BACK TO THE BASICS: WHY HAZELWOOD DEFERENCE IS INAPPROPRIATE IN THE UNIVERSITY CONTEXT

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I. Introduction

"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1] With that phrase, the Supreme Court championed the freedom of expression for students while on school property. Yet since that decision, the Court has chipped away at a student's right to free speech in the school setting. In 1988, in *Hazelwood v Kuhlmeier*, the Supreme Court provided school officials with significant deference in regulating student speech at their schools when it upheld a high school principal's decision to remove two pages of a student newspaper because it featured articles about pregnancy and divorce. [2] The Court's new test to determine when a school official's restriction of student speech was in violation of the First Amendment provides that if the school's restriction is reasonably related to a legitimate pedagogical concern it is constitutional under the First Amendment.[3] The Court reasoned that the First Amendment rights of students in public schools "are not automatically coextensive with the rights of adults in other settings," and must be "applied in light of the special characteristics of the school environment."[4] Appellate Courts have consistently applied *Hazelwood*'s "legitimate pedagogical concerns" test in cases involving speech restriction in elementary and secondary schools.[5]

However, a public university is a drastically different educational environment than an elementary or high school. The Court identified this in *Hazelwood* but declined to discuss it

[1] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).
[2] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263, 273, footnote 6 (1988).
[3] *Id.* at 273.
[4] *Id.* at 266-67 (quoting *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).
[5] Karyl Roberts Martin, *To High School: Are College Students' Free Speech Rights the Same as Those of High School Students?* 45 BOSTON COLLEGE LAW REVIEW 173, 183 (2003).

further, stating "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." With that phrase, the Court generated a windfall of debate regarding whether *Hazelwood's* "legitimate pedagogical concerns" test would be applied to a university official's restriction of student speech on a public college campus.[6]

The *Hazelwood* standard is not appropriate in the public university setting. [7] Rather, the Court should apply the constitution with more force than it does in a school, [8] using a strict scrutiny analysis that requires university officials to show that their concern was narrowly tailored to meet a compelling state interest. The analysis should weigh in favor of protecting student speech over the school officials' interest in maintaining order.[9] Two general points support the demand to apply strict scrutiny to speech occurring in this capacity. First, the Supreme Court has purposefully and meaningfully distinguished public colleges from primary and secondary schools for purposes of constitutional examinations, and given those distinctions, there is less of a compelling state interest to regulate speech at the university level. Second, the characteristics of a public university are more similar to the community at large and therefore student speech on campus should be presumed as occurring in a "public" or "limited public forum," which triggers a strict scrutiny analysis. Because of the significant distinctions between schools and universities, and because any student speech on a university campus occurs in a public or limited public forum, the Court should apply strict scrutiny to restrictions of student speech at a public university.

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[6] Christopher, N. LaVigne, *Hazelwood v. Kuhlmeier and the University: Why the High School Standard is Here to Stay*, 35 FORDHAM URD. L. J., 1191-1124 (2008); Virginia J. Nimick, *School House Rocked:* Hosty v. Carter *and the Case Against* Hazel Wood, 14 J. LAW AND POL'Y 941, 943 (2006).
[7] The terms "college" and "university" are used interchangeably throughout the article, with the intent to cover any public institution of higher learning.
[8] The term "school" strictly refers to primary and secondary educational institutions in this article.
[9] *See* Martin, *supra* note 6 at 175.

II. Prior Supreme Court Jurisprudence Distinguishes Universities from Schools

The Supreme Court has recognized distinctions between public college campuses and primary and secondary educational institutions in both First Amendment[10] and Equal Protection jurisprudence.[11] In its decisions, the Court generally relies on two general grounds to distinguish the different educational settings: first, the age and maturity of the students at each level, and second, flowing directly from the first, the different educational missions of each level of schooling in the United States.

A. Primary and Secondary Educational Institutions

In its First Amendment jurisprudence, the Supreme Court has held that the "special characteristics" of a school justify authorizing school officials to exercise more control over student speech in the elementary and secondary school setting.[12] These educational institutions are unique for countless reasons, but the Court recognized that schools are inherently unique because they are charged with the primary responsibility of educating our nation's youth."[13] The term "youth" is key in the phrase because it limits the scope of the Court's statement. At the elementary and secondary level of education, students are children. The age and maturity of students in school is substantial enough alone to justify why the Court provides school officials with significant deference to regulate student speech at school. Students at this age require order and direction to be able to successfully engage in their learning.[14] In the same regard, school

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[10] *See, e.g.*, *Healy v. James*, 408 U.S. 169, 180-81 (1972); *Papish v. Bd. of Curators of Univ. of Missouri*, 410 U.S. 667, 669-70 (1973).
[11] *See Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).
[12] *Hazelwood*, 478 U.S. at 271; *Tinker*, 393 U.S. at 506.
[13] *Hazelwood*, 478 U.S. at 273.
[14]Grant Miller and Tracey Hall, Ph.D., CLASSROOM MANAGEMENT, NATIONAL CENTER ON ACCESSING THE GENERAL CURRICULUM 3 ("Yet, no matter how nuanced or general the solutions may be, establishing and maintaining order is central to what educators do.").

officials require order to facilitate the productive learning.[15] Therefore, school officials must have the authority to restrict or to require certain actions in order to maintain order, safety, and constructive learning environments.[16]

Furthermore, children spend most of their time at school and are frequently exposed to new ideas, new experiences, and cultural phenomena for the first time in their school environment. Because of the vulnerability of young children, pre-adolescents, and adolescents, the need for regulation in this environment is compelling. School officials, who are responsible for the children for a significant portion of the child's daily life, should have the ability to regulate what students are exposed to in school or on school property to reduce the likelihood that students are bombarded with experiences and material that is beyond their maturity level at the time.[17]

Driven by the age and maturity level of students, the educational goals of public primary and secondary schools further distinguish these institutions from public universities and justify the significant deference awarded by *Hazelwood*.[18] The fundamental goal of primary and secondary educational institutions, as previously mentioned, is to "educate our nation's youth." The state officials and, more so the local school officials who work towards that goal on a daily basis, are the "experts" in the school laboratory. The Court accepted this notion in *Hazelwood* and justified the significant deference to those individuals as "…consistent with our oft-

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[15] *Tinker*, 393 U.S. at 507 ("Where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.'").
[16] *See Tinker*, 393 U.S. at 507; *Fraser*, 478 U.S. at 683; *Hazelwood*, 478 U.S. at 271.
[17] *Hazelwood*, 478 U.S. at 271. *See also Fraser*, 478 U.S. at 683-84 (noting that regulated speech in that case "could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. Some students were reported as bewildered by the speech and the reaction of mimicry it provoked.").
[18] *See Hazelwood*, 478 U.S. at 266 ("A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.") (internal quotations omitted).

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."[19] The state and local officials are charged with determining what the curriculum will be, how it will be taught, and teaching it to students. Therefore, it follows that they should also have wide authority to ensure that students are getting what they need to out of the various lessons and activities conducted at school by regulating certain conduct.[20] Furthermore, the endeavor to educate the nation's youth is not limited to academic training; students spend most of their time at school and become socialized at school. The Court has identified the school's role in "awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[21] Consequently, the Court has recognized a societal interest in teaching students "the boundaries of socially appropriate behavior."[22] Therefore, these "experts" should have the authority to differentiate when a student's behavior or speech will be disruptive to another student's learning or experience,[23] and their decisions should be given significant deference.

B. Public Colleges and Universities

Like elementary and high schools, universities are learning environments with "special characteristics." Such characteristics at the university level, however, create an entirely different educational environment and are precisely what distinguish a college campus from an elementary

[19] *Hazelwood*, 478 U.S. at 273.
[20] *Hazelwood*, 478 U.S. at 271 ("Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach...")
[21] *Hazelwood*, 478 U.S. at 272 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).
[22] *Fraser*, 478 U.S. at 681.
[23] *See id* (distinguishing the case at hand from *Tinker*, the Court explained that "In upholding the students' right to engage in a nondisruptive, passive expression of a political viewpoint in *Tinker*, this Court was careful to note that the case did 'not concern speech or action that intrudes upon the work of the schools or the rights of other students.').

or high school, making *Hazelwood* deference inappropriate. First, the age of students in college is a significant, if not sufficient, factor that demands stringent First Amendment protections. Students on college campuses are adults. Ranging in age, most college students have reached the age of majority upon entering, and are treated as "adults" in most aspects of the law. They have significant rights and privileges that children under the age of 18 do not have. The Third Circuit acknowledged some of the rights, stating "they may vote, marry, make a will, qualify as a personal representative, serve as a guardian of the estate of a minor, wager at racetracks…qualify as a practical nurse, drive trucks, ambulances and other official fire vehicles, perform general fire-fighting duties, and qualify as a private detective.[24] Therefore, as adults, their First Amendment rights, if exercised off of a college campus, would go unquestioned.

The fact that an adult student's speech occurs on a college campus is not enough to remove those First Amendment rights. First, the age and maturity of the student population proscribes the need for school officials to protect the innocence of other students from overexposure to harmful or more mature material that could potentially harm them. The Court recognized that the age, maturity, and independence separate college students from younger students because they are "less impressionable than younger students."[25] And, to the contrary, this is a time in the lives of these students to see, experience, and understand our world in new dimensions. College students are in an atmosphere where it is in their and society's interest that they absorb the variety of ideas and forms of expression that occur around them. One scholar noted, "while inculcating values in children is arguably necessary to an orderly society, such a purpose has no place in the world of adults. Adults must be considered to have the ability to

[24] *See* Nimick, *supra* note 7 at 983-984 (quoting *Bradshaw v. Rawlings* 612 F.2d 135, 139 (3d Cir. 1979)).
[25] *Widmar v. Vincent*, 454 U.S. 263, footnote 14 (1981).

shape their own values outside the realm of institutional coercion."[26] This is especially true with younger college students transitioning into adulthood. Many are leaving home for the first time. From the outset university students are becoming more mature and developing as individual, independent persons. The freedom of exchange a free-flow of ideas on a public university campus is critical to that development because it exposes students to different cultures and ideas, perhaps for the first time. Consequently, students' previous conceptions and perspectives are challenged, which facilitates educational and personal growth. Restricting the speech of students outside of a compelling state interest hinders the ability for other students on college campuses to engage the various methods of thought and to become aware, informed, and independent thinkers.

In addition, adulthood and independence leave the college student with more responsibilities. College students are no longer told precisely how to manage their education; students make the choice to apply to certain schools, choose to attend a particular school, decide on a major, pick their own courses, and choose to attend class on their own accord. Therefore, school officials have significantly less control over *what* a particular student is learning. Because students are older, more mature, and it is in their best interest to gain exposure to a plethora of ideas, and because university officials have less control, those officials do not require the same authority and deference when it comes to regulating student speech on their campuses. Accordingly, a public college student's constitutional rights should be protected to the same degree as a non-student adult.

Second, the role of public universities and their educational missions differ meaningfully from primary and secondary schools. To satisfy those missions, the First Amendment rights of

[26] Greg C. Tenhoff, *Censoring the Public University Student Press: A Constitutional Challenge*, 64 S. CAL. L. REv. 511, 530 (1991).

the students must be vigorously protected, and therefore *Hazelwood's* substantial deference test should not apply. While public universities develop specific educational missions, in general, the educational mission of a college or university is to facilitate independent thinking, learning, and experimenting which fosters an environment where students can develop innovative ideas.[27] In *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967), Justice Brennan, quoting the Court's prior decision in *Sweezy v. State of New Hampshire*, 354 U.S. 234, 250 (1957), explains the role that the university plays in our society and powerfully captures the need to protect free speech in that environment:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made…. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. (internal quotation marks omitted).

Therefore, public universities do not merely provide the education to our future leaders, who sit back passively and absorb. Rather, as the "marketplace of ideas,"[28] the public university is where students develop the means with which they will lead, serve, and innovate. Students do so by being pro-active, taking the lead role in their education, and interacting with professors and other

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[27] *See, e.g.*, *Mission Statement*, UNIVERSITY OF WISCONSIN-MADISON, *available at* http://www.wisc.edu/about/leadership/mission.php (last visited April 23, 2013) ("The primary purpose of the University of Wisconsin–Madison is to provide a learning environment in which faculty, staff and students can discover, examine critically, preserve and transmit the knowledge, wisdom and values that will help ensure the survival of this and future generations and improve the quality of life for all. The university seeks to help students to develop an understanding and appreciation for the complex cultural and physical worlds in which they live and to realize their highest potential of intellectual, physical and human development."); *Mission Statement*, OFFICE OF THE PRESIDENT, UNIVERSITY OF MICHIGAN, *available at* http://president.umich.edu/mission.php (last visited April 23, 2013) ("The mission of the University of Michigan is to serve the people of Michigan and the world through preeminence in creating, communicating, preserving and applying knowledge, art, and academic values, and in developing leaders and citizens who will challenge the present and enrich the future.").

[28] *Healy*, 408 U.S. at 180-81; *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967).

students. To restrict those necessary conversations and communications is against the public interest because it stifles the educational and personal development of our future leaders.

In *Rosenberger v. Rector & Visitors of Univ. of Virginia*, the Court identified this potential problem stating "vital First Amendment speech principles are at stake" where university officials examine student speech because of the danger it poses to speech in general by way of "chilling of individual thought and expression."[29] The Court recognized that the "danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."[30]

Consequently, rather than equate the college campus with a "school" the Supreme Court has equated the college campus with the "community at large," where First Amendment protections are very strong.[31] This characterization weighs heavily against the Court expanding *Hazelwood's* "legitimate pedagogical concerns" test to restricted student speech on a public university campus because the substantial deference it allows for is inconsistent with the First Amendment's application to adults or individuals not in a school setting. The likening of a public college campus to the community at large is appropriate because the individual college student is an adult who is engaged in learning in a more independent capacity. This occurs in an environment where exchange of ideas is essential to the success of each student, the institution, and society in general. The Court has recognized the importance of protecting free speech in that type of environment, announcing that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[32] Therefore, the constitution

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[29] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 835 (1995).
[30] *Id.*
[31] *Healy*, 408 U.S. at 180 ("The precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.").
[32] *Keyishian*, 385 U.S. 589, 603 (1967) (quoting decision in *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

must apply with more force on a college campus than in a primary school, and the First Amendment rights of students must be vigorously protected.[33] To restrict speech, then, university officials should be required to demonstrate that their restriction is narrowly tailored to meet a compelling state interest.

C. Distinction Between Universities and Schools In Other Supreme Court Jurisprudence

The Supreme Court also distinguishes between higher educational institutions and primary and secondary schools when determining when the use of race is constitutional with respect to education. This area of law further solidifies the Court's adherence to the idea that the differences between public universities and schools matter for purposes of constitutional review. To justify the continued use for race-based actions at the university level in *Grutter v. Bollinger*, Justice O'Connor identified the Court's longstanding view that "universities occupy a special niche in our constitutional tradition."[34] She also emphasized "the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment" which Court has steadfastly supported in its prior jurisprudence.[35] *Grutter* solidifies the notion that universities will be specially considered in the Court's constitutional examinations in general.

Moreover, the Court's reasoning in allowing the use of race as a factor in admissions further supports the idea that free speech on campuses is not only imperative, but should be stringently protected. The Court held that there is a compelling state interest to create diverse student populations in public universities because of the significant educational benefits that come from a diverse student population.[36] This is because, as the Court accepted, diversity in

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[33] *See Healy*, 408 U.S. at 180.
[34] *Grutter*, 539 U.S. at 329.
[35] *Id.*
[36] *Grutter*, 539 U.S. at 330 (quoting various *amici* who supported the Law School).

universities "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals,"[37] by promoting "cross-racial understanding," and breaking down of stereotypes, and creates "livelier, more spirited, and simply more enlightening and interesting" classroom discussion.[38] Therefore, the Court has provided universities with the *means* to create diverse environments for students to thrive. Yet the effects the Court has cited to would be nonexistent if the students could not freely express their views, beliefs, and ideas. In fact, before *Grutter*, in *Bakke*, Justice Powell acknowledged the relationship between freedom of speech and education when he stated, "academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."[39] Therefore, applying a standard more rigorous than *Hazelwood* is most logical; it ensures that students in a "diverse atmosphere" have the ability to freely exercise their right to speak about their diverse thoughts, opinions, beliefs, and to challenge one another.

D. Less of a Compelling State Interest to Regulate Speech at University Context

Given the distinctions between public universities and primary and secondary schools, the interest of the state in regulating speech at the different academic levels varies as well.[40] At the elementary and secondary level, the state has a compelling interest to maintain order in schools to create safe and productive learning environments and fulfill their educational missions, all which derive from around the age and maturity of the student population. However, at the university level, those same factors relating to college students – age, maturity, and educational missions– create *less* of a compelling state interest in regulating student conduct. At the same time, the individual student and society as a whole have *more* of a compelling interest

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[37] *Grutter*, 539 U.S. at 329 (quoting various *amici* who supported the Law School).
[38] *Grutter*, 539 U.S. at 329 (quoting the District Court's emphasis on the Law School's admissions policy).
[39] *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978).
[40] *See e.g.*, *Healy*, 408 U.S. at 180-81; *Widmar v. Vincent*, 454 U.S. at 274.

in protecting a college student's right to exercise free speech.[41] The individual has a greater interest to hear others freely express their thoughts and ideas, and to have his or her own challenged because it improves the individual's educational experience and contributes to the individual's development of understanding, patience, and acceptance. Additionally, society as a whole benefits from the university remaining a "marketplace of ideas" where a "robust exchange" of those ideas facilitates innovative thinking because it improves the development and competition of our state and national economies.[42] Therefore, providing university officials with *Hazelwood* deference – the ability to regulate student speech so long as it relates to "legitimate pedagogical concerns" – stifles the very pedagogical concerns universities should be focusing on by hindering the academic progress that would stem from those communications. The best way to protect these interests is to review restrictions of student speech on a public college campus with strict scrutiny, requiring university officials to show that there concern was narrowly tailored to meet a compelling state interest.

III. Forum Analysis

The Supreme Court also engages in a "forum analysis" when examining First Amendment violations.[43] Such an analysis also leads to the conclusion that the Court should apply strict scrutiny, rather than *Hazelwood* deference, to restricted speech at a university because the nature of a public university creates an environment where student speech in any capacity will occur in a public or limited public forum. Laid out by the Court in detail in *Perry*

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[41] *See Brown v. Li*, 308 F.3d 939, 961 (9th Cir. 2002) ("In fact, discussion of controversial ideas on a college campus is essential to the 'background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition' in the university setting.") (Judge Reinhardt, dissenting).

[42] *See Keyishian*, 385 U.S. at 603.

[43] *See Perry Educ. Ass'n v. Perry Local Educ.' Ass'n*, 460 U.S. 37, 45 (1983).

Education Ass'n v. Perry Local Educators' Ass'n,[44] the forum approach dictates that the government can control speech otherwise protected by the First Amendment when it controls the venue of speech in some manner.[45] Thus, after the Court first considers the general setting in which student speech occurs, such as an elementary, high school, or college, the Court then examines the specific means of speech that occurred on that school property. For example, student speech can occur in a student newspaper, on bulletin boards around the facilities, or in an open square on campus where students gather. The Court classifies the "forum" where the speech occurred as one of three categories in order to determine which standard to use in evaluating the state action to restrict the speech.[46]

The first category is the traditional public forum, which consists of "those areas of public property that have been open historically to all for communication or discussion of issues" such as public streets and parks.[47] Speech that occurs in this forum can only be restricted by the state if the restriction serves a compelling interest that is narrowly tailored.[48] The second type of forum is the limited public forum which has been opened to the public for a limited time or purpose. Again, restrictions must serve a compelling interest and be narrowly tailored to meet that interest. The last category is the nonpublic forum, which has not been open to the public, such as mailboxes. Regulations that occur in these forums must only be reasonable.[49]

Generally, public elementary and high schools are not considered "public forums."[50] Our nation's primary and secondary schools are distinct from other more traditional public areas because young children attend these institutions, and the responsibility for their safety lies within

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[44] *Id.*
[45] Nimick, *supra* note 7 at 988.
[46]*Perry*, 460 U.S. at 45. *See also* LaVigne, *supra* note 7 at 1999-1200.
[47] LaVigne, *supra* note 7 at 1200.
[48] *Perry*, 460 U.S. at 45. This applies to "content-based" restrictions. *Id.*
[49] *Perry*, 460 U.S. at 45; LaVigne, *supra* note 7 at 1200.
[50] *See Hazelwood*, 478 U.S. at 267.

the hands of school officials for most of the day. Thus while schools are "public" they are not simply open to the public and people cannot enter or use a school facilities without permission. For example, school doors remain locked during the day, requiring visitors to check in as they arrive, and often schools have security guards at doors or monitoring the halls of schools. Therefore, the presumption is that primary education schools are not public, and to be considered even a limited public forum, school officials would have had to open it for use by some segment of the public to freely engage in expressive activity.[51] Where a school has not been opened up to the public, school official's need only have a reasonable concern, related to a legitimate pedagogical concern, to restrict student speech.

On the other hand, the Supreme Court has specifically identified that the university setting is a public forum or a limited public forum with regard to *certain* types of student speech.[52] In those instances, the Court conducts a strict scrutiny analysis when reviewing a university official's actions to restrict student speech.[53] This should be extended. Given the nature of a college campus a presumption that student speech occurring on campus, in any capacity, takes place in a limited or public forum should be enacted. As a result, strict scrutiny is triggered. [54] This is appropriate because the college campus is a mini-community in and of itself; the community consists of adults who may or may not be students that live in the surrounding area, use the services of businesses in the area, and use the public streets to get to and from their destinations. A public college campus, therefore, is not closed off to the public in the way a high

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[51] *Hazelwood*, 478 U.S. at 267.
[52] *See e.g.*, *Rosenberger*, 515 U.S. at 830 (stating that one of the University of Virginia's student run newspapers was a limited public forum); *Widmar v. Vincent*, 454 U.S. at 267-68, 270.
[53] *See Rosenberger*, 515 U.S. at 830; *Widmar v. Vincent*, 454 U.S. at 267-68, 270 (reasoning that where the University opened faculties up to student groups, it had created a public forum and thus had to justify its discrimination by showing that its regulation was necessary to serve a compelling state interest, and that it is narrowly drawn to achieve that interest).
[54] *Contra* Nimick, *supra* note 7 at 988 (arguing that "Traditional public forum analysis, while logical when applied to a high school setting, is simply unworkable at the university level.").

school or elementary school is.[55] Contrarily, the public is often involved in campus activities by way of having access to student run newspapers, going to college sporting events, or just taking a walk through their town.

Additionally, college student activities are significantly separated from the university itself. Student activities are typically exclusively run by students and generally financially independent from the university.[56] As a result, speech is not, in most cases, "school sponsored," nor does it appear that way.[57] Unlike a high school, a university is less likely to be associated with any one particular belief of any one student or student group.[58] Rather, the general public understands that a university consists of a diverse student body that breaks down into various student organizations and activities and that no one group is a representation of the school as a whole. Therefore, during the form analysis, a presumption that any student speech that occurs on the campus is occurring in a public or limited public forum should be enacted. The burden would rest on the university to show that the speech occurred in a nonpublic forum, and absent that showing, strict scrutiny should be applied to restrictions of student speech.

IV. Conclusion

Supreme Court precedent currently distinguishes between high schools and universities for purposes of constitutional review; the distinctions are purposeful and meaningful, and to ignore them would be to override more than thirty years of precedent.[59] Therefore the *Hazelwood* standard of deference is not appropriate in the university context. Additionally, those distinctions impact the type of forum that student speech occurs in on a college campus. The

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[55] Discussed *supra*, Part II(B).
[56] Nimick, *supra* note 7 at 990.
[57] *See Hazelwood*, 478 U.S. 267 at (limiting the holding to "school-sponsored," distinguishing the case from *Tinker*, which involved "pure speech.").
[58] *See Hazelwood*, 478 U.S. at 266-67 (explaining that a school is entitled to "disassociate itself" from student speech that is "wholly inconsistent with the fundamental values of public school education.").
[59] Nimick, *supra* note 7 at 996.

nature of a public university is such that a presumption that student speech is always occurring in a public or limited public forum is logical. Under that presumption, the Court would review restrictions of student speech on a public college campus with strict scrutiny, requiring university officials to show that their concern was narrowly tailored to meet a compelling state interest. This strict standard is the only suitable standard and it should be applied with rigor in order to ensure that every student's First Amendment rights are protected to the extent demanded by the Constitution.