Case Comment

The Limits on University Control of Graduate Student Speech

Brown v. Li, 308 F.3d 939 (9th Cir. 2002).

In the spring of 1999, Christopher Brown, a master's degree candidate in material sciences at the University of California at Santa Barbara (UCSB), submitted his thesis for approval. The copy reviewed by Brown's thesis committee contained no acknowledgments page. After the committee approved his thesis, Brown inserted an additional two pages entitled "Disacknowledgements,"[1] in which he ranted against professors, the university, former Governor Pete Wilson, and the state of the physical sciences. The opening sentence set the tone for the entire section. Brown began, "I would like to offer special *Fuck You's* to the following degenerates . . . ."[2] He proceeded to complain about "fascists" in the university administration, label one professor as a "prick," and call the university's Board of Regents a "paragon of corrupt mismanagement."[3]

When the university learned about the disacknowledgments page, it declined to file Brown's thesis in its library system and refused to grant him a degree until he removed the offending material. Brown unsuccessfully challenged the decision within the university, and, in June 2000, he filed suit in federal district court under 42 U.S.C. § 1983. Among other claims, Brown alleged that the Dean of the Graduate Division and other named defendants had violated his First Amendment rights. The district court granted the defendants' motion for summary judgment. Brown appealed, and, in a 2-1 decision, a panel of the Ninth Circuit upheld the lower court

1. Brown v. Li, 308 F.3d 939, 943 (9th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3476 (U.S. Jan. 14, 2003) (No. 02-1039).
2. *Id*.
3. Oliver Burkeman, *West Coast Rebel*, GUARDIAN (London), June 27, 2000, at 14.

decision.[4] Judge Susan Graber reasoned as a matter of first impression that the case should be governed by the restrictive First Amendment standard developed by the Supreme Court for high school students in *Hazelwood School District v. Kuhlmeier*.[5] Her opinion represented the first unequivocal application of *Hazelwood* to a postsecondary student[6] and stands in tension with decisions in the Sixth Circuit[7] and First Circuit[8] that specifically declined to apply *Hazelwood* in the context of higher education.[9]

This Comment argues that the Ninth Circuit reached the right result in *Brown v. Li*, but applied the wrong legal standard. The Supreme Court developed the *Hazelwood* test in a case involving a high school newspaper. Its concerns about the "emotional maturity" of high school students and preventing the views of the speaker from being "erroneously attributed to the school" are less persuasive in a university setting.[10] Consequently, *Hazelwood* does not provide an appropriate standard for protecting the First Amendment rights of college and graduate students, who otherwise enjoy the full legal rights of adulthood.[11] This Comment suggests that the Ninth

4. Judges Susan Graber and Warren Ferguson agreed that Brown's First Amendment claim should be dismissed, but failed to agree on the reason, leaving the panel without a clear majority opinion. Judge Ferguson emphasized Brown's deceptive behavior and the power of the university to punish cheaters. *See Brown*, 308 F.3d at 956 (Ferguson, J., concurring).

5. 484 U.S. 260 (1988).

6. Several courts have considered applying *Hazelwood*, but no final decision has unambiguously embraced *Hazelwood* in a university setting. *See* Vanderhurst v. Colo. Mountain Coll. Dist., 208 F.3d 908, 915 (10th Cir. 2000) (using the *Hazelwood* test at the urging of both parties without deciding whether it represents the proper standard for postsecondary cases); Cummins v. Campbell, 44 F.3d 847, 853 (10th Cir. 1994) (citing *Hazelwood* with a parenthetical note about the uncertainty of its application to a college setting as part of a qualified immunity discussion, and concluding that the law about limiting the on-campus screening of a controversial film was not "clearly established"); Bishop v. Aronov, 926 F.2d 1066, 1074-75 (11th Cir. 1991) (adopting the reasoning of *Hazelwood* "even at the university level," but framing a new test for restrictions on the in-class speech of professors that considers "the strong predilection for academic freedom as an adjunct of the free speech rights of the First Amendment"); Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala., 867 F.2d 1344, 1346-47 (11th Cir. 1989) (citing *Hazelwood* with approval but ultimately relying on the district court's general finding of reasonableness rather than on the precise formulation of the *Hazelwood* test); Welker v. Cicerone, 174 F. Supp. 2d 1055, 1065 n.6 (C.D. Cal. 2001) (indicating in dicta that *Hazelwood* governs in university settings, but declining to apply *Hazelwood* to the restrictions at issue in the case); Lueth v. St. Clair County Cmty. Coll., 732 F. Supp. 1410, 1414-15 (E.D. Mich. 1990) (distinguishing *Hazelwood* but failing to question its applicability in future college cases).

7. *See* Kincaid v. Gibson, 236 F.3d 342, 346 n.5 (6th Cir. 2001) (en banc) ("Because we find that a forum analysis requires that the yearbook be analyzed as a limited public forum . . . *Hazelwood* has little application to this case.").

8. *See* Student Gov't Ass'n v. Bd. of Trs. of the Univ. of Mass., 868 F.2d 473, 480 n.6 (1st Cir. 1989) (noting in dicta that "*Hazelwood* . . . is not applicable to college newspapers").

9. The parties disagreed publicly about whether *Brown* created a circuit split. The attorney for the university argued that the Ninth Circuit had successfully distinguished *Kincaid* and *Student Government Ass'n*, thus avoiding a circuit split. *See* David Horrigan, *F-Word in Thesis Earns an F in Court*, NAT'L L.J., Nov. 4, 2002, at A4.

10. *Hazelwood*, 484 U.S. at 271-72.

11. *See* Mark J. Fiore, Comment, *Trampling the "Marketplace of Ideas": The Case Against Extending* Hazelwood *to College Campuses*, 150 U. PA. L. REV. 1915 (2002).

Circuit panel should have instead applied the more protective balancing test that governs cases involving the discipline of professors and denial of tenure. Application of that test should not alter the outcome in *Brown*, but it would lay a better foundation for future cases involving the speech of university students.

I

Judge Graber distinguished *Brown* from other cases declining to apply *Hazelwood* in a postsecondary context by emphasizing the difference between *curricular* speech and *extracurricular* speech.[12] In part, such a distinction tracks traditional First Amendment forum analysis. Judge Graber noted that an "acknowledgments section has a well-defined form and purpose in academic writing."[13] She explained that professors retain an interest in teaching their students the proper use of acknowledgments. UCSB communicated this interest to students through its *Guide to Filing Theses and Dissertations*, which assigned students and their thesis committees joint responsibility for ensuring that "everything between the margins" of their theses would "meet the standards for publishing journal articles or monographs" in their relevant academic fields.[14] Judge Graber seized upon this retention of control by the university to conclude that an academic thesis "is not a public forum, limited or otherwise."[15] Judge Graber's forum analysis seems to rest on solid footing. The Supreme Court has held that the "government does not create a public forum by inaction or by permitting limited discourse but only by intentionally opening a nontraditional forum for public discourse."[16] Although the university approved other nontraditional acknowledgments sections,[17] its lax enforcement of university policies did not signal a specific intent to change the terms of its guide.

On its own, this forum analysis would justify affording acknowledgments sections only limited First Amendment protection. Yet Judge Graber pushed the distinction between curricular and extracurricular speech too far by applying *Hazelwood* and allowing UCSB to impose any speech restrictions "reasonably related to a legitimate pedagogical

12. *Brown*, 308 F.3d at 949-50.
13. *Id*. at 952.
14. *Id*. at 942 (quoting UCSB, GUIDE TO FILING THESES AND DISSERTATIONS (1998)).
15. *Id*. at 954.
16. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985).
17. For example, the university approved a Ph.D. dissertation dedicated to "the dumb ass who left his cooling water ON for a laser that was OFF for 2 years and subsequently flooded my lab, desk, and my most important files: may your bloated, limb-less bodies wash to shore and be picked clean by seabirds and maggots." *Brown*, 308 F.3d at 967 (Reinhardt, J., dissenting).

purpose."[18] *Hazelwood* involved the removal of articles about teen pregnancy and divorced parents from a high school newspaper. A journalism class produced the paper under the supervision of a faculty member as part of the high school curriculum. Judge Graber considered *Hazelwood* to be the "most analogous" case to *Brown* because UCSB also possessed a "strong interest in setting the content of its curriculum and teaching that content."[19] In drawing this analogy, Judge Graber ignored the crucial factors discussed below that argue against applying *Hazelwood* to postsecondary students.

II

The Supreme Court grounded its opinion in *Hazelwood* on the nonpublic nature of the forum involved.[20] The test ultimately adopted by the Court, however, afforded student speech even less protection than typically provided in a nonpublic forum. Traditional nonpublic forum analysis requires that content restrictions be "reasonable in light of the purpose served by the forum."[21] The *Hazelwood* Court only required such restrictions to be "reasonably related to a legitimate pedagogical purpose."[22] This reformulation creates a slippage between the nonpublic forum standard requiring any restriction to be reasonable *in itself* and the *Hazelwood* language requiring only a reasonable *relationship* between the restriction and the final goal. More serious problems emerge when one examines the subsequent explanation in the *Hazelwood* opinion of how courts are to determine whether speech restrictions bear a reasonable relationship to the goals of public education. The Supreme Court explained that courts should strike down challenged controls over student speech "only when the decision to censor . . . has *no* valid educational purpose."[23] This formulation effectively removes the word "reasonably" from the *Hazelwood* standard and permits any regulation of speech *related* to a legitimate pedagogical concern. This is a deferential standard indeed. It is not surprising that numerous commentators have argued that *Hazelwood* provides inadequate First Amendment protection, even for the speech of high school students.[24]

18. *Brown*, 308 F.3d at 947.
19. *Id*. at 951-52.
20. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988).
21. *Cornelius*, 473 U.S. at 806.
22. *Hazelwood*, 484 U.S. at 273.
23. *Id*. (emphasis added).
24. *See, e.g.*, 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, 732; Nancy J. Meyer, *Assuring Freedom for the College Student Press After* Hazelwood, 24 VAL. U. L. REV. 53, 76 (1989); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 190 (1995); S. Elizabeth Wilborn, *Teaching the New Three Rs—Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 123 (1995).

The *Hazelwood* Court offered several justifications for providing relaxed First Amendment protection to high school newspapers: (1) the school's pedagogic interest in teaching students journalistic standards, (2) the emotional immaturity of the paper's audience, and (3) the school's interest in preventing the views of individual speakers from being wrongly attributed to it.[25] The pedagogy justification remains relevant in the postsecondary context and will be discussed below. The final two considerations do *not* apply with the same force to university students, however.[26] In fact, the *Hazelwood* decision itself explicitly reserved judgment on whether the standard it articulated should apply in higher education cases.[27]

First, the maturity concerns of *Hazelwood* prove inapposite in a university setting. University students are "less impressionable than younger students."[28] They exercise a panoply of rights not granted to most high school students, including the rights to vote, serve on juries, purchase firearms, and serve in the military. Nearly all college students can also drive, smoke, purchase pornography, sign legally binding contracts, marry without parental permission, and be tried as adults in the criminal justice system. Although not perfectly correlated with emotional maturity, age functions throughout the law as a bright-line rule. Indeed, the Supreme Court has held that college students are presumptively entitled to the same First Amendment protections as other adults.[29] Applying *Hazelwood* to these students would mark an erosion of their adult rights.

Second, in a university setting, there is less reason to fear misattribution. University students are more independent than elementary and secondary students in setting their own research agendas and expressing their ideas in writing. A third party who might easily assume that a middle school teacher heavily influenced the positions advocated in a student paper is less likely to make the same assumption when reading a college essay. The distinction proves even clearer in a case like *Brown* that involves the acknowledgments section of a graduate paper, since custom dictates that authors control their own acknowledgments. The target

25. *Hazelwood*, 484 U.S. at 271.

26. For an extensive discussion of the differences between high school and college that render *Hazelwood* inappropriate in the college context, see Fiore, *supra* note 11, at 1955-58. *See also* Gail Sorenson & Andrew S. LaManque, *The Application of* Hazelwood v. Kuhlmeier *in College Litigation*, 22 J.C. & U.L. 971, 986 (1996).

27. *Hazelwood*, 484 U.S. at 273 n.7 ("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.").

28. Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981).

29. *See* Healy v. James, 408 U.S. 169, 180 (1972) ("[T]he 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.").

audience for a master's thesis like Brown's on calcium carbonate crystal formation is likely to be quite sophisticated and aware of this custom.

III

The inapplicability of the maturity and misattribution justifications for the *Hazelwood* test in a postsecondary setting leaves open the question of how the remaining justification—the pedagogical interest of the university—should be weighed against a student's interest in free expression. This Comment proposes an approach that draws upon the well-established body of law governing professors who claim that they have been improperly disciplined or denied tenure as punishment for exercising their First Amendment rights.[30] Such cases follow the general test for retaliation against all public employees established in *Pickering v. Board of Education*.[31] The Supreme Court held in *Pickering* that courts should balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[32] Adapted to the student context of the *Brown* case, a court applying the *Pickering* test would balance the university's interest as an educator against Brown's interest in commenting upon the failings of the university. This balancing would better ensure that universities do not engage in improper viewpoint discrimination under the guise of applying neutral academic standards.[33] In contrast to the *Hazelwood* test, under which a university can simply demonstrate a relationship between its action and an educational goal, the *Pickering* test would require the university to

30. *See, e.g.*, Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 678-82 (6th Cir. 2001); Lighton v. Univ. of Utah, 209 F.3d 1213, 1224-25 (10th Cir. 2000); Williams v. Ala. State Univ., 102 F.3d 1179, 1182-84 (11th Cir. 1997); Keen v. Penson, 970 F.2d 252, 257-59 (7th Cir. 1992).

31. 391 U.S. 563 (1968).

32. *Id.* at 568; *see also* Connick v. Myers, 461 U.S. 138, 154 (1983) (concluding that courts only need to perform the *Pickering* balancing procedure if the speaker has commented upon a matter of "public concern").

33. Commentators and courts have occasionally objected to the use of balancing tests to determine the scope of First Amendment violations on the grounds that such tests provide insufficient guidance to parties and therefore unnecessarily chill speech. *See* Scallet v. Rosenblum, 911 F. Supp. 999, 1011 (W.D. Va. 1996) ("The court notes that it has reservations about extending the *Pickering* analysis to the in-class speech of university professors and graduate school instructors since the test does not explicitly account for the robust tradition of academic freedom in those quarters."); 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 2:59 (4th ed. 2000); Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 583 (1998) ("Regulation of public employees' speech is governed by imprecise public concern and balancing tests that . . . impermissibly chill the exercise of First Amendment rights."). However, it is hard to imagine the proposed test chilling speech any more than the *Hazelwood* standard, which requires plaintiffs to prove that objectionable restrictions on speech serve no valid educational purpose.

elaborate further on the nature and importance of its pedagogic goal and to establish a sufficient nexus between the means chosen and the goal pursued to outweigh the student's interest in free expression.

The analogy between university students and their professors is not perfect, but it provides better guidance than Judge Graber's application of *Hazelwood*. Like the employer-employee relationship, student-professor interactions at the university level are voluntary and involve adults. In contrast, elementary and secondary students study in the context of a custodial relationship based on mandatory attendance laws and the application of in loco parentis principles. University students, particularly graduate students, also more closely resemble their professors as they, too, exercise rights commonly bundled together under the heading of "academic freedom."[34] Postsecondary students enjoy a great deal of leeway in choosing their courses and in pursuing research topics. Indeed, UCSB's insistence that Brown abide by norms of professionalism when writing his acknowledgments section implies that the university itself recognized the similarities between his status and that of a professor.

Pickering represents a compromise between the free expression of those standing in a special relationship with the state and the desire of the state to control their speech. One of the primary virtues of the test is its flexibility. *Pickering* can easily accommodate notions of academic freedom by placing them on the side of the scales favoring free expression. *Hazelwood*, on the other hand, provides little opportunity to consider the nature of academic freedom because it focuses only on the interests of the state.[35]

IV

A switch from the *Hazelwood* test to the *Pickering* test would not have changed the outcome in *Brown*. Professors have a strong interest in guiding student use of acknowledgments sections because such sections are

34. Academic freedom proves problematic as a legal concept because of disagreement about whether the right attaches to individuals or institutions. *See* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 257 (1989). This Comment uses the term in its more conventional sense denoting the well-recognized need to protect intellectual inquiry from state interference.

35. In his dissenting opinion in *Brown*, Judge Reinhardt suggested adopting an intermediate form of scrutiny requiring the university to demonstrate a *substantial* relationship between its restrictions and a legitimate pedagogical concern. *Brown*, 308 F.3d at 964 (Reinhardt, J., dissenting). The problem with Judge Reinhardt's intermediate scrutiny suggestion is that it remains wedded to the unbalanced framework of *Hazelwood* by continuing to focus only on the state's interest without asking whether the speech itself merits additional protection because it occurs in a university setting. It therefore fails to weigh the unique status of higher education as a "marketplace of ideas" in the same manner as a *Pickering*-style balancing test. *See* Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967) (characterizing classrooms as a "marketplace of ideas").

common in academic publications and are governed by norms of professionalism. Students who do not learn the appropriate use of acknowledgments risk their chances for publication. In *Brown*, the need for corrective action was particularly pressing. Not only did Brown fill his disacknowledgments section with profanity and unprofessional attacks, but he also included an inordinate number of grammatical errors.[36] The educational benefit of refusing to accept Brown's thesis was clear and outweighed Brown's interest in expressing his criticism of the university within his thesis itself.

If the *Brown* court had switched from *Hazelwood* to *Pickering*, however, it would have laid a better foundation for future cases analyzing the First Amendment claims of university students. *Hazelwood* has shown a remarkable ability to spread from its original context to cover other areas of secondary education.[37] The resulting impact on freedom of speech has been pronounced. Applying *Hazelwood* in a university setting risks setting off a similar chain reaction. Would courts accept a university's desire not to anger a wealthy donor as a legitimate pedagogical interest? What about the perceived need to maintain order on campus? What if a college censored a student newspaper in the name of teaching journalistic standards? The *Pickering* test is no panacea, but it provides courts with more leverage to police the boundary between illegitimate censorship and permissible educational practice.

—Tom Saunders

36. *See* Burkeman, *supra* note 3 (characterizing the disacknowledgments section as a "vigorous, if occasionally illiterate, tirade").

37. *See, e.g.*, Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the "College* Hazelwood*" Case*, 68 TENN. L. REV. 481, 499 (2001) (discussing *Hazelwood*'s application in cases involving random drug tests, a student's right to receive information, the management of school facilities, and student attendance at off-campus parties); *see also* Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990) (applying *Hazelwood* to the in-class Bible reading of a fifth-grade teacher).