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A "Disacknowledgment" of Post-Secondary Student Free Speech—Brown v. Li and the Applicability of Hazelwood v. Kuhlmeier to the Post-Secondary Setting

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A "DISACKNOWLEDGMENT" OF POST-SECONDARY STUDENT FREE SPEECH—*BROWN v. LI* AND THE APPLICABILITY OF *HAZELWOOD v. KUHLMEIER* TO THE POST-SECONDARY SETTING

I. INTRODUCTION

> By voluntarily entering the university, or being placed there by those having the right to control him, [the student] necessarily surrenders very many of his individual rights. How his time shall be occupied; what his habits shall be; his general deportment; . . . his hours of study and recreation,—in all these matters, and many others, he must yield obedience to those who, for the time being, are his masters . . . .[1]

Fortunately for today's undergraduate and graduate students, such a view—at least in theory—no longer prevails. However, sometimes, the more things change, the more they seem to stay the same. As will be the focus of this Note, in the realm of First Amendment free speech rights, applying the deferential *Hazelwood v. Kuhlmeier*[2] standard to the post-secondary setting would likely perpetuate the control of university officials, albeit in a less dramatic form.

The free speech rights of students are frequently pitted against the free speech rights of teachers and school administrators. When such a collision of rights occurs, the courts must intervene. The United States Supreme Court's intervention resulted in a trilogy of cases that has shaped and defined jurisprudence in this area at the pre-collegiate level—the *Tinker-Fraser-Hazelwood* trilogy.[3]

The jurisprudence surrounding this collision of rights in the educational setting has been a jurisprudence of distinctions. Courts have made distinctions between the types of speech at issue. Thus, First Amendment caselaw in the educational setting can be categorized into cases dealing with lewd, vulgar, and plainly offensive speech, "school-sponsored speech," and other speech that

1. Todd Edward Pettys, Note, *Punishing Offensive Conduct on University Campuses:* Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University, 72 N.C. L. REV. 789, 799 (1994) (quoting North v. Bd. of Trs., 27 N.E. 54, 56 (Ill. 1891)).

2. 484 U.S. 260 (1988). This Note will only address students' free speech rights in the *public* school setting.

3. *See Hazelwood*, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969).

"happens to occur on the school premises," or pure speech.[4] In addition, courts have made distinctions based on the medium through which, or the place where, the speech was communicated.[5] Thus, First Amendment caselaw can also be categorized depending on whether the speech was made in a traditional public forum, in a limited public forum, or in a nonpublic forum.[6] One distinction, though, that courts consistently have failed to make is the distinction between free speech rights at the primary and secondary school level as opposed to free speech rights at the undergraduate and graduate school level.[7]

The source of much of the confusion and disagreement in this complex and sensitive area of the law has stemmed from a footnote in the 1988 *Hazelwood* case.[8] In *Hazelwood*, a case dealing with a high school newspaper, the Court held that educators' actions to censor student speech did not violate the First Amendment "so long as their actions are reasonably related to legitimate pedagogical concerns."[9] However, in the now infamous footnote seven, the Court specifically limited its holding to the high school level: "We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."[10] Almost fifteen years later, the Supreme Court has yet to answer this question, and the lower courts have failed to agree on what degree of deference should be afforded officials at the college level.[11]

The confusion caused by footnote seven is readily apparent in the recent Ninth Circuit Court of Appeals case of *Brown v. Li*.[12] Christopher Brown, a master's degree candidate at the University of California at Santa Barbara, claimed that his First Amendment rights were violated.[13] The committee reviewing his thesis initially approved it, but afterwards, Brown added a "Disacknowledgments" section, complete with profanity and criticism of school officials.[14] The committee, upon finding out about the section, refused

4. Fleming v. Jefferson County Sch. Dist., 298 F.3d 918, 923 (10th Cir. 2002).
5. *See infra* text accompanying notes 81-82.
6. *See infra* Part II.B.
7. *See infra* text accompanying notes 136-43 and Part III.B.
8. *Hazelwood*, 484 U.S. at 273 n.7.
9. *Id*. at 273.
10. *Id*. at 273 n.7.
11. *See infra* Part II.D.2.
12. 308 F.3d 939 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 1488 (2003). For a more in-depth discussion of the facts and opinions in *Brown*, see *infra* Part III.
13. *Brown*, 308 F.3d at 941-42.
14. *Id.* at 943. This "Disacknowledgments" section was basically the antithesis of the "traditional" Acknowledgment, or dedication, section that some students choose to submit with their writings. For a more in-depth discussion of the content of Brown's "Disacknowledgments" section, see *infra* Part III.A.

to approve the section, even after Brown removed the profanity.[15] The Dean of the school informed Brown that he would not receive his degree if his thesis were not approved, and that his thesis would not be approved unless Brown removed the "Disacknowledgements" section.[16] These facts resulted in a fragmented opinion from the Ninth Circuit Court of Appeals. Two judges concluded that Brown's rights were not violated by the school's refusal to allow him to include the "Disacknowledgments" section, but for drastically different reasons.[17] One of these judges reasoned that Brown's rights were not violated because, as a matter of first impression for the Ninth Circuit, *Hazelwood* applied at the college level, and thus, the school official's actions were justified under the deferential *Hazelwood* standard.[18]

Although *Brown* creates no binding precedent[19] and, at first glance, may seem of little importance, the underlying issues at stake and the arguments made for extending the deferential *Hazelwood* standard to the college arena have far-reaching implications for free speech rights at the post-secondary level. Applying *Hazelwood* to the post-secondary setting would ignore well-settled precedents,[20] and could result in the free speech rights of an undergraduate or graduate student—who could be in his or her twenties, thirties, forties, or even older—receiving the same protection as the free speech rights of a kindergartener.[21] Moreover, although the *Brown* court attempted to limit its reasoning to curriculum-related speech, the possibility exists that *Hazelwood* could be extended in the post-secondary setting to extracurricular speech as well.[22] In addition, there is a risk that if a clear distinction is not made between the pre-collegiate and collegiate school environments in free speech cases, courts may be willing to extend analyses utilized in pre-

15. *Brown*, 308 F.3d at 943-44.

16. *Id*. at 944.

17. *Id*. at 957 (Reinhardt J., dissenting). For a more in-depth discussion and analysis of the judges' opinions, see *infra* Parts III.B and III.C.

18. *Id.* at 951-53.

19. *See infra* note 179.

20. *See infra* Part II.C.

21. Of course, under the *Hazelwood* analysis emotional maturity is taken into account. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988). However, both primary/secondary and post-secondary students' speech rights still could be violated if the school's actions are "reasonably related to legitimate pedagogical concerns." *Id*. at 273. Even if emotional maturity is a factor to consider, the fact of the matter remains that the standard would be easier for post-secondary school officials to meet. *See infra* note 267 and accompanying text (noting that the majority of courts applying *Hazelwood* have come out in favor of the school officials).

22. *See infra* notes 110, 266-67 and accompanying text.

collegiate cases to higher education cases in areas besides the First Amendment.[23]

Although others have examined collegiate level cases that have applied the *Hazelwood* analysis[24] and argued that *Hazelwood* should not extend to the post-secondary setting,[25] they have not done so in the context of the recent *Brown* case and the unique reasoning employed by the Ninth Circuit.[26] Moreover, this Note will identify other areas of the law beyond free speech that have created distinctions between the secondary and post-secondary school settings.[27]

Part II of this Note consists of a historical analysis of the underlying issues at stake in *Brown v. Li*, focusing on how courts have made distinctions between the pre-collegiate and collegiate environments. Part III gives a detailed account of the Ninth Circuit Court of Appeals decision in *Brown v. Li*. Part IV provides an analysis of the various opinions in *Brown*, as well as an analysis of the following proposed standards for courts to apply in the place of *Hazelwood*: (1) a modified *Hazelwood* standard; (2) a "student-friendly" *Tinker* standard; (3) a limited public forum standard; (4) an intermediate level of scrutiny standard, or (5) a standard reminiscent of those presented in *Healy v. James*[28] and *Papish v. Board of Curators of the University of Missouri*.[29] Part V concludes that the Supreme Court needs to resolve the unanswered *Hazelwood* issue to clear up the confusion in the lower courts and should do so by continuing its tradition of safeguarding free speech in the university setting. By doing so, the Court will give due credit to the uniqueness of the post-

23. Gail Sorenson & Andrew S. LaManque, *The Application of* Hazelwood v. Kuhlmeier *in College Litigation*, 22 J.C. & U.L. 971, 974 (1996) (noting that "application to higher education cases of rationales developed in pre-collegiate cases may spread beyond First Amendment speech issues, however important, to unduly limit collegiate faculty and student freedom in other important respects.").

24. *See generally id*. This article chronicled the ten cases in higher education that had cited Hazelwood at the time the article was written. Sorenson and LaManque's article is an excellent starting point. This Note will both incorporate and update the higher education cases citing *Hazelwood*.

25. *See, e.g.*, Mark J. Fiore, Comment, *Trampling the "Marketplace of Ideas": The Case Against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915 (2002). Fiore comments on the issue of whether *Hazelwood* should extend to the college level, principally in the context of the Sixth Circuit decision of *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (en banc). Although this Note comes to the same conclusion as Fiore's article, it does so for different reasons, and also examines the issue in the context of *Brown*.

26. *See infra* Part III.B.

27. *See infra* Part II.E.

28. 408 U.S. 169 (1972).

29. 410 U.S. 667 (1973) (per curiam).

secondary setting and will ensure the continued viability of the "marketplace of ideas."[30]

II. HISTORICAL ANALYSIS

A. Landmark Trilogy: First Amendment Rights in the Public School Setting

The landmark cases discussed below have formed the foundation of American jurisprudence concerning the collision of First Amendment rights in the school setting. Although all three cases concern pre-collegiate free speech rights, many lower courts use them to define the scope of First Amendment rights in the college and university settings.[31]

As the Supreme Court once noted:

> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, (rather) than through any kind of authoritative selection."[32]

This fundamental principle was reaffirmed in the first case of the Supreme Court trilogy, *Tinker v. Des Moines Independent Community School District*.[33] In *Tinker*, three students, ages thirteen, fifteen, and sixteen years old, wanted to protest the Vietnam War and advocate peace by wearing black armbands to

30. The notion of the "marketplace of ideas" was first expressed by Justice Holmes in his dissent in *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting). Justice Holmes wrote:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that *the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market*, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system *I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death*, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Id. at 630 (emphasis added).

31. *See infra* notes 139-143 and accompanying text; *see also infra* Parts III.B.1, 3.

32. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (citations omitted).

33. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969). For a more in-depth analysis of *Tinker*, see, for example, Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 628-30, 650-54 (2002).

school.[34] Upon hearing about the students' intentions, school officials immediately adopted a policy that led to the disciplining of any student who wore such an armband to school.[35] Despite the policy, the students chose to wear the armbands and they were disciplined accordingly. They claimed that school officials representing the high school and junior high school violated their First Amendment right to free speech.[36]

The *Tinker* majority first concluded, in an oft-cited statement, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[37] Noting that the case did "not relate to regulation of the length of skirts or the type of clothing, [or] to hair style,"[38] the Court characterized the type of speech at issue as "pure speech."[39] In order to restrict a student's speech, the school must show that the speech would "'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"[40] Importantly, the school "must be able to show that its action was caused by *something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint*,"[41] and that "school officials cannot suppress 'expressions of feelings with which they do not wish to contend.'"[42] Thus, the *Tinker* Court afforded students broad First Amendment protection.[43]

The Supreme Court retreated from *Tinker's* broad protection of students' free speech rights in *Bethel School District v. Fraser*.[44] Fraser, a high school

34. *Tinker*, 393 U.S. at 504.

35. *Id.*

36. *Id*.

37. *Id.* at 506.

38. *Id*. at 507-08. The regulations the Court chose to list are regulations one might typically expect to find at the primary and secondary school level, not at the post-secondary level.

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

40. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (1966)).

41. *Id.* (emphasis added).

42. *Id.* at 511 (quoting *Burnside*, 363 F.2d at 749).

43. Even Justice Stewart, in his concurring opinion, noted the expansiveness of the decision. *See id*. at 514-15 (Stewart, J., concurring) (stating "I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults.").

44. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986). For a more in-depth discussion of *Fraser*, see, for example, Royal C. Gardner, Note, *Protecting a School's Interest in Value Inculcation to the Detriment of Students' Free Expression Rights:* Bethel School District v. Fraser, 28 B.C. L. REV. 595 (1987). Gardner analyzed the *Fraser* decision itself and the probable "chilling effect" of the decision. *Id*. at 599. In addition, Gardner noted the following, in anticipation of the *Hazelwood* decision: "Much of the uncertainty that *Fraser* will produce can be avoided if the Supreme Court narrows *Fraser*'s scope in its upcoming decision of *Kuhlmeier v. Hazelwood School District*." *Id*. at 624. However, as this Note will demonstrate, *Hazelwood* has only created more confusion. *See also* Philip J. Prygoski, *Low Value Speech: From* Young *to* Fraser, 32 ST. LOUIS U. L.J. 317, 345-53 (1987) (discussing the facts of the case and rationale of

student, used what the Court characterized as an "elaborate, graphic, and explicit sexual metaphor" in a speech he gave to nominate another student for a student elective office.[45] Distinguishing the "political 'message'" at issue in *Tinker* from the "sexual" message at issue in *Fraser*, the Court held that the "vulgar speech and lewd conduct [were] wholly inconsistent with the 'fundamental values' of public school education" and "would undermine the school's basic educational mission."[46] The Court's reasoning is replete with references to age. For example, the Court noted the following:

> The First Amendment guarantees wide freedom in matters of *adult* public discourse . . . . It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to *children* in a public school . . . . [T]he constitutional rights of students in public schools are not automatically coextensive with the rights of *adults* in other settings.[47]

In addition, the Court noted that "[t]he speech could well be seriously damaging to its *less mature audience, many of whom were only 14 years old* and on the threshold of awareness of human sexuality."[48]

Like *Fraser*, *Hazelwood* also limited the First Amendment free speech rights of students at the high school level.[49] The Court narrowly framed the issue in *Hazelwood* as "the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum."[50] *Hazelwood* school officials deleted two pages from the *Spectrum*, a newspaper written and edited by students in the

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the Court's decision along with a critique of the Court's analysis). For a more modern analysis and interpretation of *Fraser*, see, for example, Miller, *supra* note 33, at 629-31, 654-60.

45. *Fraser*, 478 U.S. at 677-78. The nominating student delivered the following speech:

> "I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.
>
> "Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
>
> "Jeff is a man who will go to the very end—even the climax, for each and every one of you.
>
> "So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be."

Id. at 687 (Brennan, J., concurring) (quoting from the student's nominating speech).

46. *Id.* at 685-86.

47. *Id.* at 682 (emphasis added).

48. *Id.* at 683 (emphasis added). The Court went on to note that the Court's "First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include *children*." *Fraser*, 478 U.S. at 684 (emphasis added).

49. 484 U.S. 260 (1988).

50. *Id.* at 262.

high school's journalism class.[51] The *Spectrum's* principal deleted the two pages because, in addition to including articles the adviser did not object to, the pages also included stories about divorce and pregnancy, with references to sexual activity and birth control.[52]

The Court first considered the issue of whether the *Spectrum* could be characterized as a public forum, for if it could, the speech contained therein would receive greater First Amendment protection.[53] The Court found that the school, both in practice and in policy, intended for the *Spectrum* to be "part of the educational curriculum and a 'regular classroom activit[y],'"[54] and that the school "fail[ed] to demonstrate the 'clear intent [required] to create a public forum.'"[55] The Court explained that "school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public, such as student organizations."[56]

The Court distinguished *Tinker* as the issue in *Tinker* was whether the school was required to *tolerate* the student's speech, whereas the issue in *Hazelwood* was whether the school would be required to affirmatively *promote* particular student speech.[57] The Court defined the *Tinker* category as including "a student's personal expression that happens to occur on the school premises," whereas the *Hazelwood* category included speech that "members of the public might reasonably perceive to bear the imprimatur of the school . . . [and] may fairly be characterized as part of the school curriculum . . . ."[58] School officials could regulate such "school-sponsored" speech falling into the *Hazelwood* category "so long as their actions are reasonably related to legitimate pedagogical concerns."[59] In regulating the speech, school officials

51. *Id*.

52. *Id.* at 263-64.

53. *Id.* at 267.

54. *Hazelwood*, 484 U.S. at 268. The Court listed the factors that influenced its determination: "[the adviser] selected the editors of the newspaper, scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students on the development of their stories, reviewed the use of quotations, edited stories, [etc.]." *Id*.

55. *Id.* at 270 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)).

56. *Id*. at 267 (quoting Perry Educ. Assn. v. Perry Local Educ. Assn., 460 U.S. 37, 47, 46 (1983)).

57. *Id.* at 271.

58. *Hazelwood*, 484 U.S. at 271. The Court listed as examples of the *Hazelwood* category of speech "school-sponsored publications, theatrical productions, and other expressive activities." *Id.* The Court also noted that such activities could be characterized as part of the curriculum, "whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id*.

59. *Id.* at 273.

could "take into account the emotional maturity of the intended audience."[60] School officials, the Court noted, would be able to regulate speech dealing with the topics such as "the existence of Santa Claus in an elementary school setting . . . [and] the particulars of teenage sexual activity in a high school setting."[61] The Court intimated that courts could intervene only in the narrow category of circumstances where such purportedly school-sponsored activities serve "no valid educational purpose . . . [and] 'directly and sharply implicate[]'" First Amendment principles.[62]

In applying the standard, the Court found that it was reasonable for the school to have concluded that the students did not adequately master all of the requirements of the journalism class.[63] Hence, the deleting of the two pages, even though they also contained unobjectionable content, was reasonably related to pedagogical interests under the deferential standard.[64]

B. The Starting Point: Public Forum Analysis[65]

After *Hazelwood*, the determination of how to analyze a student's free speech claim became inextricably bound up with the public forum doctrine, for if the expressive activity occurs in a nonpublic forum, then *Hazelwood* will apply.[66] Thus, after determining whether the interest at issue is speech under the First Amendment, a court must engage in a forum analysis to determine if the speech occurred in a traditional forum, a limited public forum, or a nonpublic forum.[67] The Supreme Court delineated the basic forum doctrine in

60. *Id*. at 272.

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

62. *Id.* at 273 (citations omitted).

63. *Id.* at 276.

64. *Id.* at 276.

65. Please note that this is a complicated and unsettled area of the law that cannot be discussed in full here. For a more in-depth analysis of the public forum doctrine and the complications that arise during its application, see Brian S. Black, Note, *The Public School: Beyond the Fringes of Public Forum Analysis?*, 36 VILL. L. REV. 831 (1991) (arguing that the public forum analysis should not have been incorporated into this area of the law); James M. Henderson, Sr., *The Public Forum Doctrine in Schools*, 69 ST. JOHN'S L. REV. 529, 532, 534 (1995) (arguing that the application of the public forum doctrine in the school setting is the "principal danger" to students' First Amendment rights and noting that "[l]ower standards of scrutiny will be applied to governmental restrictions on student speech activities where one applies the public forum doctrine rather than *Tinker* and its progeny."); Matthew D. McGill, Note, *Unleashing the Limited Public Forum Analysis: A Modest Revision to a Dysfunctional Doctrine*, 52 STAN. L. REV. 929 (2000).

66. *See supra* text accompanying notes 53-56; *see also* Kincaid v. Gibson, 236 F.3d 342, 346 n.5 (6th Cir. 2001) (en banc) ("Because we find that a forum analysis requires that the yearbook be analyzed as a limited public forum—rather than a nonpublic forum—we agree with the parties that *Hazelwood* has little application to this case.").

67. Lee Rudy, Note, *A Procedural Approach to Limited Public Forum Cases*, 22 FORDHAM URB. L.J. 1255, 1257-63 (1995).

the oft-cited case of *Perry Educational Association v. Perry Local Educator's Association*.[68] At one extreme are traditional public forums, which, under *Perry*, are "places which by long tradition or by government fiat have been devoted to assembly and debate."[69] Governmental regulation of the "time, place, and manner of expression" in these "quintessential public forums" is subject to three limitations: the regulation must be (1) "content-neutral" and espouse no viewpoint discrimination; (2) "narrowly tailored to serve a [compelling] government interest;" and (3) must "leave open ample alternative channels of communication."[70]

At the other extreme are nonpublic forums—forums that have not, either through "tradition or designation," been declared public.[71] In such forums, the time, manner, and place of expressive activity can be restricted "as long as the regulation[s] on speech [are] reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[72] Thus, regulations in a nonpublic forum can be made based on *content*, but not on *viewpoint*. As the Supreme Court explained in *Cornelius v. NAACP*:

> Control over access to a nonpublic forum can be based on *subject matter* and *speaker identity* so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a

68. Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37 (1983). In *Perry*, the Indiana Board of Education allowed one teachers' union access to the interschool mail system and teacher mailboxes in Perry Township schools (based on a collective bargaining agreement), but denied access by all other teachers' unions. *Id.* at 39. An excluded union alleged, in part, that this violated the teachers' First and Fourteenth Amendment rights. *Id.* The Court held that the school mail system was not a public forum, for, *inter alia*, the "general public" could not use the mail system. *Id.* at 47. Thus, the Court analyzed whether the Board of Education's restrictions were "reasonable in light of the purpose which the forum at issue serves." *Id.* at 49. Ultimately, the Court held that the policy and practice was reasonable, reasoning that (1) "providing exclusive access to recognized bargaining representatives is a permissible labor practice in the public sector," and (2) there were alternative channels of communication available to the other unions. *Perry*, 460 U.S. at 51, 53.

69. *Id.* at 45. Some examples of traditional public forums are streets and parks. *Id.* More examples of traditional public forums include "town squares, public sidewalks, and state and federal capitol complexes." Suzanne Stone Montgomery, Note, *When the Klan Adopts-A-Highway: The Weaknesses of the Public Forum Doctrine Exposed*, 77 WASH. U. L.Q. 557, 563 (1999). In the context of traditional public forums, the Court basically has made an *a priori* determination that "the citizen's interest in free expression will . . . outweigh the state's interest in preserving order." Rudy, *supra* note 67, at 1259.

70. *Perry*, 460 U.S. at 45.

71. *Id.* at 46. "Examples of nonpublic forums are street light posts, prisons, military reservations, polling places, statutorially[sic]-required meetings of school administrators and a teachers union, and a school district's internal mail system." Montgomery, *supra* note 69, at 568.

72. *Perry*, 460 U.S. at 46.

> member of the class of speakers for whose especial benefit the forum was created, *the 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.*[73]

The Court's rationale for not allowing viewpoint discrimination is because of "the inherent risk that the Government seeks not to advance a legitimate regulatory goal but to suppress unpopular ideas or information . . . ."[74]

In the middle lies the "limited public forum," created when the government opens an otherwise non-traditional, nonpublic forum "for use by the public as a place for expressive activity."[75] Although the government has the discretion to create a limited public forum, "[t]he Constitution forbids a state to enforce certain exclusions from a forum generally open to the public . . . ."[76] Moreover, although the government "is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum."[77] In a limited public forum,

73. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (citations omitted) (emphasis added). At issue in *Cornelius* was "whether the Federal Government violates the First Amendment when it excludes legal defense and political advocacy organizations from participation in the Combined Federal Campaign . . . a charity drive aimed at federal employees." *Cornelius*, 473 U.S. at 797-806. President Kennedy issued an Executive Order allowing "[o]nly tax exempt, nonprofit charitable organizations that were supported by contributions from the public and that provided direct health and welfare services to individuals" to participate in the Campaign. *Id.* at 792. Among the groups excluded from participation included the NAACP, the Sierra Club, and the Federally Employed Women Legal Defense and Education Fund. *Id*. at 793. After noting that "the charitable solicitation of funds" was a form of protected speech under the First Amendment, the Court analyzed whether the Combined Federal Campaign was a public forum. *Id*. at 797-806. The Court held that the Combined Federal Campaign was a nonpublic forum since it had been the government's practice and policy to limit participation in the Campaign. *Id.* The Court further found that the government's interest in avoiding "the appearance of political favoritism" provided a reasonable justification for excluding certain organizations. *Id*. at 809.

74. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994). *See also* Rosenberger v. Rectors of the Univ. of Va., 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."). A circuit split has developed over whether the notion of viewpoint neutrality is required when analyzing nonpublic forums under the rubric of *Hazelwood*. This issue will be analyzed more fully in this Note. See *infra* Part IV.A.2.c.

75. *Perry*, 460 U.S. at 45. More specifically, a limited public forum can be "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802. In some instances, courts have declared the following to be limited public forums: "university meeting facilities, municipal theaters, and school board meetings." Montgomery, *supra* note 69, at 567.

76. *Perry*, 460 U.S. at 45.

77. *Id.* at 46.

the government is forbidden from exercising viewpoint discrimination.[78] To determine whether a limited public forum has been created, a court must look to the "policy and practice of the government,"[79] and "will *not* find that a [limited] public forum has been created in the face of *clear* evidence of a contrary intent . . . ."[80]

However, even before determining how to characterize the forum, a court must determine what constitutes the forum. The Supreme Court has expanded the definition of forum beyond the notion of a "physical situs" to include "intangible channels of communication" as well.[81] A medium for expressive activity can constitute a forum, even if "more in a metaphysical than in a spatial or geographic sense . . . ."[82] A court's characterization of the forum at issue, then, can have a substantial impact on the outcome of any given case.

*C. Pre-*Hazelwood *Positions: Student Speech Safeguarded*

In 1972 and 1973, the Supreme Court decided two cases that defined the Court's role in protecting the free speech rights of university students. Unlike *Hazelwood*, these cases emphasized that the free speech rights of students were akin to the rights of those outside of the school setting. Although the Justices recognized the competing interests of school officials in maintaining control, they provided much less deference to the university officials than was provided by the *Hazelwood* standard of "reasonably related to legitimate pedagogical interests."[83]

In *Healy v. James*,[84] students trying to form a chapter of the Students for a Democratic Society on the Central Connecticut State College campus claimed that their First Amendment rights of freedom of expression and association were violated when school officials refused to officially recognize the organization.[85] The Court identified the collision of interests in the case as the

78. *Rosenberger*, 515 U.S. at 829. A simple example illustrates the Court's point: "When a government builds a theater, for example, it creates a limited public forum open to theatrical productions. Other forms of expression, such as petitioning, would not be welcome in a theater, and they could therefore be excluded on a reasonable basis. The government cannot exclude a particular theatrical production from the theater, however, without a compelling justification." Rudy, *supra* note 67, at 1261.

79. *Cornelius*, 473 U.S. at 802.

80. *Id.* at 803 (emphasis added). The Court also noted the following: "In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum." *Id.* at 804.

81. Student Gov't Ass'n v. Bd. of Trs. of the Univ. of Mass., 868 F.2d 473, 476 (1st Cir. 1989).

82. *Rosenberger*, 515 U.S. at 830.

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

84. 408 U.S. 169 (1972).

85. *Id.* at 170.

interest of those, including the school officials, in an "environment free from disruptive interference with the educational process" and the "interest in the widest latitude for free expression and debate consonant with the maintenance of order."[86]

Citing *Tinker*, the Court reaffirmed the application of the First Amendment at the college and university level.[87] It held that universities have the ability to prohibit "lawless action" as well as actions, per *Tinker*, that "materially and substantially disrupt the work and discipline of the school."[88] Significantly, however, the Court relied on reasoning that was not present in *Tinker*, a high school level case. For example, after discussing *Tinker* and the principles discussed therein, the Court noted that "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on *college* campuses than in the community at large."[89] The Court further explained, "While a college has a legitimate interest in preventing disruption on the campus . . . a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."[90] This heavy burden would not be satisfied "simply because [school officials] find[] the views expressed . . . to be abhorrent."[91] Thus, although the Court did rely on a high school case, it defined the flexible and vague *Tinker* standard for the university setting.

In *Papish v. Board of Curators of the University of Missouri*,[92] a thirty-two year old graduate student claimed her First Amendment rights were violated when she was expelled from Journalism school after distributing a newspaper that included a political cartoon with profanity and a depiction of a policeman raping the Statue of Liberty and the Goddess of Justice.[93] The Court relied on *Healy* for the proposition that the "mere dissemination of ideas—no matter how offensive to good taste—on a state university cammpus[sic] may not be shut off in the name alone of 'conventions of decency.'"[94] The Court held that the only restrictions that the school could impose were reasonable time, manner, and place restrictions.[95]

86. *Id.* at 171.
87. *Id.* at 180.
88. *Id*. at 189 (quoting Tinker v. Des Moines Ind. Sch. Dist., 393 U.S. 503, 513 (1969)).
89. *Healy*, 408 U.S. at 180 (emphasis added).
90. *Id.* at 184.
91. *Id.* at 187-88.
92. 410 U.S. 667 (1973) (per curiam).
93. *Id.* at 667.
94. *Id.* at 670.
95. *Id.*

D. Hazelwood *Applied: Student Speech Stifled*

With the *Hazelwood* decision in hand—complete with the soon-to-be problematic footnote seven—it was time for the lower courts to grapple with defining the parameters of the *Hazelwood* doctrine, both at the pre-collegiate and post-secondary levels. When confronted with pre-collegiate student free speech cases, lower courts applied the *Hazelwood* doctrine with consistency, however when confronted with post-secondary student speech cases, the only consistency that is apparent in the lower courts is confusion.

1. Pre-collegiate Caselaw

Lower courts have repeatedly applied *Hazelwood* to student speech at the high school level.[96] In doing so, they have often relied on the peculiarities of the pre-collegiate audience to justify their decisions.[97]

For example, in the 1989 case *Virgil v. School Board of Columbia County, Florida*,[98] the Eleventh Circuit relied on *Hazelwood* in upholding a high school board's decision to ban a textbook from a class because of its vulgar and sexual content.[99] Although the court explicitly stated that it did not approve of the board's decision, it nonetheless felt compelled to follow *Hazelwood*.[100] In

96. *See, e.g.*, McCann v. Fort Zumwalt Sch. Dist., 50 F. Supp. 2d 918 (E.D. Mo. 1999) (applying *Hazelwood* to uphold high school officials' decision to prevent the high school marching band from performing "White Rabbit" as reasonably related to legitimate pedagogical concerns because school officials reasonably believed it promoted the use of illegal drugs).

97. *See, e.g.*, Henerey v. City of St. Charles, 200 F.3d 1128 (8th Cir. 1999). In *Henerey*, a high school student running for student body president was disqualified after handing out condoms attached to stickers bearing his slogan, "Adam Henerey, The Safe Choice," without first receiving permission. *Id.* at 1131. The court held that "the election was a school-sponsored activity that was a part of the school's curriculum" and that the school had a legitimate pedagogical concern in "divorcing its extracurricular programs from controversial and sensitive topics, such as teenage sex." *Id.* at 1133, 1136. The court went on to note that "there [can] be [no] . . . doubt that teenage sex is a controversial topic in the public schools," evidenced by the fact that parents of primary and secondary school students have brought suits against school districts for exposing their children to "offensive or graphic materials without their consent." *Id*. at 1136. *See also* Poling v. Murphy, 872 F.2d 757, 758, 763 (10th Cir. 1989) (holding that *Hazelwood* applied to "discourteous" and "rude" remarks that a high school student made about his "schoolmasters" in a student assembly because "hurting the feelings of others" does not have a legitimate place in the high school curriculum).

98. 862 F.2d 1517 (11th Cir. 1989).

99. *Id.* at 1518. The works banned by the school included classics such as "*Lysistrata*, written by the Greek dramatist Aristophanes in approximately 411 B.C., and *The Miller's Tale*, written by the English poet Geoffrey Chaucer around 1380-1390 A.D." *Id.* at 1519. According to the court, the works contained "passages of exceptional sexual explicitness." *Id*. at 1523. The court recited portions of the works deemed by some commentators to have sexual overtones. *Id*. at 1524 n.9.

100. *Virgil*, 863 F.2d at 1525. The court stated:

deciding that the school board's decision did not violate the Constitution, the court specifically took into account "the fact that most of the high school students involved ranged in age from fifteen to just over eighteen, and a substantial number had not yet reached the age of majority."[101] In doing so, the court restricted the applicability of *Hazelwood* to the high school level.[102]

The Sixth Circuit Court of Appeals also applied *Hazelwood* to a high school student's speech in *Settle v. Dickson*.[103] A ninth-grade student, Brittney Settle, changed her paper topic from "Drama" to "The Life of Jesus Christ" without getting her teacher's permission and, as a result, she received a zero on the paper.[104] The Court, relying on *Hazelwood*, rejected the argument that her First Amendment free speech rights were violated.[105] It held that school officials would not violate the First Amendment so long as they limited a student's grades or speech as part of the curriculum and did not do so as a pretext for punishing the student.[106] In coming to this conclusion, the court referred to Settle as a "young student" and noted that teachers "must daily decide . . . when it is time to stop writing or talking."[107] Both statements are indicative of a pre-collegiate, not a collegiate setting. Importantly, the court also stated, "[l]earning is more vital in the classroom than free speech," but, for reasons discussed below, such a view is inapposite in the college setting.[108]

Moreover, in applying *Hazelwood* to the high school setting, many courts have interpreted *Hazelwood* very expansively. For example, in *Fleming v. Jefferson County School District*,[109] the Tenth Circuit held that "'[t]he universe

> We decide today only that the Board's removal of these works from the curriculum did not violate the Constitution. Of course, we do not endorse the Board's decision. Like the district court, we seriously question how young persons just below the age of majority can be harmed by these masterpieces of Western literature. However, having concluded that there is no constitutional violation, our role is not to second guess the wisdom of the Board's action.

Id.

101. *Id.*

102. *Id.* at 1523 ("[W]e cannot conclude that the school board's actions were not reasonably related to its legitimate concerns regarding the appropriateness (for this *high school audience*) of the sexuality and the vulgarity in these works.") (emphasis added).

103. 53 F.3d 152 (6th Cir. 1995).

104. *Id.* at 153-54.

105. *Id.* at 153.

106. *Id*. at 155.

107. *Id.* at 155-56.

108. *Settle*, 53 F.3d. at 156. For reasons why such a view is inapposite in the post-secondary setting, see *infra* Part IV.A.1.b.

109. 298 F.3d 918 (10th Cir. 2002). This case concerned Columbine High School, the Colorado high school where two students opened fire on their teachers and fellow classmates. *Id.* at 920. The school decided to allow students to place painted tiles around the school to help with the healing process. *Id.* at 920-21. However, "there could be no references to the attack, to the date of the attack . . . no names or initials of students, no Columbine ribbons, no religious

of legitimate pedagogical concerns is by no means confined to the academic . . . [for it includes] discipline, courtesy, and respect for authority.'"[110] The court further explained, "the *Hazelwood* standard does not require that the guidelines be 'the most reasonable or the only reasonable limitation[s],' only that they be reasonable."[111] Because *Hazelwood* is susceptible to such an expansive interpretation, cases such as *Fleming* forecast the catastrophically detrimental chilling effect that would befall post-secondary students' free speech rights if *Hazelwood* were to apply.

2. Collegiate Caselaw

a. Supreme Court Silence

As earlier noted, the Supreme Court specifically reserved the question of whether the *Hazelwood* standard applies in the university setting.[112] The Court has yet to revisit the issue. However, the most recent Supreme Court case to provide an indication as to what the Court might decide in the future is *Board of Regents of the University of Wisconsin System v. Southworth*.[113] In *Southworth*, University of Wisconsin students alleged, *inter alia*, that the mandatory student activity fee violated their First Amendment right of free speech because some of their money funded organizations that did not gain the students' approval.[114] Buried within a footnote in Justice Souter's concurring opinion is the following statement: "[C]ases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, *whose students and their schools' relations to them are different and at least arguably distinguishable from their counterparts in college*

symbols, and nothing obscene or offensive." *Id*. at 921. The plaintiffs wanted to place, *inter alia*, religious symbols on their tiles. *Id*. After noting that the "district court read *Hazelwood* as only applying 'to activities conducted as part of the school curriculum,'" the *Fleming* court then stated the following: "We believe this reading of *Hazelwood* is too narrow. We read the Court's definition of 'school-sponsored' speech to mean activities that might reasonably be perceived to bear the imprimatur of the school and that involve pedagogical concerns." *Fleming*, 298 F.3d at 924. The court concluded that the project was school-sponsored speech, even though the "painting activity took place outside of school hours and was not mandatory," and even despite a school official that had explicitly stated: "this is a project outside of the school, this is a separate project . . . ." *Id.* at 930.

110. *Id.* at 925 (quoting Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989)) (alterations in original).

111. *Id*. at 932 (quoting Hawkins v. City & County of Denver, 170 F.3d 1281, 1287 (10th Cir. 1999)) (alterations in original).

112. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 n.7 (1988).

113. 529 U.S. 217 (2000).

114. *Id.* at 227. In particular, some students objected to the school using their mandatory fees to fund organizations that engaged in political and ideological expression at odds with their own personal beliefs. *Id*.

education."[115] Although this footnote is by no means controlling, it does suggest that the Court might uphold a distinction between the amount of deference to school officials at the pre-collegiate and collegiate levels when First Amendment rights are at stake.

b. Lower Court Applications and Misapplications

A 2001 case, *Hosty v. Governors State University*, is particularly indicative of the confusion that has resulted in the lower courts from *Hazelwood's* unanswered footnote seven.[116] In *Hosty*, GSU students and former editors and writers of the school's student newspaper, the *Innovator*, claimed that school officials violated their First Amendment free speech rights.[117] In particular, they alleged that the school officials violated their rights when, among other things, the officials denied them access to computer software and manuals, temporarily removed an *Innovator* computer without permission, and failed to investigate break-ins.[118] In ruling on the various defendants' motions for summary judgment, the court addressed *Hazelwood* and concluded, contrary to what the defendants argued, that it did not "cast doubt" on the cases cited by the plaintiffs in support of their position.[119]

First, the court distinguished *Hazelwood* because, unlike the newspaper in *Hazelwood*, the students retained editorial control over the *Innovator* and it was not part of a class.[120] Thus, the court intimated that if the facts of the case had been different—specifically, if the *Innovator* was part of the educational curriculum—*Hazelwood* could have applied. However, in the next few sentences, the court seemed to contradict the implication that *Hazelwood* might apply at the post-secondary level. Citing footnote seven, the court also distinguished *Hazelwood* on the basis that it involved a high school rather than

115. *Id.* at 238 n.4 (Souter, J., concurring) (citations omitted) (emphasis added). A similar point was made in the 1992 Supreme Court case of *Lee v. Weisman*, 505 U.S. 577 (1992). In *Lee*, a public school student and her father brought a suit against the child's school district for its practice of including clergy-led invocations and benedictions in the form of prayer at the school-sponsored graduation ceremonies. *Id.* at 580-81. In holding that such a practice was unconstitutional, the Court reasoned, in relevant part:

> We do not address whether that choice [of participating in or protesting the graduation ceremony] is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity . . . .

Id. at 593.

116. Hosty v. Governors State Univ., 2001 WL 1465621 (N.D. Ill. Nov. 15, 2001).

117. *Id.* at *1.

118. *Id.* at *4.

119. *Id.* at *7.

120. *Id.*

a college or university.[121] Thus, the court implied that the *deferential Hazelwood* standard would *not* apply to college and university free speech cases. Ultimately, the court did not resolve these conflicting implications. As has happened in many other cases, the court searched for guidance, found none, did not resolve the question, and left the students, school officials, and attorneys who must rely on the decision, in a state of confusion.

Some courts, however, have left no one wondering whether *Hazelwood* will or should apply at the post-secondary level. For example, in 1989, the First Circuit confronted the issue in *Student Government Association v. Board of Trustees of the University of Massachusetts*.[122] In its opinion, the court stated, "*Hazelwood* . . . is not applicable to college newspaper cases."[123]

Likewise, the Sixth Circuit confronted the *Hazelwood* issue in *Kincaid v. Gibson*.[124] Kentucky State University students claimed that their First Amendment rights were violated when school officials confiscated and refused to distribute student-produced yearbooks.[125] The Sixth Circuit Court of Appeals decided that the yearbook constituted a limited public forum, and was thus subject only to reasonable time, manner, and place regulations, and not to the deferential *Hazelwood* standard, as the district court concluded.[126] Judge Cole, speaking for the majority, stated:

> The danger of "chilling . . . individual thought and expression is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." . . . The university environment is the quintessential "marketplace of ideas," which merits full, or indeed heightened, First Amendment protection . . . . In addition to the nature of the university setting, we find it relevant that *The Thorobred* and its readers are likely to be young adults . . . . Thus, there can be no justification for suppressing the yearbook on the grounds that it might be "unsuitable for immature audiences."[127]

121. *Hosty*, 2001 WL 1465621, at *7.

122. 868 F.2d 473 (1st Cir. 1989). Students from the University of Massachusetts alleged that university officials violated their free speech rights when the university got rid of the Legal Services Office, which provided legal education and advice to students. *Id.* at 474-75. The court ultimately held that this case was to be decided using subsidy caselaw. *Id.* at 477.

123. *Id.* at 480 n.6 (citations omitted).

124. 236 F.3d 342 (6th Cir. 2001) (en banc).

125. *Id.* at 345. The Vice President for Student Affairs, Gibson, objected to the color of the yearbook's cover and theme, and criticized the publication for its lack of captions and the "inclusion of current events ostensibly unrelated to Kentucky State University." *Id.*

126. *Id.* at 346, 348.

127. *Id.* at 352 (citations omitted). In coming to its conclusion, the court also noted that *The Thorobred* was not a "closely-monitored classroom activity." *Kincaid*, 236 F.3d at 352.

Although the court did not explicitly reject the applicability of *Hazelwood* in the college setting,[128] the language arguably suggests that the Sixth Circuit might refuse to apply *Hazelwood* in the future.

Moreover, in the 1990 case of *DiBona v. Matthews*,[129] a community college student and his teacher brought an action against the college, alleging that their First Amendment rights had been violated when the school cancelled a drama class because of the content of the play that was to be performed.[130] The court began its constitutional analysis by noting that nearly all the prior cases dealing with the power of school officials to regulate the content of drama productions or written materials "involved minors rather than adult colleges."[131] Instead of relying on *Hazelwood*, the court looked to the pre-*Hazelwood* collegiate cases to support its conclusion that the school officials could not cancel the class and prohibit the production of the play.[132] After noting that *Hazelwood* had specifically reserved the question of whether its deferential standard would apply at the college level, the court rejected the college's argument that they should be given the same power to regulate school curriculum as elementary and secondary school officials:

> [W]here children are concerned the legitimate role of the government in regulating speech is substantially broader . . . . In contrast, as the Supreme Court explained in [*Healy*], "[T]he precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large."[133]

The *DiBona* court did not stop there, however. It continued its attack on the applicability of the *Hazelwood* standard:

> We question whether the rationale underlying the "school sponsorship" rule would allow its wholesale extension to educational settings involving adults.

128. *See id.* at 346 n.5 ("Because we find that a forum analysis requires that the yearbook be analyzed as a limited public forum—rather than a nonpublic forum—we agree with the parties that *Hazelwood* has little application to this case.").

129. 220 Cal. App. 3d 1329 (Ct. App. 1990).

130. *Id.* at 1333-38. The court's record recited a description of the play, entitled "Split Second":

> The play concerns a Black New York City police officer who, in the course of a routine arrest of a White suspect, is subjected to a flurry of racial slurs and epithets. In a split-second loss of control, the officer shoots and kills the suspect. He then places a knife in the hand of the victim and fabricates a story that the shooting was in self-defense.

Id. at 1333. Church leaders in the community objected to the content of the play. *Id.*

131. *Id.* at 1345.

132. *DiBona*, 220 Cal. App. 3d at 1346. For example, the court relied on the following language from *Papish* to support its conclusion: "We think *Healy* makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Id.* (quoting Papish v. Univ. of Mo. Curators, 410 U.S. 667, 670 (1973)).

133. *Id.* (quoting Healy v. James, 408 U.S. 169, 180 (1972)).

> The general public is likely to view school-sponsored student speech as bearing the "imprimatur of the school" . . . because of the greater control elementary and secondary schools exercise over the conduct of minor students. [The school officials] have cited no authority—and we are aware of none—which would allow a college or university to censor instructor-selected curriculum materials because they contain "indecent" language or deal with "offensive" topics.[134]

Ultimately, the court concluded that although school sponsorship is one factor that may be considered under some circumstances at the college level, unlike at the pre-collegiate level, it is not controlling and will not automatically lead to deference to the school's legitimate pedagogical interests.[135] Thus, according to the *DiBona* court, the *Hazelwood* standard will not apply in the college setting—at least not in its traditional form.

Many courts have reached similar conclusions when addressing the issue of whether *Hazelwood* applies *outside* of the context of a collision between the university's rights and the students' free speech rights. For example, in *Scallet v. Rosenblum*,[136] a case addressing the scope of a university instructor's in-class free speech rights when they collided with the university's interests, a Virginia District Court refused to apply the *Hazelwood* standard.[137] In making this determination, the court opined:

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134. *Id.* at 1346-47 (citations omitted).

135. *Id.* at 1347-48. The court, however, failed to identify under what circumstances school sponsorship *could* be considered at the college level. *DiBona*, 220 Cal. App. 3d at 1346-47. In the end, the court held that the school officials' decision to not allow the play to be performed was unconstitutional, noting the following:

> [W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able . . . to discern little social benefit that might result from running the risk of opening the door to such grave results.

Id. at 1348 (quoting Cohen v. California, 403 U.S. 15, 26 (1971)) (alterations in original).

136. 911 F. Supp. 999 (W.D. Va. 1996).

137. *Id.* at 1011. The plaintiff, a non-tenured instructor, alleged that the school failed to renew his contract "in retaliation for his outspokenness on issues of 'diversity'" at the Graduate School. *Id.* Scallet was somewhat of a progressive instructor, known for "champion[ing], among other things, the goal of broadening both the traditional focus of classroom materials so as to make them more accessible to women and minorities, and the traditional underpinnings of the business community itself, so as to make that sphere more hospitable to the same." *Id*. at 1004. Noting that past precedent provided no "clear guidance," the court ultimately applied the *Pickering* balancing test—a Supreme Court test for determining the amount of protection afforded teachers' *out*-of-class speech—to determine if the instructor's *in*-class speech was protected. *Id*. at 1011. Under *Pickering*, courts must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). Per the terms of this test, the court concluded that the instructor's in-class speech regarding "diversity" bordered at times on sexual

> [T]he "significant interests" discussed in *Hazelwood* that justify the restriction, in certain instances, of . . . [First Amendment] speech, are not implicated to the same extent, if at all, in the context of higher education. Certainly the interest in assuring "that readers or listeners are not exposed to material that may be inappropriate for their level of maturity" is not implicated in the graduate school context.[138]

In contrast to these cases, various courts have not altogether dismissed the concept of *Hazelwood* at the university level.[139] For example, in *Leuth v. St. Clair County Community College*,[140] the former editor-in-chief of a student-run newspaper, the *Gazette*, challenged the community college officials' decision to prohibit the inclusion of an advertisement for a Canadian nude dancing club.[141] Although the court held that the newspaper, a forum for public expression, would be governed by regulations for commercial speech, it discussed the *Hazelwood* standard and extensively compared the student newspaper at issue in *Hazelwood* to the *Gazette*.[142] By discussing the *Hazelwood* analysis and not dismissing it as inapplicable, the inference is that the court would have applied the *Hazelwood* standard had the speech been deemed "school-sponsored."[143]

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harassment, and was actually disruptive to the school's pedagogical mission. *Scallet*, 911 F. Supp. at 1020.

138. *Id.* at 1011 (citing *Hazelwood*, 484 U.S. at 271).

139. In addition to student rights cases, many cases have addressed the collision of college/university *professors'* free speech rights with university interests. *See, e.g.*, Vanderhurst v. Colo. Mountain Coll. Dist., 208 F.3d 908 (10th Cir. 2000) (acknowledging that the question of whether *Hazelwood* applied at the university or college level was unresolved, but nonetheless applying the *Hazelwood* analysis to college professor's classroom speech because both parties stipulated that it did apply). *See also* Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991). In *Bishop*, the court held that a university professor's First Amendment rights were not violated by a school official's memo that restricted his rights to talk about religious beliefs or preferences during class, and prevented him from conducting optional classes to discuss religion. *Id.* at 1075-77. To make this determination, the court noted, "insofar as [the *Hazelwood* standard] covers the extent to which an institution may limit in-school expressions which suggest the school's approval, we adopt the Court's reasoning as suitable to our ends, even at the university level." *Id.* at 1074. Thus the court adopted the *Hazelwood* analysis, albeit in a modified form. *See id.* at 1074-75 (discussing the three considerations that the court would balance). The court specifically noted that it would give more weight to the professor's rights than they "concluded [was] proper under *Kuhlmeier*." *Id.* at 1072 n.5. *See also Scallet*, 911 F. Supp. at 1010 n.11 (discussing the *Bishop* court's unique balancing test at length).

140. 732 F. Supp. 1410 (E.D. Mich. 1990).

141. *Id.* at 1412.

142. *Id.* at 1414-15.

143. There have been many other cases that have addressed the collision of college/university *students'* free speech rights with university interests where this inference holds true. *See, e.g.*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 216 (3d Cir. 2001) (discussing *Hazelwood* at length, but concluding that the *Tinker* analysis would apply because the school's anti-harassment policy "cover[ed] far more than just the *Hazelwood*-type school-sponsored speech."). *Cf.*

E. Beyond Hazelwood

The Supreme Court and lower courts also have recognized differences in the primary/secondary and undergraduate/graduate educational settings outside of the context of First Amendment free speech cases. For example, in *Benefield v. Board of Trustees of the University of Alabama*,[144] a female student alleged that the college she attended was liable under Title IX for failing to prevent her from engaging in sexual activity on campus, which negatively impacted her class work.[145] However, the court refused to find the school liable, reasoning:

> [R]egardless of their age, a college does not have the same obligation to its students as does a high school. Even though a 15, 16 or 17 year old may be found at either institution, *the institutions have uniquely different obligations to their students*, regardless of the overlap in ages.[146]
>
> . . . .
>
> [T]he authoritarian role of today's college administrators has been notably diluted in recent decades. Trustees, administrators, and faculties have been required to yield to the expanding rights and privileges of their students . . . . College students today are no longer minors; they are now regarded as adults in almost every phase of community life.[147]

Distinctions based on students' educational levels are also prevalent in the arena of Establishment Clause jurisprudence.[148] For example, one court noted the following:

> There is a large body of limited open public forum/Establishment Clause case law in the context of university students. The cases find that in the context of university students, permitting religious speech and meetings on a

Marianello v. Bushby, No. CIV.A.1:95CV167-D-D, 1996 WL 671410 (N.D. Miss. Nov. 1, 1996) (where the court made no mention of *Hazelwood*, but applied *Settle* to the graduate student's criticism and commentary of his professors during the appeals process for an unfavorable grade he received).

144. 214 F. Supp. 2d 1212 (N.D. Ala. 2002).

145. *Id.* at 1217. The student was able to attend the university based on a scholarship she received. *Id*. at 1213. She lived on campus, and on several occasions, after consuming alcohol, was sexually exploited by football and basketball players. *Id.* at 1213-14. As a result of her activities on campus, her GPA was very low and she eventually had to be placed in a drug rehabilitation center for adolescents. *Id*. at 1215. Moreover, the student denied any participation in the sexual encounters. *Benefield*, 214 F. Supp. 2d at 1214.

146. *Id*. at 1223 (emphasis added).

147. *Id*. at 1223-24 (quoting Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979)) (alteration in original).

148. *E.g.*, Chris Brown, Note, *Good News? Supreme Court Overlooks the Impressionability of Elementary-Aged Students in Finding a Parental Permission Slip Sufficient to Avoid an Establishment Clause Violation*, Good News Club v. Milford Central, 27 U. DAYTON L. REV. 269, 283-86 (2001).

> university campus would confer no imprimatur of state approval of religious practices because of the nature of university students (i.e. mature and less impressionable). However, other cases have distinguished the university setting from that of a high school, finding that a high school presents "heightened dangers in the context of the Establishment Clause."
>
> Unlike a university, where it is generally understood that a student is, with reason, responsible for the conduct of his or her own affairs, the behavior of a high school student is subject to the constant regulation and affirmative supervision of adult school authorities.[149]

Finally, in *Carboni v. Meldrum*,[150] the court talked about such a distinction in the context of the Fourth Amendment.[151] In *Carboni*, a graduate student was stripped searched because school officials suspected her of going to the restroom during a test, looking at hidden notes, and concealing them on her person when she was caught.[152] In analyzing whether the school's actions violated the graduate student's rights, the court stated:

> [A] body search of a graduate student in her late twenties undertaken at the direction of a university professor and Dean is arguably different from the same search performed on a fourteen (14) year old high school freshman by a Vice-Principal. Though higher education administrators must be allowed to make discretionary decisions, *university officials simply do not exercise the same level of disciplinary control over their students* as do public school teachers and principals.[153]

Thus, the distinction referenced to by the Supreme Court in past cases such as *Southworth* and recognized by many lower courts permeates more than just First Amendment free speech jurisprudence.

149. Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118, No. 90-C6604, 1991 WL 2458, at *8 (N.D. Ill. Jan. 8, 1991) (citations omitted). *See also* Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 260 (3d Cir. 2002) ("[P]ublic secondary and elementary school administrators are granted more leeway than public colleges and universities or legislative bodies, *e.g.*, municipalities, states, and Congress.").

150. 949 F. Supp. 427 (W.D. Va. 1996).

151. *Id.* at 434-35.

152. *Id*. at 430-31.

153. *Id*. at 434 (citations omitted) (emphasis added). Ultimately, the court did not find a violation of the Fourth Amendment's prohibition against unreasonable searches and seizures because school administrators, based on the overwhelming evidence, "could have reasonably concluded they were entitled to do [the search] under the circumstances" and because the scope was limited. *Id.* at 435-36.

III. *BROWN V. LI*: A DETRIMENTAL DISACKNOWLEDGMENT

A. Facts of Brown v. Li

The controversy in *Brown v. Li* centered around a "Disacknowledgments" section that Christopher Brown, a master's degree candidate in the Department of Material Sciences at the University of California, at Santa Barbara, included with his thesis.[154] Brown's "Disacknowledgments" section expressed the opposite sentiment that one might expect to see in the acknowledgment section of a thesis. Instead of praising those who aided him in the completion of his thesis and supported him throughout the process, Brown began his "Disacknowledgments" section in the following manner: "I would like to offer special *Fuck You*'s to the following degenerates for of [sic] being an ever-present hindrance during my graduate career."[155] Brown then proceeded to name "the Dean and staff of the UCSB graduate school, the managers of [the school's] [l]ibrary, former California Governor Wilson, the Regents of the University of California, and 'Science' as having been particularly obstructive to [his] progress toward his graduate degree."[156]

Brown felt that he had the freedom to include such a section in the opening of his thesis because of the wording of the University's "Guide to Filing Theses and Dissertations."[157] In addition to setting guidelines for the content and structure of the actual thesis,[158] the Guide said the following about an

154. Brown v. Li, 299 F.3d 1092 (9th Cir. 2002), *amended by* 308 F.3d 939, 941-43 (9th Cir. 2002). The original decision in *Brown* was released on August 12, 2002, but it was amended and superceded in October 2002. In addition to bringing claims under the federal constitution, Brown also alleged violations of his rights under the California constitution. *Id*. at 946. In its original decision, the district court did not indicate whether it considered and dismissed the state law claim or whether its decision was based solely on Brown's federal claims. *Id*. at 955. The Ninth Circuit, in its August decision, did not address this claim either. As a result, the Ninth Circuit amended its decision in October, noting the vagueness in the district court's opinion, and thus remanded the case to the district court for consideration of the state law claims. *Id*. Brown filed a petition for grant of certiorari to the Supreme Court of the United States. *Cert. denied*, Brown v. Li, 123 S. Ct. 1488 (2003).

155. *Brown*, 308 F.3d at 943.

156. *Id.*

157. *Id*. at 942, 952.

158. *Id.* at 942. This portion of the Guide seemed to be aimed only at the actual thesis itself, and not at the content of the optional "Acknowledgments" section. The Guide noted that "'Each discipline has a relatively standard method of presenting *research* results so that other researchers can find and build on past *work*." *Id.* (emphasis added). An "Acknowledgment" or "Disacknowledgment" section arguably has nothing to do with future researchers being able to build upon the student's work. The court, however, went on to note that "[w]ith respect to the content of a thesis or dissertation, the Guide states: 'You *and your committee* are responsible for everything between the margins. The organization, presentation, and documentation of your research should meet the standards for publishing journal articles or monographs in your field . . . .'" *Brown*, 308 F.3d at 942. By emphasizing "*and your committee*," the court seemed to

optional "Dedication and/or Acknowledgments" section of a student thesis: "'You *may* wish to dedicate this work to someone special to you or to acknowledge particular persons who helped you. Within the usual margin restrictions, *any format* is acceptable for these pages."[159] Brown understood this to mean that the student had complete discretion in determining the contents of this optional section—"that the student 'may' dedicate the thesis to someone special or give thanks to the helpful individuals in the section, or the student 'may' use the section to communicate some other message."[160]

In the spring of 1999, Brown submitted his thesis, entitled "The Morphology of Calcium Carbonate: Factors Affecting Crystal Shape," to his three-member Committee.[161] This version of his thesis did not include the controversial "Disacknowledgments" section.[162] In fact, Brown specifically did not submit his "Disacknowledgments" to the members of the thesis committee because "he feared that they would not approve [the section]."[163]

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suggest that the committee should retain control over the entire thesis including the "Acknowledgements" section. However, a more accurate reading of this section of the Guide suggests it is aimed at the presentation of the candidate's research, rather than the candidate's optional Acknowledgments. Guidelines for Acknowledgements is in a separate section of the Guide, and seems to rely upon considerations independent from those directed at the candidate's research. *Id.* at 942. Thus, the section should not be read to regulate the "Acknowledgements section," or, as in Brown's case, his "Disacknowledgments." Contrary to what the court suggests, the section of the guide that speaks to committee oversight does not automatically mandate the conclusion that Brown had no freedom of speech and that the committee retained control over the optional "Acknowledgments" section.

159. *Id.* (emphasis added). The court also cited a passage from a style manual that was referred to in a different portion of the Guide—not in the "Acknowledgment" guidelines section. *Id.* According to this style manual, "'In the acknowledgments, the writer thanks mentors and colleagues, lists the individuals or institutions that supported the research, and gives credit to works cited in the text for which permission to reproduce has been granted.'" *Id.* (citing KATE L. TURABIAN, A MANUAL FOR WRITERS OF TERM PAPERS, THESES, AND DISSERTATIONS §§ 1.9, 1.26 (6th ed. 1996)). However, the court's reliance on the Turabian manual is misplaced. First, in many other instances, the University did not follow such a guideline. *Brown*, 308 F.3d at 946. For instance, some students thanked "God" or their "pets." *Id.* Another student made reference to, *inter alia*, "the dips**ts who decided to put the P chemists on the forth [sic] floor" and "the dumb ass who left his cooling water ON . . . and subsequently flooded my lab, desk, and my most important files: may your bloated, limb-less bodies wash to shore and be picked clean by seabirds and maggots . . . ." *Id.* at 967 (Reinhardt, J., dissenting) (alteration in original). All of these student's "Acknowledgements" sections were approved, although the Turabian manual would seem to dictate a contrary result. *Id.* at 943. Moreover, even if the Turabian manual's definition of the "Acknowledgments" section was authoritative, it constitutes impermissible viewpoint discrimination. *See infra* Part IV.A.2.b.

160. *Brown*, 308 F.3d at 952-53. Again, even if this view was rejected, the limitation of the "Acknowledgements" section based on the speaker's viewpoint could still be declared unconstitutional. *See infra* Part IV.A.2.b.

161. *Brown*, 308 F.3d at 943.

162. *Id.*

163. *Id.*

After obtaining approval of his thesis from the thesis committee, Brown inserted the "Disacknowledgments" section, and attempted to file his thesis with the library. However, the library noticed the added section and contacted the Dean of the Graduate Division of the School, Dean Li, who withheld Brown's degree and referred the matter to Brown's thesis committee.[164]

Brown then drafted an alternative "Disacknowledgments" section, which omitted the profanity used in the original draft, but the thesis committee still refused to approve his thesis.[165] In a memorandum of its decision, the committee noted that Brown's section "did not meet professional standards for publication in the field,"[166] and concluded that "the addition or removal of material from a dissertation after the examination, evaluation and signed approval of the original materials . . . is unacceptable . . . ."[167] Dean Li also wrote Brown notifying him that his thesis would be approved as soon as he removed the "Disacknowledgments" section.[168]

Instead of complying with Dean Li's ultimatum, however, Brown appealed to the Academic Affairs Committee of the Department of Material Sciences. The Committee denied Brown's appeal, reasoning "that the entire paper, not merely the technical content of the thesis, was subject to the review and approval of the thesis committee,"[169] and that the thesis committee members had the "right[] . . . not to be associated, through their approval, with the content of the 'Disacknowledgments' section."[170] Brown's appeals to the Associate Dean of the Graduate Division, the University's Graduate Council, and the Academic Freedom Committee were likewise unsuccessful.[171] In January 2000, Brown's degree was withheld, and he was put on academic probation.[172]

164. *Id*. at 943. Filing the thesis with the library was a prerequisite to earning a degree. *Id.*

165. *Brown*, 308 F.3d at 943.

166. *Id.*

167. *Id.* at 944. In its memo, the thesis committee also "determined"—with recommendation from counsel—that the manuscript was not a "public forum." *Id*.

168. *Id*.

169. *Brown*, 308 F.3d at 944. The Academic Affairs Committee went on to state that "An Acknowledgement section in a scientific paper is relevant only as a vehicle for the author to give proper credit to people or organizations that have contributed to make possible the technical work being reported . . . [and] the student is given a certain latitude in a thesis to thank his/her parents, spouse, family or close friends . . . ." *Id*. Again, however, this reasoning is inconsistent with the action of the University on other occasions; nowhere does this definition allow for praise of pets or criticism of faculty, administration, or staff. *See supra* note 159.

170. *Brown*, 308 F.3d at 944-45. However, this argument is subject to much criticism. *See infra* Part IV.A.2.a.

171. *Brown*, 308 F.3d at 945. These individuals/panels basically reiterated the arguments made by the Academic Affairs Committee. *See supra* text accompanying notes 1665-67. The Academic Freedom Council's decision rested mainly on the reasoning that Brown had "failed to follow [the] rules." *Brown*, 308 F.3d at 945.

172. *Id.*

In the meantime, the media caught wind of the brewing controversy, and on May 11, 2000, a producer for "ABC's Nightly News with Peter Jennings" contacted Brown.[173] On May 14, University officials spoke with the producer.[174] On May 15, Brown was interviewed.[175] On May 16, Brown received a letter from Federal Express—the University had decided to award his degree, even though the "Disacknowledgments" section had not been removed from the thesis.[176] However, at the time Brown filed suit, he had not provided the library with an approved version of the thesis without the "Disacknowledgments," so his thesis was not displayed in the library according to UCSB's usual custom.[177]

In June of 2000, Brown filed a section 1983 action in the Ninth Circuit alleging, *inter alia*, "that [the Dean of the University's Graduate Division, the Chancellor of the University, the members of his thesis committee, and the Director of the University's library] violated his First Amendment rights by 'withholding' his degree by their 'conduct.'"[178]

173. *Id.* at 966 (Reinhardt, J., dissenting).

174. *Id*.

175. *Id*.

176. *Brown*, 308 F.3d at 966. The University contended that "the timing was a coincidence." *Id*.

177. *Id.* at 945.

178. *Id.* Brown also claimed that the defendants violated his procedural due process rights by failing to give him a formal hearing and that their actions in mandating that he remove the "Disacknowledgments" section violated the California state constitution. *Id*. at 945-46. A majority of the Ninth Circuit Court of Appeals upheld the District Court's grant of summary judgment on the procedural due process claim. *Brown*, 308 F.3d at 955, 956. At the time of the writing of this Note, the court of appeals had remanded the state law claims for consideration by the district court, because the district court was silent as to the state law claims. *Id*. at 955. This Note will only analyze the First Amendment claim.

B. Judge Graber's Denial of Disacknowledgments: No Viable First Amendment Claim[179]

Reviewing the district court's summary judgment for the school *de novo*, Judge Graber began by laying out the standard for determining whether the University officials were entitled to qualified immunity on the First Amendment claim.[180] Judge Graber then addressed the merits of Brown's argument that the defendant's decision to refuse to approve the "Disacknowledgments" section "demonstrate[d] a violation of his clearly established First Amendment rights."[181] Recognizing that there was "no precedent precisely on point," Judge Graber then analyzed the threshold legal question: does the deferential *Hazelwood* standard apply in the post-secondary setting?[182]

1. *Hazelwood* is the Most Analogous Case to *Brown*

Ultimately, Judge Graber concluded that *Hazelwood* did apply, reasoning that it properly "balances a university's interest in academic freedom and a student's First Amendment rights."[183] She first analyzed the *Hazelwood* decision itself to reach this conclusion.[184] After summarizing the holding of the case, Judge Graber focused on the language from *Hazelwood* that led the Court to determine that the school newspaper was part of the curriculum and

179. Note that the decision in *Brown* is a plurality decision. *Id.* at 956-57. Justices Graber and Ferguson both concluded that Brown's First Amendment rights were not violated, but applied differing legal standards. *Id.* at 957. This Note will not focus on Judge Ferguson's concurrence. Judge Ferguson summarized the situation as follows: "... the guy cooked the books, (his master's thesis), got caught, and now wants to shield his misbehavior under the umbrella of the First Amendment." *Id*. at 955 (Ferguson, J., concurring). Instead of addressing the issue of whether *Hazelwood* applied to Brown's case, Judge Ferguson characterized the case as one of deception, focusing on Brown's "dishonest addition of the 'Disacknowledgments,'" and concluded that Brown could not "cheat and then seek to evade accountability through the First Amendment." *Brown*, 308 F.3d at 955. As the dissent aptly noted, however, "the record . . . [did] not support this conclusion. The university's offer to afford Brown all of the same benefits that he would have received before he 'cheated' if he would simply remove the offending material from his thesis belies the argument that the sanctions were imposed to punish him for cheating." *Id.* at 965 n.7 (Reinhardt, J., dissenting).

180. *Id.* at 946-47. In particular, Judge Graber noted that the court would have to apply a three-part test: (1) whether "the defendant's conduct violated a constitutional right", (2) whether the right "was clearly established at the time of the alleged violation"; and (3) "whether an objectively reasonable government actor would have known that his or her conduct violated the plaintiff's constitutional right." *Id.* (citing Robinson v. Solano County, 278 F.3d 1007, 1012-13 (9th Cir. 2002) (en banc)).

181. *Id.* at 947.

182. *Brown*, 308 F.3d at 947.

183. *Id.* at 952.

184. *Id*. at 947-48.

not a public forum.[185] Judge Graber noted that the Court so concluded because the newspaper was "'supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences;'"[186] thus, school officials could regulate student speech provided it was "'reasonably related to legitimate pedagogical concerns.'"[187]

Before discussing the specific applicability of *Hazelwood*, the court analogized Brown's case to *Settle v. Dickson*, where the Sixth Circuit Court of Appeals applied *Hazelwood*.[188] In *Settle*, a ninth-grade student received approval for her paper topic, changed topics without the knowledge of the teacher, and then claimed her First Amendment rights were violated when she received no credit for the paper.[189] Reciting the deferential standard once more, Judge Graber concluded that "*Hazelwood* and *Settle* lead to the conclusion that an educator can, consistent with the First Amendment, require that a student comply with the terms of an academic assignment,"[190] notwithstanding the fact that both cases involved student speech at the pre-collegiate level.

Curiously, however, Judge Graber did not address the underlying policy reasons for applying *Hazelwood* in the post-secondary setting. Noting a lack of Supreme Court guidance on the issue, Judge Graber took the position that *Hazelwood*, even if it was not the correct standard to apply, was the best.[191]

2. Curricular Versus Extra-curricular Expressive Activities.

Providing support for her argument, Judge Graber reasoned that the post-collegiate cases in the First and Sixth Circuits that had distinguished *Hazelwood* and held that the deferential standard did not apply at the collegiate level were themselves distinguishable from *Brown*.[192] Because those cases involved *extracurricular* activities, and *Brown* involved curriculum-related

185. *Id.* at 947-48.

186. *Id.* at 947 (citing *Hazelwood*, 484 U.S. at 271).

187. *Brown*, 308 F.3d at 949 (citing *Hazelwood*, 484 U.S. at 271, 273).

188. *Id.* at 948. For a more in-depth discussion of *Settle*, see *supra* text accompanying notes 103-108.

189. *Id.* at 948 (citing Settle v. Dickson County Sch. Bd., 53 F.3d 152, 154-55 (6th Cir. 1995)).

190. *Id.* at 949.

191. *Id*. at 951. Judge Graber noted the following:

> We do not know with certainty that the Supreme Court would hold that *Hazelwood* controls the inquiry into whether a university's requirements for and an evaluation of a student's curricular speech infringe that student's First Amendment rights. Nevertheless, of all the Supreme Court's cases, *Hazelwood* appears to be the most analogous to the present case.

Brown, 308 F.3d at 951.

192. *Id.* at 949 (citing Kincaid v. Gibson, 236 F.3d 342 (6th Cir. 2001) (en banc); Student Gov't Ass'n v. Bd. of Trs. of Univ. of Mass., 868 F.2d 473 (1st Cir. 1989)).

student speech, *Kincaid* and *Student Government Association* were not controlling.[193]

The Supreme Court, noted Judge Graber, never articulated the appropriate standard for reviewing a university's regulation of post-secondary student speech that is related to a school's curriculum; thus, it remained an open question whether *Hazelwood* applied.[194] Judge Graber argued that a review of Supreme Court precedent showed that the Court upheld the curricular-extracurricular distinction in other contexts, indicating that the Court might continue to do so if confronting a free speech case in the university setting.[195] The precedents showed, argued Judge Graber, that "the curriculum of a public educational institution is one means by which the institution itself expresses its policy, a policy with which others do not have a constitutional right to interfere."[196] Judge Graber expanded her argument by citing to academic freedom cases. In addition, Judge Graber argued that a university's control of its curriculum may in fact be even *broader* than a primary or secondary school's regulation of its curriculum, for "arguably the need for academic discipline and editorial rigor increases as a student's learning progresses."[197]

3. Application of *Hazelwood* to *Brown*

Finally, Judge Graber applied the *Hazelwood* standard to the facts in *Brown* and concluded, without any analysis, that Brown's thesis, co-signed by members of the thesis committee, was not a public forum.[198] Moreover, the "Acknowledgments" section was curricular "because it was designed to teach Plaintiff how to research within an academic specialty and how to present his

193. *Id.* at 949.

194. *Id*.

195. *Id.* at 950-51 (citing Bd. of Educ. Of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002) ("distinguishing between core educational functions and voluntary extracurricular activities for Fourth Amendment purposes"); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 673-74 (1998) ("'Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or *a public school prescribing its curriculum*, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others.'") (emphasis added); Bd. of Educ. Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 862 (1982) (plurality refused to extend holding to curricular speech, noting "'the only books at issue in this case are *library* books, books that by their nature are optional rather than required reading. Our adjudication of the present case thus does not intrude into the classroom, or into the compulsory courses taught there.'")).

196. *Brown*, 308 F.3d at 951.

197. *Id.*

198. *Id.* at 954. In fact, it seems that Judge Graber was not even sure that the thesis was the proper thing to use for the forum analysis. *Id.* at 954 n.5 (noting that "[t]he dissent posits that a 'public forum' analysis might provide an appropriate standard for this case. However, the dissent does not identify what, precisely, could constitute a public forum in this case.") (citations omitted).

results to other scholars in his field."[199] Judge Graber also rejected Brown's reading of the Guide,[200] concluding that *Hazelwood* did not require viewpoint neutrality, and thus "a teacher may require a student to write a paper from a particular viewpoint, even if it is a viewpoint with which the student disagrees, so long as the requirement serves a legitimate pedagogical purpose."[201] According to Judge Graber, in *Brown*, the University's legitimate pedagogical purpose was teaching Brown "the proper format for a scientific paper."[202] With little discussion, Judge Graber also recognized that the committee members had a competing First Amendment right not to approve the thesis.[203] Finally, she concluded that even though other acknowledgement sections were "nonconforming,"[204] no genuine issue of material fact existed because one thesis committee's derelict adherence to the written academic standards "simply ha[d] no bearing on whether *his* thesis committee had a legitimate pedagogical purpose."[205] Even though this would admittedly result in a lack of uniformity, Judge Graber suggested that each committee could set its own academic standards without implicating First Amendment concerns.[206]

C. Dissent's Disagreement: Majority Disacknowledged First Amendment Implications[207]

Judge Stephen Reinhardt began his analysis by putting the First Amendment issue in perspective, anticipating the reaction some might have to the case. "Although the underlying dispute may appear to some to be trivial,

199. *Id.* at 952.

200. *See supra* text accompanying notes 157-160 for a discussion of Brown's argument.

201. *Brown*, 308 F.3d at 953.

202. *Id*. at 952. Judge Graber argued that the university was trying to teach Brown how to conform to professional norms. *Id*. at 953.

203. *Id.* at 952 (citing Parate v. Isibor, 868 F.2d 821, 828-30 (6th Cir. 1989) (*Parate* held "that a university professor has a First Amendment right to assign grades and evaluate students as determined by his or her independent professional judgment.")) Judge Graber thought the academic freedom interest was even more compelling in *Brown* than in *Parate* since the committee member's names would be included in the thesis, suggesting that they were responsible for the entire content of the thesis—acknowledgement and all. *Brown*, 308 F.3d at 952.

204. *Id.* at 953. For examples of other nonconforming "Acknowledgments" section, see *supra* note 158.

205. *Id.* at 953.

206. *Id.* at 953-54 (noting that "this thesis committee was entitled to set an academic standard for Plaintiff's thesis, including its acknowledgments section, even if no thesis committee in the past had ever set one.").

207. Note that Judge Reinhardt, in addition to dissenting, concurred in part. *Id*. at 956 (Reinhardt, J., dissenting). Judge Reinhardt agreed with Judge Graber and Judge Ferguson that the district court's decision to grant summary judgment on Brown's procedural due process claim should be affirmed and that the case should be sent back to the district court to address the California state law claims. *Brown*, 308 F.3d at 956.

and perhaps not worthy of serious First Amendment deliberation, the extreme positions taken by the parties during the course of their disagreement and the erroneous legal rule advocated by [Judge Graber] leaves me with little choice but to discuss the constitutional questions in some depth."[208] Judge Reinhardt criticized the plurality for refusing to confront or discuss the First Amendment issues implicated in the case.[209] Next, Judge Reinhardt presented his arguments: (1) *Hazelwood* was the erroneous legal standard; (2) a different legal standard or standards should be applied in the university setting; and (3) even assuming *Hazelwood* applied in the post-secondary setting, the facts on record presented genuine issues of material fact that precluded summary judgment.[210]

1. *Hazelwood* is Inapplicable in the Post-secondary Setting

Judge Reinhardt "vehemently disagree[ed]" with Judge Graber that *Hazelwood* should apply in the post-secondary setting.[211] In reaching his conclusion, Judge Reinhardt considered underlying policy rationales and examined past precedent.

First, Judge Reinhardt argued that differences between primary/secondary and post-secondary students warranted the inapplicability of *Hazelwood*.[212] High school students, Judge Reinhardt argued, are less emotionally mature than college and graduate students.[213] Moreover, Judge Reinhardt argued, without giving examples, that the application of *Hazelwood* to universities and graduate schools would "seriously undermine the rights" of such students.[214] In addition, post-secondary students are typically more independent, and most enjoy greater legal freedoms than high school students, including, but not limited to, being able to purchase cigarettes, to marry, to the join the military, to vote, and to legally consume alcohol.[215] In fact, *Hazelwood* itself suggested that such a distinction might be upheld.[216]

Second, Judge Reinhardt argued that legal precedent showed that post-secondary students should be afforded more First Amendment protections. He pointed out that many of the cases that Judge Graber relied on in her analysis

208. *Id.*

209. *Id.* at 959.

210. *Id.* at 957-58.

211. *Id.* at 960 (Reinhardt, J. dissenting).

212. *Brown*, 308 F.3d at 957.

213. *Id.*

214. *Id.* at 957.

215. *Id.* at 961. Of course, some high school students may also have such rights, as Judge Reinhardt readily acknowledges. *Id*. However, a majority of students do not have such rights until reaching college.

216. *Brown*, 308 F.3d at 956 (Reihnardt, J. dissenting) (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 n.7 (1988)).

included language that suggested *Hazelwood* was limited to primary and secondary student speech.[217] Judge Reinhardt also cited cases that explicitly recognized that college and graduate students are less impressionable than primary and secondary students,[218] cases that suggested primary and secondary students were subject to more discipline,[219] and cases that stood for the proposition that post-secondary students should receive the same protection as adults outside of the educational setting.[220]

Most importantly, Judge Reinhardt criticized Judge Graber for incorrectly importing the curricular-extracurricular distinction into the realm of *Hazelwood*.[221] Judge Graber's distinction, stated Judge Reinhardt, was "disingenuous at best."[222] In fact, Judge Reinhardt argued, the language of *Hazelwood* suggested that the deferential standard could be applied to both curricular and extracurricular activities.[223] Accordingly, because the *Kincaid* case dealt with a student publication under faculty and university management,

217. *Id.* at 961 (citing Planned Parenthood of Southern Nev., Inc., v. Clark Cty. Sch. Dist., 941 F.2d 817, 829 (9th Cir. 1991) (en banc) ("discussing the immaturity of a high school audience and stating that the First Amendment standard applicable to high school student speech must provide educators with 'the ability to consider the emotional maturity of the intended audience'"); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988) ("'[A] school must be able to take into account the emotional maturity of the intended audience'") (alteration in original); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683-84 (1986) ("emphasizing that one reason why high school officials should be accorded more deference to limit student speech is because a high school audience is 'less mature'")).

218. *Id.* at 961 (citing Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 835 (1995); Widmar v. Vincent, 454 U.S. 263, 274 (1981); Tilton v. Richardson, 403 U.S. 672, 688 (1971)).

219. *Id.* at 961-62 ("The activities of high school students . . . may be more stringently reviewed than the conduct of college students, as the former are in a much more adolescent and immature stage of life.") (citing Nicholson v. Bd. of Educ. Torrance Unified Sch. Dist., 682 F.2d 858, 863 n.4 (9th Cir. 1982); *Id.* at 962 (noting that "'A college relies in large measure on faculty self-governance and its contributions to administrative decisions. This is analogous to, but different from a high school's need to discipline by . . . superiors.'") (quoting Mabey v. Reagan, 537 F.2d 1036, 1046-47 (9th Cir. 1976)).

220. *Brown*, 308 F.3d at 962 ("emphasizing that 'the right of teaching institutions to limit expressive freedom of students ha[s] been confined to high schools'") (citing Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 239 n.4 (2000) (alterations in original); ("'[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.'") (quoting Healy v. James, 408 U.S. 169, 180 (1972)).

221. *Id.* at 962-63 (Reinhardt, J., dissenting).

222. *Id.* at 963.

223. *Id.* (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988)) ("'[S]chool-sponsored publications [and] theatrical productions'" that are 'supervised by faculty members . . . are examples of expressive activities that 'bear the imprimatur of the school' and are therefore subject to the *same* degree of First Amendment scrutiny as curricular speech, even if they do not 'occur in a traditional classroom setting.'")).

the language of *Hazelwood* arguably should have dictated a different result, contrary to Judge Graber's analysis.[224]

Ultimately, Judge Reinhardt concluded, "the reasons underlying the deference with respect to the regulation of the speech rights of high school youths do not apply in the adult world of college and graduate students, an arena in which academic freedom and vigorous debate are supposed to flourish . . . ."[225]

2. Proposed Applicable Legal Standards[226]

Although Judge Reinhardt did not provide an in-depth explanation of how current standards would be applied in student free speech cases, he proposed two alternative legal standards that could be applied in the post-secondary setting—standards that he thought would provide more protection for college and graduate students than *Hazelwood*, but that also would accommodate the university's interest in furthering pedagogical purposes.[227]

First, Judge Reinhardt argued that student speech in the post-secondary setting could be governed by the limited public forum doctrine.[228] Under this doctrine, schools could impose reasonable time, place, and manner restrictions on speech, but could not make restrictions on the basis of viewpoint, and could only discriminate on the basis of content if school officials could show that the restriction at issue was narrowly drawn to accommodate some compelling interest.[229] Second, Judge Reinhardt suggested that courts could apply an intermediate level of scrutiny to school regulations of college and graduate student speech, like the standard applied to the quasi-suspect gender class in equal protection claims.[230]

224. *Id.*

225. *Brown*, 308 F.3d at 957.

226. The viability and intelligibility of these proposed standards will be considered *infra* at Part IV.B.

227. *Brown*, 308 F.3d at 963-64 (Reinhardt, J., dissenting). Although he only mentioned two possible standards, Judge Reinhardt did not think that they were the only possibilities. *Id*. Whatever standard ultimately applies, Judge Reinhardt cautioned that "it is important to distinguish student speech from university speech, teacher or other employee speech, and the speech of private individuals using the university's facilities . . . . [For] [i]t may be that different First Amendment standards are applicable in different contexts to restrictions imposed at the university level . . . ." *Id*. at 964.

228. *Id.* at 964.

229. *Id.*

230. *Brown*, 308 F.3d at 964. If such a standard were applicable to the university setting, "the university would have the burden of demonstrating that its regulation of college and graduate speech was *substantially* related to an important pedagogical purpose." *Id*. (emphasis added).

3. Genuine Issues of Material Fact Existed that Precluded Summary Judgment

Even assuming *Hazelwood* applied, Judge Reinhardt still thought that the *Brown* case was improperly disposed of on summary judgment.[231] Judge Reinhardt classified *Brown* as a case of excessive punishment.[232] He argued that the actions taken by the university—withholding Brown's degree for almost a year, and placing him on academic probation, making him ineligible for a university teaching or research position or financial aid—were grossly disproportionate in comparison to the alleged violation.[233]

In Judge Reinhardt's eyes, if *Hazelwood* applied, the ultimate resolution of the case would turn on the motivation of the defendant.[234] And, as Judge Reinhardt argued, the facts of the case suggested the possibility of two competing possible motivations—the university may have punished Brown for his noncompliance with the "proper format for a scientific paper," or the university may have punished him for his "hostile" and "castigating" views regarding university officials.[235] As such, Judge Reinhardt concluded that there was a genuine issue of material fact as to whether the university's purported reasons for disciplining Brown were reasonably related to a legitimate pedagogical purpose or were pretextual, an issue that could not properly be decided by the court on a summary judgment motion.[236] Thus, he would have, at the least, reversed the district court's grant of summary judgment on the First Amendment claims.[237]

231. *Id.* at 965.

232. *Id.* at 960 n.4 (Reinhardt, J., dissenting). Judge Reinhardt, piercing the veil of the defendants' argument, noted, "this case is about much more than the mere decision not to approve the disacknowledgments or the ensuing decision not to permit the placement of the thesis in the library." *Id.* at 960.

233. *Brown*, 308 F.3d at 965.

234. *Id.* at 960.

235. *Id.* at 966, 967.

236. *Id.* at 967. Judge Reinhardt argued that the possibility of pretext was strengthened by the fact that the University decided to confer the degree immediately after the media contacted the University and Brown. *Id.* at 966. In addition, the pretext argument was strengthened by the fact that the University had not disciplined a student who wrote the following acknowledgement:

> To: 1) the dips**ts who decided to put the P-chemists on the forth [sic] floor, 2) the inept facilities management monkey who raised the cooling water pressure and 3) the dumb ass who left his cooling water ON for a laser that was OFF for 2 years and subsequently flooded my lab, desk, and my most important files: may your bloated, limb-less bodies wash to shore and be picked clean by seabirds and maggots . . . .

Brown, 308 F.3d at 967.

237. *Id.* at 957 (Reinhardt, J., dissenting).

IV. ANALYSIS

A. Majority Misses the Point

Judge Graber's analysis failed to adequately safeguard the free speech rights of post-secondary students. Instead of squarely confronting the unresolved First Amendment issues in-depth, many of her arguments were conclusory and lacked support. Most troubling, her opinion was plagued by a lack of underlying policy considerations—considerations indispensable to answering the threshold legal question of whether *Hazelwood* should apply in the university setting. Specifically, Judge Graber's analysis was erroneous for the following reasons: (1) *Hazelwood* should not apply in the post-secondary setting; (2) even if *Hazelwood* was the correct legal standard to apply, Judge Graber's application of the deferential *Hazelwood* standard to the facts of Brown was incomplete; and (3) at the least, Brown raised genuine issues of material fact that precluded summary judgment.

1. Hazelwood is Inapplicable in the Post-Secondary Setting[238]

Lacking precedent, Judge Graber concluded that *Hazelwood* was the applicable legal standard in some situations when confronting post-secondary student free speech claims:

> We do not know with certainty that the Supreme Court would hold that *Hazelwood* controls the inquiry into whether a university's requirements for and evaluation of a student's curricular speech infringe that student's First Amendment rights. Nevertheless, of all the Supreme Court's cases, *Hazelwood* appears to be the most analogous to the present case.[239]

By so noting, Judge Graber amplified the weakness of her arguments. In fact, this weakness was also underscored by the arbitrariness of the distinction she drew to distinguish *Brown* from other circuits that addressed the applicability of *Hazelwood* and because her analysis was not supported by policy reasons.

a. Curricular versus Extracurricular: An Arbitrary Distinction

The major premise underlying Judge Graber's argument—the argument that allows her to apply *Hazelwood* to the university setting—was that *Hazelwood* applies in the post-secondary setting to curricular activities, but not to extracurricular activities.[240] By drawing this distinction, Judge Graber attempted to distinguish *Kincaid* and *Student Government Association*, thus

238. This begs the question of what standard should apply in the post-secondary setting if *Hazelwood* does not. Possible legal standards will be proffered and critiqued. *See infra* Part IV.B.

239. *Brown*, 308 F.3d at 951.

240. *See supra* Part III.B.2 (examining in more detail the distinction that Judge Graber draws).

reaching the opposite conclusion of other circuits.[241] However, this distinction, at least in the *Hazelwood* arena of law, is unsupported by the caselaw.

First, the distinction is unsupported by the *Hazelwood* decision itself. As Judge Reinhardt aptly pointed out in his dissent, the *Hazelwood* court, albeit in dicta, suggested that there was no *per se* bar to the applicability of the deferential *Hazelwood* standard to extracurricular activities:

> "School-sponsored publications [and] theatrical productions" . . . that are "supervised by faculty members" . . . are examples of expressive activities that "bear the imprimatur of the school" and are therefore subject to the *same* degree of First Amendment scrutiny as curricular speech, even if they do not "occur in a traditional classroom setting."[242]

The examples listed by the *Hazelwood* Court can be fairly characterized as extracurricular—an implication reinforced by the Court's explanation that such activities do not occur in the traditional classroom setting. In addition, although the particular facts of the case involved an activity that the Court characterized as "part of the educational curriculum and a 'regular classroom activit[y],'"[243] the Court's holding referred only to "school-sponsored" activities, with no further limitation.[244] Even if this is a misreading of the *Hazelwood* decision and this was not the intent of the *Hazelwood* Court, lower courts, in interpreting the *Hazelwood* decision, have held that this is a fair, if not correct, reading of *Hazelwood*. For example, in 2002, the Tenth Circuit, in interpreting the applicability of *Hazelwood* to a tile-painting project at Columbine High School in Colorado, held the following:

> [T]he district court read *Hazelwood* as only applying "to activities conducted as part of the school curriculum." . . . We believe this reading of *Hazelwood* is too narrow. We read the Court's definition of "school-sponsored" speech to mean activities that might reasonably be perceived to bear the imprimatur of the school and that involve pedagogical concerns.[245]

241. For a more in-depth discussion of these decisions, see *supra* text accompanying notes 122-28.

242. *Brown*, 308 F.3d at 963 (Reinhardt, J., dissenting) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

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

244. *Id.* at 273.

245. Fleming v. Jefferson County Sch. Dist., 298 F.3d 918, 924 (10th Cir. 2002). The court concluded that the project was school-sponsored speech, even though "the painting activity took place outside of school hours and was not mandatory," and even despite a school official who had explicitly stated, "'this is a project outside of the school, this is a separate project . . . .'" *Id.* at 930. For a more in-depth discussion of *Fleming*, see *supra* notes 109-111 and accompanying text. Judge Reinhardt, in his dissent, provided an example of school-sponsored speech that takes place outside of school hours and is not mandatory from the Ninth Circuit. *Brown*, 308 F.3d at 963 (Reinhardt, J. dissenting) ("interpreting the Supreme Court's *Hazelwood* decision and holding that 'the Court intended that the *same* principles that animate educational decisions . . . come into play when determining what advertisements are suitable for publication in school

Thus, although the Supreme Court has noted a curricular-extracurricular distinction in non-*Hazelwood* cases,[246] the Supreme Court arguably did not uphold this distinction in *Hazelwood*.

Contrary to Judge Graber's conclusion, more prevalent in the rhetoric of lower court cases applying *Hazelwood* are distinctions based not on the supposed curricular-extracurricular dichotomy, but instead on the differences between primary and secondary students as opposed to college and graduate students. In fact, this is a distinction that courts and individual judges recognized even before *Hazelwood* emerged onto the jurisprudential scene.[247] Courts applying *Hazelwood* in the pre-collegiate setting and courts applying *Hazelwood* in the post-secondary setting have recognized such a distinction.[248] In addition, the pre-collegiate/post-secondary distinction finds support in other First Amendment cases outside of the *Hazelwood* context.[249]

Most importantly, the *Hazelwood* decision explicitly noted that such a distinction might be recognized in student free speech jurisprudence.[250] Although the ultimate viability of such a distinction has not been definitively

newspapers, yearbooks and athletic programs.'") (citing Planned Parenthood of Southern Nev., Inc. v. Clark Cty. Sch. Dist., 941 F.2d 817, (9th Cir. 1991) (omissions in original).

246. *See supra* note 195.

247. *See, e.g.*, J.D. Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986) (Hill, J., dissenting). In that decision, Judge Hill criticized the majority for applying the *Fraser* standard at the college level and noted:

> The purpose of education through high school is to instill basic knowledge, to lay the foundations to enable a student to learn greater knowledge, and to teach basic social, moral, and political values. A college education, on the other hand, deals more with challenging a student's ideas and concepts on a given subject matter. The college atmosphere enables students to rethink their views on various issues in an intellectual atmosphere which forces students to analyze their basic beliefs. Thus, high school is necessarily more structured than college, where a more free-wheeling experience is both contemplated and needed. What might be instructionally unacceptable in high school might be fully acceptable in college.

Id. at 588. The case of *Mailloux v. Kiley*, 323 F. Supp. 1387 (D.C. Mass. 1971), also discusses this distinction at some length:

> The secondary school more clearly that the college or university acts in loco parentis with respect to minors. It is closely governed by a school board selected by a local community . . . . While secondary schools are not rigid disciplinary institutions, neither are they open forums in which mature adults, already habituated to social restraints, exchange ideas on a level of parity.

Id. at 1392.

248. *See supra* Part II.D.

249. *See supra* Part II.E.

250. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 n.7 (1988) ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.").

determined,[251] the Supreme Court, in recent student free speech jurisprudence, seems inclined to uphold the distinction.[252] In fact, even before *Hazelwood* came onto the jurisprudential scene, the Supreme Court endorsed such a distinction in decisions such as *Healy* and *Papish*.[253]These Supreme Court and lower court precedents combine to strongly suggest that, contrary to Judge Graber's conclusion, *Hazelwood* should not apply in the post-secondary setting.

b. Deep-Seated Distinctions: Applying *Hazelwood* is Not Good Policy

Although Judge Reinhardt only briefly discussed the underlying policies that caution against applying *Hazelwood* to undergraduate and graduate student speech,[254] similar policy discussions are noticeably absent from Judge Graber's analysis. Judge Graber could have, and should have, considered the competing policy arguments. If she had, she might have come to the proper conclusion that applying *Hazelwood* would not make for good policy.

First, one need not look further than the underlying differences between pre-collegiate and post-secondary students, both in and outside of the classroom, to see that applying *Hazelwood* to undergraduate and graduate students would be detrimental. For example, there is ample psychological data to support the conclusion that students at the different levels fundamentally differ.[255] Because school officials have to be more concerned with the impressionability of primary and secondary students, a concern that the Supreme Court apparently recognized when formulating the deferential *Hazelwood* standard, it would be both unfair and illogical to apply the same standard to college and graduate students.

Moreover, the dynamics of the educational setting in the pre-collegiate and post-secondary settings differ greatly. The pre-collegiate educational setting

251. Brown v. Li, 308 F.3d 939, 949 (9th Cir. 2002) ("It is thus an open question whether *Hazelwood* articulates the standard for reviewing a university's assessment of a student's academic work.").

252. *See supra* Part II.D.2.a.

253. *See supra* Part II.C. The *Healy* Court set out the following standard: "While a college has a legitimate interest in preventing disruption on the campus . . . a 'heavy burden' rests on the college to demonstrate the appropriateness of that action." Healy v. James, 408 U.S. 169, 184 (1972). In *Papish*, the Court concluded that only reasonable time, manner, and place restrictions could be imposed on post-secondary student speech, reasoning "that the mere dissemination of ideas—no matter how offensive to good taste—on a state university cammpus [sic] may not be shut off in the name alone of 'conventions of decency.'" Papish v. Bd. Of Curators of the Univ. of Mo., 410 U.S. 667, 670 (1973) (per curiam).

254. *See supra* text accompanying notes 211-215.

255. *See supra* note 115.

has been characterized as one of "cultural transmission."[256] According to this theory:

> The school environment provides "inputs" of information that the student/machine stores and then "outputs" as behavior. Because the child's internal thought processes merely reflect physical and social inputs, cultural transmissionists see the educational process as a guided acquisition of knowledge that reinforces desirable responses and eliminates undesirable ones . . . . [T]he purpose of education is . . . to assure the internalization of established norms, with the child's need to learn societal discipline receiving particular emphasis.[257]

In contrast to the cultural transmission theory is "progressivism."[258] Unlike cultural transmission, progressivism "highly values student expression and independent thought," and the primary goal of progressive education is to develop the student's thought processes.[259] Until the Supreme Court's decision in *Hazelwood*, cultural transmission was rejected and progressivism was advocated in higher education.[260] In contrast, before *Hazelwood*, the pre-collegiate educational setting was characterized by cultural transmission or indoctrination.[261] With the advent of the deferential *Hazelwood* standard, cultural transmission was arguably even more deeply imbedded in free speech jurisprudence.[262] Extending the application of *Hazelwood* to the free speech rights of undergraduate and graduate students conflicts with the progressivist environment that was so entrenched in the post-secondary educational setting.

Second, aside from the more theoretical considerations, there are practical considerations to address. The introduction of the deferential *Hazelwood* standard to student free speech jurisprudence has had a noticeably detrimental effect at the high school level. For example, within three weeks of the *Hazelwood* decision, the Student Press Law Center ("SPLC") – a non-profit organization that seeks to protect student media rights – "answered more than

256. William B. Senhauser, Note, *Education and the Court: The Supreme Court's Ideology*, 40 VAND. L. REV. 939, 943 (1987).

257. *Id*. at 943-44 (citing Lawrence Kohlberg & Rochelle Mayer, *Development as the Aim of Education*, 42 HARV. EDUC. REV. 449, 456 (1972)).

258. *Id*. at 947.

259. *Id*. at 948.

260. *Id*. at 952-53.

261. Senhauser, *supra* note 256, at 952, 962-977. Senhauser does note that for a while, it seemed as though the Supreme Court was going to, and did indeed, embrace progressivism at the primary and secondary level with its *Tinker* decision. *Id*. at 954-59. However, the cultural transmission ideology was "revitalized" by the Supreme Court's decision in *Fraser*. *Id.* at 971.

262. Senhauser's article does not address the effect of the *Hazelwood* decision, for it was published before *Hazelwood* was decided. However, because *Hazelwood* arguably established an even more deferential standard than *Fraser*, it would not at all be a stretch to say that *Hazelwood* not only embraced, but also extended the cultural transmission ideology. For a discussion of *Tinker*, *Fraser*, and *Hazelwood*, see *supra* Part II.A.

500 calls from students, teachers, and professional journalists about the implications of the opinion."[263] Even ten years after *Hazelwood*, the SPLC was receiving calls on average of "one per day, every day."[264] The Director of the SPLC, attributing this to *Hazelwood*, stated, "*Hazelwood* has essentially gutted the First Amendment in many of America1s [sic] high schools . . . ."[265] Moreover, the *Hazelwood* analysis has been extended "beyond the realm of student expression rights" into other areas implicating pre-collegiate students' concerns.[266] Most strikingly, cases that actually rule censorship improper under the deferential *Hazelwood* standard are "rare."[267] Based on such ramifications from the application of *Hazelwood* at the pre-collegiate level, the ramifications for college and graduate students would be just as devastating, if not more. According to its terms, the *Hazelwood* standard tips the balance in favor of school officials, giving them much authority and discretion to censor student speech. In a setting where students are more mature, have more legal rights, and where the emphasis is on independent thinking instead of indoctrination, such censorship could ultimately lead to the demise of the "marketplace of ideas."[268]

263. Rosemary C. Salamone, *Free Speech and School Governance in the Wake of* Hazelwood, 26 GA. L. REV. 253, 271 (1992). The SPLC continued to track an increase in censorship after the *Hazelwood* decision, reporting that "school officials show[ed] little hesitation to censor student publications for a variety of arguably 'pedagogical' reasons." *Id.* at 307. In addition, "[a]lmost without exception, courts uph[o]ld school officials' decisions to censor." Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the "College* Hazelwood*" Case*, 68 TENN. L. REV. 481, 497 (2001). Moreover, Peltz lists examples of "cases of censorship that never reach[ed] the courtroom." *Id*. at 497-98.

264. Peltz, *supra* note 263, at 498.

265. Student Press Law Center, *High School Censorship Calls Soar in '97*, 14 REPORT 3 (Fall 1998) (quoting SPLC Executive Director Mark Goodman) (quotation marks omitted), *available at* http://www.splc.org/report_detail.asp?id=272&edition=10 (last visited February 28, 2003). For example, "[t]he *Hazelwood* doctrine in the high schools [has given] principals nearly unbridled discretion to say what is and what is not appropriate content for student media." Peltz, *supra* note 263, at 533.

266. Peltz, *supra* note 263, at 499.

267. *See, e.g., id.* at 505-06 (describing one case as "ground-breaking for its pro-student conclusion under a purely *Hazelwood* analysis."). Importantly, *Hazelwood* emphasized 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." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988). One commentator points out that "[i]n most of the cases citing this facet of *Hazelwood*, the [C]ourt held in favor of the administration, using [this] exact quote." Mel Krutz, Hazelwood: *Results and Realities*, *in* PRESERVING INTELLECTUAL FREEDOM: FIGHTING CENSORSHIP IN OUR SCHOOLS 223 (Jean E. Brown ed., 1994).

268. Keyishan v. Bd. of Regents, 385 U.S. 589, 603 (1967). Peltz forecasted the "chilling effect" that *Hazelwood* would have in the context of the college media:

> A chilling effect at the college level would of course be disastrous for cutting off vital forums for information and debate on college campus. But the consequences could be

2. Even if *Hazelwood* Applies, Judge Graber's Application was Erroneous

Even assuming, despite the past precedent and policy reasons discussed above, that *Hazelwood* was the correct legal standard for the Ninth Circuit to apply in *Brown v. Li*, Judge Graber's application did not comport with the standards and guidelines set forth in *Hazelwood*. An analysis of the facts from *Brown* under the framework set forth in *Hazelwood* reveals that the defendant's motion for summary judgment should have been denied.

a. Brown's "Disacknowledgments" Did Not Bear the "Imprimatur" of the School

The *Hazelwood* Court specifically defined the *Hazelwood* category of speech as "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[269] The Court noted that school officials are entitled to a great amount of control over such speech in order "to assure that the views of the individual speaker are not erroneously attributed to the school."[270] Just how much control can school officials exercise? According to *Hazelwood*, school officials can set "standards that may be higher than those demanded by some . . . publishers . . . in the '*real*' world . . . ."[271] Contrary to the high school students in *Hazelwood*, Brown *was* operating in the "real" world, far removed from eight-hour school days, bells ringing, and recess. He had completed high school. He had completed his undergraduate studies. He was a graduate master's student, on the road to publishing his thesis, "The Morphology of Calcium Carbonate," a thesis designed to add to the body of knowledge in the professional scientific community.[272] For these and other reasons that will be discussed, it is quite doubtful that a reasonable third party would come to the conclusion that Brown's "Disacknowledgements" section would be attributed to the members of his thesis committee.[273]

> even more tragic outside the ivy-covered walls. Imagine a generation of college-trained journalists with no practical experience handling controversial subject matter, nor with any more than an academic understanding of the role of the Fourth Estate in American society . . . . [T]he quality of professional journalism would suffer immeasurably.

Peltz, *supra* note 263, at 534-35.

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

270. *Id.* at 271.

271. *Id.* at 272 (emphasis added).

272. Brown v. Li, 308 F.3d 939, 943 (9th Cir. 2002).

273. Some might argue that even if this is true, the library still has the ultimate discretion to determine whether to display such student works on its shelves or in its file cabinets. Although there is no case on point, in *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, the Court confronted the issue of whether school officials could remove materials from the library "because particular passages . . . offended their social, political and moral tastes . . . ." 457 U.S. 853, 858-

Judge Graber assumed, but did not analyze whether or why, the "Disacknowledgments" section would be attributed to the school. She bypassed any analysis of this issue by viewing the content of Brown's research as one with the "Disacknowledgments" section.[274] Instead, she should have disassociated the optional "Disacknowledgments" section from the content of Brown's work, as a reasonable person reading Brown's thesis likely would have done. In the context of the *Brown* case, the reasonable person for purposes of analysis is a reasonable (and probably educated) adult reader, as is suggested by the complexity of his thesis title and the purpose for which the thesis was being published, namely, to add to existing scientific research. An argument that such an adult would conclude that the University adopted and approved of Brown's "Disacknowledgments" is unsupported. Books, law review articles, and theses are some examples of works that contain "Acknowledgments" sections. As is most readily illustrated with bound works, this section normally appears on a page or pages at the beginning of the work, often even before the pages containing the table of contents. These sections normally appear separate from the substance of the work and are noticeably personal, sometimes naming people of whom and events of which the reader has no knowledge. Based on both their content and physical disassociation from the content of the work, the likelihood that such a section would "bear the imprimatur of the school" is virtually nonexistent.

Moreover, Judge Graber ignored the fact that the school had allowed another student ("Student A") to include what was, based on its language,

59 (1982). The Court, after analyzing its precedents, stated: "[School officials] possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner. . . . Our Constitution does not permit the official suppression of *ideas*." *Id*. at 870-71. The Court also stated: "[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in [our] pluralistic, often contentious society . . . ." *Id*. at 868. However, the Court expressly limited its holding: "[N]othing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools." *Id*. at 871. Thus, some may read this opinion as allowing school officials much discretion in choosing what books to exclude from its shelves. However, the Court also made another distinction:

> [This case] does not involve textbooks . . . . Respondents do not seek in this Court to impose limitations upon their school Board's discretion to prescribe the curricula of the . . . schools. On the contrary, the only books at issue in this case are *library* books, books that by their nature are optional rather than required reading.

Id. at 861-62.

Brown's thesis is more analogous to optional reading than a textbook, for no one would be compelled to read his thesis. Thus, to the extent that *Pico* can be read as allowing possible unfettered discretion to school officials in determining what to add to their library shelves, it is inapplicable to Brown's situation.

274. *Brown*, 308 F.3d at 952.

more of a "Disacknowledgments" than an "Acknowledgments" section.[275] Although Student A did not name any particular school officials, the student's "Acknowledgment" section could arguably be characterized by some as more offensively descriptive than Brown's. In addition to using profanity, Student A "acknowledged" some members of the school's staff by writing "may your bloated, limb-less bodies wash to shore and be picked clean by seabirds and maggots."[276] Brown's "Disacknowledgments" section, in contrast, used no profanity,[277] and the arguably harshest word Brown used to refer to school officials was "degenerates."[278] Student A's "Acknowledgments" section, however, was approved. How the school could argue that Brown's views, but not Student A's, could be attributed to the school remains a mystery. Judge Graber did not even attempt to account for this inconsistency. Thus, because it was unlikely that Brown's "Disacknolwedgments" section would be perceived by outsiders to bear the imprimatur of the school, the deferential *Hazelwood* standard should not have applied.

b. The Optional "Acknowledgments" Section Was a Limited Public Forum

Once more, Judge Graber's analysis suffered from a lack of explanation. Without any explanation, she concluded: "An academic thesis co-signed by a committee of professors is not a public forum, limited or otherwise."[279] Judge Graber's conclusion is erroneous, however, for she misidentified the proper forum for analysis.

The Supreme Court has not confined the definition of a forum to physical locations; instead, a forum can be "metaphysical" and/or an "intangible channel[] of communication."[280] Thus, for instance, courts have declared that incorporating a public comment period into a school board agenda and including an advertising section within a magazine created limited public forums.[281]

275. *See id.* at 967 (Reinhardt, J., dissenting).

276. *Id.* at 967.

277. Note, however, that his amended "Disacknowledgments" section did not contain profanity. *Id.* at 943.

278. *Id*.

279. *Brown*, 308 F.3d at 954.

280. Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995); Student Gov't Ass'n v. Bd. of Trs. of the Univ. of Mass., 868 F.2d 473, 476 (1st Cir. 1989).

281. Rutgers 1000 Alumni Council v. Rutgers, 803 A.2d 679, 687 (N.J. Super. Ct. App. Div. 2002) (advertising section); Bach v. Sch. Bd. of the City of Va. Beach, 139 F. Supp. 2d 738, 741 (E.D. Va. 2001) (public comment period). In *Bach*, the challenged governmental action took the form of school board bylaws that "prohibit[ed] personal attacks." *Id.* at 739. The plaintiffs contended that while those who criticized school officials would be silenced, another "speaker would be able to proffer laudatory praises of the school officials without fear of being

As argued above, the "Acknowledgments" or "Disacknowledgments" section can be disassociated from the actual substantive and academic portion of the thesis.[282] Because Brown's expressive activity was regulated only in the "Disacknowledgments" section,[283] that section is the proper basis for the forum analysis.

Although not a traditional public forum, the "Acknowledgments" section should have been characterized as a limited public forum, not a nonpublic forum, as Judge Graber concluded.[284] To reach this determination, one must first analyze the policies and practices of the school and take into account any clear indication that the school officials did not intend to create a limited public forum.[285] School officials at the University of California at Santa Barbara did not produce "clear evidence" of a contrary intent. Instead, an examination of their policies and practices indicates quite the opposite.

First, the university officials, through the school's thesis Guide, manifested an intent to create a limited public forum. The language of the policy is permissive, indicating that the inclusion of an "Acknowledgements" in a student thesis was optional.[286] Although the policy provided for a restriction on *format*, the language of the policy did not place any explicit restrictions on the *content* of the section. Of course, one may argue that by titling that portion of the Guide "Dedication and/or Acknowledgments," the school evidenced such an intent. However, this by no means establishes the "clear" intent that is seemingly necessary under the mandates of *Cornelius*.[287] Thus, in the words of *Hazelwood*, school officials opened the "Acknowledgment" forum "'for indiscriminate use' . . . by some segment of the public," namely, all thesis students.[288]

Even more compelling were the university officials' own actions. If their intent was to limit the content of the "Acknowledgments" section to the sorts of examples cited in Turabian's Style Manual, or some variation thereof, the school failed miserably and obviously did not enforce it with any consistency. As has already been noted, the record was peppered with examples of approved student "Acknowledgments" sections that arguably do not fall within

silenced . . . ." *Id.* at 742. Ultimately, the court agreed and concluded that such "[a] policy that chills protected speech cannot stand." *Id.* at 744.

282. *See supra* Part IV.A.2.a.

283. *Brown*, 308 F.3d at 943 (noting that the actual substantive portion of Brown's thesis was originally approved by the thesis committee).

284. For a discussion of the differences between these types of forum, see *supra* Part II.B.

285. *See supra* text accompanying notes 79-80.

286. *See supra* notes 157-159 and accompanying text.

287. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985). This is especially true when considered in light of the university's actual practice.

288. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47, 46 n.3 (1983)).

the ambit of their own proffered definition—most notably, the student who, in so many words, "Acknowledged" the ineptitude of school employees.[289] The school officials' actions were characterized not by consistency, but by selective enforcement.

Selective enforcement, however, is exactly what the First Amendment seeks to avoid. Judge Graber would uphold selective enforcement.[290] She would allow for a lack of uniformity of the enforcement of student free speech rights based on the level of laxness of a particular overseeing thesis committee. However, once a limited public forum is established, school officials can exclude students from the forum based on content, but cannot exclude students based on their individual viewpoints.[291] A simple example illustrates this point:

> When the government builds a theater, for example, it creates a limited public forum open to theatrical productions. Other forms of expression, such as petitioning, would not be welcome in a theater, and they could therefore be excluded on a reasonable basis. The government cannot exclude a particular theatrical production from the theater, however, without a compelling justification.[292]

Contrary to Judge Graber's conclusion, Brown was excluded because of his unpopular viewpoints. The school officials cannot argue that their actions were content-based and not viewpoint-based. If the school officials' actions or intentions were content-related, they would have also excluded Student A's "Acknowledgments" section, and disciplined him as well.[293] The Supreme Court has made it very clear: "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[294]

289. *See supra* note 159.

290. Brown v. Li, 308 F.3d 939, 953 (9th Cir. 2002) (noting that "this thesis committee was entitled to set an academic standard for Plaintiff's thesis, including it acknowledgments section, even if no thesis committee in the past ever had set one.").

291. *See supra* text accompanying note 78.

292. Rudy, *supra* note 67, at 1261 (footnotes omitted).

293. A similar argument and analysis was advanced in Bach v. Sch. Bd. of the City of Va. Beach, 139 F. Supp. 2d 738 (E.D. Va. 2001). In *Bach*, plaintiffs claimed that the school's regulations "prohibiting 'personal attacks' during the public comment period of School Board meetings" constituted an unconstitutional infringement on their First Amendment right to free speech. *Id*. at 739. However, although factually distinguishable from *Brown*, the court's analysis and reasoning is instructive. Per the contested provision in *Bach*, a speaker could not criticize the school administration. *Id*. at 742. However, similar to the effect of the provision in *Brown*, "[a]t the same time, a speaker would be able to proffer laudatory praises of the school officials without fear of being silenced, because the contested provision places no corresponding ban on statements that promote or inflate the honesty, integrity, or character of a named official." *Id*.

294. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

The policies and practices of the school officials manifested an intent to create a limited public forum. Once that public forum was created, the school officials were bound to its terms. By punishing Brown because of his "Disacknowledgments" section, the officials overstepped those bounds, and in doing so, violated the letter and the spirit of the First Amendment.

c. Even if the "Acknowledgments" Section was a Non-public Forum, the University's Actions Constituted Impermissible Viewpoint Discrimination

Assuming, *arguendo*, that Judge Graber was correct in concluding that the thesis as a whole constituted a nonpublic forum, the university's actions still amounted to an infringement of Brown's First Amendment free speech rights.

According to traditional public forum analysis, viewpoint discrimination is impermissible even in the context of a nonpublic forum.[295] However, a circuit split has developed over whether the notion of viewpoint neutrality is required when analyzing nonpublic forums under the rubric of *Hazelwood*.[296] The First and the Third Circuits are among those circuits that have concluded viewpoint discrimination is allowed in *Hazelwood*-type cases; the Sixth and Eleventh Circuits are among those who mandate viewpoint neutrality.[297] The Ninth

295. Janna J. Annest, Note and Comment, *Only the News That's Fit to Print: The Effect of* Hazelwood *on the First Amendment Viewpoint-Neutrality Requirement in Public School-Sponsored Forums*, 77 WASH. L. REV. 1227, 1227 (2002).

296. Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1011 n.2 (9th Cir. 2000). For an analysis of the interplay of *Hazelwood* and the viewpoint neutrality requirement, *see* Annest, *supra* note 295.

297. *Downs*, 228 F.3d. at 1011 n.2. The Court of Appeals for the First Circuit explained:

> [The *Perry* Court held that the school] may regulate speech on that property only if the regulation is reasonable and not an effort to suppress expression due to the view expressed . . . . [W]hile citing *Perry Educ. Ass'n*, the Court in *Kuhlmeier* did not require that school regulation of school-sponsored speech be viewpoint neutral.

Ward v. Hickey, 996 F.2d 448, 454 (1st Cir. 1993) (citations omitted). The Court of Appeals for the Third Circuit agreed, stating:

> *Hazelwood* clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical concerns . . . . Under *Hazelwood*, "[e]ducators are entitled to exercise greater control over . . . student expression" when it is elicited as part of a teacher-supervised, school-sponsored activity. In that specific environment, viewpoint neutrality is neither necessary nor appropriate, as the school is there [sic] responsible for "determin[ing] the content of the education it provides."

C.H. v. Oliva, 195 F.3d 167, 172-73 (3rd Cir. 1999) (alterations in original) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) and *Rosenberger*, 515 U.S. at 833, *vacated en banc*, 226 F.3d 198 (3rd Cir. 2000)). *See also* Annest, *supra* note 290, at 1246 n.194 ("The Third Circuit affirmed the judgment of the district court regarding the events . . . which had given rise to the panel's discussion of *Hazelwood*. The panel analysis of *Hazelwood* thus remains as persuasive authority on the circuit's position.") (citations omitted). On the other hand, the Sixth

Circuit has authority that might be read to support both positions. For example, in *Chandler v. McMinnville*, the Court of Appeals for the Ninth Circuit did not even mention viewpoint neutrality in explaining that *Hazelwood* held that "federal courts are to defer to a school's decision to suppress or punish vulgar, lewd, or plainly offensive speech, and to 'disassociate itself' from speech that a reasonable person would view as bearing the imprimatur of the school . . . ."[298] In *Planned Parenthood v. Clark County School District*, however, the court of appeals "incorporated 'viewpoint neutrality' analysis into nonpublic forum, school-sponsored speech cases."[299] However, although it dealt with school-sponsorship, this was not a *Hazelwood* case, and thus, is not necessarily controlling.[300]

In *Brown*, Judge Graber took the position that viewpoint neutrality was not required. However, the circuit split should be resolved in favor of requiring viewpoint neutrality. First, allowing viewpoint discrimination makes the already deferential *Hazelwood* standard even more deferential. Student rights would be left to the whims of school officials. Moreover, viewpoint neutrality has been incorporated into the forum analysis for quite some time, and a departure from this would not comport with the concept of *stare decisis*. In fact, the absence of any discussion of viewpoint neutrality and discrimination in *Hazelwood* has even been called a "curious omission."[301] It is quite possible, however, that the Court did not discuss the issue because it felt that it was settled and did not warrant any further discussion. Maybe the omission was not so curious after all. As the Eleventh Circuit best articulated the reason: "[T]here is no indication that the [*Hazelwood*] Court intended to

and Eleventh Circuits disagree. *See, e.g.*, Kincaid v. Gibson, 191 F.3d 719, 727 (6th Cir. 1999) (vacated *en banc*, 236 F.3d 342 (6th Cir. 2001) ("The Court in *Hazelwood* noted . . . that if the school did not intentionally create a public forum, then the publication remains a nonpublic forum, and school officials may impose any reasonable, non-viewpoint-based restriction on student speech exhibited therein.")); Searcey v. Harris, 888 F.2d 1314, 1325 (11th Cir. 1989) ("Although *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*, we do not believe it offers any justification for allowing educators to discriminate based on viewpoint. The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis . . . . Without more explicit direction, we will continue to require school officials to make decisions relating to speech which are viewpoint neutral.") (citations omitted).

298. Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992). However, this language was dicta. *See Downs*, 228 F.3d at 1011.

299. *Id.* at 1010-11 (discussing Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817, 828 n.19, 829-30 (9th Cir. 1991)).

300. *Planned Parenthood* involved school educators' refusals to accept advertisements for Planned Parenthood in student yearbooks, newspapers, and athletic programs. *Id.* at 1010. Although noting the split, the court did not reach the issue in *Downs*, for the court concluded neither *Hazelwood* nor *Planned Parenthood* was applicable "because it is a case of the government itself speaking." *Id.* at 1011.

301. Peltz, *supra* note 263, at 506.

drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views."[302]

Assuming that this was the correct standard, the University's actions in *Brown* would violate the First Amendment, for the same reasons stated above.[303]

d. University's Actions Needed to be *Reasonably* Related to *Legitimate* Pedagogical Goals

Even assuming Judge Graber correctly decided that the "Acknowledgments" section did not constitute a limited public forum and that *Hazelwood* does not require viewpoint neutrality, the University's actions in regulating Brown's speech should have failed under the terms of the *Hazelwood* standard. The *Hazelwood* decision itself suggests that to be illegitimate, the University's actions would have to serve "no valid educational purpose."[304] Although this guidance from *Hazelwood* suggests that school officials' decisions about what is legitimate or not will rarely be disturbed, the facts of *Brown* suggest that this might be one of those rare cases.

Judge Graber concluded that the University's legitimate pedagogical objective was "teaching [Brown] the proper format for a scientific paper."[305] However, the *content* of Brown's "Disacknowledgments" section arguably has nothing to do with the proper *format* of a *scientific* paper. Moreover, the fact that an "Acknowledgments" section is disassociated from the content of the thesis student's scientific research and scientific conclusions only further bolsters this argument.[306] It seems illogical to argue, as Judge Graber does, that if masters' students have not learned the "skill" of writing an optional acknowledgments section, "they are not qualified to receive advanced degrees in chemistry."[307] Moreover, one could argue that no legitimate pedagogical reason exists because the educational purpose sought to be furthered by a master's thesis is independent thought and analysis, not conformity.[308]

302. *Searcey*, 888 F.2d at 1319 n.7.

303. *See supra* text accompanying notes 290-94.

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

305. Brown v. Li, 308 F.3d 939, 952 (9th Cir. 2002).

306. *See supra* Part IV.A.2.a.

307. *Brown*, 308 F.3d at 959-60 n.3 (Reinhardt, J., and dissenting).

308. Peltz made a similar argument in the context of the applicability of *Hazelwood* to college media/publications:

> A "no legitimate pedagogical concerns" argument might succeed at the college level for the very reason that *Hazelwood* was an unwise decision to begin with: practical experience with editorial freedom and responsibility is an essential component of an education in journalism. Of course, the same argument pertains at the high-school level and failed to stop *Hazelwood*. But the argument might be stronger at the college level. Employers in journalism specifically look for experienced candidates, and the collegiate journalism academy emphasizes the importance of on-the-job training.

Even assuming Judge Graber was correct in deciding that the University articulated a legitimate pedagogical goal, in order for the University's actions to be upheld, the actions had to be *reasonably* related to legitimate pedagogical goals.[309] Judge Graber concluded that Brown's "thesis was subject to a reviewing committee's *reasonable* regulation" and that Brown "was given *reasonable* standards for that assignment."[310] However, Judge Graber did not explain how she came to this conclusion. As the dissent points out, the University's extreme actions could hardly be "reasonably related" to any legitimate pedagogical goal. Not only did the University officials decide not to confer Brown's degree, but they also put him on academic probation, which prevented him from researching, teaching, or getting financial aid.[311] What goal the University attempted to accomplish by imposing such an unreasonable sanction is unclear. The reasonable relation between the University's actions and the goal of teaching Brown how to write a scientific paper in the proper format is tenuous, if not nonexistent.

Thus, in performing the *Hazelwood* analysis, Judge Graber, at the least, should have recognized that there were questions of fact pertaining to the reason for the University's harsh sanctions. At the least, this suggests that summary judgment should not have been granted.

B. Proposed Standards

Judge Reinhardt's dissent best accommodated the need to vigorously safeguard free speech rights in the university setting. First, he correctly pointed out that Judge Graber's extracurricular-curricular distinction was not supported by *Hazelwood*-type caselaw. Moreover, he did what Judge Graber failed to do—he gave recognition to the potentially pretextual bases for the school officials' actions. Most importantly, he attempted to delineate proposed standards that would accommodate the competing interests, instead of just trying to cram *Brown* into a framework in which, because of the deep-seeded distinctions between the pre-collegiate and collegiate level, it plainly did not fit. In short, instead of just ignoring the problems created by the application of *Hazelwood* at the post-secondary level, Judge Reinhardt tried to create solutions.

Assuming *Hazelwood* is the erroneous legal standard to apply in post-secondary free speech cases leaves the following question unanswered: What

Peltz, *supra* note 263, at 549. Of course, one can argue that Judge Graber did not need to provide much explanation for why the University's actions were reasonably related to legitimate pedagogical goals because the *Hazelwood* standard, by its terms, provides much deference to school officials. However, this argument only underscores the policy reasons case law warranting the inapplicability of *Hazelwood* in the post-secondary setting. *See supra* Part IV.A.1.b.

309. *Hazelwood*, 484 U.S. at 273.

310. *Brown*, 308 F.3d at 952 (emphasis added).

311. *Id.* at 965 (Reinhardt, J., dissenting).

should take its place? Following are some proposed standards, including those proffered by Judge Graber, accompanied by critiques.[312]

1. Modified *Hazelwood*

It may be that the Supreme Court, if it ever decides to close the gap in post-secondary free speech jurisprudence created by *Hazelwood*'s seventh footnote, would be hesitant in straying from the *Hazelwood* framework. The Court might still want to perpetuate the *Tinker-Fraser-Hazelwood* distinction in the post-secondary setting, but with some sensitivity to the pre-collegiate and post-secondary distinctions.[313] As it now stands, *Hazelwood* weighs heavily in favor of high school officials. One proposed solution would be to implement some sort of modified *Hazelwood* standard when analyzing post-secondary free speech claims. The Eleventh Circuit attempted to do just that in *Bishop v. Aronov*, giving teacher autonomy more weight than probably would have been considered in a high school *Hazelwood* case.[314] Analogously, when

312. The following proposed standards advocate judicial activism more than judicial restraint. Some commentators suggest that judicial restraint is the proper solution. *See, e.g.*, Michael Rebell, Tinker, Hazelwood *and the Remedial Role of the Courts in Education Litigation*, 69 ST. JOHN'S L. REV. 539 (1995).

> The reconciliation of the values of autonomy and authority has to come at the community level . . . . [A] judge ought to establish a remedial process that brings a broad representative group of people from the affected community together, and set up a special master, a facilitator or some representative of the court, as a liaison between the community and the court to ensure that there is a proper dialogue.

Id. at 549. Although this solution may be proper at the pre-collegiate level, it would not be a workable solution at the post-secondary level. Community involvement at colleges and universities is likely not as prevalent as it is at the primary and secondary levels. Moreover, there is a greater judicial interest in oversight at the post-secondary level because school officials are not acting in loco parentis with respect to undergraduate and graduate students.

313. *Tinker*, of course, would apply in situations where the expressive activity is deemed to be "political," *Fraser*, where the activity is deemed to be "sexual or offensive," and *Hazelwood*, where the activity is deemed to bear the imprimatur of the school. *See supra* Part II.A.

314. The Eleventh Circuit attempted to do just this in *Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir. 1991) ("[I]nsofar as [the *Hazelwood* standard] covers the extent to which an institution may limit in-school expressions which suggest the school's approval, we adopt the Court's reasoning as suitable to our ends, even at the university level."). Although *Bishop* involved academic freedom, it is still instructive. In applying a purportedly modified *Hazelwood* standard, the *Bishop* court said it would take into account the "context" (the dynamics of the university classroom, including "the coercive effect upon students [by] a professor's speech"), "the University's position as a public employer which may reasonably restrict the speech rights of employees more readily than the those [sic] of other persons," and "the strong predilection for academic freedom as an adjunct of the free speech rights of the First Amendment." *Id*. at 1074-75. However, even though this standard was "modified," it still led to much deference toward school officials' decisions in its application. *Id*. at 1075 (noting "in any event, we cannot supplant our discretion for that of the University"). Thus, although the court seemingly tried to be progressive, it ended up being too traditional. The court itself even noted that it could have

considering the totality of the circumstances in applying the *Hazelwood* test at the post-secondary level, the Court could decide instead to tip the balance more in favor of the student. For example, the unique environment of the post-secondary educational setting, including the fact that undergraduate and graduate students are more mature, and the amorphous notion of the "marketplace of ideas," should weigh more heavily in the *Hazelwood* analysis. The California Court of Appeals, in *DiBona v. Matthews*, similarly interpreted *Hazelwood* to apply in a modified fashion in the post-secondary setting.[315] Ultimately, the court concluded, without much further explanation or guidance, that "school sponsorship is a factor which under some circumstances can be considered at the college level," and that "[a]lthough the 'legitimate pedagogical concerns' at the college and university level may be more limited than in elementary and secondary schools, they are not nonexistent."[316]

However, because the school officials would still retain a considerable amount of discretion and deference, a modified standard would likely not give full recognition to the policy reasons against extending *Hazelwood* to the post-secondary setting.[317]

2. Totally *Tinker*

A second proposed solution to fill the *Hazelwood* hole would be to apply the *Tinker* standard to all student free speech claims at the post-secondary level. Accordingly, school officials would only be able to prohibit expressive activity if they could proffer "evidence that it is necessary to avoid *material and substantial interference* with the schoolwork or discipline . . . ."[318] This standard is more protective of students' free speech rights than *Hazelwood*, and seems to recognize and compensate for the underlying differences between

provided more deference to teachers but did not. *Id.* at 1072 n.5 (citing Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693 (1990)) ("The [Clarick] article suggests a balancing approach somewhat like the one we will endeavor to apply. The article, however, weighs teacher autonomy more heavily than we have concluded is proper under *Kuhlmeier*."). For a discussion of the facts of *Bishop*, *see supra* note 139.

315. DiBona v. Matthews, 220 Cal. App. 3d 1329 (Ct. App. 1990). The *DiBona* court gave more weight to the student's First Amendment rights than the *Bishop* court gave to the teacher's First Amendment rights when comparing them to a school official's rights. Citing *Healy* and *Papish* as authoritative law, the *DiBona* court expressed doubt whether a showing of "school sponsorship" would warrant the rationale of *Hazelwood*'s "wholesale extension to educational settings involving adults." *Id.* at 1346-47.

316. *Id.* at 1347.

317. For a discussion of these policy arguments, see *supra* Part IV.A.1.b.

318. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) (emphasis added). According to this test, "school officials cannot suppress 'expressions of feelings with which they do not wish to contend.'" *Id.* (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

primary/secondary and undergraduate/graduate students. For example, some argue that *Tinker* embraces the ideology of "progressivism"—an ideology that is characteristic of the higher educational environment.[319] However, such a total application of the *Tinker* standard to all types of free speech claims is not supported by the caselaw, for *Tinker* has been limited to "political messages" that do not bear the imprimatur of the school.[320] Thus, it is highly unlikely that the Court would extend *Tinker* in such a manner.

3. Limited Public Forum

The first proposed alternative Judge Reinhardt suggested is to apply the limited public forum analysis to all regulations of student speech at the post-secondary level.[321] However, the Supreme Court would unlikely be prepared to make a blanket declaration that all speech in the university setting fits into the rubric of the public forum analysis. As no requirement of viewpoint neutrality could "drastically rewrite First Amendment law," so, too, could this.

4. Intermediate Level of Scrutiny

The second alternative that Judge Reinhardt suggested as more protective of post-secondary students' rights was "an intermediate level of scrutiny for regulations of student speech in college and graduate programs."[322] Comparing *Brown* to *United States v. Virginia*, a Supreme Court case applying intermediate scrutiny in the equal protection context, Judge Reinhardt stated that under this standard, "the university would have the burden of demonstrating that its regulation of college and graduate student speech was *substantially* related to an *important* pedagogical purpose."[323] Judge Reinhardt

319. Senhauser, *supra* note 256, at 954-56 (arguing that the *Tinker* court "implicitly" applied progressivism and "discounted both the inculcative interest of the state and the alleged immaturity of students at the secondary educational level . . . .").

320. Fleming v. Jefferson County Sch. Dist., 298 F.3d 918, 923 (10th Cir. 2002).

321. Brown v. Li, 308 F.3d 939, 964 (9th Cir. 2002) (Reinhardt, J., dissenting).

322. *Id*. Intermediate scrutiny is to be contrasted with strict scrutiny, which requires that the law in question both serve a compelling governmental interest and be narrowly tailored to meet that goal. Alternatively, minimum rationality "requires that the law in question have a rational relationship to a legitimate public purpose or government interest." Heather J. Lorenz, Comment, *The Key to Unlocking the Schoolhouse Doors: Intermediate Scrutiny, the Appropriate Standard of Review for Race-Conscious Desegregation Policies*, 40 WASHBURN L.J. 169, 178-79 (2000) (citing Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW §§ 16-2, 16-6, at 1439-40, 1451-52 (2d ed. 1988)).

323. *Brown*, 308 F.3d at 964 (emphasis added) (citing United States v. Virginia, 518 U.S. 515, 533 (1996)). In the equal protection context, the court has applied this standard to "laws involving affirmative action, laws that discriminate on the basis of gender, and occasionally, laws that discriminate against aliens, nonmarital children, and individuals with mental disabilities." Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 316-17 (1998) (footnotes omitted).

implied that this standard would strike a more equal balance than a limited public forum analysis.[324] He stated that although it provided more deference to school officials than the limited public forum, an intermediate level of scrutiny provided more protection for students' free speech rights than *Hazelwood*.[325]

In actuality, the intermediate scrutiny standard applied in the First Amendment context would be slightly different than the standard Judge Reinhardt articulated, depending on the type of regulation at issue.[326] If the Supreme Court was of the opinion that students' First Amendment rights are equally as important as school officials' interests in regulating such speech, it would likely adopt this standard. Although an intermediate level of scrutiny strikes the fairest balance between school official and student rights,[327] it is a standard that is highly likely to yield inconsistent results.[328] In addition, an adoption of this standard by the Court is seemingly inconsistent with its pre-*Hazelwood* pronouncements regarding student free speech rights in the university setting.[329]

5. Back to the Basics: *Healy* and *Papish*

Finally, the Supreme Court could return to two of its precedents that are still cited today, which would allow school officials a limited amount of

324. *Brown*, 308 F.3d at 964.

325. *Id*.

326. Wexler, *supra* note 323, at 318 n.129. In First Amendment jurisprudence, intermediate scrutiny has applied to content-neutral regulations, time, place, and manner regulations, and regulations of commercial speech. *Id*. at 317. If the regulation related to commercial speech, the regulation must "'directly advance[] the governmental interest asserted,'" and be no "'more extensive than is necessary to serve that interest.'" *Id*. at 318 n.129 (quoting Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980)). If the regulation being challenged is content-neutral, the regulation must further the interest *and* be "'no greater than is essential to the furtherance of that interest.'" *Id*. (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)). Finally, if the regulation is one of time, place, or manner, the Court "additionally requires that the speaker have adequate alternative channels for his or her expression." *Id*. (citing Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981)).

327. Wexler, *supra* note 323, at 318 ("The most striking feature of intermediate scrutiny is that, unlike strict scrutiny or rationality review, the tier of scrutiny that the Court decides to apply does not predetermine the outcome of the case; with intermediate scrutiny, sometimes the state wins, and sometimes it loses.").

328. Of course this is true, at least to some extent, with all standards/tests that courts apply. However, the intermediate level of scrutiny seems particularly susceptible to this "problem." *Id*. at 322. Wexler noted,

> Intermediate scrutiny facilitates and encourages narrow decisionmaking by requiring the Court to focus its attention on the facts of particular cases. This practice means that each new case will generally not be predetermined by previous cases and that the decision in any given case will not resolve many issues in future cases.

Id.

329. In these pre-*Hazelwood* cases, the Court suggested that free speech rights should apply with full force in the post-secondary setting. *See infra* Part II.C.

authority to regulate expressive activity while safeguarding the First Amendment rights of post-secondary students. Thus, it would accommodate both competing interests, albeit with the balance most definitely tipped in favor of students instead of school officials.

Both *Healy* and *Papish* recognized that post-secondary students should be afforded the same First Amendment protection as adults. For example, in *Healy*, the Court specifically stressed in its opinion that First Amendment free speech rights should apply with equal force on post-secondary campuses as they apply to members of society at large.[330] To accomplish this, the Court emphasized that there is a heavy burden on school officials to justify their actions when they impose restraints on student free speech at the post-secondary level.[331] Likewise, in *Papish*, the Court emphatically stated that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech . . . ."[332]

Although *Healy* and *Papish* provide some general standards for the lower courts to follow, the Court could instead craft more explanatory and expansive guidelines from the rhetoric of these cases and use them as a starting point for developing a well-entrenched, post-secondary free speech jurisprudence. Ultimately, this would be the ideal solution for the unanswered footnote seven in *Hazelwood*. Whereas the deferential *Hazelwood* standard recognizes the unique primary and secondary school setting, a new standard emanating from *Healy* and *Papish* would be more student-friendly, recognizing the uniqueness of the post-secondary setting.

V. CONCLUSION

"[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[333] In *Brown*, preservation of the status quo prevailed. However, in all cases involving student speech, especially at the post-secondary level, this pronouncement is particularly instructive. In every case, competing interests must be balanced and assessed, and for the courts, this surely is no simple feat. As the statement makes clear, however, the First Amendment exists to protect those who might otherwise remain unprotected, especially when those individuals espouse unpopular beliefs. That protection should no less be afforded to post-secondary students.

330. Healy v. James, 408 U.S. 169, 180 (1972).

331. *Id.* at 184.

332. Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667, 671 (1973).

333. Edward T. Ramey, *Student Expression: The Legacy of* Tinker *in the Wake of Columbine*, 77 DENV. U. L. REV. 699, 701 (2000) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

Of course, the rights of professors cannot be ignored.[334] The amorphous concept of "academic freedom" is, some would argue, an equally entrenched right.[335] How should the professors' rights be balanced into the equation? At present, academic freedom jurisprudence is also in a state of disarray, for the Supreme Court has failed to clearly delineate the parameters of professors' rights.[336] Some courts even apply the deferential *Hazelwood* standard to academic freedom cases,[337] leading at least one commentator to conclude that "[t]he net effect of [this application] is the subtle infantilization of teachers."[338] The same effect results when courts apply the *Hazelwood* standard to determine the scope of undergraduate and graduate students' rights. To avoid these ill-fated consequences, both professors and students must be viewed in light of what they are—adults. Ultimately, there is no easy solution when the rights of professors and students clash. Under any of the proposed standards, one thing remains clear: Students' rights should weigh heavily in determining the outcome of any given case.

The time has come for the Supreme Court to speak so that undergraduate and graduate students may speak without fear of adverse consequences. As one court declared: "'It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions'" and "[t]his includes the ability to question the fitness of the community leaders, including the administrative leaders in a school system."[339] However, for

334. For example, one can imagine a situation where a student sues a professor, alleging a violation of First Amendment free speech rights because of a poor grade that the student received on, for example, a paper advocating the student's views.

335. For a more in-depth discussion of academic freedom jurisprudence, see Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1 (2001).

336. *Id*. at 5-6.

337. *Id*. at 16 n.84 (citing Lacks v. Ferguson Reorganized Sch. Dist. R-2, 147 F.3d 718, 724 (8th Cir. 1998); Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723 (2nd Cir. 1994); Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993); Miles v. Denver Pub. Sch., 944 F.2d 773, 775 (10th Cir. 1991); Webster v. New Lenox Sch. Dist. No. 112, 917 F.2d 1004, 1008 (7th Cir. 1990)).

338. *Id*. at 16.

339. Bach v. Sch. Bd. of Va. Beach, 139 F. Supp. 2d 738, 743 (E.D. Va. 2001) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)). At issue in *Bach* was a school regulation that prohibited, *inter alia*, "attacks or accusations regarding the honesty, character, integrity or other like personal attributes of any identified individual or group" during the public comment period at school board meetings. *Id*. at 740 n.1. In addition, the regulation mandated that individuals "[r]efrain from words or statements which, from their usual construction and common acceptance, are construed as *insults* and tend to violence or breach of the peace." *Id*. (emphasis added). The court noted that the school had created a limited public forum. *Id*. at 741. The court held that the regulation prohibiting personal attacks was unconstitutional, "for a policy that deters individuals from speaking out on an issue of public importance violates the First Amendment." *Id*. at 743 (citing Sec. of St. of Md. v. Joseph Hunson Co., Inc., 467 U.S. 947, 967-68 (1984)). Analogous to the situation in *Bach*, Brown criticized school officials, at least implicitly, for the

almost fifteen years, the Court has left lower courts, school officials, and, most importantly, undergraduate and graduate students wondering about the scope of their rights. This has, as one might expect, led to both inconsistent and unfair results. Whatever standard the Supreme Court chooses to apply, it must recognize that post-secondary students are adults who deserve to be treated like adults, both in and outside of the classroom.

Some may still view *Brown* as an insignificant case—a case of a bitter student, dissatisfied with his educational experience, who vented his frustrations in the wrong place at the wrong time. *Brown*, however, is anything but an insignificant case. If criticisms from those like Brown are not protected, more socially acceptable or politically correct criticisms will also be in danger.[340] Still, many will argue that Brown should have written a letter to the editor instead of including a "Disacknowledgments" section with his thesis. In the view of many, an adoption of Judge Reinhardt's analysis, if taken to its logical extreme, would lead this country down the proverbial "slippery slope." Whenever a student is dissatisfied with a grade, he or she could attempt to hide behind the cloak of the First Amendment and could repeatedly sue professors for unsatisfactory grades, claiming that the professor did not agree with the views expressed therein. To some, allowing the Browns of the world to prevail would merely be a manifestation of freedom run amok. However, "[t]here is . . . a philosophical and practical commitment to [such] 'hazardous freedom . . . that is the basis of our national strength.' If we want that strength to last, this commitment belongs as much in our schools as it does anywhere in our society."[341]

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manner in which they conducted school affairs. As in *Bach*, this is arguably just as much of an issue of public importance.

340. Justice Black made this point in his dissenting opinion in *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (Black, J., dissenting). ("I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.").

341. Ramey, *supra* note 333, at 711 (omission in original) (footnote omitted) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508-09 (1969)).

[*] J.D. Candidate, Saint Louis University School of Law, 2004; B.A., Saint Louis University. Success is one percent inspiration and ninety-nine percent perspiration. This adaptation of Thomas Edison's aphorism serves as a reminder that this paper would not have been a success without the inspiration, perspiration, and dedication of many people. In particular, I would like to thank the *Saint Louis University Law Journal* for allowing me the opportunity to present my viewpoints; Professor Roger L. Goldman for providing me with new perspectives; the editors and staff members who gave their time and effort to see this project to its fruition; one staff member in particular for having the patience to thoroughly critique my paper; and my family and friends, for helping me reach my potential both in and beyond the classroom. To everyone, thank you for challenging me; if you had not, I would not be as apt to challenge myself.