.* at 2639.

286 *Id.*

287 *Id.* at 2638.

Breyer portended, the Court's logic can be easily extended to silence students on any controversial issue that an administrator subjectively deems "harmful."

Permitting a school to suppress independent student speech based on disagreement with the speaker's viewpoint and an attenuated link to harm creates a slippery slope. "*Tinker* . . . has survived since 1969 because it strikes the appropriate balance regarding [independent] student speech—that which substantially disrupts school activities is not permitted; all else is."[288] By upholding a viewpoint-based restriction that did not meet *Tinker*'s material and substantial disruption standard, "*Morse* eliminated that balance as to one topic": drug use.[289] Now, other cases drawing on *Morse*'s logic threaten to eliminate other "harmful" viewpoints.[290]

Although Alito's concurrence appears to limit *Morse*'s holding, its underlying rationale may invite lower courts to expand its scope. For example, in *Ponce v. Socorro Independent School District*,[291] the Fifth Circuit acknowledged that Alito went to great lengths to "point out that the reasoning of the Court [could not] be extended to other kinds of regulations of content";[292] however, it then extended the concurrence, holding that "the student speech area demarcated by Justice Alito in *Morse*" includes "speech pertaining to grave harms arising from the particular character of the school setting."[293] Thus, presumably, if a court could construe a viewpoint as particularly harmful, that viewpoint could be suppressed. Ultimately, a viewpoint-neutrality requirement operating outside of the realm of *Tinker* will prevent courts from sliding down this slippery slope, suppressing the robust dialogue that the First Amendment was designed to protect.

Conclusion

The *Morse* dissent was correct when it conceded that "some targeted viewpoint discrimination" might be appropriate in the school setting.[294] Although when the government acts as sovereign, view-

288 *See* Douglas Lee, *Fifth Circuit Extends Limits on Student Speech*, First Amendment Center, Nov. 27, 2007, http://www.firstamendmentcenter.org/commentary.aspx?id=19363.

289 *Id.*

290 *See id.* Under the logic of *Ponce v. Socorro Independent School District*, 508 F.3d 765 (5th Cir. 2007), "the First Amendment does not protect any speech that advocates or threatens a harm at least as serious as illegal drug use." Lee, *supra* note 288.

291 508 F.3d 765.

292 *Id.* at 770.

293 *Id.*

294 Morse v. Frederick, 127 S. Ct. 2618, 2646 (2007) (Stevens, J., dissenting).

point neutrality comprises the "bedrock principle"[295] of the First Amendment, functioning to maintain a marketplace of ideas free from governmental interference, public schools cannot stand on such a foundation. Indeed, when the government acts as educator, it necessarily chooses what ideas to transmit and, in order to effectuate its mission, must be able to convey a clear curricular message.

Hazelwood's distinction between the state's curricular speech and a student's independent speech constitutes the constitutional lynchpin enabling the Court to import viewpoint neutrality into public schools. This distinction, which hinges on the pedagogical interests of the government as educator and the expressive interests of students as citizens, reveals that school-sponsored expression and independent student expression merit different degrees of viewpoint protection. In the realm of school-sponsored speech, when the state communicates a curricular message or is perceived to be speaking, viewpoint neutrality is neither necessary nor appropriate. However, when the government is not advancing a curricular message, viewpoint neutrality is essential. Schools are not merely asked to advance a curriculum, but also to foster the kind of independent thought and experimentation which constitute the essence of our intellectual tradition.[296] If viewpoint-based restrictions on independent student speech are freely permitted, the former function will swallow the latter. Thus, viewpoint neutrality must be required for independent student speech that does not pose the threat of a material and substantial disruption.

By establishing a new, viewpoint-based rule instead of operating under the *Tinker/Hazelwood* dichotomy, *Morse* created a judicially impractical framework that cannot be sustained. As Justice Thomas highlighted in his concurrence, the Court's student speech jurisprudence is already extremely complex.[297] Indeed, "the more detailed the Court's supervision becomes, the more likely its law will engender further disputes among teachers and students."[298] Thus, *Morse* was

---

295 Texas v. Johnson, 491 U.S. 397, 414 (1989).

296 *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 835 (1995) (describing the danger to speech "from the chilling of individual thought and expression" as "especially real . . . where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition").

297 *See Morse*, 127 S. Ct. at 2634 (Thomas, J., concurring) ("I am afraid that our jurisprudence now says that students have a right to speak in schools except when they don't—a standard continuously developed through litigation against local schools and their administrators.").

298 *Id.* at 2640 (Breyer, J., concurring in the judgment and dissenting in part).

correctly decided by the Ninth Circuit, which analyzed the case under the existing framework, concluding that the student's independent speech could not be constitutionally restricted under *Tinker*.[299]

Applying the First Amendment to student speech is a difficult endeavor. In fact, some might suggest that "the freedom of speech would be better served, nurtured, and protected if education . . . took place in non-state, 'First Amendment institutions,' at public expense."[300] However, as long as public schools remain under governmental control, difficult constitutional issues, such as the place of viewpoint neutrality in schools, must be addressed, not ignored. If the nation's highest court consistently refuses to clarify the place of viewpoint neutrality in the school setting, students, teachers, school districts, and lower courts will continue to become entangled in the current constitutional thicket, and, consequently, expend time and money seeking direction from the Court.

---

299 On the qualified immunity question, however, this author disagrees with the Ninth Circuit's holding.

300 *See* Garnett, *supra* note 10, at 59; *see also, e.g.*, Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 CARDOZO L. REV. 1281 (2002) (arguing in favor of school-choice programs).