

AN ANALYSIS OF FIRST AMENDMENT PROTECTION FOR STUDENT
EXPRESSION, MID-1900s-2011

by

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DISSERTATION ABSTRACT

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This dissertation sought to determine if federal-level, post-secondary student freedom of expression case law was developing in a similar path as that at the K-12 level of education. It also investigated the ways in which a K-12, highly speech-restrictive legal standard arising from the K-12 case *Hazelwood v. Kuhlmeier* has been utilized at the post-secondary level of education. The question of this case's applicability to post-secondary freedom of expression case law has resulted in a federal circuit court split on the matter. The U. S. Supreme Court has denied *certiorari* in these cases, leaving lower courts to guess as to whether or not to utilize it in decision-making.

In answering these research questions, all federal-level case law found at both levels of education from 1940 to 2011 was analyzed through both traditional legal case analysis and an analytical process specifically designed for this project. The findings revealed that, for the most part, post-secondary student expression case law is, indeed, developing both substantively and at the same pace as that at the K-12 educational level. Much of this consistency is due to utilization of another K-12 freedom of expression case, *Tinker v. Des Moines Independent Community School District*. This case has been highly protective of student expression at both levels of education.

In regard to the second research question, this research found that one federal circuit court case declined to apply *Hazelwood*, indicating it was not an appropriate standard for use at the post-secondary level of education. Three federal circuit courts and one federal district court, however, have decided cases per *Hazelwood*. Application, however, has been neither consistent nor speech-protective. Further, it is expected that unless or until the U. S. Supreme Court rules on its applicability to post-secondary student expression, the number of cases in which it is utilized will continue to rise.

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You are the joy of my life, and

“I love YOU more!”

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CHAPTER I
INTRODUCTION

FREEDOM OF EXPRESSION WITHIN THE CONTEXT OF STUDENT SPEECH

For more than 50 years, courts have been wrestling with the issue of student freedom of expression, or, more pointedly, they have tried to answer the following question: Should students, both at the primary and secondary (K-12) and post-secondary levels of education, be restricted from expressing ideas school administrators would rather they not express? At the judicial level, answering this question involves trying to strike the appropriate balance among the dominant competing interests at play—the value of students’ First Amendment rights to speak and to hear, the roles schools play in protecting the well-being of students and in teaching students appropriate social behaviors, and the need for schools to maintain order so they are able to educate students to become capable and productive, self-governing citizens.

These interests have been pitted against each other in cases before the federal judiciary since 1940.¹ At that time the doctrine of *in loco parentis*, or “standing in for the parent,” governed on the nation’s college and university campuses. Schools controlled nearly every aspect of students’ lives. Prior to the U. S. Supreme Court’s 1961 decision in *Dixon v. Alabama*,² in which the Court ruled that universities and colleges no longer were vested with the authority to act *in loco parentis* in disciplining and expelling

¹ *Minersville School Dist., Bd. of Educators of Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (Students at a K-12 school who were Jehovah’s Witnesses refused to salute the flag and were expelled. The U. S. Supreme Court held their expulsion constitutional.)

² 294 F.2d 150 (5th Cir. 1961).

students, students' lives were greatly controlled by administrators. Under the doctrine, students virtually were without recourse to challenge administrative decisions.

Dixon, however, ended the *in loco parentis* role of public, post-secondary educational institutions, and it was not long before the number of cases presented to the federal judiciary began to swell.

At that time, the United States was engaged in the Vietnam War, and college students lived under the constant threat of being drafted to fight in a war with which many not only disagreed but could do nothing to change without the right to vote. Moreover, they lived in a segregated world, at war with itself. They lived in a world in which women legally could not buy contraception. Students demonstrated against the war; rode Freedom Busses to the Deep South; and picketed for women's rights. Administrators, however, consistently obstructed such speech activities.³

It is within this context that the Free Speech Movement arose on the Berkeley campus during the 1964-1965 academic year. Its primary leader, Mario Savio, commanded the stage at the Sproul Hall sit-in to say with forceful conviction,

I ask you to consider—if this is a firm, and if the Board of Regents are the Board of Directors, and if President Kerr in fact is the manager, then I tell you something—the faculty are a bunch of employees and we're the raw material! But we're a bunch of raw materials that don't mean to be - have any process upon us. Don't mean to be made into any product! Don't mean - Don't mean to end up being bought by some clients of the University, be they the government, be they industry, be they organized labor, be they anyone! We're human beings!... There's a time when the operation of the machine becomes so odious—makes you so sick at heart—that you can't take part. You can't even passively take part. And you've got to put your bodies upon the gears and upon the wheels, upon the levers, upon all the apparatus, and you've got to make it stop. And you've got to indicate to the people who run it, to the

³ BOB ZELLNER, *THE WRONG SIDE OF MURDER CREEK: A WHITE SOUTHERNER IN THE FREEDOM MOVEMENT* (New South Books, Inc. 2008).

people who own it, that unless you're free, the machine will be prevented from working at all.⁴

Eventually, the protests and negotiations ended, with the administration acknowledging students' speech rights and lifting the ban on on-campus political activities.⁵

Two years later, in *Dickey v. Alabama State Board of Education*,⁶ a federal court for the first time specifically stated that college students had First Amendment rights. In discussing the value of both students' and professors' rights⁷ to free speech, the court wrote,

The essentiality of freedom in the community of American universities is almost self-evident. . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.⁸

Not all college campuses responded to student activism in the same way as Berkeley. In 1970, for instance, 13 students were shot, with four being killed, at Kent State University

⁴ Mario Savio, *Sit-in Address on the Steps of Sproul Hall or Operation of the Machine Speech*, 1964, accessed at <http://www.americanrhetoric.com/speeches/mariosaviosproulhallsitin.htm>.

⁵ See DAVID LANCE GOINES, *THE FREE SPEECH MOVEMENT: COMING OF AGE IN THE 1960S* (Ten Speed Press 1993); MAX HEIRICH, *THE BEGINNING: BERKELEY, 1964* (Columbia University Press 1971).

⁶ 273 F. Supp. 613 (M.D. Ala. 1967).

⁷ At the time, professors also were coming under fire for their speech both inside of the classroom and outside of it. There are a handful of high-level federal cases involving requirements that faculty regularly sign statements indicating they weren't members of subversive organizations. Of course faculty continue to find themselves in court defending their speech, but during the Cold War era, academic freedom was on trial.

⁸ *Supra* note 7, at 619 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

during a protest against the U.S. incursion into Cambodia.⁹ Partially in response to this and to the many demonstrations against the Vietnam War, the Twenty-Sixth Amendment to the Constitution of the United States was ratified in 1971, dropping the voting age to 18 years of age.¹⁰ As will be demonstrated in Chapter V, speech at the nation's public colleges and universities was protected to a high degree during this turbulent era.

Students in the K-12 schools during the 1960s and 1970s also were concerned with the social issues discussed above, in addition to concerns related to their imminent entry into the adult world in which they, too, would be confronted with the prospect of being drafted. Aside from their own demonstrations, students engaged in symbolic speech and regularly created “underground newspapers” to give voice to their concerns. At the K-12 level of education, however, the doctrine of *in loco parentis* remained.

Nonetheless, as early as 1943, the U. S. Supreme Court wrote, in relation to the value of K-12 students' free speech,

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.¹¹

⁹ *Supra* note 5.

¹⁰ Gregory 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 (2002).

¹¹ *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943).

And in 1969, the U. S. Supreme Court ruled in *Tinker v. Des Moines Independent School District*¹² that the suspension of students wearing black armbands to school in protest of the war was unconstitutional. For the first time the Court declared that K-12 students were “persons” under the Constitution. Their symbolic speech did not create a situation in which administrators could “forecast substantial disruption of or material interference with school activities.”¹³ The Court also argued that “undifferentiated fear ... or mere apprehension” of a significant disturbance would not be enough to overcome infringement of students’ First Amendment rights.¹⁴ *Tinker* is heralded by many to represent the zenith of First Amendment protection for K-12 students. It would be used to strike down administrative punishment of K-12 student speech in a number of cases, as shown in Chapter V.

It will be argued here that during this time period, students began to learn the meaning of freedom, in part through experiencing freedom of speech within the schools. They were prolific journalists learning to question authority and to write on government’s (administrators’ and school boards’) actions. In so doing, student journalists, specifically, were learning how to effectuate their future role as the Fourth Estate, or the watchdogs of government. They were learning to become citizens who would one day have the tools necessary to become self-governing.

Following these highly turbulent times and the social and political reforms achieved during this era – enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, ratification of the Twenty-Sixth Amendment, significant reforms

¹² 393 U.S. 503 (1969).

¹³ *Id.* at 514.

¹⁴ *Id.* at 509.

relating to discrimination against women in the workplace and women's access to contraception, the end of the draft in 1973, and the end of the Vietnam War in 1975 – litigation concerning protests, demonstrations, and “underground newspapers” at both levels of education decreased.

The first K-12 case heard by the U. S. Supreme Court following this period of time was *Bethel School District No. 403 v. Fraser*,¹⁵ in which a student gave a sexually suggestive speech during a high school assembly. The Court said that the school had the right to regulate and punish “lewd” and “indecent” speech even if it is not disruptive to the educational process. While the Court did not overrule *Tinker*, it created another way in which schools could regulate speech. The primary mission of the schools, the Court said, concerned the inculcation of values, and that schools had the right to “disassociate” themselves from speech that is “wholly inconsistent with the ‘fundamental values’ of public school education.”¹⁶

By 1988, the U. S. Supreme Court decided in *Hazelwood v. Kuhlmeier*¹⁷ that restrictions on K-12 student speech found to be part of the curriculum, and, as such, school-sponsored bearing the imprimatur of the school, need only be “reasonably related” to legitimate pedagogical concerns to pass constitutional muster. While the *Hazelwood* holding did not overrule *Tinker*, it created a new category of speech – the school-sponsored – that easily could be regulated, whether disruptive to the learning process or not. And, according to the nation's leading free speech advocacy organization, the

¹⁵ 478 U.S. 675 (1986).

¹⁶ *Id.* at 685.

¹⁷ 484 U.S. 260 (1988).

Student Press Law Center, calls from K-12 students regarding censorship have increased 350 percent since *Hazelwood*.¹⁸

Moreover, since 1989, this speech-restrictive K-12 legal standard has begun to be applied to post-secondary free speech case law. To date, six U. S. circuit courts of appeals¹⁹ have either chosen to analyze cases via *Hazelwood*²⁰ or explicitly have declined to do so,²¹ saying it is not applicable to the post-secondary level of education. Two cases, however, were not included in this study. One case²² is currently on appeal without a final decision. While the circuit court utilized *Hazelwood*, questions persisted as to whether the punishment of the students' curricular speech was retaliatory. Additionally, another case²³ was decided at the federal circuit court level utilizing *Hazelwood* as precedent. Again, however, there were questions about whether the student's punishment for her curricular speech was retaliatory. The case was settled out of court. Thus to date, six circuit courts have utilized *Hazelwood* in their decision-making, representing a circuit court split on both its application to post-secondary student expression and the manner in which it should be applied.

With the knowledge that the framework has been used at the K-12 level of education to significantly curtail student speech, its utilization at the post-secondary

¹⁸ Mike Hiestand, *Hazelwood School District v. Kuhlmeier: A Complete Guide to the Supreme Court Decision*, Student Press Law Center (2008), accessed at <http://www.splc.org/legalresearch.asp?id=4>.

¹⁹ *Alabama Student Party v. Student Government Association of the Univ. of Ala.*, 867 F.2d 1344 (11th Cir. 1989); *Kincaid v. Gibson*, 236 F. 3d 342 (6th Cir. 2001); *Brown v. Li*, 308 F. 3d 939 (9th Cir. 2002); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004); *Hosty v. Carter*, 412 F. 3d 731 (7th Cir. 2005); *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012).

²⁰ *Alabama Student Party*, *Brown*, *Axson-Flynn & Hosty*, *supra* note 19.

²¹ *Kincaid*, *supra* note 19.

²² *Ward*, *supra* note 19.

²³ *Axson-Flynn*, *supra* note 19.

level – and the U. S. Supreme Court’s refusal to hear these cases on appeal – leave questions about the future protection of post-secondary student expression.

RESEARCH QUESTIONS AND OVERVIEW OF FINDINGS

This dissertation, then, asked the following research questions:

R1: Is post-secondary student free expression case law following a developmental path similar to the path followed by K-12 student free expression case law?

R2: How has *Hazelwood v. Kuhlmeier* been utilized at the post-secondary level of education?

To answer these questions, 120 federal-level student freedom of expression cases found at both levels of education were analyzed utilizing traditional legal analysis and a method unique to this project to determine the dominant issues at play within this area of the law. Relying upon the 1969 U. S. Supreme Court case *Brandenburg v. Ohio*,²⁴ in which the Court held that speech that is not directed to inciting or likely to incite imminent lawless action, this dissertation argued that, absent such a showing, speech should be free.

This research revealed that post-secondary free expression case law is, in large part, following a similar developmental path to that at the K-12 level of education. When analyzing cases through the lens of the *Tinker* forecasting of material and substantial disruption standard, courts generally were supportive of student speech, which parallels protection of speech under *Brandenburg*, and should be the standard governing student speech at both levels of education. Further, this research found that, as at the K-12 level of education, utilization of the *Hazelwood* framework to analyze restrictions on post-

²⁴ 395 U.S. 444 (1969).

secondary speech resulted almost exclusively in less protection for student speech. Potential disruption typically was not a consideration in such cases, indicating far from ideal protection of speech consonant with the *Brandenburg* framework.

This chapter will proceed with a discussion of the facts in *Hazelwood* and critiques of its restrictive legal framework before turning to a brief description of recent cases in which students have been punished for speech made online in the privacy of their homes. A short analysis of landmark, U. S. Supreme Court post-secondary First Amendment cases will follow, demonstrating the high level of protection historically afforded students at the college level. From here the discussion will address the federal circuit court of appeals split on the question of whether the *Hazelwood* framework is applicable at the college level.

Next, the purposes of education generally and the historical structures of higher education will be explored. Then the various purposes of K-12 and post-secondary education will be examined, concluding with the assertion that the differences between the two levels of education make application of *Hazelwood* to college and university speech antithetical to the goals and mission of higher education. Finally, the content of each subsequent chapter will be discussed.

HAZELWOOD v. KUHLMEIER

At issue in *Hazelwood* was the principal's deletion of two pages of the curriculum-based student newspaper that dealt with teenage pregnancy and divorce. Three student staff members sued the school for violation of their First Amendment rights. When the case reached the U. S. Supreme Court, the Court ruled in favor of the

school’s administrators, indicating that students in high school, particularly younger students, were not mature enough to be exposed to sensitive topics such as teenage sexuality.²⁵

The Court also indicated that the school has a right to “disassociate itself”²⁶ from speech that members of the student body and community-at-large may “perceive to bear the imprimatur of the school.”²⁷ If the speech “is inconsistent ‘with the shared values of a civilized social order,’”²⁸ or “associate[s] the school with any position other than neutrality,”²⁹ the Court reasoned, schools are entitled to censor material so they can “fulfill their role as a ‘principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.’”³⁰

Thus the two-pronged *Hazelwood* framework was born. The Court decided that a student newspaper could be regulated if 1) it were subsidized by the school and was, thus, a nonpublic, curricular forum and 2) administrative control, or censorship, was related to “legitimate pedagogical concerns.”³¹ If the vehicle for expression, in this case a newspaper, *purposefully* had been intended to operate, through policy or practice, as a

²⁵ *Supra* note 17, at 271.

²⁶ *Id.* (quoting *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)).

²⁷ *Id.* at 271.

²⁸ *Id.* at 272. (quoting *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

²⁹ *Id.*

³⁰ *Id.* at 272 (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)).

³¹ *Supra* note 17, at 273.

public forum, however, the school could not constitutionally censor the particular speech in question.

The *Hazelwood* framework has been criticized by a number of free speech advocates as far too ambiguous, and they have warned that applying this standard to post-secondary expression might lead to unwarranted censorship.³² What are “legitimate pedagogical concerns”? How do schools determine the “shared values of a civilized order”? Are schools even responsible for making such decisions?

According to attorney Joe Murphy, the *Hazelwood* framework has been so variously interpreted and used in K-12 and post-secondary student speech and press cases that it is unclear if courts even have a clear understanding of the framework.³³ The U. S. Supreme Court itself historically has expressed concern about the potential “chilling effect” that overly broad or unclear laws and standards may have on speech.

Others have argued that application of the *Hazelwood* framework at both levels of education is inconsistent with one of the most critical missions of both schools—to educate students so they become self-governing citizens.³⁴ As 19th century educator and statesman Horace Mann so eloquently put it, “The great moral attribute of self-government cannot be born and matured in a day; and if school children are not trained to it, we only prepare ourselves for disappointment if we expect it from grown men.”

³² Organizations include the Freedom Forum, the First Amendment Center, the American Civil Liberties Association, and the Student Press Law Center.

³³ *Bait and Switch in Hosty v. Carter: The Seventh Circuit’s Recipe for Limiting Free Speech Rights of College Journalists by Extending the ‘Hazelwood Doctrine’ and Misusing Qualified Immunity*, 81 ST. JOHN’S L. REV. 429 (2007).

³⁴ *See, for ex.*, Erwin Chemerinsky, *Teaching that Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 101 (2009).

Yet when students are censored, they are not learning one of the most important principles upon which our representative democracy relies—that free speech, particularly that which is political, is necessary if the people, not government, are to be sovereign.

As Justice William J. Brennan, in his *Hazelwood* dissenting opinion wrote:

Such unthinking contempt for individual rights is intolerable from any state official. It is particularly insidious from one to whom the public entrusts the task of inculcating in its youth an appreciation of the cherished democratic liberties that our Constitution guarantees ... The young men and women of Hazelwood East expected a civics lesson, but not one the Court teaches them today.³⁵

Thus teaching students to avoid potentially controversial speech so they aren't reprimanded by administrators very well may dissuade them from actively engaging in the deliberative process, which inherently includes criticism of governmental action. Further, when student journalists operate in such a suppressive environment, they are not being prepared for their future role as the Fourth Estate.

And the problems only become more pernicious if college students also are taught not to speak. Application of the *Hazelwood* framework at the college level is contradictory to the distinction between secondary students and *adult* university students that the U. S. Supreme Court has articulated in a number of cases, both concerning student speech and not. Most prominently, this distinction has been made in Establishment Clause cases.³⁶ The Court also has delineated a distinction between minors

³⁵ *Supra* note 17, at 290.

³⁶ *See* Lee v. Weisman, 505 U.S. 577, 593 (1992) (“We do not address whether that choice [between protesting and participating] is acceptable if the affected citizens are mature adults, but we think the state may not, consistent with the Establishment Clause, place primary and secondary school children in this position.”); Bell v. Little Axe Indep. Sch. Dist. No 70, 766 F.2d 1391, 1407 (10th Cir. 1985) (referring to expert testimony that “It is not until the age of 18 that the child fully develops the ability to make decisions independent of authority figures and peers”); Widmar v. Vincent, 454 U.S. 263 (1981) (“University students are, of course, young adults. They are less impressionable than younger students and should be

in elementary and secondary schools from legally sanctioned adults in other contexts.³⁷

Moreover, the Twenty-Sixth Amendment to the Constitution of the United States, ratified in 1971, decreased the voting age from 21 to 18, giving college-aged students a higher stake in speaking out politically.

According to attorney Mike Hiestand of the Student Press Law Center (SPLC),³⁸ “Student media continue to report censorship of articles, editorials and advertisements that are perceived as ‘controversial’ or that school officials feel might cast the school in a negative light,” he wrote.³⁹ Advisers also have reported that their jobs become threatened if they do not censor when asked to do so by administrators. Nearly all of the advisers and students who have filed complaints with the SPLC attribute the asserted censorship to the *Hazelwood* ruling.⁴⁰ The SPLC has not determined the number of unreported incidents of censorship.

A Knight Foundation Study found that many students think government, indeed, has the right to censor.⁴¹ People for the American Way (PAW) also has documented a

able to appreciate that the University’s policy is one of neutrality toward religion”); *Tilton v. Richardson*, 403 U.S. 672 (1971) (“There is substance to the contention that college students are less impressionable and less susceptible than adolescents to religious indoctrination”).

³⁷ *Belotti v. Baird*, 443 U.S. 622 (1979) (In determining the constitutionality of a state statute regulating the access of minors to abortions, the Court wrote, “during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”); *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (In determining the constitutionality of a New York criminal obscenity statute prohibiting the sale to minors under 17 years of age of material defined to be obscene, the Court wrote, “[A]t least in some precisely delineated areas, a child — like someone in a captive audience — is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.”).

³⁸ The SPLC is the leading U.S. student free speech advocacy organization.

³⁹ Mike Hiestand, *Hazelwood School District v. Kuhlmeier: A Complete Guide to the Supreme Court Decision*, Student Press Law Center (2008) <http://www.splc.org/legalresearch.asp?id=4>.

⁴⁰ *Id.*

⁴¹ Warren Watson & Sarah Childers, *High School Journalism*, AMER. EDUCATOR, (Nov. 11, 2005).

steady increase in complaints regarding student censorship since *Hazelwood*. One of the most interesting aspects of PAW's report is that school censors prevail in 50 percent of the reported challenges to censorship.⁴² PAW legal director Elliot Mincberg said, "Some school officials have interpreted *Hazelwood* as granting them broad, even unchecked authority."⁴³

Student Speech in the Privacy of Their Homes

Within just the last few years, a series of K-12 cases have been decided concerning the constitutionality of punishing students for speech made in the privacy of their homes, but which have, to varying degrees, bled into the schoolhouse. In two of the four cases, students prevailed. In *Doninger v. Niehoff*,⁴⁴ a member of the student council posted a message on her blog critical of administrators and subsequently was prohibited from running for class secretary. The Second U. S. Circuit Court of Appeals found that the school did not violate the student's First Amendment rights because it determined that administrators need only forecast a material and substantial disruption at school per *Tinker*.

In *Layshock v. Hermitage School District*,⁴⁵ the Third U. S. Circuit Court of Appeals held for the student because it found that the online profile he created mocking his high school principal caused no substantial disruption on campus per *Tinker*. In the companion case *Snyder v. Blue Mountain School District*,⁴⁶ another student created an

⁴² Debra Gersh Hernandez, *Censorship in the Schools*, EDITOR & PUBLISHER, (Sept. 16, 1995).

⁴³ *Id.*

⁴⁴ 527 F.3d 41 (2d Cir. 2008).

⁴⁵ 593 F.3d 249 (3d Cir. 2010).

⁴⁶ 650 F.3d 915 (3d Cir. 2011).

online profile mocking her middle school principal. Again, the Third Circuit ruled for the student, reasoning that the profile caused no substantial disruption at school. In the final case, the Fourth U. S. Circuit Court of Appeals upheld the suspension of a student who posted online that another female student had an STD.⁴⁷ Close reading of the cases indicates the decisions primarily turned on the courts' understanding of *Tinker*, notably whether it allows punishment if a disruption is foreseeable or whether a disruption actually occurs. The U. S. Supreme Court just this term denied *certiorari* in all cases.

POST-SECONDARY U. S. SUPREME COURT CASE LAW

Historically, college and university students' freedom of expression has been protected stringently by the U. S. Supreme Court. The six cases heard by the Court, and the many others in this area of the law, have found solid footing in several bedrock First Amendment principles: 1) The right to association is inextricably tied to speech in that denial of the right to associate also denies speech,⁴⁸ 2) Speech that is offensive cannot be denied merely because it is distressful or even disgusting to others,⁴⁹ 3) Discriminating against or prohibiting speech based upon another's viewpoint is repugnant to the First Amendment,⁵⁰ and 4) Government cannot compel citizens to express beliefs with which

⁴⁷ *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011).

⁴⁸ *N.A.A.C.P. v. United States*, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.")

⁴⁹ *Bridges v. State of California*, 314 U.S. 252 (1941) ("For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.")

⁵⁰ *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972) ("Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.")

they disagree.⁵¹ Additionally, a brief note on public forum doctrine. Public forum doctrine was created as a means of determining the expression allowed on government property. Over time the Court carved out three *fora* – the open public forum, such as sidewalks where speech is rarely regulated; the nonpublic forum, such as prisons, in which speech is much more limited; and the limited public forum, which rests between these two and allows speech for certain purposes and for certain speakers. Speech typically is not regulated to a high degree in the limited public forum. In theory, viewpoint discrimination is not allowed within all types of *fora*.

The Court heard three cases pre-*Hazelwood*. In the 1972 case *Healy v. James*,⁵² the Court held that Central Connecticut State College unconstitutionally infringed students' rights to free speech and association in denying official recognition to the Students for a Democratic Society. The Court wrote, "State colleges and universities are not enclaves immune from the sweep of the First Amendment. . . . [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."⁵³

Just one year later in *Papish v. Board of Curators of University of Missouri*,⁵⁴ the Court ruled that the university's expulsion of a student for publishing two articles deemed indecent and offensive was unconstitutional. The Court wrote, "... the mere

⁵¹ *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.").

⁵² 408 U.S. 169 (1972).

⁵³ *Id.* at 180.

⁵⁴ 410 U.S. 667 (1973).

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.’”⁵⁵

In *Widmar v. Vincent*,⁵⁶ the Court declared for the first time that once a forum for expression is opened, it cannot restrict expressive activities based upon viewpoint, as the university had done. The Court wrote,

A university legitimately may regard some subjects as more relevant to its educational mission than others. But the university, like the police officer, may not allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted. If a state university is to deny recognition to a student organization — or is to give it a lesser right to use school facilities than other students — it must have a valid reason for doing so.⁵⁷

Three cases appeared before the Court post-*Hazelwood*. The first, *Rosenberger v. Rectors and Visitors of the University of Virginia*,⁵⁸ involved the university’s refusal to fund an extra-curricular newspaper dedicated to religious speech. The Court, speaking for the first time on the limited public forum, ruled that refusing to fund the newspaper due to its viewpoint while continuing to fund others was an unconstitutional violation of the students’ First Amendment rights.

Five years later, in *Board of Regents of Univ. of Wis. System v. Southworth*,⁵⁹ the Court was faced with a unique question: Should students have to fund, through mandatory student fees, organizations with which they ideologically disagreed? The Court ruled that because the student activities fee system was a metaphysical public

⁵⁵ *Id.* at 670.

⁵⁶ 454 U.S. 263 (1981).

⁵⁷ *Id.* at 280.

⁵⁸ 515 U.S. 819 (1995).

⁵⁹ 529 U.S. 217 (2000).

forum in which fees supported a large number of organizations of a wide variety of viewpoints, requiring students to pay their full fees was constitutional. The second part of the decision, however, involved the university's referendum process for determining the allocation of fees. The Court found this aspect of the fees scheme unconstitutional because its configuration did not allow for viewpoint neutrality.

The final case, heard in 2010, was *Christian Legal Soc. Chapter of Univ. of Cal., Hastings v. Martinez*.⁶⁰ Here the Court was called upon to decide if an "all-comers" policy was constitutional. Officially recognized student organizations at the law school were required to accept all students who wished to join a particular organization. The organization at question refused to allow students to join *as voting members* unless they signed a statement of Christian faith and renounced homosexuality. The Court found that the all-comers policy was constitutional because it was a viewpoint neutral program. Thus in this case, while the Court ruled against students, it also could be said that it held for students' First Amendment rights to association and, therefore, to speech at the same time.

POST-HAZELWOOD FEDERAL CIRCUIT COURT SPLIT

As discussed above, six federal circuit courts of appeals have ruled on the applicability of *Hazelwood* to the post-secondary cases presented before them.

The first case, heard by the Eleventh Circuit Court,⁶¹ was *Alabama Student Party v. Student Government Association of the University of Alabama*,⁶² in which students

⁶⁰ 319 Fed. Appx. 645 (2010).

⁶¹ The United States Court of Appeals for the Eleventh Circuit includes the following states: Alabama, Florida, and Georgia.

alleged violation of their First Amendment rights when the university restricted aspects of electioneering. The court found that the university's rules on campaigning were reasonable per *Hazelwood*. The second case, heard by the Sixth Circuit,⁶³ was *Kincaid v. Gibson*,⁶⁴ which has been viewed variously as to whether or not it applied *Hazelwood*. The case involved the court-determined unconstitutional confiscation of yearbooks the administration considered "inappropriate" and of "poor quality."⁶⁵ While the court stated that *Hazelwood* was not applicable, it proceeded to utilize the case as precedent in determining that the yearbook was a limited public forum. As such, the school could not discriminate against the viewpoints expressed therein.

The third case, *Brown v. Li*,⁶⁶ involved the university's refusal to accept a student's thesis because it contained a "Disacknowledgements" section, in which the student chastised certain university personnel, utilizing profanity in the process. The Ninth Circuit Court⁶⁷ ruled that the university acted within its constitutional limits in refusing to accept his thesis. The next case, *Axson-Flynn v. Johnson*,⁶⁸ concerned a student who refused to use the word "fuck" and to take the Lord's name in vain during

⁶² *Supra* note 19.

⁶³ The United States Court of Appeals for the Sixth Circuit includes the following states: Kentucky, Michigan, Ohio, and Tennessee.

⁶⁴ *Supra* note 19.

⁶⁵ *Id.* at 345.

⁶⁶ *Supra* note 19.

⁶⁷ The United States Court of Appeals for the Ninth Circuit includes the following states: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

⁶⁸ *Supra* note 19.

her acting class at the University of Utah. In its ruling, the Tenth Circuit Court⁶⁹ ruled for the student, in part, and remanded in part. It was not included in the analysis here because the case was settled out of court.

Then in 2005 the case that has raised the most concern among free speech advocates was *Hosty v. Carter*,⁷⁰ in which the Seventh Circuit Court⁷¹ applied *Hazelwood* to an extra-curricular student newspaper, in which student writers and editors expressed criticism of various administrators. No court before this had applied the framework to a college newspaper, one of the principal means by which ideas are transmitted within the educational environment. One such administrator, Patricia Carter, Dean of Student Affairs and Services, ordered the printer to stop the presses.

The court determined that the newspaper was a limited public forum and that neither its extra-curricular status nor age impacted forum determination, which goes against U. S. Supreme Court precedent indicating that extra-curricular activities and publications should receive the full protection of the law and not be subjected to a restrictive legal standard created for the review of K-12 student expression. Because Dean Carter, the court said, could not have known the law in this area, it determined that she was entitled to qualified immunity, which opened the floodgates for administrators nationwide to censor and to be held unaccountable if they simply proclaim convincingly enough –“I didn’t know.” Seen in this light, the students neither won their case entirely nor lost it entirely either.

⁶⁹ The United States Court of Appeals for the Tenth Circuit includes the following states: Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

⁷⁰ *Supra* note 19.

⁷¹ The United States Court of Appeals for the Seventh Circuit includes the following states: Illinois, Indiana, and Wisconsin.

The final student expression case, which, as discussed above also will not be analyzed because it is in the appeal process, was *Ward v. Polite*,⁷² in which a graduate counseling student refused to counsel homosexuals because homosexuality was against her religion. After being kicked out of the program, she sued, claiming the school compelled her to speak against her beliefs. It is on appeal for factual determination.

Finally, another case utilizing *Hazelwood*, which will not be analyzed in this dissertation because it does not involve a student, but which merits comment nonetheless is *Bishop v. Aranov*,⁷³ in which a professor spoke periodically in class about his personal religious beliefs. “He never engaged in prayer, read passages from the Bible, handed out religious tracts, or arranged for guest speakers to lecture on a religious topic during instructional time,” wrote the court.⁷⁴ The university requested that he discontinue all references to his religious beliefs while in class. Pursuant to this, he filed suit, alleging violation of his First Amendment rights via professorial academic freedom. The Eleventh Circuit Court utilized *Hazelwood* to determine that the classroom was not a public forum and subsequently ruled in favor of the university.

Hazelwood and *Hosty* have raised enough concern for state legislatures to enact laws protecting free speech. For instance, in 2007, the Illinois General Assembly (Illinois being one of the three states directly affected by *Hosty*) passed the College Campus Press

⁷² *Supra* note 19.

⁷³ 926 F. 2d 1066 (11th Cir. 1991).

⁷⁴ *Id.* at 1068.

Act (CCPA).⁷⁵ The act declares all student media at public colleges and universities to be public forums and effectively prevents another *Hosty*-type case arising in Illinois.

Since *Hazelwood*, a total of three states have passed legislation protecting college students, and seven states, including California and Oregon, have done so for secondary school students.⁷⁶ Oregon is the only state that protects the speech of both groups of students.⁷⁷ A 2007 Washington bill that would have better protected students died in committee.⁷⁸

The efficacy of state statutes protecting secondary free speech has, however, been called into question. One study concluded that, in the state analyzed, the statute itself had less influence on the protection of student expression than other variables, such as level of adviser education and differences between urban and rural schools.⁷⁹ The study noted, however, that other states should be examined before generalizing. It also did not evaluate statutes designed to protect college students.

EDUCATION, GENERALLY, AND HISTORICAL STRUCTURES OF HIGHER EDUCATION

Explication of the centrality of education to the human experience begins at least with Plato and his allegory of the cave, a fictional account of his teacher Socrates'

⁷⁵ 110 ILCS 13 (2007).

⁷⁶ Ark. Stat. Ann. Secs. 6-18-1201 – 1204; Calif. Educ. Code Sec. 48907; Colo. Rev. Stat. Sec. 22-1-120; Iowa Code Sec. 280.22; Kan. Stat. Ann. Sections 72.1504 - 72.1506; Mass. Gen. Laws Ann. ch. 71, Section 82; Ore. Rev. Stat. sec. 351.649 (2007).

⁷⁷ Ore. Rev. Stat. Sec. 351.649 (2007).

⁷⁸ SB 5946 (2009).

⁷⁹ Jennifer R. Garner & Bruce L. Plopper, *The Effects of a Student Press Law on Student Newspaper Content*, COMM.: JOURNALISM EDUC. TODAY 26 (2010).

exchange with Plato's brother Glaucon.⁸⁰ In this dialog, Socrates⁸¹ posited to Glaucon a scenario in which a group of people have lived, chained to a blank wall all of their lives, able only to see illuminated on the wall before them the shadows of figures crossing the path of the fire behind them. They begin to ascribe forms to these shadows, and to the sounds of the people walking along a raised pathway. They came to believe that the shadows and sounds were reality, not merely reflections of reality. Among themselves they guessed which shadow would appear next, praising the person who was right as the one who understood the nature of life.

Next, Socrates proposed that were one of these people, or prisoners, to be set free and shown the true forms casting the shadows that had become the prisoner's reality, would he believe the shadows were more real than the true forms to which he now was exposed? Initially, Socrates asserted, the prisoner would not, but with enough time he would begin to acclimate to the brightness of the sun, to the forms around him and to *see*, both literally and figuratively. And, Socrates asked, if this man were to return to the cave, no longer able to see the shadows, and attempt to explain to the other prisoners what he had learned, how would they view him? How would he view them? Socrates suggested that they likely would think him stupid in his inability to now see the shadows, which have constituted their reality, while in turn he would view them with pity.

Such is the life of the philosopher, Socrates said—to enlighten the prisoners, who have no knowledge of the good, the last thing to be seen. “Once one has seen it, however, one must conclude that it is the cause of all that is correct and beautiful in anything, that

⁸⁰ PLATO, THE REPUBLIC BOOK VII in: READINGS IN CLASSICAL POLITICAL THOUGHT (Peter J. Steinberger, ed. Hackett Publishing Company, Inc. 2000).

⁸¹ Socrates, the father of rhetoric, chose not to learn to write, thus his teachings were later documented by pupils such as Plato.

it produces both light and its sources in the visible realm, and that in the intelligible realm it controls and provides truth and understanding, so that anyone who is to act sensibly in public or private must see it.”⁸²

As professor of philosophy Jorn K. Bramann noted:

While Plato thus describes the liberating and empowering nature of education, he was deeply pessimistic with regard to its popularity. In the tale of the cave great emphasis is placed on the difficulties of acquiring knowledge, and on the hostility and mistrust that many people feel toward education and educated people. The ascent out of the cave and into the light is neither easy nor necessarily voluntary, and it requires a persistence and willingness to undergo changes that most people would find too strange to consider, or too painful to endure.⁸³

Yet throughout the centuries education has been a central aspiration of many. And, as one scholar noted, “The changing relationship between students and their college or university reflects the evolution of higher education in this country.”⁸⁴

Almost universally, analyses of student free speech at both the K-12 and post-secondary levels have used *Tinker* as their starting point. Such analyses, however, fail to account for the more-than-century-long period of time prior to *Tinker* in which colleges and universities had, for all intents and purposes, absolute control of student speech due to the doctrine of *in loco parentis*. It is not surprising that scholars do not include this era in their analyses because courts were loathe to interfere with administrative discipline of students. Yet neglecting to discuss this period results in a landscape only half-painted.

⁸² *Supra* note 80, at § 517, 263.

⁸³ *Educating Rita and Other Philosophical Movies*, accessed at <http://faculty.frostburg.edu/phil/forum/PlatoRep.htm> (2009).

⁸⁴ Brian Jackson, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1135 (1991). *See also*, for further discussion of early higher education in the U.S., Cheryl McDonald Jones, *In Loco Parentis and Higher Education: Together Again?*, 1 CHARLESTON L. REV. 185 (2007); ALAN CHARLES KORS ET AL, *THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES* (The Free Press 1998); FREDERICK RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY* (The University of Georgia Press 1962).

During the colonial period, for instance, higher education was conducted through small, church-affiliated colleges. In general, they were modeled after England's Oxford and Cambridge, and colleges were concerned not only with higher learning but also with the development of moral character and religious education. These early colleges retained near absolute control of both the curriculum and student behavior. They stressed social cohesion over heterogeneity. This familial quality was supported by the doctrine of *in loco parentis*, and courts stringently resisted interfering with administrative discipline of students.⁸⁵

During the late 19th and early 20th centuries, higher education experienced a fairly rapid shift from this small, religious, and socially cohesive environment. Society's increasing need for technically skilled workers led educational reformers to look to the German model of the university, in which research and specialized knowledge were emphasized. Most of the previously small colleges began the transition to this larger university model, and the student experience shifted from one in which the administration controlled nearly every aspect of the student's life to a system in which students were quite free, in relative terms, from control by the administration.⁸⁶ For instance, students generally were allowed to choose their courses, and they were relatively free from the daily supervision in place at the smaller liberal arts colleges.⁸⁷

Because the Germanic model required growth to support its specialized research agenda and because of a significant influx of World War II veterans, university populations increased dramatically. These larger universities attempted to maintain the

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

intimacy characterized by the English college model; however, their student bodies were increasingly heterogeneous. This modern multiversity was characterized, in part, by a growing tension between a diverse student body and administrative desire for discipline and control.⁸⁸

This tension became more pronounced when the U. S. Fifth Circuit Court of Appeals ruled in *Dixon v. Alabama*⁸⁹ that the expulsion of six African-American students for participating in civil rights demonstrations was a violation of the students' constitutional right to due process. Because public universities are state actors, the Court said, they could not infringe upon students' constitutional rights. This was a monumental departure from the prevailing notion of judicial non-interference in matters relating to student discipline. Not only did the Court recognize that students did, indeed, have constitutional rights within the university setting, but it also appeared to ring the death knell for the doctrine of *in loco parentis* within post-secondary education.

FREE SPEECH MOVEMENT OF THE 1960s

Three years after *Dixon*, the Free Speech Movement (FSM) arose, most prominently at Berkeley from 1964-65.⁹⁰ In 1958, students created SLATE, a campus political party with the aim of protecting the rights of student groups to support and to protest political issues unrelated to campus life, such as racial discrimination, war and peace, capital punishment, and civil liberties. The university, however, refused to recognize SLATE as a political party, deeming it only a student organization.

⁸⁸ *Id.*

⁸⁹ *Supra* note 2.

⁹⁰ *See, for ex.,* GOINES & HEIRICH, *supra* note 5.

Further, the university created a set of directives regulating the rights of student organizations to sponsor speakers and to take stands publicly on controversial off-campus issues. By the fall of 1964, SLATE'S leaders consisted primarily of students who had been to Mississippi to participate in Freedom Summer, a campaign with the explicit goal of registering African-Americans to vote.⁹¹

In September, these Freedom Riders, along with University Friends of the Student Non-Violent Coordinating Committee (SNCC) and Campus Congress of Racial Equality (CORE), set up tables at the university's entrance for the purpose of soliciting members and contributions for a variety of civil rights issues. (Under the directives, only members of the Democratic and Republican campus clubs could engage in fundraising for political parties and causes.)⁹²

When administrators learned that these groups were engaging in solicitation, they initiated disciplinary proceedings against the students. In rejection of this move, more than 500 students gathered outside the Dean's office and presented him with a petition demanding 1) that all students be given the right to engage in political solicitation and 2) that all charges against the students be dropped immediately.⁹³

The Dean was unrelenting, and over the next two months students held protests and rallies against these restrictive policies. They also met repeatedly with administrators and professors in an effort to negotiate more inclusive policies relating to political organization and speech. Yet in December, police arrested 765 demonstrators. This fueled larger demonstrations, until, finally, in January, the new chancellor issued two

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

statements, supported by FSM students, indicating both his philosophy regarding the crisis and provisional rules for political activity and speech. The members of FSM held their first legal rally the following day.⁹⁴

PURPOSES OF MODERN K-12 and POST-SECONDARY EDUCATION IN THE UNITED STATES

K-12 Education

It is within this context and the general political and social unrest within society-at-large that the *Tinker* case was decided, which, as discussed, protected K-12 students' freedom of expression to a high degree. As noted by the Court,

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures--Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.⁹⁵

Additionally, schools must promote interpersonal communication among students. "This is not only an inevitable part of the process of attending school; it is also an important part of the educational process."⁹⁶ And, most famously, the Court wrote, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁹⁷

John Dewey also felt that the social life of the child was of extreme importance because it is the basis of personal growth through which social progress and reform can

⁹⁴ *Id.*

⁹⁵ *Supra* note 12, at 507 (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 US 624, 637 (1943)).

⁹⁶ *Id.* at 512.

⁹⁷ *Id.* at 506.

be achieved. Failing to recognize both the sociological and psychological aspects of the child will lead to “evil results,” he wrote. One such evil would be neglecting the moral education of the child, which “centers around this conception of the school as a mode of social life, that the best and deepest moral training is precisely that which one gets through having to enter into proper relations with others in a unity of work and thought.” Further, he believed in active learning through *expressive* and constructive activities, without which “The child is thrown into a passive, receptive or absorbing attitude” resulting in “friction and waste.”⁹⁸

The National Association of Secondary School Principals’ “Statement of Values” says that the mission of K-12 education is to “educate the total child” through classroom instruction and other activities that “promote character, citizenship, and leadership.” Further, schools must teach students about indispensable virtues such as “honesty, dependability, trust, responsibility, tolerance, respect, and other commonly held values important to our society.”⁹⁹ In *Hazelwood*, the Court said that a school’s principal role was to engender students with cultural values and skills necessary for citizenship.

Post-Secondary Education

Barlett Giamatti, former president at Yale University, once warned that a particular danger in higher education is, “...a smugness that believes the institution’s value is so self-evident that it no longer needs explication, its mission so manifest that it

⁹⁸ John Dewey, *My Pedagogic Creed* (1897), accessed at <http://www.rjgeib.com/biography/credo/dewey.html>.

⁹⁹ National Association of Secondary School Principals’, *NAASP Statement of Values* (2002), accessed at <http://www.nassp.org/Content.aspx?topic=47103>.

no longer requires definition and articulation.”¹⁰⁰ Now, almost a quarter of a century later, with the dynamic changes that have occurred in society due to the swift advancement in technology, crises in funding and the resulting changes in the university’s funding structure, in addition to an ever-increasing heterogeneous, post-secondary community, many are beginning to specifically describe the mission and purposes of higher education.

Harold T. Shapiro, former President of Princeton University, wrote that universities serve society as both responsive servants and thoughtful critics. The modern university, he wrote, “...must serve society by providing the educational and other programs in high demand ... [and] ... the university must also raise questions that society does not want to ask and generate new ideas that help invent the future, at times even ‘pushing’ society toward it.”¹⁰¹ The university, he contended, not only influences the direction a society takes but also is a reflection of the way in which a society changes.

He further asserted that higher education is a requirement of “fully expressed citizenship.”¹⁰² “The university is an essential supplier of products and services on which the society is highly dependent, such as advanced training, expertise of various types and new ideas.”¹⁰³ Further, democracy, in its demands of political responsibility among all citizens, and the reality of the demands placed on this modern multiversity, “...requires

¹⁰⁰ A. BARLETT GIAMATTI, *A FREE AND ORDERED SPACE: THE REAL WORLD OF THE UNIVERSITY* 25 (W.W. Norton 1988).

¹⁰¹ HAROLD T. SHAPIRO, *A LARGER SENSE OF PURPOSE: HIGHER EDUCATION AND SOCIETY* 4-5 (Princeton University Press 2005).

¹⁰² *Id.* at 8.

¹⁰³ *Id.* at 45.

all citizens to have an informed cultural awareness and a capacity for critical judgment.”¹⁰⁴

Former professor of Christian ethics and theology at Drew University Edward Le Roy Long, Jr., in recognizing that defining the essential purpose of higher education is often an elusive endeavor, went beyond discussion of the purpose of the university specifically to consider also the purposes of both the liberal arts and the religious college. His primary contention was that higher education was a moral enterprise. He asserted that each type of school had three primary functions: 1) “the responsibility of the college or university for the identification, maturation, and enrichment of selfhood,” 2) “the responsibility of the college or university for the discovery/construction, extension, and dissemination of knowledge and culture,” and 3) “the responsibility of the college or university for the well-being of society.”¹⁰⁵

He went on to write that while it has become evermore commonplace within the academy to teach ethics and values, the emphasis on developing character is often met with suspicion. Nonetheless, such concerns should not, he argued, be a justifiable reason for helping students to grow and to mature into socially responsible people and citizens. He wrote:

Knowledge and learning, which are the assumed priorities within higher learning, like other human potential and achievements, are embodied in persons. If people are not taught to be properly curious, adequately motivated, concerned for truth as an object of personal commitment, and prepared to pursue learning with zest, they cannot function well in an

¹⁰⁴ *Id.* at 89.

¹⁰⁵ EDWARD LE ROY LONG, HIGHER EDUCATION AS A MORAL ENTERPRISE 6 (Georgetown University Press 1992).

institution of learning ... [and] ... what goes on outside the classroom may well be of pivotal significance.¹⁰⁶

The importance of building community, and the resulting ideas that emerge within extracurricular activities and organizations, should not be overlooked. Nor should one neglect the significance of students within these communities learning about new ideas and about the experiences of others unlike themselves. Such interactions in college are an essential means to help students develop a sense of duty to the larger community they will join upon graduation.

Richard Kahlenberg, a senior fellow at the Century Foundation and regular contributor to *The Chronicle of Higher Education*, recently was asked to be the commencement speaker at a small liberal arts college.¹⁰⁷ In his speech, he outlined what he perceived as the central goals of higher education. First he said that every American should be afforded the opportunity to seek and to obtain a higher degree, regardless of wealth. Next he said that higher education should be geared toward educating leaders in our democratic state. In order for this to occur, he said, higher education should “...advance learning and knowledge through faculty research and by giving students the opportunity to broaden their minds even when learning does not seem immediately relevant to their careers.”¹⁰⁸

Finally, and in a similar vein to Long’s observation above, he said that schools should be places in which students engage with and learn from those of all backgrounds, whether in or outside of the classroom. College and university campuses are particularly

¹⁰⁶ *Id.* at 8.

¹⁰⁷ Richard Kehlenberg, *The Purposes of Higher Education*. *The Chronicle of Higher Education*, Sept. 1, 2011, accessed at <http://chronicle.com/blogs/innovations/the-purposes-of-higher-education/30258>.

¹⁰⁸ *Id.*

important in that they are unique environments and have a duty to foster such interpersonal learning. He hoped that through the goals stated, students would find both passion and purpose in their lives, leading to living meaningful lives in which they not only desire to but also are adequately equipped to be active participants in shaping society and dealing with the most critical issues facing the nation, now and in the future.¹⁰⁹

In *Healy v. James*, the Court wrote, “The college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas,’ and we break no new constitutional ground in reaffirming this Nation’s dedication to safeguarding academic freedom.”¹¹⁰ In *Sweezy v. New Hampshire*,¹¹¹ the Court wrote, “Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate.”¹¹²

Frankfurter, in his dissenting opinion, wrote:

In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—‘to follow the argument where it leads.’ This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself.¹¹³

¹⁰⁹ *Id.*

¹¹⁰ *Supra* note 52, at 180-81 (quoting *Keyishian v. Board of Regents*, 385 U. S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U. S. 234, 249-50 (1957)).

¹¹¹ 354 U.S. 234 (1957).

¹¹² *Id.*

¹¹³ *Id.* at 262-63.

In *Keyishian v. Board of Regents*,¹¹⁴ the Court wrote, “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”¹¹⁵

Finally, in *Board of Regents of Univ. Of Wis. System v. Southworth*,¹¹⁶ the Court wrote, “If it is difficult to define germane speech with ease or precision where a union or bar association is the party, the standard becomes all the more unmanageable in the public university setting, particularly where the State undertakes to stimulate the whole universe of speech and ideas.”¹¹⁷

CONCLUSION

As discussed above, several organizations have found that application of the *Hazelwood* framework has resulted in increased censorship at the K-12 educational level, allowing administrators to censor if they can justify a legitimate pedagogical purpose, a part of the framework that many have argued is vague and opens the door for administrators to censor virtually at will. Thus its applicability at the post-secondary level, which, as of this time, has been discussed or applied in six student speech cases, is questionable at best.

¹¹⁴ 385 U.S. 589 (1967).

¹¹⁵ *Id.* at 603.

¹¹⁶ 529 U.S. 217 (2000).

¹¹⁷ *Id.* at 222.

Based upon the information presented above, it is clear that post-secondary cases reaching the High Court historically have been almost exclusively supportive of student freedom of expression. The same has not always been true in cases heard by federal circuit courts of appeals, which have split on utilization of *Hazelwood* in their analyses of post-secondary case law. Because the U.S. Supreme Court denied *certiorari* in these federal-level cases, lower courts, administrators, and students are left wondering about the extent of college students' First Amendment rights.

One of the clear implications as to the purpose of education at the K-12 level is that value inculcation predominates, though preparing students for citizenship is also a factor. As for higher education, the central purpose of education at this level – from both a scholarly and judicial perspective – appears to revolve around providing students with a unique environment in which curiosity can be cultivated and ideas can be generated, tested, and disputed without fear. This leads to the underlying purpose for supporting students' development in these areas – to produce a citizenry capable of critically analyzing social issues and making determinations about where that society should head. Due to the differences between the two institutions and the historical protection of college students' First Amendment rights per U. S. Supreme Court decisions, application of the *Hazelwood* framework is arguably incompatible within higher education.

As James Madison wrote, "A people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or perhaps both."¹¹⁸

¹¹⁸ James Madison, Letter to W. T. Barry, August 4, 1822.

This dissertation, then, will ask the following research questions:

R1: Is post-secondary student free expression case law following a developmental path similar to the path followed by K-12 student free expression case law?

R2: How has *Hazelwood v. Kuhlmeier* been utilized at the post-secondary level of education?

Chapter II will delve into the normative theories historically associated with the First Amendment and their application to student freedom of expression. It also will go into significant detail about public forum analysis, upon which one prong of the *Hazelwood* framework relies, before offering a critique of the problems associated with public forum analysis generally.

Chapter III will begin broadly by discussing the role of the doctrine of *in loco parentis* within First Amendment jurisprudence before highlighting and providing scholarly critiques of landmark U. S. Supreme Court cases at both educational levels. The discussion then will be narrowed further to critiques of the circuit court cases identified above, concluding that the myriad issues at play make application of *Hazelwood* to higher education quite problematic.

Chapter IV will present the methodology utilized within this dissertation.

Chapter V will analyze all federal-level student expression cases found at both levels of education. The discussion will focus on the outcomes in each of the 120 cases studied, in addition to themes discovered and the rationales utilized by courts to determine these outcomes.

Chapter VI will begin with an overview of the findings before discussing the importance of freedom of expression, its protection within schools, and the degree to

which this protection measures up against the ideal concept of free speech articulated in Chapter II.

CHAPTER II

THEORETICAL FRAMEWORK

Building upon a discussion of normative legal theory and an examination of the liberal origins of free speech, this chapter will focus primarily on the various normative theories put forth in support of the First Amendment both generally and in relation to student speech – the marketplace of ideas as the dominant paradigm both in the field generally and within student freedom of expression jurisprudence; the notion that citizens in our republic require information to make informed political decisions; the significance of the individual in our society and his or her right to autonomy and self-fulfillment; the importance of the press as the Fourth Estate, or the watchdog of government, a role that students will fill in their futures, particularly in journalism; and the significance given to free speech as a safety valve, allowing people to express themselves so that social stability can be maintained. Further, it will discuss the ideal concept of free speech articulated in this dissertation, and its relation to student speech. It will conclude with an in-depth discussion and analysis of public forum doctrine, which student freedom of expression case law increasingly has utilized to evaluate the constitutionality of speech restrictions and punishment.

THE FIRST AMENDMENT

While the First Amendment commands that, “Congress shall make no law ... abridging the freedom of speech, or of the press ...”¹ the Framers of the Constitution

¹ U.S. Const. amend. I.

“provided few clues to the precise scope of free speech.”² Unsurprisingly, then, a number of theories have been put forth to explain the values inherent in the First Amendment, to argue the reasons why freedom of expression should be protected, and to make determinations about how sweeping its protections normatively should be, in all variety of legal spheres.³

The freedom to express oneself, as Justice Louis Brandeis famously wrote, is “both an end and a means.”⁴ It is within the realm of normative legal theory that these means and ends are fleshed out, discussed, contested, understood. As two scholars put it, “Until we know why we protect speech we cannot talk intelligently about whether any given effort to constrain speech is dangerous.”⁵

Normative legal theory, then, concerns itself with values. It asks, “What *should* the law be?” It extends beyond discussions of the shape of legal doctrine and explanations for existing law to evaluate which laws or rules are better within a particularized area of the law.⁶ It is prescriptive, rather than descriptive in nature, and it generally is entwined with more general normative moral and political theories.

² Matthew D. Bunker, *First Amendment Theory and Conceptions of the Self*, 1 COMM. L. & POL’Y 241, 242 (1996).

³ *Id.*

⁴ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

⁵ David F. McGowan & Ragesh K. Tangri, *A Libertarian Critique of Restrictions of Offensive Speech*, 79 CAL. L. REV. 825, 833 (1991).

⁶ Lawrence B. Solum, *Legal Theory Lexicon 106: Positive and Normative Legal Theory*, accessed at http://lsolum.typepad.com/legal_theory_lexicon/2003/12/legal_theory_le.html.

ORIGINS OF FREEDOM OF EXPRESSION AS AN INDIVIDUAL'S NATURAL RIGHT

Normative First Amendment theory is grounded within Enlightenment ideals, particularly the beliefs that through reason all humans are able to mature and to think for themselves, and that once humans attain this maturity, they are able to contribute to social progress and to become self-governing. Normative legal theory encompasses the liberal conception of the autonomous, self-governing citizen who is born with natural rights, and who should, therefore, be free from tyrannical government.⁷ During the Renaissance and the growing momentum of the Reformation, liberalism became the driving force for social change.

The shift from a despotic monarchy to an emphasis on individual natural rights became a defining feature of a new conception of freedom, or exemptions from the arbitrary control of such rights, within economic, political, and social realms.⁸ The rise and centrality of the individual's rights within the liberal state is intricately connected to constructions of liberty, "...if the term is meant that ... liberty is the highest human good and that its preservation is the standard against which political institutions should be judged."⁹

⁷ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Cambridge University Press 1988). *See*, for an historical examination of European Enlightenment and its influence on the American Revolution, creation of the Declaration of Independence, and creation of the Bill of Rights, ROBERT R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION, VOL. 1: THE CHALLENGE* (The Princeton University Press 1959) and ROBERT R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION, VOL. 2: THE STRUGGLE* (Princeton University Press 1964).

⁸ *THE LIBERAL POLITICAL TRADITION: CONTEMPORARY REAPPRAISALS* (James Meadowcraft, ed., Edward Elgar Publishing 1996).

⁹ Matthew Simpson, *Political Liberty in the Social Contract in: A Decade of Transformation*, IWM Junior Visiting Fellows Conferences (1999).

In the liberal state, the rule of law is critical to enforcing individual natural rights and, therefore, supporting the social contract we've made with one another, or the positive liberty we collectively have granted each other.¹⁰ Yet the individual's natural right *to do* also requires freedom *from* oppressive forces, notably government. This can be understood as negative liberty, or an absence of barriers *to do*.

Renowned political philosopher Sir Isaiah Berlin indicated that negative liberty and positive liberty are best understood by answering the following questions. When thinking of negative liberty one must ask, "What is the area within which the subject - a person or group of persons - is or should be left to do or be what he is able to do or be, without interference by other persons?" To best understand positive liberty, the question to be asked is: "What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?" While the questions are quite different, the answers often overlap, he noted.¹¹

Within the context of the First Amendment, freedom of expression can be understood as both a positive and negative liberty.¹² In the domain of negative liberty,

¹⁰ See, for further discussion of the origins of social contract theory, THOMAS HOBBS, *LEVIATHAN* (E.P. Dutton & Co. 1914), JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (E.P. Dutton & Co. 1924), and JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (trans. Maurice Cranston, Penguin: Penguin Classics Various Editions 1968). Locke, whose ideas are generally recognized as particularly influential in the American Revolution, argued that within the state of nature all men are created equally in the eyes of God. He believed that reason dictates one should never harm another in terms of robbing that person of his life, liberty, and property. Individuals, in recognizing that their lives in the state of nature are unsatisfactory, freely consent to come together to form a community. In so doing they agree to relinquish some of their rights to a government, thereby creating a compact with this government that exists both to protect individual rights and to support the well-being of the community. If government no longer abides by this contract, the people have authority to overthrow it.

¹¹ Sir Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* (1958), accessed online at http://www.wiso.uni-hamburg.de/fileadmin/wiso_vwl/johannes/Ankuendigungen/Berlin_twoconceptsofliberty.pdf.

¹² For early discussions of the individual's right to freedom of expression, see, JOHN STUART MILL, *ON LIBERTY* (Penguin Books 1974) and JOHN MILTON, *AREOPAGITICA*

and when speech protections are not specifically spelled out, there has been much debate about the meaning of freedom *from* governmental control. Does it really mean absolute freedom to express whatever one chooses, as the First Amendment would seem to indicate?

PRIOR RESTRAINT v. SUBSEQUENT PUNISHMENT

Sir William Blackstone, a famous 18th century English jurist, said that freedom of speech proscribed prior restraint, but not subsequent punishment. Nonetheless, and contrary to popular scholarly opinion, a close reading of his “Commentaries” demonstrates that he did, indeed, make limited allowances for subsequent punishment. He wrote, “If man publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.” If a person publishes the truth with good motives, however, Blackstone said there should be no punishment.¹³

The distinction between prior restraint and subsequent punishment made its way across the Atlantic, where it has, over time, been variously accepted or rejected. David A. Anderson argued that the Framers didn’t accept the idea that subsequent punishment was constitutional, that they were quite aware that free speech, without fear of punishment, was critical to democracy. This was due, in large part, because of their experiences with a repressive English monarchy. Fear of subsequent punishment can deter, he noted, speech and publication *before* the fact, constituting an informal method of prior restraint.¹⁴ As

(<http://www.gutenberg.org/ebooks/608>). For a more contemporary discussion, see GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* (Cambridge University Press 1988).

¹³ SIR WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (Thomas E. Cooley, ed., The Lawbook Exchange, Ltd 2003).

¹⁴ David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429 (2002).

indicated in Chapter I, fear of administrative punishment has increased the rate of self-censorship among high school students significantly.

Zechariah Chafee, Jr. and Leonard W. Levy discussed two periods of time in which the government was particularly unreceptive to absolute free speech, especially when it entailed criticism of government. The first period occurred when war with France was a possibility, and the government enacted the Alien and Sedition Acts of 1798, a set of four Congressional laws aimed at quelling any political unrest that might be “dangerous” to the peace and safety of the United States. The second set was the Espionage and Sedition Acts of 1917 and 1918, respectively, the first of which passed when the United States entered World War II.¹⁵

Underlying both sets of Acts is the question of whether the First Amendment proscribes both prior restraint *and* subsequent punishment. This distinction is a critical component in fully understanding the issues at play in this dissertation, as both prior restraint and subsequent punishment have been held *constitutional* within the realm of student expression case law.

Contrary to Anderson’s assertion above, Levy originally argued that the First Amendment, as formulated by the Framers, did not proscribe subsequent punishment. Twenty-five years later, following much critique of this position, he published *Emergence of a Free Press*, in which he reconsidered his earlier perspective and said that the Framers likely also meant to prohibit subsequent punishment.¹⁶ Nonetheless,

¹⁵ LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (Belknap Press of Harvard University Press 1960); Zechariah Chafee, Jr., *FREEDOM OF SPEECH* (Harcourt, Brace and Howe 1920).

¹⁶ Leonard W. Levy, *EMERGENCE OF A FREE PRESS* (Oxford University Press 1985).

freedom of expression has never, as indicated in the introduction, been interpreted by a majority of the U.S. Supreme Court as an absolute liberty.

VALUES ASSOCIATED WITH FREEDOM OF EXPRESSION

One of the most influential expositions on the importance of expressive freedom can be found in John Stuart's Mill's *On Liberty*. He joined fellow thinkers in the view that liberty is a fundamental human right, critical if rationality would have a fighting chance to prevail. Yet to be free and to search for truth, humans must be able to exercise free expression. Readily admitting the fallibility of man, he wrote, "We can never be sure that the opinion we are endeavoring to stifle is a false opinion, and if we were sure, stifling it would be an evil still."¹⁷ Our beliefs and actions are reasonable only if we are provided the chance to freely express our ideas. Indeed, our very self-development depends upon this.

Moreover, only when our ideas have withstood disputation can we accept our ideas as rightly justified, as truth. Through the airing of a diversity of opinions, Mill reasoned, truth, or at least a part of truth, can be discovered. And it is precisely because man is intrinsically fallible that his ability to reason and to make informed decisions relies upon open discussion. Such unfettered deliberation, however, can be thwarted by the tyranny of the majority within the political process.

Rational decision-making is also understood to include the premise that government also is infallible. Without seeking input from the people, the government would be acting irrationally in choosing not to know what may have impacted and even changed its decisions. In the area of speech, then, restrictions on speech concerning

¹⁷ Mill, *supra* note 12, 77.

public matters accordingly means increasing the chances that governmental decision-making will not enhance the search for truth.

As esteemed First Amendment scholar Rodney Smolla asserted, “There is an inherent and inexorable tendency on the part of all governments to seek to expand their power over speech.”¹⁸ Yet, as Mill would argue, there is no ultimate rationality in seeking to do so.

It is within the context discussed above that we find a gradual expansion of positivist First Amendment theory, understood, as mentioned at the outset of this chapter, as grounded in values. Thus it is within this context that five primary theories of free speech have been declared critical within a representative democracy if such a republic as ours is to be free. A critical distinction among these primarily utilitarian theories involves the principal goal to be supported through free expression – the social or the individual – yet, one might argue, they also *can be* understood to support both.

- 1) The marketplace of ideas. The marketplace of ideas is the dominant paradigm in First Amendment theory. Mill, along with John Milton, later to be discussed, generally are considered the philosophical fathers of the marketplace of ideas. The essential premise here is that only through free and robust debate, in which there is competition among ideas, may people discern truth from falsehood.
- 2) Political self-governance. The idea here is that the First Amendment is meant to protect individuals in the democratic self-governing process. This theory is most closely identified with the writings of Alexander Meikeljohn, who believed that protection for political speech absolutely

¹⁸ RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 65 (Vintage Books 1992).

should be protected. Speech, in his view, is not understood as a natural right. Rather, it serves the process of self-governance.¹⁹ As Berlin said, “Political words and notions and acts are not intelligible save in the context of the issues that divide the men who use them. Consequently our own attitudes and activities are likely to remain obscure to us, unless we understand the dominant issues of our own world.”²⁰

- 3) The checking value. This concept is typically associated with justification for First Amendment protection of the press as the Fourth Estate, as the institution most able to act as a counterweight to governmental power. Vincent Blasi most famously elaborated on the need for a free press to serve as the watchdog of government, the latter of which is understood to have the means and, often, the motive to abuse its power.²¹
- 4) Individual self-fulfillment. This concept implies that free expression is understood as the natural right of all to form their own beliefs and the subsequent right to express those beliefs. Clearly, we see the influence here of the rise and general acceptance in the United States of the liberal, autonomous individual as described above.
- 5) The safety valve. When this theory is applied, freedom of expression is understood as a means to allow people to “let off steam.” Without such ability, the fear is that the *balance* between change and social stability

¹⁹ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (Harper & Brothers Publishers 1948).

²⁰ Berlin, *supra* note 11.

²¹ Vincent Blasi, *The Checking Value in First Amendment Theory*. 1977 AM. B. FOUND. RES. J. 521 (1977).

seriously could be threatened, to the point of revolution. In providing people the opportunity to be heard, the idea is that they then will be more willing to accept various decisions, even if those decisions don't align with their beliefs. As Justice Louis Brandeis once wrote, "fear breeds repression; that repression breeds hate; that hate menaces stable government; ... the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."²²

BALANCING OF INTERESTS

Precisely because these interests may be individual, social, or both, and precisely because these interests often conflict with other social interests and constitutional rights, the courts – beginning at least with the opinions of Supreme Court Justices Louis Brandeis and Oliver Wendell Holmes – have employed a balancing of all interests presented. This is referred to as the balancing test.

During this period, and extending at least through the era of the Warren Court (1953-1969), the balancing of First Amendment values with the values associated with other social interests became predominant in U. S. Supreme Court decision-making, with the Court giving preference to speech over other interests in virtually all cases it heard. This is understood as the preferred position of speech, in which speech often trumps competing interests. After this time, however, the Court has been somewhat less supportive of the notion that there is a thumb on that side of the scale favoring free speech.

Within the domain of student free expression, the value of free speech is in direct

²² *Whitney v. California*, 274 US 357, 375 (1927) (Brandeis, J., concurring).

competition with other values, such as maintaining order within schools. The dominant First Amendment normative theories that *explicitly* are utilized in support of free speech within student speech cases include 1) the marketplace of ideas, in which truth can be found only through the open discussion of opinions and 2) the belief that free speech is critical to producing self-governing citizens. Nonetheless, the individual's self-fulfillment is implicit in the case law as well, understandably, for it undergirds the value and worth in finding truth and in being politically sovereign. Thus attempts to draw a bright line between and/or among the theories are not an easy or, perhaps, even worthwhile task. As Smolla wrote:

Many classic rationales have been advanced over the years to support the 'preferred position' of speech in the hierarchy of social values. These rationales are sometimes put forward as if they were mutually exclusive. By singling out only one of them as the justification for freedom of speech, the theorist tends to build a model of free speech limited to advancing that rationale. If, for example, one sees 'democratic self-governance' as the only explanation for elevating free speech above other social values, then one will tend to treat the First Amendment as guaranteeing freedom of speech only when the speech relates to politics.²³

As demonstrated below and within the proceeding chapter, while the marketplace of ideas and political self-governance have, indeed, explicitly seemed of primary importance within student freedom of expression case law, even these do not always stand independently of each other.

THE MARKETPLACE OF IDEAS

Theoretically, the notion of a marketplace of ideas has dominated First Amendment scholarship and judicial decision-making. The marketplace of ideas

²³ *Supra* note 18, at 5.

metaphor is typically traced first to John Milton's *Areopagitica*. He famously wrote, "Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?"²⁴

Yet to end the discussion of Milton there is to ignore the context and history upon which these widely quoted and highly influential words originated. Milton, a well-regarded poet, sought divorce from his 16-year-old wife when she left one month into their marriage to return to her family. After this, Milton set out prolifically to influence Catholic canon law in England, which at that time had virtually no formalized regulations or laws relating to marriage and divorce.²⁵ He wrote several controversial tracts regarding marriage and divorce and was met with considerable opposition from religious and political leaders, seeking to ban these writings.²⁶ It is from this personal history with attempts to publish that he wrote *Areopagitica*, following institution of pre-publication licensing in England.

As Erik Lundeby wrote,

Milton's *Areopagitica* is the colourful expression of a political orator, and contains strong emotional appeals to the Parliament. The members of Parliament are praised as humanist lovers of culture, as moral educators, but most important, as reformed Christians not wanting to be associated with anything medieval or Papist like the licensing of the press. Milton appears to be a well-informed intellectual, a humanist and liberal, but not obviously one who has a considered and comprehensive position on political philosophy. The structure of the argument is not entirely perspicuous: as the text is a means of changing opinions and attitudes rather than a work of calm

²⁴ JOHN MILTON, *AREOPAGITICA*, accessed at <http://www.gutenberg.org/ebooks/608>.

²⁵ LAWRENCE STONE, *ROAD TO DIVORCE* (Oxford University Press 1990).

²⁶ *Id.*

reflection, the themes and points are to some degree scattered and recurring, and expressed through exaggerations, ridicule and allegory. Despite these poetic and literary elements, Milton's *Areopagitica* also allows a calmer reading, one that puts the weight on arguments. Read in this way, the *Areopagitica* may be seen as a classic expression of a consequentialist defence of freedom of expression, where liberty of the press is seen as circumstances of progress in education and knowledge, and licensing as leading to corruption of culture.²⁷

Following Milton, we later find strong support for such a marketplace within the writings of Mill, discussed above.

The first reference made by the U. S. Supreme Court to the concept of a marketplace of ideas is found in Justice Oliver Wendell Holmes' dissenting opinion in *Abrams v. United States*,²⁸ in which he wrote,

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.²⁹

Much of the time, this marketplace takes concrete forms, such as newspapers or broadcast and cable news stations. Journalism is, then, charged with reporting upon governmental action, thereby supporting democracy through the creation and maintenance of a marketplace of ideas.³⁰ As discussed in Chapter I, application of

²⁷ FREE SPEECH AND POLITICAL EXCLUSION, A DISSERTATION (2004), accessed at <http://www.lundebj.info/EL%20Free%20Speech%20Dissertation.pdf>.

²⁸ 250 U.S. 616 (1919).

²⁹ *Id.* at 630.

³⁰ Of course, whether or not traditional media provide all needed information is a disputed issue, particularly during the current era of increasing media concentration — both online and off. *See, for further discussion*, the arguments presented by Jerome Barron in *Access to the Press: A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

Hazelwood to post-secondary education may well impede such abilities.

The theory has been used by the U. S. Supreme Court to support expression in a number of other areas as well, such as political speech,³¹ libel law,³² broadcasting policy,³³ and commercial speech.³⁴

Returning to expression within colleges and universities, the U. S. Supreme Court noted in *Healy v. James* that:

...the precedents of this Court leave no room for the view that, *because of the acknowledged need for order* [emphasis added], First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' ... The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.³⁵

In *Board of Regents v. Southworth*, the Court stated, "Recognition must be given as well to the important and substantial purposes of the University, which seeks to facilitate a wide range of speech."³⁶ In *Rosenberger v. Rector and Visitors of Univ. of Va.*, the Court said that restricting university students' curiosity "risks

³¹ See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *Spence v. Washington*, 418 U.S. 405 (1974); *Cohen v. California*, 403 U.S. 15 (1971); *N. Y. Times Co. v. United States*, 403 U.S. 713 (1971); *N. Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

³² See, e.g., *Ashton v. Kentucky*, 384 U.S. 195 (1966); 376 U.S. 254 (1964).

³³ See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (The right of access the Court granted has receded over the years, however.).

³⁴ See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976); 376 U.S. 254 (1964).

³⁵ 408 U. S. 169, 180-81 (1972) (quoting *Shelton v. Tucker*, 364 U. S. 479, 487 (1960)).

³⁶ 529 U.S. 217, 231 (2000).

the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its colleges and universities.”³⁷

And in *Tinker v. Des Moines School District*,³⁸ the Court argued that schools may not be “enclaves of totalitarianism” and that “students may not be regarded as closed circuit recipients of only that which the State wishes to communicate.”³⁹ The Court went on to say, “The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”⁴⁰

POLITICAL SELF-GOVERNANCE

The marketplace metaphor is woven together with the closely related theory of political self-governance. The latter is most associated, in terms of its usage in general First Amendment case law, with the 1964 libel case *New York Times v. Sullivan*, in which the Court said that open speech among citizens is vital to democracy. Justice William Brennan wrote, “Thus we must consider this case against the background of a profound national commitment to the principles that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.”⁴¹

³⁷ 515 U.S. 819, 836 (1995).

³⁸ 393 U.S. 503 (1969).

³⁹ *Id.* at 511.

⁴⁰ *Id.* at 512 (quoting *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)).

⁴¹ 376 U.S. 264, 270 (1964).

As noted above, Meiklejohn believed that the First Amendment was designed, in fact, for the sole purpose of self-governance within the democratic state. Such a state, in its ideal form, cannot exist if those in power are provided with the means both to withhold information and to suppress criticism.⁴² Thus the stifling of unpopular ideas – both on the college campus and within the community-at-large – does not allow for unbridled discussion, debate, and criticism on matters of public concern. As the Court said in *Papish*, “state colleges and universities are not enclaves immune from the sweep of the First Amendment.”⁴³

In *Sweezy v. New Hampshire*, the Court wrote,

History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.⁴⁴

And, as quoted in Chapter I, the Court wrote in *Tinker* that “educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”⁴⁵ Armed with such knowledge, students should learn to hold governmental power in check.

Yet students, particularly those in journalism, also must have access to the

⁴² *Supra* note 19.

⁴³ *Papish v. Bd. of Curators of the Univ. of MO*, 410 US 667,670 (1973) (quoting *Healy v. James*, 408 U.S. 169, 180 (1972)).

⁴⁴ 354 U.S. 234, 250 (1957).

⁴⁵ *Supra* note 38, at 507 (citing *West Virginia v. Barnette*, 319 U. S. 624, 637 (1943)).

marketplace to engage in free and robust debate so that they may learn how to effectuate their later role as the Fourth Estate. As Justice Earl Warren wrote, students [and teachers] are vested with individual rights and “must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”⁴⁶ Based upon the above discussion, it seems quite clear that theories of the First Amendment are not mutually exclusive.

EMERSON AND A GENERAL THEORY OF THE FIRST AMENDMENT

Consequently, there seems to be power in Thomas Emerson’s argument that each theory *alone* lacks the explanatory power to fully justify protection of First Amendment rights. In his view, when only one theory is put forward as justification for free expression, the case for upholding First Amendment protections is significantly weakened. The stronger case results from the synergy resulting from a more holistic understanding of the various theories.⁴⁷ (Nonetheless, each theory is recognized as having power to define the contours and the boundaries of free speech.)

While readily acknowledging the importance of the above-mentioned values of free speech, his “general theory of the First Amendment”⁴⁸ is built upon the premise that the primary *purpose* of the First Amendment is to ensure “an effective system of freedom of expression in a democratic society”⁴⁹ such that the marketplace of ideas can flourish. At the core of his theory is the distinction between conduct that is expressive in nature

⁴⁶ *Supra* note 4, at 250.

⁴⁷ THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (Random House 1970).

⁴⁸ THOMAS EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (Random House 1963).

⁴⁹ *Id.* at 17.

and conduct that consists of action. Regulation of non-expressive conduct can be controlled, but not through regulation of expression.

Expression, though a form of conduct, should not, in his estimate, be regulated, except in the most rare of occasions.⁵⁰ “The government may protect or advance other social interests through regulation of action, but not by suppressing expression,” he wrote.⁵¹ It is from this central position that various legal doctrines should be constructed to protect individual rights that are in conflict with social interests.

While Emerson’s general theory has not expressly been accepted by the U. S. Supreme Court, his basic idea that theoretical segmentation is insufficient for full protection of expression is powerful and serves as the basis for the contention made here that, ideally, speech, as expressive conduct supporting the marketplace of ideas, should not be regulated unless it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁵² This standard was articulated in *Brandenburg v. Ohio*,⁵³ a landmark case in which the U.S. Supreme Court ruled Ohio’s criminal syndicalism statute unconstitutional because it broadly regulated and punished inflammatory speech that merely advocated violence or violations of the law.

In the area of student speech, the *Tinker* standard requiring school officials to *forecast* a material and substantial disruption prior to restricting rights, absent a clear showing that the speech was *directed* at or that *imminently would create* such a disruption, should be the standard against which restrictions on or punishment for student

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 395 U.S. 444, 447 (1969).

⁵³ *Id.*

speech should be evaluated. While the material and substantial standard will be shown to benefit students to a great degree in protection of their speech rights, potential abuse of what forecast entails exists, particularly because the Court did not clearly elaborate on this aspect of the standard.

As will be demonstrated in the findings, courts have upheld speech restrictions based upon prior history of disruption associated with the speech at hand within K-12 schools. This is a departure from *Brandenburg* in that the Court did not require a showing that similar incidents in the past can be the basis for speech restrictions or punishments. It also deviates from *Brandenburg* in that students may not direct their speech or intend for their speech to produce harm. While the school environment is one in which order must be maintained and is, indeed, different from society-at-large, a forecasting of disruption leaves not only students but also administrators unsure about the extent to which forecasting applies. And, as mentioned above, it allows great discretion on the part of school officials, discretion that could be exploited. Additionally, schools are places where expression should be encouraged; if that expression is not intended to cause harm and/or a material and substantial disruption or if it is not imminently likely to cause the same, student speech should be nurtured, not prohibited or punished.

Finally, the *Hazelwood* standard is a significant departure from *Brandenburg* and *Tinker*. It arguably is an overly restrictive standard to evaluate speech if the core purposes of education are to inculcate in students an appreciation of their Constitutional rights, to prepare them for self-governance, and to create productive and contributing citizens. Further, as previously discussed, and as will be shown in Chapter V, it has been used to curtail speech that arguably is far from materially or substantially disruptive to the

learning process and that does not support these educational goals.

PUBLIC FORUM DOCTRINE

This research will demonstrate that while the theories discussed above still have weight when deciding student free expression cases, the application of public forum doctrine in *Hazelwood* – and its later use in post-secondary cases – dramatically has changed the parameters of free speech within our schools. While it is not a First Amendment theory as traditionally understood, the doctrine has been used extensively in a number of student speech cases. It is critical, then, to have a clear understanding of what it is, how it has been utilized, and the problems associated with its usage.

Public forum analysis was designed as a means to determine the level of judicial review applicable to speech in various government-owned spaces. Its origins can be traced to the 1939 U. S. Supreme Court case *Hague v. Comm. for Indus. Org.*, in which the Court argued that lands designed for public use and that have been used for public gathering and discussion, such as parks, streets, and sidewalks, were traditional public forums.⁵⁴

Specifically, the Court wrote that such places “have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing questions . . . from ancient times.”⁵⁵ According to the Court, the open public forum

⁵⁴ 307 U.S. 496 (1939).

⁵⁵ *Id.* at 515. See, however, Norman T. Deutsch, *Does Anybody Really Need a Limited Public Forum?*, St. JOHNS L. REV., 82 (2008) for the argument that the Court has never cited any authority to support that public forums have been “immemorially been held in trust . . . time out of mind . . . from ancient times.”

“has as a principal purpose promoting ‘the free exchange of ideas.’”⁵⁶ Restrictions on expression in traditional public forums receive strict scrutiny review and may not discriminate based upon content or viewpoint.⁵⁷ Strict scrutiny is the most stringent standard of judicial review and means that for a law or policy to pass constitutional muster it must 1) be justified by a compelling government interest and 2) be narrowly tailored to achieve that goal or interest. Very few laws or policies survive strict scrutiny review.

Beginning in the mid-1960s, the Court began to distinguish the open, traditional public forum from other forums.⁵⁸ These cases indicated that there are two more categories of forums – the nonpublic forum and the limited public forum (often referred to as the designated public forum, though at times one will see the courts refer to them as separate forums, which has led to considerable confusion).

According to the Court, nonpublic forums stand at the opposite end of the spectrum from the public forum—they are government lands that generally are not open for public use, though the government may open them for specific purposes. Examples of

⁵⁶ *Lee v. International Soc. for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) (quoting *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 800 (1985)).

⁵⁷ Questions arise about the distinction between content discrimination and viewpoint discrimination. Generally, content discrimination is understood as restriction of speech based upon subject matter. Thus, for instance, a city government cannot allow public demonstrations on gun control but suppress demonstrations on other controversial issues, such as abortion. Viewpoint discrimination is understood as restrictions on speech based upon ideology or the specific message conveyed. Therefore, to expand on the example above, assuming the city allowed the demonstration on abortion, it could not then exclude from participation only those opposed to abortion. While the two types of speech discrimination appear to be easily differentiated, such is not always the case. For ex., Justice Kennedy wrote in *Rosenberger*, *supra* note 37, 829 that viewpoint discrimination is a subset of and “an egregious form of content discrimination.” Another example from a student speech case comes from *Widmar v. Vincent*, 454 US 263 (1981), in which the Court found that the university’s exclusion of a registered student group was based on the religious content, not its viewpoint. Finally, it has been argued that government may unconstitutionally restrict speech based upon viewpoint under the guise of creating a content-based restriction. It is largely for this reason that content discrimination also is subject to strict scrutiny.

⁵⁸ *See, for ex.*, *Turner*, *infra* note 62; *Lee*, *supra* note 56; *Cornelius*, *supra* note 56; *Perry Local Educ. Assn. v. Perry Local Educators Ass’n*, 460 U.S. 37 (1983), *Adderley v. Florida*, 385 U.S. 39 (1966).

nonpublic forums include prisons,⁵⁹ military bases,⁶⁰ and, increasingly, the schools. As opposed to public forums, restrictions on speech within the nonpublic forum are only subject to rational basis review, or as it often is called, the “reasonableness standard.” Rational basis review is the least stringent standard of judicial review. For a law or policy to be constitutional, the government need only show 1) that the action is “reasonably related” to 2) a “legitimate” government interest. “The reasonableness requirement mandates that restrictions ‘be reasonable; [they] need not be the most reasonable or the only reasonable limitation[s]’ ... [and] ... some commentators have viewed this as being ‘highly deferential.’ In fact, one has asserted that it is ‘essentially no review at all.’”⁶¹

Nonetheless, technically, exclusions cannot be content-based.⁶² Here, then, is one example of the problems associated with forum analysis; if content-based restrictions and viewpoint-based restrictions are both subject to strict scrutiny, why are nonpublic forums subject only to rational review, when exclusion should not be content- or-viewpoint-based?

Moreover, the nonpublic forum is recognized as being governmental property that almost exclusively exists for purposes other than expression. It seems antithetical to consider a student publication a nonpublic forum, as the Court did in *Hazelwood*, if a nonpublic forum is characterized as existing nearly exclusively for purposes other than expression. As Erwin Chemerinsky aptly observed in arguing that a school newspaper is

⁵⁹ Adderley, *supra* note 58.

⁶⁰ Greer v. Spock, 424 U.S. 828 (1976).

⁶¹ Norman T. Deutsche, *Does Anybody Really Need a Limited Public Forum?*, St. JOHN’S L. REV. 107, 138 (2008) (quoting Cornelius, *supra* note 55, 808); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 93 (1987).

⁶² Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

not a nonpublic forum, “A newspaper, unlike a prison or military base, exists for speech purposes.”⁶³ Moreover, much of one’s educational experience revolves around expression, in cultivating students’ critical thinking skills through exposure to new ideas and debate on issues.

The middle category of *fora* that is purported to lie between these two extremes is the limited public forum. The limited public forum is a governmental space that traditionally has not been opened up as a public forum but that the government has designated as open at certain times, for certain purposes, and for certain groups of people. Examples may include public schools (including public universities) and libraries. While the government can limit the forum to certain speakers and certain subjects,⁶⁴ viewpoint discrimination is unconstitutional within a limited public forum. Restraints on expression are supposed to be subject to strict scrutiny just as is the case with the open forum, though, as will be shown in Chapter V, courts have employed *Hazelwood* to determine a variety of speech activities are limited public forums but then subjected them only to the reasonableness requirement.

It should be noted that the government does not create a limited public forum *through inaction* but only by “intentionally opening a nontraditional forum [nonpublic forum] for public discourse.”⁶⁵ Thus intent becomes a defining factor in determinations of a forum’s status. In an effort to determine if there has been intent to open a nonpublic forum, the Court looks to the “policy and practice” of the government’s usage of the

⁶³ Erwin Chemerinsky, *Teaching That Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825 (2009).

⁶⁴ Perry, *supra* note 58.

⁶⁵ Cornelius, *supra* note 56, at 802.

property, in addition to looking at the “nature of the property and its compatibility with expressive activity.”⁶⁶

This language would be taken up in *Hazelwood* to find that the newspaper was a nonpublic forum. Additionally, and some might say disturbingly, once government has created a limited public forum, it may revoke it at will. It is “not required to indefinitely retain the open character of the facility.”⁶⁷

Slowly, both the U. S. Supreme Court and federal circuit courts began to elaborate, or at least try to make sense of, these three forums, though utilization has been far from consistent. Because of this, scholars have jumped on the discrepancies with which the various *fora* have been interpreted and subjected to various levels of review.⁶⁸

Differences in the usage of forum analysis by the courts are numerous. In *United States v. Kokinda*,⁶⁹ for example, a case dealing with citizens who set up a table on the sidewalk outside of a post office to sell various publications, individuals were arrested and subsequently brought suit, claiming their First Amendment rights had been violated. In ruling against the citizens, the Court determined that the sidewalk in this case was a nonpublic forum.

⁶⁶ *Id.*

⁶⁷ Perry, *supra* note 58, at 46.

⁶⁸ See, for further discussion, W.B. Woodall, *Fixing the Faulty Forum Framework: Changing the Way Courts Analyze Free Speech Cases*, 2 N.C. L. REV. 295 (2004); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1757 (1987) (arguing that the Court has “shrunk the limited public forum to such insignificance that it is difficult to imagine how a plaintiff could ever successfully prosecute a lawsuit to gain access to such a forum”); Nathaniel Landman, *Comment: Constitutional Law: The End of the Limited Public Forum?*, 25 WASHBURN L.J. 375 (1986); Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109 (1986).

⁶⁹ 497 U.S. 720 (1990).

In a forceful dissent, Justice William Brennan wrote, “Ironically, these public forum categories, originally conceived of as a way of preserving First Amendment rights, have been used in some of our recent decisions as a means of upholding restrictions on speech.”⁷⁰ He used *Hazelwood* as one such example. Interestingly, the Court seven years prior found in *United States v. Grace*⁷¹ that the sidewalks surrounding the U. S. Supreme Court were public forums.

In *Int. Society for Krishna Consciousness v. Lee*,⁷² a case in which the Society solicited funds for its organization within an airport and then was banned from the airport, the Court found that the airport was a nonpublic forum, requiring only rational basis review. Justice Anthony Kennedy, in his dissent, argued that those parts of the airport that were open to the public were, essentially, no different from public streets in that they were “broad, public thoroughfares full of people and lined with stores and other commercial activities.”⁷³ He went on to note that even though people who come to airports do so for air travel, there’s little difference in that and the sidewalks and roads people also use for travel.

The discrepancies only become more convoluted when one enters the domain of the limited public forum, particularly as it relates to the nonpublic forum. Deutsche persuasively argued the following:

In *dicta* in cases involving exclusions from nonpublic forums, the Court has equated limited public forums with designated open access public forums and

⁷⁰ *Id.* at 741.

⁷¹ 461 U.S. 171 (1983).

⁷² *Supra* note 56.

⁷³ *Id.* at 700.

asserted that strict scrutiny is the appropriate standard of review.⁷⁴ Nonetheless, in cases actually involving exclusions from limited public forums, the Court has effectively equated limited public forums with nonpublic forums and has applied the same standard of review [that is, rational basis review] from exclusions from the former that it applies from the latter ... Of course, the fact that the Court has applied the same standard of review in both types of restricted forum cases does not necessarily mean that it must always do so.⁷⁵

Further, he went on to note that the Court “has not applied strict scrutiny in limited public forum cases on the theory that the government had excluded persons or topics otherwise within its scope; rather, it has applied strict scrutiny only after making a preliminary determination that the exclusions were either content or viewpoint discriminatory.”⁷⁶

And it is because of these conflicting interpretations that the federal circuit courts, in both school- and non-school-related cases, have had little guidance in applying forum analysis, and, consequently, have utilized it in ways leading to different results. Because of these issues, utilizing the doctrine within education – both at the K-12 and post-secondary levels – seems suspect at the least.

CONCLUSION

This chapter has explored the meaning of normative First Amendment theory, which is concerned with values and is grounded in Enlightenment ideals, in addition to the five normative theories that have been constructed to make sense of what the First Amendment is meant to protect. As noted, while student speech cases most explicitly

⁷⁴ Citing *Lee*, *supra* note 56; *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1992); *Cornelius*, *supra* note 56; *Perry*, *supra* note 58, *Widmar v. Vincent*, 454 U.S. 263 (1981).

⁷⁵ *Deutsche*, *supra* note 61, 145.

⁷⁶ *Id.* at 142.

discuss the marketplace of ideas and political self-governance, other theories, such as the individual's natural right to self-fulfillment and the role of the press as the Fourth Estate are implied. This lends support to Emerson's contention that the theories are not mutually exclusive. And it is Emerson's distinction between conduct that is expressive and that which is not that forms the basis for the ideal concept of speech presented here – that speech should be free absent intent to incite imminent lawless action. In the final chapter of this dissertation, the findings pertaining to protection of student speech will be measured against this concept of free speech.

The discussion in this chapter also examined differing conceptions of the Framers' position on the constitutionality of prior restraint v. subsequent punishment, which, as noted, is a critical issue in the area of student freedom of expression precisely because government has engaged in both in this area of the law.

Finally, this chapter examined public forum doctrine, which has been used to restrict student speech not only at the K-12 level but also, as the next chapter will demonstrate, within a number of states covered by the federal circuit courts of appeals that have heard cases involving the applicability of *Hazelwood* to post-secondary education. Because the doctrine and the appropriate levels of judicial review associated with each have not produced consistent results, its utilization within education is an issue of extreme importance.

CHAPTER III

LITERATURE REVIEW

This chapter will begin broadly with a discussion of the doctrine of *in loco parentis* –its roots, contemporary usage in K-12 schools, and a brief exploration of its utilization at the post-secondary level of education. From here the discussion will turn to analyses and critiques of the “venerable trilogy” of landmark U. S. Supreme Court cases at the K-12 level –*Tinker v. Des Moines School District*,¹ *Bethel School District No. 403 v. Fraser*,² and *Hazelwood v. Kuhlmeier*.³ Next, landmark U. S. Supreme Court post-secondary cases, both before and after *Hazelwood*, will be analyzed before turning to scholarly discussions of the federal-level circuit court split concerning usage of the *Hazelwood* framework at the post-secondary level of education.

IN LOCO PARENTIS

To situate historically and to better make sense of the case law presented in the next chapter, it is necessary to begin this review of the literature by returning to a discussion of the doctrine of *in loco parentis*. At the outset it is important to note that while the doctrine is often associated with judicial noninterference in matters of education, courts continue to decide cases and frequently utilize the doctrine (even if not always specifically referring to it as *in loco parentis*) to decide the constitutionality of

¹ 393 U.S. 503 (1969).

² 478 U.S. 675 (1986).

³ 484 U.S. 260 (1988).

school action. As demonstrated in Chapter V, the modern judiciary has not shied away from deciding disputes at either level of education even while indicating displeasure at being called upon to intervene in school-related matters. Therefore, the doctrine requires examination as it, and the values associated with it, provide context for and lend insight into judicial decision-making.

The term originally was used in Sir William's Blackstone's "Commentaries on the Laws of England: 1765-1769."⁴ In discussing the relationship of the child and parent, he wrote that once a parent brings a child into the world, the maintenance of that child is a "principle of natural law," such that the life of that child needs to be "supported and preserved" through physical protection and an education "suitable to their station in life."⁵ Civil law, he said, provides for these parental obligations yet also allows for punishment of the child to maintain "order and obedience."⁶ In relation to education, he wrote,

He [the father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis* (in place of a parent), and has such a portion of the power of the parent committed to his charge, *viz.* that of restraint and correction, as may be necessary to answer the purposes for which he is employed.⁷

In his "Commentaries," Blackstone was discussing education at its most introductory stages. As Susan Stuart said, "restraint and correction" extended beyond mere discipline and has been, to an extent, utilized in American jurisprudence to protect teachers in the

⁴ Full text accessed at <http://www.lonang.com/exlibris/blackstone/>.

⁵ Book One, Chapter 16, Of Parent and Child, § 1. It should be noted, however, that he made allowances for the father's duties when the child was a "bastard."

⁶ *Id.* at § 2.

⁷ *Id.*

corporal punishment of students.⁸ While this aspect of *in loco parentis* has waned, she argued, the doctrine now is used primarily as a justification to maintain order, to discipline students, and to violate their civil rights, particularly in the areas of student searches and the First Amendment.⁹ She argued that because the doctrine still is being utilized to violate student rights, the courts need to “articulate some other, more modern justification for school disciplinary actions.”¹⁰

Another expert in the field observed,

The view of public schools as acting purely *in loco parentis* was dominant for much of this country's history and is still advocated by many today. Though schools do not have as complete authority as they once did, one of a school's primary functions is still to act *in loco parentis*. The school educates, disciplines, and ensures the children's safety while the children are in its care, just as any parent would. Even though a public school today has discernible limits on the rules it can make and enforce, students, while in school, do not have the same constitutional rights as ...[adults].¹¹

Historian John E. Nichols indicated that between 1658 and 1966, only nine cases were decided in lower courts relating to K-12 students' First Amendment claims. Schools won in all but one case, and in this case the court found the school had acted without statutory authority in that the school had no regulations allowing for student dismissal on the basis of publication of materials critical of administration.¹²

In each of the other cases, the courts' deferred to the judgment of school officials

⁸ Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969 (2010).

⁹ *Id.* at 977.

¹⁰ *Id.*

¹¹ Matthew Sheffield, *Stop With the Exceptions: A Narrow Interpretation of Tinker for All Student Speech Claims*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 175, 199 (2011).

¹² John E. Nichols, *The Pre-Tinker History of Freedom of Student Speech and Press*, 56 JOURN. Q. 727 (1979).

under the common law doctrine of *in loco parentis*. Only when schools acted arbitrarily in expelling students or where there was a gross violation of law did courts intervene.

“And those were seldom found” in cases extending even beyond the First Amendment.¹³

In fact, it was not until *Tinker*¹⁴ that the U. S. Supreme Court explicitly stated that students were even “persons” under the Constitution, vested with Constitutional protections.¹⁵ According to Preston C. Green III et. al., while *Tinker* diminished the doctrine to a certain degree in that the Court was unwilling to give administrators free reign to punish students absent a showing of a “material and substantial disruption,” the doctrine appears to have experienced a revival in the context of the First Amendment with the Court’s decisions in *Bethel v. Fraser*, *Hazelwood v. Kuhlmeier*, and *Morse v. Frederick*.¹⁶ They suggested that *Tinker* was, perhaps, aberrant in that it was decided during the Civil Rights Movement, during which time significant unrest at both levels of education led students to demand greater freedom of expression.

In *Bethel*,¹⁷ they wrote, “The Court based the authority of school districts to prohibit vulgar speech on their *in loco parentis* power [term specifically used] to ‘inculcate the habits and manners of civility.’”¹⁸ In *Hazelwood*,¹⁹ they argued, the Court took a major leap forward in stating that educators are entitled significant control over

¹³ *Id.* at 730.

¹⁴ *Supra* note 1.

¹⁵ Frank D. LeMonte, *Shrinking Tinker: Students are “Persons” Under Our Constitution—Except When They Aren’t*, 59 AM. UNIV. L. REV. 1324, 1339 (2009).

¹⁶ Preston C. Green, III, Julie F. Mead & Joseph O. Oluwole, *Parents Involved, School Assignment Plans, and the Equal Protection Clause*, 75 BROOK. L. REV. 503 (2011).

¹⁷ *Supra* note 2.

¹⁸ *Id.* at 528.

¹⁹ *Supra* note 3.

students, particularly relating to speech associated with school-sponsored activities from which the school would want to disassociate itself.²⁰ And finally, in *Morse*,²¹ the Court specifically referred to the doctrine to allow the school to punish a student for speech made outside of school, based upon a determination that the school was entrusted to deter students from using drugs.²²

As for post-secondary students, the doctrine was alive and well throughout the country for centuries. Brian Jackson wrote, “When students sought legal remedies for school disputes, courts invoked the doctrine of *in loco parentis* to justify either their nonintervention” or to find, largely, against students.²³ With the birth of the multiversity, courts became more sensitive to the rights of students, and many were able to win disputes via usage of contract law. “If disciplinary rules held students to certain standards of conduct, then the educational institution reciprocally could be bound by its own representations.”²⁴

After this time, as discussed in the Introduction, *in loco parentis* appeared to die on public, post-secondary campuses due to the *Dixon v. Alabama*²⁵ case, in which several African-American students were expelled for participating in civil rights demonstrations. It was here that the court indicated that judicial deference given to universities in matters of student discipline and Constitutional rights was no longer absolute.

²⁰ *Supra* note 16, at 508.

²¹ 551 U.S. 393 (2007).

²² *Id.* at 529-30.

²³ Brian Jackson, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1144 (1991).

²⁴ *Id.* at 1148.

²⁵ 294 F.2d 150 (5th Cir. 1961).

Most scholars agree that *in loco parentis* is no longer a factor in post-secondary education.²⁶ Nonetheless, others have argued there has been a resurgence in its utilization even if, again, it is not specifically referred to as *in loco parentis*. For instance, based upon the contention that colleges enter into a special relationship with students, Christopher Jayson Swartz asserted that schools have a duty to physically and to emotionally protect students, even from themselves.²⁷ Oren R. Griffen suggested that the policies developed by colleges to protect students can be viewed as devices of *in loco parentis*, thus subjecting a number of schools to tort liability claims.²⁸ Finally, Smolla wrote in 2012, “While the students, faculty, staff, and administrators who populate a university campus are not children, the university does retain some residual responsibilities in loco parentis.”²⁹

LANDMARK K-12 FIRST AMENDMENT U.S. SUPREME COURT CASES

*Tinker v. Des Moines Independent Community School*³⁰

To many, *Tinker* represents the height of First Amendment protections afforded

²⁶ See for ex., Perry A. Zirkel & Henry F. Reichner, *Is the In Loco Parentis Doctrine Dead?*, 15 J.L. & EDUC. 271 (1986); Theodore C. Stamatkos, *The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471 (1990).

²⁷ Christopher Jayson Swartz, *The Revivification of In Loco Parentis Behavioral Regulation in Public Institutions of Higher Education to Combat the Obesity Epidemic*, 45 NEW ENG. L. REV. 101 (2010).

²⁸ Oren R. Griffen, *Confronting the Evolving Safety and Security Challenge at Colleges and Universities*, 5 PIERCE L. REV. 413 (2007).

²⁹ RODNEY A. SMOLLA, *THE CONSTITUTION GOES TO COLLEGE: FIVE CONSTITUTIONAL IDEAS THAT HAVE SHAPED THE AMERICAN UNIVERSITY* 108 (New York University Press 2012).

³⁰ *Supra* note 1.

students in K-12 schools.³¹ “For its dramatic infusion of democratic speech values into a classic authoritarian relationship—that between powerful adults and powerless children in an institutional setting—the *Tinker* decision was remarkable at its inception,” wrote James B. Raskin.³²

To recap, in ruling that students who wore black armbands to school in protest of the Vietnam War, the Court said that censorship only was allowed if actual *facts* existed that would lead administrators to “forecast substantial disruption of or material interference with school activities”³³ and if the speech “*would* [emphasis added] materially or substantially interfere with the requirements of appropriate discipline in the operation of the school,”³⁴ such that the speech would collide with the right of other students to be properly educated.³⁵

Raskin went on to praise the decision in that it “advanced not only a constitutional theory of democratic rights but a democratic theory of education.”³⁶ In a democracy, the people are sovereign, and this includes students. “Thus in democracy,” he wrote, “the citizen occupies the highest office in the land, and public officials are public servants who cannot dictate political dogmas to their masters: the people.”³⁷ Students should not be “closed-circuit” recipients of only that which a school board desires, but, rather, they

³¹ See, for ex., Erwin Chemerinsky, *Teaching That Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U. CA., DAVIS 101 (2009); James B. Raskin, *Tinker Turns 40: Freedom of Expression at School and Its Meaning for American Democracy*, 58 AM. U. L. REV. 1193 (2009).

³² Raskin, *supra* note 31, at 1194.

³³ *Id.* at 514.

³⁴ *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

³⁵ *Id.* at 513.

³⁶ *Supra* note 31, at 1200.

³⁷ *Id.* at 1198.

should be free to become active and responsive participants in their learning.³⁸

Education, he wrote, is “not something that the school system *does* to the student.”³⁹ It is, in part, a tool by which the community of students investigates the world through communication amongst themselves, an aspect of schooling that not only is inevitable but also a critical part of the democratic and educational processes. Further, he contended, this free exchange of ideas cannot be confined to out-of-class discussion or activities; for the process to work, it also must be free to take place inside the classroom as well. It is not so important that students agree, he said, but that they “all feel empowered to think, act and speak for themselves.”⁴⁰ *Tinker*, in his view, represents these elements.

Not all, however, have been so praise-worthy. Kristi L. Bowman critiqued the case by pointing out that, while the Court has never spoken to the issue, *Tinker* appears to signify usage of a “reasonable anticipation test,” as opposed to the reasonableness standard articulated by the Fifth Circuit Court just three years earlier in *Burnside*⁴¹ and *Blackwell*.⁴² Reasonable anticipation of disruption is notably different from upholding student punishment due to actual disruption under the reasonableness standard and should not be a standard used in school speech cases, she said. It is antithetical to *Brandenburg*

³⁸ *Id.* (quoting *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969)).

³⁹ *Id.* at 1200.

⁴⁰ *Id.* at 1201.

⁴¹ *Burnside v. Byars*, 363 F.2d 744, 749 (1966).

⁴² Kristi L. Bowman, *The Civil Rights Roots of the Tinker’s Disruption Test*, 58 AM. UNIV. L. REV. 1129, 1152 (2009) (citing *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966)).

v. Ohio,⁴³ in which the Court ruled that inflammatory and controversial speech only can be punished if it is intended to incite and likely to incite “imminent lawless action.”⁴⁴

Speech could be and has been quashed before the fact and potentially still be held constitutional under the purview of *Tinker*, she said. Additionally, the reasonable anticipation test and the particular speech at hand – the political, which rests at the top of the hierarchy of protected speech – have given little guidance to lower courts when disruptive speech cases have appeared before them, she maintained.

This concern is echoed by Valerie Schmidt, who said that because the speech was political, did the Court mean to “rule exclusively on political speech, or all student speech in general?”⁴⁵ She expressed concern that courts do not know and have not known when to rely on *Tinker*, if at all, especially in light of its much more restrictive progeny. She also reiterated Raskin’s concern that by restricting student speech, schools are not preparing them for the “real world” they soon will enter, especially those students in high school. “The ultimate goal of the educational process is to prepare students for citizenship in the United States,” she wrote in closing.⁴⁶ Nonetheless, in light of cases such as *Bethel* and *Hazelwood*, courts, she recommended, should utilize *Tinker*’s material and substantial disruption test in all but the narrowest of cases.

Yet another concern is addressed by Edward L. Carter et. al., who said that in *Tinker*, the majority implicitly discussed what is becoming an important issue both within student speech case law and free speech jurisprudence generally – the extent of the

⁴³ 395 U.S. 444 (1969).

⁴⁴ *Id.* at 447.

⁴⁵ Valerie Schmidt, *Dirty T-Shirts, Pure Speech and the Law*, 23 ST. JOHN’S L. REV. 355, 362 (2008). See also, Green et. al., *supra* note 16.

⁴⁶ *Id.* at 380.

government's right to speak.⁴⁷ In recognizing that schools have the right to choose the messages they want to convey to students, the Court also wrote that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate [whether in the classroom or outside of it]" and "may not be confined to the expression of those sentiments that are officially approved."⁴⁸

They wrote, "The Court did not yet manifest the concern it would in later cases for the right of the school to disassociate itself from messages with which it disagreed ... [yet] ... it is significant that the tension between individual speech rights and the government's own speech right was recognized as early as the *Tinker* case in 1969."⁴⁹ They also wondered if courts today would even consider utilizing the case independently as precedent in subsequent cases because it was decided during an era of unrest. (As the results will demonstrate, schools at both levels of education have, indeed, utilized *Tinker* on numerous occasions both to uphold and to strike down speech restrictions and punishments.) Another important consideration, according to at least two scholars who wrote shortly after the case was decided, regards the Court's *implication* that schools have at least some of the characteristics of a public forum. Of particular significance was the Court's rationale that public schools are dedicated to "intercommunication among the students" and that neither teachers nor students shed their First Amendment rights at the "schoolhouse gate," wrote Susan Garrison⁵⁰

⁴⁷ Edward L. Carter, Kevin R. Kemper & Barbara L. Morgenstein, *Applying Hazelwood to College Speech: Forum Doctrine and Government Speech in the U.S. Court of Appeals*, 48 S. TEX. L. REV. 157, 162 (2006).

⁴⁸ *Tinker*, *supra* note 1, 511.

⁴⁹ *Supra* note 47, at 170.

⁵⁰ Susan Garrison, *The Public School as Public Forum*, 54 TEX. L. REV. 90 (1975); R. Allan Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931 (1969).

Geoffrey Stone wrote in 1974 that “*Tinker* might properly be viewed as resting upon the proposition that, although functionally unlike the streets and parks, the schools in their own way have nevertheless been dedicated to the exercise of First Amendment rights,” and, because schools are government spaces, forum-hood is insinuated.⁵¹ Also, as Scott C. Breneman indicated, after *Tinker*, a few lower courts, both federal and state, began integrating public forum analysis into their rationales.⁵² Thus, this issue had begun to brew before *Hazelwood*, though the cases would not reach the same conclusion as to forum status.

*Bethel School District No. 403 v. Fraser*⁵³

The *Tinker* decision was precedent for nearly twenty years until *Bethel* was decided in 1986, representing a departure from the *Tinker* holding. To review briefly, at issue was a student’s sexually suggestive speech at a voluntary school assembly. Fraser’s speech was made in support of a student’s nomination for an elective office. The Court ruled that the First Amendment did not protect student speech that was “vulgar” or “lewd”⁵⁴ and was careful to note that the “constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”⁵⁵ It is here that we see for the first time the Court discussing, in the context of student speech,

⁵¹ Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. Ct. REV. 233, 250 (1974).

⁵² Scott C. Breneman, *Widmar v. Vincent and the Public Forum Doctrine: Time to Reconsider Public School Prayer*, 1984 WIS. L. REV. (1984).

⁵³ *Supra* note 2.

⁵⁴ *Id.* at 680.

⁵⁵ *Id.* at 682.

the role of public schools in “inculcat[ing] the habits and manners of civility”⁵⁶ and teaching students the “boundaries of socially appropriate behavior.”⁵⁷ It is also here that we first see the Court, in relation to student speech, indicate that a school has the right to “disassociate itself” from speech it finds contrary to the “fundamental values of public education.”⁵⁸

In an article published in 1987, one year after *Bethel* and one year prior to the *Hazelwood* decision, Royal C. Gardner III noted that because students voluntarily attended the *Bethel* assembly, the Court’s assertion that the speech was unprotected because it reached a “captive audience” was simply incorrect.⁵⁹ Furthermore, outside of one teacher having a ten-minute discussion with students in class, there was virtually no disruption at all.⁶⁰

Gardner went on to write forcefully,

Ironically, the decision in *Fraser* may undermine what it sought to protect: a school's interest in value inculcation. Affording school officials discretion to punish speech based on subjective notions of propriety hardly serves as a valuable civics lesson to students. Instead, it may breed intolerance and reduce the first amendment to a mere platitude in students' eyes. Moreover, any chilling effect that *Fraser* produces will contribute to this intolerant

⁵⁶ *Id.* at 683 (The Court goes on to say that “The inculcation of these values is truly the ‘work of the schools’” and attributes this to *Tinker*; however, the Court in *Tinker* does not say the inculcation of socially appropriate values and behavior is the “work of the schools.” Rather, it utilizes this phrase to emphasize that the case before it did not interfere with schools’ need for order so that students may be educated. The Court in *Tinker* said that prohibition of a viewpoint that collides with the preferred viewpoint of the school is unconstitutionally impermissible unless schools officials reasonably forecast that a material and substantial disruption *might* or *would* ensue (both words were used within the opinion, causing uncertainty in lower courts).

⁵⁷ *Id.* at 681.

⁵⁸ *Id.* at 682.

⁵⁹ Royal C. Gardner III, *Protecting a School’s Interest in Value Inculcation to the Detriment of Students’ First Amendment Rights: Bethel School District v. Fraser*, 28 B.C. L. REV. 595, 620 (1987) (quoting *Bethel*, *supra* note 2, at 680).

⁶⁰ *Id.* at 619.

atmosphere. Clearly, a ‘silence born of fear’ does not foster respect for the constitutional guarantee of freedom of speech. In sum, the Court's extension of the substantial disruption standard to include speech that disrupts the school's value inculcation mission is detrimental to student free speech rights because value inculcation is a vague term that will give school officials wide discretion in curtailing student speech when the school official disagrees with the propriety of that speech. This increase in school officials' authority will naturally result in a chilling effect on student speech.⁶¹

He recommended that when the Court hears *Hazelwood*, it should avoid giving school officials the great deference afforded in *Bethel*.

In another article discussing *Bethel*, Therese Thibodeaux took great care to highlight Justice William J. Brennan’s concurring opinion and Justice Thurgood Marshall’s dissenting opinion.⁶² She stated that Justice Brennan specifically advocated against “school officials [having] limitless authority to regulate high school students’ speech.”⁶³ Justice Marshall, in his dissenting opinion, said that the school district had failed to prove that the student’s speech had been disruptive in any way. Additionally, he argued that, “where speech was involved, the Court need not adopt a *teacher's or administrator's opinion* [emphasis added] that certain speech interferes with the school's educational mission.”⁶⁴ Thibodeaux went on to address concerns that both school-sponsored and non-school-sponsored speech would be viewed by the public to bear the imprimatur of the school. Nonetheless, such considerations, she said, should not be enough to overcome student freedom of expression.

⁶¹ *Id.* at 622.

⁶² Therese Thibodeaux, *Bethel School District No. 403 v. Fraser: The Supreme Court Supports School in Sanctioning Student for Sexual innuendo in Speech*, 33 LOY. L. REV. 516 (1987).

⁶³ *Id.* at 524 (quoting *Bethel*, *supra* note 2, at 688).

⁶⁴ *Id.* (quoting *Bethel*, *supra* note 2, at 685).

In an article published one year after the decision, it was argued that the Court erred in not treating Fraser’s speech as political.⁶⁵ Paul Siegel wrote, “This is not a novel posture for the Court—leaving an important issue with respect to the Court’s view of the communication act itself unresolved by finding that even when seen in the most positive light from the communicator’s point of view, the challenged infringement upon speech would still be constitutional.”⁶⁶

On top of that, he argued, Fraser’s use of sexual innuendo was not novel in a high school, therefore casting doubt on the Court’s “facile dichotomy between political and sexual speech.”⁶⁷ He also wrote that the Court claimed it did not base its decision on the “messages” or “ideas” conveyed. Instead, “they were aimed in a content-neutral fashion at the ‘manner’ of the speech.”⁶⁸ He disagreed with the Court’s assertion that “manner” could be determined in a content-neutral fashion as the law requires. He wrote,

The problem is ... that the form and content of communication are so inextricably tied that to control the former is, in fact, to modify the latter ... it may well be that ‘manner’ needs to be separated from this venerable trilogy [time, place, and manner regulations] and recognized as a dimension of the communication process that warrants nearly as much first amendment protection as the content of the message.⁶⁹

He concluded that schools and courts should be mindful of a landmark 1927 case in which the Court wrote, “...if there be time to expose through discussion the falsehood

⁶⁵ Paul Siegel, *When is a Student’s Political Communication Not Political?: Bethel School District vs. Fraser*, 36 COMM. EDUC. 347 (1987).

⁶⁶ *Id.* at 349.

⁶⁷ *Id.* at 351.

⁶⁸ *Id.* at 352.

⁶⁹ *Id.*

and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”⁷⁰

Stanley Ingber, in addressing the paradox between schools instilling values in students and the question of what those values should be, wrote,

The dilemma of public education is thus manifest. Because few institutions affect young, impressionable personalities as profoundly as do our schools, we as a community are justifiably concerned that our education program should promote the “right” skills and values for the development of an individual capable of contributing in a meaningful way to our community. Yet by authorizing schools to develop this “right” environment, we leave our children highly vulnerable to “village tyrants” who might pervert the education process. Under the guise of properly educating the young, government could predispose children to accept and defer to authority while passively adopting prevailing values and current attitudes. The school system, consequently, epitomizes the tension between liberty and authority.⁷¹

It should be noted as well that one Susannah Barton Tobin specifically addressed the role of *in loco parentis* within the case.⁷² She began by saying that the Court has confronted a number of issues concerning disputes between parents/students and schools, and that they typically have tried to find the middle ground through certain types of local control, specifically in terms of parents serving on parent-teacher associations, through volunteering, and electing school boards.⁷³ Yet the *Bethel* court specifically mentioned the duty of schools *in loco parentis* to teach students manners and civility, subsequently using this as partial justification for its decision.

⁷⁰ *Id.* at 354 (quoting *Whitney v California*, 274 U.S. 357, 373 (1927)).

⁷¹ Stanley Ingber, *Liberty and Authority: Two Facets of the Inculcation of Virtue*, 69 ST. JOHN’S L. REV. 421, 430 (1995).

⁷² Susannah Barton Tobin, *Divining Hazelwood: The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 Harv. C.R.-C.L. Rev. 217 (2004).

⁷³ *Id.* at 241.

“The catch, of course, is the existence of constitutionally valid reasons to regulate speech and the evolving scope of those reasons over the years, depending on the circumstances of the country, the composition of the Court and the behavior of school districts.”⁷⁴ John C. Hogan and Mortimer D. Schwartz argued that because K-12 education is compulsory and because many parents cannot afford to pay for private school, *in loco parentis* “is no longer a viable concept in American schools.”⁷⁵ *Hazelwood School District v. Kuhlmeier*⁷⁶

Just two years after *Bethel*, *Hazelwood*, and its restrictive framework, significantly reduced the free speech rights of K-12 students. Additionally, in writing that its “oft-expressed view that the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges,” the Court clearly implicated the continued role of schools *in loco parentis*.⁷⁷

Research in the social sciences has painted a picture of a high school press that is very unfree. In fact, surveys have found both increased censorship and no change in censorship since *Hazelwood*. Some of the deciding factors included: already high levels of censorship at schools, administrative control over editor and adviser selection, degree to which stories are critical of administration, and urban v. rural schools.⁷⁸ In their, “Students Learn About Free Press Through Censorship,” William Click and Lillian

⁷⁴ *Id.* at 242.

⁷⁵ John C. Hogan & Mortimer D. Schwartz, *In Loco Parentis in the United States, 1765-1985*, 8 J. LEGAL HIST. 260, 270 (1987).

⁷⁶ *Supra* note 3.

⁷⁷ *Id.* at 273.

⁷⁸ Jennifer R. Garner & Bruce L. Plopper, *The Effects of a Student Press Law on Student Newspaper Content*, COMM.: JOURNALISM EDUC. TODAY 26 (2010).

Lodge Kopenhaver found that the majority of advisers and administrators in their nationwide survey believed 1) they both censored student newspapers, 2) the school's funding had an impact on this, 3) principals should be able to withhold publication, and 4) students are self-censoring. Only 27 percent of all principals and advisers said their student newspapers are *not* censored.⁷⁹

Regarding self-censorship, the findings (thus far) are not conflicting—self-censorship is prevalent. Click and Kopenhaver found that 65 percent of the principals and 60 percent of the advisers they surveyed felt that students self-censor.⁸⁰ This aligns with the SPLC's assertions mentioned in Chapter I.

In a content analysis examining student-written editorials before and after the *Hazelwood* decision, Carol S. Lomicky found that the types of editorials written prior to and after *Hazelwood* changed dramatically.⁸¹ Whether this resulted from direct censorship or self-censorship was unclear. The number of editorials of criticism written post-*Hazelwood* decreased significantly from those published prior to *Hazelwood*. She also found that those editorials of criticism prior to *Hazelwood* were much more critical of teachers, administrators, and administrative policies. Those written post-*Hazelwood* tended to be critical of “safer issues,” such as crowded hallways, activities for Homecoming Week, and parking issues. The number of entertainment-oriented editorials also dramatically increased post-*Hazelwood*.

⁷⁹ Lillian Lodge Kopenhaver & J. William Click, *Students Learn About Free Press Through Censorship*, JOURNALISM EDUC. TODAY, 2002.

⁸⁰ *Id.*

⁸¹ Carol S. Lomicky, *Analysis of High School Newspaper Editorials Before and After Hazelwood School District v. Kuhlmeier: A Content Analysis Case Study*, 29 J.L. & EDUC. 463 (2000).

Further, the number of editorials about controversial issues, such as drugs, sex, and teen pregnancy, also declined appreciably. She wrote, “At minimum, the decision [*Hazelwood*] gives school administrators a means by which to censor articles when they believe publication of the information may cause public controversy or upset school board members.”⁸² She continued, “As one newspaper columnist noted, it is important for students to have a free press while in high school so that students will be better prepared for real life journalism.”⁸³ Instead, *Hazelwood* gave principals across the country the ability to control the student press, in large part so the speech would not be perceived as the school’s.

High school newspaper advisers also have been generally critical of the decision, she said; they say that the ruling teaches bad journalism by allowing school officials to put a lid on controversy—or any news that administrators may feel would cast the school in a “bad light.”⁸⁴

Finally, she wrote,

Although the *Hazelwood* decision requires that school officials who wish to restrict student speech provide a valid educational reason for their intervention, critics believe that many administrators have interpreted the decision as license to censor anything they choose (for example, articles on sensitive topics, if, in their judgment, the topics are unsuitable for immature audiences or are deemed to be controversial). The result of the decision: a highly vague and subjective First Amendment standard for the public high school press.⁸⁵

⁸² *Id.* at 472.

⁸³ *Id.*

⁸⁴ *Id.* at 468.

⁸⁵ *Id.* at 465.

A review of legal analyses concerning *Hazelwood* reveals that, almost universally, legal scholars believe that *Hazelwood* has and only will continue to chip away at student speech rights.

A central concern among many scholars is the inherent viewpoint discrimination allowed by the ruling. As Tobin pointed out, this has led the federal circuit courts to split at both levels of education because the *Hazelwood* ruling left the issue of viewpoint discrimination, among others, unresolved.⁸⁶ She said that when the Court indicated that schools have a right to disassociate themselves from speech “that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences,”⁸⁷ it implicitly allowed for viewpoint discrimination, particularly in saying that biased or prejudiced speech was unconstitutional in the school setting.⁸⁸ Shari Golub said that even though the *Hazelwood* principal’s testimony and actions contained elements of viewpoint discrimination, such as his unilateral decision to refuse publication due to content and the viewpoint expressed therein, the majority refused to consider these elements of his testimony.⁸⁹

In another article discussing viewpoint discrimination, Marjorie Heins insisted that words such as “controversial,” “offensive,” and “vulgar,” are quintessentially viewpoint-based.⁹⁰ They are culturally and ideologically driven and ultimately construed by the

⁸⁶ Tobin, *supra* note 72.

⁸⁷ *Id.* at 221 (quoting *Hazelwood*, *supra* note 3, at 271-72).

⁸⁸ *Id.* at 221-22.

⁸⁹ Shari Golub, *Tinker to Fraser to Hazelwood – Supreme Court’s Double Play Combination Defeats High School Students’ Rally for First Amendment Rights: Hazelwood School District v. Kuhlmeier*, 38 DE PAUL L. REV. 487 (1989).

⁹⁰ Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L. Q. 99, 169 (1996).

decision-maker, which can make for a particularly speech-repressive environment. “Thus, the Supreme Court's approval in *Hazelwood* of the exclusion of ‘controversial’ articles from a school-sponsored student newspaper was profoundly antithetical to free speech values even if, as the Court ruled, school officials plainly may exercise significant control over publications produced as part of the curriculum.”⁹¹

Administrators, she asserted, can create virtually any reason for discriminating and restricting based upon the elusive “legitimate pedagogical concerns” prong of the framework, which also can be used as a form of viewpoint discrimination. W. Wat Hopkins also took aim at this prong of the test, though not for the same reasons. He wrote, “The ruling legitimizes censorship as a pedagogical tool, which it is not. Censorship teaches that the first amendment works only when school officials are willing for it to work.”⁹² He claimed it was unsound pedagogy to say, as the Court did, that the state – through the school board – was the publisher of an educational tool, the newspaper. If it is an educational tool, then logically the school board, as an agency of the state, should not be considered the publisher. Instead, he argued, it makes more sense to think of the adviser, with academic freedom, as the publisher.⁹³ Faculty advisers, he argued, should have ultimate authority over a newspaper used as an educational tool; in this way students can be taught about journalistic responsibility. *This* is sound pedagogy.

⁹¹ *Id.* at 174.

⁹² W. Wat Hopkins, *Hazelwood v. Kulmeier: Sound Constitutional Law, Unsound Pedagogy*, 16 NO. KY. L. REV. 521 (1989).

⁹³ *Id.* at 538.

R. George Wright⁹⁴ observed that while the *Hazelwood* Court said speech regulations in nonpublic forums need only be reasonable, the Court also made no explicit requirement that restrictions also should be viewpoint-neutral, going against precedent.⁹⁵ We are “left to wonder,” he wrote, “why the Court ... failed to consistently follow its own teaching, before and since, that regulations of speech in even non-public fora must be not only reasonable but, separately, must also be viewpoint neutral, or not based on viewpoint.”⁹⁶ He argued that viewpoint-neutrality cannot be dismissed solely on the grounds of the special characteristics of the school as cases already exist explicitly stating that most nonpublic forums will, indeed, have special characteristics and purposes.⁹⁷

Much also has been written on the curricular/non-curricular and school-sponsored/non-school-sponsored reasoning in the decision, which the Court used, in large part, to decide the newspaper was a nonpublic forum. As J. Mark Abrams and Mark Goodman pointed out, when the Court decided that the newspaper was school-sponsored and, therefore, part of the curriculum, it was determined to be a nonpublic forum.⁹⁸

They contended that the Court misapplied an earlier non-student-related case that indicated if, by “policy or practice,” school activities have been opened for “indiscriminate use” by the public or a specific group of the public, it had created a

⁹⁴ R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. ILL. U. L. J. 175 (2007).

⁹⁵ *See., for ex.*, *Perry Local Educ. Assn. v. Perry Local Educators Ass’n*, 460 U.S. 37 (1983) & *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788 (1985).

⁹⁶ Hopkins, *supra* note 92, at 183.

⁹⁷ Citing *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Ark. Educ. Television Com’n v. Forbes*, 523 U.S. at 666 (1998); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *United States v. Kokinda*, 497 U.S. 720 (1990); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788 (1985).

⁹⁸ J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L. J. 706 (1988).

limited public forum, not a nonpublic forum.⁹⁹ “The Supreme Court, in its rush to find an expansive rationale for handing schools more control, neglected to properly analyze the forum issue,” they wrote.¹⁰⁰

Because Hazelwood High indeed had, through written policies, established the paper for students, a limited public, to present their views and opinions, the newspaper clearly should have been classified as a limited public forum. Because the newspaper was funded almost exclusively by ad sales, they argued that this further established the newspaper as a limited public forum.

They wrote,

By misapplying *Perry* to what was in fact a public forum, the Supreme Court provided schools with an easy mechanism for determining whether or not their student newspaper is a forum for public expression. Most schools will interpret the decision as giving them the authority to control a student newspaper unless they designate it a public forum. However, schools that censor will not do their students or their educational goals a service.¹⁰¹

They vigorously argued that the *Hazelwood* Court taught students that their constitutional rights do, in fact, largely stop at the schoolhouse gate, which the *Tinker* court famously pronounced they did not. Not only that, but the decision indicates to students that while they must abide by the Constitution and learn the values behind the Constitution, their ability to enforce their Constitutional rights only is allowed after they graduate.

Hopkins – though he felt that the *Hazelwood* case was not entirely going against precedent – asserted that the Court, in ruling that schools are entitled to exercise control over the curriculum even if student activities take place outside the classroom, was really

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 720.

¹⁰¹ *Id.* at 721.

supporting the school’s concern that student expression would be perceived as the school’s speech, to “bear the imprimatur” of the school. He also reiterated what the dissenting Justices wrote “in a biting dissent,” in which they felt the appropriate balance was struck in *Tinker* and that the majority was offering “an obscure tangle” of reasons to allow administrators even more control over student expression.¹⁰²

Other scholars, such as Wright, have insisted that schools should, indeed, have the right to control students’ speech. He said that great latitude should be given to school officials not only so order can be maintained but also so schools can prepare students for citizenship. As long as the restrictions are reasonable, schools should be able to regulate as they see fit.¹⁰³ Wright, while acknowledging that viewpoint discrimination is repugnant to the First Amendment, nonetheless said an exception should be made for school-sponsored speech that might be perceived as “bearing the imprimatur of the school,” or speech that others would think the school had approved. In its educational mission, a K-12 school seeks to promote tolerance, civility, inclusion, equality, and responsibility. But, he wrote, such messages are “blurred” when student speech appears to be the school’s own, thus contradicting these goals.¹⁰⁴

LANDMARK PRE-HAZELWOOD, POST-SECONDARY FIRST AMENDMENT U.S. SUPREME COURT CASES

There is a dearth of scholarly articles and legal reviews discussing early,

¹⁰² Hopkins, *supra* note 92.

¹⁰³ John R. Craddock, *The First Amendment Rights of Public School Students Are Not Violated When School Officials Impose Reasonable Editorial Control Over the Content of School-Sponsored Publications*, 30 S. TEX. L. REV. 193 (1988).

¹⁰⁴ *Supra* note 94, at 214.

pre-*Hazelwood* post-secondary cases. Perhaps this simply is due to student victories. Discussions appear almost exclusively within subsequent case law, generally quoted in brief to support a specific part of the Court's argument. The latter appears true in relation to journal articles as well.¹⁰⁵

*Healy v. James*¹⁰⁶

The first post-secondary case heard by the U. S. Supreme Court was *Healy v. James*. The Court found that student members of the Students for a Democratic Society (SDS) were denied First Amendment rights to association (and, thereby, to speech as well) when the university declined to allow them to form a local SDS chapter on campus. The case, it should be reiterated, occurred in 1972 during a period of considerable unrest on campuses and in society generally. While citing *Tinker* in its assertion that administrators have the right to maintain order and to control conduct on school grounds, the Court, nonetheless, also quoted *Tinker* to indicate that “undifferentiated fear or apprehension of disturbance ... is not enough to overcome the right to freedom of expression.”¹⁰⁷

As Lauren C. Tanner wrote, *Healy* descended directly from *Tinker* in that the Court used the *Tinker* material and substantial disruption rule to find in favor of the students.¹⁰⁸ While the SDS nationally was known to cause significant disturbances, she wrote, the Court did not find any reason to believe the campus group would pose a

¹⁰⁵ Extensive searches were conducted for each case.

¹⁰⁶ 408 U.S. 169 (1972).

¹⁰⁷ *Id.* at 191 (citing *Tinker*, *supra* note 1, at 509).

¹⁰⁸ Lauren E. Tanner, *Rights and Regulations: Academic Freedom and a University's Right to Regulate the Student Press*, 86 TEX. L. REV. 421 (2007).

substantial threat of significant disturbance. Thus, as in *Tinker*, mere apprehension was not enough.

Lewis Bogaty said that while *Dixon* was a very important case, and often attributed as causing the demise of *in loco parentis* in post-secondary education, *Healy* marked the first time the U. S. Supreme Court indicated its support for the view that schools do not have absolute control over students.¹⁰⁹ Additionally, he wrote,

The Court treated recognition as an affirmative obligation imposed by the first amendment's right of association rather than a right contingent upon the university's voluntary grant of recognition to any group. Thus, the *Healy* decision anchored the right to recognition firmly in the first amendment rather than in any obligation imposed by the equal protection clause that would require a university to treat similar groups similarly.¹¹⁰

Yet because the Court failed to fully define all aspects of this associational right, it was unclear, he said, if student groups could make a constitutional claim for funding.¹¹¹ “While *Healy* requires the universities to provide students with two elements of associational freedom – a place to meet and the means necessary to publicize such meetings, the Court deliberately left open the question of whether funding also is an element of the right of association that a university is required to provide.”¹¹² (This issue, as discussed below in *Rosenberger* and *Southworth*, eventually would be taken up by the Court.) Even though universities, specifically in the context of academic freedom, *may not want to be associated with a student organization’s message*, that desire is not enough to overcome students’ associational rights under the First Amendment.

¹⁰⁹ Lewis Bogaty, *Beyond Tinker and Healy: Applying the First Amendment to Student Activities*, 78 COLUM. L. REV. 1700 (1978).

¹¹⁰ *Id.* at 1702.

¹¹¹ *Id.* at 1704.

¹¹² *Id.* at 1710.

*Papish v. Board of Curators of the University of Missouri*¹¹³

One year later in *Papish*, a graduate student was expelled following the publication in a non-school-sponsored newspaper of a political cartoon and an article, both considered indecent by school administrators. While it acknowledged that a university has authority to govern student conduct, the Court wrote, “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.’”¹¹⁴

“In an era of protracted political and social conflict, the use of constitutional protection for this kind of speech [offensive] has accordingly grown,” wrote Mark C. Rutzick.¹¹⁵ The law is clear, he said, that vulgarity and indecency, though not obscenity, are held constitutional in student press cases.

McGowan and Tangri¹¹⁶ analyzed the rise of “political correctness” on the college campus. Though their discussion did not focus exclusively on *Papish*, the case was used frequently to support the idea that while offensive speech may be repulsive to some or even to many, and could lead to potential conflicts, there is inherently no conflict in offensive speech.¹¹⁷ One of their supporting reasons is that even offensive speech enhances the marketplace of ideas. They wrote, “‘Politically correct’ beliefs may or may

¹¹³ 410 U.S. 667 (1973).

¹¹⁴ *Id.* at 670 (citing *Healy v. James*, 408 U.S. 169 (1972)).

¹¹⁵ Mark C. Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.-C.L.L.REV. 1 (1974).

¹¹⁶ David F. McGowan & Ragesh K. Tangri, *A Libertarian Critique of Restrictions of Offensive Speech*, 79 CAL. L. REV. 825, 833 (1991).

¹¹⁷ *Id.*

not prevail, but to the extent the debate takes place in a free marketplace, all concerned will be the better for it, regardless of the outcome.”¹¹⁸

*Widmar v. Vincent*¹¹⁹

Roughly eight years later, in *Widmar v. Vincent*, the Court addressed the question of whether a university could open a forum for expressive activities but bar from the forum expressive activities of a religious nature. In Brennan’s assessment, though the Court stated only that this particular university had created a public forum, it actually was a limited public forum in that the university had opened certain facilities purposefully for use by students.¹²⁰ Smolla agreed with this assertion and said that, unfortunately, “Widmar didn’t tell us how much latitude universities would have in deciding the extent to which its places and spaces would become limited public forums.”¹²¹ Due to this, he claimed, lower courts have not “yielded any clear and consistent legal principles” for deciding the issue.¹²²

According to Rosemary C. Salomone,¹²³ although the Equal Access Act¹²⁴ was not held constitutional until 1990, the *Widmar* Court upheld equal access principles within its decision. Even though the case involved the barring of a religious organization, which lower courts have upheld under the Establishment Clause, equal access principles,

¹¹⁸ *Id.* at 916.

¹¹⁹ 454 U.S. 263 (1981).

¹²⁰ Brennan, *supra* note 52.

¹²¹ Smolla, *supra* note 29, at 114.

¹²² *Id.*

¹²³ Rosemary C. Salomone, *From Widmar to Mergens: The Winding Road of First Amendment Analysis*, 18 HASTINGS CONST. L.Q. 295 (1991).

¹²⁴ 20 U.S.C. § 4071.

in which content-neutrality is required, did not interfere with the Establishment Clause. Further, because the university had “taken affirmative steps to disassociate itself from the ‘aims, policies, programs or opinions of any organization or its members,’” allowing the organization to meet was not considered an endorsement of the group’s ideology, or of “confer[ring] any imprimatur of state approval.”¹²⁵

LANDMARK POST-HAZELWOOD, POST-SECONDARY FIRST AMENDMENT U. S. SUPREME COURT CASES

*Rosenberger v. Rector and Visitors of the University of Virginia*¹²⁶

The *Rosenberger* case involved the Thomas Jefferson-created university’s refusal to fund a student newspaper that “primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.”¹²⁷ Holding for the first time that funding of an extracurricular program made it a limited public forum, the Court asserted that once a limited public forum has been created, restrictions cannot be based upon viewpoint. And the Court found withhold funding for the newspaper in question violated the viewpoint-neutrality principle.

One of the primary critiques of the case revolves around the separation of church and state. One year after *Rosenberger*, the journal *Academe* highlighted a discussion one year after *Rosenberger* among former Eighth U. S. Circuit Court of Appeals Judge Michael McConnell, who argued the case for the plaintiffs before the High Court; Robert O’Neil, founding director of the University of Virginia’s Thomas Jefferson Center; and

¹²⁵ Salomone, *supra* note 123, at 312-13.

¹²⁶ 515 U.S. 819 (1995).

¹²⁷ *Id.* at 823.

the editor of *Academe* at the time, John Lyons.¹²⁸ Through extensive searches, there appears to be no better illustration of the issues and problems at hand in *Rosenberger* than those represented in their discussion.

At one point during their conversation, O’Neil said, “There is the distinction that when one is dealing with religious expression, there is a unique concern not applicable to any other category of expression: that simply providing governmental support, a physical site, endorsement, or perceived endorsement in any form is something that government constitutionally may not do.”¹²⁹ This was the position, he said, of the federal court of appeals that heard the case, finding that the university had no option but to withhold funding due to the Establishment Clause. Such a concern, he said, is unique to religious expression.

McConnell agreed, saying,

...there is an aspect of free speech jurisprudence that prohibits the government from compelling citizens to support positions with which they do not agree ... and the cases go various ways ... but the common thread [in university speech cases of this kind] is that as long as the university is supporting a range of viewpoints with its mandatory fees, then there is not a problem under the compelled speech doctrine of the free press clause. I think the *Rosenberger* decision is probably consistent with that.¹³⁰

When McDonnell went on to say that the decision brings jurisprudence regarding religious speech much more closely in line with that of other forms of speech, thus making it more consistent with the First Amendment overall, O’Neil countered by saying that was precisely one of the main things that had troubled him about the case – “I have

¹²⁸ *Academe, Free Speech and Religious Expression: One Year after Rosenberger, Questions Remain*, 82 AM. ASS’N of U. PROFESSORS 37 (1996).

¹²⁹ *Id.* at 38.

¹³⁰ *Id.*

always felt that religious expression was fundamentally different and ought in certain contexts – including this one – to be treated differently.”¹³¹

In relation to the viewpoint discrimination and content discrimination the Court discussed, Lyons said that the Court was very clear in saying that religion is a *category* of speech that *describes* a viewpoint, or a set of viewpoints, just as political speech does, and, consequently, it could not be proscribed in *Rosenberger* as a basis for exclusion. O’Neill said, “It certainly is tricky,” and he felt that prior to *Rosenberger* the Court had established that there was a difference between content discrimination and viewpoint discrimination. He felt that *Rosenberger* “blurred that difference ... in the context of a category of speech which is unique and which is treated, in some respects, differently from any other category of expression – and understandably so.”¹³²

McConnell didn’t quite agree, saying pointedly, “I think the blurring exists simply because these are blurry things by their nature.”¹³³ He went on to say he believed the Court was slowly moving “toward the idea that where various *forms* [emphasis added] of content discrimination bleed into viewpoint discrimination, the close-to-absolute protections of the First Amendment begin to kick in.”¹³⁴

*Board of Regents of University of Wisconsin System v. Southworth*¹³⁵

In *Southworth*, students challenged having to fund, from mandatory student fees, organizations with which they ideologically and politically disagreed. The Court held that

¹³¹ *Id.* at 39.

¹³² *Id.*

¹³³ *Id.* at 38.

¹³⁴ *Id.*

¹³⁵ 529 U.S. 217 (2000).

the act of charging students fees to promote extracurricular speech was constitutional, in large part because it determined the overall fees scheme was a limited public forum, though a metaphysical one, and was viewpoint-neutral. It also held, however, that one of the ways in which student groups applied for funding – through a referendum process – was unconstitutional based upon the viewpoint-neutrality principle.

At least two scholars have critiqued the case via the government speech doctrine, which is relatively new and quickly evolving. The doctrine essentially states that when the government speaks, its speech does not have to be viewpoint-neutral. It is up to the courts to decide if the speech made within a public forum is private and bound by the viewpoint-neutrality principle or if the speech is the government's. According to Joseph Blocher,

Government speech creates a paradox at the heart of the First Amendment. In order to satisfy traditional First Amendment tests, the government must show that it is not discriminating against a viewpoint. And yet if the government shows that it is condemning or supporting a viewpoint, it may be able to invoke the government speech defense and thereby avoid constitutional scrutiny altogether. Government speech doctrine therefore rewards what the rest of the First Amendment forbids – viewpoint discrimination against private speech. This is both a theoretical puzzle and an increasingly important practical problem.¹³⁶

The best approaches for handling this paradox, he wrote, would be to 1) allow government speech as a defense only if the speech allows “sufficient alternatives for private speakers,” 2) allow government speech as a defense only when the government itself has no alternative channels of expression, or 3) allow government speech as a defense only if it purposefully “creates equal alternatives for private speakers.”¹³⁷

¹³⁶ Joseph Blocher, *Government Viewpoint and Government Speech*, 52 B.S. L. REV. 695, 695 (2011).

¹³⁷ *Id.* at 754.

In a recent development, the Ninth U. S. Circuit Court of Appeals ruled that a high school teacher's display of religious banners within his classroom was unconstitutional; because the teacher was a public employee, the teacher's speech was deemed governmental, not private. The case was not determined via the Establishment Clause.¹³⁸

Academic freedom at the post-secondary level generally has insulated professors from restrictions on their speech; however, as Smolla wrote,

The Court often acknowledges academic freedom as a *value*, or a *factor*, in its analysis, but it *always* holds short of explicitly enshrining academic freedom as an independent, freestanding constitutional right ... the Supreme Court of the United States has been stubbornly unreceptive to the formal recognition of academic freedom as even an implied constitutional right.¹³⁹

Rather, it is understood as a special concern under the umbrella of the First Amendment.

According to Nicole B. Casarez, because a university is not required to create a limited public forum, it can 1) continue supporting it, 2) modify its features and parameters, or 3) discontinue support, as long as the reason for doing so is viewpoint-neutral.¹⁴⁰ She hypothesized a situation in which there was a change in administration, one less tolerant of student speech than the preceding administration. Administrators easily could revise general newspaper policies, adding the requirement that someone in the administration engage in prior review, for instance, and this action still could be held constitutional. Once administration established its authority over the newspaper, it could be viewed by a court as government speech. This is a significant reason why forum

¹³⁸ *Johnson v. Poway Unified School District*, No. 10-55445 (9th Cir. Sept. 13, 2011) (The case relied heavily on a non-school-related U.S. Supreme Court case, *Garcetti v. Ceballas*, 547 U.S. 410 (2006), in which the Court said that public employees have no speech rights when speaking as public employees instead of as citizens.).

¹³⁹ Smolla, *supra* note 29, at 33-34.

¹⁴⁰ Nicole B. Casarez, *The Student Press, The Public Workplace, and Expanding Notions of Government Speech*, 35 J.C. & U.L. 1 (2008).

analysis is unsuited to speech issues at the post-secondary level, she said. It opens the door to application of the government speech doctrine. Returning to her hypothetical, she said that post-secondary journalists are “vulnerable under this rationale” because if college officials create a policy of prior review, they then can turn “an otherwise student publication into government speech.”¹⁴¹

Steven G. Gey wrote that utilizing public forum doctrine, as was done in *Southworth*, was problematic, but, even more troublesome was the Court’s “suggestion in *Southworth* that government speech may in some way be relevant to the university enterprise.”¹⁴² Though the Court said the facts of the case made government speech doctrine inapplicable, the Court spent considerable time discussing the doctrine, which, she said, raises several concerns: 1) the Court’s suggestion that if a college or university expresses a desire to make activity-fee-funded “activities part of the University’s own speech, the First Amendment analysis of the case likely would be altogether different”¹⁴³ (the intent aspect of public forum doctrine, 2) the Court offered the possibility that “traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself,”¹⁴⁴ and 3) of considerable importance, the Court wrote, “In the instant case, the speech is not that of the University or its agents.

¹⁴¹ *Id.* at 32.

¹⁴² Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing To Say?* 95 IOWA L. REV., 1259, 1296 (2010).

¹⁴³ *Id.* at 1297 (quoting *Southworth*, *supra* note 135, at 235).

¹⁴⁴ *Id.* (quoting *Southworth*, *supra* note 135, at 229 (2000)).

It is not, furthermore, speech by an instructor or a professor in the academic context, where principles applicable to government speech would have to be considered.”¹⁴⁵

*Christian Legal Society v. Martinez*¹⁴⁶

In *Christian Legal Society*, a student organization at the university law school challenged the school’s “all-comers” policy that required all officially recognized student organizations to allow all students desiring to join a particular organization to do so. One student organization refused to accept as voting members students who would not sign a statement of Christian belief and renounce homosexuality. When the university indicated to the students that they would have to allow students who would not do these things, the students brought suit. The Court held that the “all-comers” policy was a limited public forum, allowed for alternative channels for the students to communicate if they wished to forego official recognition, was viewpoint neutral in that it only regulated the organization’s conduct and was, then, constitutional.

Michael R. Denton¹⁴⁷ argued that the policy was not viewpoint-neutral in that some conduct, in this case excluding non-Christians, is inextricably linked to speech. To regulate conduct, the Court should have determined if the conduct is “indistinguishable from the beliefs such that a regulation against the conduct is really a regulation against the beliefs.”¹⁴⁸ Moreover, he argued, because the organization did allow students to join the group, even if they could not vote, such restrictions not only hinder the intellectual

¹⁴⁵ *Id.* (quoting Southworth, *supra* note 135, at 235 (2000).

¹⁴⁶ 319 Fed. Appx. 645 (2010).

¹⁴⁷ Michael R. Denton, *The Need for Religious Groups to be Exempt from the Diversity Policies of Universities in Light of Christian Legal Society v. Martinez*, 72 LA. L. REV. 1055 (2012).

¹⁴⁸ *Id.* at 1077.

growth of those non-voting members but also impede the ability of the organization to express its views within the larger student marketplace of ideas.

According to Toni M. Massaro, the case is yet another example of schools walking the fine line between student speech and their own, governmental speech when the majority reasoned that the school “had a significant interest in preserving diversity and prohibiting discrimination when its name and resources were involved.”¹⁴⁹ She, too, agreed that the Court, in fact, limited the diversity of views in the marketplace through its policy and power of the purse in allocation of student fees. She wrote, “The government's spending power is not a license to twist recipients' messages unreasonably, invade their autonomy unduly, or compel them to cede basic liberties in exchange for government support where it is not necessary to do so to promote government ends.”¹⁵⁰

Blake Lawrence, on the other hand, approached his analysis of the case through the Court’s own holdings involving school-subsidized student organizations.¹⁵¹ He said the decision was in keeping with the Court’s earlier holdings in *Healy*, *Widmar*, and *Southworth*, in that having a variety of student organizations enhances the marketplace. Anti-discrimination policies like that in *Christian Legal Society* help diversify the limited public forum of student organizations that it creates.

Further, the case reaffirmed the Court’s position that administrators who are “on the ground” are the ones most able to create and enforce rules governing association and speech. He wrote, “*CLS v. Martinez*, while not ruffling too many feathers, reaffirms

¹⁴⁹ Toni M. Massaro, *Christian Legal Society v. Martinez: Six Frames*, 38 HASTINGS L.J. 569, 570 (2011).

¹⁵⁰ *Id.* at 571.

¹⁵¹ Blake Lawrence, *The First Amendment in the Multicultural Climate of Colleges and Universities: A Story Ending with Christian Legal Society v. Martinez*, 39 HASTINGS L.J. 629 (2012).

Supreme Court deference to reasonable school policies protecting freedom of speech and association while maintaining the university sphere as a ‘marketplace of ideas.’ Though the opinion may have some weaknesses in dicta, its holding will remain strong in the future.”¹⁵²

FEDERAL CIRCUIT COURT OF APPEALS SPLIT ON APPLICATION OF HAZELWOOD

At the outset, it is critical to indicate that in footnote 7 of the *Hazelwood* opinion, the Court wrote, “We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level,” leaving many to wonder if and/or when it might do so. The High Court has not spoken to the issue beyond this footnote.

As Sarabyn explained, because the federal circuit courts are without clear guidance from the U. S. Supreme Court on utilization of *Hazelwood* at the post-secondary level, they have applied incongruent standards. While some federal and circuit courts clearly have utilized *Hazelwood*, others have refrained from doing so. “This legal pastiche leaves university students across the country with varying levels of free speech rights, creating a noticeable instability with respect to a fundamental constitutional right.”¹⁵³ She recommended that the U. S. Supreme Court make the *in loco parentis* university unconstitutional so that universities and colleges are required to treat their students like adults. Without something of this sort, she said, the circuit court split was inevitable.

¹⁵² *Id.* at 657.

¹⁵³ Sarabyn, *supra* note 106.

*Alabama Student Party v. Student Government Association of the University of Alabama*¹⁵⁴

In the case, a student sued the university in response to various provisions of the school's policies regarding electioneering. The court, in utilizing *Hazelwood*, found electioneering to be a non-public forum and that the university's restrictions were constitutional. David W. McClamrock et. al. contended that the court in *Alabama Student Party* went against long-standing post-secondary precedent when it applied *Hazelwood* to the case. In utilizing a K-12 standard for evaluating speech, the court ignored the holdings in *Healy* and *Widmar*, in which the U. S. Supreme Court made clear that college students are young adults who are "less impressionable than younger students."¹⁵⁵

In applying *Hazelwood* to the case, they argued, it ignored several of the key facts upon which the Court in *Hazelwood* relied: 1) There was no faculty supervision involved in overseeing the elections to make it a learning experience as the Court in *Hazelwood* characterized the newspaper, 2) The court did not suggest that the elections might in any way bear the imprimatur of the school, which the Court in *Hazelwood* also concerned itself with, 3) The style and content of the elections were not a factor considered as they were in *Hazelwood*, and 4) The court made no mention of funding. "Considered in the context of its decisive facts, *Hazelwood*—even if it were generally applicable on the

¹⁵⁴ 867 F.2d 1344 (11th Cir. 1989).

¹⁵⁵ David W. McClamrock, Werner J. Meyer & M. Randall Spencer, *Alabama Student Government Association of the University of Alabama: The First Amendment and Student-Government Election Campaign Speech in Public Universities*, 16 J.C. & U.L. 649, 654 (1990).

university level—would not support the Eleventh Circuit's decision in *Alabama Student Party*,” they wrote.¹⁵⁶

Brian S. Black¹⁵⁷ focused on the differences in the age and maturity of the students in both cases, in addition to the different missions at the two levels of education. He said that a critical theme throughout the *Hazelwood* decision was the age of the students, yet in *Alabama Student Party*, age did not seem to matter at all. The court did not discuss this distinction and instead “blindly” applied *Hazelwood* to the case. He wrote,

A university does not possess the same features or fulfill the same mission as an elementary or secondary school. Therefore, the standards employed in scrutinizing restrictions on expression in a university forum are not necessarily applicable when analyzing such restrictions in a public school. In fact, the *Hazelwood* Court specifically noted that it was not deciding ‘whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.’¹⁵⁸

*Kincaid v. Gibson*¹⁵⁹

To briefly restate the facts of the case: Copies of the student yearbook, produced with university funds but not as part of the curriculum, were confiscated after administrators deemed the yearbook “inappropriate” and of “poor quality.”¹⁶⁰ The Sixth U. S. Circuit Court of Appeals, holding for the student, said that *Hazelwood* was inapplicable to the case, yet the court proceeded to utilize the case extensively as

¹⁵⁶ *Id.* at 672.

¹⁵⁷ Brian S. Black, *The Public School: Beyond the Fringes of Public Forum Analysis?* 36 VILL. L. REV. 831 (1991).

¹⁵⁸ *Id.* at 876.

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

¹⁶⁰ *Id.* at 345.

precedent to determine forum status. As one Jeff Sklar noted, “In one breath in *Kincaid*, the Sixth Circuit refused to apply *Hazelwood*. In another, it did exactly what *Hazelwood* would have required it to do--a forum analysis, and a lengthy one at that. In effect, it did ‘apply *Hazelwood*,’ even though it said it did not.”¹⁶¹ The court decided the publication was a limited public forum that administrators unconstitutionally had censored via viewpoint discrimination.

As Gregory C. Lisby claimed,¹⁶² one of the chief problems with the case involves the court’s decision to use “age of majority” as only a minor reason in its decision. He said that the court “deliberately sidestepped the question” of age.¹⁶³ Instead it focused almost exclusively on whether the yearbook was a public forum. Because forum status is not affected by age, maturity, capacity, or status, he said, utilizing it in the context of the college setting allows the speech of adult students to be regulated if the speech is deemed a nonpublic forum. He wrote, “While the Sixth Circuit reached the correct result in *Kincaid*, its method of legal analysis [forum analysis] will have dire consequences for free expression by adults in higher education settings.”¹⁶⁴

The clear focus, he wrote, was on who exercised control of the yearbook – the administration and/or faculty or the students. If the university gave students relatively full reign, then there was clear intent on the part of administrators to create a limited public forum. Nonetheless, he wrote,

¹⁶¹ Jeff Sklar, *The Presses Won’t Stop Just Yet: Shaping Student Speech Rights in the Wake of Hazelwood’s Application to Colleges*, 80 S. CAL. L. REV. 641(2007).

¹⁶² Gregory 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 (2002).

¹⁶³ *Id.* at 144.

¹⁶⁴ *Id.* at 156.

At what point along a continuum of control does an educational institution retain or give up its control over student expressive activities? The myriad of combinations of school sponsorship, of funding options, of faculty involvement in the role of teacher and/or advisor, of administrative supervision, of student participation and of learning environments make this problem a potential legal quagmire. Certainly, it is a factual determination based upon policy language and practice, yet also quite likely one dependent upon context, nuance and interpretation of both intent and practice—in other words, one likely to belong, in the final analysis, to the determination of the courts.¹⁶⁵

He suggested that resolving this issue would require an “age of maturity” analysis, which would give college students the full First Amendment protections afforded other adults.

Sarabyn, in discussing ratification of the Twenty-Sixth Amendment, said that those on both sides of the ratification debate recognized that enfranchisement of those 18 and older conferred upon them all the rights and responsibilities of full-fledged citizenship.¹⁶⁶ “The Twenty-Sixth Amendment, as well as Justice Douglas’s concurrence [in *Healy*], proceeded to ground the judiciary’s subsequent move to eliminate the university’s role in loco parentis in civil law,” she wrote.¹⁶⁷

But cases like *Kincaid*, and those discussed below in which *Hazelwood* was utilized, she said, imply an *in loco parentis* power of colleges inconsistent with the Twenty-Sixth Amendment and U.S. Supreme Court precedent. “As it is, some federal circuits have already tied university students’ rights to secondary students’ rights, letting them sink together as a bundle,” she wrote.¹⁶⁸ She recommended that proper resolution involved making *in loco parentis* unconstitutional as applied to post-secondary education.

¹⁶⁵ *Id.* at 154.

¹⁶⁶ Sarabyn, *supra* note 106, at 30.

¹⁶⁷ *Id.* at 31.

¹⁶⁸ *Id.* at 40.

This means, she said, that a public university “must treat its students like adults, and therefore cannot perform the paradigmatic duties of an *in loco parentis* institution: reproducing and inculcating the current morals and manners of society in its charges.”¹⁶⁹ The Twenty-Sixth Amendment, she argued, made it unconstitutional to regulate or restrict student expression “for the purpose of acting in loco parentis.”¹⁷⁰

*Brown v. Li*¹⁷¹

One year later in *Brown v. Li*, the Ninth U. S. Circuit Court of Appeals applied *Hazelwood* to rule that the university’s refusal to accept a graduate student’s thesis due to a two-page “Disacknowledgements” section was constitutional. The “Disacknowledgements” section contained profanity and in it Brown complained that several administrators had hindered his academic career. The majority considered Brown’s thesis a nonpublic forum and found that the committee’s refusal to accept the thesis was reasonable and based upon sound pedagogical purposes.

According to Karyl Roberts Martyn, while the court acknowledged that the Sixth Circuit in *Kincaid* dealt with an extracurricular activity, the court in *Brown* said application of *Hazelwood* was appropriate in relationship to curricular activities as well.¹⁷² Both, however, represent “significant departures from the Court’s traditional free speech doctrine as applied to the university setting,” she said.¹⁷³ Adam R. Gardner

¹⁶⁹ *Id.* at 89.

¹⁷⁰ *Id.* at 91.

¹⁷¹ 308 F.3d 939 (9th. Cir. 2002).

¹⁷² Karyl Roberts Martin, *Demoted to High School: Are College Students’ Free Speech Rights the Same as Those of High School Students?* 45 B.C. REV. 173 (2003).

¹⁷³ *Id.* at 185.

rejected the decision because, he reasoned, Brown's thesis wasn't pulled due to its substantive research but, rather, for the viewpoint he expressed in the "Disacknowledgements" section.¹⁷⁴ "Brown dramatically threatens the dynamic and vibrant nature of students' speech in public universities," he wrote.¹⁷⁵

Because the U. S. Supreme Court has never ruled on the speech limitations universities may impose on students within the curricular context, he stated, the Ninth Circuit had no precedent upon which to draw and, thus, utilized *Hazelwood* as it "appear[ed] to be the most analogous to the present case."¹⁷⁶ Yet, Gardner argued, simply not having precedent at the university level does not mean a court should utilize a K-12 restrictive legal standard at the post-secondary level. "The Ninth Circuit failed to distinguish a critical point that makes the factual premises in *Hazelwood* and *Brown* starkly different: the educational setting where the students' speech occurred."¹⁷⁷

The court also should have determined that the differences between high school and university students and settings implicate different pedagogical purposes. Not only was the section of the university's official theses guide "ambivalent" and "flexible" as to writing an acknowledgment, an issue the court did not consider, but more importantly the guide stated that the "real pedagogical purpose of any thesis project is its scholastic usefulness," not the style of the acknowledgements section.¹⁷⁸ Because of the great deference (reasonableness standard) given schools under the *Hazelwood* framework in

¹⁷⁴ Adam R. Gardner, *Giving Credit Where It Is Due?: An 'Acknowledgment' of Higher Education in America*, 37 LOY. L.A. L. REV. 69 (2003).

¹⁷⁵ *Id.* at 70.

¹⁷⁶ *Id.* at 75 (quoting *Brown*, *supra* note 171, at 951).

¹⁷⁷ *Id.* at 79.

¹⁷⁸ *Id.*

determining a legitimate pedagogical purpose, he said, as long as schools can “conjure” up an even remotely legitimate pedagogical purpose, the school most likely will win the case.

He recommended that utilizing an intermediate level of scrutiny would require universities to demonstrate that the regulation was substantially related to the purported pedagogical concern. Alternatively, he suggested that *Tinker* should be applied at the post-secondary level.¹⁷⁹

Laura K. Schultz began her discussion of *Brown* by quoting an Illinois court case from 1891, in which the court said that when a student voluntarily attends a university or is “placed there by those having the right to control him,” the student necessarily then surrenders many of his individual rights to those “who, for the time being, are his masters.”¹⁸⁰ The *in loco parentis* role of the university in this early case is clear. “Fortunately for today’s undergraduate and graduate students, such a view – *at least in theory* – no longer prevails,” she wrote. “However, sometimes, the more things change, the more they seem to stay the same.”¹⁸¹

She went on to say that over time the courts, in determining student speech cases, have analyzed a myriad of factors – the type of speech, such as the vulgar and the lewd, the school-sponsored and non-school-sponsored; the medium through which the speech occurred; the place in which it occurred; the type of forum it represents, etc. Yet courts, she asserted, have consistently failed to decide cases based upon the distinction between

¹⁷⁹ *Id.* at 83.

¹⁸⁰ 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 Setting*, 47 ST. LOUIS U. L.J. 1185 (2003)(quoting *North v. Bd. of Trs.*, 27 N.E. 54, 56 (Ill. 1891)).

¹⁸¹ *Id.* at 1185.

the speech rights of students at the K-12 and post-secondary levels. *Brown* is just another example of this failure, she said.

In discussing the SPLC's claim that reports of censorship dramatically have increased at the K-12 level post-*Hazelwood*, Schultz wrote,

Most cases that actually rule censorship improper under the deferential *Hazelwood* standard are 'rare.' Based on such ramifications from the application of *Hazelwood* at the pre-collegiate level, the ramifications for college and graduate students would be just as devastating, if not more. According to its terms, the *Hazelwood* standard tips the balance in favor of school officials, giving them much authority and discretion to censor student speech. In a setting where students are more mature, have more legal rights, and where the emphasis is on independent thinking instead of indoctrination, such censorship could ultimately lead to the demise of the 'marketplace of ideas.'¹⁸²

Courts must, she recommended, take the purposes of both levels of education into much greater consideration.

*Axson-Flynn v. Johnson*¹⁸³

When a Mormon student, enrolled in an acting class at the University of Utah, refused to say "fuck" or to take the Lord's name in vain during a classroom exercise, her instructor told her to "get over it," and Axson-Flynn decided not to re-enroll the next semester. She sued the university claiming the university had violated her First Amendment right against compelled speech. The Tenth U. S. Circuit Court of Appeals reversed the district court's summary judgment in favor of the university, said that *Hazelwood* was the applicable standard, and remanded to determine if Axson-Flynn was required to use such language because the teacher had discriminated based upon Axson-

¹⁸² *Id.* at 1225.

¹⁸³ 356 F. 3d 1277 (10th Cir. 2004).

Flynn’s faith or because, as the university argued, it constituted a legitimate pedagogical concern. The parties settled out of court.

Brandon C. Pond contended that this case is a classic representation of the already present tension existing between the quintessential four essential freedoms of a university – “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study” – and the “essential” freedoms of others, notably students.¹⁸⁴ While the lower court utilized U. S. Supreme Court precedential cases involving compelled speech, the Tenth Circuit “rejected that approach, asserting that a person’s interest in compelled speech merited no different analysis than that of restricted speech, and it proceeded to analyze the case via *Hazelwood* because this was an issue of school-sponsored speech.”¹⁸⁵

Pond vehemently critiqued the court’s assertion that compelled speech and restricted speech should be treated the same. First of all, he said, the motivations behind restricting speech are many, such as disagreement with viewpoint, use of offensive content, or inappropriate usage of time, place, and manner regulations. The motivations to compel a person to speak could range from the mundane, such as trying to create a particular appearance to others, to offensive motives like “mandat[ing] compliance with a particular viewpoint.”¹⁸⁶ Despite the fact the U. S. Supreme Court has delineated

¹⁸⁴ Brandon C. Pond, *To Speak or Not to Speak: Theoretical Difficulties of Analyzing Compelled Speech Claims Under a Restricted Speech Standard*, 1 BYU EDUC. & L.J. 149 (2010) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)(Frankfurter, J., concurring).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 156.

“analytical” and “motivational” differences between the two, the “Tenth Circuit rejects this approach and conflates two radically different aspects of free speech protection.”¹⁸⁷

When compelled speech is analyzed under *Hazelwood* and the great deference given to administrators and educators in the classroom, the only protection left for the student is that compelling certain speech must be related to legitimate pedagogical concerns. And this, he held, is not difficult for a school to do. “Extending this analysis to compelled speech cases may potentially allow unconstitutional motivations to compel student speech to be used as the very pedagogical concerns that justify such compulsion.”¹⁸⁸

While he acknowledged that one of the essential freedoms of the university is to decide what is taught, that freedom is not universal. Compelling a student to espouse certain beliefs, ideas, or viewpoints is unconstitutional, thus making *Hazelwood* totally inapplicable in this case and all others in which “school-mandated speech exceeds the boundaries of permissible curricular requirements.”¹⁸⁹

McGowan and Tangri said that compelling or limiting speech in the classroom displaces one of the primary places in which students are free to inquire, to develop and to learn the tools necessary to disprove or argue against speech. It is here where an “erroneous idea expressed ... is likely to meet searching scrutiny and be effectively disproved.”¹⁹⁰ To render such an environment as nonpublic does a great disservice to the learning that occurs in the classroom; it is for this reason that such environments

¹⁸⁷ *Id.* at 156-57.

¹⁸⁸ *Id.* at 157.

¹⁸⁹ *Id.* at 162.

¹⁹⁰ *Supra* note 116, at 915.

absolutely, they concluded, should be considered public forums, as opposed to nonpublic forums.

*Hosty v. Carter*¹⁹¹

Of the cases that fall into this category, *Hosty* undoubtedly has raised the most concern among First Amendment scholars and organizations, in large part because it applied the *Hazelwood* framework in full to a student newspaper.

In one of the most comprehensive analyses of *Hosty* (and by extension the cases above), Derigan A. Silver noted that in both *Hazelwood* and *Hosty* the Court determined forum status based both upon subsidization and the policy, practice, and intent of administrators toward the publication.¹⁹² Yet the court held that the facts were insufficient to determine forum status, but because it had to find in the light most favorable to the plaintiff, it determined that newspaper was a limited public forum.

The courts, he said, have been very inconsistent in determining the degree to which sponsorship and the curricular/non-curricular distinctions play in determining forum status. Building upon this, he said the “fundamental flaw” in the *Hosty* decision revolved around the court’s presumption that government funding of the newspaper was enough to apply *Hazelwood* to the case.

He listed four principal problems associated with such an approach: 1) The court did not acknowledge that the curricular nature of the *Hazelwood* paper was a “decisive factor” in determining that it was a nonpublic forum, 2) The court went against U. S. Supreme Court precedent when it said that government sponsorship allows for speech

¹⁹¹ 412 F. 3d 731 (7th Cir. 2005).

¹⁹² Derigan A. Silver, *Policy, Practice and Intent: Forum analysis and the Uncertain Status of the Student Press at Public Colleges and Universities*, 12 COMM. L. & POL’Y 201 (2007).

regulation. Government speech doctrine, in his estimation, has established that government may only regulate its own speech or the speech of a private entity representing the government, 3) Application of forum analysis to non-curricular publications “forced the court to place too much emphasis on interpreting policy and practice to determine government intent and not enough on First Amendment values,” and 4) In applying *Hazelwood*, the court failed to “recognize the unique nature of non-curricular student publications, the important role they have historically played at public colleges and universities, and forty years of Supreme Court precedent acknowledging that ‘[t]he college classroom with its surrounding environs is peculiarly the ‘market-place of ideas.’”¹⁹³

He argued that the U. S. Supreme Court has ruled that it is inapposite to equate non-curricular and curricular expression, thus suggesting that non-curricular publications at the post-secondary level require a different standard of review – strict scrutiny.¹⁹⁴ Additionally, the court erred, he asserted, when it said that age was not an issue in determining forum status within the context of education. Beyond this, he contended that courts must examine to whom readers might attribute the publication’s messages. If they do not do this, he said, it very well might lead to a determination that the speech was the government’s, which it can control, instead of an unconstitutional abridgement of student speech based upon content.¹⁹⁵ He found the emphasis courts place on government funding and intent to be particularly disturbing.

¹⁹³ *Id.* at 228 (quoting *Bd. of Education v. Pico*, 457 U.S. 853 (1982)).

¹⁹⁴ *Id.* at 222.

¹⁹⁵ *Id.* at 224.

Because forum analysis, and its focus on policy, practice, and intent (the latter of which is especially hard to determine), allows for the creation of all different types of forums, reviewed under different standards, it creates an ad-hoc situation that lends no guidance to other courts. Ideally, he said, all student publications would be financially independent and, as such, forum analysis wouldn't even be needed. The reality, however, is that this is not the case with the majority of college newspapers, meaning courts will find them to be either nonpublic forums or limited public forums.¹⁹⁶

Finally, he relied upon general forum cases to argue that because the U. S. Supreme Court has written that, “mechanically extending forum analysis to all situations is inappropriate and courts must take into account the special nature and context of expression,” courts need to take into account the special characteristics of post-secondary education, the unique aspects of newspapers, the role that young journalists play on campus and will play once in the field, and the differences between curriculum-based publications mostly found at the K-12 level and the extra-curricular publications typically found on the university campus.¹⁹⁷ Forum doctrine, he said, is simply not a good fit in the post-secondary context.

Another scholar, Jessica Golby, wrote that, “By extending *Hazelwood's* framework to extracurricular activities, the *Hosty* court granted more power to public university officials to censor student speech than any court of appeals had done previously. Prior to *Hosty*, college students enjoyed broad free speech rights, at least with regard to their extracurricular activities, which has allowed a thriving college journalism

¹⁹⁶ *Id.* at 226-27.

¹⁹⁷ *Id.* at 228-29.

community to develop.”¹⁹⁸ The decision, however, conflated the rights of college and high school students.

Golby, too, took aim at the intent aspect of determining forum status by arguing that all administrators need to do to suppress speech rights is to express a wish or desire to do so. Moreover, there is the danger that a university could create the appearance of a public forum, but “through written policy alone ... shatter that appearance and intervene as censor whenever convenience dictates.”¹⁹⁹ As found in almost all K-12 cases utilizing *Hazelwood*, censorship prevailed, she wrote, and if that serves as a representation for what might occur at the post-secondary level following *Hosty*, a chilling effect is likely. Since the *Hazelwood* Court didn’t even mention the general prohibition of viewpoint discrimination in discussing the school’s right to censor if for “legitimate pedagogical purposes,” where does that leave college expression in relationship to viewpoint discrimination, she wondered.²⁰⁰

She recommended that courts either 1) abandon public forum analysis in favor of utilizing an intermediate level of scrutiny to all speech or 2) modify forum analysis as applied to post-secondary education such that most student speech would be categorized as either a limited public forum or an open forum.²⁰¹ The latter could be achieved by simply declaring that all college newspapers or other expressive activities are limited public forums as a matter of law, or courts could base their forum analysis solely on the

¹⁹⁸ Jessica Golby, *The Case Against Applying Hazelwood v. Kulmeier’s Public Forum Analysis to the Regulation of University Student Speech*, 84 WASH. U. L. REV. 1263, 1278 (2006).

¹⁹⁹ *Id.* at 1279.

²⁰⁰ *Id.* at 1282.

²⁰¹ *Id.* at 1282-83.

curricular/extracurricular distinction, in which all extracurricular speech would be determined to be or to occur in a limited public forum.

The university still could enforce reasonable time, place, and manner regulations, and it would be given leeway in regulating speech in the curricular context as long as the restrictions were based upon “legitimate pedagogical reasons.”²⁰² Even in *Hazelwood*, she said, the Court limited its decision to curricular activities (once it determined the newspaper was a curricular enterprise), “albeit with a broad definition of curricular.”²⁰³

As Richard Bradley Ng indicated, because the circuit courts have split on the applicability of *Hazelwood* to post-secondary education, “geography [now] defines the extent of both a student journalist’s First Amendment rights and the states’ ability to regulate university- sponsored speech at public universities.”²⁰⁴ Not only has this created disparities in protection, but, he said, more importantly it has opened a “qualified immunity loophole” that he suggested likely will be exploited because administrators can claim that due to the split, this area of the law is unsettled. In *Hosty*, the court held that the dean could not reasonably have known that confiscation of the newspapers was an unconstitutional infringement of students’ rights and was, thus, immunized from liability. Ng said that legal remedies sought by students in cases involving prior review or other “encroachment” on their First Amendment rights have been seriously hampered by the doctrine.²⁰⁵ The U. S. Supreme Court must soon address if *Hazelwood* applies on the

²⁰² *Id.* at 1282-84.

²⁰³ *Id.* at 1283.

²⁰⁴ Richard Bradley Ng, *A House Divided: How Judicial Inaction and a Circuit Court Split Forfeited the First Amendment Rights of Student Journalists at America’s Universities*, HASTINGS CONST. L.Q. 345, 346 (2008).

²⁰⁵ *Id.* at 347.

college campus, which would then close this qualified immunity loophole, no matter how the Court rules.

Ng isn't the only scholar who has expressed great concern over qualified immunity. Azhar Majeed argued that the doctrine undoubtedly will chill speech.²⁰⁶ He said that the U. S. Supreme Court has stated on more than one occasion that vagueness and overbreadth void regulations on speech that intrude upon protected freedoms. Yet, until the Court clarifies if *Hazelwood* applies to university student speech, qualified immunity will act as a shield for unconstitutional abridgments of speech not only because the law is unclear but also because administrators can hide behind the doctrine itself.

Even if the Court does not speak to this issue, however, students, he said, should pursue personal capacity suits for "applied violations of their free speech rights" pursuant to 42 U.S.C. § 1983, "a federal civil rights statute that allows individuals who have been deprived of a federal statutory or constitutional right to collect monetary damages from the responsible official."²⁰⁷ "If courts pierce qualified immunity in such cases ... knowing that they will face *personal* [emphasis added] liability for monetary damages if their actions are found to violate the law, officials at public colleges and universities will be less likely to restrict the exercise of speech and expressive activity protected by the First Amendment, he wrote."²⁰⁸ Section 813 is a powerful incentive for administrators to think twice before infringing upon students' constitutional rights.

²⁰⁶ Azhar Majeed, *Putting Their Money Where Their Mouth Is: The Case for Denying Qualified Immunity to University Administrators for Violating Students' Speech Rights*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 515 (2010).

²⁰⁷ *Id.* at 516.

²⁰⁸ *Id.* at 575.

Not all agree that *Hosty* will stop the presses. Sklar contended that *Hazelwood's* application to post-secondary speech is unlikely to create any substantial contraction of students' rights. "Most of Hosty's critics are grasping at straws," he declared, "trying to find fault in a decision that, for two reasons, changes little to nothing about students' rights."²⁰⁹ First, he argued, the vast majority of college publications are public forums [not just limited public forums], thereby making the "legitimate pedagogical concerns" prong of the test inapplicable. Second, he claimed, those that are nonpublic *appear* [emphasis added] to be subject to less administrative control than many of Hosty's critics believe."²¹⁰

He claimed that courts have repeatedly applied forum analysis to post-secondary education, though, it should be mentioned, he only referenced those cases discussed above, post-*Hazelwood*. He also said that critics concerned about *Hosty's* potential chilling effect are "irrational" because, he continued to argue, that most student publications are public forums.

Next he said that most courts will take age and maturity into account when making decisions about the constitutionality of regulations on speech, though the literature does not support this assertion. In conclusion, he wrote, "The word 'Hazelwood' has struck fear in the minds of high school journalists for nearly two decades, so one can understand why college journalists might have initially reacted with trepidation when the Seventh Circuit said in *Hosty* that *Hazelwood's* framework should

²⁰⁹ Sklar, *supra* note 161, at 642.

²¹⁰ *Id.* at 642.

apply to colleges as well. But trepidation and hysteria are hardly the same, and much of the reaction to *Hosty* is better characterized as the latter.”²¹¹

CONCLUSION

As Lisby²¹² indicated, the numerous issues at play within both K-12 and post-secondary educational cases – curricular v. extracurricular speech, school-sponsored v. non-school-sponsored speech, government speech, viewpoint discrimination and content discrimination, differing purposes of both levels of education, distinctions between the age and maturity of students, concerns about speech being viewed as bearing the imprimatur of the school, utilization of public forum doctrine, the types of speech at hand, the common law doctrine of *in loco parentis*, associational rights, utilization of *Hazelwood* at the post-secondary level of education, questions about First Amendment values, and qualified immunity – do present, as he said, a “legal quagmire,” one in which the courts appear to approach cases in an ad-hoc fashion.

As demonstrated within this literature review, the courts appear to utilize three frames when deciding cases – the disruptive speech frame as in *Tinker* and *Healy*; the offensive speech frame as in *Bethel* and *Papish*; and the school-sponsored speech frame as in *Hazelwood*, *Widmar*, *Rosenberger*, *Southworth*, and those federal circuit court cases utilizing *Hazelwood*.

Concerns abound about *Hazelwood* generally and its application at the post-secondary level of education. Many of these concerns involve the viewpoint discrimination inherent in the case and those cases utilizing it; the elusive “legitimate

²¹¹ *Id.* at 695.

²¹² *Supra* note 162, at 154.

pedagogical concerns” prong of the *Hazelwood* test, which many have argued allows administrators to censor at will and to discriminate based upon viewpoint; the potentiality that the government speech doctrine already has been incorporated into the case law and could become even more influential in future cases; the appropriateness of utilizing public forum doctrine, which has, to at least a degree, supplanted the open marketplace of ideas, particularly at the post-secondary level; and the question of whether differing institutional purposes and the age and maturity of students at both levels of education should render the *Hazelwood* framework inapplicable on college and university campuses, particularly in light of the historical protection afforded students in the latter context.

Almost universally, scholars have indicated that utilization of *Hazelwood* within post-secondary education is antithetical to the mission of colleges and universities – to prepare students for citizenry through an education occurring within an open marketplace of ideas, not one existing in a restrictive *in loco parentis* environment. Its utilization does no favors for budding journalists while in school or when they enter the “real world.” Moreover, while public forum doctrine appears inevitable because the university is a state actor, the ad-hoc manner in which it is used per *Hazelwood* does not, many contend, lend consistency or provide guidance to lower courts, which is the principle reason, it appears, the federal circuit courts have split on its applicability.

RESEARCH QUESTIONS

This dissertation, then, asked the following research questions:

R1: Is post-secondary student free expression case law following a developmental path similar to the path followed by K-12 student free expression case law?

R2: How has *Hazelwood v. Kuhlmeier* been utilized at the post-secondary level of education?

CHAPTER IV

METHODOLOGY

To determine if post-secondary student free expression case law has followed a developmental path similar to that followed by K-12 student free expression case law, federally litigated student expression cases at both the public K-12 and post-secondary levels of education were located and reviewed. Case outcomes were categorized either as protecting student expression or as one of three identified competing social interests in this area of the law – protecting the well-being of children, teaching students appropriate social behaviors, and protecting school systems. The competing social interests identified were not ranked in importance within the analysis.

All majority opinions of reported federal-level cases (at the highest level of appeal) found concerning student expression at both the public K-12 and post-secondary levels of education were analyzed. Majority opinions, as opposed to concurring and dissenting opinions, were selected because it is here that the guiding rationales leading to determined outcomes are established by the courts. Cases were located through both targeted searches and Shepardizing in Westlaw Campus Research, LexisNexis Academic, and the *Decennial Digest*; by mining scholarly articles and cases already identified; and by online searches of the Websites maintained by the SPLC and the First Amendment Center. Two cases relating to restriction of student speech per *Hazelwood* at the post-secondary level were not included because they are on appeal without a final decision.

Cases first were divided by level of education. From here they were grouped by time period. The analysis was divided by time periods as follows: 3/3/40—2/23/69,

because the first student free expression case to be decided by the U. S. Supreme Court was on March 3, 1940, and another U. S. Supreme Court decision regarding student free expression rights, *Tinker v. Des Moines*, which commonly is regarded as a milestone decision in this area of law, was decided on February 24, 1969; 2/24/69—1/12/88, as the *Hazelwood* case (another U. S. Supreme Court case), which significantly altered the interpretation of student free expression cases, was decided January 13, 1988; and 1/13/88—2001, as this is the remaining time frame and many cases are governed by the *Hazelwood* decision.

The method of analysis was specifically constructed for this research, as no existing method fit the needs of the research. Rationales were determined primarily through reading a variety of cases before conducting the research, to identify rationales commonly used by federal courts deciding student free expression cases. Additional rationales were added throughout the research process, as they were discovered. It was thought that analyzing the similarities and differences in outcomes and rationales over time would indicate whether post-secondary case law is following trends within K-12 case law.

As mentioned above, cases were analyzed based upon the outcomes and rationales in support of these outcomes, all of which are listed below. Thus, for instance, “Protecting K-12 Student Expression” (“A” below) would be the outcome in a case, and “Fostering an environment of robust debate” (directly beneath “A”) might be the court-provided rationale. Themes within the case law and the driving rationales were determined through traditional legal textual analysis. Where a case litigated more than one issue, each was evaluated to determine its driving rationale. Because there were cases

in which this occurred, at times the total number of rationales exceeded the total number of outcomes and categories of speech, also listed below. The outcome categories “Protecting the Well Being of Children/Students,” “Teaching Students Acceptable Social Behaviors, and “Protecting the School System” were all understood as speech-restrictive.

The identified outcomes and rationales were:

K-12

A) Protecting K-12 Student Expression

- Fostering an environment of robust debate
- Providing access for all voices to be heard
- Preparing students for self-governance and citizenship
- Protecting viewpoint neutrality
- Protecting speech in public or limited public forums
- Protecting speech from prior restraint
- Protecting non-disruptive, off-campus speech
- Protecting speech against overbreadth and/or vagueness
- Protecting pure speech

B) Protecting the Well-Being of K-12 Children

- Taking age into consideration
- Recognizing that students are often a “captive audience”
- Considering the sensitivity of topics

C) Teaching K-12 Students Acceptable Social Behaviors

- Teaching civility
- Teaching good taste
- Teaching boundaries of socially appropriate behavior
- Awakening students to cultural values

D) Protecting the K-12 School System

- Avoiding controversy
- Protecting right of school to regulate speech in non-public forums
- Maintaining student discipline and control
- Confirming the right of the school to speak for itself/control its message

Controlling the curriculum
Promulgating reasonable rules and conduct
Controlling speech in school-sponsored activities

Post-Secondary

A) Protecting Post-Secondary Student Expression

Fostering an environment of robust debate
Providing access for all voices to be heard
Preparing students for self-governance and citizenship
Protecting viewpoint neutrality
Protecting speech in public or limited public forums
Determining that age and maturity require special consideration
Protecting speech from prior restraint
Protecting against overbreadth and vagueness
Protecting pure speech

B) Protecting the Well-Being of Post-Secondary Students

Taking age into consideration
Recognizing that students are often a “captive audience”
Considering the sensitivity of topics

C) Teaching Post-Secondary Students Acceptable Social Behaviors

Teaching civility
Teaching good taste
Teaching boundaries of socially appropriate behavior
Awakening students to cultural values

D) Protecting the Post-Secondary School System

Avoiding controversy
Protecting right of school to regulate speech in non-public forums
Maintaining student discipline and control
Confirming the right of the school to speak for itself/control its message
Controlling the curriculum
Promulgating reasonable rules and conduct
Controlling speech in school-sponsored activities

Cases also were categorized by type: 1) content of published student works, such as official and unofficial student publications, including newspapers, magazines, yearbooks, Web postings, leaflets, posters, questionnaires, and theses; 2) verbalizations, such as student speeches and student comments made in class and out of class; 3) symbolic speech, such as wearing special indicators of political or social positions (armbands, t-shirts with photographs/drawings); 4) speech plus, such as issues involving distribution and physical demonstrations, 5) funding and 6) miscellaneous issues, such as access to public *fora* and refusal to speak. Categorization was used to determine whether certain types of expression were driving the overall results.

Tables were constructed for case outcomes at both levels of education, for each set of outcome rationales at both levels of education, and for case categories at both levels of education. Appendices included lists of cases at both levels of education, a list of case names categorized under outcomes, a list of case names for K-12 rationales, and a list of case names for post-secondary rationales.

CHAPTER V

FINDINGS

Following a brief review of the way in which cases were classified by outcomes, rationales, and categories (types of speech), this chapter will begin with a discussion of the federal judiciary's reluctance to intervene in school decision-making in this area of the law. From here, the chapter will focus on K-12 and post-secondary free expression case law outcomes and rationales. Beginning with K-12 cases, it first will discuss case outcomes – “Protecting K-12 Student Expression,” “Protecting the Well-Being of K-12 Children,” “Teaching K-12 Students Acceptable Social Behaviors,” and “Protecting the K-12 School System” – for each period of time. From here, each of the outcomes will be analyzed through discussion of the dominant rationales and themes for each time period. The K-12 section will end with an examination of how the outcomes may have been driven by case categories, or the types of speech analyzed. Next, the discussion will focus on post-secondary case law, following the same format, to examine the dominant rationales and themes within each of the outcomes – “Protecting Post-Secondary Student Expression,” “Protecting the Well-Being of Post-Secondary Students,” “Teaching Post-Secondary Students Acceptable Social Behaviors,” and “Protecting the Post-Secondary School System.” It also will conclude with discussion of how the outcomes may have been driven by case categories, or types of speech analyzed. Further, a discussion of how student speech measures up against the ideal concept of speech expressed throughout this dissertation will be examined.

Because explanations concerning rationales and categories are somewhat complex for this project, some notes about the methodology would be useful at this point. During the analysis, several cases led to more than one rationale and, therefore, more rationales and more case outcomes than total cases due to multiple issues being litigated. This explains why the number of cases may be unequal to the number of case outcomes, the number of rationales, and the number of speech categories.

For example, if a case involved student punishment for both a demonstration and the content of an “underground newspaper,” and if the court struck down punishment for the underground newspaper but upheld punishment for the demonstration, the driving rationale for protecting the underground newspaper might be “Fostering an environment of robust debate,” while the driving rationale for protecting the school system might be “Maintaining discipline and order.” There would, then, be two rationales for one case. One tally for this case would be included under the outcome “Protecting K-12 Student Expression,” while another tally for this case would be included under the outcome “Protecting the K-12 School System.” Additionally, the demonstration would be categorized under “Speech plus,” and the newspaper would be categorized under “Content of student-published works.”

Alternatively, the court might have upheld protection of both types of speech under the same rationale, “Protecting against prior restraint.” In such a situation, both types of speech would be included under the outcome “Protecting K-12 Student Expression,” and both types of speech would be included in the rationale category “Protecting against prior restraint.” Nonetheless, in both situations, there would be more total driving rationales, more total case outcomes, and more total categories of speech

than the total number of cases. Appendices C and D list by time period case names under both case outcomes and case rationales. One actual example of the totals discrepancy is the following: In Appendix C, during the time period 2/24/69—1/12/88, under outcome “Protecting K-12 Student Expression,” one case is listed twice under the rationale “Protecting against prior restraint” and one case is listed twice under the rationale “Protecting against overbreadth and/or vagueness.” Each case involved more than one litigated issue, but in both, the rationales were the same. As discussed above, however, they could have different rationales and/or different outcomes.

Additionally, before discussing the findings, it should be noted that at the K-12 level of education, nearly all courts from all time periods declared that schools, absent a constitutional infringement, should have the power to determine how youth will be educated, which necessarily also included the right of schools to create and to enforce rules governing student conduct. Courts made exceptionally clear their belief that such decisions were best left to local officials in their *in loco parentis* role, not to the judiciary.

Many courts quoted directly from *Tinker* in saying that it is the right of “school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”¹ When not directly referencing or citing *Tinker* for this proposition, courts used other language to convey this message. One representative sample of such language is as follows: “It is not the policy of the Federal Courts to intervene in the resolution of conflicts which arise in the daily operation of the school system and which do not directly and sharply implicate basic constitutional values.”²

¹ *Tinker v. Des Moines Des Moines Independent Community School Dist.*, 393 U.S. 503, 507 (1969).

² *Quarterman v. Byrd*, 453 F.2d 54, 57 (4th Cir. 1971).

It was much the same at the post-secondary level, though the reasoning was less in an *in loco parentis* role of universities. Rather, courts typically expressed their reluctance to intervene in post-secondary decision-making based upon academic freedom and the different missions of K-12 schools and higher education. Typically, the language used to affirm these positions came from, though is frequently not attributed to, Justice Felix Frankfurter's dissent in *Sweezy v. New Hampshire*,³ a case cited in Chapter II that involved the refusal of a professor to answer questions directed at determining if he was involved in subversive activities or organizations, such as the Communist Party.

In his dissent, Justice Frankfurter quoted from a statement, also rarely attributed, presented during a conference in South Africa as a plea for greater educational freedom in the country:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.⁴

A number of courts at the post-secondary level utilized parts or all of this language to state their reluctance to become involved in matters of post-secondary student discipline of expression, absent an unambiguous constitutional claim.

K-12 FREE EXPRESSION CASE LAW

Overall, 77 K-12 cases in this study were analyzed, with six being decided in the first time period, 24 being decided during the second time period, and 47 being decided

³ *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

⁴ *Id.* at 263.

during the third time period. Clearly there has been a constant increase in the number of cases from one time period to the next.

March 3, 1940, marked the first freedom of expression case determined by the U. S. Supreme Court at the K-12 level of education. From this time until the decision in *Tinker* in 1969, the federal courts heard but six cases, as indicated below in Table 1. (Appendix B lists case names and citations related to numerical values in each cell of Table 1.) Of those six, two cases (33.3%) were categorized under the outcome “Protecting K-12 Free Expression,” two cases (33.3%) were categorized under the outcome “Teaching K-12 Students Appropriate Social Behaviors,” and two cases (33.3%) were categorized under the outcome “Protecting the K-12 School System.” Thus restrictions on student speech were upheld in four of the six cases, or 66.6% of the time. As may be recalled from the methodology, “Protecting the Well Being of Children/Students,” “Teaching Appropriate Social Behaviors,” and “Protecting the School System” are understood here to represent the constitutionality of speech restrictions.

The second period of time begins with the U. S. Supreme Court’s holding in *Tinker* that, void a foreseeable material and substantial disruption to the orderly operation of schools, students, as persons under the Constitution, should be free to express themselves whether in or outside of the classroom. An “undifferentiated fear or apprehension” of a material and substantial disruption is not enough to overcome students’ First Amendment rights.⁵ The Court did add a caveat that regulations of speech that involved “collision with the rights of other students to be secure and to be let alone”

⁵ *Tinker*, *supra* note 1, at 508.

would be permissible.⁶ Many courts during this time period made a point to discuss the material and substantial disruption standard, even while frequently avoiding making decisions per this rule.

Table 1: Timeline of Outcomes in K-12 Free Speech Cases

O U T C O M E S	Protecting K-12 Free Expression	2 (33.3%)	19 (73.1%)	16 (34%)
	Protecting the Well-Being of K-12 Children	0	2 (7.7%)	2 (4.3%)
	Teaching K-12 Students Appropriate Social Behaviors	2 (33.3%)	1 (3.8%)	2 (4.3%)
	Protecting the K-12 School System	2 (33.3%)	4 (15.4%)	27 (57.4%)
	Total number of case outcomes	6	26	47
	Total number of cases	6	24	47

Time Periods: **3/3/40—2/23/69** **2/24/69—1/12/88** **1/13/88—2011**

During this time, there were 26 total case outcomes and 24 total cases. Of the total 26 cases outcomes, 19 case outcomes (73.1%) were categorized under “Protecting K-12 Free Expression,” two case outcomes (7.7%) were categorized under “Protecting the Well-Being of K-12 Students,” one case (3.8%) was categorized under “Teaching K-12 Students Acceptable Social Behaviors,” and four case outcomes (15.4%) were categorized under “Protecting the K-12 School System.” Thus student restrictions on speech were upheld in seven of the total 26 case outcomes, or 27% of the time, and 19

⁶ *Id.*

case outcomes were protective of student speech, or 73% of the time. During this time period, the courts almost always ruled in favor of protecting students' First Amendment rights.

The third period of time begins with the *Hazelwood* ruling, in which the Court held that if a student activity, in this case a newspaper, was school-sponsored and part of the curriculum, it was a non-public forum bearing the imprimatur of the school and could be regulated per legitimate pedagogical concerns. The regulation need only be reasonable, as distinguished from the *only* reasonable way to regulate or the *most* reasonable way to regulate the speech at hand.

During this time, there were 47 total case outcomes and 47 total cases. Sixteen cases (34%) were categorized under "Protecting K-12 Free Expression," two cases (4.3%) were categorized under "Protecting the Well-Being of K-12 Students," two cases (4.3%) was categorized under "Teaching K-12 Students Acceptable Social Behaviors," and 27 cases (57.4%) were categorized under "Protecting the K-12 School System." Therefore, restrictions on student speech were upheld in 31 out of 47 cases, or 66% of the time, while protection of speech occurred in 16 out of 47 cases, or 34% of the time. Not only were many more cases litigated during this time period, but the outcomes also were almost the reverse of the second time period, post-*Tinker*/pre-*Hazelwood*.

In addition to case outcomes, rationales that guided court opinions and dominant themes discovered within all three time periods also were analyzed. During the first time period, one set of cases from the 1940s, one set of cases from 1966, and one case from 1968 related to the Table 1 data deserve particular attention and will be discussed relatively at length because 1) they are historically formative, 2) when read closely, it

became clear that one or even a few phrases have greatly impacted future cases in this body of law, and 3) they will serve as a demonstration of how case rationales were determined.⁷ Due to the rationales classification system used in this research, this explanatory discussion requires some non-sequential references to Tables 4, 2, 5, and 3, prior to the main discussion of those tables. The set of cases from the 1940s involved student refusals to salute the American flag, and the set from 1966 involved two cases in which the concept of substantial and material disruption first emerged, which later would form the basis of the *Tinker* holding.

The first case was *Minersville v. Gobitis*⁸ in 1940, in which the U. S. Supreme Court upheld the school's expulsion of students who refused to salute the flag and to say the Pledge of Allegiance. The students were Jehovah's Witnesses, and their refusal was based upon scripture indicating that the law of God was superior to the laws of man. The Court discussed at length its belief that "National unity is the basis of national security."⁹ The United States flag represented, according to the Court, that the foundation of any free society is based upon national cohesion.

While the Court expressed deep concern over the conflict between the freedoms of religion and expression, it avoided ruling on this basis by instead asserting that denying legislatures the ability to craft laws to support national unity was not appropriately the domain of the judiciary. Awakening students to political and social values was the work of those elected by the people of the states; this case, then, was

⁷ One must bear in mind, however, that these phrases do not necessarily originate in student expression cases. The point is, whether or not they first appeared in this body of case law, they were utilized in these early cases, and the ideas became influential in later cases.

⁸ 310 U.S. 586 (1940).

⁹ *Id.* at 595.

categorized under the rationale “Awakening students to cultural values,” shown below in Table 4. Interestingly, it also reasoned that the legislature clearly indicated its belief in the ultimate good of the flag “exercise [as] appropriate in time and place and setting,”¹⁰ which could be viewed as a prelude to the powerful doctrine of “time, place, and manner.” The concept of “time, place, and manner” came up first indirectly in the 1939 case *Schneider v. New Jersey*,¹¹ in which the Court said some place and manner restrictions would be constitutional, but that the ones being litigated in the four combined cases under *Schneider* were not.

Just three years after *Minersville*, the U. S. Supreme Court again was called upon to decide another case involving students, also Jehovah’s Witnesses, who refused to salute the flag. In *West Virginia Board of Education v. Barnette*,¹² the Court, in ruling for the students this time, distinguished *Barnette* from *Minersville* in two predominant ways. The conflict in this case, the Court said, was between authority (specifically, compulsion to attend school and, thus, adhere to school rules) and the individual, particularly when the freedom does not “bring them into collision with rights asserted by any other individual,”¹³ language that would be modified though taken up in a number of later student freedom of expression cases. The Court then stated that the students’ refusal was also peaceful and orderly, yet another idea upon which many future cases would be decided per the material and substantial disruption rule.

¹⁰ *Id.* at 597.

¹¹ 308 U.S. 147 (1939).

¹² 319 U.S. 624 (1943).

¹³ *Id.* at 630.

The second distinction was grounded in the 1931 ruling in *Stromberg v. California*,¹⁴ a case in which the U. S. Supreme Court held that a California statute prohibiting the display of red flags, understood as associated with Communism, was unconstitutional. In its decision in *Barnette*, the Court made clear that this case, as in *Stromberg*, required the individual to express a belief, and, more importantly, a political belief with which he or she may not agree. “Government of limited power need not be anemic government,” the Court wrote. “To enforce those rights [Bill of Rights] today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.”¹⁵ The Court reasoned that requiring students to profess certain beliefs was antithetical to their preparation for citizenship, thus this case was driven by the rationale “Preparing students for self-governance and citizenship,” as shown in Table 2 below. In further support for this choice in rationales, the Court wrote, quite famously,

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.¹⁶

The second set of cases was the first in which the material and substantial disruption doctrine emerged. Though it later would be modified by *Tinker* in that the

¹⁴ 283 U.S. 359 (1931).

¹⁵ *Barnette*, *supra* note 12, at 637.

¹⁶ *Id.* at 637.

Court in *Tinker* said that schools could restrict speech before the fact if they could *reasonably forecast* a material and substantial disruption, the essence of its holding was first enunciated in *Blackwell v. Issaquena*¹⁷ and *Burnside v. Byars*.¹⁸ Both cases were decided in 1966 by the Fifth U. S. Circuit Court of Appeals, though the cases resulted in different outcomes for students. In each case, the court was presented with students choosing to wear “freedom buttons” to school in protest of racial segregation. In *Burnside*, the court emphasized that, while schools clearly cannot ignore expression with which they disagree, “They cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights in the school buildings and schoolrooms do not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”¹⁹

Because there was no disruption of this kind, the students’ suspensions were held unconstitutional and, therefore, categorized under the rationale “Providing access for all voices to be heard,” also shown below in Table 2. In *Blackwell*, however, the court again relied upon its material and disruption test but found that because there had, indeed, been a significant amount of disruption caused by the wearing of the freedom buttons, the school’s suspension of the students was constitutional. This case, then, was categorized under the rationale “Maintaining discipline and order,” shown below in Table 5.

¹⁷ 363 F.2d 749 (5th Cir. 1966).

¹⁸ 363 F.2d 744 (5th Cir. 1966).

¹⁹ *Id.* at 749.

Additionally, the driving rationale in a 1968 case²⁰ was “Protecting the right of schools to regulate speech in non-public forums,” as indicated in Table 5. Though the opinion does not specifically refer to the school as a “forum,” “limited public forum,” or “non-public forum,” the court proceeded to base its decision in large part on the public forum case *Adderley v. State of Florida*,²¹ for the contention that speech may not be “exercised at any time, in any manner, on any state-owned property without regard to the primary use which the property has been dedicated.”²² This, then, it would seem, indicates the first discussion of how the concept of the “forum” can be a defining aspect of decision-making within the student expression body of law.

Nonetheless, the court also noted, and this is of particular importance given future cases emphasizing the right of schools to have greater leeway in regulating speech that is part of the curriculum, that, “Even in a special purpose public building such as a high school, speech may not be suppressed where it presents absolutely no threat to the state’s legitimate interest in providing an orderly, efficient classroom atmosphere.”²³ Therefore, the driving rationale for this case was classified under “Maintaining Discipline and Order.”

Rationales for Protecting K-12 Student Expression

In Table 2, there are a number of cells, or rationales, in which there are few-to-no entries. As demonstrated in the discussion to follow, however, several of these rationales are still included in the courts’ reasoning.

²⁰ *Scoville v. Board of Ed. of Joliet Tp. HS Dist. 204, County of Will, State of Ill.*, 286 F. Supp. 988 (N.D. Ill. 1968).

²¹ 385 U.S. 39 (1966).

²² *Scoville*, *supra* note 20, at 991-92.

²³ *Id.* at 991.

During the second time period, as shown below in Table 2, the rationale “Protecting against overbreadth and/or vagueness” clearly dominated the courts’ reasoning when protecting K-12 student expression, with seven case rationales (six total cases) driven by overbreadth and/or vagueness (see Appendix C for case names and citations). Four of the total six cases dealt with either the content of or distribution policies directed at underground newspapers.²⁴ The courts during this time period typically dissected school policies rather than apply *Tinker* to the cases. Indeed, courts in 13 of the total 24 cases indicated disagreements with and uncertainties about how to apply *Tinker*, particularly as to the extent to which it allowed prior restraint.²⁵

In fact, the four underground newspaper cases noted above, which were classified under “Protecting against overbreadth and/or vagueness,” used this rationale to rule unconstitutional prior restraints in each case. They were not classified under “Protecting speech from prior restraint” because the courts in all four cases ruled that the prior restraint was unconstitutional *due* to overbreadth and/or vagueness. Three case outcomes (two total cases) were classified under “Protecting speech from prior restraints.”²⁶ Because there were 19 case outcomes in the second time period categorized under “Protecting K-12 Student Expression,” these six cases accounted for 32 percent of all case outcomes protective of student expression during this period.

²⁴ *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972); *Shanley v. Northeast Ind. Sch. Dist., Bexar County, Tex.*, 462 F.2d 960 (5th Cir. 1972); *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975); *Quarterman*, *supra* note 2.

²⁵ *Karp v. Becken*, 477 F.2d 171 (9th Cir. 1973); *Pliscou v. Holtville Unified School Dist.*, 411 F.Supp. 842 (S.D. Cal. 1976); *Thomas v. Board of Education, Granville Central School District*, 607 F.2d 1043 (2d Cir. 1979); *Frasca v. Andrews*, 463 F. Supp. 1043 (E.D. N.Y. 1979); *Williams v. Spencer*, 622 F.2d 1200 (4th Cir. 1980); *Reineke v. Cobb County School District*, 484 F. Supp. 1252 (N.D. Ga. 1980); *Dodd v. Rambis*, 535 F. Supp. 23 (S.D. Ind. 1981); *Fujishima, Sullivan, Shanley & Nitzberg*, *supra* note 24.

²⁶ While this rationale was utilized three times, it was used twice in one case.

Table 2: Rationales for Protecting K-12 Student Expression

Fostering an environment of robust debate	0	1	2
Providing access for all voices to be heard	1	1	1
Preparing students for self-governance and citizenship	1	1	1
Protecting viewpoint neutrality	0	0	2
Protecting speech in public forums	0	3	1
Protecting speech from prior restraint	0	3	5
Protecting non-disruptive, off campus speech	0	1	3
Protecting against overbreadth and/or vagueness	0	7	1
Protecting Pure Speech	0	2	0

Time Periods: 3/3/40—2/23/69 2/24/69—1/12/88 1/13/88—2011

One case during this period, and the first of its kind, was driven by the rationale “Protecting non-disruptive, off-campus speech.” In *Thomas v. Board of Education*,

students published a newspaper off-campus (and did not distribute it on campus), which was considered by the administration to be obscene.²⁷ Many more cases arose concerning off-campus speech in the third time period. And not all of those courts were as friendly as the court in *Thomas*, regarding punishment for off-campus speech, specifically speech created on home computers. The court wrote,

It is not difficult to imagine the lengths to which school authorities could take the power they have exercised in the case before us. If they possessed this power, it would be within their discretion to suspend a student who purchases an issue of *National Lampoon*, the inspiration for *Hard Times* [the student-created newspaper at issue], at a neighborhood newsstand and lends it to a school friend. And, it is conceivable that school officials could consign a student to a segregated study hall because he and a classmate watched an X-rated film on his living room cable television.²⁸

The remaining rationales tallied in Table 2, though used minimally, were thematically influential within the case law. For instance, 11 of the total 24 cases during the second time period included either brief or extended discussions involving the rationales “Fostering an environment of robust debate” and “Providing access for all voices to be heard,”²⁹ whether or not the courts ultimately decided for or against student litigants. Taken together, these two rationales symbolize the marketplace of ideas. Thus the courts clearly emphasized the importance that the marketplace of ideas played within schools.

²⁷ *Supra* note 25.

²⁸ *Id.* at 1051.

²⁹ *Zucker v. Panitz*, 299 F. Supp. (S.D. NY 1969); *Butts v. Dallas Independent School District*, 436 F.2d 728 (5th Cir. 1971); *Eisner v. Stamford Board of Education*, 40 F.2d 803 (2d Cir. 1971); *Bayer v. Kinzler*, 383 F. Supp. 1164 (E.D. NY 1974); *Sullivan & Shanley supra* note 24; *Karp, Thomas & Reineke, supra* note 25; *Tinker, supra* note 1.

Moreover, four of these cases underscored the importance of the rationale “Preparing students for self-governance and citizenship.”³⁰ The court in *Shanley v. Northeast Independent Sch. Dist., Bexar County, Texas*, firmly stated the importance of both the marketplace of ideas and teaching students to be self-governing citizens during this formative time in their lives. Because this passage from the *Shanley* decision is representative of the general tenor during this time period, it will be quoted in full. The court wrote,

It appears off to us that an educational institution would boggle at ‘controversy’ to such an extent that the mere representation that students should become informed of two widely-publicized, widely discussed, and significant issues that face the citizenry should prompt the board to stifle the content of a student publication. Perhaps newer educational theories have become vogue since our day, but our recollection of the learning process is that the purpose of education is to spread, not stifle, ideas and views. Ideas in their pristine form, touching only the minds and hearts of school children, must be freed from despotic dispensation by all men, be they robed as academicians or judges or citizen members of a board of education. One of the great concerns of our time is that our young people, disillusioned by our political processes, are disengaging from political participation. It is most important that our young become convinced that our Constitution is a living reality, not parchment preserved under glass.³¹

Another theme that arose during this time period involved the high level of litigation involving issues surrounding student newspapers, with four total cases involving official newspapers and seven total cases involving underground newspapers. Together they represent 11 of the 19 case outcomes listed in Table 2, or 58%, indicating strong support for protection of student newspapers, whether school-sponsored or not. Two of the three total cases under the rationale “Protecting speech in public forums”

³⁰ Eisner, *supra* note 29; Thomas & Reineke, *supra* note 25; Tinker, *supra* note 1.

³¹ Shanley, *supra* note 24, at 972-73.

were newspaper cases.³² Thus usage of public forum doctrine was slowly creeping into the case law.

In *Zucker v. Panitz*,³³ a group of students formed an “Ad Hoc Student Committee Against the War in Vietnam” and planned to place an advertisement in opposition to the war in the student newspaper. The school principal directed that it not be published. The court wrote, “The gravamen of the dispute concerns the function and content of the school newspaper.”³⁴

The students argued that the newspaper was a forum for the dissemination of student ideas while the school considered it an educational tool developed as part of the curriculum. As such, the school had in place a rule that “no advertising will be permitted which expresses a point of view on any subject not related to New Rochelle High School.’ Even paid advertising in support of student government nominees is prohibited and only purely commercial advertising is accepted.”³⁵ It argued that the war was not a “school-related” activity and did not, therefore, qualify for “news, editorial [or] advertising treatment.”³⁶

The court wrote, “If the Huguenot Herald's contents were truly as flaccid as the defendants' argument implies, it would indeed be a sterile publication. Furthermore, its function as an educational device surely could not be served if such were the content of the paper. However, it is clear that the newspaper is more than a mere activity time and

³² *Zucker*, *supra* note 29; *Gambino v. Fairfax County School Board*, 564 F.2d 157 (4th Cir. 1977).

³³ *Zucker*, *supra* note 29.

³⁴ *Id.* at 103.

³⁵ *Id.*

³⁶ *Id.*

place sheet.”³⁷ The court proceeded to list a number of items previously published that involved the war and draft in addition to other meaty fare, such as high school drug use and racial violence. The court determined that it was a forum for the dissemination of ideas and, absent a material and substantial disruption per *Tinker*, denying the student group access to this forum to advertise on a topic discussed editorially on more than one occasion was an unconstitutional infringement of students’ rights.

The court concluded, “This lawsuit arises at a time when many in the educational community oppose the tactics of the young in securing a political voice. It would be both incongruous and dangerous for this court to hold that students who wish to express their views on matters intimately related to them, through traditionally accepted nondisruptive modes of communication, may be precluded from doing so by that same adult community.”³⁸

In *Gambino v. Fairfax County School Board*,³⁹ the school board refused to allow students to publish an article about birth control because 1) it was an “in-house organ” of the school, was funded and sponsored by the board, and therefore was not a public forum, 2) the students were a captive audience, language that would be taken up nine years later in *Bethel v. Fraser*,⁴⁰ and 3) “even if the newspaper itself is subject to the first amendment protection, the article is not protected because its publication would

³⁷ *Id.*

³⁸ *Id.* at 105.

³⁹ *Supra* note 32.

⁴⁰ 478 U.S. 675 (1986).

undermine a valid school policy which prohibits the teaching of birth control as part of the curriculum.”⁴¹

The Fourth U. S. Circuit Court of Appeals upheld the district court’s findings that the newspaper was created as a public forum for student expression and, therefore, was protected by the First Amendment; that students are not a captive audience merely because their attendance is compulsory; and because the newspaper was considered a public forum, it could not be viewed as part of the curriculum, thereby barring the board from determining the newspaper’s content.

During the third time period, which begins with *Hazelwood*, the rationale “Protecting speech from prior restraint” stands out from the rest of the rationales. A total of three cases involved distribution of literature, two of which were underground newspapers.⁴²

Also noteworthy is the rationale “Protecting non-disruptive, off-campus speech.” All three cases involved online materials that students created on their home computers. They included a fake and derogatory Internet profile of the school Principal⁴³; another profile of a school principal depicting him as a sex addict and pedophile⁴⁴; and a Web site ridiculing a group of students, the use of much profanity, and, as the court noted, “a

⁴¹ *Supra* note 32, at 158.

⁴² *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988); *Nelson v. Moline Sch. Dist. No. 40*, 725 F. Supp 965 (C.D. Ill. 1989); *Rivera v. East Otero School District R-1*, 721 F. Supp. 1189, 1194 (D. Colo. 1989).

⁴³ *Layshock v. Hermitage School Dist.*, 650 F.3d 205 (3d Cir. 2011).

⁴⁴ *J.S. v. Blue Mountain Sch. Dist.*, No. 08-4138 (3d Cir. June 13, 2011) (Slip Opinion).

depressingly high number of spelling and grammatical errors.”⁴⁵ Each student’s case was protected under the *Tinker* standard.

As the Third U. S. Circuit Court of Appeals in *Layshock v. Hermitage School District* noted, discussing *Tinker*,

The school district’s only interest in banning the speech had been the ‘mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint’ or ‘an urgent wish to avoid the controversy which might result from the expression.’ The Court held that this interest was not enough to justify banning ‘a silent, passive expression of opinion, unaccompanied by any disorder or disturbance.’⁴⁶

The Third Circuit also decided another of these three cases, *J. S. v. Blue Mountain*, and, as will be demonstrated in the discussion relating to “Table 5: Rationales for Protecting the School System,” this produced a circuit court split among the Third, Second, and Fourth Circuits as to the constitutionality of schools policing students’ off-campus speech. The U. S. Supreme Court denied certiorari in all cases in January 2012.

Rationales for Protecting the Well-Being of K-12 Students

As shown below in Table 3, no cases during the first time period, two cases during the second time period, and two cases during the third time period were driven by rationales for “Protecting the Well-Being of K-12 Students. The primary rationale that stands out was “Considering the sensitivity of topics” in the second time period. These cases dealt with 1) an attempt by students to distribute a sex questionnaire to 11th and 12th grade students in 1977 and 2) an advertisement in an underground newspaper, in 1980, for a “head shop.”

⁴⁵ *Coy v. Board of Education of North Canton Schools*, 205 F. Supp.2d 791, 795 (N.D. Ohio 2002).

⁴⁶ *Layshock*, *supra* note 43, at 212 (quoting *Tinker*, *supra* note 1).

Table 3: Rationales for Protecting the Well-Being of K-12 Students

Taking age into consideration	0	0	1
Recognizing that students are often a “captive audience”	0	0	0
Considering the sensitivity of topics	0	2	1
Time Periods:	3/3/40—2/23/69	2/24/69—1/12/88	1/13/88—2011

Another theme arose when it was observed that so few cases were categorized relating to age and maturity, while a reading of the case law made it clear that these factors were no doubt significant influences in many cases, particularly post-*Hazelwood*. Discussions in 36 of the total 47 cases during the third time period included the *Tinker* Court’s famous quote, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁴⁷

In 22 of these 36 cases, the courts then quoted the U. S. Supreme Court case *Bethel v. Fraser* in saying, “... the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,”⁴⁸ signaling these courts’ perspective that age was indeed a factor in their decision-making. Moreover, courts regularly discussed the need for schools, in their *in loco parentis* role (whether

⁴⁷ *Tinker*, *supra* note 1, at 506.

⁴⁸ *Supra* note 40, at 682.

they specifically used this terminology or not), to manage their schools such that cases need not even reach the judiciary.

Rationales for Teaching K-12 Students Acceptable Social Behaviors

In Table 4, below, rationales for teaching K-12 students acceptable social behaviors again rarely drove judicial decision-making. Interestingly, however, all three cases were U. S. Supreme Court cases, and the Court infrequently hears student expression cases. As discussed above, *West Virginia v. Barnette*⁴⁹ during the first time period accounted for the one rationale dealing with “Awakening students to cultural values.” *Bethel*⁵⁰ involved a student delivering a lewd and vulgar speech at a school assembly and accounted for the single instance of a K-12 case driven by “Teaching the boundaries of socially appropriate behavior.” Finally, in the third time period, the Court held in *Morse v. Frederick*⁵¹ that a student’s display of a banner reading “BONG HiTS 4 JESUS” at a school-sponsored, off-campus event could be regulated by school administrators. The greater part of the majority opinion dealt with the Court’s grave concerns about K-12 students using drugs, which it felt the banner promoted.

⁴⁹ *Supra* note 12.

⁵⁰ *Supra* note 40.

⁵¹ 551 U.S. 393 (2007).

Table 4: Rationales for Teaching K-12 Students Acceptable Social Behaviors

Teaching civility	0	0	1
Teaching good taste	0	0	0
Teaching the boundaries of socially appropriate behavior	1	1	0
Awakening students to cultural values	1	0	0

Time Periods: **3/3/40—2/23/69** **2/24/69—1/12/88** **1/13/88—2011**

Rationales for Protecting the K-12 School System

As indicated in Table 5, below, during the first two time periods analyzed, the courts' reasoning and outcomes rarely involved protecting K-12 school systems. During the first and second time periods, in fact, the courts repeatedly lectured schools about both allowing the issues to reach the judiciary and the importance of not misconstruing case outcomes adverse to students so as to further regulate speech. In 11⁵² of the total 30 cases for these time periods, the courts included comments such as the following:

In *Nitzberg v. Parks*, the court wrote,

This is the third time that this circuit has been confronted with the free speech aspects of secondary public school regulations and found it necessary to

⁵² *Stanton v. Brunswick School Department*, 577 F. Supp. 1560 (D. Me. 1984); *Shanley, Nitzberg & Sullivan*, *supra* note 24; *Dodd, Pliscou & Thomas*, *supra* note 25; *Zucker & Eisner*, *supra* note 29; *Blackwell*, *supra* note 17; *Burnside*, *supra* note 18.

intervene in the conduct of such matters by the local school authorities. We deplore this, as was said in the first case ‘because it is not the policy of Federal Courts to intervene in the resolution of conflicts which naturally arise in the daily operation of the school systems.’⁵³

In *Eisner v. Stamford Board of Education*, the court recognized that the case was “following in the choppy waters left by *Tinker*,”⁵⁴ but continued to say, “It is to everyone’s advantage that decisions with respect to the operation of local schools be made by local officials. The greater the generosity of the Board in fostering – not merely tolerating – students’ free exercise of their constitutional rights, the less likely it will be that local officials will find their rulings subjected to unwieldy constitutional litigation.”⁵⁵ And in *Dodd v. Rambis*, a case in which the court upheld the school’s speech regulation, the court wrote, “It is hopeful that this decision will not be interpreted so as to result in a ‘chilling effect’ on students advocating constitutionally protected conduct. On the other hand, the Court does not intend that this ruling shall give to the school officials a license or invitation to prohibit conduct that is constitutionally protected.”⁵⁶

By the third time period, such proclamations were rare, though courts continued to emphasize that schools were vested with the authority to “prescribe and control conduct” per *Tinker*.⁵⁷ Barely a court upholding a school’s regulation of speech in this period did not include this language within its ruling. While no cases are listed under the rationale “Avoiding controversy,” it is certainly a theme as the discussion below

⁵³ *Supra* note 24, at 384.

⁵⁴ *Supra* note 29, at 807.

⁵⁵ *Id.* at 809.

⁵⁶ *Supra* note 25, at 31.

⁵⁷ *Tinker*, *supra* note 1, at 507.

suggests, and the case law reads. Schools were assuredly concerned with deterring controversy within and outside of school.

Table 5: Rationales for Protecting K-12 School Systems

Avoiding controversy	0	0	0
Protecting the right of schools to regulate speech in non-public forums	0	0	2
Maintaining discipline and order	2	2	14
Confirming the right of school to speak for itself/control its message	0	0	1
Controlling the curriculum	0	0	3
Promulgating reasonable rules and conduct	0	2	1
Controlling expression in school-sponsored activities	0	0	7

Time Periods: **3/3/40—2/23/69** **2/24/69—1/12/88** **1/13/88—2011**

As is evident in Table 5, the courts readily upheld school restrictions designed to maintain discipline and order and to control expression in school-sponsored activities.

The latter is the direct result of the *Hazelwood* holding and gives schools extraordinary

power to regulate speech if it is part of the curriculum, and, therefore, school-sponsored. While only one case was driven by the rationale “Confirming the right of the school to speak for itself/control its message,” this rationale is inextricably tied to *Hazelwood* in that the *Hazelwood* Court said if the public might perceive the speech to bear the imprimatur of the school, it is school-sponsored speech subject to regulations that need only be reasonable, as discussed above. It is also tied to the rationale “Controlling the curriculum,” in that all three cases utilized parts of *Hazelwood* to uphold restrictions on speech within the classroom.

Of the 14 cases under the rationale “Maintaining discipline and order,” eight related to students’ apparel, notably t-shirts, hats, and belt buckles with the confederate flag.⁵⁸ When schools were able to demonstrate a history of racial tension and/or violence, the courts always upheld school rules regulating wearing items that might reasonably create a *Tinker*-level material and substantial disturbance, even if none occurred as a direct result of the student’s choice in clothing. When schools were unable to demonstrate a history of disturbance, the courts almost universally ruled that the dress codes were unconstitutional.

Three other cases involved student-created online material produced in the privacy of their homes. In these cases, students’ punishments were found to be constitutional and were categorized under the rationale “Maintaining discipline and order.”

⁵⁸ Scott v. Sch. Bd. of Alachua Cty., 324 F.3d 1246 (11th Cir. 2003); Governor Wentworth Reg. Sch. V. Hendrickson, 421 F. Supp.2d 410 (D. N.H. 2006); BWA v. Farmington R-7 School Dist., 508 F. Supp. 2d 740 (E.D. Miss. 2007); Wisniewiewski v. Bd. of Educ. of the Weedsport Central Sch. Dist., 494 F.3d 34 (2d Cir. 2007); A.M. ex rel. McAllum v. Cash, 585 F.3d 214 (5th Cir. 2009); Hardwick ex rel. Hardwick v. Heyward, 674 F. Supp.2d 725 (D. S.C. 2009); Defoe v. Spiva, 625 F.3d 324 (6th Cir. 2010).

In *Wisniewiewski v. Board of Education*,⁵⁹ an eighth-grader created an instant messaging icon suggesting that a particular teacher would be shot and killed. The Second U. S. Circuit Court of Appeals upheld the student's suspension per *Tinker*'s material and substantial disruption standard.⁶⁰ In *Doninger v. Niehoff*, a student called school officials "douchebags" on LiveJournal and told other students to call an administrator to "piss her off more."⁶¹ Again, the Second Circuit ruled against the student's speech, asserting that because the administrator received numerous phone calls and e-mails in addition to much student talk on-campus about the issue, the school was justified, per the *Tinker* disruption standard, in refusing to allow her to run for class secretary.

Finally, in the 2011 case *Kowalski v. Berkeley County Schools*,⁶² a student created a Web page on MySpace accusing another student of having a sexually transmitted disease. Also applying the *Tinker* standard, the Fourth U. S. Circuit Court of Appeals wrote,

Kowalski indeed pushed her computer's keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment. She also knew that the dialogue would and did take place among Musselman High School students whom she invited to join the "S.A.S.H." group and that the fallout from her conduct and the speech within the group would be felt in the school itself. ... There is surely a limit to the scope of a high school's interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate. But we need not fully define that limit here, as we are satisfied that the nexus of Kowalski's speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being.⁶³

⁵⁹ 494 F.3d 34 (2d Cir. 2007).

⁶⁰ *Id.*

⁶¹ 527 F.3d 41, 45 (2d Cir. 2008).

⁶² 652 F. 3d 565 (4th Cir. 2011).

⁶³ *Id.* at 573.

Thus as mentioned above, the Second and Fourth Circuits upheld school punishment of students' online material created in their homes and the Third Circuit struck down punishments in two cases involving the same.

A final observation is fitting as a conclusion to this section of the findings. Courts in seven cases during this period employed and discussed, sometimes at length, a specific section of Justice Black's dissent in *Tinker* as part of their reasoning for upholding speech restrictions.⁶⁴ Four of these cases incidentally were decided by U. S. Circuit Courts of Appeals. Justice Black wrote, and these courts quoted and expanded upon this statement: "I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students."⁶⁵

As shown below in Table 6, "Content of Student-Published Works" and "Speech Plus" were significant drivers of all case outcomes during the second time period. This largely was due to, respectively, the high number of newspaper cases that were regulated due to content and the high number of newspaper cases in which distribution of the newspapers was the primary issue.

During the third time period, the types of speech were more evenly distributed than in the second time period; however, "Content of Student-Published Works" and "Symbolic Speech" constituted the majority of speech types. During this time period, the "Content of Student-Published Works" included a wider variety of materials, such as newspapers, underground newspapers, and Internet postings, Web pages, and profiles.

⁶⁴ Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989); Muller v. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir. 1996); Fleming v. Jefferson County Sch. Dist., 298 F.3d 918 (10th Cir. 2002); Governor, Lowery, BWA & Hardwick, *supra* note 58.

⁶⁵ *Tinker*, *supra* note 1, at 419.

The vast majority of the speech accounted for under “Symbolic Speech” included apparel with the confederate flag, in addition to a handful of other designs and statements.

Table 6: K-12 Case Categories

Content of Student-Published Works	2 (33.3%)	12 (46.2%)	18 (38.3%)
Verbalizations	0	1 (3.8%)	5 (10.6%)
Symbolic Speech	2 (33.3%)	2 (7.7%)	14 (29.9%)
Speech Plus	0	11 (42.3%)	5 (10.6%)
Funding	0	0	0
Miscellaneous	2 (33.3%)	0	5 (10.6%)
Time Periods:	3/3/40—2/23/69	2/24/69—1/12/88	1/13/88—2011

POST-SECONDARY FREE EXPRESSION CASE LAW

Overall, 43 post-secondary cases in this study were analyzed, with four being decided in the first time period, 21 being decided during the second time period, and 18 being decided during the third time period, as shown below in Table 7.

August 31, 1967, marked the first federal-level freedom of expression

post-secondary case,⁶⁶ and all four cases (100.0%) in this time period were categorized under the outcome “Protecting Post-Secondary Student Expression.”

Table 7: Timeline of Outcomes in Post-Secondary Free Speech Cases

O U T C O M E S	Protecting Post-Secondary Student Expression	4 (100%)	16 (72.7%)	14 (64.5%)
	Protecting Well-Being of Post-Secondary Students	0	0	0
	Teaching Post-Secondary Students Appropriate Social Behaviors	0	0	0
	Protecting the Post-Secondary School System	0	6 (27.3%)	8 (36.5%)
	Total number of case outcomes	4	22	22
	Total number of cases	4	21	18
Time Periods:		3/3/40—2/23/69	2/24/69—1/12/88	1/13/88—2011

During the second time period, there were 22 total case outcomes and 21 total cases. Of the total case outcomes, 16 (72.7%) were categorized under “Protecting Post-Secondary Student Expression,” and the remaining six cases (27.3%) were categorized under “Protecting the Post-Secondary School System.” Protection of speech was upheld in 16 of the total 22 case outcomes, or 73% of the time.

⁶⁶ Hammond v. South Carolina State College, 272 F. Supp. 947 (D.C. S.C. 1967).

During the third time period, there were 22 total case outcomes and 18 total cases. Of the total case outcomes, 14 case outcomes (64.5%) were categorized under “Protecting Post-Secondary Student Expression,” and the remaining eight case outcomes were categorized under “Protecting the Post-Secondary School System” (36.5%). Protection of speech was upheld in 14 of the total 22 case outcomes, or 65% of the time, which is roughly a 10% drop from the second time period. (Appendix D lists case names and citations related to numerical values in each cell of Table 7.)

Rationales for Protecting Post-Secondary Student Expression

As shown in Table 8 below, during the first time period one case was driven by the rationale, “Protecting speech from prior restraint,” two cases were driven by the rationale, “Protecting speech from overbreadth and/or vagueness,” and one case was driven by the rationale “Protecting pure speech.” These four early cases began to lay the groundwork for protecting student speech, though stated expressions of support for students’ First Amendment rights were found in only one case. The other three cases were decided based upon established First Amendment principles and precedent, as demonstrated below in their discussion.

In the first case heard by the federal judiciary at the post-secondary level of education, *Hammond v. South Carolina State College*,⁶⁷ numerous students demonstrated on campus to reject unspecified practices of the college. In place were rules prohibiting students from having celebrations, parades, or demonstrations without prior approval. Following the students’ indefinite suspension, they sued for violation of their First Amendment rights.

⁶⁷ *Id.*

Table 8: Rationales for Protecting Post-Secondary Student Expression

Fostering an environment of robust debate	0	1	0
Providing access for all voices to be heard	0	2	2
Preparing students for self-governance and citizenship	0	0	0
Protecting viewpoint neutrality	0	6	2
Protecting speech in public or limited public forums	0	2	6
Determining that age and maturity require special consideration	0	0	0
Protecting speech from prior restraint	1	3	0
Protecting speech from overbreadth and/or vagueness	2	0	4
Protecting Pure Speech	1	2	0
Time Periods:	3/3/40—2/23/69	2/24/69—1/12/88	1/13/88—2011

In its decision, the court firmly recognized the rights of the college when it wrote, “Unless the [school] officials have authority to keep order, they have no power to guarantee education. If they cannot preserve order by rule and regulation, and insist on obedience to those rules, they will be helpless in the face of the mob, powerless to command or rebuke the fanatic, the irritant, the malingerer, the rabble rouser.”⁶⁸

While the court also recognized fundamental First Amendment values generally, it made no mention of the First Amendment rights of students specifically. Its ruling was based upon the idea that the right to assemble should not be restricted absent a “clear and present danger, of riot, disorder, or immediate threat to public safety, peace, or order,”⁶⁹ per *Dennis v. United States*.⁷⁰ The rules in place requiring prior approval did not meet this standard and were considered an unconstitutional prior restraint on speech.

The second case, *Dickey v. Alabama State Board of Education*,⁷¹ was the first federal level, post-secondary newspaper case of many more to come in the second time period. The student editor at Troy State College, Dickey, was censored from publishing an article that not only criticized the state governor in his handling of a matter relating to prior censorship of another publication but also supported the university’s president in his repudiation of this censorship. Dickey’s faculty adviser and the president of the college told him he could not publish the editorial because a rule was in place at the college that prohibited criticism of the Governor or state legislature. The court wrote, “The rule has

⁶⁸ *Id.* at 949.

⁶⁹ *Id.* at 950.

⁷⁰ 341 U.S. 494 (1951) (The U.S. Supreme Court upheld prohibitions on the advocacy to overthrow the government absent a clear and present danger).

⁷¹ 273 F. Supp. 613 (M.D. Ala. 1967) (While this case was appealed to the Fifth Circuit Court of Appeals, the court found the case moot because Dickey had decided not to re-enroll at the college, thus the federal district court case still governs.).

been referred to in this case as the ‘Adams Rule.’ The theory of the rule, as this Court understands it, is that Troy State College is a public institution owned by the State of Alabama, that the Governor and the legislators are acting for the owner and control the purse strings, and that for that reason neither the Governor nor the Legislature could be criticized.”⁷²

Dickey ignored the faculty adviser and President, to a point, when he inserted a blank space under the proposed editorial’s headline and printed “Censored” diagonally across the blank space. He subsequently was suspended from the college for one year due to insubordination. The court began its discussion by writing,

It is basic in our law in this country that the privilege to communicate concerning a matter of public interest is embraced in the First Amendment right relating to freedom of speech and is constitutionally protected against infringement by state officials. The Fourteenth Amendment to the Constitution protects these First Amendment rights from state infringement, and these First Amendment rights extend to school children and students insofar as unreasonable rules are concerned. Boards of education, presidents of colleges, and faculty advisers are not excepted from the rule that protects students against unreasonable rules and regulations.⁷³

The court recognized that colleges needed to be able to maintain order; however, the rules they create for achieving this end must be reasonable. It found that the rule in question, absent any showing of disruption per *Burnside*, that resulted in Dickey’s suspension was unreasonable and, then, unconstitutional. The court further wrote, “The attempt to characterize Dickey’s conduct, and the basis for their action in expelling him, as ‘insubordination’ requiring rather severe disciplinary action, does not disguise the basic fact that Dickey was expelled from Troy State College for exercising his

⁷² *Id.* at 616.

⁷³ *Id.* at 617 (citing *Thornhill v. State of Alabama*, 310 U.S. 88 (1940) & *Barnette*, *supra* note 12).

constitutionally guaranteed right of academic and/or political expression.”⁷⁴ This case was classified under the rationale “Protecting pure speech” and was the first to declare that post-secondary students had First Amendment rights on campus.

The third case, *Snyder v. Bd. of Trustees of the Univ. of Ill.*,⁷⁵ was driven by the rationale “Protecting speech from overbreadth and/or vagueness.” At issue was the university’s repeated denial of an official student organization’s request to invite a Communist to speak on campus, unless the students and their faculty adviser could ensure the speaker “will not carry on, advertise or publicize the subversive and seditious activities of the Communist Party, U.S.A., and that, to the best of (your) knowledge, no violation of law will occur in connection with the speech.”⁷⁶ At the time, the Clabaugh Act was in effect in Illinois, and it prohibited universities from allowing such speakers to use their facilities for publicizing or “carrying on” their subversive activities and ideologies.

The court began by citing the public forum case *Adderley v. Florida*,⁷⁷ to support the contention that public universities and their facilities are for the purpose of education and, as such, officials reasonably can regulate the time and manner of speech on government property. It went on to note that the university had an open-door policy regarding student organizations’ invitations to speakers, but that this organization’s speaker was denied due to viewpoint, which is in conflict with First Amendment principles. Once the school chose to create a speech activity (or forum), it could not then

⁷⁴ *Id.* at 618.

⁷⁵ 286 F. Supp. 927 (E.D. Ill. 1968).

⁷⁶ *Id.* at 930.

⁷⁷ *Supra* note 21.

ban certain participants (or certain types of speech) based upon viewpoint. This would become a major theme found in the newspaper cases during the second time period.

It then determined that the statute forbidding such speakers was unconstitutionally vague and broad because it “lacks the precision of language required for a statute regulating an area so closely intertwined with First Amendment liberties ... and because it lacks the procedural safeguards required for a form of regulation amounting to censorship.”⁷⁸ As such, it was an unjustifiable prior restraint of speech, also void under the *Dennis*⁷⁹ rule stating there must be a clear and present danger of substantive evil before restricting speech. “The Supreme Court has consistently maintained this hostile attitude toward prior restraints,” the court noted.⁸⁰

While the court said that the First Amendment was in large part designed to prevent such suppression of political viewpoints in the marketplace of ideas, it, like the court in *Hammond*, made no mention of students’ First Amendment rights. Indeed, it concluded with, “We wish to emphasize that we do not by our decision today limit in any way the legitimate interest of the University officials in protecting the primary function of a state supported higher educational institution.”⁸¹

The final case during this formative time period was *Dickson v. Sitterson*,⁸² which also involved the denial of a student organization’s speaker request. The denial resulted from university rules drafted to align with a North Carolina statute prohibiting

⁷⁸ *Supra* note 75, at 933.

⁷⁹ *Supra* note 70.

⁸⁰ *Supra* note 75, at 934.

⁸¹ *Id.* at 937.

⁸² 280 F. Supp. 486 (M.D. N.C. 1968).

Communist or other subversive speakers from utilizing the University of North Carolina's facilities. The court began its discussion by saying,

This Court is not blind to world affairs, and can understand and appreciate the vital concern of the people of the State of North Carolina over the unregulated appearance of dedicated members of the Communist Party on the campuses of its State-supported institutions. The record in this case clearly establishes that the Communist conspiracy is dedicated to the destruction of freedom, and attempts to achieve its goals of world conquest through discord, deceit and untruths. The record further establishes that the use of college campuses affords the Communist Party with an optimum chance of reaching and influencing a maximum number of young people. Certainly, the State is under no obligation to provide a sanctuary for the Communist Party, or a platform for propagandizing its creed.⁸³

Nonetheless, the court found the state statute and the university's rules pertaining to such speakers unconstitutionally vague. Again, however, there was no discussion of students' First Amendment rights. In fact, the court wrote, "Institutions of higher learning are engaged in the education of students, rather than satisfying their whimsical curiosity."⁸⁴

During the second time period, the mood began to shift in that courts not only discussed students' First Amendment rights but also began both to acknowledge and to use the U. S. Supreme Court's holding in *Tinker* as support and precedent for their decision-making. Instead of picking apart school policies, as was done during this time period at the K-12 level of education, courts instead typically utilized the principles set forth in *Tinker*. This likely accounted for no entries under the rationale "Protecting speech from overbreadth and/or vagueness." In roughly half, or 11 of the total 21 cases during this period, courts at all levels of the federal judiciary cited and/or discussed

⁸³ *Id.* at 497.

⁸⁴ *Id.*

Tinker as part of their reasoning for protecting post-secondary students' rights.⁸⁵ This theme will be illustrated by analyzing one case from each level of the federal judiciary that utilized *Tinker* to support protecting post-secondary student freedom of expression.

As early as April 1969, just three months after the Court decided *Tinker*, the United States District Court for the Northern District of Tennessee decided the case *Smith v. Univ. of Tenn.*⁸⁶ At issue was the university's refusal to allow two well-known though controversial speakers to participate in a lecture series. Part of its discussion of *Tinker* was as follows: "The [U. S. Supreme] Court indicated that the area in which school officials may limit free speech is confined to speech that 'would materially and substantially disrupt the work and discipline of the school.'"⁸⁷ The court did *not* go on to distinguish *Tinker* (as a K-12) case from the post-secondary case with which it dealt. In fact, it proceeded to use the case as precedent, along with another non-school-related case, to find four of the contested school guidelines concerning speakers unconstitutional. It wrote, "This [specific aspects of the policy guidelines] vests in the administrative officials discretion to grant or withhold a permit upon criteria unrelated to proper regulation of school facilities and is impermissible."⁸⁸

⁸⁵ *Smith v. Univ. of Tenn.*, 300 F. Supp. 777 (N.D. Tenn. 1969); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970); *Channing Club v. Board of Regents of Texas Tech University*, 317 F. Supp. 688 (N.D. Tex. 1970); *Korn v. Elkins* 317 F. Supp. 138 (D. Md. 1970); *University of So. Miss. Chapter of the Miss. Civil Liberties Union v. University of So. Miss.*, 452 F.2d 564 (5th Cir. 1971); *Trujillo v. Love*, 322 F. Supp. 1266 (D. Col. 1971); *Healy v. James*, 408 U.S. 169 (1972); *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir. 1973); *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973); *Widmar v. Vincent*, 454 U.S. 263 (1981).

⁸⁶ *Supra* note 85.

⁸⁷ *Id.* at 781.

⁸⁸ *Id.* at 783.

In *University of So. Miss. Chapter of the Miss. Civil Liberties Union v. University of So. Miss.*,⁸⁹ the Fifth U. S. Circuit Court of Appeals cited and relied upon *Tinker* six times during its discussion of the constitutionality of the university's denial of official recognition of the University of Southern Mississippi Chapter of the Mississippi Civil Liberties Union. As in *Smith*, the court did not concern itself with *Tinker* being decided at the K-12 level of education. In its first and second citations of *Tinker*, it wrote, "It is no longer a serious contention that 'either students or teachers shed their constitutional rights to freedom of speech or expression at the school-house gate.' ... Student rights of free expression may be prohibited only if they 'materially and substantially [interfere] with the requirements of appropriate discipline in the operation of the school.'"⁹⁰

Next, analogizing restrictions on the organization's meetings to "speaker bans" that restrict certain speakers based upon viewpoint, the court wrote, "To sustain such censorial practices, a University would at the very least have to demonstrate a strong probability of the kind of material disruption spoken of in the *Tinker* case."⁹¹ It continued, "Serious, bona fide litigation carried on by a minority group as a peaceful means of guaranteeing its rights in a larger community is a form of expression and association protected by the First and Fourteenth Amendments. ... As such, it cannot serve as a justification for keeping the Civil Liberties Union off the campus of the University unless the litigation itself would result in the kind of disruption spelled out in *Tinker*."⁹²

⁸⁹ *Supra* note 85.

⁹⁰ *Id.* at 566 (also quoting *Burnside*, *supra* note 18).

⁹¹ *Id.* at 567.

⁹² *Id.* (citing *NAACP v. Button*, 371 U.S. 415 (1963)).

In warning the university against allowing concerns about student litigation to become restrictions on fundamental First Amendment rights, the court wrote,

...in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.⁹³

Finally, the U. S. Supreme Court's usage of *Tinker* in *Widmar v. Vincent*⁹⁴ will be discussed. While the Court did not rely as heavily on *Tinker* in its decision-making as other cases did, including those not discussed, it cited *Tinker*, in addition to its own decisions in *Healy v. James*⁹⁵ and *Shelton v. Tucker*,⁹⁶ for the pronouncement that the First Amendment extends to the college campus. While this might seem obvious given the above case discussions, it is significant because it came from the U. S. Supreme Court, which wrote, "The University's institutional mission, which it describes as providing a 'secular education' to its students ... does not exempt its actions from constitutional scrutiny. With respect to persons entitled to be there, our cases leave no

⁹³ *Id.*

⁹⁴ *Supra* note 85.

⁹⁵ *Id.*

⁹⁶ 546 U.S. 899 (1960) (The Court struck down an Arkansas statute requiring all state-operated university and college professors to sign a statement indicating all organizations of which they were members. The statute was designed to determine the fitness of professors based upon their ideologies and potential associations with subversive organizations or parties.).

doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”⁹⁷

At issue was the university’s refusal to allow a student group to continue to use its buildings for meetings. The group was of a religious nature, and the university feared entanglement with the Establishment Clause. The Court wrote, “Through its policy of accommodating their [all student groups] meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.”⁹⁸ Religion was not a constitutionally valid reason, according to the Court.

While the Court acknowledged the university’s academic freedom to determine “who may teach, what may be taught, how it shall be taught, and who may be admitted to study”⁹⁹ and its right to “make academic judgments as to how best to allocate scarce resources,” in order to justify such a content-based exclusion, the university would have to demonstrate a compelling state interest that was narrowly tailored.¹⁰⁰ In other words, it would have to survive strict scrutiny as is required per public forum doctrine when the exclusion is content- or viewpoint-based. Recognizing the university’s concerns about its association with religion, Justice Lewis Powell wrote, “... this Court has explained that a religious organization's enjoyment of merely ‘incidental’ benefits does not violate the prohibition against the ‘primary advancement’ of religion.”¹⁰¹ Furthermore, an “open

⁹⁷ *Id.* at 269.

⁹⁸ *Supra* note 85.

⁹⁹ *Id.* at 277.

¹⁰⁰ *Id.* at 270 (citing *Carey v. Brown*, 447 U.S. 455, 461, 464-465 (1980)).

¹⁰¹ *Id.* at 274 (citing *Committee for Public Education v. Nyquist*, 413

forum in a public university does not confer any imprimatur of state approval on religious sects or practices.”¹⁰² Additionally, the large number of student organizations that were non-religious indicated its overall secular effect. “If the Establishment Clause barred the extension of general benefits to religious groups, ‘a church could not be protected by the police and fire departments or have its public sidewalk kept in repair,’” he wrote.¹⁰³ This case would serve as weighty precedent during the third time period in cases involving student organizations.

Five cases explicitly referred to speech as being or as being a part of a “forum,” which was understood during this time to be what is now called an open public forum.¹⁰⁴ And in 11 of the total 21 cases, courts said that once an activity or forum has been created/opened, schools cannot shut out certain forms of speech or certain speakers based upon either their viewpoints or the content of their speech. Thus while there were only three entries in the rationale category “Protecting speech in public or limited public forums,” public forum principles were clear in 11 cases.¹⁰⁵

Additionally, courts were uniform in their belief that these “forums” remained forums for student free expression regardless of how they were funded, which would not be true in all cases during the third time period, following the ruling in *Hazelwood*. The court in *Antonelli v. Hammond* wrote, “We are well beyond the belief that any manner of

U.S. 756 (1973), *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736 (1976), *Hunt v. McNair*, 413 U.S. 734 (1973) & *McGowan v. Maryland*, 366 U.S. 420, 422 (1961)).

¹⁰² *Id.*

¹⁰³ *Id.* at 274-75 (quoting *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736 (1976)).

¹⁰⁴ *Sword v. Fox*, F.2d 1091 (4th Cir. 1971); *Thonen v. Jenkins*, 491 F.2d 722 (4th Cir. 1973); *Arrington v. Taylor*, 380 F. Supp. 1348 (M.D. N.C. 1974); *Antonelli & Trujillo*, *supra* note 85.

¹⁰⁵ *Brooks v. Auburn Univ.*, 412 F.2d 1171 (5th Cir. 1969); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975); *Antonelli, Bazaar, Trujillo, Joyner, & Widmar*, *supra* note 85; *Thonen, Arrington & Sword*, *supra* note 104.

state regulation is permissible simply because it involves an activity which is part of the university structure and is financed with funds controlled by the administration [most were at this time]; The state is not necessarily the unrestrained master of what it creates and fosters ... the creation of the form does not also give birth to the power to mold its substance.”¹⁰⁶

As the data in Table 8 also show, six cases were classified under the rationale “Protecting viewpoint neutrality.” Five of these cases involved student punishment for the content of student newspapers, with one paper being an “underground newspaper.”¹⁰⁷ The sixth case involved the administration withholding funding for a student newspaper based upon its content.¹⁰⁸

The six newspaper cases above represent six of the total 10 cases litigated involving newspapers; therefore, cases involving newspapers accounted for 48% of the total 21 cases during this time period. In all cases, the courts struck down regulations of or student punishment for the content or distribution of the newspapers. While these cases spawned several rationales, with six cases categorized under “Protecting viewpoint neutrality,”¹⁰⁹ two cases categorized under the rationale, “Protecting pure speech,” one case categorized under the rationale “Protecting speech from prior restraint,”¹¹⁰ and one case categorized under the rationale “Protecting speech in public or limited public

¹⁰⁶ *Supra* note 85, at 1337.

¹⁰⁷ *Papish, Channing Club & Joyner*, *supra* note 85; *Thonen supra* 104; *Schiff, supra* note 105.

¹⁰⁸ *Stanley v. McGrath*, 719 F.2d 279 (8th Cir. 1983).

¹⁰⁹ *Papish, Channing Club & Joyner*, *supra* note 85; *Thonen, supra* note 104; *Schiff, supra* note 105; *Stanley, supra* note 108.

¹¹⁰ *Antonelli, supra* note 85.

forums,”¹¹¹ three themes emerged that crossed rationale categories. Courts 1) expressed repugnance toward restricting speech based upon claims of indecency, 2) indicated an equal distaste toward administrators restricting speech based upon controversial content, and 3) never, during this time period, allowed administrators to use the power of the purse to unconstitutionally censor student newspapers, which at this time typically were assumed to be open forums regardless of funding or association with the curriculum. These newspaper cases account for roughly half of all cases, case outcomes, and rationales; involve four of the nine total rationale categories; and highlight the themes discussed above. One case per theme will be discussed below.

In *Thonen v. Jenkins*, two student editors were expelled after publishing in the school newspaper a letter “critical of parietal regulations and ended with a ‘four-letter’ vulgarity referring to the president of the university.”¹¹² In striking down the expulsion, the Fourth U. S. Circuit Court of Appeals wrote,

The record reveals that university officials undertook to deny these college students the right to continue their education because one word in an otherwise unexceptionable letter on a matter of campus interest was deemed offensive to good taste. On at least one prior occasion the officials had remonstrated with the student editors about the use of vulgarity in the publication but had made it clear that they did not intend to act in a censorial fashion nor did they suggest that such vulgarity would not be tolerated in the future. It was only when the vulgarity was used in the open letter addressed to President Jenkins with respect to his dormitory policy that the school authorities viewed it as totally unacceptable and took disciplinary action against Thonen and Schell. That they may not do. The decisions of the Supreme Court make clear ‘that the mere dissemination of ideas no matter how offensive to good taste on a state university campus may not be shut off in the name alone of `conventions of decency.’¹¹³

¹¹¹ Trujillo, *supra* 85.

¹¹² Thonen, *supra* note 104, at 722.

¹¹³ *Id.* at 723-24 (quoting Papish, *supra* note 85).

In *Stanley v. McGrath*,¹¹⁴ the Eighth U. S. Circuit Court of Appeals dealt with a case involving an issue of the student newspaper that created a great deal of controversy within the administration and among community religious groups and citizens. It created such a stir that the Minnesota legislature held hearings on the matter. At issue was the paper's "Finals Week" or "Humor Issue," which was "styled in the format of sensationalist newspapers, [and] contained articles, advertisements, and cartoons satirizing Christ, the Roman Catholic Church, evangelical religion, public figures, numerous social, political, and ethnic groups, social customs, popular trends, and liberal ideas."¹¹⁵

Immediately, the university began conducting meetings to determine its course of action. It decided to use the power of the purse by allowing students who objected to the newspaper to be refunded that portion of their fees allocated to the newspaper. It also raised the Student Publication Board's fees. The court ruled that the university could not take such retaliatory measures simply because it disagreed with the newspaper's content.

In the 1971 case *Trujillo v. Love*,¹¹⁶ the student government decided that it wanted to reallocate its fees distribution, apportioning less to the newspaper. The president of the university agreed to this and said the university would finance the printing of the newspaper. The president later announced that the university would assume the role of the publisher, and the mass communication department would supervise the newspaper. This is the first case in which funding of a college newspaper changed the editorial functioning of the newspaper. Students were to submit controversial articles to the faculty

¹¹⁴ *Supra* note 108.

¹¹⁵ *Id.* at 280.

¹¹⁶ *Supra* note 85.

adviser before printing, to determine if they would be published. This information, however, was not properly conveyed to the newspaper's staff, and when it produced its "Welcome Week" edition, the controversy began.

The issue contained an article and cartoon poking fun at the university president's decision to close campus pubs. The chairman of the mass communication department had the printer delete that page of the newspaper. Following this, the managing editor, uncertain of what the school would consider "controversial," submitted two stories, which the chairman refused to publish and subsequently suspended her from her position and stopped publication of the newspaper altogether.

The court ruled that prior to the change in funding, the newspaper served as a student forum. Even though the financing changed and the policy of faculty review was supposed to be instituted such that the newspaper could serve as an educational tool, in fact, students on staff continued to operate practically independently. As a result, the court ruled, the newspaper continued to serve as a student forum, and the "restraints placed on plaintiff's writing did abridge her right of free expression, and her suspension was an impermissible punishment for the exercise of that right."¹¹⁷

Thus this case represents the first discussion of how funding and faculty review/association with the curriculum of a newspaper specifically can change the forum status of a student newspaper. In ruling that the newspaper continued to operate as a forum for student expression even after the funding and policy changes, it implicitly stated that these factors could affect the forum status of a college newspaper if the paper had been regularly supervised as intended. These issue of subsidization and prior review would be taken up in the third time period in *Hosty v. Carter*, which, as has been

¹¹⁷ *Id.* at 1270.

discussed in Chapters I and III, has raised much concern over the editorial independence of post-secondary newspapers.

While there was only one entry under the rationale “Fostering an environment of robust debate” and only two entries under the rationale “Providing access for all voices to be heard,” which as stated in the K-12 discussion symbolized the marketplace of ideas, 12 out of the total 21 cases either used language indicative of the marketplace of ideas or specifically used the term.¹¹⁸ Therefore, courts during this time period clearly emphasized the importance that colleges and universities contribute to and enrich the campus marketplace of ideas.

During the third time period, there was slightly less discussion of the marketplace of ideas, with eight¹¹⁹ out of the total 18 cases discussing the benefits of robust debate, yet a theme emerged in which frequently such discussions were tied to public forum access and funding, hot issues during this time period. Public forums and limited public forums were understood to support and to benefit the marketplace of ideas. While “Protecting speech in public or limited public forums” was the driving rationale in six cases, nine¹²⁰ out of the 18 cases during this time found the speech in question to be in one of the three types of *fora*.

¹¹⁸ Channing Club, Antonelli, Univ. of So. Miss., Widmar, Bazaar, Smith, Healy & Trujillo, *supra* note 85; Arrington & Thonen, *supra* note 104; Brooks, *supra* note 105.

¹¹⁹ Alabama Student Party v. Student Government Association, 867 F.2d 1344 (11th Cir. 1989); Lueth v. St. Clair County Cmty. College, 732 F. Supp. 1410 (E.D. Mich. 1990); Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992); Carroll v. Blinken, 957 F.2d 991 (2d Cir. 1992); Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995); Kincaid v. Gibson, 236 F.3d 342 (6th Cir. 2001); DeJohn v. Temple Univ., 537 F.3d 301 (3d Cir. 2008); McCauley v. University of the Virgin Islands, 628 F.3d 232 (3d. 2010).

¹²⁰ Flint v. Dennison, 361 F. Supp.2d 1215 (D. Mont. 2005); Hosty v. Carter, 412 F. 3d 731 (7th Cir. 2005); Christian Legal Soc. Chapter of Univ. of Cal., Hastings v. Martinez, 319 Fed. Appx. 645 (2010); Alabama Student Party, Lueth, Carroll, Hays County, Kincaid & Rosenberger, *supra* note 119.

Because the high Court had decided a number of important public forum cases by this time, courts didn't assume a forum was an open forum as courts seemed to do in the newspaper cases during the second time period. Now, courts meticulously analyzed the policy, practice, and intent of universities toward the forum to determine its forum status. When they determined that a forum was an open or limited public forum, restrictions on speech typically received strict scrutiny. The court in *Carroll* wrote, in relation to the organization at issue,

Such a forum, he [the university president during testimony] continued, is 'consonant with the educational mission' of the university. In seeking to foster debate, exchange and contemplation about matters of campus and wider importance, SUNY Albany is hardly assuming a novel collegiate role. As Justice Brennan wrote in *Keyishian*, '[t]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' ... Indeed, SUNY Albany's interest in sponsoring and maintaining a thriving campus forum of vigorous advocacy and political action is itself a concern of constitutional dimensions, since a central purpose of the First Amendment is to guarantee the free interchange of views and energetic debate.¹²¹

The case involved two issues: compelled membership in the organization funded and compelled funding of the organization. The court determined that the compelled funding was constitutional because of the reasons above. The second aspect, compelled membership, was found unconstitutional and will be discussed under the outcome "Protecting the Post-Secondary School System."

There were several cases that utilized or purportedly declined to utilize *Hazelwood* to analyze the constitutionality of speech restrictions. Two cases, *Kincaid v.*

¹²¹ *Carroll*, *supra* note 119, at 1001 (quoting, respectively, *Keyishian v. Board of Regents*, 385 U.S. at 603 (1967); *United States v. Associated Press*, 326 U.S. 1 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

*Gibson*¹²² and *Hosty v. Carter*, represent two of the four cases involved in the circuit court split over application of *Hazelwood* at the post-secondary level. In *Kincaid*, the administration was displeased with the quality and content of the student yearbook and withheld its distribution. The district court that initially heard the case applied *Hazelwood* to find that the yearbook was a non-public forum and that the school's confiscation of the yearbooks was constitutional. On appeal to the Sixth U. S. Circuit Court of Appeals, the three-judge panel that first heard the case also proceeded to analyze the case via *Hazelwood*. It, too, determined that the yearbook was a non-public forum and that the university's action was constitutional.

Finally, the full Sixth Circuit heard the case *en banc*, to determine primarily whether *Hazelwood* applied. After reviewing a number of public forum cases, the court wrote in footnote five, "Because we find that a forum analysis requires that the yearbook be analyzed as a limited public forum — rather than a nonpublic forum — we agree with the parties that *Hazelwood* has little application to this case."¹²³

Following this backward logic, the court proceeded to cite *Hazelwood* three times, along with other popular public forum cases, to support the following contentions: 1) that the yearbook was not a "closely-monitored classroom activity in which an instructor assigns student editors a grade, or in which a university official edits content,"¹²⁴ 2) "In 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 — *Kincaid* himself was thirty-seven at the time of his March 1997 deposition. Thus, there can be no justification for

¹²² *Supra* note 119.

¹²³ *Id.* at 359.

¹²⁴ *Id.* at 352.

suppressing the yearbook on the grounds that it might be ‘unsuitable for immature audiences,’”¹²⁵ and 3) “the proposition put forth by the university officials and relied upon by the district court — i.e., that the government must open a forum for indiscriminate use by the general public in order to create a designated public forum — is erroneous.”¹²⁶

Therefore, through distinguishing *Hazelwood* in the first two propositions and directly utilizing it as support for the third, it would appear that the court did rely on *Hazelwood* in its decision-making, albeit through means other than those employed by the federal district court and the three-judge panel.

In finding that the yearbook was a limited public forum, the court proceeded to determine if the university’s actions were within legal bounds. It wrote that restrictions on speech within limited public forums only could be restricted in time, place and manner, and that restricting such speech based upon the speaker’s view was unconstitutional. The restriction at hand met neither requirement and was held unconstitutional.

*Hosty v. Carter*¹²⁷ also traveled through the federal courts as each tried to determine if *Hazelwood* applied, in this case to a student newspaper. In *Hosty*, the editor of the student newspaper previously had criticized actions of the dean of the university’s college of arts and sciences. After refusing to retract statements in that editorial or to print the administration’s response, the dean of student services and affairs, Carter, directed the printer to cease printing of the newspaper. When the federal district court heard the case,

¹²⁵ *Id.*

¹²⁶ *Id.* at 353.

¹²⁷ *Supra* note 120.

it ruled that *Hazelwood* was inapplicable at the college level and found Carter's actions to violate the constitution. A panel of the Seventh U. S. Circuit Court of Appeals affirmed the district court's holding, and then the full Circuit Court granted *certiorari*.

The court began its discussion with, "Hazelwood provides our starting point"¹²⁸ and proceeded to directly analyze the case via the *Hazelwood* holding. In discussing both cases, the court wrote,

To the extent that the justification for editorial control depends on the audience's maturity, the difference between high school and university students may be important. (Not that any line could be bright; many high school seniors are older than some college freshmen, and junior colleges are similar to many high schools.) To the extent that the justification depends on other matters — not only the desire to ensure 'high standards for the student speech that is disseminated under [the school's] auspices' (the Court particularly mentioned 'speech that is ... ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences ... but also the goal of dissociating the school from 'any position other than neutrality on matters of political controversy' — there is no sharp difference between high school and college papers.¹²⁹

The court said that because it had to view the issue in the light most favorable to the plaintiff, in this case the student editor, the newspaper was a limited public forum. As such, Carter's refusal to allow further printing was an unconstitutional abridgment of the student's First Amendment right. Carter, however, received qualified immunity because the question of whether *Hazelwood* applied to the college press was unsettled law when she instructed the printer to cease publication. Her actions were based on legitimate pedagogical concerns, the second prong of the *Hazelwood* framework.

¹²⁸ *Id.* at 734.

¹²⁹ *Id.* at 734-45.

The court made a point, nonetheless, to note that had the case gone to trial, things might have turned out differently. First, the newspaper's charter indicated that the editor was responsible to the Director of Student Life, who might have established criteria for school-subsidized publications. Because no evidence of this was before the court, however, it was not an issue considered. Second, every publication on campus was supposed to have a faculty adviser. The parties disagreed about the extent of the newspaper's faculty adviser's role – whether it was merely to offer advice or if it also included exercise of editorial control. Because the district court acted on a motion of summary judgment, this issue also wasn't presented for the full Circuit Court to evaluate. The court's emphasis on these two issues clearly suggest that subsidization and the control this might have given the Director of Student Life, in addition to whether the faculty adviser had the power to exercise editorial control might have resulted in a finding that the newspaper was a non-public forum per *Hazelwood*.

Access to funding and compelled funding were also dominant themes during this time period. In the precedent-setting case *Board of Regents of Univ. of Wis. System v. Southworth*,¹³⁰ the U. S. Supreme Court was asked to determine if a group of students constitutionally could be compelled to help fund, through payment of fees, organizations with which they ideologically and/or politically disagreed. The Court wrote, "It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may

¹³⁰ 529 U.S. 217 (2000).

support valid programs and policies by taxes or other exactions binding on protesting parties.”¹³¹

Because the sole purpose of collecting the fees at issue was to enhance the marketplace of ideas and the process was viewpoint neutral, the Court found it to be constitutional. Yet, as a number of commentators have pointed out, the Court also said that “If the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker.”¹³² As such, the government could regulate the speech in any way it likes.

Four cases accounted for the four entries under the rationale “Protecting against overbreadth and/or vagueness.” Each case dealt with anti-harassment policies. These were the only cases involving such policies, indicating that not one at the federal level passed constitutional muster. While the speech restrictions within all three cases could be construed as prior restraints and viewpoint discriminatory, in each case the rulings were based upon overbreadth and/or vagueness. One will be discussed at length because it encompasses the central issues at hand in all four, with the understanding that there were variations among the various speech codes’ provisions.

The case to be discussed is *John DOE v. Univ. of Michigan in 1989*.¹³³ At issue was the constitutionality of the University of Michigan at Ann Arbor’s “Policy on Discrimination and Discriminatory Harassment of Students in the University Environment.” The university created the policy because of increasing racial hostilities

¹³¹ *Id.* at 229.

¹³² *Id.*

¹³³ 721 F. Supp. 852 (E.D. Mich. 1989).

on the campus. The terms of the policy stated that it only applied to “educational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers.” Other rules governed speech and conduct in university housing (though the policy also intruded there in certain ways), and only physical violence and destruction of property were regulated in generally public areas of the campus.

The policy prohibited a very large swath of expression, such as any speech that “stigmatizes or victimizes” another person based upon race, religion, sexual orientation, sex, handicap, age, marital status, creed, national origin, and ethnicity such that it interfered with that person’s academic efforts, employment, participation in university activities, or personal safety.¹³⁴ It also regulated sexual advances, requests, favors, or any such related speech or conduct that might harm another in the ways listed above.¹³⁵

Punishments for violations ranged from formal reprimands to expulsion. Shortly after the university approved the policy, it created an interpretative guide for students, telling them what they could and could not say to others. Some examples of regulated speech listed in the interpretive guide included telling jokes about homosexuals, laughing in class if someone stutters, displaying a confederate flag in the residence hall, excluding someone from a study group because of race or gender, etc.

A male student, DOE, was a graduate student in psychology who feared he would be reprimanded for discussing controversial theories regarding his specialty, biopsychology. The court wrote,

Were [it] to look only at the plain language of the Policy, it might have to agree with the University that Doe could not have realistically alleged a genuine and credible threat of enforcement. The Policy prohibited conduct which ‘stigmatizes or

¹³⁴ *Id.* at 856.

¹³⁵ *Id.*

victimizes’ students on the basis of ‘race, ethnicity, religion, sex, sexual orientation’ and other invidious factors. However, the terms ‘stigmatize’ and ‘victimize’ are not self defining. These words can only be understood with reference to some exogenous value system. What one individual might find victimizing or stigmatizing, another individual might not.¹³⁶

Further, because the record before the court indicated the drafters of the policy “intended that the speech need only be offensive to be sanctionable,”¹³⁷ because students had been disciplined under the policy, and because the interpretive guide was filled with examples of relatively common behaviors, DOE was correct in fearing he could be reprimanded. The court found the policy to be both overbroad and vague.

The court wrote, “While the Court is sympathetic to the University's obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech. Unfortunately, this was precisely what the University did. ... The apparent willingness to dilute the values of free speech is ironic in light of the University's previous statements of policy on this matter.”¹³⁸

Rationales for Protecting the Well-Being of Post-Secondary Students

As shown below in Table 9, there were no entries for any of the rationales across time periods. This is likely due to the judiciary’s even greater reluctance to intervene in matters relating to older, post-secondary students. Courts in the first and second time periods didn’t appear to place much emphasis on age in their decision-making. In the newspaper cases, courts readily embraced *Tinker*, a decision made at the K-12 level. By the third time period, however, age did become a factor in the courts’ reasoning; it just

¹³⁶ *Id.* at 859.

¹³⁷ *Id.* at 860.

¹³⁸ *Id.* at 868.

wasn't found to be the driving rationale. Nonetheless, courts in nine cases¹³⁹ discussed either the differences in age between K-12 and post-secondary students or the differences in the missions of both levels of education. Typically, the discussion was aimed at asserting that there was, indeed, a difference, though this was not always the case. Interestingly, each of the nine cases was decided after 2001, each of the anti-harassment cases is included,¹⁴⁰ and four of the cases involved usage of *Hazelwood* in judicial decision-making.¹⁴¹

Table 9: Rationales for Protecting the Well-Being of Post-Secondary Students

Taking age into consideration	0	0	0
Recognizing that students are often a “captive audience”	0	0	0
Considering the sensitivity of topics	0	0	0
Time Periods:	3/3/40—2/23/69	2/24/69—1/12/88	1/13/88—2011

¹³⁹ Welker v. Cicerone, 174 F. Supp.2d 1055 (C.D. Col. 2001); Brown v. Li, 308 F.3d 939 (9th Cir. 2002); Bair v. Shippensburg Univ. 280 F. Supp.2d 357 (M.D. Penn. 2003); Amidon v. Student Assoc. of the State Univ. of N.Y. at Albany, 508 F.3d 94 (2d Cir. 2007); Kincaid, DeJohn & McCauley *supra* note 119; Hosty, *supra* 120.

¹⁴⁰ DOE, *supra* note 133; Welker, Bair & DeJohn, *supra* note 139.

¹⁴¹ Kincaid, *supra* note 119; Hosty, *supra* note 120; Brown, *supra* note 139.

Rationales for Teaching Post-Secondary Students Acceptable Social Behaviors

As shown below in Table 10, there are no entries for any rationales across time periods. Typically courts did not even discuss these rationales, as the issues raised in the post-secondary cases did not lend themselves to analysis linked to these rationales.

Table 10: Rationales for Teaching Post-Secondary Students Acceptable Social Behaviors

Teaching civility	0	0	0
Teaching good taste	0	0	0
Teaching the boundaries of socially appropriate behavior	0	0	0
Awakening students to cultural values	0	0	0
Time Periods:	3/3/40—2/23/69	2/24/69—1/12/88	1/13/88—2011

Rationales for Protecting the Post-Secondary School System

As shown below in Table 11, there were zero entries for all rationales during the first time period. During the second time period, the rationale “Promulgating reasonable rules and conduct” clearly stands out from the other rationales. Indeed, five of the total seven rationales categories had zero entries, and there is only one entry for the rationale “Maintaining discipline and order.” In large part, this is the result of so few case

outcomes being classified under this outcome, as only six outcomes from five cases, of the total 22 case outcomes during this time period (29%) were found to be protective of the school system.

In the case classified under the rationale “Maintaining discipline and order,” *Norton v. Discipline Comm. of East Tenn. State Univ.*,¹⁴² a group of students produced inflammatory materials, critical of both the student body and the administration. They called for students to rise up in protest. The administration suspended the students following distribution, and the students brought suit. The court wrote, “It is not required that the college authorities delay action against the inciters until after the riot has started and buildings have been taken over and damaged. The college authorities had the right to nip such action in the bud and prevent it in its inception. This is authorized even in criminal cases.”¹⁴³ The court found the university’s actions reasonable and constitutional.

The four cases, comprising five case outcomes, classified under the rationale “Promulgating reasonable rules and conduct” involved, respectively, 1) panel meetings and a discussion series, 2) a demonstration, 3) a sit-in, and 4) student refusal to fund, through payment of student fees, the student newspaper because they disagreed with its views.

During the third time period, the war in Vietnam was over, and protests and demonstrations on campuses nationwide were no longer a serious threat. The case law leading to protection of the school system during this period typically involved student punishment for speech in non-public forums, as will be discussed below. As shown in

¹⁴² 419 F.2d 195 (6th Cir. 1969).

¹⁴³ *Id.* at 201 (citing *Burnside*, *supra* note 18; *Blackwell*, *supra* note 17; *Tinker*, *supra* note 1; *Dennis*, *supra* note 70).

Table 11, five case outcomes (four cases) were classified under the rationale “Protecting the right of schools to regulate in non-public forums.” Two cases were classified under the rationale “Controlling the curriculum,” and one case outcome was classified under “Promulgating reasonable rules and conduct.”

Table 11: Rationales for Protecting the Post-Secondary School System

Avoiding controversy	0	0	0
Protecting the right of schools to regulate speech in non-public forums	0	0	5
Maintaining discipline and order	0	1	0
Confirming the right of school to speak for itself/control its message	0	0	0
Controlling the curriculum	0	0	2
Promulgating reasonable rules and conduct	0	5	1
Controlling expression in school-sponsored activities	0	0	0
Time Periods:	3/3/40—2/23/69	2/24/69—1/12/88	1/13/88—2011

In *Alabama Student Party v. Student Government Ass'n*,¹⁴⁴ the court was presented with two related issues, which accounts for the two outcomes in the case: 1) the restriction of campaign literature to certain days and 2) limitation of debates to the week before the election. Applying *Hazelwood*, the court found that the election was created as a learning or laboratory experience. As such, it was a non-public forum. The court wrote,

The University should be entitled to place reasonable restrictions on this learning experience. The district court concluded after a hearing that although the regulations were ‘rather narrow and limiting,’ they were neither ‘unreasonable,’ nor ‘arbitrary and capricious.’ The district court noted that by promulgating such regulations, the University sought to minimize the disruptive effect of campus electioneering, an interest which the district court found to be legitimate. There was no evidence that the regulations were anything but viewpoint-neutral.¹⁴⁵

As such, the regulations were found to be constitutional. Restrictions on speech in non-public forums need not be compelling, only reasonable and viewpoint-neutral, which the court found each aspect of the election process to be. This case represents one of the four cases involved in the circuit court split regarding application of *Hazelwood* to post-secondary speech.

In *Flint v. Dennison*,¹⁴⁶ the Ninth U. S. Circuit Court of Appeals was asked to decide if it was constitutionally permissible for a university to impose a dollar amount on how much a student may spend while campaigning for student office. After the court determined that the election constituted a limited public forum, it wrote,

¹⁴⁴ *Supra* note 119.

¹⁴⁵ *Id.* at 1349.

¹⁴⁶ *Supra* note 120.

The University uses ASUM [the student government] primarily as an educational tool—a means to educate students on principles of representative government, parliamentary procedure, political compromise, and leadership. In contrast to participation in state or national politics, participation in ASUM student elections is limited to ASUM-enrolled University students—students must maintain at least a 2.0 grade point average to run for office and only students are allowed to vote in the election.¹⁴⁷

It then considered whether the campaign limit was in any way viewpoint discriminatory. It found that it was not. From here it analyzed if the campaign limit was reasonable per *Cornelius v. NAACP Legal Defense & Educ, Fund, Inc.*¹⁴⁸ It determined that the restriction was reasonable in light of the legitimate pedagogical interests of the university and, therefore, constitutional. (It did not cite *Hazelwood*, from which the test of legitimate pedagogical concerns or interests derives.)

And in *Carroll v. Blinken*,¹⁴⁹ discussed earlier, the court also was called upon to determine the second part of the complaint that dealt with compelled membership in the organization at issue. The court found that the university could not compel students to be affiliated with an organization with which they ideologically and politically disagreed.

The final case under this rationale was the recent U. S. Supreme Court case *Christian Legal Soc. Chapter of Univ. of Cal., Hastings v. Martinez*.¹⁵⁰ At issue was the campus organization Christian Legal Society's rejection of students as voting members who would not sign a statement of faith and who were homosexuals. The university law school had in place an "all-comers" policy that required student organizations to allow all

¹⁴⁷ *Id.* at 827.

¹⁴⁸ 473 U.S. 788 (1985).

¹⁴⁹ *Supra* note 119.

¹⁵⁰ *Supra* note 120.

students, regardless of status or beliefs, to be allowed membership in any student group they wished to join.

Speaking to the speech via associational claim, the Court wrote, ...as evidenced by another set of decisions, this Court has rigorously reviewed laws and regulations that constrain associational freedom. In the context of public accommodations, we have subjected restrictions on that freedom to close scrutiny; such restrictions are permitted only if they serve ‘compelling state interests’ that are ‘unrelated to the suppression of ideas’—interests that cannot be advanced ‘through ... significantly less restrictive [means].’ ... ‘Freedom of association,’ we have recognized, ‘plainly presupposes a freedom not to associate.’¹⁵¹

Utilizing public forum cases, the Court found the RSO program to be a limited public forum and found that the all-comers policy was reasonable per *Cornelius*,¹⁵² provided adequate alternative channels of communication per *Perry Educ. Assoc’n v. Perry Local Educators’ Assoc’n*,¹⁵³ if the organization should decide to forego official recognition, was viewpoint neutral, and, as such, constitutional.

Finally, the two cases under the rationale “Controlling the curriculum” will be discussed because the first, *Brown v. Li*,¹⁵⁴ utilized *Hazelwood* and represents one of the four cases in the circuit court split, and because the federal district court in *O’Neal v. Falcon*¹⁵⁵ also utilized *Hazelwood* in its decision-making.

¹⁵¹ *Id.* at 2975 (quoting, respectively, *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) & *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000)).

¹⁵² *Supra* note 148.

¹⁵³ 460 U.S. 37 (1983).

¹⁵⁴ *Supra* note 139.

¹⁵⁵ 668 F. Supp.2d 979 (W.D. Tex. 2009).

In *Brown*,¹⁵⁶ a graduate student received approval for his thesis, but before sending it to the library, he added a “Disacknowledgements” section that began with, “I would like to offer special Fuck You's to the following degenerates for being an ever-present hindrance during my graduate career”¹⁵⁷ It then proceeded to identify the “Dean and staff of the UCSB graduate school, the managers of Davidson Library, former California Governor Wilson, the Regents of the University of California, and ‘Science’ as having been particularly obstructive to Plaintiff's progress toward his graduate degree.”¹⁵⁸

When administrators got word of this, they instructed him to remove the “Disacknowledgements” section. He refused to do so and submitted it again, absent the profanity. Again, he was instructed to remove it, and he received a letter from the dean stating that his degree would be conferred only after he removed that section of his thesis. After appealing to a variety of academic offices and officials with no relief, Brown filed suit.

The Ninth U. S. Circuit Court of Appeals looked to *Hazelwood* through which to analyze the case because, as the court wrote, “We have found no precedent precisely on point. However, a review of the cases discussing the relationship between students' free speech rights and schools' power to regulate the content of curriculum demonstrates that educators can, consistent with the First Amendment, restrict student speech provided that the limitation is reasonably related to a legitimate pedagogical purpose.”¹⁵⁹

¹⁵⁶ *Supra* note 139.

¹⁵⁷ *Id.* at 943.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 947.

It further noted, “The Supreme Court has suggested that core curricular speech — that which is an integral part of the classroom-teaching function of an educational institution — differs from students' extracurricular speech and that a public educational institution retains discretion to prescribe its curriculum.”¹⁶⁰ Moreover, the court wrote, the curriculum is one means by which a university expressed its policy and mission.

More than once the court wrote that it did not know if the U. S. Supreme Court would rule that *Hazelwood* governs in such a case, but it said that it was the most analogous case to that at hand. While the court never determined, nor attempted to determine forum status, it found that the university's curricular requirements were legitimate pedagogical concerns and constitutional.

Finally, in *O'Neal v. Falcon*,¹⁶¹ a community college student wanted to, as her topic for a speech, discuss abortion. Her teacher told her that abortion was too controversial and told her to find another topic. The court utilized *Hazelwood*, while also discussing several of the other cases that also have chosen to use it at the post-secondary levels, and wrote,

After reviewing the precedents concerning students' rights of free speech within a public school, we find few cases that address the conflict between the student's rights of speech in the classroom and a teacher's responsibility to encourage decorum and scholarship, including her authority to determine course content, the selection of books, the topic of papers, the grades of students and similar questions. Students do not lose entirely their right to express themselves as individuals in the classroom, but federal courts should exercise particular restraint in classroom conflicts between student and teacher over matters falling within the ordinary authority of the teacher over curriculum and course content.¹⁶²

¹⁶⁰ *Id.* at 950 (citing *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998)).

¹⁶¹ *Supra* note 155.

¹⁶² *Id.* at 984-84.

The court said that *Hazelwood* did not require it to “balance the gravity of the school's educational purpose against a student's First Amendment right to free speech, only that the educational purpose behind the speech suppression be valid.”¹⁶³ The court found that the professor had a legitimate pedagogical concern about allowing students to write on such a controversial topic and found the speech restriction constitutional. The court in this case also did not attempt to determine forum status but instead relied upon the legitimate pedagogical concerns prong of *Hazelwood*.

As shown below in Table 12, during the first time period, two cases were classified as “Content of Student-Published Works,” two cases were classified as “Symbolic Speech,” and two cases were classified as “Miscellaneous.” They involved, respectively, student newspapers, wearing of “Freedom Buttons,” and refusals to salute the flag.

During the second time period, the newspaper cases accounted for most entries under “Content of Student-Published Works,” two cases under “Speech Plus” due to school refusal to distribute the newspapers, and two cases under “Funding,” when schools refused to further fund papers following controversial content. Thus, while they are spread out here, these cases no doubt influenced the overall results during this time period. The “Miscellaneous” category dealt with the denial of official recognition to student organizations and the speaker cases.

During the third time period, the types of speech were fairly evenly distributed, outside of the zero entry for “Symbolic Speech.” The “Miscellaneous” category dealt with election campaigning issues, an all-comers policy, and a membership requirement. It

¹⁶³ *Id.* at 986.

would not appear that any one category of speech drove the overall results during this time period.

Table 12: Post-Secondary Case Categories

Content of Student-Published Works	2 (33.3%)	7 (31.8%)	5 (22.7%)
Verbalizations	0	0	4 (18.2%)
Symbolic Speech	2 (33.3%)	0	0
Speech Plus	0	5 (22.7%)	1 (4.5%)
Funding	0	4 (18.2%)	6 (27.3%)
Miscellaneous	2 (33.3%)	6 (27.3%)	6 (27.3%)
Time Periods:	3/3/40—2/23/69	2/24/69—1/12/88	1/13/88—2011

CHAPTER VI

DISCUSSION

OVERVIEW OF THE FINDINGS

The first research question posed in this dissertation asked if post-secondary freedom of expression case law was following a similar developmental path to that at the K-12 level of education. The answer is primarily yes, though there were a few exceptions. As discussed below, the two K-12 landmark U. S. Supreme Court decisions, *Tinker v. Des Moines Independent School District*¹ and *Hazelwood v. Kuhlmeier*,² which delineated the three time periods, set the stage upon which the majority of post-secondary decisions would be decided. After each of these two cases was decided, courts hearing cases at both levels of education utilized them relatively at the same pace and with the same frequency, indicating that post-secondary free speech case law is, substantively, following in a similar developmental path as case law at the K-12 level of education. One of the exceptions, however, is that courts at the K-12 level lagged behind courts at the post-secondary level in utilizing *Tinker*.

Nonetheless, application of the *Tinker* standards of both material and substantial disruption *and* of disruption *forecast* typically, though not exclusively, resulted in a high degree of protection for students at both levels of education. When not protected, courts either determined that schools reasonably forecasted a material and substantial disruption, or that such a disruption did, indeed, occur.

¹ 393 U.S. 503 (1969).

² 484 U.S. 260 (1988).

As may be recalled from Chapter III, the ideal concept of free speech proposed in this dissertation asserts that expressive conduct not intended to or likely to incite imminent lawless action should be fully protected; therefore, the overall findings of this research indicate that courts deciding student expression cases have, in many instances, adopted a parallel concept of free speech protection to protect student expression. The major exception to this has been when courts applied the *Hazelwood* standard to student expression.

Additionally, during the second period of time, roughly 73 percent of cases at each level of education were protective of student speech. Also during this time, approximately half of all cases at both levels involved either official or “underground” newspapers containing offensive or controversial material, for which protection of speech also was high. During the third period of time, the types of speech litigated were much more varied at both levels of education, and courts at both levels readily utilized public forum doctrine in their decision-making. Moreover, when cases were analyzed via *Hazelwood*, speech protection at both levels of education was low.

The issues of age, maturity, and the differing missions of the schools also was not a huge consideration in judicial decision-making at both levels of education during the second time period, though courts began to speak to the issue more following *Bethel School District No. 403 v. Fraser*³ and then after *Hazelwood*, which was decided just two years later. Finally, discussions relating to the marketplace of ideas were relatively high during the second time period at both levels of education. During the third time period, however, such discussions decreased, though not substantially.

³ 478 U.S. 675 (1986).

One of the developmental distinctions between the two levels of education involved the number of cases litigated across time periods. At the K-12 level, there was a steady increase in the number of cases, with six cases decided during the first time period, 24 decided during the second time period, and 47 decided during the third time period. In contrast, at the post-secondary level, four cases were decided during the first time period, 21 cases were decided during the second time period, and 18 cases were decided during the third time period. Thus at the post-secondary level, the number of cases increased significantly from the first to the second time periods but remained fairly stable from the second to third time periods. In this regard, post-secondary case law is not following a similar developmental path to that at the K-12 level of education. Also, while protection of speech remained quite stable across all three time periods at the post-secondary level, it did not at the K-12 level. From the second to the third time periods at the K-12 level, speech protection went from 73 percent to 34 percent, as shown in Table 1. At the post-secondary level, protection of speech from the second to third time periods went from 72 percent to 65 percent, as shown in Table 7.

The second research question asked how the *Hazelwood* framework was used at the post-secondary level. As expected, it has been utilized as precedent in several cases, and that number appears to be increasing. Additionally, aside from two cases, the remaining cases did not utilize both prongs of the framework in their reasoning. Instead of determining the type of forum at hand, the first prong, they relied solely on the second prong, or analyzing if the speech regulation was related to legitimate pedagogical concerns. Clearly, the law in this area is unsettled, and it is expected to continue to be

unless the U. S. Supreme Court makes a decision concerning the applicability of *Hazelwood* to post-secondary expression.

FREEDOM OF EXPRESSION AND ITS PROTECTION WITHIN SCHOOLS

After discussing the importance of the First Amendment generally and as it applies to students, the discussion here will turn to the highlights and discrepancies discovered in the case law. Both the reasons and the possible reasons why the data appear as they do will be examined.

In our democratic nation, freedom of speech is understood to be a fundamental human right that serves a number of functions: to ensure that the individual, as an autonomous human being bestowed with natural rights, is free to determine the course of his or her life; to support robust debate in the marketplace of ideas such that citizens may make informed political decisions and fulfill their sovereign role in our democratic republic; to allow citizens to “let off steam,” in order for a balance between social change and social stability to be maintained; and to allow both citizens and journalists to serve as the watchdogs of government, or to help ensure that government does not trample upon the rights of both majority and minority groups. Without the right to free expression, one of the fundamental principles behind democracy – that government should impose no more than the necessary minimum restrictions on individuals – would be a difficult, if not insurmountable, obstacle to overcome.

In our society, this right to free speech is not limited to adult citizens in society-at-large. Students at both the K-12 and post-secondary levels of education, who represent minority groups in society, also have the right to free expression as persons under the Constitution of the United States. In fact, the Bill of Rights was created, in part, to protect

the rights of such minority groups against the tyranny of the majority. As such, the federal courts have recognized, to varying degrees, the First Amendment rights of both groups of students. As the future leaders of our nation, the value of student free speech cannot be underestimated.

As demonstrated in Chapter V, Table 1, there has been a steady increase in the number of cases presented to the federal judiciary at the K-12 level of education, with six cases being decided during the first time period (two of which were speech-protective), 24 being decided during the second time period (post-*Tinker*/pre-*Hazelwood*, with 19 speech-protective case outcomes), and 47 being decided during the last time period (post-*Hazelwood*, with 16 speech-protective outcomes). As shown in Table 7, at the post-secondary level, four cases were decided during the first time period (all of which were speech-protective), 21 cases were decided during the second time period (16 of which were speech-protective), and 18 cases were decided during the third time period (14 of which were speech-protective).

During the first time period, there were only 10 total cases decided by the federal judiciary, as indicated above. Aside from the fact that courts at the post-secondary level were much more protective of speech than their counterparts at the K-12 level of education, no anomalies stood out within the data. These cases were foundational, however, as discussed in Chapter V.

One of the notable aspects in the Table 1 data involves the protection of K-12 speech during the second time period as compared with the third time period. During the time period between *Tinker* and *Hazelwood*, student speech was protected to a high degree. In roughly 73% of all cases decided during this time period, courts struck down

administrative regulations of, or punishments for, student speech. During the third time period, K-12 speech was protected only 34% of the time.

While protection for student expression at the K-12 level was high during the second time period, most courts did not utilize *Tinker* in their decision-making due to expressed uncertainty concerning whether it did or did not allow for prior restraint. This uncertainty hinged on the word “forecast,” which was used only once in the *Tinker* decision. The Court wrote, “As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.”⁴

Roughly half of all cases involved official or “underground” newspapers, yet, instead of applying *Tinker*, the courts analyzed the school policies involving student publications. In all cases, they found such policies deficient and unconstitutional prior restraints, not by the *Tinker* disruption standard but due to overbreadth and/or vagueness. As shown in Table 2, this rationale accounted for seven of the total 26 case outcomes. By the third time period, courts at the K-12 level readily applied the *Tinker* holding. Thus critics who assert that *Tinker* is “dead” are quite mistaken. Almost exclusively, the cases in which the *Tinker* “forecast” standard was utilized involved controversial and offensive apparel or controversial and offensive speech made on home computers.

As indicated in Chapter V, when schools had a history of racial violence or tension, courts always upheld restrictions of such apparel per the forecast part of the *Tinker* holding. When speech made online on home computers bled into the school causing significant disruptions, courts also used *Tinker* to uphold student punishment.

⁴ *Supra* note 1, at 514.

The latter cases, however, were not driven by whether the school reasonably could forecast a disruption, but, rather, based upon whether the speech did, in fact, create a material and substantial disruption. This partially accounts for the high number of entries in Table 5 under the rationale “Maintaining discipline and order,” which jumped from two in the second time period to 14 in the third. Another interesting aspect of the data in Table 5 relates to the rationale “Controlling expression in school-sponsored activities,” which went from zero entries during the second time period to seven in the third time period. This is attributed to the *Hazelwood* holding and the number of cases that utilized the framework to rule in favor of school restrictions on speech.

At the post-secondary level of education, courts readily used *Tinker* in their decision-making during the second time period. And again, in nearly 73 percent of the cases, speech was protected. Like the cases at the K-12 educational level, official and “underground” newspaper cases accounted for roughly half of all cases decided.

Table 6 highlights two more interesting K-12 findings regarding types of speech. First, only two cases involved “Symbolic Speech” during the second time period, while there were 14 cases involving symbolic speech in the third time period. This is the result of the numerous cases during the third time period involving controversial apparel. Second, there were 11 cases classified as “Speech Plus” during the second time period and only five during the third time period. The majority of the 11 cases involved distribution of official and “underground” newspapers. Newspapers accounted for the stability between the second and third time periods in relation to the number of cases classified as “Content of Student-Published Works.” The one difference, however, is that most of the newspapers during the second time period were “underground” newspapers,

while during the third time period most were official school newspapers. Newspapers also accounted for the majority of the “Content of Student-Published Works” at the post-secondary level during the second time period, as shown in Table 12.

It is unsurprising that newspapers accounted for such a large percentage of the total cases during this time period at both levels of education. First, the nation was at war, not only with Vietnam but also with itself, in that students and citizens alike began to demand equal protection under the law. Second, newspapers were the primary vehicles for students to express their views on these social and political issues. There was no Internet. There were no cell phones from which to send mass text messages. To reach at least a fairly large audience, students needed to do so through creating and distributing newspapers and other printed materials. While courts hearing K-12 cases expressed their distaste for hearing the cases, they nonetheless were highly supportive of students’ speech on the controversial topics of the times.

Courts at both levels of education during this time period certainly did not shy away from striking down punishment of offensive or controversial speech. This accounts for most of the 16 case outcomes in Table 7 under the rationale “Protecting Post-Secondary Student Expression.” There were only two fewer cases under this outcome during the third period. Additionally, there also was stability between the two time periods for the outcome “Protecting the Post-Secondary School System.” The number of cases in both outcomes during the second time period likely was due to the high level of student activity during this era of civil unrest. During the third time period, these issues were no longer a factor, and the speech cases appearing before the courts were of a wide

variety, though access to and funding for student organizations and *Hazelwood*-related cases dominated (both of which also contributed to the number of public forum cases).

Courts hearing cases at the post-secondary level from 1969-1988 rarely based their decision-making on age, maturity, or the different missions of the schools. It was not until *Hazelwood* that courts deciding post-secondary cases began to emphasize these factors. In about half of those later cases, in fact, courts used these factors to assert either 1) that there was a distinct difference between the two groups of students or 2) that there was no real difference between the two. As discussed in the findings, those cases in which the courts asserted that age made a difference involved anti-harassment policies,⁵ and three of the four cases in which courts said that age and the missions of the schools were *not* critical factors involved utilization of the *Hazelwood* framework. The anti-harassment policy cases also explain the jump from zero entries in the second time period to four entries during the third time period for the rationale “Protecting speech from overbreadth and/or vagueness” in Table 8.

At the K-12 level, age and maturity were not significant influences within the case law during the second time period but became more prominent following *Hazelwood*. As for this aspect of the findings, it could be the result of less tumultuous times. By 1975, the war was over. Protests and demonstrations on secondary and post-secondary campuses had died down. This alone could account for the stability in the number of cases litigated at the post-secondary level from the second to the third time periods, as discussed above.

Students were simply less vocal because they were not confronted with war, segregation, and extreme sexism. College students nationwide regularly engaged in mass

⁵ As a reminder, all federal courts struck down schools’ anti-harassment policies because they were determined to be overbroad and/or vague.

demonstrations and protests, and were prolific writers engaged in spreading their messages pertaining to the social and political upheavals during the second time period. When the war ended and they, along with citizens in society-at-large, had achieved many of the social reforms they fought so zealously for, one would expect the number of cases litigated to “level off,” just as they did.

It also is important to point out that during the second time period, discussions concerning the importance of the marketplace of ideas were frequently included in the courts’ reasoning. At the K-12 level, 11 of the total 24 cases included discussions of the marketplace of ideas, though the specific term was not always used. Four of these cases highlighted the importance of teaching students to be self-governing citizens. While the latter number is low, the concept was embedded in discussions concerning the marketplace of ideas. At the post-secondary level during this time, 12 of the total 21 cases discussed the significance of the marketplace of ideas, or used language indicative of the concept, in students’ educational growth. No cases were driven by the rationale “Preparing students for self-governance,” yet again this concept was often embedded and/or implied within the courts’ discussions of the marketplace.

During the third time period, there was slightly less discussion of the marketplace of ideas within post-secondary cases; however, when discussed, it often was tied to discussions about access to and funding for public forums. In fact, in roughly 50 percent of post-secondary cases analyzed during this time, courts determined that the speech in question was part of or one of the three types of *fora*. This accounted for the five entries in Table 11 under the rationale “Protecting the right of schools to regulate speech in non-public forums.”

As indicated in Chapter V, the notion of the public forum at the K-12 level was beginning to creep into judicial reasoning during the second time period. Three cases indicated that the speech at hand either was part of a public forum or, by itself, was a public forum. By the third time period, the idea that student speech activities were generally non-public forums prevailed due to the *Hazelwood* ruling. Thirteen of the 47 total cases utilized *Hazelwood* as precedent.

At the post-secondary level of education, the public forum concept also slowly became incorporated into the case law, with courts in three cases during the second time period determining that the speech at hand was part of a public forum. At this time, it was assumed that if there was a forum for student expression, it was a traditional public forum, open to all. Yet it was also here that a court spoke for the first time about how funding might impact forum status.

By the third time period, the speech in nine of the total 18 cases was found to be an outlet of one of the three types of *fora*. No longer, however, did the courts assume a forum was a traditional open forum. Clearly, both levels of education were integrating public forum doctrine at roughly the same pace; however, post-secondary courts were much more likely to analyze in great depth the public forum cases that had been handed down by the U. S. Supreme Court to determine which type of forum the speech outlet constituted.

When the *Hazelwood* framework reached post-secondary speech in 1989, the landscape within this area of the law began to change. Courts already had employed public forum doctrine to post-secondary freedom of expression case law, but not one

court until this time had utilized the speech-restrictive *Hazelwood* framework to determine the constitutionality of speech regulations or punishments.

Aside from the obvious concerns relating to mere application of such a standard to the post-secondary context – one that courts typically interpret as not requiring viewpoint neutrality – its application becomes all the more vexing because of the divergent ways in which the courts have applied it. In two of the four circuit court of appeals cases analyzed here that constitute the federal circuit court split over this matter, the courts utilized the framework in full. This meant they determined the forum status of the speech at hand based upon the principles articulated in *Hazelwood* before they turned to the second prong or made a determination as to whether the speech restriction was reasonably related to a legitimate pedagogical purpose.

In the first case to apply *Hazelwood*, *Alabama Student Party v. Student Government Association*,⁶ the court found that the speech itself, which involved electioneering, was a non-public forum and that the school's regulation of the speech was reasonably related to a legitimate pedagogical interest. The case resulted in upholding the speech regulation.

The second case decided at the federal circuit court level, *Kincaid v. Gibson*,⁷ involved confiscation of the student yearbook based upon administrative disapproval of the style and content of the yearbook. The court in this case said that *Hazelwood* didn't apply in the post-secondary context, yet it proceeded to utilize *Hazelwood* to determine the forum status of the student yearbook. It found that it was a limited public forum and that its confiscation was unconstitutional.

⁶ 867 F.2d 1344 (11th Cir. 1989).

⁷ 236 F. 3d 342 (6th Cir. 2001).

In a third case, *Brown v. Li*,⁸ the Ninth U. S. Circuit Court did not even undertake to determine whether the speech, a graduate student's thesis, was or occurred in a public forum. It based its decision solely on the fact that the speech at hand was curricular and, as such, restrictions needed only to be reasonably related to a legitimate pedagogical concern. It found that it was.

In *Hosty v. Carter*,⁹ the Ninth Circuit determined, employing the *Hazelwood* framework, that the speech, in this case the student newspaper, constituted a limited public forum. It specifically indicated that age was not a factor in determining the status of a forum. It then sought to determine if the restriction on the speech was for a legitimate pedagogical purpose. Because not all of the factual evidence was presented to the court, it could not ascertain if the speech restriction was based upon such an interest. Nonetheless, the point is that the court recognized and utilized both prongs of the *Hazelwood* framework. Such cannot be said for the other two circuit courts that applied *Hazelwood* to the cases at hand.

As such, not only are the circuit courts applying *Hazelwood* in different ways, therefore giving little guidance to the lower courts in their circuits as to its proper application, but the results also have not been speech-protective. As discussed in Chapter III, while the court in *Hosty* held that the speech restriction was unconstitutional, it also indicated that if the case had gone to trial for factual determinations, it may have led to a different result had there been a closer relationship between the newspaper and administrative review. Further, it implied that funding of the newspaper also could have

⁸ 308 F. 3d 939 (9th Cir. 2002).

⁹ 412 F. 3d 731 (7th Cir. 2005).

changed the forum status. Thus while the students “won,” they also lost the battle purely due to the court’s utilization of *Hazelwood* to a student newspaper.

Application of *Hazelwood* to evaluate the constitutionality of a speech restriction involving a newspaper is not in keeping with U. S. Supreme Court precedent regarding post-secondary student expression. Unless or until the Court rules on this matter, post-secondary students nationwide are subject to enhanced censorship should a court choose to apply this standard to the case at hand.

An additional three cases utilizing *Hazelwood* will be discussed below. The first was not included above because it was decided by a federal district court, and, therefore, is not a part of the federal circuit court split. It was, though, analyzed as part of the findings. The second two cases, both of which were heard by federal circuit courts, were not included in the findings because the first was settled out of court and the second is on appeal. They are discussed here, however, because they further illustrate the way in which *Hazelwood* has been variously applied.

In *O’Neal v. Falcon*,¹⁰ decided by a federal district court in Texas, involved a university professor’s refusal to allow a student to use abortion as the topic for an assigned speech. The court, in upholding the speech restriction, utilized *Hazelwood* for the contention that curricular decisions, as long as they are related to legitimate pedagogical concerns, are constitutional. Here again, the court did not determine forum status of either the classroom or the proposed speech.

Finally, the two circuit court cases not analyzed in this dissertation but that also utilized *Hazelwood*, involved 1) a student who refused to say “Fuck” and to take the Lord’s name in vain as part of her theatre class and 2) a graduate student who was

¹⁰ 668 F. Supp.2d 979 (W.D. Tex. 2009).

expelled because she refused to counsel homosexuals due to her religious beliefs. In the first case, *Axson-Flynn v. Johnson*,¹¹ the Tenth U. S. Circuit Court held that *Hazelwood* applied because the speech in question was curricular. The same was true in the second case.¹²

Taken together, the circuit courts appear to be signaling that all curricular and non-curricular speech on college campuses potentially is subject to a *Hazelwood* analysis, which, thus far, has resulted in upholding punishment for student speech save one case, *Hosty v. Carter*.¹³ Even this case, however, indicates that if a newspaper is not completely editorially and financially independent, it could become a non-public forum per *Hazelwood*. Moreover, those cases involving purely curricular speech are utilizing a framework that is built upon an analysis of forum status, but which these cases clearly ignore.

Thus subjecting curricular and non-curricular speech to such a restrictive K-12 holding severely curtails the marketplace of ideas. It is, in large part, through both extra-curricular activities and the learning that takes place within the classroom that prepares students for the “real world;” that teaches them they are free to investigate, dispute, and question assumptions and beliefs; that their ideas do, indeed, matter; and, for those who aspire to become journalists, that questioning authority is not only their right but also their responsibility. Utilizing *Hazelwood* in these contexts teaches post-secondary students that their rights do, indeed, stop at the schoolhouse gate.

¹¹ 356 F. 3d 1277 (10th Cir. 2004).

¹² *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012).

¹³ *Supra* note 9.

CONCLUSION

The *Tinker* standard of material and substantial disruption is, in many ways, very similar to the *Brandenburg v. Ohio* test, in which “... the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁴

In *Tinker*, the Court reasoned that if schools could not forecast a material and substantial disruption to the orderly operation of schools, it could not forbid or punish the speech. Just as Emerson’s “General Theory of the First Amendment”¹⁵ makes a distinction between conduct that is expressive and conduct that is not, the Court in *Tinker* recognized that students wearing black armbands in protest of the war was a form of conduct, but one with an expressive purpose. As such, it was pure symbolic speech. As discussed in Chapter II, the ideal concept of free speech proposed in this dissertation asserts that expressive conduct that is not intended to or likely to incite imminent lawless action should be fully protected.

Application of the *Tinker* standard within the K-12 and post-secondary student speech cases analyzed here overall has resulted in heightened protection for speech. While not all cases utilizing the standard result in the protection of all student speech, the courts, for the most part, have utilized it in the manner for which it was created – to ensure safety in the schools and to ensure that the school environment is conducive to learning. Thus the K-12 and post-secondary free expression case law that in this

¹⁴ 395 U.S. 444, 448 (1969).

¹⁵ THOMAS EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (Random House 1963).

dissertation has been analyzed via *Tinker*, comes fairly close to the ideal concept of free speech put forth in this study.

Application of the *Tinker* standards of both material and substantial disruption *and* of disruption *forecast* typically, though not exclusively, resulted in a high degree of protection for students at both levels of education. When not protected, courts either determined that schools reasonably forecasted a material and substantial disruption, or that such a disruption did, indeed, occur. As may be recalled from Chapter III, the ideal concept of free speech proposed in this dissertation asserts that expressive conduct not intended to or likely to incite imminent lawless action should be fully protected.

The overall findings of this research indicate that courts deciding student expression cases have, in many instances, adopted a *parallel* concept of free speech protection to protect student expression when utilizing the *Tinker* standard to determine disruption. As in *Brandenburg v. Ohio*, inflammatory speech that did not create an imminent threat to a material and substantial disruption typically was protected. As demonstrated in the findings, however, within the context of student speech, the bar for determining imminence is lower than that articulated in *Brandenburg*. As just discussed, for instance, courts typically upheld restrictions on and punishments for wearing inflammatory t-shirts if there had been a history of racial violence; such a requirement demonstrating past occurrences does not necessarily indicate that similar speech would produce the same reaction, which the *Brandenburg* Court recognized. Nonetheless, even though the *Tinker* standard may be less stringent than *Brandenburg*, when considering that schools are, indeed, unique environments, it arguably provides a sufficient standard

against which to evaluate student speech if students are to value constitutional freedoms and become productive, self-governing citizens.

Regarding the *Hazelwood* standard, it clearly is not a parallel concept of free speech to that articulated in *Brandenburg*. As discussed throughout this dissertation, it frequently has been utilized in ways that appear wholly unrelated to the maintenance of order within schools. Those cases analyzed via *Hazelwood* do not come close to this idealized concept of free speech. Based upon the findings in Chapter V and the discussion provided here, the holding in *Tinker* is the most appropriate method for analyzing speech at both levels of education if teaching students to become self-governing citizens is an outcome considered critical to the future of democracy in this nation. If students are to understand and to appreciate freedom, they must be educated in an environment that respects and supports their freedom as provided for in the Constitution of the United States.

Finally, due to the increasing number of cases relating to off-campus, online speech at the K-12 level of education, a trend that is expected to continue, future research in this area would be worthwhile. Moreover, because the findings here, which demonstrate that for the most part post-secondary freedom of expression case law is, indeed, following a similar developmental path to that at the K-12 level, one would expect in the future to see federal-level litigation at post-secondary schools involving online speech as well. Court rulings on this form of speech also should be monitored over time with further research.

APPENDIX A

K-12 AND POST-SECONDARY CASE LISTS

K-12

A.M. ex rel. McAllum v. Cash, 585 F. 3d 214 (5th Cir. 2009)
Baker v. Downey City Board of Education, 307 F. Supp. 517 (C.D. CA 1969)
Barber Ex Rel. Barber v. Dearborn Public Schools, 286 F. Supp. 2d 847 (E.D. Mich. 2003).
Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973)
Bayer v. Kinzler, 383 F. Supp. 1164 (E.D. NY 1974)
Baxter v. Vigo County School Corporation, 26 F.3d 728 (7th Cir. 1994)
Bethel v. Fraser, 478 U.S. 675 (1986)
Beussink v. Woodland R0IV Sch. Dist., 30 F. Supp.2d 1175 (E.D. Miss. 1998)
Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (5th Cir. 1966)
Boucher v. School Board of the School District of Greenfield, 134 F. 3d 821 (7th Cir. 1998)
Bragg v. Swanson, 371 F. Supp.2d 814 (S.D. W. Va. 2005)
Bull v. Dardanelle Public School Dist. No. 15, 745 F. Supp. 1455 (E.D. Ark. 1990)
Burch v. Barker, 861 F. 2d 1149 (9th Cir. 1988)
Burnside v. Byers, 363 F.2d 744 (5th Cir. 1966)
Butts v. Dallas Independent School District, 436 F.2d 728 (5th Cir. 1971)
BWA v. Farmington R-7 School Dist., 508 F. Supp. 2d 740 (E.D. Miss. 2007)
Bystrom v. Fridley High School, 822 F. 2d 747 (8th Cir. 1987)
Castornia v. Madison County Sch. Bd. 246 F.3d 536 (6th 2001)
Chambers v. Babbit, 145 F.Supp.2d 1068 (D. C. Minn. 2001)
Clark v. Dallas, 806 F. Supp. 116 (N.D. Tex. 1992)
Corder v. Lewis Palmer Sch. Dist. No. 38, 566 F.3d 1219 (10th Cir. 2009)
Coy v. Board of Education of North Canton Schools, 205. F. Supp. 2d 791 (N.D. Ohio 2002)
Curry ex rel Curry v. Hensiner, 513 F.3d (6th Cir. 2008)
DeFabio v. East Hampton Free Sch. District, 623 F.3d 71 (2d Cir. 2010)
Defoe v. Spiva, 625 F.3d 324 (6th Cir. 2010)
Dodd v. Rambis, 535 F. Supp. 23 (S.D. Ind. 1981)
Doe v. Pulaski County Special School District, 306 F.3d 616 (8th Cir. 2002)
Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008)
Draudt v. Wooster Cisty Sch. Dist. Bd. of Educ., 246 F. Supp. 820 (N.D. Ohio 2003)
Eisner v. Stamford Board of Education, 40 F.2d 803 (2d Cir. 1971)
Fleming v. Jefferson County Sch. Dist., 298 F.3d 918 (10th Cir. 2002)
Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979)
Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972)
Gambino v. Fairfax County School Board, 564 F. 2d 157 (4th Cir. 1977)
Governor Wentworth Reg. Sch. V. Hendrickson, 421 F. Supp. 2d 410 (D. N.H. 2006)
Griggs v. Fort Wayne Sch. Dist., 359 F. Supp.2d 731 (N.D. Ind. 2005)

Hardwick ex rel. Hardwick v. Heyward, 674 F. Supp. 2d 725 (D. S.C. 2009)
 Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988)
 J.S. v. Blue Mountain Sch. Dist., No. 08-4138 (3d Cir. June 13, 2011)(Slip Opinion)
 Karp v. Becken, 477 F.2d 171 (9th Cir. 1973)
 Katz v. McAuley, 438 F.2d 1058 (2d Cir. 1971)
 Kowalski v. Berkeley County Schools, 652 F. 3d 565, (4th Cir. 2011)
 LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001)
 Layshock v. Hermitage School Dist., 650 F.3d 205 (3d Cir. 2011).
 Lowery v. Euverard, 497 F. 3d 584 (6th Cir. 2007)
 M.A.L. ex rel M.L. v. Kinsland, 543 F.3d 841 (6th Cir. 2008)
 M. B. v. Liverpool Central Sch. Dist., 487 F. Supp.2d 117 (N.D. N.Y. 2007)
 McCann v. Fort Zumwalt Sch. Dist., 50 F. Supp.2d 918 (E.D. Mo. 1999)
 Minersville School Dist., Bd. of Educators of Minersville Sch. Dist. V. Gobitis, 310 U.S.
 586 (1940)
 Morrison v. Board of Educ. of Boyd County, 521 F.3d 602 (6th Cir. 2008)
 Morse v. Frederick, 551 U.S. 393 (2007)
 Muller v. Jefferson Lighthouse School, 98 F. 3d 1530 (7th Cir. 1996)
 Nelson v. Moline Sch. Dist. No. 40, 725 F. Supp 965 (C.D. Ill. 1989)
 Nitzberg v. Parks, 525 F. 2d 378 (4th Cir. 1975)
 Phillips v. Oxford Separate Main Sch. Dist., 314 F. Supp.2d 643 (N.D. Miss. 2003)
 Pliscou v. Holtville Unified School Dist., 411 F.Supp. 842 (S.D. Cal. 1976)
 Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989)
 Posthumus v. Bd. of Educ. Of the Mona Shores Public Schools, 80 F. Supp.2d 891
 (W.D. Mich. 2005)
 Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971)
 Reineke v. Cobb County School District, 484 F. Supp. 1252 (N.D. Ga. 1980)
 Rivera v. East Otero School District R-1, 721 F. Supp. 1189, 1194
 (D. Colo. 1989)
 S.C. v. Sagreville Bd. of Educ., 33 F.3d 417 (3d Cir. 2003)
 Scott v. Sch. Bd. of Alachua Cty., 324 F.3d 1246 (11th Cir. 2003)
 Scoville v. Board of Ed. of Joliet Tp. HS Dist. 204, County of Will, State of Ill., 286
 F. Supp. 988 (N.D. Ill. 1968)
 Seamons v. Snow, 206 F.3d 1021 (10th Cir. 2000)
 Settle v. Dickson County School Bd., 53 F. 3d 152 (6th Cir. 1995)
 Shanley v. Northeast Ind. Sch. Dist., Bexar County, Tex., 462 F.2d 960 (5th Cir. 1972)
 Stanton v. Brunswick School Department, 577 F. Supp. 1560 (D. Me. 1984)
 Sullivan v. Houston Ind. Sch. Dist., 333 F. Supp. 1149 (S.D. Tex. 1971)
 Sypniewski v. Warren Hills Regional Bd. of Educ., 307 F.3d 243 (3d Cir. 2002)
 Thomas v. Board of Education, Granville Central School District, 607 F. 2d 1043
 (2d Cir. 1979)
 Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969)
 Trachtman v. Anker, 563 F. 2d 512 (2d Cir. 1977)
 Virgil v. School Board of Columbia County, 862 F.2d 1517 (11th Cir. 1989)
 West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)
 Williams v. Spencer, 622 F. 2d 1200 (4th Cir. 1980)
 Wisniewiewski v. Bd. of Educ. of the Weedsport Central Sch. Dist., 494 F.3d 34

(2d Cir. 2007)
Zucker v. Panitz, 299 F. Supp. (S.D. NY 1969)

Post-Secondary

Alabama Student Party v. Student Government Association, 867 F.2d 1344
(11th Cir. 1989)
Amidon v. Student Assoc. of the State Univ. of N.Y. at Albany, 508 F.3d 94
(2d Cir. 2007)
Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970)
Arrington v. Taylor, 380 F. Supp. 1348 (M.D. N.C. 1974)
Bair v. Shippensburg Univ. 280 F. Supp.2d 357 (M.D. Penn. 2003)
Bayless v. Martine, 430 F.2d 873 (5th Cir. 1970)
Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973)
Board of Regents of Univ. of Wis. System v. Southworth, 529 US 217 (2000)
Brooks v. Auburn Univ., 412 F.2d 1171 (5th Cir. 1969)
Brown v. Li, 308 F. 3d 939 (9th Cir. 2002)
Carroll v. Blinken, 957 F.2d 991 (2d Cir. 1992)
Channing Club v. Board of Regents of Texas Tech University, 317 F. Supp. 688
(N.D. Tex. 1970)
Christian Legal Soc. Chapter of Univ. of Cal., Hastings v. Martinez, 319 Fed. Appx. 645
(2010)
Clemson Univ. Vietnam Moratorium Comm. v. Clemson Univ., 306 F. Supp.
129 (A.D. S.C. 1969)
DeJohn v. Temple Univ., 537 F.3d 301 (3d Cir. 2008)
Dickey v. Alabama State Board of Education, 273 F. Supp. 613 (M.D. Ala. 1967)
Dickson v. Sitterson, 280 F. Supp. 486 (M.D. N.C. 1968)
Flint v. Dennison, 361 F. Supp.2d 1215 (D. Mont. 2005)
Hammond v. South Carolina State College, 272 F. Supp. 947 (D.C. S.C. 1967)
Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992)
Healy v. James, 408 U.S. 169 (1972)
Heenan v. Rhodes, 761 F.Supp.2d 1318 (M.D. Ala. 2011)
Hosty v. Carter, 412 F. 3d 731 (7th Cir. 2005)
John DOE v. Univ. of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989)
Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973)
Keeton v. Anderson, 664 F.3d 865 (11th Cir. 2011)
Kincaid v. Gibson, 236 F. 3d 342 (6th Cir. 2001)
Korn v. Elkins 317 F. Supp. 138 (D. Md. 1970)
Lopez v. Candaele, 622 F. 3d 1112 (9th Cir. 2010)
Lueth v. St. Clair County Cmty. College, 732 F. Supp. 1410 (E.D. Mich. 1990)
McCauley v. University of the Virgin Islands, 628 F.3d 232 (3d. 2010)
Norton v. Discipline Comm. of East Tenn. State Univ., 419 F.2d 195 (6th Cir. 1969)
O'Neal v. Falcon, 668 F. Supp.2d 979 (W.D. Tex. 2009)
Papish v. Board of Curators of the University of Missouri, 410 U.S. 667 (1973)
Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995)
Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975)

Smith v. Univ. of Tenn., 300 F. Supp. 777 (N.D. Tenn. 1969)
Snyder v. Bd. of Trustees of the Univ. of Ill., 286 F. Supp. 927 (E.D. Ill. 1968)
Sonnier v. Crain, 613 F.3d 43 (E.D. La. 2008)
Stanley v. McGrath, 719 F.2d 279 (8th Cir. 1983)
Sword v. Fox, 446 F.2d 1091 (4th Cir. 1971)
Thonen v. Jenkins, 491 F.2d 722 (4th Cir. 1973)
Trujillo v. Love, 322 F. Supp. 1266 (D. Col. 1971)
University of So. Miss. Chapter of the Miss. Civil Liberties Union v. University of So.
Miss., 452 F.2d 564 (5th Cir. 1971)
Welker v. Cicerone, 174 F. Supp.2d 1055 (C.D. Col. 2001)
Widmar v. Vincent, 454 U.S. 263 (1981)

APPENDIX B

CASE LISTS FOR OUTCOMES

K-12: 3/3/40—2/23/69

A) Protecting K-12 Student Expression

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)
Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966)

B) Protecting the Well-Being of K-12 Students

No cases

C) Teaching K-12 Students Acceptable Social Behaviors

Minersville School District, Board of Education of Minersville School District
v. Gobitis, 310 U.S. 586 (1940)
Baker v. Downey City Board of Education, 307 F. Supp. 517 (C.D. Cal. 1969)

D) Protecting the K-12 School System

Blackwell v. Issaquena County Board of Education, 363 F.2d 749
(5th Cir. 1966)
Scoville v. Board of Education of Joliet Township High School District 204,
County of Will, State of Illinois, 286 F. Supp. 988 (N.D. Ill. 1968)

K-12: 2/24/69—1/12/88

A) Protecting K-12 Student Expression

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969)
Zucker v. Panitz, 299 F. Supp. (S.D. NY 1969)
Butts v. Dallas Independent School District, 436 F.2d 728 (5th Cir. 1971)
Eisner v. Stamford Board of Education, 40 F.2d 803 (2d Cir. 1971)
Sullivan v. Houston Ind. Sch. Dist., 333 F. Supp. 1149 (S.D. Tex. 1971)
Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971)
Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972)
Shanley v. Northeast Ind. Sch. Dist., Bexar County, Tex., 462 F.2d 960
(5th Cir. 1972)
Karp v. Becken, 477 F.2d 171 (9th Cir. 1973)
Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973)

Bayer v. Kinzler, 383 F. Supp. 1164 (E.D. NY 1974)
Nitzberg v. Parks, 525 F. 2d 378 (4th Cir. 1975)
Pliscou v. Holtville Unified School Dist., 411 F.Supp. 842 (S.D. Cal. 1976)
Gambino v. Fairfax County School Board, 564 F. 2d 157 (4th Cir. 1977)
Thomas v. Board of Education, Granville Central School District, 607 F. 2d 1043
(2d Cir. 1979)
Reineke v. Cobb County School District, 484 F. Supp. 1252 (N.D. Ga. 1980)
Dodd v. Rambis, 535 F. Supp. 23 (S.D. Ind. 1981)
Stanton v. Brunswick School Department, 577 F. Supp. 1560 (D. Me. 1984)

B) Protecting the Well-Being of K-12 Students

Trachtman v. Anker, 563 F. 2d 512 (2d Cir. 1977)
Williams v. Spencer, 622 F. 2d 1200 (4th Cir. 1980)

C) Teaching K-12 Students Acceptable Social Behaviors

Bethel v. Fraser, 478 U.S. 675 (1986)

D) Protecting the K-12 School System

Katz v. McAuley, 438 F.2d 1058 (2d Cir. 1971).
Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979)
Dodd v. Rambis, 535 F. Supp. 23 (S.D. Ind. 1981)
Bystrom (Cory) v. Fridley High School, 822 F. 2d 747 (8th Cir. 1987)

K-12: 1/13/88—2011

A) Protecting K-12 Student Expression

Burch v. Barker, 861 F. 2d 1149 (9th Cir. 1988)
Nelson v. Moline Sch. Dist. No. 40, 725 F. Supp 965 (C.D. Ill. 1989)
Rivera v. East Otero School District R-1, 721 F. Supp. 1189, 1194
(D.Colo. 1989)
Clark v. Dallas, 806 F. Supp. 116 (N.D. Tex. 1992)
Beussink v. Woodland R0IV Sch. Dist., 30 F. Supp.2d 1175
(E.D. Miss. 1998)
Seamons v. Snow, 206 F.3d 1021 (10th Cir. 2000)
Chambers v. Babbit, 145 F.Supp.2d 1068 (D. C. Minn. 2001)
Castornia v. Madison County Sch. Bd. 246 F.3d 536 (6th 2001)
Sypniewski v. Warren Hills Regional Bd. of Educ., 307 F.3d 243
(3d Cir. 2002)
Coy v. Board of Education of North Canton Schools, 205. F. Supp. 2d
791 (N.D. Ohio 2002)

Barber Ex Rel. Barber v. Dearborn Public Schools, 286 F. Supp. 2d 847
(E.D. Mich. 2003).
Bragg v. Swanson, 371 F. Supp.2d 814 (S.D. W. Va. 2005)
Griggs v. Fort Wayne Sch. Dist., 359 F. Supp.2d 731 (N.D. Ind. 2005)
Layshock v. Hermitage School Dist., 650 F.3d 205 (3d Cir. 2011).
M. B. v. Liverpool Central Sch. Dist., 487 F. Supp.2d 117 (N.D. N.Y. 2007)
J.S. v. Blue Mountain Sch. Dist., No. 08-4138 (3d Cir. June 13, 2011)
(Slip Opinion)

B) Protecting the Well-Being of K-12 Students

Muller v. Jefferson Lighthouse School, 98 F. 3d 1530 (7th Cir. 1996)
Morse v. Frederick, 551 U.S. 393 (2007)

C) Teaching K-12 Students Acceptable Social Behaviors

Bull v. Dardanelle Public School Dist. No. 15, 745 F. Supp. 1455
(E.D. Ark. 1990)
Posthumus v. Bd. of Educ. Of the Mona Shores Public Schools, 80 F.
Supp.2d 891 (W.D. Mich. 2005)

D) Protecting the K-12 School System

Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988)
Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989)
Virgil v. School Board of Columbia County, 862 F.2d 1517
(11th Cir. 1989)
Bull v. Dardanelle Public School Dist. No. 15, 745 F. Supp. 1455
(E.D. Ark. 1990)
Settle v. Dickson County School Bd., 53 F. 3d 152 (6th Cir. 1995)
Boucher v. School Bd. of the School Dist. of Greenfield, 134 F.3d 821
(7th Cir. 1998)
McCann v. Fort Zumwalt Sch. Dist., 50 F. Supp.2d 918 (E.D. Mo. 1999)
LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001)
Fleming v. Jefferson County Sch. Dist., 298 F.3d 918 (10th Cir. 2002)
S.G.. v. Sagreville Bd. of Educ., 33 F.3d 417 (3d Cir. 2003)
Scott v. Sch. Bd. of Alachua Cty., 324 F.3d 1246 (11th Cir. 2003)
Draudt v. Wooster Cisty Sch. Dist. Bd. of Educ., 246 F. Supp. 820
(N.D. Ohio 2003)
Phillips v. Oxford Separate Main Sch. Dist., 314 F. Supp.2d 643
(N.D. Miss. 2003)
Governor Wentworth Reg. Sch. V. Hendrickson, 421 F. Supp. 2d 410
(D. N.H. 2006).
BWA v. Farmington R-7 School Dist., 508 F. Supp. 2d 740
(E.D. Miss. 2007)
Wisniewiewski v. Bd. of Educ. of the Weedsport Central Sch. Dist., 494

F.3d 34 (2d Cir. 2007)
Lowery v. Euverard, 497 F. 3d 584 (6th Cir. 2007)
Barr v. Lafen, 538 F.3d 554 (6th Cir. 2008)
Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008)
Curry ex rel Curry v. Hensiner, 513 F.3d (6th Cir. 2008)
M.A.L. ex rel M.L. v. Kinsland, 543 F.3d 841 (6th Cir. 2008)
Corder v. Lewis Palmer Sch. Dist. No. 38, 566 F.3d 1219 (10th Cir. 2009)
A.M. ex rel. McAllum v. Cash, 585 F. 3d 214 (5th Cir. 2009)
Hardwick ex rel. Hardwick v. Heyward, 674 F. Supp. 2d 725
(D. S.C. 2009)
Defoe v. Spiva, 625 F.3d 324 (6th Cir. 2010)
DeFabio v. East Hampton Free Sch. District, 623 F.3d 71 (2d Cir. 2010)
Kowalski v. Berkeley County Schools, 652 F. 3d 565, (4th Cir. 2011)

Post-Secondary: 3/3/40—2/23/69

A) Protecting Post-Secondary Student Expression

Hammond v. South Carolina State College, 272 F. Supp. 947 (O.D. S.C. 1967)
Dickey v. Alabama State Board of Education, 273 F. Supp. 613 (M.D. Ala. 1967)
Snyder v. Board of Trustees of the University of Illinois, 286 F. Supp. 927
(N.D. Ill. 1968)
Dickson v. Sitterson, 280 F. Supp. 486 (M.D. N.C. 1968)

B) Protecting the Well-Being of Post-Secondary Students

No cases

C) Teaching Post-Secondary Students Acceptable Social Behaviors

No cases

D) Protecting the Post-Secondary School System

No cases

Post-Secondary: 2/24/69—1/12/88

A) Protecting Post-Secondary Student Expression

Snyder v. Bd. of Trustees of Univ. of Ill., 286 F. Supp. 922 (N.D. Ill. 1968)
Smith v. Univ. of Tenn., 300 F. Supp. 777 (N.D. Tenn. 1969)
Brooks v. Auburn Univ., 412 F.2d 1171 (5 th Cir. 1969)

Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970)
University of So. Miss. Chapter of the Miss. Civil Liberties Union v. University
of So. Miss., 452 F.2d 564 (5th Cir. 1971)
Trujillo v. Love, 322 F. Supp. 1266 (D. Col. 1971)
Healy v. James, 408 U.S. 169 (1972)
Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973)
Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973)
Papish v. Board of Curators of the University of Missouri, 410 U.S. 667 (1973)
Thonen v. Jenkins, 491 F.2d 722 (4th Cir. 1973)
Arrington v. Taylor, 380 F. Supp. 1348 (M.D. N.C. 1974)
Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975)
Widmar v. Vincent, 454 U.S. 263 (1981)
Stanley v. McGrath, 719 F.2d 279 (8th Cir. 1983)

B) Protecting the Well-Being of Post-Secondary Students

No cases

C) Teaching Post-Secondary Students Acceptable Social Behaviors

No cases

D) Protecting the Post-Secondary School System

Norton v. Discipline Comm. of East Tenn. State Univ., 419 F.2d 195
(6th Cir. 1969)
Clemson Univ. Vietnam Moratorium Comm. v. Clemson Univ., 306 F.
Supp. 129 (A.D. S.C. 1969)
Bayless v. Martine, 430 F.2d 873 (5th Cir. 1970)
Sword v. Fox, 446 F.2d 1091 (4th Cir. 1971)

Post-Secondary: 1/13/88—2011

A) Protecting Post-Secondary Student Expression

John DOE v. Univ. of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989)
Lueth v. St. Clair County Comm. College, 732 F. Supp. 1410 (E.D. Mich. 1990)
Carroll v. Blinken, 957 F.2d 991 (2d Cir. 1992)
Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992)
Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819 (1995)
Board of Regents of Univ. of Wis. System v. Southworth, 529 US 217 (2000)
Kincaid v. Gibson, 236 F. 3d 342 (6th Cir. 2001)
Welker v. Cicerone, 174 F. Supp.2d 1055 (C.D. Col. 2001)
Bair v. Shippensburg Univ. 280 F. Supp.2d 357 (M.D. Penn. 2003)

Hosty v. Carter, 412 F. 3d 731 (7th Cir. 2005)
Amidon v. Student Assoc. of the State Univ. of N.Y. at Albany, 508 F.3d 94
(2d Cir. 2007)
DeJohn v. Temple Univ., 537 F.3d 301 (3rd Cir. 2008)
McCauley v. Univ. of the Virgin Islands, 618 F.3d 232 (3d Cir. 2010)

B) Protecting the Well-Being of Post-Secondary Students

No cases

C) Teaching Post-Secondary Students Acceptable Social Behaviors

No cases

D) Protecting the Post-Secondary School System

Alabama Student Party v. Student Government Ass'n, 867 F.2d 1344, 1347
(11th Cir. 1989)
Carroll v. Blinken, 957 F.2d 991 (2d Cir. 1992)
Board of Regents of Univ. of Wis. System v. Southworth, 529 US 217 (2000)
Brown v. Li, 308 F. 3d 939 (9th Cir. 2002)
Flint v. Dennison, 361 F. Supp.2d 1215 (D. Mont. 2005)
O'Neal v. Falcon, 668 F. Supp.2d 979 (W.D. Tex. 2009)
Christian Legal Soc. Chapter of Univ. of Cal., Hastings v. Martinez, 319 Fed.
Appx. 645 (2010)

APPENDIX C

K-12 RATIONALES CASE LISTS

3/3/40—2/23/69

A) Protecting K-12 Student Expression

1 – Fostering an environment of robust debate

No cases

2 – Providing access for all voices to be heard

Burnside v. Byers, 363 F.2d 744 (5th Cir. 1966)

3 – Preparing students for self-governance and citizenship

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)

4 – Protecting viewpoint neutrality

No cases

5 – Protecting free speech in public or limited public forums

No cases

6 – Protecting speech from prior restraint

No cases

7 – Protecting non-disruptive, off-campus speech

No cases

8 – Protecting pure speech

No cases

9 -- Protecting speech from overbreadth and/or vagueness

No cases

B) Protecting the Well-Being of K-12 Students

1 – Taking age into consideration

No cases

2 – Recognizing that students are often a “captive audience”

No cases

3 – Considering the sensitivity of topics

No cases

C) Teaching K-12 Students Acceptable Social Behaviors

1 – Teaching civility

No cases

2 – Teaching good taste

No cases

3 – Teaching the boundaries of socially appropriate behaviors

Baker v. Downey City Board of Education, 307 F. Supp. 517
(C.D. Cal. 1969)

4 – Awakening students to cultural values

Minersville School Dist., Bd. of Educators of Minersville Sch. Dist. V.
Gobitis, 310 U.S. 586 (1940).

D) Protecting the K-12 School System

1 – Avoiding controversy

No cases

2 – Protecting the right of schools to regulate speech in non-public forums

No cases

3 – Maintaining discipline and order

Blackwell v. Issaquena County Board of Education, 363 F.2d 749
(5th Cir. 1966)

Scoville v. Board of Ed. of Joliet Tp. HS Dist. 204, County of Will, State
of Ill., 286 F. Supp. 988 (N.D. Ill. 1968)

4 – Confirming the right of the school to speak for itself/control message

No cases

5 – Controlling the curriculum

No cases

6 – Promulgating reasonable rules

No cases

7 – Controlling expression in school-sponsored activities

No cases

2/24/69—1/12/88

A) Protecting K-12 Student Expression

1 – Fostering an environment of robust debate

Reineke v. Cobb County School District, 484 F. Supp. 1252
(N.D. Ga. 1980)

2 – Providing access for all voices to be heard

Bayer v. Kinzler, 383 F. Supp. 1164 (E.D. NY 1974)

3 – Preparing students for self-governance and citizenship

Butts v. Dallas Independent School District, 436 F.2d 728 (5th Cir. 1971)

4 – Protecting viewpoint neutrality

No cases

5 – Protecting free speech in public or limited public forums

Zucker v. Panitz, 299 F. Supp. (S.D. NY 1969)
Gambino v. Fairfax County School Board, 564 F. 2d 157 (4th Cir. 1977)
Stanton v. Brunswick School Department, 577 F. Supp. 1560
(D. Me. 1984)

6 – Protecting speech from prior restraint

Eisner v. Stamford Board of Education, 40 F.2d 803 (2d Cir. 1971)
Eisner v. Stamford Board of Education, 40 F.2d 803 (2d Cir. 1971)
Sullivan v. Houston Ind. Sch. Dist., 333 F. Supp. 1149 (S.D. Tex. 1971)

7 – Protecting non-disruptive, off-campus speech

Thomas v. Board of Education, Granville Central School District, 607 F.
2d 1043 (2d Cir. 1979)

8 – Protecting speech from overbreadth and/or vagueness

Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971)
Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972)
Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972)
Shanley v. Northeast Ind. Sch. Dist., Bexar County, Tex., 462 F.2d 960
(5th Cir. 1972)
Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973)
Nitzberg v. Parks, 525 F. 2d 378 (4th Cir. 1975)
Pliscou v. Holtville Unified School Dist., 411 F.Supp. 842
(S.D. Cal. 1976)

9 – Protecting pure speech

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969)
Karp v. Becken, 477 F.2d 171 (9th Cir. 1973)

B) Protecting the Well-Being of K-12 Students

1 – Taking age into consideration

No cases

2 – Recognizing that students are often a “captive audience”

No cases

3 – Considering the sensitivity of topics

Trachtman v. Anker, 563 F. 2d 512 (2d Cir. 1977)
Williams v. Spencer, 622 F. 2d 1200 (4th Cir. 1980)

C) Teaching K-12 Students Acceptable Social Behaviors

1 – Teaching civility

No cases

2 – Teaching good taste

No cases

3 – Teaching the boundaries of socially appropriate behaviors

Bethel v. Fraser, 478 U.S. 675 (1986)

4 – Awakening students to cultural values

No cases

D) Protecting the K-12 School System

1 – Avoiding controversy

No cases

2 – Protecting the right of schools to regulate speech in non-public forums

No cases

3 – Maintaining discipline and order

Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979)

Dodd v. Rambis, 535 F. Supp. 23 (S.D. Ind. 1981)

4 – Confirming the right of the school to speak for itself/control message

No cases

5 – Controlling the curriculum

No cases

6 – Promulgating reasonable rules

Katz v. McAuley, 438 F.2d 1058 (2d Cir. 1971).

Bystrom (Cory) v. Fridley High School, 822 F. 2d 747 (8th Cir. 1987)

7 – Controlling expression in school-sponsored activities

No cases

1/13/88—2011

A) Protecting K-12 Student Expression

1 – Fostering an environment of robust debate

Beussink v. Woodland R0IV Sch. Dist., 30 F. Supp.2d 1175

(E.D. Miss. 1998)

Chambers v. Babbit, 145 F.Supp.2d 1068 (D. C. Minn. 2001)

2 – Providing access for all voices to be heard

Sypniewski v. Warren Hills Regional Bd. of Educ., 307 F.3d 243

(3d Cir. 2002)

3 – Preparing students for self-governance and citizenship

Clark v. Dallas, 806 F. Supp. 116 (N.D. Tex. 1992)

4 – Protecting viewpoint neutrality

Castornia v. Madison County Sch. Bd. 246 F.3d 536 (6th 2001)
Barber Ex Rel. Barber v. Dearborn Public Schools, 286 F. Supp. 2d 847
(E.D. Mich. 2003).

5 – Protecting free speech in public or limited public forums

Bragg v. Swanson, 371 F. Supp.2d 814 (S.D. W. Va. 2005)

6 – Protecting speech from prior restraint

Burch v. Barker, 861 F. 2d 1149 (9th Cir. 1988)
Nelson v. Moline Sch. Dist. No. 40, 725 F. Supp 965 (C.D. Ill. 1989)
Rivera v. East Otero School District R-1, 721 F. Supp. 1189, 1194
(D.Colo. 1989)
Seamons v. Snow, 206 F.3d 1021 (10th Cir. 2000)
Griggs v. Fort Wayne Sch. Dist., 359 F. Supp.2d 731 (N.D. Ind. 2005)

7 – Protecting non-disruptive, off-campus speech

Coy v. Board of Education of North Canton Schools, 205. F. Supp. 2d
791 (N.D. Ohio 2002)
Layshock v. Hermitage School Dist., 650 F.3d 205 (3d Cir. 2011).
J.S. v. Blue Mountain Sch. Dist., No. 08-4138 (3d Cir. June 13, 2011)
(Slip Opinion)

8 – Protecting speech from overbreadth and/or vagueness

M. B. v. Liverpool Central Sch. Dist., 487 F. Supp.2d 117
(N.D. N.Y. 2007)

9 – Protecting pure speech

No cases

B) Protecting the Well-Being of K-12 Students

1 – Taking age into consideration

Muller v. Jefferson Lighthouse School, 98 F. 3d 1530
(7th Cir. 1996)

2 – Recognizing that students are often a “captive audience”

No cases

3 – Considering the sensitivity of topics

Morse v. Frederick, 551 U.S. 393 (2007)

C) Teaching K-12 Students Acceptable Social Behaviors

1 – Teaching civility

Posthumus v. Bd. of Educ. Of the Mona Shores Public Schools, 80 F.
Supp.2d 891 (W.D. Mich. 2005)

2 – Teaching good taste

No cases

3 – Teaching the boundaries of socially appropriate behaviors

No cases

4 – Awakening students to cultural values

No cases

D) Protecting the K-12 School System

1 – Avoiding controversy

No cases

2 – Protecting the right of schools to regulate speech in non-public forums

Phillips v. Oxford Separate Main Sch. Dist., 314 F. Supp.2d 643
(N.D. Miss. 2003)
M.A.L. ex rel M.L. v. Kinsland, 543 F.3d 841 (6th Cir. 2008)

3 – Maintaining discipline and order

Boucher v. School Bd. of the School Dist. of Greenfield, 134 F.3d 821
(7th Cir. 1998)
LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001)
S.C. v. Sagreville Bd. of Educ., 33 F.3d 417 (3d Cir. 2003)
Scott v. Sch. Bd. of Alachua Cty., 324 F.3d 1246 (11th Cir. 2003)
Governor Wentworth Reg. Sch. V. Hendrickson, 421 F. Supp. 2d 410
(D. N.H. 2006).
BWA v. Farmington R-7 School Dist., 508 F. Supp. 2d 740
(E.D. Miss. 2007)
Wisniewiewski v. Bd. of Educ. of the Weedsport Central Sch. Dist., 494
F.3d 34 (2d Cir. 2007)
Barr v. Lafen, 538 F.3d 554 (6th Cir. 2008)
Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008)
A.M. ex rel. McAllum v. Cash, 585 F. 3d 214 (5th Cir. 2009)
Hardwick ex rel. Hardwick v. Heyward, 674 F. Supp. 2d 725
(D. S.C. 2009)
Defoe v. Spiva, 625 F.3d 324 (6th Cir. 2010)
DeFabio v. East Hampton Free Sch. District, 623 F.3d 71 (2d Cir. 2010)
Kowalski v. Berkeley County Schools, 652 F. 3d 565 (4th Cir. 2011)

4 – Confirming the right of the school to speak for itself/control message

Lowery v. Euverard, 497 F. 3d 584 (6th Cir. 2007)

5 – Controlling the curriculum

Virgil v. School Board of Columbia County, 862 F.2d 1517
(11th Cir. 1989)
Settle v. Dickson County School Bd., 53 F. 3d 152 (6th Cir. 1995)
Curry ex rel Curry v. Hensiner, 513 F.3d (6th Cir. 2008)

6 – Promulgating reasonable rules

Draudt v. Wooster Cisty Sch. Dist. Bd. of Educ., 246 F. Supp. 820
(N.D. Ohio 2003)

7 – Controlling expression in school-sponsored activities

Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988)

Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989)

Bull v. Dardanelle Public School Dist. No. 15, 745 F. Supp. 1455

(E.D. Ark. 1990)

McCann v. Fort Zumwalt Sch. Dist., 50 F. Supp.2d 918 (E.D. Mo. 1999)

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

Corder v. Lewis Palmer Sch. Dist. No. 38, 566 F.3d 1219 (10th Cir. 2009)

APPENDIX D
POST-SECONDARY RATIONALES CASE LISTS

3/3/40—2/23/69

A) Protecting Post-Secondary Student Expression

1 – Fostering an environment of robust debate

No cases

2 – Providing access for all voices to be heard

No cases

3 – Preparing students for self-governance and citizenship

No cases

4 – Protecting viewpoint neutrality

No cases

5 – Protecting free speech in public or limited public forums

No cases

6 – Determining that age and maturity require special consideration

No cases

7 – Protecting speech from prior restraint

Hammond v. South Carolina State College, 272 F. Supp. 947
(O.D. S.C. 1967)

8 – Protecting speech from overbreadth and/or vagueness

Snyder v. Bd. of Trustees of the Univ. of Ill., 286 F. Supp. 927
(N.D. Ill. 1968)
Dickson v. Sitterson, 280 F. Supp. 486 (M.D. N.C. 1968)

9 – Protecting pure speech

Dickey v. Alabama State Board of Education, 273 F. Supp. 613
(M.D. Ala. 1967).

B) Protecting the Well-Being of Post-Secondary Students

1 – Taking age into consideration

No cases

2 – Recognizing that students are often a “captive audience”

No cases

3 – Considering the sensitivity of topics

No cases

C) Teaching Post-Secondary Students Acceptable Social Behaviors

1 – Teaching civility

No cases

2 – Teaching good taste

No cases

3 – Teaching the boundaries of socially appropriate behaviors

No cases

4 – Awakening students to cultural values

No cases

D) Protecting the Post-Secondary School System

1 – Avoiding controversy

No cases

2 – Protecting the right of schools to regulate speech in non-public forums

No cases

3 – Maintaining discipline and order

No cases

4 – Confirming the right of the school to speak for itself/control message

No cases

5 – Controlling the curriculum

No cases

6 – Promulgating reasonable rules and conduct

No cases

7 – Controlling expression in school-sponsored activities

No cases

2/24/69—1/12/88

A) Protecting Post-Secondary Student Expression

1 – Fostering an environment of robust debate

Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973)

2 – Providing access for all voices to be heard

University of So. Miss. Chapter of the Miss. Civil Liberties Union v.
University of So. Miss., 452 F.2d 564 (5th Cir. 1971)
Healy v. James, 408 U.S. 169 (1972)

3 – Preparing students for self-governance and citizenship

No cases

4 – Protecting viewpoint neutrality

Channing Club v. Board of Regents of Texas Tech University, 317
F. Supp. 688 (N.D. Tex. 1970)
Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973)
Papish v. Board of Curators of the University of Missouri, 410 U.S. 667
(1973)
Thonen v. Jenkins, 491 F.2d 722 (4th Cir. 1973)
Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975)
Stanley v. McGrath, 719 F.2d 279 (8th Cir. 1983)

5 – Protecting speech in public or limited public forums

Trujillo v. Love, 322 F. Supp. 1266 (D. Col. 1971)
Widmar v. Vincent, 454 U.S. 263 (1981)

6 – Determining that age and maturity require special consideration

No cases

7 – Protecting speech from prior restraint

Smith v. Univ. of Tenn., 300 F. Supp. 777 (N.D. Tenn. 1969)
Brooks v. Auburn Univ., 412 F.2d 1171 (5th Cir. 1969)
Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970)

8 – Protecting speech from overbreadth and/or vagueness

No cases

9 – Protecting pure speech

Korn v. Elkins 317 F. Supp. 138 (D. Md. 1970)

B) Protecting the Well-Being of Post-Secondary Students

1 – Taking age into consideration

No cases

2 – Recognizing that students are often a “captive audience”

No cases

3 – Considering the sensitivity of topics

No cases

C) Teaching Post-Secondary Students Acceptable Social Behaviors

1 – Teaching civility

No cases

2 – Teaching good taste

No cases

3 – Teaching the boundaries of socially appropriate behaviors

No cases

4 – Awakening students to cultural values

No cases

D) Protecting the Post-Secondary School System

1 – Avoiding controversy

No cases

2 – Protecting the right of schools to regulate speech in non-public forums

No cases

3 – Maintaining discipline and order

Norton v. Discipline Comm. of East Tenn. State Univ., 419 F.2d 195
(6th Cir. 1969)

4 – Confirming the right of the school to speak for itself/control message

No cases

5 – Controlling the curriculum

No cases

6 – Promulgating reasonable rules and conduct

Clemson Univ. Vietnam Moratorium Comm. v. Clemson Univ., 306 F.
Supp. 129 (A.D. S.C. 1969)
Bayless v. Martine, 430 F.2d 873 (5th Cir. 1970)
Sword v. Fox, 446 F.2d 1091 (4th Cir. 1971)
Sword v. Fox, 446 F.2d 1091 (4th Cir. 1971)
Arrington v. Taylor, 380 F. Supp. 1348 (M.D. N.C. 1974)

7 – Controlling expression in school-sponsored activities

No cases

1/13/88—2011

A) Protecting Post-Secondary Student Expression

1 – Fostering an environment of robust debate

No cases

2 – Providing access for all voices to be heard

Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992)
Welker v. Cicerone, 174 F. Supp.2d 1055 (C.D. Col. 2001)

3 – Preparing students for self-governance and citizenship

No cases

4 – Protecting viewpoint neutrality

Board of Regents of Univ. of Wis. System v. Southworth, 529 US 217
(2000)

Amidon v. Student Assoc. of the State Univ. of N.Y. at Albany, 508 F.3d
94 (2d Cir. 2007)

5 – Protecting speech in public or limited public forums

Lueth v. St. Clair County Comm. College, 732 F. Supp. 1410
(E.D. Mich. 1990)

Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992)

Carroll v. Blinken, 957 F.2d 991 (2d Cir. 1992)

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

Kincaid v. Gibson, 236 F. 3d 342 (6th Cir. 2001)

Hosty v. Carter, 412 F. 3d 731 (7th Cir. 2005)

6 – Determining that age and maturity require special consideration

No cases

7 – Protecting speech from prior restraint

No cases

8 – Protecting speech from overbreadth and/or vagueness

John DOE v. Univ. of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989)

Bair v. Shippensburg Univ., 280 F. Supp.2d 357 (M.D. Penn. 2003)

DeJohn v. Temple Univ., 537 F.3d 301 (3rd Cir. 2008)

McCauley v. Univ. of the Virgin Islands, 618 F.3d 232 (3d Cir. 2010)

9 – Protecting pure speech

No cases

B) Protecting the Well-Being of Post-Secondary Students

1 – Taking age into consideration

No cases

2 – Recognizing that students are often a “captive audience”

No cases

3 – Considering the sensitivity of topics

No cases

C) Teaching Post-Secondary Students Acceptable Social Behaviors

1 – Teaching civility

No cases

2 – Teaching good taste

No cases

3 – Teaching the boundaries of socially appropriate behaviors

No cases

4 – Awakening students to cultural values

No cases

D) Protecting the Post-Secondary School System

1 – Avoiding controversy

No cases

2 – Protecting the right of schools to regulate speech in non-public forums

Flint v. Dennison, 361 F. Supp.2d 1215 (D. Mont. 2005)

Christian Legal Soc. Chapter of Univ. of Cal., Hastings v. Martinez, 319
Fed. Appx. 645 (2010)

Alabama Student Party v. Student Government Ass’n, 867 F.2d 1344
(11th Cir. 1989)

Alabama Student Party v. Student Government Ass'n, 867 F.2d 1344
(11th Cir. 1989)
Carroll v. Blinken, 957 F.2d 991 (2d Cir. 1992)

3 – Maintaining discipline and order

No cases

4 – Confirming the right of the school to speak for itself/control message

No cases

5 – Controlling the curriculum

Brown v. Li, 308 F. 3d 939 (9th Cir. 2002)
O'Neal v. Falcon, 668 F. Supp.2d 979 (W.D. Tex. 2009)

6 – Promulgating reasonable rules and conduct

Board of Regents of Univ. of Wis. System v. Southworth, 529 US 217
(2000)

7 – Controlling expression in school-sponsored activities

No cases

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