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FROM T-SHIRTS TO TEACHING: MAY PUBLIC SCHOOLS CONSTITUTIONALLY REGULATE ANTIHOMOSEXUAL SPEECH?

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In applying the First Amendment in the public school context, courts are faced with the challenge of balancing the constitutional rights of students against the discretion of schools to control speech and conduct on school grounds. This Note focuses on the specific issue of public schools regulating antihomosexual speech. Evaluating the First Amendment rights of students expressing antihomosexual sentiment through private and school-sponsored mediums, this Note ultimately argues for a comprehensive standard permitting schools to regulate both private and school-sponsored student speech.

INTRODUCTION

Bright-colored signs on poster board bounced up and down as students marched in front of Sacramento’s Mira Loma High School in April 2006.1 Divided by much more than the slab of pavement physically separating them, students clad in self-made T-shirts chanted at one another from across the street.2 Antihomosexual slogans such as “Homosexuality is sin!” and “The Bible says Adam and Eve, not Adam and Steve” were met with calls to “Stop the Hate!” and chants of “Gay is Okay!”3 The students were demonstrating their support and opposition to the Gay-Straight Alliance’s Day of Silence and the recent suspension of students for wearing antigay T-

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3. Stand Up and Speak Out, supra note 1.
This scene has become increasingly frequent as the controversy over antihomosexual speech in public schools continues to spark political, legal, religious, and social debate across the country. Responding to this national controversy, courts have addressed the conflict between a student’s First Amendment free speech right and the power of schools to limit antihomosexual speech. The courts are divided as to how the speech should be classified, what standard should apply, and what level of protection should be afforded homosexual students in public high schools. The courts’ divergent opinions have left school authorities without a clear understanding of when they may permissibly limit antihomosexual speech on school grounds.

Litigation involving school-imposed limitations on antihomosexual speech has centered on two distinct scenarios. The first involves the expression of antihomosexual speech through school-sponsored mediums. In Hazelwood School District v. Kuhlmeier, the U.S. Supreme Court defined school-sponsored speech as “expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” Under Hazelwood, schools may limit school-sponsored speech “so long as their actions are reasonably related to legitimate pedagogical concerns.” The Hazelwood Court, however, did not explicitly resolve whether schools must remain viewpoint neutral when limiting school-sponsored speech. Division over this viewpoint neutrality requirement has caused courts to disagree over whether schools may permissibly limit antihomosexual school-sponsored speech based on the viewpoint it expresses.

The second scenario involves an individual student’s expression of antihomosexual sentiment on school grounds. The speech rights of students in public schools are governed by Tinker v. Des Moines Independent Community School District. Under Tinker, schools may limit student speech only when that speech threatens to “substantially interfere with the work of the school or impinge upon the rights of other students.” Whether a student’s rights are impinged upon by degrading hate speech has yet to be decided by the Supreme Court. Consequently, courts across the circuits are divided over whether schools may limit antihomosexual student speech in the interest of protecting the rights of other students.

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6. Id. at 271.
7. Id. at 273.
8. See infra Part II.A.
9. See infra Part II.A.
11. Id. at 509.
12. See infra Part II.B.
This Note posits a standard supporting a school’s right to limit antihomosexual speech in both of these scenarios. Part I examines traditional First Amendment doctrine. It discusses the Court’s historic protection of a broad free speech principle and resultant disfavor for government regulation of private speech. Part I then examines the major exceptions to this highly protective First Amendment standard by examining the few instances in which the government may regulate speech based on its subject matter and viewpoint. Part I then discusses the manner in which these traditional First Amendment doctrines have been adapted and reformulated in the public school context.

Part II focuses on the divisive issue of how First Amendment doctrine has been applied to antihomosexual speech in public schools. It examines conflicting lower court decisions addressing when public schools may limit school-sponsored and student antihomosexual speech.

Part III resolves the division among the courts by addressing the question of viewpoint neutrality under *Hazelwood* and the question of hate speech under *Tinker*. This resolution entails a careful application of First Amendment case law that is consistent with, and sensitive to, the historic function of schools in American society. Ultimately, this Note advocates for a cohesive standard permitting schools to limit antihomosexual school-sponsored and student speech.

I. TRADITIONAL FIRST AMENDMENT PROTECTIONS AND LIMITATIONS

Part I discusses the breadth and limitations of the First Amendment both within and outside of the school context. Part I.A examines the Court’s traditional deference to the First Amendment and its commitment to an American ideal of free speech that protects an individual’s right to express herself, regardless of how offensive her sentiments might be. Part I.B then discusses four major instances in which the government is exempt from this broad First Amendment protection of private expression, and is able to impose content-based restrictions on speech. Three of these exceptions—speech in a public forum, obscene speech, and fighting words—are pure content-based exceptions that allow the government to consider the subject matter of the speech when imposing regulations. The fourth exception, government speech, permits the government to move beyond considerations of subject matter and discriminate on the basis of viewpoint when directly articulating, or subsidizing, a government message. Finally, Part I.C examines the manner in which the courts have interpreted and reformulated these historic First Amendment principles in the public school context.

A. Government Regulation of Private Speech

Despite the First Amendment’s protection of freedom of speech, the government may impose reasonable time, manner, and place restrictions on
private speech that are content neutral and serve a significant government interest.\textsuperscript{13} Content-based restrictions that prohibit speech based on the subject matter expressed, and their most controversial incarnation, viewpoint-based restrictions, however, have largely been deemed unconstitutional.\textsuperscript{14} This section outlines the Court's traditional disfavor for government imposition of these content-based limitations on private speech.

Historically, the Court's disapproval of viewpoint and content-based restrictions on private speech has been consistent, even when the speech sought to be expressed is offensive to the public.\textsuperscript{15} Indeed, the Court has noted, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."\textsuperscript{16} The Court has endorsed this broad First Amendment protection of offensive speech with full recognition of the "verbal tumult [and] discord" that such a policy might incur.\textsuperscript{17}

\textbf{B. Exceptions to the First Amendment's Protection of Free Speech}

Despite the Court's traditional disfavor for content- and viewpoint-based limitations on private speech, a number of exceptions have arisen. Part I.B.1 examines the government's license to impose content-based limitations on (1) speech uttered in a nonpublic forum, (2) obscene speech, and (3) speech that constitutes fighting words. Further, Part I.B.2 discusses the limited manner in which the government may impose viewpoint-based limitations on speech.

\textbf{1. Permissible Government Imposition of Content-Based Regulations}

\textit{a. Nonpublic Forums}

Three types of government owned forums exist: (1) traditional public forums such as streets and parks, (2) designated public forums "opened for


\textsuperscript{15} See Texas v. Johnson, 491 U.S. 397, 414 (1989) (noting twenty years of U.S. Supreme Court cases upholding an individual's First Amendment right to express "offensive" and "disagreeable" ideas freely); Cohen v. California, 403 U.S. 15, 16, 24--26 (1971) (upholding the First Amendment right of an individual to walk down a courthouse hallway wearing a jacket with the plainly visible expression "Fuck the Draft" inscribed on it); Catherine J. Ross, Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech, 53 Vand. L. Rev. 427, 481--82 (2000).

\textsuperscript{16} Johnson, 491 U.S. at 414 (citations omitted); Ross, supra note 15, at 481--82 (discussing Johnson).

\textsuperscript{17} Cohen, 403 U.S. at 24--25; see also Ely, supra note 14, at 114 ("[The majority in Cohen] was wise enough to recognize . . . that what seems offensive to me may not seem offensive to you, and indeed that much valuable free speech . . . very likely was of a sort that many would have found offensive.").
use by the public as a place for expressive activity,” and (3) nonpublic forums. The latitude that the government may exercise in limiting the content and source of discourse within these forums varies according to the nature of the forum. Within traditional public forums and designated speech forums, the government may impose content-neutral time, place, and manner restrictions, provided that those regulations are narrowly drawn to achieve a compelling government interest and leave open alternate channels of communication. Content-based restrictions on speech in traditional public forums and designated speech forums are presumptively invalid, but may be permitted in rare circumstances where the government can show that the regulation is “necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”

All remaining government property falls into the category of nonpublic forums. The government may exclude speakers and topics from a nonpublic forum provided that such restrictions are reasonable in light of the forum’s purpose and are viewpoint neutral. The government may discriminate on the basis of content to preserve the purpose of a nonpublic forum, but it may not discriminate against speech that would otherwise fall within the limits of the forum’s purpose based on the view that it expresses. Thus, a school could permit organizations intending to discuss

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19. Steven H. Shiffrin & Jesse H. Choper, The First Amendment: Cases, Comments, Questions 426 (2d ed. 1996) (noting that “[p]ublic forum doctrine recognizes that government is obligated to permit some of its property to be used for communicative purposes without content discrimination, but public forum doctrine also allows other government property to be restricted to some speakers or for talk about selected subjects”); David S. Day, The End of the Public Forum Doctrine, 78 Iowa L. Rev. 143, 161 (1992) (noting that the Perry Court “declared that the level of judicial scrutiny would be determined by the category of the forum”).

20. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); see supra notes 13–14 and accompanying text. The Ward Court noted,

"Even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”


22. See Int’l Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S 672, 678–79 (1992); Buchanan, supra note 18, at 950 (“[A] nonpublic forum is simply a governmentally controlled forum that is not a ‘traditional public forum’ or ‘a public forum created by government designation . . . .’”).


educational issues to use a school facility at the exclusion of groups wishing to discuss noneducational issues, but it could not exclude a group wishing to discuss religion while permitting other noneducation-focused groups to utilize the school premises. Collectively, these components essentially boil down to a reasonableness test that, historically, has not been very difficult to meet.

b. Obscene Speech

Outside of nonpublic forums, there are a few narrow exceptions that permit the government to issue content-based limitations on private speech. Obscene speech, for example, has been relegated by the Court to a category of low-value speech producing little social benefit and thus deserving of little constitutional protection. Accordingly, obscene speech is not constitutionally protected and is subject to government regulation.

In defining the parameters of the “obscene speech” category, modern courts typically adhere to the guidelines set out in Miller v. California, which permitted the regulation of speech that, “taken as a whole, appeal[s] to the prurient interest in sex, . . . portray[s] sexual conduct in a patently offensive way, and . . . do[es] not have serious literary, artistic, political, or scientific value.” While this standard necessarily demands an examination of content, it is divorced from considerations of viewpoint.


27. See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 n.12 (1973) (citing Roth v. United States, 354 U.S. 476, 485 (1957)); see also Roth, 354 U.S. at 485 (“It has been well observed that [obscene] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . . .” (emphasis omitted) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942))); Steven G. Gey, The Apologetics of Suppression: The Regulation of Pornography as Act and Idea, 86 Mich. L. Rev. 1564, 1570–71 (1988).

28. Roth, 354 U.S. at 485 (noting that “obscenity is not within the area of constitutionally protected speech or press”); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 195 (1983) (describing obscene speech as “perhaps the least protected class of low value expression”).


Thus, the government may regulate movie theaters showing sexually oriented material on the basis of a film’s content but may not regulate theaters showing sexually oriented material with a communist message on the basis of a film’s political viewpoint.32


c. Fighting Words

Like obscene speech and nonpublic forums, “fighting words” are exempted from broad free speech protection. The Court has removed fighting words from the cover of the First Amendment because “by their very utterance [they] inflict injury [and] tend to incite an immediate breach of the peace.”33 Fighting words are those words that are likely to provoke a violent reaction when addressed to the average citizen.34 The courts have significantly narrowed the fighting words doctrine over the years,35 and it currently appears to apply only in circumstances where the speech constitutes a direct and personal insult to an individual.36 Though an evaluation of fighting words necessarily entails an examination of their content, “[t]he government may not regulate [their] use based on hostility—or favoritism—towards the underlying message expressed.”37

It is debatable whether the courts should expand the definition of fighting words to include hate speech. Hate speech, though not yet explicitly defined by the courts, is generally conceived of as hostile and offensive speech that targets an individual based on his or her race, religion, sexual orientation, or gender.38 Proponents of hate speech bans contend that hate

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32. Cf. Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 69–70 (1976). In Young, the Supreme Court noted,

[A] line may be drawn on the basis of content without violating the government’s paramount obligation of neutrality in its regulation of protected communication. For the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same.

Id. at 70.

33. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). In Chaplinsky, the Court upheld a statute that had the purpose of “preserv[ing] the public peace . . . [by forbidding such words that] have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed.” Id. at 573 (citations omitted). Walter Chaplinsky was convicted of violating the statute by telling a city marshal that the marshal was “a God damned racketeer” and “a damned Fascist.” Id. at 569.


speech, like fighting words, inflicts harm by its very utterance and thus should not be protected by the First Amendment.  

Professor Charles R. Lawrence grounds this argument in the First Amendment, arguing that hate speech, like fighting words, should not be protected because it undermines the First Amendment’s purpose to “foster the greatest amount of speech” by muting the voices of its victims. Lawrence personifies this point with a personal anecdote from one of his students who, in response to being called a “faggot,” “found himself in a state of semi-shock,” unable to muster up a response, conscious of the fact that any verbal expression would have been “inadequate to counter the hundreds of years of societal defamation that one word—‘faggot’—carried with it.” Thus, Lawrence asserts that hate speech, as an instrument of speech suppression, conflicts with the First Amendment’s promotion of speech and should not be protected.

Taking a somewhat more radical approach, Professor Thane Rosenbaum justifies hate speech prohibitions by deconstructing the traditional American idealization of a marketplace of ideas and suggesting that more speech is not always best. Rosenbaum criticizes the First Amendment’s premium on free speech at the cost of psychic harm, and argues in favor of a legal framework that recognizes the injurious and threatening nature of spiritually violent speech. Rosenbaum envisions a system where spiritual violence is removed from the cover of the First Amendment and treated in as legally actionable a manner as its physical manifestation.

Despite the contentsions of these scholars, the courts have yet to adopt a conception of the fighting words doctrine that specifically removes hate

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American Controversy 8 (1994)); Frederick Schauer, Uncoupling Free Speech, 92 Colum. L. Rev. 1321, 1349 (1992); Strossen, supra note 35, at 488; Ronald Turner, Hate Speech and the First Amendment: The Supreme Court’s R.A.V. Decision, 61 Tenn. L. Rev. 197, 226 (1993) (“Hate speech is more than intolerance; it is direct and open hostility and the manifestation of racism, sexism, and other ‘isms.’” (citation omitted)).

39. See Steven L. Winter, Re-Embodying Law, 58 Mercer L. Rev. 869, 892 (2006) (“In legal debate, [the] conventional metaphorical notion of speech as action is manifested in the arguments that hate speech is a matter of words that wound or the Chaplinsky notion that ‘fighting words’ are words which by their very utterance inflict injury.”).

40. Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431, 452 (“Assaultive racist speech functions as a preemptive strike. The racial invective is experienced as a blow, not a proffered idea, and once the blow is struck, it is unlikely that dialogue will follow.”); see Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim’s Story, 87 Mich. L. Rev. 2320, 2337 (1989) (“In order to avoid receiving hate messages, victims have had to . . . curtail their own exercise of speech rights . . . .”).

41. Lawrence, supra note 40, at 455.
42. Id.

44. See id. at 276–77. Professor Thane Rosenbaum describes spiritual violence as consisting of intangible “harm that exist below the radar of physical measurement,” such as “humiliation, indignity, [and] basic neglect.” Id. at 34.
45. Id. at 275–80.
speech from the protection of the First Amendment. The courts have rejected hate speech codes for two principal reasons. First, ordinances 
criminalizing speech that offends, victimizes, or stigmatizes an individual 
based on his or her race, religion, gender, or sexual orientation are 
unconstitutionally overbroad.\footnote{46} Such a regulation impermissibly "sweeps 
within its ambit a substantial amount of protected speech along with that 
which it may legitimately regulate."\footnote{47} Thus, an ordinance permissibly 
prohibiting fighting words may not sweep with it an individual's right to 
utter speech that causes "hurt feelings, offense, \[and\] resentment."\footnote{48} 

Even if, however, a hate speech ordinance were drafted so as to only 
prohibit racist, sexist, or homophobic speech that otherwise qualified as 
fighting words, it would nevertheless be unconstitutional. The Court has 
found that the government's power to permissibly regulate fighting words 
does not encompass a power to selectively regulate subsets of the fighting 
words category.\footnote{49} Selective regulations impermissibly "impose special 
prohibitions on those speakers who express views on disfavored 
subjects."\footnote{50} Thus, a policy prohibiting fighting words based on "race, 
color, creed, religion, or gender" to the exclusion of other subjects, such as 
union membership, may be held unconstitutional.\footnote{51}

2. Permissible Government Imposition of Viewpoint-
Based Limitations on Speech

The Supreme Court carefully articulated the bounds of government 
speech in \textit{Rosenberger v. Rector and Visitors of the University of Virginia}\footnote{52} 
when it distinguished between direct government speech, government-

Byron White's concurring opinion in \textit{R.A.V}. that classified such speech ordinances as 
overbroad was joined by Justices Harry Blackmun, Sandra Day O'Connor, and John Paul 
Stevens. \textit{R.A.V.}, 505 U.S. at 397.}

\footnote{47. \textit{Univ. of Mich.}, 721 F. Supp. at 864 (citations omitted).}

\footnote{48. \textit{R.A.V.}, 505 U.S. at 414 (White, J., concurring); see \textit{Univ. of Mich.}, 721 F. Supp. at 
864. In \textit{University of Michigan}, the U.S. District Court for the Eastern District of Michigan 
struck down a university policy that permitted the discipline of any person engaging in 
"behavior, verbal or physical, that stigmatize[d] or victimize[d] an individual on the basis of 
race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital 
status, handicap or Vietnam-era veteran status" by way of "an express or implied threat to an 
individual's academic efforts." \textit{Univ. of Mich.}, 721 F. Supp. at 856. The court noted that the 
"Supreme Court has consistently held that statutes punishing speech or conduct solely on the 
grounds that they are unseemly or offensive are unconstitutionally overbroad." \textit{Id}. at 864.}

\footnote{49. \textit{R.A.V.}, 505 U.S. at 384–85 ("[T]he government may proscribe libel; but it may not 
make the further content discrimination of proscribing only libel critical of the 
government.")}

\footnote{50. \textit{Id}. at 391 (citations omitted); see also \textit{Univ. of Mich.}, 721 F. Supp. at 863 (noting 
that antidiscrimination policies cannot prohibit certain speech because of disagreement with 
the ideas or messages conveyed); Turner, \textit{supra} note 38, at 210–14 (discussing the majority 
opinion in \textit{R.A.V}).}

\footnote{51. \textit{R.A.V.}, 505 U.S. at 391.}

\footnote{52. 515 U.S. 819 (1995).}
subsidized speech aimed at articulating a government message, and government-subsidized speech aimed at facilitating a diversity of viewpoints. The Court determined that, when the government directly funds a policy or subsidizes private entities to convey a government message, "it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." Conversely, when the government "expends funds to encourage a diversity of views," viewpoint restrictions are improper. Thus, the government may not impose viewpoint restrictions on speech when its stated aim is to encourage a diversity of opinions, but it may impose viewpoint restrictions when it is directly articulating its own message or subsidizing others to do so.

The Rosenberger opinion is clear that limitations on direct government speech need not be viewpoint neutral. However, it creates a somewhat gray area in the realm of government-subsidized speech, raising the question of what distinguishes government-subsidized speech offered for public discourse from government-subsidized speech offered for a government purpose. Professor Robert C. Post suggests that the Rosenberger decision is most easily understood in a framework of "managerial domains." "Within managerial domains, the state organizes its resources so as to achieve specified ends," and, unlike in domains of public discourse, is permitted to impose viewpoint discriminatory limitations on speech. "Thus the state can regulate speech within public educational institutions so as to achieve the purposes of education; . . . it can regulate speech within the military so as to preserve the national defense; . . . and so forth."

C. The Public School Context

Part I.A and Part I.B laid out traditional First Amendment doctrine. This section examines the Court's interpretation and reformulation of First Amendment principles in the public school context. Part I.C.1 explores the contours of First Amendment protection of private student speech in public
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schools under Tinker. Part I.C.2 discusses curricular speech and the broad manner in which schools may regulate such speech under the First Amendment. Finally, Part I.C.3 looks at the somewhat elusive category of school-sponsored speech under Hazelwood and the extent of its First Amendment protections. All of the speech standards discussed in this section differ from those outside of the school context. Indeed, the Supreme Court has continually noted that “the First Amendment rights of students in the public schools ‘are not automatically coextensive with the rights of adults in other settings,’”60 and must be “applied in light of the special characteristics of the school environment.”61

1. Private Speech in Public Schools

In Tinker, a school suspended a group of students for wearing armbands62 in protest of the Vietnam War.63 The Supreme Court strongly criticized the school’s attempted suppression of student expression, noting that “state-operated schools may not be enclaves of totalitarianism.”64 Accordingly, the Court found that, absent a showing that the speech would cause a substantial disruption or impinge upon the rights of other students, limitations on student speech in schools are prohibited.65

2. Curricular Speech in Public Schools

When speaking for itself, a school’s speech is characterized as government speech, and thus the school enjoys broad discretion in choosing what views and messages to express.66 In Board of Education v. Pico,67 the Supreme Court noted that schools have “absolute discretion” in choosing curriculum.68 The Court found this discretion necessary to enable schools

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62. Though the armbands did not contain any words, the Court classified the wearing of the armbands as symbolic speech, which is protected by the First Amendment. Id. at 505–06.
63. Id. at 504; see Susan H. Bitensky, A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the Public Schools, 70 Notre Dame L. Rev. 769, 806 (1995).
64. Tinker, 393 U.S. at 511.
65. Id. at 509, 512–13; see Bitensky, supra note 63, at 806–07.
66. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995) (“When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.”); see supra notes 52–59 and accompanying text.
68. Id. at 869. Though the majority limited the school’s discretion in choosing what books to place in the library, the Court explicitly reaffirmed the broad discretion of school boards making choices involving curriculum. See Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1015 (9th Cir. 2000) (“In Pico, the court made clear at the outset that the respondents in that case did not seek ‘to impose limitations upon the school Board’s discretion to prescribe the curricula of the Island Trees schools.’”) (quoting Pico, 457 U.S. at
to discharge their duty of inculcating community values in the student body. Chief Justice Warren E. Burger noted,

If... schools may legitimately be used as vehicles for “inculcating fundamental values necessary to the maintenance of a democratic political system,” school authorities must have broad discretion to fulfill that obligation. How are “fundamental values” to be inculcated except by having school boards make content-based decisions...

The Pico Court’s characterization of educational institutions as sites of values inculcation has deep roots within American history. Professor David A. Diamond notes that “[v]alue inculcation, rather than value neutrality, has been the tradition of public education since the beginning of the American republic.” The responsibility of public educational institutions to inculcate values in its students dates back to the English common law doctrine of in loco parentis. The doctrine essentially transfers a portion of the powers and responsibilities of parents to schools. The Supreme Court, though acknowledging that modern schools derive their power from the State and not just from parents, has continually reinforced the “custodial and tutelary” duties of schools acting in loco parentis.


Pico, 457 U.S. at 864 (“We are therefore in full agreement with petitioners that local school boards must be permitted ‘to establish and apply their curriculum in such a way as to transmit community values,’ and that ‘there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.’” (quoting Petitioners’ Brief at 10, Pico, 457 U.S. 893 (No. 80-2043)); see Bitensky, supra note 63, at 806.


Pico, 457 U.S. at 889 (Burger, J., dissenting) (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979)). Though the opinion cited is a dissent, both the majority and the dissent agreed on the broad discretion enjoyed by schools making curriculum choices. See supra notes 68–69 and accompanying text.


New Jersey v. T.L.O, 469 U.S. 325, 336–37 (1985) (noting that “school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents’ immunity from the strictures of the Fourth Amendment”).

The in loco parentis view of educational institutions was affirmed in *Bethel School District No. 403 v. Fraser*, when the Court determined that public schools, acting in their role as values inculcator, may limit "the use of vulgar and offensive terms in public discourse." The Court reasoned that schools are properly entrusted with the duty to determine the bounds of appropriate speech in the classroom and school assembly hall. Ultimately, the Court concluded that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech... would undermine the school's basic educational mission."

The authority of schools to discriminate on the basis of viewpoint when designing a curriculum is not only grounded in judicial precedent and educational history, it is further demanded by the current realities of the American educational system. Professors Martin H. Redish and Kevin Finnerty speculate on the havoc within the educational system that would ensue were viewpoint neutrality requirements imposed on a school's choice of curriculum. They note the insufficient time enjoyed by public schools within the school year to teach all sides to every issue, even those that the school deems invalid, and the confusion that might result if students were exposed to such "an indiscriminate form of information transmission."

Scholarship evaluating what happens to the discretion enjoyed by public schools speaking for themselves in the context of a nonpublic forum is somewhat limited. The prevailing view, however, suggests that when nonpublic forum analysis meets government speech analysis in the context of public schools, government speech rights must take precedence. Professor William G. Buss contends that "the usual nonpublic forum test that prohibits viewpoint discrimination must be modified for contexts involving curriculum decisions (and in all contexts in which government legitimately prefers its own speech)."

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77. 478 U.S. 675.
78. Id. at 681 ("[P]ublic education must prepare pupils for citizenship in the Republic... It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." (alteration in original) (quoting Charles A. Beard & Mary R. Beard, *New Basic History of the United States* 228 (1968))); see S. Elizabeth Wilbom, *Teaching the New Three Rs—Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. Rev. 119, 131-32 (1995).
79. Fraser, 478 U.S. at 683.
82. Redish & Finnerty, supra note 68, at 98.
83. Id.; see also Diamond, supra note 72, at 493 n.86.
view in Rosenberger\textsuperscript{85} when noting that "[a] holding that [a public educational institution] may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the [public institution's] own speech, which is controlled by different principles."\textsuperscript{86}

The principle that government speech rights take precedence was demonstrated in \textit{Downs v. Los Angeles Unified School District},\textsuperscript{87} where a teacher at a public high school sued the school district after it prevented him from placing materials containing antihomosexual viewpoints on a school bulletin board designated for information pertaining to the school's Gay and Lesbian Awareness Month. The U.S. Court of Appeals for the Ninth Circuit classified the bulletin board as government speech in a nonpublic forum and held that, "when a public high school is the speaker, its control of its own speech is not subject to the constraints of constitutional safeguards and forum analysis."\textsuperscript{88} Thus, consistent with the parameters of government speech articulated in Rosenberger, the school ensured that its message of tolerance was communicated clearly by limiting the antihomosexual viewpoints of one of its representatives.\textsuperscript{89}

3. School-Sponsored Speech in Public Schools

In 1988, the Supreme Court articulated a new, and highly nuanced, standard wedged somewhere in between the broad protection of student speech in \textit{Tinker} and the broad protection of government speech in \textit{Pico}. In \textit{Hazelwood},\textsuperscript{90} the Court first addressed the unique doctrinal challenges in classifying student speech that, more than simply occurring on school grounds, "might reasonably [be] perceive[d] [as] bear[ing] the imprimatur of the school."\textsuperscript{91} In \textit{Hazelwood}, the Court reviewed a school principal's elimination of two pages of a student newspaper produced in the course of a journalism class. The principal deemed the material in question to be an

\textsuperscript{85} 515 U.S. 819 (1995) (holding that the University of Virginia violated the First Amendment by refusing to fund the printing of a student newspaper because of the newspaper's religious viewpoint).
\textsuperscript{86}  Id. at 834; see supra notes 52–59.
\textsuperscript{87} 228 F.3d 1003 (9th Cir. 2000).
\textsuperscript{88}  Id. at 1013.
\textsuperscript{89}  Id. at 1014 ("An arm of local government—such as a school board—may decide not only to talk about gay and lesbian awareness and tolerance in general, but also to advocate such tolerance if it so decides, and restrict the contrary speech of one of its representatives.").
\textsuperscript{91}  Id. at 271. See \textit{Fleming v. Jefferson County School District} for further discussion of what constitutes bearing the school's imprimatur. 298 F.3d 918, 925 (10th Cir. 2002). The Fleming court noted the following:

The imprimatur concept covers speech that is so closely connected to the school that it appears the school is somehow sponsoring the speech. Expressive activities that do not bear the imprimatur of the school could include a variety of activities conducted by outside groups that take place on school facilities after-school, such as club meetings.

\textit{Id.} (citing Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001)).
invasion of certain students' right to privacy and inappropriate for the school's younger students.  

The *Hazelwood* Court first addressed the question of whether the school had created a public forum. The Court found that because the school had not intentionally opened up a forum for "indiscriminate use" by the students or public generally, no public forum had been created. The forum had remained reserved for the intended purpose of creating "a supervised learning experience for journalism students," and consequently, as is the case with traditional nonpublic forums, the school was entitled to regulate its content in a reasonable manner.

The Court next addressed whether the speech in question was appropriately governed by *Tinker*. The Court distinguished student speech under *Tinker* that incidentally happens to occur on school grounds from speech that the school promotes, and consequently framed a new category of "school-sponsored" speech. The Court ruled that school-sponsored speech, when "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences," could "fairly be characterized as part of the school curriculum." Relying on a school's traditional discretion to regulate curricular speech, the Court ruled that the First Amendment does not bar educators from editing the style and content of a student's school-sponsored speech, provided that their actions are "reasonably related to legitimate pedagogical concerns."

II. THE DEBATE: THE COURTS DIVIDE OVER WHAT TYPES OF ANTIHOMOSEXUAL EXPRESSIONS PUBLIC SCHOOLS MAY REGULATE

Part I.A and Part I.B of this Note laid out the underpinnings of First Amendment jurisprudence and the Supreme Court's historical protection of a broad free speech principle. Part I.C then narrowed this First Amendment


95. *Hazelwood*, 484 U.S. at 270.

96. See *supra* notes 22–26 and accompanying text.

97. *Hazelwood*, 484 U.S. at 270; see *supra* notes 22–26 and accompanying text.

98. *Hazelwood*, 484 U.S. at 270–71; see *supra* note 92, at 184. Susan Bitensky notes that the *Hazelwood* Court reasoned that the question before it was not whether the Free Speech Clause requires public schools to tolerate student speech unrelated to the curriculum, as in *Tinker*, but, rather, whether the clause requires schools to tolerate student speech that is part of the curriculum and thereby give the impression that the school endorses the contents of such speech.

Bitensky, *supra* note 63, at 816.


100. Id.; see Bitensky, *supra* note 63, at 816–17.

A comprehensive understanding of when and the extent to which the First Amendment protects antihomosexual speech in public schools requires a careful examination of the major categories of school speech introduced in Part I, and the distinct legal standards that the courts have imposed on each. This endeavor is complicated, however, by the courts' division over how to treat antihomosexual speech within these different categories. Although the courts have affirmed the discretion of schools to regulate antihomosexual curricular speech, they have divided sharply over whether schools may regulate antihomosexual student expression offered through private and school-sponsored mediums.

Part II explores this judicial debate over how courts should treat antihomosexual student expression within the traditional categories of school speech. Part II.A.1 examines the U.S. District Court for the Eastern District of Michigan's conclusion in Hansen v. Ann Arbor Public Schools that antihomosexual speech presented through school-sponsored channels may not be regulated based on the viewpoint that it expresses. The controversy and criticism surrounding this decision has undermined its precedential strength, and is discussed fully in Part II.A.2. Part II.B then explores the differing court opinions on whether schools may regulate antihomosexual student speech in the interest of promoting tolerance and protecting the rights of homosexual students.

A. The Debate over Whether Public Schools May Regulate Antihomosexual School-Sponsored Speech

This section examines the debate over whether Hazelwood sanctions limitations on school-sponsored antihomosexual speech. The central question is whether Hazelwood requires schools to remain viewpoint

102. The U.S. Court of Appeals for the First Circuit recently extended the widely accepted authority of public schools to regulate curricular speech into the realm of tolerance-based discussions of homosexuality. In Parker v. Hurley, parents of elementary school children claimed that a curriculum containing tolerance-based messages regarding homosexuals and homosexual couples had violated their free exercise right. No. 07-1528, 2008 WL 250375, at *1 (1st Cir. Jan. 31, 2008). Although the parents wished their children to be exempt from these lessons, they conceded that “the school system has a legitimate secular interest in seeking to eradicate bias against same-gender couples and to ensure the safety of all public school students.” Id. at *11 (internal quotation marks omitted). The court reinforced this idea by noting the “well recognized” proposition that, “while parents can choose between public and private schools, they do not have a constitutional right to ‘direct how a public school teaches their child.’” Id. at *10 (quoting Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395 (6th Cir. 2005)).

103. See supra notes 62–65, 90–101 and accompanying text.

neutral when regulating speech that might reasonably be perceived as
bearing the school’s imprimatur. Part II.A.1 looks at the recent Hansen
decision that struck down a school’s regulation of antihomosexual speech
pursuant to a viewpoint neutrality requirement under Hazelwood. Part
II.A.2 then examines the Hansen court’s reliance on a viewpoint neutrality
requirement by exploring the arguments of courts and theorists on both
sides of the debate.

1. Hansen v. Ann Arbor Public Schools

The Eastern District of Michigan addressed whether schools may
regulate antihomosexual school-sponsored speech in Hansen.105 Ann
Arbor High School (Ann Arbor) holds an annual Diversity Week.106 All
events scheduled during Diversity Week are organized by student groups
and approved by the principal of the school.107 In 2002, Ann Arbor
approved the addition of a panel discussion entitled “Religion and
Homosexuality” to Diversity Week.108 The panel consisted of six “pro-
homosexual adult clergy and religious leaders.”109 Ann Arbor’s Gay-
Straight Alliance club and its supervising faculty, who all intended the
panel to convey a welcoming and affirming message regarding
homosexuality, primarily organized the panel.110

Elizabeth “Betsy” Hansen, a senior at Ann Arbor, and a member of the
extracurricular club Pioneers for Christ,111 attempted to elect a religious
clergy member representative of her viewpoint to the panel, but was
denied.112 Hansen was, however, invited to speak at a general assembly
during Diversity Week.113 Hansen wrote a speech that included comments
such as “I can’t accept religious and sexual ideas or actions that are wrong”
in reference to homosexuality.114 Ann Arbor administrators found portions
of Hansen’s speech objectionable “because [they] targeted...
homosexuals.” \textsuperscript{115} Ann Arbor suggested that Hansen make changes, and she did. \textsuperscript{116}

Subsequently, Hansen brought suit against Ann Arbor for violation of her First and Fourteenth Amendment rights. \textsuperscript{117} In addressing the First Amendment claim, the Hansen court distinguished between the government’s own direct speech and school-sponsored speech. The court defined direct school speech, or government speech, as taking place “[w]hen the government itself is the speaker.” \textsuperscript{118} The court found that in this situation, the government “may make viewpoint-based choices and choose what to say and what not to say.” \textsuperscript{119} As to school-sponsored speech, the court recognized Hazelwood as the prevailing standard, \textsuperscript{120} and found that a school may “exercise editorial control so long as its actions in doing so ‘are reasonably related to legitimate pedagogical concerns’” and are viewpoint neutral. \textsuperscript{121} Because the Diversity Week events at issue were “specifically and particularly planned by student groups with their faculty advisors and were approved by school administration,” the court found the speech on the panel and at the general assembly to fall under the final category, and thus to be governed by Hazelwood. \textsuperscript{122}
The *Hansen* court rejected all of Ann Arbor’s asserted pedagogical concerns as pretext for the school’s disagreement with Hansen’s viewpoint.\(^{123}\) Citing cases from the U.S. Courts of Appeals for the Sixth, Ninth, and Eleventh Circuits, the court asserted that “under *Hazelwood*, a school does not have a completely unfettered right to restrict speech. A school’s restrictions on speech reasonably related to legitimate pedagogical concerns must still be viewpoint-neutral.”\(^{124}\) Consequently, Ann Arbor was found to have violated *Hazelwood* and impermissibly limited school-sponsored speech on the basis of viewpoint.\(^{125}\)

2. Challenging the Premises of *Hansen*

The *Hansen* decision relies on the idea that limitations on school-sponsored speech made under *Hazelwood* must be viewpoint neutral; however, there is much contention among the circuits and scholars as to whether that is true.\(^{126}\) Even within *Hansen*’s Sixth Circuit, the lower courts have yet to wholly endorse a viewpoint neutrality requirement under *Hazelwood*. Indeed, a recent case from the U.S. District Court for the Eastern District of Kentucky involving a public school’s prohibition of antihomosexual speech noted the “splintered jurisprudence” on this issue.\(^{127}\)

Scholars and courts arguing in favor of a viewpoint neutrality requirement under *Hazelwood* point to the Court’s traditional language of viewpoint neutrality in nonpublic forum analysis. The principal cases relied upon by the *Hazelwood* Court, *Cornelius v. NAACP Legal Defense and Education Fund Inc.*\(^{128}\) and *Perry Education Ass’n v. Perry Local Educators’ Ass’n*,\(^{129}\) noted that restrictions on nonpublic forums must be
reasonable in light of the forum’s purpose and viewpoint neutral. This has led courts in the Second, Sixth, Ninth, and Eleventh Circuits to doubt that the Supreme Court would change the course of First Amendment public forum analysis in a silent and ambiguous manner. Thus, these courts conclude that Hazelwood, consistent with the Court’s traditional nonpublic forum analysis, requires that schools regulate school-sponsored speech in a viewpoint neutral manner that is reasonable in light of the forum’s purpose.

Scholars who argue against Hansen’s reading of Hazelwood have taken two avenues of analysis: strict textual interpretation and a pragmatic analysis of the consequences of a viewpoint neutral requirement. Relying on the plain language of the opinion, courts and scholars note that Hazelwood at no point explicitly articulates a requirement of viewpoint neutrality.

Beyond this plain language analysis of Hazelwood, scholars have refuted a viewpoint neutrality requirement by pointing to its infeasibility. The difficulties inherent in navigating the fine and gray line between speech in a nonpublic forum that the school sponsors, and official speech by the school, have been highlighted as reason enough to reject disparate standards.

Moreover, scholars have criticized a viewpoint neutrality requirement under Hazelwood for its unlikely success as a regulatory measure. Some

130. Cornelius, 473 U.S. at 806; Perry, 460 U.S. at 49; see supra notes 18–26 and accompanying text. Whether the Court has, in practice, consistently applied a viewpoint neutrality requirement in public forum analysis is debatable. See Erwin Chemerinsky, Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court’s Application, 74 S. Cal. L. Rev. 49, 59 (2000); Greene, supra note 26, at 32–33; Janna J. Annest, Note & 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, 1233 (2002) (“The court has... obscured the distinction between content and viewpoint by declining to fully explain its characterization of potentially viewpoint-based laws as viewpoint-neutral.”); see, e.g., Perry, 460 U.S. at 65 (Brennan, J., dissenting) (asserting that the majority improperly classified a regulation awarding one union sole access to an interschool mail system as viewpoint neutral when, in fact, the policy repressed speech based on its point of view). Nevertheless, courts that have interpreted Hazelwood as imposing a viewpoint neutrality requirement on nonpublic forum regulations have taken the Perry and Cornelius Courts at their word. See infra note 131 and accompanying text.

131. See, e.g., Peck, 426 F.3d at 632–33; Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817, 829 (9th Cir. 1991); Searcey v. Harris, 888 F.2d 1314, 1319 n.7, 1325 (11th Cir. 1989) (“Although the Supreme Court did not discuss viewpoint neutrality in Hazelwood, there is no indication that the Court intended to drastically re-write First Amendment law . . . .”); Dean v. Utica Cmty. Schs., 345 F. Supp. 2d 799, 813 (E.D. Mich. 2004).

132. Salomone, supra note 68, at 316; see supra note 131 and accompanying text.

133. Ward v. Hickey, 996 F.2d 448, 454 (1st Cir. 1993); Wright, supra note 92, at 182–83 (“[W]hen the Hazelwood Court reiterates its non-public forum finding, it again omits the usual viewpoint-neutrality requirement, even when citing language in Perry that does impose such a viewpoint-neutrality requirement.” (footnotes omitted)); see also supra notes 22–26.

134. Wright, supra note 92, at 198 (noting that we should “be reluctant to try to impose radically different free speech tests on such only hazily distinguishable categories”).
scholars have predicted that, whether or not lip service is paid to a prohibition on viewpoint discrimination, no such requirement will operate in reality.\textsuperscript{135} Professor R. George Wright notes that the examples listed by the Hazelwood Court as permissibly regulated school-sponsored speech, such as speech that appears to advocate "'conduct otherwise inconsistent with the shared values of a civilized order,'" are unlikely to be regulated on the basis of anything but viewpoint.\textsuperscript{136}

**B. The Debate over Whether Public Schools May Regulate Antihomosexual Student Speech**

The previous section discussed the competing opinions as to whether antihomosexual school-sponsored speech may be constitutionally regulated by public schools. This section moves on to examine the debate over whether schools may regulate student speech that, rather than being endorsed by the school, simply happens to occur on school grounds. Part II.B.1 discusses the Ninth Circuit's finding that, under Tinker, schools may regulate antihomosexual student speech in the interest of protecting the rights of homosexual students to be secure and free from harassment. Conversely, Part II.B.2 examines the U.S. District Court for the Southern District of Ohio's contention that, under Tinker, student speech may not be regulated purely based on the fact that it expresses antihomosexual sentiment.

1. **Harper v. Poway Unified School District**

In *Harper v. Poway Unified School District*,\textsuperscript{137} the Ninth Circuit weighed in on the debate over whether schools may limit antihomosexual student speech. Plaintiff Tyler Chase Harper attended Poway High School (Poway).\textsuperscript{138} In 2004, Poway's extracurricular organization, the Gay-Straight Alliance, held a Day of Silence with the permission of Poway.\textsuperscript{139} The Day of Silence aimed to encourage tolerance, especially tolerance of homosexuals.\textsuperscript{140}

\textsuperscript{135} Id. at 186–87. For further discussion of this approach see Martin H. Redish & Kevin Finnerty's analysis of the pragmatist's voice in the debate over when values inculcation should be permitted in public schools. Redish & Finnerty, *supra* note 68, at 95.

\textsuperscript{136} Wright, *supra* note 92, at 186 (quoting Hazelwood Sch. Dist. v. Kuhlmeir, 484 U.S. 260, 272 (1988)); see Roy, *supra* note 112, at 668 (suggesting that schools might offer "sham" justifications for restricting school-sponsored speech which "conceal[] a desire to suppress a political, religious or racial viewpoint"); see also *supra* note 130 and accompanying text.

\textsuperscript{137} 445 F.3d 1166 (9th Cir. 2006), vacated, 127 S. Ct. 1484 (2007).

\textsuperscript{138} Id. at 1171.

\textsuperscript{139} Id.; see Kevin C. McDowell, *The Paradox of Inclusion by Exclusion: The Accommodation of Religion in the Public Schools*, 40 Ind. L. Rev. 499, 502 (2007).

On the 2004 Day of Silence, plaintiff Harper wore a T-shirt that read "I Will Not Accept What God Has Condemned" and "Homosexuality Is Shameful—Romans 1:27."\footnote{Harper, 445 F.3d at 1171; see McDowell, supra note 139, at 502.} On the following day, Harper wore a T-shirt that read "Be Ashamed, Our School Embraced What God Has Condemned" on the front, and "Homosexuality Is Shameful. Romans 1:27" on the back.\footnote{Harper, 445 F.3d at 1171; see McDowell, supra note 139, at 502.} The school administration told Harper that his shirt was "inflammatory,... and that it created a negative and hostile working environment for others."\footnote{Harper, 445 F.3d at 1172 (internal quotation marks omitted); see McDowell, supra note 139, at 502.} Harper refused to remove his shirt and consequently he was instructed to remain in the school’s front office, away from other students, for the remainder of the day.\footnote{Harper, 445 F.3d at 1172; see McDowell, supra note 139, at 502.}

Subsequently, Harper brought suit for violation of his First Amendment rights.\footnote{Harper, 445 F.3d at 1173; see McDowell, supra note 139, at 502.} The court relied on the authority of schools under Tinker to curtail a student’s freedom of speech when that speech "'impinge[s] upon the rights of other students.'"\footnote{Harper, 445 F.3d at 1173; see McDowell, supra note 139, at 502.} The court found that Tinker’s protection of the rights of students to be secure involves freedom from physical assault and "freedom from... psychological attacks that cause young people to question their self-worth and their rightful place in society."\footnote{Harper, 445 F.3d at 1177 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)); Paul M. Smith et al., Courtside: Student Speech Rights, Comm. Law., Fall 2006, at 23, 23–24 (2006).} Citing extensive sociological research on the topic,\footnote{See, e.g., Michael Bochenek & A. Widney Brown, Human Rights Watch, Hatred in the Hallways: Violence and Discrimination Against Lesbian, Gay, Bisexual, and Transgender Students in U.S. Schools (2001), http://www.hrw.org/reports/2001/uslgbt/toc.htm; Kelli Kristine Armstrong, The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in Our Public Schools, 24 Golden Gate U. L. Rev. 67 (1994); Nicolyn Harris & Maurice R. Dyson, Safe Rules or Gays’ Schools? The Dilemma of Sexual Orientation Segregation in Public Education, 7 U. Pa. J. Const. L. 183 (2004); Susanne M. Stronski Huwiler & Gary Remafedi, Adolescent Homosexuality, 33 Rev. Jur. U.I.P.R. 151 (1999); Amy Lovell, “Other Students Used to Say, ‘Look at the Dykes’”: Protecting Students from Peer Sexual Orientation Harassment, 86 Cal. L. Rev. 617 (1998); Thomas A. Mayes, Confronting Same-Sex, Student-to-Student Sexual Harassment: Recommendations for Educators and Policy Makers, 29 Fordham Urb. L.J. 641 (2001).} the court found that psychological attacks on homosexual students are "harmful not only to the students’ health and welfare, but also to their educational performance and their ultimate potential for success in life."\footnote{Harper, 445 F.3d at 1179; Smith et al., supra note 146, at 24.} Consequently, the court found that the school was justified in prohibiting Harper from displaying his T-shirt "‘on the ground that his conduct was injurious to gay and lesbian students and interfered with their right to learn’ and be let alone."\footnote{Harper, 445 F.3d at 1180; Smith et al., supra note 146, at 24.} Sensitive to the importance of a student’s fundamental right to freedom of
speech and expression, the court limited its holding "to instances of
derogatory and injurious remarks directed at students’ minority status such
as race, religion, and sexual orientation."\textsuperscript{151}

Although the Harper court rooted its analysis in the Tinker standard, it
did not confine its discussion to situations where limitations on student
speech are justified by resulting impingements on the rights of other
students. Rather, the court provided additional support for the school’s
actions by invoking the traditional role of educational institutions as sites of
values inculcation.\textsuperscript{152} It reasoned that a school’s educational mission
entails the “inculcation of ‘fundamental values of habits and manners of
civility essential to a democratic society.’”\textsuperscript{153} Consequently, the court
found that schools may promote conversations “of tolerance, equality and
democracy without being required to provide equal time for student or other
speech espousing intolerance, bigotry or hatred.”\textsuperscript{154} Ultimately, a school
may foster conversations of tolerance without permitting “quid pro quo . . .
hateful and injurious speech that runs counter to [its] mission.”\textsuperscript{155}

The Harper decision was vacated as the request for a preliminary
injunction became moot when the plaintiff graduated;\textsuperscript{156} however, the
court’s rationale has been used as persuasive precedent. Most notably, the
U.S. Court of Appeals for the Seventh Circuit in Zamecnik v. Indian Prairie
School District No. 204 Board of Education\textsuperscript{157} recently adopted the Harper
standard in a case with nearly identical facts.\textsuperscript{158}

2. Nixon v. Northern Local School District Board of Education

Contrary to the Harper court’s interpretation of Tinker, the U.S. District
Court for the Southern District of Ohio has held that public schools may not

\textsuperscript{151} Harper, 445 F.3d at 1183; see Dent, supra note 106, at 599.
\textsuperscript{152} Harper, 445 F.3d at 1185; see Dent, supra note 106, at 600; supra notes 69–81 and
accompanying text.
\textsuperscript{153} Harper, 445 F.3d at 1185 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S.
675, 681 (1986)); see Dent, supra note 106, at 600.
\textsuperscript{154} Harper, 445 F.3d at 1185.
\textsuperscript{155} Id. at 1186.
\textsuperscript{156} Recent Cases, 120 Harv. L. Rev. 1691, 1694 (2007).
\textsuperscript{157} No. 07 C 1586, 2007 WL 1141597 (N.D. Ill. Apr. 17, 2007).
\textsuperscript{158} In Zamecnik, defendant Indian Prairie School District (Indian Prairie) permitted the
Gay-Straight Alliance student organization to organize a Day of Silence, which was
“intended to protest anti-gay discrimination and [to] express support for tolerance of gays.”
Id. at *1. The day following the 2006 Day of Silence, plaintiff Heidi Zamecnik, a high
school senior at Indian Prairie, wore a T-shirt with the words “Be Happy, Not Gay”
inscribed on the back. Id. at *2. The dean of students at Indian Prairie advised Zamecnik
that her shirt had offended other students and that she must cross off the words “Not Gay”
from her T-shirt. Id. Zamecnik complied and went back to class. Id. Zamecnik subsequently
moved for a preliminary injunction to enjoin Indian Prairie from preventing her from
expressing her antihomosexual views. Id. at *1. Applying Harper, the court found Indian
Prairie’s limitation on student speech to be justified both by the school’s pedagogical interest
in promoting tolerance among students, and by its responsibility to protect gay students from
being harmed physically and psychologically. Id. at *8–11.
regulate antihomosexual speech based on the viewpoint that it expresses. In
_Nixon v. Northern Local School District Board of Education_, 159 an eighth-
grade student sought to wear a T-shirt with the words "Homosexuality is a
sin! Islam is a lie! Abortion is murder! Some issues are just black and
white!" inscribed on the back. 160 The principal and assistant principal
informed the student and the student’s parents that he could not return to
class if he did not remove the shirt or turn it inside out. 161 The student
refused, and his parents took him out of school for the day. 162
Subsequently, the student and his parents filed suit seeking a preliminary
injunction that would allow the student to wear his T-shirt. 163

In evaluating the plaintiff’s claim, the court sought to determine the
“extent of a student’s constitutional right to freely express himself on
school grounds.” 164 The court rejected the defendant’s suggestion that
the school district was permitted under _Fraser_ to limit the student’s freedom to
wear his T-shirt. 165 The court reasoned that the T-shirt did not qualify as
plainly offensive speech, and that political expressions such as the one at
issue were more appropriately analyzed under _Tinker_. 166

The _Nixon_ court focused on _Tinker_’s condition that limitations on student
speech must be based on more than “‘a mere desire to avoid the discomfort
and unpleasantness that always accompany an unpopular viewpoint.’” 167
The court found that the school had failed to offer “evidence of any history
of violence or disorder in the school or any other circumstances that would
justify a reasonable likelihood of disruption, beyond the mere fact that there
are groups of students and/or staff that could likely find the shirt’s message
offensive.” 168 The court further rejected the suggestion that the school’s
action might have been sanctioned under _Tinker_ due to the T-shirt’s

160. _Nixon_, 383 F. Supp. 2d at 967; see _Lau_, _supra_ note 122, at 366.
161. _Nixon_, 383 F. Supp. 2d at 967; _see_ Brett Thompson, _Comment, Student Speech
considered the t-shirt to be offensive and inappropriate, and prohibited Nixon from wearing
it at school”).
163. _Nixon_, 383 F. Supp. 2d at 968; _see_ Thompson, _supra_ note 161, at 874.
164. _Nixon_, 383 F. Supp. 2d at 969.
165. _Id._ at 971; _see_ Thompson, _supra_ note 161, at 874. In _Bethel School District No. 403
v. Fraser_, the Supreme Court found that schools may abridge a student’s First Amendment
right in the interest of “prohibit[ing] the use of vulgar and offensive terms in public
discourse.” 478 U.S. 675, 683 (1986). For a full discussion of the _Fraser_ decision, see _supra_
notes 77–81.
166. _Nixon_, 383 F. Supp. 2d at 971. The _Nixon_ court found that _Fraser_ was more
concerned with the offensive manner in which speech can be conveyed, as opposed to the
content of that speech, and that _Tinker_ was more concerned with the content of potentially
offensive political views. _Id._ at 971; _see_ Thompson, _supra_ note 161, at 874. _But see Fraser_,
478 U.S. at 683 (1986) (“By glorifying male sexuality, and in its verbal content, the speech
was acutely insulting to teenage girl students.”).
Dist._, 393 U.S. 503, 509 (1969)); _see_ Thompson, _supra_ note 161, at 875.
168. _Nixon_, 383 F. Supp. 2d at 973; _see_ Thompson, _supra_ note 161, at 875.
capacity to invade the rights of other students. The court explained, "Just as in Tinker, there is no evidence [here] that [the student's] silent, passive expression of opinion interfered with the work of [the school] or collided with the rights of other students to be let alone."[170]

Scholarship reacting to the Harper-Nixon disagreement has focused on Harper's reliance on, and Nixon's rejection of, a student's right to be free not only from physical assault, but also from psychological harm. Professors Richard Fossey, Todd A. DeMitchell, and Robert LeBlanc argue that Harper's concern for the psychological vulnerability of students to demeaning speech misapplies Tinker and deviates from American constitutional norms.[171] Under this view, Tinker left no room for a decision like Harper when it determined that "suppressing a student's speech in the school environment required something more than 'a mere desire to avoid the discomfort and unpleasantness.'"[172] These professors find that, beyond its misapplication of Tinker, Harper stands as an affront to our nation's historical commitment to a freedom of speech that absorbs the risk of provoking debate, disturbance, and personal offense.[173] Rejecting a solution built on speech restrictions, this approach ultimately advocates for an expansion of debate and dialogue on controversial topics such as homosexuality.[174]

On the other side of the debate, Professor Holning Lau criticizes Nixon for its failure to appreciate the psychological harm that hate speech inflicts on the identity development of schoolchildren.[175] Lau argues that children engaged in identity development are exceptionally vulnerable, and thus require a unique free speech standard that regulates hate speech among children in schools.[176] In Lau's view, Harper's legitimization of school policies that restrict a student's ability to inflict cognizable identity harms on other students has roots as far back as Brown v. Board of Education,[177] when the Supreme Court first "invoked identity interests to justify special

169. Nixon, 383 F. Supp. 2d at 974; see Thompson, supra note 161, at 875.
170. Nixon, 383 F. Supp. 2d at 974; see Lau, supra note 122, at 368 n.328.
171. Fossey et al., supra note 140, at 570–72; see also Hansen v. Ann Arbor Pub. Schs., 293 F. Supp. 2d 780, 802 (E.D. Mich. 2003) (rejecting the idea that "gays would be threatened or be made less 'safe' by allowing the expression of an opposing viewpoint").
173. Fossey et al., supra note 140, at 570–71; see also Redish & Finnerty, supra note 68, at 87 (criticizing educational systems that seek to inculcate values within and outside the curriculum as failing to prepare individuals for autonomous thought processes that are essential to democratic society).
174. Fossey et al., supra note 140, at 572 ("When it comes to controversial topics like the one taken up in Harper, public schools and their students would be better served by more speech rather than less.").
175. Lau, supra note 122, at 368.
176. Id. at 327, 338–40, 365.
rights for children.” Ultimately, Lau concludes that Harper properly found Tinker’s protection of a student’s rights to “be secure and to be let alone” to encompass a right to develop his or her identity freely.

Lau’s argument for protecting a student’s identity development has been highlighted as uniquely applicable to homosexual students. Many legal, educational, and sociological scholars have noted the toxicity of modern public schools for homosexual students. The effects of verbal abuse, physical violence, and social ostracization on homosexual students have been linked to higher rates of depression, suicide, and substance abuse.

178. Lau, supra note 122, at 361. This reading of Brown is consistent with Professor Charles Lawrence’s interpretation. See Lawrence, supra note 40, at 462. Lawrence notes that Brown “speaks directly to [a] psychic injury inflicted by racist speech,” analogous to injuries “for which the law commonly provides, and even requires, redress.” Id. at 462. Beyond finding this jurisprudence of distinct First Amendment rights for children to be rooted in Supreme Court precedent, Professor Lau grounds the discretionary power of schools to limit hate speech in the catalog of other harms from which schools have the discretion to protect their students. Lau, supra note 122, at 367. Lau notes the discretion of schools to determine what forms of search and seizure are unreasonable and what student speech is likely to lead to substantial disruption. Id.


180. Lau, supra note 122, at 367; see Diamond, supra note 72, at 504–05 (discussing the U.S. Court of Appeals for the Second Circuit’s accurate recognition, in Trachman v. Ankler, 440 F.2d 803, 807 (2d Cir. 1971), that Tinker protects against psychological harm). But see Roy, supra note 112, at 667. Like Lau, Lisa Shaw Roy asserts that functionally offensive speech threatens the value and identity development of students. Id. Believing, however, that a student marketplace of ideas will control for the effects of functionally offensive student speech, Roy limits permissible regulation of this speech to instances when the speech is school sponsored. Id. at 667, 670.

Crafting a comprehensive rule for student speech requires careful consideration of the different categories of school speech and their corresponding legal principles. Disagreement among the courts on how to regulate antihomosexual sentiment within these categories of school speech, however, complicates the formulation of a satisfactory standard. A complete understanding of when schools may regulate antihomosexual expressions cannot be achieved without first answering the questions left lingering by the Hansen, Harper, and Nixon courts.

This Note posits that Hansen improperly applied a viewpoint neutrality requirement under Hazelwood, and that ultimately, in accordance with the traditional role of schools in society and the historic judicial deference paid to the government when regulating its own speech, schools may regulate antihomosexual speech based on the view that it expresses. This Note further posits that Harper properly interpreted Tinker, and that schools may regulate antihomosexual hate speech in the interest of protecting the rights of homosexual students. Ultimately then, having resolved the jurisprudential questions plaguing the courts, this Note advocates a comprehensive speech standard that permits schools to regulate antihomosexual sentiment regardless of whether it is expressed through school-sponsored or private student mediums.

A. Constitutional Regulation of Antihomosexual School-Sponsored Speech Under Hazelwood

The “splintered jurisprudence” on whether or not Hazelwood imposes a viewpoint neutrality requirement on school-sponsored regulations of speech derives from the Court’s use of both nonpublic forum analysis, which historically prohibits viewpoint discrimination, and curricular speech analysis, which historically affords the government broad discretion in regulating curriculum, and even license to discriminate on the basis of viewpoint. This section reconciles the Hazelwood Court’s use of these conflicting standards by examining the Court’s traditional deference to a school’s regulation of its own speech, and the Court’s own reliance on Hazelwood as precedent in cases involving nonpublic forum analysis.

Though, in truth, the ambiguity of the Hazelwood decision cannot be resolved absolutely without word from the Court, the best answer seems to be that which comports with traditional conceptions of government speech

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182. See supra note 127 and accompanying text.
183. See supra notes 93–97 and accompanying text.
184. See supra notes 22–26 and accompanying text. But see supra note 130.
185. See supra note 100 and accompanying text; see also Redish & Finnerty, supra note 68, at 105–06 (discussing the Hazelwood Court’s broad definition of school curriculum).
186. See supra notes 68–71 and accompanying text (discussing traditional government speech jurisprudence).
and government speech in the school context. The Court’s traditional and strongly articulated endorsement of a school’s broad discretion in regulating curricular speech fits easily within traditional jurisprudence on government speech.  

The school’s freedom to discriminate on the basis of viewpoint makes sense in light of its function as a government entity and its historic role as a values inculcator.  

It is hard to imagine then why a subsection of curricular speech that is approved by the school, sponsored by the school, perceived as bearing the imprimatur of the school, and “designed to impart particular knowledge or skills to student[s],” would be removed from the government’s broad discretion over public education and placed under a distinct set of standards demanding viewpoint neutrality. The fact that the Court could come up with no other classification for the speech than curricular provides little reason to adjust its treatment from every other form of speech that the Court has deemed curricular in the past. These considerations of a school’s traditional freedom to employ viewpoint discrimination when designing curriculum, along with the Court’s silence on any additional requirement of viewpoint neutrality, weigh strongly against the Hansen court’s conclusions.  

The Hazelwood Court’s requirement that the school’s editorial control over student speech be reasonably related to a legitimate pedagogical concern does little to disturb this analysis. As Professor Post has noted, within managerial domains, the state may impose viewpoint discriminatory limitations on speech to achieve the government’s specified ends. As noted in Part I, “the state can regulate speech within public educational institutions so as to achieve the purposes of education.” The Hazelwood Court is simply instructing the government to remain within its managerial domain. By stepping outside of its function as an educational institution concerned with pedagogical interests, the government would lose its legitimacy, and consequently its discretionary privilege to engage in viewpoint discrimination.  

Unfortunately, however, this conclusion does little to address the Hazelwood Court’s application of nonpublic forum analysis. In attempting to resolve this conflict, an examination of the Court’s own use of Hazelwood as precedent is instructive. It is telling that in Rosenberger the Court cites Hazelwood as an example of the proposition that the viewpoint

187. See supra notes 54–56 and accompanying text.  
188. See supra notes 69–81 and accompanying text.  
190. Id. (“These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting . . . .”)  
191. See supra note 133 and accompanying text.  
192. See supra notes 119–22 and accompanying text.  
194. See supra note 58 and accompanying text.  
195. Post, supra note 53, at 164; see supra notes 58–59 and accompanying text.
neutrality requirement imposed upon the government when it facilitates private speech in a nonpublic forum does nothing to restrict the government’s own speech, which “is controlled by different principles.” This suggests that we might extend Professor Buss’s argument regarding the intersection between government speech and nonpublic forum analysis into the category of school-sponsored speech. Thus, in regulating school-sponsored speech in a nonpublic forum, a school is not limited by a nonpublic forum’s viewpoint neutrality requirements. Examining Hazelwood in this light allows for a coherent standard of permissible viewpoint discrimination when the government speaks for itself, whether that speech is uttered in the context of a traditional classroom setting, a school-sponsored activity, or a nonpublic forum.

Interestingly, Hansen embraced this principle, but limited it to considerations of direct government speech. In its discussion of government speech, Hansen cited Downs v. Los Angeles Unified School District, and its proposition that, when speaking for itself, the government is not bound by public forum analysis. Thus, Hansen got it right in noting that, when speaking for itself, the government may make viewpoint-based choices irrespective of the forum in which its speech falls, but got it wrong in assuming that Hazelwood deviated from that standard.

Ultimately then, a school can restrict antihomosexual speech that bears the imprimatur of the school in the interest of a legitimate pedagogical concern. The determination of whether or not objectives such as promoting tolerance and “provid[ing] a safe and supportive environment for gay and lesbian students” reasonably relate to legitimate pedagogical concerns ultimately rests within the discretion of the courts. The extremely broad nature of the “legitimate pedagogical concern” standard, however, appears to leave ample room for these sorts of interests. Indeed, in Hazelwood,

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197. See supra note 84 and accompanying text.
198. 228 F.3d 1003 (9th Cir. 2000). For a discussion of Downs, see supra notes 87–89 and accompanying text.
200. Id. at 793.
201. Id. at 802 (citation omitted). The Hansen court’s main criticism of the pedagogical concerns asserted by Ann Arbor relied on their viewpoint discriminatory nature. Consequently, in light of a school’s right to discriminate on the basis of viewpoint when regulating school-sponsored speech, the Hansen court’s rejection of pedagogical concerns such as promoting tolerance, and providing a supportive environment for homosexual students, holds little predictive or substantive value.
202. See Fleming v. Jefferson County Sch. Dist., 298 F.3d 918, 925–26 (10th Cir. 2002) (discussing the broad nature of the pedagogical interest test); see, e.g., Zamecnik v. Indian Prairie Sch. Dist. No. 204 Bd. of Educ., No. 07 C 1586, 2007 WL 1141597, at *10 (N.D. Ill. Apr. 17, 2007) (noting that “a high school’s interest in promoting the tolerance of differences among students and protecting gay students from harassment is a legitimate pedagogical concern that permits the school to restrict speech expressing negative statements about gays”); Morrison ex rel. v. Bd. of Educ., 419 F. Supp. 2d 937 (E.D. Ky. 2006) (holding that a
the Court accepted the school's pedagogical interests in protecting the privacy of students, and avoiding discussion of controversial topics such as divorce and pregnancy that might offend the sensitivities of immature audiences.\textsuperscript{203} Considering the breadth of the pedagogical interest category, it is difficult to imagine a situation in which a school could not frame its reasons for limiting student speech as pertaining to a legitimate pedagogical concern.

B. \textit{Constitutional Regulation of Antihomosexual Student Speech Under Tinker}

Application of \textit{Tinker} to instances of student speech that happen to occur on school grounds is uncontroversial. The standard in \textit{Tinker} is explicit: to regulate pure student speech legitimately, a school must show that the speech would cause a substantial disruption or impinge upon "the rights of other students to be secure and to be let alone."\textsuperscript{204} Controversy arises, however, when schools extend the impingement of rights analysis beyond its traditional framework of physical assault and fighting words to include a distinct category of hate speech.\textsuperscript{205} To accept such a conclusion involves effectively reading hate speech theory into the \textit{Tinker} standard.\textsuperscript{206} Relying on the unique circumstances of the school environment, this section argues that \textit{Tinker} does protect students against verbal assaults on their identity, and that consequently schools may permissibly regulate antihomosexual student speech.

Conceiving of \textit{Tinker} as a pure First Amendment case leaves little room for inclusion of hate speech theory. First and foremost, the Court has yet to adopt any such standard.\textsuperscript{207} Thus, as the law stands now, there is no indication that hate speech as a category distinct from traditional fighting words is unprotected by the First Amendment. Further, removing hate speech from First Amendment protection violates a clear American tradition of protecting free speech whether or not that speech is deeply offensive.\textsuperscript{208}
Tinker, however, is not a pure First Amendment case. It is, as the Tinker court notes, an application of the First Amendment in light of the special characteristics of a school setting.\textsuperscript{209} When considering the special characteristics of a school environment, courts often focus on the emotional and developmental vulnerabilities of children\textsuperscript{210} and the corresponding tutelary duty of schools.\textsuperscript{211} In every Supreme Court student speech case since Tinker, the duty of schools to protect these vulnerabilities has outweighed the First Amendment rights of students.\textsuperscript{212}

Considering the special sensitivities of schoolchildren and the custodial function of schools\textsuperscript{213} allows us to read Tinker as protecting more than just a student's right to be free from physical violence. As Professor Lau has demonstrated, children working through their own emotional and sexual development are extremely vulnerable to the "crippling effects" of hate speech.\textsuperscript{214} This unique vulnerability to hate speech demands that schools limit derogatory student speech that "cause[s] young people to question their self-worth and their rightful place in society."\textsuperscript{215} Thus, the special circumstances of a school environment leave educators with broad latitude to conceive of a student's right to be "secure and to be let alone" under Tinker in more than a physical sense.\textsuperscript{216}

While it is now clear that the rights of students under Tinker to be "secure and to be alone"\textsuperscript{217} may be violated by verbal attacks, the question

\textsuperscript{209} Tinker, 393 U.S. at 506; see Diamond, supra note 72, at 496; supra note 61 and accompanying text.

\textsuperscript{210} See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 274–75 (1988) (upholding the school principal's authority to censor sexually "frank talk" in a school publication, partially on the basis that it was inappropriate for young audiences); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (noting that the sexual nature of a student's speech "could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality").

\textsuperscript{211} See supra notes 72–81 and accompanying text.

\textsuperscript{212} See, e.g., Morse v. Frederick, 127 S. Ct. 2618 (2007) (upholding a school's authority to restrict student speech advocating drug use based on the special characteristics of the school environment and the school's interest in preventing student drug use); Hazelwood, 484 U.S. 260; Fraser, 478 U.S. 675.

\textsuperscript{213} See supra notes 73–76 and accompanying text.

\textsuperscript{214} Lau, supra note 122, at 346; supra notes 175–76 and accompanying text.

\textsuperscript{215} Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006).

\textsuperscript{216} Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969). Further, outside of the school environment and its special circumstances, children's rights are often treated as different and more limited than those of adults. For example, children of a certain age are not permitted to work. See, e.g., 29 U.S.C. § 212 (2000); Id. § 213(c). Children are tried differently in the criminal justice system. See, e.g., 18 U.S.C. § 5032 (2000). Children may be searched in school without reasonable cause. See New Jersey v. T.L.O., 469 U.S. 325, 340 (1985). And, children are restricted from purchasing sexually explicit materials that an adult might buy. See, e.g., Ginsberg v. New York, 390 U.S. 629 (1968). Notably, in Ginsberg the Court justified a New York law restricting a child's constitutional right to purchase sexually explicit, though not legally obscene, materials on the grounds that parents and teachers, "who have this primary responsibility for children's well-being," are entitled to legal policies "designed to aid discharge of that responsibility." Id. at 639.

\textsuperscript{217} Tinker, 393 U.S. at 508.
remains whether homophobic speech meets that standard. Medical and sociological research supports the idea that the rights of homosexual students are impinged upon when attending schools that permit verbal assaults on their identity. Studies directly linking peer harassment with increased rates of depression, suicide, and substance abuse in homosexual teenagers speak to the palpable harm inflicted upon these students.

Ultimately, understanding psychically violent, antihomosexual speech as violating a student's right to be secure and let alone does nothing to disrupt Tinker. Despite the contentions of the Nixon court, there is a grave difference between an armband protesting a political act and a T-shirt attacking a student's sexual identity. The unique harms inflicted by unkind expressions of intolerance and condemnation of a young person's sexual identity justify prohibitions on antihomosexual hate speech in schools. Consequently, the Harper court legitimately included verbal assaults on a student's sexual identity under Tinker's "impingement of rights" limitation on the First Amendment.

CONCLUSION

In 1954, the Supreme Court boldly recognized that students who are constantly reminded of their perceived inferiority and difference are less willing and able to receive an adequate education. Building on the

218. See supra note 181 and accompanying text. Further, a recent tragedy in a California school has highlighted the possibility that unmitigated antihomosexual verbal assaults may escalate into violence. In early February 2008, Lawrence King, an eighth-grade California student, announced publicly to his classmates that he was gay. Rebecca Catheart, Boy's Killing, Labeled a Hate Crime, Stuns a Town, N.Y. Times, Feb. 23, 2008, at A11. A few weeks later, King was shot to death by a fellow student. Id. The prosecution is calling the killing a hate crime, suggesting that the shooting was a response to King's sexual identity. Id. In response to the young boy's death, a number of advocacy organizations are pushing for "legislative review of anti-bias policies in California schools." Id. The executive director of the Gay-Straight Alliance Network released a public statement declaring, "The tragic death of Lawrence King is a wake-up call for our schools to better protect students from harassment at school." Press Release, Gay-Straight Alliance Network et al., GSA Network, Transgender Law Ctr., and EQCA Saddened over Shooting of Gay Jr. High Student in Oxnard: Advocates Urge Stronger Bullying Prevention Efforts to Prevent Escalation of Violence (Feb. 14, 2008), available at http://www.gsanetwork.org.

219. See supra note 181 and accompanying text. This Note does not suggest that students should be prohibited from expressing any opinion on homosexuality. Hate speech, declaring a student's inferiority or indignity based upon his or her sexual identity, differs drastically from respectful dialogue and debate. As Professor Lau explains, "[C]lassroom debates over whether homosexuality is immutable or whether same-sex marriage should be banned, while controversial, . . . do not inherently suggest that gays and lesbians should be despised and denied respect." Lau, supra note 122, at 345. As the Harper court notes, the fact that issues surrounding homosexuality may be politically debatable does not give students license to "assault[] their fellow students with demeaning statements[] by calling gay students shamefu." Harper, 445 F.3d at 1181.

220. See supra note 170 and accompanying text.

Brown legacy, modern public schools must be sensitive to the messages of inferiority resonating in their classrooms, on their auditorium stages, and within their crowded hallways. T-shirts and public proclamations of the sinfulness and deviance of homosexuality leave gay students wondering if their classmates are right about their inhumanity, immutable difference, and eternal damnation. It is the responsibility of public schools to regulate these messages in order to protect the rights of homosexual students, and to provide all students with equal access to a safe and supportive educational environment. This Note posits that schools may pursue these goals under a legal standard of speech that permits the regulation of antihomosexual messages whether they are delivered through curricular, school-sponsored, or private student mediums.

A public school's power to limit antihomosexual speech is well grounded in Supreme Court case law. A thorough reading of First Amendment jurisprudence in light of the traditional discretion of schools to inculcate fundamental values, and create a learning environment sensitive to the unique vulnerabilities of schoolchildren, reveals a clear standard. When antihomosexual speech may reasonably be classified as bearing the imprimatur of the school, it falls under Hazelwood and may be regulated, provided that the school can reasonably relate its speech restriction to a legitimate pedagogical concern. When antihomosexual speech is offered by a student and does not bear the imprimatur of the school, it falls under Tinker and may be regulated in the interest of protecting the rights of homosexual students to be secure and let alone. Although such speech restrictions would not be constitutional outside of schools, they are consistent with the Court's historic deference to school administrators who must balance a student's freedom of expression against the physical and psychological vulnerabilities of other children.

This Note does not argue in favor of muting student debate on political and social issues relating to homosexuality. Rather, it advocates a comprehensive speech standard that permits schools to limit various forms of expression that attack and degrade the sexual identity of homosexual students. Under this standard, the poster board signs at Mira Loma High School declaring the shamefulness of homosexuality may be banned by the school whether they are used for a classroom lesson, a school-sponsored forum, or a student protest.

The line dividing when public schools may and may not regulate student expression regarding homosexuality is personified in the experience of a Mira Loma High School student who witnessed the protests discussed in the

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222. Reis, supra note 181, at 13. Reis quotes a homosexual student as stating that "[incidents of harassment] make[] me feel that I'm less human than everybody else and make[] me wonder if I am a freak or not, and if I die will I go to hell? So many fears running through my head it's pitiful." Id.

223. For a full discussion of the Mira Loma High School protests, see supra notes 1–4 and accompanying text.
Introduction. Hassan Shabazz, when attending high school in Sacramento, openly expressed his moral opposition to the homosexual lifestyle. In mid-April 2006, Shabazz even attended a school board meeting and spoke out against what he perceived to be his school’s progay standpoint. But on April 26, 2006, when Shabazz showed up for school and was offered an antihomosexual T-shirt, he refused to put it on. Only seventeen years old, Shabazz was able to recognize the difference between diversity and division, between opposition and persecution, between debate and disrespect. It is the difference between a Harper T-shirt and a Tinker armband. It is the difference between when a school may abridge a student’s First Amendment right to express offensive viewpoints and when it may not.

225. Id. (quoting Hassan Shabazz as responding to the antigay protesters by declaring, “We’re supposed to be serving a God of love, and you’re persecuting people and making enemies”).