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“THE KEY WORD IS STUDENT”: HAZELWOOD CENSORSHIP CRASHES THE IVY-COVERED GATES

FRANK D. LO MONTE*

I. INTRODUCTION

When the Supreme Court decided Hazelwood School District v. Kuhlmeier1 in 1988, First Amendment advocates took comfort that the damage inflicted by the ruling—in which the Court greatly reduced free-speech rights in public schools—would be confined to primary and secondary education.2 But that confidence now turns out to have been misplaced. With the Sixth Circuit’s 2012 ruling in Ward v. Polite,3 four federal circuits have now explicitly embraced Hazelwood as the standard by which all student speech—even that of adult-aged, postsecondary students—is to be judged.4 Only one circuit, the First, has expressly rejected Hazelwood in the college setting.5 Ward follows an increasingly common pattern in which colleges assert the Hazelwood level of control over their students’ speech: A student voices opposition to school curriculum, often on moral or religious grounds, in ways that the

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3. 667 F.3d 727 (6th Cir. 2012).
4. See Hosty v. Carter, 412 F.3d 731, 735 (7th Cir. 2005) (en banc); Axson-Flynn v. Johnson, 356 F.3d 1277, 1284–85 (10th Cir. 2004); see also Ala. Student Party v. Student Gov’t Ass’n, 867 F.2d 1344, 1347 (11th Cir. 1989). The Ninth Circuit’s position, described infra at notes 130–37, 139–41, is at best confusing.
5. See Student Gov’t Ass’n v. Bd. of Trs. of the Univ. of Mass., 868 F.2d 473, 480 n.6 (1st Cir. 1989).
college's administration believes reflect unfitness for the student's course of study.  

The expansion of Hazelwood into these factual settings exemplifies how the decision has become unmoored from its foundations. The characterization of Hazelwood in cases such as the Tenth Circuit's Fleming v. Jefferson County School District—that it governs anything that "affects the learning process"—would be unrecognizable to the Hazelwood Court. In Hazelwood, the Supreme Court carved out a category of "curricular" speech that, in the majority's view, was entitled to minimal First Amendment protection.  

The Court's justifications can be broadly categorized as (1) the "maturity" rationale (that vulnerable student listeners need protection against harmful speech) and (2) the "disassociation" rationale (that schools should be free to disown speech that associates the school with controversial political views or that sets a poor educational example). Neither of these rationales justifies upsetting the long-accepted judicial disfavor for censorship on college campuses.

The Supreme Court used Hazelwood as the vehicle to import into the schoolhouse the "forum" analysis that applies when a speaker seeks to use government property to deliver a message. But when a college student criticizes the way that a course is taught—especially when the criticism is delivered in a private conversation with the instructor, as in the case of Michigan college student (and Sixth Circuit plaintiff) Julea Ward—none of Hazelwood's purposes apply.

Because college campuses are—legally, and in practical reality—accepted as gathering places for the exchange of individual

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7. 298 F.3d 918 (10th Cir. 2002).

8. Id. at 931.


10. See id. at 270–72.

11. See id. at 270–71 (ruling that schools have greater leeway in controlling speech when the medium for the speech is school-sponsored).

ideas and theories, colleges have little need to “disassociate” themselves from a speaker’s distasteful message.\textsuperscript{13} Reasonable listeners do not ascribe to the college the views of individual students—and certainly not those of students who are criticizing the college’s curriculum. The doctrine of academic freedom, which has little-to-no judicial recognition at the K-12 level, protects the sanctity of the college campus as a place where speech that pushes against accepted convention is not merely tolerated, but encouraged. Since at least some courts believe that \textit{Hazelwood} permits viewpoint discrimination,\textsuperscript{14} the expansion of \textit{Hazelwood} into the college setting means that, in substantial portions of the country, a public university may censor or discipline speech on the basis of the speaker’s viewpoint with no greater showing than a deferentially reviewed facsimile of reasonableness.

The \textit{Hazelwood} level of control is more justifiable in the “captive audience” setting of a K-12 school, where attendance is legally compulsory and offended listeners may not always be able to avert their eyes.\textsuperscript{15} (It should not be forgotten that the boundary drawn in \textit{Hazelwood}—that a school may censor upon showing “legitimate pedagogical concerns”\textsuperscript{16}—derived directly from the “legitimate penological interests” standard set by the Court a year earlier in the

\begin{footnotesize}
\begin{enumerate}
\item See Fleming v. Jefferson Cnty. Sch. Dist., 298 F.3d 918, 926 (10th Cir. 2002) (“[W]e conclude that \textit{Hazelwood} allows educators to make viewpoint-based decisions about school-sponsored speech.”). \textit{But see} Planned Parenthood v. Clark Cnty. Sch. Dist., 941 F.2d 817, 829 (9th Cir. 1991) (finding that “reasonableness” standard under \textit{Hazelwood} implicitly includes viewpoint neutrality); Searcey v. Harris, 888 F.2d 1314, 1325 (11th Cir. 1989) (holding that, even after \textit{Hazelwood}, school administrators are obligated “to make decisions relating to speech which are viewpoint neutral”). \textit{See also} Seidman v. Paradise Valley Unified Sch. Dist. No. 69, 327 F. Supp. 2d 1098, 1108 (D. Ariz. 2004) (detailing circuit split over viewpoint neutrality).
\item \textit{id.} at 273.
\end{enumerate}
\end{footnotesize}
context of censorship by prisons in *Turner v. Safley.* The interests of the school, the speaker, and the listener balance out quite differently when the audience is made up of adults who are free to leave.

If restored to its originally understood boundaries, *Hazelwood* will apply only to a very narrow range of truly "curricular" speech (and indeed, arguably, not even to the *Hazelwood* facts themselves). When a student speaks in the context of an assigned academic exercise, the student’s interest in individual expression is relatively low—indeed, an audience member may reasonably believe that the student is reciting a school-mandated viewpoint, like the debate-team member who must argue the side to which her team is assigned. In that setting, the educational value of the lesson arguably can override the individual’s expressive interest in the message, if the two are irreconcilable.

*Hazelwood* was not intended to, and should never have developed into, a free-floating infirmity that accompanies “student” status. The *Ward* court’s assertion—that when applying *Hazelwood* “[t]he key word is student”—is entirely wrong. The key word in *Hazelwood* is “forum,” and because college campuses are widely

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20. As the Eighth Circuit observed in ruling in the students’ favor, substantial evidence indicated that the *Spectrum* newspaper “was intended to be and operated as a conduit for student viewpoint” rather than primarily as a vehicle for teaching. *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1372 (8th Cir. 1986). For example, a local board of education policy stated that “[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism” and expressly protected students’ right to freely discuss “controversial” issues. Likewise, a policy statement, published in the first newspaper of each school year explicitly disclaimed school responsibility for any of the individual student viewpoints expressed in *Spectrum*, quoted the *Tinker* case by name and asserted that the newspaper “as a student-press publication, accepts all rights implied by the First Amendment of the United States Constitution[.]” *Id.* at 1373.
21. See infra Part III.B.
22. See infra Part III.B.
23. See discussion infra Part II.D.1.
recognized as public forums, the Hazelwood doctrine should have virtually no relevance to the content-based regulation of speech by college students.

Cases such as Ward present a special threat by extending Hazelwood from a case about disowning sponsorship of speech into a case about disciplining speech. Lowering the bar for the punishment of speech—so that a student may be suspended or expelled for essentially any basis a college decides is "reasonable"—is flatly inconsistent with decades of First Amendment and due process jurisprudence. It is, moreover, societally undesirable. The public is increasingly reliant on college journalists as primary providers of news. The chilling effect of empowering colleges to punish speakers virtually at will imposes an intolerable toll on students' ability to blow the whistle on wrongdoing and to engage in candid journalistic and editorial speech.

Existing First Amendment doctrine provides ample basis for colleges to exercise legitimate control over speech at the extremes. But speech that neither disrupts class work nor crosses real-world legal boundaries—such as threats of violence or severe and pervasive harassment—is properly counteracted by counter-speech, not by regulation and punishment.

II. STUDENT SPEECH JURISPRUDENCE AND HAZELWOOD

A. The Pre-Hazelwood Landscape

Every graduate of a high-school civics course is familiar at some level with Tinker v. Des Moines Independent Community School

25. See Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 836 (1995) ("For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.").


27. See infra notes 251-253 and accompanying text.

28. See infra notes 251-253 and accompanying text.

29. See discussion infra Part V.

30. See discussion infra Part VI.
District,\textsuperscript{31} the case most remembered for its resounding declaration that students and teachers do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”\textsuperscript{32} In \textit{Tinker}, the Court found that an Iowa school district violated students’ First Amendment rights by suspending them for refusing to remove armbands worn to express opposition to the war in Vietnam.\textsuperscript{33} While the students’ protest provoked some animated discussion among classmates, the Court held that nothing short of a “material and substantial interference with schoolwork or discipline” could justify punishment.\textsuperscript{34} Significantly, the Court made no distinction as to where on school premises the armbands were worn.\textsuperscript{35}

To be sure, \textit{Tinker} represents a compromise level of protection well short of what an adult citizen could expect if punished under a content-based government regulation. Outside of school, restrictions on the content of speech bear a heavy presumption of unconstitutionality, and, as the Supreme Court recently reaffirmed in \textit{Snyder v. Phelps}\textsuperscript{36} (the “Westboro Baptist Church case”), even speech of minimal value to public discourse that is calculated to outrage the vast majority of its listeners is immune from content-based government sanction.\textsuperscript{37} The \textit{Tinker} Court declined to go so far, recognizing that the constitutional right of free expression must be “applied in light of the special characteristics of the school environment.”\textsuperscript{38}

In the view of most courts, \textit{Tinker} provides, despite later-created doctrinal exceptions, the default standard against which all content-based

\textsuperscript{31} 393 U.S. 503 (1969).

\textsuperscript{32} \textit{Id.} at 506.

\textsuperscript{33} \textit{Id.} at 504, 514.

\textsuperscript{34} \textit{Id.} at 508, 511.

\textsuperscript{35} See \textit{id.} at 508–10.

\textsuperscript{36} 562 U.S. __, 131 S. Ct. 1207 (2011).

\textsuperscript{37} See generally \textit{id.} (involving protesters who picketed outside of the funeral of a United States Marine’s funeral carrying signs reading “Thank God for Dead Soldiers” and “Priests Rape Boys”); \textit{see also} Texas v. Johnson, 491 U.S. 397, 414 (1989) (observing, in invalidating a statute making it a criminal offense to burn a flag as a form of protest, that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

\textsuperscript{38} \textit{Tinker}, 393 U.S. at 506.
restrictions on student speech are to be judged. Tinker has widely, though not unanimously, gained acceptance as the applicable standard at the postsecondary level as well. The Supreme Court’s college speech jurisprudence can be interpreted as putting college students on par with adult citizens in the off-campus world, and some courts maintain that Tinker is insufficiently protective at the college level. But most circuits have adopted Tinker as the starting point for analyzing censorship of college students’ expression. Consequently, to the extent that subsequent student-speech cases such as Hazelwood are read as creating doctrinal exceptions to Tinker, that erosion places the First Amendment rights of college students at risk.

B. The Development of Forum Doctrine

Over an evolving series of cases dating back to the 1930s, the Supreme Court developed the construct of the “forum” to determine the


40. See Daniel A. Applegate, Stop the Presses: The Impact of Hosty v. Carter and Pitt News v. Pappert on the Editorial Freedom of College Newspapers, 56 CASE W. RES. L. REV. 247, 271 (2005) (“College students are more mature than high school students, possess the same rights as other adults, and are entitled to the same protection of these rights as granted to a noncollege student of the same age and maturity. The concern of the Court in Hazelwood regarding the age and maturity of the students is not present at the college level.”).

41. See McCauley v. Univ. of the V.I., 618 F.3d 232, 247 (3d Cir. 2010) (observing that the Supreme Court’s student-speech jurisprudence “cannot be taken as gospel in cases involving public universities,” and concluding, “[p]ublic universities have significantly less leeway in regulating student speech than public elementary or high schools”); see also DeJohn v. Temple Univ., 537 F.3d 301, 314 (3d Cir. 2008) (“[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. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (quoting Healy v. James, 408 U.S. 169, 180 (1972)).
permissible level of regulation when a speaker seeks to use government property as a conduit for expression. The doctrine is rooted in the understanding that, while all government property belongs to the public, not all government property is equally amenable to communicative use. A “forum” may be a physical space, such as the steps of a courthouse, or it may be “metaphysical,” such as a government financing system.42

It is clearly and universally accepted that certain public spaces, chiefly sidewalks and parks, qualify as “traditional public forums” that by their nature and history are fully compatible with wide-open expressive use.43 In those traditional forums, the government’s ability to regulate is at its lowest. The government may impose reasonable and content-neutral curbs on the time, place, and manner of speech (such as a “no electric bullhorns after midnight” rule). But if a regulation is directed at the speaker’s message, then it is presumed unconstitutional and will be struck down if it is not the least restrictive means of fulfilling a compelling government interest.44

Beyond that, very little about the forum doctrine is clear and universally accepted. When government property is held open to speakers for “indiscriminate use,” a “designated” public forum is created, with the same protection against content-based regulation as a traditional public forum.45 Although the term is at times loosely used interchangeably with “designated” public forum, the law also appears to recognize a distinct class of “limited” public forums that are

42. Examples of nonphysical “forums” have included a charitable fundraising drive in a government office, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1986), and the public comment period at a city council meeting, Rowe v. Cocoa, Fla., 358 F.3d 800, 802 (11th Cir. 2004).

43. In the case often regarded as the wellspring of the forum doctrine, Hague v. Committee for Industrial Organization, the Supreme Court recognized that the government’s regulatory authority was at its lowest in streets and parks, places that “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” 307 U.S. 496, 515 (1939).


45. In a designated public forum, as in a traditional public forum, reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. See Widmar v. Vincent, 454 U.S. 263, 269–70 (1981).
“designated” for use only by a subcategory of the public or for a particular type of speech. Property that is neither traditionally open to public discourse nor held open by government designation is referred to as a “nonpublic forum.” In a nonpublic forum, government regulation of speech need be only reasonable and viewpoint neutral.

While forum doctrine evolved over decades, it found its clearest expression in the Court’s 1983 decision in *Perry Education Association v. Perry Local Educators’ Association*. An examination of that case is helpful to understand how the forum doctrine made its way across the schoolhouse threshold, and why that doctrine is ill fitting to the college campus in general and to the Ward fact pattern in particular.

46. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001) (“When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified in reserving its forum for certain groups or for the discussion of certain topics.”) (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)) (internal quotes and brackets omitted). The Supreme Court has been less than optimally disciplined when it comes to the nomenclature of public forums, but if the characterization in *Good News Club* is accurate—that any regulation “must not discriminate against speech on the basis of viewpoint” and must be “reasonable in light of the purpose served by the forum”—then there is no discernibly greater protection in a limited public forum than in a nonpublic forum. *Id.* at 106–07.

47. Commentators have persuasively argued that the nonpublic forum analysis fails to distinguish between spaces that are amenable to expressive use yet are not made available for that purpose (such as the pages of a class-produced curricular newspaper) versus those that simply are unsuited to public expression at all (for instance, a nuclear missile silo). See Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 786 (2009); Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 WILLAMETTE L. REV. 647, 655 (2010). This is not a meaningless distinction, for in the former case it might at times make sense to entertain a constitutional inquiry into the reasons that a vehicle otherwise suited to expressive purposes was structured otherwise—for example, where it can be shown that a university, favoring the incumbent student government regime that is passive and compliant, deliberately engineers the “forum” of the election system so as to discourage competition. See generally Husain v. Springer, 494 F.3d 108 (2d Cir. 2007) (finding an actionable First Amendment claim where a college administration canceled and rescheduled a student government election with the intent to negate the impact of a student newspaper’s endorsement).


In *Perry Education Association*, a teacher's union challenged an Indiana school district's practice of allowing only one union, the officially certified collective-bargaining representative for teachers, to use school mailboxes to distribute messages to teachers.\(^{50}\) The Seventh Circuit held that denying the competing union an opportunity to reach its intended audience violated the First Amendment.\(^{51}\) But the Supreme Court, applying forum doctrine, reversed.\(^{52}\)

The Court found that the mailboxes constituted a nonpublic forum, and access therefore could be regulated in any reasonable and viewpoint-neutral manner.\(^{53}\) The Court recognized that property such as the mailboxes could become a dedicated public forum either by express declaration or by a showing that, in practice, the boxes had been held open "for indiscriminate use by the general public."\(^{54}\) Neither was the case in *Perry Education Association*—the boxes had always been limited to use by those with official school business, with exceptions selectively made for a few outside entities such as the Cub Scouts.\(^{55}\)

The justification for allowing the government to pick-and-choose among approved speakers and even approved topics in a nonpublic forum is important, though it frequently is overlooked when forum doctrine is invoked in furtherance of a school's control of student speech. The Court explained in *Perry Education Association* that the government could ration the expressive use of property such as school mailboxes to "preserve the property under its control for the use to which it is lawfully dedicated."\(^{56}\) The Court went on to explain that the ability to discriminate among users was necessary for the government to restrict usage to "activities compatible with the intended purpose of the property."\(^{57}\)

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50. *Id.* at 41.
53. *Id.* at 48–49.
54. *Id.* at 47. *See also* Brody v. Spang, 957 F.2d 1108, 1117 (3d Cir. 1992) ("The determination of whether the government has designated a public forum is based upon two factors: governmental intent and the extent of use granted.").
55. *Perry Educ. Ass'n*, 460 U.S. at 47.
56. *Id.* at 46 (quoting U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981)).
57. *Id.* at 49.
C. Hazelwood Changes the Landscape

1. What the Hazelwood Court Decided

The Hazelwood case began with a double-page spread of news articles prepared for publication in Spectrum, the student newspaper at St. Louis-area Hazelwood East High School. While seemingly tame by today’s tabloid-television standards, the stories—one about teen pregnancy, and another about the consequences of divorce on children—drew the attention of Principal Robert Reynolds, who flagged the stories as problematic and instructed the newspaper’s printing vendor to replace the articles with blank white space. Three student editors filed suit, arguing that the school district failed to carry its burden under Tinker of demonstrating that the stories would have materially disrupted school functions.

After a bench trial, the federal district court ruled in the school’s favor and found no unlawful censorship. Presaging the Supreme Court’s ultimate resolution, the district court recognized a new First Amendment tier, less protective than Tinker, for speech that is part of an official school activity: “Where the particular program or activity is an

58. Although the following discussion concerns the treatment only of student speech, some courts have regarded Hazelwood as applying equally to the “curricular” speech of teachers in the classroom. See, e.g., Vanderhurst v. Colo. Mountain Coll. Dist., 208 F.3d 908, 913–14 (10th Cir. 2000); Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 718, 724 (8th Cir. 1998); Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723–24 (2d Cir. 1994); Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993); Webster v. New Lenox Sch. Dist., 917 F.2d 1004, 1008 (7th Cir. 1990). The policy considerations weigh differently when the speaker is a government authority figure, however, since a teacher’s in-class speech—unlike that of a student—might reasonably be taken for the official voice of the school. Moreover, in recent years teacher speech has more commonly been analyzed under a balancing-of-interests test applicable to speech by public employees that the Supreme Court coined in Pickering v. Board of Education, 391 U.S. 563 (1968), and elaborated on in Connick v. Myers, 461 U.S. 138 (1983), and Garcetti v. Ceballos, 547 U.S. 410 (2006). The First Amendment treatment of teacher speech consequently is beyond the scope of this Article.

60. Id. at 264.
61. Id.
integral part of the school's educational function, something less than substantial disruption of the educational process may justify prior restraints on students' speech and press activities.\textsuperscript{63} The Eighth Circuit, identifying \textit{Spectrum} as "a vehicle for First Amendment expression," reversed.\textsuperscript{64} The court found that the school was obligated to use less restrictive measures, such as briefly delaying publication to seek the student editors' concurrence with any necessary changes.\textsuperscript{65}

The Supreme Court took up the case in its 1987 term with a vacancy left by Justice Lewis Powell's retirement—Justice Anthony Kennedy would not fill the seat until February 1988—and decided it on a 5-3 vote in the school district's favor.\textsuperscript{66} Justice Byron White's majority opinion struck a distinction between the students' class-produced speech in \textit{Spectrum} and the individual expression of the student antiwar protesters in \textit{Tinker}: "The question whether the First Amendment

\textsuperscript{63.} \textit{Id.} at 1463. Curiously, Judge Francis Nangle's compilation of case law about the censorship of student media accurately cited the holdings of a number of pre-\textit{Hazelwood} rulings—nearly all of them affirming the right of students to publish controversial material over the objection of school authorities—and yet derived from them the opposite conclusion. See \textit{id.} at 1463 (citing, in support of the conclusion that students have reduced legal protection when writing in curricular student publications, the following cases in which courts in fact ruled in favor of the First Amendment rights of student journalists, Gambino v. Fairfax Cnty. Sch. Bd., 564 F.2d 157 (4th Cir. 1977) (enjoining educators from prohibiting publication of article in school newspaper); Stanton v. Brunswick Sch. Dep't, 577 F. Supp. 1560 (D. Ma. 1984) (prohibiting school officials from preventing publication of student quote in yearbook); Reineke v. Cobb Cnty. Sch. Dist., 484 F. Supp. 1252 (N.D. Ga. 1980) (enjoining school district from censoring and controlling student newspaper published by journalism class); Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974), \textit{sum. aff'd}, 515 F.2d 504 (2d Cir. 1975) (holding that school authorities violated students' rights in seizing and preventing distribution of sex information supplement in school newspaper); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969) (enjoining school officials from prohibiting publication of Vietnam protest ad in school newspaper)). Consistent with Judge Nangle's legal research—but inconsistent with his characterization of the research—it was overwhelmingly the opinion of lower courts before \textit{Hazelwood} that nothing less than a \textit{Tinker}-level of disruption to school activities would justify censoring student-produced media, even when the media was part of a journalism course.


\textsuperscript{65.} \textit{Id.} at 1375.

\textsuperscript{66.} \textit{Hazelwood}, 484 U.S. at 276.
requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech.  

This distinction between tolerating and promoting was crucial to the Court’s ability to steer a course around *Tinker* without overruling it: “[W]e conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.”

In place of the highly protective *Tinker* standard—requiring the government to demonstrate “material and substantial disruption”—the majority concluded that school officials could lawfully censor “school-sponsored expressive activities” merely by showing that “their actions are reasonably related to legitimate pedagogical concerns.”

The *Hazelwood* majority cited four primary justifications for reducing the level of protection when speech is subsidized by the school as a curricular exercise:

1. The role of the school in “awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”

2. The school’s need “to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics.”

3. The school’s ability “to set high standards for the student speech that is disseminated under its auspices.”

4. The importance of disassociating the school from speech that advocates conduct “inconsistent with ‘the shared values of a civilized social order’” or that “associate[s] the school with any position other than neutrality on matters of political controversy.”

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67. *Id.* at 270–71.
68. *Id.* at 272–73.
69. *Id.* at 273.
70. *Id.* at 272.
71. *Id.*
72. *Id.* at 271–72.
73. *Id.* at 272 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).
These justifications can be broadly understood as the "maturity" rationale (justifications 1 and 2) and the "disassociation" rationale (justifications 3 and 4). The Court explained what would qualify as a legitimate pedagogical purpose for censorship by reference to these objectives. To fulfill the instructional purpose of the curricular exercise, a school could refuse to distribute student expression that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." In furtherance of the "disassociation" rationale, a school could refuse to disseminate speech that promotes vices (drug use, drinking, "irresponsible sex") or that attributes a politically controversial viewpoint to the school.

In a rousing dissent, Justice William Brennan prophetically anticipated how schools would misuse their newfound latitude to suppress speech that challenges authority. Censorship, he admonished, "in no way furthers the curricular purposes of a student newspaper, unless one believes that the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors." He cautioned that the majority's approach would give license to a regime of "thought control" in which unprincipled administrators "can camouflage viewpoint discrimination as the 'mere' protection of students from sensitive topics."

The Hazelwood Court was unclear whether the new legal standard it was creating should apply in the postsecondary context. In an oft-cited footnote, Justice White remarked that the Court "need not now decide whether the same degree of deference is appropriate with respect

74. See Edward L. Carter, Kevin R. Kemper & Barbara L. Morgenstern, Applying Hazelwood to College Speech: Forum Doctrine and Government Speech in the U.S. Court of Appeals, 48 S. TEX. L. REV. 157, 161 (2006) ("Since 1988, the Court's opinion in Hazelwood . . . has stood for the proposition that public school administrators may regulate student speech that would otherwise be protected by the First Amendment when that speech involves topics sensitive to an immature audience and when students' messages might be attributed to the school itself.").
75. Hazelwood, 484 U.S. at 271.
76. Id. at 272.
77. Id. at 284 (Brennan, J., dissenting) (emphasis omitted).
78. Id. at 288 (Brennan, J., dissenting).
to school-sponsored expressive activities at the college and university level."

In the ensuing twenty-five years, the Court has never clarified Justice White’s equivocal remark, and has had occasion to refer to Hazelwood only a handful of times. In Board of Regents of University of Wisconsin System v. Southworth, a case involving the disbursement of student activity fees to campus clubs, Justice David Souter’s concurrence cited Hazelwood as an instance in which the ability of institutions to limit student expression has been confined to K-12 schools, observing that “students and their schools’ relation to them are different and at least arguably distinguishable from their counterparts in college education.”

Ten years later, the Court made passing reference to Hazelwood in Christian Legal Society v. Martinez, which determined that the state-run Hastings College of the Law could deny official recognition to clubs that enforced ideological barriers to membership. Justice Ruth Bader Ginsburg’s majority opinion approvingly cited Hazelwood to support the proposition that judges should “resist ‘substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.’” In neither instance did the Court squarely confront whether the Hazelwood framework applies to student speech at the college level. That omission may be meaningful given that both cases involved speech subsidized by student fees, and a fee system is a classic example of a case lending itself to analysis as a metaphysical forum. At a minimum, there is no affirmative indication that the Court will impose the Hazelwood framework when asked directly to evaluate a content-based restriction on college students’ speech.

79. Id. at 274 n.7 (majority opinion).
81. Id. at 238 n.4 (Souter, J., concurring).
82. 561 U.S. __, 130 S. Ct. 2971 (2010).
83. Id. at 2994.
84. Id. at 2988 (alteration in original) (quoting Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 206 (1982)).
85. See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995) (recognizing student activity fee funding system at the University of Virginia as a “metaphysical” forum requiring viewpoint-neutrality in the apportionment of grants to student publications).
D. Hazelwood Broadens Beyond the Newsroom

While Hazelwood began its life as an exception to the Tinker doctrine, today it might more honestly be said, at least at the K-12 level, that misapplications have turned Tinker into an exception to the Hazelwood doctrine. Once forum doctrine invaded the province of the public school, courts began subdividing school buildings into ever-thinning slivers, shrinking the square footage covered by the Tinker level of protection almost out of existence. Courts have largely fulfilled Justice Brennan’s worst fears, slavishly deferring to school censorship decisions even where the speaker’s message is not harmful to the audience but merely deviates from the school’s “party line.”

1. Hazelwood has Been Misapplied to Speech Not Reasonably Mistaken for That of the School

Courts have applied Hazelwood even where no reasonable listener would confuse individual speech for the officially sanctioned word of the school. Student campaign speeches, commemorative wall tiles and decorative murals, and graduation songs have all been swept

86. See Stanley Ingber, Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts, 69 TEX. L. REV. 1, 81 (1990) (characterizing the drift of school-speech caselaw as “unmistakably toward unquestioned deference to the decisions of school administrators”). A rare—but perhaps revealing—exception to unchecked Hazelwood deference occurred in Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989). In Searcey, the Eleventh Circuit—even after finding that a “career day” program at a public high school qualified as “curricular”—decided that the selective exclusion of an anti-war organization was impermissible viewpoint discrimination. Id. at 1324–25. Tellingly, the speaker in Searcey was not a student, but an outside organization of adults. See id. at 1315.

87. See Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989) (involving a student government campaign speech over a school intercom system).


89. See Nurre v. Whitehead, 580 F.3d 1087, 1093–95 (9th Cir. 2009) (involving the choice of songs to be played at a graduation ceremony).
under the umbrella of a rule designed to enable schools to disassociate themselves from speech "that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." 90

In a rare faithful application, a federal district court in 2010 held that Tinker, not Hazelwood, provided the proper framework for an eighth-grader’s challenge to punishment imposed for violent imagery in his class-produced essays. 91 Carefully analyzing the rationale for Hazelwood, the court recognized that a student’s speech on an assignment meant only for the teacher’s eyes “does not raise the same concerns as other school-sponsored speech cases such as Hazelwood” where speech is directed at young listeners: “This case does not involve a risk that other students would be exposed to the violent themes of [the student’s] writings or that [the student’s] speech might be wrongly attributed to the school.” 92

More commonly, however, courts have come to gloss over—if not to express open disregard for—the audience-protection and disassociation rationales of Hazelwood, treating the standard as controlling except in the narrow instance that speech appears on the student’s own body, such as a message on a t-shirt. 93 Courts have treated Hazelwood as if its boundaries set forth by the Supreme Court were merely a starting point from which lower courts were free to deviate, rather than binding legal precedent. For example, the Sixth Circuit dismissed the First Amendment claims of an elementary school student

92. Id. at *8.
93. See Dan V. Kozlowski, Hazelwood’s Application in the Circuit Courts, 3 U.B. J. OF MEDIA L. & ETHICS 1, 6 (2012), available at http://law.ubalt.edu/downloads/law_downloads/UB_JMLE_Vol.3_Nos.1-2.pdf ("[C]ircuit courts have broadly applied Hazelwood — both in terms of when it is applied and to whom—and expansively interpreted the ‘legitimate pedagogical concerns’ standard, generally granting wide discretion to school officials. This makes Hazelwood doubly dangerous."). For an example of a faithful application of the “imprimatur” doctrine to messages on students’ personal apparel, see Castorina v. Madison Cnty. Sch. Bd., 246 F.3d 536, 543 (6th Cir. 2001) (declining to apply Hazelwood to school’s refusal to allow two students to wear t-shirts bearing Confederate flag emblems: “Most importantly, no reasonable observer could conclude that the school had somehow endorsed the students’ display of the Confederate flag.”).
who was prohibited from selling candy canes accompanied by Christian religious messages as part of a make-believe "store" exercise, where students learned the workings of retail establishments by trading homemade goods: "Plaintiff suggests that Hazelwood only applies if the audience might mistake the speech as originating from the school. However, that reading is too narrow. This court has applied the Hazelwood standard when the speech at issue was made as part of school activities." The Sixth Circuit’s formulation—"part of school activities"—appears to swallow significant amounts of speech (including, perhaps, the student vendor’s speech in Curry) that the school is being asked merely to "tolerate" rather than "affirmatively to promote."

The willingness of subsequent courts to read the "imprimatur" requirement out of Hazelwood is perhaps best illustrated by the Third Circuit’s split decision in a 2000 case involving an elementary-school student’s religious-themed poster. In C.H. v. Oliva, the en banc court split 6-6 over a student’s claim that the school violated his First Amendment rights by removing his drawing of Jesus from a hallway display of student art. While there was no majority opinion, the split resulted in affirmance of the trial court’s ruling dismissing most claims—a result decried by then-Judge Samuel Alito. In dissent, Judge Alito

95. Hazelwood, 484 U.S. at 270–71. Additionally, the Sixth Circuit’s formulation of what constituted a valid justification for censorship in Curry appeared capable of being mischievously applied to any student speech, even individual speech divorced from school activities: "The school’s desire to avoid having its curricular event offend other children or their parents, and to avoid subjecting young children to an unsolicited religious promotional message that might conflict with what they are taught at home qualifies as a valid educational purpose." Curry, 513 F.3d at 579. The Supreme Court has never said that "offensive" speech is proscribable in schools, and to the contrary, has suggested the opposite is true. See Morse v. Frederick, 551 U.S. 393, 409 (2007) (rejecting school’s argument that a student’s pro-drug banner at a school-sanctioned event could be censored because its message was offensive: "After all, much political and religious speech might be perceived as offensive to some.").
97. 226 F.3d 198 (3d Cir. 2000) (en banc).
98. Id. at 200–03.
wrote that the case should have been governed by *Tinker* rather than—as the three-judge panel below believed—by *Hazelwood*: 99

While *Hazelwood* certainly applies to many things that occur in the classroom . . . nothing in *Hazelwood* suggests that its standard applies when a student is called upon to express his or her personal views in class or in an assignment. On the contrary, *Hazelwood* governs only those expressive activities that might reasonably be perceived "to bear the imprimatur of the school." . . . Things that students express in class or in assignments when called upon to express their own views do not "bear the imprimatur of the school" . . . and do not represent "the [school's] own speech." 100

Judge Alito went on to decry the "disturbing results" that an expansive view of *Hazelwood* would produce: Students "could be prevented from expressing any views that school officials could reasonably believe would cause 'resentment' by other students or their parents . . . . Such a regime is antithetical to the First Amendment and the form of self-government that it was intended to foster." 101

Revealingly, in its one opportunity to expand the scope of *Hazelwood* at the high school level, the Supreme Court pointedly declined the invitation. In *Morse v. Frederick*, the Court dealt with the case of a high school senior suspended for waving a banner bearing what was deemed to be a pro-drug message—"Bong Hits 4 Jesus"—while among classmates during a school-approved outing to watch the Olympic torch relay run. 102 The Court deemed the event to be "school sanctioned" 103—the rally took place on a hill across from school, under the supervision of school employees, during a school-authorized release day—and consequently declared Joseph Frederick's banner to be "school
speech."\textsuperscript{104} Nevertheless, Chief Justice John Roberts, writing for the majority, summarily concluded that Hazelwood "does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur."\textsuperscript{105}

It would have been a simple matter for the Morse Court to declare that the impromptu assembly was a "nonpublic forum," the educational purpose of which was to promote school unity or to teach obedience in group gatherings, but there is no indication that such a view was even seriously entertained. This message has yet to register with lower courts, which even post-Morse continue to apply Hazelwood in settings that no observer, other than a constitutional lawyer, could regard as "curricular" or could mistake for an official school communication.\textsuperscript{106}

2. *Hazelwood* has Been Misapplied to Speech Unconnected with a Curricular Activity

In everyday conversation, students, parents, and school employees clearly understand the distinction between activities that are "curricular" (coursework) and those that are "extracurricular" (clubs, sports, social events). Although Hazelwood by its terms applies to "curricular" expression, it has become disturbingly commonplace for courts to read that prerequisite out of existence and to regard any organized function taking place at school—or even away from school, if the event is school-subsidized—as a "curricular" event.\textsuperscript{107}

Courts have accomplished this sleight-of-hand—transforming the "extracurricular" into the "curricular"—by suggesting that simply learning how to obey the rules of an activity is itself educational.\textsuperscript{108}

\begin{itemize}
\item \textsuperscript{104} Id. at 400.
\item \textsuperscript{105} Id. at 405.
\item \textsuperscript{106} See, e.g., Curry ex rel. Curry v. Hensiner, 513 F.3d 570, 579–80 (6th Cir. 2008) (applying Hazelwood to homemade crafts bearing religious messages that student offered for sale at a swap-shop held in the school gym).
\item \textsuperscript{107} See, e.g., Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989) (finding that a campaign speech for student council office was Hazelwood curricular speech); McCann v. Fort Zumwalt Sch. Dist., 50 F. Supp. 2d 918 (E.D. Mo. 1999) (deciding that choice of songs by high school marching band was Hazelwood curricular speech).
\item \textsuperscript{108} See, e.g., Morgan v. Swanson, 659 F.3d 359, 389 (5th Cir. 2011) (holding that a student handing out copies of a religious parable at a school-organized "winter
Others have indulged the fiction that anything relating to school programs or functions is curricular. For example, in *Seidman v. Paradise Valley Unified School District No. 69*, a federal district court held that a fundraising campaign in which a parent volunteer organization sold commemorative wall tiles was a "curricular" forum because the fundraiser was "undertaken for a primarily educational purpose (fund raising for school playground equipment)." In other words, even though nothing about the fundraising campaign was itself an educational exercise, the fact that the money would advance an educational objective—a non-curricular one at that (a playground)—was enough to render the tile sales "curricular."

This formulation invites limitless expansion of the *Hazelwood* doctrine beyond any logical stopping point. Almost any undertaking (e.g., cooking a meal, driving a car, playing touch football) can be "educational" in the sense of practicing and mastering that skill. If that is all it takes to make an activity "curricular," then the presence of any school support (e.g., the paid time of a faculty adviser, subsidized meeting space) might transform the activity into a "nonpublic forum" with the accompanying degree of institutional control.

III. *Hazelwood* Goes to College

A. *Hazelwood* has Gained Increasing Acceptance as the Yardstick for College Students' First Amendment Rights

Within months, appellate circuit courts began staking out diverging views of *Hazelwood's* relevance at the college level—the
result invited by Justice White's equivocal footnote in Hazelwood.\textsuperscript{111} Perhaps fittingly, the first two circuits to address the question came out pointing in opposite directions.

When students challenged the University of Massachusetts' decision to withdraw funding from a free legal clinic that had represented students in suing the University, the First Circuit declined to apply the Supreme Court's student speech case law; instead, the court viewed the case as a dispute over forcing the state to continue subsidizing a service.\textsuperscript{112} In its analysis, the court contrasted the clinic (which it found not to be a vehicle for student expression at all) with a designated public forum such as a student newspaper where First Amendment protections apply.\textsuperscript{113} In declining to apply public forum analysis to the students' case, the court remarked parenthetically that the Hazelwood standard "is not applicable to college newspapers" because they operate as public forums.\textsuperscript{114}

Conversely, the Eleventh Circuit applied a broader notion of Hazelwood's scope in a case challenging the University of Alabama's ability to limit student government campaign speech to a narrow electioneering window.\textsuperscript{115} The court held that student government and its corresponding campaigns are not a public forum, but a forum reserved for the purpose of providing a "supervised learning experience for students interested in politics and government."\textsuperscript{116} Consequently, the court concluded that the Hazelwood rationale permitted the University to regulate candidates' speech based on a mere justification that the regulation was reasonable, even if the speech was not alleged to be unlawful or disruptive.\textsuperscript{117}

\textsuperscript{111} Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 274 n.7 (1988).
\textsuperscript{112} Student Gov't Ass'n v. Bd. of Trs. of the Univ. of Mass., 868 F.2d 473, 477 (1st Cir. 1989).
\textsuperscript{113} Id. at 480. The court went on to conclude that no First Amendment violation occurred, both because the legal-services program was not itself a vehicle for student expression, nor was there any showing that legal services were denied to students on account of the content of their speech. See id. at 481–82.
\textsuperscript{114} Id. at 480 n.6.
\textsuperscript{115} Ala. Student Party v. Student Gov't Ass'n, 867 F.2d 1344 (11th Cir. 1989).
\textsuperscript{116} Id. at 1347.
\textsuperscript{117} Id.
In a case that is closest to true "curricular" speech, the Tenth Circuit decided in *Axson-Flynn v. Johnson* 118 that instructors at the University of Utah did not violate a theatre student's First Amendment rights in pressuring her to recite lines containing profanity during a class exercise. 119 The student, an observant Mormon, resisted reading the monologue as written and asked to omit the objectionable language. After initially refusing, her instructor relented and allowed the student to modify the monologue, awarding her a high grade. But at the end of the term, faculty members advised the student: "You can choose to continue in the program if you modify your values. If you don't, you can leave." 120 Believing she had no choice, the student withdrew and transferred to another college. 121

The Tenth Circuit found that the theatre classroom was neither traditionally open to the public for expressive activity nor dedicated to widespread public use for that purpose. Consequently, it was a nonpublic forum, "meaning that school officials could regulate the speech that takes place there 'in any reasonable manner.'" 122 The justifications proffered by the University—that reciting the objectionable lines would teach the student to portray an unfamiliar character and to respect authors' work as written—were held to be educationally legitimate. 123

Contrasting with *Axson-Flynn*, the Sixth Circuit decided in *Kincaid v. Gibson* 124 that *Hazelwood* is inapplicable to "extracurricular" speech in a college publication produced outside the classroom setting. 125 In *Kincaid*, administrators at Kentucky State University confiscated and refused to distribute a student-produced yearbook, *The Thorobred*, because of editorial disagreements with the students' choice of theme, colors, and photographs. 126 A Sixth Circuit panel sided with the

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118. 356 F.3d 1277 (10th Cir. 2004).
119. *Id.* at 1277.
120. *Id.* at 1282.
121. *Id.* at 1282–83.
122. *Id.* at 1285 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988)).
123. *Id.* at 1291.
124. 236 F.3d 342 (6th Cir. 2001) (en banc).
125. *Id.* at 346 n.5.
126. *Id.* at 345.
college, but the en banc circuit found that the impoundment of the yearbook violated the First Amendment. In declining to apply Hazelwood, the court said that “we find it relevant that the editors of The Thorobred and its readers are likely to be young adults”—noting that one of the editors was thirty-seven years old—and concluded: “[T]here can be no justification for suppressing the yearbook on the grounds that it might be ‘unsuitable for immature audiences.’” While Kincaid is often shorthanded as a case repudiating Hazelwood at the college level, it may more precisely be understood as a case accepting that Hazelwood imported forum doctrine onto the college campus, but that publications produced by college students outside the confines of a course are designated public forums.

Courts in the Ninth and Second Circuits, perhaps appropriately when confronted with a confusing legal standard, have issued mixed signals. The Ninth Circuit case of Brown v. Li—which produced three opinions, one from each panel member, and no consensus rationale—exemplifies how divisive and confounding Hazelwood has become.

In Brown, University of California, Santa Barbara graduate student Christopher Brown decided, in lieu of the customary thank-you preface to his master’s thesis, to append a “Disacknowledgements” section delivering a profane parting shot to professors and administrators he described as “an ever-present hindrance during my graduate career.” Although the preface was not considered a part of the graded academic exercise—which Brown completed successfully—his thesis committee initially declined to approve the paper, and he was placed on academic probation. By the time the case got to court, Brown had been awarded his degree—but the college declined him the customary courtesy of having his thesis shelved at the campus library.

128. Kincaid, 236 F.3d at 356–57.
129. Id. at 352.
130. 308 F.3d 939 (9th Cir. 2002).
131. Id. at 943.
132. Id. at 943–45.
133. Id. at 945.
Brown’s suit challenged both the initial withholding of his degree and the refusal to stock his completed work in the library with the “Disacknowledgements” section intact. 134 A three-judge panel of the Ninth Circuit affirmed summary judgment in favor of the University on a 2-1 vote, but the decision produced three fractured rationales. The two-judge majority broadly agreed that, under the Supreme Court’s free-speech jurisprudence, it does not offend the First Amendment to require a student to comply with the terms of an academic assignment. 135

Turning the Hazelwood “maturity” rationale on its head, the majority observed:

The Supreme Court’s jurisprudence does not hold that an institution’s interest in mandating its curriculum and in limiting a student’s speech to that which is germane to a particular academic assignment diminishes as students age. Indeed, arguably the need for academic discipline and editorial rigor increases as a student’s learning progresses. 136

In so holding, the court knocked one of the foundational pilings from beneath Hazelwood, turning a case about protecting impressionable young schoolchildren into a case in which institutional control actually increases as the speaker ages.

The majority’s conception of what qualified as a lawful basis for the University’s actions also illustrates the perils of introducing so elusive a concept as “legitimate pedagogical basis” into the law of the First Amendment. The College, the court concluded, “was entitled to require that the acknowledgements section . . . recognize those who made a positive contribution to Plaintiff’s education” for two reasons: (1) to “encourage critical thinking” and (2) to “conform to professional norms.” 137 That a college must be able to censor criticism of its employees to encourage critical thinking seems a construct worthy of

134. Id. at 945-46.
135. Id. at 949.
136. Id. at 951 (citation and emphasis omitted).
137. Id. at 953.
George Orwell, and left standing alone, “conformity” swallows its own tautological tail: We impose our authority on you to teach you to obey authority. Every act of censorship is an effort to teach conformity.

More recently, the Ninth Circuit has equivocated on the applicability of Hazelwood to colleges. In Hudson v. Craven, a community college professor challenged her employer’s decision to discontinue her contract because she took a group of students to participate in a political protest as part of a class assignment in economics. The court expressed doubt about the appropriateness of Hazelwood, even while appearing to apply it and finding that the professor’s removal was justified by “legitimate interests”:

Hazelwood arose in a high school and not a community college setting, but that does not change the fact that the decision of a public institution of higher education to avoid sanctioned political entanglement is a judgment that is best left to the institution. Although we draw from Hazelwood the principle that educational institutions have a strong pedagogical interest in avoiding institutional association with potentially divisive political issues, we need not consider whether a college necessarily has the same leeway as a high school to preserve that neutrality.

While the Second Circuit is not firmly in either camp, its 2007 ruling in Amidon v. Student Association of the State University of New York exhibits skepticism about affording postsecondary institutions the breadth of deference contemplated by Hazelwood. In Amidon, students whose conservative political organization was denied funding challenged their college’s use of a referendum to set the priorities for allocation of student activity fees. Approvingly citing Justice Souter’s

139. 403 F.3d 691 (9th Cir. 2005).
140. Id. at 693–95.
141. Id. at 700–01.
142. 508 F.3d 94 (2d Cir. 2007).
143. Id. at 94.
144. Id. at 97.
footnote from Southworth, the court rejected the University’s argument that Hazelwood required deference to a college’s choice of funding mechanisms. Because Amidon involves an atypical Hazelwood fact pattern—essentially, a funding dispute among rival student organizations—its reasoning may not necessarily apply in the more commonplace, and more worrisome, scenario of censorship by administrators in defense of some asserted institutional interest.

The legal community was not fully roused to the impact of Hazelwood at the college level until 2005, when the en banc Seventh Circuit became the first to apply Hazelwood in the context of a student-run campus newspaper. In Hosty v. Carter, the court dismissed the First Amendment claims of student editors at Illinois’ Governors State University, whose newspaper was shut down by college administrators. The newspaper, Innovator, angered Governors State officials with a series of sharply critical articles that administrators termed biased and factually inaccurate. The University responded by ordering the printer to refrain from printing any future editions unless an administrator pre-approved the content.

A three-judge panel of the Seventh Circuit sided with the student editors, but the en banc court, applying Hazelwood, reversed. The majority disposed of the editors’ claims on qualified immunity grounds, holding that the legal status of the Innovator was sufficiently murky that Governors State administrators would not have known how

145. Id. at 105 (citing Bd. of Regents of Univ. of Wisc. v. Southworth, 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring)).
146. 412 F.3d 731 (7th Cir. 2005) (en banc).
147. Id. at 731.
148. Id. at 733.
149. Id.
150. Hosty v. Carter, 325 F.3d 945 (7th Cir. 2003), vacated en banc, 412 F.3d 731 (7th Cir. 2005).
152. The doctrine of qualified immunity is a construct of constitutional tort law that permits individual government actors to escape personal financial liability for judgment calls made in the course of discharging their official duties. The doctrine has become a formidable obstacle for plaintiffs, because it permits recovery only where the government official disregards “clearly established” legal precedent on facts similar enough to give notice that the challenged behavior was unlawful. See Saucier v. Katz, 533 U.S. 194, 201 (2001), receded on other grounds by, Pearson v. Callahan, 555 U.S. 223 (2009).
much control they could lawfully exert. The court embarked on a
drambling and not entirely coherent expedition through forum doctrine,
suggesting without firmly concluding that the _Innovator_ likely would
have qualified for heightened First Amendment status as a designated
public forum—a question mooted when the case was pretermitted on
immunity grounds. A dissent by Judge Diane Wood had the better of
the logic, pointing out that, until the majority muddied the constitutional
status of college newspapers by introducing _Hazelwood_ into the
discussion, decades of unbroken precedent established that shutting
down a newspaper to silence criticism was forbidden.

_Hosty_ provoked near-unanimous condemnation to the point that
it impelled legislators in Illinois to enact remedial legislation, the College
Campus Press Act, restoring the status of college publications to their
pre- _Hosty_ position. Legal scholars criticized the majority both for its
inautful application of _Hazelwood_ and forum doctrine, as well as for its
apparent indifference to the practical consequences of failing to draw a
bright line categorically protecting college journalists.

The divide among the circuits continues to the present, and
manifests itself in disparate outcomes. In 2010, both the Third and Fifth

153. _Hosty_, 412 F.3d at 739.
154. _Id_. at 736–37.
155. _Id_. at 742 (Wood, J., dissenting).
156. 110 ILL. COMP. STAT. ANN. 13 (West 2007); _see also_ Moore v. Watson,
838 F. Supp. 2d 735 (N.D. Ill. 2012) (describing and applying College Campus Press
Act to a case involving an adviser and student editor removed by college to punish
editorial content decisions).
157. _See, e.g._, Carter, Kemper & Morgenstern, _supra_ note 74, at 181
(expressing doubt that the “disassociation” rationale of _Hazelwood_ logically applied
to the student-run extracurricular newspaper in _Hosty_: “That readers would associate
the content of the _Innovator_, the student newspaper, with the university
administration is not clear and is not addressed by the en banc majority’s opinion.”);
Kerry Brian Melear, _The First Amendment and Freedom of Press on the Public
University Campus: An Analysis of Hosty v. Carter_, 216 ED. LAW REP. 293 (April 5,
2007) (“[T]he decision in _Hosty_ fails to consider the striking differences in age and
maturity between students on the postsecondary and K-12 levels.”); Laura Merritt,
_How the Hosty Court Muddled First Amendment Protections by Misapplying
Hazelwood to University Student Speech_, 33 J.C. & U.L. 473, 484 (2007) (asserting
that the _Hosty_ majority’s characterization, that the minimal level of _Hazelwood_
protection applies whenever school money is used to subsidize speech, “sets the tone
for the entire decision, and it gets _Hazelwood_ wrong”).
Circuits heard First Amendment challenges to student disciplinary codes at the University of the Virgin Islands and Louisiana State University (LSU), respectively. In the Virgin Islands case, the code prohibited "offensive" and "unauthorized" speech.\(^{158}\) At LSU, the code banned "extreme, outrageous or persistent acts, or communications that are intended or reasonably likely to harass, intimidate, harm or humiliate another."\(^{159}\) The courts applied strikingly different approaches and reached opposite conclusions. The Fifth Circuit upheld the LSU regulation, primarily applying the *Tinker* "substantial disruption" standard but also, in passing, quoting *Hazelwood*'s admonition that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission.'"\(^{160}\) The Third Circuit struck down sections of the Virgin Islands code, carefully elaborating the distinctions between high school and college life: the maturity of the students; the educational missions of the institutions; the administrators' roles; and "the fact that many university students reside on campus and thus are subject to university rules at almost all times."\(^{161}\)

**B. Recent Rulings Have Dangerously Extended *Hazelwood* into the Realm of College Discipline for Course-Related Speech**

In a string of recent cases, federal courts have confronted the issue that the Tenth Circuit resolved in the College's favor in *Axson-Flynn*: Whether a student has a constitutionally protected right to object to course assignments. In each recent case, courts have applied *Hazelwood* to find that no such right exists, even where the student spoke privately outside of a classroom setting, and even where the consequence of speaking out was expulsion.

The most recent and significant of these cases began when Julea Ward, a graduate student at Eastern Michigan University in training to become a guidance counselor, told her clinical supervisor that she was uncomfortable seeing one of the clients assigned to her for counseling as

\(^{158}\) *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 239 (3d Cir. 2010).
\(^{159}\) *Esfeller v. O'Keefe*, 391 F. App'x 337, 341 (5th Cir. 2010).
\(^{161}\) *McCauley*, 618 F.3d at 243.
part of a course-assigned practicum. Ward explained that, because of her strong religious opposition to homosexuality, she would prefer to assign the client—who sought counseling about a same-sex relationship—to a different practicum student. Ward was removed from practicum duties and given a letter initiating disciplinary proceedings on the grounds of violating the professional standards of the American Counseling Association. After a formal hearing, a university disciplinary panel expelled Ward from the counseling program.

The district court concluded that, because Ward’s dismissal “arose within the curricular context of the clinical Practicum,” and because the course itself was “not created as a public forum,” her speech was entitled only to the Hazelwood level of protection. Nevertheless, the court found a triable issue of fact as to whether, in asking to refer the client to a more appropriate counselor, Ward was in fact acting consistently with professional standards—and if so, whether “professional standards” were a pretext for the college to retaliate for her religious speech.

The University appealed, and the Sixth Circuit affirmed. In explaining why Hazelwood should apply even to speech by graduate students, the court stated:

For the same reason this test works for students who have not yet entered high school . . . it works for students who have graduated from high school. The key word is student. Hazelwood respects the latitude educational institutions—at any level—must have to further legitimate curricular objectives . . . . Nothing in Hazelwood suggests a stop-go distinction between student speech at the

163. Id.
164. Id. at 808.
165. Id. at 809.
166. Id. at 814.
167. Id. at 815.
Like the trial court, however, the Sixth Circuit declined to dismiss Ward’s claims. The court found a disputed issue as to whether the discipline was motivated by the unprofessionalism of Ward’s speech—in which case, the court suggested, it would be lawful—or by the religious content of the speech.\(^{170}\)

Because it adds the Sixth Circuit to the roster of those extending Hazelwood onto the college campus, Ward is the most meaningful of the recent “curriculum objector” cases, but it is far from the only one. A year before the Ward ruling, its outcome was presaged by a federal district judge’s ruling in Heenan v. Rhodes.\(^{171}\)

Judith Heenan, a fifty-one-year-old graduate nursing student at Auburn University, claimed that her college piled strikes onto her record in retaliation for her complaints about the unfairness of the grading and disciplinary systems, to the point where she accumulated enough demerits to be expelled.\(^{172}\) Heenan testified that, after she became known for complaining to other faculty members about her instructor’s allocation of disciplinary “points,” she was targeted for closer scrutiny and verbal abuse.\(^{173}\) Her complaint involved four separate clashes with her supervisor that resulted in the assignment of four disciplinary “points,” which triggered a performance review that resulted in her “dis-enrollment” from the School of Nursing.\(^{174}\)

Heenan argued that the school could not punish her for speaking in opposition to school policies without surmounting the “disruption” burden of Tinker.\(^{175}\) But the district court instead categorized Heenan’s

169. Id. at 733–34. Notably the Ward court never cited the circuit’s earlier foray into Hazelwood, Kincaid v. Gibson, 236 F.3d 342 (6th Cir. 2001) (en banc), in which the court declined to apply Hazelwood to a censorship claim involving a college yearbook. While the rulings appear difficult to reconcile, it is possible to read Kincaid as accepting the Hazelwood forum analysis but simply concluding that, under the circumstances, the yearbook constituted a limited or designated public forum.

170. Ward, 667 F.3d at 737–38.
171. 757 F. Supp. 2d 1229 (M.D. Ala. 2010).
172. See id. at 1234–35.
173. See id. at 1232.
174. See id. at 1232–33.
175. Id. at 1236.
complaints as curricular speech subject to *Hazelwood*, even though her remarks were made during one-on-one clinical observations with a faculty adviser and in private meetings with faculty, rather than in class or in a school-financed medium. The court acknowledged it was applying a broad reading of *Hazelwood*, but found it to be consistent with the expansive use of the doctrine elsewhere: "Heenan’s case does not directly involve the school-sponsored dissemination of student speech. However, the law in *Hazelwood* has been adopted by other courts faced with the question of what protections are due student expression that touches upon internal school matters of pedagogical and curricular concern." The judge concluded that, "where a student’s speech threatens a school’s pedagogical and curricular system, it is not subject to the expansive protections applied to student political speech under *Tinker*.

Exemplifying the malleability of what qualifies as a legitimate curricular justification, the court found that the college had a legitimate interest in teaching its students to refrain from complaining about their grades and to accept that poor grades reflected their own deficient performance: "[O]ne of the traits of a good teacher is the ability to get a student, finally, to stop blaming others (including her teacher) for the bad grade she has received." This, like the Ninth Circuit’s acceptance in

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176. See *id.* at 1237.
177. *Id.* at 1237–38.
178. *Id.* at 1238. The implication that *Tinker* protects speech addressing itself only to national political concerns and not speech challenging school policies is flatly contradicted by a number of post-*Tinker* rulings, most notably among them *Lowry v. Watson Chapel School District*, 540 F.3d 752 (8th Cir. 2008), in which the Eighth Circuit rejected exactly the distinction relied on by the *Heenan* court and ruled that a student demonstration protesting the school dress code was protected *Tinker* speech.
179. *Heenan*, 757 F. Supp. 2d at 1241 (parentheses in original). In addition to being a dubious application of *Hazelwood*, the court’s determination on this point almost certainly was error because it presumed that Heenan’s protests about the grading and disciplinary systems were unfounded pretexts for her own failings as a student, rather than (as Heenan attested) the complaints of a whistleblower exposing a capricious grading system. If this was not a misapplication of the summary judgment standard, which required presuming the truth of Heenan’s factual evidence and all reasonable inferences therefrom, then the other possibility is even worse: That the truth of the complaints was immaterial, and that the college could expel Heenan for being a complainer even if her complaints were well-founded. If that is
Brown of "conformity" as a legitimate educational objective, makes essentially every punishment for speech self-validating, as it can always be said that silencing complaints was part of the school's educational purpose. It takes little imagination to envision how a college bent on retaliation might put a "complaints are not protected speech" standard to malicious use.

In response to Heenan's petition for reconsideration, the court issued a corrected opinion that more carefully distinguished punishable from non-punishable speech. The ruling clarified that complaints about coursework made in private social conversations, such as hallway chatter with classmates, were not properly punishable under Hazelwood. Still, the judge reasserted that "grievances that were made to, or in the presence of, her instructors and supervisors and were related to her training" constituted curricular speech that was, under Hazelwood, punishable on the basis of any legitimate educational purpose.

Ward and Heenan are the clearest illustrations of the breadth with which Hazelwood is being applied at the college level, but they are not isolated outliers. A case resembling Ward, Keeton v. Anderson-Wiley, involved a dispute between Augusta State University (ASU) and a counseling student who, like Julea Ward, held strong religious-based beliefs that homosexuality is immoral. Jennifer Keeton repeatedly voiced her views to professors and classmates in her program, including relaying an interest in "conversion therapy" to change the behavior of gay and bisexual people. Keeton told an instructor that "it would be hard to work with the population" of lesbian, gay, bisexual, and transsexual (LGBT) students in light of her

the way future courts interpret Heenan, then it is no exaggeration to say that Heenan's incorporation of Hazelwood eviscerates constitutional protection for whistleblowers.

180. See supra notes 130–138 and accompanying text.
182. Id. at 1321.
183. Id.
185. Id. at 1372.
186. Id. at 1372.
profound moral opposition to homosexuality.\textsuperscript{187} A classmate reported to the school that Keeton had expressed interest in “conversion therapy,” an approach that attempts to counsel patients into abandoning homosexuality.\textsuperscript{188} The school placed Keeton on a “remediation plan” that, under school policy, was mandated when a student exhibited unsatisfactory progress on “interpersonal or professional criteria unrelated to academic performance.”\textsuperscript{189} The penalty for refusing to complete the remediation was expulsion. Keeton declined to participate in the plan, which called for her “to increase [her] exposure and interaction with gay populations,” and take part in other diversity-sensitivity measures.\textsuperscript{190}

The district court, applying \textit{Hazelwood}, found no constitutional violation in imposing the remediation requirement, because it advanced Augusta State’s legitimate pedagogical interests.\textsuperscript{191} The court treated Keeton’s espoused anti-gay views as “curricular” speech because they occurred in the context of her schooling, and because they violated principles of professional ethical conduct intrinsic to Augusta State’s

\textsuperscript{187} \textit{Id.} at 1371 n.2.
\textsuperscript{188} \textit{Id.} at 1372. This fact is a matter of some inconsistency between the district court and Eleventh Circuit opinions. At the circuit court level, the court elaborated further and found that Keeton not only “expressed interest” in conversion therapy, but that she actually intended to try to “convert” gay youths herself, and if she was unable to do so, would refer them to a practitioner of “conversion.” \textit{Keeton}, 664 F.3d at 869. This is a crucial and perhaps decisive distinction, because indicating philosophical disagreement with the standards of the profession is different from indicating an intent to violate those standards. The distinction is made effectively in Judge William Pryor’s \textit{Keeton} concurrence, in which he observes that the evolution of medicine often has benefited from practitioners’ willingness to challenge orthodoxies, such as the once-accepted notion that homosexuality was a mental disorder requiring treatment. \textit{Id.} at 882 (Pryor, J., concurring). Judge Pryor emphasized the importance of protecting students’ ability to espouse unpopular views that, when aired in the marketplace, may gain acceptance: “[W]e have never held that \textit{Hazelwood} permits a public university to punish a student’s expressions of opinion when the speech is not school-sponsored or does not suggest the school’s approval.” \textit{Id.} (Pryor, J., concurring).
\textsuperscript{189} \textit{Keeton}, 733 F. Supp. 2d at 1372 n.2.
\textsuperscript{190} \textit{Id.} at 1373.
\textsuperscript{191} \textit{Id.} at 1379.
curriculum. The court repeatedly invoked the lower court's ruling on comparable facts in Ward, decided only a month earlier.

On appeal, the Eleventh Circuit largely followed the trial court's reasoning and affirmed. Applying forum analysis, the court defined the ASU "counseling program" as the forum, rather than the physical space in which Keeton made her remarks. Defining an academic program as a forum is not an intuitively logical extension of Hazelwood, since Hazelwood concerned the forum status of an actual vehicle for speaking to a public audience. (The forum in Hazelwood was the Spectrum newspaper, not the journalism program as a whole.) Moreover, characterizing the academic program as the forum is self-fulfilling, as it will never be the case that an entire collegiate course of study is held open for indiscriminate public use so as to qualify as a forum. (Indeed, it is not clear how an institution could designate an academic program as a forum.) The sleight-of-hand that leads from speech taking place in a location to speech taking place in a context is filled with portent. A speaker can, without much uncertainty, change the location of her speech, for example, by submitting a column to the community newspaper if the column is removed from the campus paper. But choosing an alternative "context" is another matter, as it is far from certain where the boundaries of that "context" begin and end, and it is increasingly apparent that courts will treat speech as occurring in the "context" of a course even if it occurs outside of the classroom.

Having identified the forum, albeit imprecisely, and having unsurprisingly concluded that the program was a nonpublic forum, the court proceeded to accept, and defer to, the school's asserted justifications for ordering Keeton to accept remediation. The court explained that it regarded Keeton's speech as curricular because it was made in the course of her participation in "a school-sponsored expressive activit[y]"—that is, the clinical program—and that the counseling program (including the remediation program) are "part of the school curriculum" and are "supervised by faculty members and

192. Id.
195. Id. at 871.
designated to impart particular knowledge or skills.'”\(^{196}\) Overruling the College’s decision to order remediation, the court concluded, “would interfere with ASU’s control over its curriculum.”\(^{197}\)

Similarly, a federal district court in California found no actionable First Amendment claim where a student at a teacher’s college alleged that he was coerced as part of class activities to affirm political views with which he strongly disagreed.\(^{198}\) The student, Stephen Head, testified that his instructor force-fed students a diet of his personal political opinions, including using class time to advocate for a statewide ballot proposition.\(^{199}\) Proceeding pro se, he alleged that his rights were violated when the instructor repeatedly forced him to redo assignments without reference to sources and ideas that did not conform with her own “multicultural” ideological views, then assigned low grades even to the resubmitted work.\(^{200}\) Nonetheless, in finding in favor of the University, the court concluded that “foster[ing] educators who can function effectively and sensitively in the multicultural, multilingual . . . environment of today’s secondary schools” is a “legitimate pedagogical purpose” in furtherance of the University’s curricular mission.\(^{201}\)

Taken together, these cases represent a breathtaking expansion of the Hazelwood doctrine, and a concomitant shift in the balance of individual liberty versus “law-and-order” punitive authority.

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\(^{196}\) Id. at 875 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 570 (1988)). The court cited Hazelwood’s formulation of school-sponsored expressive activities as including school publications, theatrical productions, and other such means of creative expression, but did not explain how a counseling program fit within that classification. Id. (citing Hazelwood, 484 U.S. at 570).

\(^{197}\) Id.


\(^{199}\) Id. at *2.

\(^{200}\) Id.

\(^{201}\) Id. at *7. The court further held, that the student’s (evidently inartful) complaint failed to demonstrate facts supporting his primary theory, that he was compelled to speak in ways contrary to his own ideological and religious beliefs. See id. The court found that, although Head may have been forced to listen to speech contrary to his own world-view, he personally was not forced to espouse any particular belief: “Learning the premises does not necessarily include believing in them. Learning the course material in no way compromises one’s personal right to believe as he wishes.” Id. at *6.
C. Hazelwood is Unsuitable to Cases Where Adult-Age College Students are Suspended or Expelled for Their Speech

The jurisprudence of student speech rights has been described, aptly, as a "mixture of muddled reasoning and inconsistent decisions." Cases like Ward only exacerbate this confusion, by introducing the Hazelwood framework into plainly inapplicable settings. If none of the purposes animating Hazelwood apply, the analysis becomes a matter of deference for deference's sake.

1. Hazelwood's "Maturity" Rationale is Inapplicable

There is no indication that any of the disputed speech in the Ward or Heenan cases took place in a classroom or in front of other students; thus, there simply was no audience to protect. In both cases, the speakers were graduate students over thirty years of age, a fact that neither court afforded any recognition. Because neither the speakers nor the listeners were impressionable children in need of protection from unsuitable material, Hazelwood's concern for "the emotional maturity of the intended audience" is of no moment.

More broadly, notions of shielding delicate ears against dangerously complex or challenging ideas is dissonant with the long-

202. Brownstein, supra note 47, at 721. See also Carter, Kemper & Morgenstern, supra note 74, at 182 (summarizing survey of post-Hazelwood rulings from federal appellate courts: "[T]here is substantial confusion and disagreement between commentators on one side, and the federal courts of appeals on another, regarding whether Hazelwood's principles may be applied not only to high school journalism students but also college students in a variety of speech contexts.").

203. See Ward v. Polite, 667 F.3d 727 (6th Cir. 2012). Sympathizers with the college might attempt to view Ward's case as one involving the speech her instructors anticipated her giving to a future counseling client—and indeed, had Ward actually counseled a client in an unprofessional manner, the equities would balance out quite differently. But those are not the operative facts. See id. Ward testified that, were she made aware that a student was seeking affirmation that there is nothing wrong with being homosexual, she would decline to accept that referral and assign the student to a different counselor—in other words, she would take affirmative steps to avoid giving advice inconsistent with the school's teachings. See id.

accepted role of the college as “peculiarly the ‘marketplace of ideas.’”

The Supreme Court has long displayed exceptional solicitude for the First Amendment in the college setting, suggesting that the bar will be especially high to justify the exclusion of ideas on “audience protection” grounds. For example, the Court overturned expulsion of an independent newspaper editor at the University of Missouri whose publication, *The Free Press Underground*, included strong profanity and a cartoon depicting the Statue of Liberty and Lady Justice being raped by police officers. In ordering the student reinstated, the Court held 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.’”

In settings beyond First Amendment speech, college students have been recognized as having rights greater than those recognized at the K-12 level. For instance, a college almost certainly has less latitude to compel a student to submit to an invasive bodily search than does a K-12 school. It is incongruous with the law’s otherwise consistent


206. See, e.g., Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 835 (1995) (holding that the danger “to speech from the chilling of 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”); see also Meggen Lindsay, *Tinker Goes to College: Why High School Free Speech Standards Should Not Apply to Post-Secondary Students*, 38 Wm. Mitchell L. Rev. 1470, 1483 (2012) (observing that, since *Tinker*, the Supreme Court “has never upheld a student-speech restriction at the university level” and “has not linked high school- and college-speech rights”).


208. *Id.* at 670.

209. See Carboni v. Meldrum, 949 F. Supp. 427, 434 (W.D. Va. 1996) (observing that, in the context of a strip-search of a graduate student suspected of concealing notes on her body to cheat on an exam, “[t]hough 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”) (citations omitted). See also Laura K. Schultz, *A “Disacknowledgment” of Post-Secondary Student Free Speech—Brown v. Li and the Applicability of Hazelwood v. Kuhlmeier to the Post-Secondary*
treatment of adult-aged college students—who are eligible to vote, join
the military, purchase firearms, sign contracts, incur civil and criminal
liability in adult court and otherwise bear the legal indicia of
adulthood—to regard them as “constitutional children” whose speech is
of no greater legal dignity than that of an eighth-grader.

2. Hazelwood’s “Disassociation” Rationale is Inapplicable

The Supreme Court justified its retreat from Tinker by reference
to a school’s need to distance itself from speech that is of poor quality so
as to undermine the teaching of sound research and writing skills, or that
might be mistaken for a statement of the school’s position on a political
controversy.210 When speech is made in private meetings or during one-
on-one teaching sessions, as in Ward or Heenan, neither of these
justifications plausibly applies.211 Moreover, no listener who happened
to hear Julea Ward question her school’s curriculum could conceivably
believe she was speaking as an official representative of the college or
delivering a message approved by the college.

In the broader sense, it will rarely if ever be the case that a
reasonable listener would confuse the message of an individual college
student for that of the institution.212 A school or college does not speak
through its students any more than a business “speaks” to the public.

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(finding that “the question . . . addressed in Tinker” was different than the current
question “concern[ing] educators’ authority over school-sponsored publications” and
that schools acting as publishers were able to censor speech because of its poor
quality or that was inconsistent with social values).

211. Ward v. Polite, 667 F.3d 727, 731 (6th Cir. 2012). At issue in Ward was
the plaintiff’s refusal to communicate certain beliefs, and this issue was discussed by
Ward with her faculty supervisor, rather than in a public setting. Id. See also Heenan

212. The Supreme Court made a similar observation in the context of a
student-produced newspaper at the University of Virginia containing religious-
themed content: “the government has not fostered or encouraged any mistaken
impression that the student newspapers speak for the University.” Rosenberger v.
through its customers.213 It is well established that colleges cannot be held liable for the speech of their students because they have no legal authority to dictate what they say. As a Louisiana court held in relieving a university of liability for an allegedly libelous article published in a campus newspaper:

The relationship between a university and its student newspaper is anomalous and cannot be compared with a publisher and its newspaper. The latter may exercise censorship to the fullest, as it deems commercially proper to do so, but the former is almost completely barred from censoring its student paper since that would be prior restraint and would impede the free flow and expression of ideas.214

Importing *Hazelwood* into the college setting risks muddying this sound apportionment of responsibility, which has enabled college journalism to thrive. If colleges perceive that they are no longer constitutionally estopped from overruling the judgment of student editors, at least some will be tempted to meddle in editorial judgments, perhaps invoking liability concerns as a pretext.215

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213. See, e.g., *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 433–43 (2002) (holding that school cannot be liable for violating federal privacy law based on the acts of its students, because a student—even while carrying out a teacher’s directive to grade a classmate’s paper—is not “a person acting for” the school).


215. The Court recognized this very hazard in *Rosenberger*, observing that to hold a university responsible for an Establishment Clause violation merely because it provides funding to a student newspaper that contains religious articles would invite institutions to subject students’ work to a regime of impermissible pre-publication
In other contexts, courts have had no difficulty recognizing that not all speech occurring on the grounds of a school or college is attributable to the institution, even where institutional resources are used.\textsuperscript{216} When campuses play host to student activities addressing religious themes, courts have consistently held that the mere use of college facilities and financial support does not make the institution responsible for the students' religious speech for Establishment Clause purposes.\textsuperscript{217} If it is clearly accepted that reasonable viewers understand, for example, a religious-themed play presented in a campus theater as the individual speech of the student performers, then the same should hold true when the speech occurs in the pages of a newspaper or magazine, or on a university-hosted website.

Especially where the speaker is an adult, the Hazelwood standard inverts the order of priority of interests. Rather than be concerned that a speaker’s unwelcome ideas might be mistaken by an undiscerning listener as the speech of the institution, we should worry instead that the individual will incur reputational harm when the institution places its words in his mouth (for example, by exercising its authority to rewrite a “poorly written” or “inadequately researched”\textsuperscript{218} editorial column).

3. Forum Doctrine is Neither Necessary Nor Appropriate When Claims Arise Out of Student-Professor Communications

Cases like \textit{Ward} and \textit{Heenan} force us to examine why the forum analysis exists in the first place, and whether it is helpful or necessary in

\textsuperscript{216} See, e.g., Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990) (concluding, in reliance on the distinction between tolerating speech versus affirmatively endorsing and helping disseminate it, that it was constitutional for Congress to require public schools to grant access to school facilities to student-organized religious groups on equal terms with secular organizations).

\textsuperscript{217} See, e.g., Linnemeir v. Bd. of Trs. of Purdue Univ., 260 F.3d 757, 762 (7th Cir. 2001) (citing \textit{Good News Club v. Milford Cent. Sch. Dist.}, 533 U.S. 98, 121 (2001), for the proposition that “private religious speech enunciated on government property is not automatically attributed to the government”).

the setting of a college campus. Although an analytical framework is meant to provide ease for judges and predictability for those who must live under their decisions, forum doctrine has accomplished neither objective.219 Once courts began parsing government property into absurdly molecular-level subparts—defining the forum as “the tiles on the wall” rather than “the hallway” or “the school building,” for instance220—the characterization of the forum became self-fulfilling.

Federal courts have acknowledged that forum doctrine is not a one-size-fits-all analysis robotically applied to every utterance on government property. For instance, public employee speech is subject to its own set of standards,221 analytically paralleling the Tinker approach that apportions rights based on the status of the speaker, not the property on which she speaks. Similarly, when asked to pass on the constitutionality of a federal regulatory regime forcing libraries to install content filters on public-access Internet terminals as a condition of qualifying for federal discounts on technology, the Court declined to apply forum analysis and instead analyzed the case on the basis of federal Spending Clause jurisprudence.222


221. See Garcetti v. Ceballos, 547 U.S. 410, 420–22 (2006) (setting forth distinction between protected speech made in public employee’s capacity as a citizen, versus unprotected speech that is made pursuant to official duties).

222. See United States v. Am. Library Ass’n, Inc., 539 U.S. 194, 205–09 (2003) (commenting that principles of forum doctrine “are out of place in the context of this case”). Similarly, not all college funding programs—even when conditions are attached to funding that appear to burden speech or religion—are analyzed by reference to forum status. See Locke v. Davey, 540 U.S. 712, 720 n.3 (2004) (declining to apply forum analysis in constitutional challenge to state tuition subsidy program, which withheld eligibility from those pursuing theology degrees in an effort to avoid excessive entanglement with religion, because a tuition assistance program “is not a forum for speech”).
In view of the animating principles behind the forum doctrine, it is questionable whether speech by a college student ever belongs in that structure. But it is beyond serious doubt that fact situations like those in Ward and Heenan do not. In Perry Education Association, the Supreme Court explained that the purpose underlying forum classification was to enable the government to regulate access to public property so as to preserve its character and intended use. A student's conversation with her instructor occupies no public space, creates no risk of audience confusion, and presents no inconsistency with the intended character and use of a college campus.

Neither Ward nor Heenan used a government-provided means of communication as the conduit for expression. Although it appears clear that in no instance did the disputed speech occur in a classroom setting in front of an audience of student listeners, in neither case did the courts afford any recognition to where the student-teacher conversations took place. Location, in other words, is conclusive—except when it is insignificant. The sloppy doctrinal shortcut undergirding these rulings is that speech about curriculum equates to curricular speech. If that understanding of Hazelwood takes hold, then dissenters who question their schools' academic offerings—or who seek to blow the whistle on institutional wrongdoing—will be at risk of legalized reprisal.

223. See Tanner, supra note 205, at 435 ("Overall, the inability of forum analysis to protect the university's regulatory authority or students' expressive rights makes its application entirely unacceptable in the university context because it undermines the university's educational mission.").


225. See supra notes 49–57 and accompanying text.

226. See generally Ward, 667 F.3d 727. Rather than active speech through a government-provided means of communication, the issue was Ward's refusal to engage in speech with which she disagreed on religious grounds. See id. See also Heenan, 761 F. Supp. 2d 1318.


228. The Heenan court, belatedly, acknowledged that speech to outside third parties (such as social friends) about the curriculum could not be classified as Hazelwood speech. Heenan, 761 F. Supp. 2d at 1321. But the court gave no indication that a student could safely complain internally up the chain of command confident in the knowledge that her complaints were constitutionally protected, and to the contrary, strongly indicated that being a complainer was itself a legitimate justification for punishment regardless of the merits of the complaints. Id.
Implicitly underlying the application of forum doctrine is the understanding that the choice to use a governmental channel of communication is just that—a choice—and that alternative means of reaching the desired audience exist. But in cases such as Ward, courts plainly are permitting the content-based regulation of speech regardless of the medium used. There is no suggestion in the district or circuit court opinions that, had Ward conveyed her dissent from university policy by spending her personal money to purchase an advertisement in the Detroit Free Press rather than by speaking with her instructor in a private conversation, her First Amendment claims would have been analyzed any differently. (The Ward court notably did not, even while adopting Hazelwood, use the word “forum” or attempt to define what forum Ward was using.) If the “forum” is defined by anything that the disciplinarian decides is relevant to the course, then the “forum” is a little dark constitutional cloud that hovers over the student’s head following her everywhere she goes, whether on government property or private.

Forum doctrine is about control of government property that speakers seek to use for communicative purposes. It is not a floating infirmity on the content of speech. If the regulation is understood as, “do

speech cases employing Hazelwood to find that dissent from college curriculum is unprotected speech are unsettlingly reminiscent of the developing body of public employee law, under which employee complaints about their own working conditions similarly are held to be unprotected.

229. See Christian Legal Soc’y of the Univ. of Calif. Hastings Coll. of the Law v. Martinez, 561 U.S. ___, ___, 130 S. Ct. 2971, 2991 (2010) (noting that law-student group denied access to bulletin boards, email system and other official communication channels had alternative non-school-funded methods of communicating its message to its intended recipients, and observing that “when access barriers are viewpoint neutral, our decisions have counted it significant that other available avenues for the group to exercise its First Amendment rights lessen the burden created by those barriers”).

230. See Peter C. Buck, A Better Bargain in Filene’s Basement: A Response to Professor Abel, 84 N.C. L. Rev. 1501, 1502 n.4 (2006) (describing the iconic cartoon character from Al Capp’s “Li’l Abner” comic strip, Joe Btfsplk, “the forlorn character who jinxed all around him and whose every move was shadowed by a dark cloud immediately over his head”).

231. See, e.g., Gay Guardian Newspaper v. Ohoopee Reg’l Library Sys., 235 F. Supp. 2d 1362, 1367 (S.D. Ga. 2002) (discussing the three types of forums as government property and the various restrictions which can be placed on expression within each of them).
not say anything, anywhere, that indicates resistance to the department's policies," that no longer is "forum" speech to be analyzed under the 
Perry Education Association-Hazelwood line of cases. Rather, it is a 
content-based restriction on speech that, like any in the real world, is 
impermissible unless strict scrutiny is satisfied.

Forum doctrine has never been a comfortable fit in the 
educational setting. Although Tinker predated Perry Education 
Association's formalization of the public forum framework, the concept 
existed in Supreme Court jurisprudence at least as early as 1939. Yet 
nothing in Tinker even hinted that the right to wear an anti-war armband 
might vary within subunits of the building.

Schools are qualitatively unlike other property to which courts 
have applied forum analysis. Communication is incidental to the 
function of a railroad car or a bus shelter. Communication is central to 
the function of a school. A transit system can eliminate all expression 
from the outside of city buses; a school cannot eliminate all expression 
from the classroom and hallways, a point Justice Fortas ably articulated in 
Tinker: "[P]ersonal intercommunication among the students . . . is not 
only an inevitable part of the process of attending school; it is also an 
important part of the educational process."

Although Hazelwood itself implicitly recognized that a student 
newspaper could qualify for heightened First Amendment protection if 
operated as a public forum, this theoretical protection may be largely illusory. Since a newspaper is not a traditional public forum, it can be a 
designated public forum only by express dedication by the government

232. See supra notes 42-43 and accompanying text.
(nowhere discussing that the wearing of black armbands in protest of the Vietnam 
conflict was subject to different levels of constitutional protection in different parts 
of the school).
(holding that city was not obligated to accept legislative candidate's political ads on 
cards posted inside transit cards, because cards, which were reserved only for 
commercial advertising, were not a public forum).
235. Tinker, 393 U.S. at 512.
(recognizing that it would be possible to operate a school newspaper as a designated 
public forum by opening its pages to indiscriminate use "by its student reporters and 
editors, or by the student body generally").
or by an unbroken history of being held open for "indiscriminate" expressive use. Rarely, if ever, will the facts unequivocally establish a student newspaper's forum status. The more likely scenario will be, as with the Hazelwood East High School Spectrum, that factors point in varying directions: a board dominated by college employees, or by a faculty adviser, will have a degree of hiring and budgeting authority, and a substantial percentage of funding will flow from the college. Absent an express dedication and with any structural ambiguities, courts will hesitate (as in Hazelwood itself) to declare that a forum has been created. To the extent that forum status requires proof of "indiscriminate" public access, no newspaper functions in this manner and indeed none could. Members of the general public—or even of the student body as a whole—do not have any particular claim of entitlement to use the space. What is left, then, is the prospect of "limited" public forum status, with, based on the Supreme Court's recent iterations, no greater First Amendment status than a nonpublic forum.

In a recent case involving censorship of high school journalists, the Second Circuit decided that, even though the student newspaper at New York's Ithaca High School bore the outward indicia of forum status, it was merely a "limited" public forum—and, as such, its content could be limited to the topics that school administrators deem suitable for the audience. If government officials can redefine the permissible subject matter on an ad hoc basis, status as a limited public forum is effectively meaningless.

The Supreme Court has never addressed the circumstances under which a designated public forum can be abolished. There is little history of federal courts searching behind the purported justification when an agency closes a forum. Absent any meaningful check, forum

237. See id. One example of a school creating a designated public forum open to indiscriminate use would be the "free expression" boards many schools or universities have to allow students to express their opinions.


239. The Supreme Court has said repeatedly that, having created a forum, a government agency is not obligated to maintain it as a forum indefinitely. See, e.g., Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985). For an illustration, see the district court's decision in Gay Guardian Newspaper v. Ohooppe Regional Library System, 235 F. Supp. 2d 1362, 1373–79 (S.D. Ga. 2002). There, a public library removed a table formerly accessible to the public for
designation is easily abused as a tool of retaliation. The motive to retaliate is significantly heightened in an institutional setting, since the governing authority itself will so often be the target of the speaker’s uncomfortably candid, critical, or inquisitive speech. Because courts have allowed government agencies to freely narrow the permissible uses of designated public forums, or even to abolish them entirely, forum doctrine is insufficiently protective of student speakers who—unlike those seeking to use off-campus public forums—do not have reasonable alternative means of communication to make themselves heard.

4. *Hazelwood* Allows Government Entities to Refuse to Disseminate Speech, Not to Punish It

Even if there were instances in which *Hazelwood* made sense at the college level, in no event should *Hazelwood* ever apply in the disciplinary setting. *Hazelwood* is about the ability of a school to withhold its name and financial support from speech, not about the ability to suspend or expel a student for having spoken. The *Hazelwood* Court expressly struck this distinction in differentiating between speech that schools must tolerate versus speech that schools can be forced to promote: “[T]he standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.”

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242. *Id.* at 272–73.
The *Tinker* standard is capable of being articulated as a prohibition carrying punishment: "Do not engage in speech that substantially disrupts the operations of school."\(^{243}\) The *Hazelwood* standard is not. A disciplinary rule that codified *Hazelwood*—"do not engage in speech that the school has a legitimate pedagogical reason to punish"—undoubtedly would be struck down as unconstitutional, both because it is so vague as to give unbridled discretion to disciplinary authorities and because it fails to give those regulated fair notice of the scope of conduct that is prohibited.\(^{244}\)

Nor are the examples of "legitimate pedagogical justifications" set forth in *Hazelwood* consistent with the imposition of discipline. *Hazelwood* lets schools distance themselves from speech that is "inadequately researched," "poorly written," or "ungrammatical."\(^{245}\) But no school would purport to make bad grammar or substandard writing a basis for suspension or expulsion. The need for a school or college to teach optimal practices in no way implies the ability to punish those whose performance falls short of ideal.

Besides being vague and open-ended, *Hazelwood* simply is not sufficiently protective when discipline is at issue. Giving the chair of an academic department the ability to punitively kick a student out of college for any "legitimate pedagogical basis" almost assures that no expulsion can be successfully challenged, since a professor's subjective belief that a student is a poor performer will almost by definition be regarded as a legitimate pedagogical justification.

*Hazelwood* involved speech through a vehicle (a school-funded newspaper) over which the government had complete control; when the principal gave the order to yank a page, the page was not printed. When

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243. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) ("[C]onduct by the student . . . [which] disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech.").

244. A law or regulation that restricts speech based on content ""is void for vagueness if its prohibitions are not clearly defined."" Piscottano v. Murphy, 511 F.3d 247, 280 (2d Cir. 2007) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)). Vague regulations that fail to give those regulated "fair warning" of the scope of the conduct that is prohibited have been struck down both on First Amendment and due process grounds. See Grayned, 408 U.S. at 108–09.

the government controls the on and off switch, there is no need to contemplate punishment, since the speech never reaches the audience and the anticipated negative reaction never occurs. *Hazelwood* is consequently of no relevance when government seeks to punish, rather than prevent, unwelcome speech. Because *Hazelwood* did not disturb *Tinker* as to the imposition of discipline, then, suspension or expulsion for the content of speech is legitimate only if "substantial disruption" occurs or is imminent.

IV. COMPELLING PRACTICAL AND PUBLIC-POLICY CONSIDERATIONS DEMAND A STANDARD MORE PROTECTIVE THAN *HAZELWOOD*

If none of the legal imperatives animating *Hazelwood* apply to disciplinary action against college students—that is, there is neither an impressionable audience nor a likelihood of audience confusion requiring disassociation—then it is proper to ask why *Hazelwood* is even in the conversation at all. When a rule of deference to a school’s management of a forum becomes a rule of deference to a school’s management *without* the forum, it becomes apparent that deference for deference’s sake is the objective. The question thus becomes, apart from the plainly inapplicable justifications from *Hazelwood* and *Perry Education Association* themselves, what other objectives might justify such extreme deference, and at what cost?

A. *Student Users of the "Forum" Cannot be Singled Out for Uniquely Disfavored Treatment*

Although courts have applied the *Hazelwood* standard to the in-class speech of K-12 teachers,246 college-level instructors possess a relatively high degree of free speech protection. The doctrine of academic freedom, while not defined with optimal judicial clarity, insulates professors against administrative second-guessing of

It would be incongruous to give professors (whose speech is arguably attributable to the government) more autonomy from the college administrators they work for than their non-employee students have. If words are unsuitable for a college audience and might be mistaken for the institution’s speech when uttered by a student, then they are doubly so when uttered by an adult authority figure.

B. Constitutional Malpractice: Hazelwood Places a Ceiling on the Evolution of “Teaching Hospital” Journalism on Campus

There is significant societal interest in access to the uncensored speech of college students. Colleges provide the entire community with cultural opportunities to hear new and experimental plays and musical performances, and to view avant-garde works of art. Colleges cannot effectively fulfill this function if every performance and exhibit is subject to being shut down because the college wishes to maintain neutrality and avoid association with controversy.

Colleges are also increasingly the primary providers of news coverage for their communities. Tens of thousands of professional newsroom jobs have been eliminated since the beginning of a sustained economic downturn in 2008. Coverage of education issues has

247. See Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) (expressing special solicitude for a college’s faculty hiring and firing decisions, grounded in the judiciary’s “reluctance to trench on the prerogatives of state and local educational institutions and [its] responsibility to safeguard their academic freedom, ‘a special concern of the First Amendment’”) (quoting Keyishian v. Bd. of Regents, 385 U. S. 589, 603 (1967))). In Ewing, the Court applied an exceedingly deferential review to a fired medical-school resident’s due process claim against his former institution, finding it was the plaintiff’s burden to demonstrate “such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment.” Id. at 227.

248. See Seth Zweifler, A New Direction: J-labs Turn Classrooms into Newsrooms, STUDENT PRESS LAW CTR. REPORT, Fall 2012, at 26 (describing how universities in North Carolina, Maryland, and elsewhere are establishing student-staffed news bureaus that supply content to professional media organizations or publish on their own college-hosted websites).

249. See Robert Hodierne, Is There Life After Newspapers? Thousands Upon Thousands of Newspaper Journalists have Lost Their Jobs in Recent Years in Endless Rounds of Layoffs, AM. JOURNALISM REV., Feb./Mar. 2009, at 20; Christine
suffered disproportionately from this downsizing. A December 2009 study by the Brookings Institution found that education coverage accounted for only 1.4% of all the time and space devoted to news by leading print, broadcast, and online media outlets—much of it event-driven, such as coverage of crimes or disease outbreaks at schools, and very little of it discussing larger issues of public consequence.250

In light of the retrenchment of professional news organizations, leading authorities have called on collegiate journalism schools to assume responsibility for meeting the information needs of the local community. In an October 2011 report, the New America Foundation challenged college journalism schools to emulate the model of teaching hospitals that serve as primary caregivers to underserved communities, rededicating themselves to creating local news coverage rather than just teaching about it.251 That challenge was echoed in an August 2012 open letter from five of the largest philanthropic funders of journalism, who urged the nation’s college and university presidents to transform journalism schools into “forceful partners in revitalizing an industry at the very core of democracy.”252

College journalists will understandably hesitate to pursue news stories reflecting discredit on their institutions if their work product may be punished, as in Ward and Heenan, with removal from school if it is deemed inconsistent with the school’s educational mission.253 Federal

Haughney, The Undoing of the Daily, N.Y. TIMES, June 4, 2012, at B1 (describing how major daily newspapers including those in Detroit and New Orleans have abandoned seven-day-per-week print publication in light of dwindling revenues).


253. Attempts by colleges to censor the content of student publications are surprisingly commonplace, and college students repeatedly have sought refuge in the First Amendment—with great success, the Seventh Circuit’s Hosty decision
courts have long recognized that the prospect of content-based punishment can impose an impermissible "chilling effect," leading speakers to muzzle themselves, particularly if the trigger point for incurring sanctions is indistinct.254

If student-produced journalism is subject to sanction up to and including expulsion from school, the intimidation will impose a chill, depriving the public of candid news coverage. The Hazelwood standard—which permits censorship for reasons that include "associating the school with any position other than neutrality on matters of political controversy"255—is flatly incompatible with journalism, and doubly so with journalism that is expected to meet the standards of, if not to supplant, the work of experienced professionals.

C. The Ward Conception of Hazelwood Risks Leaping the "Schoolhouse Gate" into Cyberspace

One of the most difficult constitutional issues perplexing courts and legal scholars is the status of speech that students create off campus notwithstanding. See, e.g., Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973) (finding that North Carolina Central University violated student editors' First Amendment rights by withdrawing funding from newspaper in response to editorial opposing integration of historically black college); Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973) (declaring that officials at the University of Mississippi could not prohibit publication in the student literary magazine of articles containing "earthy language" and a depiction of an interracial love affair); Thonen v. Jenkins, 491 F.2d 722 (4th Cir. 1973) (ordering East Carolina University to rescind disciplinary sanctions against student journalists who published letter calling university president a "four-letter vulgarity"); Korn v. Elkins, 317 F. Supp. 138 (D. Md. 1970) (finding that University of Maryland could not restrain printing and distribution of a student magazine carrying a photo of a burning American flag).

254. See, e.g., Morrison v. Bd. of Educ. of Boyd Cnty., 521 F.3d 602, 616 n.7 (6th Cir. 2008) ("[A] statute may be void for vagueness if it would deter would-be speakers from speaking because they cannot tell whether their intended speech falls within the statute's prohibitions."); Reno v. ACLU, 521 U.S. 844, 871–72 (1997)); Moore v. City of Kilgore, 877 F.2d 364, 387 (5th Cir. 1989) ("To bypass a prior restraint requires tremendous verve from the speaker; foolhardiness is another way of stating the same thing, for the speaker must risk receiving a sanction not for the speech expressed but for ignoring the screening procedure. Verve is not, however, a constitutional requirement.").

on their personal time and distribute online. The recent drift of court rulings—almost all, so far, in the K-12 setting—has been to equate off-campus speech with on-campus speech, either because the speech itself is viewable at school or because off-campus viewers might react to it at school.\(^{256}\) Once the distinction between off- and on-campus speech has been erased, and with \textit{Hazelwood} unhitched to the use of a government-provided means of communication, there is a genuine risk that the First Amendment protection of all speech by students at all times will lose meaningful constitutional protection.

This is not idle speculation. In a disciplinary case against a thirty-one-year-old college student punished for speech on her personal Facebook page, counsel for the University of Minnesota attempted to convince the Minnesota Supreme Court to apply the \textit{Hazelwood} standard to speech on a social networking page on the grounds that the speech contravened the University’s interest in training students to observe professional standards.\(^{257}\) Although the court declined to go that far and decided the case in the University’s favor on narrower grounds,\(^{258}\) the fact that the argument was seriously advanced portends the risk that \textit{Hazelwood}—a case about the use of a school-funded newspaper to reach an audience of children—might one day follow adult-aged college students into their living rooms.

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\(^{256}\) For a comprehensive survey of the evolving judicial views of students’ off-campus online speech, see Clay Calvert, \textit{Punishing Public School Students for Bashing Principals, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve,} \textit{7 FIRST AMEND. L. REV.} 210 (2009). See also James M. Patrick, \textit{The Civility Police: The Rising Need to Balance Students’ Rights to Off-Campus Internet Speech Against the School’s Compelling Interests,} \textit{79 U. CIN. L. REV.} 855 (2010) (surveying law regarding school authority over off-campus speech and proposing a “compelling interest” standard that would require a heightened showing beyond \textit{Tinker} before schools could punish purely off-campus expression).


\(^{258}\) Tatro v. Univ. of Minn., \textit{816 N.W.2d} 509, 518-24 (Minn. 2012).
V. COLLEGES CAN AMPLY FULFILL THEIR EDUCATIONAL MISSIONS WITHOUT RESORTING TO HAZELWOOD

Because the listening audience on a college campus is capable of handling mature subject matter and is not physically constrained to endure unwelcome speech, colleges have no need for the Hazelwood level of control over what their students say and write. 259 First Amendment doctrine recognizes ample authority for colleges to maintain order, prevent disturbances, and respond to threats or harassment. Anything less—speech that merely offends, makes listeners angry or uncomfortable, or represents a brief distraction or detour from coursework—is to not merely be tolerated but, on a college campus, welcomed as a contribution to the truth-seeking clash of ideas. 260

First, it is the majority view that speech may be punished if it imminently threatens a substantial disruption. This authority satisfies the need to maintain order and to punish the student who, for instance, launches a profane tirade against the instructor during class.

Second, content-neutral time, place, and manner restrictions can be enforced, so as to channel out-of-place speech (e.g. prohibition on leafleting during a midterm exam) into reasonable alternative settings. 261

Third, under limited circumstances it may make sense to view certain student-college interactions, such as those in postsecondary professional programs, as governed by contract theory (provided that

260. Beckerman v. Tupelo, 664 F.2d 502, 510 (5th Cir. 1981) ("The existence of a hostile audience, standing alone, has never been sufficient to sustain a denial of or punishment for the exercise of First Amendment rights.").
261. An illustration of the adequacy of pre-Hazelwood First Amendment doctrine to address free-speech claims on college campuses can be found in the district court's analysis in Smith v. Tarrant County College District, 694 F. Supp. 2d 610 (N.D. Tex. 2010), a case involving two college students' challenge to regulations that denied them the right to wear empty gun holsters as a form of silent political protest against the banning of concealed firearms on campus. Without reliance on Hazelwood, the district court assigned varying levels of constitutional scrutiny to the prohibition based on the location where the students sought to wear their holsters: In the classroom (reviewed as a reasonable time, place and manner restriction), and in public outdoor areas of the campus (reviewed under strict scrutiny). See generally id. Although aspects of the court's analysis are problematic, the point is that Hazelwood is a solution in search of a problem, a doctrine that adds nothing of value to the coherent resolution of First Amendment claims.
adequate contract-formation formalities are observed). Thus, a law student who enters into a clinical program that entails access to client confidences may be sanctioned for breaching a confidentiality agreement entered into as a precondition of participation.

Fourth, a student may always be downgraded through the academic process for failure to complete an assignment or a refusal to follow instructions. Thus, the student who submits an essay about global warming when assigned to write a book review of *Don Quixote* can be assigned a grade fairly reflecting his noncompliance. Given these sounder and more age-appropriate methods of analyzing First Amendment claims at the college level, the set of circumstances to which *Hazelwood* should properly apply on a college campus may well be an empty set.

With some justification, courts are hesitant to assume the role of "grading appeals board," sitting in judgment over whether a book report is an "A" or a "B" effort.²⁶² But even in the academic context, no one would seriously dispute that an undeserved grade could be actionable if a blatantly unlawful cause-and-effect (e.g., "Have sex with me or I'm changing this 'A' to a 'C'") were demonstrated. If *Hazelwood*'s expansion is motivated by solicitude for the management of scarce resources, both of the judiciary and of beleaguered institutions on the receiving end of raise-my-grade lawsuits, narrower remedies might be enacted, such as a heightened pleading standard that requires direct rather than circumstantial evidence of an invidious motivation to survive a motion to dismiss.

²⁶² See, e.g., Owens v. Parrinello, 365 F. Supp. 2d 353, 360 (W.D.N.Y. 2005) (applying deferential rational-basis review to community college's decision not to award certificate to student plaintiff: "Courts . . . should avoid interfering with or second-guessing a college's academic decisions."); Hammond v. Auburn Univ., 669 F. Supp. 1555, 1560–61 (M.D. Ala. 1987) ("The federal courts have adopted a very limited role in the review of challenges to academic decisions. . . . [T]he widest possible range of discretion must be afforded university faculties in their evaluation of a student's academic performance and eligibility to promotion or graduation."). See also Husain v. Springer, 494 F.3d 108, 136 (2d Cir. 2007) (Jacobs, J., concurring in part and dissenting in part) (dismissively referring to a dispute over the cancellation of a college student government election as "a case about nothing" and lamenting that a ruling in favor of the student plaintiffs "will impose on a busy judge to conduct a trial on this silly thing, and require a panel of jurors to set aside their more important duties of family and business in order to decide it").
VI. Conclusion

Doctrinally, the distinction between "Tinker speech" and "Hazelwood speech" could hardly be clearer: Tinker is about speech that the government is asked to tolerate, and Hazelwood is about speech that the government is asked to affirmatively promote. Courts that rely on Hazelwood to ratify the punishment of college students who question institutional policies are obliterating this distinction. While there is every reason to believe that the Supreme Court would ultimately vindicate the right of a college student to engage in editorial commentary about academic issues or to speak out publicly against campus wrongdoing, the cloud of uncertainty should be removed, because uncertainty breeds self-censorship.

Just as in the case of public employee speech, student speech is appropriately recognized as belonging to a category that is sui generis. The question of whether a teacher union may use school mailboxes is in no way analogous to the question of whether a student may be kicked out of college for criticizing the instructor's grading methods, and it serves no purpose—other than the expedited judicial dispatch of cases that rightfully should be difficult—to cram the latter into a framework designed for the former. The relationship between college student and college arguably is closer to that of citizen and city rather than that of high schooler and school. A student who is expelled from high school is legally entitled to an alternative placement that ensures a minimally adequate education. A student who is expelled from college is not. Upon expulsion, a student may lose not merely her chance at higher education but also her job and her home. Expulsion is less like being removed from high school and more like being banished from one's hometown. Against those stakes, the possibility of vindication in a Supreme Court proceeding five years down the road is minimally reassuring.

263. See Bruce C. Hafen & Jonathan O. Hafen, The Hazelwood Progeny: Autonomy and Student Expression in the 1990s, 69 ST. JOHN'S L. REV. 379, 397 (1995) (noting "Hazelwood's distinction between toleration and promotion" and explaining "while schools have a responsibility to tolerate certain types of speech, they need not lend the school's name or facilities to promote that expression").
Much is made of Tinker's admonition that First Amendment rights are to be considered in light of "the special characteristics of the school environment," and courts tend to lean on that passage to justify affording heightened deference to the decisions of school disciplinarians. But it is also a "special characteristic" of the school environment that affronts to the Constitution often go unnoted by the public and unreported by the victim because of the intimidating power differential inherent in the student-institution relationship. And it is also a "special characteristic" of the school environment that violations of students' First Amendment rights habitually go unpunished. This occurs because graduation moots eligibility for injunctive relief and qualified immunity forecloses money damages except in the most blatant cases of intentional wrongdoing. Nothing about the school environment changes, or should change, the bedrock First Amendment understanding that, as between the speaker and the government, close judgment calls must necessarily cut in the speaker's favor so that free expression enjoys the "breathing space" it requires.

265. See, e.g., Cuff ex rel. B.C. v. Valley Cent. Sch. Dist., 677 F.3d 109, 111-18 (2d Cir. 2012) (quoting the "special characteristics" passage from Tinker and finding that an elementary school acted lawfully in suspending a ten-year-old who, as part of a class assignment, drew a crayon picture of an astronaut in which the cartoon character expressed a wish to "blow up the school with the teachers in it"); Tatro v. Univ. of Minn., 816 N.W.2d 509, 520-21 (Minn. 2012) (quoting that passage from Tinker repeatedly and purporting to recognize a new First Amendment exception allowing public universities to punish speech that "violates established professional conduct standards").
266. See, e.g., Lane v. Simon, 495 F.3d 1182, 1187 (10th Cir. 2007) (dismissing college editors' claims for injunctive relief arising out of the retaliatory discharge of their journalism adviser, where the students had graduated while the case was on appeal, thus mooting their case as they could no longer benefit from an injunction restoring the adviser to his former role). See also Moore v. Watson, 838 F. Supp. 2d 735 (N.D. Ill. 2012) (finding that, although student editor's First Amendment rights were violated when college fired him in retaliation for articles questioning school spending, no remedy was available because student had left school and was ineligible to reenroll).
267. See NAACP v. Button, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").
The instinct to defer to an instructor when speech concerns the content of curriculum is perhaps understandable. Courts hesitate to intercede partly out of respect for academic freedom and for the subjective professional judgments inherent in the student-professor relationship. But courts also at times appear to hesitate because they regard matters of daily school governance (e.g., who gets to play basketball or participate in cheerleading, who wins a student council election, who gets an “A” on a term paper) as too immaterial to “make a federal case out of them.”

That the stakes may appear penny-ante to adult eyes does not mean that no redressable constitutional injury occurred. Federal judges did not tell Paul Cohen he was wasting their time with his refusal to turn his jacket inside-out, and they should not tell Judith Heenan that her derailed aspirations for a nursing career are an unworthy use of judicial resources.

Although Hazelwood did not deprive students of all First Amendment protection—the burden remains on the government to come forward with a justification “reasonably related to legitimate pedagogical

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268. See, e.g., Heenan v. Rhodes, 761 F. Supp. 2d 1318, 1322 (M.D. Ala. 2011) (justifying dismissal of graduate student’s claim that she was assigned unfair disciplinary demerits for speaking out against school policies: “To hold otherwise would mean that any public university or school student, armed with only with a personal affidavit challenging her grades, could obtain court review of those grades, with the result that, across the country, courts would then be, impermissibly, in the business of routinely reviewing school grades.”).

269. The First Amendment recognizes that an act of government retaliation can inflict a cognizable injury even if the speaker is not deprived of a constitutionally guaranteed right or benefit, so long as the retaliation is sufficiently severe as to deter a person of reasonable fortitude from future acts of legally protected speech. See, e.g., T.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767, 780 (N.D. Ind. 2011) (holding that school’s deprivation of participation in extracurricular activities, when motivated by a student’s bawdy video posted on an off-campus website, could support a First Amendment claim even though there was no entitlement to membership on an athletic team: “[A] student cannot be punished with a ban from extracurricular activities for non-disruptive speech.”).

270. Cohen v. California, 403 U.S. 15 (1971). As the Court observed there: “This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.” Id. at 15.

THE KEY WORD IS STUDENT

concerns"—in practice, the Hazelwood standard has become a virtual rubber stamp for whatever excuse for censorship a school can muster. Even if that allocation of authority strikes the right balance for speech directed to a captive audience of teenagers, blind deference to government decision-makers is philosophically irreconcilable with the nourishment of inquisitive minds on a college campus.

The Ward court fundamentally misconceived the rationale for the Hazelwood standard and, in so doing, introduced the doctrine into a setting where it serves none of Hazelwood's purposes and upsets the carefully calibrated balance that for decades has protected individual liberty on campus. The operative word in Hazelwood is not, as Ward asserted, "student." The operative word is "forum." Divorced from its intended context—preventing the misuse of government resources to convey speech educationally unsuited to its listeners—Hazelwood risks creating a constitutional underclass of citizens, even accomplished fifty-year-old professionals, who cannot safely question their government.


273. Whether Hazelwood is a more or less rigorous standard than a plain-vanilla "rational basis" standard that would normally apply in a nonpublic forum is a subject of significant disagreement. The Hazelwood Court's reference to "legitimate pedagogical concerns" has persuaded some commentators that Hazelwood contemplates a narrower range of deference, because not every rational reason for censorship will be related to pedagogical concerns. For instance, preserving a favorable image of the school so as to maintain public support is "rational" in the sense that it is empirically logical, but it would not be a legitimate pedagogical justification for censorship, because training students to publish misleadingly positive information is without educational value. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988); see also Dean v. Utica, 345 F. Supp. 2d 799 (E.D. Mich. 2004) (concluding that a principal's desire to suppress truthful factual information about a lawsuit against the high school was not a legitimate pedagogical basis for censorship satisfying Hazelwood). Other commentators, however, are convinced that Hazelwood is a less demanding standard than rational-basis scrutiny because of the emphasis on the unique qualities of the school environment. See Tanner, supra note 205, at 431 (describing Hazelwood as a "highly deferential" standard that amounts to "a rational basis standard of review specially adapted to the educational context").


275. Id.