

CENSORSHIP MAKES THE SCHOOL LOOK BAD:  
WHY COURTS AND EDUCATORS MUST EMBRACE THE  
“PASSIONATE CONVERSATION”

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ABSTRACT

This Article analyzes the Supreme Court’s decision in *Hazelwood School District v. Kuhlmeier*. The Court held that students have no freedom to choose the content of school-sponsored newspapers or other curricular vehicles, so long as the justification for censorship is “reasonably related to legitimate pedagogical concerns.” LoMonte argues the Court erred in elevating the government’s reputation to a concern of constitutional value. LoMonte urges the Supreme Court to re-think its decision as it has done with respect to persons in other categories. Young people use their talents to organize reform movements and have political opinions worth hearing, particularly about the education they are receiving.

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## INTRODUCTION

In June 1986, Supreme Court Justice Byron White authored *Bowers v. Hardwick*, validating the constitutionality of a Georgia statute making it a felony to engage in sodomy, even between consenting adults in the privacy of their home.<sup>1</sup> Noting the “ancient roots” of government condemnation of homosexuality, White wrote that “we are quite unwilling” to recognize that the constitutional right to familial privacy extends to same-sex relations.<sup>2</sup> Chief Justice Warren Burger put an exclamation mark on the Court’s 5-4 decision with a withering concurrence: “To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”<sup>3</sup>

The decision did not, as they say, age well. The Court retreated from *Bowers* just 17 years later in *Lawrence v. Texas*, holding that the liberty interests protected by the Due Process Clause encompass freedom from government intrusion into private sexual conduct.<sup>4</sup> Justice Anthony Kennedy’s 6-3 majority opinion in *Lawrence* repudiated not just the dubious legal reasoning of *Bowers* but its larger stigmatic effect: “Its continuance as precedent demeans the lives of homosexual persons. . . . *Bowers* was not correct when it was decided, and it is not correct today.”<sup>5</sup>

Less than two years after *Bowers*, a similar Court lineup reached a similarly dehumanizing result in *Hazelwood School District v. Kuhlmeier*.<sup>6</sup> Again, Justice White wrote for a divided Court, this time a shorthanded 5-3 majority following Justice Lewis Powell’s retirement. In *Hazelwood*, the Court declared that students have no freedom to choose the content of school-sponsored newspapers or other curricular vehicles, so long as the school can point to a justification for censorship that is “reasonably related to legitimate pedagogical concerns.”<sup>7</sup> This deferential variant of reasonableness puts both thumbs on the school’s side of the scale when a student asserts a First Amendment claim.

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1. 478 U.S. 186, 196 (1986).
  2. *Id.* at 191–92.
  3. *Id.* at 197 (Burger, J., concurring).
  4. 539 U.S. 558 (2003).
  5. *Id.* at 575, 578.
  6. 484 U.S. 260 (1988).
  7. *Id.* at 273.

As with *Bowers*, a product of the same reactionary majority bent on dismantling the civil-liberties legacy of the Warren Court,<sup>8</sup> *Hazelwood* has aged poorly. In one especially coldblooded application, a federal appeals court relied on *Hazelwood* to justify a school's decision to punish a high-school cheerleader who refused to perform a cheer routine honoring the athlete she accused of raping her—because, in the court's words, the student was no more than a “mouthpiece” for her school.<sup>9</sup>

As noteworthy as *Hazelwood* is for its detrimental impact on journalism in schools, the case has outsized cultural significance beyond the newsroom. The propositions for which it stands—that young people are too irresponsible to be trusted with constitutional rights, and that the government may suppress political speech that provokes controversy<sup>10</sup>—are propositions that modern civil society is, or should be, decisively rejecting. We are living in a moment of renewed youth activism across a wide range of causes, empowered by new communication tools that dwarf the reach of a traditional school-produced news publications.<sup>11</sup> That young people have political opinions worth hearing, particularly about the education they are receiving, should be a non-debatable proposition.

This Article explains why, just as the Court in *Lawrence* repudiated the

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8. See Thomas Healy, *A Supreme Legacy*, THE NATION (June 23, 2016), <https://www.thenation.com/article/archive/a-supreme-legacy/> [<https://perma.cc/7K38-WKZQ>] (citing scholars' critique that the Burger Court began the “conservative counterattack” on the Warren Court's civil liberties legacy and “effectively gutted” key rulings that desegregated schools, proscribed school prayer, and compelled police to notify criminal suspects of their rights).

9. *Doe v. Silsbee Indep. Sch. Dist.*, 402 F. App'x. 852, 855 (5th Cir. 2010). The appellants argued the school violated the cheerleader's right to free speech under the First Amendment because the cheerleader's decision not to cheer was a symbolic expression of her disapproval of the athlete who allegedly sexually assault her. *Id.* The court held the school had no duty to promote the cheerleader's message by allowing her not to cheer, and that the cheerleader's refusal to cheer for the athlete who allegedly sexually assault her constituted a substantial interference with the school's work. *Id.*; see also *infra* Section III.B.

10. See Anna Cecile Pepper, *Walking Out the Schoolhouse Gates*, 105 VA. L. REV. ONLINE 198, 207 (2019) (stating that “when the student activity is school-sponsored and *Hazelwood* applies, a school will be able to restrict student political speech and curtail the expressive conduct, even if the only justification is to avoid controversy”); Marjorie Heins, *Viewpoint Discrimination*, 24 HAST. CONST. L.Q. 99, n.368 (1996) (commenting that *Hazelwood* is difficult to reconcile with the Court's recognition “of the extraordinary importance of protecting controversial political speech,” including in the classroom).

11. See *Heart of the Movement: How These 12 Young Activists are Seeding Change in Their Towns*, USA TODAY (Aug. 17, 2020, 9:25 AM), <https://www.usatoday.com/in-depth/news/nation/2020/08/17/young-activists-across-country-leading-charge-change/5598081002/> [<https://perma.cc/4PCC-PT9D>] (describing how people of color as young as seventeen are assuming leadership of grassroots movements in small and medium-size cities to reform racial and class injustices).

demeaning of gay and lesbian people embodied by the *Bowers* decision, it is time to do the same for *Hazelwood*. Over the past half-century, Congress and the courts have dismantled barriers that denied less-powerful categories of people the dignity of full legal personhood: Enacting the Americans With Disabilities Act,<sup>12</sup> ending gender discrimination in public higher education,<sup>13</sup> and recognizing LGBT status as a protected category under federal anti-discrimination law.<sup>14</sup> One class of Americans remains conspicuous by its absence: The 65 million Americans who attend public educational institutions.<sup>15</sup>

## I. STUDENT CONSTITUTIONAL RIGHTS IN DECLINE

### *A. Foundations of Free Expression*

The Bill of Rights is recognized as granting all persons, without exception, fundamental rights enforceable against government at all levels, including the school-district level.<sup>16</sup> Among these foundational rights is the First Amendment's guarantee of freedom of speech, of the press, and of the right to petition the government for the redress of grievances.<sup>17</sup> The First Amendment is understood to forbid agencies at all levels of government from engaging in "prior restraint," interdicting speech before it can be heard.<sup>18</sup> The First Amendment especially disfavors content-based restrictions on a speaker's message, which are presumed to be

12. Americans with Disabilities Act, 42 U.S.C §§ 12101–12213 (1990).

13. See *United States v. Virginia*, 518 U.S. 515 (1996) (ordering Virginia Military Institution to end practice of gender discrimination in admissions).

14. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

15. This Article focuses on public institutions because the First Amendment applies only to interactions between Americans and state entities, including state schools and colleges. The estimate of 65 million attendees is compiled from *Fast Facts: Back to School Statistics*, NAT'L CTR. FOR EDUC. STAT., [https://nces.ed.gov/fastfacts/display.asp?id=372#College\\_enrollment](https://nces.ed.gov/fastfacts/display.asp?id=372#College_enrollment) [<https://perma.cc/ENR7-UFL8>] (14.6 million students in public colleges and universities) and Maya Riser-Kositsky, *Education Statistics: Facts About American Schools*, EDUC. WK. (June 16, 2020), <https://www.edweek.org/ew/issues/education-statistics/index.html> [<https://perma.cc/49YC-YNNF>] (50.8 million students in public K-12 schools).

16. See James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1336 (stating that "the Court has created a body of rules that governs the constitutional rights that students (or their parents) can legitimately assert against state and local education officials") (parentheses in original).

17. U.S. CONST. amend. I.

18. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

unconstitutional.<sup>19</sup> This is doubly so if the restriction discriminates based on the speaker's viewpoint, as the government is prohibited from preferring one side of a contested issue.<sup>20</sup> If challenged, a content-based restriction will be deemed unconstitutional unless it is shown to be narrowly tailored to restrict no more speech than is necessary to achieve a compelling government interest.<sup>21</sup>

When a speaker seeks to use government property as the vehicle to convey a message, such as staging a rally in a public park, federal courts analyze First Amendment disputes under the "public forum" doctrine, which gives the government leeway to manage public property to preserve its intended use and character.<sup>22</sup> A speaker's right to use government property for expression depends on the nature of the property and its amenability to expressive use.<sup>23</sup> Once property is deemed to be a forum, either by tradition or because the government has "designated" it for expressive use, strict scrutiny applies to any content-based restrictions on the use of the forum, including decisions to selectively exclude speakers.<sup>24</sup> The government may, however, enforce reasonable and viewpoint-neutral regulations on the time, place and manner of speech, such as restricting the use of electronic amplifiers in a park.<sup>25</sup>

In everyday life, the First Amendment, as with all constitutional rights,

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

20. See *id.* at 391–92.

21. See *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest.").

22. See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985) (describing forum analysis as "a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes").

23. *Id.*

24. See *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) ("Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."). Under the "strict scrutiny" standard, "a government restriction on speech will be upheld only if it is narrowly tailored to achieve a compelling state interest." Lindsey Gold, *Music Videos: The Gray Area in First Amendment Protected Speech and the Resulting Trademark Consequences*, 2018 *CARDOZO L. REV. DE NOVO* 13, 22 (2018).

25. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (explaining that, in a public forum, content-neutral regulations on the time, place and manner of speech will be constitutional if they are narrowly tailored to serve a significant government interest, and leave ample alternative channels for communication).

applies with full force regardless of age.<sup>26</sup> For example, a police officer would require no lesser degree of evidentiary basis to search a car driven by a teenager as opposed to one driven by a middle-aged adult. But within certain contexts—prisons, the workplace, and public schools—constitutional rights diminish, at times to the point of near-nonexistence.<sup>27</sup>

The U.S. Supreme Court first recognized the Constitution as a check on coercive school authority in the 1943 case of *West Virginia State Board of Education v. Barnette*.<sup>28</sup> There, the justices sided with Jehovah's Witness families resisting a state regulation that compelled students to stand, salute the American flag and recite the Pledge of Allegiance, contrary to the plaintiffs' religious beliefs.<sup>29</sup> In a stirring opinion for the Court, Justice Robert H. Jackson made no mention of the school setting or the age of the affected speakers; for him, the case was simply about a government agency's authority to compel individuals to profess beliefs they may not genuinely hold:

To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.<sup>30</sup>

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<sup>26</sup> See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.")

<sup>27</sup> See Scott A. Moss, *Students and Workers and Prisoners – Oh My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1640 (2007) ("[L]ike many things in life, considering institutional context is good in moderation, bad in excess. By dividing speech rights so starkly by institutional context, courts have not just recognized, but in fact overstated, the uniqueness of schools, workplaces, and prisons.")

<sup>28</sup> 319 U.S. 624 (1943).

<sup>29</sup> See *id.* at 629–30, 642.

<sup>30</sup> *Id.* at 641–42.

The justices did not return to the subject of student speech rights until 1969, amid widespread domestic unrest occasioned by diminishing support for the war in Vietnam. Siblings John and Mary Beth Tinker and a classmate, Christopher Eckhardt, asked the Court to find that their silent act of protest—wearing black armbands to school in support of a ceasefire in Vietnam—was protected speech beyond the authority of a public school to prevent or punish.<sup>31</sup> In a 7-2 decision, *Tinker v. Des Moines Independent Community School District*, the justices coined an enduring standard to determine where a student’s rights end and the school’s punitive authority begins: Speech may be proscribed only where the prohibition is “necessary to avoid material and substantial interference with schoolwork or discipline.”<sup>32</sup> And in the *Tinker* case, no disruption occurred or was realistically forecast.<sup>33</sup> Justice Abe Fortas’ majority opinion resounded with *Barnette*’s pro-democracy rhetoric, viewing the choice as one of constitutional imperatives over a government agency’s convenience:

[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength.<sup>34</sup>

As important as *Tinker* was in advancing the law of the First Amendment, the decision carried equally great symbolic weight; it recognized that schools are government regulators subject to meaningful constitutional constraints, and that those constraints are fundamental to the work of teaching citizenship.<sup>35</sup> As one commentator has written, the *Tinker*

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31. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

32. *Id.* at 511.

33. *Id.* at 514.

34. *Id.* at 508–09.

35. See Abby Marie Mollen, *In Defense of the “Hazardous Freedom” of Controversial Student Speech*, 102 NW. U. L. REV. 1501, 1505 (2008) (discussing how *Tinker* recognizes “the role

decision “articulated a relationship between students’ liberty and adults’ democratic self-governance . . . Simply put, schools create citizens to sustain our democracy by training students to know and exercise their First Amendment rights.”<sup>36</sup>

Scholars disagree over how meaningful the checking force of *Tinker* really is, with some skeptics pointing to the inherent malleability of the “material and substantial interference” standard.<sup>37</sup> Nevertheless, a half-century of experience demonstrates that it has at least been possible for a student plaintiff with a sympathetic set of facts to win a First Amendment case governed by the *Tinker* standard, particularly where courts find value in the students’ political or religious messages.<sup>38</sup>

In the two decades following *Tinker*, student journalists not infrequently sought refuge in the decision to protect their independence.<sup>39</sup> They often prevailed. In one illustrative case, decided just months after *Tinker*, a federal district court in New York found that the *Tinker* principle extended to students’ decision to accept a strongly worded newspaper advertisement opposing the Vietnam War.<sup>40</sup> Taking note of the ongoing turmoil over antiwar protest activity, the judge concluded:

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students’ First Amendment rights play in mitigating the democratic perils of public education”).

36. Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 212 (2013).

37. Compare Mary-Rose Papandrea, *The Great Unfulfilled Promise of Tinker*, 105 VA. L. REV. ONLINE 159, 160 (2019) (“This [*Tinker*] standard is unnecessarily deferential to school administrators and poses precisely the sort of censorship that the Court would never tolerate outside of the school setting.”), with Christine Snyder, *Reversing the Tide: Restoring First Amendment Ideals in America’s Schools Through Legislative Protections for Journalism Students and Advisors*, 2014 B.Y.U. EDUC. & L.J. 71, 74 (2014) (stating that *Tinker* “set a high bar for the actions of school administrators in the future”).

38. See, e.g., *Guiles ex rel. Guiles v. Marineau*, 461 F. 3d 320, 330–31 (2d Cir. 2006) (citing *Tinker* and holding that school could not prevent student from wearing T-shirt carrying political message mocking President George W. Bush as a substance abuser and draft dodger).

39. See *Gambino v. Fairfax Cnty. Sch. Bd.*, 564 F.2d 157, 158 (4th Cir. 1977) (enjoining school from prohibiting publication of article referring to birth control); *Stanton v. Brunswick Sch. Dep’t*, 577 F. Supp. 1560, 1575 (D. Me. 1984) (granting a preliminary injunction enjoining school officials from removing student’s yearbook quote deemed objectionable); *Reineke v. Cobb Cnty. Sch. Dist.*, 484 F. Supp. 1252, 1262 (N.D. Ga. 1980) (applying *Tinker* and granting a preliminary injunction after finding that school violated student editors’ First Amendment rights by confiscating editions of class-produced newspaper and removing portions of articles in other editions); *Bayer v. Kinzler*, 383 F. Supp. 1164, 1165–66 (E.D.N.Y. 1974) (finding that school violated First Amendment by confiscating student-produced newspaper supplement containing information about contraception and abortion, because there was no showing that the information was harmful).

40. *Zucker v. Panitz*, 299 F. Supp. 102, 105 (S.D.N.Y. 1969).

This lawsuit arises at a time when many in the educational community oppose the tactics of the young in securing a political voice. It would be both incongruous and dangerous for this court to hold that students who wish to express their views on matters intimately related to them, through traditionally accepted nondisruptive modes of communication, may be precluded from doing so by that same adult community.<sup>41</sup>

At a time of violent unrest in America's streets—a time with resonant modern-day echoes—the *Zucker* court recognized that journalism was a constructive outlet through which young people could vent outrage over a war they were at imminent risk of being summoned to fight.

### *B. The Rise of Deference to School Authoritarianism*

The *Tinker* decision represented the crest of the sixteen-year Warren Court's remaking of the nation's civil-liberties landscape, a period that also produced the *Brown v. Board of Education* school desegregation breakthrough,<sup>42</sup> the *Gideon* decision guaranteeing felony criminal defendants the right to counsel,<sup>43</sup> and scores of others. But the author of *Tinker*, Justice Abe Fortas, resigned just two months after writing the decision, and a month later, Chief Justice Earl Warren retired.<sup>44</sup> Those departures, followed by Justice William O. Douglas' retirement in 1975, reshaped the bench, giving way to an era of "law-and-order" jurisprudence unreceptive to plaintiffs' civil-rights claims in general—and students' in particular.

It took seventeen years for another student speech case to reach the Court. By then, the lineup of justices, and their philosophy, was unrecognizable from the *Tinker* days. In *Bethel Area School District v. Fraser*,<sup>45</sup> the Court signaled that maintaining order and teaching decorum

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41. *Id.*

42. 347 U.S. 483, 493 (1954).

43. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

44. See Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 *DRAKE L. REV.* 527, 527–28 (2000) (explaining that Warren already had announced his planned retirement when *Tinker* was decided, and that Fortas resigned shortly afterward "amidst a scandal") (hereinafter, "Chemerinsky, *Schoolhouse*").

45. 478 U.S. 675 (1986).

would take priority over students' interests in self-expression.<sup>46</sup> In *Fraser*, the Court dispensed with the First Amendment claims of a student disciplined for a student government nominating speech, in front of a school assembly, peppered with double entendre references to genitalia.<sup>47</sup> Acknowledging that the speaker's attempt at humor was not punishably disruptive under the *Tinker* standard, the Court simply crafted a new one: The speech was unprotected because it was "offensively lewd and indecent."<sup>48</sup>

Although the *Fraser* decision was narrow, the mentality shift that the case represented was profound. Chief Justice Burger's opinion heavily relied on the majority's philosophy of education as a vehicle to "inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."<sup>49</sup> Even so, the decision acknowledged the need for a balancing approach that recognizes the value of student voices: "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."<sup>50</sup>

When the *Hazelwood* case reached the Court just two years later, the balancing approach was nowhere to be found. In *Hazelwood*, the student editors of the *Spectrum* newspaper at Missouri's Hazelwood East High School prepared a package of articles addressing social problems of consequence in students' lives: Teen pregnancy, the dangers of running away from home, growing up in a home with divorced parents, and the failure rate of teen marriages.<sup>51</sup> Decades later, one of the former student editors, Cathy Kuhlmeier, recalled that the editors decided to feature the cautionary pregnancy story prominently because dozens of her classmates were having babies, forcing the school to open a daycare center.<sup>52</sup> As

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46. See *id.* at 683–84.

47. The majority did not see fit to reproduce the offending parts of the speech, but Justice William Brennan did so in his dissent. See *id.* at 687 (Brennan, J., dissenting).

48. *Id.* at 685.

49. *Id.* at 681 (internal quotes and citation omitted).

50. *Id.*

51. *Kuhlmeier v. Hazelwood Sch. Dist.*, 607 F. Supp. 1450, 1457 (E.D. Mo. 1985).

52. See *October 2016 Podcast: Meet the OG in the Fight for Student Press Freedom*, STUDENT PRESS L. CTR. (Oct. 31, 2016), <https://splc.org/2016/10/october-2016-podcast-meet-the-og-in-the-fight-for-student-press-freedom-2/> [<https://perma.cc/P6V7-N8UZ>] (hereinafter, *SPLC Podcast*).

customary, the journalism teacher submitted proofs of the newspaper to Principal Robert Reynolds before the paper was sent to the printer.<sup>53</sup> Reynolds disapproved of the pregnancy article and the parental divorce article, and ordered the journalism teacher to remove the two pages containing those articles before sending the paper to press.<sup>54</sup> The school's proffered rationales for removing the articles focused on two concerns: That the pregnancy story failed to adequately anonymize three quoted students, and that the divorce story lacked any responsive comments from the absentee father referred to as an "alcoholic."<sup>55</sup>

The students challenged the decision to remove the articles, arguing that the school's rationales did not satisfy the *Tinker* burden.<sup>56</sup> The district court surveyed the caselaw since *Tinker* and concluded that schools had been afforded greater control over speech that is entwined with the educational process: "Where the particular program or activity is an integral part of the school's educational function, something less than substantial disruption of the educational process may justify prior restraints on students' speech and press activities."<sup>57</sup> Contrary to the *Tinker* approach, which did not recognize any variation in the level of constitutional protection based on where speech takes place, the district court introduced the "forum" concept into student speech law, finding that the decisive question was whether the vehicle being used for expression "is an open and public forum of free expression or an integral part of the curriculum."<sup>58</sup> And the *Spectrum* newspaper, the judge concluded, was the latter.<sup>59</sup>

On appeal, the Eighth Circuit agreed with the district court that a public forum analysis was proper, but disagreed on its application.<sup>60</sup> The court noted that the *Spectrum* operated both as a matter of policy and as a matter of practice as a forum for student expression; the school district's written policies emphasized the freedom to "express one's own opinions on the controversial issues," and the newspaper's staff had repeatedly done so without incident.<sup>61</sup> "*Spectrum* was not just a class exercise in which

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53. *Id.* at 263–64.

54. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263–64 (1988).

55. *Hazelwood*, 607 F. Supp. at 1460.

56. *Id.* at 1461–62.

57. *Id.* at 1463.

58. *Id.*

59. *Id.* at 1465.

60. *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1371–72 (8th Cir. 1986).

61. *Id.* at 1373.

students learned to prepare papers and hone writing skills,” Judge Gerald Heaney wrote, “it was a public forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution and their state constitution.”<sup>62</sup>

The Supreme Court granted certiorari and, on a 5-3 vote with one vacancy, reversed.<sup>63</sup> Following the district court’s roadmap, the Court divided student speech into two distinct categories.<sup>64</sup> The first, still governed by *Tinker*, encompasses “personal expression that happens to occur on the school premises.”<sup>65</sup> The second, henceforth subject to diminished protection, encompasses “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.”<sup>66</sup> The Court offered three rationales for which school authorities might defensibly exert censorship authority over this latter category: “[T]o assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.”<sup>67</sup> When students’ speech bears the school’s imprimatur, Justice White wrote for the Court, schools’ employees are free to exert control over its content, “so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>68</sup> To the majority, the distinction came down to whether a school was being asked to “tolerate” speech, or to affirmatively “promote” the speech.<sup>69</sup> Relaxing the school’s burden to justify censorship of school-sponsored speech, Justice White wrote, is “consistent with our oft-expressed view that the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”<sup>70</sup>

Gone were any concerns for larger democratic principles or the need to constrain government’s coercive power. Paramount in *Hazelwood* was

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62. *Id.*

63. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

64. *Id.* at 270–71.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 273.

69. *Id.* at 270–71.

70. *Id.* at 273.

concern for the image of the school, and how an ill-considered news article might confuse readers into attributing undesirable sentiments to the school. Nothing in the majority's opinion acknowledged any civic or educational value in student expression, or considered that the content of the articles addressed contemporary social issues of public concern—the speech that, in the off-campus world, the Court has most vigilantly protected.<sup>71</sup>

In a stirring dissent, Justice William Brennan rebuked the majority for its noxious “civics lesson” of judicially legitimized government image control.<sup>72</sup> To the Court's central concern, that distasteful student speech would be wrongly ascribed to the school itself, Brennan identified less speech-restrictive alternatives; The school could require newspapers to carry a disclaimer, or the school could engage in counter-speech, the remedy that the Court always prescribes first.<sup>73</sup> Brennan dismantled each of the majority's stated rationales for lowering the censorship bar, but saved special scorn for the “disassociation” rationale.<sup>74</sup> Allowing school authorities for purposes of avoiding association with controversy, he wrote, “in no way furthers the curricular purposes of a student *newspaper*, unless one believes that the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors.”<sup>75</sup>

Among the legal and journalism communities, reaction to *Hazelwood* was swift and overwhelming: The Court had gone much too far, further even than necessary to decide the case. “[E]ducators will be free to censor any topic they deem to fall under the amorphous penumbra of ‘legitimate pedagogical concern,’” one legal commentator wrote months after the ruling.<sup>76</sup> A veteran journalism professor predicted that the decision would backfire by driving students to leave school-supervised publications and, without training or oversight, start their own: “[W]hile the school board in

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71. See, e.g., *Snyder v. Phelps*, 562 U.S. 443 (2011) (finding that anti-gay hate speech by protesters could not be penalized by the government, even indirectly through an award of civil damages in litigation by private parties, because the issue of gay rights is a matter of public concern); see also *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”).

72. *Hazelwood*, 484 U.S. at 277, 291 (Brennan, J., dissenting).

73. *Id.* at 289 (Brennan, J., dissenting).

74. *Id.* at 282–89 (Brennan, J., dissenting).

75. *Id.* at 284 (Brennan, J., dissenting) (emphasis in original).

76. Helene Bryks, *A Lesson in School Censorship: Hazelwood v. Kuhlmeier*, 55 BROOK. L. REV. 291, 325 (1989).

*Hazelwood* won the case, public education in general suffered a devastating defeat.”<sup>77</sup> Two attorneys with the Student Press Law Center accused the justices of “using an atom bomb to swat a fly.”<sup>78</sup> After *Hazelwood*, administrators began taking advantage of their augmented legal authority “to censor all student-authored articles with which the district did not agree.”<sup>79</sup>

The judicial rollback of free-speech law was part of a larger movement to dismantle student constitutional rights.<sup>80</sup> In 1985, Justice White, who would go on to write the *Hazelwood* opinion, wrote for the majority in *New Jersey v. T.L.O.*, diminishing students’ Fourth Amendment right to be protected against unreasonable searches by school authorities.<sup>81</sup> Just as the Court would soon do in the First Amendment context, the *T.L.O.* court created a lesser level of Fourth Amendment protection that relaxes the government’s normal burden to justify a search, from “probable cause” to mere “reasonable suspicion,” when the target of the search is a student.<sup>82</sup> In a sentiment that would echo soon afterward in *Hazelwood*, Justice White wrote:

[T]he accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law.<sup>83</sup>

In other words, the Court regarded the privacy concerns of students in school as being of diminished value as compared with adults in the off-

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77. W. Wat Hopkins, *Hazelwood v. Kuhlmeier: Sound Constitutional Law, Unsound Pedagogy*, 16 N. KY. L. REV. 521, 536 (1989).

78. See J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L.J. 706, 726 (1988).

79. Sara Prose, Note, *Dean v. Utica Community Schools: A Significant Victory for the Student Press Community and a Potential Guiding Force to the Reexamination of the Hazelwood Holding*, 87 U. DET. MERCY L. REV. 247, 261 (2010).

80. See Rosemary C. Salomone, *Free Speech and School Governance in the Wake of Hazelwood*, 26 GA. L. REV. 253, 319 (1992) (observing that *Hazelwood* “was not an isolated decision but rather one that came on the heels of more than a decade of Court rulings shifting the balance away from individual student rights toward school authority and community interests”).

81. 469 U.S. 325 (1985).

82. *Id.* at 341–42.

83. *Id.* at 341.

campus world, and viewed the school's interest in "order" as weighty enough to override those diminished privacy concerns.

In the years that followed, the Court would build on Justice White's *T.L.O.* foundation to find that the Fourth Amendment permits subjecting student athletes to drug tests—at the beginning of each playing season, and then by random draw throughout the season—as a condition of being allowed to take part in sports.<sup>84</sup> And the Court would then expand that ruling to any student participating in any extracurricular activity, even a non-dangerous one in which intoxication does not present any substantial risk of harming the student or others.<sup>85</sup> In the latter decision, the Court expressly cited *T.L.O.* and the "special needs" of the school environment<sup>86</sup> to justify an intrusion that almost certainly would not be tolerated in the adult world as a condition of receiving a government benefit or privilege.<sup>87</sup>

This line of caselaw reflects a credulous view of government as a benevolent protector of students that cannot be encumbered in its protective zeal by constitutional niceties. Although students arguably need even stronger constitutional protection against government overreaching as compared with the off-campus adult world, because of their vulnerability to coercion and because they spend most of their weekday hours in a custodial setting, the Court has swung the pendulum decidedly in the opposite direction.

### *C. Where the Hazelwood Court Went Wrong*

While the primary focus of this Article is to move the discussion past *Hazelwood* regardless of whether the decision is defensibly consistent with First Amendment precedent, it bears noting that the decision is not just unsound educational policy but also is legally flawed in critical ways.

Shoehorning student newspapers into the public forum doctrine is an uncomfortable squeeze. Student newspapers are not amenable to the same analysis that applies to sidewalks, streets and other physical government

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84. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

85. *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 836–38 (2002).

86. *Id.* at 829.

87. *See, e.g., Chandler v. Miller*, 520 U.S. 305 (1997) (striking down state statute requiring that candidates produce a clean drug test as a condition of qualifying for elected office); *Lebron v. Sec'y, Fla. Dep't of Child. & Fams.*, 710 F.3d 1202 (11th Cir. 2013) (enjoining enforcement of a Florida statute denying welfare benefits to applicants who declined to submit to a suspicionless drug test).

property. The reason that courts apply the public forum doctrine to government property is not so that the government can disavow responsibility for poor spelling or grammar, but so that the property can be maintained for its primary intended use.<sup>88</sup> A fundraising table can be removed from the sidewalk outside of a U.S. Post Office because the sidewalk is intended to facilitate entry and exit by postal patrons.<sup>89</sup> But the primary purpose of a student newspaper is to carry student-authored articles. An article about teen pregnancy does not obstruct the use of the newspaper for its primary purpose. Nor did the *Hazelwood* principal remove the article to ration the use of a limited piece of property for other speakers; two pages of the *Spectrum* were removed, not replaced with competing content.<sup>90</sup> This decisively differentiates the *Hazelwood* setting from the signature *Perry Education* case, in which the Court accepted the school's justification that teacher mailboxes could not be held open for indiscriminate use by outsiders so as to avoid drowning out official school communications.<sup>91</sup> As the Court said in *Perry Education*: “[W]hen government property is not dedicated to open communication the government may—without further justification—restrict use to those who participate in the forum’s official business.”<sup>92</sup> The editors of the *Hazelwood East* newspaper were the authorized participants in the forum’s “official business.” Their presence was the entire purpose for the forum, not a distraction from it.<sup>93</sup>

Moreover, the *Hazelwood* decision is internally inconsistent, because it specifies that censorship must be justified by a rationale “reasonably related to legitimate pedagogical concerns,” but then identifies the school’s desire

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88. See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985) (“[T]he Court has adopted a forum analysis as a means of determining when the Government’s interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes.”).

89. See *United States v. Kokinda*, 497 U.S. 720, 732–35 (1990) (“The purpose of the forum in this case is to accomplish the most efficient and effective postal delivery system.”).

90. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 264 (1988).

91. See *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 47–48 (1983) (selective exclusion of speakers from school mailboxes could be justified by imperative of “preservation of the facilities for school-related business”).

92. *Id.* at 53.

93. *Hazelwood*, 484 U.S. at 267–68. The same is true of the other context in which *Hazelwood* is regularly invoked to validate school censorship: The commencement speech. See *infra* notes 123–26 and accompanying text. The valedictory speaker is the one-and-only authorized user of the podium. Her speech occupies the same amount of time and space whether she thanks her principal or thanks her God, so her use of the forum in no way crowds out the property’s primary intended use.

to avoid association with political controversy as an acceptable reason to censor.<sup>94</sup> There is no pedagogical value in teaching journalists to avoid matters of political controversy. In a 2013 resolution timed to coincide with the 25th anniversary of the *Hazelwood* decision, the Association for Education in Journalism and Mass Communication, the leading international membership organization for postsecondary journalism educators nationwide, declared:

[N]o legitimate pedagogical purpose is served by the censorship of student journalism even if it reflects unflatteringly on school policies and programs, candidly discusses sensitive social and political issues, or voices opinions challenging to majority views on matters of public concern. The censorship of such speech is detrimental to effective learning and teaching, and it cannot be justified by reference to ‘pedagogical concerns.’<sup>95</sup>

With these words, the most prominent experts in the field of journalism education identified the fallacy that *Hazelwood* is about, or has ever been about, the quality of instruction.

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<sup>94</sup> *Hazelwood*, 484 U.S. at 272–73.

<sup>95</sup> *Resolution One 2013*, ASS’N FOR EDUC. IN JOURNALISM & MASS COMM’N (Apr. 2, 2013), <http://www.aejmc.org/home/2013/04/resolution-one-2013/> [<https://perma.cc/XNZ8-VS8H>].

## II. THE CIVIC AND EDUCATIONAL TOLL OF HAZELWOOD

*A. Fighting City Hall – and Losing (Almost) Every Time*

In 2005, Robert Ochshorn and his fellow editors of the *Tattler* newspaper at New York's Ithaca High School challenged their school's decision to censor an editorial cartoon ridiculing the ineffectiveness of the sex education program.<sup>96</sup> To dramatize their point—that sex education was taught in an unrealistic way, causing students to treat it as a joke—the editors sought to publish a cartoon that depicted a teacher trying to teach a sex-education class using poorly drawn stick figures in coupling poses.<sup>97</sup> The faculty adviser ordered the editors to remove the cartoon, and the editors sued.<sup>98</sup>

The district court found that the newspaper operated as a limited public forum, citing substantial evidence in policy and practice that the school ceded some editorial discretion to the student editors: The faculty adviser did not select the editors, assign story ideas, direct the staff meetings, or select or edit guest submissions, and the paper functioned as an extracurricular activity and was not produced as a graded class assignment.<sup>99</sup> The Second Circuit accepted that the newspaper constituted a limited public forum, but found that in the context of a student newspaper, limited public forum status offers no enhanced protection beyond *Hazelwood*, so the cartoon could freely be censored.<sup>100</sup> The “forum,” by the court's understanding, consisted only of “content consistent with a supervised, age-appropriate learning experience for student editors and high school readers.”<sup>101</sup> In other words, even where a forum exists—which the Supreme Court stated would relieve students from the *Hazelwood* level of control—the “forum” can confer “freedom” to publish only articles the school deems appropriate.

In his exhaustive look at the legal landscape in the twenty-five years following *Hazelwood*, Professor Kozlowski concluded that students

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96. R.O. *ex rel.* Ochshorn v. Ithaca City Sch. Dist., 645 F.3d 533 (2d Cir. 2011).

97. *Id.* at 536.

98. *Id.* at 536–38.

99. R.O. by Ochshorn v. Ithaca City Sch. Dist., No. 5:05–CV–695, 2009 WL 10677063, at \*13 (N.D.N.Y. Mar. 24, 2009).

100. R.O. *ex rel.* Ochshorn, 645 F.3d at 540.

101. *Id.*

virtually never prevailed in First Amendment challenges once courts made the threshold determination that *Hazelwood*, rather than *Tinker*, supplied the standard.<sup>102</sup> “[W]hen a court rules that *Hazelwood* controls a case,” Kozlowski’s analysis concluded, “almost always the First Amendment claimant is about to lose because the ‘legitimate pedagogical concerns’ standard is applied so deferentially. *Hazelwood* has been stretched far from its factual moorings, and the ‘legitimate pedagogical concerns’ standard is interpreted so loosely that courts have rendered it effectively meaningless.”<sup>103</sup>

The unmooring of *Hazelwood* began almost immediately. Although the Supreme Court pointedly reserved judgment in *Hazelwood* as to whether adult-age college students could be subject to the same smothering level of institutional control,<sup>104</sup> the Eleventh Circuit soon answered: Yes, they can.<sup>105</sup> In a March 1989 ruling, the appeals court applied *Hazelwood* in dismissing the First Amendment claims of University of Alabama student government candidates aggrieved by speech-restrictive campaign rules: “The University should be entitled to place reasonable restrictions on this learning experience. . . . The University judgment on matters such as this should be given great deference by federal courts.”<sup>106</sup> Subsequently, the Seventh and Tenth Circuits have likewise applied *Hazelwood* to speech by college students,<sup>107</sup> while the Sixth Circuit has equivocated.<sup>108</sup>

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102. Dan V. Kozlowski, *Unchecked Deference: Hazelwood's Too Broad and Too Loose Application in the Circuit Courts*, 3 U. BALT. J. MEDIA L. & ETHICS 1 (2012).

103. *Id.* at 6.

104. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273–74, n.7 (1988) (“We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”).

105. *Ala. Student Party v. Student Gov’t Ass’n*, 867 F.2d 1344, 1347 (11th Cir. 1989).

106. *Id.*

107. *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc) (regarding censorship of a college paper); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) (regarding a drama student’s refusal on religious grounds to use off-color language during an assigned performance).

108. In a case involving a college yearbook, the *en banc* court decided in *Kincaid v. Gibson*, 236 F.3d 342, (6th Cir. 2001) (en banc), that college media operate as public forums immune from the *Hazelwood* level of control. *See id.* at 352 (“[W]e find that the fact that the forum at issue arises in the university context mitigates in favor of finding that the yearbook is a limited public forum.”). But subsequently, in *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), the court applied *Hazelwood* to speech by a college graduate student regarding her instructional practicum assignment, even though the student did not seek to reach an audience beyond a one-to-one conversation with her instructor. The takeaway from the two cases read together is that the Sixth Circuit believes *Hazelwood* and its forum analysis to be applicable to college student speech, but that clear evidence of an intent and practice of operating a designated public forum will carry the day.

The Sixth Circuit's *Ward v. Polite* involved a graduate student removed from a masters' program in counseling because of her speech. In that case, the student plaintiff was punished for telling her supervisor that she could not comfortably offer counseling about same-sex relationships because of her religious beliefs.<sup>109</sup> *Ward* exemplifies a different type of expansion: Applying *Hazelwood* to speech directed to academic supervisors, where the student is speaking *about* the delivery of instruction but is not speaking as *part* of the delivery of instruction.<sup>110</sup> In rejecting the graduate student's First Amendment claim, the court explained, "[t]he key word is student. *Hazelwood* respects the latitude educational institutions—at any level—must have to further legitimate curricular objectives."<sup>111</sup>

Courts have likewise expansively applied the *Hazelwood* standard in cases where no instruction at all was taking place: Forbidding a kindergarten student from handing out pencils to classmates inscribed with a message about Jesus,<sup>112</sup> preventing an elementary-schooler from selling religious-themed candy canes as part of a student vendor fair in the school gymnasium,<sup>113</sup> and refusing to post a religious advertisement on the outfield fence of the high school baseball park.<sup>114</sup> As these cases demonstrate, in practice, the *Hazelwood* doctrine comes down to a legally sanctioned device for minimizing controversy, even where the only plausible educational "benefit" is teaching students to obey orders. And once *Hazelwood* is reduced to a vehicle for teaching obedience, every censorship directive becomes self-validating—as in the case of a Colorado graduation speaker punished for deviating from a school-sanitized version of her remarks, because a federal appeals court found that the process of submitting to the censors' review was itself "related to learning."<sup>115</sup>

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109. *Id.* at 733–34.

110. 667 F.3d at 740–41.

111. *Id.* at 733. *See also* Keeton v. Anderson-Wiley, 664 F.3d 865, 869, 882 (11th Cir. 2011) (applying *Hazelwood* on facts essentially identical to *Ward*, in which a student voiced religious-based discomfort at being assigned to counsel LGBT children); Heenan v. Rhodes, 757 F. Supp. 2d 1229, 1237–38 (M.D. Ala. 2010), *amended on reh'g* by 761 F. Supp. 2d 1318 (M.D. Ala. 2011) (applying the *Hazelwood* standard to punitive action against a college nursing student who complained to her instructors about inequities in the grading and disciplinary systems, without evidence that the complaints took place during instructional time or interfered with instruction).

112. *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 275–77 (3d Cir. 2003).

113. *Curry ex rel. Curry v. Hensinger*, 513 F.3d 570, 574, 576–77 (6th Cir. 2008).

114. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 962 (9th Cir. 1999).

115. *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1229 (10th Cir. 2009). Professor Roe argues persuasively from a behavioral-science perspective that being censored for purposes of

The resulting impenetrability of *Hazelwood* deference leaves students defenseless against even the most egregious abuse of school authority, where the censor is actively concealing school malfeasance or giving effect to community prejudices.

In Lenoir City, Tennessee, a journalism teacher was demoted for failing to censor a yearbook article—“It’s OK to be Gay”—that supportively chronicled a student’s coming-out decision, and one school board member called for the teacher to be criminally investigated for supporting the decision to publish it.<sup>116</sup> The same Tennessee school censored the student newspaper editor’s first-person column—“No Rights: The Life of an Atheist”—calling for her community to be more tolerant of people with different religious beliefs.<sup>117</sup> The superintendent explained that political and religious topics were to be avoided because they might provoke “passionate conversations.”<sup>118</sup>

A New Jersey high school squelched a student editor’s report, based largely on information gleaned from publicly accessible school board meetings, about a string of misconduct complaints filed against the district school superintendent, alleging that the story fell short of the school’s standards because it used information from anonymous sources and concerned a “confidential” personnel dispute.<sup>119</sup> The article *was* belatedly published, but only after the superintendent had resigned to accept another

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teaching obedience to authority runs counter to student cognitive development: “Learning in accordance with conceptual development . . . both encourages and requires students to actively think for themselves and to articulate their thoughts.” This “requires schools to be substantially tolerant of, and indeed to promote, all forms of student expression because such expression advances the students’ conceptual development.” Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CALIF. L. REV. 1269, 1301 (1991).

116. Hugh G. Willett, *Yearbook Story on Gay Student Ignites Controversy*, CHATTANOOGA TIMES FREE PRESS (May 3, 2012), <https://www.timesfreepress.com/news/news/story/2012/may/03/tennessee-yearbook-story-gay-student-ignites-contr/76986/> [https://perma.cc/8MFK-DBWB].

117. Hugh G. Willett, *Lenoir City High School Won’t Publish Atheist Student’s Editorial on Religion in Schools*, KNOXVILLE NEWS SENTINEL (Feb. 23, 2012), <http://archive.knoxnews.com/news/local/lenoir-city-high-school-wont-publish-atheist-students-editorial-on-religion-in-schools-ep-361147409-357186221.html?from=global> [https://perma.cc/3QQK-9U6W].

118. Gene Policinski, *‘Passionate Conversations’ in Schools are a Good Thing*, FREEDOM F. INST. (June 8, 2012), <https://www.freedomforuminstitute.org/2012/06/08/passionate-conversations-in-schools-are-a-good-thing/> [https://perma.cc/BW2F-VZRE].

119. Sara Gregory, *New Jersey School Board Will Vote Monday Whether to Uphold Principal’s Censorship*, STUDENT PRESS L. CTR. (May 15, 2014), <https://splc.org/2014/05/new-jersey-school-board-will-vote-monday-whether-to-uphold-principals-censorship/> [https://perma.cc/323Y-AEL2].

job and the newspaper's faculty adviser abruptly resigned.<sup>120</sup>

In Texas, an award-winning journalism teacher lost her job for supporting her students in a controversy over their ability to publish candid news coverage that the principal told student editors, "cast the school in a bad light."<sup>121</sup> The principal of Prosper High School, John Burdett, temporarily banned the school-sponsored newspaper from publishing any editorials after a draft editorial criticized his administration's management of a student assembly, which he called "not uplifting."<sup>122</sup>

Nor has the *Hazelwood* rationale been limited to the newspapers and theatrical performances mentioned in the Court's ruling. Commencement speeches are commonly censored, and noncompliant speakers punished, by reference to the *Hazelwood* standard.<sup>123</sup> In Tampa Bay, a principal ejected the class salutatorian from the graduation ceremony in mid-speech because he paused while reading his school-sanitized text, leading the principal to fear that he was about to go off-script into a rant about his pet peeve, the school's filthy bathrooms.<sup>124</sup> A 19-year-old valedictory speaker in Dallas was interrupted when the principal ordered her microphone cut as she began to read remarks about police violence against Black people, which school

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120. Jenna Spoot, *Formerly Censored Article Published in New Jersey Student Newspaper After School Board and Principal Give OK*, STUDENT PRESS L. CTR. (June 13, 2014), <https://splc.org/2014/06/formerly-censored-article-published-in-new-jersey-student-newspaper-after-school-board-and-principal/> [<https://perma.cc/4EUH-23Z4>]; Jenna Spoot, *New Jersey Journalism Adviser Resigns from Position After Censorship Controversy*, STUDENT PRESS L. CTR. (June 27, 2014), <https://splc.org/2014/06/new-jersey-journalism-adviser-resigns-from-position-after-censorship-controversy/> [<https://perma.cc/HK54-LPVM>].

121. Danny Gallagher, *Prosper High's Newspaper Staff Says New Principal Censored Stories, Ousted Adviser*, DALL. OBSERVER (June 8, 2018), <https://www.dallasobserver.com/news/censorship-at-ponder-high-riles-student-journalists-leads-to-advisers-ouster-10764146> [<https://perma.cc/CSE9-9QUJ>].

122. Nanette Light, *Prosper High School Journalists Allege Newspaper Censorship by Principal, Fight Editorial Policy*, DALL. MORNING NEWS (May 24, 2018), <https://www.dallasnews.com/news/2018/05/25/prosper-high-school-journalists-allege-newspaper-censorship-by-principal-fight-editorial-policy/> [<https://perma.cc/W425-DSVP>].

123. See, e.g., *Corder v. Lewis Palmer Sch. Dist.*, 566 F.3d 1219, 1229 (10th Cir. 2009) (denying First Amendment claim of student who was punished for inserting a reference to her faith into a school-approved text of her commencement speech, because the process of having the speech reviewed by the school is "related to learning"); see also *Griffith v. Caney Valley Pub. Sch.*, 157 F. Supp. 3d 1159 (N.D. Okla. 2016) (finding that *Hazelwood* precluded a student's First Amendment claim for being denied the ability to adorn her graduation cap with a feather to honor her Native American heritage).

124. See Daniel Ruth, *Wharton Salutatorian Deserved His Moment*, TAMPA BAY TIMES (June 14, 2013), <https://www.tampabay.com/opinion/columns/ruth-wharton-salutatorian-deserved-his-moment/2126676/> [<https://perma.cc/93JP-ZEGX>].

reviewers had edited out.<sup>125</sup> An Oklahoma valedictorian was denied her diploma because she refused to issue a written apology after substituting “hell” for “heck” in her pre-approved commencement speech.<sup>126</sup> Here, too, none of the animating concerns behind *Hazelwood*—exposing students to unduly mature or poorly written speech, or committing defamation or invasion of privacy<sup>127</sup>—are implicated, except for the school’s imperative to dampen controversy.

*B. The Silsbee Case: No Longer “Persons Under our Constitution”*

During a February 2009 high school basketball game, one member of the Silsbee High School cheerleading squad did something outwardly unremarkable that ignited a First Amendment controversy: She folded her arms across her chest and sat down.<sup>128</sup> The cheerleader, “Hillaire S.,” made the decision to silently sit out performing a routine honoring a particular basketball player, Rakheem Bolton, because months earlier she had reported to police that Bolton raped her at an afterschool party when she was too intoxicated to consent to sex.<sup>129</sup> The cheerleading coach pulled Hillaire aside into a hallway, where the school principal and school superintendent gave her an order: Cheer for everyone, or no one.<sup>130</sup> She refused, and was dismissed from the team.<sup>131</sup>

Her family sued school officials, alleging due process and First Amendment violations.<sup>132</sup> School attorneys countered with schools’ most effective weapon: *Hazelwood*.

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125. Elisha Fieldstadt, *Dallas School District Apologizes for Cutting Off Valedictorian's Speech*, NBC NEWS (June 11, 2019), <https://www.nbcnews.com/news/us-news/dallas-school-district-apologizes-cutting-valedictorian-s-speech-n1016431> [https://perma.cc/T294-L5DY].

126. Tu Thanh Ha, *U.S. Valedictorian Denied High School Diploma for Saying ‘Hell’ in Speech*, GLOBE & MAIL (Aug. 20, 2012), <https://www.theglobeandmail.com/news/world/us-valedictorian-denied-high-school-diploma-for-saying-hell-in-speech/article4489629/> [https://perma.cc/S9UE-NNVG].

127. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

128. Carolina Heldman, *A Cheerleader's Rape in a Small Texas Town*, MS. MAG. (May 27, 2011), <https://msmagazine.com/2011/05/27/a-cheerleaders-rape-in-a-small-texas-town/> [https://perma.cc/G6AN-6MJ7]; see *Doe v. Silsbee Indep. Sch. Dist.*, 402 F. App'x. 852 (5th Cir. 2010).

129. Heldman, *supra* note 128.

130. *Id.*

131. *Id.*

132. *C. & C.S. v. Silsbee Indep. Sch. Dist.*, No. 1:09-CV-374-TH, 2009 WL 10679659, at \*4 (E.D. Tex. Oct. 7, 2009).

A federal district court granted the school defendants' motion to dismiss all claims.<sup>133</sup> U.S. District Judge Thad Heartfield found that there could be no due process violation, because no due process is required when a school makes the discretionary decision to take away the privilege of participating in extracurricular activities.<sup>134</sup> The judge did not even address the applicability of *Hazelwood*, finding as a threshold matter that Hillaire's act of sitting out the cheer was not sufficiently expressive for purposes of a First Amendment claim, because it did not "convey the sort of particularized message that symbolic conduct must convey to be protected speech."<sup>135</sup>

On appeal, a Fifth Circuit panel made up of Judges Emilio Garza, Edith Clement and Priscilla Owen issued a brief unsigned opinion summarily affirming dismissal.<sup>136</sup> The court held that, even if silently sitting could be construed as expressive conduct, the family could not proceed on a First Amendment claim because, under *Hazelwood*, the school had no duty to "promote" Hillaire's message: "In her capacity as cheerleader, H.S. served as a mouthpiece through which [the school district] could disseminate speech – namely, support for its athletic teams."<sup>137</sup> The court went on to find that sitting out the cheerleading routine "constituted substantial interference with the work of the school, because as a cheerleader, H.S. was at the basketball game for the purpose of cheering, a position she undertook voluntarily."<sup>138</sup>

For good measure, the district court then concluded that the family's claims against the school district and its employees were so frivolous that they should pay the defendants' \$38,903 in attorney fees and costs, an unusual award against a plaintiff in a civil-liberties case.<sup>139</sup> A Fifth Circuit

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133. *Id.* at \*6. The family also brought due process claims against the district attorney whose office initially failed to secure an indictment against Bolton and the other accused student, which were dismissed as part of the same action. *Id.* at \*3.

134. *Id.* at \*5.

135. *Id.* at \*4.

136. *Doe v. Silsbee Indep. Sch. Dist.*, 402 F. App'x 852, 855–56 (5th Cir. 2010).

137. *Id.* at 855.

138. *Id.*

139. *C. & C.S. v. Silsbee Indep. Sch. Dist.*, No. 1:09-CV-374-TH, 2010 WL 11538532, at \*1, \*3 (E.D. Tex. Feb. 23, 2010); *Doe v. Silsbee Indep. Sch. Dist.*, 440 F. App'x 421, 424 (5th Cir. 2011). See also William H. ReMine, *Civil Suits for Civil Rights: A Primer on § 1983*, 26-NOV COLO. LAW. 5, 11 (1997) (remarking that, in federal civil-rights cases, "[a]ttorney fees may be awarded to the prevailing party, but this usually applies only to prevailing plaintiffs."); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (explaining that, while a prevailing plaintiff in an employment discrimination case is normally entitled to an award of attorney fees as a matter of course, "a plaintiff should not be assessed

panel largely upheld the award but remanded for downward adjustment on the grounds that the First Amendment portion of the case was not “so lacking in arguable merit as to be groundless or without foundation.”<sup>140</sup>

As Professor Norton has observed, the *Silsbee* case represents an aggressive application of *Hazelwood* where none of the *Hazelwood* Court’s concerns are implicated: There was no interference with learning, nothing was ungrammatical or poorly written, and the student’s unspoken message was not age-inappropriate for her audience.<sup>141</sup> Indeed, the district court’s entire basis for deciding the case was the absence of any discernible message. *Silsbee*, then, represents *Hazelwood* stripped to its essential truth: It is about obedience for its own sake.<sup>142</sup>

In *Tinker*, the Supreme Court regarded it as an unremarkable proposition that “[s]chool officials do not possess absolute authority over their students. Students in school as well as out of school are ‘persons’ under our Constitution.”<sup>143</sup> The *Silsbee* case unsettles this settled principle: Students are not “persons” at all, it turns out, but insentient vehicles through which government authorities convey speech.

### III. THE CIVIC AND EDUCATIONAL BENEFITS OF STUDENT VOICE

*Hazelwood* epitomizes the “inculcative” philosophy of education that views students as inert recipients of delivered knowledge, whose role is to accept and absorb it.<sup>144</sup> But educational research, particularly in the field of civics, widely discredits this oversimplified model.<sup>145</sup> As Professor Roe has

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his opponent’s attorney’s fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so”).

140. Doe, 440 F. App’x at 428.

141. Helen Norton, *Imaginary Threats to Government’s Expressive Interests*, 61 CASE W. RESRV. L. REV. 1265, 1281–82 (2011).

142. See Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 597 (2011) (observing that “inculcative” approach exemplified by *Fraser* and *Hazelwood* “asserts that restrictions on student speech can themselves serve an independent, valid educational function,” by teaching conformity to standards set by authority figures).

143. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

144. See Waldman, *supra* note 141.

145. See Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CAL. L. REV. 1269, 1292–93 (1991) (“The consensus of researchers and theorists . . . is that the learning process is properly characterized as developing thinking skills. This view of learning

written: “[S]tudents are not ‘empty vessels waiting passively to be filled by the school’s lessons . . . Knowledge is not simply inculcated or instilled directly by instruction but is assimilated or accommodated by the learner . . . .”<sup>146</sup> Students learn experientially—including by watching whether adult role models value, or devalue, civil liberties.

In a survey of high school students in Kansas and Missouri, University of Kansas researcher Piotr Bobkowski identified a correlation between schools that students regard as respecting First Amendment values and students’ own sense of civic efficacy—that is, the sense that students could have a meaningful voice in shaping public policy.<sup>147</sup> Teaching the Constitution in the abstract, but devaluing it in practice, breeds cynicism and creates a sense of civic futility, convincing students at a formative time in their development as citizens that the government gets to make its own rules and that “city hall” always wins.

University of Kansas researchers have documented that the toll of censorship falls especially hard on female students, both because they are disproportionately likely to take part in journalism and because they are more prone to “self-censor” in anticipation of an adverse reaction from authority figures.<sup>148</sup> A survey of 453 North Carolina high school journalists found that 41% of female students and 28% of male students reported being told not to write about certain off-limits topics, with marijuana legalization and same-sex marriage as the top of the forbidden list.<sup>149</sup> Of those directed to avoid taboo topics, 88% of female students reported that they complied, versus 64% of male students.<sup>150</sup>

Notably, 52% of the students enrolled in public K-12 schools are nonwhite, while only 21% of teachers and 22% of principals are.<sup>151</sup> This

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as ‘conceptual development’ is quite distinct from and contrary to an understanding of learning as the inculcation of values.”).

146. *Id.* at 1294.

147. *Civic Engagement Among High School Journalists*, CIVICS & JOURNALISTS (2015), <http://civicsandjournalists.org/wp-content/uploads/2015/11/Results-handout.pdf> [<https://perma.cc/U6LA-RTB9>].

148. Piotr S. Bobkowski & Genelle I. Belmas, *Mixed Message Media: Girls’ Voices and Civic Engagement in Student Journalism*, 10 GIRLHOOD STUD. 89, 95–97 (2017), <https://www.berghahnjournals.com/view/journals/girlhood-studies/10/1/ghs100107.xml> [<https://perma.cc/2N77-UHNM>].

149. *Id.* at 97.

150. *Id.*

151. NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T OF EDUC., RACIAL/ETHNIC ENROLLMENT IN PUBLIC SCHOOLS (May 2020), [https://nces.ed.gov/programs/coe/indicator\\_cge.asp](https://nces.ed.gov/programs/coe/indicator_cge.asp)

means that a policy of heavy institutional censorship puts largely white decision-makers in charge of deciding which perspectives of largely nonwhite speakers get to be heard. Student media is unlike other civic learning opportunities because of its counter-majoritarian ethic—exactly the ethic that *Hazelwood* censorship empowers schools to suppress. Student government and similar civic leadership programs reward people of high social status who conform to mainstream views.<sup>152</sup> Student media provides an outlet for people with minority perspectives and contrarian views to feel heard.<sup>153</sup>

The frustration and disempowerment of censorship discourages students from taking part in journalism education at a time when the skills and values that journalism education conveys are most desperately needed. Media futurist Dan Gillmor has identified five signature characteristics that distinguish good journalism: Thoroughness, Accuracy, Fairness, Independence, Transparency.<sup>154</sup> These qualities, Gillmor writes, are the foundation of a 21st century education in navigating the realm of online information: “If we don’t teach our children the kind of critical thinking skills these principles imply, they will end up hopeless adrift amid an onslaught of media or so cynical that they will disbelieve trustworthy sources.”<sup>155</sup> Essentially every American is involved in media whether as a consumer or as a creator (or, increasingly, as both). Gillmor’s principles of

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[<https://perma.cc/TYB7-VBJ2>]; NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T OF EDUC., CHARACTERISTICS OF PUBLIC SCHOOL TEACHERS (May 2020), [https://nces.ed.gov/programs/coe/indicator\\_clr.asp#:~:text=In%202017%E2%80%9318%2C%20about%2079,1%20percent%20of%20public%20school](https://nces.ed.gov/programs/coe/indicator_clr.asp#:~:text=In%202017%E2%80%9318%2C%20about%2079,1%20percent%20of%20public%20school) [<https://perma.cc/9P7J-8V2Q>]; NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T OF EDUC., CHARACTERISTICS OF PUBLIC SCHOOL PRINCIPALS (May 2020), [https://nces.ed.gov/programs/coe/indicator\\_cls.asp#:~:text=In%202017%E2%80%9318%2C%20about%2078.and%209%20percent%20were%20Hispanic](https://nces.ed.gov/programs/coe/indicator_cls.asp#:~:text=In%202017%E2%80%9318%2C%20about%2078.and%209%20percent%20were%20Hispanic) [<https://perma.cc/KCH8-UQNW>].

152. See Meg Benner, Catherine Brown & Ashley Jeffrey, *Elevating Student Voice in Education*, CTR. FOR AMER. PROGRESS (Aug. 4, 2019) (citing student government participation as a vehicle for maximizing student voice in schools, but noting that student government “[g]enerally involves a small number of students who are elected by their peers and typically have higher social capital”).

153. See Josie Fochrenbach Brown, *Inside Voices: Protecting the Student-Critic in Public Schools*, 62 AM. U. L. REV. 253, 259 (2012) (arguing for stronger protection of student free-speech rights, because “[r]espect for social critics ensures that minorities participate in self-governance, incorporating potentially alienated outsiders into the body politic and diversifying the knowledge base for public decision-making”).

154. Dan Gillmor, *Introduction: Toward a (New) Media Literacy in a Media Saturated World*, in JOURNALISM AND CITIZENSHIP: NEW AGENDAS IN COMMUNICATION 1, 10 (Zizi Papacharissi ed., 2009).

155. *Id.* at 9–11.

trustworthy journalism are values we should want every denizen of the online conversation to internalize and practice.

The field of civic education is increasingly recognizing the importance of helping young people find on-ramps into the world of “participatory politics,” a peer-driven form of engagement that operates outside the confines of traditional power structures.<sup>156</sup> Central to participatory politics is developing the skills to analyze and create digital media, as Professor Kahne and his colleagues have written: “[Y]outh will need an expanded set of skills if they are to effectively tap into the affordances of the digital age when engaging in investigation and research.”<sup>157</sup> Preparing students to take on the work of policymaking and governance, civic educators widely agree, means giving students “voice” and “agency” that starts with the education they are receiving: “[P]olitical competency is best acquired by practicing the messy, often difficult, process of democracy. Students are less apt to gain political skills, values, and knowledge from sitting on the sidelines.”<sup>158</sup> And *Hazelwood* censorship has sidelined two generations of America’s best-informed, most engaged future leaders.

#### IV. VALUING NEW VOICES

##### *A. Uncensored Journalism Fulfills a Civically Valuable Function*

The Emmy-nominated HBO film, “Bad Education,” starring Hugh Jackman and Allison Janney, chronicles the downfall of a charismatic Long Island school superintendent, Frank Tassone, whose high-flying lifestyle was fueled by a massive embezzlement scheme that came crashing down with his 2004 arrest.<sup>159</sup> The story is true. The catalyst for its disclosure was investigative reporting by a student reporter for the *Hilltop Beacon*, who was the first to publicly question Tassone’s spending.<sup>160</sup>

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156. Joseph Kahne, Erica Hodgin & Elyse Eidman-Aadahl, *Redesigning Civic Education for the Digital Age: Participatory Politics and the Pursuit of Democratic Engagement*, 44 THEORY & RSCH. SOC. EDUC. 1, 4 (2016).

157. *Id.* at 15.

158. Nicholas V. Longo, Christopher Drury & Richard M. Battistoni, *Catalyzing Political Engagement: Lessons for Civic Educators from the Voices of Students*, 2 J. POL. SCI. EDUC. 313, 315 (2006).

159. BAD EDUCATION (HBO Films 2019).

160. See EJ Dickson, *What ‘Bad Education’ Got Right — and Wrong — About the Real-Life Scandal*, ROLLING STONE (Apr. 30, 2020, 4:42 PM), <https://www.rollingstone.com/culture/culture->

Less cinematically, high school journalists in the southeast Kansas town of Pittsburg won nationwide acclaim when, in 2017, they broke news that the local professional media had overlooked: Their newly hired principal claimed to have earned two advanced degrees attending what turned out to be an online diploma mill.<sup>161</sup> The story led the principal to resign, and the school to tighten its hiring standards.<sup>162</sup>

In Pennsylvania, student reporter Grace Marion uncovered a scheme by school authorities to conceal the severity of sexual misconduct complaints against school employees—by maintaining the complaints in the files of the student complainants and not the employees, making sure that the documents could be kept confidential on student privacy grounds, and that the complaints would not follow the employees into future jobs.<sup>163</sup> Marion's reporting earned her the Hugh M. Hefner Foundation's annual First Amendment award.<sup>164</sup>

The public is increasingly reliant on students to expose mismanagement or malfeasance in schools, because of the nationwide collapse of local news coverage, with thousands of newspapers closing or downsizing as advertising revenue evaporates.<sup>165</sup> A Brookings Institution study, conducted even before recent cutbacks worsened the problem, found that only 1.4% of

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features/bad-education-hbo-true-story-scandal-fact-check-992263/ [https://perma.cc/BL26-L5TK]; see also Rebekah Rombom, *On Top of the News at Roslyn High*, N.Y. TIMES (June 27, 2004), <https://www.nytimes.com/2004/06/27/nyregion/on-top-of-the-news-at-roslyn-high.html> [https://perma.cc/3S23-ESBC].

161. Christopher Mele, *High School Journalists Land a Scoop, and the Principal Resigns*, N.Y. TIMES (Apr. 5, 2017), <https://nyti.ms/3mDpYb0> [https://perma.cc/79ZV-GFRK].

162. Mara Rose Williams, *Pittsburg school officials admit hiring process failed, thank student journalists*, K.C. STAR (Apr. 7, 2017), <https://www.kansascity.com/news/local/article143460289.html>.

163. Grace Marion, *Neshaminy Faces Accusations of Mishandling Sexual Assault and Harassment Cases*, PLAYWICKIAN (June 17, 2018), <https://playwickian.com/8461/news/neshaminy-faces-accusations-of-mishandling-sexual-assault-and-harassment-cases/> [https://perma.cc/W7H3-3R5P].

164. Kristen A. Graham, *Bucks Grad Fought Her High School on Censorship. Now, She's Gone National*, PHILA. INQUIRER (Aug. 11, 2019), <https://www.inquirer.com/education/neshaminy-high-grace-marion-journalist-censorship-award-controversy-20190811.html> [https://perma.cc/9FK4-JCQE].

165. Margaret Sullivan, *The Local-News Crisis is Destroying What a Divided America Desperately Needs: Common Ground*, WASH. POST (Aug. 5, 2018, 3:00 PM), [https://www.washingtonpost.com/lifestyle/style/the-local-news-crisis-is-destroying-what-a-divided-america-desperately-needs-common-ground/2018/08/03/d654d5a8-9711-11e8-810c-5fa705927d54\\_story.html](https://www.washingtonpost.com/lifestyle/style/the-local-news-crisis-is-destroying-what-a-divided-america-desperately-needs-common-ground/2018/08/03/d654d5a8-9711-11e8-810c-5fa705927d54_story.html) [https://perma.cc/UY8A-LDFR]; see also Clara Hendrickson, *Local Journalism in Crisis: Why America Must Revive Its Local Newsrooms*, BROOKINGS INST. (Nov. 12, 2019), <https://www.brookings.edu/wp-content/uploads/2019/11/Local-Journalism-in-Crisis.pdf> [https://perma.cc/F2YZ-5SVV].

mainstream news stories were devoted to education.<sup>166</sup> The Brookings authors identified censorship of student journalism as one of the impediments to the flow of information to the public: “Some school officials discourage student reporters from asking difficult questions or raising controversial issues. In fact, student journalism of this kind should be encouraged. Student newspapers often lead the media to important education stories.”<sup>167</sup>

The Brookings research underscores the federal judiciary’s categorical failure to take into account the First Amendment interests of a critical forgotten constituency: The audience. The Supreme Court has long recognized that the First Amendment embodies not just a right to publish information but a right to receive it.<sup>168</sup> When public schools use their governmental authority to get between journalists and their intended readers, both sides in the conversation lose something of value. Because students’ interests are more readily discounted, deferential judges invariably omit any discussion of the parents and policymakers who might benefit from a candid insider perspective.<sup>169</sup>

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166. E.J. Dionne, Jr., Darrell M. West, & Grover J. “Russ” Whitehurst, *Invisible: 1.4 Percent Coverage for Education is Not Enough*, BROOKINGS INST. (Dec. 2, 2009), <https://www.brookings.edu/research/invisible-1-4-percent-coverage-for-education-is-not-enough/> [<https://perma.cc/6QBN-Z88S>].

167. *Id.*

168. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”).

169. *See Norton*, *supra* note 140, at 1267 (observing that Supreme Court’s aggressive use of “government speech” doctrine “has deeply disturbing implications not only for government workers’ free speech rights, but also for the public’s access to information about its government’s effectiveness”).

*B. States and Increasingly Striking a More Sensible Balance*

While the Supreme Court sets the constitutional floor beneath which state and local governments may not venture, nothing prevents a state from extending its residents more than the constitutional minimum of civil liberties. Increasingly, states are awakening to the educational detriments of government-sanctioned censorship and granting students a state cause of action that restores the pre-*Hazelwood* level of press freedom.<sup>170</sup> As of this writing, fourteen states have statutes that constrain school censorship authority, half of which have been enacted just since 2015.<sup>171</sup> Most of these statutes explicitly limit the grounds for censorship to speech that would be legally actionable (such as libel) or substantially disruptive of school functions, restoring the *Tinker* balance.<sup>172</sup> The reinvigorated reform movement takes its name, “New Voices,” from the 2015 New Voices of North Dakota Act that became a model for the country.<sup>173</sup> A wide range of civic and educational organizations have endorsed the New Voices movement, including the American Bar Association, giving it newfound momentum.<sup>174</sup> In an August 2017 resolution, the ABA House of Delegates unanimously called on states to fortify legal protections for student journalists and their faculty advisers, who frequently suffer the brunt of school retaliation.<sup>175</sup> A report accompanying the ABA resolution drew a direct link between high-quality journalism education and civic and media literacy: “Meaningful civic education requires that students feel safe and empowered to discuss issues of social and political concern in the

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170. For a history of the “anti-*Hazelwood*” reform movement, see Tyler J. Buller, *The State Response to Hazelwood v. Kuhlmeier*, 66 ME. L. REV. 89 (2013), which was written at a time when just seven states had enhanced statutory protection for student speech.

171. See *New Voices*, STUDENT PRESS L. CTR., <https://splc.org/new-voices/> [<https://perma.cc/V2X6-5364>] for a timeline of each of the press freedom statutes (one of which, California’s, actually predates *Hazelwood*).

172. *Id.*

173. See Steven Francis Listopad & Elizabeth Crisp Crawford, *The Origins of New Voices USA: A Lesson in Teaching Advocacy to Improve Teaching and Learning*, 73 JOURNALISM & MASS COMM’N EDUCATOR 469, 471 (2018) (chronicling origins of the North Dakota act and its path through the legislature).

174. David L. Hudson Jr., *Free Expression of Student Journalists Gets ABA support*, ABA J. (Mar. 1, 2018), [https://www.abajournal.com/magazine/article/student\\_journalists\\_free\\_expression](https://www.abajournal.com/magazine/article/student_journalists_free_expression) [<https://perma.cc/9TT9-58YZ>].

175. *Resolution 119B*, A.B.A. (Aug. 2017), [https://splc.org/wp-content/uploads/2018/08/1570\\_aba\\_resolution\\_119b\\_and\\_reporto.pdf](https://splc.org/wp-content/uploads/2018/08/1570_aba_resolution_119b_and_reporto.pdf) [<https://perma.cc/TGN3-HPDY>].

responsible, accountable forum of journalistic media.”<sup>176</sup>

## V. A WAY FORWARD RETHINKING DEFERENCE

In its much-quoted *Carolene Products* footnote, the Supreme Court recognized that the normal presumption that regulations are to be reviewed deferentially may apply with less force when the regulations appear motivated by “prejudice against discrete and insular minorities,” or affect the ability of underrepresented groups to invoke the protection of the political process.<sup>177</sup> A Second Circuit judge vividly identified the perils of unchecked deference in the case of a New York English teacher unjustly fired for wearing an antiwar armband reminiscent of the Tinkers’: “The dangers of unrestrained discretion are readily apparent. Under the guise of beneficent concern for the welfare of school children, school authorities, albeit unwittingly, might permit prejudices of the community to prevail. It is in such a situation that the will of the transient majority can prove devastating to freedom of expression.”<sup>178</sup>

Federal courts have justified giving a blank check of authority to school administrators on the grounds that judges lack expertise in managing educational institutions.<sup>179</sup> But courts regularly decide cases involving unfamiliar industries and technologies on which they must educate themselves.<sup>180</sup> There is no reason to believe that elected county school boards will make better decisions than a panel of judges with advanced college degrees when the decision requires knowledge of civil-rights law.<sup>181</sup>

176. *Id.* at 1.

177. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (affirming constitutionality of federal food-safety regulation while also identifying possibility that, in future cases, “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”).

178. *James v. Bd. of Educ. of Cent. Dist. No. 1*, 461 F.2d 566, 575 (2d Cir. 1972).

179. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973) (observing, in connection with adjudicating challenge to adequacy and equity of state education financing system, “this case . . . involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels”).

180. *See* Moss, *supra* note 27, at 1645 (observing that schools, workplaces and prisons “are not unusually resistant to outside analysis; courts regularly evaluate facts, set legal rules, and pass judgment in cases involving far more complex contexts”).

181. *See* Justin Driver, *The Public School as the Preeminent Site of Constitutional Law*, 98 NEB. L. REV. 777, 789 (2020) (“[I]t seems worth observing that members of the Supreme Court—as a

As the Court recognized in its most recent case involving freedom of speech and association in the setting of higher education: “This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question.”<sup>182</sup> The level of hands-off deference afforded to educational institutions in *Hazelwood* is unprecedented in any other area of civil liberties other than in prisons and jails, and has, inevitably, invited abuse and overreaching.<sup>183</sup>

In the *Lawrence* case that overturned *Bowers*, the Supreme Court recognized that adherence to precedent is no longer an imperative if subsequent legal and historical developments undermine the basis for the prior decision.<sup>184</sup> *Hazelwood* is such a case, for many reasons.

First, subsequent experience has now proven that the safety valve identified by the *Hazelwood* Court—that students could secure heightened First Amendment protection by obtaining “forum” designation for their publications<sup>185</sup>—in fact offers no relief at all. As demonstrated most vividly by the Second Circuit’s *Ochshorn* decision, even convincing a school to designate a student publication as a “forum” has become legally meaningless, because the school is free to “designate” the forum as suitable only for speech that school authorities deem appropriate, which is no more protection than *Hazelwood*.<sup>186</sup> Moreover, post-*Hazelwood* decisions have

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result of having been students themselves—possess much richer experience with schools than they do with many contexts that consistently appear on their docket.”); see also Renee E. Rothauge, Note, *Seen But Not Heard: In What Forum May High School Students Exercise First Amendment Rights After Hazelwood?*, 25 WILLAMETTE L. REV. 197, 218 (1989) (observing that *Hazelwood* leaves the level of press freedom in schools “subject to the parochial whims of district school boards” so that the First Amendment will cease to have a consensus national understanding).

182. *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 686 (2010).

183. See Lance D. Cassak, *Hearing the Cries of Prisoners: The Third Circuit’s Treatment of Prisoners’ Rights Litigation*, 19 SETON HALL L. REV. 526, 581 n.290 (1989) (noting “striking” similarity between *Hazelwood*’s formulation of student First Amendment rights and the Court’s treatment of free-speech rights in prisons in the case of *Turner v. Safley*, 482 U.S. 78, 89 (1987), where just a year earlier, the Court held that prison authorities could censor inmate speech as long as their justification was “reasonable related to legitimate penological concerns”); see also Chemerinsky, *Schoolhouse*, *supra* note 44 at 530 (citing *Hazelwood* and observing that “[t]he judiciary’s unquestioning acceptance of the need for deference to school authority leaves relatively little room for protecting students’ constitutional rights”).

184. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

185. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 269–70 (1988) (describing the indicia that would signal an intent to operate a student newspaper as a public forum).

186. See *R.O. ex rel. Ochshorn v. Ithaca City Sch. Dist.*, 645 F.3d 533, 540 (2d Cir. 2011)

found that the “designation” of a forum may be instantaneously revoked at the whim of the government for any reason, even a viewpoint-retaliatory reason, making the “designation” even more meaningless.<sup>187</sup> Keeping in mind that the *Hazelwood* decision turned on a single vote, there is no telling how the case might have come out had the Court known that First Amendment law would evolve in such a way as to make a designated public forum largely a nullity.

Second, *Hazelwood* is a product of a bygone time when it might have been conceivable to prevent a fourteen-year-old from being exposed to frank discussion of teenage pregnancy by removing pages from newspapers. Needless to say, we do not live in that world any longer. Nearly eighty-two percent of households have internet service, and more than eighty-nine percent of families can access the internet, either through a home subscription or through a smartphone.<sup>188</sup> And the advance of online publishing, which dispenses with the need to distribute news publications on school property during the school day, has consequences for the “disassociation” interests of schools as well. Rather than exercise heavy-handed censorship over student journalism, a school now has the ability to distance itself from the speech simply by enabling the students to publish on a third-party platform, such as WordPress, that bears no school web address or other outward indicia of school affiliation.<sup>189</sup>

Third, the country is in the midst of an overdue rethinking of the lasting consequences of overzealous school discipline. *Hazelwood* is about disavowing sponsorship of speech, but its vagueness has invited sloppy misapplication by lower courts as a basis not just for refusing to distribute

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(finding that student newspaper was operated as a forum, but that “the school confined the paper to content consistent with a supervised, age-appropriate learning experience for student editors and high school readers,” so that the school could freely censor its contents despite the forum designation).

187. See Frank D. LoMonte, *Everybody out of the Pool: Recognizing a First Amendment Claim for the Retaliatory Closure of (Real or Virtual) Public Forums*, 30 U. FLA. J.L. & PUB. POL'Y 1, 16–21 (2019–20) (explaining how courts have allowed government agencies to freely close formerly public forums without inquiring into motive, and critiquing that view).

188. NAT'L CTR. FOR EDUC. STAT., DIGEST OF EDUCATION STATISTICS: TABLE 702.06. NUMBER AND PERCENTAGE OF HOUSEHOLDS WITH COMPUTER AND INTERNET ACCESS, BY STATE: 2016, [https://nces.ed.gov/programs/digest/d17/tables/dt17\\_702.60.asp](https://nces.ed.gov/programs/digest/d17/tables/dt17_702.60.asp) [<https://perma.cc/8Q59-UMXH>].

189. See Alyson Klein, *Keeping High School Journalism Class on the Cutting Edge*, EDUC. WEEK (Oct. 3, 2018), <https://www.edweek.org/technology/keeping-high-school-journalism-class-on-the-cutting-edge/2018/10> [<https://perma.cc/N88V-WH7L>] (documenting growing popularity of online publishing in lieu of print publication among high school newsrooms).

speech but also for punishing the speaker.<sup>190</sup> It is no longer plausible to discount the mountain of evidence that removing a student from school, even once, can have life-altering consequences.<sup>191</sup> A student suspended for writing an article or delivering a speech that is viewed as undermining the school's curricular objectives may be set on a trajectory for becoming a dropout. The Obama administration prodded school authorities to revisit their zero-tolerance disciplinary codes to avoid hair-trigger expulsions that, disproportionately, fall on students of color and special-education students.<sup>192</sup> *Hazelwood* represents a "zero tolerance" standard for controversy. The discrediting of zero tolerance discipline is occasion for rethinking whether adequate safeguards exist to meaningfully remedy unjust overreactions.

Fourth, students at both the K-12 and college levels are engaging in political advocacy at levels not seen since the civil-rights movement of the 1960s and '70s.<sup>193</sup> Students are assuming leadership in the movements to address climate change, gun violence, race-based policing practices, and any number of other causes.<sup>194</sup> The great generational leveler of technology

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190. See, e.g., *Poling v. Murphy*, 872 F.2d 757, 763–64 (6th Cir. 1989) (applying *Hazelwood* and not *Tinker* as the standard for disciplining a student over harsh remarks about school administrators in a campaign speech: "[T]he Supreme Court has made it quite clear that the First Amendment standard for determining when non-sponsored student speech may be punished is a standard that need not be applied where sponsored student speech . . . is concerned."). For a fuller explanation of why the *Hazelwood* standard cannot intelligibly be the starting point for school punitive authority, see Frank D. LoMonte, *The Key Word is Student: Hazelwood Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305, 352 (2013) (explaining that a student cannot tailor her conduct to a standard that is based on *Hazelwood*, because a prohibition against "speech that the school has a legitimate pedagogical reason to punish" would not provide the fair notice that due process requires).

191. See U.S. COMM'N ON C.R., BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES 74 (2019) (citing research showing that students who are suspended or expelled from school "were more than twice as likely" as their peers "to be arrested during the same month of their suspension or expulsion from school."); Artika R. Tyner, *The Emergence of the School-to-Prison Pipeline*, AM. BAR ASS'N (June 1, 2014), [https://www.americanbar.org/groups/gpsolo/publications/gpsolo\\_ereport/2014/june\\_2014/the\\_emergence\\_of\\_the\\_school-to-prison\\_pipeline/](https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2014/june_2014/the_emergence_of_the_school-to-prison_pipeline/) [<https://perma.cc/5H8M-CB6F>] ("Zero tolerance policies can also serve as a gateway into the school-to-prison pipeline. . . . [I]n some instances the enforcement of zero tolerance policies can be far-reaching, therefore increasing the likelihood of interaction with law enforcement and future incarceration.").

192. Motoko Rich, *Administration Urges Restraint in Using Arrest or Expulsion to Discipline Students*, N.Y. TIMES (Jan. 8, 2014), <https://www.nytimes.com/2014/01/09/us/us-criticizes-zero-tolerance-policies-in-schools.html> [<https://perma.cc/W89S-Z3GY>].

193. See, e.g., USA TODAY, *supra* note 11.

194. See Melinda D. Anderson, *The Other Student Activists*, ATLANTIC (Nov. 23, 2015),

equips young people with unprecedented ability to be participants in policymaking and not just spectators.<sup>195</sup> As America's streets filled with "Black Lives Matter" demonstrators in 2020, students led the charge in calling for their schools to remove uniformed police officers,<sup>196</sup> whose very presence creates an intimidating climate and heightens the danger that minor disciplinary scrapes will end with arrest.<sup>197</sup> Student plaintiffs are leveraging the legal system to demand that the federal government act to secure their futures by addressing carbon emissions linked to global climate change.<sup>198</sup> But while students can litigate today's weightiest political issues in court, they may be stopped from discussing them in the pages of a newspaper, if a school official regards the existence of climate change as a matter of political controversy.

Fifth, it is increasingly well-documented that the K-12 education system fails to provide young people with the knowledge and critical-thinking skills

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<https://www.theatlantic.com/education/archive/2015/11/student-activism-history-injustice/417129/> [<https://perma.cc/5L7E-QNSZ>] ("High-school youth are flexing their collective muscles for equity: fighting budget cuts and out-of-school suspensions as they take on racial issues and academic offerings.").

195. Rainesford Stauffer, *Social Media Transformed Teens' Ability to Build Activist Movements Online*, TEEN VOGUE (Dec. 19, 2019), <https://www.teenvogue.com/story/social-media-activism-changed-everything> [<https://perma.cc/82Q5-RV2F>].

196. See Melanie Asmar, *Denver School Board Votes to Phase Police out of Schools*, COLO. INDEP. (June 12, 2020), <https://www.coloradoindependent.com/2020/06/12/denver-school-board-phasing-out-police/> [<https://perma.cc/447D-KTJN>] (stating that school resource officers would be removed from Denver public schools by June 2021 in reaction to community concern over disproportionate criminal referrals of black youth); Katherine Knott, *Charlottesville Schools, Police Agree to End MOU for School Resource Officers*, DAILY PROGRESS (June 11, 2020), [https://www.dailyprogress.com/news/local/charlottesville-schools-police-agree-to-end-mou-for-school-resource-officers/article\\_558f34f9-d3fd-5fc5-8b22-5334f173655f.html](https://www.dailyprogress.com/news/local/charlottesville-schools-police-agree-to-end-mou-for-school-resource-officers/article_558f34f9-d3fd-5fc5-8b22-5334f173655f.html) [<https://perma.cc/8J4E-XHF8>] (reporting that, following nationwide unrest over police violence, Charlottesville, Virginia schools will end relationship with police department); see also Stephen Sawchuk, *More School Districts Sever Ties with Police. Will Others Follow?*, EDUC. WK. (June 26, 2020), <https://www.edweek.org/ew/articles/2020/06/26/more-school-districts-sever-ties-with-police.html> [<https://perma.cc/W2Y8-MT4X>] (describing how student-led movements provoked districts in San Francisco, Seattle and elsewhere to limit or end ties with local police departments).

197. See Catherine J. Ross, "Bitch," *Go Directly to Jail: Student Speech and Entry Into the School-to-Prison Pipeline*, 88 TEMP. L. REV. 717, 723 (2016) ("The proliferation of armed police officers at schools has only intensified the risks of entering the fast track from school to court.").

198. In *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), a split federal appeals court panel threw out the claims of young environmental activists on threshold redressability grounds without reaching the merits of their assertions. But they drew a supportive dissent from Judge Josephine L. Staton, who wrote: "There is no justiciability exception for cases of great complexity and magnitude." See *id.* at 1185 (Staton, J., dissenting).

to be effective consumers of media and participants in civic life.<sup>199</sup> Readership of news among young people is in free-fall; the Pew Research Center reports that Americans under twenty-nine are the country's least avid news consumers, with only two percent saying they "often" read print newspapers, sixteen percent saying they regularly watch television news, and thirteen percent regularly listening to radio news.<sup>200</sup> We are confronting a moment in American history in which foundational legal norms that once underpinned our pluralistic society are being demolished.<sup>201</sup> At this moment, it seems especially inadvisable for public schools to be inculcating students in authoritarianism, teaching them the lesson of *Hazelwood* that the government is always right and that the citizen-critic is always wrong. As the Second Circuit's Judge Irving R. Kaufman presciently wrote in a case vindicating a teacher's right to wear an antiwar armband in the classroom: "It would be foolhardy to shield our children from political debate and issues until the eve of their first venture into the voting booth. Schools must play a central role in preparing their students to think and analyze and to recognize the demagogue."<sup>202</sup>

Finally, other seemingly "settled" case law that demonizes the less-powerful is being revisited in light of contemporary values. The Supreme Court used a 2018 case involving the Trump administration's directive to impose "enhanced screening" on would-be visitors from countries with large Muslim populations,<sup>203</sup> to disavow a case that was not even directly at issue: *Korematsu v. United States*.<sup>204</sup> In *Korematsu*, the Court turned aside a constitutional challenge brought by a California man imprisoned in an internment camp during World War II for violating a federal exclusion order

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199. "[W]e have come to take democracy for granted, and civic education has fallen by the wayside. In our age, when social media can instantly spread rumor and false information on a grand scale, the public's need to understand our government, and the protections it provides, is ever more vital." U.S. Supreme Court, 2019 Year-End Report on the Federal Judiciary 2 (Dec. 31, 2019), <https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf> [<https://perma.cc/VF3L-6SN9>].

200. Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RSCH. CTR. (Dec. 10, 2018), <https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/> [<https://perma.cc/4E2S-38RW>].

201. See David Montgomery, *The Abnormal Presidency*, WASH. POST (Nov. 10, 2020), <https://www.washingtonpost.com/graphics/2020/lifestyle/magazine/trump-presidential-norm-breaking-list/> [<https://perma.cc/67UB-GENX>].

202. *James v. Bd. of Educ. of Cent. Dist. No. 1*, 461 F.2d 566, 574 (2d Cir. 1972).

203. *Trump v. Hawaii*, 138 S. Ct. 2392, 2403–04 (2018).

204. 323 U.S. 214 (1944).

targeting only people of Japanese ethnicity.<sup>205</sup> The decision has been widely reviled and regarded as a dead letter, though never formally overruled.<sup>206</sup> But in *Trump v. Hawaii*,<sup>207</sup> Chief Justice John Roberts took the opportunity to make explicit what legal scholars had long believed: “*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear— ‘has no place in law under the Constitution.’”<sup>208</sup>

The repudiation of *Korematsu* followed fifteen years after the Court, in *Lawrence*, disavowed its anachronistic *Bowers* decision and declared that states could no longer criminalize consensual same-sex relations.<sup>209</sup> As these rulings demonstrate, it is eminently defensible for the Court to revisit and correct shortsighted decisions when the societal norms and values underpinning those decisions evolve so that the decisions lack legitimacy. Indeed, the Court has done so in the realm of student speech, using its 1943 *Barnette* ruling to set right an errant decision from just three years earlier that empowered schools to force students to pledge allegiance to the flag in derogation of their conflicting religious beliefs, which led to harassment of Jehovah’s Witness adherents.<sup>210</sup>

*Hazelwood*, no less than *Korematsu* or *Bowers*, is a case birthed in bigotry that gives indulgence to bigotry.<sup>211</sup> It demonizes young people, placing them in constitutional exile alongside convicted felons, for using their voices to question authority. It emboldened four federal judges to tell a teenage sexual assault victim that her wish to be free from school-compelled praise for her accused rapist was a frivolous waste of judicial resources.<sup>212</sup> As the *Silsbee* case amply demonstrates, no government

205. *Id.* at 218–19.

206. *See, e.g.*, Erwin Chemerinsky, *Korematsu v. United States: A Tragedy Hopefully Never to Be Repeated*, 39 PEPP. L. REV. 163, 170 (2011) (denouncing the ruling as “a powerful example of the government violating basic constitutional principles in a time of crisis without making the country any safer”).

207. 138 S. Ct. 2392.

208. *Id.* at 2423 (citing *Korematsu*, 323 U.S. at 248) (Jackson, J., dissenting).

209. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

210. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

211. *See* Robertson v. Anderson Mill Elem. Sch., 989 F.3d 282 (4th Cir. 2021) (applying *Hazelwood* to dismiss a First Amendment claim on behalf of a 10-year-old South Carolina student whose essay urging acceptance of LGBTQ rights was omitted from a collection of student essays). As part of his rationale for removing the student’s essay from a collection of her classmates’ work, the principal stated that “it was not age-appropriate to discuss transgenders, lesbians, and drag queens outside of the home” and that “due to the type of school this is, the people that work here and the students and families of the students that go here, the topic would be disagreeable.” *Id.* at 286.

212. *See supra* Section III.B. (discussing the district court and Fifth Circuit’s *Silsbee* decisions

official can be entrusted with limitless authority and boundless judicial deference, especially not one responsible for the welfare of young people.

### CONCLUSION

*Hazelwood* is the *Bowers v. Hardwick* of our generation. The opinion reads like a curious relic of a benighted past, when adult authority figures believed that fourteen-year-olds did not know where babies come from and could be protected against teen pregnancy by remaining unaware of it. The decision exists for the sole purpose of worsening the power imbalance between students and the government institutions to which they are subject. To paraphrase Justice Kennedy in *Lawrence*, *Hazelwood* was not correct when it was decided, and it is not correct today.

The foundational error around which *Hazelwood* is built is elevating the government's reputation to a concern of constitutional value. Making the "imprimatur" of the school the triggering event for censorship authority was the Supreme Court's tipoff that *Hazelwood* was not centrally concerned with miseducating students or exposing them to unsuitable material, but preserving the school's image. The Court erased any ambiguity by recognizing the avoidance of political controversy as a wholly adequate justification for censoring even the highest quality and most educationally responsible journalism.<sup>213</sup> In this way, *Hazelwood* is a bullet into the heart of the First Amendment, telling citizens that their grievances about the quality of government services they are receiving must be subordinated to the government's concern for its reputation.

In the landmark *New York Times Company v. Sullivan* case, the Supreme Court guaranteed news organizations the freedom to comment on the performance of government officials, because injury to the image of public officials is insignificant when weighed against the value of uninhibited dialogue about the issues of the day.<sup>214</sup> There, the Court said: "Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error . . . Criticism of

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involving a disciplined Texas cheerleader whose First Amendment claim was held to be frivolous); see also Norton, *supra* note 141, at 1276 (calling the *Silsbee* case "an unusually powerful example of an action repugnant to individual autonomy").

213. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

214. 376 U.S. 254, 269–73 (1964).

[government officers'] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations."<sup>215</sup> For students, *Sullivan* exists as an aspirational abstraction on a page, its message dissonant from their lived experience.<sup>216</sup>

Tellingly, in the censorship cases that have made their way into the public discourse through media coverage or litigation, school authorities rarely are motivated by any of the rationales cited by Principal Reynolds in censoring the *Spectrum*—that news stories invade privacy or expose young people to unsuitably mature subjects.<sup>217</sup> Rather, the explanation is invariably some variation of “making the school look bad.” That the *Hazelwood* Court equipped schools with “image-maintenance” authority was, arguably, a piece of ill-considered *dicta*, since Principal Reynolds did not cite the school’s reputation or aversion to controversy as grounds for his censorship decision. So long as that *dicta* remains on the books, schools will regard their concern for unfavorable public reaction as a legitimate reason for censorship.

As Professor Papandrea has pointed out, avoiding blame for citizens’ speech is a feeble justification for government censorship: “[T]he Court has recognized that it is not always reasonable to attribute speech to a property owner, at least when the property owner is legally compelled to permit the speech.”<sup>218</sup> Papandrea identifies the destructive circularity of this reasoning: The more the government asserts control over the speech of its citizens, the more the public will blame the government for its content—justifying still greater control.<sup>219</sup>

What Cathy Kuhlmeier and her classmates were doing is classic whistleblowing: Calling for adult authority figures to pay closer attention to social problems already well-apparent to students.<sup>220</sup> For the judiciary to give official sanction to the notion that students could be exposed to pregnant classmates without harm, but not to a news article discussing pregnancy, legitimizes denial and ignorance. Schools themselves benefit,

215. *Id.* at 272–73.

216. See Abrams & Goodman, *supra* note 78, at 723 (“Students are taught they must pay homage to the values of the Constitution even though they will have no enforceable constitutional rights until they receive their high-school diploma.”).

217. *Hazelwood*, 484 U.S. at 264–65.

218. Mary-Rose Papandrea, *The Government Brand*, 110 NW. U. L. REV. 1195, 1219 (2016) (hereinafter, Papandrea, *Brand*).

219. See *id.* at 1221.

220. *Hazelwood*, 484 U.S. at 263–65.

whether they appreciate it or not, when students are able to illuminate problems to be addressed and corrected.<sup>221</sup>

In a 2016 podcast interview, Kuhlmeier looked back with particular regret on the school's removal of the *Spectrum* articles because of a story that was not even regarded as objectionable, exploring the teen runaway problem.<sup>222</sup> The article offered advice and resources for students in troubled homes to keep them from turning to suicide.<sup>223</sup> One Hazelwood East classmate, whom she referred to as "Reggie," did run away from home and took his life in the restroom of a local department store.<sup>224</sup> "I think that one for me is very hard to accept," she said, "the fact that we weren't able to publish those articles because of the slim chance that maybe Reggie read that article, maybe Reggie would still be here today, and I have a hard time accepting that. That we weren't able to help out and reach someone."<sup>225</sup>

Enforced ignorance, too, has costs. Denying students access to accurate information about the problems in their lives, and a chance to air those problems and connect with others who share them, can result in life-altering harm. *Hazelwood* fails to value—or even acknowledge—those costs.<sup>226</sup> It fails to weigh the lopsided consequences of a decision to censor too lightly (that a parent must have an uncomfortable conversation with her fourteen-year-old about sex, or that the principal might receive irate telephone calls) against the consequences of a decision to censor too heavily (that students might be deprived of life-saving information, or that the public might be kept uninformed of abusive school practices).<sup>227</sup>

As Justice Brennan observed in his *Hazelwood* dissent, *Tinker* equips

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221. See Susannah Barton Tobin, Note, *Divining Hazelwood: The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217, 243 (2004) (discussing the "safety valve" function of student media in providing a supervised space for students to vent about what is frustrating them, and observing that "knowledge of particular student difficulties will allow officials to respond to concerns before potentially problematic matters move beyond speech to violence or self-inflicted harm").

222. See *SPLC Podcast*, *supra* note 52.

223. *Id.*

224. *Id.*

225. *Id.*

226. See Bryks, *supra* note 76, at 320 (commenting that "the blatant flaw of the *Hazelwood* decision is that the Court never even attempted to identify the students' interests").

227. See Pappandrea, *Brand*, *supra* note 216, at 1220 ("[A] reasonable observer's *mistaken* perception that the government endorses speech harms only the government's interests in distancing itself from messages it does not like. It does not undermine anyone's civil liberties.") (emphasis in original).

schools with all the authority they legitimately need: A student who interrupts math class by delivering a political speech can be punished for creating a substantial disruption, but a student who disagrees with the civics teacher's views on capitalism cannot be.<sup>228</sup> Perhaps the greatest irony of *Hazelwood* is that, while school administrators have spent thirty years convincing judges that everything that happens in the proximity of a school building is part of the instructional process, they have forgotten that their own behavior is included. As one prominent education journalist has written:

In the midst of debates over what students should learn in civics and how to deliver those lessons, civics education advocates risk missing the larger context: Compulsory K-12 schooling itself makes up the most intensive interaction the average American will have with a civic institution—far outpacing the time spent filling in a ballot, sitting in a jury box, or waiting in line at the DMV. . . . All but absent from the growing civics education conversation is the recognition that everyday interactions in schools also inform students' civic development, and that often those interactions tell a totally different story about individuals' rights from the government textbooks used in class.<sup>229</sup>

Constitutional rights are our birthright as Americans. They are not rationed out by the government only to the “deserving.” But even if civil liberties *were* a prize to be earned, America's teens have amply demonstrated their worthiness to join the exclusive “club” of humanity from which the judiciary has excluded them. The right was earned on the battlefield of Tallahassee, where amateur teen lobbyists harnessed their outrage and grief to put school safety atop the 2018 Florida legislative agenda.<sup>230</sup> The right is earned each day as teens use their expressive talents

228. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 283 (1988) (Brennan, J. dissenting).

229. Stephen Sawchuk, *Schools Teach Civics. Do They Model It?*, EDUC. WK. (May 13, 2019), <https://www.edweek.org/ew/articles/2019/05/08/schools-teach-civics-do-they-model-it.html> [https://perma.cc/68WA-XXXJ].

230. James Call, *Legislators scramble as students head to Tallahassee to lobby for tighter gun restrictions*, TALLAHASSEE DEMOCRAT (Feb. 19, 2018), <https://www.tallahassee.com/story/news/2018/02/19/legislators-scramble-students-head-tallahassee->

to organize reform movements,<sup>231</sup> to save lives from suicide,<sup>232</sup> and to help pass laws addressing social injustice.<sup>233</sup> These young people are much more than government mouthpieces. It is past time for the judiciary to tell them so.

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lobby-tighter-gun-restrictions/352534002/ [https://perma.cc/KU3J-Q6UP].

231. See Brock Colyar, *6 Teens Organized a Protest. 10,000 People Showed Up.*, CUT (June 17, 2020), <https://www.thecut.com/2020/06/6-teens-organized-a-protest-10-000-people-showed-up.html> [https://perma.cc/8XBZ-FW7X] (describing how six teen girls who met online through Twitter mobilized a 10,000-person march against police violence in Nashville, one of the nation's largest such protests); Maggie Angst, *Mitty High Alumni Speak Out About Racism They Faced at School*, MERCURY NEWS (June 5, 2020), <https://www.mercurynews.com/2020/06/05/san-jose-private-school-alumni-speak-out-about-the-racism-they-say-they-faced/> [https://perma.cc/48HF-CKPN] (reporting that students and recent graduates of elite Bay-area private schools have taken to social media to advocate for an end to racial stereotyping and tokenism in their schools); Christine Brennan, *Player Protests: When Athletes Stand Up (or Kneel) for Social Justice Issues*, NPR (Sept. 21, 2016), <https://www.npr.org/2016/09/21/494749929/player-protests-when-athletes-stand-up-or-kneel-for-social-justice-issues> [https://perma.cc/T5DV-U2D3] (reporting that high school football players in Illinois, New Jersey, Texas and Washington organized a kneeling protest during the pregame national anthem as a symbol of racial injustice).

232. See Erin Vallejo, *Students Lead the Way on Mental Health at School Using Social Media*, KQED (May 30, 2019), <https://www.kqed.org/education/531901/students-lead-the-way-on-mental-health-at-school-using-social-media> [https://perma.cc/X63D-GF65] (explaining that California teens responded to classmate's suicide by launching online movement, #YouCanTalkToMe, offering peers a refuge to discuss mental-health concerns).

233. See Lauren Barack, *A Teacher's 3 Takeaways from His Students' Bill Becoming Law*, EDUC. DIVE (Apr. 10, 2019), <https://www.educationdive.com/news/a-teachers-3-takeaways-from-his-students-bill-becoming-law/552198/> [https://perma.cc/B9RA-C2TD] (describing how a New Jersey social-studies class helped write and secure enactment of federal legislation requiring National Archives to develop and publish a database of unsolved civil-rights crimes); Civil Rights Cold Case Records Collection Act of 2018, Pub. L. No. 115-426, 132 Stat. 5489.