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Hazelwood v. Kuhlmeier and the University: Why the High School Standard is Here to Stay

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HAZELWOOD V. KUHLMEIER AND THE UNIVERSITY: WHY THE HIGH SCHOOL STANDARD IS HERE TO STAY

*Christopher N. LaVigne**

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INTRODUCTION

It is said that the core value of American colleges and universities is the existence of an environment free from restraint on thought other than that which may be imposed by competing, contrasting, or conflicting thought and expression of other scholars

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and students.¹ The Supreme Court has echoed this theory, hailing the university as the quintessential marketplace of ideas.² American colleges and universities, however, are also charged with the potentially incompatible task of instilling the values and self-restraint necessary to create productive members of society.³ Over the past two decades, the desire to balance these tasks has produced a “philosophical furor over whether the group is more important than the individual, whether the sensibilities of minorities and women should be elevated over the freedom of expression, and whether ‘equality’ should prevail over robust discourse” in universities.⁴

There has been wide-ranging debate concerning freedom of thought and expression in the university and it has taken many forms, including concerns about the status of academic freedom,⁵ allegations of bias in the classroom,⁶ criticism of and support for

1. See, e.g., Gerard V. Bradley, *Religion at a Public University*, 49 WM. & MARY L. REV. 2217, 2257 (2008) (“Academic exchanges operate according to norms of relentless, perpetual inquiry.”); William R. Greiner, *Speech in, for, and by(?) the “Multiversity”*: *Reflections of a Recovering President*, 54 BUFF. L. REV. 863, 871 (2006) (examining John Henry Cardinal Newman’s *The Idea of a University*, in 28 HARV. CLASSICS 31, 39 (Charles W. Eliot ed., 1910), and summarizing that today’s university “is and must be a free and open forum in which its people can engage in an unfettered search for knowledge, wherever that may lead”); see also David van Mill, *Freedom of Speech*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter ed. 2002), <http://plato.stanford.edu/archives/win2002/entries/freedom-speech/> (last visited Sept. 18, 2008) (noting that one of the main values of the university is the exchange of ideas).

2. See, e.g., Healy v. James, 408 U.S. 169, 180-81 (1972) (“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.”). The rationale for the marketplace metaphor, no doubt familiar to students and scholars of the First Amendment, rests on the idea “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” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

3. See Virginia J. Nimick, *Schoolhouse Rocked: Hosty v. Carter and the Case against Hazelwood*, 14 J.L. & POL’Y 941, 942 (2006); see also *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 672 (1973) (Burger, C.J., dissenting) (noting that “a university is not merely an arena for the discussion of ideas . . . [but] is also an institution where [students] learn the self-restraint necessary to the functioning of a civilized society and understand the need for those external restraints to which we must all submit if group existence is to be tolerable”).

4. Kenneth Lasson, *Political Correctness Askew: Excesses in the Pursuit of Minds and Manners*, 63 TENN. L. REV. 689, 691 (1996).

5. See Neil W. Hamilton, *Foreword: Symposium on Zealotry and Academic Freedom*, 22 WM. MITCHELL L. REV. 333 (1996).

6. See Robert M. O’Neil, *Bias, “Balance,” and Beyond: New Threats to Academic Freedom*, 77 U. COLO. L. REV. 985 (2006).

political correctness,⁷ and arguments over the development and use of hate speech codes.⁸ Despite this scholarly debate, the issue of college student speech⁹ has been played out and decided in the courts.¹⁰ Since 1972, the Supreme Court has decided a number of cases dealing with the speech rights of college students.¹¹ These precedents have repeatedly upheld the free speech rights of students and student organizations.¹² Commentators see the precedent as sending a “clear message that the First Amendment [cannot] be avoided or watered down in the university context, [and that the] rights of college students [are equal to] those of the adult population at large.”¹³

7. See Lasson, *supra* note 4, at 718-21.

8. See generally TIMOTHY C. SHIELL, *CAMPUS HATE SPEECH ON TRIAL* (1998).

9. There are different types of speech on college and university campuses, each with its own regulations. See AM. ASS'N UNIV. PROFESSORS, *DECLARATION OF PRINCIPLES* (1915), reprinted in *ACADEMIC FREEDOM AND TENURE* app. A, at 157-76 (Louis Joughin ed., 1967) (emphasizing the crucial function in allowing professors to engage in their socially valuable search for truth free from political or other external constraints, as professors are supposed to be impartial experts progressively gaining objective knowledge); Greiner, *supra* note 1, at 869 (arguing that speech by university administrative officials—for example, university presidents—is speech of the university and, as such, is to be regulated accordingly; such agents “can speak with authority . . . on matters regarding university governance, management, and fundamental principles, but beyond that the university has little or no institutional competence to take positions on other matters”).

10. See discussion *infra* Parts I-II.

11. See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667 (1973); *Healy v. James*, 408 U.S. 169 (1972).

12. See *Southworth*, 529 U.S. at 233-34 (upholding the university's right to use a mandatory activity fee to subsidize all student groups, even ones with goals and purposes with which students may disagree); *Rosenberger*, 515 U.S. at 843-45 (upholding the right of a Christian student group to receive funding for printing from the university, where the university had a general policy of paying such costs for student groups); *Widmar*, 454 U.S. at 265, 277 (finding that the university discriminated wrongly against a religious student group by denying it access to university buildings and grounds to conduct its meetings, even though that group previously had permission and other groups still had permission); *Papish*, 410 U.S. at 671 (finding that a university's actions in expelling a student for distributing an independent newspaper containing offensive political material could not be justified under the First Amendment); *Healy*, 408 U.S. at 184 (finding a university's denial of recognition to a student group was a form of prior restraint and imposing a heavy burden on the university to justify such restraint).

13. Michael O. Finnigan, Jr., *Extra! Extra! Read All About It! Censorship at State Universities*, 74 U. CIN. L. REV. 1477, 1482 (2006).

The Supreme Court has also decided a line of cases dealing with high school student speech rights.¹⁴ These cases are often seen as distinct from the Court's college speech jurisprudence¹⁵ and they apply a more restrictive framework to evaluate student speech.¹⁶ Unlike the college speech jurisprudence, the Court has consistently upheld the ability of primary and secondary schools to regulate student expression.¹⁷

*Hazelwood School District v. Kuhlmeier*¹⁸ was one of the more recent decisions in the Court's line of high school speech cases. In this case, the Court evaluated the administrative control of a high school newspaper and held that public school officials could control speech in school-sponsored activities if they did so for legitimate pedagogical reasons.¹⁹ While the Court reserved the question of whether this standard should be applicable at the university level,²⁰ various federal circuit courts have since applied this speech-restrictive standard to student speech at colleges and universities.²¹

In light of these circuit court opinions, there has been considerable debate about whether and to what extent the *Hazelwood* framework should apply to college and university students.²² Most

14. See *Morse v. Frederick*, 127 S. Ct. 2618 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

15. See Nimick, *supra* note 3, at 982-83 (noting that the Supreme Court has regularly highlighted the distinction between the constitutional rights of high school students and those of college students).

16. See, e.g., Finnigan, *supra* note 13, at 1494 (noting the reasons why the Supreme Court has allowed greater restrictions on speech in the high school environment).

17. See *Morse*, 127 S. Ct. at 2625 (upholding the right of a high school to punish a student who unfurled a banner displaying "Bong Hits for Jesus" during a procession of the Olympic torch); *Hazelwood*, 484 U.S. at 272 (upholding the right of a school to require a student newspaper to submit to prior review of the paper by school personnel before it is printed); *Fraser*, 478 U.S. at 685 (upholding a high school's suspension of a student who gave a speech, that the Court described as an elaborate, graphic, and sexual metaphor, before a student assembly).

18. *Hazelwood*, 484 U.S. at 260.

19. See *id.* at 273.

20. See *id.* at 273 n.7.

21. See discussion *infra* Part II.A.

22. See Louis M. Benedict, *The First Amendment and College Student Newspapers: Applying Hazelwood to Colleges and Universities*, 33 J.C. & U.L. 245 (2007); Edward L. Carter et al., *Applying Hazelwood to College Speech: Forum Doctrine and Government Speech in the U.S. Courts of Appeals*, 48 S. TEX. L. REV. 157, 160 (2006); Finnigan, *supra* note 13; Jessica Golby, *The Case Against Extending Hazelwood v. Kuhlmeier's Public Forum Analysis to the Regulation of University Student Speech*, 84 WASH. U. L. REV. 1263, 1279 (2006); Samuel P. Jordan, *Viewpoint Restrictions and School-Sponsored Student Speech: Avenues for Heightened Protection*, 70 U. CHI. L. REV. 1555, 1566 (2003); Karyl Roberts Martin, *Demoted to High School: Are College Students' Free Speech Rights the Same as Those of High School Students?*, 45 B.C. L.

scholars have concluded, for various reasons, that the more speech-restrictive standard that the Supreme Court applied to high school students in *Hazelwood* should not apply to university students.²³ This criticism reached fever pitch following a recent decision of the U.S. Court of Appeals for the Seventh Circuit,²⁴ in which the *Hazelwood* framework was applied to a university mandate that a student newspaper submit to the prior review and approval of university officials before publication.²⁵

Critics argue that the application of *Hazelwood* to universities goes against Supreme Court precedent and recommend that circuit judges heed the distinction between high school and college student speech until the Supreme Court resolves the matter.²⁶ This

REV. 173 (2003); Laura Merritt, *How the Hosty Court Muddled First Amendment Protections by Misapplying Hazelwood to University Student Speech*, 33 J.C. & U.L. 473, 493-94 (2007); Nimick, *supra* note 3; Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the "College Hazelwood" Case*, 68 TENN. L. REV. 481, 482 (2001); Jennifer Ross, *Keeping Speech Free in the College Marketplace of Ideas: California Legislation as an Imperfect Solution to Censorship by University Administrators*, 41 U.S.F. L. REV. 727 (2007); Chris Sanders, *Censorship 101: Anti-Hazelwood Laws and the Preservation of Free Speech at Colleges and Universities*, 58 ALA. L. REV. 159 (2006); Greg C. Tenhoff, *Censoring the Public University Student Press: A Constitutional Challenge*, 64 S. CAL. L. REV. 511 (1991); R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793 (2007); R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. ILL. U. L.J. 175, 198 (2007).

23. See Nimick, *supra* note 3, at 982-85 (arguing that the *Hazelwood* test should not be applicable in the university setting due to the different age and maturity levels of students and due to the different missions of high schools and colleges); *infra* notes 160-63 and accompanying text.

24. *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005).

25. See, e.g., Finnigan, *supra* note 13, at 1492-96 (explaining various reasons why *Hosty* was wrongly decided); Nimick, *supra* note 3 (setting forth several arguments questioning the ruling in *Hosty*).

26. See *Carter*, *supra* note 22, at 182 (concluding that whether applications of *Hazelwood* to the university context are correct awaits another Supreme Court pronouncement and that, in the meantime, jurists should consider whether the analogy of university students to their high school counterparts is justified in light of real differences in maturity levels and expectations of high school and college students); Finnigan, *supra* note 13, at 1496 (concluding that applying *Hazelwood* to speech in the university context represents a significant departure from established First Amendment rights of college students, and that the Supreme Court erred by denying certiorari to the Seventh Circuit's application of *Hazelwood* to college student expression in *Hosty*, 412 F.3d 731); Golby, *supra* note 22, at 1286 (noting that applying *Hazelwood* to colleges ignores the significant distinctions the Supreme Court has consistently recognized between high school and college student expression and proposing judicial tests that provide clear standards and protect the long tradition of the university as a "marketplace of ideas"); Jordan, *supra* note 22, at 1579 (recommending two alternative judicial tests to the *Hazelwood* framework that would better protect student speech); Merritt, *supra* note 22, at 496-97 (noting that application of *Hazelwood* to

Note argues that, while the Supreme Court's decisions in the college context have been protective of students' free speech rights, there are similarities between the *Hazelwood* opinion and the Court's recent university speech decisions that have increasingly recognized the power of university officials to regulate student expression.

Those who criticize the application of *Hazelwood* to college student speech rely primarily on two of the Court's early college student speech decisions for the notion that college student speech rights are the same as those of adults in the community at large. The problem with this reliance is that, while those early cases do not justify the application of *Hazelwood* to the college context, the Court has decided several recent cases by applying virtually the same test to analyze college student speech that the courts of appeals have been applying since *Hazelwood*. Thus, the circuit courts' application of *Hazelwood* to college student speech cannot be considered wrong in the sense that they are departing from the Supreme Court's view of college student speech rights. In light of this, the *Hazelwood* framework remains applicable to university student speech in a majority of circuits, and those circuits that have not heard the issue are likely to follow suit and apply *Hazelwood* in the university context. Student free speech advocates, then, should consider extrajudicial remedies if they wish to ensure increased protection for students' freedom of expression in colleges and universities.

Part I of this Note examines the Supreme Court's line of college student speech cases and its decision in *Hazelwood School District v. Kuhlmeier*. Part II explores several important circuit court decisions that have applied *Hazelwood* to cases involving university student speech. Part III evaluates scholarly reaction to these circuit decisions, including the claim that the application of *Hazelwood* to the university context departs from well-established

colleges breaks with a long tradition of Supreme Court protection of First Amendment rights of college and university students and recommending, in the absence of a Supreme Court grant of certiorari, that future courts should recognize the flaws in applying *Hazelwood* to university settings and recognize the broad First Amendment protections that university students have historically enjoyed); Nimick, *supra* note 3, at 996 (arguing that applying *Hazelwood* to student speech in the university overrules more than thirty years of First Amendment jurisprudence and ignores differences in age and maturity levels of high school and college students and the different missions of high schools and colleges, while recommending that courts limit *Hazelwood* to the high school setting); Peltz, *supra* note 22, at 555 (recommending various avenues students can pursue in court, to avoid further extension of the *Hazelwood* doctrine to college student speech).

precedent granting college students broad free speech rights. Part IV argues that the application of *Hazelwood* to college student speech is actually supported by recent Supreme Court decisions and that there is good reason to believe other courts considering the issue will also apply *Hazelwood's* principles. This Note concludes that the federal courts may not be the best place for student free speech proponents to look if they wish to uphold and expand student speech rights, and recommends that they consider looking elsewhere for relief.

I. SUPREME COURT UNIVERSITY SPEECH JURISPRUDENCE

A. Early Cases

In 1972, the Supreme Court decided *Healy v. James*,²⁷ and found that Central Connecticut State College violated the First Amendment rights of students who wanted to form a local chapter of Students for a Democratic Society (“SDS”) by denying the group recognition as a campus organization.²⁸ The late 1960s and early 1970s were characterized by a climate of unrest on many college campuses, during which SDS chapters across American campuses served as a “catalytic force.”²⁹ In light of this, the president of the college denied official recognition to a proposed SDS chapter on Central Connecticut’s campus, stating that he found the organization’s philosophy “antithetical to the school’s policies,” and that he doubted this local chapter would be independent from the infamous national chapter (reflecting his fear that the local chapter would adopt the disruptive practices of other chapters).³⁰

The Court found that “colleges and universities are not enclaves immune from the sweep of the First Amendment,” and that the First Amendment protections afforded college students should comport with those in the community at large.³¹ The Court noted that the “college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas’” and that the principle of academic freedom should be safeguarded.³² Specifically, the Court held that once a student group filed a proper application for campus recognition, the burden was placed on the college to justify its

27. 408 U.S. 169 (1972).

28. *See id.* at 187.

29. *See id.* at 171.

30. *See id.* at 174-75.

31. *See id.* at 180.

32. *See id.* at 180-81 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

decision of rejection.³³ Noting that the college's action denying SDS recognition was a form of prior restraint,³⁴ the Court found a heavy burden rested on the college to demonstrate the appropriateness of their action.³⁵

This heavy burden might be met, however, by a college's legitimate interest in preventing disruption on campus.³⁶ The Court acknowledged the duty of schools to balance the need for First Amendment protections with the comprehensive authority of school officials to prescribe and control conduct, to maintain order within the school.³⁷ Accordingly, the Court reasoned that a college "may have, among its requirements for recognition, a rule that prospective groups affirm that they intend to comply with reasonable campus regulations."³⁸

A year after *Healy*, the Court decided *Papish v. Board of Curators of the University of Missouri*, a case involving the expulsion of a graduate student from the University of Missouri School of Journalism for distributing an outside private newspaper "containing forms of indecent speech" in violation of university bylaws.³⁹ The cover of the newspaper showed a political cartoon depicting policemen raping the Statue of Liberty and Goddess of Justice, with a caption underneath which read, "With Liberty and Justice for All."⁴⁰ The paper also included a story entitled "M—F— Acquitted," which discussed the trial of a city youth who was a member of an organization known as "Up Against the Wall, M—F—."⁴¹

In a per curiam opinion, the Court found that while schools have an undoubted authority to enforce reasonable rules governing student conduct, the mere dissemination of ideas, no matter how offensive, may not be shut off in the name of "conventions of decency."⁴² After determining that neither the political cartoon

33. *See id.* at 184.

34. "Prior restraint" refers only to distinctive methods of regulating expression. A classic example of a prior restraint is a law that forces newspapers to obtain pre-approval from the government before any publication. *See Lovell v. Griffin*, 303 U.S. 444, 451-52 (1972) (finding an ordinance prohibiting the distribution of handbooks, advertising, or literature within the city of Griffin, Georgia, without obtaining permission of the City Manager to be invalid on its face as an unreasonable form of prior restraint); *supra* text accompanying note 25.

35. *See Healy*, 408 U.S. at 184.

36. *See id.*

37. *See id.* at 180.

38. *Id.* at 193.

39. 410 U.S. 667 (1973).

40. *Id.* at 667.

41. *See id.* at 667-68.

42. *See id.* at 670.

nor the headline story involved in the case could be labeled as constitutionally obscene or otherwise unprotected, the Court found that the university's actions in expelling the student were clearly motivated by the content of the newspaper⁴³ and could not be justified as a nondiscriminatory application of reasonable campus regulations.⁴⁴

B. Later Cases: The Forum Analysis

Almost a decade after *Healy*, in *Widmar v. Vincent*,⁴⁵ the Court heard a case brought by members of a registered religious group against the University of Missouri at Kansas City challenging a university regulation prohibiting the use of university buildings or grounds "for purposes of religious worship or religious teaching."⁴⁶ The group had previously gained permission to conduct its meetings on campus, but was later informed it could no longer do so pursuant to university policy.⁴⁷ Members of the group alleged that the regulation violated their rights to free exercise of religion and freedom of speech under the First Amendment.⁴⁸

Recognizing that the First Amendment rights of college students are not automatically the same as the rights of adults elsewhere, the Court undertook an analysis of the type of forum in which the student expression at issue took place. This "forum analysis" was most clearly delineated in *Perry Education Association v. Perry Local Educators' Association*.⁴⁹ The forum analysis evaluates regulation of otherwise constitutionally protected speech depending on the type of expressive venue, or forum, involved and the forum's intended purpose.⁵⁰ The Court, in *Perry*, detailed three different forum classifications for evaluating government regulation under the First Amendment: 1) the traditional public forum; 2) the lim-

43. Content-based speech regulations are presumptively invalid. *See, e.g.,* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

44. *See Papish*, 410 U.S. at 670.

45. 454 U.S. 263 (1981).

46. *See id.* at 265.

47. *See id.*

48. *See id.* at 266.

49. 460 U.S. 37 (1983). In *Perry*, the Court found that high school teachers' mailboxes are non-public forums, and it was thus reasonable for the school district to prohibit rivals of the exclusive district union from having access to the mailboxes. *See id.* at 53-55.

50. This forum analysis is applied in and outside of the school context. In fact, in the application of the forum analysis, the location where speech takes place determines the nature of the forum. For instance, public streets and sidewalks are considered public forums. *See Schneider v. State*, 308 U.S. 147 (1939). In contrast, school mailrooms are considered nonpublic forums. *See Perry*, 460 U.S. at 47.

ited, or “designated,” public forum; and 3) the nonpublic forum.⁵¹ The traditional public forum consists of those areas of public property that have been open historically to all for communication or discussion of issues (for example, public streets and parks).⁵² In order for a regulation of speech to be upheld in a public forum it must serve a compelling state interest and be narrowly tailored to that end.⁵³ The limited public forum is one that has been opened to the public for a designated purpose or limited to discussion of certain subjects (for example, university meeting facilities for student groups and municipal theaters).⁵⁴ In this context, the public university,⁵⁵ may determine the content of speech in a limited public forum, but any regulation of speech within that content must be narrowly tailored to serve a compelling interest.⁵⁶ Nonpublic forums are those that have not traditionally been opened to the public (for example, United States mailboxes and high school newspapers) and any regulation that is reasonable and intended to preserve the purpose of the forum is permissible.⁵⁷

Applying this forum analysis to the facts in *Widmar*, the Court found that, “through its policy of accommodating [the] meetings” of numerous student groups, “the university [had] created a forum generally open for use by student groups.”⁵⁸ While the Court again recognized that colleges are “peculiarly ‘the marketplace of ideas,’”⁵⁹ it also recognized that First Amendment principles must be applied “in light of the special characteristics of the school environment.”⁶⁰ The Court noted that

[a] university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable regu-

51. See *Perry*, 460 U.S. at 45-46.

52. See *id.* at 45.

53. See *id.*

54. See *id.*; see also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (finding that the “necessit[y] of confining a forum to the limited and legitimate purposes for which it was created may justify” a state’s regulation of that forum in order to reserve the forum for certain groups or discussion of certain topics).

55. See *Bradley*, *supra* note 1 (discussing how the First Amendment, and constitutional norms in general, binds public universities and puts private schools in a different position).

56. See *Perry*, 460 U.S. at 45; *supra* note 54.

57. *Id.* See discussion *infra* Part I.C for the example of a student newspaper as a nonpublic forum.

58. *Widmar v. Vincent*, 454 U.S. 263, 267 (1981).

59. *Id.* at 268 n.5 (quoting *Healy v. James*, 408 U.S. 169, 180 (1972)).

60. *Id.* (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

lations compatible with that mission upon the use of its campus and facilities.⁶¹

With these differences in mind, the Court recognized that colleges were not required to establish a public forum on their campuses.⁶²

However, since the university had established a public forum, the Court determined that the university had “discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion.”⁶³ “In order to justify [such] discriminatory exclusion from a public forum based on the religious content of a group’s . . . speech,” the university would have to “show that its regulation [was] necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end.”⁶⁴

The Court agreed that the university’s interest in not violating the Establishment Clause was compelling, but that having an “equal access” policy would be compatible with the Court’s Establishment Clause cases.⁶⁵ The Court found that by creating a forum generally available to all student groups, the university would not thereby be endorsing or promoting any of the particular ideas aired there.⁶⁶ “The university would [actually] risk greater [constitutional] ‘entanglement’ by attempting to enforce its exclusion of ‘religious worship’ and ‘religious speech.’”⁶⁷ Thus, the university could not justify excluding a group based on the religious content of the group’s speech.

In 1995, another religious student group aired its First Amendment complaints against their university before the Supreme Court. In *Rosenberger v. Rector and Visitors of the University of Virginia*,⁶⁸ the University of Virginia withheld authorization for reimbursements for printing costs to a student organization, Wide Awake, which published a Christian newspaper.⁶⁹ The university had a policy of paying the printing costs of student publications; however, it denied funding to Wide Awake for the sole reason that the student paper was a “religious activity” that “primarily pro-

61. *Id.*

62. *See id.* at 268.

63. *Id.* at 269.

64. *Id.* at 269-70.

65. *See id.* at 271.

66. *See id.* at 272 n.10.

67. *Id.* at 272 n.11.

68. 515 U.S. 819 (1995).

69. *See id.* at 822.

notes or manifests a particular belie[f] in or about a deity or an ultimate reality,” in violation of university guidelines.⁷⁰

The Court again undertook the forum analysis explicated in *Widmar*. The Court noted that

‘There is no question that the [school], like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated.’ . . . The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify . . . reserving it for certain groups or for the discussion of certain topics.⁷¹

However, once a limited forum has been opened, the school “must respect the lawful boundaries it has itself set.”⁷² Speech may not be excluded where its distinction from other types of allowable speech is not “reasonable in light of the purpose served by the forum.”⁷³ In determining whether the exclusion of speech is legitimate, the Court observed a “distinction between . . . content discrimination, which [is] permissible if it preserves the purposes of [the] limited forum, and . . . viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations.”⁷⁴

According to the Court, this forum analysis is not the only important principle to emerge from *Widmar*. The Court found that *Widmar* also stood for the principle that when the State is the speaker—i.e., when it appropriates public funds, in this case to fund a state university, to promote a particular policy—it may make content-based choices.⁷⁵ Thus, “[w]hen the University determines the content of the education it provides, it is the University speaking” and it is permitted to regulate what is or is not expressed accordingly.⁷⁶

Taking this into account, the Court found that the University of Virginia was not using its funds to subsidize a message of its own, but instead to encourage a diversity of views from private speakers.⁷⁷ This distinction is subtle, but important. If the Court had found that the state’s funding of the University of Virginia was be-

70. *Id.* at 825.

71. *Id.* at 829 (quoting *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993)).

72. *Id.*

73. *Id.*

74. *Id.* at 829-30; see *supra* note 54 and accompanying text.

75. See *Rosenberger*, 515 U.S. at 833.

76. *Id.*

77. See *id.* at 834.

ing used to promote a particular policy (in this case, the policy of non-sponsorship of religion),⁷⁸ then the Court could have allowed the university to regulate the content of the student journals in furtherance of that policy.⁷⁹ The Court did not find this, but instead found that the university was appropriating its funds to create an open forum.⁸⁰ Thus, the university had to adhere to the principle that regulations of speech in an open forum must be content neutral unless some content-based restriction is necessary to serve a compelling governmental interest.⁸¹

In light of this, the Court determined that the university had engaged in unlawful viewpoint discrimination.⁸² The university's prohibition against funding religious activities did not exclude religion as a subject matter, but selected "for disfavored treatment those student journalistic efforts with religious editorial viewpoints."⁸³ Since the university provided funds for other student journals, they had to provide funds to *Wide Awake*.⁸⁴

Five years after the Court decided *Rosenberger*, it ruled on another free speech claim brought by a group of college students. In *Board of Regents of the University of Wisconsin System v. Southworth*,⁸⁵ students at the University of Wisconsin brought a First Amendment challenge to a mandatory student activity fee imposed by the university to support student organizations engaging in political or ideological speech.⁸⁶ The students objected to the speech and expression of some of the student organizations and claimed they could not be required to pay for, and subsidize, such speech.⁸⁷

The Court again applied the public forum analysis explicated in *Widmar* and *Rosenberger*.⁸⁸ Noting that the university had dis-

78. See *supra* note 70 and accompanying text.

79. See *Rosenberger*, 515 U.S. at 833 ("When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."); *supra* notes 75-76 and accompanying text.

80. See *Rosenberger*, 515 U.S. at 834 ("[W]e did not suggest in *Widmar*[] that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.").

81. See *id.*; see also *supra* notes 49-56 and accompanying text.

82. See *Rosenberger*, 515 U.S. at 831.

83. *Id.*

84. See *id.* at 840.

85. 529 U.S. 217 (2000).

86. See *id.* at 221.

87. See *id.*

88. See *id.* at 230.

claimed that the speech was its own, the Court found that this was not a case where recognition need be given to a university's ability to control the content of its own speech or the speech it was subsidizing through some student group or other party.⁸⁹ As was the case in *Widmar* and *Rosenberger*, the Court found that the purpose of the forum created by the mandatory student activity fee was to facilitate the free and open exchange of ideas by and among its students: "The speech the University seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds. To insist upon asking what speech is germane would be contrary to the very goal the University seeks to pursue."⁹⁰

The Court left such a decision to the university, allowing for a university to adopt some other system to determine students' First Amendment rights if it decided to do so.⁹¹ "The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social and political subjects in their extracurricular campus life outside the lecture hall."⁹² If it does so, the Court held, the university is entitled to impose a mandatory fee to sustain an open dialogue to these ends.⁹³

The Court ended its decision by warning that it not be taken to imply that in other instances the university, its agents, or its faculty are subject to the analysis used to decide this case.⁹⁴ Where the university speaks, such as to promote its own policies or to advance a particular idea, "the analysis likely would be altogether different."⁹⁵

C. The *Hazelwood* Decision

The scholarly criticism discussed in Part III of this Note stems from subsequent applications of the Supreme Court's decision in *Hazelwood School District v. Kuhlmeier*.⁹⁶ *Hazelwood* was a high

89. See *id.*; *supra* note 80 and accompanying text; *cf.* notes 75-76 and accompanying text.

90. *Southworth*, 529 U.S. at 230, 232.

91. See *id.* at 232.

92. *Id.* at 233.

93. See *id.*

94. See *id.* at 235.

95. *Id.* For the analysis to be used in this instance, see *supra* notes 75-76, 78-80 and accompanying text.

96. 484 U.S. 260 (1988).

school speech case that was decided between the Court's decisions in *Widmar* and *Rosenberger*.⁹⁷

The plaintiffs in *Hazelwood* were student staff members of a high school newspaper who argued that their school violated their First Amendment rights by deleting two pages of articles from an issue of the newspaper.⁹⁸ The newspaper at issue was written and edited as part of a journalism class the high school offered and was funded by the school board.⁹⁹

The practice of the newspaper was for the journalism teacher to submit page proofs of each issue to the principal for review prior to publication.¹⁰⁰ On one such occasion, the principal objected to two of the articles that were to appear in a particular issue: one dealt with three unnamed students' experiences with pregnancy and the other discussed the impact of divorce on students at the school.¹⁰¹ The principal believed that there was no time to make the necessary changes in the stories before the scheduled press run and concluded that his only options were to eliminate the two pages on which the offending stories appeared or to publish no newspaper at all.¹⁰² The student staff members then sued seeking a declaration that the school violated their First Amendment rights.

Applying the forum analysis explicated in *Perry*,¹⁰³ the Court concluded that school facilities may be deemed public forums only if school authorities have by policy or practice opened those facilities for indiscriminate use by the general public.¹⁰⁴ Since the newspaper was part of a class curriculum, and due to the practice of supervision by school officials over the paper, the Court concluded that the newspaper was a nonpublic forum reserved for its intended purpose as a learning experience for journalism students.¹⁰⁵

Accordingly, the Court held that school officials were entitled to regulate the newspaper in any reasonable manner.¹⁰⁶ The Court noted that this decision dealt with "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."¹⁰⁷ The Court

97. *Widmar* was decided in 1981, *Hazelwood* in 1988, and *Rosenberger* in 1995.

98. See *Hazelwood*, 484 U.S. at 262.

99. See *id.*

100. See *id.* at 263.

101. See *id.*

102. See *id.* at 263-64.

103. See *supra* notes 49-57 and accompanying text.

104. See *Hazelwood*, 484 U.S. at 267.

105. See *id.* at 270.

106. See *id.*

107. *Id.* at 281.

concluded that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”¹⁰⁸ In a footnote that has caused an avalanche of debate and controversy,¹⁰⁹ the Court refused to decide “whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”¹¹⁰

II. SUBSEQUENT APPLICATIONS OF *HAZELWOOD* TO COLLEGE STUDENT SPEECH

Since *Hazelwood*, the federal circuit courts have grappled with the issue of whether the principles in the decision should be applied at the university level. Only the First Circuit has expressly held that *Hazelwood* does not apply to student speech in the college and university setting.¹¹¹ On the other hand, seven federal circuit panels have applied *Hazelwood* in some fashion to college student speech.¹¹²

A. Circuit Courts Applying *Hazelwood* to the University Context

In *Alabama Student Party v. Student Government Association of the University of Alabama*,¹¹³ the Eleventh Circuit heard a case brought by students at the University of Alabama challenging, on First Amendment grounds, university regulations that imposed limits on campaign expenditures of students interested in running for positions on the Student Government Association.¹¹⁴ Noting the deference courts give to the educational missions of universities, the court applied *Hazelwood* in finding that educators have the right to control school-related speech so long as their actions are reasonably related to legitimate pedagogical concerns.¹¹⁵ Applying

108. *Id.* at 273.

109. See discussion *infra* Parts II, III.

110. *Hazelwood*, 484 U.S. at 273 n.7.

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

112. See *Flint v. Dennison*, 488 F.3d 816 (9th Cir. 2007); *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004); *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001); *Cummins v. Campbell*, 44 F.3d 847 (10th Cir. 1994); *Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala.*, 867 F.2d 1344 (11th Cir. 1989).

113. 867 F.2d at 1344.

114. See *id.*

115. See *id.* at 1346.

this standard, the court upheld the university regulations, finding that student government campaigns do not constitute a forum generally open to the public, but one reserved for the creation of “a supervised learning experience for students interested in politics and government.”¹¹⁶ Student campaign expenditures constituted a form of school-sponsored speech that could be regulated pursuant to the university’s legitimate pedagogical interest in minimizing the disruptive effect of campus electioneering.¹¹⁷

In *Cummins v. Campbell*,¹¹⁸ members of the Ohio State University Student Union alleged that the university unlawfully engaged in a form of prior restraint by determining that the student group could not show the controversial film *The Last Temptation of Christ* until it got approval from the university president and legal counsel.¹¹⁹ The Tenth Circuit applied *Hazelwood*, finding that the Student Union Activities Board (SUAB) was sponsored by the university.¹²⁰ In particular, the court found that the student activities board appeared to be an agent or extension of Ohio State University (OSU), given that it received student fees from OSU’s coffers, the director of the Student Union was an OSU employee, and the SUAB name was on the advertisements for the film.¹²¹ Thus, the group’s showing of the film constituted school-sponsored speech and the university’s decision to prevent the group from screening the film was a lawful regulation reasonably related to the university’s legitimate pedagogical concern as to whether it wanted to endorse the content of such a controversial film.¹²²

In *Axson-Flynn v. Johnson*,¹²³ the Tenth Circuit again applied *Hazelwood*, this time to a case brought against the University of Utah by a student in the university’s Actor Training Program.¹²⁴ The student claimed that the university compelled her to speak in violation of her First Amendment rights by requiring her to utter certain offensive words when performing a script.¹²⁵ Faculty members in the acting program told the student¹²⁶ to “get over” her

116. *Id.* at 1347.

117. *See id.*

118. 44 F.3d 847 (10th Cir. 1994).

119. *See id.* at 849.

120. *See id.* at 853.

121. *See id.* at 852.

122. *See id.*

123. 356 F.3d 1277 (10th Cir. 2004).

124. *See id.* at 1280.

125. *See id.*

126. The student’s refusal to swear or take God’s name in vain stemmed from her religious beliefs as a member of the Church of Latter Day Saints. *See id.* at 1281.

refusal to say the word “fuck” or take God’s name in vain during classroom acting exercises when the script for the performance called for such language.¹²⁷ The court looked to *Hazelwood* and found the acting program to be a non-public forum, “meaning that school officials could regulate the speech that takes place there ‘in any reasonable manner.’”¹²⁸ Further, the court found that the expression involved in the acting program was “school-sponsored speech,” and professors have a legitimate pedagogical concern in limiting speech within a curriculum.¹²⁹ Finally, the court held that when a teacher gives an assignment a student has no constitutional right to change that assignment or receive credit for something other than what the professor assigned.¹³⁰

In *Brown v. Li*,¹³¹ the Ninth Circuit applied *Hazelwood* where a graduate student at the University of California at Santa Barbara alleged the university violated his First Amendment right by refusing to accept his graduate thesis due to the inclusion of a “Disacknowledgements” section.¹³² The court found that *Hazelwood* appropriately deferred “to the university’s expertise in defining academic standards and teaching students to meet them.”¹³³ Therefore, the court upheld the university’s refusal to accept the student’s thesis, finding that the thesis was school-sponsored speech and that the university’s finding that the “Disacknowledgements” section of the thesis failed to comply with professional standards was a reasonable pedagogically-oriented regulation.¹³⁴

In *Flint v. Dennison*,¹³⁵ the Ninth Circuit upheld the right of the University of Montana to impose a dollar limit on what students

127. *See id.* at 1280.

128. *Id.* at 1285 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988)).

129. *See id.*

130. *See id.* at 1287. The court also noted that substantial deference is given to educators’ stated pedagogical concerns. *Id.* The *Axson-Flynn* court, in reaching this decision, cited the Supreme Court’s decision in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 833 (1995), for the proposition that “[w]hen the University determines the content of the education it provides, [it is] permitted . . . to regulate the content of what is or is not expressed.” *Id.* at 1290.

131. 308 F.3d 939 (9th Cir. 2002).

132. *See id.* at 952. This section of the thesis, using profane language, mockingly “thanked” the Dean and staff of the university’s graduate school, former California Governor Wilson, the Regents of the University of California, and “science” for “having been particularly obstructive” to his progress toward his graduate degree. *Id.*

133. *Id.*

134. *See id.*

135. 488 F.3d 816 (9th Cir. 2007).

may spend on their campaigns for student office.¹³⁶ While the court did not explicitly rely on *Hazelwood*, it noted that *Hazelwood* reinforced the conclusion that the university campaign expenditure limitations must be analyzed within a traditional forum analysis.¹³⁷ Applying the forum analysis, the court held that student elections at the university constituted a limited public forum that provided an invaluable educational opportunity for students to develop leadership and political skills.¹³⁸ Within such an educational context the expenditure limitations, which did not affect how a student's campaign funds could be spent, were reasonable regulations designed to limit the use of the forum to its intended purposes.¹³⁹ In other words, the court held that the spending limitations were vital to maintaining the character of the student election process as an educational tool, rather than as an ordinary political exercise.¹⁴⁰

In *Hosty v. Carter*,¹⁴¹ editors of Governors State University's student newspaper claimed that the university engaged in prior restraint in violation of the First Amendment when the university told the newspaper's printer not to print any issues that the dean of student affairs had not reviewed and approved in advance.¹⁴² The Seventh Circuit applied *Hazelwood* and undertook a forum analysis but could not determine from the record exactly what type of forum the student newspaper constituted.¹⁴³ Noting that there is no sharp difference between high school and college papers, the court found it clear that the newspaper did not operate in a tradi-

136. *See id.* at 820.

137. *See id.* at 829.

138. *See id.* at 820.

139. *See id.* at 820, 833-36.

140. *See id.* at 835 (finding that the "'primary intent' of the spending limits [was] 'to prevent student government's being diverted by interests other than ones educational,'" and that it was "obvious that the purpose of imposing the spending limit on student candidates [was] to serve pedagogical interests in educating student leaders at the University").

141. 412 F.3d 731 (7th Cir. 2005).

142. *See id.* at 733.

143. *See id.* at 734. In deciding to apply *Hazelwood* in the university context, the court discussed the significance of footnote seven in the Supreme Court's *Hazelwood* decision. The court explained:

[T]his footnote does not even hint at the possibility of an on/off switch: high school papers reviewable, college papers not reviewable. . . . Whether . . . review is possible depends on the answer to the public-forum question, which does not (automatically) vary with age. Only when courts need assess the reasonableness of the asserted pedagogical justification . . . does age come into play.

Id.

tional public forum, as it was subsidized by the university.¹⁴⁴ Citing *Hazelwood's* principle that “[w]hen a school regulates speech for which it also pays . . . the appropriate question is whether the [school’s] actions are reasonably related to legitimate pedagogical concerns,” the court posited that the university’s subsidization of the paper could have created a limited public forum, thus allowing the university to regulate the newspaper to preserve the forum’s intended use.¹⁴⁵ The court determined that the dean was entitled to qualified immunity in her demand for review before the university would pay the newspaper’s printing fees,¹⁴⁶ so the issue of the type of forum the student newspaper constituted was left unresolved.

In *Kincaid v. Gibson*,¹⁴⁷ the Sixth Circuit, sitting en banc, struck down Kentucky State University’s (“KSU”) confiscation and ban of the university’s student yearbook.¹⁴⁸ The university’s vice president for student affairs objected to a student editor’s organization of the university yearbook for the 1993-1994 academic year, finding the publication inappropriate and of poor quality.¹⁴⁹ After consulting with the university president, the vice president for student affairs confiscated the yearbooks and withheld them from the campus community.¹⁵⁰ While the court found that *Hazelwood* did not control the case, it noted that *Hazelwood* applied marginally insofar as the Supreme Court applied a forum analysis to decide the case.¹⁵¹ Applying the forum doctrine, the court held that the yearbook was a limited public forum and the university “may impose only reasonable time, place, and manner regulations, and content-based regulations that are narrowly drawn to effectuate a

144. *See id.* at 737.

145. *See id.*

146. The uncertainty of whether *Hazelwood* applied to university expression in the Seventh Circuit prior to this decision exempted the dean from personal liability, as it would not be “clear to a reasonable [public official] that his conduct was unlawful in the situation he confronted.” *Id.* at 738.

147. 236 F.3d 342 (6th Cir. 2001).

148. *See id.* A panel from the same circuit had previously upheld the university regulation, relying on *Hazelwood* in finding that the student yearbook a non-public forum and that the university’s regulation of that forum was reasonable. *See id.* at 346.

149. The vice president objected to the editor’s attempt “to do something different,” which included giving the yearbook a theme of “destination unknown,” reflecting what the editor believed to be uncertainty KSU students felt, the high unemployment rates, and a current controversy regarding whether KSU was going to become a community college. *See id.* at 345.

150. *See id.*

151. *See id.* at 346 n.5.

compelling state interest, on expressive activity in a limited public forum.”¹⁵² The university’s confiscation of the yearbooks, which lasted six years to the date of the en banc decision, was not a reasonable time, place, or manner restriction, nor was it narrowly crafted, as the university allowed no alternative grounds for similar expressive activity.¹⁵³

B. The First Circuit’s Refusal to Apply *Hazelwood* to University Student Speech

Standing alone amongst these circuit opinions is *Student Government Association v. Board of Trustees of the University of Massachusetts*,¹⁵⁴ in which the First Circuit heard a case brought against the University of Massachusetts by students alleging that the university violated their free speech rights by abolishing the university’s Legal Services Organization, which the university established to represent students and student organizations in litigation against the university.¹⁵⁵ The court found that *Hazelwood*’s forum analysis did not apply to the case at hand because the Legal Services Organization was not a forum or channel of communication, but merely a subsidy the university granted to students who elected to use the court system.¹⁵⁶ Accordingly, the court found that the university had not attempted to restrict the First Amendment rights of students; rather, it had simply stopped subsidizing students’ use of the courts.¹⁵⁷

III. SCHOLARLY REACTION TO THE APPLICATION OF HAZELWOOD IN THE UNIVERSITY CONTEXT

The scholarly response to the federal circuit courts’ application of *Hazelwood* to university student speech has been abundant.¹⁵⁸ Most scholars are critical of these circuit opinions, while others have lauded the Sixth and First Circuits’ attempts at limiting or not applying the *Hazelwood* framework.¹⁵⁹ Others criticize the application of *Hazelwood*’s forum analysis to college student speech be-

152. *Id.* at 354.

153. *See id.*

154. 868 F.2d 473 (1st Cir. 1989).

155. *See id.*

156. *See id.* at 480 n.6.

157. *See id.* at 477.

158. *See, e.g., supra* note 22.

159. *See Nimick, supra* note 3, at 989-90 (lauding the First Circuit’s refusal to rely on forum analysis in *Student Gov’t Ass’n*); *Peltz, supra* note 22, at 533 (praising the Sixth Circuit’s decision in *Kincaid* for limiting the application of *Hazelwood*).

cause it ignores important differences between colleges and high schools¹⁶⁰ and allows for viewpoint regulation.¹⁶¹ Several scholars claim that the application of *Hazelwood's* formula for regulation of school-sponsored speech¹⁶² to college student speech is too restrictive and subjects virtually any university student expression to regulation.¹⁶³

160. The argument that the application of *Hazelwood* to college student speech ignores the differences in maturity levels in college and high school students, and the different missions of colleges and high schools, is echoed by numerous critics. See Carter *supra* note 22, at 182; Finnigan *supra* note 13, at 1494-95; Golby *supra* note 22, at 1280; Martin, *supra* note 22, at 195-97; Nimick, *supra* note 3, at 982-85; Ross, *supra* note 22, at 737; Tenhoff, *supra* note 22, at 535.

161. The Supreme Court has long held that any regulation based on preference among competing viewpoints is constitutionally suspect. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (finding the First Amendment does not permit a state to impose special prohibitions on those speakers who express views on disfavored subjects). In public forum analysis, however, the Court has also consistently recognized a distinction between content discrimination and viewpoint discrimination. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828-30 (1995) (highlighting the distinction between content discrimination, which is constitutionally permissible if it preserves the purposes of a limited or non-public forum, and viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations). The critics cited in this Note argue that the *Hazelwood* decision expanded the scope of permissible content discrimination to such an extent that any distinction between content and viewpoint discrimination collapsed, and that administrators, therefore, now have the means to engage in virtually any viewpoint discrimination. See Golby, *supra* note 22, at 1282 (criticizing the application of *Hazelwood* in the college context because the Supreme Court's forum analysis in that case did not mention any prohibition of viewpoint discrimination, thus permitting courts in subsequent cases to conclude it is permissible); Jordan, *supra* note 22, at 1566-67 (finding that "a fair reading of *Hazelwood* suggests that the Supreme Court intended that some viewpoint-based restrictions of school-sponsored speech would be permissible," due to the absence of any viewpoint-neutrality requirement in the *Hazelwood* decision itself and due to the ability of viewpoint restrictions to be disguised as a school's attempt to define and preserve the scope of a limited or non-public forum); Peltz, *supra* note 22, at 507-08 (finding that traditionally impermissible viewpoint discrimination may be camouflaged as permissible content discrimination, and that since *Hazelwood*, courts have disregarded the viewpoint discrimination prong of the non-public forum analysis when evaluating student claims of First Amendment violations); Wright, *supra* note 22, at 195 (finding, in post-*Hazelwood* applications of the forum doctrine to universities, "what might otherwise be thought of as a fatally viewpoint-based restriction on speech may be sanitized and excused if the 'viewpoint' can instead be described as part of the unstated definition, scope, and limits of the forum").

162. This formula posits that if the school speaks on its own behalf, if it sponsors speech, or if students, parents, or members of the community could reasonably believe the school has sponsored speech, the school can regulate the speech so long as the regulation reasonably relates to the school's legitimate pedagogical concerns. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *supra* Part I.C.

163. See *Hosty v. Carter*, 412 F.3d 731, 742 (9th Cir. 2007) (Evans, J., dissenting) ("The majority's holding . . . is particularly unfortunate considering the manner in which *Hazelwood* has been used in the high school setting to restrict controversial

A consistent theme throughout these criticisms, though, is the claim that the circuit opinions applying *Hazelwood* to student expression in the university are flawed because they ignore Supreme Court precedent that specifically protects student speech rights in the university.¹⁶⁴ In support of this claim, scholars repeatedly invoke the Supreme Court's decisions in *Healy v. James*¹⁶⁵ and *Papish v. Board of Curators of the University of Missouri*¹⁶⁶ for the principle that the university is the quintessential marketplace of ideas and the First Amendment rights of college students are the same as those of the public in general.¹⁶⁷ In *Healy*, the Court held

speech."); Golby, *supra* note 22, at 1279 (criticizing the application of *Hazelwood*'s public forum doctrine to the college context because it places too much control over expression in the hands of school administrators); Jordan, *supra* note 22, at 1568 (finding that in the post-*Hazelwood* era, "courts have accepted very broad definitions of school-sponsored speech and legitimate pedagogical concerns, and have deferred to a school's identification of both," and that "these developments indicate a troubling lack of protection for student expression"); Merritt, *supra* note 22, at 493-94 (claiming that to see how applications of *Hazelwood* could affect student expression at colleges and universities, one only needs to look at how *Hazelwood* has affected student expression in secondary education, where administrators have been permitted to control a wide range of student expression and have been given broad deference in deciding what constitutes a legitimate pedagogical concern, and pointing to a California State University system memorandum to university presidents suggesting that they might have more authority than previously thought to control student speech); Nimick, *supra* note 3, at 994-95 (finding that since *Hazelwood*, high school administrators have been granted broad authority to regulate and, to some extent, dictate student speech, and that an expansion of *Hazelwood* would inevitably chill all speech on university campuses and effectively defeat the notion of the university as a quintessential marketplace of ideas); Peltz, *supra* note 22, at 496-509 (documenting the "profound and immediate" increase in incidences of censorship after *Hazelwood* and noting that there is no reason to expect college administrators to respond differently if *Hazelwood* is held to govern regulations of college student speech); Ross, *supra* note 22, at 739 (claiming that application of *Hazelwood* to the expression of college students is problematic because "[a]fter *Hazelwood*, high school principals had 'nearly unbridled discretion' to control student media," and "*Hazelwood*'s devastating impact on high school students' [free speech rights] might be replicated on college campuses" (quoting *Hosty*, 412 F.3d at 742 (Evans, J., dissenting))).

164. See *supra* note 26 and accompanying text.

165. 408 U.S. 169 (1972).

166. 410 U.S. 667 (1973).

167. See Finnigan, *supra* note 13, at 1482 (claiming *Healy* and *Papish* "sent a clear message that the First Amendment could not be avoided or watered down in the university context"); Golby, *supra* note 22, at 1266 (noting *Healy* and *Papish* stand for the proposition that First Amendment protections apply with the same force on college campuses as they do in the community at large); Merritt, *supra* note 22, at 479 (finding *Healy* and *Papish* give college students the same First Amendment rights as independent adults); Nimick, *supra* note 3, at 960 ("Unlike *Hazelwood*, [*Healy* and *Papish*] stood for the proposition that the First Amendment should apply with equal force, both on and off campus. . . . [The Court] held university officials to a much more strict standard than that articulated in *Hazelwood*."); Peltz, *supra* note 22, at 510 ("Before *Hazelwood* the Supreme Court had held unequivocally that 'the precedents

that a university could not deny recognition to a student group on the grounds that the group's leftist, potentially radical philosophy¹⁶⁸ was adverse to the university's policies, as it was constitutionally impermissible under the First Amendment.¹⁶⁹ In *Papish*, the Court held that a university's expulsion of a student for distributing a newspaper containing offensive material on campus was a violation of the student's First Amendment rights.¹⁷⁰ In both of these decisions, the Court relied on the principles that the First Amendment rights of students were largely coextensive with those of the public at large¹⁷¹ and that regulation of the "mere dissemination of ideas" due to disagreement with those ideas does not comport with those rights.¹⁷²

Critics have taken these principles to mean that the application of *Hazelwood* to colleges represents a shift in the treatment of college student speech due to the application of a public forum analysis, the higher degree of deference given to university regulations,¹⁷³ and the ignorance of the Court's different treatment of high school and college students when assessing constitutional rights.¹⁷⁴ While the application of *Hazelwood* to the university

of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large.'" (quoting *Healy*, 408 U.S. at 180)).

168. The group was part of a larger national student movement during the 1960's and 1970's that used civil disobedience, seizure of buildings, vandalism, and arson on some campuses to "bring about constructive changes." See *Healy*, 408 U.S. at 171-72.

169. See *id.* at 191; *supra* Part I.A.

170. See *Papish*, 410 U.S. at 667; *supra* Part I.A.

171. See *Healy*, 408 U.S. at 180.

172. See *Papish*, 410 U.S. at 670-71.

173. See *Golby*, *supra* note 22, at 1266; see also Finnigan, *supra* note 13, at 1489 (claiming that the Supreme Court's decisions in *Healy* and *Papish* set down a clear rule in favor of students in cases of university censorship and that *Hazelwood* altered a substantial body of precedent granting college students First Amendment protections on par with those outside the university); Jordan, *supra* note 22, at 1566 (positing that *Hazelwood* can be seen as a shift in the Supreme Court's attitude toward regulation of student speech because it allows for the permissibility of viewpoint discrimination); Merritt, *supra* note 22, at 479-81 (citing the Supreme Court opinions in *Healy* and *Papish* to highlight the Court's recognition of students' autonomy within the university and the broad protection afforded student expression on campuses, and claiming that when *Hazelwood* was decided it was thought unlikely to ever be applied in the college and university setting); Nimick, *supra* note 3, at 961-64 (arguing that applying *Hazelwood* to student speech in the university overrules more than thirty years of First Amendment jurisprudence and that, in *Healy* and *Papish*, the Court held university officials to a much stricter standard when regulating student speech than in *Hazelwood*).

174. See *Golby*, *supra* note 22, at 1280 (discussing how the Supreme Court has consistently treated children and adults differently in a variety of areas, including in high school and college contexts); Nimick, *supra* note 3, at 982-83 (claiming the Supreme

context departs significantly from the analysis in *Healy* and *Papish*, this criticism ignores that several years before *Hazelwood* was decided, starting with *Widmar v. Vincent*,¹⁷⁵ the Supreme Court abandoned the analysis used in these early cases and applied a test virtually the same as that used in *Hazelwood* to college student speech.

IV. MISPLACED CRITICISM: *HAZELWOOD* HAS NOT BEEN WRONGLY APPLIED TO COLLEGE STUDENT SPEECH IN LIGHT OF THE SUPREME COURT'S RECENT RULINGS

The circuit court decisions discussed in Part II.A may create bad policy because they recognize greater restrictions on free speech in colleges and universities than most free speech advocates would tolerate. A common criticism is that these cases wrongly ignore the differences between high school and college students and discard the notion that the university is the typical marketplace of ideas in today's society.¹⁷⁶ If scholars wish to criticize these restrictions, however, they must criticize the Supreme Court's treatment of college student speech, not just the recent circuit court decisions that applied *Hazelwood* to college speech, because those appellate decisions do not significantly depart from the Supreme Court's framework for evaluating the First Amendment rights of college students. Those critics who claim that they do depart from Supreme Court precedent¹⁷⁷ ignore that the Court has always recognized universities' substantial power to regulate students and that its recent college speech opinions have consistently applied a public forum analysis and given great deference to universities' autonomous decision-making authority.¹⁷⁸ While the Court has indeed recognized that the university is the archetypal marketplace of

Court has regularly highlighted the importance of the distinction between high school students, who are mostly minors, and college students, who are almost exclusively adults); see also Finnigan *supra* note 13, at 1494 (citing *Healy* as evidence that courts have consistently recognized the distinction in the relative age differences between high school and college students).

175. 454 U.S. 263 (1981).

176. See *supra* notes 160-63.

177. See *supra* notes 26, 167, 173-74 and accompanying text.

178. When these arguments are not outright ignored, there is tendency to simply mention that there is Supreme Court precedent that supports the application of *Hazelwood's* principles to the university and subsequently ignore it. See, e.g., Golby, *supra* note 22, at 1285 (mentioning in one sentence, at the very end of the article, that there is "Supreme Court precedent suggesting that the public forum analysis is the proper framework for scrutinizing student speech at universities").

ideas,¹⁷⁹ the Court's contemporary university speech jurisprudence has provided support for the post-*Hazelwood* university free speech decisions.

A. Since *Healy* and *Papish*, the Court Has Consistently Applied a Forum Analysis to Student Speech in the University

While the restrictive standards of *Hazelwood* would likely not withstand scrutiny under the speech-protective rhetoric of *Healy* and *Papish*,¹⁸⁰ scholars who criticize the application of *Hazelwood* to universities completely ignore the Supreme Court's later college

179. See *Healy v. James*, 408 U.S. 169, 180 (1972).

180. *Healy* and *Papish* may actually lend support to universities' current regulatory power. Despite broad language, *Healy* and *Papish* do recognize substantial power of universities to regulate speech. In *Healy*, a case repeatedly cited for the recognition that the university is the quintessential marketplace of ideas and for the broad free speech rights of college students, see *supra* note 167, the Court embraced several principles that limited that recognition. The Court found that universities have a legitimate interest in preventing disruption on campus. See *Healy*, 408 U.S. at 189. Further, it held that circumstances requiring the safeguarding of that interest may justify restraint of speech, including the prohibition of associational activities "where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." *Id.* In addition to recognizing "the College administration's broad rulemaking power to assure that the traditional academic atmosphere is safeguarded," *id.* at 194 n.24, the Court also recognized the ability of the university to impose sanctions on those who violate the rules. See *id.*; see also *id.* at 192 ("We . . . hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power to properly discipline . . .").

The Court drew a line between advocacy and action and highlighted the ability of universities to regulate conduct, as opposed to mere expression, see *id.* at 192, but the Court also established that a university has broad power to enact reasonable campus regulations to preserve its unique educational environment. Even under *Healy* this principle, coupled with the principle that any constitutional distinction between speech and conduct is specious, see Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79-80 (1968) (describing the largely untenable distinction between conduct and expression, and noting several instances of the Court's recognition of this notion), illustrates that the Court believes that universities have the ability to regulate certain forms of expression. As an extreme example, a university could regulate a student group that burned a flag on the university quad, while classes were in progress, in protest of American foreign policy. Under *Healy*, the flag-burning could catch the attention of those students in class, or on the way to class, arguably distracting students or making them late to class, thus interrupting class or interfering with others' opportunity to obtain an education.

While *Papish* is consistently cited along with *Healy* by critics, it was a short per curiam opinion that added nothing new to the Court's university speech jurisprudence, but merely echoed the principles articulated in *Healy*. See *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667 (1973). The *Papish* Court reaffirmed that universities do not have the power to regulate expression simply because they disagree with it, but can enact reasonable regulations of student speech and conduct in order to maintain the educational environment. See *id.* at 670.

student speech opinions.¹⁸¹ This oversight, intentional or not, is significant because one of the main criticisms of the federal circuit courts' recent college student speech decisions is that the application of *Hazelwood's* forum analysis is too restrictive of student speech and allows the university too much power to regulate a broad array of student speech.¹⁸² The problem with this argument is that the Court applied a forum analysis to college student speech and concluded that the university is not a public forum long before the *Hazelwood* litigation began.¹⁸³

In the 1981 case of *Widmar v. Vincent*,¹⁸⁴ the Court broke from its recognition of broad student speech rights illustrated in *Healy* and *Papish*, and applied the same forum analysis applied in *Hazelwood* to university student speech.¹⁸⁵ The Court ultimately ruled for the students, concluding that a university could not exclude a religious student group from premises it had opened for use by all other non-religious campus groups.¹⁸⁶ The Court also found that a university was not a traditional public forum, noting that a university differs in significant respects from public forums such as streets or parks or even municipal theaters.¹⁸⁷ *Widmar* thus marked the beginning of the Court's use of a forum analysis as the framework for evaluating college student speech issues. The Court recognized that universities are limited forums and that they have attendant power to impose "reasonable regulations compatible with [their

181. Some articles cite the Supreme Court's later college student speech decisions, but they do not analyze them in any meaningful way. The opinions are merely cited for the specific decision that was rendered, which, as noted above, all upheld the free speech rights of students in the face of attempted university regulation, *see supra* note 12 and accompanying text, without any acknowledgement that the Court applied a forum analysis, found the university not to be a traditional public forum, and recognized substantial deference to the university's autonomy in regulating itself. *See Merritt, supra* note 22, at 482 (citing *Rosenberger v. University of Virginia*, 515 U.S. 819, 829 (1995), and *Board of Regents of the University of Wisconsin v. Southworth*, 529 U.S. 217 (2000), for the proposition that after *Hazelwood* the Court has continued to protect college and university student speech, but nowhere acknowledging the Court's use of a forum analysis); Nimick, *supra* note 3, at 965-66 (discussing briefly *Rosenberger* and *Southworth*, but never mentioning the forum analysis and selectively quoting principles conveying broad student speech rights).

182. *See supra* notes 160-163 and accompanying text.

183. The controversy that gave rise to the *Hazelwood* suit occurred in May of 1983. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988).

184. 454 U.S. 263 (1981).

185. *See supra* notes 58-62 and accompanying text.

186. *See Widmar*, 454 U.S. at 277.

187. *See id.* at 268 n.5.

educational] mission upon the use of [their] campus and facilities.”¹⁸⁸

In *Rosenberger v. Rector & Visitors of the University of Virginia*,¹⁸⁹ the Court furthered the forum analysis that was applied in *Widmar*.¹⁹⁰ The Court found that the denial of university funding to a Christian student group amounted to viewpoint discrimination in violation of the First Amendment. The Court, however, renewed its contention that the university is a limited forum,¹⁹¹ noting explicitly that “[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the [university] in reserving it for certain groups or for the discussion of certain topics.”¹⁹² Thus, the Court legitimated the ability of the university to engage in content discrimination when the purpose is to preserve the forums it creates.¹⁹³

The Court’s most recent college student speech case enunciated several principles that further legitimize the notion that the Court is sympathetic to, or at least neutral towards, the subsequent federal circuit court applications of *Hazelwood* to student speech in universities. In *Board of Regents of the University of Wisconsin System v. Southworth*,¹⁹⁴ the Court again applied a forum analysis to the student speech at issue, and found that students who contributed to the university’s mandatory student activity fund had no right to object to the university’s funding of groups whose ideas they may find disagreeable.¹⁹⁵ The Court found that the purpose of the mandatory activity fee was to create a forum open to a wide variety of viewpoints.¹⁹⁶ The Court, however, tempered this finding by claiming that “[i]t is not for the [courts] to say what is or is not germane to the ideas . . . pursued in [a university forum].”¹⁹⁷ If a university decided that its interests were better served by some

188. *Id.*

189. 515 U.S. 819 (1995).

190. See *supra* notes 71-81 and accompanying text.

191. See *Rosenberger*, 515 U.S. at 829.

192. *Id.*

193. See *id.* (noting the “distinction between . . . content discrimination, which may be permissible if it preserves the purposes of that limited forum, and . . . viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations”); cf. *supra* note 52-57 and accompanying text.

194. 529 U.S. 217 (2000).

195. See *id.* at 221; *supra* notes 85-90 and accompanying text.

196. See *Southworth*, 529 U.S. at 232.

197. *Id.*

other type of system (other than a system open to diverse viewpoints), it would be free to implement that system.¹⁹⁸

The Court held that the university “may determine that its mission is well served” by allowing students “to engage in dynamic discussion of philosophical, religious, scientific, social, and political subjects in . . . extracurricular campus life.”¹⁹⁹ If a university reaches this conclusion, it may impose means to sustain that end. It follows that the university may also determine that its mission is not well served by such dynamic discussion and, if so, the university may take measures (i.e. regulations of expression) to sustain whatever other ends, aside from dynamic discussion, it chooses. The Court thus exhibited great deference to universities’ self-regulation and supported universities’ broad power to decide what kind of expression is allowed on their campuses.²⁰⁰

B. The Circuit Courts Are Justified in Applying *Hazelwood* in the University Context

The Supreme Court has consistently recognized the principles contained within the *Hazelwood* framework and applied them without fail to student speech in the university context. The Court’s decisions in *Widmar*, *Rosenberger*, and *Southworth* illustrate: (1) the application of a forum analysis to university student speech, (2) the recognition that the university is not a public forum, and (3) the understanding that courts largely defer to the regulatory decisions schools make for themselves. All of these principles are utilized by the federal circuits in applying *Hazelwood*. Criti-

198. *See id.*

199. *Id.* at 233.

200. It is also interesting to note that, in concurring with the Court’s decision in *Southworth*, Justices Souter, Stevens, and Breyer cited the same case as the Eleventh, Tenth, Ninth, and Seventh Circuits for the premise that courts should give great deference to autonomous decisionmaking by the academy itself. The concurring justices in *Southworth* cite *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) for the proposition that courts should be reluctant to intrude upon the prerogatives of educational institutions because “[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking [sic] by the academy itself.” *Southworth*, 529 U.S. at 237 (Souter, J., concurring). In their applications of *Hazelwood* to college student speech, the Eleventh, Tenth, Ninth, and Seventh Circuits cite *Ewing* for the idea that great deference should be given by federal courts to autonomous decisionmaking by the academy itself. *See* *Hosty v. Carter*, 412 F.3d 731, 736 (7th Cir. 2005); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293 n.14 (10th Cir. 2004); *Brown v. Li*, 308 F.3d 939, 951 (9th Cir. 2002); *Ala. Student Party v. Student Gov’t Ass’n of the Univ. of Ala.*, 867 F.2d 1344, 1347 (11th Cir. 1989).

cisms of those decisions,²⁰¹ namely, those criticisms that argue that the application of a forum analysis to college student speech is too restrictive because it allows for viewpoint regulation and potentially subjects any student expression in the university to regulation,²⁰² can be levied at the Court's invocation of these principles. Accordingly, the courts of appeals are justified in applying *Hazelwood* to college student speech.

The major difference between the federal appellate decisions discussed in Part II.A and the Supreme Court decisions in *Widmar*, *Rosenberger*, and *Southworth* is the circuit courts' application of *Hazelwood's* school-sponsored speech rationale.²⁰³ Essentially, the application of this rationale to college student speech has effectively done what the Supreme Court, in *Widmar*, *Rosenberger*, and *Southworth*, refused to do: found that school "sponsorship," via subsidization of speech activities, allows the university to regulate the content of *its own* speech.²⁰⁴ What this indicates is not that the circuit courts are applying a different test to college student speech, as compared to the Supreme Court's decisions in this area,²⁰⁵ but that, in their application of *Hazelwood*, they have gone from a primarily forum-based analysis of student speech (as exemplified in *Widmar*, *Rosenberger*, and *Southworth*)²⁰⁶ to a "government speech"-based analysis.²⁰⁷

This government speech rationale was acknowledged in *Widmar*, *Rosenberger*, and *Southworth*,²⁰⁸ but the Court found that the facts of these cases did not support an analysis based on the government, or university, regulating its own speech (or "speech for

201. See *supra* Part II for analysis of the circuit courts' application of *Hazelwood* in the university context.

202. See *supra* notes 160-63 and accompanying text.

203. For an explanation of the "school-sponsored speech" rationale, see *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988) ("[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.").

204. Compare *supra* Part II.A, with *supra* notes 77-95 and accompanying text.

205. See *supra* Parts I.A-B.

206. See *supra* notes 58-67, 71-74, 77-84, 88-93 and accompanying text.

207. See *supra* notes 75-76. For the best summary of this analysis, see *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 833 (1995) ("When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.").

208. See *supra* notes 75-81, 89 and accompanying text. The university in *Southworth* specifically disclaimed that the speech at issue was its own. See *Bd. of Regents of the Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 229 (2000).

which it also pays”²⁰⁹). Unlike the Court, however, the circuit courts—the First Circuit aside²¹⁰—have been willing to look at the facts of college student speech cases and to determine that, through the university’s subsidization of student speech activities, the speech at issue was the university’s own speech and recognition need be given to a university’s right to control the content of its own speech.²¹¹ Thus, in their application of *Hazelwood*, the circuit courts have used the same framework used by the Supreme Court in *Widmar*, *Rosenberger*, and *Southworth* and have simply reached different conclusions.²¹²

This is furthered by the fact that the Supreme Court has repeatedly refused to grant certiorari to “controversial” cases applying *Hazelwood* to student speech in the university.²¹³ If the Court thought the circuits were applying the wrong standard, they would have granted certiorari in those cases and corrected them.

It is immaterial that the Court has ultimately upheld student speech rights in its decisions because the Court’s rationale justifies the application of *Hazelwood* to college student speech. The Court’s *ratio decidendi* in each university speech case since 1981 has de facto applied the same test used by the circuit courts in their application of *Hazelwood* to college student speech.²¹⁴ Simply because the Court found that the university regulations involved in each case where a forum analysis was applied were unconstitutionally restrictive of student speech, it does not automatically follow that this must always be the case. The Court recognized that where a limited or non-public forum is found, or where a university spon-

209. See *Hosty v. Carter*, 412 F.3d 731, 734 (7th Cir. 2005).

210. See *Student Gov’t Ass’n v. Bd. of Trs. of the Univ. of Mass.*, 868 F.2d 773 (1st Cir. 1989).

211. See *Hosty*, 412 F.3d at 737; *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004); *Brown v. Li*, 308 F.3d 939, 952 (9th Cir. 2002); *Cummins v. Campbell*, 44 F.3d 847, 852 (10th Cir. 1994); *Ala. Student Party v. Student Gov’t Ass’n of the Univ. of Ala.*, 867 F.2d 1344, 1347 (11th Cir. 1989).

212. See discussion *supra* Part II.A. The Supreme Court in *Rosenberger*, citing *Hazelwood* itself, noted that when the university determines the content of the education it provides, or when it subsidizes speech, the university is speaking and can regulate the content, and even viewpoint, of what is or is not expressed. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995). Therefore, the Court acknowledged the application of *Hazelwood*’s principle that when a university speaks or sponsors speech (i.e., when speech bears the imprimatur of the university, see *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271(1988)), the university can regulate the expression. Even though the Court did not find that the university was speaking or sponsoring speech in *Rosenberger*, other courts are not prohibited from finding otherwise in different cases.

213. See *Hosty v. Carter*, 546 U.S. 1169 (2006); *Brown v. Li*, 538 U.S. 908 (2003).

214. See discussion *supra* Part IV.A.

sors speech, certain regulations of student expression will be upheld.²¹⁵ Conversely, just because most circuit courts have upheld university regulations of student speech in their application of the forum analysis does not mean this must always be the case. Indeed, the Sixth Circuit's decision to strike down a university's confiscation and ban on a student yearbook is a shining example of student speech being upheld in light of a court's application of a forum analysis.²¹⁶

CONCLUSION

The application of the Supreme Court's decision in *Hazelwood School District v. Kuhlmeier* by the federal courts of appeals to student speech in colleges and universities gives broad power to those institutions to regulate what is or is not said within their confines.²¹⁷ As argued in this Note, these applications are firmly grounded in the Supreme Court's recent university speech decisions.²¹⁸ Therefore the case law, at least in the Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits, is unlikely to change anytime soon. In light of the similar forum analyses and government speech tests applied by the circuit courts and the Supreme Court, those circuits which have yet to address a post-*Hazelwood* college student speech issue²¹⁹ will likely apply *Hazelwood's* principles, and those echoed in recent college speech Supreme Court decisions.²²⁰

Scholars, students, and proponents of free speech should never give up their fight and should continue to petition the courts if they seek greater college student speech rights or redress of university censorship. In practice, however, if they disagree with the limitations placed on speech of college students and the regulatory power given to universities through the application of *Hazelwood* to college speech issues, their efforts need also be directed elsewhere. Aim could be taken, for example, at educating the student body on university campuses of the value of free speech and re-

215. See *supra* notes 71-76 and accompanying text.

216. See *Kincaid v. Gibson*, 236 F.3d 342, 354 (6th Cir. 2001).

217. See discussion *supra* Parts II.A, III and accompanying text.

218. See *supra* Part IV and accompanying text.

219. The Second, Third, Fourth, Fifth, and Eighth Circuits have yet to hear a case directly concerning the issue of college student speech since the Supreme Court's decision in *Hazelwood*.

220. See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981).

educating university administrators as to the university's purpose and place as "peculiarly the 'marketplace of ideas.'"²²¹ Legislation protecting students' free speech rights is another option,²²² one proposed and already adopted in many jurisdictions, for better or worse.²²³ These efforts are likely to be more successful than looking to the courts to change the existing law.

221. *Healy v. James*, 408 U.S. 169, 180 (1972); *see, e.g., Merritt*, *supra* note 22, at 495-96 (proposing that students encourage "college and university leaders to sign pledges recognizing that they intend to let campus media exist without any influence or control of the school").

222. Indeed, the Supreme Court, in *Southworth*, hinted that this may be an answer to discontent with subsequent judicial application of the school-sponsored speech rationale. The Court said that when the government, or in this case, the university, speaks or sponsors speech, "it is, in the end, accountable to the electorate and the political process for its advocacy." *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000).

223. *See generally* Ross, *supra* note 22 (analyzing California Educational Code section 66301, which prohibits public colleges from imposing disciplinary sanctions on students for speech or other expression that would be protected by the First Amendment outside the school, and California's Leonard Law, which extends section 66301 to private colleges); Sanders, *supra* note 22 (examining why "anti-*Hazelwood* statutes are the most effective and sensible way to stave off" the negative effects of the application of *Hazelwood* to universities and suggesting a model law). *But see* Cheryl A. Cameron et al., *Academic Bills of Rights: Conflict in the Classroom*, 31 J.C. & U.L. 243 (evaluating federal and state attempts at student free speech legislation and warning advocates of such legislation that taking authority to control the classroom away from professional educators and putting it into the hands of the government and politics may not be the best course of action).

