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The Public School: Beyond the Fringes of Public Forum Analysis

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THE PUBLIC SCHOOL: BEYOND THE FRINGES OF PUBLIC FORUM ANALYSIS?

I. INTRODUCTION

The freedom of expression protected by the first amendment is "the Constitution's most majestic guarantee." Although freedom of expression serves many values in American society, one vital purpose of this first amendment guarantee is to ensure that the "marketplace of ideas" remains uninhibited. Consequently, attempts by the govern-

1. The first amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I.


4. See Comment, supra note 3, at 127 & n.2; see also Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution."); Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 257 (1986) ("[I]t is important to protect the integrity of the marketplace of political ideas."); CBS, Inc. v. FCC, 455 U.S. 367, 395 (1981) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . ."); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("debate on public issues should be uninhibited, robust, and wide open").

The "marketplace of ideas" theory of the first amendment is based upon the premise that freedom of speech is necessary to assure that people have before them the requisite information to form their own beliefs and opinions. van Geel, supra note 3, at 250. Maintaining this free marketplace of ideas allows for the advancement of knowledge and the discovery of truth, both of which are first
ment to suppress the free flow of ideas offend the first amendment. The Supreme Court has been particularly unwilling to tolerate restrictions on expression which permit or prescribe speech according to the viewpoint advocated by the speaker. Thus, when scrutinizing first amendment challenges to regulations which restrict expression on government property, the Court will assess, inter alia, whether the government is engaging in "viewpoint discrimination" by denying the challenging individual or group access to the government property for expressive purposes while at the same time allowing access to other similarly situated individuals or groups.

amendment values identified by Professor Emerson. Id. For a discussion of the principle functions served by the first amendment according to Professor Emerson, see supra note 3. For a critical analysis of the "marketplace of ideas" concept of the first amendment, see M. Redish, supra note 3, at 45-48. Professor Redish posits that "[t]he 'marketplace-of-ideas' concept... has often been subjected to savage attack, and to a certain extent the attacks have been entirely valid." Id. at 46 (footnote omitted).

5. See D. Bogen, Bulwark of Liberty: The Court and the First Amendment 4-5 (1984) ("The language of the First Amendment leads to the principle that the government may not act for the purpose of suppressing ideas."); see also Comment, supra note 3, at 128. See, e.g., First Nat'l Bank v. Bellotti, 435 U.S. 765, 785-86 (1978) ("Especially where... the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.") (footnote omitted); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). For a discussion of Mosley, see infra note 31.

6. See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 61-62 (1983) (Brennan, J., dissenting) ("[w]e have never held that government may allow discussion of a subject and then discriminate among viewpoints on that particular topic"). Justice Brennan, in a dissenting opinion in Perry, also stated that "[v]iewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'" Id. at 62. See also City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175-76 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees."). For a discussion of the role of viewpoint neutrality in analyzing regulations of expression under the first amendment, see infra notes 51 & 54 and accompanying text.

7. See, e.g., Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985) (remanding for determination of whether government impossibly excluded particular charitable organizations from participating in charity drive aimed at government employees because government disagreed with organizations' viewpoints); Cox v. Louisiana, 379 U.S. 536 (1965) ("disturbing the peace" and "obstructing public passages" statutes, which allowed conviction of protester merely for peacefully expressing unpopular views, violate constitutional rights of free speech and assembly); Niemotko v. Maryland, 340 U.S. 268 (1951) (city's denial of permit for use of public park by Jehovah's Witnesses for Bible talks, while granting permits to other political and religious groups for similar purposes, deemed unconstitutional because denial based solely upon city's disagreement with Jehovah's Witnesses or their views); Hague v. CIO, 307 U.S. 496 (1939) (holding unconstitutional permit ordinances which allowed city
To provide a framework to assess the constitutionality of restrictions placed upon expression on government-controlled property, the Supreme Court introduced the public forum doctrine in *Perry Education Association v. Perry Local Educators' Association.* Since 1983, the Court has employed the public forum doctrine to analyze restrictions on expression in a variety of settings. However, despite the seemingly broad application of public forum analysis, the doctrine has been criticized as inadequate to resolve the issues presented in disputes over freedom of expression on publicly owned property.

The public school is one setting in which the public forum doctrine

officials to prevent respondents from holding public meetings and distributing pamphlets solely on basis of respondents' affiliation with Communist viewpoint). For a discussion of *Cornelius,* see *infra* note 53. For a discussion of *Cox,* see *infra* notes 28-29 and accompanying text. For a discussion of *Hague,* see *infra* notes 23-25 and accompanying text.

8. 460 U.S. 37 (1983). For a detailed examination of *Perry* and the public forum doctrine, see *infra* notes 36-54 and accompanying text.

9. For a discussion of the specific applications of forum analysis, see *infra* notes 56-81 and accompanying text.

10. See, e.g., *Cornelius v. NAACP* Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 833 (1985) (Stevens, J., dissenting) ("I am somewhat skeptical about the value of this analytical approach [(i.e., forum analysis)] in the actual decisional process. At least in this case, I do not find the precise characterization of the forum particularly helpful in reaching a decision." (citation omitted)); *Estiverne v. Louisiana State Bar Ass'n,* 863 F.2d 371, 377 (5th Cir. 1989) ("[W]e believe that the first amendment issues presented here warrant a more detailed discussion and should not be obscured behind a formulaic application of the public forum doctrine."). The *Estiverne* court noted that "public forum analysis becomes more difficult as it is applied to an increasingly broad panoply of government-sponsored communication." *Id.*

Commentators have also criticized the effectiveness of the public forum doctrine. See, e.g., L. TRIBE, *supra* note 2, § 12-24, at 987 ("[M]any recent cases illustrate the blurriness, the occasional artificiality, and the frequent irrelevance, of the categories within the public forum classification."); Cass, *First Amendment Access to Government Facilities,* 65 VA. L. REV. 1287, 1308 (1979) (public forum doctrine "calls for a single division between public forums and other places. . . . [But] the distinction on which this difference turns is not clearly formulated . . . ." (footnotes omitted)); Post, *Between Governance and Management: The History and Theory of the Public Forum,* 34 UCLA L. REV. 1713, 1715 (1987) ("The Court has yet to articulate a defensible constitutional justification for its basic project of dividing government property into distinct categories. . . . These rules have proliferated to such an extent as to render the doctrine virtually impermeable to common sense."); *Werhan, The Supreme Court's Public Forum Doctrine and the Return of Formalism,* 7 CARDozo L. REV. 535, 341 (1986) (condemning doctrine as the kind of formalism that "produces incoherent results untouched by the interplay of considerations that should inform . . . decision-making under the first amendment"); *Leedes,* *Pigeonholes in the Public Forum,* 20 U. Rich. L. REV. 499, 522 (1986) (suggesting that categories established by the Court in the public forum doctrine "may be too confining because first amendment freedoms need breathing space"); *Note,* *Public Forum Analysis After Perry Education Association v. Perry Local Educators' Association—A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property,* 54 FORDHAM L. REV. 545, 545 (1986) (positing that the Court's attempt to clarify the public forum doctrine in *Perry* has "left basic questions unanswered and lower courts confused" (footnote omitted)).
is particularly inadequate to address the range of interests involved when restrictions on expression are imposed. In *Searcey v. Harris*, the United States Court of Appeals for the Eleventh Circuit employed forum analysis to scrutinize a set of regulations drafted by the Atlanta School Board to control access of outside speakers to the Board-created Career Day program. The district court had previously examined the regulations and determined that certain provisions of the regulations were designed to suppress the viewpoint of a peace group seeking access to the school-sponsored Career Day program and therefore, did not pass constitutional muster. After first concurring with the district court that Career Day constituted a nonpublic forum, the Eleventh Circuit affirmed the district court’s holdings regarding the regulations with slight modifications. The Eleventh Circuit found that some of the Board’s regulations were unreasonable and viewpoint discriminatory because they prevented one group, the Atlanta Peace Alliance (APA), from gaining access to the Career Day events.

Part I of this Note outlines the development and current status of the public forum doctrine, including the application of the doctrine to a public school curricular setting. Part II describes the factual background and the Eleventh Circuit’s application of the public forum doctrine.

11. For a discussion of the particular inadequacies of the public forum doctrine as applied to the public school, see *infra* notes 132-81 and accompanying text.


13. *Id.* at 1318-26. For a discussion of the Career Day regulations scrutinized by the district court and the Eleventh Circuit, see *infra* notes 106 & 108-19 and accompanying text.


15. *Searcey v. Harris*, 888 F.2d at 1320, 1326. For a discussion of the decision by the Eleventh Circuit, see *infra* notes 115-19 and accompanying text.

16. *Id.* at 1326. In its findings of fact, the district court described the Atlanta Peace Alliance (APA) as “a coalition of individuals and groups organized for the purpose of providing high school students in Atlanta with information on careers and educational opportunities related to peace as well as information to help them make informed choices concerning military enlistment.” *Searcey v. Crim*, 681 F. Supp. at 823.

17. For a discussion of the history and current status of the public forum doctrine, see *infra* notes 29-59 and accompanying text. For a discussion of the
trine in Searcey. Part III discusses the features of the public school which warrant the application of a different standard in analyzing first amendment claims arising out of a public school curricular setting. Part III also proposes that the "reasonableness" standard employed in Hazelwood School District v. Kuhlmeier is a more appropriate standard for scrutinizing restrictions on expression in a public school. This Note concludes first that the Searcey court would have reached a different conclusion had it employed the Hazelwood standard and second, that Searcey presented a prime opportunity for the Eleventh Circuit to respond to the uniqueness of the public school as a first amendment forum, and consequently, gave the Eleventh Circuit the opportunity to remove the public school from the strictures of the public forum doctrine.

II. BACKGROUND

A. Development of the Public Forum Doctrine in the Supreme Court

Prior to the 1939 plurality opinion of Justice Roberts in Hague v. CIO, the Supreme Court denied that any right of access to public places existed for free speech purposes. However, in Hague, Justice Roberts penned what is now considered the forerunner of the public forum doctrine:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

The public forum doctrine as applied to a public school curricular setting, see infra notes 73-84 and accompanying text.

18. For a discussion of the factual background and the district court's and Eleventh Circuit's application of the public forum doctrine in Searcey, see infra notes 86-119 and accompanying text.

19. For a discussion of the features of the public school which warrant the application of a different standard in analyzing first amendment claims in a public school curricular setting, see infra notes 158-81 and accompanying text.


21. For a discussion of the reasonableness standard proposed in Hazelwood, see infra notes 132-41 and accompanying text.

22. For a discussion of the application of the Hazelwood standard to the facts presented in Searcey, see infra notes 182-97 and accompanying text.


24. See, e.g., Davis v. Massachusetts, 167 U.S. 43, 47 (1897) ("For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.").

25. Hague, 307 U.S. at 515. Respondents in Hague were individuals and unincorporated labor associations who alleged that officials of Jersey City had, inter
Although some Supreme Court Justices periodically used the phrase “public forum” following *Hague*, the coining of the phrase “public forum” for the purposes of first amendment analysis is traditionally attributed to Harry Kalven’s classic 1965 article, *The Concept of the Public Forum: Cox v. Louisiana.* In *Cox*, the Court held that two Louisiana statutes, which gave “unfettered discretion” to local officials to regulate even peaceful public demonstrations, were unconstitutional as applied, and thus, reversed the defendant’s conviction for violating these statutes. Using *Cox* as a springboard to propose a new approach to the first amendment issues surrounding speech in public places, Kalven stated:

> [I]n open democratic society the streets, the parks, and

alia, refused to issue the necessary permits to allow respondents to hold public meetings and prevented respondents from distributing pamphlets while permitting others to distribute similar literature. *Id.* at 500-01. In both cases, petitioners were acting under the color of city ordinances in preventing respondents’ activities. *Id.* at 501. However, respondents alleged that the city officials prevented their activities solely on the ground that the respondents were Communists or Communist organizations, and therefore, the city’s actions were unconstitutional. *Id.* The Court upheld, with some modification, an injunction issued by the lower court preventing city officials from “abridging or denying” the respondents’ right to meet and distribute literature. *Id.* at 516-18.

26. See, e.g., *International Ass’n of Machinists v. Street*, 367 U.S. 740, 796 (1961) (Black, J., dissenting); *id.* at 806 (Frankfurter, J., dissenting).


The Supreme Court’s use of the phrase “public forum” prior to Kalven’s 1965 article was “not in the context of a recognizable first amendment theory. The Supreme Court of California, however, had used the phrase in a surprisingly contemporary sense as early as 1946” in *Danskin v. San Diego Unified School District*, 28 Cal. 2d 536, 545-48, 171 P.2d 885, 890-91 (1946). Post, *supra* note 10, at 1718 n.11 (citation omitted).


29. *Id.* at 545, 558. In *Cox*, the defendant, Cox, led a group of more than 2000 students in a peaceful assembly at the state capitol building and then led the group in a march to the courthouse where the students sang, prayed and listened to a speech delivered by Cox on a sidewalk across the street from the courthouse. *Id.* at 539-42. The students had gathered at the courthouse to protest segregation, discrimination and the earlier arrest of fellow student protesters. *Id.* at 539. Cox was arrested the day after the march and was later convicted of breaching the peace and obstructing public passages in violation of two Louisiana statutes. *Id.* at 544, 553. In assessing the validity of Cox’s conviction under the breach of the peace statute, the Court held that Louisiana could not constitutionally punish the defendant for merely engaging in the type of conduct which the record revealed. *Id.* at 545. In addition, the Court determined that the breach of the peace statute as interpreted by the Louisiana Supreme Court was “unconstitutionally broad in scope.” *Id.* Similarly, in overturning Cox’s conviction for obstructing public passages, the Court held that the local officials’ possession of “unfettered discretion” in the application of the public passage statute was an “unwarranted abridgement of [Cox’s] freedom of speech and assembly.” *Id.* at 558.
other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.\textsuperscript{30}

Not until 1972, however, did the concept of the public forum emerge as a viable component of first amendment jurisprudence.\textsuperscript{31}


At least one commentator has posited that Kalven's choice of the phrase "public forum" has created difficulty in this area of first amendment jurisprudence. Post, \textit{supra} note 10, at 1719. Post maintains that Kalven's use of the term "public forum" shifted the focus of a first amendment analysis to the categories of public property and away from the relationship between the category of public property and "the underlying constitutional value of public discussion." \textit{Id.} According to Post, Kalven never intended for the concept of the "public forum" to serve merely as a means of categorizing the type of government property. \textit{Id.} at 1718-19.

\textsuperscript{31} L. TRIBE, \textit{supra} note 2, § 12-24, at 986. Tribe notes that between 1963 and 1972, the public forum doctrine "went through a troubled period of gestation." \textit{Id.} First among the decisions cited by Tribe as contributing to the "gestation" of the public forum doctrine is Edwards v. South Carolina, 372 U.S. 229 (1963), in which the Court reversed a breach of the peace conviction where the defendants were engaged in the orderly carrying of anti-segregation placards on the state capitol grounds. L. TRIBE, \textit{supra} note 2, § 12-24, at 986 n.3. See \textit{Edwards}, 372 U.S. at 238. In 1965, this decision was followed by Cox v. Louisiana, 379 U.S. 536 (1965), a decision which Tribe describes as more "hesitant" than \textit{Edwards}. L. TRIBE, \textit{supra} note 2, § 12-24, at 986 n.3. In \textit{Cox}, the Court reversed the defendant's convictions for both breach of the peace and obstructing a public passageway by assembling near a courthouse, but speculated that it may be constitutionally permissible for the government to close all streets and other public facilities to parades and meetings. 379 U.S. at 545, 555-58.

Finally, Tribe describes Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969), as the case in which "the hesitant approach of \textit{Cox} was replaced by the more confident approach of \textit{Edwards}.") L. TRIBE, \textit{supra} note 2, § 12-24, at 986 n.3. \textit{Shuttlesworth} relied upon the dictum of Justice Roberts in \textit{Hague} v. CIO, 307 U.S. 496, 515-16 (1939), to hold invalid an ordinance which required a permit to "participate in any 'parade or procession or other public demonstration' " in public places. 394 U.S. at 152, 159. For a discussion of Justice Roberts' plurality opinion in \textit{Hague}, see \textit{supra} notes 23-25 and accompanying text.

Among the "public forum" cases which led to the solidification of the public forum doctrine during the 1970s, Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), stands as the case in which the Supreme Court formally adopted Kalven's phrase "public forum" as a term of art. Post, \textit{supra} note 10, at 1724 & n.41. In \textit{Mosley}, the Court addressed the constitutionality of a city ordinance which prohibited picketing within 150 feet of any school just before, just after or while school was in session. 408 U.S. at 92-93. The ordinance contained a provision which exempted from the ban "peaceful picketing of any school involved in a labor dispute." \textit{Id.} Mosley, a postal worker, had frequently picketed Jones Commercial High School in Chicago for several months prior to the enactment of the ordinance. \textit{Id.} at 93. Mosley usually picketed by himself during school...
During the 1970s and early 1980s, the Supreme Court increasingly emphasized and relied upon the characterization of publicly owned property for purposes of first amendment analysis. During this period, the characterization of some publicly owned property as "public forums" necessarily meant that publicly owned property which did not fit into the

hours on the public sidewalk adjoining the high school, carrying a sign that read: "Jones High School practices black discrimination. Jones High School has a black quota." Id. The City of Chicago conceded that Mosley's picketing was always "peaceful, orderly, and quiet." Id. After the picketing ordinance was passed, police officials informed Mosley that he would be arrested if his picketing continued, and thus, Mosley ceased picketing the day before the ordinance became effective. Id. Thereafter, Mosley brought suit, seeking declaratory and injunctive relief from enforcement of the ordinance. Id. at 93-94. The Court held that the city's ordinance discriminated among pickets based on the content of their message, and thus denied equal protection to Mosley. Id. at 102. Although the case was decided on equal protection grounds, the Court was guided by first amendment principles and stated in often-quoted language, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Id. at 95. Moreover, in officially introducing the phrase "public forum" as a term of art in first amendment jurisprudence, the Court stated that "justifications for selective exclusions from a public forum must be carefully scrutinized." Id. at 98-99.

While Mosley marked the Court's adoption of the phrase "public forum," Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), marked the time "that the Court first treated the phrase as a substantive term of limitation, using the term to distinguish between different types of publicly owned property." Note, A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property, 35 STAN. L. REV. 121, 123 (1982); see also Post, supra note 10, at 1734 (Lehman represented the "first time the Justices gave the phrase serious and divisive doctrinal attention."). In Lehman, the Court established that some publicly owned places would not be considered classic public forums. Lehman, 418 U.S. at 302-03. In determining whether a forum is public or not, and thus, in determining the degree of protection afforded the speech, the Lehman Court considered both "the nature of the forum and the conflicting interests involved." Id. Consequently, restrictions on expression in non-public forums are subject to a lower level of scrutiny than the standards traditionally applied to classic public forums. See id. at 303-04.

32. See, e.g., Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) ("A university differs in significant respects from public forums such as streets or parks or even municipal theaters."); United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 133 (1981) ("While Congress . . . may not by its own ipse dixit destroy the 'public forum' status of streets and parks which have historically been public forums, we think that . . . a letterbox may not properly be analogized to streets and parks."); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 655 (1981) (characterizing state fairgrounds as limited public forum); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975) (municipal theater constitutes public forum); Lehman, 418 U.S. at 302-04 (characterizing advertising space on municipal transit cars as not public forum).

In addition, the Supreme Court has at times cited pre-1970 cases as though they had turned on the characterization of the specific property involved under the developing public forum doctrine. Note, supra note 31, at 123-124. See, e.g., Greenburgh Civic Ass'ns, 453 U.S. at 131 n.7 (citing Hague v. CIO, 307 U.S. 496 (1939), as though Hague Court had applied term "public forum" to streets and parks).
"public forum" characterization would therefore be considered nonforums.\textsuperscript{33} Under such a dichotomy, regulations restricting expres-
sion in nonforums were subjected to a lower level of judicial scrutiny than regulations restricting expression in "public forums."\textsuperscript{34}

After more than twenty years of uncertainty, the Supreme Court at-
tempted a "comprehensive doctrinal synthesis"\textsuperscript{35} of the public forum doctrine in Perry Education Association v. Perry Local Educators' Association.\textsuperscript{36} Under a collective bargaining agreement with the Board of Education of Perry Township schools, the Perry Education Association (PEA) served as the exclusive bargaining representative for the school district's teachers and had exclusive access to the interschool mail system and the teachers' school mailboxes.\textsuperscript{37} No other union was allowed access to either the interschool mail system or the teachers' mailboxes.\textsuperscript{38} The Perry Local Educator's Association (PLEA), a rival teachers' union, brought suit against both the PEA and individual members of the Board of Education alleging that the denial of similar access to the interschool mail system and the teachers' mailboxes violated PLEA's first and four-
teenth amendment rights.\textsuperscript{39}

The Perry Court used this opportunity to set out three categories of forums for first amendment purposes: (1) traditional, "quintessential public forums," (2) "designated" or "limited public forums," and (3) "nonpublic forums."\textsuperscript{40} The Court described "quintessential public forums" as places such as public streets and parks, dedicated to assem-
bly and debate "by long tradition or by government fiat."\textsuperscript{41} In these forums, the government may not prohibit all expressive activity.\textsuperscript{42} Rather, in order to enforce any content-based restriction against commu-
icative activity in a "quintessential public forum," the state must show that the restriction is necessary to serve a compelling state interest and that it is narrowly drawn to achieve its purpose.\textsuperscript{43} The state may also impose content-neutral time, place and manner restrictions in such a forum if they are narrowly tailored to serve a significant interest, and if

\begin{itemize}
  \item \textsuperscript{33} See, e.g., Greenburgh Civic Ass'ns, 453 U.S. at 132 (letterbox is not public forum); Greer v. Spock, 424 U.S. 828, 838 (1976) (holding that military base, although clearly publicly owned property, does not constitute public forum); Lehman, 418 U.S. at 302-04 (determining that advertising spaces on municipal transit cars are not first amendment forums).
  \item \textsuperscript{34} Note, supra note 31, at 127.
  \item \textsuperscript{35} L. Tribe, supra note 2, § 12-24, at 987.
  \item \textsuperscript{36} 460 U.S. 37 (1983).
  \item \textsuperscript{37} Id. at 38-39.
  \item \textsuperscript{38} Id. at 39.
  \item \textsuperscript{39} Id. at 39, 41.
  \item \textsuperscript{40} Id. at 45-46.
  \item \textsuperscript{41} Id. at 45.
  \item \textsuperscript{42} Id.
  \item \textsuperscript{43} Id. (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).
\end{itemize}
adequate alternative channels of communication remain open.44 "Designated" or "limited public forums" are places such as school facilities or a municipal theaters which have been opened for use by the public for expressive activity.45 Once the government establishes a "limited public forum," "it is bound by the same standards as apply in a traditional public forum" in its regulation of expression which falls within the category of expression for which the forum has been designated.46 The Court defined "nonpublic forums" as "[p]ublic property which is not by tradition or designation a forum for public communication."47 In this third category of fora, the primary consideration is preservation of the property for its intended use.48 Therefore, access restrictions for "nonpublic forums" are subject to a lower level of scrutiny than those for public forums,49 and need only be reasonable50 and viewpoint-neutral.51

44. Id.
45. Id. at 45.
46. Id. at 46.
47. Id.
48. Id. ("In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise . . ."); see Note, The Role of Viewpoint Neutrality in Nonpublic Fora Access Restrictions: Cornelius v. NAACP Legal Defense and Educational Fund, 20 U.S.F. L. Rev. 851, 857 (1986) ("The primary consideration in a nonpublic forum is preservation of the property for its intended use.").
49. Perry, 460 U.S. at 46. In commenting on this reduced level of scrutiny for the nonpublic forum, the Perry Court stated that the very concept of a nonpublic forum embodies "the right to make distinctions in access on the basis of subject matter and speaker identity" which would be impermissible in a public forum. Id. at 49. "The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." Id.
50. Id. at 46. For further discussion of the "reasonableness" requirement under Perry as applied to Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989), see infra notes 182-86 and accompanying text.
51. Perry, 460 U.S. at 46. Specifically, the Court stated that any effort to regulate expressive conduct in a nonpublic forum must be reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view." Id. (citing United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 n.7 (1981)).

Under the strict scrutiny afforded to restrictions on expression in a public forum, the government must establish that the restriction serves a compelling state interest and is narrowly tailored to serve that interest. Id. at 45. However, in a nonpublic forum, in addition to establishing that a restriction is viewpoint-neutral, the government must merely establish that a restriction is reasonable. Id. at 45, 49. In fact, several Justices as well as numerous commentators have suggested that a reasonableness standard is akin to no scrutiny at all. See, e.g., Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 821 (1985) (Blackmun, J., dissenting) (denigrating reasonableness standard applicable to nonpublic forum as "nothing more than a rational-basis requirement"); Werhan, supra note 10, at 410 (noting that the Court's use of the reasonableness standard "is a signal that the Court finds no first amendment issue at stake"). Werhan contends that Justice White "went out of his way in Perry to emphasize the laxity of the reasonableness standard governing speaker access to a nonforum." Id. at 410 n.366 (citing Perry, 460 U.S. at 53). This significantly lower standard of scrutiny afforded to restrictions on expression in a nonpublic...
The Perry Court employed this three-forum framework and held that the Perry Township school's internal mail system and the teachers' mailboxes were nonpublic forums\textsuperscript{52} and that the policy restricting access to the exclusive bargaining representative of the teachers was reasonable.\textsuperscript{53} As to the requirement of viewpoint neutrality in a nonpublic forum under Perry lends a "heightened significance" to the viewpoint neutrality requirement within the context of a nonpublic forum. Note, \textit{supra} note 48, at 860; see also Perry, 460 U.S. at 62 (Brennan, J., dissenting) (by focusing on the characterization of the type of forum involved, "the Court disregards the independent First Amendment protection afforded by the prohibition against viewpoint discrimination" (emphasis added)). Therefore, it is not unlikely that under the framework proposed in Perry, analysis of restrictions on expression in a nonpublic forum could turn solely upon the viewpoint neutrality prong of the test.

This independent significance of viewpoint neutrality is not without precedent in first amendment jurisprudence of the Court. \textit{See}, e.g., \textit{First Nat'l Bank v. Bellotti}, 435 U.S. 765, 785-86 (1978) ("Especially where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." (footnote omitted)); \textit{Healy v. James}, 408 U.S. 169, 187-88 (1972) (state "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent"); \textit{Niemotko v. Maryland}, 340 U.S. 268, 284 (1951) (holding that Jehovah's Witnesses, who were denied access to public park to give Bible talks when members of other religious organizations had been granted access to park for religious purposes, were subjected to improper denial of access due to public officials' disagreement with their views).

Furthermore, the Court's longstanding concern with viewpoint discrimination is evidenced by an early line of cases which invalidated license requirements for speech in public places when the issuing of the license was within the discretion of a government official. Note, \textit{supra} note 48, at 859 n.49. Granting government officials such unfettered discretion is thought to create a great risk of a viewpoint-based denial of first amendment rights. \textit{Id}. For example, in \textit{Shuttlesworth v. City of Birmingham}, 394 U.S. 147 (1969), the Court overturned a conviction under an ordinance which required parties seeking to parade or demonstrate in Birmingham to obtain a permit from the city. \textit{Id}. at 149, 159. The ordinance either allowed city officials to dictate which streets or public ways may be used for such parades or demonstrations or to refuse to issue a permit entirely if the city deemed it was necessary for the "public welfare, peace, safety, health, decency, good order, morals or convenience." \textit{Id}. at 149.

The Court noted its disapproval of such broad licensing statutes in \textit{Cox v. Louisiana}, 379 U.S. 536 (1965):

\begin{quote}
It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.
\end{quote}

\textit{Id}. at 557-58. For a discussion of \textit{Cox}, see \textit{supra} notes 28-29 and accompanying text.

52. \textit{Perry}, 460 U.S. at 46. "The school mail facilities at issue here fall within this third category [i.e., nonpublic forum]." \textit{Id}.

53. \textit{Id}. at 50. The Court noted that "[t]he differential access provided PEA and PLEA is reasonable because it is wholly consistent with the District's legitimate interest in 'preserv[ing] the property . . . for the use to which it is lawfully dedicated.'" \textit{Id}. at 50-51 (quoting United States Postal Serv. v. Council of
forum, the Supreme Court dismissed the conclusion of the Seventh Circuit that the selective access policy constituted viewpoint discrimination and consequently, upheld the selective access policy.\textsuperscript{54}

Greenburgh Civic Ass'ns, 453 U.S. 114, 129-30 (1981)). Moreover, "the reasonableness of the limitations on PLEA's access to the school mail system is also supported by the substantial alternative channels that remain open for union-teacher communication to take place." \textit{Id.} at 53.

Two years after Perry, the Supreme Court reaffirmed the utility of its three forum analysis framework in Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985). In \textit{Cornelius}, the Court considered whether an Executive Order, which prevented charities such as the NAACP Legal Defense and Educational Fund, Inc. from participating in the Combined Federal Campaign (CFC or Campaign), was an unconstitutional restriction on access to the Campaign. \textit{Id.} at 790. The CFC was an annual charitable fundraising drive conducted in the federal workplace through the voluntary efforts of federal employees. \textit{Id.} The Campaign was "designed to lessen the Government's burden in meeting human health and welfare needs by providing a convenient, nondisruptive channel for federal employees to contribute to nonpartisan agencies that directly serve those needs." \textit{Id.} at 795. The Executive Order limited participation to "voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families," and specifically excluded "[a]gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves." \textit{Id.} (quoting Exec. Order No. 12,404, 3 C.F.R. 151 (1984)). The NAACP Legal Defense and Educational Fund, Inc., along with five other organizations, brought suit challenging their threatened exclusion under the Executive Order, arguing, \textit{inter alia}, that the denial of the right to participate in the CFC violated their first amendment right to solicit charitable contributions. \textit{Id.} The district court determined that the CFC was a "limited public forum," that the exclusion of the plaintiffs was content-based and that, as the regulation was not narrowly drawn to further a compelling government interest, it was unconstitutional. \textit{Id.} at 796. The district court granted summary judgment to the charities, and on appeal, the judgment was affirmed by a divided court of appeals. \textit{Id.} The Supreme Court held that the charitable solicitation of funds is a form of protected speech and undertook an extensive forum analysis to scrutinize the constitutionality of the access restrictions of the Executive Order. \textit{Id.} at 799-813. The Supreme Court reversed the judgment of the lower courts and held that the exclusion of the charities was reasonable, and therefore, constitutional. \textit{Id.} at 813. In reaching its decision, the Court determined that the CFC was a nonpublic forum, therefore restrictions limiting access to the forum could be made if such restrictions were both reasonable and viewpoint-neutral. \textit{Id.} at 804-06.

The \textit{Cornelius} Court merely examined the reasonableness of the restrictions imposed by the Executive Order, as the issue of viewpoint neutrality was not before the Court. \textit{Id.} at 809-13. The Court found that the access restrictions were reasonable because they were designed to "minimize disruption to the federal workplace, to ensure the success of the fundraising effort, [and] to avoid the appearance of political favoritism without regard to the viewpoint of the excluded groups." \textit{Id.} at 813. In the course of scrutinizing the access restrictions in \textit{Cornelius}, the Court clarified the standard of reasonableness which would be employed in scrutinizing access restrictions in nonpublic forums. \textit{Id.} at 808. The Court stated, "[t]he Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation." \textit{Id.}

\textsuperscript{54} \textit{Perry}, 460 U.S. at 49 & n.9, 55. In response to the contention of the court of appeals that the mailbox access policy favored the viewpoint of the PEA...
B. Forum Analysis Doctrine in the Circuit Courts

Since Perry, the Court has had relatively little opportunity to apply its forum analysis doctrine. However, the courts of appeals have had ample opportunity to interpret and apply the forum analysis doctrine to a wide variety of fact patterns. Not surprisingly, many of these lower (the exclusive bargaining representative for the Perry teachers), the Supreme Court reasoned that "[t]here is... no indication that the School Board intended to discourage one viewpoint and advance another." Id. at 49 (emphasis added). Instead, the Court asserted, "[w]e believe it is more accurate to characterize the access policy as based on the status of the respective unions rather than their views." Id.

In dissent, Justice Brennan, joined by Justices Marshall, Powell and Stevens, argued extensively that the Court completely mischaracterized the issue in Perry by resorting to a lengthy forum analysis rather than focusing on the viewpoint discrimination aspect. Id. at 57, 62-64. Justice Brennan wrote, "[t]he critical inquiry, therefore, is whether the Board's grant of exclusive access to the petitioner amounts to prohibited viewpoint discrimination." Id. at 65. Furthermore, by "[a]ddressing the question of viewpoint discrimination directly, free of the Court's irrelevant public forum analysis, it is clear that the exclusive access policy discriminates on the basis of viewpoint." Id. at 65.

One commentator, discussing the role of viewpoint neutrality, stated that "[i]f there is one doctrinal rule that appears to have the universal approval of the Justices, it is that the regulation of speech in a nonpublic forum must be 'viewpoint-neutral.' " Post, supra note 10, at 1824. Some commentators have adamantly joined in the Court's universal prohibition of viewpoint discrimination. Id. at 1824 n.379. See, e.g., Stone, Content Regulation and the First Amendment, 25 WM. & MARY L. REV. 189, 229 (1983) ("[G]overnment can never justify a restriction on otherwise protected expression merely because it disagrees with the speaker's views."); Stephan, The First Amendment and Content Discrimination, 68 VA. L. REV. 203, 233 (1982) (requirement of viewpoint neutrality "seems an essential concomitant of any rational system of freedom of expression").


57. See, e.g., Barnard v. Chamberlain, 897 F.2d 1059, 1066 (10th Cir. 1990) (bar association journal was nonpublic forum and bar association's refusal to publish article written by member of Utah Bar did not constitute viewpoint discrimination); Planned Parenthood v. Clark County School Dist., 887 F.2d 935,
court decisions have produced inconsistent results when employing the forum analysis laid out in Perry. 58

58. For example, in Calash v. City of Bridgeport, 788 F.2d 80 (2d Cir. 1986), the Second Circuit considered the claim of a concert promoter seeking access to a municipal stadium for a rock concert following the city's denial of that access. Id. at 81. The Second Circuit agreed with the district court; the municipal stadium was a nonpublic forum even though expressive activity had been officially allowed there. Id. at 81, 83. The Calash court reached this conclu-
Similarly, the scrutinizing of a restriction on expression for the presence of viewpoint discrimination under the public forum doctrine despite its description of the stadium as "a large, outdoor arena, located on parkland adjacent to a public high school," and its finding that the municipality allowed "civic, charitable and non-profit organizations" to use the stadium for expressive fund-raising purposes such as a Beach Boys' concert. *Id.* at 81.

The Second Circuit's characterization of the municipal stadium as a non-public forum appears to contradict the three-forum rubric established in *Perry* for forum analysis. See Century Fed., Inc. v. City of Palo Alto, 710 F. Supp. 1559, 1571 n.18 (N.D. Cal. 1988) (The *Calash* court "reached a . . . questionable result in finding that a municipal stadium was a category-three nonpublic forum. . . . This approach to forum analysis would seem to be in considerable tension with cases . . . where the Supreme Court treated a municipal theater as a category-two designated public forum." (citations omitted)). Indeed, in defining the public forum doctrine, the *Perry* court specifically included municipal theaters within the realm of "limited public forums." *Perry* Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Accord Cinevision Corp. v. City of Burbank, 745 F.2d 560, 570 (9th Cir. 1984) (outdoor amphitheater is limited public forum), cert. denied, 471 U.S. 1054 (1985). But see Rock Against Racism v. Ward, 848 F.2d 367, 369 (2d Cir. 1988) (park bandshell is traditional public forum), rev'd *on other grounds*, 491 U.S. 781 (1989).

One commentator suggests, however, that a municipal stadium should not always be characterized as a limited public forum. M. YUDOF, WHEN GOVERNMENT SPEAKS 241 (1983). Yudof writes that "where the government's mission is to communicate and the scarcity of resources make editorial selectivity inevitable, the state need not tolerate or acquiesce in use of the forum that substantially destroys the communication and editorial processes." *Id.*

Similarly, the Second Circuit in Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767 (2d Cir. 1984), employed forum analysis to characterize the newsrack area in a commuter train station. *Id.* at 772-73. The court attempted to follow the analysis established in *Perry*, and found that this part of a public area should be deemed a nonpublic forum. *Id.* The court reached this conclusion even though it determined that this area of the train station was public, that it should be viewed as a forum appropriate for newspaper racks, that newsracks had long been permitted and that they had in fact been installed and used to distribute papers for many years. *Id.* at 770-73.

Perhaps most illustrative of the difficulty faced by the lower courts in applying the public forum doctrine is *ACORN* v. City of Phoenix, 603 F. Supp. 869 (D. Ariz. 1985), aff'd, 798 F.2d 1260 (9th Cir. 1986). In *Phoenix*, the court employed a *Perry* public forum analysis to validate the city's total ban on soliciting at intersections. *Id.* at 871. The application of the public forum doctrine in *Phoenix* is troubling because the court characterized the intersection of two streets as a nonpublic forum despite specific language in *Perry* indicating that streets themselves constitute "quintessential public forums." *Perry*, 460 U.S. at 45 (emphasis added); see *Phoenix*, 603 F. Supp. at 871. In reaching this conclusion, the *Phoenix* court necessarily reasoned that the confluence of two first category (public forum) properties constitutes a third category (nonpublic forum) property. See, Note, supra note 10, at 552. The logic of the court suggests that "speakers in the streets [must] be on guard not to approach intersections lest they be stripped of their constitutional right to a forum." *Id.* at 552-53.

In fact, the Fifth Circuit expressly recognized the complexities of applying forum analysis as prescribed in *Perry*: "[P]ublic forum analysis becomes more difficult as it is applied to an increasingly broad panoply of government-sponsored communication." Estiverne v. Louisiana State Bar Ass'n, 863 F.2d 371, 377 (5th Cir. 1989).
has proven to be troublesome, even for the Supreme Court. Prior to Searcey, the Eleventh Circuit had an opportunity to clarify its approach to scrutinizing restrictions on expression for evidence of viewpoint discrimination in a nonpublic forum in *M.N.C. of Hinesville, Inc. v. United States Department of Defense*. In *M.N.C.*, a civilian publisher of a newspaper brought suit against the Department of Defense (DOD) seeking equal access to information provided to a competitor by the DOD as well as equal access to the competitor's points of distribution. The plaintiff, M.N.C., claimed that the Army's decision to award a publishing contract to a competitor civilian newspaper and to afford the competitor preferential access to an army base in order to distribute the newspapers constituted a violation of M.N.C.'s first amendment rights. After agreeing with the district court that the military base was a nonpublic forum, the court pronounced two categories of content-based restrictions imposed in forums: viewpoint-based and viewpoint-neutral.

59. For example, in *Perry*, the Court split five to four on whether preventing the rival teachers' union from gaining access to the school's internal mail system constituted viewpoint discrimination. *Dienes*, *The Trashing of the Public Forum Doctrine: Problems in First Amendment Analysis*, 55 Geo. Wash. L. Rev. 109, 118 (1986); see *Perry*, 460 U.S. at 49, 56. Likewise, in *Cornelius*, the majority suggested that the government's discrimination in favor of groups that utilize traditional service-oriented approaches to aiding the poor and against those preferring advocacy may not constitute viewpoint bias. *Dienes*, supra, at 118; see *Cornelius*, 473 U.S. at 812-13. Justice Blackmun's dissent, however, found such distinctions to constitute blatant viewpoint discrimination. *Dienes*, supra, at 118; see *Cornelius*, 473 U.S. at 833 (Blackmun, J., dissenting).

60. 791 F.2d 1466 (11th Cir. 1986).

61. Id. at 1470.

62. Id. at 1470-71.

63. Id. at 1473.

64. Id. at 1474. The *M.N.C.* court explained that viewpoint-based restrictions are those which distinguish between the views of certain speakers, whereas viewpoint-neutral restrictions are those that do not. Id. For example, Congress could pass a law making it illegal to affix on a government building any object not readily removable. According to Tribe, such a restriction is content-neutral, and therefore, presumably constitutional. L. Tribe, supra note 2, § 12-3, at 798. Such a law would also be viewpoint-neutral because any object affixed to a government building, regardless of the message which it conveyed, would be a violation of the law. However, Congress could instead pass a law making it illegal to affix on a government building any object which expresses a political opinion, such as campaign posters. Such a law would be content-based as it is directed only toward those objects which espouse political opinions, while still permitting objects addressing other subjects to be affixed to the same building. Such a law, however, would be viewpoint-neutral because no particular political opinion is disfavored by the law. Finally, Congress could pass a law making it illegal to affix on a government building any sign expressing opposition to the President of the United States. This type of law would be both content-based and viewpoint-based. Tribe notes that a law of this variety would presumably be unconstitutional unless the government could establish that "the message triggering the regulation presents a 'clear and present danger' or is otherwise unprotected by the first amendment." Id.

However, some commentators have argued that even restrictions which are content-neutral—and therefore viewpoint-neutral—on their face have "unequal
Only viewpoint-neutral restrictions will be tolerated in a nonpublic forum. The M.N.C. court then examined the procedures by which the Army selected the competitor newspaper over M.N.C.'s in order to determine whether the procedures were viewpoint-based, and therefore, invalid. Ultimately, the court found no evidence that the Army had discriminated based upon M.N.C.'s viewpoint. After further determining that the access restrictions were reasonable in addition to being viewpoint-neutral, the court affirmed the district court's decision and refused to grant M.N.C. the requested injunctive relief.

The Eleventh Circuit emphasized the process by which the Army had selected a base newspaper in its analysis of viewpoint neutrality. The court's discussion set the stage for its analysis of the viewpoint neutrality of the Career Day regulations in Searcey v. Harris. Specifically, the Eleventh Circuit in Searcey relied, in part, upon the strict requirement of viewpoint neutrality to invalidate several School Board created restrictions on access to a high school Career Day program.


Although in 1983 the Court "codified" the public forum doctrine in Perry, it was not until five years later that the Court applied the doctrine to a public school in Hazelwood School District v. Kuhlmeier. In Hazelwood, three former high school students, who were staff members of the Hazelwood School District's student newspaper, alleged that school

effects on various types of messages." Stone, supra note 54, at 218 (1983) (quoting Karst, Equality as a Central Principle in the First Amendment, 43 U. CHI. L. REV. 20, 36 (1975)). For example, Stone notes that a content-neutral law which bans all street demonstrations may have a disproportionate impact upon those who rely upon street demonstrations to further their views. Stone, supra, at 218. Most content-neutral restrictions, therefore, have at least some content-differential effects. Id. Such restrictions, although not as severe as content-based restrictions which substantially interfere with the communication of ideas and viewpoints, nonetheless are analogous to "more modest viewpoint discrimination." Id.

65. M.N.C., 791 F.2d at 1475. The M.N.C. court cited Greer v. Spock, 424 U.S. 828 (1976), for the proposition that viewpoint-neutral restrictions will be upheld in a nonpublic forum, whereas viewpoint-based restrictions will not be upheld. Id. at 1474-75.

66. Id. at 1475.

67. Id. at 1475-76.

68. Id. at 1476-77.

69. Id. at 1475-76.

70. 888 F.2d 1314 (11th Cir. 1989). For a discussion of the Searcey court's analysis of the viewpoint neutrality of the Career Day regulations, see infra notes 117 & 120-28 and accompanying text.

71. Searcey, 888 F.2d at 1324-25.


officials had violated their first amendment rights by deleting two pages of articles from one issue of the newspaper.74 One of the deleted articles described three Hazelwood students' experiences with pregnancy, while the other discussed the impact of divorce on students at the school.75

The district court concluded that the deletion of the two pages of articles by school officials did not violate the students' first amendment rights, because the decision to exclude the articles had a "substantial and reasonable basis" and involved an "integral part of the school's educational function."76 The Eighth Circuit applied the public forum doc-

74. Id. at 262. Students in the Journalism II class at Hazelwood High School wrote and edited Spectrum, the high school newspaper. Id. The newspaper had a circulation of more than 4,500 copies and was distributed to students, school personnel and members of the community. Id.

The standard procedure during the period in question was for the Journalism II instructor to submit page proofs of each Spectrum issue to the Principal of Hazelwood High School for his review prior to publication of the newspaper. Id. at 263. This procedure was followed for the Spectrum issue which contained the deleted articles. Id. The Principal exercised his discretion to remove the two articles from the newspaper during this review. Id.

75. Id. The Principal testified that although the pregnancy article used fictitious names, the identity of the students portrayed in the article could be determined from its text. Id. In addition, the Principal believed that references in the articles to sexual activity and birth control were "inappropriate for some of the younger students at the school." Id. Moreover, the divorce story quoted a student by name as saying that her father "wasn't spending enough time with my mom, sister and I" prior to the divorce, that he "was always out of town on business or out late playing cards with the guys," and that he "always argued about everything" with her mother. Id. In deciding to delete this article, the Principal felt that the student's parents should have been afforded an opportunity to review and respond to the student's remarks, or to consent to the publication of the article. Id. At the time the Principal decided to delete the divorce article, he was unaware that the Journalism II instructor had deleted the student's name from the final version of the article. Id.

The two pages deleted from the newspaper also contained articles dealing with teenage marriage, runaways and juvenile delinquents, as well as a general article addressing teenage pregnancy. Id. at 264 n.1. The Principal testified that these articles were deleted solely because they appeared on the same pages as the objectionable articles, not because he objected to their content. Id.

76. Id. at 264-65; see Hazelwood v. Kuhlmeier, 607 F. Supp. 1450 (E.D. Mo. 1985). Specifically, the district court held that the Principal's concern with the students' anonymity in the pregnancy article was "legitimate and reasonable," since Hazelwood High School contained so few pregnant students and the article itself disclosed sufficient additional details about the students to make their identification possible. Hazelwood, 484 U.S. at 264. Moreover, the court determined that the Principal was justified in deleting the articles to shield younger students from unsuitable material and "to avoid the impression that [the school] endorses the sexual norms of the subjects" of the article. Id. at 265.

Similarly, the district court viewed the deletion of the divorce article as a reasonable response to the Principal's concerns over the invasion of privacy of the parents of the student named in the article. Id. Finally, the court concluded that the Principal was justified in deleting the entire two pages of the newspaper, rather than simply requiring the exclusion or modification of the teenage pregnancy and divorce articles, based upon his "reasonable belief" that time was of
trine and reversed the district court, concluding that the censorship of the articles by school officials was violative of the student journalists' first amendment rights. The Supreme Court disagreed with the Eighth Circuit's characterization of the newspaper as a public forum, finding instead that the newspaper constituted a nonpublic forum in which "school officials were entitled to regulate the contents of the Spectrum in any reasonable manner." The Court stated that the regulation of student expression in a curricular forum, such as a student newspaper, would be upheld provided such regulation is "reasonably related to legitimate pedagogical concerns." Accordingly, the Court reversed the decision of the Eighth Circuit and held that, because the deletion of the articles was based upon reasonable and legitimate education the essence, and consequently, there was no time to modify the articles in question. Id.

In reaching its conclusions, the district court did not employ forum analysis as outlined by the Supreme Court in Perry, 460 U.S. 37 (1983), but rather invoked a "substantial and reasonable basis" standard as outlined in Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979). Hazelwood, 484 U.S. at 264.

77. Hazelwood, 484 U.S. at 265-66; see Hazelwood v. Kohlmeier, 795 F.2d 1368 (8th Cir. 1986). Specifically, the Eighth Circuit determined that the newspaper was both a part of the school's curriculum and a public forum. Hazelwood, 484 U.S. at 265. The court concluded that the newspaper was a public forum because it was "intended to be and operated as a conduit for student viewpoint." Id. Because the newspaper was a public forum, the Eighth Circuit concluded that school officials could not censor its contents unless such censorship was needed to prevent "material and substantial interference with school work or discipline." Id. Finding no evidence that the Principal could have reasonably concluded that the deleted articles would result in substantial disruption in the school, the court stated that school officials could only delete the articles if their publication could have resulted in the school district facing tort liability for libel or invasion of privacy. Id. at 265-66. Because neither the subjects of the articles nor their families could have maintained such tort actions against the school, the court held that the school officials had violated the first amendment rights of the student journalists. Id. at 266.

78. Id. at 270. The Court found that the school district did not have the requisite intent to turn the newspaper into a public forum, and therefore, the newspaper constituted a nonpublic forum under the public forum analysis rubric of Perry. Id. The Court noted that "the evidence relied upon by the Court of Appeals in finding Spectrum to be a public forum [was] equivocal at best." Id. at 269 (citation omitted).

79. Id. at 273. The Court emphasized that this "reasonableness" standard for educators "is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges." Id.

One commentator concludes that the reasonableness standard posited in Hazelwood involves a two-stage analysis. Hafen, Hazelwood School District and the Role of First Amendment Institutions, 1988 DUKE L.J. 685, 693 (1988). The first stage of the analysis requires a determination of whether the student expression at issue "occurs in a context that implicates the school's educational mission." Id. If the first inquiry is answered in the affirmative, the second prong of the analysis asks "whether the educator's decision has a rational—but not necessarily an explicitly educational—basis." Id.
tional concerns, school officials had not violated the student journalists' first amendment rights.

Hazelwood represents a noteworthy development in First Amendment jurisprudence as applied to public schools for several reasons. First, Hazelwood created a new category of student speech—school-sponsored expressive activities—for purposes of first amendment analysis. Moreover, the "reasonableness" standard posited in Hazelwood indicates the extremely deferential posture of the Court to the decisions of educators and school officials when scrutinizing restrictions on expression in a curricular setting under the public forum doctrine. The Eleventh Circuit considered Searcey v. Harris against this backdrop of first amendment jurisprudence.

D. Searcey v. Harris

1. Facts

In 1973, a group called the Merit Employers Association began working with the Atlanta Board of Education (the Board), planning activities designed to encourage students in the Atlanta Public School system to aspire to high goals. Over time, these activities evolved into two somewhat distinct programs: "Youth Motivation Day" and "Career

80. Hazelwood, 484 U.S. at 274-76.
81. Id. at 276.
82. In fact, one commentator has described the Hazelwood decision as "probably the most significant free speech case involving public school students since the Court decided Tinker v. Des Moines Independent Community School District" in 1969. Hafen, supra note 79, at 685.
83. Id. at 685. Prior to Hazelwood, the Court generally relied upon the standard established in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), when evaluating the constitutionality of a school official's regulation of student speech. Hafen, Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures, 48 Ohio St. L.J. 663, 664 (1987). Under Tinker, a school official may only regulate student speech when such regulation is "necessary to avoid material and substantial interference with school work or discipline." 393 U.S. at 511. The Hazelwood Court specifically rejected the application of the Tinker standard to student speech in a school-sponsored curricular setting. Hazelwood, 484 U.S. at 270-71, 272-273.
84. Justice White, writing for the majority, employed the phrase "substantial deference" in describing the Court's posture in scrutinizing educators' decisions to regulate school-sponsored expressive activities. Hazelwood, 484 U.S. at 273 n.7.
85. 888 F.2d 1314 (11th Cir. 1989).
86. Searcey v. Crim, 681 F. Supp. 821, 824 (N.D. Ga. 1988), aff'd as modified sub nom. Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989). The court noted that 92% of the students in the Atlanta public school system may be classified as "minorities" and 85% may be classified as "poor." Id. at 823-24. Specifically, the Merit Employers Association sought to "raise students' employment expectations, to encourage students to aspire to high goals in spite of racism, and to assure students that opportunities for success do exist for them." Id. at 824.
Day."\(^{87}\) In January 1977, the Board adopted a general career education policy which represented the only written policy relating to the Career and Youth Motivation Days prior to March 9, 1987.\(^{88}\) The participants in the programs, who were invited by the Merit Employers Association or the school staff, were generally informed as to the general purpose of the programs, but were given wide latitude in making their presentations.\(^{89}\) Prior to October 1983, the Board did not exclude any individual or group from participating in the programs based upon the career to be discussed.\(^{90}\) In short, the Board exercised little or no discretion over who would be allowed to participate, what written material would be distributed or what topics would be discussed.\(^{91}\)

In addition to the annual Career Day, the school system’s guidance offices and guidance office bulletin boards provided career information to students in the Atlanta Public Schools.\(^{92}\) During the school year, guidance counselors met with students to discuss career and college-related issues and distributed pertinent literature containing information about careers and colleges to interested students.\(^{93}\) Counselors also arranged student meetings with college, career and military recruiters, and placed printed college and career materials on designated bulletin boards.\(^{94}\)

On February 21, 1983, the Atlanta Peace Alliance (APA) sent a let-

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87. Id. On “Youth Motivation Day,” community members recruited by the Merit Employers Association and school staff come into the schools to share with the students their methods for overcoming obstacles in life and securing responsible positions in business and industry. Id. On “Career Day,” community members speak with students about more specific job opportunities and distribute printed career information. Id. The career education programs vary in format, but generally begin with an all-school assembly and a keynote address, followed by the students breaking into small groups and going to classrooms where members of various career fields give presentations. Id.

88. Id. March 9, 1987 is the date on which the Board adopted a formal set of regulations pertaining to the Career and Youth Motivation Days. Id. at 826. “Thus, prior to March 9, 1987, the Board had no written policy concerning limitations on the types of groups or individuals who could participate in these programs or the topics that could be addressed.” Id. at 824.

89. Id.

90. Id. at 825.

91. Id. at 824-25.

92. Id. at 825.

93. Id. This material was generally distributed at the individual discretion of the guidance counselors. Id.

94. Id. In addition to scrutinizing the Career Day regulations, the district court also considered the constitutionality of restrictions placed by the Board upon access of the Atlanta Peace Alliance (APA) to school guidance offices and guidance office bulletin boards. Id. at 828. Citing the longstanding practice of the Atlanta public schools of holding the guidance offices and bulletin boards “generally open to all groups and individuals that wish to offer students career, education, scholarship or vocational information,” the court concluded that any attempt by the Atlanta School Board to apply their proposed access restrictions to the guidance offices and guidance office bulletin boards would “run afoul of the First Amendment.” Id. at 828, 831. The School Board did not appeal the district court’s conclusion regarding the guidance offices and bulletin boards,
ter to each of the principals of Atlanta’s twenty two public schools requesting permission to place literature in guidance offices, set up a table at Career Day, speak in forums where pro-military speakers were present and to place paid advertisements in the school newspapers. On April 4, 1983, the APA presented their proposal at a public meeting of the Board, and on June 6, 1983, APA representatives met with Dr. Crim, the Superintendent of Atlanta’s public schools, to discuss the APA proposal. Following the June 6 meeting, Dr. Crim agreed to the APA’s proposal.

Soon after Dr. Crim’s decision to allow the APA to have access to the schools, the Atlanta Journal published an editorial which labelled the APA’s views as propaganda and accused Dr. Crim of mixing career counseling with “radical politics.” After the editorial appeared, the Board reviewed Dr. Crim’s decision and, following a private executive session on October 4, 1983, announced the total suspension of the APA from Atlanta’s public schools. At that time, the Board also directed Dr. Crim to develop a formal policy governing Career Day.

As of April 1984, the Board had not adopted any policy regarding the Career Day program and was still excluding the APA from the schools. The APA then filed suit alleging that the Board violated their first amendment rights by preventing them from participating in Career Day or from placing literature in the schools. Prior to trial, the Board adopted a uniform policy relating to Career Day. By trial, and consequently, the Eleventh Circuit did not consider these forums in its analysis. See Searcey v. Harris, 888 F.2d 1314, 1317 (11th Cir. 1989).


96. Id. No decision regarding the APA request was made at that meeting. Id. In May 1983, however, the principals from two of Atlanta’s 22 high schools accepted the APA literature to be placed in the respective guidance offices. Id.

97. Id. Specifically, Dr. Crim “agreed to distribute materials supplied by the APA to guidance offices; to allow the APA to set up a table at Career Day; to make a list of APA speakers available to the high schools; and to allow the APA to place paid advertisements in the school year books.” Id.

98. Id. The editorial was apparently sparked by a radio interview given by Dr. Crim on July 15, 1983, during which he discussed his agreement to allow the APA access to the schools. Id. The editorial was entitled Don’t Peddle Propaganda on School Career Days and urged the Board members to exclude the APA from the schools. Id. “The editorial caused quite a stir within the Board.” Id.

99. Id. at 825.

100. Id. at 826.

101. Id.

102. Id. at 826.

103. Id. at 822-23, 826.

104. Searcey v. Harris, 888 F.2d 1314, 1317 (11th Cir. 1989). The policy stated:

The Board believes that schools should provide educational programs that are pertinent to the practical aspects of post-secondary life and to
however, the Board had not adopted any administrative regulations to interpret the policy.\textsuperscript{105} When the district court deferred ruling until regulations were adopted, the Board adopted Administrative Regulations to govern Career Day.\textsuperscript{106} These regulations provided the basis upon which the district court and the Eleventh Circuit scrutinized the constitutionality of the Board's exclusion of the APA from Career Day.

2. \textit{Decisions of the Northern District of Georgia and of the Eleventh Circuit}

The district judge, employing public forum analysis, determined that Career Day was a nonpublic forum.\textsuperscript{107} Consequently, the district

the world of work. The Board therefore supports "Career Day" programs as part of the general curriculum programs for our schools. Career Day is to be a program which allows students to gain career awareness and to explore career opportunities in various fields. Participants in "Career Day" programs shall have direct knowledge of the career opportunities about which they speak and shall be limited to providing appropriate information about career fields. Participants shall not be allowed to criticize or denigrate the career opportunities provided by other participants. Written information about career opportunities may also be made available to students at school sites subject to the conditions imposed above. Restrictions may not be imposed on the types of career opportunities in such material. The Superintendent shall prepare appropriate administrative regulations for the implementation of this policy.

\textit{Id.}

105. \textit{Id.}

106. \textit{Id.} The district court "gave each party fifteen days after the adoption of the regulations for comment." \textit{Id.} at 1317 n.5. Three of the Career Day regulations invoked by the Board were pertinent in \textit{Searcey}. Regulation Nine provided that presenters at Career Day must have some type of "direct knowledge" of the career about which they will speak, in addition to having a "present affiliation or authority" with the career field. \textit{Id.} at 1327. Regulation Ten required that information concerning careers must be presented in a complete, objective and "positive and encouraging manner," and excluded any presenter who primarily sought to "discourage a student's participation in a particular career" from participation in Career Day. \textit{Id.} at 1327-28. Regulation Eleven prevented participants in Career Day from criticizing or denigrating career opportunities offered by other Career Day participants and required that the information presented to students encourage and motivate them toward positive career goals. \textit{Id.} at 1328. Additionally, Regulation Eleven, like Regulation Ten, excluded participants "whose primary focus or emphasis is to discourage students from such career participation." \textit{Id.}

107. \textit{Searcey v. Crim}, 681 F. Supp. 821, 826-28 (N.D. Ga. 1988). The district court's primary focus in characterizing Career Day as a nonpublic forum was whether the policy and practice of the Atlanta School Board demonstrated an \textit{intent} to create a public forum. \textit{Id.} at 827. The plaintiffs sought to characterize Career Day as a public forum by establishing that Career Day included a wide variety of groups and individuals who were afforded wide latitude in the content and style of their presentations. \textit{Id.} at 828. However, the district court noted that the participants in Career Day were specifically invited and selected based upon their perceived ability to serve as positive role models for students. \textit{Id.} Also, the court reasoned that, because Career Day was part of the required curriculum of the Atlanta Public Schools, labelling Career Day as a public forum could have a disruptive effect upon the program and prevent a school from ac-
court examined the content-based regulations to determine whether they were reasonable and viewpoint-neutral. As a result of its public forum analysis, the court enjoined the Board from enforcing the Career Day regulations against the APA to the extent that the regulations:

1. prevented the APA from presenting information concerning peace oriented education or career fields;
2. required the APA to have direct knowledge of the opportunities about which they speak;
3. prevented the APA from primarily attempting to discourage students from participating in a particular field;
4. forbade the APA from denigrating military careers;
5. required the APA to have a present affiliation with the career fields about which they speak.

The Board then filed an appeal.

The Eleventh Circuit affirmed the district court’s judgment with slight modifications. After agreeing with the district court that Career Day was a nonpublic forum, the Eleventh Circuit determined that the requirement contained in Career Day Regulation Nine, that a speaker at Career Day have “direct knowledge” of a career, was reasonable, and thus, reversed the district court’s finding. With respect to the remainder of Regulation Nine, however, the Eleventh Circuit found

complishing its curricular goals. Finding that the Board has no intention of creating a public forum, the court concluded that Career Day was a nonpublic forum.

108. Id. at 829-30.
109. Id. at 831.
110. Searcey v. Harris, 888 F.2d 1317, 1319 (11th Cir. 1989). Here, the district court was referring to the language of Administrative Regulation Nine. For an explanation of Regulation Nine, see supra note 106.
111. Id. Here, the district court was referring to the language of Administrative Regulation Eleven. For an explanation of Regulation Eleven, see supra note 106.
112. Id. at 1318. Here, the district court was referring to the language of Administrative Regulations Ten and Eleven. For an explanation of Regulations Ten and Eleven, see supra note 106.
113. Id. Here, the district court was referring to the language of Administrative Regulation Nine. For an explanation of Regulation Nine, see supra note 106.
114. Searcey v. Harris, 888 F.2d at 1318. The district judge also scrutinized the restrictions placed by the Board upon the guidance offices and bulletin boards. Searcey v. Crim, 681 F. Supp. 821, 831 (N.D. Ga. 1988). For a discussion of the district court’s analysis of these restrictions, see supra note 94 and accompanying text.
115. Searcey v. Harris, 888 F.2d at 1326.
116. Id. at 1322, 1326. The district court had determined that the “direct knowledge” requirement was formulated specifically to suppress the APA’s point of view and was unreasonable. Searcey v. Crim, 681 F. Supp. at 829. In reversing the district court, the Eleventh Circuit determined that a direct knowledge requirement is reasonably related to ensuring that speakers at Career Day present reliable information and serve as positive role models to the students. Searcey v. Harris, 888 F.2d at 1321. Moreover, the court of appeals noted that it was reasonable for the Board to conclude that persons who lacked direct knowledge of a particular career field would not present appropriate information. Id.
that the requirement that a speaker have a "present affiliation" with his or her career was unreasonable and viewpoint discriminatory, and thus, affirmed the district court's finding.\textsuperscript{117} As for the "no discouragement" requirement under Regulations Ten and Eleven, the court of appeals affirmed the district court's finding of unreasonableness with only slight modification.\textsuperscript{118} In effect, the \textit{Searcey} court invalidated or clarified the particular language in the regulations which had previously excluded the APA from Career Day, thus allowing the APA to participate in the Career Day program.\textsuperscript{119}

3. \textit{The Viewpoint Neutrality Requirement in the Circuit Court}

One important element in the Eleventh Circuit's analysis of the Career Day regulations in \textit{Searcey} was the requirement that such regulations must be viewpoint-neutral in order to pass constitutional muster.\textsuperscript{120} Indeed, the Supreme Court specifically included the requirement of viewpoint neutrality for a nonpublic forum analysis in outlining its public forum doctrine in \textit{Perry}.\textsuperscript{121} However, the School Board in \textit{Searcey} maintained that, based on the Court's 1988 decision in \textit{Hazelwood School District v. Kuhlmeier}, school officials were no longer prohibited from engaging in viewpoint-based discrimination.\textsuperscript{122} The Eleventh Circuit disagreed with the Board's contention and examined the Career Day regulations for evidence of viewpoint discrimination.\textsuperscript{123}

The Eleventh Circuit refuted the School Board's contention that \textit{Hazelwood} eliminates the requirement of viewpoint neutrality for restrictions on expression in a nonpublic curricular forum.\textsuperscript{124} First, the court

\textsuperscript{117}. \textit{Searcey v. Harris}, 888 F.2d at 1321, 1326. The Eleventh Circuit stated that "[i]t is not intuitively obvious that individuals who are no longer affiliated with a career would have less information or would present a less effective role model ..." \textit{Id.} at 1321. Therefore, because the Board had not introduced any evidence to support the reasonableness of the "present affiliation" requirement, the court of appeals found that such a restriction was unreasonable. \textit{Id.} at 1322.

\textsuperscript{118}. \textit{Id.} at 1322-24, 1326. Specifically, the district court had struck down the "no discouragement" ban of Regulation Ten and the "no criticism, no denigration" ban of Regulation Eleven. \textit{Id.} at 1326. Although the Eleventh Circuit agreed with the district court's reasoning, it held that the "no discouragement" and the "no criticism" requirements were reasonable "[t]o the extent that a speaker is discouraging a student from entering a specific career by providing students with valid and informative disadvantages of that career." \textit{Id.} "On the contrary, exhortative and denigrative presentations by speakers for the purpose of denouncing certain careers for the purpose which they serve may properly be banned." \textit{Id.}

\textsuperscript{119}. \textit{Id.}

\textsuperscript{120}. \textit{Id.} at 1319, 1324-25.

\textsuperscript{121}. 460 U.S. 37, 46 (1983). For a discussion of the \textit{Perry} public forum doctrine and the viewpoint neutrality requirement contained therein, see \textit{supra} notes 35-54 and accompanying text.

\textsuperscript{122}. \textit{Searcey v. Harris}, 888 F.2d at 1319, 1324-25.

\textsuperscript{123}. \textit{Id.} at 1324-25.

\textsuperscript{124}. \textit{Id.} at 1319.
opined that the reasonableness standard employed in Hazelwood is no different from the Perry standard for a nonpublic forum; "it is merely an application of that standard to a curricular program."\[125\] In addition, the Searcey court reasoned that its earlier decision in Alabama Student Party v. Student Government Association of the University of Alabama\[126\] specifically directed that the Perry standard is applicable to situations where outsiders seek access to a school for expressive purposes.\[127\] Moreover, the court posited that the Supreme Court did not consider the viewpoint neutrality requirement in Hazelwood, and therefore, the Hazelwood decision merely acknowledged a school's ability to discriminate based on content, not viewpoint.\[128\] Each of the arguments forwarded by the Searcey court in support of the application of a viewpoint neutrality requirement to the Career Day regulations will be considered below.

III. Analysis

A. The Curricular Forum: Reasonableness and Viewpoint Discrimination

In examining the Career Day regulations, the Eleventh Circuit accepted the district court's characterization of the Career and Youth Motivation Days as nonpublic forums for purposes of first amendment

\[125\] Id. Although the Eleventh Circuit actually refers to the Cornelius standard in discussing the standard of review for nonpublic forums, the Court in Cornelius merely quoted from Perry. Id. For a discussion of Cornelius, see supra note 53. For a discussion of the Perry standard, see supra notes 47-51 and accompanying text.

\[126\] 867 F.2d 1344 (11th Cir. 1989). In Alabama Student Party, university students and an association of students interested in running for office in the student government challenged campaign regulations adopted by the Student Government Association. Id. at 1345. The regulations: (1) restricted the distribution of campaign literature to three days before the election and only in designated locations; (2) prohibited the distribution of campaign literature on election day; and (3) limited public election debates to the week of the election. Id. Although the district court employed a Perry forum analysis in assessing the constitutionality of the campaign regulations, the Eleventh Circuit found Perry not controlling and undertook a general reasonableness analysis of the campaign regulations. Id. at 1345-47. Acknowledging the deference afforded by precedent to educators who are regulating expression with the intention of furthering the educational mission of a school, the court upheld the campaign regulations. Id. at 1347. In reaching its decision, the Eleventh Circuit noted that "[t]here was no evidence that the regulations were anything but viewpoint-neutral," although the court did not indicate its reasoning for reaching this conclusion. Id.

\[127\] Searcey v. Harris, 888 F.2d at 1319 n.7. The Alabama Student Party court specifically stated that the Cornelius standard is the applicable standard where outsiders seek access to a school. 867 F.2d 1344, 1345 (11th Cir. 1989). However, as applied to a nonpublic curricular forum as in Searcey, the Perry and Cornelius standards are equivalent. For a discussion of the public forum doctrine as outlined in Perry, see supra notes 35-54. For a discussion of the public forum doctrine as applied in Cornelius, see supra note 53.

\[128\] Searcey v. Harris, 888 F.2d at 1319 n.7.
Consequently, the Searcey court stated that "the Board's Career Day policy and regulations will be upheld if they are reasonable in light of the purposes of the forum and were not promulgated to suppress the viewpoint of the APA." Indeed, the characterization and analysis of Career Day as a nonpublic forum appears to be proper in light of the principles established in Perry. Because a public school represents publicly-owned property which serves a unique function in American society, restrictions on expression within the curricular "forum" of the public school should not be subjected to standard forum analysis.

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129. Id. at 1318. The APA did not appeal the finding by the district court that the Career and Youth Motivation Days were nonpublic forums, therefore, the Eleventh Circuit did not revisit the issue. Id.

130. Id. at 1319 (emphasis added).


The Searcey court relied upon the district court's characterization of Career Day as a nonpublic forum, without offering any independent reasoning for this conclusion. Searcey v. Harris, 888 F.2d at 1318-19. The reasoning of the district court, however, is consistent with the guidelines established by the Supreme Court in Perry. In Perry, the Court described a nonpublic forum as "[p]ublic property which is not by tradition or designation a forum for public communication." 460 U.S. at 46. In Searcey, the district court determined that Career Day was not by tradition accessible to the public, nor did the Atlanta School Board intend to "designate" Career Day as anything but a nonpublic forum. Searcey v. Crim, 681 F. Supp. 821, 828 (N.D. Ga. 1988). Thus, Career Day was properly designated as a nonpublic forum. For a discussion of the reasoning of the district court in characterizing Career Day as a nonpublic forum, see supra note 107.


For example, in Bethel, the Court considered the Section 1983 claim of a high school student who was suspended from school after delivering a nominating speech at a school assembly which contained "elaborate, graphic, and explicit sexual metaphor." Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 677-79 (1986). The student admitted that he deliberately used sexual innuendo in the speech and was thereafter suspended pursuant to a Bethel High School disciplinary rule prohibiting the use of "obscene, profane language or gestures." Id. at 678. Following his suspension, the student brought suit against the school district alleging a violation of his first amendment right to free speech. Id. at 679. Despite the fact that the student's speech involved "highly protected political expression," the Court held that the school district acted entirely within its authority in imposing sanctions upon the student in response to his indecent speech. Hafen, supra note 79, at 691. See also, Bethel, 478 U.S. at 685. In so holding, the Court "painted the school's educational domain in broad strokes . . . to reaffirm the place of public schools in teaching basic values within and beyond the classroom." Hafen, supra note 79, at 691. Acknowledging this unique function of the public school, the Court posited:

The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

The process of educating our youth for citizenship in public schools is
Rather, in light of the deference evidenced by the Supreme Court in *Hazelwood* to the decisions of educators in regulating expression in a curricular forum, and because of the special needs and objectives of the public school curricular forum, the *Searcey* court should merely have examined the Career Day regulations to determine if they were “reasonably related to legitimate pedagogical concerns.” Indeed, the School Board in *Searcey* made exactly this argument.

not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized society.

*Bethel*, 478 U.S. at 683.

Similarly, in Board of Education v. Pico, the Court scrutinized an attempt by a school board to remove library books, which members of the board found to be “anti-American, anti-Christian, anti-Semitic, and just plain filthy,” from the district’s junior and senior high school libraries. 457 U.S. at 856-57. The Board’s attempt to remove the books was challenged by a group of students from the affected schools, who brought a Section 1983 action alleging that the Board’s actions violated their first amendment rights. *Id.* at 856, 858-59. In a plurality opinion, the Court declined to defer to the Board’s decision to remove the books from the library, stating that the Board’s sweeping claim of discretion “overlook[ed] the unique role of the school library” and the “regime of voluntary inquiry that there holds sway.” *Id.* at 869. The plurality, however, acknowledging the special functions of the public school, concluded that the school board “might well defend their claim of absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values,” *id.* (emphasis added), and that the Board does possess unchallenged discretion in placing orders for library books, *id.* at 871, as well as “absolute discretion” in curricular matters. *Id.* at 869. See also *Tinker* v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969) (“First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.” (emphasis added)); San Diego Comm. Against Registration and the Draft v. Governing Bd. of the Grossmont Union High School Dist., 790 F.2d 1471, 1484 (9th Cir. 1986) (Wallace, J., dissenting) (citing *Tinker* and noting court’s “obligation to apply first amendment rights ‘in light of the special characteristics of the school environment’ requires that we accept school policies that are reasonably designed to adjust those rights to the needs of the school environment” (citations omitted)); Student Coalition for Peace v. Lower Merion School Dist. Bd. of School Directors, 776 F.2d 431, 437 (3d Cir. 1985) (“The courts have never ‘suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for his unlimited expressive purpose.’” (citation omitted)); Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 Tex. L. Rev. 477, 497 (1981) (“Conventional first amendment analysis is inappropriate in the public school situation . . . .”); see generally, Dessem, Board of Curators of the University of Missouri v. Horowitz: *Academic Versus Judicial Expertise*, 39 Ohio St. L.J. 476 (1978) (discussing Supreme Court’s view that academic decisions should be left to educators).

133. *Hazelwood*, 484 U.S. 260, 273 (1988). Certainly, the *Perry* standard employed by the *Searcey* court is well-established in first amendment jurisprudence. However, the application of the *Hazelwood* standard is more appropriate in the context of a public school, because it properly affords greater deference to the curricular decisions of administrators and teachers by not requiring that all decisions be viewpoint-neutral. For a discussion of the *Perry* standard, see * supra* notes 35-54 and accompanying text. For a discussion of *Hazelwood* and the “reasonableness” standard employed therein, see * supra* notes 72-84 and * infra* notes 138-52 and accompanying text.
B. Hazelwood and the Elimination of the Requirement of Viewpoint Neutrality in a Curricular Forum

The Atlanta School Board recognized the special needs of the public school setting and the inadequacy of standard forum analysis in evaluating the Board's access policy on Career and Youth Motivation Days. The School Board argued that the Supreme Court's recent decision in Hazelwood "change[d] the First Amendment analysis applied to school officials' decisions relating to curricular programs." Specifically, the Board asserted that, after Hazelwood, there is no requirement that restrictions on speech in a public school curricular activity, such as Career Day, must be viewpoint-neutral. The Board argued that the only requirement is that any restriction on speech in a curricular activity must simply be reasonable.

In Hazelwood, the Supreme Court asserted that, because of the special role of schools in our society, school officials are permitted to regulate student expression in a curricular setting where such a regulation would not be upheld in a nonschool setting. The School Board essentially argued that the Hazelwood decision established a new standard for scrutinizing restrictions on expression in a public school curricular setting. 

134. See Searcey v. Harris, 888 F.2d at 1319.

135. Id.

136. Id. at 1319 n.7, 1924. The Board's contention appears to be in direct opposition to the standard of scrutiny for a nonpublic forum enunciated in Perry and employed by both the district court and the Eleventh Circuit in analyzing the Board's Career Day access restrictions. Searcey v. Harris, 888 F.2d at 1319; Searcey v. Crim, 681 F. Supp. 821, 828 (N.D. Ga. 1988). Under a Perry analysis of a nonpublic forum, any restrictions on expression seemingly must be both reasonable and viewpoint-neutral. Perry, 460 U.S. at 46. This analysis, in fact, was the standard employed by both the district court and the Eleventh Circuit in analyzing the Career Day access restrictions in the instant case. See Searcey v. Harris, 888 F.2d at 1319; Searcey v. Crim, 681 F. Supp. at 828. The mere reasonableness standard announced in Hazelwood, however, is not necessarily inconsistent with the Perry analytical framework for a nonpublic forum. For a discussion of the interplay between the Perry and Hazelwood analyses, see infra note 141.

The School Board essentially argued that the Hazelwood decision established a new standard for scrutinizing restrictions on expression in a public school curricular setting. Searcey v. Harris, 888 F.2d at 1319. This new standard requires only that restrictions on expression in a public school curricular forum be reasonable, essentially eliminating the requirement of viewpoint neutrality imposed under Perry. Id.

137. Searcey v. Harris, 888 F.2d at 1319. The Hazelwood Court specifically required that any restrictions on speech in a school-sponsored expressive activity be "reasonably related to legitimate pedagogical concerns." Hazelwood, 484 U.S. at 273. For a discussion of the Hazelwood standard of scrutiny, see supra notes 78-84 and accompanying text.

138. Hazelwood, 484 U.S. at 271. The Court stated that educators have the authority to exercise greater control over school-sponsored student expression in order to accomplish the curricular objectives of the activity and to prevent students from being exposed to material that may be inappropriate for their age and maturity level. Id. Also, school officials are entitled to regulate student expression to assure that the views of the speaker are not improperly attributed to...
lation of expression in a curricular setting are that such restrictions must be "reasonably related to pedagogical concerns" and must have a "valid educational purpose." Moreover, according to the Hazelwood Court, school administrators are to be afforded a great deal of deference in their decisions to restrict expression in a school setting. The Eleventh Circuit, however, dismissed the School Board's contention that the Hazelwood decision warranted the application of a mere "reasonableness" standard to the Career Day regulations. One of the school and to dissociate the school from speech that is biased or prejudicial.

For a discussion of Hazelwood, see supra notes 72-84 and accompanying text.

139. Hazelwood, 484 U.S. at 273. Noticeably absent from the Hazelwood standard for a curricular setting is any explicit requirement that the restrictions be viewpoint-neutral. Indeed, viewpoint neutrality is one of the two essential elements for a restriction on expression in a nonpublic forum that must be satisfied in order to pass constitutional muster under the Perry framework. 460 U.S. at 46. For a discussion of Perry, see supra notes 35-54 and accompanying text.

140. Hazelwood, 484 U.S. at 273 & n.7. The Hazelwood Court addressed the regulation of student speech in a curricular setting. In Searcey, however, the Eleventh Circuit considered a regulation of access of outsiders who sought to participate in a curricular forum within the school. 888 F.2d at 1316-17. However, it is difficult—if not impossible—to argue that a public school administrator should not have at least the same right to regulate the expression and the access of outsiders to a public school curricular activity as the Court affords an administrator when regulating student expression within the same forum.

In delineating the standard of review for speech in a curricular setting, the Hazelwood Court noted that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." 484 U.S. at 273 (emphasis added). The Hazelwood Court's deferential posture toward the decision of educators is evidenced throughout the decision: "It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d],' as to require judicial intervention to protect students' constitutional rights." Id. (citation omitted).

The Court further stated that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." Id.

141. Searcey v. Harris, 888 F.2d at 1319 & n.7. Specifically, the Searcey court asserted that the reasonableness standard employed in Hazelwood is no different from the [Perry] standard for a nonpublic forum; "instead it is merely an application of that standard to a curricular program." 888 F.2d at 1319. In fact, the reasonableness standards employed in Perry and Hazelwood may be functionally equivalent when applied to a public school curricular forum. The School Board's central contention, however, was that the Hazelwood decision rendered the viewpoint neutrality branch of the Perry forum analysis inapplicable to a curricular forum. Id.

Additionally, the Searcey court reasoned that its earlier decision in Alabama Student Party v. Student Government Association of the University of Alabama, 867 F.2d 1344 (11th Cir. 1989), directed that the Perry standard—with its accompanying requirement of viewpoint neutrality—is applicable to situations where outsiders seek access to a school for expressive purposes. 888 F.2d at 1319 n.7. However, the language of Alabama Student Party referred to by the Searcey court in
the principle reasons relied upon by the Eleventh Circuit in rejecting the Board's contention is that the Hazelwood Court was not confronted with any evidence of viewpoint discrimination, and therefore, the Hazelwood decision merely afforded educators the right to make reasonable content-based restrictions. However, a close reading of the language of Hazelwood—considered in conjunction with the overriding interests of the public school—suggests that, in fact, the Court is prepared to allow educators to invoke reasonable restrictions on expression which may also be viewpoint-based.

According to the Hazelwood Court, educators may regulate expression in a curricular forum "to assure that participants learn whatever lessons the activity is designed to teach." Moreover, school officials are permitted to exercise control over expression in a curricular forum to prevent students from being exposed to material which may not be appropriate for their intellectual and emotional maturity levels. Support of this proposition cites cases involving a university, not an elementary or secondary school. Alabama Student Party, 867 F.2d at 1345 (citing Widmar v. Vincent, 454 U.S. 263 (1981); Healy v. James, 408 U.S. 169 (1972)). Additionally, Alabama Student Party itself involves a university forum, rather than an elementary or secondary school. Alabama Student Party, 867 F.2d at 1345. A critical theme throughout the Hazelwood decision is the need for recognition of the unique features of the public school when scrutinizing restrictions on expression in a curricular forum. Hazelwood, 484 U.S. at 271-72. A university does not possess the same features or fulfill the same mission as an elementary or secondary school. Therefore, the standards employed in scrutinizing restrictions on expression in a university forum are not necessarily applicable when analyzing such restrictions in a public school. In fact, the Hazelwood Court specifically noted that it was not deciding "whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." Id. at 273 n.7. For a discussion of the unique features of the public school which warrant a different standard of analysis, see infra notes 158-81 and accompanying text.

142. Searcey v. Harris, 888 F.2d at 1319 n.7.
143. The Hazelwood Court labels these overriding interests as "legitimate pedagogical concerns." 484 U.S. at 271-73. For a discussion of these "legitimate pedagogical concerns" as defined in Hazelwood, see infra notes 145-49 and accompanying text. For a discussion of the unique features and functions of the public school which warrant the use of a mere "reasonableness" standard in assessing restrictions on expression in a curricular forum, see infra notes 158-81 and accompanying text.

144. In fact, one commentator has asserted that not only is the Court prepared to accept viewpoint-based restrictions, but in fact "the Hazelwood decision provides no limiting mechanism to restrain educators from censoring student speech." Note, A Lesson in School Censorship: Hazelwood v. Kuhlmeier, 55 Brooklyn L. Rev. 291, 323 (1989) (emphasis added).
145. Hazelwood, 484 U.S. at 271.
146. Id. The Hazelwood Court cited the need for educators to account for the emotional maturity of the intended audience in determining whether particular expression addressing sensitive topics should be permitted in the curricular forum. Id. at 272. Such sensitive topics might include the existence of Santa Claus in an elementary school forum or specific information about teenage sexual activity in a high school forum. Id.
nally, the Hazelwood Court bestowed upon educators the discretion to regulate expression to ensure that the views of individual speakers are not wrongfully perceived to bear the imprimatur of the school. Thus, school officials possess authority to refuse to sponsor speech that might be perceived, inter alia, to advocate conduct inconsistent with "the shared values of a civilized social order," or "to associate the school with any position other than neutrality on matters of political controversy."

Having expressly granted school officials the discretion to undertake regulation of expression in support of the above-listed "legitimate pedagogical concerns," surely the Court did not then expect or require that all regulations on expression undertaken by educators in furtherance of these concerns would be strictly viewpoint-neutral. Rather,

147. Id. at 271.
148. Id. at 272 (quoting Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).
149. Id. at 272. One commentator has observed that by allowing school officials to dissociate the school from any appearance of partisanship, the Hazelwood Court attempted "to stifle the very speech that the first amendment seeks to protect, namely political speech." Note, supra note 144, at 317.

Additionally, the Hazelwood Court outlined several other categories of expression from which school officials have a right to dissociate the school: (1) speech that is "biased or prejudiced," Hazelwood, 484 U.S. at 271, and (2) speech that would "substantially interfere with [the school's] work . . . or impinge upon the rights of other students." Id. (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 509 (1969)).

150. In fact, it would be logically indefensible—if not entirely impossible—for the Court to require that every decision made by educators in pursuit of these valid objectives must be strictly viewpoint-neutral. For example, the Hazelwood Court granted school officials the discretion to regulate expression to prevent students from being exposed to material that may not be appropriate for their emotional maturity levels. 484 U.S. at 271-72. The Court noted that such restrictions might properly involve, for example, protecting elementary school students from such sensitive topics as the existence of Santa Claus. Id. at 272. Using the Court's example, it follows that educators will necessarily enjoy discretion to exclude a storyteller who openly denies the existence of Santa Claus in his or her stories from an elementary school holiday festival, even though other storytellers who perpetuate the Santa Claus legend may be permitted to participate in the same festival.

Even more pointedly, the Court granted school officials authority to refuse to sponsor expression which advocates conduct inconsistent with "the shared values of a civilized social order." Id. Accordingly, educators may, for example, refuse to sponsor speech which appears to advocate "irresponsible sex." Id. Invoking such restrictions on expression necessarily involves school officials first determining whether or not a particular viewpoint—such as the advocacy of irresponsible sex—is consistent with societal values. Upon finding that such a viewpoint is in fact inconsistent, school officials are granted the authority to refuse to sponsor such expression. Under this framework, school officials would presumably be acting within permissible first amendment bounds by excluding a speaker whom administrators deem an advocate of irresponsible sex from a high school roundtable discussion addressing teenage sexuality, while at the same time permitting speakers who advocate teenage abstinence to serve as panelists for the same discussion. When school officials seek to determine what, in fact,
in order to effectuate the clear intent of the Court to allow educators to pursue these "legitimate pedagogical concerns," the language of Hazelwood must be read to grant educators broad discretion to regulate expression in a curricular setting, even if such regulation is not entirely viewpoint-neutral.\(^1\) Therefore, according to the Hazelwood opinion, the only limitation imposed upon school officials’ pursuit of permissible objectives is that they must act reasonably when imposing restrictions on expression to achieve these objectives.\(^2\)

are the so-called "shared values of civilized society," and when they determine that a particular speaker’s viewpoint is inconsistent with those values, and thus, exclude that speaker from a curricular forum, school officials will be exercising viewpoint discrimination.

151. The Eleventh Circuit opined that Hazelwood merely authorizes educators to regulate expression based upon content, not viewpoint. \(^3\)Searcey v. Harris, 888 F.2d at 1319 n.7. However, in order to promote the “legitimate pedagogical concerns” outlined in Hazelwood, school officials must engage in both content and viewpoint selectivity. For example, one valid basis cited by Hazelwood for regulating expression in a curricular forum is to prevent the erroneous appearance that the views of a particular speaker bear the imprimatur of the school. 484 U.S. at 271. In pursuit of this permissible objective, junior high school officials might deem it necessary to exclude a speaker from the Nazi Party from participating in a school-wide assembly addressing political parties in the American political system, despite allowing representatives from the Republican, Democratic and Libertarian parties to freely participate. Although the decision to exclude the Nazi Party would largely be based upon the disagreeable viewpoint of the speaker, school officials would presumably be justified in excluding such a speaker not only to avoid the appearance to the students that the school is placing its imprimatur upon the views of the speaker, but also because the speaker’s viewpoint would be decidedly “biased or prejudiced.” \(^4\)See id.

Moreover, the Hazelwood Court held that educators may regulate the style and content of expression in a curricular forum provided such restrictions are “reasonably related to legitimate pedagogical concerns.” \(^5\)Id. at 273. The Eleventh Circuit in Searcey relied upon this language in concluding that Hazelwood allows educators to make reasonable content-based restrictions, but not viewpoint-based restrictions. 888 F.2d at 1319 n.7. In so reasoning, the Searcey court necessarily concluded that there is a bright line distinguishing content-based restrictions from viewpoint-based restrictions. However, in M.N.C. of Hinesville, Inc. v. United States Department of Defense, 791 F.2d 1466 (11th Cir. 1986), the Eleventh Circuit defined viewpoint-based restrictions as merely a type or subset of content-based restrictions, rather than as an entirely separate category. \(^6\)Id. at 1474. The M.N.C. court stated that “content-based restrictions imposed in nonpublic forums may fall into two categories, those that distinguish between the views of certain speakers (viewpoint-based) and those that do not (viewpoint-neutral),” \(^7\)Id.; accord, M. Redish, supra note 3, at 91 (“The classic content-based regulation is one that prohibits the expression of a particular point of view.”). Thus, under the plain language of the Eleventh Circuit in M.N.C., by affording educators the discretion to make reasonable content-based restrictions, the Hazelwood Court granted educators the right to make both viewpoint-based and viewpoint-neutral restrictions.

152. Hazelwood, 484 U.S. at 273. Moreover, interpreting Hazelwood to require that educators merely act “reasonably” when regulating expression in a curricular forum is not necessarily inconsistent with the standard established for a nonpublic forum by the Court in Perry. Perry Educ. Assoc. v. Perry Local Educators’ Assoc., 460 U.S. 37, 46 (1983). In establishing its constitutional standard for restrictions on expression in a nonpublic forum, the Perry Court stated that
Not only does the language of Hazelwood indicate that courts should not consider viewpoint neutrality when scrutinizing restrictions on expression in a curricular forum, but in addition, an examination of the role of the public school in American society suggests that a requirement of viewpoint neutrality is inconsistent with the mission of the public school. American public schools by their very nature are—and should be—value-laden institutions. Consequently, viewpoint discrimination is inherent in many decisions regulating expression in the curricular setting. Thus, school officials must sometimes engage in what would be termed “viewpoint discrimination” under the Perry forum analysis, in order to achieve the desired ends in a curricular setting.

"the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Id. at 46 (citing United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 n.7 (1981)); accord Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) ("[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."). Such viewpoint discrimination—based upon the improper motivation of the government to suppress a viewpoint with which it merely disagrees—is per se unconstitutional and would be unacceptable even under the Hazelwood standard. See Stone, supra note 54, at 227-29.

However, viewpoint discrimination undertaken to further the “legitimate pedagogical concerns,” outlined in Hazelwood, represents a separate species of viewpoint discrimination which is neither specifically proscribed by the language of Perry, nor unconstitutional per se. See id. at 229. Rather, when educators restrict expression in a curricular forum in order to further a “legitimate pedagogical concern,” such viewpoint discrimination is, by definition, not undertaken “merely because [school] officials oppose the speaker’s view,” and would therefore not be proscribed under the plain language of Perry. Perry, 460 U.S. at 46. Therefore, Hazelwood can be viewed as consistent with Perry in indicating that the mere presence of viewpoint discrimination in a restriction on expression in a curricular forum will not by itself invalidate the restriction, provided that school officials can establish that the restriction is reasonable and undertaken to further a “legitimate pedagogical concern” or a “valid educational purpose.” Hazelwood, 484 U.S. at 273.

153. For a discussion of Hazelwood and the diminished role of viewpoint neutrality when scrutinizing restrictions on expression in a curricular forum, see supra notes 135-52 and accompanying text.

154. See, e.g., Board of Educ. v. Pico, 457 U.S. 853, 864 (1982) ("We have acknowledged that public schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.'") (citing Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)). For a discussion of Pico, see supra note 132 and accompanying text. See also Diamond, supra note 132, at 499 ("Value inculcation, rather than value neutrality, has been the tradition of public education since the beginning of the American republic.").

155. For example, an elementary school class might undertake a study of the Founding Fathers with a stated objective to encourage patriotism and love of America in students who successfully complete the unit. By its very nature, this stated objective itself is viewpoint discriminatory because it is based upon the viewpoint that one should love his or her country. Moreover, to achieve this stated objective, such a unit requires that students of such a young age must be
Therefore, regulations on expression in a public school curricular forum should not be scrutinized under the *Perry* public forum doctrine, but instead, they should be subjected to a more deferential standard of reasonableness as was proposed in *Hazelwood*.

C. *Endemic Viewpoint Discrimination and the Need for Judicial Deference in a Public School Curricular Forum*

A careful examination of public school policy and operation reveals that decision-makers frequently and properly engage in "viewpoint discrimination" or "viewpoint selectivity" to achieve the desired pedagogical ends. Consequently, traditional public forum analysis—which presented with information framed in decidedly pro-American terms. For other examples of educators engaging in viewpoint discrimination, see *infra* notes 158, 161 & 165 and accompanying text. For examples of state education statutes which mandate the inculcation of such values, see *infra* note 158.

158. See, e.g., Ambach v. Norwick, 441 U.S. 68 (1979). In *Norwick*, the Court examined the constitutionality of a New York statute which prevented resident aliens who refused to become United States citizens from obtaining a teaching certificate. *Id.* at 69-70. Although the Court had previously held that classifications based upon alienage were "inherently suspect and subject to close judicial scrutiny," *Graham v. Richardson*, 403 U.S. 365, 372 (1971), the *Norwick* Court held that such a high standard did not apply to school teachers. *Norwick*, 441 U.S. at 80. In reaching this conclusion, the Court considered the role of public education and the degree of discretion that public school teachers possess, emphasizing the importance of the value-laden role of the teacher and the discretion exercised by the teacher in producing students with the proper value orientation. *Id.* at 76-80.

One commentator has observed that "*Norwick* is essentially a statement by the Court that public school education is a value-laden activity and that the state is entitled to ensure that the exemplars chosen for the students have the proper value orientation." *Diamond*, *supra* note 132, at 527. Indeed, one of the central theses of Diamond's article is the need for judicial deference to the decisions of educators in areas of first amendment concern to allow school officials to fulfill the mandates of the public school, including value inculcation. *See Diamond*, *supra* note 132. Implicit in the role of school officials fulfilling these mandates is the need to make decisions which are necessarily "viewpoint selective."

In fact, many states confer discretion by statute to school officials to engage in "viewpoint discrimination," or more benignly, "viewpoint selectivity" in seeking to achieve the state's objectives in its public schools. For example, New York requires that students up to grade eight shall study math, reading, spelling, the English language, geography, United States history, civics, hygiene, physical education, the history of the State of New York and science. N.Y. EDUC. LAW § 3204 (McKinney 1981). However, the statute also enumerates additional state interests in public education, including the teaching of the destructive effects of communism, the harmful effects of drugs, and the inculcation of patriotic attitudes. *Id.* §§ 802, 804, 3204. Similarly, New Jersey requires that high school students undertake a two-year study of the history of the United States which shall include the study of events which "will tend to instill . . . a determination to preserve these principles and ideals [of the American form of representative government] . . . and an appreciation of their solemn duty and obligation to exercise the privilege of the ballot . . . ." N.J. STAT. ANN. § 18A:35-2 (West
expressly forbids any form of viewpoint discrimination—is inappropriate in a public school curricular forum.

First, the public school is by design an institution principally concerned with "nurturing the underlying values of the first amendment." However, because the public school is controlled to a large extent by both state and local elected officials, society as a whole as well as the local community ostensibly defines what "underlying values" will be conveyed and how they should be promoted within the public school. Such societal and communal control is evidenced, for example, when school boards or teachers select textbooks forwarding their own views or biases, or when a teacher is required to submit her or his weekly lesson plans to the administration for a review of the content and methodology. Such practices, although commonplace, represent a

1987). Moreover, New Jersey affords each local school board the discretion to develop courses which transmit "the principles of humanity as the same apply to kindness and avoidance of cruelty to animals and birds, both wild and domesticated." Id. § 18A:35-4.1 (West 1988).

In fact, the Supreme Court has expressed an overall need for increased restrictions on first amendment rights when there is an immature audience that cannot protect itself from the exercise of expression by others. See, e.g., FCC v. Pacifica Found., 438 U.S. 726, 749-50 (1978) (justifying broadcast restrictions involving indecent language because of media's unique accessibility to children and state's interest in protecting youth).

159. See Hafen, supra note 79, at 701. Hafen describes public schools as "first amendment institutions." Id. at 685. According to Hafen, "first amendment institutions" are institutions which can "advance the underlying values of the first amendment in the lives of individuals." Id. at 685 n.5. Thus, the public school is "not just another bureaucratic arm of the state, but is an institution that mediates between the individual and the megastructures of contemporary government." Id. at 701.

In order to advance the values of the first amendment, however, educators must interact with students in a manner which is fundamentally different from any other type of interaction between the state and individuals. Id. In the context of the public school, the state engages in "supervising, directing [and] forbearing, all according to personalized educational judgments about the needs and circumstances of each child." Id. By engaging in such activities, educators are seeking to support, rather than to interfere, with first amendment values. Id. Yet, requiring viewpoint neutrality in all restrictions on expression undertaken by school officials potentially prevents educators from selectively promoting these same first amendment values.

The curricular activities of a public school, in particular, bear heavily upon the values underlying the first amendment. See Diamond, supra note 132, at 497. Such activities are "concerned with conveying information, assessing the effects of the conveyance of information, and indoctrinating the participants with the correct notions about information." Id.

160. Diamond, supra note 132, at 497. "[E]lected representatives of the state designate the ideology and some of the content of public school teaching material. The elected representatives of the locality, the local school board, and their appointees designate the remainder of the content and much of the ideology." Id.

161. Id. Such viewpoint selectivity is also evidenced throughout the school year when a teacher, after attempting to convey to the students the required version of a particular subject, tests the students to see if they have learned the
type of viewpoint discrimination which would be deemed impermissible under the public forum doctrine posited in *Perry.*

The viewpoint neutrality requirement of the *Perry* public forum doctrine is also inappropriate for use in scrutinizing restrictions on expression in a public school curricular forum because "one of public education's principal functions always has been to indoctrinate a generation of children with the values, traditions, and rituals of society." The tradition of the American public education system is value inculcation, not value neutrality. Judicial affirmation of the public schools' attempt to inculcate community values is evidenced in cases addressing the disciplining or firing of teachers for extracurricular behavior.

material properly. *See id.* Answers which largely conform to the views taught are rewarded with high marks, while answers not largely conforming to the expounded views are penalized. *Id.* "In the end, a sufficient compilation of proper responses to the controlled process produces a graduate." *Id.*

*162.* For a discussion of the *Perry* forum analysis, see *supra* notes 35-54 and accompanying text.

*163.* Diamond, *supra* note 132, at 498 (citing R. Williams, *American Society: A Sociological Interpretation* 305 (3d ed. 1970)). The Supreme Court has also noted the role of the public school as an instiller of societal values. *See, e.g.,* Ambach v. Norwick, 441 U.S. 68, 76 (1979) (noting that "[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions"); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (noting that education serves as "a principal instrument in awakening the child to cultural values"). Interestingly, the role of the public school as a conveyor of societal values was cited by the *Searcey* court as well. 888 F.2d at 1319. However, while acknowledging this special function of the public school, the *Searcey* court, nonetheless, engaged in a traditional public forum analysis in scrutinizing the Career Day regulations of the Atlanta School Board. *Id.* at 1318-1325. For a discussion of the forum analysis employed in *Searcey,* see *supra* notes 107-28 and accompanying text.

*164.* Diamond, *supra* note 132, at 499 ("[F]rom the beginning, American education was concerned with the teaching of 'sound doctrine' by teachers, locally selected and controlled, who were 'sound in faith.'").

*165.* *See, e.g.,* Sullivan v. Meade Indep. School Dist., 530 F.2d 799 (8th Cir. 1976); Cook v. Hudson, 511 F.2d 744 (5th Cir. 1975); Miller v. School Dist. Number 167, 495 F.2d 658 (7th Cir. 1974). Typically, the teacher is not engaging in illegal behavior, but rather simply behavior which is contrary to the values which the school system seeks to promote. Diamond, *supra* note 132, at 505 n.129. Diamond cites three cases in support of this proposition. *Id.* First, in Sullivan v. Meade Independent School District, the Eighth Circuit upheld the firing of a single female school teacher because she was living with a man. 530 F.2d at 804-08. The court noted that the school teacher's conduct might have a negative effect on her students, especially in light of the fact that she taught in a small rural community, and therefore, her termination was justified. *Id.* at 808. Similarly, in Cook v. Hudson, the Fifth Circuit held that a school district was entitled to require that all members of its faculty must be committed to a desegregated school system. 511 F.2d at 748. Therefore, the school was justified in not rehiring a teacher who sent his children to a private, segregated school in direct violation of a school board rule forbidding such practice by members of the faculty. *Id.* at 744-46, 749. Finally, in Miller v. School District Number 167, the Seventh Circuit held that a school board, elected by the local community,
Such attempts at value inculcation plainly contradict the viewpoint-neutral requirements imposed under a traditional forum analysis.

A third and compelling reason for excluding the viewpoint neutral requirement in analyzing restrictions on expression in a public school is that by allowing "managerial authority over speech," the school's primary goal of education is furthered. Courts have long recognized the need for restrictions on expression in order to achieve the legitimate goals of many different types of institutions including prisons, military bases, the judicial system and public schools where student speech is involved. Thus, while viewpoint discrimination, prior re-

166. Post, supra note 10, at 1769. Although Post refers specifically to employees or members of an institution, there is little reason to draw any distinction between restrictions imposed upon a teacher or a janitor employed by a public school or an outside speaker invited into the school by the administration. To argue otherwise would lead to the situation where although a teacher might be restrained from presenting a certain viewpoint to her or his class, that same teacher could simply invite an outside speaker to present the same restricted material.

167. See, e.g., Turner v. Safley, 482 U.S. 78, 89 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."). Post notes that even though prisoners do not enter confinement voluntarily, the Court has explicitly subordinated the first amendment rights of prisoners in order for prison officials to attain "the legitimate penological objectives of the corrections system." Post, supra note 10, at 1770 (citing Pell v. Procunier, 417 U.S. 817 (1974)).

168. See, e.g., Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian life."). Regarding free speech in the military, the Court stated in Brown v. Glines, 444 U.S. 348, 354 (1980), that "[s]peech likely to interfere with...vital prerequisites for military effectiveness...can be excluded from a military base." Post, supra note 10, at 1770.

169. Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984). The Supreme Court in Rhinehart held "that the fair and expeditious administration of the judicial system justifies subjecting the pretrial speech of litigants to prior restraints at the discretion of a trial judge." Post, supra note 10, at 1771. It is noteworthy that this "judicial authority extends equally to plaintiffs, who have voluntarily submitted to a court's jurisdiction, and to defendants, who have not." Id. (emphasis added). The judge's control of speech within the courtroom is even more extensive, and extends indifferently to parties, witnesses and even spectators. Id. at 1771 n.228.

170. See, e.g., Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988). For a discussion of Hazelwood, see supra notes 73-84 and accompanying text. See also Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). Post observes that even though elementary and secondary students are compelled to attend school, the Supreme Court has held "that student speech, 'in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.'" Post, supra note 10, at 1770 (quoting Tinker, 393 U.S. at 513).
straints, official discretion, agenda setting and so forth are presumptively unconstitutional when the state seeks to govern the speech of the general public, these principles do not automatically apply when the government regulates speech within the institutions it manages. 171 Rather, once it is established that the government may properly exercise managerial authority over the resource at issue, the sole question for judicial determination should be whether a regulation on speech is "necessary for the achievement of . . . legitimate institutional ends." 172 Thus, in light of the undisputable need for public officials and educators to exercise managerial authority over the curricular environment of a public school, the sole issue before the court when scrutinizing a restriction on expression in a curricular setting should be whether the restriction is "reasonably related to legitimate pedagogical concerns." 173 Unavoidably, there will be instances in which it will be necessary for a school official or a teacher to regulate expression based, at least partially, on viewpoint in order to achieve valid pedagogical goals. 174 If such decisions were scrutinized according to the public forum rubric established in Perry, however, a court would be compelled to find that such restrictions were viewpoint discriminatory, and therefore, unsustainable. 175

A fourth and final rationale for not employing traditional public forum analysis when scrutinizing restrictions on expression in a public school is the Court-acknowledged need for deference to the decisions of educators concerning curricular issues. 176 This deference to the judg-

171. Post, supra note 10, at 1782.
172. Id. at 1783.
173. Hazelwood, 484 U.S. at 273. For a discussion of the Hazelwood standard, see supra notes 78-84 and accompanying text.
174. Indeed, the facts of Hazelwood are illustrative of a situation in which an educator was justified in regulating expression based—at least partially—on the content and viewpoint of student speech. Hazelwood, 484 U.S. 260 (1988). For a discussion of Hazelwood, see supra notes 73-84 and accompanying text.
175. For a discussion of the Perry public forum doctrine, see supra notes 35-54 and accompanying text. Under the public forum analysis proposed in Perry, any restrictions on expression—whether in a public or nonpublic forum—must be viewpoint-neutral. Perry, 460 U.S. at 45-46. Therefore, when a science teacher elects to teach only one theory to explain a phenomenon, despite the availability of numerous accepted approaches, that teacher is necessarily favoring one viewpoint over another and technically engaging in forbidden viewpoint discrimination. Similarly, when a school board selects a history textbook partially based upon the author's pro-American treatment of the events surrounding World War II, the board is engaging in viewpoint discrimination. This author suggests that under a traditional public forum analysis, both the science teacher's and the school board's decisions would constitute impermissible viewpoint discrimination—despite the presence of a reasonable basis for both decisions—and would therefore be unsustainable. Under the Hazelwood standard of reasonableness, however both the science teacher's and the school board's decisions would be sustainable, provided only that the decisions were "reasonably related to legitimate pedagogical concerns." Hazelwood, 484 U.S. at 273.
ment of educators is necessary because "in the public school context, perhaps no one, but certainly not the judiciary, can readily ascertain the mental or emotional state that is necessary, appropriate, or desirable for learning to take place."\textsuperscript{177} Employing the Hazelwood reasonableness standard in scrutinizing restrictions on expression in a public school would vest educational decision-makers with the appropriate latitude to make decisions affecting the curricular environment.\textsuperscript{178} Conversely, a requirement that all restrictions on expression imposed by educators must be viewpoint-neutral has three deleterious effects: (1) it forecloses a large area of discretion to the public school decision-maker who is faced with limited time and resources;\textsuperscript{179} (2) it invites increased litigation as educators seek to contend with an increasingly pluralistic society\textsuperscript{180} and (3) it denies the social realities and structure of the American public school system which is commissioned to inculcate values as well as to impart knowledge.\textsuperscript{181}

\textsuperscript{177} Diamond, \textit{supra} note 132, at 486. The difficulty of ascertaining the circumstances and conditions necessary for learning is aptly illustrated by the circumstances surrounding the issuance of the Coleman Report in 1965. \textit{Id.} at 486 n.51. The Coleman Report was touted as a comprehensive analysis of education and suggested that "the social class composition of public schools is the most important variable affecting learning." \textit{Id.} Therefore, the Report recommended that "lower income blacks should be integrated in classes with middle-income white students." \textit{Id.} This report was widely criticized on a number of bases, including its methodology and its basic assumptions. \textit{Id.} For an example of criticism of the Coleman Report, see Goodman, \textit{De Facto School Segregation: A Constitutional and Empirical Analysis}, 60 CALIF. L. REV. 275, 403-37 (1972). In 1981, Professor Coleman issued a second report which "suggested that everyone, regardless of race or social class, learns better in private and parochial schools than in public schools." Diamond, \textit{supra} note 132, at 486 n.51. Diamond writes that "[t]he changed viewpoint of the later Coleman Report reflects the tremendous empirical uncertainty over what constitutes the best, or even an adequate, learning environment." \textit{Id.}

\textsuperscript{178} For a discussion of the Hazelwood reasonableness standard, see \textit{supra} notes 78-84 and accompanying text.

\textsuperscript{179} See Widmar v. Vincent, 454 U.S. 263, 276 (1981) (recognizing right of state university to "make academic judgments as to how best to allocate scarce resources").


\textsuperscript{181} For a discussion of the inculcation of values in the public school, see \textit{supra} notes 163-65 and accompanying text.
D. The Application of the Hazelwood Reasonableness Standard to Searcey v. Harris

The Searcey court relied upon the Perry public forum doctrine in assessing the various access restrictions imposed by the School Board on the APA. This assessment required the court to determine whether the Board's Career Day access policy was both "reasonable" and "viewpoint-neutral." Curiously, the court in Searcey appeared to apply the same "reasonableness" standard suggested by Hazelwood in assessing the validity of the Career Day regulations. In fact, the Searcey court acknowledged that because Career Day was a nonpublic forum, the School Board would be acting reasonably if the regulations placed on Career Day made "content-based distinctions which serve an educational purpose." This standard is functionally identical to the "reasonably related to legitimate pedagogical concerns" standard established in Hazelwood for assessing the reasonableness of a restriction on expression in a curricular setting.

Following its testing of the reasonableness of the Career Day regulations, however, the court in Searcey imposed a viewpoint neutrality test as is required when analyzing restrictions on expressions in a nonpublic forum. Under the more appropriate standard of Hazelwood, rather than the viewpoint neutrality test applied by the Searcey court, the School Board would have been acting reasonably if the regulations placed on Career Day were "reasonably related to legitimate pedagogical concerns." Not surprisingly, the court in Searcey concluded that the reasonableness standards in Hazelwood and Cornelius were indistinguishable for purposes of its analysis of the School Board's Career Day regulations. The court noted that "as with any other nonpublic forum, once the School Board determines that certain speech is appropriate for its students, it may not discriminate between speakers who will speak on the topic merely because it disagrees with their views." Id. at 1324.

The court cited an opinion of the Ninth Circuit as an example of school authorities opening a forum [a school newspaper] for discussion of the military and then—merely because the school disagreed with the group's viewpoint—refusing access to a peace group who sought to address the same topic. Searcey v. Harris, 888 F.2d at 1324. In San Diego Committee, the Ninth Circuit employed public forum analysis and determined that the exclusion of the peace group's advertising from the school newspaper was viewpoint discriminatory, and therefore, unconstitutional. San Diego Comm. Against Registration and the Draft v. Governing of Grossmont Union School Dist., 790 F.2d 1471, 1481 (9th Cir. 1986). Although decided prior to Hazelwood, San Diego Committee represents an
than employing a second test and requiring that the Career Day regulations be viewpoint-neutral, the *Searcey* court should have simply stopped its analysis of the Career Day regulations after applying the reasonableness test. If the Board was unable to demonstrate that a particular regulation was "reasonably related to [a] legitimate pedagogical concern,"188 the regulation would have been unsustainable. However, if the Board could establish that a regulation bore upon a "legitimate pedagogical concern" or furthered a "valid educational purpose" surrounding Career Day, the regulation would be sustainable, even if the regulation clearly discriminated against the viewpoint of the APA, or any other group or individual.189 In essence, under the *Hazelwood* standard, the test for restrictions on expression in a curricular forum is streamlined to one simple standard.190

Not surprisingly, had the *Searcey* court employed the *Hazelwood* standard rather than a traditional public forum analysis in assessing the constitutionality of the Career Day regulations, it is likely that the court would have reached a different conclusion.191 The Eleventh Circuit in *Searcey* determined that the regulation which excluded all speakers whose "primary focus or emphasis to discourage a student’s participation in a particular career field" was unreasonable as it totally excluded such persons or groups from Career Day, rather than simply limiting what the group might discuss at the forum.192 The court reached this other situation in which the basic standard of reasonableness is more appropriate than the traditional public forum rubric in analyzing a restriction on expression in a curricular setting such as a school newspaper. If the administrator is unable to demonstrate an underlying "legitimate pedagogical concern" in his exclusion of the peace group’s advertising, then the administrator’s action would be unsustainable. See *Hazelwood*, 484 U.S. at 273. However, even if, in fact, the administrator’s rationale for excluding the peace group was largely viewpoint-based, such a restriction would still be sustainable under the *Hazelwood* standard if the administrator could demonstrate the "reasonableness" of the exclusion. Therein lies the important distinction between the application of the public forum doctrine with its traditionally strict requirement of viewpoint neutrality and the application of the more deferential *Hazelwood* standard of reasonableness to a curricular setting.

189. *Id.*
190. Specifically, the test under *Hazelwood* is simply whether a restriction on expression is "reasonably related to legitimate pedagogical concerns." *Id.*
191. For a discussion of the Career Day Regulations, see *supra* note 106.
192. *Searcey v. Harris*, 888 F.2d at 1322. Additionally, the court in *Searcey* determined that the portion of the regulations requiring that participants have "some present affiliation with that career field" was unreasonable because it would necessarily preclude even recent retirees from participating in Career Day. *Id.* at 1321. The court reached this conclusion despite noting that the purposes underlying the "present affiliation" requirement—to ensure that "a presenter knows what he is talking about" and to avoid political debate at Career Day—were in fact "legitimate pedagogical concerns." *Id.* at 1320-21. Thus, the *Searcey* court invalidated the "present affiliation" requirement based upon its de-
conclusion despite acknowledging that motivating students and "excluding discussion of controversial matters from Career Day" were valid educational objectives. Essentially, the Searcey court reasoned that, although the total exclusion of speakers who sought primarily to discourage students would further these legitimate objectives, the availability of a less restrictive alternative made the regulation unreasonable.

Under the deferential approach of Hazelwood, however, it is unlikely that this regulation would have been invalidated. Rather, in light of the need for deference to the decisions of educators acknowledged in Hazelwood, the Searcey court would have upheld the regulation once it determined that, in fact, the total exclusion of the speakers would further the legitimate pedagogical objectives of motivating students and "excluding discussion of controversial matters from Career Day."

The fact that the Searcey court was able to propose less restrictive means to further these valid objectives—namely limiting what a group can say rather than total exclusion—would not make the original regulation unreasonable. Thus, applying the Hazelwood reasonableness standard, the Searcey court would have sustained the regulation which excluded termination that such a requirement was not a reasonable means of achieving the stated "legitimate pedagogical concerns." Id. at 1321-22.

Even under the deferential approach of Hazelwood, however, it is likely that the "present affiliation" requirement would have been invalidated. The School Board failed to introduce any evidence into the record to indicate how this requirement would in any way further the legitimate concerns underlying the regulation. Id. at 1322. Absent any justification on the record, the Searcey court would be unable to conclude that the "present affiliation" requirement was reasonable, even under the deferential standard of Hazelwood. See id. (citing Hazelwood, 484 U.S. at 275 & n.8).

193. See id. at 1322-23.

194. Id. at 1322. The court stated that "[i]t is the total banning of a group from the forum—rather than limiting what a group can say—that we find to be unreasonable." Id.

195. For a discussion of the deferential approach of Hazelwood, see supra notes 78-84 and accompanying text.

196. See Searcey v. Harris, 888 F.2d at 1322-23. Indeed, the Searcey court found that the regulation prohibiting a group whose sole purpose is to discourage students from a particular career field was reasonable. Id. at 1322.

Earlier, the district court had determined that the regulation which prohibited the participation of persons whose primary focus was to discourage students from a particular field was reasonable. Id. However, the district court invalidated the regulation after concluding that it was promulgated to suppress the viewpoint of the APA. Id.

Under the Hazelwood standard, the district court would not have engaged in a separate viewpoint neutrality analysis to invalidate the regulation. Rather, the district court would have sustained the regulation once it had determined that the regulation was reasonable and furthered legitimate pedagogical concerns.

197. In fact, the government argued in Searcey that in order to be sustained, a regulation "need only be reasonable; it need not be the most reasonable or the only reasonable limitation." Id. at 1321 (emphasis added) (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 808 (1985)).
participants whose primary emphasis was to discourage students from pursuing one particular career field.

IV. CONCLUSION

The public forum doctrine has proven to be effective in assessing the constitutionality of restrictions on expression in most government-controlled forums. A public school, however, represents a unique forum in light of the special mission that society has delegated to the public school system. Continued application of the public forum doctrine in scrutinizing restrictions on expression in the public schools fails to adequately consider the special features of the public school and will inevitably hinder the necessary discretion vested in educational decision-makers. Consequently, rather than applying the public forum doctrine to Career Day in Atlanta's public schools, the Eleventh Circuit should have employed the reasonableness standard posited in Hazelwood. Such a standard more fully addresses the unique mission of the American public school system and the special status which the courts have historically granted to that system.

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