SCHOOL SHOOTINGS, CERAMIC TILES, AND *HAZELWOOD*: THE CONTINUING LESSONS OF THE COLUMBINE TRAGEDY

On April 20, 1999, Eric Harris and Dylan Klebold, two classmates at Columbine High School, went to school carrying guns.[1] They shot and killed twelve students and one teacher.[2] They also shot and severely wounded several others.[3] This incident set off a firestorm of media coverage. After other school shootings that year,[4] the country began to focus on the lessons about guns and about the state of American youth that could be gleaned from these tragedies.

The lessons learned from the Columbine tragedy go beyond guns and youth; they include constitutional lessons as well. In June 2002, the Tenth Circuit handed down an opinion, *Fleming v. Jefferson County School District R-1*,[5] holding that, under *Hazelwood School District v. Kuhlmeier*,[6] school officials at Columbine High could regulate school-sponsored speech that discriminated based on viewpoint.[7] The Tenth Circuit recognized and discussed the circuit split on the issue of whether school officials must be viewpoint-neutral in their treatment of school-sponsored speech.[8] This Comment will address the background of this split, provide an in-depth discussion of *Fleming*, examine the reasoning and analysis on both sides of the split, and finally suggest why the Tenth Circuit's abrogation of a viewpoint-neutral requirement leaves speech in schools dangerously underprotected.

I. BACKGROUND: THE *HAZELWOOD* PROBLEM

A. Overview of Private Speech on Government Property

The freedom of expression preserved by the First Amendment has been called "the Constitution's most majestic guarantee."[9] This "majestic guarantee" is violated when the government attempts to restrict "expression be-

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1. Tom Kenworthy, *Up to 25 Die in Colorado School Shooting; Two Student Gunmen Are Found Dead*, WASH. POST, Apr. 21, 1999, at A01.

2. Cheryl W. Thompson, *2 Shooters Acted Alone, Officials Say; Evidence of Allies Fails to Surface*, WASH. POST, May 3, 1999, at A03.

3. Kenworthy, *supra* note 1.

4. On November 19, 1999, a twelve-year-old boy allegedly shot and killed a classmate at a middle school in Deming, New Mexico. Later that year on December 6, 1999, a thirteen-year-old student allegedly injured four classmates by opening fire with a semi-automatic handgun in Fort Gibson, Oklahoma. *Violence in U.S. Schools*, ABCNEWS.COM, *at* http://abcnews.go.com/sections/us/DailyNews/schoolshootings990420.html (last visited Oct. 14, 2003).

5. 298 F.3d 918 (10th Cir. 2002).

6. 484 U.S. 260 (1988).

7. *Fleming*, 298 F.3d at 926.

8. *Id.* at 926-28.

9. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 785 (2d ed. 1988).

cause of its message, its ideas, its subject matter, or its content."[10] When a First Amendment challenge to restriction of private speech on government property is brought, a three-step analysis is helpful.[11] First, a court must determine whether the speech is protected by the First Amendment.[12] Second, if the speech is protected, the court "must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic."[13] Third, a court "must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard."[14]

The U.S. Supreme Court has recognized three classifications of public forums, which are "government-owned property used by individuals for expressive activity."[15] First, the "quintessential" public forum is one that has been "traditionally used for assembly, . . . such as streets and parks."[16] In a "quintessential" public forum, restrictions to private speech must be narrowly tailored to a compelling governmental interest.[17] Also, these restrictions may not be based on viewpoint discrimination.[18] Second, the "designated" or limited public forum is one that the government chooses to open to the public, such as schools and theaters.[19] Although the government is not required to and does not always choose to make a facility a limited public forum, once the government does open it to the public, restrictions on private speech, just like with "quintessential" public forums, must be narrowly tailored to achieve a compelling governmental interest and may not be based on the speaker's viewpoint.[20] Third, the "nonpublic" forum is government property that is not traditionally used for assembly or public expression, or that the government has voluntarily designated as such, such as an airport terminal or a charity fundraiser in federal office buildings.[21] In "nonpublic" forums, restrictions on private speech are permissible if they are reasonable and not intended to discriminate against a particular view-

10. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (citing Cohen v. California, 403 U.S. 15, 24 (1971); Street v. New York, 394 U.S. 576 (1969); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964)).

11. *See generally* Fleming v. Jefferson County Sch. Dist. No. R-1, 170 F. Supp. 2d 1094, 1105 (D. Colo. 2001) (citing Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788 (1985)).

12. *Cornelius*, 473 U.S. at 797. Although most private speech is protected, certain speech such as obscenity has no First Amendment protection. Miller v. California, 413 U.S. 15, 23 (1973).

13. *Cornelius*, 473 U.S. at 797.

14. *Id.*

15. Janna J. Annest, *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, 1229 (2002).

16. *Id.*; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

17. *Id.* (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

18. *Id.*

19. *Id.*

20. *Id.* at 46 (citing Widmar v. Vincent, 454 U.S. 263 (1981)).

21. *Id.*; Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 674 (1992); Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 836 (1985).

point.[22] In other words, restrictions to speech in nonpublic forums must be both reasonable and viewpoint-neutral.

Generally, in First Amendment analysis, a determination of a law's validity largely depends on its characterization as either a viewpoint or content-based regulation.[23] While content discrimination is sometimes permissible, the courts almost always invalidate regulations that discriminate based on viewpoint.[24] If a court determines that the law is not discriminatory based on viewpoint, it may then decide whether it is content-neutral or content-based.[25] Content-neutral laws are subject to intermediate scrutiny, and content-based laws are subject to strict scrutiny.[26]

Primary and secondary public schools, while government property, create an interesting wrinkle in this public forum analysis because they are in the unique position of having a dual duty to both foster varying opinions and indoctrinate community standards.[27] Because of this dual role, there has been a traditional deference to school board and officials' determinations about what regulations and restrictions are appropriate; however, when a Constitutional right, including a First Amendment right, is violated by a regulation, the deference disappears.[28] The Supreme Court has stated that once the government entity opens any kind of forum, even in a school, the government is obligated "to justify its discriminations and exclusions under applicable constitutional norms."[29] In *Tinker v. Des Moines Independent Community School District*, students protested their suspension from school because they wore black armbands in protest of the Vietnam War.[30] Stating that students do not "shed their constitutional rights . . . at the schoolhouse gate,"[31] the U.S. Supreme Court held this regulation was a violation of the students' First Amendment rights, because absent "substantial disruption" to the school, the students had a right to voice their political beliefs about the war.[32]

B. Hazelwood

In *Hazelwood*, students of Hazelwood East High School challenged the principal's decision to cut out two pages of a student publication called *Spectrum*.[33] This publication was published as part of a journalism course in

22. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).
23. *See* Annest *supra* note 15, at 1230.
24. *Id.*
25. *Id.*
26. *See* Turner Broad. Sys, Inc. v. FCC, 512 U.S. 622, 642 (1994) (regarding content-neutral regulations); Sable Communications v. FCC, 492 U.S. 115, 126 (1989) (regarding content-based regulations).
27. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511-12 (1969).
28. *Id.*
29. Widmar v. Vincent, 454 U.S. 263, 267 (1981).
30. *Tinker*, 393 U.S. at 504.
31. *Id.* at 506.
32. *Id.* at 510-11.
33. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).

which the students received academic credit.[34] The principal objected to two stories.[35] One of the stories was about the effect teen pregnancy had on three pregnant students.[36] The principal objected to the article because it did not sufficiently protect the girls' anonymity even though they used fake names and because he felt the article's discussion of sexual activity and birth control were inappropriate for the school's younger students.[37] The other objectionable story was about divorce.[38] The principal felt a student's negative references toward her father were inappropriate because the father had not had the opportunity to respond and because he mistakenly believed the student's name was in the article.[39] However, the names were actually cut from the final version.[40] Because the principal believed there was not sufficient time to make corrections, he opted to remove the pages that contained the objectionable stories rather than just the stories themselves.[41]

Although the Eighth Circuit characterized *Spectrum* as a public forum, the Supreme Court majority found the publication was a nonpublic forum because the school did not intend *Spectrum* to be available for indiscriminate use by the staff or student body.[42] Even though the Court characterized *Spectrum* as a nonpublic forum, the Court emphasized the *Tinker* court's statement that students do not "shed their constitutional rights . . . at the schoolhouse gate."[43] However, the Court recognized that a school may restrict "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school," as long as it is "reasonably related to legitimate pedagogical concerns."[44] The Court held that the publication was school-sponsored and that the principal's regulations were reasonable.[45] The *Hazelwood* Court recognized that this case differed from *Tinker*, which defined what speech schools must tolerate, because *Spectrum* represented a school-sponsored forum.[46]

Having determined reasonableness of the restriction, under the traditional public forum analysis one would expect the Court to then determine whether the restriction was intended to discriminate against a particular viewpoint. However, the Court was silent on the viewpoint-neutrality issue.[47] It is this silence that has created a circuit split. The First, Third, and most recently, the Tenth Circuit interpret the Court's silence as abandoning

34. *Id.*
35. *Id.* at 263.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 263-64.
42. *Id.* at 268-70.
43. *Id.* at 266.
44. *Id.* at 271-73.
45. *Id.* at 276.
46. *Id.* at 271.
47. *Id.* at 270.

the viewpoint-neutrality requirement.[48] The Eleventh, Ninth, and Sixth Circuit continue to recognize the long-standing tradition of viewpoint-neutrality in First Amendment jurisprudence.[49]

II. *FLEMING*: PERMITTING VIEWPOINT-BASED REGULATIONS

A. Facts

After the horrific shootings in 1999, school officials attempted to change the appearance of the high school and to give the students and community a sense of retaking the school.[50] To aid in this process, the librarian and art teacher developed a project in which students could create a piece of art on a 4-inch-by-4-inch ceramic tile that would be glazed, fired, and then placed in a mosaic around the school.[51] The stated purpose for the project was twofold.[52] First, the project was to give students a chance to come back into the school and become more comfortable there.[53] Second, the project was meant to make students feel that they were a part of the reconstruction of their school.[54] The project was eventually expanded to allow other members of the community who were affected by the shootings to participate and paint their own tiles.[55]

School officials created guidelines for this project that prohibited references to the 1999 shootings, to the date of the shootings, initials or names of students, Columbine ribbons, religious symbols, and obscene or offensive material.[56] Eventually, the guidelines were relaxed to allow families of the victims to paint their children's names and initials and the Columbine ribbon; however, references to the date of the shooting, religious symbols, and obscene or offensive materials were still prohibited.[57] The tiles were screened by school officials, and those with prohibited material were not to be hung in the school.[58] The plaintiffs in this case, some family members of those killed, claimed, among other things, that the restrictions of the tile project violated their right to free speech under the First Amendment of the U.S. Constitution.[59]

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48. Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918 (10th Cir. 2002); C.H. *ex rel* Z.H. v. Oliva, 195 F.3d 167 (3d Cir. 1999); Ward v. Hickey, 996 F.2d 448 (1st Cir. 1993).

49. Kincaid v. Gibson, 191 F.3d 719 (6th Cir. 1999); Planned Parenthood of So. Nev. v. Clark County Sch. Dist., 941 F.2d 817 (9th Cir. 1991); Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989).

50. Fleming v. Jefferson County Sch. Dist. No. R-1, 170 F. Supp. 2d 1094, 1099 (D. Colo. 2001).

51. *Id.* at 1098-99.

52. *Id.* at 1099.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 1103.

58. *Id.*

59. *Id.* at 1096.

B. Lower Court Decision

The district court held that the restrictions on the tile project did abridge the plaintiffs' First Amendment rights and issued an injunction ordering the school district to allow the plaintiffs to paint the tiles the way they wished and/or to hang the tiles of the plaintiffs with the references to the date of the shooting and religious symbols.[60] With regard to whether the tile project constituted school-sponsored speech, the district court employed the *Hazelwood* definition of school-sponsored speech as that speech which "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[61] The district court also emphasized other language from *Hazelwood* as an augmentation of the definition: "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] Unlike *Hazelwood*, where the newspaper was part of a classroom activity, in this case the court found no evidence that the "tile project was part of the school curriculum or that it was designed to impart particular knowledge or skills to student participants."[63] Further, the district court found it illogical to advance this argument because many of the tiles were painted not by students, but by members of the community.[64]

The school district argued that in five years students and visitors to the school might believe that the tiles bear the imprimatur of the school, because they would be unaware of the context of the tile project.[65] Recognizing the appropriate test for determining whether speech bears the imprimatur of the school is one of a "reasonable observer familiar with the history and context of the community," the district court rejected this argument and held that because of the volume of media coverage on the shootings and surrounding events, such a reasonable observer would be aware that members of the community were also asked to paint tiles and that the project was not speech endorsed by the school.[66]

Since the court held that the tile project was not school-sponsored speech, *Hazelwood* was not applied.[67] Instead, the court held that the school was a limited public forum.[68] As such, under *Lamb's Chapel v. Center Moriches School District*,[69] the government may not target particular views

60. *Id.* at 1117.
61. *Id.* at 1108 (quoting Hazelwood Sch. Dist. V. Kuhlmeier, 484 U.S. 260, 271 (1988)).
62. *Id.* at 1109 (emphasis omitted) (quoting *Hazelwood*, 484 U.S. at 270-71).
63. *Id.*
64. *Id.*
65. *Id.* at 1110.
66. *Id.*
67. *Id.* at 1108.
68. *Id.* at 1111-12.
69. 508 U.S. 384 (1992).

for restriction.[70] The court found the school district's stated concern about preventing the mosaic from becoming a memorial was not reasonable because of the allowance of other references to the shooting, such as Columbine ribbons and names and initials of victims, and because the school placed other memorials within the school.[71] The district court also rejected the school district's restriction on religious symbols as viewpoint discrimination.[72]

C. Court of Appeals' Decision

The court of appeals reversed the district court's ruling that the tile project's guidelines violated the Free Speech Clause of the First Amendment.[73] Like the district court, the Tenth Circuit Court of Appeals defined school-sponsored speech as those activities "that might reasonably be perceived to bear the imprimatur of the school and that involve pedagogical concerns."[74] However, the court of appeals disagreed with the district court's reading of *Hazelwood* as only applying to activities that were part of the school curriculum.[75] The imprimatur concept, the court opined, was meant to cover speech that is so closely connected to the school that it appears the school is endorsing the speech.[76] Also, the court felt 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."[77] Finding the tile project was just such an activity, coupled with the level of involvement of school officials in the project's organization, funding, and supervision, the court held this conveyed an approval of the messages being displayed and constituted school-sponsored speech.[78] Therefore, the court of appeals held that the tile project was governed by *Hazelwood*.[79]

Finding the reasoning presented by the Third Circuit in *C.H. ex rel Z.H. v. Oliva*[80] for allowing viewpoint-based regulations as persuasive,[81] the court concluded that *Hazelwood* does not require viewpoint-neutrality and that viewpoint-based restrictions are constitutionally allowable, as long as they reasonably relate to legitimate pedagogical concerns.[82] In support, the court of appeals pointed to the fact that *Hazelwood* did not specifically in-

70. *Id.* at 394.
71. *Fleming*, 170 F. Supp. 2d at 1112-13.
72. *Id.* at 1113.
73. Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 934 (10th Cir. 2001).
74. *Id.* at 924.
75. *Id.* (citing *Fleming*, 170 F. Supp. 2d at 1108).
76. *Id.* at 925.
77. *Id.* (citing Di Loreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 968 (9th Cir. 1999)).
78. *Id.* at 930-31.
79. *Id.* at 930-32.
80. 195 F.3d 167 (3d Cir. 1999).
81. *See infra* notes 97-104 and accompanying text (discussing *Oliva*).
82. *Fleming*, 298 F.3d at 928-29.

clude language requiring viewpoint-neutrality and noted that *Hazelwood's* reasoning for allowing more 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." [83] Using the slippery slope argument, the court mentioned that, by mandating viewpoint neutrality, a school could be forced to allow pro-drug speech if it wanted to promote anti-drug speech.[84]

The pedagogical concerns behind the guidelines, identified by the Tenth Circuit, were twofold: (1) to ensure the school remained a positive learning environment and not a memorial to the shootings; and (2) to avoid polarization and disruption that might occur because of religious symbols.[85] Even though names and initials of victims were allowed, the court of appeals felt that maintaining the restriction on the date of the shootings was a reasonable balance between "accommodating the victims' parents and preventing the tile project from becoming a memorial."[86] Rejecting the plaintiffs' argument, the court stated that just because the school allowed references to the shootings in certain areas of the school did not limit school officials' ability to restrict such references from this tile project.[87] The court recognized differences between the school's speech, which, as a general rule, the government's own speech does not grant the public the right to speak on the same topics, and the tile project.[88] The tile project was omnipresent throughout the school, whereas the school's references to the shooting were "isolated plaques" that the school maintained control over to ensure that the tone and presentation of those references were appropriate and not disruptive.[89] The court also held that the restrictions on religious symbols were reasonably related to the two pedagogical concerns, because religious symbols may be a reminder of the shooting itself and/or religious symbols may serve as a point of divisiveness and disruption because of religious controversy.[90] Therefore, all the restrictions were reasonably related to the pedagogical goals and were proper.[91]

D. Other Circuits

The initial court to read *Hazelwood* as abrogating the necessity for a viewpoint-neutrality requirement in nonpublic forums was the First Circuit. In 1993, the court decided *Ward v. Hickey*,[92] interpreting *Hazelwood* as not

83. *Id.* at 928.
84. *Id.*
85. *Id.* at 932.
86. *Id.*
87. *Id.* at 933.
88. *Id.*
89. *Id.*
90. *Id.* Religious symbols and speech implicate the constitutional right to freedom of religious expression and anti-establishment principles that are outside the scope of this Comment.
91. *Id.* at 934.
92. 996 F.2d 448 (1st Cir. 1993).

requiring viewpoint neutrality in school-sponsored speech.[93] However, the court offered no reasons to support this view other than the plain meaning of the text,[94] when in fact the text was silent. In *Ward*, the plaintiff, a biology teacher, claimed she was not rehired by the defendant school board because she led a class discussion on abortion.[95] Despite finding no viewpoint-neutrality necessary, the First Circuit still decided for the school board on other grounds.[96]

In 1999, the Third Circuit followed suit in *C.H. ex rel. Z.H. v. Oliva*.[97] In *Oliva*, a first grade student claimed that his First Amendment rights were violated when his teacher prevented him from giving a presentation of religious materials in his class.[98] The student claimed that, under *Lamb's Chapel*[99] and *Rosenberger v. Rector & Visitors of the University of Virginia*,[100] the school could not prohibit religious viewpoints if it allowed secular viewpoints.[101] However, the court disagreed and distinguished these cases, which the court characterized as schools being forced to "tolerate" speech, from *Hazelwood*, where the speech was school-sponsored.[102] Citing an example of suppressing speech that promotes alcohol use, the court also found that "*Hazelwood* clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical concerns."[103] However, the Third Circuit, sitting en banc, later vacated the opinion and "decline[d] to address the tendered constitutional issue under these circumstances."[104] Therefore, to some degree it remains unclear what the Third Circuit position is regarding whether *Hazelwood* continues the viewpoint-neutrality requirement to school-sponsored speech.

III. *SEARCEY*: REQUIRING VIEWPOINT NEUTRALITY

A. Facts

The Atlanta School Board created a Career Day and Youth Motivation Day program to motivate students to set career and educational goals and to

93. *Id.* at 454.
94. *Id.*
95. *Id.* at 452.
96. *Id.* at 456.
97. 195 F.3d 167 (3d Cir. 1999).
98. *Id.*
99. 508 U.S. 384 (1993) (holding that a school district could not refuse a church group access after school hours to offer parenting classes from a religious viewpoint).
100. 515 U.S. 829 (1995) (holding that prohibiting a religious club from receiving school funding offered to other school organizations violated the First Amendment).
101. *Oliva*, 195 F.3d at 173.
102. *Id.*
103. *Id.* at 172-73.
104. C.H. *ex rel.* Z.H. v. Oliva, 226 F.3d 198, 203 (3d Cir. 2000) (en banc).

inform students of opportunities available to them after graduation.[105] At the outset of the program, there were no set guidelines or regulations.[106] It was left up to individual principals to run the program at their respective schools.[107] The only constant at every school was that no restrictions were placed on content of speeches or discussions.[108]

In February 1983, the Atlanta Peace Alliance ("APA") sought permission from the superintendent and principals to place literature in guidance offices and to appear at Career Days.[109] At first, the superintendent accepted, but after publicity on the issue, the Atlanta School Board directed the superintendent to deny APA's request to appear at Career Day and to develop uniform regulations concerning this program.[110] The regulations that were adopted included requirements that participants have direct knowledge of a field and have a present affiliation or authority with that field.[111] Also, the regulations prohibited participants from "criticizing or denigrating" the other participants' fields and totally banned participants "whose primary focus or emphasis is to discourage a student's participation in a particular career field."[112] The APA brought a lawsuit alleging that the denial of its request to participate in the Career Day activity was a violation of its members' First Amendment rights.[113]

B. Analysis

The school board argued that they were allowed to make viewpoint-based decisions under *Hazelwood*.[114] In rejecting this argument, the Eleventh Circuit stated that *Hazelwood* involved a content-based, rather than viewpoint-based decision, and that *Hazelwood* did not offer "any justification for allowing educators to discriminate based on viewpoint."[115] In addition, the court interpreted *Hazelwood* as not changing the standard for nonpublic forums established in *Cornelius v. NAACP Legal Defense and Educational Fund*,[116] rather it simply provided a "context in which the reasonableness of regulations should be considered."[117] In other words, the court held that *Hazelwood* only addressed the reasonableness prong of the public forum doctrine but in no way abrogated the viewpoint-neutrality requirement. Because this prohibition against viewpoint discrimination is a long-

105. Searcey v. Harris, 888 F.2d 1314, 1316 (11th Cir. 1989).
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 1317.
112. *Id.*
113. *Id.* at 1316.
114. *Id.* at 1324-25 (quoting Atlanta School Board administrative regulations).
115. *Id.* at 1325.
116. 473 U.S. 788, 811 (1985) (finding that restrictions of access to a nonpublic forum must be reasonable and viewpoint neutral).
117. *Searcey*, 888 F.2d at 1319.

held rubric of the First Amendment, the court stated that "[w]ithout more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral."[118] Presumably, "explicit direction" could come only from Supreme Court precedent.

The court first recognized Career Day as a nonpublic forum; therefore, restriction "must be reasonable in light of the purposes of the forum."[119] The court underwent a restriction-by-restriction analysis of the new restrictions to determine whether each passed this standard.[120] Regarding the direct knowledge requirement, the court found the requirement of present affiliation to be unreasonable because it did not reasonably relate to the success of Career Day, and because it might exclude presenters who were retired from a profession and professional career counselors, who had provided valuable information in previous Career Days.[121] With respect to the no criticism requirement, the court held that restrictions on groups whose sole purpose is to discourage students from a particular career field was reasonable because it detracted from the motivational purpose of the forum. Total banning of groups, however, was unreasonable because providing valid information regarding disadvantages to certain fields is appropriate.[122] The court also noted that the need to be informed of both the positives and negatives is especially important in a military career because "a soldier cannot quit."[123]

In rejecting the school board's argument that *Hazelwood* does not prohibit viewpoint discrimination, the court interpreted *Hazelwood* as allowing school officials to discriminate based on content but not viewpoint.[124] Citing *Perry Education Ass'n v. Perry Local Educators' Ass'n* and *Cornelius*, the court stated that "[t]he prohibition against viewpoint discrimination is firmly embedded in first amendment analysis."[125]

C. Other Circuits

The Ninth Circuit also included a viewpoint neutrality requirement in school-sponsored speech in *Planned Parenthood of Southern Nevada v. Clark County School District*.[126] In that case, the Ninth Circuit upheld a school's refusal to allow Planned Parenthood advertisements in the newspaper, yearbook, and athletic programs because the action was not viewpoint discrimination.[127] The Ninth Circuit held that the school's actions must be reasonable under *Hazelwood* and viewpoint-neutral under *Cornelius*.[128]

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118. *Id.* at 1325.
119. *Id.* at 1320.
120. *Id.* at 1320-25.
121. *Id.* at 1321.
122. *Id.* at 1322.
123. *Id.* at 1323.
124. *Id.* at 1324.
125. *Id.* at 1325.
126. 941 F.2d 817 (9th Cir. 1991).
127. *Id.* at 830.
128. *Id.* at 829.

However, the court held that the school's position was viewpoint-neutral because the district excluded any discussion of birth control products and information.[129] Although the Ninth Circuit has not overruled this holding, a more recent panel of the circuit criticized the holding of *Planned Parenthood*.[130]

The Sixth Circuit Court of Appeals joined the Eleventh and Ninth Circuits in *Kincaid v. Gibson*.[131] In that case, students at Kentucky State University made a First Amendment challenge to a school official's decision not to distribute *The Thorobred*, the school yearbook, because she did not approve of the theme, the use of pictures of political figures, and the cover because it was not school colors.[132] The Sixth Circuit declared that *Hazelwood* required viewpoint-neutrality but that the yearbook failed to accomplish its intended purpose; therefore, the refusal to distribute did not violate the First Amendment.[133]

IV. VIEWPOINT-NEUTRALITY SHOULD BE REQUIRED IN THE REGULATION OF SCHOOL-SPONSORED SPEECH

A. Hazelwood *Does Not Abandon the Traditional Viewpoint-Neutrality Requirements*

Those advocating the First, Third, and Tenth Circuit's analysis of *Hazelwood* have argued that if the *Hazelwood* majority had intended to impose the traditional nonpublic forum analysis, then "the principal's actions would have been analyzed for evidence of viewpoint-neutrality instead of simply for reasonableness."[134] These critics of viewpoint-neutrality argue that, because *Hazelwood* failed to perform the viewpoint evaluation, the Court must have meant to create a new category of forum: the public school nonpublic forum.[135] In this category of forum, speech may be regulated as long as the regulation is reasonably related to pedagogical concerns.[136] However, this analysis ignores the Eleventh Circuit's argument that *Hazelwood* allows regulation based on content and not on viewpoint.[137] The fact that *Hazelwood* was silent does not automatically lead to a conclusion that the Court created a new category of public forum that does not require viewpoint-neutrality. It can be easily concluded that *Hazelwood* simply

129. *Id.*

130. Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1010-11 (9th Cir. 2000).

131. 191 F.3d 719 (6th Cir. 1999), *vacated and reheard*, 236 F.3d 342 (6th Cir. 2000) (characterizing, on rehearing, college newspapers as limited public forums but not questioning the panel's characterization and treatment of *Hazelwood*).

132. *Id.* at 723.

133. *Id.* at 726-29.

134. *See* Annest, *supra* note 15, at 1248.

135. *Id.*; *see also* Brian S. Black, *The Public School: Beyond the Fringes of Public Forum Analysis?*, 36 VILL. L. REV. 831, 850 (1991).

136. Annest, *supra* note 15, at 1249.

137. Searcey v. Harris, 888 F.2d 1314, 1324-25 (11th Cir. 1989).

meant to provide guidance on how to review the reasonableness prong of the nonpublic forum standard, while not abrogating the other prong of viewpoint-neutrality.[138] Given 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. It seems unlikely that the Supreme Court would "drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views" without clearly indicating that was the Court's intent.[139]

It has been suggested that requiring viewpoint-neutrality of school officials would be impossible because they make daily decisions, such as curriculum and textbook choices, that necessarily require viewpoint-based determinations.[140] However, there is a distinction that may be made between curriculum and textbook choices, which involve the right to receive information, and the ability to silence a viewpoint, which directly implicates the First Amendment.[141]

B. Allowing Viewpoint Discrimination in School-Sponsored Speech Will Likely Create a Slippery Slope Eroding the First Amendment

It has been argued that the *Hazelwood* standard of only reasonableness provides sufficient protection of students' First Amendment rights from schools allowed to discriminate based on viewpoint.[142] These proponents argue that the "reasonably related to legitimate pedagogical concerns" standard is sufficient.[143] Unfortunately, this is not true. In fact, *Hazelwood* alone has had unfortunate consequences. One commentator has stated that the *Hazelwood* decision has "resulted in a tyranny by school administrators" that has turned once "bold and enterprising student publications" into nothing more than public relations materials for school officials.[144] With more courts of appeals not requiring viewpoint-neutrality in regulation of all incarnations of school-sponsored speech, the consequences may soon go beyond just turning student publications into propaganda machines to stifling all individual thought and expression from students in any school activities.

The standard itself creates a great risk of subversion of minority views through its unclear use of what constitutes "legitimate pedagogical con-

138. *Id.* at 1319.

139. *Id.* at 1319 n.7.

140. Annest, *supra* note 15, at 1256; David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 497 (1981).

141. *See* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866-68 (1982).

142. *See* Annest, *supra* note 15, at 1256-58.

143. *Id.* at 1257 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).

144. Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the "College* Hazelwood*" Case*, 68 TENN. L. REV. 481, 483 (2001).

cerns" and the unclear line between individual and school-sponsored speech.[145] What, if any, is the limit on these pedagogical goals? Is a legitimate pedagogical goal to prevent open, lively discussions on topics that administrators alone classify as disruptive? Essentially, this standard leaves student expression completely at the mercy of school officials.[146]

What exactly constitutes school-sponsored speech is almost equally as unclear. The definition provided in *Hazelwood* seems simple enough—"expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school"—but the application leads to a murky picture.[147] In *Hazelwood* itself, the Court chose to ignore the fact that the paper had a disclaimer that indicated it was student-written and stated that the publication "accept[ed] all rights implied by the First Amendment."[148] Instead, the Court focused on the fact that it was part of a classroom activity.[149] However, as Justice Brennan stated in his dissent, the curricular purpose of the student newspaper is "in no way further[ed] . . . unless one believes that the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors."[150] Also, it is easy to conceive that the definition might extend to cover a student's individual speech in a classroom discussion because, after all, it is a part of regular classroom activity. If this occurs, schools will become thought police, and teachers "could transform students into 'closed-circuit recipients of only that which the State chooses to communicate.'"[151]

The interpretation that *Hazelwood* eliminates viewpoint-neutrality may also lead to a chipping away of First Amendment protection in other areas. This standard may begin to affect what teachers choose to say and teach in the classroom. It may also affect what books are available in school libraries. Despite *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,[152] which held that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books," it seems likely that these books could bear the

145. Helene Bryks, *A Lesson in School Censorship:* Hazelwood v. Kuhlmeier, 55 BROOK. L. REV. 291, 325 (1989) (discusses "the amorphous penumbra of 'legitimate pedagogical concern'"); Shari Golub, Tinker *to* Fraser *to* Hazelwood—*Supreme Court's Double Play Combination Defeats High School Students' Rally for First Amendment Rights:* Hazelwood School Dist. v. Kuhlmeier, 38 DEPAUL L. REV. 487, 513 (1989) (calling the "legitimate pedagogical concern" standard "vague and broad").

146. Renée E. Rothauge, *Seen But Not Heard: In What Forum May High School Students Exercise First Amendment Rights After* Hazelwood*?*, 25 WILLAMETTE L. REV. 197, 218 (1989) (characterizing students' rights of expression under *Hazelwood* as "subject to the parochial whims of district school boards"); Jeffrey D. Smith, *High School Newspapers and the Public Forum Doctrine:* Hazelwood School District v. Kuhlmeier, 74 VA. L. REV. 843, 861 (1988) (stating the "sweeping language [of *Hazelwood*] has placed students at the mercy of school officials").

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

148. *Id.* at 269.

149. *Id.* at 268-69.

150. *Id.* at 284 (Brennan, J., dissenting).

151. *Id.* at 286 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)).

152. 457 U.S. 853 (1982).

imprimatur of the school and be excluded under the reasoning of *Fleming*.[153] Also, other forums, such as theaters and museums, which are there for educational purposes, could arguably fall under this standard as well.

CONCLUSION

Despite always invalidating every law that the Supreme Court has characterized as viewpoint-based,[154] in announcing its "reasonableness" standard for regulation of school-sponsored speech in *Hazelwood*, the Court somewhat mysteriously failed to undergo the viewpoint-neutrality analysis, which is necessary in nonpublic forum analysis. The Court was completely silent on the matter, which has created a division of thought amongst scholars and federal courts. The text of *Hazelwood* does not specifically abrogate the requirement. Therefore, the Eleventh Circuit's argument that the Court was simply assuming it was a content, not viewpoint, based regulation, or that it simply provided a context for the reasonableness prong, while still maintaining the viewpoint prong, are completely plausible and arguably correct. In joining with the circuits that do not require viewpoint-neutrality, the Tenth Circuit left its school-age citizens in a dangerous position where their First Amendment rights may be subjugated by school officials. This risky proposition of eroding a protection as well-established and developed as protection of private speech on government property should not be undertaken lightly and, at the very least, should only take place by direction from the Supreme Court.[155]

The crux of this entire Comment and its concerns of the eroding of the First Amendment by the Tenth Circuit's decision in *Fleming* is perhaps best summarized in a statement made by Justice Brennan: "Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'"[156]

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153. *Id.* at 872.

154. Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 56 (2000).

155. Although there is a clear split between the circuits, the Supreme Court denied certiorari in *Fleming v. Jefferson County School District R-1*, 537 U.S. 1110 (2003).

156. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting).