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Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech

Emily Gold Waldman

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RETURNING TO *HAZELWOOD*'S CORE: A NEW APPROACH TO
RESTRICTIONS ON SCHOOL-SPONSORED SPEECH

*Emily Gold Waldman**

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I. INTRODUCTION

Nearly twenty years ago in *Hazelwood School District v. Kuhlmeier*,¹ the Supreme Court, in upholding the constitutionality of a public high school principal's censorship of a student newspaper produced in a journalism class, held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."² Since then, *Hazelwood*'s "reasonably related to legitimate pedagogical concerns"

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1. 484 U.S. 260 (1988).
2. *Id.* at 273.

standard³ has been invoked in a tremendous array of school speech cases. Courts have not only applied it in a wide variety of *student* speech contexts⁴ but have also relied on it in cases involving public schools' textbook selections and curricular choices,⁵ teachers' in-class speech,⁶ and even speech in a school setting by outside entities (such as recruiters and advertisers).⁷

In the process, two major circuit splits have developed. First, the circuits have divided over the extent of *Hazelwood*'s reach, particularly whether *Hazelwood* applies to a teacher's classroom speech.⁸ Second, a sharp split has developed over whether *Hazelwood* goes so far as to permit viewpoint-based speech restrictions, which are generally prohibited under the First Amendment.⁹ Both of these questions have given rise to rich parallel lines of scholarship.¹⁰ The two issues, however, are rarely

3. *Id.*

4. *See infra* text accompanying notes 76–81.

5. *See infra* Part III.A.

6. *See infra* Part III.B.

7. *See infra* Part III.C.

8. *Compare* *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 724 (8th Cir. 1998) (applying *Hazelwood* to a teacher's in-class speech), *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994) (same), *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993) (same), *Bishop v. Aronov*, 926 F.2d 1066, 1071 (11th Cir. 1991) (same), and *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 775 (10th Cir. 1991) (same), with *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 478 (7th Cir. 2007) (applying the approach set forth in *Pickering v. Board of Education*, 391 U.S. 563, 572–75 (1968), to a teacher's in-class speech), *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1053 (6th Cir. 2001) (same), *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 372 (4th Cir. 1998) (en banc) (Luttig, J., concurring) (same), and *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 798–99 (5th Cir. 1989) (same). *See generally infra* Part III.B.

9. *Compare* *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 928–29 (10th Cir. 2002) (holding that *Hazelwood* permits viewpoint discrimination), and *Ward*, 996 F.2d at 454 (same), with *Peck v. Baldwinville 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, 829 (9th Cir. 1991) (same). *See generally infra* Part III.

10. On the question of what legal standard should apply to a teacher's classroom speech, see, for example, Theresa J. Bryant, *May We Teach Tolerance? Establishing the Parameters of Academic Freedom in Public Schools*, 60 U. PITT. L. REV. 579 (1999); William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER, RACE & JUST. 213 (1999) [hereinafter Buss, *Academic Freedom*]; Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1 (2001); Todd A. DeMitchell, Counterpoint, *A New Balance of In-Class Speech: No Longer Just a "Mouthpiece,"* 31 J.L. & EDUC. 473 (2002); Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Incultation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62 (2002); W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301 (1998); Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693 (1990); Emily Holmes Davis, Note, *Protecting the "Marketplace of Ideas": The First Amendment and Public School Teachers' Classroom Speech*, 3 FIRST AMEND. L. REV. 335 (2005); R. Weston Donehower, Note, *Boring*

considered in tandem.

This Article argues that these two issues are related in a critical, yet largely unexamined way: the extension of *Hazelwood* beyond the student speech context has severely muddled the question whether *Hazelwood* permits viewpoint-based speech restrictions. Indeed, three of the five circuits to explicitly address whether *Hazelwood* permits viewpoint discrimination did so in cases that did not even involve student speech.¹¹ Moreover, the varying speech contexts in which the circuits have first confronted this question have led to divergent results. The First Circuit, for instance, first addressed the viewpoint discrimination issue in a teacher speech case.¹² The court applied *Hazelwood*'s standard and concluded that it generally permitted viewpoint discrimination.¹³ On the other hand, the Ninth and Eleventh Circuits both first reached the question in cases addressing speech by outside entities—respectively yearbook advertisers¹⁴ and recruiters at a career fair.¹⁵ These courts applied *Hazelwood*'s standard and concluded that it generally forbade viewpoint discrimination.¹⁶ This divergent result is not a coincidence. Rather, the significantly different interests implicated by teacher speech and outside-entity speech directly contributed to these conflicting interpretations of *Hazelwood*. In short, *Hazelwood* has been pulled in so many directions that its underlying standard has lost coherence.

Lessons: Defining the Limits of a Teacher's First Amendment Right to Speak Through the Curriculum, 102 MICH. L. REV. 517 (2003).

As to the viewpoint-discrimination issue, see, for example, William G. Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505 (1989) [hereinafter Buss, *School Newspapers*]; Katie Hammett, Commentary, *School Shootings, Ceramic Tiles, and Hazelwood: The Continuing Lessons of the Columbine Tragedy*, 55 ALA. L. REV. 393 (2004); Lisa Shaw Roy, *Inculcation, Bias, and Viewpoint Discrimination in Public Schools*, 32 PEPP. L. REV. 647 (2005); Janna J. Annet, Comment, *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 (2002); Denise Daugherty, Note, *Free Speech in Public Schools: Has the Supreme Court Created a Haven for Viewpoint Discrimination in School-Sponsored Speech?*, 20 GA. ST. U. L. REV. 1061 (2004); Samuel P. Jordan, Comment, *Viewpoint Restrictions and School-Sponsored Student Speech: Avenues for Heightened Protection*, 70 U. CHI. L. REV. 1555 (2003); 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 (2004).

11. See *Ward*, 996 F.2d at 450 (involving a teacher discussing abortion with her class); *Planned Parenthood*, 941 F.2d at 819 (involving Planned Parenthood advertisements submitted for publication in high school newspapers); *Searcey v. Harris*, 888 F.2d 1314, 1315–16 (11th Cir. 1989) (involving the right of outside speakers to come to the school). The Second and Tenth Circuits considered the issue in the context of student speech. See *Peck*, 426 F.3d at 620; *Fleming*, 298 F.3d at 921–22.

12. See *Ward*, 996 F.2d at 454.

13. *Id.*

14. See *Planned Parenthood*, 941 F.2d at 829.

15. See *Searcey*, 888 F.2d at 1325.

16. *Planned Parenthood*, 941 F.2d at 829; *Searcey*, 888 F.2d at 1325.

This Article argues that this conundrum can be untangled by returning to *Hazelwood*'s core as a student speech case. It first argues that *Hazelwood*'s reach has been significantly overextended and that it should be applied only in student speech cases. *Hazelwood* was a student speech case, and its rationale and approach are uniquely suited to that context.

Removing these other categories of speech from the *Hazelwood* equation, in turn, sheds light on the persistent debate over whether *Hazelwood* permits not only content-based discrimination but also viewpoint-based discrimination. In other words, resolving the circuit split over *Hazelwood*'s reach helps to resolve the circuit split over whether *Hazelwood* permits viewpoint-related speech restrictions. Once we return to *Hazelwood*'s student speech origins and to the text of *Hazelwood* itself, it becomes relatively clear that *Hazelwood* contemplated permitting viewpoint-based restrictions on student speech in certain circumstances—a position implicitly supported by the Supreme Court's recent decision in *Morse v. Frederick*.¹⁷ The real question is not *whether Hazelwood* permits viewpoint discrimination, but *when*.

Answering this question requires a more nuanced analysis of two issues. First, what does it mean for student speech to occur in a “school-sponsored” context, such that, as the *Hazelwood* Court put it, “students, parents, and other members of the public might reasonably perceive [the speech] to bear the imprimatur of the school”?¹⁸ Second, which types of restrictions on student speech are “reasonably related to legitimate pedagogical concerns”?¹⁹ I argue that the courts should adopt a sliding-scale approach that weighs the level of school sponsorship against the nature of and justification for the speech restriction. When the perception of school sponsorship is highest—because the student speech at issue will affect other students' learning experiences or permanently transform the physical appearance of the school—a school should have broad latitude to restrict the speech even if the restrictions are viewpoint based. In contrast, when the perception of school sponsorship is lower—because the student speech, despite its occurrence in a school-sponsored context, is clearly attributable to a particular student and will transform neither other students' learning experiences nor the permanent appearance of the school—any viewpoint-based restrictions imposed by the school should be more rigorously scrutinized.

The Article begins by discussing the *Hazelwood* decision in depth. It then discusses the various contexts in which courts have applied *Hazelwood* and the circuit split that has developed over how broadly *Hazelwood* should reach.²⁰ Next, it describes the circuit split over whether

17. 127 S. Ct. 2618 (2007); *see also infra* notes 324–29 and accompanying text.

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

19. *Id.* at 273.

20. This Article focuses on K–12 public schools, the context in which *Hazelwood* arose. *See*

Hazelwood permits viewpoint-based speech restrictions, highlighting the different speech contexts in which the circuits have reached divergent conclusions. The Article then argues that the overextension of *Hazelwood* links the two splits. This Part also discusses why *Hazelwood* is uniquely suited to the student speech context and why other doctrines—namely, the *Pickering–Connick* framework²¹ for teachers’ classroom speech and basic public forum analysis for outside entities’ speech—are better suited to analyze school-speech restrictions of nonstudents. To support this position, this Article draws upon the Supreme Court’s recent decision in *Garcetti v. Ceballos*.²² Finally, having returned to *Hazelwood*’s core as a doctrine governing student speech, the Article proposes a sliding-scale approach that courts should use to evaluate viewpoint-based restrictions on student speech.

II. THE *HAZELWOOD* DECISION

The *Hazelwood* dispute began when the principal of Hazelwood East High School received copies of the page proofs for the May 13, 1983,

id. at 262. The Seventh Circuit, in an en banc opinion, has held that *Hazelwood* also generally applies in the university setting, *Hosty v. Carter*, 412 F.3d 731, 734–35 (7th Cir. 2005) (en banc), despite a strong dissent, *id.* at 739–41 (Evans, J., dissenting). Several other circuits have reached the same conclusion as *Hosty*’s majority, applying *Hazelwood* in cases involving speech restrictions at the university level. *See, e.g.*, *Vanderhurst v. Colo. Mountain Coll. Dist.*, 208 F.3d 908, 915 (10th Cir. 2000); *Bishop v. Aronov*, 926 F.2d 1066, 1071 (11th Cir. 1991). Not surprisingly, the question whether *Hazelwood* should apply in a university setting, or should instead be limited to the K–12 public school context in which it arose, has given rise to much scholarship, particularly in *Hosty*’s aftermath. *See, e.g.*, Edward L. Carter, Kevin R. Kemper, & Barbara L. Morgenstern, *Applying Hazelwood to College Speech: Forum Doctrine and Government Speech in the U.S. Courts of Appeals*, 48 S. TEX. L. REV. 157 (2006) (finding that the majority of scholars argue that the *Hazelwood* framework is not appropriate on college campuses but that over half of the federal circuits considering the issue have applied *Hazelwood* to the university setting); Jessica B. Lyons, Note, *Defining Freedom of the College Press After Hosty v. Carter*, 59 VAND. L. REV. 1771 (2006) (analyzing the effect of *Hazelwood* and *Hosty* on freedom of the press at the university level and articulating a new standard for university speech). Although I draw upon some of the university cases insofar as they relate to my discussion of whether *Hazelwood* should apply to a teacher’s classroom speech, the separate issue of applying *Hazelwood* in a university setting is beyond the scope of this Article.

21. *See Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). As discussed in more detail below, the *Pickering–Connick* framework sets forth a two-prong test for assessing free speech claims by public employees. *See infra* notes 139–48 and accompanying text. A public employee alleging that his employer violated his First Amendment rights by disciplining him for his speech must establish that he was speaking on a matter of public concern. *Connick*, 461 U.S. at 147. If the employee establishes this, then the court proceeds to a balancing test (frequently referred to as “*Pickering* balancing”) and weighs the employee’s First Amendment speech interest against the employer’s justification for disciplining the employee. *Id.* at 148–54.

22. 126 S. Ct. 1951 (2006).

issue of *Spectrum*, the school's newspaper.²³ Students in the high school's Journalism II class wrote and edited *Spectrum*, and the school district's board of education funded the newspaper.²⁴ The faculty member serving as the journalism teacher and newspaper adviser typically provided the principal with copies of the page proofs for review prior to each issue's publication.²⁵

When Hazelwood East's principal saw the May 13 page proofs, he was troubled by two of the articles.²⁶ One article discussed three pregnant students at the high school.²⁷ The principal was concerned that the references to sexual activity and birth control were inappropriate for some of the school's younger students and that the pregnant students might be identifiable from the text even though pseudonyms had been used.²⁸ The other article discussed the impact of divorce on some students at the school.²⁹ Here, the principal was concerned because this article included a student's complaints about her father without providing her parents with an opportunity to respond to the comments or to consent to their publication.³⁰ Believing that there was no time to change these articles, the principal ordered the faculty adviser to pull the stories from the issue.³¹ The adviser complied, and the issue was released without the two pages on which the articles were to appear.³² Three students on *Spectrum*'s staff sued, alleging that censoring the articles violated their First Amendment rights.³³

When the Hazelwood East students filed their lawsuit, only one Supreme Court decision addressed school restrictions on student speech: *Tinker v. Des Moines Independent Community School District*.³⁴ In *Tinker*, the Supreme Court upheld the right of students to wear black armbands to school to protest the Vietnam War.³⁵ Stating that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"³⁶ the Court concluded that the students had a constitutional right to wear their armbands (which the Court

23. *Hazelwood*, 484 U.S. at 263.

24. *Id.* at 262–63.

25. *Id.* at 263.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 263–64.

32. *See id.* at 264.

33. *Id.* at 262, 264.

34. 393 U.S. 503 (1969).

35. *Id.* at 514.

36. *Id.* at 506.

deemed “pure speech”³⁷) unless doing so would “materially and substantially” disrupt the work of the school or invade the rights of others.³⁸ Although the armbands had caused “discussion outside of the classrooms,” they had neither disrupted class work nor intruded upon the rights of others and therefore had to be allowed.³⁹

Applying *Tinker* to the *Hazelwood* dispute, the Eighth Circuit concluded that the high school principal’s censorship of the two pages in *Spectrum* was unconstitutional, reversing the district court’s ruling to the contrary.⁴⁰ The Eighth Circuit held that *Spectrum* was a public forum for student viewpoints and that there was no reasonable expectation that publishing the articles “would have materially disrupted classwork or given rise to substantial disorder in the school.”⁴¹ Nor could the articles have been constitutionally censored under *Tinker*’s alternative justification—preventing the invasion of other students’ rights—which the court narrowly construed to refer only to situations in which “publication of [the] speech could result in tort liability for the school.”⁴² Accordingly, the Eighth Circuit ruled in favor of the Hazelwood students’ First Amendment claim, prompting the school district to petition for certiorari, which the Supreme Court granted.⁴³

By the time *Hazelwood* reached the Supreme Court a year later, the Court had issued a second decision involving students’ First Amendment rights: *Bethel School District No. 403 v. Fraser*.⁴⁴ In *Fraser*, a high school student was disciplined for a nomination speech of a classmate that he delivered at a school assembly.⁴⁵ His speech used an “elaborate, graphic, and explicit sexual metaphor.”⁴⁶ Specifically, the student stated that the candidate was “a man who is . . . firm in his pants, . . . who takes his point and pounds it in[, and] . . . who will go to the very end—even the climax, for each and every one of you.”⁴⁷ After the school punished the student for giving the speech, he sued, alleging a First Amendment violation.⁴⁸

37. *Id.* at 508.

38. *Id.* at 513–14.

39. *Id.* at 514.

40. *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1370, 1374–76 (8th Cir. 1986), *rev’d*, 484 U.S. 260 (1988).

41. *Id.* at 1374–75.

42. *Id.* at 1375–76.

43. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 265–66 (1988).

44. 478 U.S. 675 (1986).

45. *Id.* at 677.

46. *Id.* at 678.

47. *Id.* at 687 (Brennan, J., concurring).

48. *Id.* at 678–79 (majority opinion).

The Ninth Circuit applied *Tinker* and affirmed the lower court's ruling in the student's favor, but the Supreme Court reversed.⁴⁹ Rather than applying *Tinker*'s material-disruption or invasion-of-rights tests, the Court in *Fraser* essentially deemed *Tinker* inapplicable, stressing the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech in this case."⁵⁰ Emphasizing that "the penalties imposed in this case were unrelated to any political viewpoint," the Court concluded that the First Amendment did not "prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission."⁵¹ The Court thus rejected the student's First Amendment argument and ruled in the school district's favor.⁵²

Hazelwood presented a third factual variation. Unlike *Fraser*, the speech at issue was not lewd or vulgar.⁵³ And unlike *Tinker*, the speech was not simply the personal expression of individual students. Rather, the speech at issue in *Hazelwood* was going to be communicated through a school-sponsored activity: a newspaper produced by a journalism class.⁵⁴ Pulling together strands of *Tinker* and *Fraser*, the Court in *Hazelwood* began by noting that although public school students did not "'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'"⁵⁵ the "First Amendment rights of students in the public schools [were] 'not automatically coextensive with the rights of adults in its other settings.'"⁵⁶ The *Hazelwood* Court proceeded, in section II.A of its opinion,⁵⁷ to apply general public forum doctrine in order to conclude that *Spectrum* was not a public forum for student expression.⁵⁸ Rather, it was "part of the educational curriculum and a 'regular classroom activit[y]'"⁵⁹ This, in turn, led the Court to conclude that "school officials were entitled to regulate the contents of *Spectrum* in any reasonable manner."⁶⁰

49. *Id.* at 679–80.

50. *See id.*

51. *Id.* at 685.

52. *See id.* at 687.

53. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 n.4 (1988).

54. *See id.* at 262–63.

55. *Id.* at 266 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

56. *Id.* (quoting *Fraser*, 478 U.S. at 682).

57. I note the headings that the Court in *Hazelwood* used to structure its opinion because, as discussed *infra*, I believe that they help clarify the scope of the Court's holding. *See infra* text accompanying notes 262–64.

58. *Hazelwood*, 484 U.S. at 267–70.

59. *Id.* at 268 (alteration in original) (quoting Reply Brief for the Petitioners, *Hazelwood*, 484 U.S. 260 (No. 86-836), 1987 WL 864174, at *4).

60. *Id.* at 270 (formatting added). As discussed in further detail below, the Court explained that public schools are not traditional public forums (such as streets, parks, and the like) and can be deemed

What, then, qualified as a “reasonable manner” of regulation? In section II.B, the Court in *Hazelwood* left behind general public forum doctrine to address this issue. First, the Court again emphasized the distinction between “whether the First Amendment requires a school to tolerate particular student speech” (the *Tinker* question) and “whether the First Amendment requires a school affirmatively to promote particular student speech” (the *Hazelwood* question).⁶¹ The Court explained:

The former question addresses educators’ ability to silence a student’s personal expression that happens to occur on the school premises. The latter question concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.⁶²

As to this latter category of speech, the *Hazelwood* Court concluded that educators could impose restrictions “so long as their actions are reasonably related to legitimate pedagogical concerns.”⁶³ Such concerns included, for instance, (1) ensuring that “participants learn whatever lessons the activity is designed to teach,” (2) shielding readers and listeners from material that might “be inappropriate for their level of maturity,” and (3) generally disassociating the school from any speech that (a) was “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane,” (b) could be seen as “advocat[ing] drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order,’” or (c) could “associate the school with

public forums only if school authorities have ‘by policy or by practice’ opened those facilities ‘for indiscriminate use by the general public,’ or by some segment of the public, such as student organizations. If the facilities have instead been reserved for other intended purposes, ‘communicative or otherwise,’ then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.

Id. at 267 (citations omitted) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 n.7, 47 (1983)).

61. *Id.* at 270–71.

62. *Id.* at 271.

63. *Id.* at 273.

any position other than neutrality on matters of political controversy.”⁶⁴

In justifying this approach, the *Hazelwood* Court highlighted the negative consequences that it envisioned if schools were not granted this level of discretion over school-sponsored student speech. First, the schools would be constrained from “their role as ‘a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.’”⁶⁵ Second, in direct response to the dissent’s suggestion that *Tinker* provided the appropriate test for any school restrictions on student speech,⁶⁶ the Court argued that this suggestion would require schools to “open their newspapers to all student expression that does not threaten ‘materially disrupt[ion of] classwork’ or violation of ‘rights that are protected by law,’ regardless of how sexually explicit, racially intemperate, or personally insulting that expression otherwise might be.”⁶⁷ Schools would likely prefer to shut down student newspapers altogether, the Court predicted, rather than circulate such views under their auspices.⁶⁸

Pursuant to its newly articulated “reasonably related to legitimate pedagogical concerns” test, the *Hazelwood* Court then ruled in favor of the school district.⁶⁹ As to the teen pregnancy article, the Court held that the principal’s censorship was reasonably related to shielding “14-year-old freshmen” and perhaps their “even younger brothers and sisters,” who might read the paper if it were brought home, from the article’s frank discussion of the teenage girls’ sexual histories and use or non-use of birth control.⁷⁰ Additionally, the Court stated that the principal might reasonably have been concerned that the article had failed to adequately protect the teenage girls’ anonymity or to provide their boyfriends and parents (who were mentioned in the article) the chance to respond or consent to the publication.⁷¹ Similarly, as to the divorce article, the Court found that “[t]he principal could reasonably have concluded that [the student’s father] was entitled to an opportunity to defend himself as a matter of journalistic fairness.”⁷² The Court thus found that the principal “could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal

64. *Id.* at 271–72 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

65. *Id.* at 272 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

66. *Id.* at 283–84 (Brennan, J., dissenting).

67. *Id.* at 276 n.9 (majority opinion) (alteration in original) (citation omitted) (quoting *id.* at 289 (Brennan, J., dissenting)).

68. *See id.*

69. *Id.* at 273–76.

70. *Id.* at 274–75.

71. *Id.* at 274.

72. *Id.* at 275.

attacks.”⁷³ The principal’s censorship of the articles was therefore constitutional because it was reasonably related to legitimate pedagogical concerns.⁷⁴

III. THE SPLIT OVER *HAZELWOOD*’S REACH

Hazelwood immediately changed the landscape for assessing the constitutionality of school restrictions on student speech. Taken together, *Tinker* and *Hazelwood* essentially divided the student speech universe in two: student speech that merely occurred on school premises could be restricted only if it caused a material disruption or invaded others’ rights, while student speech disseminated in a school-sponsored context could be restricted when the school had a legitimate pedagogical reason for doing so.⁷⁵ *Hazelwood* itself made clear that this latter category should be construed broadly, encompassing not only classroom activities and official school-sponsored publications and productions but also any “other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school,” provided that the students are supervised by faculty members and the activities are designed to teach students particular knowledge or skills.⁷⁶

Indeed, over the past nineteen years, courts have invoked *Hazelwood* in a tremendous array of student speech cases, in almost every conceivable context from kindergarten through high school. Examples, each of which I return to in Part V, include:

- A kindergartner who sued after he created a poster for a school assignment to illustrate ways of saving the environment, and his school displayed his poster in a way that concealed its depiction of Jesus Christ;⁷⁷

73. *Id.* at 276.

74. *See id.*

75. *Fraser*, in turn, can be viewed as applying to the subcategory of cases in which the speech at issue is so vulgar and offensive, and so lacking in political content, that no constitutional protection attaches when it is uttered in the school setting. Of course, had *Fraser* been decided after *Hazelwood*, perhaps the Supreme Court would have simply applied *Hazelwood* (given that the speech was delivered at a school-sponsored assembly) and upheld the restriction as reasonably related to a legitimate pedagogical purpose. Indeed, the Court in *Fraser* considered the importance of school sponsorship by stating that “[a] high school assembly or classroom is no place for a sexually explicit monologue.” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986). In *Fraser* the Court did not, however, rest its holding on the fact of school sponsorship, a concept that did not come fully into focus until *Hazelwood*. In 2007, the Supreme Court carved out yet another subcategory of student speech that is unworthy of constitutional protection: speech that can “reasonably be regarded as encouraging illegal drug use.” *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007).

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

77. *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 621–23, 633 (2d Cir. 2005)

- An elementary school student who sued when his school refused to allow him to distribute, during a classroom holiday party, candy canes with religious messages;⁷⁸
- A high school student who sued when his school disqualified his candidacy for student council president after he delivered a speech at a school assembly in which he stated, among other things, that “[t]he administration plays tricks with your mind and they hope you won’t notice. For example, why does [the assistant principal] stutter when he is on the intercom? He doesn’t have a speech impediment. If you want to break the iron grip of this school, vote for me for president.”;⁷⁹
- Several Columbine High School students and their parents, who sued when the school refused to hang the tiles that they had created as part of a tile painting project to commemorate the April 1999 Columbine massacre;⁸⁰ and
- A high school student who sued after her school removed the religious murals that she had painted on school walls as part of a high school beautification project.⁸¹

As disparate as these cases are, they all share a common thread: the restriction of student speech in school-sponsored contexts. It makes perfect sense, then, that the courts employed *Hazelwood* to assess each dispute.

More surprising, however, is that courts have also applied *Hazelwood* in cases that do *not* involve student speech. Indeed, in 1992—a mere four years after *Hazelwood*—Rosemary Salomone described this trend, writing that “[j]ust about any aspect of school sponsored activity (newspapers, career days, elective courses) conducted anywhere in the school (classrooms, hallways) is considered to be a nonpublic forum subject to the reasonableness standard of *Hazelwood*.”⁸² This trend has become even more pronounced since then, with numerous courts apparently concluding that *all* speech that can be considered “school sponsored”—student speech,

(holding that the school’s actions were likely unconstitutional under *Hazelwood* but remanding to the district court for further analysis); *see infra* notes 216–18, 368–71 and accompanying text.

78. *Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 274, 280–81 (3d Cir. 2003) (holding that the school’s actions were constitutional under *Hazelwood*); *see infra* notes 350–55 and accompanying text.

79. *Poling v. Murphy*, 872 F.2d 757, 759, 764 (6th Cir. 1989) (holding that the school’s actions were constitutional under *Hazelwood*); *see infra* text accompanying notes 372–75.

80. *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 922, 933 (10th Cir. 2002) (holding that the school’s actions were constitutional under *Hazelwood*); *see infra* notes 221–25, 356–61 and accompanying text.

81. *Bannon v. Sch. Dist.*, 387 F.3d 1208, 1211, 1217 (11th Cir. 2004) (holding that the school’s actions were constitutional under *Hazelwood*); *see infra* text accompanying notes 243–48, 357–59.

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

teachers' classroom speech, outside-entity speech, and speech that reflects district-level decisions about textbooks and curricula—comes within *Hazelwood*'s reach. To set the stage for my argument that this reflects an overextension of *Hazelwood*, I discuss below the various nonstudent-speech contexts in which courts have applied *Hazelwood* and the circuit divisions that have developed in these areas.

A. Textbook and Curriculum Selection

Courts are generally conflicted about whether *Hazelwood*'s “reasonably related to legitimate pedagogical concerns” standard⁸³ applies to a school district's decisions about textbooks and curricula, sometimes issuing mixed messages within a single opinion. The courts that have concluded that *Hazelwood* is inapplicable to those decisions have done so on the grounds that textbook and curricular decisions reflect pure government speech, which cannot violate the speech rights of others. In contrast, the courts that have applied *Hazelwood* seem to have interpreted *Hazelwood* as implicitly announcing a generally applicable “reasonableness” standard for all school district decisions about speech-related matters. Although the splits over textbooks and curricula have not yet entirely risen to the surface, examining the decisions on this topic makes clear that divisions are percolating.

Only two circuits have addressed whether *Hazelwood* applies to textbook selection decisions, and they have reached opposite conclusions. The Fifth Circuit confronted the issue in *Chiras v. Miller*,⁸⁴ in which an author of an environmental-science textbook and a high school student brought First Amendment claims after the Texas State Board of Education refused to approve the use of the textbook.⁸⁵ The plaintiffs argued that this refusal stemmed from the influence of conservative think tanks and violated *Hazelwood*'s standard.⁸⁶ The Fifth Circuit analyzed in detail whether *Hazelwood* applied, noting a lack of consensus among the circuit courts “regarding the application of First Amendment principles to the selection of curricular materials by school boards.”⁸⁷ The court concluded that when the board of education “devises the state curriculum for Texas and selects the textbook with which teachers will teach to the students, it is the state speaking.”⁸⁸ Thus, *Hazelwood* was inapplicable, the court reasoned, because the existence of some sort of expressive forum was a “necessary precondition” for the application of *Hazelwood*.⁸⁹

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

84. 432 F.3d 606 (5th Cir. 2005).

85. *Id.* at 607–08.

86. *Id.* at 609–11.

87. *Id.* at 614–16.

88. *Id.* at 614.

89. *Id.* at 617–18.

The Fifth Circuit acknowledged, however, that its holding conflicted with the Eleventh Circuit's decision in *Virgil v. School Board*.⁹⁰ In *Virgil*, parents filed suit after the school board removed a previously approved textbook from an elective high school course due to complaints from other parents that the book contained sexually explicit material.⁹¹ The Eleventh Circuit concluded that *Hazelwood* provided "direct guidance."⁹² The court broadly characterized *Hazelwood* as "establish[ing] a relatively lenient test for regulation of expression which 'may fairly be characterized as part of the school curriculum'" and did not discuss *Hazelwood*'s specific genesis in the student speech context.⁹³ In applying *Hazelwood*, the *Virgil* court ultimately concluded that the board's action was constitutional because the textbook decision was a curricular decision that would be perceived as bearing the imprimatur of the school.⁹⁴ The court also found that the board's decision was reasonably related to legitimate pedagogical concerns: shielding students from the "explicit sexuality and excessively vulgar language in the selections."⁹⁵ Thus, although both the Fifth and Eleventh Circuits concluded that the two school districts' actions were constitutional, the courts took divergent routes to get there.

The case law surrounding *Hazelwood*'s applicability to curriculum selection, as opposed to textbook selection, is murkier. In one of the first post-*Hazelwood* cases to address this issue, *Bradley v. Pittsburgh Board of Education*,⁹⁶ the Third Circuit essentially took the position that *Hazelwood*'s reasonableness standard does not apply to curricular decisions. In *Bradley*, a high school teacher brought a First Amendment claim after her school prohibited her from organizing her classroom according to the "Learnball" technique.⁹⁷ Learnball involved dividing the class into teams, allowing students to elect their team leaders and establish class rules, and setting up a system of rewards, such as letting the radio be played in the classroom.⁹⁸ "[W]e do not have to delineate the scope of academic freedom afforded to teachers under the First Amendment" here, the Third Circuit ruled, because "no court has found that teachers' First

90. *Id.* at 616–17 (citing *Virgil v. Sch. Bd.*, 862 F.2d 1517, 1521 (11th Cir. 1989)).

91. *Virgil*, 862 F.2d at 1518–19. The complained-of material was in passages of Aristophanes's *Lysistrata* and Chaucer's *The Miller's Tale*. *Id.* at 1519.

92. *Id.* at 1521.

93. *Id.* (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

94. *Id.* at 1522.

95. *Id.* at 1522–23. The *Virgil* court explained that it was not applying the Supreme Court's 1982 decision in *Board of Education v. Pico*, 457 U.S. 853 (1982), which related to the removal of books from a school library, and which, as the *Virgil* court noted, took "special note of the 'unique role of the school library' as a repository for 'voluntary inquiry.'" *Virgil*, 862 F.2d at 1523 n.8 (citing *Pico*, 457 U.S. at 869).

96. 910 F.2d 1172 (3d Cir. 1990).

97. *Id.* at 1174.

98. *Id.* at 1174–75.

Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates.”⁹⁹

In 1998, the Third Circuit reaffirmed (in an opinion by then-Judge Samuel Alito) this view in *Edwards v. California University of Pennsylvania*.¹⁰⁰ There, the court stated that *Hazelwood* did not apply to school administrators’ decisions about “what will be taught in the classroom” and that it therefore did not need to engage in the *Hazelwood* analysis.¹⁰¹ The *Edwards* court strongly suggested that curricular choices reflected pure government speech.¹⁰²

Subsequent to the *Bradley* court’s 1990 pronouncement that no court had recognized a teacher’s First Amendment right to choose her own curriculum, some courts began to recognize such a right. In particular, the Tenth Circuit suggested in *Vanderhurst v. Colorado Mountain College District*¹⁰³ that it disagreed with the argument that “a teacher enjoys no First Amendment right to determine the educational content of a course.”¹⁰⁴ The *Vanderhurst* court noted the Supreme Court’s statement in *Keyishian v. Board of Regents*¹⁰⁵ that academic freedom is “a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”¹⁰⁶ The *Vanderhurst* court went on to state that, at least for purposes of the instant case involving a teacher’s lawsuit, *Hazelwood* provided the appropriate standard for assessing the constitutionality of terminating an instructor who had “attempt[ed] to communicate course content at odds with the . . . chosen curriculum.”¹⁰⁷

Other courts have issued mixed messages about whether *Hazelwood* applies to curricular choices, suggesting both that curricular choices reflect pure government speech and that *Hazelwood* is still somehow applicable. In *Bishop v. Aronov*,¹⁰⁸ for example, the Eleventh Circuit stated both that *Hazelwood* applied to a school’s restrictions on the content of a particular

99. *Id.* at 1176. The *Bradley* court added that the school district was entitled to determine that Learnball was not an appropriate pedagogical method. *Id.*

100. 156 F.3d 488 (3d Cir. 1998).

101. *Id.* at 491. *Edwards* arose in the public university context, *id.* at 490, and thus presumably would apply with equal, if not greater, force in the K–12 setting.

102. *See id.* at 491 (“Our conclusion that the First Amendment does not place restrictions on a public university’s ability to control its curriculum is consistent with the Supreme Court’s jurisprudence concerning the state’s ability to say what it wishes when it is the speaker.” (citing *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 833–34 (1995)).

103. 208 F.3d 908 (10th Cir. 2000).

104. *Id.* at 913.

105. 385 U.S. 589 (1967). *Keyishian* involved a suit brought by public university professors challenging a state law requiring them to certify that they were not Communists. *Id.* at 592–93.

106. *Vanderhurst*, 208 F.3d at 913 (quoting *Keyishian*, 385 U.S. at 603).

107. *Id.* at 914–15. The court noted that both the plaintiff and the defendant “embrace[d] the [*Hazelwood*] approach as the proper means to analyze *Vanderhurst*’s First Amendment claim.” *Id.*

108. 926 F.2d 1066 (11th Cir. 1991).

course¹⁰⁹ and that when a teacher and school disagree about the content of a course, the school “must have the final say” because schools must have “command of their own courses.”¹¹⁰ Similarly, a recent Northern District of California decision initially stated that “teachers do not have a First Amendment right to determine what curriculum will be taught in the classroom,”¹¹¹ but the court also stated that the plaintiff teacher (who had sued over restrictions placed on his use of supplemental classroom materials that had religious content) “might still state a claim if he alleges restrictions which are not ‘reasonably related to legitimate pedagogical concerns.’”¹¹²

The most recent development on this front comes from the Seventh Circuit, which had initially straddled the line whether *Hazelwood* applied to curricular choices but implicitly retreated from this position in January 2007. In *Webster v. New Lenox School District*,¹¹³ a 1990 case in which a teacher alleged that the school district violated his First Amendment rights by prohibiting him from teaching creationism,¹¹⁴ the Seventh Circuit issued an ambiguous decision. It first stated that the school board had authority “to set the curriculum”¹¹⁵ and that the “[F]irst [A]mendment is ‘not a teacher license for uncontrolled expression at variance with established curricular content.’”¹¹⁶ But the court nonetheless then applied *Hazelwood* and stated that the school district’s prohibition on teaching creationism had been related to the school board’s important and legitimate pedagogical interest in avoiding an Establishment Clause violation.¹¹⁷ The Seventh Circuit left unclear whether it had invoked *Hazelwood* at the end of its decision essentially to gild the lily or whether it genuinely believed that the school district needed to satisfy the *Hazelwood* standard to prevail against the teacher’s claim. In a 2007 case, *Mayer v. Monroe County Community School Corp.*,¹¹⁸ which questioned the constitutional protection afforded to a teacher’s classroom speech,¹¹⁹ the Seventh Circuit essentially answered the question that *Webster* left open. According to the *Mayer* court, *Webster* held simply that the teacher “did not have a constitutional right to introduce his own views on the

109. *Id.* at 1074.

110. *Id.* at 1075–76.

111. *Williams v. Vidmar*, 367 F. Supp. 2d 1265, 1271 (N.D. Cal. 2005) (capitalization and emphasis omitted).

112. *Id.* at 1270, 1273 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)).

113. 917 F.2d 1004 (7th Cir. 1990).

114. *Id.* at 1006.

115. *Id.* at 1007.

116. *Id.* (quoting *Palmer v. Bd. of Educ.*, 603 F.2d 1271, 1273 (7th Cir. 1979)).

117. *Id.* at 1008.

118. 474 F.3d 477 (7th Cir. 2007).

119. *Id.* at 478.

subject but must stick to the prescribed curriculum—not only the prescribed subject matter, but also the prescribed perspective on that subject matter.¹²⁰ The *Mayer* court did not even acknowledge *Webster*'s previous invocation of *Hazelwood*. *Mayer* suggests that the Seventh Circuit no longer interprets *Hazelwood* as limiting school districts' curricular choices (to the extent that it ever did).¹²¹

Given the evolving and sometimes amorphous nature of circuit decisions on this issue, it is hard to firmly classify which circuits view *Hazelwood* as fully applicable to curricular selections. Much of the murkiness, I believe, stems from courts' frequent blending of the curricular selection question with the question of when schools may constitutionally restrict a teacher's in-school speech. While the Third Circuit in *Bradley* attempted to distinguish these two issues,¹²² the Seventh, Tenth, and Eleventh Circuits have drawn no such distinction.¹²³ As such, assessing the circuit split over whether *Hazelwood* applies to a teacher's in-school speech sheds light on the incipient split over curriculum selection.

B. Teachers' Classroom Speech

The division among the circuits concerning *Hazelwood*'s reach is clearer when it comes to a public school teacher's in-class speech, but the split continues to evolve. Since *Hazelwood* was decided, the First, Second, Eighth, Tenth, and Eleventh Circuits have explicitly applied it to restrictions on a teacher's in-school speech—regardless whether the speech related to curricular decisions or consisted of stray classroom

120. *Id.* at 479.

121. As I argue *infra*, this development accords with the Supreme Court's recent holding in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006). See *infra* notes 286–304 and accompanying text.

122. *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (suggesting that even if teachers possess some academic freedom under the First Amendment, “no court has found that teachers’ First Amendment rights extend to choosing their own curriculum”).

123. For example, when suggesting that *Hazelwood* should apply to the plaintiff teacher's choices about the class curriculum, the *Vanderhurst* court directly invoked a line of cases applying *Hazelwood* to teachers' classroom comments. *Vanderhurst v. Colo. Mountain Coll. Dist.*, 208 F.3d 908, 914 (10th Cir. 2000). In particular, the *Vanderhurst* court focused on the Tenth Circuit's previous decision in *Miles v. Denver Public Schools*, 944 F.2d 773 (10th Cir. 1991), which held *Hazelwood* applicable in a case that involved only a teacher's offhand classroom comment about two particular students and did not involve any curricular selections. *Id.* at 774, 776; *Vanderhurst*, 208 F.3d at 914; see also *supra* notes 103–07 and accompanying text. Similarly, the *Aronov* court reduced the curriculum-content issue to the question of the degree to which a school may “control classroom instruction before touching the First Amendment rights of a teacher,” thus drawing no distinction between curricular issues and classroom-speech issues. *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991). By the same token, even though *Mayer* involved an isolated classroom comment about the teacher's personal opposition to the war in Iraq and not a teacher's curricular selection, the Seventh Circuit nonetheless fell back on the principle that a teacher must teach whatever curriculum the board prescribes. *Mayer*, 474 F.3d at 480.

comments. In contrast, the Fourth, Fifth, and Sixth Circuits have applied to teacher speech the framework that is generally applicable to a public employee's First Amendment claims: the *Pickering-Connick* test. Most recently, the Seventh Circuit, having previously applied *Hazelwood* to teachers' classroom speech, suddenly switched gears and applied *Pickering v. Board of Education*.¹²⁴ Meanwhile, the Third and Ninth Circuits have not definitively weighed in on the issue, and the D.C. Circuit has not reached it.

The first circuit to apply *Hazelwood* to a teacher's in-school speech was the Seventh Circuit in its 1990 *Webster* decision, which addressed school restrictions on teaching creationism and briefly referred to *Hazelwood*.¹²⁵ The following year, in *Aronov*, the Eleventh Circuit similarly invoked *Hazelwood*. The *Aronov* court acknowledged that *Hazelwood* addressed restrictions on student speech rather than teacher speech¹²⁶ but stated that "insofar as [*Hazelwood*] covers the extent to which an institution may limit in-school expressions which suggest the school's approval, we adopt the Court's reasoning as suitable to our ends."¹²⁷

Shortly thereafter, the Tenth Circuit followed suit in *Miles v. Denver Public Schools*.¹²⁸ There, a public high school teacher sued after being disciplined for commenting to his ninth grade government class: "I don't think in 1967 you would have seen two students making out on the tennis court."¹²⁹ This comment, a reference to a widely circulated rumor that two students had been seen having sex on the tennis court the previous day, prompted complaints from the parents of the two students in question.¹³⁰ In assessing the teacher's claim that the discipline had violated his First Amendment rights, the Tenth Circuit deemed *Hazelwood* applicable.¹³¹ It noted that *Hazelwood* had involved student speech rather than teacher speech but found "no reason to distinguish between the classroom discussion of students and teachers in applying *Hazelwood* here. A school's interests in regulating classroom speech . . . are implicated regardless of whether that speech comes from a teacher or student."¹³² The court further found that *Hazelwood* was satisfied because the impetus for

124. 391 U.S. 563 (1968).

125. *Webster v. New Lenox Sch. Dist.*, 917 F.2d 1004, 1008 (7th Cir. 1990).

126. *Aronov*, 926 F.2d at 1074.

127. *Id.*

128. 944 F.2d 773 (10th Cir. 1991).

129. *Id.* at 774.

130. *Id.*

131. *Id.* at 775.

132. *Id.* at 777. The court also stated that it was "convinced that if students' expression in a school newspaper bears the imprimatur of the school, then a teacher's expression in the 'traditional classroom setting' also bears the imprimatur of the school." *Id.* at 776 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

the discipline was reasonably related to the school's pedagogical interests.¹³³

In subsequent years, several circuits joined the trend of applying *Hazelwood's* standard to teacher speech. In 1993, expressly relying on *Miles*, the First Circuit concluded in *Ward v. Hickey*¹³⁴ that *Hazelwood* should apply to a nontenured teacher's suit against her school district, which chose not to reappoint her because she had discussed with her ninth grade biology class the abortion of fetuses with Down's Syndrome.¹³⁵ Citing *Miles*, the First Circuit reasoned that "a teacher's statements in class during an instructional period are . . . part of a curriculum and a regular class activity. Like [*Hazelwood's*] school newspaper, the classroom is not a public forum, and therefore is subject to reasonable speech regulation."¹³⁶ The Second Circuit followed suit in 1994,¹³⁷ as did the Eighth Circuit in 1998.¹³⁸

In contrast, the Fourth, Fifth, Sixth, and Seventh Circuits have explicitly held that the Supreme Court's 1967 *Pickering* decision, which first announced a general standard for assessing the constitutionality of speech restrictions on public employees, applies to restrictions on a teacher's in-school speech. Interestingly, *Pickering* itself involved a public school teacher's statements, albeit outside of the classroom.¹³⁹ The plaintiff was dismissed after he sent a local newspaper a letter that criticized the school board's funding decisions.¹⁴⁰ The *Pickering* Court held that this termination had violated the teacher's First Amendment rights, explaining that a balance must be struck "between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹⁴¹ The Court concluded that the teacher had spoken as a "member of the general public" about an issue of public concern, that the school district could not show that the teacher's

133. *Id.* at 778–79.

134. 996 F.2d 448 (1st Cir. 1993).

135. *Id.* at 450–53.

136. *Id.* at 453 (citing *Miles*, 944 F.2d 773). *Ward* was decided on rather unusual grounds. Evidently, the teacher did not argue on appeal that the school "was not entitled to limit her statements." *Id.* at 454. Instead, she argued only that the school had "failed to notify her that her conduct was prohibited." *Id.* The First Circuit noted that she possessed a First Amendment right "to know what conduct is proscribed" and that the school was "not entitled to retaliate against speech that it never prohibited," *id.* at 453–54, a notion that few other courts have endorsed. The *Ward* court concluded, however, that she had waived the issue by failing to sufficiently raise it in the court below. *Id.* at 455.

137. *See Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994).

138. *See Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 724 (8th Cir. 1998).

139. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968).

140. *Id.* at 564–66.

141. *Id.* at 568.

letter had caused any disruption, and that the teacher's speech was therefore constitutionally protected.¹⁴² The Court continued to elucidate its approach in *Connick v. Myers*,¹⁴³ developing a two-pronged test for assessing the free speech claims of public employees. The initial threshold question, the Court explained, is whether the employee was speaking as a citizen on a matter of public concern; if not, the First Amendment claim immediately fails.¹⁴⁴ If so, a court must evaluate whether the employee's First Amendment interest in making the speech in question outweighed the employer's justification for limiting the speech.¹⁴⁵ This evaluation is commonly referred to as "Pickering balancing."¹⁴⁶ In 2006, the Supreme Court further refined this approach in *Garcetti v. Ceballos*,¹⁴⁷ emphasizing that the initial threshold inquiry rests primarily on whether the employee was speaking in his capacity as a citizen, rather than on whether the speech related to a matter of public concern.¹⁴⁸

In 1989, the Fifth Circuit became the first circuit to apply the *Pickering-Connick* framework to restrictions on a teacher's in-class speech. In *Kirkland v. Northside Independent School District*,¹⁴⁹ the court applied this framework to a teacher's claim that he had been dismissed for using an unapproved reading list.¹⁵⁰ The *Kirkland* court concluded that the teacher's use of an unapproved reading list did not raise a matter of public concern particularly because he had never spoken out in public about his list or attempted to obtain approval for it.¹⁵¹ The court thus concluded that

142. *Id.* at 572–74.

143. 461 U.S. 138 (1983). *Connick* involved the speech of an assistant district attorney. *Id.* at 140.

144. *Id.* at 147 (“[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.”).

145. *Id.* at 148–54 (explaining that when the public employee *has* spoken as a citizen on a matter of public concern, the question becomes whether the government was justified in disciplining the employee, which justification requires the court to engage in a “particularized balancing” that considers “the government’s interest in the effective and efficient fulfillment of its responsibilities to the public” as well as the extent to which the speech “involved matters of public concern”).

146. *See, e.g.*, *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 467 (1995); *Connick*, 461 U.S. at 151; Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 *Nw. U. L. REV.* 1007, 1016 (2005); Rosalie Berger Levinson, *Superimposing Title VII’s Adverse Action Requirement on First Amendment Retaliation Claims: A Chilling Prospect for Government Employee Speech*, 79 *TUL. L. REV.* 669, 682–85 (2005).

147. 126 S. Ct. 1951 (2006). Like *Connick*, *Garcetti* involved an assistant district attorney’s speech. *Id.* at 1955.

148. *Id.* at 1960. For further discussion of *Garcetti*, see *infra* notes 286–304 and accompanying text.

149. 890 F.2d 794 (5th Cir. 1989).

150. *Id.* at 795–800.

151. *Id.* at 800.

the teacher's claim could not pass the initial threshold for First Amendment protection, and the court did not proceed to a balancing inquiry.¹⁵² Although it mentioned *Hazelwood* in passing, the court did not substantively evaluate whether *Hazelwood*, as opposed to *Pickering–Connick*, provided the applicable framework for the teacher's claim.¹⁵³ This is not entirely surprising, given that as of 1989, none of the cases applying *Hazelwood* to a teacher's in-class speech had been decided.¹⁵⁴

By the time the Fourth Circuit confronted the issue in the late 1990s, however, the cases applying *Hazelwood* rather than *Pickering–Connick* had indeed been decided. Thus, the Fourth Circuit faced a clear choice between *Hazelwood* and *Pickering–Connick*—a choice that ultimately prompted the circuit to sit en banc. In the case at issue, *Boring v. Buncombe County Board of Education*,¹⁵⁵ a high school drama teacher sued when she was transferred after having the students in her advanced acting class perform a play called “Independence” in a state competition.¹⁵⁶ The play depicted “the dynamics within a dysfunctional, single-parent family—a divorced mother and three daughters; one a lesbian, another pregnant with an illegitimate child.”¹⁵⁷ After the district court dismissed the teacher's claim, a three-judge panel of the Fourth Circuit reinstated it, concluding that *Hazelwood* provided “the best means of navigating” her claim.¹⁵⁸ The court acknowledged that *Hazelwood* “directly addressed the free speech rights of students, not teachers” but stated that “the rationale that largely animated *Hazelwood* . . . appears to apply equally well in the context of a teacher's play selection for a school-sponsored drama production.”¹⁵⁹ The court concluded that although legitimate pedagogical reasons might have motivated the school district's decision to discipline the teacher for her speech, none had been established on the record.¹⁶⁰

The Fourth Circuit subsequently heard the case en banc, and in a 7–6 split, ruled that *Pickering–Connick*, and not *Hazelwood*, should apply to a teacher's classroom speech.¹⁶¹ In explaining its decision to apply *Pickering–Connick*, the majority reasoned that “[t]his is not a case concerning pupil speech, as in *Hazelwood*, either classroom or otherwise. This case concerns itself exclusively with employee speech, as does

152. *Id.*

153. *Id.*

154. For a discussion about those cases applying *Hazelwood* to teachers' in-class speech, see *supra* notes 125–38 and accompanying text.

155. 98 F.3d 1474 (4th Cir. 1996), *vacated*, 136 F.3d 364 (4th Cir. 1998) (en banc).

156. *Id.* at 1476–77.

157. *Id.* at 1476.

158. *Id.* at 1482.

159. *Id.*

160. *Id.* at 1479.

161. *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998) (en banc).

Connick”¹⁶² The majority further concluded that teachers lacked a “First Amendment right to participate in the makeup of the curriculum” of a public high school, reasoning:

Someone must fix the curriculum of any school, public or private. In the case of a public school, in our opinion, it is far better public policy, absent a valid statutory directive on the subject, that the makeup of the curriculum be entrusted to the local school authorities who are in some sense responsible, rather than to the teachers, who would be responsible only to the judges¹⁶³

In contrast, the dissent (written by the author of the initial majority opinion) continued to argue that *Hazelwood* should apply, asserting that the *Pickering–Connick* framework did “not provide a workable formula for analyzing whether the First Amendment protects a teacher’s in class speech. . . . Her speech is neither ordinary employee workplace speech nor common public debate.”¹⁶⁴

In 2001, the Sixth Circuit sided with the Fourth and Fifth Circuits, concluding that *Pickering–Connick* should apply to a teacher’s in-class speech. In *Cockrel v. Shelby County School District*,¹⁶⁵ the plaintiff teacher was terminated after, among other things, inviting actor Woody Harrelson to talk to her fifth grade class about the environmental benefits of industrial hemp.¹⁶⁶ The Sixth Circuit applied *Pickering–Connick* to the teacher’s First Amendment claim, acknowledging the circuit split but concluding that it saw “no reason to part from *Pickering* when deciding cases involving a teacher’s in-class speech.”¹⁶⁷ The court went on to rule—unlike the *Kirkland* and *Boring* courts—that the teacher’s speech had indeed been constitutionally protected, concluding that the speech had related to a matter of public concern and that the *Pickering–Connick* balancing weighed in the teacher’s favor.¹⁶⁸

162. *Id.* at 371 n.2.

163. *Id.* at 371.

164. *Id.* at 378 (Motz, J., dissenting). The dissent also argued in the alternative that even under the *Pickering–Connick* framework, the teacher’s claim should still go forward. *Id.* Somewhat counterintuitively, in light of the dissent’s view that *Hazelwood* should apply and that the case should go forward, the dissent also asserted that *Hazelwood* is a less speech-protective approach than *Pickering*. *Id.* Indeed, the dissent justified the position that *Hazelwood* should apply precisely on the grounds that the *Pickering–Connick* framework “fails to give school administrators the necessary and appropriate control over a teacher’s in-class speech.” *Id.*

165. 270 F.3d 1036 (6th Cir. 2001).

166. *Id.* at 1041–42.

167. *Id.* at 1055 n.7.

168. *Id.* at 1050–55. The Sixth Circuit reaffirmed this approach in *Evans-Marshall v. Board of Education*, 428 F.3d 223, 230–32 (6th Cir. 2005).

Finally, as noted above,¹⁶⁹ on January 24, 2007—in the first circuit court decision to address this issue following *Garcetti*'s refinement of the *Pickering–Connick* framework—the Seventh Circuit held in *Mayer* that *Pickering* and its progeny applied to a teacher's classroom speech.¹⁷⁰ On that basis, the Seventh Circuit rejected the plaintiff teacher's claim that the school district violated her First Amendment rights by terminating her for telling students during a classroom discussion of current events that she opposed the war in Iraq.¹⁷¹ The court held that she was speaking in her capacity as an employee and was therefore unprotected.¹⁷²

The Third, Ninth, and D.C. Circuits have not squarely addressed the issue of how to evaluate the constitutionality of restrictions on a teacher's in-class speech, but there are some clues as to how the Third and Ninth Circuits are likely to rule. The Third Circuit quite emphatically concluded in *Bradley* and *Edwards* that *Hazelwood* is inapplicable to curricular decisions.¹⁷³ These cases and their rationales suggest that the Third Circuit may take a similar approach to a teacher's in-class speech.¹⁷⁴

The signals from the Ninth Circuit, however, have been more mixed. On the one hand, in *Downs v. Los Angeles Unified School District*,¹⁷⁵ the Ninth Circuit concluded that *Hazelwood* did not apply to a teacher's posting of anti-gay messages on a bulletin board near his classroom because the speech at issue was pure government speech.¹⁷⁶ The *Downs* court stated that the boards were the school district's property, “[o]nly school faculty and staff had access to post materials on these boards,” and it was therefore the school district itself speaking through the bulletin boards.¹⁷⁷ Relying in part on the Third Circuit's holdings in *Bradley* and *Edwards*, the *Downs* court concluded that the teacher had “no First Amendment right to speak for the government” and that his First Amendment claim therefore failed.¹⁷⁸ The following year, however, the Ninth Circuit assumed *arguendo* that *Hazelwood* applied to a teacher's

169. See *supra* text accompanying notes 118–21.

170. *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 478–80 (7th Cir. 2007).

171. *Id.*

172. *Id.* The court stated: “It is enough to hold that the [F]irst [A]mendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system.” *Id.* at 480.

173. See *supra* notes 96–102 and accompanying text (noting that *Bradley* and *Edwards* were decided on the ground that curricular choices reflect pure government speech).

174. In other words, the Third Circuit may well find a lack of any cognizable First Amendment interest by a teacher in her in-class speech such that *Hazelwood* is inapplicable and any *Pickering* inquiry is quickly resolved in the government's favor.

175. 228 F.3d 1003 (9th Cir. 2000).

176. *Id.* at 1011–12.

177. *Id.* at 1011.

178. *Id.* at 1017.

instructional speech in the classroom.¹⁷⁹

Interestingly, the circuits have split not only over whether *Hazelwood*'s or *Pickering–Connick*'s framework should apply to a teacher's in-class speech but also over which framework provides greater protection for teacher speech. The Ninth Circuit, in assuming *arguendo* that *Hazelwood*'s standard should apply to a teacher's in-class speech, stated that it was doing so precisely because *Hazelwood* "appear[ed] to be more speech-protective" than *Pickering–Connick*.¹⁸⁰ In contrast, both the Tenth Circuit in *Miles* and the dissenters on the Fourth Circuit in *Boring* justified applying *Hazelwood* on the grounds that *Hazelwood* provided *less* protection for teacher speech and correspondingly greater discretion for school districts, a balance they deemed appropriate.¹⁸¹

This further lack of consensus indicates how deeply the circuits have split over this question and illustrates the complexity of the issue. None of the circuit courts explained in detail its belief that one approach was more speech-protective than the other, and in fact there is some truth to both positions. *Pickering–Connick* provides much more protection when the teacher is speaking as a citizen on a matter of public concern but much less protection—indeed, none at all—in other circumstances. *Hazelwood*, in contrast, provides limited, but consistent, protection by generally prohibiting speech restrictions that are not reasonably related to legitimate pedagogical purposes. (Of course, the determination whether *Hazelwood* permits viewpoint-based restrictions—the topic to which I turn in Part IV—bears greatly on how speech-protective *Hazelwood* ends up being.)

Academic commentary is also divided over whether and how the First Amendment protects a K–12 public school teacher's classroom speech. Some commentators have argued that teacher speech is entitled to significant constitutional protection—particularly given the Supreme

179. Cal. Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1148–49 (9th Cir. 2001) ("We need not resolve this controversy . . . to decide the merits of this appeal. Instead, we may assume *arguendo* that the instructional speech [in question] receives some First Amendment protection. Specifically, we will assume that regulations of such speech are subject to the test articulated in *Hazelwood*.").

180. *Id.* at 1149.

181. See *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 777 (10th Cir. 1991) ("Although the *Pickering* test accounts for the state's interest as an employer, it does not address the significant interests of the state as educator. . . . The concern addressed in *Pickering*—the right of an employee to participate as other citizens in debate on public matters—is simply less forceful when considered 'in light of the special characteristics of the school environment.'" (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988))); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 378 (4th Cir. 1998) (Motz, J., dissenting) (arguing that *Hazelwood* should apply because "the governmental interest element as set forth in *Connick* fails to give school administrators the necessary and appropriate control over a teacher's in-class speech. School administrators should be free to specify curriculum and to curtail classroom speech for *any* legitimate pedagogical reason. They should not be required to demonstrate that a restriction on in-class speech is necessitated by workplace efficiency or harmony.").

Court's broad statements about the importance of academic freedom—and have argued that neither *Pickering–Connick* nor *Hazelwood* sufficiently achieves that goal.¹⁸² Other commentators, however, argue that whatever the appropriate extent of academic freedom in higher education, the concept is largely inapplicable to a K–12 public school teacher's speech, which is entitled to very little First Amendment protection. For example, Martin Redish and Kevin Finnerty assert:

Although a teacher's First Amendment right allows him to say what he wishes outside the classroom, the inmates do not run the asylum. If a school board or principal decides that a particular subject is to be taught in a particular way, individual teachers do not have a constitutional right in the classroom to preempt the decisions of their superiors.¹⁸³

C. *Speech by Outside Entities*

In comparison to the substantial discussion in the case law and academic commentary about teachers' classroom speech, there has been much less examination of speech by outside entities—such as recruiters, advertisers, and parents—in school-sponsored contexts. The trend here,

182. Gregory Clarick and Emily Holmes Davis, for example, each argue that neither *Hazelwood* nor *Pickering–Connick* is speech-protective enough and that a *Tinker*-like standard, under which a restriction on a teacher's classroom speech is permitted only upon a showing that the speech caused an actual or potential disruption, should apply. See Clarick, *supra* note 10, at 732; Davis, *supra* note 10, at 366. Karen Daly similarly laments that although the Supreme Court “has spoken approvingly in dicta of ‘academic freedom,’ albeit in the context of McCarthy-era statutes,” it has not provided any precedent directly on point, and that the lower courts, in turning to either *Hazelwood* or *Pickering* to fill the void, have provided insufficient protection for a teacher's classroom speech. Daly, *supra* note 10, at 4–16. She therefore proposes a “mixed procedural-substantive test,” which she refers to as “*Hazelwood* flipped,” that evaluates teachers' free speech claims on the basis of how much prior notice they received that the speech was prohibited. See *id.* at 51–56.

183. Redish & Finnerty, *supra* note 10, at 67 (footnote omitted); see also *id.* at 81–82 (“Whatever the scope of a teacher's First Amendment right to speak outside the four walls of the school or to discuss in school matters unrelated to the curriculum, a teacher has no constitutional right to teach the topics or substance of his choice. . . . The classroom, then, is not a public forum where a teacher has a private First Amendment right to communicate.” (footnotes omitted)). W. Stuart Stuller similarly likens the notion of academic freedom for K–12 public school teachers to a “fish out of water,” stating that in comparison to the role of a university professor, who is charged with the production of scholarship, a K–12 public school teacher's role is to present course materials and serve as a role model for his students. Stuller, *supra* note 10, at 335–36. Noting that most disputes over a teacher's in-class speech “involve value-based decisions that require a sense of the community,” Stuller argues that these are “questions that are best resolved through the democratic process,” i.e., the local school board, rather than through First Amendment claims. *Id.* at 337; see also DeMitchell, *supra* note 10, at 475 (asserting that public school “teachers are hired to speak for the school board[,] thus furthering the school board's message, which is the curriculum”).

however, is clearly toward applying *Hazelwood*. The Ninth and Eleventh Circuits have already moved in this direction, as have several district courts.

In 1989, the Eleventh Circuit became the first circuit court to apply *Hazelwood* to speech by an outside entity in a school-sponsored setting, in *Searcey v. Harris*.¹⁸⁴ In *Searcey*, the Atlanta Peace Alliance sued the Atlanta School Board over the board's policy of excluding the Alliance from a career day program while admitting military recruiters.¹⁸⁵ The school board excluded the Peace Alliance because the board's career day policy stated (among other things) that participants in the program must have "direct knowledge" of the career about which they would speak, must have a "present affiliation" with that career field, and could not criticize or denigrate that career field.¹⁸⁶ Without any real discussion of whether it mattered that *Hazelwood* had been a student speech case, the Eleventh Circuit applied *Hazelwood*.¹⁸⁷ The court then concluded, as discussed below,¹⁸⁸ that *Hazelwood* prohibited viewpoint discrimination, such that it would be unconstitutional for the board to "allow speakers to point out the advantages of a particular career but ban any speaker from pointing out the disadvantages of the same career."¹⁸⁹

The Ninth Circuit subsequently applied *Hazelwood* to speech by an outside entity in *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*.¹⁹⁰ Planned Parenthood sued after a school district refused to publish Planned Parenthood's advertisements in the district's high school newspapers, yearbooks, and athletic programs.¹⁹¹ Unlike the Eleventh Circuit in *Searcey*, the Ninth Circuit explicitly addressed whether extending *Hazelwood* outside of the student speech context was appropriate.¹⁹² The court answered that question in the affirmative, stating that the *Hazelwood* Court "specifically spoke in terms of 'school-sponsored publications, theatrical productions, and other expressive

184. 888 F.2d 1314, 1319 (11th Cir. 1989).

185. *Id.* at 1315–17. In the higher-education context, the Supreme Court recently analyzed whether *schools* are entitled to First Amendment protection for their decisions not to provide military recruiters with the same access to students that other recruiters receive, and concluded that they are not. See *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60–65 (2006). For a discussion of the history and implications of the *Forum for Academic & Institutional Rights* decision, see Emily S. Wilbanks, Comment, *Constitutional Law: Speaking with Your Mouth Shut? Exploring the Outer Limits of First Amendment Protection in the Context of Military Recruiting on Law School Campuses*, 59 FLA. L. REV. 437 (2007).

186. *Searcey*, 888 F.2d at 1317–18.

187. *Id.* at 1319.

188. See *infra* Part V.

189. *Searcey*, 888 F.2d at 1319 & n.7, 1324–25.

190. 941 F.2d 817, 819 (9th Cir. 1991).

191. *Id.* at 820.

192. *Id.* at 827.

activities.”¹⁹³ The Ninth Circuit further noted that at the beginning of the *Hazelwood* opinion, the Court stated that unless the school has opened up its facilities to the general public, school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.¹⁹⁴ The *Planned Parenthood* court thus concluded that “there is no principled distinction between students’ constitutional rights and those of Planned Parenthood to access to school-sponsored publications.”¹⁹⁵ The Ninth Circuit went on to hold, as had the Eleventh Circuit in *Searcey*, that *Hazelwood* prohibited viewpoint discrimination.¹⁹⁶ Ultimately, however, the court ruled in favor of the school district, reasoning that the district’s actions were constitutionally permissible because the district’s policy excluded both pro-life advertisements and pro-choice and birth-control-related advertisements.¹⁹⁷ Similarly, in *DiLoreto v. Downey Unified School District Board of Education*,¹⁹⁸ the Ninth Circuit applied *Hazelwood* to a plaintiff’s claim that a school district violated his First Amendment rights by refusing to post on the high school baseball field fence his advertisement, which displayed the Ten Commandments.¹⁹⁹

Recently, a new school fundraising trend has given rise to another type of outside-entity speech in the school setting. This trend consists of fundraisers involving the sale of bricks or tiles that will be placed on some sort of walkway on or near the school, with the idea that purchasers—typically parents—may inscribe a personal message on the brick or tile. In the past three years, three different district courts have addressed this trend in cases with remarkably similar fact patterns: a parent purchases a brick or tile, the parent requests that a religious message be inscribed (e.g., “[student name,] Jesus Loves You”), the school district refuses the request, and the parent files a First Amendment claim.²⁰⁰ In all three cases, the district courts turned to *Hazelwood* for guidance and

193. *Id.* (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

194. *See id.* at 822, 827. For further discussion of this portion of *Hazelwood*, see *infra* notes 260–64 and accompanying text.

195. *Planned Parenthood*, 941 F.2d at 827.

196. *Id.* at 829.

197. *Id.*

198. 196 F.3d 958 (9th Cir. 1999).

199. *Id.* at 962–69. The court ultimately held that the school district’s decision was constitutional because it reflected a content-based (as opposed to viewpoint-based) restriction that was reasonably related to the legitimate pedagogical concern of avoiding controversy. *Id.* at 968–70.

200. *See Kiesinger v. Mex. Acad. & Cent. Sch.*, 427 F. Supp. 2d 182, 184 (N.D.N.Y. 2006) (involving a brick walkway in front of a high school); *Demmon v. Loudoun County Pub. Sch.*, 342 F. Supp. 2d 474, 476 (E.D. Va. 2004) (involving a brick “walkway of fame” on high school property); *Seidman v. Paradise Valley Unified Sch. Dist. No. 69*, 327 F. Supp. 2d 1098, 1102 (D. Ariz. 2004) (involving a “Tiles for Smiles” program in which parents purchased small tiles to be permanently affixed to interior elementary school walls).

ultimately held that the school districts' restrictions had reflected unconstitutional viewpoint discrimination.²⁰¹

* * *

Two conclusions emerge from examining the contexts in which courts have applied *Hazelwood* in the nearly twenty years since it was decided. First, *Hazelwood*'s reach now extends far beyond the student speech context. Second, there is a clear lack of consensus among the circuits as to the precise boundaries of that reach. Not only are different circuits coming to different conclusions about how broadly *Hazelwood* should extend, but they are also not even settled as to which rationales point in which directions. These developments have significantly complicated the courts' analysis of whether *Hazelwood* permits viewpoint-based speech restrictions, the topic to which I now turn.

IV. THE SPLIT OVER WHETHER *HAZELWOOD* PERMITS VIEWPOINT-RELATED RESTRICTIONS

While the circuit split over *Hazelwood*'s reach is significant in its own right, it takes on added importance when viewed in the context of the circuits' division over whether *Hazelwood* allows viewpoint-related restrictions in addition to content-related restrictions.²⁰² The *Hazelwood* Court never explicitly addressed this question,²⁰³ leaving courts (and commentators) to puzzle over it. So far, the Second, Ninth, and Eleventh Circuits have concluded that *Hazelwood* prohibits viewpoint-based restrictions, while the First and Tenth Circuits have held that it permits such restrictions.²⁰⁴

201. See *Kiesinger*, 427 F. Supp. 2d at 191–95; *Demmon*, 342 F. Supp. 2d at 488; *Seidman*, 327 F. Supp. 2d at 1105–12.

202. In using this terminology, this Article employs the Supreme Court's definitions in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), which indicate that the distinction between content discrimination and viewpoint discrimination, while "not a precise one," turns on whether an entire subject matter is being excluded (content discrimination) or whether a particular perspective, ideology, or opinion is being excluded (viewpoint discrimination). *Id.* at 829–31. For further discussion of this opinion and the ambiguities that lie beneath its surface, see generally Kent Greenawalt, *Essay: Viewpoints From Olympus*, 96 COLUM. L. REV. 697 (1996).

203. Evidently, the school conceded that "'control over access' to *Spectrum* is permissible only if 'the distinctions drawn . . . are viewpoint neutral,'" *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 287 n.3 (1988) (Brennan, J., dissenting) (formatting added) (alteration in original) (quoting Brief for Petitioners at 32, *Hazelwood*, 484 U.S. 260 (No. 86-836)), and the Court did not deem the challenged restrictions to be viewpoint-based, thus making this a peripheral issue.

204. The Third and Sixth Circuits briefly weighed in on the issue but ultimately retracted their opinions on other grounds. In *C.H. ex rel. Z.H. v. Oliva*, a three-judge panel of the Third Circuit initially concluded that *Hazelwood* permitted viewpoint-based restrictions. 195 F.3d 167, 173 (3d Cir. 1999), *aff'd in part by an equally divided court, vacated in part*, 226 F.3d 198 (3d Cir. 2000) (en banc). The Third Circuit subsequently took the case en banc, at which point it vacated the earlier opinion and resolved the case on other grounds, such that it did not need to resolve the

Hazelwood itself provides some evidence for both sides of the debate. As mentioned above, in section II.A of its analysis,²⁰⁵ the *Hazelwood* Court invoked general public forum principles, stating:

The public schools do not possess all of the attributes of streets, parks, and other traditional public forums Hence, school facilities may be deemed to be public forums only if school authorities have “by policy or by practice” opened those facilities “for indiscriminate use by the general public,” or by some segment of the public, such as student organizations. If the facilities have instead been reserved for other intended purposes, “communicative or otherwise,” then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. “The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”²⁰⁶

The *Hazelwood* Court went on to conclude that the school newspaper, *Spectrum*, was a nonpublic forum because it was created as a “part of the educational curriculum” and was a regular classroom activity subject to considerable oversight by the journalism teacher and ultimately the school principal.²⁰⁷ The Court thus concluded, citing *Perry Education Association v. Perry Local Educators’ Association*²⁰⁸ and *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*,²⁰⁹ that “school officials were entitled to regulate the contents of *Spectrum* in any reasonable manner.”²¹⁰

The *Hazelwood* Court, however, failed to mention that *Perry* and *Cornelius* not only held that restrictions in a nonpublic forum had to be reasonable but also stated that such restrictions must be viewpoint neutral.²¹¹ In discussing only the need for reasonableness, the *Hazelwood*

viewpoint-discrimination issue. *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 200–03 (3d Cir. 2000); see also *infra* notes 340–48, 362–66. Similarly, in *Kincaid v. Gibson*, a three-judge panel of the Sixth Circuit initially interpreted *Hazelwood* to prohibit viewpoint-based restrictions. 191 F.3d 719, 727 (6th Cir.), *vacated*, 197 F.3d 828 (6th Cir. 1999). The Sixth Circuit then took the case en banc, vacated the earlier decision, and resolved the case on other grounds. *Kincaid v. Gibson*, 236 F.3d 342, 356–57 (6th Cir. 2001).

205. See *supra* notes 58–59 and accompanying text.

206. *Hazelwood*, 484 U.S. at 267 (citations omitted) (citing and quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 47 (1983), and *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

207. *Hazelwood*, 484 U.S. at 268–70.

208. 460 U.S. 37 (1983).

209. 473 U.S. 788 (1985). *Perry* and *Cornelius* are seminal decisions that outlined the general legal framework for First Amendment cases involving a nonpublic forum.

210. *Hazelwood*, 484 U.S. at 270 (formatting added).

211. *Cornelius*, 473 U.S. at 806 (“Control over access to a nonpublic forum can be based on

Court left unclear whether the viewpoint-neutrality requirement applied to the school district's restrictions on *Spectrum*. While *Hazelwood*'s invocation of *Perry* and *Cornelius* arguably points toward maintaining the viewpoint-neutrality requirement, subsequent parts of the *Hazelwood* opinion—such as the Court's statement that a school must “retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order’”²¹²—point the other way.

The Second, Ninth, and Eleventh Circuits have interpreted *Hazelwood* as implicitly maintaining the viewpoint-neutrality requirement. “The prohibition against viewpoint discrimination is firmly embedded in [F]irst [A]mendment analysis,” the Eleventh Circuit reasoned in *Searcey v. Harris*, the first circuit court decision to address this issue.²¹³ “Without more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral.”²¹⁴ Similarly, in *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*, the Ninth Circuit simply cited *Cornelius* and *Perry* in concluding that *Hazelwood* required viewpoint neutrality.²¹⁵ Most recently, in late 2005, in *Peck v. Baldwinsville Central School District*,²¹⁶ the Second Circuit also relied on *Cornelius* and *Perry* in holding that *Hazelwood* did not permit viewpoint-based restrictions.²¹⁷ The *Peck* court noted that *Hazelwood* referred to *Cornelius* and *Perry* and stated that it 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 student speech.”²¹⁸ Commentators asserting that *Hazelwood* should be read as requiring viewpoint neutrality have generally argued along similar lines.²¹⁹

subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.” (citing *Perry*, 460 U.S. at 49)).

212. *Hazelwood*, 484 U.S. at 272 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

213. *Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989).

214. *Id.*

215. *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991).

216. 426 F.3d 617 (2d Cir. 2005).

217. *Id.* at 632–33.

218. *Id.*

219. Katie Hammett, for example, argues that “[g]iven the clear public forum standards developed and the great importance of the First Amendment protection of free speech, it seems much more likely that if the majority in *Hazelwood* meant to create a new category in the public forum doctrine and not require viewpoint-neutrality, as is required in all other categories, the Court would have explicitly stated that it was doing so.” Hammett, *supra* note 10, at 405. Denise Daugherty similarly argues that “[i]n the absence of clear instruction from the Supreme Court to abandon the viewpoint neutral requirement on restrictions of free speech, the circuit courts should

In contrast, the First and Tenth Circuits have concluded that *Hazelwood* permits viewpoint discrimination. The First Circuit reached that conclusion without much analysis in *Ward v. Hickey*, a teacher speech case, simply reasoning that despite citing *Perry*, *Hazelwood* “did not require that school regulation of school-sponsored speech be viewpoint neutral.”²²⁰

The Tenth Circuit analyzed the viewpoint-discrimination issue in more depth in *Fleming v. Jefferson County School District R-1*,²²¹ a case involving tiles that were painted by students and their families in the aftermath of the Columbine High School massacre.²²² Columbine implemented a tile painting project to reintroduce students to the school but prohibited tiles that included religious symbols, the date of the shooting, or anything obscene or offensive.²²³ Based on these prohibitions, the school refused to hang in school hallways certain tiles, which depicted, *inter alia*, crosses, gang graffiti, the date 4-20, a skull dripping with blood, and a Jewish star.²²⁴ Analyzing the plaintiffs’ claim that the school’s refusal to hang their tiles violated their free speech rights, the Tenth Circuit concluded that *Hazelwood* did not require viewpoint neutrality, reasoning:

[T]he Court’s specific reasons supporting greater control over school-sponsored speech, such as determining the appropriateness of the message, the sensitivity of the issue, and with which messages a school chooses to associate itself, often will turn on viewpoint-based judgments. . . . No doubt the school could promote student speech advocating against drug use, without being obligated to sponsor speech with the opposing viewpoint.”²²⁵

Janna Annest similarly argues that *Hazelwood* implicitly permits viewpoint-based restrictions in school-sponsored contexts, reasoning that “[i]f the Court intended to impose standard nonpublic forum strictures on public schools, the principal’s actions would have been analyzed for evidence of viewpoint-neutrality instead of simply for reasonableness.”²²⁶

Thus, as with the circuit split over *Hazelwood*’s reach, here too courts and commentators are divided. But while much attention has been devoted to analyzing each of these splits as distinct phenomena, there has been

not discard the requirement on their own.” Daugherty, *supra* note 10, at 1083.

220. *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993).

221. 298 F.3d 918 (10th Cir. 2002).

222. *Id.* at 920–21.

223. *Id.* at 921–22.

224. *Id.*

225. *Id.* at 928.

226. Annest, *supra* note 10, at 1248.

very little examination of whether the two splits are related. In fact, as this Article argues below, the two splits are connected in an important way that sheds light on both issues.

V. THE CONNECTIVE THREAD: LINKING THE TWO SPLITS

How does the circuit split over *Hazelwood*'s reach connect to the circuit split over whether *Hazelwood* permits viewpoint-based restrictions? This Article's thesis is straightforward: when evaluating whether *Hazelwood* permits viewpoint discrimination, courts have been influenced, perhaps without realizing it, by the context in which they are applying it. As such, the extension of *Hazelwood* to contexts beyond school-sponsored student speech has directly contributed to the confusion and conflict over whether *Hazelwood* should be interpreted as permitting viewpoint discrimination.

Indeed, out of the five circuits that have reached the viewpoint discrimination issue left open by *Hazelwood*, three of them did so in cases that did not even involve student speech. The First Circuit first reached the issue in *Ward v. Hickey*, which concerned a teacher's in-class speech.²²⁷ Meanwhile, the Ninth Circuit, in *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*, and the Eleventh Circuit, in *Searcey v. Harris*, both reached the issue in cases about speech by an outside entity.²²⁸ It is not surprising, therefore, that the First Circuit concluded that *Hazelwood* permitted viewpoint-based restrictions while the Ninth and Eleventh Circuits came down on the other side. Whether school districts can restrict the viewpoints that teachers express to their students in the classroom implicates very different concerns than the question whether school districts can maintain viewpoint-based restrictions once they open school-sponsored settings to speech by an outside entity. In short, once *Hazelwood* is interpreted as applying to the speech of students, teachers, and outside entities, it is not possible to reach a uniform, workable answer to the viewpoint-discrimination question.

The notion that a school district cannot impose viewpoint-based restrictions on a teacher's in-class speech is deeply problematic. This would mean, for instance, that if the curriculum included a unit on slavery, it would violate a teacher's First Amendment rights to permit her to express antislavery views while prohibiting her from expressing proslavery views. A teacher sharing antidemocratic views with her students in the context of a government class would likewise have to receive First Amendment protection.²²⁹ While courts would still likely be able to impose

227. *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993).

228. *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 819 (9th Cir. 1991); *Searcey v. Harris*, 888 F.2d 1314, 1315–16 (11th Cir. 1989).

229. *Cf. Stuller*, *supra* note 10, at 341 (“[T]he normal operations of schools would be rife with

certain constraints on teacher autonomy—for example, the Establishment Clause would continue to limit a teacher's ability to engage in religious speech—a ruling that *Hazelwood* applies to a teacher's in-class speech *and* prohibits all viewpoint-based speech restrictions would clearly transfer tremendous authority from democratically elected school boards to individual teachers. Indeed, such a ruling would largely undermine a school board's ability to shape and control what students learn in their classrooms.

A finding that *Hazelwood* applies to teacher speech, therefore, tends to propel a court to the conclusion that *Hazelwood* permits viewpoint-based restrictions.²³⁰ By the same token, no circuit interpreting *Hazelwood* to prohibit viewpoint discrimination has done so in a case applying *Hazelwood* to a teacher's in-class speech. Relatedly, it is noteworthy that in addition to the First Circuit, the other circuit to explicitly hold viewpoint-related restrictions permissible—the Tenth Circuit—is also one that had *already* applied *Hazelwood* to a teacher's in-class speech and curricular selection.²³¹ Had the Tenth Circuit held in *Fleming v. Jefferson County School District R-1*²³² that viewpoint discrimination was impermissible under *Hazelwood*, its precedents, taken together, would have suggested that school officials could not regulate the viewpoints that teachers communicated to their students in class.

In contrast, of the three circuits concluding that viewpoint discrimination is impermissible under *Hazelwood*—the Second, Ninth, and Eleventh—two reached that conclusion in cases involving speech by an outside entity. The Ninth Circuit concluded that *Hazelwood* forbade viewpoint discrimination when evaluating Planned Parenthood's right to advertise in school publications, and the Eleventh Circuit reached the same conclusion when evaluating peace activists' right to participate alongside military recruiters in a high school career fair.²³³ Just as it makes sense that the First Circuit concluded that *Hazelwood* permitted viewpoint-based restrictions when it viewed the issue through the lens of teacher speech, so too does it make sense that the Ninth and Eleventh Circuits held that *Hazelwood* forbade viewpoint-based restrictions when they were introduced to the question in the context of speech by an outside entity. Unlike teachers' classroom speech—which school districts hire teachers

First Amendment horror shows if only the First Amendment applied. Teachers are routinely required to have their lesson plans approved in advance: prior restraints. They are often called upon to teach from a text with which they have a measure of disagreement: coerced speech. And, of course, viewpoint discrimination is rampant: humans evolved from lower species; the Holocaust did occur, and racial stereotyping is bad.”)

230. See, e.g., *Ward*, 996 F.2d 920–21; see also *supra* notes 220–26 and accompanying text.

231. See *supra* notes 103–07, 128–33 and accompanying text.

232. 298 F.3d 918 (10th Cir. 2002).

233. See *supra* notes 213–15 and accompanying text.

to engage in, and which is at the very center of schools' educational and inculcative functions—speech by an outside entity such as a recruiter or an advertiser is far more analogous to speech that generally triggers a basic public forum analysis. Under such an analysis, viewpoint-based restrictions, even in a nonpublic forum, are unconstitutional.

It is ironic that although *Hazelwood* was a student speech case, much of subsequent courts' analysis over whether *Hazelwood* allows viewpoint discrimination has arisen in other contexts. It is also unfortunate. The courts that have extended *Hazelwood* to a variety of school-sponsored speech contexts and reached the *Hazelwood* viewpoint-discrimination issue in whichever context it arises first, are running the risk of unnecessarily boxing themselves in for future cases.

The Ninth and Eleventh Circuits have already faced this predicament. The Ninth Circuit confronted it in *Downs v. Los Angeles United School District*,²³⁴ a case in which a high school teacher who objected to the school's recognition of "Gay and Lesbian Awareness Month" created his own bulletin board entitled "Redefining the Family."²³⁵ This bulletin board featured a portion of the Declaration of Independence, excerpts from newspaper articles, and a Bible quote condemning homosexuality.²³⁶ His bulletin board thus stood as a direct response to his colleagues' bulletin boards, which depicted rainbow flags, lists of famous gays and lesbians in history, articles about domestic partnership benefits, and the like.²³⁷ When district officials ordered the teacher to remove the materials, he brought a First Amendment claim and contended on appeal that even if *Hazelwood* applied to his speech (as the district court had held in dismissing his claim), *Hazelwood* required viewpoint neutrality.²³⁸ In support of this position, the teacher invoked *Planned Parenthood*, in which the Ninth Circuit held that *Hazelwood* was broadly applicable in school-sponsored speech contexts and that it forbade viewpoint discrimination.²³⁹

The *Downs* court thus found itself painted into a corner: it quite clearly felt that the school district should be permitted to restrict this sort of speech but realized that the viewpoint-neutrality requirement previously adopted by the Ninth Circuit in *Planned Parenthood* made it difficult to find this restriction permissible. After all, the school was censoring a bulletin board that expressed negative messages about homosexuality while permitting bulletin boards that expressed the contrary viewpoint. The court ended up taking a circuitous route to arrive at its desired result.

234. 228 F.3d 1003 (9th Cir. 2000).

235. *Id.* at 1006.

236. *Id.* at 1006–07. One of the newspaper excerpts stated that 60% of Americans considered homosexuality immoral. *Id.*

237. *Id.* at 1006.

238. *Id.* at 1005, 1008.

239. *See supra* notes 190–97 and accompanying text.

The court held that the speech on the bulletin board was not in fact teacher speech, but rather pure government speech because the principal retained authority over all of the school's bulletin boards.²⁴⁰ As such, the court reasoned that *Planned Parenthood* and its viewpoint-neutrality requirement were inapplicable.²⁴¹

This solution, while initially appealing, fails to hold up under examination. The actual speech in question was not pure government speech: it did not reflect the views of the school district and was actually directed at *opposing* the school's recognition of Gay and Lesbian Awareness Month. That the principal retained authority over the bulletin board upon which the teacher had posted his dissenting speech did not transform that speech into pure government speech any more than the Hazelwood East High School principal's authority to censor *Spectrum* rendered the contents of that newspaper pure government speech. Just as the *Hazelwood* Court deemed the articles in *Spectrum* "school-sponsored" speech (rather than pure government speech, a possibility that the *Hazelwood* Court did not even consider), so too should the *Downs* teacher's speech have fallen into that category. But because that conclusion would have forced the Ninth Circuit to apply *Planned Parenthood*—which the court clearly did not want to do²⁴²—it contorted its analysis to find that the teacher's speech was government speech and that *Planned Parenthood* could be distinguished on that basis. The constraints that pushed the *Downs* court to do so are evident, but a more intellectually honest approach would have been to directly revisit *Planned Parenthood*'s broad holding—that *Hazelwood* applied beyond school-sponsored student speech and generally prohibited viewpoint discrimination.

The Eleventh Circuit found itself similarly constrained when it decided *Bannon v. School District*.²⁴³ In *Bannon*, a high school undergoing long-term remodeling invited its students to paint murals on the large plywood panels that appeared throughout the school's exterior and interior hallways.²⁴⁴ The only instruction given to the students was that their artwork "could not be profane or offensive to anyone."²⁴⁵ One student proceeded to paint three murals that featured religious language (such as

240. *Downs*, 228 F.3d at 1011–12.

241. *Id.* at 1011.

242. *Id.* at 1010–11 ("Despite the absence of express 'viewpoint neutrality' discussion anywhere in *Hazelwood*, the *Planned Parenthood* court incorporated 'viewpoint neutrality' analysis into nonpublic forum, school-sponsored speech cases in our Circuit. Thus, were *Downs*'s case a case of school-sponsored or imprimatur speech in a nonpublic forum—as the district court concluded—we would necessarily be compelled by *Planned Parenthood* to review [the school district's] actions through a viewpoint neutrality microscope." (citations and footnote omitted)).

243. 387 F.3d 1208 (11th Cir. 2004).

244. *Id.* at 1210.

245. *Id.*

“God Loves You. What Part of Thou Shalt Not Didn’t You Understand? God.”) and symbols (such as crucifixes).²⁴⁶ The murals quickly led to commotion and media attention, and the faculty adviser ordered the student to paint over the religious portions of the murals.²⁴⁷ The student, in turn, brought a First Amendment claim, arguing that the faculty adviser’s actions amounted to viewpoint discrimination,²⁴⁸ which the Eleventh Circuit, in *Searcey*, had held was impermissible under *Hazelwood*.²⁴⁹

A recent string of Supreme Court cases, culminating in *Good News Club v. Milford Central School*,²⁵⁰ supported the student’s argument that excluding her religiously themed murals constituted viewpoint discrimination.²⁵¹ The *Bannon* majority opinion, however, did not even mention *Good News*. Instead, referring only to less relevant Supreme Court cases that had preceded *Good News*, the *Bannon* court held rather summarily that “the school did not engage in viewpoint discrimination, but rather censored the murals on the basis of their content. . . . These are obviously inherently religious messages, which cannot be recast as the discussion of secular topics from a religious perspective.”²⁵² Having essentially assumed away the viewpoint-discrimination issue, the majority easily held that *Hazelwood* was satisfied because the restriction was reasonably related to the legitimate pedagogical concern of reducing the disruption the murals caused.²⁵³

The *Bannon* concurrence, in contrast, acknowledged that under the relevant Supreme Court precedents, the school district’s actions reflected

246. *Id.* at 1211.

247. *Id.*

248. *Id.* at 1211–12.

249. *See Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989). It is noteworthy that *Searcey* was a case about speech by an outside entity. *See id.* at 1319; *see also supra* notes 184–89 and accompanying text.

250. 533 U.S. 98 (2001).

251. *Id.* at 110. In *Good News*, a school district established a community use policy whereby the school building could be used after hours by district residents for “instruction in any branch of education, learning or the arts” and could also be used for “social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community.” *Id.* at 102. The policy prohibited, however, using the building for religious purposes. *Id.* at 103. On that basis, the district refused to allow the Good News Club, whose activities included prayer and proselytization, to use the school building after hours. *Id.* The Supreme Court held that this refusal amounted to viewpoint discrimination because the Club merely sought “to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint.” *Id.* at 109–10. The Court also held that viewpoint discrimination was impermissible in a limited public forum, which both sides agreed the district’s actions had created, and that the district’s actions were therefore unconstitutional. *Id.* at 111–12. Because the situation in *Good News* involved a limited public forum rather than a nonpublic forum, *id.* at 106, *Hazelwood* was inapplicable.

252. *Bannon*, 387 F.3d at 1215–16.

253. *Id.* at 1217.

viewpoint discrimination, which the Eleventh Circuit's *Searcey* decision had previously interpreted *Hazelwood* as prohibiting.²⁵⁴ The concurrence concluded, however, that *Searcey* could be distinguished because *Searcey* involved outside-entity speech, while *Bannon* involved student speech.²⁵⁵ Specifically, the concurrence argued that “*Searcey* merely stands for the proposition that when a school has opened itself to outside speakers for some school-sponsored function, such as career day, it may not discriminate against the outside speakers’ viewpoints.”²⁵⁶ In contrast, the concurrence continued, *Hazelwood* could be read to permit viewpoint-based restrictions against school-sponsored student speech, particularly given the portions of *Hazelwood* regarding student speech that might be perceived as advocating drug use, alcohol use, or irresponsible sex.²⁵⁷ The concurrence thus agreed with the majority’s conclusion that the school district’s speech restriction was permissible but followed a different route to get there.²⁵⁸

Downs and *Bannon* illustrate the problematic intersection between the broad extension of *Hazelwood* and the viewpoint-discrimination issue. School-sponsored speech encompasses a large range, and the interests implicated by a teacher’s in-class speech, an outside entity’s speech, and a student’s speech are significantly different. A one-size-fits-all approach to all school-sponsored speech, therefore, is destined for failure. The *Bannon* concurrence does offer one possible solution to the problem: applying *Hazelwood*’s “reasonably related to legitimate pedagogical concerns” standard to all school-sponsored speech but interpreting this standard to permit viewpoint-based restrictions in some contexts but not in others.²⁵⁹

The better approach, however, is to return to *Hazelwood*’s core as a student speech case and to limit its applicability to that setting. Of course, courts often apply precedents to factually distinct settings—broadening, contracting, and otherwise modifying the precedents along the way. In *Hazelwood*’s case, however, this extension is ill advised. A close examination of *Hazelwood*’s text makes clear that it did not simply *arise* in a student speech context but that its entire rationale and approach are uniquely suited to student speech. Furthermore, as discussed below, other existing legal frameworks are far more appropriate for the other categories

254. *Id.* at 1217 (Black, J., concurring).

255. *Id.* at 1218–19.

256. *Id.* at 1218.

257. *Id.*

258. Neither the majority nor the concurrence addressed the separate question whether the murals’ presence created an Establishment Clause problem. Having ruled that the restriction on the murals did not violate the First Amendment in the first place, they did not need to proceed to that aspect of the school district’s defense.

259. *See Bannon*, 387 F.3d at 1218–20 (Black, J., concurring).

of school-sponsored speech to which *Hazelwood* has been applied, and there is no reason to interpret *Hazelwood* as supplanting those frameworks.

The notion that *Hazelwood*'s standard applies to all school-sponsored speech seems to stem from the opinion's initial broad statement that when school facilities have been reserved for specified intended purposes, "no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community."²⁶⁰ Indeed, the Ninth Circuit explicitly relied on this statement to reject Planned Parenthood's argument that *Hazelwood* applied only to student speech.²⁶¹

An examination of the *Hazelwood* opinion's structure, however, reveals that this reliance reflects a misreading. The relied-upon statement is in section II.A of the opinion, where the Court essentially summarized its public forum jurisprudence and reiterated the reasonableness test that applies to nonpublic fora.²⁶² The next part of the opinion, section II.B, reflects the Court's attempt to flesh out the meaning of reasonableness in the particular context of school-sponsored *student* speech, which was the particular issue raised by the facts in *Hazelwood*.²⁶³ It was specifically in section II.B that the Court first articulated the "reasonably related to legitimate pedagogical concerns" standard.²⁶⁴

In addition to the distinct section headings, two other pieces of textual evidence indicate that this standard was formulated specifically for the student speech context. First, almost every sentence in this portion of the discussion explicitly refers to "student expression" or "student speech"—including, most importantly, the very sentence setting forth the "reasonably related to a legitimate pedagogical concern" standard.²⁶⁵

260. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988).

261. *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 827 (9th Cir. 1991).

262. *Hazelwood*, 484 U.S. at 267–70.

263. *Id.* at 270–73.

264. *Id.* at 273. Karen Daly reached the same conclusion, noting that the "structure of the [*Hazelwood*] opinion argues for limitation of the 'reasonably related to pedagogical concerns' standard to student speech." Daly, *supra* note 10, at 12.

265. In the very first sentence of section II.B, the Court framed the issue as "whether the First Amendment requires a school . . . affirmatively to promote particular *student speech*." *Hazelwood*, 484 U.S. at 270–71 (emphasis added). The court went on to state:

Educators are entitled to exercise greater control over this . . . form of *student expression* A school must be able to set high standards for the *student speech* that is disseminated under its auspices . . . and may refuse to disseminate *student speech* that does not meet those standards. . . . [A] school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate *student speech* on potentially sensitive topics A school must also retain the authority to refuse to sponsor *student speech* that might reasonably be perceived to advocate drug or alcohol use

Second, several of the interests that the *Hazelwood* Court identified as raising legitimate pedagogical concerns indicate that the Court was mostly concerned with student speech. Although some of the interests that the Court mentioned are equally applicable to speakers and listeners,²⁶⁶ others bespeak a particular emphasis on teaching the *speaker* a lesson.²⁶⁷

For example, the *Hazelwood* Court cited a pedagogical interest in ensuring that participants in school-sponsored expressive activities “learn whatever lessons the activity is designed to teach.”²⁶⁸ The Court also noted a related interest in communicating disapproval of “ungrammatical, poorly written, [or] inadequately researched” speech.²⁶⁹ Indeed, the Court later found that the *Hazelwood* East principal’s censorship had been reasonable precisely because he could have concluded that the students who wrote the articles in question had failed to master relevant portions of the Journalism II curriculum.²⁷⁰ Such concerns make sense primarily in the student speech context.²⁷¹

Similarly, the *Hazelwood* Court also identified the interests that a school has in “awakening . . . child[ren] to cultural values” and “preparing [them] for later professional training.”²⁷² To fulfill this role, the Court explained that schools must retain the authority to restrict “student speech that might reasonably be perceived to advocate . . . conduct . . . inconsistent with ‘the shared values of a civilized social order.’”²⁷³ Here, too, the Court appears to have been particularly concerned with teaching student speakers a lesson—how to conduct themselves appropriately in public settings so that they would be prepared for successful and productive adult lives.

. . . [E]ducators do not offend the First Amendment by exercising editorial control over the style and content of *student speech* in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

Id. at 271–73 (emphasis added).

266. *Id.* at 271. The interests that are equally applicable to speakers and listeners include restricting speech that is biased, prejudiced, vulgar, profane, or inappropriate for the students’ level of maturity. *Id.*

267. See Buss, *School Newspapers*, *supra* note 10, at 520–21 (“[T]he Court in *Hazelwood* was not very clear in delineating whether *Spectrum* was a curricular device for teaching its readers or its writers.”).

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

269. *Id.*

270. *Id.* at 276.

271. As Daly puts it, “school administrators . . . have no stake in ensuring *teachers* ‘learn whatever lessons the activity is . . . designed to teach.’” Daly, *supra* note 10, at 13 (quoting *Hazelwood*, 484 U.S. at 271).

272. *Hazelwood*, 484 U.S. at 272.

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

The broad spirit of *Hazelwood*, in addition to its text, also counsels its limitation to the student speech setting. The *Tinker/Hazelwood* division of the student speech universe—whereby students enjoy broad freedom to express their personal views on school premises but are subject to greater oversight when they do so within the context of school-sponsored activities—strikes a balance reflecting the unique relationship between students and their schools. On the one hand, school serves as a microcosm of society for K–12 students. School is their primary opportunity to meet and communicate with each other, and it is there that they take on positions of leadership among their peers in formal and informal ways. Indeed, as *Tinker* itself noted, among the activities to which schools are dedicated is “personal intercommunication among the students.”²⁷⁴ At the same time, school is a crucial societal mechanism for educating students about, and inculcating them in, cultural values and mores. The *Tinker/Hazelwood* regime responds to that duality by roughly aligning the degree of school authority over student speech with the level of school sponsorship, and thus apparent approval, of that speech.²⁷⁵

Neither teachers nor outside entities stand in that relationship toward schools, and other legal doctrines provide better frameworks for assessing the constitutionality of school restrictions on their speech. The relationship between a school and a teacher is, at bottom, an employer–employee relationship. As one commentator writes, “Teaching is an occupation effected through speech.”²⁷⁶ A teacher speaks to students in the classroom because she is hired and paid to do so, and such in-class speech occurs in her role as an authority figure. When a school imposes restrictions on a teacher’s in-class speech, those restrictions are not aimed at the *Hazelwood* interests of improving the speaker’s grammar, instructing her in social norms, or preparing her for a successful career. Rather, such restrictions—regardless whether they are well- or ill-advised in particular cases—reflect a supervisory attempt to control how a teacher performs her job of conveying information to students.

Thus, the *Pickering–Connick* framework that generally covers public employees provides a better fit for assessing a school district’s restrictions on the classroom speech of public school teachers. It is already well established that this framework applies to teacher speech outside of the classroom. *Pickering* itself involved a public school teacher’s letter to a newspaper editor,²⁷⁷ and several other Supreme Court cases have applied

274. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. at 512.

275. This Article argues in Part VI, *infra*, that this alignment can be beneficially tightened through a sliding-scale approach to *Hazelwood*. When the perception of school imprimatur is likely to be at its highest, schools should have more freedom to dissociate themselves from the speech in question. *See infra* Part VI.

276. Stuller, *supra* note 10, at 341.

277. *See supra* notes 139–42 and accompanying text.

Pickering to the speech of public school teachers outside of the classroom. *Mount Healthy City School District Board of Education v. Doyle*,²⁷⁸ for example, involved a public teacher's call to a local radio station about the new dress code for teachers,²⁷⁹ and *Givhan v. Western Line Consolidated School District*²⁸⁰ involved a public school teacher's complaint to the principal about what she perceived as racially discriminatory practices in the school district.²⁸¹

The courts applying *Hazelwood* rather than *Pickering–Connick* to a teacher's in-class speech have nonetheless concluded, either explicitly or implicitly, that the classroom context renders *Pickering–Connick* inapplicable.²⁸² The Fourth Circuit's initial *Boring v. Buncombe County Board of Education* opinion, for example, stated that the *Pickering–Connick* "public concern" analysis simply does not provide a very useful tool when analyzing a teacher's classroom speech" because "the essence of a teacher's role in the classroom, and therefore as an employee, is to discuss with students issues of public concern."²⁸³ Several commentators similarly argue that the uniqueness of the classroom environment means that *Pickering–Connick* cannot apply to teacher speech that occurs in the classroom. Karen Daly, for instance, writes that the "*Pickering* line of cases fails to account for the unique job requirements of public school teachers," who "are expected to engage in semi-public speech on a variety of topics."²⁸⁴ Gregory Clarick likewise argues that "[t]he distinction between speech related to issues of public concern and speech internal to an employee[']s workplace does not take into account the function and unique atmosphere of teaching."²⁸⁵

Given that the *Pickering–Connick* framework requires a threshold assessment of the capacity in which the public employee has spoken, however, it is difficult to see why the framework cannot encompass a teacher's in-class speech. The fact that a public school teacher has spoken in the classroom—rather than on a radio station, in a newspaper, or to the

278. 429 U.S. 274 (1977).

279. *Id.* at 282.

280. 439 U.S. 410 (1979).

281. *Id.* at 411–13. In both *Givhan* and *Mount Healthy*, the Court applied *Pickering* and remanded the case for factual inquiry into whether the public school teachers would have been terminated absent the speech in question. *See id.* at 414–17; *Mount Healthy*, 429 U.S. at 283–87.

282. The dissent from the *Boring* en banc opinion, for example, argued that *Connick* did "not provide a workable formula for analyzing whether the First Amendment protects a teacher's in-class speech. . . . Her speech is neither ordinary employee workplace speech nor common public debate." *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 378 (4th Cir. 1998) (en banc) (Motz, J., dissenting).

283. *Boring v. Buncombe County Bd. of Educ.*, 98 F.3d 1474, 1479–80 (4th Cir. 1996), *vacated*, 136 F.3d 364 (4th Cir. 1998) (en banc).

284. Daly, *supra* note 10, at 10 (footnote omitted).

285. Clarick, *supra* note 10, at 702.

principal—may ultimately lead to a different *outcome* under *Pickering–Connick*. But that should not remove the case from *Pickering–Connick*'s domain.

The Supreme Court's 2006 *Garcetti v. Ceballos* decision confirms this view. In *Garcetti*, a deputy district attorney brought a First Amendment claim after being retaliated against for writing a memo to his supervisors in which he concluded that an affidavit used to obtain a search warrant contained serious misrepresentations and that the resulting criminal case should therefore be dismissed.²⁸⁶ *Garcetti* thus required the Court to clarify an important question about the *Pickering–Connick* two-pronged framework. As described above, the threshold inquiry under that framework is whether the employee was speaking as a citizen on a matter of public concern. Only if a court answers that question affirmatively does it proceed to the balancing test.²⁸⁷ The plaintiff in *Garcetti* did not dispute that he had prepared the memo pursuant to his employment duties as a prosecutor, but he argued that his speech nonetheless satisfied the threshold because it related to a matter of public concern—governmental misconduct.²⁸⁸ He therefore urged the Court to find the threshold satisfied and to proceed to the balancing test.²⁸⁹ The *Garcetti* majority, however, held that the plaintiff's speech did not meet the threshold, emphasizing that the central inquiry under *Pickering–Connick* was whether the speech was uttered in the plaintiff's capacity as an employee, rather than whether it related to an issue of public concern.²⁹⁰ The Court wrote:

We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. . . .

. . . .
 . . . When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.²⁹¹

Garcetti is instructive, despite its occurrence outside of the public school context. The deputy district attorney's memo was essentially a hybrid of employee speech and speech on a matter of public concern—the

286. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1955–56 (2006).

287. *See supra* notes 144–45 and accompanying text.

288. *Garcetti*, 126 S. Ct. at 1959–60.

289. *Id.* at 1961.

290. *Id.* at 1959–60.

291. *Id.* at 1960.

same characteristic of a teacher's classroom speech that some courts and commentators have identified as making *Pickering–Connick* irrelevant.²⁹² But the Supreme Court did not hesitate to apply the *Pickering–Connick* framework to the deputy district attorney's speech.²⁹³ Indeed, nothing in the majority or dissenting opinions even suggested that the hybrid nature of this speech somehow rendered *Pickering–Connick* inapplicable. The dissenters' only disagreement related to the case's *outcome* under that two-part framework—in particular, whether the Court should have found the threshold satisfied and proceeded to the balancing test.²⁹⁴ This calls into question any notion that *Pickering–Connick* is not capacious enough to include a teacher's classroom speech. Indeed, in the first post-*Garcetti* circuit court case involving a teacher's classroom speech²⁹⁵—*Mayer v. Monroe County Community School Corp.*²⁹⁶—the Seventh Circuit applied *Pickering–Connick*, as refined by *Garcetti*, without even acknowledging that it had previously applied *Hazelwood* in the same context.²⁹⁷

The real wrinkle with applying *Pickering–Connick* to a public school teacher's in-class speech is what room it leaves for academic freedom.²⁹⁸ The *Garcetti* majority's interpretation of *Pickering–Connick*'s threshold First Amendment inquiry—that any speech made pursuant to employment duties cannot pass the threshold—would seem to imply that very little room remains. Just like the deputy district attorney in *Garcetti*, when a public school teacher speaks in the classroom, she is fulfilling her employment duties, regardless whether her speech also happens to touch on a matter of public concern.

Indeed, in his dissent, Justice Souter flagged this very issue. He noted that the *Garcetti* majority's interpretation of *Pickering* was “spacious enough to include even the teaching of a public university professor,” adding that “I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and

292. See *supra* notes 282–85 and accompanying text.

293. See *Garcetti*, 126 S. Ct. at 1959–60.

294. Justice Souter's dissent, for example, argued that when a public employee speaks about a matter of public concern pursuant to his official duties, a court should find the threshold satisfied and proceed to a balancing test, at which stage the employee should not prevail “unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it.” *Id.* at 1967 (Souter, J., dissenting). Justice Breyer's dissent also argued that the Court should have proceeded to *Pickering* balancing, even though the deputy district attorney had spoken pursuant to his official duties, on grounds that (1) independent professional canons required the attorney to utter the speech in question and (2) the Constitution itself required him to raise these concerns. *Id.* at 1974–75 (Breyer, J., dissenting).

295. See *supra* notes 149–53 and accompanying text.

296. 474 F.3d 477 (7th Cir. 2007).

297. *Id.* at 478–80.

298. Of course, a similar wrinkle exists even if *Hazelwood* is applied instead, given that *Hazelwood* allows speech restrictions that are reasonably related to any legitimate pedagogical concern.

universities, whose teachers necessarily speak and write ‘pursuant to official duties.’”²⁹⁹ In response, the *Garcetti* majority explicitly reserved judgment on that issue, stating:

Justice Souter suggests today’s decision may have important ramifications for academic freedom, at least as a constitutional value. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.³⁰⁰

Thus, it remains to be seen how the Supreme Court, when presented with the issue, will apply the *Pickering–Connick–Garcetti* framework to a public educator’s classroom speech. Perhaps the Court will provide additional protection by reducing or altering the initial threshold inquiry in this context, making it easier for courts to proceed to the balancing test. It seems fairly likely, though, that if the Court alters the framework to provide increased First Amendment protection to educators, such protection will be limited to the speech of public university professors and will not extend to that of K–12 public school teachers. Justice Souter’s expressed concern, which triggered the majority’s response and reservation of the issue—mentioned only “public university professor[s]” and “academic freedom in public colleges and universities.”³⁰¹ And, indeed, the concept of academic freedom as a First Amendment concern is far more established at the university level than at the K–12 public school level, where elected school boards bear ultimate responsibility for curricular and policy decisions.³⁰² As the Seventh Circuit concluded in *Mayer*:

[K–12 public education] is compulsory, and children must attend public schools unless their parents are willing to incur the cost of private education or the considerable time commitment of home schooling. Children who attend school because they must ought not be subject to teachers’ idiosyncratic perspectives. Majority rule about what subjects and viewpoints will be expressed in the classroom has the potential to turn into indoctrination But if indoctrination

299. *Garcetti*, 126 S. Ct. at 1969–70 (Souter, J., dissenting).

300. *Id.* at 1962 (majority opinion) (citation omitted).

301. *Id.* at 1969 (Souter, J., dissenting).

302. *See supra* notes 182–83 and accompanying text.

is likely, the power should be reposed in someone the people can vote out of office, rather than tenured teachers. At least the board's views can be debated openly, and the people may choose to elect persons committed to neutrality on contentious issues.³⁰³

That said, should the Court adapt the *Pickering–Connick–Garcetti* framework to better protect a public educator's in-class speech, it may do so in a way that also encompasses the speech of K–12 public school teachers. This Article's point is simply to emphasize that any First Amendment protection for a teacher's in-class speech should stem from the public employment-based framework, rather than from *Hazelwood*.³⁰⁴

303. *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 479–80 (7th Cir. 2007).

304. Even if the Supreme Court ultimately concludes that teachers lack First Amendment protection for their in-class speech, that will not leave them wholly without job protection. Tenured teachers possess extensive job security. Circuit court decisions also suggest that an untenured teacher who, through her classroom speech, unknowingly violates a school restriction of which she lacked notice and loses her position on that basis may well have an actionable constitutional claim under principles of vagueness and substantive due process. *See, e.g., Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 23 (1st Cir. 1999) (reiterating that teachers must be given “appropriate notice of what sorts of expressive conduct are out of bounds”); *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993) (holding that even if “a school may prohibit a teacher's statements before she makes them, . . . it is not entitled to retaliate against speech that it never prohibited”); *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1177 (3d Cir. 1990) (stating that although the plaintiff teacher, in arguing that the ban on a particular classroom technique was vague and overbroad, had “couch[e]d her claim in First Amendment terms, her argument is basically a due process one” and asserting that “[w]e have stated in a different context that a rule that forbids the doing of an act in terms so vague that people of common intelligence must guess as to its meaning and differ as to its application violates due process”). Additionally, in certain circumstances untenured teachers are entitled to procedural due process (i.e., notice and a hearing) before they may be terminated. *See Perry v. Sindermann*, 408 U.S. 593, 599–603 (1972); Buss, *Academic Freedom*, *supra* note 10, at 262–74 (arguing that outside of the First Amendment, notions of implied contractual terms, procedural due process, and substantive due process all provide protection for a teacher's classroom speech, particularly when they have not received adequate notice that the speech in question was prohibited). Karen Daly also argues that the presence or absence of notice should determine the level of constitutional protection accorded a teacher's in-class speech. *See supra* note 182.

Furthermore, states as well as individual school districts remain free to provide their teachers with additional protection for their classroom speech. *See, e.g., Malverne Union Free Sch. Dist. v. Sobol*, 586 N.Y.S.2d 673, 677–78 (N.Y. App. Div. 1992) (explaining that the New York State Commissioner of Education recognized a circumscribed right of academic freedom on the part of public school teachers in New York); OUACHITA PARISH SCH. BD., OUACHITA PARISH SCIENCE CURRICULUM POLICY (2006), available at http://www.opsb.net/downloads/forms/Ouachita_Parish_Science_Curriculum_Policy.pdf (providing one northern Louisiana parish's new policy regarding the teaching of science, which states that the “District understands that the teaching of some scientific subjects, such as biological evolution, the chemical origins of life, global warming, and human cloning, can cause controversy, and that some teachers may be unsure of the District's expectations concerning how they should present information on such subjects” and that “teachers shall be permitted to help students understand, analyze, critique, and review in an objective manner the scientific strengths and weaknesses of existing scientific theories pertinent to the course being

Trying to fit the square peg of a teacher's in-class speech into the round hole of *Hazelwood* distorts *Hazelwood* itself, undermining its utility in the student speech context for which it was actually designed.

Hazelwood should likewise not apply to restrictions on speech by an outside entity in school-sponsored settings. As discussed above, *Hazelwood*'s analysis proceeded in two parts.³⁰⁵ Section II.A summarized the Court's general public forum doctrine, repeatedly referring to *Perry Education Association v. Perry Local Educators Association*³⁰⁶ and *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*³⁰⁷ Section II.B explained the meaning of "reasonableness" in the specific context of school-sponsored student speech (implying, in the process, the permissibility of certain viewpoint-based restrictions).³⁰⁸ When the speaker is an outside entity rather than a student, there is no need to proceed to section II.B's analysis, which deals specifically with student speech. Instead, courts should simply apply general public forum doctrine.

The courts that have applied *Hazelwood* to outside-entity speech have, in practice, actually ended up doing just this. But rather than doing so by concluding that *Hazelwood* does not apply beyond the student context, as this Article urges, they have done so by interpreting *Hazelwood* in a way that makes its analysis functionally indistinguishable from basic public forum analysis. In *Searcey*, for example, the Eleventh Circuit concluded that the career day at issue did not create a public forum, that speech restrictions on the speakers must therefore only be reasonable and viewpoint neutral, and that certain restrictions satisfied those requirements but others did not.³⁰⁹ *Hazelwood* entered the discussion only when the court rejected the school district's argument that *Hazelwood* eliminated the viewpoint-neutrality requirement.³¹⁰ Indeed, the *Searcey* court specifically stated that *Hazelwood* "does not alter the test for reasonableness in a nonpublic forum such as a school but rather provides the context in which the reasonableness of regulations should be considered."³¹¹ Thus, the *Searcey* court would have reached the identical result had it found *Hazelwood* altogether inapplicable.

Similarly, in *Planned Parenthood*, the Ninth Circuit concluded that the yearbook in question was a nonpublic forum,³¹² interpreted *Hazelwood* as

taught").

305. See *supra* notes 260–64 and accompanying text.

306. 460 U.S. 37 (1983).

307. 473 U.S. 788 (1985).

308. For further discussion of the potential permissibility of viewpoint-based restrictions see *supra* notes 262–64 and accompanying text and *infra* Part VI.

309. *Searcey v. Harris*, 888 F.2d 1314, 1318–26 (11th Cir. 1989).

310. *Id.* at 1319 & n.7, 1324–25.

311. *Id.* at 1319.

312. *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991).

maintaining the viewpoint-neutrality requirement, and then assessed whether the speech restriction had been reasonable and viewpoint neutral.³¹³ Again, the result would have been identical had the Ninth Circuit simply deemed *Hazelwood* inapplicable to speech by an outside entity. Indeed, once a court interprets *Hazelwood* as containing a viewpoint-neutrality requirement, the analysis becomes identical to the general approach to a nonpublic forum. The viewpoint-neutrality requirement is the same, and *Hazelwood*'s "reasonably related to legitimate pedagogical concerns" standard³¹⁴ simply becomes one way of phrasing the general reasonableness requirement for nonpublic fora.³¹⁵

General public forum doctrine also provides schools with the flexibility that they need to restrict inappropriate outside-entity speech in school-sponsored settings. As an initial matter, schools are not required to open their doors to outside entities. While the presence of students and teachers in schools is a given, the presence of outside entities is not. And once a school does decide to open its door to outside entities—whether by making its facilities generally available after school, holding a career forum, selling ads in its yearbook, or providing outside entities with access to its distribution systems—it can set the terms for that access. One possibility is to create a limited public forum, in which all individuals who wish to speak about a topic that falls within the forum's boundaries are presumptively entitled to access. Another possibility is to create a nonpublic forum in which each speaker must individually obtain permission before participating; here, restrictions as to particular speakers will be permissible as long as they are reasonable and viewpoint-neutral. Alternatively, if the school merely brings in a particular outside speaker to serve as its *own* agent in conveying a message to students (for example, an outside health educator to speak about the dangers of drug use or unsafe sex), then no forum at all will have been created, and no other outside entities will be able to claim a First Amendment right of access.³¹⁶

Applying *Hazelwood* to outside-entity speech—and stretching it to mirror the general public forum doctrine in the process—is therefore both unnecessary and unwise. It is unnecessary because the general public

313. *Id.*

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

315. *See Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 926 (10th Cir. 2002) (observing, en route to its conclusion that *Hazelwood* must not require viewpoint neutrality, that "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").

316. *See, e.g., Make the Road by Walking, Inc. v. Turner*, 378 F.3d 133, 151 (2d Cir. 2004) (stating that "[o]nly where the government allows private parties to express their personal views in a nonpublic forum is it required to avoid viewpoint discrimination" and that if a governmental entity or its contractual agents are the only speakers on government property, then "there is no actionable viewpoint discrimination, because there is no discrimination").

forum doctrine can do the job on its own and because courts should not interpret *Hazelwood* as supplanting the doctrine outside of the student speech context. And it is unwise because, as *Downs* and *Bannon* illustrate, it leads to precedents that complicate subsequent applications of *Hazelwood* to student speech.

Finally, as to textbook and curricular selections, the Third, Fifth, and Seventh Circuits have persuasively explained, in *Edwards v. California University of Pennsylvania*, *Chiras v. Miller*, and *Mayer* respectively, why these selections reflect school-district-level decisions and thus amount to pure government speech.³¹⁷ As such, here too *Hazelwood* should be inapplicable. *Hazelwood*'s reach should therefore be narrowed back to the context in which it first arose: school-sponsored student speech.

VI. THIS ARTICLE'S PROPOSAL: A SLIDING-SCALE APPROACH FOR STUDENT SPEECH

Extending *Hazelwood* to a broad range of speech contexts has not only unnecessarily complicated the viewpoint-discrimination analysis. It has also rendered it increasingly abstract, with courts largely treating the question whether *Hazelwood* permits viewpoint discrimination as a simple "yes or no" issue. Returning to *Hazelwood*'s core as a student speech case helps sharpen the analysis of this question.

It seems relatively clear that *Hazelwood* contemplated permitting viewpoint-based restrictions on school-sponsored student speech in at least some circumstances. The *Hazelwood* Court stated that public schools *must* "retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order'"³¹⁸ and that schools may also dissociate themselves from speech that is "biased or prejudiced."³¹⁹ The Court went on to argue that if *Tinker*, as opposed to its newly announced standard, applied to school newspapers, schools would be faced with including in their newspapers "all student expression that does not threaten 'materia[l] disrupt[ion of] classwork' or violation of 'rights that are protected by law,' regardless of how sexually explicit, racially intemperate, or personally insulting that expression otherwise might be."³²⁰ The Court predicted that many schools would simply dissolve their student newspapers to avoid facing this

317. See *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007); *Chiras v. Miller*, 432 F.3d 606, 607–08 (5th Cir. 2005); *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491–92 (3d Cir. 1998).

318. *Hazelwood*, 484 U.S. at 272 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

319. *Id.* at 271.

320. *Id.* at 276 n.9 (alteration in original) (citation omitted) (quoting *id.* at 289 (Brennan, J., dissenting)).

prospect.³²¹

The Court's statements strongly imply the permissibility of viewpoint-based restrictions in some circumstances. After all, if *Hazelwood* does not allow viewpoint-based restrictions, it is difficult to see how it achieves the majority's expressed goal of providing schools with additional discretion—beyond what they already possess under *Tinker*—to censor, in school-sponsored settings, student speech that expresses, for example, pro-drug, pro-drinking, or “racially intemperate” views. *Hazelwood*'s omission of any viewpoint-neutrality requirement also points in this direction. Indeed, Susannah Barton Tobin—who opposes viewpoint-based restrictions and urges the Court to revisit this issue—concedes that “evidence indicates that the 1988 [*Hazelwood*] Court might have intended to abandon the viewpoint neutrality requirement for school speech.”³²² Interestingly, Tobin reports that when she interviewed one of the *Hazelwood* students' attorneys about the case, he described himself as “somewhat astonished to learn that some courts have construed the case as prohibiting, or at least not authorizing, censorship based on the speaker's views,” reflecting that “I always thought that it quite clearly did sanction viewpoint discrimination.”³²³

The Supreme Court's 2007 decision in *Morse v. Frederick*³²⁴ accords with this analysis. In *Morse*, a high school student sued after he was disciplined for displaying a banner stating “Bong Hits 4 Jesus” as the Olympic Torch Relay passed by his high school, while fellow members of the school community (including administrative officials, teachers, and students who had been excused from class) looked on.³²⁵ Finding that neither *Bethel School District No. 403 v. Fraser*³²⁶ nor *Hazelwood* applied because the banner was neither plainly offensive nor school sponsored,³²⁷ the Court created a new exception to *Tinker*: schools may restrict speech “that can reasonably be regarded as encouraging illegal drug use.”³²⁸ The *Morse* Court thus endorsed an explicitly viewpoint-based rationale for restricting some student speech even when that speech does *not* bear the school's imprimatur.³²⁹ If viewpoint-based restrictions can be appropriate

321. *Id.*

322. Tobin, *supra* note 10, at 219.

323. *Id.* at 228.

324. 127 S. Ct. 2618 (2007).

325. *Id.* at 2622–23.

326. 478 U.S. 675 (1986).

327. *Morse*, 127 S. Ct. at 2627, 2629.

328. *Id.* at 2622.

329. Indeed, Justice Stevens's dissent, Justice Breyer's partial concurrence and partial dissent, and the majority all recognized the viewpoint-based nature of the Court's holding. *See id.* at 2645 (Stevens, J., dissenting) (“The Court's test invites stark viewpoint discrimination.”); *id.* at 2639 (Breyer, J., concurring in the judgment in part and dissenting in part) (noting that the holding is “based . . . on viewpoint restrictions”); *id.* at 2629 (majority opinion) (acknowledging the dissent's “accus[ation]” that the decision “authoriz[es] ‘viewpoint discrimination’” and pointing out that

even in that context, then they should certainly be permissible when the speech in question is actually school sponsored, such that *Hazelwood* applies.

Nonetheless, concluding that *Hazelwood* permits viewpoint discrimination as to *some* school-sponsored student speech should be only the start of the analysis. The more challenging issue—and the one that remains relatively unexplored—is *when Hazelwood* allows such viewpoint-based restrictions. In other words, given the general suspicion of viewpoint-based restrictions, when will a school’s viewpoint-based restriction sufficiently relate to a legitimate pedagogical concern? The best way to answer this question is through a sliding-scale approach that incorporates the two core aspects of *Hazelwood*: (1) the initial trigger for *Hazelwood*’s applicability, i.e., the occurrence of the speech in a school-sponsored activity that “students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school,”³³⁰ and (2) the ultimate standard once *Hazelwood* applies, i.e., that the speech restriction be “reasonably related to legitimate pedagogical concerns.”³³¹ As described below, the stronger the perception of school imprimatur over the student speech at issue, the more latitude the school should receive to employ viewpoint-based restrictions.³³²

The trigger for *Hazelwood*’s applicability is a relatively low one. *Hazelwood* encompasses students’ speech in the classroom,³³³ in their school assignments,³³⁴ in school publications,³³⁵ in school assemblies,³³⁶ in

even the dissent conceded “that ‘it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting’” (quoting *id.* at 2644–46 (Stevens, J., dissenting)).

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

331. *Id.* at 273.

332. *Cf. Jordan*, *supra* note 10, at 1573–74 (arguing that “[t]he range of pedagogical concerns considered ‘legitimate’ to sustain a restriction should vary depending on” whether the restriction is viewpoint-based and that the “avoidance of controversy” should not qualify as a legitimate pedagogical concern for purposes of viewpoint-based restrictions). This Article’s proposal, rather than taking the question whether a restriction is viewpoint based as its starting point, instead begins earlier with an assessment of the school-sponsored context in which the restriction occurs, in terms of how strong the perception of school imprimatur is likely to be. That initial assessment, in turn, determines the applicable level of scrutiny for viewpoint-based restrictions.

333. *See, e.g., C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 169, 171 (3d Cir. 1999) (applying *Hazelwood* to school restrictions on a student wishing to read a Bible story to the class), *aff’d in part by an equally divided court, vacated in part*, 226 F.3d 198 (3d Cir. 2000) (en banc); *DeNooyer v. Livonia Pub. Sch.*, 799 F. Supp. 744, 746–49 (E.D. Mich. 1992) (applying *Hazelwood* to school restrictions on a student’s show-and-tell performance), *aff’d sub nom. Denooyer v. Merinelli*, 12 F.3d 211 (6th Cir. 1993) (unpublished table decision).

334. *See, e.g., Duran v. Nitsche*, 780 F. Supp. 1048, 1054–56 (E.D. Pa. 1991) (applying *Hazelwood* to school restrictions on a student’s choice of an oral-presentation topic).

335. *See, e.g., Hazelwood*, 484 U.S. at 260; *Paye v. Gibraltar Sch. Dist.*, No. 90CV70444DT, 1991 U.S. Dist. LEXIS 16480, at *12–18 (E.D. Mich. Aug. 6, 1991) (applying *Hazelwood* to school restrictions on the content of a student literary magazine).

336. *See, e.g., Poling v. Murphy*, 872 F.2d 757, 758, 762–64 (6th Cir. 1989) (applying

school productions,³³⁷ and in artwork that temporarily or permanently decorates the school halls.³³⁸ It also encompasses student speech in any other activity that is supervised by faculty members, designed to impart knowledge or skills to student participants, and could be perceived by others as bearing the school's imprimatur.³³⁹ Given this broad scope, not all *Hazelwood*-qualifying student speech will be equally suggestive of school imprimatur. Generally, the perception of imprimatur will be strongest in two situations: when the student speech changes the permanent physical appearance of the school or when the student speech changes the nature of other students' substantive classroom experience. In these situations, the student expression comes relatively close to functioning as the school's own speech, especially in terms of the expression's practical effect. Thus, school officials should receive broad latitude to restrict these types of student speech, even if the restrictions are viewpoint based.

In contrast, where the speech is clearly attributable to a particular student and does not alter either the school's permanent physical appearance or other students' classroom experience, the perception that the expression bears the school's imprimatur is likely to be weaker. Members of the school community are less likely to believe that the school affirmatively approves of the speech, as opposed to simply permitting (or not preventing) its dissemination. This category of speech will typically include student speech that is delivered at a school assembly, printed in a school publication, or submitted in response to a particular class assignment. Here, *Hazelwood*'s standard should be applied more stringently, by subjecting school speech restrictions that involve viewpoint discrimination to an examination more akin to intermediate scrutiny than to rational basis review.

This distinction in how *Hazelwood*'s standard should apply is nicely illustrated by the Third Circuit in *C.H. ex rel. Z.H. v. Oliva*,³⁴⁰ which involved two instances of school-sponsored student speech falling on different places along the "imprimatur spectrum." In the first instance, the

Hazelwood to school disciplinary action against a student for a speech he delivered during a school assembly that all students had to attend).

337. See, e.g., *McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918, 920, 923–24 (E.D. Mo. 1999) (applying *Hazelwood* to school restrictions on a high school marching band's song choices).

338. See, e.g., *Peck v. Baldwinsville*, 426 F.3d 617, 621–25 (2d Cir. 2005) (applying *Hazelwood* to student artwork that was to be temporarily displayed during an environmental assembly); *Bannon v. Sch. Dist.*, 387 F.3d 1208, 1210–13 (11th Cir. 2004) (applying *Hazelwood* to a student-created mural that was to remain in the school's hallways for up to four years); *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 920–23 (10th Cir. 2002) (applying *Hazelwood* to tiles that were to be affixed to school walls).

339. See *Hazelwood*, 484 U.S. at 270–71.

340. *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167 (3d Cir. 1999), *aff'd in part by an equally divided court, vacated in part*, 226 F.3d 198 (3d Cir. 2000) (en banc).

plaintiff child was in kindergarten, and his teacher, as a Thanksgiving assignment, asked the students in the class to make posters depicting what they were thankful for.³⁴¹ The plaintiff created a poster indicating that he was thankful for Jesus.³⁴² His poster was hung in the hallway along with his classmates' posters, but school employees removed it because of its religious theme.³⁴³ When the plaintiff's teacher returned the next day, she put the poster back up but in a less prominent location at the end of the hallway.³⁴⁴ The second instance occurred approximately eighteen months later, when as part of a reading instructional program, the plaintiff's first-grade teacher invited students to bring in a book from home and read one of their favorite stories to the class.³⁴⁵ The plaintiff brought in "The Beginner's Bible" and sought to read a Bible story to his classmates.³⁴⁶ Because of its religious content, the teacher did not allow him to read the story to his classmates and instead had the plaintiff read the story to her in private.³⁴⁷

The first-grade incident concerning the Bible story is a good example of school-sponsored student speech that is likely to produce a strong perception of school imprimatur. The classroom is at the center of a school's pedagogical mission, and schools have plenary control over what is taught there. This was not a situation where the student simply would have been expressing his own views in response to a question or class assignment. Rather, the student, in reading a Bible story to his classmates as part of an in-class activity, would have been changing the very nature of that activity and affecting his fellow students' classroom experience. As the Third Circuit stated in its initial opinion dismissing the plaintiff's complaint:

[T]he classroom setting involve[s] a religiously heterogeneous and captive audience. It is not unreasonable to expect that parents of non-Christian children would resent exposure of their six-year-old children to a reading from the Bible. Nor is it unreasonable to expect that some parents of Christian first graders would regard a compelled classroom exposure to material from the Bible as an infringement of their parental right to guide the religious development of their children at this stage. Moreover, it is not unreasonable to expect that any resentment engendered by [the plaintiff's] reading would have a significant adverse impact on the

341. *Id.* at 168.

342. *Id.*

343. *Id.* at 169.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

important relationship between the parents, the teacher, and their school.³⁴⁸

Indeed, given that other students would have been compelled to listen to the Bible story, the school might have faced claims from other parents of an Establishment Clause violation had it permitted the reading.

But a school should not have to show that speech will cause an Establishment Clause violation to justify excluding the speech from a classroom lesson. When it comes to the substance of classroom lessons, which are at the core of a school's educational mission, school officials should retain broad discretion to restrict student speech for any legitimate pedagogical purpose—including the avoidance of potential disruption or discomfort by other students and their parents—even if doing so entails a viewpoint-based restriction.

Of course, schools should not have entirely free rein to restrict student speech in the classroom setting. A restriction that is truly unrelated to any legitimate pedagogical purpose (for example, a classroom election-day activity in which students may speak only in favor of candidates from one party) should be held unconstitutional. Provided that the school can articulate a genuine pedagogical justification for its restriction, however, the restriction should pass constitutional scrutiny regardless whether it is viewpoint related.³⁴⁹

A similar high-imprimatur situation was presented in *Walz v. Egg Harbor Township Board of Education*,³⁵⁰ in which a first grader sought to pass out candy canes bearing religious messages to his fellow students during an in-class, seasonal holiday party.³⁵¹ The messages explained that the candy cane represented Jesus, “who came to earth as our Savior.”³⁵² The pedagogical purpose of the party, according to the school, was “to teach social skills and respect for others in a festive setting.”³⁵³ The school,

348. *Id.* at 175. Upon hearing the case en banc, the Third Circuit affirmed the dismissal of the plaintiff's claim regarding the first-grade incident, stating that it was equally divided on the issue and would thus affirm without further explication. *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 200 (3d Cir. 2000) (en banc). As further discussed *infra*, the en banc court also dismissed the claim regarding the kindergarten incident but on different grounds than those set forth by the initial three-judge panel. *Id.* at 201–03.

349. Kent Greenawalt argues along similar lines. See KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? 167 (2005) (“[I]n many circumstances, [a] teacher should exercise her judgment not to have [a] religious reading presented to the whole class. She might fear conflict over religion or the dominance of one view. (She might worry that if one student brings a Bible reading, others will begin to do so.) . . . So long as the teacher's judgment is not an automatic dismissal of any reading with religious content, a court should accept it.”).

350. 342 F.3d 271 (3d Cir. 2003).

351. *Id.* at 273–74. The student also sought to do so the previous year while he was in kindergarten. *Id.*

352. *Id.* at 274.

353. *Id.* at 279.

having prohibited students from bringing in any gifts with commercial, political, or religious messages, did not permit the student to distribute the candy canes at the party, although it allowed him to do so at recess and after school.³⁵⁴ The court found that the school's actions were constitutional, explaining that "[the student] was not attempting to exercise a right to personal religious observance in response to a class assignment or activity. His mother's stated purpose was to promote a religious message through the channel of a benign classroom activity."³⁵⁵ Again, had the teacher allowed the student to engage in the speech in question, the very substance of the classroom activity would have changed. The school's determination that it wanted to maintain the secular nature of this activity warranted great deference.

Other cases falling at the high end of the imprimatur spectrum include *Fleming v. Jefferson County School District R-1*³⁵⁶ and *Bannon v. School District*,³⁵⁷ in which the speech at issue would have changed the permanent physical appearance of the school and been less clearly attributable to one individual student. In *Fleming*,³⁵⁸ the tiles in question were to be installed in the halls of Columbine High School, becoming a permanent part of the school's interior. Similarly, in *Bannon*, the religiously themed murals were to remain in the school's exterior and interior hallways throughout the duration of the school's long-term remodeling project, which was to last up to four years.³⁵⁹ In both cases, therefore, the speech in question was going to transform the appearance of the school in a relatively permanent fashion, lasting long after the creator of the speech was gone. The *Fleming* court emphasized this aspect, stating that "expressive activities that the school allows to be integrated permanently into the school environment and that students pass by during the school day come much closer to reasonably bearing the imprimatur of the school."³⁶⁰ In these cases, the schools were properly granted broad discretion to restrict the speech at issue, even though some of their restrictions were viewpoint based. Like classroom lessons, the permanent physical appearance of the school is almost inseparable from the school itself. A reasonable observer is likely to perceive speech that has been permanently etched on school walls as the school's own, or, at the very least, as strongly indicative of the school's own views.³⁶¹

354. *Id.* at 273–74.

355. *Id.* at 280.

356. 298 F.3d 918 (10th Cir. 2002).

357. 387 F.3d 1208 (11th Cir. 2004).

358. For further discussion of *Fleming*, see *supra* notes 221–25 and accompanying text.

359. *Bannon*, 387 F.3d at 1210.

360. *Fleming*, 298 F.3d at 925; see also Tobin, *supra* note 10, at 261 (writing, in regard to *Fleming*, that "[u]nlike a newspaper article, a speech, or even a temporary display of artwork, the tiles were intended to become part of the fabric of the school building, and as such, were not easily distanced from the school's own beliefs").

361. See GREENAWALT, *supra* note 349, at 171–72.

The kindergarten incident in *Oliva*, by contrast, provides a good example of student speech that, despite occurring in a school-sponsored context, was not strongly suggestive of school imprimatur. The student's poster was temporarily hung in a school hallway alongside numerous other posters responding to the same assignment.³⁶² The poster was clearly attributable to one particular student, was presumably going to be removed relatively soon after the Thanksgiving holiday, and was not affecting the substance of any classroom lesson or activity.³⁶³ In fact, then-Judge Alito, who dissented from the Third Circuit's en banc dismissal³⁶⁴ of the plaintiff's claim, argued that the poster should not even be considered *Hazelwood*-qualifying speech, asserting that "[t]hings that students express in class or in assignments when called upon to express their own views do not 'bear the imprimatur of the school' and do not represent 'the [school's] own speech.'" ³⁶⁵ The dissent further stated that "reasonable students, parents, and members of the public would not have perceived [the plaintiff's] poster as bearing the imprimatur of the school or as an expression of the school's own viewpoint."³⁶⁶ This is an aggressive interpretation of *Hazelwood*, which expressly stated that it covered all activities that were part of the school curriculum.³⁶⁷ But Judge Alito's larger point—that speech contained in one student's response to a school assignment is unlikely to yield a strong perception of school imprimatur—is well taken.

362. C.H. *ex rel.* Z.H. v. *Oliva*, 226 F.3d 198, 201 (3d Cir. 2000) (en banc).

363. *Id.* at 200–02.

364. *Id.* at 201–03. The en banc majority dismissed the claim without prejudice on grounds that it did not name the kindergarten teacher as a defendant and did not allege that any of the defendants (the first-grade teacher, principal, superintendent, school board, State Commissioner of Education, New Jersey Department of Education, and the United States Department of Education) had participated in or been aware of the removal of the poster or the relocation to a less prominent position on the hallway. *Id.* at 201–03. It thus did not reach the core *Hazelwood* issue, unlike the original appellate panel, which held that the decision to temporarily remove and subsequently relocate the poster satisfied *Hazelwood*, stating that "[g]iven the sensitivity of the issues raised by student religious expression, coupled with the notable immaturity of the students involved and the relatively public display of the posters in the school hallway, the school's temporary removal of the poster does not violate the First Amendment rights of the student artist." C.H. *ex rel.* Z.H. v. *Oliva*, 195 F.3d 167, 175 (3d Cir. 1999), *aff'd in part by an equally divided court, vacated in part*, 226 F.3d 198 (3d Cir. 2000) (en banc).

365. *Oliva*, 226 F.3d at 214 (Alito, J., dissenting) (alteration in original) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988), and *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995)).

366. *Id.*

367. *Hazelwood*, 484 U.S. at 270–71. In *Morse v. Frederick*, Justice Alito repeated this aggressive characterization of *Hazelwood*, stating that *Hazelwood* "allows a school to regulate what is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ." 127 S. Ct. 2618, 2637 (2007) (Alito, J., concurring).

A strikingly similar situation arose in *Peck v. Baldwinsville Central School District*.³⁶⁸ In *Peck*, a kindergartner, in response to an assignment to create a poster illustrating ways to help the environment, drew a poster that depicted trees, grass, children recycling, and a “robed, praying figure” intended to be Jesus.³⁶⁹ His teacher, when hanging all of the students’ posters for an environmental assembly, folded the plaintiff student’s poster in half so that the portion depicting Jesus was concealed.³⁷⁰ The Second Circuit held that the student’s resulting First Amendment claim could go forward, ruling that *Hazelwood* generally prohibited viewpoint discrimination.³⁷¹ As in the *Oliva* Thanksgiving poster incident, here too the perception of school imprimatur in regard to the student’s poster was low, given that the poster was hung alongside numerous other posters for a limited duration and was clearly attributable to one particular student. It is unlikely that any observer viewing the student’s poster in this context would have believed that the school agreed with or had communicated the view that Jesus provided a way to save the environment.

Student speech communicated through assemblies or publications will also typically yield a relatively weak perception of school imprimatur. In *Poling v. Murphy*,³⁷² for instance, the plaintiff student’s campaign speech for student council president was one of numerous speeches delivered by various student candidates during a school assembly.³⁷³ The plaintiff stated that “[t]he administration plays tricks with your mind and they hope you won’t notice. For example, why does [the assistant principal] stutter while he is on the intercom? He doesn’t have a speech impediment. If you want to break the iron grip of this school, vote for me for president.”³⁷⁴ There is no question that the assembly, which was overseen by a faculty adviser to the student council and which all students were required to attend,³⁷⁵ fell within *Hazelwood*’s broad umbrella. But it is less likely that the student body actually perceived school officials as necessarily agreeing with all of the views espoused by the candidates. Rather, any perception of school imprimatur was likely limited to an impression that the school permitted its students to give these speeches as part of the self-government opportunities offered to them and that school officials did not deem the speeches inappropriate enough to warrant exclusion. Student-authored editorials and articles in school newspapers, magazines, yearbooks, and other publications are similarly unlikely to yield a particularly strong

368. 426 F.3d 617 (2d Cir. 2005).

369. *Id.* at 622–23.

370. *Id.* at 623.

371. *Id.* at 631–33; *see also supra* notes 216–18 and accompanying text.

372. 872 F.2d 757 (6th Cir. 1989).

373. *Id.* at 758–59.

374. *Id.* at 759.

375. *Id.* at 758–59.

impression of school imprimatur. The very existence of the student author's byline implies some level of distinction between the school's own views and the views of the student.

This is not to say that schools should not have considerable power to restrict student speech in school-sponsored contexts that fall on the low end of the "imprimatur spectrum," i.e., student speech that just satisfies the *Hazelwood* threshold. *Hazelwood*, itself a school newspaper case, clearly establishes this power. But *Hazelwood* did not involve viewpoint-based restrictions. And given the general suspicion of viewpoint discrimination and the failure of *Hazelwood* to speak explicitly to this issue, viewpoint-based restrictions of such low-imprimatur speech should be subject to real scrutiny. Indeed, although *Hazelwood* can be seen as generally providing for deferential "rational basis" review,³⁷⁶ these types of restrictions should fall within a subcategory of *Hazelwood* cases in which review more akin to intermediate scrutiny is appropriate. Rather than being required to show merely a reasonable relationship to a legitimate pedagogical concern, a school imposing a viewpoint-based restriction on student speech yielding only a weak perception of school imprimatur should have to show that the restriction is substantially related to an important pedagogical purpose—that there is an exceedingly persuasive justification for the restriction.³⁷⁷

This sliding-scale approach, whereby the level of scrutiny of viewpoint-based restrictions would be inversely related to the level of school imprimatur, would have two speech-protective results. First, in low-imprimatur settings triggering intermediate scrutiny, a school could not impose a viewpoint-based restriction without connecting the restriction to an important pedagogical concern. Not all of the pedagogical concerns that *Hazelwood* identified as "legitimate" would necessarily rise to this level, particularly because this more stringent standard would apply only to student speech that was already at the low end of the imprimatur spectrum. For example, *Hazelwood* listed, as two legitimate pedagogical concerns, "assur[ing] that . . . the views of the individual speaker are not erroneously attributed to the school" and preserving a school's "authority to refuse to sponsor student speech that might reasonably be perceived to . . . associate the school with any position other than neutrality on matters of political controversy."³⁷⁸ But once the speech in question has been found to yield

376. See, e.g., Stuller, *supra* note 10, at 322 (referring to *Hazelwood*'s standard as "rational basis review in the educational setting").

377. Cf. Craig v. Boren, 429 U.S. 190, 197 (1976) (establishing an intermediate level of scrutiny—in the context of gender-based classifications—under which classifications are permissible if they are substantially related to an important governmental purpose); United States v. Virginia, 518 U.S. 515, 532–33 (1996) (describing this level of review as requiring an "exceedingly persuasive" justification).

378. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

only a weak perception of school sponsorship, this type of concern is unlikely to be sufficiently important to justify a viewpoint-based restriction. Similarly, if the school's proffered pedagogical interest in imposing the viewpoint-based restriction is to avoid potential disruption, then to establish an important pedagogical concern the school should be required to show a significant likelihood that disruption will result from dissemination of the student's speech.

Second, in such low-imprimatur settings the school would also have to demonstrate a substantial—not just a “reasonable”—relationship between the *viewpoint-based* nature of the restriction and the important pedagogical concern. This differs from *Hazelwood*'s suggestion that the particular method by which a school official restricts the student speech generally need not be closely scrutinized. That message was communicated by the *Hazelwood* Court's apparent lack of concern over the principal's harsh method of censoring the two articles in question. The principal pulled two pages, which also included other articles, out of the newspaper,³⁷⁹ rather than deleting only the two articles in question or allowing the student authors to make changes (such as giving other parties mentioned in the article the opportunity to comment). Acknowledging that the principal had not looked into whether these less speech-restrictive alternatives were feasible, the Court simply noted that the principal's actions were “reasonable under the circumstances as he understood them.”³⁸⁰ This Article's proposed approach would require more searching scrutiny if the methods used are viewpoint based. Only when the important pedagogical concern cannot be accomplished through a viewpoint-neutral approach should a school be deemed to have proffered a sufficiently persuasive justification for its viewpoint-based restriction. Thus, a viewpoint-based restriction motivated solely by the school's desire to avoid being associated with a controversial position would presumably fail not only because this is unlikely to be an important pedagogical concern (given the low perception of school imprimatur) but also because other methods—such as prominent disclaimers—could achieve the same goal without suppressing the student speaker's views.

Using a sliding-scale approach to assess restrictions on school-sponsored student speech accords with Supreme Court precedent on both the school and speech fronts. Indeed, in several other contexts involving public school students' other constitutional rights, the Supreme Court has turned to sliding-scale frameworks as the best method of balancing students' rights against schools' educational and safety needs. With regard to students' Fourth Amendment rights in the context of random drug testing, for example, the Court held in *Vernonia School District 47J v.*

379. *Id.* at 264.

380. *Id.* at 276.

*Acton*³⁸¹ that the constitutionality of such testing depends upon a fact-specific weighing of the nature and immediacy of the school's interest in conducting the testing against the nature of the students' privacy interest and the character of the intrusion.³⁸² Similarly, regarding students' Fourteenth Amendment procedural due process rights in the context of school discipline, the Court indicated in *Goss v. Lopez*³⁸³ that the level of process that is due depends on the extent of the discipline imposed.³⁸⁴ The *Goss* Court held that suspensions of ten days or less require some type of "notice and informal hearing" and that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures."³⁸⁵

Meanwhile, on the speech front, the *Pickering–Connick* framework essentially calls for a sliding-scale analysis in its second prong. Once a court concludes that the First Amendment threshold is satisfied, it then proceeds to a balancing test in which the employer's interest in regulating the speech is weighed against the employee's First Amendment interest in uttering it.³⁸⁶ *Connick v. Myers* was explicit about the sliding-scale nature of this approach, stating that "a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern."³⁸⁷ Acknowledging that "such particularized balancing is difficult," the Court emphasized that "the court must reach the most appropriate possible balance of the competing interests."³⁸⁸

Just as the Supreme Court has recognized the appropriateness of sliding-scale approaches for other constitutional issues involving both schools and speech, so too does this Article's proposed sliding-scale approach provide a helpful way of analyzing the difficult questions raised by viewpoint-based restrictions of student speech in school-sponsored settings. Indeed, returning to some of the cases discussed above usefully

381. 515 U.S. 646 (1995).

382. *Id.* at 654–65. Pursuant to this framework, the *Vernonia* Court upheld the school district's policy of requiring student athletes to submit to random urinalysis drug testing, explaining that student athletes had reduced expectations of privacy, that the nature of the intrusion was relatively minimal given the way in which the samples were collected and the fact that results were not turned over to law enforcement, and that the school district's interest in combating its drug-use problem was great. *Id.* The Supreme Court subsequently upheld a similar policy involving random urinalysis drug testing of student participants in extracurricular activities. *See Bd. of Educ. v. Earls*, 536 U.S. 822, 826–38 (2002). Again, in *Earls*, the Court emphasized the privacy-shielding method of urine collection and the fact that failing results were not turned over to law enforcement, thus implying that greater levels of intrusion would require correspondingly greater levels of justification. *Id.* at 832–33.

383. 419 U.S. 565 (1975).

384. *Id.* at 583–84.

385. *Id.*

386. *See supra* notes 139–48 and accompanying text.

387. *Connick v. Myers*, 461 U.S. 138, 152 (1983).

388. *Id.* at 150.

illustrates how this Article's proposed approach would play out in practice.

The key points of departure between the actual resolution of these cases and the sliding-scale proposal's resolution of these cases can be seen in *Oliva*, *Peck*, and *Poling*. In *Oliva*, the Third Circuit's initial three-judge panel applied the same level of scrutiny to both the kindergarten Thanksgiving poster depicting Jesus and the first-grade incident concerning the Bible story, upholding the constitutionality of both restrictions on that basis and affirming the district court's dismissal of the complaint at the pleading stage.³⁸⁹ The sliding-scale approach, in contrast, would require viewpoint-based restrictions on the Thanksgiving poster to satisfy intermediate scrutiny because of the low perception of imprimatur there. It is unlikely that the school's restriction could have passed this test because none of the "legitimate pedagogical concerns" identified by the *Oliva* panel with regard to removal and relocation of the poster are particularly strong. The *Oliva* panel described those concerns as "the sensitivity of the issues raised by student religious expression, coupled with the notable immaturity of the students involved and the relatively public display of the posters in the school hallway."³⁹⁰ The decision does not cite any evidence that the poster interfered with any classroom lessons, caused *any*—let alone significant—disruption in the hallways, or led other students to believe that the school was endorsing the poster's religious message (thus raising the specter of an Establishment Clause violation). Therefore, this Article's proposed approach would yield the same result for the Bible story but a different result for the Thanksgiving poster.

With *Peck* and *Poling*, meanwhile, the proposed approach would lead to the same ultimate result that the Second and Sixth Circuits respectively reached, but on somewhat different grounds. In *Peck*, the Second Circuit based its decision on the conclusion that *Hazelwood* generally prohibited viewpoint-based restrictions.³⁹¹ Under this Article's approach, in contrast, the concealment of the Jesus figure on the student's poster would be unconstitutional not because viewpoint-based discrimination is *always* prohibited by *Hazelwood* but because the context was insufficiently suggestive of school imprimatur to warrant the viewpoint-based speech restriction.

Finally, in *Poling*, the school officials' discipline of the student would be entirely permissible under this Article's proposed sliding-scale approach. That is because the discipline, at least as the school officials explained it, stemmed not from opposition to the views expressed by the student but from the conclusion that the student's mockery of the assistant

389. C.H. *ex rel.* Z.H. v. *Oliva*, 195 F.3d 167, 174–76 (3d Cir. 1999), *aff'd in part by an equally divided court, vacated in part*, 226 F.3d 198 (3d Cir. 2000) (en banc).

390. *Id.* at 175.

391. *Peck v. Baldwinsville Sch. Dist.*, 426 F.3d 617, 632–33 (2d Cir. 2005); *see also supra* notes 216–18 and accompanying text (discussing the *Peck* decision).

principal's stuttering had been rude and in poor taste.³⁹² Given that the speech restriction at issue was not viewpoint based, the sliding-scale approach would require the restriction to be only reasonably related to legitimate pedagogical concerns. In contrast, had the student simply criticized the administration's "iron grip" on the school without using personally derogatory language and had the school still punished him, then such discipline would clearly have been based on the substance of the student's anti-administration viewpoint. Under this Article's proposal, such a viewpoint-based restriction would be subject to heightened scrutiny because of the low-imprimatur setting, and it would likely not pass constitutional muster because of the lack of any apparent important pedagogical purpose.

VII. CONCLUSION

In arguing that *Hazelwood's* reach has been significantly overextended, this Article asserts that a one-size-fits-all approach to *Hazelwood* is destined for failure. *Hazelwood's* analysis was designed specifically to evaluate restrictions on school-sponsored student speech, and courts should limit its application to that context. Courts should apply the general public forum analysis to speech by an outside entity and the *Pickering-Connick* framework to a teacher's in-class speech. The confusion and dissension over whether *Hazelwood* permits viewpoint-based restrictions has been an unfortunate byproduct of its overextension.

But even *within Hazelwood's* core of student speech, a one-size-fits-all approach to the viewpoint-discrimination issue is not the best method. *Hazelwood's* standard arose from the Supreme Court's recognition that context matters. Just as the existence of school sponsorship determines whether *Tinker* or *Hazelwood* applies in the first place, so too should the level of school sponsorship guide courts in determining exactly how *Hazelwood* should apply to each particular case. The sliding-scale approach that this Article proposes will allow for a more nuanced alignment between the perception of school imprimatur and the level of judicial scrutiny applied to viewpoint-based restrictions, fulfilling the underlying goal of the *Tinker/Hazelwood* regime and restoring balance to school officials' treatment of student speech.

392. Poling v. Murphy, 872 F.2d 757, 759-60 (6th Cir. 1989).

