

DEMOTED TO HIGH SCHOOL: ARE COLLEGE STUDENTS' FREE SPEECH RIGHTS THE SAME AS THOSE OF HIGH SCHOOL STUDENTS?

Abstract: The First Amendment guarantees significant rights to free speech and expression for students of all ages. These rights have been limited, however, by the U.S. Supreme Court's 1988 decision in *Hazelwood School District v. Kuhlmeier* that school officials can regulate the style and content of school-sponsored student speech in ways that are "reasonably related to legitimate pedagogical concerns." Since then, lower courts have relied on *Hazelwood* to uphold censorship of student speech in elementary and secondary school, including restrictions based on the speaker's viewpoint. Recent cases have extended this analysis to the university context by upholding acts of censorship under *Hazelwood's* reasonableness standard. This Note argues that university officials should not be given the same level of deference as secondary school officials when regulating student speech. The "material and substantial disruption" test currently provides the most appropriate framework for balancing the competing interests in favor of protecting university students' speech rights.

INTRODUCTION

Traditionally, students of all ages have enjoyed significant speech rights under the First Amendment, allowing them to express their views freely.¹ In 1969, the U.S. Supreme Court said, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."² Despite these guarantees, the Court significantly limited high school students' speech rights two decades later.³ In 1988, in *Hazelwood School District v. Kuhlmeier*, the Court held that high school faculty could restrict the style and content of "school-sponsored" student speech, as long as the regulations were "reasonably related to legitimate pedagogical con-

¹ U.S. CONST. amend. I; see, e.g., *Healy v. James*, 408 U.S. 169, 180 (1972); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

² *Tinker*, 393 U.S. at 506.

³ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

cerns."⁴ The Court gave substantial deference to school officials' decisions regarding the content of school-sponsored speech because the school could be viewed as endorsing this type of speech.⁵ Since then, federal courts have relied on *Hazelwood* to uphold acts of censorship at the elementary and secondary school levels.⁶ Courts have disagreed, however, on the appropriate standard for reviewing alleged violations of university students' free speech rights.⁷

In 2002, in *Brown v. Li*, a divided panel of the U.S. Court of Appeals for the Ninth Circuit held that a university committee could withhold approval of a graduate student's thesis because of objectionable content without violating his First Amendment rights.⁸ The court focused on whether the thesis committee's actions constituted impermissible acts of censorship when it refused to approve the content of the thesis's "Acknowledgments" section.⁹ This section of Christopher Brown's thesis, entitled "Disacknowledgements," criticized the school's administration.¹⁰ The Ninth Circuit judges disagreed over the applicable standard for reviewing the committee's decision.¹¹ Only one of the three judges adopted *Hazelwood*'s framework for analyzing the case,¹² whereas another judge criticized this approach.¹³

The U.S. Supreme Court had refrained from deciding in *Hazelwood* whether courts should give university officials the same degree of deference as high school principals.¹⁴ Nevertheless, Judge Susan Graber, the author of the *Brown* decision, relied on *Hazelwood*'s reasonableness test because the judges could not identify a more appropriate standard for reviewing the thesis committee's decision.¹⁵ Before *Brown*, only one other federal appellate court had applied the deferential *Hazelwood* standard to uphold a university official's act of cen-

⁴ *Id.*

⁵ *See id.* at 271.

⁶ *See, e.g.,* Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 929, 934 (10th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003) (mem.); Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817, 828 (9th Cir. 1991) (en banc).

⁷ Compare *Brown v. Li*, 308 F.3d 939, 949 (9th Cir. 2002) (applying *Hazelwood*'s reasonableness test), *cert. denied*, 123 S. Ct. 1488 (2003) (mem.), with *Kincaid v. Gibson*, 236 F.3d 342, 354 (6th Cir. 2001) (en banc) (*Kincaid II*) (applying strict scrutiny).

⁸ 308 F.3d at 952.

⁹ *Id.* at 947.

¹⁰ *Id.* at 943.

¹¹ *Id.* at 963 (Reinhardt, J., concurring in part and dissenting in part).

¹² *Id.* at 949 (Graber, J.).

¹³ *Brown*, 308 F.3d at 963 (Reinhardt, J., concurring in part and dissenting in part).

¹⁴ 484 U.S. at 273 n.7.

¹⁵ *See Brown*, 308 F.3d at 947.

sorship.¹⁶ In 1999, in *Kincaid v. Gibson* ("Kincaid I"), a panel of the U.S. Court of Appeals for the Sixth Circuit held that the university yearbook was a school-sponsored expressive activity and university officials could regulate its content in any reasonable manner.¹⁷ The en banc court subsequently reversed this decision on the basis that the university's actions should be reviewed with greater scrutiny than *Hazelwood*'s reasonableness test.¹⁸ The circuit court decisions in *Brown* and *Kincaid I* raise the issue of what standard a court should apply when reviewing censorship in the university context.¹⁹

This Note examines the standards that courts employ to determine students' First Amendment rights at the secondary and post-secondary educational levels.²⁰ Although other commentators have argued against the application of *Hazelwood* to the university context, this Note extends their analyses by exploring several alternative standards to guide future courts' decisions.²¹ Part I outlines students' First Amendment rights prior to the *Hazelwood* decision.²² Part II discusses the *Hazelwood* opinion and its impact on students' rights to free speech in elementary and secondary schools.²³ Part III reviews the application of the *Hazelwood* standard to students' First Amendment rights in the public university setting.²⁴ Part IV argues that, because high school and college learning environments differ significantly, *Hazelwood*'s reasonableness test does not give sufficient consideration to college and university students' speech rights.²⁵ Finally, Part V presents several alternative approaches to resolving these cases and recommends that future courts balance the relevant interests in favor of preserving students' free speech rights.²⁶

¹⁶ *Kincaid v. Gibson*, 191 F.3d 719, 726 (6th Cir. 1999) (*Kincaid I*), *reh'g en banc granted and vacated* by 197 F.3d 828 (6th Cir. 1999), *rev'd and remanded en banc*, *Kincaid II*, 236 F.3d 342.

¹⁷ 191 F.3d at 728.

¹⁸ See *Kincaid II*, 236 F.3d at 346.

¹⁹ See *Brown*, 308 F.3d at 947; *Kincaid II*, 236 F.3d at 346.

²⁰ See *infra* notes 27-200 and accompanying text.

²¹ See George C. Lisby, *Resolving the Hazelwood Conundrum: The First Amendment Rights of College Students in Kincaid v. Gibson and Beyond*, 7 COMM. L. & POL'Y 129, 155-56 (2002); Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the "College Hazelwood" Case*, 68 TENN. L. REV. 481, 533 (2001); Mark J. Fiore, Comment, *Trampling the "Marketplace of Ideas": The Case Against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915, 1948 (2002).

²² See *infra* notes 27-50 and accompanying text.

²³ See *infra* notes 51-110 and accompanying text.

²⁴ See *infra* notes 111-200 and accompanying text.

²⁵ See *infra* notes 201-233 and accompanying text.

²⁶ See *infra* notes 234-289 and accompanying text.

I. STUDENTS' FIRST AMENDMENT RIGHTS PRIOR TO *HAZELWOOD SCHOOL DISTRICT V. KUHLMIEIER*

A. *Tinker v. Des Moines Independent Community School District's Material and Substantial Disruption Test*

In 1969, the U.S. Supreme Court granted extensive First Amendment rights to students in *Tinker v. Des Moines Independent Community School District*, now known as the "black-armband case."²⁷ In *Tinker*, junior high and high school students wore black armbands to school as a protest of the Vietnam War.²⁸ The school principals suspended these students for violating a school district policy, adopted several days earlier, which prohibited students from wearing armbands to school.²⁹ The Court viewed the students' form of expression as "akin to 'pure speech,'" which directly invoked First Amendment protections, contrasting it with disruptive speech or group demonstrations.³⁰ Although recognizing that school officials have the authority to regulate student conduct in the school, the Court determined that the students in this case were being punished for a peaceful protest that did not interfere with the work of the school or intrude on the rights of other students.³¹ Thus, the Court concluded that the policy violated the students' First Amendment rights.³²

In *Tinker*, the Court held that the school could only censor student expressions of opinion that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."³³ This "material and substantial disruption" test attempted to balance the First Amendment rights of students against the needs of school officials to maintain order.³⁴ As a result, school officials were required to prove more than just an unsupported fear or apprehension that the students' expression might cause a disturbance.³⁵ Applying this test, the Court affirmed the students' right

²⁷ See 393 U.S. 503, 511-14 (1969).

²⁸ *Id.* at 504.

²⁹ *Id.*

³⁰ *Id.* at 508.

³¹ *Id.*

³² *Tinker*, 393 U.S. at 514.

³³ *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

³⁴ See *id.* at 506-07.

³⁵ *Id.* at 508.

to wear black armbands to school because their actions did not create a disturbance in the school.³⁶

The Court did not limit its holding to speech that occurs within the confines of a classroom discussion.³⁷ The Court stated that communication among students is not only inevitable, "it is also an important part of the educational process."³⁸ Therefore, students' First Amendment rights must be protected during curricular and extracurricular activities that occur on school grounds, as long as those activities do not substantially disturb the functioning of the school or invade the rights of other students.³⁹

In affirming the students' rights to free expression, the Court also noted that the ban against black armbands singled out one particular symbol (worn to express a political viewpoint), whereas the school permitted students to wear other symbols (such as buttons relating to political campaigns).⁴⁰ This type of viewpoint discrimination is unconstitutional under the Court's established First Amendment doctrine and is not permitted in any forum for public speech.⁴¹

B. Narrowing of Students' Free Speech Rights

Despite the Court's strong protection of students' free speech rights in *Tinker*, the Court subsequently limited these rights when it balanced them against the state's significant interest in "teaching students . . . socially appropriate behavior."⁴² In 1986, in *Bethel School District No. 403 v. Fraser*, the Court upheld the suspension of a high school student for making sexually suggestive statements at a school assembly.⁴³ Chief Justice Warren Burger, writing for the majority, distinguished Matthew N. Fraser's sexually explicit and offensive speech

³⁶ *Id.* at 509.

³⁷ See *Tinker*, 393 U.S. at 512.

³⁸ *Id.*

³⁹ See *id.* at 512-13.

⁴⁰ *Id.* at 510-11.

⁴¹ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); see also *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995) (stating "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant").

⁴² *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986); see *Tinker*, 393 U.S. at 511.

⁴³ 478 U.S. at 685. Although the majority characterized Matthew N. Fraser's speech as "lewd," "vulgar," and "offensive," *id.* at 683, Justice Brennan noted that Fraser did not use any obscene language that would remove his speech from First Amendment protection, *id.* at 688 (Brennan, J., concurring).

during a school assembly from *Tinker's* "nondisruptive, passive expression of a political viewpoint" because Fraser's speech intruded on the work of the school and the rights of the other students.⁴⁴ Whereas *Tinker* was punished for a peaceful expression of his viewpoint, Fraser was punished for using sexually explicit speech that the Court found inappropriate in a school setting.⁴⁵

Although the Court did not explicitly overrule *Tinker's* material and substantial disruption test, it held that the school could prohibit inappropriate modes of expression (including offensive speech) without proving that the speech created disruption in the school.⁴⁶ The Court thus adopted a balancing test that permitted school officials to regulate student speech in order to achieve the school's educational mission, stating that "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."⁴⁷ The Court noted that, even though schools must tolerate divergent political or religious views, educators also have an interest in teaching students to be sensitive to others.⁴⁸ Applying these principles to the facts of Fraser's case, the Court concluded that the principal's actions appropriately furthered the school's interest in disassociating itself from "vulgar speech and lewd conduct [that] is wholly inconsistent with the 'fundamental values' of public school education."⁴⁹ The *Fraser* decision thus marked a change in the U.S. Supreme Court's approach to students' First Amendment rights because it granted significant deference to school officials' decisions concerning appropriate behavior in the public school environment.⁵⁰

II. *HAZELWOOD SCHOOL DISTRICT V. KUHLMIEIER'S* "LEGITIMATE PEDAGOGICAL CONCERNS" TEST

In 1988, in *Hazelwood School District v. Kuhlmeier*, the U.S. Supreme Court adopted a new, more deferential standard that now governs most school regulations of student expression.⁵¹ In *Hazelwood*, student

⁴⁴ *Id.* at 680.

⁴⁵ *See id.* at 685.

⁴⁶ *Id.* at 683.

⁴⁷ *Id.* at 681.

⁴⁸ *Fraser*, 478 U.S. at 681.

⁴⁹ *Id.* at 685-86.

⁵⁰ *See id.* at 683; *see also* Peltz, *supra* note 21, at 491.

⁵¹ *See* 484 U.S. 260, 273 (1988).

staff members of the high school newspaper, *Spectrum*, argued that the school principal violated their free speech rights when he removed articles dealing with controversial topics, such as teenage pregnancy and divorce, from the newspaper.⁵² In 1985, the U.S. District Court for the District of Missouri upheld the principal's actions because the court determined that the newspaper was not a public forum and the principal had reasonable concerns about the appropriateness of the topics and the students' anonymity.⁵³ In 1986, the U.S. Court of Appeals for the Eighth Circuit reversed, characterizing the school newspaper as a public forum and applying *Tinker v. Des Moines Independent Community School District's* material and substantial disruption test to the facts of the case.⁵⁴ The circuit court held that the principal had violated the students' First Amendment rights because there was insufficient evidence that publication of the articles would create disruption in the school or invade the rights of others.⁵⁵

The U.S. Supreme Court reversed the circuit court's decision and adopted a new standard for reviewing restrictions on student speech in the school setting.⁵⁶ Quoting *Tinker* and *Bethel School District No. 403 v. Fraser*, the Court acknowledged that students retain constitutional rights to free speech and expression, however, these rights may be limited in light of the school's special environment and educational mission.⁵⁷ Accordingly, the Court considered the characteristics of the forum in which the speech occurred (*Spectrum* was produced in Journalism class) and the nature of the speech contained within the censored articles.⁵⁸ The Court then reviewed the principal's decision to determine whether it was an appropriate means of preserving the students' rights while maintaining control over the school.⁵⁹

A. Public Forum Analysis

First, the Court analyzed the nature of the forum involved because courts scrutinize restrictions on speech more closely in truly

⁵² *Id.* at 262-63.

⁵³ *Kuhlmeier v. Hazelwood Sch. Dist.*, 607 F. Supp. 1450, 1466 (D. Mo. 1985), *rev'd*, 795 F.2d 1368 (8th Cir. 1986), *rev'd and remanded*, 484 U.S. 260.

⁵⁴ *See Hazelwood*, 795 F.2d at 1373-74.

⁵⁵ *See id.* at 1375-76.

⁵⁶ *See Hazelwood*, 484 U.S. at 266, 273.

⁵⁷ *Id.* at 266 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) and *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

⁵⁸ *Id.* at 267-72 (analyzing first the nature of the forum, then the type of speech).

⁵⁹ *Id.* at 274-76.

public areas.⁶⁰ Traditionally, the U.S. Supreme Court has recognized three types of public fora: (1) the traditional public forum, which the public generally views as available for free speech and assembly (such as a public street or park); (2) the limited public forum, which is opened to public speech for a limited time or purpose; and (3) the nonpublic forum, which is government property that is not open for public communication.⁶¹

In a traditional public forum, the state may regulate the time, place, and manner of speech, but content-based restrictions on speech are rarely permitted.⁶² Courts strictly scrutinize content-based regulations of speech in a traditional public forum because courts traditionally recognize this type of forum as a venue for public assembly and free expression.⁶³ To survive strict scrutiny, the state must show that any content-based regulation in a traditional public forum is necessary to serve a compelling state interest and is narrowly tailored to achieve this purpose.⁶⁴ Likewise, when a limited public forum is opened to the public for a specific purpose or time frame, any government restriction on speech is reviewed with strict scrutiny.⁶⁵

In contrast, the state may reserve a nonpublic forum for a specific purpose, as long as any regulation on speech is reasonable and is not intended to suppress the speaker's viewpoint.⁶⁶ The Court has analyzed the reasonableness of a government restriction on speech based on the purpose of the forum and "all the surrounding circumstances."⁶⁷ The government's actions in limiting access to a nonpublic forum do not need to be the *most* or *only* reasonable restrictions available.⁶⁸

Public schools generally are not considered open to the public for free speech and assembly, and thus are not considered traditional public fora.⁶⁹ For a public school to be considered a limited or nonpublic forum, there must be some evidence that school officials have

⁶⁰ See *id.* at 267; see also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

⁶¹ See, e.g., *Perry*, 460 U.S. at 45-46. Some courts refer to a limited public forum as a "designated" public forum when the forum has been reserved for speech pertaining to a designated subject or purpose. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985) (referring to this type of forum as a "public forum by designation").

⁶² See *Perry*, 460 U.S. at 45.

⁶³ See *Cornelius*, 473 U.S. at 800; *Perry*, 460 U.S. at 45.

⁶⁴ *Cornelius*, 473 U.S. at 800; *Perry*, 460 U.S. at 45.

⁶⁵ *Cornelius*, 473 U.S. at 800; see *Perry*, 460 U.S. at 46.

⁶⁶ *Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 46.

⁶⁷ *Cornelius*, 473 U.S. at 809.

⁶⁸ *Id.* at 808.

⁶⁹ *Hazelwood*, 484 U.S. at 267.

opened the facilities, through policy or practice, for use by some segment of the public (such as student organizations) to freely engage in expressive activity.⁷⁰

Regarding the Hazelwood school newspaper, the Court found insufficient evidence to indicate that school officials intended to create a traditional or limited public forum.⁷¹ Instead, the Court determined that *Spectrum* was a nonpublic forum because school officials retained significant control over its publication and its production occurred in conjunction with the school's journalism classes.⁷² Ultimately, the Court concluded that the school intended the newspaper to be a "supervised learning experience for journalism students," rather than a forum available for indiscriminate use by members of the public.⁷³ Thus, the school could impose content-based restrictions on speech based on reasonable objectives.⁷⁴

B. Regulation of School-Sponsored Speech

Next, the Court reviewed the nature of the speech at issue in *Hazelwood* to determine whether the school officials' actions were reasonable.⁷⁵ The Court drew a distinction between the "personal expression" of students and student speech that is "school-sponsored."⁷⁶ Members of the public may view school-sponsored speech as bearing the "imprimatur" of the school, and thus the school must be able to disassociate itself from speech that it finds inappropriate.⁷⁷ Although the First Amendment requires schools to tolerate pure student speech that happens to take place on school property, schools can exercise greater control over school-sponsored expressive activities, such as a school newspaper, because the public is likely to view the school as promoting this type of speech.⁷⁸

The Court held that restrictions on the style and content of student speech in school-sponsored expressive activities must only be "reasonably related to legitimate pedagogical concerns" to preserve stu-

⁷⁰ *Id.*

⁷¹ *Id.* at 270.

⁷² *See id.* at 268, 270.

⁷³ *Id.* at 270.

⁷⁴ *Hazelwood*, 484 U.S. at 270.

⁷⁵ *See id.* at 270-72.

⁷⁶ *Id.* at 271.

⁷⁷ *Id.*

⁷⁸ *See id.*

dents' First Amendment rights.⁷⁹ In articulating this standard, the Court stated that school officials are entitled to substantial deference because they have primary responsibility in our society for educating the nation's youth.⁸⁰ Although the Court extensively discussed the emotional maturity of the intended audience as a reason for granting schools this level of deference, it did not limit its holding to the elementary or secondary school setting.⁸¹ Instead, the Court left open the issue of whether the same standard should apply to post-secondary education.⁸²

Finally, the Court deemed the Hazelwood school officials' actions reasonable in light of the legitimate pedagogical goals served by those actions.⁸³ Those legitimate goals included the protection of students' and parents' privacy and the maintenance of journalism standards for the treatment of controversial issues.⁸⁴ The school principal could have reasonably decided that "frank talk" about sex, pregnancy, and birth control was inappropriate in a school-sponsored publication distributed to high school freshmen and possibly taken home and read by the students' younger siblings.⁸⁵ Thus, the principal's decision to remove the articles from the school newspaper did not violate the student writers' free speech rights.⁸⁶

C. Dissenting Opinion

Justice William Brennan, joined by Justices Thurgood Marshall and Harry Blackmun, wrote a dissenting opinion that would have applied *Tinker's* material and substantial disruption test to show the school impermissibly infringed upon the students' free speech rights.⁸⁷ Justice Brennan found that the students' speech did not disrupt classroom activity or invade the rights of others, and the principal could

⁷⁹ *Hazelwood*, 484 U.S. at 273. For the view that the *Hazelwood* standard does not change the test for reasonableness in a nonpublic forum, but rather is merely an application of that standard to the public school setting, see *Searcey v. Harris*, 888 F.2d 1314, 1319 (11th Cir. 1989).

⁸⁰ See *Hazelwood*, 484 U.S. at 273.

⁸¹ See *id.* at 272, 273 n.7.

⁸² *Id.* at 273 n.7 (stating "[w]e need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level").

⁸³ See *id.* at 276.

⁸⁴ *Id.*

⁸⁵ *Hazelwood*, 484 U.S. at 274-75.

⁸⁶ *Id.* at 276.

⁸⁷ *Id.* at 278 (Brennan, J., dissenting); see *Tinker*, 393 U.S. at 509.

have taken other steps to dissociate the students' speech from the school without excising the articles in their entirety.⁸⁸ Thus, Justice Brennan concluded that the school principal had violated the students' First Amendment rights when he removed the articles from the school newspaper.⁸⁹

Rejecting the majority's attempt to create a new First Amendment standard, Justice Brennan argued that *Tinker* struck the proper balance between school officials' interests in maintaining order and the students' right to freely express views that might conflict with those of the school.⁹⁰ Although acknowledging that the *Hazelwood* majority did not overrule *Tinker*, Justice Brennan argued that the majority created a "taxonomy of school censorship" by inappropriately distinguishing between personal and school-sponsored speech.⁹¹ Noting that the *Tinker* and *Fraser* courts did not draw such a distinction, Justice Brennan argued that the *Tinker* standard should apply regardless of whether the student's speech is "school-sponsored."⁹² Thus, the *Hazelwood* majority should have applied the material and substantial disruption test to decide the case.⁹³

D. Federal Court Decisions Since *Hazelwood*

Since the U.S. Supreme Court's *Hazelwood* decision in 1988, lower courts have consistently applied the "legitimate pedagogical concerns" test to allow elementary and secondary schools to restrict students' and teachers' expression in a variety of "school-sponsored" contexts.⁹⁴ The circuit courts have disagreed, however, on the extent to which schools can regulate speech based on the particular viewpoint expressed.⁹⁵

⁸⁸ *Hazelwood*, 484 U.S. at 289 (Brennan, J., dissenting).

⁸⁹ *See id.* at 278 (Brennan, J., dissenting).

⁹⁰ *See id.* at 280–81 (Brennan, J., dissenting).

⁹¹ *Id.* at 281 (Brennan, J., dissenting).

⁹² *See id.* at 281–82 (Brennan, J., dissenting).

⁹³ *See* 484 U.S. at 282 (Brennan, J., dissenting).

⁹⁴ *See, e.g., Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993) (holding that a school committee may regulate a teacher's classroom speech if the *Hazelwood* test is met and the teacher has notice of what conduct is prohibited); *Poling v. Murphy*, 872 F.2d 757, 762–64 (6th Cir. 1989) (upholding disqualification of a high school student from school elections because the student criticized the school administration in a campaign speech).

⁹⁵ *See, e.g., C.H. v. Oliva*, 195 F.3d 167, 172 (3d Cir. 1999), *reh'g en banc granted and vacated* by 197 F.3d 63 (3d Cir. 1999), *aff'd en banc by an equally divided court*, 226 F.3d 198 (3d Cir. 2000); *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (*en banc*); *see also Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 926 (10th Cir. 2002) (discussing circuit split over viewpoint discrimination by school officials), *cert. denied*, 537 U.S. 1110 (2003) (mem.).

Traditionally, viewpoint discrimination has been considered a particularly objectionable form of content discrimination.⁹⁶ Whereas content-based restrictions on speech may be permissible in light of the forum's purpose, viewpoint-based regulations impermissibly target speech because of the speaker's ideology, opinion, or perspective.⁹⁷

In nonpublic forum decisions prior to *Hazelwood*, the U.S. Supreme Court had held that the government, when regulating speech based on content, could not suppress speech based on the speaker's viewpoint.⁹⁸ The Court did not specifically address this issue in *Hazelwood*, but instead deferred to public school officials' discretion in making decisions about the school curriculum.⁹⁹ As a result, the U.S. Courts of Appeals for the First, Third, and Tenth Circuits have concluded that, under *Hazelwood*, viewpoint discrimination is permissible in the public school setting.¹⁰⁰ In contrast, the U.S. Courts of Appeals for the Ninth and Eleventh Circuits have held that viewpoint discrimination is impermissible in any type of government forum, even a nonpublic forum like a public school.¹⁰¹

In 2002, in *Fleming v. Jefferson County School District R-1*, the U.S. Court of Appeals for the Tenth Circuit discussed this circuit split concerning viewpoint discrimination.¹⁰² The case involved a mosaic created by students and members of the community at Columbine High School after the 1999 shootings at the school.¹⁰³ The school district designed the mosaic as a project for rebuilding the school, not as a memorial commemorating the tragic shootings.¹⁰⁴ Consequently, school administrators removed tiles that did not meet the guidelines for the project, including any tiles that contained references to the shooting.¹⁰⁵

In deciding whether this act of censorship constituted impermissible viewpoint discrimination, the court analyzed the U.S. Supreme Court's reasoning in *Hazelwood* and reviewed the holdings of other

⁹⁶ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

⁹⁷ *Id.* at 829-30.

⁹⁸ *Perry*, 460 U.S. at 46.

⁹⁹ See *Hazelwood*, 484 U.S. at 273.

¹⁰⁰ See *Fleming*, 298 F.3d at 926; *C.H.*, 195 F.3d at 172; *Ward*, 996 F.2d at 454. For an argument supporting this view, see Janna J. Annet, Note and Comment, *Only the News That's Fit to Print: The Effect of Hazelwood on the First Amendment Viewpoint-Neutrality Requirement in Public School-Sponsored Forums*, 77 WASH. L. REV. 1227, 1258-59 (2002).

¹⁰¹ See *Planned Parenthood*, 941 F.2d at 829; *Searcey*, 888 F.2d at 1325.

¹⁰² See 298 F.3d at 926.

¹⁰³ *Id.* at 920-21.

¹⁰⁴ *Id.* at 921.

¹⁰⁵ *Id.* at 921-22.

circuit courts regarding viewpoint discrimination.¹⁰⁶ Judge David Ebel reasoned that the *Hazelwood* Court did not intend to “simply repeat the traditional nonpublic forum analysis in school cases” when the Court articulated the legitimate pedagogical concerns test.¹⁰⁷ In light of the special emphasis placed on the school’s right to control speech that bears the imprimatur of the school, the *Fleming* court concluded that *Hazelwood* does not require that restrictions on school-sponsored speech be viewpoint neutral.¹⁰⁸ The court then applied the *Hazelwood* standard to the facts of the case and held that the school district’s guidelines for the mosaic were reasonably related to the legitimate pedagogical concerns articulated for the project.¹⁰⁹ The Tenth Circuit thus endorsed the view that students’ speech could be restricted based on the viewpoint expressed, a level of censorship not permitted even in the typical nonpublic forum.¹¹⁰

III. REGULATION OF STUDENT SPEECH AT PUBLIC UNIVERSITIES

Although the U.S. Supreme Court explicitly declined to decide whether the *Hazelwood School District v. Kuhlmeier* standard should apply at the university level, scholars predicted that the Court would not extend its deferential reasoning to the university context based on prior First Amendment jurisprudence.¹¹¹ College students generally enjoy the same First Amendment protections as those of the general public.¹¹² The Court has long recognized that “[t]he college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas.’”¹¹³ The recent federal appellate court decisions in *Kincaid v. Gibson* (“*Kincaid I*”) and *Brown v. Li* thus represent significant departures from the Court’s traditional free speech doctrine as applied to the university setting.¹¹⁴

¹⁰⁶ See *id.* at 926–28.

¹⁰⁷ See *Fleming*, 298 F.3d at 926.

¹⁰⁸ See *id.* at 928.

¹⁰⁹ See *id.* at 934.

¹¹⁰ See *id.* at 926; *Perry*, 460 U.S. at 46.

¹¹¹ See Peltz, *supra* note 21, at 509; see, e.g., *Healy v. James*, 408 U.S. 169, 180 (1972).

¹¹² *Healy*, 408 U.S. at 180 (stating, “the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large”).

¹¹³ *Id.*

¹¹⁴ See *Brown v. Li*, 308 F.3d 939, 947 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 1488 (2003) (mem.); *Kincaid v. Gibson*, 191 F.3d 719, 726 (6th Cir. 1999) (*Kincaid I*), *reh’g en banc granted and vacated* by 197 F.3d 828 (6th Cir. 1999), *rev’d and remanded en banc*, 236 F.3d 342 (6th Cir. 2001) (*Kincaid II*).

A. *Tinker v. Des Moines Independent Community School District* Applied to the University Setting

Prior to *Hazelwood*, the U.S. Supreme Court protected university students' First Amendment rights against the competing interests of university officials.¹¹⁵ For example, in 1972, the Court affirmed college students' First Amendment rights to free expression and association in *Healy v. James*, when Central Connecticut State College officials refused to recognize a local chapter of the Students for a Democratic Society organization.¹¹⁶ Non-recognition barred the student group from accessing campus facilities, including meeting rooms, bulletin boards, and the school newspaper.¹¹⁷ The Court held that the students had a cognizable First Amendment interest in obtaining official recognition because the university's decision impacted the students' ability to assemble and speak as a group.¹¹⁸ Thus, the college was required to prove that it had an acceptable reason for denying recognition to the student group in order to avoid a First Amendment violation.¹¹⁹

College officials asserted several reasons for the decision, including concern over the student group's affiliation with a controversial national organization and disagreement with the national organization's philosophies.¹²⁰ The Court determined that disagreement with the groups' philosophies or views was not a sufficient reason for denying recognition.¹²¹ The school's decision would be permissible, however, if school officials could show that the group's activities were directed at inciting or producing "lawless action" or substantially disrupting the school environment.¹²² Evidence that the group intended to violate reasonable campus rules, interrupt classes, or substantially interfere with the rights of other students would indicate that the students intended to disrupt the campus environment.¹²³ The Court concluded that college officials could not limit the student group's right to free association and expression on campus unless there was sufficient evi-

¹¹⁵ See, e.g., *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 671 (1973); *Healy*, 408 U.S. at 184.

¹¹⁶ 408 U.S. at 172, 194.

¹¹⁷ *Id.* at 176.

¹¹⁸ *Id.* at 184.

¹¹⁹ See *id.*

¹²⁰ *Id.* at 185-87.

¹²¹ *Healy*, 408 U.S. at 187-88.

¹²² *Id.* at 189 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

¹²³ *Id.*

dence to show that the students would not comply with reasonable school regulations.¹²⁴

B. Application of *Hazelwood* to University Extracurricular Activities

In 1999, a panel of the U.S. Court of Appeals for the Sixth Circuit first applied the *Hazelwood* standard to the acts of a public university official in *Kincaid I*, affirming the U.S. District Court for the Eastern District of Kentucky's grant of summary judgment to university officials who banned distribution of the Kentucky State University 1992–1994 yearbook.¹²⁵ The U.S. Court of Appeals for the Sixth Circuit, sitting en banc, subsequently reversed the panel's decision in *Kincaid v. Gibson* ("*Kincaid II*") because the university's actions were not narrowly tailored to achieve a compelling state interest.¹²⁶

1. University Newspaper as a Nonpublic Forum

In *Kincaid I*, university students maintained that school officials violated their rights to free speech by confiscating the student yearbook because of its content.¹²⁷ Following the structure of the U.S. Supreme Court's analysis in *Hazelwood*, the Sixth Circuit panel first addressed whether the university yearbook constituted a public forum.¹²⁸ The court looked for evidence of the university's intent in order to determine whether the yearbook should be characterized as a public forum or a nonpublic forum.¹²⁹ The panel distinguished the university yearbook from the student newspaper in *Hazelwood* because the yearbook was not produced as part of a classroom activity and Betty Gibson, as Vice President of Student Affairs, exercised less control over the yearbook than the high school principal exercised over the *Hazelwood* newspaper.¹³⁰ Although the panel distinguished the two publications, it found that the evidence was insufficient to prove that the university intended the yearbook to serve as a public forum, so

¹²⁴ *Id.* at 194.

¹²⁵ See *Kincaid I*, 191 F.3d at 721. The yearbook covered two years of campus life. *Id.* at 723.

¹²⁶ 236 F.3d at 344.

¹²⁷ 191 F.3d at 724.

¹²⁸ *Id.* at 727–28.

¹²⁹ *Id.* at 727; see *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988). In a footnote, the panel recognized that a school publication may not be considered a traditional public forum, but may constitute a limited or designated public forum entitled to full protection under the First Amendment. See *Kincaid I*, 191 F.3d at 727 n.3.

¹³⁰ See *Kincaid I*, 191 F.3d at 727.

the yearbook must be considered a nonpublic forum.¹³¹ Thus, the panel applied *Hazelwood's* reasonableness standard for a school-sponsored activity in a nonpublic forum.¹³²

Addressing Gibson's actions under the *Hazelwood* standard, the panel stated that confiscation of the yearbook "was reasonable in light of the yearbook's failure to accomplish its intended purpose."¹³³ School officials gave several reasons for confiscating the yearbook, including its purple cover (which did not reflect the university's colors), the ambiguous theme and title ("Destination Unknown"), the lack of captions under pictures, and the inclusion of pictures of current events and public figures.¹³⁴ Even though the students argued that other options were available to school officials besides confiscation, the panel held that Gibson's decision was reasonable "[i]n light of the undisputedly poor quality of the yearbook," and did not need to be the "most reasonable" option.¹³⁵

Additionally, the panel addressed the students' contention that the university's stated reason for confiscating the yearbook was a pretext for its true reason for confiscation: disapproval of the yearbook's message.¹³⁶ Although the panel acknowledged that viewpoint discrimination is impermissible even in a nonpublic forum, it found insufficient evidence to suggest that Gibson's actions were viewpoint-based.¹³⁷ The court concluded that the yearbook did not convey a particular message, and although Gibson testified that she did not understand the theme, "Destination Unknown," this statement did not suggest an intent to suppress the students' views.¹³⁸ Thus, Gibson's decision was a permissible, content-based regulation of speech that did not constitute viewpoint discrimination.¹³⁹

In his partial dissent, Judge R. Guy Cole Jr. disagreed with the panel's decision to apply the *Hazelwood* standard to a university setting.¹⁴⁰ Although Judge Cole agreed that the yearbook was not a traditional public forum, he argued that the majority ignored the possibility

¹³¹ See *id.* at 728.

¹³² *Id.*

¹³³ *Id.* at 729.

¹³⁴ *Id.* at 723.

¹³⁵ *Kincaid I*, 191 F.3d at 729.

¹³⁶ *Id.* at 729 n.4.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See *id.*

¹⁴⁰ *Kincaid I*, 191 F.3d at 730 (Cole, J., concurring in part and dissenting in part).

that it was a limited public forum.¹⁴¹ If the university intended the yearbook to be a limited public forum, then any restrictions on speech would have to be narrowly tailored to serve a compelling state interest in order to survive strict scrutiny.¹⁴² Judge Cole also noted that the reasons for affording deference to school officials are less compelling at the university level because college students are more mature than high school students, with most having reached the age of majority.¹⁴³

2. University Newspaper as a Limited Public Forum

In the en banc decision, the Sixth Circuit held that the yearbook was a limited public forum and applied strict scrutiny review.¹⁴⁴ Judge Cole, who dissented in part in *Kincaid I*, wrote the decision for the court.¹⁴⁵ Judge Cole began his opinion by analyzing the type of public forum at issue.¹⁴⁶ The full court, like the panel before it, questioned whether the university intended to open the forum to a segment of the public.¹⁴⁷ Judge Cole identified several factors from the *Hazelwood* decision that could be used to make this determination: school policy, school officials' practices regarding the yearbook, the nature of the property and its compatibility with free expression, and the context in which the speech occurred.¹⁴⁸ Examining all of these factors, including the publication's intended audience of young adults, the court found that the yearbook was a limited public forum.¹⁴⁹

Because the court characterized the yearbook as a limited public forum, the university could only impose reasonable time, place, and manner restrictions on its publication (such as limiting when and where the students could distribute the books).¹⁵⁰ Furthermore, strict scrutiny review required that any content-based regulations must be narrowly designed to serve a compelling state interest.¹⁵¹ The court stated that total confiscation of the yearbook was not a reasonable time, place, or

¹⁴¹ *Id.* at 731 (Cole, J., concurring in part and dissenting in part).

¹⁴² *See id.* (Cole, J., concurring in part and dissenting in part).

¹⁴³ *Id.* at 730-31 n.1 (Cole, J., concurring in part and dissenting in part).

¹⁴⁴ *See Kincaid II*, 236 F.3d at 349, 354.

¹⁴⁵ *See id.* at 344; *Kincaid I*, 191 F.3d at 730-32 (Cole, J., concurring in part and dissenting in part).

¹⁴⁶ *See Kincaid II*, 236 F.3d at 347-52.

¹⁴⁷ *See id.* at 348-49.

¹⁴⁸ *See id.* at 349-52.

¹⁴⁹ *See id.*

¹⁵⁰ *See id.* at 354 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)).

¹⁵¹ *Kincaid II*, 236 F.3d at 354.

manner regulation because the university's actions were based on the yearbook's content, not the manner in which it was distributed.¹⁵² The university's actions also were not narrowly tailored to serve a compelling state interest, as the school could have taken reasonable steps to ensure the quality of the yearbook without wholly confiscating the final product.¹⁵³ Furthermore, the school did not provide an alternative forum for similar expressive activity.¹⁵⁴ Thus, the court concluded that the university officials had violated the students' First Amendment rights.¹⁵⁵

The court also stated, in dicta, that even if the yearbook were a nonpublic forum, confiscation of the yearbook would violate the students' rights.¹⁵⁶ Even under the reasonableness standard, the court found that the university's actions were disproportionate to its stated interests and therefore were not reasonable.¹⁵⁷ Furthermore, the court noted that total confiscation of the yearbook suggested an attempt to suppress the students' viewpoint, which included the yearbook editor's choice of theme, selection of pictures, and expression of opinions.¹⁵⁸ The court concluded that under limited public forum or nonpublic forum analysis, the university officials' actions violated the First Amendment.¹⁵⁹

C. Application of *Hazelwood* to University Curricular Speech

In 2002, in *Brown*, a divided panel of the U.S. Court of Appeals for the Ninth Circuit applied *Hazelwood* to a university's restriction on a student's speech.¹⁶⁰ An academic committee of the University of California at Santa Barbara approved Christopher Brown's master's thesis in the spring of 1999.¹⁶¹ Subsequent to the approval, Brown inserted a two-page section, entitled "Disacknowledgements," and attempted to file the thesis with the library.¹⁶² The unapproved addition

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See *Kincaid II*, 236 F.3d at 355.

¹⁵⁷ See *id.* at 355-56 (applying the standard for a nonpublic forum under *Perry*, 460 U.S. at 46).

¹⁵⁸ See *id.* at 356.

¹⁵⁹ See *id.*

¹⁶⁰ See *Brown*, 308 F.3d at 947.

¹⁶¹ *Id.* at 943.

¹⁶² *Id.* Brown's original "Disacknowledgements" section contained profane language and identified several university administrators and other public officials as having hindered Brown's graduate career. *Id.*

to the thesis came to the attention of the thesis committee, which notified Brown that it would not approve the amended thesis because the "Disacknowledgements" did not meet publication standards.¹⁶³ Brown appealed the committee's decision through several university channels and the school placed him on academic probation for exceeding the time limit for completing a master's degree.¹⁶⁴ Eventually, the university awarded Brown his degree in May 2000, but would not add his thesis to the library archives because he refused to file the originally approved version.¹⁶⁵

Brown initiated his lawsuit against several university officials in June 2000.¹⁶⁶ In his complaint, Brown alleged that the university had violated his First Amendment rights when the thesis committee failed to approve the "Disacknowledgements" section of his thesis, when the library refused to file his thesis in its archives, and when his master's degree was withheld for over a year.¹⁶⁷ The U.S. District Court for the Central District of California granted summary judgment to the university officials in an unpublished opinion and Brown appealed.¹⁶⁸ The Ninth Circuit panel subsequently affirmed the lower court's decision under *Hazelwood*'s reasonableness standard.¹⁶⁹

1. Judge Graber: *Hazelwood* Is Applicable

Because Brown's other claims followed from the thesis committee's decision not to approve the "Disacknowledgements" section, the judges focused on whether this action violated Brown's First Amendment rights.¹⁷⁰ Finding no precedent directly on point, Judge Graber, writing for the panel, relied on the *Hazelwood* standard for reviewing restrictions on student speech.¹⁷¹ Applying this standard, Judge Graber concluded that the university officials did not violate Brown's rights because their actions were reasonable in light of their legiti-

¹⁶³ *Id.* at 943-44. The university's Guide to Filing Theses and Dissertations included general criteria for an optional "Dedication and/or Acknowledgments" section of a thesis. *Id.* at 942. The thesis committee refused to approve the "Disacknowledgements" section even after Brown removed all profanities. *Id.* at 943.

¹⁶⁴ *Id.* at 944-45.

¹⁶⁵ *Brown*, 308 F.3d at 945.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 945, 947.

¹⁶⁸ *Id.* at 946.

¹⁶⁹ *Id.* at 954.

¹⁷⁰ *See Brown*, 308 F.3d at 947.

¹⁷¹ *Id.*; *see Hazelwood*, 484 U.S. at 273.

mate concerns for maintaining professional standards.¹⁷² Because the university's thesis requirements were reasonable and pedagogically appropriate, the university could withhold approval of a thesis that did not meet those standards.¹⁷³

Judge Graber concluded that an academic thesis "is not a public forum, limited or otherwise," and thus rejected any public forum analysis.¹⁷⁴ Nevertheless, Judge Graber used *Hazelwood's* test to balance the university's interest in controlling its curriculum against Brown's right to free speech.¹⁷⁵ Brown's thesis was required for completion of his master's degree and thus could be viewed as part of the curriculum.¹⁷⁶ The thesis was designed to teach Brown how to research and present a study within his academic specialty, so the requirement that the thesis comply with professional standards was pedagogically appropriate.¹⁷⁷ Thus, the committee's decision to reject the thesis served a legitimate objective.¹⁷⁸

Judge Graber recognized that the appropriate standard for reviewing restrictions on students' speech at the university level remained an open issue.¹⁷⁹ Although acknowledging that the Sixth Circuit rejected application of *Hazelwood's* test in *Kincaid II*, Judge Graber distinguished that case because the university restricted extracurricular, as opposed to curricular, speech.¹⁸⁰ Relying on previous distinctions between curricular and extracurricular speech in First Amendment cases, Judge Graber reasoned that *Hazelwood's* test could be used to review university officials' decisions regarding curricular speech, even if that standard had been rejected for students' extracurricular speech.¹⁸¹

To support her distinction between curricular and extracurricular speech, Judge Graber reviewed a Sixth Circuit decision, *Settle v. Dickson*

¹⁷² See *Brown*, 308 F.3d at 952.

¹⁷³ See *id.*

¹⁷⁴ *Id.* at 954.

¹⁷⁵ See *id.* at 952.

¹⁷⁶ *Id.*

¹⁷⁷ *Brown*, 308 F.3d at 952.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 949.

¹⁸⁰ See *id.*; *Kincaid II*, 236 F.3d at 346 n.5.

¹⁸¹ See *Brown*, 308 F.3d at 950 (citing Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 862 (1982)). In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, the U.S. Supreme Court held that a local school board could not remove books from the school library on the basis that the board members did not like the ideas contained within the books. 457 U.S. at 872. The Court limited its holding to books contained in the library for optional reading and did not reach the issue with regard to textbooks or other books used in classroom teaching. *Id.* at 861-62.

County School Board, as factually similar to *Brown's* case.¹⁸² Judge Graber relied on the similarities between the curricular assignments in *Brown* and *Settle* to conclude that the same standards apply in the high school and graduate school environments.¹⁸³ In *Settle*, a ninth-grade student argued that her First Amendment rights were violated when her teacher refused to approve her topic for a class research paper.¹⁸⁴ The teacher approved the student's first topic, "Drama," and then the student changed her topic to "The Life of Jesus Christ" without obtaining the teacher's approval.¹⁸⁵ The Sixth Circuit noted that the *Hazelwood* school newspaper was "a kind of open forum for students," and concluded that student speech in the classroom could be restricted even more than in an extracurricular forum.¹⁸⁶

Additionally, Judge Graber rejected *Brown's* argument that he had a First Amendment right to express any viewpoint he chose in the Acknowledgements section of his thesis.¹⁸⁷ Judge Graber concluded that a university could require a student to write a paper from a particular viewpoint, even a viewpoint with which the student disagreed, as long as this requirement was based on a legitimate pedagogical purpose.¹⁸⁸ The thesis committee could thus require *Brown* to recognize those who had made positive contributions to his education in his Acknowledgements section, if he chose to include one, because this requirement conformed to professional standards.¹⁸⁹

2. Judge Reinhardt: *Hazelwood* Is Not Applicable

Judge Stephen Reinhardt wrote a separate opinion rejecting the application of the *Hazelwood* standard to student speech in the university context.¹⁹⁰ Furthermore, Judge Reinhardt maintained that even though the court applied the *Hazelwood* test, the case should have been remanded because *Brown* raised genuine issues of material fact regard-

¹⁸² See *Brown*, 308 F.3d at 948; *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995) (holding that a teacher could limit speech in the classroom "in the name of learning," so long as restrictions on speech are not a pretext for punishing a student for a particular viewpoint).

¹⁸³ See *Brown*, 308 F.3d at 948-49.

¹⁸⁴ 53 F.3d at 155.

¹⁸⁵ *Id.* at 154.

¹⁸⁶ *Id.* at 155.

¹⁸⁷ *Brown*, 308 F.3d at 953.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* Although *Brown* did not have to include an Acknowledgements section in his thesis, if he chose to do so, the committee could restrict the content of that section. *Id.*

¹⁹⁰ See *id.* at 957 (Reinhardt, J., concurring in part and dissenting in part).

ing the reasonableness of the university's actions and the possibility that the university impermissibly punished him for his viewpoint.¹⁹¹

Judge Reinhardt maintained that the Ninth Circuit should not adopt the legitimate pedagogical concerns test in future cases concerning college students' speech because *Hazelwood's* deference to school officials was inappropriate "in the adult world of college and graduate students, an arena in which academic freedom and vigorous debate are supposed to flourish."¹⁹² Applying *Hazelwood's* deferential analysis to the university setting could have a dangerous chilling effect on student speech.¹⁹³ Judge Reinhardt suggested that the U.S. Supreme Court based its reasoning in *Hazelwood* on the emotional immaturity of the newspaper's audience, a concern that would not apply to university students.¹⁹⁴ Furthermore, past U.S. Supreme Court decisions have recognized that college students are both more mature than high school students and less likely to be influenced on controversial topics.¹⁹⁵ Just as college students are given greater legal rights than high school students in many areas (such as voting), the same principles extend to First Amendment rights.¹⁹⁶

Finally, Judge Reinhardt rejected the argument that extracurricular speech can be distinguished from curricular speech because the U.S. Supreme Court did not recognize this distinction in *Hazelwood*.¹⁹⁷ Instead, the *Hazelwood* Court considered the nature of the speech (school-sponsored or personal) to determine the correct level of scrutiny, regardless of whether the expressive activity occurred in the classroom.¹⁹⁸ Arguing that curricular speech and extracurricular speech, such as a student yearbook, are equally likely to be perceived as bearing the imprimatur of the school, Judge Reinhardt found no basis for distinguishing *Brown's* case from *Kincaid II*.¹⁹⁹ Thus, he pro-

¹⁹¹ See *id.* at 958, 960 (Reinhardt, J., concurring in part and dissenting in part).

¹⁹² *Brown*, 308 F.3d at 957 (Reinhardt, J., concurring in part and dissenting in part).

¹⁹³ See *id.* at 963 (Reinhardt, J., concurring in part and dissenting in part).

¹⁹⁴ See *id.* at 961 (Reinhardt, J., concurring in part and dissenting in part).

¹⁹⁵ See *id.* (Reinhardt, J., concurring in part and dissenting in part) (citing *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) (noting that "[u]niversity students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.")).

¹⁹⁶ See *id.* (Reinhardt, J., concurring in part and dissenting in part).

¹⁹⁷ *Id.* at 963 (Reinhardt, J., concurring in part and dissenting in part); see *Hazelwood*, 484 U.S. at 271-73.

¹⁹⁸ See *Hazelwood*, 484 U.S. at 271; *Brown*, 308 F.3d at 963 (Reinhardt, J., concurring in part and dissenting in part).

¹⁹⁹ See *Brown*, 308 F.3d at 963 (Reinhardt, J., concurring in part and dissenting in part); *Kincaid II*, 236 F.3d at 349.

posed several alternative methods for deciding the case, such as limited public forum analysis (requiring strict scrutiny) or adoption of an intermediate level of scrutiny.²⁰⁰

IV. HAZELWOOD SCHOOL DISTRICT V. KUHLMIEER'S DEFERENCE IS INAPPROPRIATE IN THE UNIVERSITY SETTING

In *Brown v. Li*, the U.S. Court of Appeals for the Ninth Circuit confronted the novel issue of the appropriate standard for reviewing the university's acts regulating student speech in a curricular setting.²⁰¹ Because the U.S. Supreme Court has not addressed a public university's regulation of a student's curricular speech, the Ninth Circuit looked to *Hazelwood School District v. Kuhlmeier* for guidance.²⁰² Likewise, a panel of the U.S. Court of Appeals for the Sixth Circuit applied *Hazelwood* to university officials' regulation of students' extra-curricular speech in *Kincaid v. Gibson*, but this decision was subsequently overturned by the en banc court.²⁰³ The courts' decisions to apply the deferential *Hazelwood* standard in the university context fail to take into account the inherent differences between secondary and post-secondary education.²⁰⁴ Future application of this mode of analysis could have detrimental effects on the rigor of university education, where individual thought and free expression are particularly valued.²⁰⁵

A. Distinctions Between Secondary and Post-Secondary Education

Courts must consider the nature and purpose of the educational environment when balancing the rights of students against the interests of the school.²⁰⁶ The context in which speech occurs, such as the university or high school campus, is an important factor in determining whether the state intended to create a forum for free expression.²⁰⁷ The Sixth Circuit recognized the importance of individual

²⁰⁰ See *Brown*, 308 F.3d at 964 (Reinhardt, J., concurring in part and dissenting in part).

²⁰¹ See 308 F.3d 939, 949 (9th Cir. 2002), cert. denied, 123 S. Ct. 1488 (2003) (mem.).

²⁰² *Id.*; see *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

²⁰³ *Kincaid v. Gibson*, 191 F.3d 719, 726 (6th Cir. 1999) (*Kincaid I*), reh'g en banc granted and vacated by 197 F.3d 828 (6th Cir. 1999), rev'd and remanded en banc, 236 F.3d 342 (6th Cir. 2001) (*Kincaid II*).

²⁰⁴ See *infra* notes 206–222 and accompanying text for a discussion of the differences between secondary and higher education.

²⁰⁵ See *Brown*, 308 F.3d at 957 (Reinhardt, J., concurring in part and dissenting in part).

²⁰⁶ See *Hazelwood*, 484 U.S. at 266; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

²⁰⁷ See *Kincaid II*, 236 F.3d at 352.

thought and unregulated speech at the post-secondary level when it remarked, "[t]he university is a special place for purposes of First Amendment jurisprudence."²⁰⁸ University administrators' suppression of student speech could have a chilling effect on this valued form of expression because students may hesitate to make statements that could be censored.²⁰⁹

In contrast, courts have placed greater limitations on elementary and high school students' rights to free expression.²¹⁰ For example, the U.S. Supreme Court recognized that teachers and students retain significant rights under the First Amendment, but also acknowledged that the school environment has "special characteristics."²¹¹ Although "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school-house gate," schools are also responsible for teaching children values that are consistent with those of the community.²¹² As a result, courts are more likely to defer to school administrators' decisions regarding the need to maintain order in the school and the appropriateness of discussing sensitive issues in light of the children's age and maturity.²¹³

Even though high school students retain some First Amendment rights, the U.S. Supreme Court has acknowledged that these rights are not equivalent to those of adults.²¹⁴ For example, the government cannot restrict an adult's controversial or offensive expressions in a public place unless the state can demonstrate a compelling reason for doing so.²¹⁵ School officials, however, can prohibit the use of the exact same speech during a high school assembly because a student's speech rights are not equivalent to an adult's right to free expression in a public place.²¹⁶

Although courts recognize that schools have legitimate interests in regulating student conduct, a problem arises when the student is an adult (presumably in college) and wishes to exercise his or her right to free expression.²¹⁷ Competing views of the role and purpose

²⁰⁸ *Id.*

²⁰⁹ *See id.* (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995)).

²¹⁰ *See, e.g., Hazelwood*, 484 U.S. at 273.

²¹¹ *Tinker*, 393 U.S. at 506.

²¹² *Id.*; *see Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

²¹³ *See Hazelwood*, 484 U.S. at 274-75.

²¹⁴ *See Fraser*, 478 U.S. at 682.

²¹⁵ *See id.*

²¹⁶ *See id.*

²¹⁷ *See Kincaid II*, 236 F.3d at 352.

of the university underlie the debate over whether similar standards should apply to First Amendment violations in the secondary and post-secondary school contexts.²¹⁸ In *Brown*, Judge Graber of the Ninth Circuit maintained that an educational institution's interest in limiting a student's speech to the parameters of an academic assignment does not diminish as the student's age increases.²¹⁹ Judge Graber stated that the university's interest may even be more compelling where there is a greater "need for academic discipline and editorial rigor," such as in a master's thesis.²²⁰ This contrasts with Judge Reinhardt's assertion in the same case that the university is an environment in which "academic freedom and vigorous debate are supposed to flourish."²²¹ Courts should consider the nature of the university learning environment as a significant, if not determining, factor in deciding whether to give deference to school officials' restrictions on student speech.²²²

B. Extension of Viewpoint Discrimination to Public Universities

The recent holdings of the U.S. Courts of Appeals for the First, Third, and Tenth Circuits regarding viewpoint discrimination raise an additional concern over application of the *Hazelwood* standard to colleges and universities.²²³ The Tenth Circuit, in *Fleming v. Jefferson County School District R-1*, concluded that viewpoint discrimination is permissible based on the assumption that schools must make viewpoint-based judgments in determining what messages should bear the imprimatur of the school.²²⁴ Thus, a school can choose to permit student speech that advocates against drug use or teenage sex without being obligated to tolerate student speech that endorses the opposite viewpoint.²²⁵ Likewise, the Ninth Circuit panel in *Brown* rejected the plaintiff's argument that he had a First Amendment right to express

²¹⁸ See *Brown*, 308 F.3d at 951; *id.* at 957 (Reinhardt, J., concurring in part and dissenting in part).

²¹⁹ See *id.* at 951.

²²⁰ See *id.*

²²¹ *Id.* at 957 (Reinhardt, J., concurring in part and dissenting in part).

²²² See *Kincaid II*, 236 F.3d at 352.

²²³ See *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 926 (10th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003) (mem.); *C.H. v. Oliva*, 195 F.3d 167, 172 (3d Cir. 1999), *reh'g en banc granted and vacated by* 197 F.3d 63 (3d Cir. 1999), *aff'd en banc by an equally divided court*, 226 F.3d 198 (3d Cir. 2000); *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993).

²²⁴ See 298 F.3d at 928.

²²⁵ *Id.*

any viewpoint he chose in his thesis's Acknowledgments section.²²⁶ The panel stated that under *Hazelwood*, a teacher may require a student to complete a curricular assignment from any viewpoint, even one with which the student disagrees, as long as the requirement serves a legitimate pedagogical purpose.²²⁷ This reasoning suggests that future courts may allow universities to regulate speech based on the viewpoint expressed.²²⁸

Viewpoint discrimination is not appropriate in the context of a public university, where the free exchange of ideas and opposing viewpoints is particularly valued.²²⁹ Under the Court's usual nonpublic forum analysis, the government cannot regulate speech based on the speaker's viewpoint even though content-based restrictions are permissible.²³⁰ Although the U.S. Supreme Court did not specifically address viewpoint discrimination in *Hazelwood*, the circuit courts have relied on the *Hazelwood* majority's substantial deference to school officials as a justification for allowing schools to regulate speech based on viewpoint.²³¹ For example, in *Fleming*, the Tenth Circuit held that *Hazelwood* does not require educators to enforce viewpoint neutrality because they must make decisions concerning the appropriateness of a speaker's message and the audience's sensitivity to controversial issues.²³² Because this level of deference to school officials is not appropriate at the university level, viewpoint discrimination also should not be upheld in this context.²³³

V. ALTERNATIVE STANDARDS OF REVIEW

Courts have addressed restrictions on student speech in a variety of contexts within the elementary and high school settings, but only a few circuit courts have addressed this issue at the university level.²³⁴

²²⁶ See 308 F.3d at 953.

²²⁷ *Id.*

²²⁸ See *id.*

²²⁹ See *Kincaid II*, 236 F.3d at 352.

²³⁰ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); see also *Kincaid II*, 236 F.3d at 356 (stating that, "in a traditional, limited, or nonpublic forum, state officials may not expunge even 'garbage' if it represents a speaker's viewpoint").

²³¹ See 484 U.S. at 273; *Fleming*, 298 F.3d at 928.

²³² *Fleming*, 298 F.3d at 928.

²³³ See *Kincaid II*, 236 F.3d at 356 (noting that the university's confiscation of the school yearbook "smacks of viewpoint discrimination"); see also *Brown*, 308 F.3d at 965 (Reinhardt, J., concurring in part and dissenting in part) (raising question of material fact about whether the university punished Brown for the viewpoint he sought to express).

²³⁴ See, e.g., *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 926 (10th Cir. 2002) (high school case), *cert. denied*, 537 U.S. 1110 (2003) (mem.); *Brown v. Li*, 308 F.3d

Judge Graber's application of the *Hazelwood School District v. Kuhlmeier* standard in *Brown v. Li* is not binding for future cases because the two judges who concurred in the decision followed different rationales.²³⁵ Accordingly, this Part explores alternative standards for reviewing speech regulations on college campuses.²³⁶

Courts continue to struggle over the appropriate level of scrutiny for First Amendment issues in the public university setting.²³⁷ Different First Amendment standards may be applicable depending on the context in which the speech occurs on a university campus.²³⁸ For example, distinct standards may be applied when regulating the speech of an agent of the university (such as a professor), a student, or a private individual who is using the university's facilities.²³⁹ For regulations of student speech, courts should adopt a framework that adequately protects students' free speech rights against the state's interest in regulating conduct within the school.²⁴⁰ Furthermore, courts should use heightened scrutiny when purported justifications for restrictions on speech may be pretexts for impermissible viewpoint discrimination.²⁴¹

A. *Revival of Tinker v. Des Moines Independent Community School District's Material and Substantial Disruption Test*

The material and substantial disruption test provides a viable framework for reviewing alleged First Amendment violations on university campuses.²⁴² Under this standard, educators can maintain order on school campuses while encouraging students to express opinions from any viewpoint.²⁴³ *Tinker v. Des Moines Independent Community School District* offers several advantages for analysis in the university context.²⁴⁴ The *Tinker* Court did not limit its holding to classroom speech, so the material and substantial disruption test may be applied to curricular

939, 949 (9th Cir. 2002) (university case), *cert. denied*, 123 S. Ct. 1488 (2003) (mem.); C.H. v. Oliva, 195 F.3d 167, 172 (3d Cir. 1999) (elementary school case), *reh'g en banc granted and vacated by* 197 F.3d 63 (3d Cir. 1999), *aff'd en banc by an equally divided court*, 226 F.3d 198 (3d Cir. 2000).

²³⁵ See *Brown*, 308 F.3d at 955–56 (Ferguson, J., concurring).

²³⁶ See *infra* notes 237–289 and accompanying text.

²³⁷ See, e.g., *Brown*, 308 F.3d at 947.

²³⁸ See *id.* at 964 (Reinhardt, J., concurring in part and dissenting in part).

²³⁹ See *id.* (Reinhardt, J., concurring in part and dissenting in part).

²⁴⁰ See *id.* at 963–64 (Reinhardt, J., concurring in part and dissenting in part).

²⁴¹ See *Kincaid v. Gibson*, 236 F.3d 342, 356 (6th Cir. 2001) (en banc) (*Kincaid II*).

²⁴² See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

²⁴³ See *id.* at 506–07.

²⁴⁴ See *id.*

and extracurricular activities on college campuses.²⁴⁵ The *Tinker* standard also allows school officials to regulate speech that invades the rights of other students, an interest that the *Hazelwood* court recognized as a legitimate concern for school authorities.²⁴⁶ An additional advantage of the material and substantial disruption test is that it does not rely on complex public forum analysis.²⁴⁷ Regardless of the forum in which speech occurs, university officials may adopt the *Tinker* test to maintain order while preserving students' First Amendment rights.²⁴⁸

What constitutes "material and substantial disruption" may be different in the university, as opposed to the secondary school, setting.²⁴⁹ Given the significant differences in school practices and policies on college campuses, a court could conclude that conduct which may disrupt teaching in a high school would not be disruptive in the college environment.²⁵⁰ In *Healy v. James*, the Court adopted the *Tinker* standard as an appropriate framework for analyzing college students' First Amendment right to form a student organization on campus.²⁵¹ The Court required school administrators to demonstrate that the students were likely to create a disruption on campus by violating reasonable campus rules, interrupting classes, or substantially interfering with the rights of other students.²⁵² Likewise, future courts applying the material and substantial disruption test should consider the special characteristics of the university setting when deciding whether the threat of substantial disruption warrants censorship of student speech.²⁵³

Although *Tinker* has not been explicitly overruled, the viability of its holding has been questioned.²⁵⁴ The U.S. Supreme Court declined to apply the *Tinker* test in *Bethel School District No. 403 v. Fraser*, reasoning that offensive and sexually explicit speech invades the rights of other

²⁴⁵ See *id.* at 512-13.

²⁴⁶ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 274 (1988); *Tinker*, 393 U.S. at 508.

²⁴⁷ See *infra* notes 268-271 and accompanying text for a discussion of the disadvantages of public forum analysis.

²⁴⁸ See 393 U.S. at 506.

²⁴⁹ See *Healy v. James*, 408 U.S. 169, 189 (1972); *Tinker*, 393 U.S. at 508.

²⁵⁰ See, e.g., *Healy*, 408 U.S. at 189.

²⁵¹ See *id.*

²⁵² *Id.*

²⁵³ See *id.*

²⁵⁴ See Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 DRAKE L. REV. 527, 529 (2000) (citing *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 737 (7th Cir. 1994)).

students.²⁵⁵ Likewise, in *Hazelwood*, the Court created a new category of speech that schools may regulate as long as the state has legitimate reasons for doing so.²⁵⁶ Thus, in the high school context, *Tinker* only applies to "pure" student speech, which the public would not perceive to bear the imprimatur of the school.²⁵⁷ Although *Tinker's* applicability is narrow in the secondary school context, the state has a less significant interest in protecting students from offensive speech in the university setting, where students are more mature.²⁵⁸

B. Standards Based on Context: Public Forum Analysis

Public forum analysis requires courts to consider the context in which speech occurs as well as the government's purpose in creating an expressive forum.²⁵⁹ To protect a student's rights, a court could find, as did the U.S. Court of Appeals for the Sixth Circuit in *Kincaid v. Gibson* ("*Kincaid II*"), that the student's speech occurred in a limited public forum, thus triggering strict scrutiny.²⁶⁰ Under this standard, content-based regulations of speech must be narrowly tailored to achieve a compelling state interest.²⁶¹ In *Kincaid II*, the Sixth Circuit viewed the public university setting, along with school policies, the school administration's practices, and the forum's compatibility with expressive activity, as a significant factor in determining that the school intended to create a limited public forum.²⁶² Future courts should rely on this reasoning to find that all or most aspects of a public university campus are designated public fora for student speech.²⁶³

Alternatively, a court could adopt an intermediate level of scrutiny for acts restricting student speech on university campuses.²⁶⁴ Un-

²⁵⁵ See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986).

²⁵⁶ See 484 U.S. at 270-71.

²⁵⁷ See *id.*; see also *Tinker*, 393 U.S. at 506.

²⁵⁸ See, e.g., *Kincaid II*, 236 F.3d at 352. In *Hosty v. Carter*, a panel of the U.S. Court of Appeals for the Seventh Circuit similarly recognized that the significant differences between universities and high schools require broader protection of First Amendment rights in higher education. See 325 F.3d 945, 949 (7th Cir. 2003), *vacated and reh'g en banc granted*, No. 01-4155 (7th Cir. June 25, 2003).

²⁵⁹ See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

²⁶⁰ 236 F.3d at 349; see *Brown*, 308 F.3d at 964 (Reinhardt, J., concurring in part and dissenting in part).

²⁶¹ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

²⁶² See 236 F.3d at 352.

²⁶³ See *id.*

²⁶⁴ See *Brown*, 308 F.3d at 964 (Reinhardt, J., concurring in part and dissenting in part) (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996) (applying intermediate scrutiny to gender-based classifications at a public university under equal protection analysis)).

der intermediate scrutiny, a university would have to demonstrate that its regulation of student speech is substantially related to an important state interest.²⁶⁵ This standard would provide more protection for student speech than *Hazelwood*, while giving more deference to university officials than strict scrutiny under limited public forum analysis.²⁶⁶ Courts may find that intermediate scrutiny provides a more appropriate balance between the government's and students' interests than the current public forum standards.²⁶⁷

Public forum analysis also has several limitations, including the problem of defining what aspect of the school setting constitutes a "forum."²⁶⁸ A court may define the scope of a forum broadly (such as the entire university campus) or narrowly (such as the student newspaper), potentially resulting in different outcomes.²⁶⁹ For example, the U.S. Court of Appeals for the Ninth Circuit panel rejected public forum analysis in *Brown* because it could not determine what constituted a forum for free speech in that case.²⁷⁰ Although the panel rejected the notion that a master's thesis could be considered any type of forum for speech, it relied on the U.S. Supreme Court's analysis in *Hazelwood*, which was rooted in public forum doctrine.²⁷¹

C. Standards Based on Age: The "Age-of-Majority" Test

A final possible approach is an "age-of-majority" test, which would create two different standards for reviewing students' First Amendment rights: one for minors and one for adults.²⁷² The Sixth Circuit adopted a similar approach when it considered the age of the students, among other factors, in characterizing the yearbook as a limited public forum in *Kincaid II*—thus rendering *Hazelwood* inapplicable.²⁷³ The advantage of this approach is that it elevates college students' free speech rights to those of adults, rather than equating them with high school students.²⁷⁴

²⁶⁵ See *id.* (Reinhardt, J., concurring in part and dissenting in part).

²⁶⁶ See *id.* (Reinhardt, J., concurring in part and dissenting in part).

²⁶⁷ See *id.* (Reinhardt, J., concurring in part and dissenting in part).

²⁶⁸ See *id.* at 954 n.5; *Kincaid II*, 236 F.3d at 348.

²⁶⁹ See *Kincaid II*, 236 F.3d at 352.

²⁷⁰ 308 F.3d at 954 n.5.

²⁷¹ See *id.* at 952, 954 n.5; see also *Hazelwood*, 484 U.S. at 267–70.

²⁷² See Lisby, *supra* note 21, at 155–56.

²⁷³ See *Kincaid II*, 236 F.3d at 352 (stating "[i]n addition to the nature of the university setting, we find it relevant that the editors of *The Thorobred* and its readers are likely to be young adults").

²⁷⁴ See Lisby, *supra* note 21, at 155–56.

Although this approach provides a clear, bright-line test based on age, the age-of-majority test also has significant limitations that may lead courts to reject it based on the facts of a particular case.²⁷⁵ Although many students have reached the age of eighteen when they begin college, some have not and would still be considered minors. Using twenty-one as the age of majority would prove even more troublesome, as many university students are under this age.²⁷⁶ The *Hazelwood* Court focused on the potential impact of controversial speech on an immature audience, not the speaker's age or maturity.²⁷⁷ Likewise, a court could apply the deferential high school standard to university regulations of speech in a setting where some members of the audience fall under the age of majority.²⁷⁸ Thus, the age-of-majority test may not provide any greater protection of university students' rights than the *Hazelwood* standard.²⁷⁹

D. Framework for Future Analysis

Until the U.S. Supreme Court decides whether *Hazelwood* should apply in the university context, courts should use a framework of analysis that preserves college students' full First Amendment rights to free speech and expression.²⁸⁰ Finding that the university has created a limited public forum preserves students' free speech rights by subjecting regulations of speech to strict scrutiny.²⁸¹ Even in the case of a nonpublic forum, a court should find that the students' speech does not bear the imprimatur of the school if university officials have taken steps to distance the school from students' personal speech.²⁸² Courts should also recognize that the state's interest in protecting students from sensitive issues is significantly less compelling at the university level.²⁸³ Thus, *Hazelwood's* deferential standard is not appropriate in the university context.²⁸⁴ Instead, courts should apply the material and substantial disruption test to review restrictions on student speech when the university has not created a public forum.²⁸⁵

²⁷⁵ See *id.* at 155.

²⁷⁶ See *id.*

²⁷⁷ See 484 U.S. at 271.

²⁷⁸ See *id.*

²⁷⁹ See *id.*

²⁸⁰ See *id.* at 273 n.7; *Healy*, 408 U.S. at 194.

²⁸¹ See *Kincaid II*, 236 F.3d at 354.

²⁸² See *Hazelwood*, 484 U.S. at 271.

²⁸³ See *id.* at 272.

²⁸⁴ See *id.*

²⁸⁵ See *Tinker*, 393 U.S. at 512-13.

Tinker's standard provides the most appropriate balance between the competing interests of the university and the student because it requires university officials to refrain from censoring student speech unless there is evidence that substantial disruption is likely to occur.²⁸⁶ In addition to adopting guidelines that follow the *Tinker* framework, university officials can take other measures to maintain order and avoid disruption on university campuses without suppressing students' speech.²⁸⁷ For example, students who threaten or cause disruption can be disciplined under university regulations that meet due process requirements, eliminating the need for school officials to restrict student speech in order to avoid potential disruption.²⁸⁸ Focusing on the disruption created by students' speech provides an appropriate balance between the university's interests in maintaining an environment conducive to education and the students' needs to express their views freely.²⁸⁹

CONCLUSION

The First Amendment guarantees of free speech and expression are vital to university education. Courts must balance these significant constitutional interests against the need for university officials to create an environment in which learning can occur. Although the school's interest in regulating student conduct is significant, university officials should not be given the same level of deference as elementary or secondary school officials when regulating student speech. At least two panels of circuit court judges have applied *Hazelwood School District v. Kuhlmeier's* deferential reasonableness standard, which does not adequately protect university students' free speech rights, to the collegiate setting. Until the U.S. Supreme Court provides an alternative standard of review for university regulations of student speech, courts should rely on the material and substantial disruption test as a framework for balancing these competing interests.

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²⁸⁶ See *id.* at 506-07.

²⁸⁷ *Brown*, 308 F.3d at 964 (Reinhardt, J., concurring in part and dissenting in part).

²⁸⁸ See *Healy*, 408 U.S. at 184.

²⁸⁹ See *id.*