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The Speech, Not the Speaker: Protecting Public School Student Expression

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Student speech in the public K-12 environment has received limited protection from the Supreme Court. After the Hazelwood v. Kuhlmeier *decision, giving public schools greater latitude to restrict student expression, several states passed legislation to support student speech rights. Examining court cases involving student expression in states with anti-Hazelwood laws or regulations reveals these efforts have been tailored to the circumstances of the* Hazelwood *decision, focusing primarily on student media rather than student expression. Looking at student expression from the perspectives of "foundation" and "speech" may offer states a path to protecting student expression as well as ensuring administrators retain control of the educational environment*.

The question of the extent to which public school students may enjoy free expression within the academic environment has largely been guided by four Supreme Court cases: *Tinker v. Des Moines* (1969), *Bethel School District v. Fraser* (1986), *Hazelwood v. Kuhlmeier* (1988) and *Morse v. Frederick* (2007). This progression of precedents, spanning nearly 40 years, started with a basic presupposition that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Tinker,* 1969 at 506), but also developed a series of exceptions, giving administrators a loose set of tools to restrict or restrain certain types of speech that could otherwise enjoy greater protection off-campus.

Of these four cases, the *Hazelwood* decision, which upheld the censorship of two pages from a high school newspaper by a school administrator, garnered a unique state response. In the years since it was handed down in 1988, six states have passed so-called "anti-*Hazelwood*" statutes aimed at conveying a greater protection for student speech or media in public elementary and secondary schools, joining California, which already had such a statute on the books (California Student Free Expression Law, 1977). Two additional states enacted administrative regulations to protect student speech.

Yet student "media" and "speech" are two different legal considerations. Though most "anti-*Hazelwood*" laws begin with statements of general support for the protection of student expression, the bulk of the laws are cast in language narrowly focused on student media – most specifically, newspapers. The laws, for example, may spell out the degree of protection student editors have in selecting story ideas, but under "plain meaning" doctrine, this provides poor support for student theater, creative writing or dress codes, all of which have been the subject of school regulations upheld by courts using *Hazelwood* as relevant precedent.

Such statutory framing is curious, as the language in *Hazelwood* implies the Supreme Court considers it a speech case, not a press one – in fact, the student petitioners are regularly referred to as a speakers rather than journalists or the press. The statutes appear to be written to address the facts of *Hazelwood* rather than its application, and as such, state statutes meant to reaffirm the rights threatened by *Hazelwood* created a safe harbor for many student media outlets, but not for other forms of student expression.

This review of Supreme Court and lower court decisions suggests the need for an alternate way to approach statutory protection of student expression within the public K-12 setting that both ensures the schools' ability to control the academic environment as well as the students' abilities to express themselves within the parameters of First Amendment jurisprudence. State and federal court decisions relying on the *Hazelwood* precedent in the nine states with anti-*Hazelwood* laws or regulations shows the successful use of the precedent to restrict student expression in commencement speeches, creative writing and art, student organizations and

student dress. Despite the intent to provide protections for student speech, these laws and regulations appear to offer only student media an umbrella.

Protecting student expression allows students to engage with critical constitutional rights that can impact their future involvement in civic and political activities. Supreme Court decisions regarding student speech seek to find a balance between the importance of these rights and the schools' abilities to provide effective educational environments. A blend of elements from the Supreme Court decisions and the states' statutory and administrative approaches may provide a roadmap for future states contemplating legislative action to protect student expression.

The Big Four: Tinker, Fraser, Hazelwood and Morse

Public school student speech jurisprudence begins with *Tinker v. Des Moines Independent Community School District* (1969). Des Moines public school students John Tinker and Mary Beth Tinker wore black armbands to school to protest the Vietnam War, despite a recently passed district policy prohibiting such an act (*Tinker*, 1969 at 504). The Tinkers were suspended from school until they agreed to remove the armbands. Instead, the Tinkers chose to go to court, declaring an unconstitutional ban on their right to free expression.

The district court sided with the school district: "In this instance, however, it is the disciplined atmosphere of the classroom, not the plaintiffs' right to wear arm bands on school premises, which is entitled to the protection of the law" (*Tinker*, 1966 at 973). The 8th Circuit Court of Appeals heard the case en banc, and reaffirmed the district court's decision in a per curiam opinion (*Tinker*, 1967).

Arguing before the Supreme Court, the district's concern was for disruption of the school's functioning and students' learning, as well as the potential for harm to the Tinker children due to their stance on a highly charged topic. The Court recognized the need for schools to control the academic environment and assert authority over their students but stated "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression" (*Tinker*, 1969 at 508).

Tinker's greatest impact, however, comes from the following part of Justice Fortas's opinion for the majority:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more that mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly, where there is no finding and no showing that engaging in the forbidden contact would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained (*Tinker*, 1969 at 509).

Having perceived a viewpoint-based restraint of speech, the Court applied strict scrutiny and determined that while maintaining an orderly learning environment was a compelling interest, the district did not prove the Tinkers' silent speech posed a threat of material and substantial interference to such order. Moreover, the symbolic speech of the Tinkers' armbands constituted the political expression so near the core of the First Amendment.

The *Tinker* decision created a new foundation for student speech protection in public schools. It established that a student's free speech rights were not coextensive with an adult's, but age or student status alone did not completely eliminate the First Amendment. As with so many free speech issues, the court created a balancing test between the value of the student's right to free speech against the school's right to maintain discipline within the daily operations of the academic environment. The school's interest was not insignificant,

but the mechanism of the test shifted the burden of proof to the school, requiring districts to prove that the learning environment either had been disrupted or that there was reasonable expectation of such disruption. This shift broke with tradition, as the courts had generally deferred to school districts and their locally elected school boards in questions of curriculum, policy or discipline.

Justice Black's dissent in the *Tinker* case reflected his distaste for a potential empowerment of student over school, arguing that nothing in the Constitution "compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students" (*Tinker*, 1969 at 526). That exact phrase found its way into the Supreme Court's next opportunity to address student speech in public schools: *Bethel School District v. Fraser* (1986).

During a student-run high school assembly, student Matthew Fraser delivered a sexually suggestive speech nominating a friend for student government. The school suspended him under a district rule against obscene and profane language.

With *Tinker* as a guide, the lower courts found for Fraser, stating the district had failed to demonstrate a substantial disruption in the school environment: "(Fraser) made a personal judgment when he chose to use sexual innuendo in his speech. It may have been politically risky to do so, but the decision was his and his alone to make. As long as the speech was neither obscene nor disruptive, the First Amendment protects him from punishment by school officials" (*Fraser*, 1985 at 1365).

The Supreme Court reversed, arguing that the purpose of the public school system is to help students obtain the "fundamental values of 'habits and manners of civility' essential to a democratic society," (*Fraser*, 1986 at 681) and therefore schools can determine that "lewd, indecent, or offensive speech" (*Fraser*, 1986 at 683) is contrary to that educational mission and restrict it. *Fraser* did not overturn *Tinker*, but carved out an exception to it for lewd or vulgar language based in part on previous Supreme Court decisions that had upheld the concept of variable obscenity, or the idea that some sexually based material may be legal for adults but inappropriate for minors (*Ginsberg*, 1968).

The "educational mission" referred to in the decision is the overarching mission of American public education: to prepare children for participation in civil discourse so vital to democratic society. Students who wish to use their free speech rights within the academic setting are called on to do so responsibly, with consideration for the range of maturity levels in their audience. In *Fraser*, Matthew Fraser did not show consideration for the 14-year-old students in the audience, many of whom were embarrassed or confused by his speech (*Fraser*, 1986 at 677). Because it was his approach to speech that was being regulated, rather than any specific viewpoint (he was not, for example, being punished because he nominated one student over another), the Court upheld the restriction.

As *Fraser* was decided, another student speech case was working its way through the federal courts: *Hazelwood School District v. Kuhlmeier* (1988). This case dealt with the removal of two pages from the Hazelwood East High School newspaper, *Spectrum,* by an administrator during his usual prior review of the publication. The administrator had concerns with an article on teen pregnancy, believing the anonymous students were too easy to identify, and with an article on divorce in which he felt a student's father was unfairly criticized without the opportunity to reply (*Hazelwood*, 1988 at 262).

Lower courts were split on this case. The district court sided with the school (*Kuhlmeier*, 1985) using a *Fraser*-style of analysis (though not the precedent itself, as it had not been delivered yet), while the 8th Circuit Court of Appeals sided with the students, using *Tinker* as its guide (*Kuhlmeier*, 1986).

As noted in the introduction to this article, the Supreme Court dealt with this case as a student speech issue, not a media or press case that happened to occur in the public school environment. That said, the Court began its formal analysis with a more adult-coextensive forum analysis rather than diving strictly into *Fraser* or *Tinker*. Forum analysis has been used in a variety of government-administered places where expression may take place, ranging from physical spaces like meeting rooms or airports to opportunities like access to government employee mailboxes or in this case, a high school student newspaper.

Justice White noted the Hazelwood *Spectrum* was a newspaper created in the classroom under the direction of a member of the teaching staff. It was aimed at the student body and did not pursue topics or audiences outside the school. Student writers and editors earned grades and academic credit for their work, and prior review by the school's administrators was an accepted part of the publication process. Based on these factors, the Court determined that the *Spectrum* was a private forum, which could be regulated under a reasonableness test, and bore the appearance of school-sponsorship, leaving it open to pedagogically supported restriction. Justice White noted there was a difference between tolerating speech, as was the case in *Tinker*, and promoting it (*Hazelwood*, 1988 at 270-71):

> The standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold 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* (*Hazelwood*, 1988 at 272-73, emphasis added).

Lower courts have developed a series of factors to help determine when expressive activities may be legitimately called "school-sponsored" and therefore be regulated under the *Hazelwood* precedent:

- whether the students produced the newspaper as part of the high school curriculum
- whether students received credits and grades for completing the course
- whether a member of the faculty oversaw the production
- whether the school deviated from its policy of producing the paper as part of the educational curriculum
- the degree of control the administration and the faculty advisor exercised
- applicable written policy statements of the board of education
- the school's policy with respect to the forum
- the school's practice with respect to the forum
- the nature of the property at issue and its compatibility with expressive activity. (*Dean*, 2004 at 807).

The *Hazelwood* decision, like *Fraser*, did not overrule *Tinker*. Justice White was careful to distinguish the case from *Tinker* by virtue of the perceived connection between the student newspaper and the school. The political speech of the Tinkers was undoubtedly their own, but the student newspaper, which bore the name of the school in its masthead and was unmistakably a product of the students when they were in school, was close enough to the school's own speech that it was allowed a reasonable say in the content and approach of the speech.

It took nearly 20 years for the Supreme Court to take up the issue of student speech again, and when it did, it was a most unusual case. Joseph Frederick, a student at Juneau-Douglas High School, waved a banner reading "Bong Hits 4 Jesus" at a school-sanctioned field trip to watch the Olympic Torch pass through the city. Principal Deborah Morse demanded he take it down. When he refused, she suspended him. Frederick brought suit, claiming his First Amendment rights had been abridged and that the *Tinker* standard demanded Morse show his speech to be a material disruption to the school day in order to restrict it (*Morse*, 2007 at 396).

The Justices took a content-specific approach to the case and centered much of their discussion on whether Frederick's banner advocated or promoted illegal drug use. The phrase "Bong Hits," Morse argued, was a direct reference to the use of marijuana, and she believed that "display of the banner would be construed by students, District personnel, parents and others witnessing the display of the banner, as advocating or promoting illegal drug use – in violation of school policy" (*Morse,* 2007 at 401). The Court agreed, rejecting Frederick's argument that the banner was meant to be nonsensical.

This allowed the Court to phrase – and answer – the legal question at hand thusly: "…Whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may" (*Morse*, 2007 at 403). In his majority opinion, Justice Roberts took a paternalistic view reminiscent of the *in loco parentis* doctrine, clarifying that a school's "custodial and tutelary responsibility for children" (*Morse*, 2007 at 407) means it has a duty to remain consistent in educating students against illegal drug use. Therefore, "the governmental interest in stopping student drug abuse--reflected in the policies of Congress and myriad school boards, including JDHS--allow schools to restrict student expression that they reasonably regard as promoting illegal drug use" (*Morse*, 2007 at 408).

A concurrence by Justice Alito cited his belief that this decision created precedent only for instances of speech advocating illegal drug use, and that it should not be extended beyond such a consideration (*Morse*, 2007 at 422). Lower courts, however, have used this precedent to cover a broad range of issues considered as contrary to a school's mission as drug use, such as writing with violent or sexual themes (Calvert, 2008).

Both the *Hazelwood* and *Morse* decisions distanced themselves from *Tinker* because of the close connection the speech had to a school activity, yet both also opened the door to viewpoint discrimination in student speech regulation. The *Hazelwood* decision allows for restriction based on a legitimate pedagogical purpose, leaving it up to administrators as to whether viewpoint balance is pedagogically desirable. *Morse* explicitly allows for viewpoint discrimination – only speech that advocates illegal drug use is open to restriction. Speech that advocates against illegal drug use does not fall under the *Morse* precedent.

With the conclusion of *Morse,* a patchwork of student speech doctrine emerges. Speech that is lewd or vulgar and has some sort of tie to the school is regulated under *Fraser*, speech that takes place in school-sponsored activities is regulated under *Hazelwood* and speech that advocates illegal drug use (or other harms that a school has a responsibility to defend students against) is regulated by *Morse*. All other student speech at public schools may be regulated under *Tinker* if the school can establish a material or substantial disruption to the academic setting as a result of the speech. As stated, it would appear that student speech enjoys a fair amount of protection. In practice, it does not.

The "Anti-Hazelwood" Response

The facts of the *Hazelwood* precedent dealt with a student newspaper, but the legal precedent extended to any expressive activity that could be called school-sponsored. Unlike *Fraser* or *Morse*, the *Hazelwood* decision garnered a response from individual states that wished to block the impact of the ruling. Those states could either respond to the broad precedent of schools having significant ability to restrict student expression in school settings or to the narrower factual circumstances in *Hazelwood* of a student newspaper facing censorship. An examination of the statutes and regulations shows that many states chose the narrower path.

State statutes and administrative policies are often an efficient recourse for states when confronted with

Supreme Court rulings that restrict freedoms – the Court tolerates laws that grant more freedoms, but not fewer (Olson, Van Ommeren, & Rossow, 1993). They are easier to pass than constitutional amendments and can be precisely written with clear definitions to minimize misinterpretation and even anticipate problems, like changing technologies (Pember & Calvert, 2011, p. 8).

Arkansas (Arkansas Student Publications Act, 1995), California (California Student Free Expression Law, 1977), Colorado (Colorado Student Free Expression Law, 1990), Iowa (Iowa Student Free Expression Law, 1989), Kansas (Kansas Student Publications Act, 1992), Massachusetts (Massachusetts Student Free Expression Law, 1988) and Oregon (Oregon Student Free Expression Law, 2007) have all passed state statutes aimed at protecting public elementary and secondary student speech and media. California's statute predated the *Hazelwood* decision, with the rest coming between 1989 and 2007. Pennsylvania (Pennsylvania Administrative Code: Student Rights and Responsibilities, 1984/2005) and Washington (Washington Administrative Code: Student Rights, 1977) have written student speech protections into their educational administrative codes, though Washington's is simply a one-sentence reiteration of the First Amendment rights to speech, press, religion, assembly and petition under reasonable time, place and manner constraints.

Reviewing these protections (with the exception of Washington) reveals that most of them appear to address the facts of the *Hazelwood* decision rather than its legal standard. While most begin with a general statement of support for student speech and expression, six of the eight are framed to primarily address rights related to student journalists and student publications. No specific mention is made of protections for other forms of expression. For example, in Iowa's Section 280.22 – "Student exercise of free expression" – all eight subsections reference student publications, and four of the eight *only* apply to student publications (i.e. "§3. There shall be no prior restraint of material prepared for official school publications except when the material violates this section"). "Student publications" are defined as "material produced by students in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee" (Section 280.22, §7) but no definition of "expression" is provided.

Massachusetts and California are the exceptions, and have expanded their legislation to cover speech more broadly, for example, to "include without limitation, the rights and responsibilities of students, collectively and individually, (a) to express their views through speech and symbols, (b) to write, publish, and disseminate their views, (c) to assemble peaceably on school property for the purpose of expressing their opinions" (Massachusetts Student Free Expression Law, 1988). The Pennsylvania administrative code (1984/2005) also addresses speech in a broader fashion, specifically including but not limiting to publications.

There are some similarities that run throughout anti-*Hazelwood* policies. Most dictate exceptions to protected speech, such as libel, obscenity, falsity, invasion of privacy, or attempts to cause a significant disruption to the school environment (a reference to *Tinker)*. The statutes grant students the right and responsibility for assigning and editing news topics, and charge advisers with supervising students and teaching professional standards.

The core question remains: Do anti-*Hazelwood* laws protect student expression? A *Shepherd's* search for the *Hazelwood* precedent in state and federal courts in the nine states with anti-*Hazelwood* laws or regulations reveals there are still many ways *Hazelwood* can be applied in an anti-*Hazelwood* state:

- *Hazelwood* supported the suspension of a Pennsylvania student who said he would "pull a Columbine" in response to ongoing harassment by other students (*Johnson v. New Brighton Area School District*, 2008 at *3). Even though other students stated they did not take his comment seriously and no harm was indicated to the learning environment, the District Court determined the school was not required to tolerate something

it considered a threat (*Johnson*, 2008 at *5-*7).

- *Hazelwood* upheld an Arkansas student uniform policy penalizing students for wearing armbands (*Lowry v. Watson Chapel School District*, 2007). Despite the factual analogy to *Tinker*, the court used *Hazelwood* to support the administration's determination that armbands ran contrary to the school's mission of "bridging socioeconomic gaps between families in the school district, focusing attention on learning rather than fashion, and improving school security" (*Lowry*, 2007, at 719).
- *Hazelwood* denied student chapters of religious clubs in California (*Perumal v. Saddleback Valley Unified School District*, 1988) and Washington (*Prince v. Jacoby*, 2002) the same resources as secular clubs, claiming the policies set to guide student clubs implied enough school sponsorship to open the door to regulation.
- *Hazelwood* denied a variety of adults and children from participating in an art project involving abstract tiles intended to help the community deal with the aftermath of the Columbine High School shootings (*Fleming v. Jefferson County*, 2002). In an effort to prevent the school itself from becoming a permanent memorial, administrators had prohibited tiles that included references to the attack (names, dates, etc), religious symbols or anything deemed offensive or obscene (*Fleming*, 2002 at 921). The 10th Circuit reviewed the administration's policy, the program's management by art teachers and the school's policy of prior review of tiles before inclusion and concluded both that the expression was reasonably school-sponsored, allowing for greater restriction of all participants (*Fleming*, 2002 at 929-930).
- *Hazelwood* censored commencement speakers in Colorado and Iowa. In Colorado, the 10th Circuit determined "[t]he universe of legitimate pedagogical concerns is by no means confined to the academic, for it includes discipline, courtesy, and respect for authority" (*Corder v. Palmer*, 2009 at *17) and "A graduation ceremony is an opportunity for the School District to impart lessons on discipline, courtesy, and respect for authority" (*18). As such, the school could uphold an unwritten policy requiring prior review of commencement speeches and prior restraint of those with religious themes.
- *Hazelwood* denied a Pennsylvania fifth grader's request to present a special project on the power of God to her classmates because of the school's interest in preventing students from being "exposed to material that is inappropriate for their particular maturity level" and "subjected to expression that could be erroneously attributed to the school" (*Duran v. Nitsche*, 1991 at 1055).

The 10th Circuit in *Corder v. Palmer* (2009), involving the commencement speaker in Colorado who was punished for including a religious message in her speech, was the only appellate court to directly address the seeming conflict between its ruling and the state statute. The court dismissed the statute's applicability, stating, "Although the statute begins with a general statement that students in public schools 'shall have the right to exercise freedom of speech and of the press' it is clear from reading the entire statute that section 22-1-120 regulates only student 'expression' that is contained within a written 'publication'" (*Corder*, 2009 at *33). The 10th Circuit concluded their decision in *Corder* with:

> Further, even if the statute were ambiguous, there is no legislative history or Colorado case law, which would alter our plain-meaning analysis. It appears, however, that section 22-1-120 was passed by the Colorado legislature in the wake of Hazelwood and the concern regarding its impact on student newspapers. This "response to Hazelwood" is another indication that the Colorado legislature meant for this statute to be limited in applicability to written student publications (*Corder*, 2009 at *34, internal citations omitted).

The 10th Circuit's interpretation of Colorado's law is a strong indicator of how courts may look at those state statutes or regulations that are framed more narrowly to address student media.

State statutes written to explicitly cover a broader range of student expression have been more successful at achieving that protection. For example, California's law begins:

> "Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not such publications or other means of expression are supported financially by the school or by use of school facilities…" (California Student Free Expression Law, 1977).

California's law was passed in 1977, and was tested shortly after the *Hazelwood* decision when a public high school administrator attempted to censor a student newspaper's April Fool's Day spoof issue (*Leeb v. DeLong*,

1988). When examining appropriate legal guidance, the Court of Appeals of California, Fourth Appellate District noted:

> "If *Kuhlmeier* were specifically applicable in California, little more would have to be said. But it is not. Section 48907 of the Education Code and California decisional authority clearly confer editorial control of official student publications on the student editors alone, with very limited exceptions. The broad power to censor expression in school-sponsored publications for pedagogical purposes recognized in *Kuhlmeier* is not available to this state's educators" (*Leeb*, 1988 at 54).

Seven years later, the Court of Appeals of California, Fifth Appellate District took up the question of whether or not a school could require students to remove the profanity from a student film that dealt with the issue of teen pregnancy and was created in connection with a film arts class (*Lopez v. Tulare Joint Union High School*, 1995). The court acknowledged that due to California's state statute protecting student expression, they could not be guided by the *Hazelwood* precedent and instead worked within the statute to determined if the profanity and mature themes in the film fell under the few categories of speech considered unprotected by the statute (*Lopez*, 1995 at 1328-29). The court found for the school, since it was attempting to restrict the profanity – which was unprotected by the statute – rather than the work as a whole (1329).

In a different, but no less effective approach, Massachusetts's student free expression statute states:

> "The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school. Freedom of expression shall include without limitation, the rights and responsibilities of students, collectively and individually, (a) to express their views through speech and symbols, (b) to write, publish, and disseminate their views, (c) to assemble peaceably on school property for the purpose of expressing their opinions" (Massachusetts Student Free Expression Law, 1988).

The Massachusetts statute has been used in court cases involving student newspapers, but also dress codes, student club posters and candy canes. In *Pyle v. South Hadley* (1996), the Supreme Judicial Court of Massachusetts first interpreted the meaning of the statute in a case involving a student who was suspended for wearing t-shirts his school considered offensive, though not disruptive (*Pyle*, 1996 at 284). The court, in finding for the student, determined:

> "The clear and unambiguous language protects the rights of the students limited only by the requirement that any expression be non-disruptive within the school. The language is mandatory. The students' rights include expression of views through speech and symbols, 'without limitation.' There is no room in the statute to construe an exception for arguably vulgar, lewd, or offensive language absent a showing of disruption within the school" (*Pyle*, 1996 at 286).

Pyle was applied in *Bowler v. Town of Hudson* (2007), when students contested their administrators' removal of posters advertising their conservative club. The school's concern was for the poster's Web link leading to graphic footage of hostage beheadings (*Bowler*, 2007 at 173). The court, however, determined that the school could not prove a disruption to the learning environment caused by the posters, and found for the student group (178). A District Court came to a similar conclusion in *Westfield High School L.I.F.E. Club v. City of Westfield* (2003), in a case of students who wished to hand out candy canes with a religious message during non-instructional time at school. Because the school had failed to reasonably forecast any disruption or disorder because of the students' expression, forbidding it violated their rights under the state statute (*Westfield*, 2003 at 111-12).

As *Corder* indicates, federal courts may interpret anti-*Hazelwood* statutes to address the facts of the *Hazelwood* decision rather than the broad use of the precedent. This interpretation is reinforced by the wording of six of the statutes, which are framed so specifically toward student newspapers or media. As such, states with anti-*Hazelwood* statutes and regulations still see the precedent's application in state and federal courts to support the restriction of student speech so long as there is a legitimate pedagogical purpose behind the restriction.

Having a state statute is better than having no statute, but as Massachusetts and California suggest, it could be better.

Striking the Balance and Finding a Middle Ground

When *Hazelwood* was decided, student journalists and free speech advocates worried that censorship would sweep over the nation's high school student media. Representative Nicholas Paleologos from Massachusetts, when proposing his state's statute to protect student expression, said in a press release:

> "We can't expect our kids to learn to think critically if we muzzle them whenever they try and do so. Last week's Supreme Court decision [*Hazelwood*] put student newspapers into the principal's paper shredder… In our state the message to students should be that though we may disagree with their views and opinions, we value their right to express themselves" (*Pyle*, 1996 at 167).

At least 26 states have attempted to pass anti-Hazelwood legislation (Olson, Van Ommeren, & Rossow, 1993, p. 3). The Student Press Law Center offers model legislation for states considering such a statute. (Student Press Law Center, 2000). It begins with a declaration of free speech and press rights, but the details primarily address the rights of student media and journalists. While this is an effective tool for the protection of student newspapers and yearbooks, it does less for other forms of expression that may occur in public schools.

States that wish to grant their students broader protection may be wary of mirroring Massachusetts and California's approaches. These states are not called the "bluest of the blue" without reason, and few other states have legislatures willing to pass a measure that puts a lot of faith into 14- to 18-year-old students. Passing a state statute and getting districts to comply with the requirements of such a law is in itself a difficulty (Plopper, 1995).

Reviewing the current Supreme Court decisions and state responses, two clear questions emerge in each situation: who provided the foundation and who provided the speech? This lends itself to a two-by-two grid that may provide states with a path toward maintaining the balance between school control and student rights to expression:

	School Foundation	**Student Foundation**
School Speech	*Hazelwood, Fraser, Morse*	Generally not constitutional
Student Speech	Viewpoint-neutral/strict scrutiny	*Tinker*

The foundation is the vehicle that carries the expression. This might be the financial support to pay for paper or printing, it might be the salary of the faculty advisor or it might be bulletin boards in the hallways or the school's Web site. It is whatever enables the expression to take place, and it may be made up of many different parts.

The speech is the expression itself – the words, the performance, the art, the articles, the newscast, the short story, the black armband. The key to determining speech is whether the student (as this article only evaluates speech originating from students, not any speech that may occur within the school setting) is speaking on his/her own behalf, or on behalf of the school.

Crossing the two results in four categories of speech and resulting guidance:

School foundation, school speech: A fair amount of expression that occurs in the academic setting falls into this category. Student expression that occurs through instructional time (either through discussion or choice of assignment topics) would carry the school's message on a school foundation. It would not be impossible for a student newspaper to fall into this category, if the school provided all the materials that allowed the newspaper to publish and dictated the article selection. In this category, the *Hazelwood, Fraser* and *Morse* precedents would offer guidance, and schools could regulate such expression so long as they had legitimate pedagogical purposes in doing so.

Student foundation, student speech: Expression that occurs within the academic setting, but with few if any other ties to the school, would fall into this category. This would include the student's choice in clothing, nonacademic discussions with other students, expressive activity that occurs on school grounds due to access available to the public (for example, renting the auditorium) and expressive activity that is created off campus but may be brought on campus by a variety of means, such as an "underground" newspaper or a student Web site accessed with campus computers. Expressive activity that falls into this category would be governed by the *Tinker*, and could be regulated if it caused or there was evidence that it would cause a substantial disruption to the academic setting.

Student foundation, school speech: Expressive activity that falls under this category is a little dicey – it is uncomfortably close to compelled speech, which has been deemed unconstitutional in such cases as *West Virginia Board of Education v. Barnette* (1943). Student dress codes might also fall into this category, though the reasons behind these regulations are often non-expressive in nature and survive constitutional analysis because any expressive restriction is incidental to the interest served by the regulation.

School foundation, student speech: This is where the most challenging student expressive activity would lie – when the school provides an opportunity for expression, but the students provide all of the actual expressive activity. Examples may include student newspapers that are funded in part by schools, student groups that have faculty advisors or are allowed to use school resources above and beyond those available to the general public, theater performances selected by students but performed under school supervision or art exhibits of work created by students but organized by the school.

The *Hazelwood* decision does give guidance on how to answer this question. If the students have established the expressive activity to be their voice, then it cannot logically be determined to bear the imprimatur of the school and should not be regulated by the *Hazelwood* standard. Instead, it should be treated as a limited public forum, where regulations must both be viewpoint neutral and satisfy strict scrutiny.

The *Corder* case might be a good example of this expressive activity. Commencement ceremonies are certainly a school foundation, and student speakers are often given guidance on how to craft and deliver a speech. Yet the students elect their commencement speakers, who deliver their own expressive messages. Using this approach, a federal court may instead ask the school to show that it had a compelling interest in regulating the commencement speech (likely satisfied in the desire to show that the school was not providing a platform for religious speech) and the regulation was narrowly tailored to meet that interest (harder to prove, as a simple disclaimer on the commencement program would have accomplished this goal).

States may find this two-by-two analysis productive to creating a comprehensive law or administrative regulation that protects student expression within the public academic environment. Statutes or rules can offer thorough definitions of "foundation" and "speech" that help set clear boundaries around what is protected and when. Further, such rules or regulations may suggest or require individual school districts create student expression policies that provide more explicit guidance to schools and students regarding when student expression is protected and when it is not.

This approach is not perfect, but it does away with complicated forum analyses and replaces them with a framing of "speech" and "foundation" that can be easily crossed to provide guidance. It still provides schools with the tools to ensure an orderly educational environment while acknowledging the broad spectrum of student expression that generally enjoys full First Amendment protection beyond the "schoolhouse gate."

This study presents an alternative approach to regulation of student expression within public schools. Yet it begs the question: why go to such lengths to protect student expression?

If student expression is continuously restricted in the environment in which students spend a substantive part of their day for over two-thirds of the year, they have no preparation to exercise these rights once they attain adulthood. Free speech does not hold the same allure as other activities minors are prohibited from doing until they reach 18 or 21 – teens aren't getting busted for "underage free speech parties" happening when parents are away or sneaking off of school property for a quick pack of journalism.

It's hard to reconcile the idea of teaching the importance of vigorous and responsible engagement with free expression in an environment that doesn't allow it to occur in practice. Today's educators from kindergarten to college are pressured to introduce measures that will increase their students' interest in civic engagement. Such an interest cannot peak in an environment in which students are not allowed to freely discuss what they observe, how they feel about it and what they would (or plan to) do to improve their communities.

Finally, "free speech" has never meant "free from consequences." Broadening protections for student expression does not mean shielding them from penalty. Those penalties, however, must be deserved on the merits (or lack thereof) of the expression, not the academic standing of the speaker. Student expression is worthy of protection, but a state's approach must encompass the full range of expression, rather than focus solely on student media. In this way, these young people, especially those just on the brink of adulthood, can truly begin to understand the extent of, and responsibility for, their First Amendment rights.

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