

**“School Sponsorship” and *Hazelwood’s* Protection of
Student Speech: Appropriate for all Curriculum Contexts?**

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I. INTRODUCTION

In choosing a research and writing topic for this course, it was made clear that I could select whichever topic I desired,¹ so long as I analyzed any type of education law at any level of education. I knew the ultimate grade did not necessarily depend upon my particular substantive topic of choice, but rather upon my ability to adequately provide the germane rules of law, clearly explain the central thesis, and persuasively argue the particular legal consequence. If I chose a topic that did not easily lend itself to such a task—or if I simply chose a patently

¹ See Steven L. Willborn, *Syllabus for Education Law*, UNIVERSITY OF NEBRASKA COLLEGE OF LAW (Fall 2011), https://my.unl.edu/webapps/portal/frameset.jsp?tab_group=courses&url=%2Fwebapps%2Fblackboard%2Fexecute%2Fcontent%2Ffile%3Fcmd%3Dview%26content_id%3D_607272_1%26course_id%3D_8469_1%26framesetWrapped%3Dtrue.

inappropriate topic for purposes of my education as an ethically-accountable future member of the bar—I would nevertheless be allowed to discuss my selected topic; a correspondingly poor grade would be the most probable consequence.² Yet, even if my choice was largely discretionary, my selected topic could implicate speech on my part, speech which could be protected (at one level or another) by the First Amendment,³ for the College of Law is a government institution and my selected topic possibly an expression of opinion,⁴ whether controversial or not. Ironically therefore, in discussing a topic of education law, this Article addresses whether—and to what extent—the First Amendment protects student speech when students select or discuss a particular topic as part of curriculum⁵ that allows students to freely and sovereignly choose their desired substantive topic.⁶

Specifically, this Article addresses the applicability of the First Amendment protection provided by *Hazelwood School District v. Kuhlmeier*,⁷ protection that allows a school to censor

² Of course, notwithstanding the *probable* consequences of my actions, a paper where I committed an ethical violation, such as plagiarism, or where I displayed a disregard for the basic rights and dignity of others, such as racial or gender intolerance, might also subject me to discipline by the school system or disfavor by the state bar. See NEB. S. CT. R. § 3-103 (“[T]he essential eligibility requirements for admission to the practice of law in Nebraska are: . . . (G) The ability to avoid acts that exhibit disregard for the . . . welfare of others.”); see also *Honor Code*, UNIVERSITY OF NEBRASKA COLLEGE OF LAW (May 9, 1988), <http://law2.unl.edu/HonorCode.aspx>.

³ See, e.g., *Curry v. Sch. Dist. of City of Saginaw*, 452 F. Supp. 2d 723, 737–38 (E.D. Mich. 2006); see also U.S. CONST. amend I (“Congress shall make no law . . . *abridging the freedom of speech*” (emphasis added)).

⁴ See *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002) (conducting First Amendment analysis for an article written as part of graduate school curriculum).

⁵ Typically, the educational curricula will involve some form of linguistic, grammatical, or artistic assignment, but not necessarily so. See *Curry*, 452 F. Supp. 2d at 737 (protecting topic-selection speech that arose from an economic/social studies activity).

⁶ It is important to note this Article does not concern speech that disruptively harms other students, which may be censored. See *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969). Nor does this Article concern speech that promotes illegal drug use or inappropriate sexual activity, which may also be censored. See *Morse v. Frederick*, 551 U.S. 393 (2007); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). The speech relevant to this Article would not have any proven disruptive effect on the student body nor would it be classified as promoting lewd, illegal, or illicit conduct. Cf. *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995) (involving speech that the court never even suggested as having any disruptive effect or promoting any illicit conduct). The student speech would be simply communicated between students and their teachers or students and their immediate classmates, under curricula that allow students to freely discuss their desired substantive topic. See, e.g., Lisa Shaw Roy, *Inculcation, Bias, and Viewpoint Discrimination in Public Schools*, 32 PEPP. L. REV. 647, 658 (2005) (“[For a] written assignment such as a research paper or essay containing religious themes, . . . no one but the student author and the teacher would read the content of the paper.”).

⁷ 484 U.S. 260 (1988).

speech “in school-sponsored activities so long as [the school’s] actions are reasonably related to legitimate pedagogical concerns.”⁸ Part II provides and explains the pertinent federal jurisprudence, obligatorily starting with *Tinker v. Des Moines Independent Community School District*,⁹ continuing with *Hazelwood*, and ending with *Settle v. Dickson County School Board*.¹⁰ Part III discusses why *Hazelwood’s* scope of First Amendment protection is not appropriate for all curriculum contexts, particularly for this context. Part IV then advocates for a heightened scope of First Amendment protection in this context. Part IV also addresses any administrative problems or difficulties with implementing this heightened level of protection, and Part V will add some concluding thoughts and summations.

II. SUPREME COURT AND OTHER FEDERAL CASE LAW

Although the Supreme Court has never explicitly articulated the level of First Amendment protection that applies when a student selects or discusses particular subject matter as part of curriculum that allows a free choice of his or her desired topic, the most oft-cited federal decision¹¹ on this issue appears to be *Settle*. There, the teacher summarily gave her student a failing grade after the student voluntarily chose Jesus Christ as the topic of a ninth-grade research paper.¹² The Sixth Circuit Court of Appeals found against the student on her First Amendment claim, holding *Hazelwood’s* scope of First Amendment protection allowed the teacher “broad discretion to give grades and conduct class discussion based on the content of speech.”¹³ Before fully examining *Settle*, however, it is important to discuss two forerunning

⁸ *Id.* at 273.

⁹ 393 U.S. 503 (1969).

¹⁰ 53 F.3d 152 (6th Cir. 1995).

¹¹ *See Ward v. Members of the Bd. of Control of E. Mich. U.*, 700 F. Supp. 2d 803, 816 (E.D. Mich. 2010) (citing *Settle* as persuasive authority used by other federal courts when analyzing the issue).

¹² *Settle*, 53 F.3d at 156.

¹³ *Id.*

Supreme Court opinions. Namely, *Tinker* and *Hazelwood*, for the sixth circuit essentially decided *Settle* through these decisions.

A. Tinker v. Des Moines Independent Community School District

On December 16, 1965, John Tinker and Christopher Eckhardt attended their Des Moines high school while wearing black armbands that symbolically protested the Vietnam War.¹⁴ Two days before, the school district adopted a policy that prohibited high school students from wearing armbands during school hours and suspended students from school should they to refuse to remove the armbands.¹⁵ Consequently, when John and Christopher attended school on December 16, the school district suspended them until the armbands were removed.¹⁶

By and through their parents, John and Christopher brought a § 1983 cause of action against the school district, alleging the school district's policy violated their First Amendment rights to free speech.¹⁷ Both lower federal courts ruled in favor of the school district and found that the policy "was reasonable in order to prevent disturbance of school discipline."¹⁸ Yet, on appeal, the Supreme Court disagreed.¹⁹ It held that a student may "express his opinions, even on controversial subjects . . . , if he does so without 'materially and substantially interfere(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others."²⁰ The Supreme Court believed students retain their full First Amendment rights "at the schoolhouse gate"²¹ unless their speech actually materially and

¹⁴ *Tinker*, 393 U.S. at 504.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 505.

¹⁹ *Id.* at 513.

²⁰ *Id.*

²¹ *Id.* at 506. Yes, admittedly, an over-used cliché. But would an Article on this subject be complete without it?

substantially disrupts the educational setting of the school.²² Accordingly, under heightened scrutiny and without any real showing of material disruption, the Supreme Court reversed.²³

But, for purposes of the Article, perhaps more important than *Tinker*'s holding was its tone. Throughout the opinion, the Court emphasized that schools “do not possess absolute authority over their students”²⁴ and reiterated this viewpoint by stating students “may not be confined to the expression of those sentiments that are officially approved.”²⁵ The Court, in essence, endorsed a social reconstructionist model of education, a model that views student rights and responsibilities as meaningless if they are only rights and responsibilities owed to the school.²⁶ As one commentator has abridged, “the Court’s language in *Tinker* leaves the reader to understand that there is a line between inculcation and indoctrination—and that the Court can, if called upon, readily distinguish between the two.”²⁷ Quite simply, keeping in mind a discussion to come later in this Article,²⁸ the Court’s tone in *Tinker* espouses broad, probing protection of

²² *Id.* at 513.

²³ *Id.* at 514.

²⁴ *Id.* at 511. Justice Fortas continued his pro-student slant, strongly asserting that “[i]n our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.” *Id.*

²⁵ *Id.* Again, further statements of the sort are littered throughout the opinion, such as: “In *Meyer v. Nebraska*, Mr. Justice McReynolds expressed this Nation’s repudiation of the principle that a State might so conduct its schools as to ‘foster a homogeneous people.’” *Id.*

²⁶ See John S. Mann & Alex Molnar, *On Student Rights*, EDUCATIONAL LEADERSHIP: RIGHTS, RESPONSIBILITIES, AND CURRICULUM, May 1974, at 668 (citing *Tinker* for its discussion of social reconstructionism). The language of the opinion strongly supports this reconstructionist-oriented conclusion, expressing a need to “teach” students their civil rights:

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

. . . .

The Nation’s future depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of multitude of tongues, (rather) than through any kind of authoritative selection.

Tinker, 393 U.S. at 507, 512 (quoting, in part, *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (emphasis added)).

²⁷ Roy, *supra* note 6, at 651.

²⁸ See *infra* section III.C.

student speech and bottoms why *Hazelwood's* scope of protection should not apply in all curriculum contexts. Before entering that discussion, however, it is necessary to frame *Hazelwood*.

B. Hazelwood School District v. Kuhlmeier

Throughout the 1982–1983 school year, the students at Hazelwood, a school district near St. Louis, operated a school newspaper that printed every three weeks.²⁹ The school district funded the newspaper and its operations (although it was partially subsidized from newspaper sales), and the newspaper was an instrumental element of the school's Journalism II curriculum.³⁰ The newspaper was sold to the school's students, but also to the school's personnel and the public community.³¹ Prior to publication, the Journalism II teacher closely monitored each issue and submitted them to an administrator for review.³² Accordingly, on May 10, the teacher submitted the May 13 issue for review.³³

Within that issue, one article anonymously detailed the experiences of three pregnant female students at the school, while another article described the effects of divorce on other students.³⁴ Concerned for the privacy and anonymity of the individuals discussed in the articles, and also concerned that an article discussing birth control and sexual activity was inappropriate in a high school setting, the administrator redacted the pages on which the articles appeared and printed the newspaper in its redacted form.³⁵ Subsequently, three Journalism II students brought a § 1983 cause of action against the school district, alleging that the principal's actions violated

²⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 263.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

their First Amendment rights to free speech.³⁶ The district court ruled in favor of the school district but the Eighth Circuit Court of Appeals reversed, quoting *Tinker* and finding no showing that the articles caused or would cause a material and substantial disruption.³⁷

Despite *Tinker* and its strong language, the Supreme Court nonetheless reversed in favor of the school district.³⁸ The Court believed *Tinker* was philosophically different, because *Tinker* involved the “question of whether the First Amendment requires a school *to tolerate* particular student speech.”³⁹ The facts before it, on the other hand, posed a different question: whether the First Amendment required the school *to affirmatively promote* a particular speech.⁴⁰ Recognizing, therefore, the difference between speech tolerance and speech promotion, the Court articulated a rational-basis scope of First Amendment protection when the public can reasonably perceive the student speech bears the school’s imprimatur, stating “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.”⁴¹

³⁶ *Id.* at 264.

³⁷ *Id.* at 265.

³⁸ *Id.* at 276.

³⁹ *Id.* at 270 (emphasis added).

⁴⁰ *Id.* at 270–71. Succinctly, the Court stated the difference as this: “The latter question concerns educators’ authority over school-sponsored publications, the article productions, and other expressive activities that students, parents, and member of the public might reasonably perceive to bear the imprimatur of the school.” *Id.* at 271.

⁴¹ *Id.* at 273. In a footnote immediately following the announcement of the new standard, the Court seemingly added a premonition to the issue addressed by this Article, stating:

We reject respondents’ suggestion that school officials be permitted to exercise prepublication control over school-sponsored publications only pursuant to specific written regulations. To require such regulations in the context of a curricular activity could unduly constrain the ability of educators to educate. *We need not now decide whether such regulations are required before school officials may censor publications not sponsored by school that students seek to distribute on school grounds.*

Id. at 273 n.6 (emphasis added). Indeed, if a research, writing, or artistic topic is discussed in a classroom setting where the public is highly likely to believe the speech is “not sponsored by the school,” the Court left open the question of whether a teacher must *prescribe* certain topics in order to constrain discussion, and whether the initial free discretion to discuss a topic implicates greater First Amendment protection. *Cf.* Ronna F. Schneider, *Education Law: First Amendment, Due Process and Discrimination Litigation*, in 1 EDUCATION LAW § 2:8 (West, Westlaw

Although the Court spoke in an educational *laissez faire* tone that belied *Tinker*,⁴² its primary impetus was that *school-sponsored* student speech does not enjoy full First Amendment protection—a school is free to “disassociate itself” from speech it deems undesirable.⁴³ Yet, the Court defined “school-sponsored” speech narrowly. The Court could have easily discussed how the Journalism II teacher exercised substantial control in selecting and monitoring the newspaper,⁴⁴ thereby resting its scope of protection upon the postulation that school-sponsored speech includes all aspects of curricula because a school inherently promulgates and sponsors all curricula within its programs.⁴⁵ But the Court did not emphasize the teacher’s control.⁴⁶ Instead, the Court focused on how the speech affected the public perception, i.e., whether the public could reasonably believe the school supported or ratified the speech.⁴⁷

Consequently, in defining school-sponsored speech narrowly, the Court did not articulate a lower standard of First Amendment protection that applies to all aspects of curricula. Rather, the Court articulated a lower standard of protection that applies only when student speech

through November 2010) (indicating that *Hazelwood* reasonableness standard has been applied by lower courts such as the sixth circuit in *Settle* but that *Hazelwood* did not necessarily require this application).

⁴² For instance, at the very beginning of the opinion, Justice White clearly took a pro-school outlook, stating “the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.” *Hazelwood*, 484 U.S. at 267. Later, Justice White plainly stated: “Otherwise, the schools would be unduly constrained from fulfilling their role as ‘a principal instrument in *awakening the child to cultural values*,’ in preparing him for later professional training, and in helping him to adjust normally to his environment.” *Id.* at 272 (emphasis added). Finally, towards the end of his analysis, Justice White again took a pro-school outlook, stating “the education of the Nation’s youth is primarily the responsibility of the parents, teachers, and state and local school officials, and not of federal judges.” *Id.* at 273.

⁴³ *See id.* at 271–72.

⁴⁴ *See id.* The Court first began its analysis by clearly explaining how the facts of the case made it different than *Tinker*, in that the student speech concerned “expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” *Id.* at 271. Then, the Court continued its analysis by asserting that educators are entitled to control the classroom setting, but the Court immediately supported this assertion by explaining how a school may “disassociate itself” from speech. *Id.* at 271–72. Outside of discussing the facts, the Court therefore did not attempt to couch its decision upon how the teacher prescriptively retained control of the publication, but rather upon how the public viewed the publication. *See id.*

⁴⁵ *See Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152, 156 (6th Cir. 1995) (“Teachers therefore must be given broad discretion to give grades and conduct class discussion based on the content of speech. Learning is more vital in the classroom than free speech.”).

⁴⁶ *See Hazelwood*, 484 U.S. at 271–73.

⁴⁷ *See id.*; *see also supra* note 44 and accompanying text.

“associate[s] the school with any position other than neutrality” and is “disseminated under its auspices.”⁴⁸ Thus, *Hazelwood* limits student speech that reasonably carries the school’s stamp of approval, as long as censorship is reasonably related to legitimate educational goals.⁴⁹ After *Hazelwood*, however, have lower federal courts inappropriately extended this narrow scope of First Amendment protection to all contexts of curricular speech? Determining this requires a synopsis of *Settle*, for the answer lies therein.

C. Settle v. Dickson County School Board

During March 1991, Dana Ramsey, a ninth-grade teacher in Tennessee, assigned a research paper to her students, requesting them to research, synthesize, and write a paper on any topic of their choice (subject to her approval).⁵⁰ Her only stated requirement for approval was that the topic be “interesting, researchable and decent.”⁵¹ One of her students, Brittney Settle, originally chose “Drama” as her topic, but then selected a new topic after she realized “Drama” was too broad.⁵² Brittney’s new topic was Jesus Christ; specifically, the life of Jesus Christ from a scientific and historical perspective.⁵³ Dana Ramsey refused to accept Brittney’s outline on Jesus Christ, informing her that she needed to select a new topic.⁵⁴ Brittney did not select a new topic and submitted her research paper on Jesus Christ, at which point Dana Ramsey summarily gave Brittney a zero grade.⁵⁵

Brittney consequently brought a § 1983 cause of action against the school district, alleging Dana Ramsey’s actions violated her First Amendment right to free speech.⁵⁶ The

⁴⁸ *Id.* at 271–72.

⁴⁹ *Id.* at 272–73.

⁵⁰ *Settle*, 53 F.3d at 153.

⁵¹ *Id.*

⁵² *Id.* at 154.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 155.

⁵⁶ *Id.* at 154.

district court dismissed the case on summary judgment, citing *Hazelwood* as precedent for its decision.⁵⁷ Brittney appealed to the Sixth Circuit Court of Appeals, arguing that (1) Dana Ramsey’s actions violated her First Amendment right as a matter of law, or (2) a genuine issue of material fact existed as to whether Dana Ramsey predicated her actions on a legitimate pedagogical concern.⁵⁸ On appeal, the sixth circuit affirmed. The appellate court believed that a school may limit or grade speech in the classroom so long as a teacher does so “in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion, or political persuasion.”⁵⁹

In making the analysis of pretext, the court then listed the six “pedagogical” reasons Dana Ramsey put forth in support of her decision: first, that Brittney failed to receive permission on her second chosen topic;⁶⁰ second, that it would have been difficult to grade or write the paper objectively because she knew Brittney had “a strong personal belief in Christianity;”⁶¹ third, that the school did not “deal with personal religion” because it was “*just not an appropriate thing to do in a public school;*”⁶² fourth, that Brittney’s personal knowledge of Jesus Christ would allow Brittney to produce a paper without conducting research;⁶³ fifth, that the law did not allow her to deal with religious issues as a teacher;⁶⁴ and sixth, that Brittney would be unable to produce a paper that included the requirement of four original sources.⁶⁵ But without inquiring into the

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 155.

⁶⁰ *Id.* at 154.

⁶¹ *Id.* According to the sixth circuit, Dana Ramsey “knew that [Brittney] had a strong personal belief in Christianity that would make it difficult for her to write a dispassionate research paper,” and Dana Ramsey “believed that the paper would be difficult to grade because [Brittney] might take any criticism of the paper too personally.” *Id.*

⁶² *Id.* (emphasis added). “People don’t send their children to school for a teacher to get in a dialogue with personal religious beliefs. They send them to learn to read and write and think. And you can do that without getting into personal religion.” *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* Dana Ramsey put forth this explanation even with the obvious knowledge that there is a plethora of textual information outside of the Bible regarding the life of Jesus Christ, and even after admitting that she allowed

legitimacy of Dana Ramsey’s assertions, the sixth circuit concluded that her stated reasons for censorship fell “within the broad leeway of teachers to determine the nature the curriculum and the grades”⁶⁶ In essence, notwithstanding the fact that the sixth circuit proclaimed it would factually examine pretext, the court felt Dana Ramsey’s censorship was reasonably related to her “legitimate” pedagogical concerns.⁶⁷

In doing so, the court applied nothing more than a simple, face-value, rational-basis review. Indeed, as Judge Batchelder noted in his concurrence,⁶⁸ Dana Ramsey’s justifications would probably not have passed muster under an even slightly more stringent examination. For instance, by explaining that it would be difficult to write objectively on such a subjective topic,⁶⁹ Dana Ramsey completely failed to consider whether she should have first read Brittany’s paper in order to judge its objectivity, choosing instead to summarily give Brittany a zero grade.⁷⁰ If, after truly examining the paper, Dana Ramsey felt the paper did not objectively meet the criteria of the assignment, the First Amendment would not prohibit Dana Ramsey from giving Brittany a zero grade, for her actions would not be predicated upon Brittany’s opinionated speech but rather upon her failure to fulfill the curriculum.⁷¹

Or, by explaining that Brittany’s personal knowledge would allow her to produce a paper without conducting research,⁷² Dana Ramsey failed to address how her curriculum also required

secondary (non-original) sources for the paper. *Id.* at 154–55 (“I required that they have two books and two encyclopedias or resources, but they could substitute using magazine articles or pamphlets.”).

⁶⁶ *Id.* at 156.

⁶⁷ *See id.*

⁶⁸ *Id.* at 157–58 (Batchelder, J., concurring).

⁶⁹ *Id.* at 154 (majority opinion).

⁷⁰ *See id.* at 157–58 (Batchelder, J., concurring) (stating that “I would agree that some of Ms. Ramsey’s after-the-fact reasons are not very convincing”).

⁷¹ *Cf.* Neal H. Hutchens, *A Delicate Balance: Faculty Authority to Incorporate Professionalism Standards into the Curriculum versus College and University Students First Amendment Rights*, 270 ED. LAW REP. 371, 384 (2011) (“If academic and professional requirement are made clear . . . and actions taken against a student on academic grounds reflect the exercise of legitimate pedagogical concerns, precedent suggests that public colleges and university possess considerable legal autonomy in dismissing students for academic reasons.”).

⁷² *Settle*, 53 F.3d at 154.

students to incorporate at least four original sources.⁷³ Thus, if Brittney truly did produce a paper without using more than her own knowledge, would not the failure to satisfy the source-requirement sufficiently warrant a zero grade?⁷⁴ Clearly, even under a standard that slightly probes the facts, summary judgment would not have been appropriate, as there would have been a genuine issue of material fact concerning the existence of Dana Ramsey's pretextual intent.⁷⁵

Although *Settle* does not extensively cite or quote *Hazelwood*, its scope of First Amendment protection appears directly borne from *Hazelwood's* reasonable basis, face-value review. Because there was a *reasonable basis* (albeit hardly reasonable) connecting Dana Ramsey's censorship with her educational concern, the school district did not violate Brittney's First Amendment right; a further review of the record was not required.⁷⁶ Thus, as illustrated by *Settle*, lower federal courts apply *Hazelwood's* scope of First Amendment protection when a student discusses particular subject matter as part of curriculum that allows the choice of topic.

Other federal cases exhibit *Hazelwood's* adoption as well. In *DeNooyer v. Livonia Public Schools*,⁷⁷ for example, a federal trial court held in favor of a school district on a second-grader's § 1983 cause of action. There, the school prohibited a second-grader from presenting a videotape of herself singing a worship hymn to Jesus Christ.⁷⁸ The presentation was part of a

⁷³ *Id.*

⁷⁴ *Cf.* Hutchens, *supra* note 71, at 384.

⁷⁵ Judge Batchelder hinted at such a conclusion, but ultimately decided that Dana Ramsey's rather irrational reasons were not intentionally discriminatory, but errors in judgment instead. *Settle*, 53 F.3d at 157 (Batchelder, J., concurring). If, as Judge Batchelder believed, Dana Ramsey's stated reasons for censorship were indeed irrational, would not the determination of intent be one for a jury and not for a judge. *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293 (10th Cir. 2004) ("Viewing the evidence in a light most favorable to [the student], we find that there is a genuine issue of material fact as to whether [the school's] justification for the [censorship] was truly pedagogical or whether it was a pretext for religious discrimination. Therefore, summary judgment was improper.").

⁷⁶ *Settle*, 53 F.3d at 156 ("The argument that Ms. Ramsey was untruthful in expressing her real reasons has no basis in the record, as both the School Board and the District Court found, and arises from *an unfortunate tendency in lawsuits* for parties to cavil at their opponents through unsupported accusations. *There is no basis* for finding a real dispute of fact about Ms. Ramsey's motives, and the District Court was therefore correct in disposing of the case on summary judgment.").

⁷⁷ 799 F. Supp. 744 (E.D. Mich. 1992).

⁷⁸ *Id.* at 746.

discretionary show-and-tell program developed to promote self-esteem and oral communication.⁷⁹ The school district believed the videotape would not advance that educational goal, claiming the student would not speak directly to the class nor would the other students' level of maturity enable them to understand the message.⁸⁰ Yet, the school district failed to consider whether it should have allowed the student to recite or sing the hymn in class, and it failed to address how the same message is routinely given—during a Sunday-school service—to children often younger and less mature than second-graders.⁸¹ The court nevertheless heavily cited *Hazelwood* to find in favor of the school district, stating “[t]he school wanted to avoid a situation where other students and their parents would . . . infer the school’s endorsement”⁸²

Clearly, *Hazelwood* has spilled over its factual setting. Federal courts apply *Hazelwood*’s scope of First Amendment protection when schools censor student speech as part of curriculum that allows students to sovereignly choose their desired topic of discussion.⁸³ Whether that is appropriate, however, is an entirely other question. Next I will argue the propriety of *Hazelwood*’s application in this context is doubtful, particularly when considering (1) the rationale of *Hazelwood*, (2) the actual inquiry routinely made by lower federal courts, and (3) the compulsory setting wherein this student speech occurs.

⁷⁹ *Id.*

⁸⁰ *Id.* at 746–47.

⁸¹ See, e.g., *Sunday School Songs*, SQUIDOO, INC., <http://www.squidoo.com/sunday-school-songs> (last visited December 2, 2011) (providing a multitude of worship hymns often song by children as young as five or six). Of course, unlike a private church, a school would legitimately have an interest in viewing this speech as being educationally irrelevant and therefore not worth-while in the classroom, but the school’s rationale—that the students were not mature enough to understand the message—seems shaky, for students of a younger age are clearly deemed mature enough to understand the message,

⁸² *DeNooyer*, 799 F. Supp. at 751. Unlike *Settle*, the district court in *DeNooyer* cited *Hazelwood* multiple times, apparently building most of it analysis from an extension of *Hazelwood*, even though school-sponsorship of the speech was much more in question than it was in *Hazelwood*.

⁸³ See also, e.g., *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617 (2nd Cir. 2005) (applying *Hazelwood*’s First Amendment protection); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) (same); *Brown v. Li*, 308 F.3d 309 (9th Cir. 2002) (same); *Ward v. Members of the Bd. of Control of E. Mich. U.*, 700 F. Supp. 2d 803 (E.D. Mich. 2010); *O’Neal v. Falcon*, 668 F. Supp. 2d 979 (W.D. Tex. 2009); *Curry v. Sch. Dist. of the City of Saginaw*, 452 F. Supp. 2d 723 (E.D. Mich. 2006).

III. HAZELWOOD'S FIRST AMENDMENT PROTECTION APPEARS INAPPROPRIATE FOR THIS CONTEXT

To begin, it is helpful to clearly define the curriculum context this analysis addresses. It is not meant to address illicit or unacceptably harmful student speech,⁸⁴ nor is it meant to address student speech that does not fulfill clearly defined curricula,⁸⁵ nor is it meant to address student speech heard outside the classroom.⁸⁶ The analysis addresses student speech in the context of students who freely discuss a topic as part of curriculum that gives the student almost sovereign discretion in the selection of their topics, but is nonetheless summarily censored or graded because of its non-illicit subject matter rather than its inability to satisfy the curricular criteria.

Within that context, *Hazelwood's* scope of First Amendment protection is not appropriate for three reasons. First, *Hazelwood* addressed student speech that—through the public's eye—reasonably carried the school's stamp of approval.⁸⁷ This context presents very little risk the public will view the speech as being school-sponsored.⁸⁸ Second, *Hazelwood* calls for very little probing of the facts.⁸⁹ But some lower federal courts already apply a more probing inquiry within this context,⁹⁰ thereby making citation to *Hazelwood* relatively inconsistent. Third,

⁸⁴ See, e.g., *Morse v. Frederick*, 551 U.S. 393 (2007) (allowing school censorship of speech that promoted illegal activity but did not reasonably carry the school's imprimatur or cause a material and substantial disruption).

⁸⁵ Cf. *Brown*, 308 F.3d at 952 (stating the student “prepared an assignment that did not comply with the stated criteria” and the teacher’s decision was “reasonably related to a legitimate pedagogical objective: teaching [the student] the proper format for a scientific paper”).

⁸⁶ See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (censoring speech in a newspaper funded and printed by the school).

⁸⁷ See *id.* at 271–72.

⁸⁸ See *Roy*, *supra* note 6, at 658 (opining that this speech cannot reasonably be associated with school sponsorship).

⁸⁹ See *Hazelwood*, 484 U.S. at 273 (requiring only a reasonable relation between the pedagogical concern and the school censorship; see also *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152, 156 (6th Cir. 1995) (relying upon *Hazelwood* to give an almost non-existent probing of the facts); *O’Neal v. Falcon*, 668 F. Supp. 2d 979 (W.D. Tex. 2009) (citing *Hazelwood* and stating “that other topics that are also potentially disruptive are discussed in class even if they did not end up being disruptive in fact, does not mean that abortion is not a potentially disruptive topic”).

⁹⁰ See, e.g., *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 631 (2nd Cir. 2005) (“[W]e think that there are at least disputed factual questions, which may not be resolved on summary judgment, as to whether [the student’s] poster offers a ‘religious viewpoint,’ and whether, if the poster had depicted a purely secular image that was equally outside the scope of [the] environmental lessons, it would similarly have been censored.”); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293 (10th Cir. 2004) (“[W]e find that there is a genuine issue of material fact as to whether Defendant’s justification for script adherence requirement was truly pedagogical”); see also *Ward v. Members*

adopting *Hazelwood*'s scope of First Amendment protection ignores *Tinker*'s precedential weight without our compulsory education system.⁹¹

A. This Curriculum Context Presents Little Risk of Erroneous School Sponsorship

As discussed above,⁹² *Hazelwood* could have easily focused on how the Journalism II teacher substantially controlled and monitored the school newspaper, yet the Court focused almost primarily on how the student speech affected public perception, i.e., whether the speech could be seen as carrying the school's imprimatur.⁹³ In doing so, the Court created a scope of First Amendment protection separate⁹⁴ from *Tinker*, for it was reasonable to assume that "a school [could] refuse to lend its name and resources to the dissemination of student" speech that it deemed undesirable.⁹⁵ *Hazelwood*'s categorical exception therefore was not based upon a school's ability to control all aspects of student speech within curricula, but upon the right of a school to avoid the supposition of sponsorship.⁹⁶

In this context, however, there is very little risk that student speech would carry the school's imprimatur. The teacher gives the assignment, the student chooses his or her desired topic, and the discourse primarily occurs between the teacher and the student. By approving the

of the Bd. of Control of E. Mich. U., 700 F. Supp. 2d 803 (E.D. Mich. 2010) (requiring further factual inquiry of intent); *Curry v. Sch. Dist. of the City of Saginaw*, 452 F. Supp. 2d 723 (E.D. Mich. 2006) (same).

⁹¹ See *Settle*, 53 F. 3d at 158 (Batchelder, J., concurring) ("If there is a First Amendment issue here, it would fall somewhere in between *Hazelwood* and *Tinker* as a form of student expression *allowed* under the school curriculum but *not* sponsored or endorsed by the school.").

⁹² See *supra* section II.B.

⁹³ See *Hazelwood*, 484 U.S. at 271–72. Of course, to the extent the teacher's control helped structure the public's perception, that fact was still relevant, but the Court failed to address the teacher's control in that manner. See *id.*

⁹⁴ Although Justice Thomas refuses to accept the concept of First Amendment rights in the school setting, for he believes students possess almost no First Amendment rights, Justice Thomas succinctly recognized that many view *Hazelwood* as an exception to *Tinker*, stating that in *Hazelwood* "the Court made an exception to *Tinker* for school-sponsored activities. . . . [F]or school-sponsored activities, the Court created a new standard that permitted school regulation of student speech that are 'reasonably rated to legitimate pedagogical concerns.'" *Morse v. Frederick*, 551 U.S. 393, 418 (2007) (Thomas, J., concurring) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)).

⁹⁵ *Hazelwood*, 484 U.S. at 272–73.

⁹⁶ See also *Morse*, 551 U.S. at 423 (Alito, J., concurring) (stating *Hazelwood* "allows a school to regulate what is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ").

topic, the teacher no more accepts its premise than its contradiction, for the teacher's ultimate interest is merely to examine whether the final product exhibits adequate research, clear writing, and a logically-sound conclusion. No reasonable member of the public would suppose the teacher mandated such a topic upon the student, or upon the class for that matter. Moreover, "[t]hough other students may hear about the topic from the student author, it . . . seems unlikely that those students [would] attribute the author's message to the school."⁹⁷ To think otherwise would belie the very fact that the teacher gave the students broad discretion in selecting their own desired topics.

Therefore, because *Hazelwood's* exception to *Tinker* was intended to apply in curriculum contexts that meaningfully risk the erroneous supposition of school-sponsorship,⁹⁸ and because this context presents very little indicia of school-sponsorship, *Hazelwood's* application is inappropriate. In short, schools are not "entitled to exercise greater control" over student speech when the views of the student cannot be "erroneously attributed to the school."⁹⁹

B. Citation to Hazelwood is Inconsistent with the Actual Protection Provided by Lower Federal Courts

Sometimes, lower federal courts truly adopt *Hazelwood's* rational-basis review. In *O'Neal v. Falcon*,¹⁰⁰ for example, a federal district court held that a university did not violate the First Amendment when its teacher prohibited a classroom presentation concerning abortion. The teacher believed a controversial, overly-subjective topic such as abortion was too disruptive to

⁹⁷ Roy, *supra* note 6, at 658.

⁹⁸ *Hazelwood*, 484 U.S. at 270–71 ("The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. . . . The latter question concerns educators' authority over school-sponsored publications . . . that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.").

⁹⁹ *Id.* at 270.

¹⁰⁰ 668 F. Supp. 2d 979 (W.D. Tex. 2009).

the curriculum goal: improving the students' effective communication skills.¹⁰¹ The student, on the other hand, argued that (1) the university allowed other equally controversial topics to be presented, and (2) the teacher did not produce any actual evidence of disruption.¹⁰² Without examining the students' assertions,¹⁰³ the district court granted summary judgment for the university, citing *Hazelwood* and *Settle*¹⁰⁴ while stating:

The fact that perhaps not all potentially disruptive topics are banned does not mean that banning this particular topic is not legitimate. It is not the place of this Court to evaluate whether [the teacher or the university] made the best decision in banning the topic of abortion; it may ***only determine whether they have advanced a valid pedagogical reason***, and they have.¹⁰⁵

However, despite *Settle* and other federal decisions that have employed an extremely deferential standard, there exists a significant body of federal case law that applies a more probing standard of review. In *Axson-Flynn v. Johnson*,¹⁰⁶ the Tenth Circuit Court of Appeals cited *Hazelwood* and *Settle*, but remanded a grant of summary judgment because it felt there was a genuine issue of material fact concerning discriminatory intent. There, an acting student refused to recite profanity during assigned performances—substituting the profanity for language she deemed in consort with her religious views—and the university eventually threatened to expel her if she continued her refusal.¹⁰⁷ She then brought a § 1983 cause of action against the university, alleging the university violated her First Amendment right to free speech.¹⁰⁸

¹⁰¹ *Id.* at 985.

¹⁰² *Id.*

¹⁰³ Indeed, the record disclosed evidence that the censorship decision was actually not motivated by pedagogical concerns. After first asking if she could speak about abortion, the complaint alleged that the teacher refused, stating “every already knew what they thought about the tissue, he was pro-choice, and [the presentation] was not going to change his mind” *Id.* If this factual allegation was treated as true, even a more slightly probing scope of protection would not have permitted summary judgment. *See supra* note 75 and accompanying text.

¹⁰⁴ Before articulating its ruling on the summary judgment motion, the district court took three pages to analyze *Hazelwood*, *Settle*, and other similar federal court decisions. *See id.* at 983–85.

¹⁰⁵ *Id.* at 987 (emphasis added).

¹⁰⁶ 356 F.3d 1277 (10th Cir. 2004).

¹⁰⁷ *Id.* at 1282–83.

¹⁰⁸ *Id.* at 1283.

The university put forth two legitimate pedagogical reasons for its decision: first, that using profanity teaches acting students to step outside of their comfort zone and “convincingly portray an offensive” character;¹⁰⁹ and second, that using profanity teaches acting students the value of preserving an author’s work.¹¹⁰ In addressing the legitimacy of these goals, the tenth circuit heavily favored the university, stating: “[a] more stringent standard would effectively give each student veto power over curricular requirements, subjecting the curricular decisions of teachers to the whims” of a particular student.¹¹¹ In essence, the university’s pedagogical reasons were legitimate on their face. But the court reversed the grant of summary judgment, believing that material facts existed to find a discriminatory pretext.¹¹² Yet, under *Hazelwood’s* scope of protection, why?

Could it be the court did not necessarily accept *Hazelwood’s* application even if its rhetoric proclaimed otherwise? As stated above, a true application of *Hazelwood* does not require any real probing of the facts. If the stated reason for censorship is reasonable, a school’s censorship passes First Amendment muster.¹¹³ Here, the university clearly had a legitimate pedagogical concern under that analysis. A university can decide which simulated characters provide students an optimal educational experience.¹¹⁴ Nonetheless, the court remanded,¹¹⁵

¹⁰⁹ *Id.* at 1291.

¹¹⁰ *Id.* I would have also added a third pedagogical reason: that the teachers viewed the role as being educationally valuable. Unlike other scenarios discussed in the Article, the acting student was not given a free, discretionary choice of topic or subject matter. *See id.* Rather, the teacher saw educational value in the character and explicitly assigned the character for that reason. In essence, the acting student did not question censorship of her free topic-selection, the acting student challenged the educational propriety of the assigned subject matter. *See id.* As stated above, however, a teacher is free to judge performance based upon the fulfillment of the stated academic criteria. Thus, in and of itself, I believe this pedagogical reason—if promoted—would have been sufficient to censor the acting student’s speech. *Cf. id.* at 1292.

¹¹¹ *Id.*

¹¹² *Id.* at 1293.

¹¹³ *See supra* notes 76–82 and accompanying text.

¹¹⁴ *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (“This standard is consistent with our oft-expressed view that the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”).

favoring a more inquisitive scope of First Amendment protection. As such, some lower courts apparently view *Hazelwood's* application as inappropriate in this context, thereby inconsistently applying a heightened scope of First Amendment protection.¹¹⁶ Judge Batchelder's concurrence in *Settle* even forewarned this judicial self-contradiction: "If there were a First Amendment issue here, it would fall somewhere in between *Hazelwood* and *Tinker* as a form of student expression *allowed* under the school curriculum but *not sponsored* . . . by the school."¹¹⁷

Consequently, notwithstanding the federal courts' lip service to *Hazelwood*, at least some federal decisions implicitly deem *Hazelwood's* scope of First Amendment protection inadequate in this context, given the heightened need to protect student speech that does not implicate school sponsorship.

C. Hazelwood's Scope of Protection Inadequately Addresses Students' Rights, Particularly when Considering Tinker and the Compulsory Education System

Without any true concern for erroneous school-sponsorship,¹¹⁸ many espouse another differentiation between *Hazelwood* and *Settle*: a classroom is a purely nonpublic forum and therefore schools may "impose reasonable restrictions"¹¹⁹ on student speech that occurs within that forum.¹²⁰ In other words, a rational-basis scope of First Amendment protection applies in this context, not because of *Hazelwood's* particular concern for unintended school-sponsorship, but because a classroom is a nonpublic forum where probing First Amendment protection is

¹¹⁵ *Axson-Flynn*, 356 F.3d at 1293 ("Thus, we may override an educator's judgment where the proffered goal or methodology was a sham pretext for an impermissible ulterior motive.").

¹¹⁶ *See id.*; *see also* *Ward v. Members of the Bd. of Control of E. Mich. U.*, 700 F. Supp. 2d 803 (E.D. Mich. 2010) (remanding, even in light of some clearly applicable pedagogical concerns, so that the district court could conduct a more probing analysis of the university's intent); *Curry v. Sch. Dist. of the City of Saginaw*, 452 F. Supp. 2d 723 (E.D. Mich. 2006) (finding a First Amendment violation even with evidence that the student speech in the grade-school setting disrupted at least one other student's learning environment).

¹¹⁷ *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152, 158 (6th Cir. 1995) (Batchelder, J., concurring) (emphasis added).

¹¹⁸ *See supra* section III.A.

¹¹⁹ *Hazelwood*, 484 U.S. at 267.

¹²⁰ *See, e.g., Settle*, 53 F.3d at 155; *Axson-Flynn*, 356 F.3d at 1285 ("We thus find that the . . . classroom constitutes a nonpublic forum, meaning that school officials could regulate the speech that takes place there 'in a reasonable manner.'" (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988))).

never provided.¹²¹ Consequently, it's possible the *Hazelwood* Court felt compelled to analyze school-sponsorship because the school newspaper arguably created a designated public forum,¹²² a forum where greater First Amendment protection is provided.¹²³ Given this forum-differentiation between *Hazelwood* and *Settle*, is the concern for *Hazelwood*'s adoption legitimate, since the same scope of protection theoretically applies anyway?

Yes, the concern is legitimate. With *Tinker*'s validity still intact,¹²⁴ and with our compulsory system of education, rational-basis protection in this context is inadequate regardless of the vehicle through which such protection applies. In *Tinker*, the Court clearly adopted a social reconstructionist approach,¹²⁵ giving speech full First Amendment protection in the school setting and self-creating its first exception to that full protection (speech that materially and substantially disrupts).¹²⁶ That Justice Stewart authored a concurrence in *Tinker* which explicitly criticized the majority's expansive protection¹²⁷ supports this conclusion.¹²⁸

¹²¹ See *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983).

¹²² See *Hazelwood*, 484 U.S. at 271–72. Although the Court stated it did not view the case as being a designated public forum case, its analysis seemingly contradicted this premise. If rational basis review was the standard, would not the fact that the “anonymous” students could be easily identified, *id.* at 274, be a reasonable basis for the censorship? I believe so. And, if so, why discuss school-sponsorship and the public supposition thereof? In my view, the Court was concerned that the newspaper was arguably a designated public forum—rather than a nonpublic forum—and that rational-basis review was not quite appropriate outside the Court's school-sponsorship exception.

¹²³ *Id.* at 267.

¹²⁴ See *Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Thomas, J., concurring) (noting *Tinker*'s validity in the face of enumerated judicial exceptions that better define *Tinker*'s scope of First Amendment protection).

¹²⁵ See *supra* notes 24–30 and accompanying text.

¹²⁶ See *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 513–14 (1969).

¹²⁷ See *id.* at 514–15 (Stewart, J., concurring) (“I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults.”).

¹²⁸ Also supporting this conclusion is the Court's extremely strong wording:

[S]tate-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are “*persons*” under our Constitution. **They are possessed of fundamental rights which the State must respect. . . .** [S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. **They may not be confined to the expression of those sentiments that are officially approved.**

Id. at 511 (majority opinion).

Moreover, after combining *Tinker's* expansive (and still valid) precedent with our current compulsory education system,¹²⁹ it appears rational-basis protection—regardless of its rhetorical vehicle—is inappropriate in this curriculum context. Must students attend school, must they take particular course-work, must they complete all assignments necessary for graduation, and then must they speak only in consort with the school even when (1) the school initially gives them free discretion to select a topic for discussion, and (2) they meet the criteria regardless of the discussion's subject matter? Certainly, where topic-criteria is prescribed, rational-basis protection is more justified, for the teacher already espouses an educational objective concerning particular subject matter, and the Free Exercise clause¹³⁰ protects the compulsion, rather than the censorship, of speech. Likewise, where the government institution is a university, rational-basis protection is more justified, for the student voluntarily attends the chosen curricular program.¹³¹

But where the topic of discussion is wholly unprescribed, where the attendance is compelled, where the assignment's completion is mandatory, *Hazelwood's* First Amendment protection is inappropriate and inadequate, for rational-basis protection eviscerates the First Amendment when schools can censor any speech by summarily declaring it non-educational. Are we truly willing to take *Settle's* language¹³² to its fullest extent and proclaim that students may only speak what they are told? If yes, then perhaps this Article should discuss *Tinker's* forthcoming judicial abrogation.¹³³ If not, then *Hazelwood's* scope of First Amendment protection is indeed inadequate in this context.

¹²⁹ See, e.g., NEB. REV. STAT. § 79-201 (Reissue 2008) (requiring school attendance for all children under the age of eighteen who have not received parental permission to discontinue enrollment at the age of sixteen).

¹³⁰ See, e.g., *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293–94 (10th Cir. 2004) (analyzing the compulsion of speech under the First Amendment Free Speech clause and the First Amendment Free Exercise clause).

¹³¹ See *id.*

¹³² “Teachers therefore must be given broad discretion *based on the content of speech*. Learning is more vital in the classroom than free speech.” *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152, 156 (6th Cir. 1995) (emphasis added).

¹³³ Cf. *Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Thomas, J., concurring) (“I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so.”).

IV. A HEIGHTENED SCOPE OF FIRST AMENDMENT PROTECTION

This curriculum context is not the same as *Tinker*'s. *Tinker* involved speech that was not remotely associated with coursework assignments.¹³⁴ But, as explained above, this context is inappropriate for *Hazelwood*'s scope of First Amendment protection. How, therefore, should the First Amendment apply? One could argue an exception to *Tinker* has not been judicially created and thus *Tinker*'s full protection applies, allowing censorship in situations only where student speech materially and substantially disrupts,¹³⁵ implicates school-sponsorship,¹³⁶ or advocates an illicit position.¹³⁷ *Tinker*'s scope of protection, though, might create an unreasonable incentive for students to challenge any grade, regardless of whether the grade was fairly deserved. As such, without *Tinker* or *Hazelwood* being applicable, Judge Batchelder's concurrence¹³⁸ in *Settle* provides the seed for the applicable scope of protection: it must fall somewhere between *Tinker*'s full protection and *Hazelwood*'s rational-basis protection. Thus, some form of intermediate protection, perhaps?

If so, a modified version of the protection articulated in *United States v. O'Brien*¹³⁹ appears helpful, although *O'Brien* involved speech in a wholly different context. There, the Court articulated an intermediate scope of First Amendment protection for content-neutral speech, requiring that (1) censorship be within the government's power, (2) censorship further an important governmental interest, (3) the governmental interest be unrelated to censorship of free

¹³⁴ *Tinker*, 393 U.S. at 510.

¹³⁵ *See id.*

¹³⁶ *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272–73 (1988).

¹³⁷ *See Morse*, 551 U.S. at 409–10.

¹³⁸ *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152, 158 (6th Cir. 1995) (“If there were a First Amendment issue here, it would fall somewhere in between *Hazelwood* and *Tinker* as a form of student expression *allowed* under the school curriculum but *not* sponsored or endorsed by the school.”).

¹³⁹ 391 U.S. 367, 376 (1968).

expression, and (4) censorship be narrowly tailored.¹⁴⁰ Here, *O'Brien's* fourth requirement appears undesirable in this context; narrowly-tailored censorship may create an unreasonable incentive for students to challenge a specific grade, possibly even demanding an A- rather than a B+. Similarly, requirement three appears inapplicable in this context; problems usually arise only when free expression actually affects pedagogical concerns. Nonetheless, the remaining elements are helpful.

First, if the protection required that *censorship be substantially within the governmental interest*, a school could clearly espouse a governmental interest, because “education of the Nation’s youth is primarily the responsibility of . . . state and local officials.”¹⁴¹ Moreover, because irrational censorship of protected speech is not substantially within the government’s interest,¹⁴² this requirement would encompass any pretextual inquiry currently applied by lower federal courts.¹⁴³ Second, if the protection required that *censorship legitimately further the governmental interest*, a school could simply show that the selected topic legitimately inhibited the pedagogical goals of the assignment; namely, that the topic legitimately did not allow for adequate research, clear communication, and persuasive conclusions. What’s more, by requiring censorship be *legitimately related*, the irrational problems associated with reasonable-basis protection would likely disappear, for courts could no longer take schools at their word.

Would this standard induce frivolous litigation? Would it take too much discretion from those who have teaching expertise? In all likelihood, probably not. Censorship that is substantially within the government’s pedagogical interest and that legitimately furthers the

¹⁴⁰ *Id.* (“[I]f it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”).

¹⁴¹ *Hazelwood*, 484 U.S. at 273.

¹⁴² *See, e.g.,* *Curry v. Sch. Dist. of City of Saginaw*, 452 F. Supp. 2d 273 (E.D. Mich. 2006) (finding a First Amendment violation in this context even under a lesser scope of protection).

¹⁴³ *See, e.g.,* *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617 (2nd Cir. 2005); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004).

government's pedagogical interest leaves open a large opportunity for teachers to give poor grades based upon the topic's inability to lend itself to such an educational assignment. It also leaves open the opportunity for teachers to clearly *prescribe* curricula. Moreover, this scope of protection appears no more restrictive than the pretextual examination currently applied by many courts, for any pretextual inquiry essentially asks the same questions, i.e., given the facts, was the censorship truly because of a pedagogical concern.

V. CONCLUSION

Lower federal courts have routinely applied *Hazelwood's* scope of First Amendment protection when students select, discuss, or present a particular topic as part of curriculum that allows students to freely and sovereignly choose their substantive topic of desire. *Hazelwood's* adoption, however, is inappropriate in this context. *Hazelwood* involved student speech that reasonably implicated school sponsorship, yet sponsorship implication is improbable in this context. Also, although courts rhetorically rely upon *Hazelwood*, the analysis of some lower federal courts actually belies *Hazelwood's* application. Finally, the existence of compulsory education laws—when combined with *Tinker's* precedential validity—requires a more probing, inquisitive scope of protection.

Thus, in this context, an appropriate scope of First Amendment protection requires that the school's actions (1) be substantially within the government's educational interest, and (2) legitimately further the government's educational interest. This scope of protection would eliminate the need to stretch *Hazelwood* beyond its intended limits. It would be in accord with the protection currently given by some lower federal courts. And it would leave intact the precedential tone of *Tinker* while also considering the different context *Tinker* addressed.