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THE HAZELWOOD PROGENY: AUTONOMY AND STUDENT EXPRESSION IN THE 1990'S

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INTRODUCTION

American law and legal scholarship are confused these days about the meaning of autonomy, including the autonomy of children. In two significant recent cases, *Bethel School District v. Fraser*¹ and *Hazelwood School District v. Kuhlmeier*,² the Supreme Court has attempted to clarify this confusion as it affects public school students. However, the positive influence, that these cases offer to American education is not widely appreciated among legal scholars. Indeed, both within and beyond the school context, many child advocates are actively seeking to establish the legal notion that children are presumptively autonomous persons,³ a concept that departs significantly from the Supreme Court's understanding.

Our analysis of autonomy ideology, especially when applied to children in public schools, convinces us that it is in children's and society's best interests to limit children's short-term legal autonomy in order to facilitate development of their long-term actual autonomy. A review of lower court applications of *Hazelwood* since 1988 suggests that most American judges now read that case as strengthening the authority of public schools to nurture student development toward this ultimate goal.

In Part I, this Article discusses the development of autonomy ideology and introduces its application in the context of American public schools. Part II describes how the lower courts have applied *Hazelwood* and explores the principles for which that case now stands. Part III provides

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¹ 478 U.S. 675 (1986).

² 484 U.S. 260 (1988).

³ See, e.g., BRUCE C. HAFEN & JONATHAN O. HAFEN, *Abandoning Children to Their Autonomy: the U.N. Convention on the Rights of the Child*, 37 HARV. INT'L L.J. (forthcoming 1996).

a brief conclusion and a comment on the way *Hazelwood* contributes to constitutional reasoning about autonomy by distinguishing between what state agencies *tolerate* and what they *promote*.

I. AUTONOMY AND STUDENTS' RIGHTS

A. *Autonomy as Philosophical Ideology: An Historical Sketch*

Before focusing on students' rights, we offer a brief summary of Western intellectual history that suggests how autonomy has come to play its currently prominent role in modern legal and social thought.⁴ Since ancient times, people have sought a frame of reference that gives order and meaning to "life," not only to life in general, but to one's individual life as well—"my life." A major contribution of ancient Greek thought was the idea that there is a natural order to the universe, and that humankind would fulfill its highest purpose by living in harmony with that natural order. Thus, the meaning of "my life" was to be found with reference to a surrounding natural framework for "life" in a larger and more objective sense.

For many centuries before 1500 a.d., the dominant frame of reference in European society was a religious view of the world. Given that framework, the meaning of "life" as a universal construct was defined by Christian religious teachings. The source of meaning for "my life" was defined as living in harmony with those larger-scale teachings about "life."

The revolutionary age that began with the Renaissance emphasized at its very core the significance of individual freedom, thereby giving new meaning to the value of "my life" for each person. This strong sense of personal liberty was especially significant as a political concept, becoming a major premise of the American Revolution and the U.S. Constitution. Ideas about the importance of individual choice also led to the development of a free market economy, which in turn hastened the coming of the Industrial Revolution. At the same time, the triumph of individualism in this revolutionary era did not alter Western culture's basic assumption that the universe was based on ordering principles of Nature; rather, the revolutions in science and culture simply shifted the prevailing assumptions from a *religious* explanation of the cosmos to a *scientific* explanation. Even

⁴ For succinct and readable reference material on the topics discussed in this subsection, see FRANKLIN L. BAUMER, *MAIN CURRENTS OF WESTERN THOUGHT* (1978); ROBERT C. SOLOMON, *CONTINENTAL PHILOSOPHY SINCE 1750: THE RISE AND FALL OF THE SELF* (1988); THOMAS H. GREER, *A BRIEF HISTORY OF THE WESTERN WORLD* (5th ed. 1987); RONALD N. STROMBERG, *WESTERN INTELLECTUAL HISTORY SINCE 1945* (1975).

with so dramatic a shift, Western thought continued to take for granted that there is a natural and objective order within which each person can find a sense of harmony and purpose. With or without religious assumptions, for example, most people during this period believed in "human nature," the notion that a set of inborn attitudes and moral instincts is common to all men and women. Each person's individual makeup obviously varied, but he or she still partook of this larger natural order, because people believed that humanity "belonged" to, or was simply part of, Nature—or God's creation. Each individual reflected "natural" impulses, because he or she carried some of Nature within.

Thomas Jefferson began with this assumption in writing the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness." Immanuel Kant powerfully articulated the idea that each person is born with a discoverable, inner set of moral standards.⁵ Similar ideas are found in the more recent work of psychologist Carl Jung, who discovered what he called "the collective unconscious," a universal sense of humankind's collective "Self" reflected in the common patterns and images of world religions and mythologies.

The history of Western civilization over the last hundred years, however, recounts an erosion of confidence in the idea that there is any fixed frame of reference, either "out there" or internally common to everyone. Many of society's leading thinkers have become skeptical not only about the particular ordering principles furnished by religion, science, or some other source; they also doubt that there is any such thing as a set of natural, pre-existing principles at all.

This unsettling mindset is a major theme of twentieth-century life. As Tevya sang, "without our traditions our lives would be as shaky as a fiddler on the roof." And life has begun to feel just that shaky. Viktor Frankl, who survived a German concentration camp for Jews, echoed Tevya's worry: "The traditions that had buttressed man's behavior are now rapidly diminishing. No instinct tells him what he has to do, and no tradition tells him what he ought to do; soon he will not know what he wants to do."⁶

We see this rejection of traditional patterns and assumptions in many expressions of twentieth-century art, music, and literature. Art forms

⁵ SOLOMON, *supra* note 4, at 38.

⁶ VIKTOR FRANKL, *MAN'S SEARCH FOR MEANING* 168 (1959).

really do mirror the society that produces them. The true, the good, and the beautiful are now less likely to be defined by traditional objective standards that most people accept; rather, the standards for judgment now tend to be in the eye of the artist, the writer, and the beholder. Many traditional patterns of rhythm, harmony, and aesthetic quality have been uprooted in favor of sometimes incomprehensible abstractions that represent only the author's subjective "I-centeredness."

When Nietzsche wrote in the late 19th century that "God is dead," he "meant [the death] not only [of] the God of the Judeo-Christian faith but [also of] the whole realm of philosophical absolutes, from Plato down to his own day." We have since lived through a century of uncertainty and anxiety, fears that have been greatly aggravated by world wars, threats of economic collapse, and the risk of nuclear annihilation. These worries have become widely shared, partly because of nearly universal education and communication, which cause the philosophical problems that once bothered only the elite few now to bother almost everybody.

In the middle of this turmoil rages a central fear: if there is no objective order, no natural framework for "life" in general, then all values are relative and "my life" is without foundation or meaning. Of course, this same circumstance also produces a perverse sense of liberation: with no fixed framework, I can do as I please, without accountability.

As modern writers have struggled to make sense of the uprooting of our traditions, a new form of individualism has emerged as a predominant anchor point. Ours is the age of "the celebration of the self."⁷ This time, however, the individual does not exercise her precious agency as part of a surrounding field of natural order.⁸ Rather, "man makes himself," meaning "it is the individual who gives meaning to history, not the other way around."⁹ Thus, "there is no final truth about human beings; they are what they choose to be."¹⁰ We cannot assume that "all people everywhere are ultimately like us,"¹¹ because "there is no such thing as human nature."¹²

In the post-modern age, many scholars now see a new island of apparent certainty in this sea of turmoil, one last absolute: the sanctity of individual autonomy, which they would now isolate from and exalt above

⁷ SOLOMON, *supra* note 14, at 194.

⁸ *See id.* at 195.

⁹ *Id.* at 174 (quoting Jean-Paul Sartre (1905-80)).

¹⁰ *Id.* at 178.

¹¹ *Id.* at 196.

¹² SOLOMON, *supra* note 14, at 195.

any particular social or natural context. In these scholars' view, we need pick up only one piece from our shattered cultural consensus—the piece called “my life.” Then we can reconstruct a sense of meaning, but not one that begins from a larger set of surrounding principles or human connections. Instead, other people and the universe itself must find their meaning by reference to “my life” as the starting point.

The “self's” ongoing conflict with traditional values is captured in the contemporary comic strip “Calvin and Hobbes.”

[Calvin] is a little boy (implausibly given the name of a stern Protestant theologian) asserting that what he wants—fame, luxury, diversion, staying out of school, hitting Susie with a snowball—is all that should matter.

I am the center of the universe, he says; values are what I say they are.

And then there is the tiger [Hobbes] (paradoxically given the name of an English philosopher [whose writings] pretty much defend [Calvin's] view), who offers the sober judgment of [traditional] mankind about this self-centeredness, all in the language of gentle irony.¹³

Philosopher James Q. Wilson believes that discovering why “Calvin is usually wrong and Hobbes is almost always right” is “the fundamental moral issue of our time,” because that inquiry will reveal our basis for making any moral judgments.¹⁴

The post-modernist arguments that challenge claims to objective truth, especially when such claims are based on traditional hierarchical value systems, nonetheless have great value. These arguments are forcing a re-examination of historical assumptions, sometimes unmasking entrenched patterns of unfairness against socially marginalized persons and groups. The personal interests and biases of some organizations and individuals have at times masqueraded as objectively fixed and neutral standards, and such forms of pretense need to be unmasked.

We wish to emphasize from this historical context primarily the point that the contemporary “preoccupation with the autonomy of the individual and the exaltation of his subjective longings” sometimes seems bent on “obliterating,” not merely on “reforming,” society.¹⁵ Moreover, the modern preoccupation with the subjective, autonomous “self” is a complete

¹³ James Q. Wilson, *Private Acts Not Beyond Moral Scrutiny*, *Pope Says*, DESERET NEWS, Nov. 28, 1993, at A16.

¹⁴ *Id.*; see also JAMES Q. WILSON, *THE MORAL SENSE* (1993) (discussing human impulses of sympathy, fairness, self-control, and duty in context of social, moral and gender identity).

¹⁵ R. V. Young, *The Old New Criticism and Its Critics*, *FIRST THINGS*, Aug.-Sept. 1993, at 38, 40-42.

reversal of the earlier assumptions by which individuals found personal meaning and purpose in larger spheres of meaning. Many of those prior assumptions, at least after the Renaissance, enhanced social strength in ways that developed and prolonged individual liberty, in part by anchoring ideas about personal freedom within thought systems designed to ensure long-term cultural stability. These thought systems are the origin of our understanding about children's needs, and society's obligations, to prepare—not merely declare—children for a life of *de facto*—not merely *de jure*—autonomy.

The development of Western jurisprudence has paralleled this larger pattern of intellectual history. The general idea of natural law dominated legal thinking from Aristotle to Aquinas to John Locke, reflecting views of law that were consistent with larger assumptions about the existence of a natural order beyond—or as a common pattern within—each individual. But during the last century, the larger assumptions have changed drastically, and the dominant legal theories changed with them. Natural law was succeeded by legal positivism, legal realism, and most recently by the critical legal studies movement.

Another recent theory, which some call “neo-natural law,” has emerged in the work of such scholars as Ronald Dworkin and John Rawls.¹⁶ Neo-natural law theory holds that there *are* some moral absolutes, which purportedly distinguish this view from the relativism of most prior twentieth-century legal theory.

A beginning premise in this vision of moral absolutes is the primacy of individual autonomy. A simple example of the hypothesis of neo-natural law is the statement that kids are people too—meaning, each person, regardless of age, is inherently endowed with absolute autonomy that presumptively trumps the claims on that person asserted by other persons or groups. This theory also emphasizes the autonomy rights of the least advantaged—those whose personhood has been most abused by the traditional assumptions of law and social power during the recent past.¹⁷ Thus, children's relative lack of capacity arguably places them among the least advantaged, entitling them even more to be “left alone” in their theoretical autonomy. The problem with this approach, of course, is that it can abandon children to their legal autonomy before they have developed their capacity for responsible autonomous action.

¹⁶ See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

¹⁷ See RAWLS, *supra* note 16, at 151.

B. “*De Jure*” vs. “*De Facto*” Autonomy

Premature grants of legal autonomy can ironically undermine children’s development of actual autonomy. Thus, we question the use of autonomy rights theory as a premise for legal reasoning about children, but not because we doubt the value of real autonomy. Indeed, the idea of personal freedom has transcendent significance. We find no idea more compelling than the concept that each individual personality is unique, free, enduring, and even everlasting. But precisely because each person matters so much, our question is, how can we help our children realize their potential—and their culturally embedded *right*—to achieve truly meaningful autonomy?

For example, a child is not “free” to play the piano just because no physical force keeps her from walking to the piano bench. She will achieve the freedom to make music only when she has developed the capacity to obey the laws of music. Consider similarly a child who wants to write a paper in a public school. Does this child have “freedom of expression” merely by being left alone at his desk? He may be free of all censorship or restraint, but is that enough? “Freedom of expression” can indeed mean freedom *from* restraints, but freedom of expression also means freedom *for* expression—which means having the *capacity* for understanding and self-expression. If free speech is to be meaningful, a citizen must not only be free to speak but should have something worth saying, together with the maturity, insight, and skill needed to say it intelligibly.

To help our children develop real autonomy, we must help them temporarily submit their immediate freedom to the schoolmaster of educational discipline, limiting their freedom temporarily through “compulsory education” that enhances their capacity for the meaningful exercise of freedom. Because many people fail to see the need for education of this kind these days, it just might be that young people today have never had so much freedom of speech with so little that is worth saying.

For our children’s own sake, we must often limit children’s legally bestowed (“*de jure*”) autonomy in the short-run in order to maximize their actual (“*de facto*”) autonomy in the long-run. Such limits are essential not only to develop their own ability to function independently, but also to sustain in perpetuity the social conditions that will continually regenerate autonomous capacity within each new individual. Both the law and common sense tell us to gradually remove, adapt, and customize these

limits as a child grows toward autonomous capacity.¹⁸ However, many modern attitudes prefer a short-range view of personal autonomy that would remove such limits, regardless of the effects on society or the damage to the long-term development of meaningful personal autonomy.

C. *Autonomy in Public Schools*

Rosemary Salomone describes the Supreme Court's student free speech cases¹⁹ in the language of autonomy, noting the tension in these cases between "the autonomy of the student as a self-determining individual" and "the authority of public school officials" as "protectors of community values or preferences."²⁰ Many scholars and courts have interpreted *Tinker v. Des Moines Independent Community School District* as a seminal source for the view that students possess inherent autonomy. This view believes that *Tinker* created an "anti-institutional presumption"²¹ about the educational and disciplinary decisions of public school officials for nearly two decades. Accordingly, some of these commentators are concerned about the recent emphasis on "community values" articulated in *Fraser* and *Hazelwood*, as this emphasis restores a new presumption of constitutional validity for what schools decide—in apparent derogation of student autonomy.²²

The early student rights cases, however, like the other individual rights cases of the 1960's, began not as a fundamental challenge to the core educational authority of public schools, but as a recognition that the Bill of

¹⁸ See FRANKLIN E. ZIMRING, *THE CHANGING WORLD OF ADOLESCENCE* (1982).

¹⁹ Rosemary C. Salomone, *Free Speech and School Governance in the Wake of Hazelwood*, 26 GA. L. REV. 253 (1992) (analyzing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Board of Educ. v. Pico*, 457 U.S. 853 (1982); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986)).

²⁰ Salomone, *supra* note 19, at 266.

²¹ *Id.* at 318-19.

²² "*Hazelwood's* language concerning the mission of schools to *inculcate community values*. . . effectively transmits *Tinker's* anti-institutional presumption into a presumption of constitutional validity for the school's educational policy decisions. This presumption shifts the burden of proof . . . to the students, who now must demonstrate a *clear abuse of discretion* before obtaining relief from a school prohibition." *Id.* at 318-19 (emphasis added); see also Stanley Ingber, *Liberty and Authority: Two Facets of the Inculcation of Virtue*, 69 ST. JOHN'S L. REV. 421 (1995).

[A]ny effort to indoctrinate "official values" [in schools] is in tension with our designs to have a democratic polity . . . To allow officials to inculcate values is to admit that free speech protects expression only so long as the speaker has been conditioned to say what those in authority accept. In [such] a society . . . freedom of speech is virtually irrelevant.

Id. at 443 & n.122.

Rights imposes limits on what schools may do as agents of the state. Yet, as the number of individual rights cases grew during the 1970's and early 1980's, many legal scholars, educators, and judges became so fascinated with First Amendment analysis that they began to assume that the limitations on governmental power expressed in the free speech, establishment clause, and free exercise cases represented much more than a few exceptional boundaries on a wide domain of school authority. Indeed, these writers came to see First Amendment limitations as the major premise for our primary reasoning about students and schools. The shift in language from "individual rights" to "autonomy" over the past several years is a subtle reflection of this change. The not-so-subtle result of such thinking was to create an almost unconscious bias against institutional action, requiring schools and other similarly situated institutions to justify their core values and functions, as if they were a necessary evil rather than agencies of liberation and enlightenment. Ironically, as explained elsewhere,²³ this bias can itself undermine the schools' ability to do what they were created to do. Consider three illustrations showing the effects of this autonomy-based paradigm about public school students.

First, suppose one assumes that public schools should inculcate basic values in their students. Where should one go to determine what values the schools may—and should—teach? In their search for appropriate and needed values, educators, lawyers, scholars, and judges are likely to begin by consulting the prominent Supreme Court cases on the First Amendment rights of students. Indeed, *Barnette*, *Tinker*, *Pico*, *Fraser*, *Hazelwood*, and a few other cases have much to say about the issues that arise as schools attempt to teach values to students. To assume, however, that these cases are the primary sources of instructional authority in the nation's schools—as if the schools would have no legitimate authority to teach values had those cases not been decided—is too narrow a view. One should not read into the recent "constitutionalization of education law" the assumption that the legal doctrines explaining what schools may *not* do without offending the First Amendment are the same legal doctrines or even the same concepts that tell schools what they *may or should do* in the first instance. The search to know what educational and cultural values the schools should teach their students invites a much larger range of thought.²⁴

²³ See generally Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663 (1987).

²⁴ See, e.g., Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the Public Schools*, 70 NOTRE DAME L. REV. 769 (1995) (pointing to international human rights concepts as source for identifying values that

The paper prepared for this Symposium by Professor Stanley Ingber²⁵ offers the second and third illustrations of how it is possible to exaggerate—and therefore misconstrue—the role of autonomy-based conceptions of constitutional rights for students. For example, Ingber provides a valuable context for thinking about student rights issues in his comparison of the autonomy-based philosophy of individual rights found in the liberal tradition of the Enlightenment with the connection-oriented philosophy of civic republicanism.²⁶ He recounts the way his own thought about students has developed, moving from an individualistic to a republicanistic view. Where he once believed that student free speech rights derived from individualism's desire to promote autonomy and the marketplace of ideas, he now believes that “when dealing with children, the significance of free speech relates more to the communal interest of character development than to the individual's concern for the protection of autonomy, an autonomy that children do not yet fully possess.”²⁷ This realization that “children surely constitute the Achilles heel of . . . liberal ideology” because they lack the capacity to choose “among values without constraint from others or the state”²⁸ is similar to our own views.

Despite Professor Ingber's agreement with us on this perspective, his view differs from ours regarding the respective roles of courts and schools in developing students' understanding and abilities. We believe this difference provides the third example of what happens when one over-constitutionalizes his or her understanding of autonomy in education law.

Ingber argues persuasively that schools must teach their students the value of both liberty and order—a position we strongly share. In its practical application, however, his view is more pessimistic than ours regarding the schools' commitment and ability to teach such skills as skepticism, tolerance, creativity, and free inquiry.²⁹ He takes the position that, unless judges are actively enforcing students' free speech rights, students simply will not learn these skills.³⁰ In urging that the educational decisions of school teachers and officials need closer judicial scrutiny than

may—and should—be taught).

²⁵ Ingber, *supra* note 22.

²⁶ *Id.* at 430.

²⁷ *Id.* at 474.

²⁸ *Id.* at 440.

²⁹ Ingber, *supra* note 22, at 444 (arguing that inculcating positive values of individual dignity, independent inquiry, and willingness to question authority in structural, disciplined pedagogical environment sends mixed signals to students).

³⁰ *Id.* at 456-57 (“[Teachers] accustomed to wielding power cannot readily see issues from the perspective of [the students] who are the subjects of their authority.”).

allowed by the *Hazelwood* standards (which allow judicial review of educators' discretion in extreme cases),³¹ he writes that students need more than "predigested ideas,"³² and that *Hazelwood's* restrictions on the rule of *Tinker* have rendered "[t]he domain of critical, independent thought" to be "limited indeed."³³

This approach assumes that educators lack pedagogical skill or that they place little value on teaching their students the entire range of intellectual skills that create autonomous capacity. It further assumes that the authentic student experience with "the free speech virtues of participation and tolerance"³⁴ occurs primarily when students, with the help of courts, overrule the educators who seek to instruct them. Yet Professor Ingber offers no evidence for his implicit belief that, unless they face the threat of judicial intervention, public school teachers cannot or will not use their educational discretion to teach "the need to tolerate diversity, the thrill of independent thought, and the empowerment gained by questioning authority."³⁵ In our view, *Hazelwood* encourages and enables teachers to teach these and other vital skills better than they would teach them if they lacked confidence in the authority—and responsibility—of their own teaching role, a level of uncertainty we believe prevailed in too many schools prior to *Hazelwood*. Thus we believe that "schools as well as courts can advance and protect the values of the first amendment."³⁶

To assume that only courts and lawyers who understand the nuances of First Amendment law possess the understanding and the will to teach the skills of critical inquiry is similar to the overly narrow assumption noted above that schools should inculcate in their students only those values explicitly identified in First Amendment case law.

To be sure, First Amendment case law provides an important source for understanding the constitutional limitations on the educative role of public schools. Those cases obviously emphasize and illustrate that schools should teach the values of participation, tolerance, and expression. These

³¹ See Bruce C. Hafen, Comment, *Hazelwood School District and the Role of the First Amendment Institutions*, 1988 DUKE L. J. 685, 693 ("[T]he *Hazelwood* standard involves two stages of inquiry: courts must first ask whether the student expression at issue occurs in a context that implicates the school's educational mission and must then ask whether the educator's decision has a rational—but not necessarily an explicitly educational—basis.").

³² Ingber, *supra* note 22, at 441.

³³ *Id.* at 452. Professor Ingber refers here to *Hazelwood's* holding that teachers and school administrators may reasonably regulate student expression within a school's educational environment (as distinguished from a student's personal speech in non-educational contexts).

³⁴ *Id.*

³⁵ *Id.* at 474 n.267.

³⁶ Hafen, *supra* note 31, at 685 (DUKE L.J.).

values, however, are but a fraction of the entire complex of values the schools must teach. First Amendment doctrine is not the primary authority or source of reasoning to explain the affirmative purpose of public school education. Honoring the limits by which schools conduct their educational enterprise can obviously teach students some constitutional and educational values. But schools constantly teach those same values in their own way, and they exist to teach many other values as well. Moreover, the rationale for constitutional limits is not the primary rationale on which schools rest. Public schools were not created by the Bill of Rights. They are creatures of state law, empowered by the plenary authority of state constitutions and state legislative action, established to provide, as stated by the example of the California Constitution, "intellectual, scientific, moral, and agricultural improvement" among children.³⁷

That broad educational mandate obviously reaches very important limits when a public school invades the religious liberty of a Jehovah's Witness child by coercing that child to pledge allegiance to the flag,³⁸ or when a school principal punishes a secondary school student for wearing a black arm band to protest the Vietnam War in a non-disruptive way,³⁹ or when a school board requires its students to engage in religious worship or prayer. But these cases mark the extreme boundaries of school authority as circumscribed by the First Amendment. Such cases are not the fountainhead of schools' authority. For that reason, the Supreme Court's recent language in *Fraser* and *Hazelwood* describing schools and teachers as role models who should teach "the habits and manners of civility"⁴⁰ and other "shared values of a civilized social order"⁴¹ is not an amazing new charter of the autonomy rights of teachers and principals in derogation of the autonomy rights of students; rather, that language simply reaffirms and illustrates the broad authority and responsibility on which public schools have always drawn to teach their students all of the values and skills that enable true autonomy.⁴²

Thus, to begin the analysis of a school's actions with the presumption that the school must justify any intrusion into its students' pre-existing autonomy lets the exception swallow the rule. This approach contradicts

³⁷ CAL. CONST. art. IX, § 1 (Deering 1981).

³⁸ *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

³⁹ *Tinker v. Des Moines Indep. Community Sch. Dist.* 393 U.S. 503 (1969).

⁴⁰ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986) (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

⁴¹ *Id.* at 683.

⁴² *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) ("[T]he education of the nation's youth is primarily the responsibility of parents, teachers . . . and not federal judges.").

the basic political theory on which American public schools are established. Against this background, we now consider the approach of the Supreme Court to issues of student autonomy in its free speech cases.

II. *FRASER* AND *HAZELWOOD*: REINFORCING THE AUTHORITY OF SCHOOLS TO CARRY OUT THEIR EDUCATIONAL MISSION

A. *Students' Rights Cases Prior to Fraser and Hazelwood: Barnette, Tinker, and Pico*

Until 1943, the Supreme Court had not addressed the concept of "students' rights." In the midst of World War II, the Court handed down its opinion in *West Virginia Board of Education v. Barnette*,⁴³ holding that a public school could not compel students who were Jehovah's Witnesses to pledge allegiance to the American flag because such compulsion would have a coercive effect on the students' religious beliefs.

The next major students' rights case arose about 25 years later—in the midst of another war, this time in Vietnam, and at the height of the civil rights movement⁴⁴—when the Supreme Court recognized students' rights of expression in *Tinker v. Des Moines Independent Community School District*.⁴⁵ In *Tinker*, the Court upheld the right of students to protest U.S. involvement in the Vietnam War by wearing black arm bands on school grounds. *Tinker* held that public school officials may not discipline students for either actual or symbolic political speech unless that speech is materially and substantially disruptive.⁴⁶ For years thereafter, many lower courts interpreted *Tinker's* presumption favoring student speech as a fundamental restriction on school officials' discretion in educational matters concerning student speech.⁴⁷

⁴³ 319 U.S. 624 (1943).

⁴⁴ For a discussion of the context in which *Tinker* was decided, see Hafen, *supra* note 46, at 691 (OHIO ST. L.J.).

⁴⁵ 393 U.S. 503, 514 (1969).

⁴⁶ 393 U.S. at 513. The Court recognized that school authorities do not possess absolute control over students, and that students could not "be confined to the expression of those sentiments that are officially approved." *Id.* at 511. Students are entitled to freely express their views unless a constitutionally valid reason for regulation of such speech is shown. *Id.* Speech which results in a disruption of classwork, "substantial disorder or invasion of the rights of others," however, would not be constitutionally protected speech. *Id.* at 513. The wearing of black arm bands by Marybeth Tinker and her classmates in their famous cases was protected speech because the students were peaceably expressing their views without disruption or disturbance of other individuals. *Id.* at 514.

⁴⁷ *See, e.g.*, *Shamloo v. Mississippi State Bd. of Trustees of Insts. of Higher Learning*, 620 F.2d 516, 523-25 (5th Cir. 1980) (finding invalid and unconstitutionally vague a University regulation requiring student demonstrations to be "wholesome"); *Goetz v. Ansell*, 477 F.2d 636,

Such a reading of *Tinker* seemed buttressed by the Supreme Court's holding in *Board of Education, Island Trees School District v. Pico*⁴⁸ in 1982. Relying heavily on *Tinker* and *Barnette*, the *Pico* plurality held that public school officials may not arbitrarily remove books from school library shelves based on the content of the books⁴⁹ because school officials would thereby infringe on students' constitutional right to receive information.⁵⁰ The Court limited this right, however, by expressly acknowledging that public school officials have considerable discretion to manage schools' affairs, such as determining the curriculum and the original content of school libraries.⁵¹ Thus, *Pico* established that students have a limited right to receive information as well as the right to freedom of expression.⁵²

B. *Fraser and Hazelwood: A Reaffirmation of Schools' Educational Role*

In 1986, the Ninth Circuit in *Fraser v. Bethel School District*⁵³ applied *Tinker* in determining whether a vulgar campaign speech given by a student at a school assembly should receive First Amendment protection.⁵⁴ That court concluded that, because the evidence showed that the speech had caused no real "disruption" in either the assembly or class-

638-39 (2d Cir. 1973) (enjoining school from disciplining student for remaining seated during flag pledge); *Scoville v. Bd. of Educ. of Joilet Township High Sch. Dist.* 204, 425 F.2d 10, 14-15 (7th Cir.) (holding that non-disruptive publication and distribution of student newspaper was valid exercise of students' rights), *cert. denied*, 400 U.S. 826 (1970); Right to Read Defense Comm. of Chelsea v. School Comm. of the City of Chelsea, 454 F. Supp. 703, 714-15 (D. Mass. 1978) (enjoining school from banning non-obscene book where book was relevant to courses taught and no substantial interest was shown to justify infringement on students' rights).

⁴⁸ 457 U.S. 853, 869-72 (1982) (plurality opinion).

⁴⁹ *Id.* The Court noted that the books in question were library books which were "optional rather than required reading." *Id.* at 867.

⁵⁰ 457 U.S. at 868-69. The Court wrote that this right is essential to prepare students for effective participation in society, and the library is an important place for students to "test or expand upon" information or idea obtained from the classroom or other sources. *Id.*

⁵¹ The Court recognized the school's right to determine the original content of books in its library, but specifically held that school boards could not remove books from library shelves in an effort to "prescribe" their views on political, national, religious or other matters. *Id.* at 870-72. Therefore, whether the removal of books from a school library deprives students of their First Amendment rights depends on the motivation for such removal. *Id.* at 871. *Id.* at 867-69. The Court found that the school's claim of absolute discretion in matters of curriculum could not extend "beyond the compulsory environment of the classroom" into a voluntary area such as the school library. *Id.* at 869.

⁵² 457 U.S. at 867-68.

⁵³ 755 F.2d 1356 (9th Cir. 1985), *rev'd*, 478 U.S. 675 (1986).

⁵⁴ *Id.* at 1357-65.

rooms, *Tinker's* presumption in favor of student speech protected the student's speech even though its content was vulgar.⁵⁵

On appeal, the Supreme Court reversed,⁵⁶ holding that the First Amendment did not prevent school officials from disciplining students for using offensive language at school functions.⁵⁷ Moreover, the Court's opinion contained language suggesting that it was altering *Tinker's* presumptions by granting educators broader discretion to restrict student speech.⁵⁸ Some commentators and courts read the decision more narrowly, restricting its application to cases in which student speech was vulgar or obscene.⁵⁹ *Fraser*, nonetheless, turned out to be an important transitional case leading from *Tinker's* presumption favoring student speech to *Hazelwood's* affirmation of the institutional authority of schools to educate students.⁶⁰

On the same day that the Supreme Court decided *Fraser*, the Eighth

⁵⁵ 755 F.2d at 1357-65. The Ninth Circuit rejected the three claims raised by the school district on appeal. *Id.* at 1361-65. First, it rejected the argument that the school could discipline the student because his speech had disrupted the school's ability to educate. *Id.* at 1361. The court found that no disruption, in fact, had occurred. *Id.* at 1361. Second, the court held that the district's interest in maintaining "civility" did not justify disciplinary action for offensive speech, and was outweighed by the student's First Amendment rights. *Id.* at 1363. Finally, the court concluded that the assembly was outside the compulsory classroom environment and that the student was, therefore, protected by the first amendment in such an environment. *Id.* at 1363-65.

⁵⁶ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

⁵⁷ *Id.* at 681-87. In reaching this conclusion, the Court recognized the need to balance the freedom of speech in schools against society's interest in "teaching students the boundaries of socially appropriate behavior." *Id.* at 681. The Court reiterated its view that the constitutional rights of students are not necessarily on the same level as the rights of adults, and concluded that the manner of speech appropriate for a school classroom or assembly is a decision for the school board to make. *Id.* at 682-83.

⁵⁸ *Id.* at 685-86. We have previously speculated that the *Fraser* Court's reaffirmation of schools' authority to educate may have been, in part, a response to empirical evidence from the mid-1980's showing a decline in the academic quality of schools, which some researchers linked to declines in teachers' authority to educate. See Hafen, *supra* note 46, at 692 (OHIO ST. L.J.); see also *infra* notes 211-212, and accompanying text. Thus, the historical settings of *Tinker* and *Fraser* were very different. See Hafen, *supra* note 46, at 692 (OHIO ST. L.J.) ("Just as the 1960's asked for reassurance that students are people too, the early 1980's asked for reassurance that schools should be more seriously devoted to meaningful education.").

⁵⁹ See e.g., Therese Thibodeaux, *Bethel School Dist. No. 403 v. Fraser: The Supreme Court Supports School in Sanctioning Student for Sexual Innuendo in Speech*, 33 LOY. L. REV. 516, 522-23 (1987) (limiting holding to support of discipline for lewd or indecent speech); see also Hafen, *supra* note 46, at 691 (OHIO ST. L.J.).

⁶⁰ In its decision, the *Fraser* Court hearkened back to its first free speech case involving minors, in which Justice Stewart stated that "a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Ginsberg v. State of New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring).

Circuit decided *Kuhlmeier v. Hazelwood School District*.⁶¹ In *Hazelwood*, the Eighth Circuit read *Tinker* as preventing school officials from removing student stories from a school-sponsored newspaper, even though the stories arguably violated the privacy of other students.⁶² Specifically, the court held that no such supervision of student expression was permitted unless the stories threatened to disrupt educational activities or constituted a tortious invasion of the rights of others.⁶³ Because school officials were unable to make this showing, the court ruled in favor of the students.⁶⁴

In 1988, the Supreme Court reversed the Eighth Circuit,⁶⁵ ruling that school officials have broad authority to define and supervise students' education, including the right to regulate the content of school-sponsored student newspapers.⁶⁶ The Court distinguished the private, passive student expression at issue in *Tinker* from student expression in a school-sponsored activity.⁶⁷ More importantly, where school sponsorship is clear, *Hazelwood* reversed the burden placed on school officials by *Tinker*,

⁶¹ 795 F.2d 1368 (8th Cir. 1986), *rev'd*, 484 U.S. 260 (1988). We discuss the *Hazelwood* case only briefly here. For a more complete analysis of this decision, see Hafén, *supra* note 46 (OHIO ST. L.J.); Hafén, *supra* note 54 (DUKE L.J.). *But see* Helene Bryks, Comment, *A Lesson in School Censorship: Hazelwood v. Kuhlmeier*, 55 BROOK. L. REV. 291 (1989) (criticizing *Hazelwood* Court's application of previous precedent).

⁶² The student newspaper stories at issue in *Hazelwood* were an article on student pregnancy and an article discussing the impact of divorce on students at the school. *Hazelwood*, 795 F.2d at 1370-71. The school official who refused to allow publication of the articles was concerned that private information about several identifiable students would be revealed in the pregnancy article, and that allegations against a student's parent in the other article were to be published without an opportunity for the parent to respond. *Id.* at 1371. The official decided that there was no time to remedy the problems with the stories and therefore removed the pages on which those stories were printed and allowed publication of the remainder of the issue. *Id.* at 1370-71.

⁶³ *Id.* at 1374-76. The court determined that the newspaper was a public forum rather than merely part of the school's curriculum, and the school district, therefore, was required to demonstrate that the prohibition was necessary to avoid material interference with school work or the rights of others. *Id.* at 1374.

⁶⁴ The court found no indication that the censored articles would have materially disrupted classwork, and also found that no tort action could have been maintained against the school on the basis of the articles. *Hazelwood*, 795 F.2d at 1375-76. Therefore, the officials were not justified in censoring the articles under the *Tinker* standard. *Id.* at 1376.

⁶⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

⁶⁶ In reaching its conclusion the Court held that the newspaper was a limited purpose forum rather than a public forum, and regulation of its contents was controlled by time, place, and manner restrictions rather than the *Tinker* standard. *Id.* at 270.

⁶⁷ The Court distinguished the question in *Tinker* (whether a school must tolerate student speech) from the issue in *Hazelwood* ("whether the First Amendment requires a school affirmatively to promote particular student speech"). *Id.* at 270-71. Since the Court determined that the newspaper was part of the school curriculum, it found that school officials could exercise more control over content, in an effort to protect the students and prevent having the students' views from being attributed to the school. *Id.* at 271.

holding that regulation of student speech is permissible so long as it is "reasonably related to a legitimate educational purpose."⁶⁸

Some commentators and lower courts have since viewed *Hazelwood* as merely a censorship or public forum case that applies to students using school facilities.⁶⁹ The Supreme Court, however, recently confirmed in *Vernonia School District v. Acton*⁷⁰ that *Hazelwood* means much more. In *Acton*, the Supreme Court upheld the right of a school district to administer random drug tests to student athletes. Further buttressing *Hazelwood*'s holding that schools must have broad authority to fulfill their educational mission, the Court in *Acton* made clear that "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."⁷¹ The Court stressed in *Acton* that students' rights are necessarily restricted in a school setting because school teachers and administrators "stand in loco parentis over children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that [parental] status."⁷² Unlike the authority of private schools, the "in loco parentis" authority of public schools must be weighed against constitutional constraints arising from the schools' role as state agents. Nonetheless, the Court stated, "we have acknowledged that for many purposes [public] school authorities act in loco parentis."⁷³ The Court also underscored the changes wrought on *Tinker* by *Hazelwood* and *Fraser*: "while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate' the nature of those rights is what is appropriate for children in school."⁷⁴ Thus, *Acton*'s holding and its language make it difficult to

⁶⁸ *Id.* at 273; see also Thomas C. Fischer, *Whatever Happened to Mary Beth Tinker and Other Sagas in the Marketplace of Ideas*, 23 GOLDEN GATE U. L. REV. 351, 357-58 (1993). Professor Fischer argues that *Tinker* represented the high-water mark of constitutionally-based "students' rights." *Id.* at 358. He asserts that *Hazelwood* follows a trend in the lower courts to significantly weaken the unwise and unworkable standard set forth in *Tinker*. *Id.* According to Professor Fischer, the Court's *Tinker* standard, coupled with what some perceive as back-pedaling in *Hazelwood*, "left the academy profoundly confused and significantly changed." *Id.*

⁶⁹ See, e.g., William Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505 (1989) (arguing that *Hazelwood* does not represent significant shift away from *Tinker*).

⁷⁰ 115 S. Ct. 2386 (1995).

⁷¹ *Id.* at 2392.

⁷² *Id.* at 2391.

⁷³ *Id.* at 2392 (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986)).

⁷⁴ *Acton*, 115 S. Ct. at 2392 (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969), and citing, *inter alia*, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988), and *Fraser*, 478 U.S. at 683).

argue that *Hazelwood* is anomalous.

Moreover, as summarized below, lower courts, like the Supreme Court in *Acton*, have read *Hazelwood* broadly.⁷⁵ These courts accept the Supreme Court's recognition that school officials must have broad discretion to pursue their primary educational mission of preparing children for adulthood and full integration into society.⁷⁶ Also implicit in the following decisions is the premise that children's legal ("de jure") autonomy must be subject to certain limitations in the short-run to maximize the development of their actual ("de facto") autonomy in the long-run.⁷⁷ As we have attempted to explain elsewhere,⁷⁸ recognition of this premise is essential not only to develop children's individual capacity but also to sustain in perpetuity the social conditions that will maintain a democratic society populated by mature and self-reliant individuals.

C. *Applying Hazelwood in the Lower Courts: A Fundamental Shift in the Scope of School-Related Rights of Expression*

Though lower courts have embraced *Hazelwood* with varying degrees of enthusiasm, the decision has clearly changed the way courts apply First Amendment speech analysis in contexts involving schools, students, and even faculty.⁷⁹ Although there are exceptions, most lower courts have read *Hazelwood* as clarifying educators' authority to control student expression for the sake of preserving the institutional and educational integrity of public schools.⁸⁰ These courts have also chosen to extend *Hazelwood*'s application beyond student newspaper cases and even student

⁷⁵ See *infra* notes 81-82 and accompanying text.

⁷⁶ See *infra* notes 81-82 and accompanying text (discussing lower courts' application of *Hazelwood* doctrine).

⁷⁷ See *infra* part II.C.

⁷⁸ See Hafen, *supra* note 23 (OHIO ST. L.J.); *supra* note 31 (DUKE L.J.).

⁷⁹ See Hafen, *supra* note 31, at 693-97 (DUKE L.J.) (discussing Supreme Court's First Amendment analysis in *Hazelwood*).

⁸⁰ See Salomone, *supra* note 19, at 274-306. Post-*Hazelwood* lower court decisions have answered many questions left open in *Hazelwood*. *Id.* These decisions tend to follow *Hazelwood* in granting public school officials "broader legal discretion in molding student thought and opinion and consequently expression into a shape that conforms with the dominant values of the community." *Id.* at 315; see also Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 81-82 (1990). The legal trend with regard to public schools is "unmistakably toward unquestioned deference to the decisions of school administrators" confronted by student speech activities. Ingber, *supra*, at 81. Mr. Ingber views this as a dangerous trend, allowing school officials to permit only speech which they view as consistent with social acceptability. *Id.* This allows schools to evade their character-building responsibilities, and instead gives children "improper signals regarding democratic values and personal self-awareness." *Id.* at 86.

speech cases.⁸¹ These courts have also adopted *Hazelwood*'s distinction between toleration and promotion, holding that, while schools have a responsibility to tolerate certain types of speech, they need not lend the school's name or facilities to promote that expression.⁸²

1. Cases Turning on the Toleration/Promotion Distinction

As discussed more fully below, one of the most helpful additions to constitutional law made by the Court in *Hazelwood* is its distinction between *toleration* of student speech and *promotion* of student speech.⁸³ *Hazelwood* suggests that schools must tolerate students' personal speech under most circumstances but that schools are not compelled to "promote" speech of students or others in the school community by providing a school-sponsored forum for expression.⁸⁴ The underlying rationale for this distinction is that students or even the public may reasonably believe that schools endorse what they produce through official educational channels.⁸⁵

For example, in *Crosby v. Holsinger*,⁸⁶ the Fourth Circuit addressed whether a school principal had the right to eliminate the school symbol, a cartoon character called "Johnny Reb," after receiving complaints about the symbol from black students and parents.⁸⁷ The court applied *Hazelwood* to conclude that the principal's decision to change the symbol did not violate the students' First Amendment rights to have a particular school symbol.⁸⁸ The court stated that "school officials need not sponsor or promote all student speech," particularly if the public "might reasonably

⁸¹ See Salomone, *supra* note 19, at 274 (noting wide range of cases interpreting *Hazelwood*).

⁸² See Salomone, *supra* note 19, at 267-68 (explaining distinction between toleration and promotion); see also *Planned Parenthood of S. Nev. v. Clark*, 941 F.2d 817, 830 (9th Cir. 1991) (allowing school to remove textbook containing "vulgar and sexually explicit" material from curriculum); *Crosby v. Holsinger*, 852 F.2d 801, 802 (4th Cir. 1988) (allowing school to disassociate itself from controversial school symbol because of educational concerns).

⁸³ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-73 (1988). Toleration "addresses educators' ability to silence a student's personal expression that happens to occur on the school premises," while promotion of speech "concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities" that the public might perceive as expressing the school's own view. *Id.* at 271.

⁸⁴ *Id.* at 270-73. In this context, the Court noted that a school could set very high standards for student speech which could be attributed to the school itself. *Id.* at 272. A school could refuse to sponsor student speech advocating unpopular or radical views, and could disassociate itself from "any position other than neutrality on matters of political controversy." *Id.* at 271-72.

⁸⁵ *Hazelwood*, 484 U.S. at 271.

⁸⁶ 852 F.2d 801 (4th Cir. 1988).

⁸⁷ *Id.* at 802.

⁸⁸ *Id.*

perceive [the speech] to bear the imprimatur of the school."⁸⁹ The court acknowledged that "[t]here is a difference between tolerating student speech and affirmatively promoting it."⁹⁰ In applying this standard, the court held that because a school symbol bears the "stamp of approval" of the school, school authorities are free to disassociate the school from such a symbol.⁹¹

In *Planned Parenthood of Southern Nevada v. Clark County School District*,⁹² the federal district court originally held that school officials were obliged to publish advertisements from Planned Parenthood in school-sponsored publications, even though school officials believed that publishing the advertisements might lead some people erroneously to believe that the school favored or sponsored Planned Parenthood services.⁹³ Shortly after the district court issued its opinion, the Supreme Court decided *Hazelwood*. In light of *Hazelwood*, the district court withdrew its original opinion and ruled in favor of the school.⁹⁴ The Ninth Circuit, en banc, upheld the district court's revised opinion.⁹⁵

Similarly, in *Virgil v. School Board of Columbia County*,⁹⁶ the

⁸⁹ *Id.* at 802 (quoting *Hazelwood*, 484 U.S. at 271).

⁹⁰ *Id.* at 802.

⁹¹ *Crosby*, 852 F.2d at 803. Significantly, unlike the majority of courts applying *Hazelwood*, the Fourth Circuit noted that the public forum doctrine did not apply to this case. *Id.* at 802 n.2.

⁹² 941 F.2d 817 (9th Cir. 1991).

⁹³ *Id.* at 820.

⁹⁴ *Id.*

⁹⁵ *Clark*, 941 F.2d at 820. In *Clark*, the high school officials who authorized advertisements in school-sponsored publications declined to accept advertisements for the services of Planned Parenthood in student newspapers, yearbooks, and athletic programs. *Id.* The schools believed that publishing the advertisements might affect their classes on sex education and otherwise put the school imprimatur on one side of a controversial issue. *Id.* at 829. Citing *Hazelwood*, the Ninth Circuit held that the school's publications were non-public forums because the school had not opened the forum for indiscriminate use and had exhibited clear intent to retain control over the forum. *Id.* at 823-29.

The court also rejected Planned Parenthood's argument that *Hazelwood* did not apply because student speech was not involved. *Id.* at 827. The court held that because "[t]he publication is the same and the audience is the same, whether the source for the speech is from inside the school or outside, or is paid or free," and because the school has "the same pedagogical concerns, such as respecting audience maturity, disassociating itself from speech inconsistent with its educational mission and avoiding the appearance of endorsing views, no matter who the speaker is," *Hazelwood* applies. *Id.*

In ruling in favor of the school, the court stated that "[a] school's decision not to promote or sponsor speech that is unsuitable for immature audiences, or which might place it on one side of a controversial issue, is a judgment call which *Hazelwood* reposes in the discretion of school officials and which is afforded substantial deference." *Id.* at 829. Recognizing that deference, the court found that the school's decision to refuse Planned Parenthood's advertisements was reasonable. *Id.*

⁹⁶ 862 F.2d 1517 (11th Cir. 1989).

Eleventh Circuit heard a challenge to a school board's decision to discontinue use of a humanities textbook because the board believed it contained vulgar and sexually explicit material.⁹⁷ The court held, based on *Hazelwood*, that school officials have the right to remove such material from the curriculum because their actions are "reasonably related to legitimate pedagogical concerns."⁹⁸ The court reasoned that when textbooks are used in the regular course of study, even when "optional reading," they carry the imprimatur of school approval.⁹⁹ Therefore, the court concluded that school officials had the right to remove textbooks.¹⁰⁰

Likewise, in *Gerig v. Board of Education of the Central School District*,¹⁰¹ the Missouri Court of Appeals upheld the right of a school district to terminate a teacher who permitted articles of dubious literary quality to be published in the student newspaper under his supervision.¹⁰² Evidence supported the school's view that students would presume that the newspaper's content bore the imprimatur of the school and that the school condoned its contents.¹⁰³ Thus, under *Hazelwood*, the Court ruled that the school took reasonable action in terminating the teacher.¹⁰⁴

2. Cases Upholding *Tinker's* Protection of "Personal" Student Speech

Given the expansion of *Hazelwood's* applicability, some may wonder what is left of *Tinker*. Cases handed down since *Hazelwood* generally hold

⁹⁷ *Id.* at 1518.

⁹⁸ *Id.* Motivation was not at issue in this case because the parties previously had stipulated that the board's reasoning was related to the sexual and vulgar language in the textbooks, and the court stated that it could not conclude that the Board's action was not reasonably related to the stated legitimate concern. *Id.* at 1522-25.

⁹⁹ *Virgil*, 862 F.2d at 1522. The court found that the textbook was part of the overall school curriculum, and the fact that the textbook was part of an elective course did not alter such finding. *Id.*

¹⁰⁰ *Id.*; see also *Webster v. New Lenox Sch. Dist.*, 917 F.2d 1004 (7th Cir. 1990) (applying *Hazelwood* in allowing school officials to prohibit teaching of non-evolutionary creation where subject was part of school curriculum).

¹⁰¹ 841 S.W.2d 731 (Mo. Ct. App. 1992).

¹⁰² The teacher taught English and media classes, and compiled a publication which was intended only for his media class. *Id.* at 733. The objectionable publication included "explicit, crude and tasteless sexual references, articles which promoted, or at least condoned, the use of drugs, and articles accusing the [local] police of substance abuse." *Id.* Several copies of the publication were circulated outside the media class, which led to the charges against the teacher. *Id.* The court followed principles set out in *Hazelwood* to determine that the Board could terminate the teacher for unacceptable conduct regardless of whether the publication was a "teaching technique." *Id.* at 735.

¹⁰³ *Gerig*, 841 S.W.2d at 734.

¹⁰⁴ *Id.* at 735.

that *Tinker* still protects "personal" student speech that is non-disruptive.¹⁰⁵ Thus, cases arguably controlled by *Tinker* generally focus on whether student speech is "personal" or "school-sponsored" and whether the student speech is manifestly disruptive.¹⁰⁶

For instance, in *Chandler v. McMinnville School District*,¹⁰⁷ two high school students wore buttons supporting an ongoing teachers' strike.¹⁰⁸ School administrators asked the students to remove the buttons, stating that they were disruptive. The students filed suit against the school district.¹⁰⁹ The students feared further disciplinary action if they refused to remove the buttons and argued that, therefore, their First Amendment rights to freedom of expression had been violated.¹¹⁰ In reversing the lower court, which had dismissed the claim, the Ninth Circuit concluded that because the buttons were not vulgar per se, school-sponsored, or manifestly disruptive, the speech was permissible under *Fraser*, *Hazelwood*, and *Tinker*.¹¹¹

In *Slotterback v. Interboro School District*,¹¹² a Pennsylvania district court considered whether a school district could be permitted to bar students from distributing certain written materials, such as those that "proselytize a particular religious or political belief."¹¹³ The court held

¹⁰⁵ See *infra* notes 217-18 and accompanying text (discussing cases upholding *Tinker's* protection of "personal" student speech).

¹⁰⁶ See *infra* notes 297-99 and accompanying text.

¹⁰⁷ 978 F.2d 524 (9th Cir. 1992).

¹⁰⁸ *Id.* at 526. Two of those buttons displayed the slogans "I'm not listening scab" and "Do scabs bleed?" *Id.* Similar buttons were distributed by the two students to other students at the school. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Chandler*, 978 F.2d at 526. The school district moved to dismiss the complaint for failure to state a claim upon which relief could be granted. *Id.* The district court granted the motion, stating that the slogans on the buttons were offensive and inherently disruptive. *Id.* The students argued on appeal to the Ninth Circuit that the case should be governed by *Tinker* rather than *Fraser*. *Id.* at 527-28. The students contended that their case could be distinguished from *Fraser* in three ways: (1) the buttons constituted silent, rather than sexually explicit, speech; (2) the buttons expressed a political viewpoint, and were therefore entitled to greater protection; and (3) the display of the buttons did not take place at a school-sponsored activity. *Id.* at 528.

¹¹¹ *Chandler*, 978 F.2d at 528-31. The court ruled that "the standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is governed by *Fraser*, school-sponsored speech by *Hazelwood*, and all other speech by *Tinker*." *Id.* at 529 (citations omitted).

¹¹² 766 F. Supp. 280 (E.D. Pa. 1991); see also Salomone, *supra* note 19, at 283-85 (discussing application of *Hazelwood* in this case).

¹¹³ *Slotterback*, 766 F. Supp. at 293. The school objected to the distribution by two students of literature advocating a particular religion. *Id.* at 284. The students concentrated their efforts outside the classroom, but did distribute the literature several times during classes. *Id.* The school objected to the disruption and litter caused by the distributions, and came up with an official "Procedure for Distribution of Non-School Written Materials." *Id.* at 285. The students

that a public forum analysis would be inappropriate because “personal” student speech was involved.¹¹⁴ Drawing on the “toleration versus promotion” language of *Hazelwood*, the Court determined that the student speech in this case should be “tolerated” under the standards of *Tinker* because it was personal expression.¹¹⁵

3. Cases Extending *Hazelwood* to Faculty Speech

Several lower courts have used *Hazelwood*'s analysis to permit school officials to restrict the free speech rights of faculty members.¹¹⁶ These cases suggest that such restrictions are necessary to allow schools to determine how they should fulfill students' educational needs.¹¹⁷

For example, in *Ward v. Hickey*,¹¹⁸ the First Circuit determined that because a classroom discussion is a school-sponsored activity and a classroom is not a public forum, a Massachusetts public school was permitted under *Hazelwood* to impose reasonable restrictions on a teacher's classroom speech.¹¹⁹ The plaintiff, a biology teacher, claimed that the local school district violated her First Amendment rights when it decided not to reappoint her due, in part, to a classroom discussion in which she discussed abortion of Down's Syndrome fetuses.¹²⁰ The court found that the school's decision in this case was “reasonably related to legitimate

contended that distribution of religious materials was speech protected by the First Amendment and that the school's restrictions were invalid. *Id.* at 286.

¹¹⁴ *Slotterback*, 766 F. Supp. at 290-91. The court noted that even if public forum analysis were applicable, a standard of strict scrutiny would be applied to the school officials' actions because the school had established a designated public forum. *Id.* at 292-93. The court, however, followed *Tinker* in applying strict scrutiny to the content-based portions of the school's distribution policy, recognizing that “plaintiff's speech was personal, was not school-sponsored, and occurred during school hours. . . .” *Id.* at 291.

¹¹⁵ *Id.* at 289-91. The court declared that the parts of the distribution policy which prohibited distributions of religious and political literature were overbroad and facially invalid. *Id.* at 300.

¹¹⁶ See *infra* notes 141-57 and accompanying text (discussing cases extending *Hazelwood* to faculty speech).

¹¹⁷ For a discussion of restrictions placed on faculty speech, see Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693 (1990); Donna Prokop, Note, *Controversial Teacher Speech: Striking a Balance Between First Amendment Rights and Educational Interests*, 66 S. CAL. L. REV. 2533 (1993).

¹¹⁸ 996 F.2d 448 (1st Cir. 1993).

¹¹⁹ *Id.* at 453-54.

¹²⁰ *Ward*, 996 F.2d at 450. Plaintiff also contended that the school failed to give her proper notice of what speech was permissible. *Id.* at 451. The court found in this regard that a school is not obligated to expressly prohibit all imaginable inappropriate conduct by teachers in an effort to apprise teachers of what is “inappropriate.” *Id.* at 454. Instead, the court ruled that the relative inquiry is: “based on existing regulations, policies, discussions, and other forms of communication between school administration and teachers, [is] it reasonable for the school to expect the teacher to know that her conduct [is] prohibited?” *Id.*

pedagogical concerns” based on the age and sophistication of the students, the relationship between teaching methods and valid educational objectives, and the context and manner of the presentation.¹²¹

In a similar case, *Miles v. Denver Public Schools*,¹²² the school district reprimanded a teacher for making an inappropriate comment during class regarding a rumor about the sexual activities of two students.¹²³ Applying *Hazelwood*, the Tenth Circuit determined that the school had legitimate pedagogical interests in controlling the content of a teacher’s speech because such speech, in a classroom setting, “bears the imprimatur of the school.”¹²⁴ The court also referenced the significant educational interests of the state as “educator,” finding that such interests justify restrictions on the speech rights of students and teachers.¹²⁵ The school, therefore, was justified in reprimanding the teacher, and the court refused to “interfere with the authority of the school officials to select among alternative forms of discipline. We will protect appropriate constitutional interests. We should not and will not run the schools.”¹²⁶

Other cases demonstrate that the right of school officials to control the curriculum can take precedence over the conflicting free speech rights of teachers.¹²⁷ In *Kirkland v. Northside Independent School District*,¹²⁸ a public school teacher’s contract was not renewed because, in part, the teacher was teaching from his own individual reading list rather than the

¹²¹ *Ward*, 996 F.2d at 453. The court determined that a school committee could regulate a teacher’s classroom speech if: (1) “the regulation [was] reasonably related to a legitimate pedagogical concern;” and (2) the teacher had been given advance notice of what conduct was unacceptable and, therefore, prohibited. *Id.* at 452.

¹²² 944 F.2d 773 (10th Cir. 1991).

¹²³ *Id.* at 774-75. The comment, an unsubstantiated rumor, arose during a classroom discussion in which a student had asked the teacher to give specific examples of his assertion that “the quality of the school had declined” in recent years. *Id.* at 774. Although the teacher apologized to the principal for his bad judgment, he was reprimanded and put on paid administrative leave for four days. *Id.*

¹²⁴ *Miles*, 944 F.2d at 776. In applying *Hazelwood* to *Miles*, the court stated that “[a] school’s interests in regulating classroom speech . . . are implicated regardless of whether the speech comes from a teacher or student.” *Id.*, 944 F.2d at 777.

¹²⁵ *Id.* at 778-79. The school asserted several concerns to justify its actions: first, the school’s need to disassociate itself from speech it considers inappropriate; second, “an interest in ensuring that teacher employees exhibit professionalism and sound judgment;” and third, the school’s need to provide a proper educational atmosphere. *Id.* at 778. The court felt that the brief administrative leave allowing the school to investigate the incident and the narrowly tailored reprimand were reasonable in light of the school’s legitimate pedagogical concerns. *Id.*

¹²⁶ *Id.* at 779.

¹²⁷ See *infra* notes 151-57 and accompanying text.

¹²⁸ 890 F.2d 794 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990).

reading list approved by the school district.¹²⁹ The teacher contended that the district's action violated his right to free expression under the First Amendment. In upholding the school district's action, the Fifth Circuit held that under *Hazelwood*, "school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community."¹³⁰

In *Roberts v. Madigan*,¹³¹ a teacher sponsored a daily fifteen minute silent reading period during which students were authorized to read whatever they wished, including books from the teacher's library, which included several religious books. During this same time, the teacher often read his Bible silently. School officials asked the teacher to remove the religious books from his classroom library and not to display the Bible during the school day.¹³² In upholding the school's action, the Tenth Circuit stated in dictum that *Hazelwood* suggested that school officials may impose speech restrictions on teachers as well as students.¹³³ Because the school officials stated that they removed the books to avoid an Establishment Clause violation, the court based its holding on an Establishment Clause analysis rather than on *Hazelwood*.¹³⁴

4. Student Newspaper Cases

The Supreme Court's decision in *Hazelwood* surprised many observers because courts have seldom restricted speech found in newspapers.¹³⁵

¹²⁹ *Id.* at 795. The school district alleged several reasons for not renewing the teacher's contract, including: poor supervision of one of his classes; below average evaluations; poor interaction with students, parents, and members of the faculty; and the use of a non-approved reading list. *Id.* at 795-96. It was the policy of the school that if a teacher was dissatisfied with the approved reading list, he or she could supplement it or use a substitute list if administrative approval was obtained. *Id.* at 796.

¹³⁰ *Kirkland*, 890 F.2d at 800-01 & n.18 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988)). Plaintiff failed to prove that his reading list was constitutionally protected speech, or that the list was the motivating factor behind the decision not to rehire him. *Id.* at 797-801. The court concluded that "the First Amendment does not vest public school teachers with authority to disregard established administrative mechanisms for approval of reading lists." *Id.* at 795. Recognizing the school's pedagogical interests in shaping the curriculum, the court noted that "[t]he first amendment has never required school districts to abdicate control over public school curricula to the unfettered discretion of individual teachers." *Id.*

¹³¹ 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 112 S. Ct. 3025 (1992).

¹³² *Id.* at 1049.

¹³³ *Id.* at 1056.

¹³⁴ *Id.* at 1056-58.

¹³⁵ See Salomone, *supra* note 19, at 253-55 (discussing shock over *Hazelwood* decision). But see J. Marc Abrams & S. Mark Goodman, Comment, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*. 1988 DUKE L.J. 706 (arguing that independent school newspapers and newspapers at college level are left unaffected

Since *Hazelwood*, however, lower courts such as in *Gerig v. Board of Education*, discussed above, have recognized a school's right to control the content of official school newspapers.¹³⁶ Nevertheless, several state courts have found *Hazelwood* inapplicable to student newspaper cases.¹³⁷

For example, in *Desilets v. Clearview Regional Board of Education*,¹³⁸ an eighth grade student claimed that his First Amendment rights were violated when the school refused to publish two movie reviews he submitted to the school newspaper because the movies being reviewed—*Rain Man* and *Mississippi Burning*—were rated R.¹³⁹ The New Jersey Superior Court distinguished this case from *Hazelwood*,¹⁴⁰ holding that the school had failed to show a valid educational purpose for the censorship.¹⁴¹ The court concluded that because there was nothing offensive in the article and the school had not censored it because of poor literary style, the school must have censored the article because it disagreed

by *Hazelwood*).

¹³⁶ See *supra* notes 86-104 and accompanying text.

¹³⁷ See *supra* notes 86-104 and accompanying text.

¹³⁸ 630 A.2d 333 (N.J. Super. Ct. App. Div. 1993), *aff'd*, 647 A.2d 150 (N.J. 1994).

¹³⁹ The student offered to insert a disclaimer that the movies being reviewed were not endorsed by the school, but both the faculty advisor and the school superintendent felt that such a disclaimer would not sufficiently counteract the implied endorsement of R-rated movies. *Desilets*, 630 A.2d at 335. The student also pointed out that reviews of three other R-rated movies had appeared in the newspaper. *Id.* The school responded that those reviews had been permitted because the school district did not yet have a full understanding of the implications and holding of *Hazelwood*. *Id.*

The state trial court found that the school officials' actions were permissible under *Hazelwood*, rejecting plaintiff's argument that *Hazelwood* did not apply because the student newspaper was not part of the regular school curriculum. *Id.* at 336. The students met after school to work on the newspaper and did not receive credit for their work. The trial court, however, also ruled that the New Jersey Constitution contained a more expansive view of the student right of expression than the federal Constitution as interpreted by *Hazelwood*. *Id.*, 630 A.2d at 336. The state standard, according to the trial court, required the school to show that there was no less oppressive alternative to the censorship. *Id.* The trial court then held that a disclaimer was a less-intrusive means of accomplishing substantially the same result as total censorship of the reviews. *Id.*

On appeal, the New Jersey Superior Court affirmed the trial court but declined to apply a state constitutional analysis. *Id.* Instead, the appellate court based its decision solely on federal constitutional law. *Id.* at 336-39.

¹⁴⁰ The appellate court found that *Hazelwood* applied to school-related activities "[a]s long as they are supervised by faculty members and designed to impart knowledge or skills to the student participants," even when students do not receive academic credit for their work and the work is done after regular school hours. *Desilets*, 630 A.2d at 338 (quoting *Hazelwood*).

¹⁴¹ The court indicated that students would not regard the review as an endorsement of R-rated movies by the school as long as a disclaimer was inserted into the article. *Desilets*, 630 A.2d at 339-40. This approach would appear to be the "no less intrusive means" approach advocated by the trial court but ostensibly rejected by the appellate court.

with its subject matter. Thus, the court ruled that "the pedagogical interests of the school do not extend beyond the style and content of the article."¹⁴²

At least one other lower court has refused to apply *Hazelwood* as controlling precedent in student newspaper cases where the plaintiff based his claims on state law. In *Leeb v. DeLong*,¹⁴³ the California Court of Appeals heard a case with facts similar to those of *Hazelwood*. The student editor of a high school newspaper submitted an April Fool's issue to the school's principal for approval. The principal concluded that a portion of the issue contained innuendo damaging to the reputations of certain featured students, and refused to permit distribution of the issue.¹⁴⁴

The student editor sued the school district, claiming an infringement of his rights of expression under the Constitution of California.¹⁴⁵ The court found that if *Hazelwood* were applicable in California, the case would have easily been decided in the school district's favor.¹⁴⁶ A California statute, however, provides student editors with the right to control the editorial content of student newspapers with very limited exceptions.¹⁴⁷ Consequently, the court ruled that "[a] school district in this state may censor expression from official school publications which it reasonably believes to contain an actionable defamation, but not as a matter of taste or pedagogy."¹⁴⁸

¹⁴² *Desilets*, 630 A.2d at 339. The majority's opinion draws the questionable distinction between subject matter and content. *Id.* at 339-40. Under the majority's approach to *Hazelwood*, despite the objections of school officials, any subject could be addressed in a school newspaper as long as the content of the article itself was not obscene and the style was not objectionable. *Id.* One can easily defend the position that the school did have a legitimate pedagogical objective in exercising control over the subjects addressed in school newspapers, as did Judge D'Annunzio in his dissenting opinion which favored the school's actions under a *Hazelwood* analysis. *Id.* at 339-42.

¹⁴³ 243 Cal. Rptr. 494 (Cal. Ct. App. 1988).

¹⁴⁴ *Leeb*, 243 Cal. Rptr. at 495. The issue reported that Michael Jackson was planning a concert at the school, that the Los Angeles Raiders were going to play the school football team, and that spring break had been cancelled due to lack of interest. *Id.* On the third page of the issue, a photo of female students from the school appeared, with the caption "Nude Photos: Girls of Rancho." *Id.* According to the article, the July issue of Playboy magazine would carry nude photographs of certain high school students and those interested should sign up. *Id.* The female students in the photo were standing in a line with their purported applications in hand. *Id.* Apparently, the publication did not obtain "totally informed consent" from the female students depicted in the photograph. *Id.*

¹⁴⁵ *Leeb*, 243 Cal. Rptr. at 496.

¹⁴⁶ *Id.* at 497-98.

¹⁴⁷ See CAL. EDUC. CODE § 48907 (West 1994).

¹⁴⁸ *Leeb*, 243 Cal. Rptr. at 502. It was not enough under the statute that a lawsuit is merely threatened. *Id.* at 503.

As this case indicates, a few states do not follow *Hazelwood*, at least in the student newspaper context. They have instead codified the *Tinker* standard, requiring schools to show a material disruption of students' education or potential tort liability before educators are permitted to restrict what students choose to print in school newspapers.¹⁴⁹ Of the states that have considered such legislation,¹⁵⁰ however, most have rejected it.¹⁵¹

5. Extension of *Hazelwood* to the First Amendment Right of Association

Lower courts have also extended *Hazelwood*'s precedent to restrict First Amendment rights other than freedom of speech. For example, in *Bush v. Dassel-Cokato Board of Education*,¹⁵² a Minnesota district court held that *Tinker*, when read in light of *Fraser* and *Hazelwood*, did not prohibit schools from disciplining students who attended parties at which alcohol was consumed.¹⁵³ This decision extends *Hazelwood*'s reach beyond First Amendment speech issues to the First Amendment's right to freedom of association, a facet of student "autonomy" that arguably reaches beyond mere speech.¹⁵⁴

6. Cases Extending *Hazelwood* to University Settings

The *Hazelwood* Court expressly stated that it was withholding judgment on whether its articulated standards would also apply in a university setting.¹⁵⁵ Predictably, therefore, lower courts have not consistently applied *Hazelwood* in cases involving universities.

In *Bishop v. Aronov*,¹⁵⁶ the Eleventh Circuit held that a university did not violate the constitutional rights of a professor when it prohibited him from making religious statements during class. The court applied the

¹⁴⁹ The only statute codifying the *Tinker* standard prior to *Hazelwood* was California's student expression law. Salomone, *supra* note 19, at 302-06. Massachusetts, Iowa, and Kansas have passed similar legislation since *Hazelwood* was decided. *Id.*

¹⁵⁰ As of 1992, approximately 22 states had considered such legislation. *Id.*

¹⁵¹ States considering, but rejecting, legislation patterned after California's statute include Hawaii, Illinois, Indiana, Kentucky, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oregon, Rhode Island, Washington, and Wyoming. *Id.*; see also *Anti-Hazelwood Legislation Stalls in Three States*, STUDENT PRESS LAW CENTER REPORT vol. xvi, No. 3 (Fall 1995) (reporting that Missouri, Nebraska, and Florida had each rejected Legislation designed to circumvent *Hazelwood*).

¹⁵² 745 F. Supp. 562 (D. Minn. 1990).

¹⁵³ *Id.* at 569.

¹⁵⁴ *Cf.* *City of Milwaukee v. K.F.*, 426 N.W.2d 329 (Wis. 1988) (citing *Hazelwood* in upholding city youth curfew ordinance).

¹⁵⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988).

¹⁵⁶ 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 3026 (1992).

public forum analysis set forth in *Hazelwood*, determining that the classroom during instruction was not a public forum.¹⁵⁷ The court also found that the University's actions in restricting the professor's speech during class were reasonably related to a legitimate educational interest.¹⁵⁸ The court also applied a version of the school-sponsorship language from *Hazelwood*, holding that a teacher's language could be perceived by students as being authorized by the university.¹⁵⁹

The Second Circuit, in *Fox v. Board of Trustees*,¹⁶⁰ refused to apply *Hazelwood* to a university environment when a student challenged a university regulation barring commercial product demonstrations in student dormitories. The court held that students have the right to receive information in their dormitory rooms, which are not public forums.¹⁶¹ The dissent would have applied *Hazelwood* to university speech and permitted the university's action.¹⁶²

7. Cases Applying *Hazelwood* to Student Speech At School-Sponsored Assemblies and Graduation Ceremonies

Lower courts have applied *Hazelwood* to cases having a similar factual setting to *Fraser*. That is, where students speak at school-sponsored assemblies or graduation ceremonies, courts generally grant wide latitude to school officials to restrict speech if they determine it would be in the best educational interests of their students.

For instance, in *Poling v. Murphy*,¹⁶³ the Sixth Circuit in 1989 held that the First Amendment does not give a high school student the right to make admittedly discourteous and rude remarks about school officials during a campaign speech delivered at a school-sponsored assembly.¹⁶⁴

¹⁵⁷ *Id.* at 1070-71. The court reasoned that no public forum existed "during instructional periods . . . 'reserved for other intended purposes' viz., the teaching of a particular university course for credit." *Id.* at 1071 (quoting *Hazelwood*, 484 U.S. at 267).

¹⁵⁸ *Id.* at 1076.

¹⁵⁹ *Bishop*, 926 F.2d at 1076. The court stated that the university may permissibly seek to avoid the impression of "official sanction." *Id.*

¹⁶⁰ 841 F.2d 1207 (2d Cir.1988), *rev'd*, 492 U.S. 469 (1989).

¹⁶¹ *Id.* at 1211. For a discussion of the exercise of editorial control over the content of university student newspapers, see Greg C. Tenhoff, Note, *Censoring the Public University Student Press: A Constitutional Challenge*, 64 S. CAL. L. REV. 511 (1991).

¹⁶² The United States Supreme Court reversed the Second Circuit but did so on issues relating to the constitutional limitations on commercial speech. See *Board of Trustees v. Fox*, 492 U.S. 469 (1989).

¹⁶³ 872 F.2d 757 (6th Cir.), *cert. denied*, 493 U.S. 1021 (1989).

¹⁶⁴ *Id.* The court noted that "[u]ntil recent years, lawyers and educators alike might have found it puzzling that such a question should even be asked. Not today; the question is a serious one under contemporary constitutional concepts" *Id.* at 758.

Applying *Hazelwood*, the court entered summary judgment in favor of the school district after explaining with some eloquence that civility is a legitimate pedagogical concern.¹⁶⁵

In *Brody v. Spang*,¹⁶⁶ the Third Circuit considered to what extent religious speech may be included in a public high school graduation ceremony. Although the court remanded the case for additional factual findings, as part of its public forum analysis, the court indicated that, under *Hazelwood*, it was unlikely that high school commencement exercises could have been designated a public forum because the "process for setting the format and contents of a graduation ceremony are more likely to resemble the tightly controlled school newspaper policies at issue in *Hazelwood* than the broad group access policies considered in [other Supreme Court cases]."¹⁶⁷

8. The Equal Access Act Cases

Hazelwood reinforced the notion that actions taken by school officials related to legitimate pedagogical objectives deserve protection from aggressive constitutional scrutiny.¹⁶⁸ As a result, courts have also had to

¹⁶⁵ The court reasoned as follows:

The universe of legitimate pedagogical concerns is by no means confined to the academic; as the Supreme Court put it in *Fraser*, "schools must teach by example the shared values of civilized social order." Sometimes, of course, these "shared values" come in conflict with one another; independence of thought and frankness of expression occupy a high place on our scale of values, or ought to, but so too do discipline, courtesy, and respect for authority. Judgments on how best to balance such values may well vary from school to school. Television has not yet so thoroughly homogenized us that conduct deemed unexceptionable in New York City, for example, will necessarily be considered acceptable in rural Tennessee.

Local school officials, better attuned than we to the concerns of the parents/taxpayers who employ them, must obviously be accorded wide latitude in choosing which pedagogical values to emphasize, and in choosing the means through which those values are to be promoted. We may disagree with the choices, but unless they are beyond the constitutional pale we have no warrant to interfere with them. Local control over public school, after all, is one of this nation's most deeply rooted and cherished traditions.

Id. at 762-63 (citations omitted). The court also found compelling the facts that the speech was held on school grounds and was part of a school-sponsored assembly. *Id.* at 262.

¹⁶⁶ 957 F.2d 1108 (3d Cir. 1992).

¹⁶⁷ *Id.* at 1119. The court also noted that under *Hazelwood*, school officials must be permitted to "retain the authority to refuse . . . to associate the school with any position other than neutrality on matters of political controversy." *Id.* at 1122 (quoting *Hazelwood*, 484 U.S. at 272).

¹⁶⁸ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) ("[W]e 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."); see *Nicholson v. Board of Educ. Torrance United*

determine whether school officials' actions vis-a-vis federal statutes likewise require different treatment,¹⁶⁹ despite the difficulty of blending the already unwieldy public forum analysis with statutory analysis. The most common statute to be addressed by courts in this manner is the Equal Access Act.¹⁷⁰

In *Board of Education v. Mergens*,¹⁷¹ the Supreme Court held that a public school's policy prohibiting use of school facilities for student groups discussing religious topics violated the Equal Access Act because other student groups were allowed to use the same facilities.¹⁷² Even so, the Court restated an underlying basis of the Court's decisions in *Hazelwood* and *Fraser*: "we think that schools and school districts nevertheless retain a significant measure of authority over the type of officially recognized activities in which their students participate."¹⁷³

In another Equal Access Act case, *Gregoire v. Centennial School District*,¹⁷⁴ the Third Circuit determined that a school district's decision to prohibit an evangelical youth organization from renting a school auditorium for a religious presentation violated the Equal Access Act because the school district had rented its auditorium to many other community groups. A dissenting judge cited *Hazelwood* for the principle that the school district's decision to restrict use of its facilities should be

Sch. Dist., 682 F.2d 858 (9th Cir. 1982) (supporting this proposition); *Seyfried v. Walton*, 668 F.2d 214 (3d Cir. 1981) (same); *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977) (same), *cert. denied*, 435 U.S. 925 (1978); *Frasca v. Andrews*, 463 F. Supp. 1043 (E.D.N.Y. 1979) (same).

¹⁶⁹ See, e.g., *Garnett v. Renton Sch. Dist.*, 874 F.2d 608 (9th Cir. 1989) (holding that school district's refusal to allow student religious group to meet in high school classroom did not violate Equal Access Act), *vacated*, 496 U.S. 914 (1990).

¹⁷⁰ 20 U.S.C. § 4071 (1988). The statute provides the following: "It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access . . . to . . . any students who wish to conduct a meeting within that limited open forum . . ." § 4071(a). The statute determines that "[a] public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more non-curriculum related student groups to meet on school premises during non-instructional time." § 4071(b).

¹⁷¹ 496 U.S. 226 (1990).

¹⁷² The district court, relying on *Hazelwood*, had held that the school's denial of respondents' request to use school facilities to discuss religious topics was reasonably related to legitimate pedagogical concerns. *Id.* at 233. In affirming the Eighth Circuit's reversal of the district court, however, the Supreme Court found that some student groups' use of school's facilities during non-instructional times was "noncurriculum related." *Id.* at 243-47. Therefore, the school maintained a "limited open forum" under the Equal Access Act, and was prohibited under the Act from content-based discrimination against any particular student group who wished to meet during non-instructional time. *Id.* at 247.

¹⁷³ *Id.* at 240-41 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) and *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986)).

¹⁷⁴ 907 F.2d 1366 (3d Cir. 1990).

accorded deference, especially where a student group's activities could be potentially disruptive.¹⁷⁵

Finally, in *Clark v. Dallas Independent School District*,¹⁷⁶ the Northern District of Texas determined that *Hazelwood* did not apply to the school district's policy prohibiting student groups from periodically meeting near the school cafeteria after school to read the Bible and pray together. The court held that because "the conduct at issue was voluntary, student-initiated, and free from the imprimatur of school involvement," *Tinker*, rather than *Hazelwood*, dictated the outcome of the case. Applying *Tinker*, the court concluded that the school had not met its burden of showing that "the restriction of [the students'] activity and expression was necessary to avoid material and substantial interference with the operation of [the school]." ¹⁷⁷

9. Other Applications of *Hazelwood*

A number of cases have cited *Hazelwood* for its use of public forum analysis in determining whether restrictions on speech are permissible under the First Amendment. Often, courts simply cite *Hazelwood* for the proposition that a public school is usually not a public forum.¹⁷⁸ In other cases, courts use *Hazelwood* to analogize schools to other public facilities.¹⁷⁹

¹⁷⁵ *Id.* at 1393 (Stapleton, J., dissenting).

¹⁷⁶ 806 F. Supp. 116 (N.D. Tex. 1992).

¹⁷⁷ *Id.* at 120 (citation omitted).

¹⁷⁸ *See, e.g.*, *Nelson v. Moline Sch. Dist.*, 725 F. Supp. 965 (C.D. Ill. 1989). In *Nelson*, students seeking to distribute a non-denominational newspaper in a school's hallways and classrooms challenged a school's decision to prohibit such distribution. The court applied a public forum analysis, concluding that school hallways and classrooms were non-public forums. The court then held that school officials were allowed to impose reasonable regulations which preserved the use for which the school was intended, "i.e. teaching fundamental values of public school education." *Id.* at 974; *see also* *Vukadinovich v. Board of Sch. Trustees*, 978 F.2d 403 (7th Cir. 1992) (holding *inter alia* that teacher fired for various reasons does not have actionable constitutional claim for access to school grounds when school officials prohibited such access). *cert. denied*, 114 S. Ct. 133 (1993); *Garnett v. Renton Sch. Dist.*, 874 F.2d 608, 613 (9th Cir. 1989) (rejecting student religious group's claim that school officials had violated their First Amendment rights by refusing to allow them to use high school classroom prior to start of school day because under *Hazelwood* school's classroom does not constitute public forum), *vacated*, 496 U.S. 914 (1990).

¹⁷⁹ *See, e.g.*, *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992). In *Kreimer*, a case which received massive media attention at the time, the Third Circuit Court of Appeals ruled that a public library was a limited public forum permitted to promulgate certain rules regarding the conduct of library patrons. *Id.* at 1262. In applying a public forum analysis to the library, the court referred to *Hazelwood* for the proposition that the government opens a designated public forum where "by policy or practice [it permits] . . . indiscriminate use by the general public."

Several courts have also cited language in *Hazelwood* as support for such propositions as: (1) the education of children should be left to parents and local school officials rather than judges;¹⁸⁰ (2) restrictions on constitutional rights must be permitted under certain circumstances;¹⁸¹ and (3) school officials must have discretion to reasonably pursue legitimate educational objectives.¹⁸²

D. *The General Significance of Hazelwood*

Now, 25 years after *Tinker*, students still retain the right of *personal* expression on school grounds so long as that expression is not materially disruptive.¹⁸³ *Tinker*, however, no longer protects speech that is delivered through school-sponsored activities, such as student newspapers or assemblies.¹⁸⁴ Thus, school officials have much greater discretion in making decisions that restrict students' short-term autonomy rights in the

Id. at 1259 n.13 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) quoting *Perry Educ. Assn. v. Perry Loc. Educator's Ass'n*, 460 U.S. 37, 47 (1983)).

¹⁸⁰ See, e.g., *Steirer v. Bethlehem Area Sch. Dist.*, 789 F. Supp. 1337, 1343 (E.D. Pa. 1992) (upholding graduation requirement of 60 hours of community service), *aff'd*, 987 F.2d 489 (3d Cir.), *cert. denied*, 114 S. Ct. 85 (1993).

¹⁸¹ While no Supreme Court opinion directly modifies or applies the standards set forth in *Hazelwood* or *Fraser*, the Court has referred to those opinions as support for propositions regarding the nature of a school environment and the necessity of age-based classifications. Most recently, in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2546 (1992), the Supreme Court held a "hate crimes" ordinance invalid. In a concurring opinion, Justice Stevens noted that "the distinctive character of . . . a secondary school environment . . . influences our First Amendment analysis." *Id.* at 2568 (Stevens, J., concurring); see also *Thompson v. Oklahoma*, 487 U.S. 815, 853 (1988) (O'Connor, J., concurring) ("Legislatures recognize the relative immaturity of adolescents, and we have often permitted them to define age-based classes that take account of this qualitative difference between juveniles and adults."). For a discussion of *R.A.V.*, see Thomas H. Moore, Note, *R.A.V. v. City of St. Paul: A Curious Way to Protect Free Speech*, 71 N.C. L. REV. 1252 (1993).

¹⁸² For example, in *Silano v. Sag Harbor Union Free Sch. Dist.*, 42 F.3d 719 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 2612 (1995), the court relied on *Hazelwood* to hold that schools have the right to restrict the speech rights of guest lecturers as well as faculty and students if the restriction is based on a legitimate educational objective. *Id.* at 722. In addition, in *Wise v. Pea Ridge School District*, 855 F.2d 560 (8th Cir. 1988), the court rejected the appeal of summary judgment granted against two students protesting application of a school district's corporal punishment policy. In dictum, the court stated: "we note that our decision is consistent with the Supreme Court's decisions which defer to school administrators in matters such as discipline and maintaining order in the schools." *Id.* at 566 (citing *Hazelwood*, 484 U.S. at 266).

¹⁸³ For a discussion of the aftermath of *Tinker* prior to the *Hazelwood* decision, see Shari Golub, *Tinker to Fraser to Hazelwood—Supreme Court's Double Play Combination Defeats High School Students' Rally for First Amendment Rights: Hazelwood School District v. Kuhlmeier*, 38 DEPAUL L. REV. 487 (1988) (detailing Court's trend toward minimalizing students' rights).

¹⁸⁴ *Id.* at 514 (criticizing *Hazelwood* for nullifying student's rights established in *Tinker* and "endors[ing] the confusing and one-sided public forum analysis").

interest of helping them to develop their capacity for future autonomy.¹⁸⁵ This change has been reflected in lower court decisions in nearly every circuit since *Hazelwood* was decided.

1. Reinforcing the Role of Public Schools

We have described elsewhere the reason we believe the *Hazelwood* decision is grounded on a theoretical approach that advances rather than threatens the development of students' actual powers of expression.¹⁸⁶ In this sense, the Court has limited the de jure autonomy of students in a way that promotes the de facto development of their actual capacity for autonomous action.

The traditional presumptions of our legal and political structure that protect and encourage school discretion are, like the very concept of minority status for children, designed to benefit children by educating them—that is, teaching them the knowledge and skills needed to act with true autonomy. The nation's system of public education reflects a broadly based social commitment to view children as legally privileged, not disadvantaged. Children, by nature, lack intellectual and moral capacity, yet because they are literally society's future, children have been deemed *entitled* to education. Indeed, this nation's longstanding recognition of each child's "right" to an education is one of the most enlightened and well-funded declarations of human rights in the modern age.¹⁸⁷

But schools cannot educate their students without the authority, the confidence, the financial support, and the public support needed to

¹⁸⁵ See LAURENCE D. HOULGATE, *THE CHILD & THE STATE: A NORMATIVE THEORY OF JUVENILE RIGHTS* 57 (1980).

Adults have a *duty* to force or compel children to do those acts that will aid them in becoming autonomous beings and to refrain from doing those acts that will hinder them in attaining their goal, and this (natural) duty is derived from the child's (natural) right to be provided the conditions that will allow him to realize his potential to become an autonomous being.

Id.

¹⁸⁶ See Hafen, *supra* note 23 (OHIO ST. L.J.); Hafen, *supra* note 31 (DUKE L.J.).

¹⁸⁷ The right to an education has not been recognized by the federal courts. See *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."). At the state level, the right to an education, "reached its pinnacle in *Serrano v. Priest*, wherein the Supreme Court of California declared: "We are convinced that the distinctive and priceless function of education in our society warrants, indeed, compels our treatment of it as a fundamental interest.'" SAMUEL M. DAVIS & MORTIMER D. SCHWARTZ, *CHILDREN'S RIGHTS AND THE LAW* 132 (1987) (discussing and quoting *Serrano v. Priest*, 5 Cal. 3d 584, 608-09 (1971)).

implement effective educational programs. As James Coleman¹⁸⁸ and others have demonstrated in their empirical studies, the decline in U.S. student academic achievement during the 1970's and 1980's is clearly linked to the decline in school authority that followed in the wake of *Tinker* and the anti-authoritarian era it symbolized. Thus, we consider anti-authoritarian educational theories, such as the theories of A.S. Neill, to be fundamentally misguided. Neill claims that a child is "innately wise and realistic. If left to himself without adult suggestion of any kind, he will develop as far as he is capable of developing."¹⁸⁹ Children obviously need education that teaches them the skills of critical thinking, including a healthy skepticism about authority and authority figures. Students of all ages also need ample opportunities to express themselves freely, with ever increasing latitude to learn how to make decisions by *making* some and living with their consequences. The *Hazelwood* Court determined that the educational approaches that will best develop the minds and expressive powers of public school students are rooted in educational philosophy, not constitutional law. Thus, the Court recognized that judges should not define the terms of curricular and extra-curricular educational programs. It also implicitly recognized that schools should ground their authority and their conceptual guidance not in the exceptional case law of First Amendment jurisprudence, but in their own educational expertise and in the broad grants of state power that originally created our system of public schools. Those decisions created the schools not as a national threat but as a national treasure.¹⁹⁰

For such reasons, we resist the characterization of *Hazelwood* and its lower court progeny as addressing a simple dichotomy between student autonomy and community control. The community has enormous responsibility for public school students, not to control them—as if in prison—but to teach them. Schools exist, therefore, to facilitate the education—indeed the "liberation"—of children toward literal personal autonomy. We know of no more potent children's liberation movement than the establishment of American public schools. To liberate children from ignorance and the shackles of their own uneducated capacity is to recognize their right to "liberal"—that is, autonomy-creating—education.

¹⁸⁸ See JAMES S. COLEMAN ET AL., *HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED* (1982).

¹⁸⁹ ALEXANDER S. NEILL, *SUMMERHILL: A RADICAL APPROACH TO CHILD REARING* 4 (1960).

¹⁹⁰ *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of the state and local governments.").

2. Autonomy and the Toleration/Promotion Distinction

We wish to note one conceptual strength of the *Hazelwood* approach that has applications in other contexts of constitutional analysis; namely, the distinction the Court drew between what a school must *tolerate* and what it must *promote*. As Professor Salomone has noted,

The Court defined the distinction between toleration and promotion as follows:

[Toleration] addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. . . . [Promotion] concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.¹⁹¹

The Court in *Board of Education v. Mergens* later drew a similar distinction in holding that, under the federal Equal Access Act, a high school that had created a limited open forum must allow after-hours access to its facilities by a student religious club:

[A] school does not *endorse or support* student speech that it merely *permits* on a nondiscriminatory basis. . . . The proposition that schools do not endorse everything they fail to censor is not complicated. . . . Although a school may not itself lead or direct a religious club, a school that *permits* a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or *endorsement* of the particular religion.¹⁹²

Our comment on this distinction requires the creation of a brief conceptual context.

As we have noted elsewhere, American law has historically placed all personal conduct into one of three categories—protected, permitted, and prohibited:

- (1) *protected* conduct (such as political speech), which is protected by a preferred constitutional right;
- (2) *permitted* conduct (such as driving a car), which is the subject neither of constitutional protection nor of unusual prohibitions; and
- (3) *prohibited* conduct (such as robbery), which is forbidden by a criminal sanction or by a classificatory scheme that (sometimes harshly) excludes persons in certain categories.

¹⁹¹ Salomone, *supra* note 42, at 267 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

¹⁹² *Board of Educ. v. Mergens*, 496 U.S. 226, 250-52 (1990) (emphasis added).

The law creates a natural spectrum with protected activity on one extreme, prohibited activity on the other extreme, and a broad range of permitted activity in the middle. We may say that sexual intimacy between *married* persons is *protected* by a constitutional right State criminal laws against adultery and fornication place sexual relationships between the *unmarried* in the *prohibited* category. If a *legislature* . . . [decriminalizes such conduct], sexual conduct between the unmarried moves from category (3) to category (2)—it becomes permitted, even though it is not yet protected. . . . [But] if a *court* finds a state’s adultery and fornication laws unconstitutional, sexual conduct between consenting adult takes on a protected status. . . . [Thus] decriminalization decisions by the *judiciary* are likely to move conduct from category (3) all the way across the spectrum to category (1).¹⁹³

In imagining a spectrum from (1) protected to (2) permitted to (3) prohibited conduct, natural boundaries exist between categories (1) and (2), and between categories (2) and (3), the boundary of “endorsement” and the boundary of “tolerance.”

(1)	E N D O R S E M E N T	(2)	T O L E R A N C E	(3)
PROTECTED Conduct		PERMITTED Conduct		PROHIBITED Conduct

The Court’s analysis in *Hazelwood* gives meaning to both boundaries. The Court held that a school must “endorse” or “sponsor” only those activities the school chooses to place within its educational purpose, as determined exclusively by school officials. Thus, we see the boundary between (1) protected conduct and (2) permitted conduct as the point of “endorsement,” meaning that the school determines for itself which forms of student

¹⁹³ Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy; Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 546-47 (1983).

expression it will place within its most "protected" sphere. Both its students and the public are entitled to expect that activities in this category have the school's complete institutional endorsement, and that such an endorsement has substantial meaning.

We see the boundary between (2) permitted conduct and (3) prohibited conduct as the point of "toleration," meaning that a school may be required to "tolerate" or "permit" certain student activities that it does not necessarily "endorse." The *Hazelwood* Court reaffirmed the holding of *Tinker*, that the First Amendment requires a school to "tolerate" a student's "personal speech" in non-educational settings even if the school would not choose to include that expression within its endorsed or protected sphere, so long as the expression is not disruptive to the school's functioning.¹⁹⁴ The *Tinker* students who wore black arm bands to protest the Vietnam War were clearly within the "permitted" sphere, even though the school's officials opposed the expression.¹⁹⁵

We find the distinction between tolerance and endorsement a useful one, because in many constitutional—and simply public—contexts, the public is confused by judicial results or language that blurs the tolerance/promotion distinction. That very blurring created rampant confusion for years in lower courts about the meaning of *Tinker*. Once the Supreme Court had held that schools must tolerate non-disruptive speech, many courts missed the distinction between educational and non-educational contexts, because they missed the distinction between tolerance and endorsement. For instance, the lower courts in both *Fraser* and *Hazelwood* held that the *Tinker* "tolerance" rule required schools to provide the institutionally endorsed platform of a school assembly and a school-sponsored newspaper for the offensive expression of individual students.¹⁹⁶

As *Hazelwood* now makes clear, it is one thing to require schools to "tolerate" a student's offensive but non-disruptive personal expression, but it is quite another when the alleged student autonomy theory that justifies this tolerance runs to the unchecked extreme of requiring schools to "promote" student expression that distorts the existing educational order within the protected sphere of school-sponsored activities. When that

¹⁹⁴ *Hazelwood*, 484 U.S. at 271-72.

¹⁹⁵ *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 513 (1969) ("The Constitution says that Congress (and the state) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances.").

¹⁹⁶ See *Kuhlmeier v. Hazelwood Sch. Dist.*, 607 F. Supp. 1450, 1462-63 (D. Mo. 1985).

happens, a school loses the institutional authority and discretion it must have to carry out its educational mission. In addition, this distinction also helps a school's students, and the public, understand that just because the law requires tolerance of certain conduct, that conduct does not enjoy official endorsement.

In public schools, as in other contexts, the institutional policies that originate in the "protected" sphere usually reflect not merely an autonomy-based *individual interest*, but what Roscoe Pound called *social interests*.¹⁹⁷ Pound believed that a primary reason for protecting certain individual interests in domestic relations law is that we thereby promote society's own best long-term interests.¹⁹⁸ For example, ever since the 1920's, the Supreme Court has included within the "protected" constitutional sphere the relational interests of marriage and kinship¹⁹⁹ and the right of parents to direct the upbringing of their children.²⁰⁰ Yet the Court has refused to include other personal relationships or the sexual privacy of unmarried persons (straight or gay) within the protected sphere.²⁰¹ The constitutional distinction between married and unmarried

¹⁹⁷ Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 177 (1916); Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2-4 (1943).

¹⁹⁸ See Pound, *supra* note 197, at 196 (MICH. L. REV.). These long-term interests include, "protection of dependent persons, and in the rearing and training of sound and well-bred citizens for the future." *Id.*

¹⁹⁹ See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that statute providing for sterilization of habitual criminals violated equal protection clause).

²⁰⁰ See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.")

²⁰¹ See *Bowers v. Hardwick*, 478 U.S. 186 (1986). The Court has, of course, included the right to elective abortion and the right to obtain and use contraceptives within this protected sphere for both married and single persons. *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Although some commentators have inferred a right of sexual privacy from these decisions, our analysis of the constitutional interests involved shows otherwise. See Hafen, *supra* note 216, at 538-44 (MICH. L. REV.).

The civil rights movements of the past generation were concerned primarily with moving the choices and needs of women and racial minorities from being merely "permitted" to being legally "protected" by potent anti-discrimination laws. During most of this same era, gays and lesbians sought to move their choices and needs from being "prohibited" to being "permitted," through decriminalization of their private conduct. But when autonomy theories assume that conduct long considered deviant should move all the way from "prohibited" to the exclusive realm of "protected," those theories alter the analysis in ways that potentially alter our reasons for maintaining protected classifications in the first place.

In advocating constitutional protection for homosexual privacy, Justice Blackmun made no serious claim that homosexual relationships deserve to be included within the time-honored category of marital and family relationships. *Bowers*, 478 U.S. at 204 (Blackmun, J., dissenting). This category has been granted constitutional protection because of the high degree of social, as well as individual, interests in stable laws dealing with marriage and kinship. *Griswold v.*

persons springs primarily from the Court's recognition that the obligations of parenthood, marriage, and biological kinship are fundamental to preserving a civilized order. Thus those obligations are worthy of being constitutionally *protected*, not merely *tolerated*, by the law.

Similarly, the right of children to receive an education deserves special protection²⁰² because education serves not only children's individual interests, but also the long-term social interests of democratic societies, which utterly depend on having a well-educated and stable citizenry. The Court has also excluded obscenity from the realm of expression protected by the First Amendment, in part because obscene expression lacks "social value."²⁰³

In all of these illustrative situations, both "individual" interests and "social" interests play some role in defining the contours and the purposes of the most protected constitutional categories. The very idea of "personal autonomy," however, inherently takes a non-negotiable stance. Autonomy arguments not only typically fail to establish high social value, but they often thrive on challenging the existing order of social stability. The power of the protected sphere to communicate society's endorsement and sponsorship tells us that our system does not, and should not, "protect" everything it "tolerates." At the same time, past patterns of constitutional analysis have often unintentionally confused the distinction between state tolerance and state promotion, thereby confusing the distinction between

Connecticut, 381 U.S. 479 (1965). On the contrary, Justice Blackmun's dissent would protect homosexual privacy *not* because it "contribute[s] . . . to the general public welfare, but because . . . [it] forms so central a part of an individual's life." *Bowers*, 478 U.S. at 204 (Blackmun, J., dissenting). This language illustrates how autonomy arguments lay little claim to social interests, other than the arguable social interest of preserving every person's autonomous choices.

Without consciously identifying *Hazelwood's* distinction between tolerance and endorsement, the American public has grown more *tolerant* of a homosexual lifestyle. Yet the public also resists the absolutist autonomy claims of gay rights advocates who claim the socially legitimizing *endorsement* of protected legal preferences, such as same-sex marriage. The public is now willing to "permit"—that is, it would not "prohibit"—such lifestyle choices even if it does not wish to "protect" them. According to recent press accounts, public attitudes draw a clear line between "passive toleration" and "active support" of homosexual conduct. Richard Bernstein, *When One Person's Civil Rights Are Another's Moral Outrage*, N.Y. TIMES, Oct. 16, 1994, § 4, at 6; Dennis, *Shaky Ground: Gay Rights Confront Determined Resistance From Some Moderates*, WALL ST. J., Oct. 7, 1994, at A1. The *Hazelwood* analogy is a useful analytical tool for determining how to ensure legal tolerance of formerly "prohibited" conduct by "permitting" that conduct without also giving it the normative endorsement of a "protected" constitutional status.

²⁰² The Supreme Court, however, has not yet held that the right to receive an education is a "fundamental" interest. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37-38 (1973).

²⁰³ *E.g.*, *Roth v. United States*, 354 U.S. 476, 484-85 (1957) (holding that statute prohibiting mailing of obscene material was not violative of either First Amendment or Due Process rights).

what the law merely permits and what it protects. For this reason, *Tinker* and *Hazelwood* together offer a needed and illuminating illustration of constitutional reasoning that has potential applications well beyond the context of student rights.

