

A Common Judicial Standard for Student Speech Regulations

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*The First Amendment’s applicability to student speech in public education is a heavily litigated and widely studied issue. Much of this legal action and commentary has centered on the Supreme Court’s two major standards for reviewing student speech regulations—formulated successively in *Tinker v. Des Moines Independent Community School District* and *Hazelwood School District v. Kuhlmeier*. The Court has never clarified exactly what educational institutions are covered by these standards, leaving their applicability to higher education disputed by academics and, to a lesser extent, lower courts. Additionally, *Tinker* is less deferential to school administrators than *Hazelwood*, creating a major tension in First Amendment law. This Note proposes a common standard applicable to all levels and forms of public education as an alternative to the separate *Tinker* and *Hazelwood* standards. Under this new standard, an educational institution may regulate student speech within a curricular context so long as those regulations are reasonably related to legitimate pedagogical concerns. Outside a curricular context, student speech regulations are only permissible if the speech has or would likely materially and substantially disrupt pedagogical activities, prevent appropriate discipline, or interfere with the legal rights of others. In bringing the two standards together, this Note eliminates a major flaw with the *Hazelwood* standard—the “school-sponsored” requirement—and clarifies elements the Supreme Court previously left vague.*

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Introduction

On March 14, 2018, elementary, middle, and high school students throughout the United States walked out of their classrooms for seventeen minutes, calling for authorities at all levels of government to enact stricter gun control laws.¹ Organizers estimated that almost 1 million students participated in the walkout across more than 3,000 registered protests.² In the days leading up to the walkout, a number of school districts cautioned that students who left class would be subject to discipline, citing concerns

1. Arian Campo-Flores, *Gun-Violence Protests Drew an Estimated 1 Million Students*, WALL ST. J. (Mar. 15, 2018, 7:41 AM), <https://www.wsj.com/articles/students-plan-national-school-walkout-to-protest-shootings-1521019801> [<https://perma.cc/3CLZ-KHPR>]; see also Emanuella Grinberg & Holly Yan, *A Generation Raised on Gun Violence Sends a Loud Message to Adults: Enough*, CNN (Mar. 16, 2018, 5:03 PM), <https://www.cnn.com/2018/03/14/us/national-school-walkout-gun-violence-protests/index.html> [<https://perma.cc/NJE9-W2W2>] (identifying specific policies supported by the movement).

2. Campo-Flores, *supra* note 1.

including student safety and disruption to school operations.³ In a country whose Constitution protects all persons from government restrictions on their freedom of speech, a situation like the 2018 walkout raises two important legal questions. First, in what situations can school authorities, as state actors, restrict speech and expressive activity that would otherwise be constitutionally protected? Second, how do differences between schools (e.g., the students’ age, curriculum, campus layout) affect what restrictions are constitutionally permissible?

The Supreme Court formulated its core test for student speech regulations in *Tinker v. Des Moines Independent School District*.⁴ Under *Tinker*, students at public schools are free to express their opinions, no matter how controversial, as long as they do so without “‘materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others.”⁵ *Tinker* thus protects student speech from sanction by school officials acting as government agents, but not categorically. In formulating the “substantial-disruption test,” the Court established that the “special characteristics” of an educational environment allow restrictions on speech by students that would be impermissible in other contexts.⁶

In the five decades since *Tinker* was decided in 1969, the Supreme Court has heard four major successor cases regarding student speech rights: three that limit the application of the substantial-disruption test and one that purports to clarify it. *Bethel School District No. 403 v. Fraser*⁷ and *Morse v. Frederick*⁸ grant more judicial deference to school regulations of “lewd and indecent speech”⁹ and speech that “can reasonably be regarded as encouraging illegal drug use”¹⁰ respectively, creating content-specific

3. Tom Dart, *Walkout Wednesday: Students Risk Punishment for Joining Gun Control Protest*, GUARDIAN (Mar. 13, 2018, 1:00 PM), <https://www.theguardian.com/us-news/2018/mar/13/walkout-wednesday-students-gun-control-protest> [<https://perma.cc/28RC-3VQ8>].

4. 393 U.S. 503 (1969).

5. *Id.* at 513 (alteration in original) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

6. *Id.* at 506–07, 514. Unless mentioned otherwise, all schools and educational institutions referenced in this Note are public rather than private. Also, all referenced legal rules and holdings about student speech rights as protected by the First Amendment apply exclusively to public educational institutions. *Tinker* and its successor cases apply to public school employees because they act as government agents subject to the First Amendment. *See id.* at 509 (stating that the substantial-disruption test determines when “the State in the person of school officials [can] justify prohibition of a particular expression of opinion”).

7. 478 U.S. 675 (1986).

8. 551 U.S. 393 (2007).

9. *Fraser*, 478 U.S. at 685.

10. *Morse*, 551 U.S. at 397.

carveouts where regulations are permissible even if they fail the substantial-disruption test. *Hazelwood School District v. Kuhlmeier*,¹¹ by contrast, covers far more content than *Fraser* and *Morse*. Distinguishing situations where a school “affirmatively . . . promot[es]” student speech from situations where, as in *Tinker*, the school merely “tolerate[s]” student speech, the *Hazelwood* Court held that schools can regulate speech in “school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”¹² I.e., schools may “assure that participants learn whatever lessons the activity is designed to teach.”¹³ *Hazelwood* thus created a standard that is much more deferential to school officials than *Tinker*’s and covers speech in a broad array of activities—like classwork and extracurricular activities—that “may fairly be characterized as part of the school curriculum.”¹⁴ But such activities must be “reasonably perceiv[able] to bear the imprimatur of the school” for *Hazelwood*’s more lenient standard to apply.¹⁵

Most recently in *Mahanoy Area School District v. B.L.*,¹⁶ the Court affirmed that “the special characteristics that give schools additional license to regulate student speech [do not] always disappear when a school regulates speech that takes place off campus.”¹⁷ The speech at issue in *Mahanoy*—“vulgar language and gestures criticizing . . . the school” outside school hours and away from campus on social media—did not create a threat of disruption that met the *Tinker* standard.¹⁸ But the Court suggested in dicta that various forms of off-campus conduct like harassment and bullying may suffice.¹⁹ Commentators, including Justice Thomas in his dissent, have argued that *Mahanoy*, by declining to establish clear guidelines, will not provide substantial guidance to lower courts in future cases involving off-campus speech.²⁰

11. 484 U.S. 260 (1988).

12. *Id.* at 270–71, 273.

13. *Id.* at 271.

14. *Id.*

15. *Id.*

16. 141 S. Ct. 2038 (2021).

17. *Id.* at 2045.

18. *Id.* at 2042, 2047–48.

19. *Id.* at 2045.

20. See, e.g., Daniel W. Gudorf, Case Note, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2042 (2021), 48 OHIO N.U. L. REV. 169, 189 (2021) (“[I]n this case, it will likely be difficult for future courts and schools to draw much guidance from *Mahanoy* in deciding similar free speech controversies involving off-campus speech.”); *Mahanoy*, 141 S. Ct. at 2063 (Thomas, J., dissenting) (“In effect, [the Court] states just one rule: Schools can regulate speech less often when that speech

Mahanoy's vagueness regarding when schools can regulate off-campus speech is only the latest issue in the *Tinker* series producing legal uncertainty. The Court has never explicitly confirmed whether the standards formulated in *Tinker* or *Hazelwood* apply to universities.²¹ The Court's reasoning in *Fraser*, *Morse*, and *Mahanoy* heavily depends on schools' interest in protecting children²²—indicating little to no applicability to universities—but such child-specific reasoning is not present in *Tinker* or *Hazelwood*.²³ Legal scholarship has been generally critical of courts using either case as a standard for regulating speech by university students,²⁴ although courts use both cases in a higher education context relatively consistently.²⁵ A second issue is that *Tinker* and *Hazelwood* are in tension with each other. Having emerged from very different courts over a fifty-year period, the cases subsequent to *Tinker* weigh and evaluate different interests involved in divergent ways to determine what restrictions on student speech are constitutional. *Hazelwood* devotes substantial attention to a factor completely unaddressed in other *Tinker* cases: whether the school established an activity or facility as a public forum.²⁶ Legal scholarship has generally

occurs off campus.”); David L. Hudson Jr., *Mahanoy Area School District v. B.L.: The Court Protects Student Social Media but Leaves Unanswered Questions*, 2021 CATO SUP. CT. REV. 93, 105–06 (discussing “unanswered questions” in *Mahanoy*, including how courts should weigh features of off-campus speech and how to determine when the effects of off-campus speech are “serious or severe” enough to merit government regulation under *Tinker*).

21. Unless specified otherwise, I use the terms “universities,” “colleges,” and “post-secondary education” interchangeably to refer to all forms of higher education.

22. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (noting special state interest in protecting minors from sexually explicit speech); *Morse v. Frederick*, 551 U.S. 393, 407 (2007) (arguing that schools have a compelling purpose in deterring drug use by children because it is particularly harmful for them); *Mahanoy*, 141 S. Ct. at 2046 (stating that one reason why schools generally have a diminished interest in regulating off-campus speech is that administrators rarely stand in the place of students' parents outside school); *id.* at 2049 n.2 (Alito, J., concurring) (“I do not understand the decision in this case to apply to [public college or university] students.”).

23. See *infra* note 82 and accompanying text; *infra* section II(B)(1).

24. See, e.g., Meggen Lindsay, Note, *Tinker Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students*—*Tatro v. University of Minnesota*, 38 WM. MITCHELL L. REV. 1470, 1473 (2012) (arguing that the *Tinker* standard “should be restricted to K–12 speech”); Mark J. Fiore, Comment, *Trampling the “Marketplace of Ideas”*: *The Case Against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915, 1955 (2002) (arguing that “the inherent differences between younger students and college students” make applying *Hazelwood* to higher education “largely illogical”).

25. See, e.g., *Collins v. Putt*, 979 F.3d 128, 132 (2d Cir. 2020) (upholding an application of the *Hazelwood* standard because the speech at issue, a blog post written by a college student for a class assignment, was school-sponsored and noting that otherwise, the *Tinker* standard would apply); *infra* sections II(A)(2), II(B)(2).

26. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988).

addressed this tension by criticizing *Hazelwood*²⁷ rather than exploring how it can be reconciled with *Tinker* as part of a coherent set of legal standards.

This Note formulates a new “common standard” for when public educational institutions can restrict, sanction, or otherwise regulate speech and expression by students, applicable to all levels and forms of education. In doing so, it aims to integrate *Tinker* and *Hazelwood* in a way that is clearer and more coherent than the existing separate standards. This common standard would allow schools to regulate student speech within a curricular context so long as those regulations are reasonably related to legitimate pedagogical concerns. Outside a curricular context, whether on- or off-campus, speech regulation would only be permissible if the speech would (1) materially and substantially disrupt an activity in the curricular context serving a legitimate pedagogical purpose, (2) prevent appropriate discipline in the curricular context or in school facilities, or (3) interfere with the legal rights of other persons. This new standard is analytically conservative, aiming to hew as closely as possible to the original holdings in *Tinker*, *Fraser*, *Hazelwood*, *Morse*, and *Mahanoy* without being logically incoherent. While substantive defenses and critiques of the cases are beyond the scope of my analysis, the common standard deviates from precedent by clarifying elements the Supreme Court previously left vague and eliminating *Hazelwood*’s requirement that speech be “school-sponsored” to receive more judicial deference.

Part I explains in depth the standards articulated in *Tinker* and *Hazelwood*, which form the basis of the new common standard. Part II analyzes how *Tinker* and *Hazelwood* apply to higher education, demonstrating empirically that lower courts universally apply *Tinker* to universities, and a large majority apply *Hazelwood* to them as well. It also argues that both *Tinker* and *Hazelwood*, as currently formulated by the Supreme Court and interpreted by subsequent cases, properly apply to post-secondary education as a matter of law, although state governments can certainly adopt more liberal speech standards that limit the power of university administrators to restrict speech. Part III formulates the new common standard for student speech regulation, explaining differences with the established *Tinker* and *Hazelwood* standards. It also defines the terms used in the standard—such as “curricular context,” “legitimate pedagogical purpose,” and “substantial disruption”—that *Tinker* and *Hazelwood* left undefined.

27. See *infra* note 75 and accompanying text.

I. The *Tinker* and *Hazelwood* Standards

This Part explains and analyzes the standards the Supreme Court formulated in *Tinker* and *Hazelwood* in detail. Subpart A discusses *Tinker*'s substantial-disruption test, and subpart B discusses the separate deferential standard *Hazelwood* applies to schools regulating student speech in school-sponsored activities.

A. *Tinker: The Substantial-Disruption Test*

The first case substantively defining the First Amendment rights of students in public schools, *Tinker*, established that the First Amendment protects student speech and expression.²⁸ But the “special characteristics of the school environment”²⁹ allow schools to regulate how students exercise those rights in limited circumstances.

Tinker concerned a coordinated protest by several public school students, who wore black armbands to class to publicize their opposition to U.S. involvement in the Vietnam War.³⁰ After school administrators “became aware of the plan” several days before the demonstration, they preemptively adopted a policy banning the wearing of armbands in all secondary schools.³¹ The three *Tinker* plaintiffs wore armbands anyway and were suspended under the rule.³² Ultimately, the Supreme Court found for the students.³³ The Court noted that numerous precedents over the preceding fifty years made it “unmistakable” that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”³⁴ However, those precedents also affirmed that officials could and needed to maintain discipline and order in schools.³⁵

The Court reasoned that the discipline and order schools can enforce is limited considering the fundamental rights of their students. Schools cannot limit student speech “to the expression of those sentiments that are officially approved” and must make a “specific showing of constitutionally valid

28. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

29. *Id.*

30. *Id.* at 504.

31. *Id.*

32. *Id.*

33. *Id.* at 514.

34. *Id.* at 506–07.

35. *Id.* at 507 (first citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); and then citing *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)).

reasons” to implement a speech policy.³⁶ Suppressing viewpoints that contradict official opinion cannot, on its own, justify regulating speech. The Court defined the appropriate justifications for student speech regulation by stating that a student can express their opinions freely, “even on controversial subjects . . . if he does so without ‘materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others.”³⁷ This new test drew heavily from several forerunner cases. The first prong of *Tinker*’s new substantial-disruption test—material and substantial interference with discipline—directly quoted the Fifth Circuit’s formulation in *Burnside v. Byars*,³⁸ a very similar student speech case.³⁹ The second prong—collision with the rights of others—incorporated an idea articulated in *Blackwell v. Issaquena County Board of Education*⁴⁰ (a companion case to *Burnside* in the Fifth Circuit) that the state’s interest in preserving others’ rights can also justify regulating student speech.⁴¹

Back to *Tinker* itself, the Court determined that no disruption or disturbances resulted from the students wearing the armbands.⁴² Indeed, no facts in the record would make one reasonably believe that disruption was imminent.⁴³ Because the record in *Tinker* was so favorable to the plaintiffs, the Court did not need to further clarify the boundaries of the substantial-disruption test’s two prongs. As such, the opinion does not directly define what constitutes a substantial disruption, although it establishes that speech restrictions must be motivated by “something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”⁴⁴ It is also uncertain how the test would apply in different school-related contexts. For instance, can speech in the classroom

36. *Id.* at 511.

37. *Id.* at 513 (second alteration in original) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

38. 363 F.2d 744 (5th Cir. 1966).

39. *Burnside* held that a school policy barring students from wearing “freedom buttons,” *id.* at 746, was unconstitutional. *Id.* at 749. Because there was no evidence of significant disruption at the school in question, the policy was “arbitrary and unreasonable.” *Id.* at 748–49.

40. 363 F.2d 749 (5th Cir. 1966).

41. *Tinker*, 393 U.S. at 513 (“[C]onduct by the student . . . [that] involves . . . invasion of the rights of others, is, of course, not immunized by the constitutional guarantee of freedom of speech.” (citing *Blackwell*, 363 F.2d 749, 754)). The Fifth Circuit noted in *Blackwell* that “a collision with the rights of others” would justify speech restrictions. *Blackwell*, 363 F.2d at 754 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630 (1943)).

42. *Tinker*, 393 U.S. at 514.

43. *Id.*

44. *Id.* at 509.

be more closely regulated than speech in the cafeteria? The Court suggested in dicta that discussions in class are “supervised and ordained”⁴⁵ in a way speech in a noncurricular context is not, but it treated the substantial-disruption test as a universal standard for regulating student speech whenever a student is “on the campus during the authorized hours” of the school day.⁴⁶ Adding further uncertainty, the opinion refers to the rights-of-others prong as “the rights of other students” several times in the opinion,⁴⁷ but only identifies two rights schools can protect from interference: “to be secure and to be let alone.”⁴⁸

In summary, *Tinker*’s substantial-disruption test is simple but vague, identifying two circumstances where schools can restrict student speech but defining them only cursorily, if at all. These features make *Tinker* highly flexible but in need of substantive clarification by the Supreme Court.⁴⁹ *Tinker*’s standard applied to all student speech in an academic environment as originally formulated, but subsequent jurisprudence in *Fraser*, *Hazelwood*, and *Morse* carved out exceptions of varying size. *Tinker* nonetheless remains the default standard for student free speech cases.⁵⁰

B. *Hazelwood*: Broader Deference for School-Sponsored Activities

Hazelwood, decided nineteen years after *Tinker*, establishes a far more deferential standard to school officials but applies only to “school-sponsored” activities.⁵¹ Under the *Hazelwood* standard, no risk of substantial disruption at school or collision with the rights of others is necessary for officials to restrict student speech in these activities. Instead, speech regulations must only be “reasonably related to legitimate pedagogical

45. *Id.* at 512.

46. *Id.* at 512–13.

47. *Id.* at 508–09.

48. *Id.* at 508.

49. Other criticisms of *Tinker* are highly diverse. *See, e.g.*, Noah C. Chauvin, *Replacing Tinker*, 56 U. RICH. L. REV. 1135, 1138 (2022) (arguing that *Tinker* is insufficiently protective of student speech because it is overly deferential to school officials and allows schools to restrict speech based on others’ potential reactions); R. George Wright, *Post-Tinker*, 10 STAN. J. C.R. & C.L. 1, 21, 25 (2014) (arguing that *Tinker* is insufficiently deferential to school officials and does not measurably contribute to the aims of public education).

50. *See* Brett Thompson, Comment, *Student Speech Rights in the Modern Era*, 57 MERCER L. REV. 857, 894, 898 (2005) (noting that courts continue to use *Tinker* for speech that “‘happens to occur’ at school” while using the *Hazelwood* standard for school-sponsored speech).

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

concerns,”⁵² with the scope of those concerns largely determined by parents and schools rather than by courts.⁵³

The speech at issue in *Hazelwood* was not a one-off, localized expression of antiwar sentiment by a handful of students like in *Tinker*, but articles in a high school paper that circulated more than 4,500 copies a year.⁵⁴ The paper, *Spectrum*, was written and edited by Hazelwood East High School students as part of a journalism class, with all publication costs paid for by the local Board of Education.⁵⁵ Due to concerns about a planned article about teenage pregnancy, the school’s principal, Robert Reynolds, exercised his prepublication-review powers and removed two pages from an issue of the paper.⁵⁶ In response, several *Spectrum* students filed a lawsuit against the school district seeking an injunction and other relief.⁵⁷ Ultimately, the Supreme Court found that Reynolds’ conduct was in fact reasonable and did not violate the *Spectrum* students’ First Amendment rights.⁵⁸

The Court first considered whether *Spectrum* had been designated as a public forum, as the Eighth Circuit had concluded below.⁵⁹ In *Perry Education Ass’n v. Perry Local Educators’ Ass’n*⁶⁰—decided after *Tinker* but before *Hazelwood*—the Court had identified three categories of forums on public property.⁶¹ Had the paper been a designated public forum, regulations

52. *Id.* at 273.

53. *See id.* (“This standard 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.”).

54. *Id.* at 262.

55. *Id.* at 262–63.

56. *Id.* at 263–64. Reynolds believed that the anonymous students referenced in the article “still might be identifiable from the text” and that some of the article’s material was “inappropriate for some of the younger students at the school.” *Id.* at 263. He also thought that the parents of a student referenced in an article about divorce “should have been given an opportunity to respond to [the student’s] remarks or to consent to their publication.” *Id.*

57. *Id.* at 264.

58. *Id.* at 276.

59. *Id.* at 267; *see also* *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1372 (8th Cir. 1986) (holding that “*Spectrum* is a public forum because it was intended to be and operated as a conduit for student viewpoint”), *rev’d*, 484 U.S. 260 (1988).

60. 460 U.S. 37 (1983).

61. The first category, traditional public forums such as streets and parks, *id.* at 45 (citing *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)), comprises places where courts apply strict scrutiny to speech regulations, meaning the government can only enforce content-neutral regulations “narrowly tailored to serve a significant government interest.” *Id.* (first citing *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 132 (1981); then citing *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n*, 447 U.S. 530, 535–36 (1980); then citing *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); then citing *Cantwell v. Connecticut*, 310 U.S. 296, 311

on the paper's content would have been subject to strict scrutiny.⁶² Examining the record, the Court found that as a school-regulated curricular activity, there was no evidence that the school had opened the paper to "indiscriminate use" by the journalism students "either 'by policy or by practice.'"⁶³ Instead, faculty had exercised substantial control over things like publication timelines, selecting editors, and printing, in addition to Reynolds's established practice of prepublication review.⁶⁴ To the extent students had journalistic freedom, it was consistent with the pedagogical purposes of the journalism class, not an indication that the newspaper was a designated public forum.⁶⁵

Having dismissed arguments that deference to the school should be limited based on forum analysis, the Court distinguished the articles at issue from the student speech in *Tinker*. "The question whether the First Amendment requires a school to *tolerate* particular student speech," the Court argued, "is different from the question whether the First Amendment requires a school affirmatively to *promote* particular student speech."⁶⁶ The Court identified three major reasons why authorities had greater latitude to constitutionally regulate student expression in these school-sponsored activities. Specifically, a school's interests at stake include (1) assuring that students learn whatever the activity is supposed to teach, (2) limiting students' exposure to material beyond their maturity level, and (3) preventing others from erroneously attributing students' views to the school itself.⁶⁷ Thus, the Court concluded that a more deferential standard applied. Regulation of school-sponsored speech is the rule, not the exception. Rather than resorting to the regulation of speech only when there is a threat of substantial disruption or interference with the rights of others, officials can exercise control over student speech in school-sponsored activities so long as such control is "reasonably related to legitimate pedagogical concerns."⁶⁸

(1940); and then citing *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939)). Because traditional forums are long-established as public venues for expression, authorities may not prohibit all public expression. *Id.* In the second category, a state can also designate government property as a public forum. *Id.* at 45–46. In the third category, all other public property, nonpublic forums, are governed by a more deferential standard where speech regulations are constitutional so long as they are reasonable and not viewpoint discriminatory. *Id.* at 46.

62. *Id.* at 45–46.

63. *Hazelwood*, 484 U.S. at 270 (quoting *Perry*, 460 U.S. at 47).

64. *Id.* at 268–69.

65. *See id.* at 269–70 ("A decision to teach leadership skills in the context of a classroom activity hardly implies a decision to relinquish school control over that activity.")

66. *Id.* at 270–71 (emphasis added).

67. *Id.* at 271.

68. *Id.* at 273.

Reynolds's actions were thus constitutional. Under the circumstances, he could reasonably conclude that the articles were inappropriate material for a high school audience and did not sufficiently reflect mastery of the class's curriculum on journalism ethics.⁶⁹

To be constitutionally valid under *Hazelwood*, a speech restriction must meet three criteria. First, the restriction must target curricular speech. The Court limited its conception of school-sponsored activities where such speech occurs to those that “are supervised by faculty members and designed to impart particular knowledge or skills to student participants” rather than any speech that happens to occur on a school campus.⁷⁰ Second, the restriction must target speech that is school-sponsored, i.e., speech that others could “reasonably perceive to bear the imprimatur of the school.”⁷¹ Combined, these two attributes make the speech *promoted* by the school and thus covered by the *Hazelwood* standard, as opposed to the *tolerated* speech covered by the *Tinker* standard.⁷² Third, the restrictions must be “reasonably related to legitimate pedagogical concerns.”⁷³ *Hazelwood* does not define the scope of “legitimate” concerns but suggests a highly deferential standard by declaring education “primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”⁷⁴

Legal scholarship has generally opposed the *Hazelwood* standard, believing that its deference to schools threatens students' First Amendment rights and academic freedom.⁷⁵ *Hazelwood* has also been criticized for using

69. *Id.* at 274–76.

70. *Id.* at 271; *cf.* RESTATEMENT OF CHILD. AND THE L. § 8.10 cmt. e (AM. L. INST., Tentative Draft No. 3, 2021) (defining curricular speech as “any expressive activity that is designed and/or supervised by school personnel to facilitate students' learning”). Note that neither *Hazelwood* nor the *Restatement* limit curricular speech to specific physical locations. *Compare Hazelwood*, 484 U.S. at 271 (noting that school-sponsored activities can be regulated “whether or not they occur in a traditional classroom setting”), with RESTATEMENT OF CHILD. AND THE L. § 8.10 cmt. e (AM. L. INST., Tentative Draft No. 3, 2021) (“A curricular activity can take place . . . outside of the school's property . . .”).

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

72. *Id.* at 270–71.

73. *Id.* at 273.

74. *Id.*; *see also* RESTATEMENT OF CHILD. AND THE L. § 8.10 cmt. f (AM. L. INST., Tentative Draft No. 3, 2021) (noting that the legitimate pedagogical concern standard is “highly deferential to the school's decisionmaking” and can include diverse aims like “fostering certain values, . . . ensuring students' emotional well-being, and imposing discipline”); Maria Morocco, *Hazelwood One Year Later*, UPDATE ON L.-RELATED EDUC., Spring 1989, at 48, 49 (characterizing *Hazelwood* as more deferential to school officials than *Tinker*).

75. Rosemary C. Salomone, *Free Speech and School Governance in the Wake of Hazelwood*, 26 GA. L. REV. 253, 254 (1992); *see also, e.g.*, Helene Byrks, Comment, *A Lesson in School Censorship: Hazelwood v. Kuhlmeier*, 55 BROOK. L. REV. 291, 292 (1989) (arguing that

broad, unclear language⁷⁶ and distorting *Tinker* and other relevant precedents.⁷⁷ Due to the breadth of the school-sponsored-speech concept, *Hazelwood* is the largest and most significant exception to *Tinker* that the Supreme Court has formulated. It establishes a parallel standard to *Tinker*'s substantial-disruption test that can seem to conflict with the protective reasoning in *Tinker* itself. A more deferential standard for regulating student speech is appropriate in some circumstances. But as Part III shows, the proper distinction is between curricular and noncurricular speech, not between school-sponsored and unsponsored speech.

II. Applying *Tinker* and *Hazelwood* to Post-Secondary Education

This Part explains how the standards formulated for student speech rights in *Tinker* and *Hazelwood* apply to all public educational institutions rather than only to primary and secondary education. This analysis is, like existing case law, generally focused on universities but applicable to any context where a state actor is acting as a teacher in a teacher–student relationship. Subpart A discusses *Tinker*'s substantial-disruption test, and subpart B discusses *Hazelwood*'s school-sponsored speech standard. The new standard formulated in Part III, hewing closely to *Tinker* and *Hazelwood*, will apply to higher education as well. While both standards give university

Hazelwood's sweeping language could lead to widespread erosion of student First Amendment rights); Dinita L. James, Note, *The School as Publisher: Hazelwood School District v. Kuhlmeier*, 67 N.C. L. REV. 503, 504 (1989) (predicting that schools would “invoke their broad powers to stifle student expression”); Shari Golub, Note, *Tinker to Fraser to Hazelwood—Supreme Court's Double Play Combination Defeats High School Students' Rally for First Amendment Rights: Hazelwood School Dist. v. Kuhlmeier*, 38 DEPAUL L. REV. 487, 514–15 (1989) (seeing *Hazelwood* as a major step in the Supreme Court's “obliteration of students' first amendment rights”); Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third “Essential Freedom,”* 45 STAN. L. REV. 1835, 1847 (1993) (calling *Hazelwood* “unfortunate”); E. Edmund Reutter, Jr., *Academic Freedom Advisory: Be Wary of the Long Arm of Kuhlmeier*, 89 WEST'S EDUC. L. REP. 347, 347 (1994) (expressing concern over *Hazelwood*'s impact on academic freedom); Gail Sorenson & Andrew S. LaManque, *The Application of Hazelwood v. Kuhlmeier in College Litigation*, 22 J. COLL. & U. L. 971, 973 (1996) (discussing *Hazelwood*'s impact on both faculty and student speech rights); W. Wat Hopkins, *Hazelwood v. Kuhlmeier: Sound Constitutional Law, Unsound Pedagogy*, 16 N. KY. L. REV. 521, 538–39 (1989) (arguing that *Hazelwood*-style censorship in student activities is not pedagogically legitimate, even if the basic holding in *Hazelwood* is legally sound). *But see* Bruce C. Hafen, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 685 (1988) (arguing *Hazelwood* strengthens students' fundamental interest in free expression and helps develop their educated capacity for self-expression); Bruce C. Hafen & Jonathan O. Hafen, *The Hazelwood Progeny: Autonomy and Student Expression in the 1990's*, 69 ST. JOHN'S L. REV. 379, 379 (1995) (arguing that courts post-*Hazelwood* are recognizing schools' interest in nurturing student development).

76. Byrks, *supra* note 75, at 324–25.

77. Paul Siegel, *Tinkering with Stare Decisis in the Hazelwood Case*, 27 FREE SPEECH Y.B. 97, 98–100 (1989).

officials some authority to regulate student speech, policies that would be constitutional at one school can be unconstitutional at another, as discussed in subpart C. Accordingly, what would cause a substantial disruption and what constitutes a legitimate pedagogical purpose generally differ between post-secondary education and lower education. Also, these standards do not prevent states from mandating more liberal speech standards and curtailing schools' discretion further than the default allowed under *Tinker* and *Hazelwood*. Subpart D briefly discusses *Fraser*, *Morse*, and *Mahanoy*, which are more explicitly limited to children.

A. *The Substantial-Disruption Test and Universities*

1. *Why Tinker Applies.*—The *Tinker* Court did not explicitly include or exclude universities in the substantial-disruption test's scope, but the opinion's reasoning suggests that it applies to public educational contexts generally, rather than particular levels of education. As a matter of logic, the school and student characteristics that the Court based the test on are not limited to lower education or children. Material disruptions to classwork, substantial disorder, and interference with the rights of others can take place at a university, resulting from what in other contexts would be protected expression under the First Amendment. These disruptions can take place whether the students involved are primarily children or primarily adults.⁷⁸ Indeed, the Court saw commonalities between *Tinker* and two district court cases involving colleges. The cases, involving an "orderly protest meeting on [a] state college campus" and the "expulsion of [a] student editor of [a] college newspaper," respectively, were cited as examples of First Amendment activity that would not "materially and substantially disrupt the work and discipline of the school."⁷⁹ *Tinker* itself does not limit the substantial-disruption test to lower education and identifies these college speech cases as instances where the test would not be satisfied. Thus, the standard applies to higher education.

A major argument that commentators frequently invoke against applying *Tinker* to universities is that universities, unlike primary and

78. *Tinker* was issued in 1969. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Three years later, the Court noted that from 1969–1970, "[a] climate of unrest prevailed on many college campuses in this country. There had been widespread civil disobedience on some campuses, accompanied by the seizure of buildings, vandalism, and arson. Some colleges had been shut down altogether, while at others files were looted and manuscripts destroyed." *Healy v. James*, 408 U.S. 169, 171 (1972).

79. *Tinker*, 393 U.S. at 513–14 (first citing *Hammond v. S.C. State Coll.*, 272 F. Supp. 947, 949 (D.S.C. 1967); and then citing *Dickey v. Ala. State Bd. of Educ.*, 273 F. Supp. 613, 615–16 (M.D. Ala. 1967), *vacated as moot*, *Troy State Univ. v. Dickey*, 402 F.2d 515 (5th Cir. 1968)).

secondary schools, do not stand *in loco parentis* (in the place of their students' parents).⁸⁰ Although *in loco parentis* was a prominent justification for student speech restrictions in later *Tinker*-series cases—particularly *Fraser* and *Morse*⁸¹—it was not part of the Court's analysis in *Tinker*. *Tinker* never invokes the parental attributes of schools as a justification for regulating student speech. In fact, the majority only uses words like “children,” “youth,” and “young” when describing the case's young plaintiffs or quoting or referencing other cases.⁸² The relevant status relationship that gives school officials some latitude to regulate student speech is their status as educators, not—if present at all—their status *in loco parentis*.

Subsequent Supreme Court cases have applied the substantial-disruption test directly to colleges, referenced the applicability of the test, or otherwise affirmed that universities have special characteristics that affect how the First Amendment applies to them. The first of these decisions, *Healy v. James*,⁸³ was decided only three years after *Tinker* in 1972. The case concerned a group of college students who wanted to form a local chapter of Students for a Democratic Society (SDS), a group whose chapters had been implicated in contemporary incidents of campus unrest nationwide.⁸⁴ After the college's president denied recognition to the chapter,⁸⁵ the Court reversed the college's denial of recognition.⁸⁶ *Healy* cited and partially quoted *Tinker* for the proposition that “state-operated educational institutions” have a legally recognized interest in “prescrib[ing] and control[ing] conduct.”⁸⁷

80. See Lindsay, *supra* note 24, at 1482–83 (arguing that because there is no *in loco parentis* relationship in a university setting, “[c]ollege students are adults and should enjoy the same broad swath of First Amendment protections at school as they would in any other setting”); Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split over College Students' First Amendment Rights*, 14 TEX. J. ON C.L. & C.R. 27, 84 (2008) (arguing that it is unconstitutional for universities to stand *in loco parentis* to their students); see also Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2044–45 (2021) (identifying *in loco parentis* as a special characteristic of schools justifying different First Amendment standards).

81. See *infra* subpart II(D).

82. See *Tinker*, 393 U.S. at 508 (“[A] few students made hostile remarks to the *children* wearing armbands . . .” (emphasis added)); *id.* at 507 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (using the words “young” and “youth”). For other Justices, the plaintiffs' age was much more legally salient, although none invoked *in loco parentis* directly. See *id.* at 514–15 (Stewart, J., concurring) (“I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults.”); *id.* at 524 (Black, J., dissenting) (“School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens.”).

83. 408 U.S. 169 (1972).

84. *Id.* at 170–71.

85. *Id.* at 174–76.

86. *Id.* at 194.

87. *Id.* at 180 (citing and quoting in part *Tinker*, 393 U.S. at 507).

Although the First Amendment applies with full force on a college campus, “First Amendment rights must always be applied ‘in light of the special characteristics of the . . . environment’ in the particular case.”⁸⁸

Courts and commentators sometimes misinterpret *Healy*’s statements about the First Amendment’s broad applicability to universities as drawing a legal distinction between the standard used for universities and the standard used for lower education.⁸⁹ In reality, the Court applied *Tinker* as a possible justification for restrictions on the plaintiff students’ First Amendment freedoms: “Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.”⁹⁰ If there had been evidence that the SDS chapter would pose “a substantial threat of material disruption,”⁹¹ then the Court would have affirmed the denial of recognition. The Court ruled for the students only because the record “offer[ed] no substantial basis” for that conclusion.⁹²

Post-*Healy*, the Court has referenced the applicability of the substantial-disruption test in university contexts on several occasions. In *Papish v. Board of Curators of the University of Missouri*,⁹³ the Court concluded that the student plaintiff’s expulsion from university was transparently motivated by unconstitutional content discrimination.⁹⁴ The Court presumably did not need to apply the substantial-disruption test because no “disruption of campus order or interference with the rights of others” was alleged.⁹⁵ If there had been substantial disruption, it follows that the *Tinker* standard would apply. In *Widmar v. Vincent*,⁹⁶ the Court noted that university campuses possess many characteristics of public forums, but student First Amendment rights “must be analyzed ‘in light of the special characteristics of the school

88. *Id.* (quoting *Tinker*, 393 U.S. at 506).

89. *See, e.g.,* DeJohn v. Temple Univ., 537 F.3d 301, 315 (3d Cir. 2008) (citing *Healy*’s language on universities before explaining that “[d]iscussion by adult students in a college classroom should not be restricted. Certain speech, however, which *cannot* be prohibited to adults *may* be prohibited to public elementary and high school students.”); Lindsay, *supra* note 24, at 1480–81 (“While the [*Healy*] Court was willing to nod to *Tinker*, it was not willing to apply it.”). *But see* Hunt v. Bd. of Regents of the Univ. of N.M., 792 F. App’x 595, 602 (10th Cir. 2019) (saying that *Healy* “extended *Tinker* to the university setting”).

90. *Healy*, 408 U.S. at 189.

91. *Id.*

92. *Id.* at 190, 194.

93. 410 U.S. 667 (1973) (per curiam).

94. *Id.* at 670–71.

95. *Id.* at 671 n.6.

96. 454 U.S. 263 (1981).

environment.”⁹⁷ A state establishing a university does not automatically create a traditional public forum like a park.⁹⁸ Instead, a university’s educational characteristics allow student speech regulations subject to the *Tinker* standard.⁹⁹

Taken together, *Tinker*, *Healy*, *Papish*, and *Widmar* show that the Supreme Court has, in a diverse series of cases, repeatedly and consistently contemplated applying the substantial-disruption test to universities. *Tinker* cited college speech cases where restrictions would not be justified under the test. *Healy* ordered a college to recognize a student group because there was no threat of substantial disruption. In *Papish*, the test did not apply solely because there was no disruption evidence in the record. Finally, in *Widmar*, the Court adhered to *Tinker*’s doctrine that the First Amendment applies to universities considering their distinctive characteristics as educational institutions.

2. *Application in Circuit Courts.*—At present, there is no substantial dispute in lower courts on *Tinker*’s use in university student speech cases. Eleven circuit courts have directly applied or confirmed *Tinker*’s applicability in cases involving college students’ First Amendment rights.¹⁰⁰

97. *Id.* at 267 n.5 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

98. *See supra* note 61.

99. *See Widmar*, 454 U.S. at 268 n.5 (elaborating on the difference between universities and traditional public forums that allow universities to impose student speech regulations).

100. *See Gay Students Org. of the Univ. of N.H. v. Bonner*, 509 F.2d 652, 663 (1st Cir. 1974) (quoting, in a case about university speech regulations, the Supreme Court’s guidance that “in a school environment . . . ‘Also prohibitable are actions which “materially and substantially disrupt the work and the discipline of the school.”” (quoting *Healy v. James*, 408 U.S. 169, 189 (1972) (quoting *Tinker*, 393 U.S. at 513)); *Collins v. Putt*, 979 F.3d 128, 133–34 (2d Cir. 2020) (noting that if a university student’s speech was not covered by *Hazelwood*’s school-sponsored standard, the *Tinker* standard would apply); *DeJohn v. Temple Univ.*, 537 F.3d 301, 317 (3d Cir. 2008) (concluding that university sexual harassment policy could not be applied to the extent it violated *Tinker*); *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 251–52 (3d Cir. 2010) (stating that *Tinker* can only be invoked if a substantial disruption exists, and then declining to invoke it to save an overbroad university code of conduct provision from being found unconstitutional); *Sword v. Fox*, 446 F.2d 1091, 1096–97, 1096 n.16 (4th Cir. 1971) (upholding a ban on demonstrations in college buildings as reasonable and noting that courts must consider “the special characteristics of the school environment” (quoting *Tinker*, 393 U.S. at 506)); *Shamloo v. Miss. State Bd. of Trs. of Insts. of Higher Learning*, 620 F.2d 516, 521–22 (5th Cir. 1980) (analyzing whether student protests posed a material threat of disruption under *Tinker*); *Norton v. Discipline Comm. of E. Tenn. State Univ.*, 419 F.2d 195, 196, 198–200 (6th Cir. 1969) (upholding restrictions on literature calling on students to “assault the bastions of administrative tyranny” because it posed a substantial threat of inciting “disorderly and destructive activities” and undermining respect for professors’ authority); *Salehpour v. Univ. of Tenn.*, 159 F.3d 199, 208 (6th Cir. 1998) (“Plaintiff’s claim fails at the

Some of these cases have upheld restrictions on student speech using the substantial-disruption test, while others have rejected them. These cases typically take it as given that the *Tinker* standard applies, although differences between lower and higher education influence reasoning under the standard.¹⁰¹

For instance, in *Pickings v. Bruce*,¹⁰² an early post-*Tinker* case, the Eighth Circuit reversed the suspension of SURE, a college racial justice group in Arkansas that had been sanctioned by the college president for inviting controversial speakers.¹⁰³ The court accepted that “the administrators could enforce a ban, if they could reasonably forecast that the [speakers’] presence on-campus would substantially interfere with the work of school, the rights of students and the maintenance of appropriate discipline.”¹⁰⁴ But the facts of the case did not support that conclusion. At most, the speakers’ “militant views” could exacerbate tensions with the community and “provoke discussions between students.”¹⁰⁵ Generic fear of provocative opinions is insufficient to satisfy the substantial-disruption test, so the college president’s behavior was unconstitutional.¹⁰⁶

inception where his alleged speech, i.e., his conduct of disrupting the classroom milieu for the sole purpose of advancing and pursuing his admitted ‘power struggle’ with the University, was not protected activity.” (citing *Tinker*, 393 U.S. at 513)); *Lee v. Bd. of Regents of State Colls.*, 441 F.2d 1257, 1260 (7th Cir. 1971) (“The problems which defendants foresee fall far short of fulfilling the *Tinker* standard.”); *Pickings v. Bruce*, 430 F.2d 595, 599–600 (8th Cir. 1970) (finding that under the circumstances, a campus racial justice group did not pose a substantial risk of disturbance under *Tinker*); *Mabey v. Reagan*, 537 F.2d 1036, 1050 (9th Cir. 1976) (assessing whether faculty member’s disruptive behavior was sufficient to meet the substantial disruption standard); *Axson–Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004) (noting that *Tinker*, rather than *Hazelwood*, would apply if the student’s speech was not school-sponsored); *Doe v. Valencia Coll.*, 903 F.3d 1220, 1230 (11th Cir. 2018) (“Because Koeppel’s conduct interfered with Jane’s rights, Valencia was free to regulate it under *Tinker* without impinging on Koeppel’s First Amendment rights.”). Note that these cases range from as early as 1969 (the year the Supreme Court decided *Tinker*) to as late as 2020.

101. See, e.g., *Mabey*, 537 F.2d at 1048 (doubting that the “appropriate discipline” emphasized in *Tinker* “is the operative concept in a college” but noting that “[s]ubstantial interference with scholarly research may also be proscribed”); *McCauley*, 618 F.3d at 247 (concluding that “any application of free speech doctrine derived from [*Tinker*-series cases] should be scrutinized carefully,” considering universities’ differences with lower-education institutions).

102. 430 F.2d 595 (8th Cir. 1970).

103. *Id.* at 596–97, 600.

104. *Id.* at 599.

105. *Id.* at 599–600.

106. See *id.* at 600 (“[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” (alteration in original) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969))).

Courts have also upheld university speech restrictions under *Tinker*. In a more recent case, *Doe v. Valencia College*,¹⁰⁷ the Eleventh Circuit upheld a nursing student's suspension for allegedly stalking and sexually harassing a classmate.¹⁰⁸ When the student took the dispute to federal court, the Eleventh Circuit rejected his contention that the suspension violated his First Amendment rights. The court relied on *Tinker*'s rights-of-others prong.¹⁰⁹ The student's conduct had violated his classmate's rights "to be secure and to be let alone,"¹¹⁰ the two rights specifically mentioned in *Tinker*.

From 1969 to the present, the *Tinker* standard has been invoked and used by courts as a substantive ground for assessing student speech restrictions against First Amendment challenges. This trend and preceding analysis do not suggest that there are no legally meaningful differences between universities and high schools or between college students and schoolchildren. But those differences do not make the substantial-disruption test inapplicable to higher education.

B. School-Sponsored Speech and Universities

1. *Why Hazelwood Applies.*—*Hazelwood*, like *Tinker*, applies to student speech in universities. But it does so in spite of the Supreme Court's statement that, in resolving *Hazelwood*, it did not need to decide "whether the same degree of deference is appropriate" for school-sponsored speech in higher education.¹¹¹ In general, commentators have opposed applying *Hazelwood* in higher education, typically emphasizing the differences between students in lower education and those in college.¹¹² While maturity

107. 903 F.3d 1220 (11th Cir. 2018).

108. *Id.* at 1224–25.

109. *See id.* at 1229–30 (identifying the rights-of-others prong as a way of satisfying *Tinker*'s substantial-disruption test).

110. *Id.* at 1230 (quoting *Tinker*, 393 U.S. at 508).

111. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 274 n.7 (1988); *see also* Stuart Walters Belt, Note, *Hazelwood School District v. Kuhlmeier*, 16 N. KY. L. REV. 191, 203 (1988) (discussing uncertainty about *Hazelwood*'s applicability to colleges and universities). The Court has not used the *Hazelwood* standard in university student speech cases but has referenced it. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995) (citing *Hazelwood* as a principle controlling "the University's own speech"). *But see* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring) (citing *Hazelwood* and *Tinker* as cases "confined to high schools").

112. *See, e.g.,* Fiore, *supra* note 24, at 1955 (asserting that the rationales underlying *Hazelwood* are "illogical" in the university context because of the "inherent differences between younger students and college students"); Virginia J. Nimick, Note, *Schoolhouse Rocked: Hosty v. Carter and the Case Against Hazelwood*, 14 J.L. & POL'Y 941, 996–97 (2006) (claiming that applying

is one of the three justifications for applying a more deferential standard to school-sponsored speech,¹¹³ the Court did not suggest that this rationale was necessary for the test to apply. The other justifications—ensuring students learn what they are supposed to and avoiding erroneous attribution of views to the school¹¹⁴—are no less applicable as a matter of law because the students are adults or the university embraces a pedagogical model based on free inquiry. Student immaturity is sometimes a justification for speech restrictions, as it was in *Fraser* and *Morse*.¹¹⁵ But *Hazelwood* applies to all students, regardless of age or what institution they attend, because all students have a distinctive, pedagogical relationship with the state through its educational institutions.¹¹⁶

2. *Application in Circuit Courts.*—Federal courts have generally but not exclusively adopted this interpretation of *Hazelwood*, applying the school-sponsored speech standard to higher education. Six circuit courts have directly applied *Hazelwood* in university student free speech cases.¹¹⁷ Two

Hazelwood to universities ignores other jurisprudence on higher education); David L. Hudson, Jr., *Thirty Years of Hazelwood and Its Spread to Colleges and University Campuses*, 61 HOW. L.J. 491, 492 (2018) (arguing that *Hazelwood* should be applied “sparingly, if at all” to universities because they are supposed to be open spaces where ideas can be freely expressed). *But see* Christopher N. LaVigne, Note, *Hazelwood v. Kuhlmeier and the University: Why the High School Standard Is Here to Stay*, 35 FORDHAM URB. L.J. 1191, 1215–17 (2008) (arguing that applying *Hazelwood* to universities is completely consistent with Supreme Court precedent in *Healy*, *Papish*, and *Widmar*).

113. *See supra* note 67 and accompanying text.

114. *See supra* note 67 and accompanying text.

115. *See infra* subpart II(D).

116. *See Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012) (“The key word is student.”).

117. *See Collins v. Putt*, 979 F.3d 128, 132 (2d Cir. 2020) (concluding that the district court did not err by analyzing a college student’s First Amendment claim under *Hazelwood*); *Ward*, 667 F.3d at 733–34 (“Nothing in *Hazelwood* suggests a stop-go distinction between student speech at the high school and university levels, and we decline to create one.”); *Hosty v. Carter*, 412 F.3d 731, 734 (7th Cir. 2005) (en banc) (“Yet [*Hazelwood*’s] footnote [seven] does not even hint at the possibility of an on/off switch: high school papers reviewable, college papers not reviewable. It addresses degrees of deference.”); *Keefe v. Adams*, 840 F.3d 523, 531 (8th Cir. 2016) (“As our sister circuits have recognized, a college or university may have an even stronger interest in the content of its curriculum and imposing academic discipline than did the high school at issue in *Hazelwood*.”); *Axson–Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004) (concluding that a college student’s speech was school-sponsored and “thus governed by *Hazelwood*”); *Ala. Student Party v. Student Gov’t Ass’n of the Univ. of Ala.*, 867 F.2d 1344, 1347 (11th Cir. 1989) (holding that “the University should be entitled to place reasonable restrictions on [student government elections]” and that the court “should honor the traditional ‘reluctance to trench on the prerogatives of state and local educational institutions’” (quoting *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985))); *Keeton v. Anderson–Wiley*, 664 F.3d 865, 875 (11th Cir. 2011) (holding that *Hazelwood* applied to a university counselor program’s clinical practicum because it was a school-sponsored activity).

circuits have not addressed the issue.¹¹⁸ Two others have discussed *Hazelwood*'s applicability but declined to reach a conclusion.¹¹⁹ In the only appellate case that has overtly rejected *Hazelwood* as applicable to universities, *Student Government Ass'n v. Board of Trustees of the University of Massachusetts*,¹²⁰ the First Circuit stated in dicta (and without any analysis) that *Hazelwood* "is not applicable to college newspapers."¹²¹ The case only mentioned student newspapers as one of several kinds of forums that were inapposite to the dispute at hand, which concerned the closure of a legal services office partially staffed by students.¹²² As the Sixth Circuit later noted—after substantial caselaw on *Hazelwood* and universities had developed in lower courts in the ensuing decades—the First Circuit's statement "seem[ed] to be a misconception that *Hazelwood* decided the issue (it did not)."¹²³

118. The Fourth Circuit has not applied *Hazelwood* in university student speech cases, although some district courts have applied the standard. See *Bhattacharya v. Murray*, 515 F. Supp. 3d 436, 453 (W.D. Va. 2021) (referencing *Hazelwood* in a case over a medical student's suspension and dismissal). The *Bhattacharya* court relied in part on *Keefe v. Adams*, which upheld professional standards in graduate schools as school-sponsored speech subject to the *Hazelwood* standard. *Keefe*, 840 F.3d at 531; see also *Bhattacharya*, 515 F. Supp. 3d at 454–55 (distinguishing the student plaintiff's language from the speech at issue in *Keefe*). The Fifth Circuit once quoted but did not apply *Hazelwood* in an unpublished university student speech case. See *Esfeller v. O'Keefe*, 391 F. App'x 337, 341 (5th Cir. 2010) (quoting *Hazelwood* but applying *Tinker*).

119. See *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 249–50 (3d Cir. 2010) (concluding that the speech at issue was not school-sponsored and did not serve a legitimate pedagogical purpose, making *Hazelwood* inapplicable). Because *Hazelwood* did not apply, the Third Circuit "decline[d] to consider" whether *Hazelwood* could apply to a "university setting." *Id.* at 250 n.12. The situation with the Ninth Circuit is more complicated. In 2002, Judge Graber, writing for a divided panel, applied *Hazelwood* as the "most analogous" standard. *Brown v. Li*, 308 F.3d 939, 951–52 (9th Cir. 2002) (opinion of Graber, J.). *Brown* concerned a master's degree candidate who added a series of vulgar "disacknowledgments" to his thesis without faculty approval. *Id.* at 943. Judge Ferguson, concurring only in the result, agreed that the plaintiff had no valid First Amendment claim but based his conclusion on the plaintiff's deceptive conduct. *Id.* at 955–56 (Ferguson, J., concurring in the result); see also *Oyama v. Univ. of Haw.*, 813 F.3d 850, 860 n.8 (9th Cir. 2015) (stating that Judge Graber's application of *Hazelwood* to universities "did not command a majority of the panel"). Since *Brown*, the Ninth Circuit has heard various university speech cases, but none have implicated the school-sponsored speech test, leaving *Hazelwood*'s applicability unresolved. See *Flint v. Dennison*, 488 F.3d 816, 829 n.9 (9th Cir. 2007) (noting that the speech at issue was not school-sponsored and declining to consider *Hazelwood*'s applicability); *Oyama*, 813 F.3d at 863 ("This case presents no occasion to extend [*Hazelwood*] to the university setting."); *O'Brien v. Welty*, 818 F.3d 920, 931–32 (9th Cir. 2016) (stating that a case involving threatening conduct by a student did not implicate *Hazelwood*).

120. 868 F.2d 473 (1st Cir. 1989).

121. *Id.* at 480 n.6.

122. *Id.* at 474, 480.

123. *Ward v. Polite*, 667 F.3d 727, 734 (6th Cir. 2012).

Cases using *Hazelwood* have provided persuasive reasoning that the test applies to all public educational contexts. The Sixth Circuit issued arguably the most thorough analysis of the issue in its 2012 decision *Ward v. Polite*.¹²⁴ The *Ward* court concluded that *Hazelwood* affirmed the general authority of public educational institutions—regardless of their level or their students’ ages—to regulate student speech as a matter of pedagogical necessity.¹²⁵ The fact that university students have a First Amendment right to freedom of speech does not mean that they can freely express themselves on curricular assignments.¹²⁶ Otherwise, contrary to *Hazelwood*’s language, a university would be compelled to tolerate speech that was inconsistent with its basic teaching objectives.¹²⁷ Because this reasoning is applicable to universities and “nothing in *Hazelwood* suggests a stop-go distinction,”¹²⁸ the test could be used to assess restrictions on university student speech.

Like the Sixth Circuit in *Ward*, federal courts have generally used *Hazelwood* when relevant in university student speech cases because its reasoning does not exempt higher education.¹²⁹ To the extent it differentiates higher and lower education, *Hazelwood* only suggests that university officials may be entitled to less deference given their pedagogical goals and how old their students are. No “on/off switch”¹³⁰ in *Hazelwood* limits the test to specific educational environments.

C. *How Tinker and Hazelwood Apply Differently to Universities*

The substantial disruption and school-sponsored speech tests are situational standards: What constitutes a threat of material disruption or school-sponsored speech at one school could be an integral school activity at another. In the aggregate, there are differences between higher and lower education that impact how much leeway *Tinker* and *Hazelwood* provide to one over the other. Courts generally do and should grant less power to universities to regulate student speech under both standards.¹³¹ But there are

124. 667 F.3d 727 (6th Cir. 2012).

125. *Id.* at 733.

126. *Id.*

127. *See id.* (“A school need not tolerate student speech that is inconsistent with its basic educational mission.” (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988))).

128. *Id.* at 733–34.

129. *See supra* note 117.

130. *Hosty v. Carter*, 412 F.3d 731, 734 (7th Cir. 2005) (en banc).

131. *See McCauley v. Univ. of the V.I.*, 618 F.3d 232, 242–47 (3d Cir. 2010) (discussing various features of universities that would lead courts to apply greater scrutiny to student speech regulations).

situations where both *Tinker* and *Hazelwood* should grant additional deference to university speech regulations.

The most salient difference between public universities and lower-education schools is their pedagogical purposes, which determine when *Hazelwood* justifies restrictions on school-sponsored speech. Universities typically have an educational mission where free inquiry and the exchange of ideas are distinctively important.¹³² College students are generally given more leeway with where they go and how they spend their time than primary and secondary students.¹³³ Courts have repeatedly recognized these liberal characteristics of universities.¹³⁴ By contrast, inculcating children with certain values is a common and legitimate purpose of primary and secondary schools.¹³⁵ This distinction, as well as the relative immaturity of younger schoolchildren, make more extensive speech restrictions appropriate as a general rule in lower education.¹³⁶ Under *Hazelwood*, restricting speech in a university classroom environment premised on the free exchange of ideas is less likely to be reasonably related to a legitimate pedagogical purpose or be reasonably construed by an observer as an opinion the school approves of. Under *Tinker*, controversial speech may be less likely to disrupt university campuses, given the greater emotional maturity of the students.¹³⁷

Furthermore, the physical characteristics of universities, at least on average, limit the number of speech restrictions that would satisfy the *Tinker* standard. Universities are typically much larger than primary and secondary schools in terms of both enrollment and area. On average, public schools in

132. See, e.g., *Statement on Free Expression and Free Inquiry*, UNIV. OF VA., <https://freespeech.virginia.edu/statement-free-expression-and-free-inquiry> [<https://perma.cc/B6C7-3ENE>] (“[U]nequivocally affirm[ing]” the university’s “commitment to free expression and free inquiry”); *University Statement on Free Speech*, UNIV. OF IOWA, <https://freespeech.uiowa.edu/university-statement-free-speech> [<https://perma.cc/7USE-E638>] (identifying “open dialogue, free inquiry, and healthy, vigorous debate” as “the essence of a public research institution” and “essential to the educational mission of the university”).

133. *McCauley*, 618 F.3d at 246.

134. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion) (“The essentiality of freedom in the community of American universities is almost self-evident.”); *Kim v. Coppin State Coll.*, 662 F.2d 1055, 1064 (4th Cir. 1981) (discussing universities’ importance for fostering independent thinking).

135. See *McCauley*, 618 F.3d at 243 (noting that public schools “are tasked with inculcating a ‘child [with] cultural values’” (alteration in original) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954))).

136. See *id.* at 246 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988)) (discussing how elementary and high school administrators must consider students’ emotional maturity when implementing speech restrictions).

137. See *Doe v. Rector & Visitors of George Mason Univ.*, 149 F. Supp. 3d 602, 627 (E.D. Va. 2016) (“[T]hat which might ‘materially and substantially disrupt’ an elementary or secondary school could be fundamental to universities.”).

the United States have about 500 students,¹³⁸ while universities have more than 6,000.¹³⁹ A typical elementary school occupies a single building, but a flagship state university can have hundreds, with large public spaces in between.¹⁴⁰ Because universities are so large, a 100-person protest that might have a localized impact at one or two buildings at a college would involve 20% of the student body at an average high school and thus probably be far more disruptive to basic school operations.

These general differences between lower and higher education explain why courts, even while recognizing *Tinker's* applicability to higher education, rarely uphold university speech restrictions because of a risk of substantial disruption.¹⁴¹ Direct harassment of other students, which implicates *Tinker's* rights-of-others prong, has thus been a more frequent basis for upholding speech restrictions under *Tinker*.¹⁴² However, a court would be more likely to uphold a college speech restriction under the substantial-disruption prong if the student's speech had a very high probability of disrupting core school operations and there was a direct connection between the speech and the disruption. A court would be reluctant to protect speech that directly advocates or appears precisely calculated to cause a disruption, as contrasted with the passive, symbolic speech at issue in *Tinker* itself.¹⁴³

Nonetheless, the differences between higher and lower education discussed above are generalizations, not universal and categorical distinctions. A state may establish higher education institutions that differ markedly from traditional universities and have educational missions where free inquiry is inherently disruptive or regimentation is pedagogically necessary.¹⁴⁴ Even in traditional universities, a substantial number of speech restrictions are justifiable under *Hazelwood*. While traditional universities

138. *Average Public School Student Size*, PUB. SCH. REV., <https://www.publicschoolreview.com/average-school-size-stats/national-data> [<https://perma.cc/86JZ-K7SN>].

139. Sarah Wood, *10 Colleges with the Most Undergraduate Students*, U.S. NEWS & WORLD REP. (Nov. 15, 2022, 9:00 AM), <https://www.usnews.com/education/best-colleges/the-short-list-college/articles/colleges-with-the-most-undergraduates> [<https://perma.cc/4L9T-K9MH>].

140. *E.g.*, Bobby Blanchard, *MAP: UT Buildings and the History Behind Their Names*, DAILY TEXAN (Oct. 20, 2013), <https://thedailytexan.com/2013/10/20/map-ut-buildings-and-the-history-behind-their-names/> [<https://perma.cc/NSQ3-2LQH>].

141. For an example of courts declining to uphold restrictions under the substantial-disruption prong, *see supra* notes 102–06 and accompanying text.

142. *See, e.g., supra* notes 107–10 and accompanying text.

143. *See, e.g., Norton v. Discipline Comm. of E. Tenn. State Univ.*, 419 F.2d 195, 196, 200 (6th Cir. 1969) (upholding disciplinary action against university students who distributed literature “calculated to cause a disturbance and disruption of school activities”).

144. *See, e.g., United States v. Virginia*, 518 U.S. 515, 520–22 (1996) (discussing the Virginia Military Institute's regimented educational system).

take a more liberal approach to education than many lower-education schools, they still maintain fixed academic standards that give speech restrictions a legitimate pedagogical purpose. A 2015 survey showed that 85% of colleges maintained a common set of learning outcomes for all undergraduates.¹⁴⁵ Further, 76% of colleges maintain distribution requirements (requiring students to complete courses in specific fields of study), and 44% maintain a core curriculum (requiring all students to take specific courses).¹⁴⁶ Rather than environments where students are free to learn whatever they want at all times, a typical university aims to teach students specific things to fulfill designated curricular objectives. A university thus has a legitimate pedagogical purpose in regulating speech to ensure that curriculum is taught and mastered. And, for the purposes of applying *Tinker*, the designation of an academic institution as primary, secondary, or post-secondary does not inherently mean that the students in one are more mature than the students in the other. “[M]any high school seniors are older than some college freshmen, and junior colleges are similar to many high schools.”¹⁴⁷

Although speech restrictions are generally less justifiable in a university, some restrictions would only be suitable in a university environment under *Tinker* or *Hazelwood*. Under *Tinker*, speech that substantially or materially disrupts scholarly research would implicate the substantial-disruption test at a typical university but not at a typical elementary school.¹⁴⁸ Additionally, a university student calling for disruptive protests could be more likely to produce that reaction than a similarly situated high school student. Demonstrations—sometimes including violent and disruptive activities—have been common on university campuses for much of American history.¹⁴⁹ Rather than an artifact of the 1960s and 1970s, disruptive protests are a contemporary concern at many U.S. colleges. For instance, a recurring tactic that student protesters have used in recent years is occupying administrative offices.¹⁵⁰ Some public universities have also

145. Scott Jaschik, *Distribution Plus*, INSIDE HIGHER ED (Jan. 18, 2016), <https://www.insidehighered.com/news/2016/01/19/survey-colleges-finds-distribution-requirements-remain-popular-new-features> [<https://perma.cc/VR9M-MP4W>].

146. *Id.*

147. *Hosty v. Carter*, 412 F.3d 731, 734 (7th Cir. 2005) (en banc).

148. *Mabey v. Reagan*, 537 F.2d 1036, 1048 (9th Cir. 1976).

149. *See Healy v. James*, 408 U.S. 169, 171 (1972) (discussing campus unrest in the 1960s and 1970s).

150. *E.g.*, Eddy Martinez, *Connecticut College Students Occupy Administrative Building on Campus and Call for President’s Resignation*, CONN. PUB. RADIO (Feb. 27, 2023, 6:05 PM),

experienced violent protests in response to controversial speaker events.¹⁵¹ Under these circumstances, a university administrator could be more justified in restricting speech advocating protests or expressed during protests than their counterpart in lower education. Using *Hazelwood*, courts have repeatedly upheld speech restrictions or sanctions when students in professional schools breached standards of professional conduct.¹⁵² Such a policy could only be justified in higher education, where at least in some circumstances, curricular requirements can include higher standards of behavior.

States can also restrict the deference to school officials permitted by the First Amendment. Indeed, some already do so for both higher and lower education.¹⁵³ California law explicitly reserves most editorial functions of “official school publications” to “pupil editors,” abrogating *Hazelwood* by statute.¹⁵⁴ Illinois provides that “a student journalist has the right to exercise freedom of speech and of the press in school-sponsored media.”¹⁵⁵ If states believe that public universities should adopt more liberal standards than lower education, they can certainly mandate that by statute.

<https://www.ctpublic.org/news/2023-02-27/connecticut-college-students-occupy-on-campus-building-calling-for-presidents-resignation> [<https://perma.cc/8QFQ-UTBG>]; Emma Whitford, *10-Day Sit-in at Seton Hall*, INSIDE HIGHER ED (Nov. 5, 2018), <https://www.insidehighered.com/news/2018/11/06/seton-hall-students-occupied-administration-building-quest-institutional-change> [<https://perma.cc/BL3N-W3FJ>]; Scott Jaschik, *Duke Students End Sit-in in President's Office*, INSIDE HIGHER ED (Apr. 10, 2016), <https://www.insidehighered.com/quicktakes/2016/04/11/duke-students-end-sit-presidents-office> [<https://perma.cc/U8DE-GMHG>].

151. See, e.g., Katy Steinmetz, *Fighting Words: A Battle in Berkeley over Free Speech*, TIME (June 1, 2017, 6:12 AM), <https://time.com/4800813/battle-berkeley-free-speech/> [<https://perma.cc/55CM-UBBS>] (discussing how “militant left-wing activists” at the University of California, Berkeley “shut down” an event by “setting fires [and] breaking windows, causing a campus-wide ‘shelter in place’ order”); Giuli Frendak, *Dozens Clash with Police During Protest at UNM*, KOB (Dec. 1, 2022, 5:29 PM), <https://www.kob.com/new-mexico/dozens-clash-with-police-during-protest-at-unm/> [<https://perma.cc/L8MT-DXKH>] (describing a confrontation at a protest at the University of New Mexico).

152. See, e.g., *Keefe v. Adams*, 840 F.3d 523, 532–33 (8th Cir. 2016) (affirming a student’s expulsion from a nursing program for threats that violated ethics guidelines); *Keeton v. Anderson–Wiley*, 664 F.3d 865, 878–79 (11th Cir. 2011) (holding that the university could bar a counseling student from expressing her personal beliefs on homosexuality in accordance with ethics guidelines).

153. See Tyler J. Buller, *The State Response to Hazelwood v. Kuhlmeier*, 66 ME. L. REV. 89, 110 (2013) (identifying seven states with statutes that expand student speech rights).

154. CAL. EDUC. CODE § 48907(c) (West 2023).

155. 105 ILL. COMP. STAT. § 80/10 (2016).

D. *Other Tinker-Series Cases and Universities*

As a final note, the other three Supreme Court cases in the *Tinker* series—*Fraser*, *Morse*, and *Mahanoy*—are, unlike *Tinker* and *Hazelwood*, seemingly confined to lower education, or at least educational environments where the students are predominantly underage. *Fraser* was predicated on the government’s rights to protect minors from sexually explicit material,¹⁵⁶ suggesting it would be inapplicable in an environment like a typical university where almost all students are legal adults. *Morse* similarly identified “detering drug use by schoolchildren”—i.e., not adults—as an important interest that can justify restricting some student expression.¹⁵⁷ And *Mahanoy* relies heavily on a school’s *in loco parentis* status as a justification for speech regulation.¹⁵⁸ Assuming *Tinker* and *Hazelwood* properly allow school regulation of university student speech, the specific reasoning in *Fraser*, *Morse*, and *Mahanoy* is likely inapplicable.¹⁵⁹

III. Formulating a Common Standard

As *Tinker* and *Hazelwood* both govern student speech at all levels of public education, this Note formulates a revised general test that, in keeping as close to the existing standards as possible, will also apply universally. This test, which I refer to throughout this Part as the common standard, is as follows:

Curricular Context: In a curricular context, an educational institution may regulate student speech so long as those regulations are reasonably related to legitimate pedagogical concerns.

Outside Curricular Context: An educational institution may only regulate student speech outside a curricular context when the speech has or would likely:

156. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684–85 (1986) (referencing past precedent limiting the reach of sexually explicit speech when the audience may include children (first citing *Ginsberg v. New York*, 390 U.S. 629, 631, 633 (1968) (upholding a state statute banning the sale of sexually explicit material to minors); then citing *Bd. of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (plurality opinion) (recognizing in dicta that school authorities have an interest in protecting children from exposure to vulgar speech); and then citing *FCC v. Pacifica Found.*, 438 U.S. 726, 729, 738, 749 (1978) (affirming federal authority to regulate speech that was indecent but not obscene in part to protect minors from exposure))).

157. *Morse v. Frederick*, 551 U.S. 393, 407, 409–10 (2007); see also *id.* at 413 n.3 (Thomas, J., concurring) (confining discussion to elementary and secondary education).

158. See *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021) (“[O]ff-campus speech will normally fall within the zone of parental, rather than school-related responsibility.”).

159. See *id.* at 2049 n.2 (Alito, J., concurring) (“I do not understand the decision in this case to apply to [public college or university] students.”).

- (1) Materially and substantially disrupt an activity in the curricular context serving a legitimate pedagogical purpose;
- (2) Prevent appropriate discipline in the curricular context or in school facilities; or
- (3) Interfere with the legal rights of other persons.

Regulations outside a curricular context must be limited to preventing or stopping these situations and reasonably calculated to do so.

The *curricular-context* prong is substantially similar to *Hazelwood*'s school-sponsored speech test, while the *outside-curricular-context* prong is based on *Tinker*'s substantial-disruption test. Both prongs apply to individuals as long as they are students of public educational institutions. They apply on- or off-campus, although regulating off-campus speech is harder to justify under the outside-curricular-context prong. The most significant difference between the common standard and existing precedent is that student speech does not need to be school-sponsored to be regulated under a *Hazelwood*-like standard of review. While others have criticized and supported discarding *Hazelwood*'s school-sponsored requirement before,¹⁶⁰ this Note is the first to do so in the context of formulating a unified alternative to both *Tinker* and *Hazelwood*.

In the rest of this Part, I define terms of art used in the common standard and address differences between it and existing Supreme Court precedents. Subpart A defines the curricular context, which distinguishes the two prongs. Subpart B defines what constitutes a legitimate pedagogical purpose under the standard. Subpart C discusses the common standard's application to off-campus speech and the relevance of the forum analysis used in *Hazelwood*. Subpart D explains why the curricular-context prong does not require that speech appear to bear the school's imprimatur to be covered. Subpart E explains the relatively general terms the outside-curricular-context prong borrows from *Tinker*. Subpart F addresses several counterarguments that I anticipate critics will raise against the common standard. Finally, subpart G applies the common standard to a sample situation—student-organized walkout protests—to illustrate that particular circumstances can vary which restrictions are constitutionally permissible.

160. See, e.g., Jessica Golby, Note, *The Case Against Extending Hazelwood v. Kuhlmeier's Public Forum Analysis to the Regulation of University Student Speech*, 84 WASH. U. L. REV. 1263, 1284–85 (2006) (suggesting the extracurricular/curricular distinction as “[a] more realistic solution” to the problems posed in determining school sponsorship).

A. *Defining the Curricular Context*

The curricular context, as used in the common standard, refers to any activities that are designed or supervised by school personnel to advance student learning where students have sufficient advance notice that their expression will be used to evaluate their academic performance. This definition draws heavily from the conceptions of “curricular speech” used in *Hazelwood* and the *Restatement of Children and the Law*¹⁶¹ but with an additional due process element. Because schools are empowered to substantially limit students’ constitutional speech rights within the curricular context, they are constitutionally required to notify students what speech is prohibited and how their speech will be evaluated.¹⁶² The guidelines must be adequately specific and unambiguous to tell students how they should comport themselves in a curricular activity and what they must do to show mastery and receive a positive evaluation. An ordinary student in the program in question (i.e., a typical fifth grader in a fifth-grade class, a typical organic-chemistry student in a college organic-chemistry class) must have a reasonable opportunity and fair warning of what speech is covered and how it will be assessed.¹⁶³ Flexibility and vagueness in how a curricular context is defined are acceptable if these conditions are met.¹⁶⁴

Providing notice under this standard is unlikely to be a major imposition on schools. It is already a common practice for teachers to provide students with syllabi that explain grading policies and an overview of course requirements and assignments.¹⁶⁵ In some cases, providing a syllabus is

161. *Compare* *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (defining school curriculum as activities “supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences”), *with* RESTATEMENT OF CHILD. AND THE L. § 8.10 cmt. e (AM. L. INST., Tentative Draft No. 3, 2021) (defining curricular speech as “any expressive activity that is designed and/or supervised by school personnel to facilitate students’ learning”).

162. *See* *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (“[W]here a vague statute ‘abut[s] upon sensitive areas of basic First Amendment freedoms,’ it ‘operates to inhibit the exercise of [those] freedoms.’” (alterations in original) (footnote omitted) (first quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); and then quoting *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 287 (1961))); *id.* at 108 (“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.”).

163. *Cf. id.* at 108 (“[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”).

164. *See id.* at 110 (“Condemned to the use of words, we can never expect mathematical certainty from our language.”).

165. *See, e.g., Class Syllabi*, UNIV. OF TEX. AT AUSTIN, <https://catalog.utexas.edu/general-information/academic-policies-and-procedures/class-syllabi/> [<https://perma.cc/8R38-DZEK>] (outlining mandatory requirements for class syllabi, which instructors must provide to students by the first day the class meets).

already legally mandatory.¹⁶⁶ An ordinary syllabus would be sufficient advance notice to students of what expression is covered by the curricular context in most cases. Courts should additionally apply some degree of common sense regarding what an ordinary student's understanding of the curricular context's scope and the standard of review would be. Generally, the more technical and unusual the assessment methods are, the more specific instructors should be when they provide notice to students. A student could not be expected to comply with a highly technical code of professional conduct without access to a copy of that code, for instance. Similarly, because speech outside normal instruction is traditionally less regulated, teachers should identify when speech will be evaluated in those circumstances more precisely than they would with speech in a classroom setting. Notice of academic standards that are more general and commonly understood—e.g., following basic math or grammar rules in homework assignments—would, by contrast, be unnecessary.

Activities that happen to take place at a school but are not faculty-supervised or designed to advance student learning are outside the curricular context. For instance, it is hard to devise an educational system where pep rallies, lunch breaks, and homecoming dances could be considered parts of a high school's curriculum. This requirement means that a school cannot formulate a curricular purpose for an activity after the fact as a pretext. Activities must be designed to advance student learning, and thus, their curricular purpose must be clearly established from when they are planned to when they are executed.

B. *Identifying Legitimate Pedagogical Purposes*

A pedagogical purpose is legitimate if (1) it is formulated to give students the knowledge or skills the curricular context is based on,¹⁶⁷ (2) it is validly authorized by law, and (3) students have sufficient advance notice of what it is.¹⁶⁸ This conception of a school's potential pedagogical objectives

166. See, e.g., TEX. EDUC. CODE ANN. § 51.974(a)(1) (West 2023) (mandating that “each institution of higher education” must provide a syllabus that, among other requirements, “provides a brief description of each major course requirement, including each major assignment and examination”).

167. Cf. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (describing curricular activities as “designed to impart particular knowledge or skills to student participants and audiences”).

168. The advance notice requirement is necessary for the same due process reasons discussed above. See *supra* subpart II(A).

is highly broad and deferential to schools.¹⁶⁹ However, there are four important limits to what a school can consider a pedagogical purpose. First, and most basically, the purpose must be substantively educational and directly connected to the material covered in the curricular context. This limit was present in *Hazelwood*¹⁷⁰ and recognizes that the basis of a curricular context—and thus any rationale for a more deferential standard of review for student speech restrictions—is its educational function.

Second, the purpose must be authorized by the laws of the relevant jurisdiction. A school’s purpose cannot run directly counter to the legal authority that establishes it as a public educational institution. For instance, if state law specified that certain funds must be used to support high school history programs, a school district could not use those funds to create new middle school music classes instead. In that context, teaching music would not be a legitimate pedagogical objective.

Third, the purpose must not fall afoul of other constitutional provisions. For instance, a teacher cannot enforce a policy that only students of one race can contribute to class discussions unless the policy survives strict scrutiny review.¹⁷¹ Even if the policy served an otherwise legitimate pedagogical purpose, such as demonstrating the harms of racial discrimination, it would still need to be a “narrowly tailored measure[] that further[ed] compelling governmental interests.”¹⁷² This particular example would almost certainly fail to survive judicial review because there would likely be race-neutral ways of pursuing the same pedagogical objective.¹⁷³ Similarly, a pedagogical purpose could not be so arbitrary that it fails to satisfy rational basis review.¹⁷⁴

169. See RESTATEMENT OF CHILD. AND THE L. § 8.10 cmt. f (AM. L. INST., Tentative Draft No. 3, 2021) (describing a school’s pedagogical purposes as “broad” and “self-defined”).

170. See *Hazelwood*, 484 U.S. at 273 (requiring student speech restrictions to only be “reasonably related to legitimate pedagogical concerns,” rather than any legitimate government objective).

171. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications . . . must be analyzed by a reviewing court under strict scrutiny.”).

172. *Id.*

173. See *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013) (“The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits . . .”).

174. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (noting that a policy survives rational basis review if “there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it”).

Fourth, the purpose must be independent—logically and factually—of the speech regulation itself. In other words, the supposed pedagogical purpose cannot be a pretext when the true purpose is speech restriction.¹⁷⁵

States can establish schools with a variety of pedagogical purposes. As a matter of policy, it may be desirable that a college class serve as a “great bazaar[] of ideas where the heavy hand of regulation has little place.”¹⁷⁶ Indeed, the vast majority of public universities likely have mission statements that reflect this traditional liberal vision.¹⁷⁷ But that policy judgment does not dictate that, as a matter of law, every public educational institution must have that purpose. Indeed, some public universities do not.¹⁷⁸ Recognition that there are multiple legitimate pedagogical purposes is central to the Supreme Court’s reasoning in *Hazelwood* and to the common standard formulated in this Note.

C. *Application to Off-Campus Speech and Limiting Forum Analysis*

Both prongs of the common standard apply to students at all times, whether or not they are on school grounds. The standard is relational, applying to a student because of their pedagogical connection with the school rather than any particular characteristics of the school building or other forums. Accordingly, the common standard disregards *Hazelwood*’s forum analysis as largely but not completely irrelevant.

By establishing a school, a state establishes the curricular context as a nonpublic forum, allowing the state to regulate the use of the space, provided those regulations are reasonable and “not an effort to suppress expression merely because public officials oppose the speaker’s view.”¹⁷⁹ A school’s

175. See RESTATEMENT OF CHILD. AND THE L. § 8.10 cmt. f (AM. L. INST., Tentative Draft No. 3, 2021) (stating that facts cannot reveal that “the school’s stated pedagogical purpose” is a “pretext to censor speech for reasons that have nothing to do with students’ education”); *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995) (“So long as the teacher limits speech or grades speech . . . in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.”).

176. *Kim v. Coppin State Coll.*, 662 F.2d 1055, 1064 (4th Cir. 1981).

177. See, e.g., UNIVERSITY OF VIRGINIA FACULTY HANDBOOK 2023–2024, at 4 (2023), https://provost.virginia.edu/system/files/2023-24%20UVA%20Faculty%20Handbook%20-%20PDF%20V2_508.pdf [<https://perma.cc/JBW6-A3QH>] (affirming the university’s “enduring commitment” to “the free and collegial exchange of ideas”).

178. See, e.g., *Mission and Vision*, VA. MIL. INST., <https://www.vmi.edu/about/governance/mission-and-vision/> [<https://perma.cc/9WV2-5GTX>] (discussing how the institute provides education within a “system of military discipline”).

179. See *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (citing *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 131 n.7 (1981)) (identifying reasonable regulations unrelated to viewpoint discrimination as legitimate for nonpublic forums).

legitimate pedagogical purposes and evaluation standards, established in advance, designate the curricular context as a nonpublic forum (whether physical or otherwise) where student speech can be reasonably regulated in accordance with those purposes and standards. Because the curricular context is a nonpublic forum, forum analysis is only implicated when a school attempts to regulate student speech unreasonably or beyond the curricular context's established pedagogical purposes.¹⁸⁰

The scope of this nonpublic forum and the regulations authorities may impose are limited by the same principles discussed in subparts III(A) and III(B). Because any speech restriction must be reasonably related to a legitimate pedagogical purpose in the curricular context, speech policies must not be unreasonably restrictive for students. In particular, the more restrictive a speech policy is, particularly on speech outside a classroom environment or digital equivalent, the more critically courts should examine them to confirm they are at least plausibly serving a legitimate educational function.¹⁸¹

Outside the curricular context and school facilities, a school's power to regulate student speech is based exclusively on the school–student relationship. The Supreme Court recently affirmed in *Mahanoy* that schools' interests in regulating speech “remain significant in some off-campus circumstances” and that “the special characteristics that give schools additional license to regulate student speech [do not] always disappear when a school regulates speech that takes place off campus.”¹⁸² When students are not on campus or in a government forum like a curricular context, only their status as students can justify speech regulation. The interest balancing suggested in *Mahanoy* is not unusual, closely resembling the standard for public employees formulated in *Pickering v. Board of Education*.¹⁸³ *Pickering* allows the government to regulate speech by public employees on matters of public concern provided that they “arrive at a balance between the interests of the [employee], as a citizen . . . and the interest of the State, as an employer, in promoting the efficiency of the public services it performs

For a similar argument for viewing curricular activities as (at least presumptively) a nonpublic forum, see Golby, *supra* note 160, at 1284–85.

180. For additional critiques of *Hazelwood*'s forum analysis, see James E. Ellsworth, *Censorship in Secondary School Newspapers: Hazelwood School District v. Kuhlmeier*, 2 *BYU J. PUB. L.* 291, 303–04 (1988); Siegel, *supra* note 77, at 99.

181. See *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021) (“[C]ourts must be more skeptical of a school’s efforts to regulate off-campus speech, for doing so may mean that the student cannot engage in that kind of speech at all.”).

182. *Id.* at 2045.

183. 391 U.S. 563 (1968).

through its employees.”¹⁸⁴ *Tinker*’s substantial-disruption test, as originally formulated and as modified in the common standard, strikes a similar balance between students’ interests in free expression and state interests in education, ensuring that any speech regulations outside the curricular context are at minimum reasonable and not arbitrary abuses of government power.

In general, off-campus speech poses a less proximate threat of disruption than on-campus speech and is thus less likely to be regulatable under the common standard’s outside-curricular-context prong. *Mahanoy* identifies several scenarios where regulations could still occur, including “bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning . . . the use of computers, or participation in other online school activities; and breaches of school security devices.”¹⁸⁵ Other possible scenarios include advocating disruptive in-class protests and disclosing confidential information in violation of a school honor code.

D. *Rejecting the School-Sponsored Requirement*

The most significant difference between the common standard and *Hazelwood* is that curricular speech does not have to be school-sponsored to fall under the more deferential curricular-context prong. By designating a specific curricular context, a school establishes a nonpublic forum where regulation of student speech is constitutionally permissible, rendering the school-sponsored requirement legally superfluous.¹⁸⁶ There is a more practical reason as well. Courts applying *Hazelwood* have already deemphasized the school-sponsored criterion, minimizing its importance as a separate requirement and, in some cases, collapsing *Hazelwood*’s two prongs into one.¹⁸⁷ A prominent example of this phenomenon is *Axson–Flynn v. Johnson*.¹⁸⁸ There, the Tenth Circuit concluded that “speech which is prescribed as part of the official school curriculum . . . is school-sponsored speech.”¹⁸⁹ Curricular speech, according to the *Axson–Flynn* court, is

184. *Id.* at 568.

185. *Mahanoy*, 141 S. Ct. at 2045.

186. *See supra* subpart III(C).

187. *But see* RESTATEMENT OF CHILD. AND THE L. § 8.10 cmt. e (AM. L. INST., Tentative Draft No. 3, 2021) (describing the school-sponsored requirement as “essential” to avoid “sharply reduc[ing] the protection afforded in *Tinker*.”).

188. 356 F.3d 1277 (10th Cir. 2004).

189. *Id.* at 1286; *see also* *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 925 (10th Cir. 2002) (“We think that the Court’s language that activities are ‘school-sponsored’ speech if they are ‘designed to impart particular knowledge or skills to student participants and audiences,’ means activities that affect learning, or in other words, affect pedagogical concerns.” (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988))).

automatically school-sponsored. In this and other cases, courts have effectively worked around the school-sponsored requirement's original definition—"reasonably perceiv[able] to bear the imprimatur of the school"¹⁹⁰—to uphold reasonable regulations of curricular speech.¹⁹¹

Other courts have developed ad hoc standards to get around the school-sponsored requirement. Several cases, for instance, have involved students expressing themselves in ways that violate codes of professional conduct,¹⁹² running directly counter to the standards set by the school. Yet, these courts have held that professional-code restrictions on student speech satisfy strict scrutiny because they are narrowly tailored to serve the compelling government interest of evaluating a student's suitability for the profession. For instance, in *Oyama v. University of Hawaii*,¹⁹³ the Ninth Circuit concluded that the university's decision to deny a candidate's application to become a student teacher was narrowly tailored under the circumstances given the candidate's controversial statements.¹⁹⁴ In other cases, courts have applied *Hazelwood* while apparently believing that the school-sponsored requirement does not apply at all.¹⁹⁵ In these cases, courts have effectively worked around the school-sponsored requirement's original definition—"reasonably perceiv[able] to bear the imprimatur of the school"¹⁹⁶—to uphold reasonable regulations of curricular speech.

Because the school-sponsored requirement is legally unnecessary and is already ignored in many cases, it is not an element of the common standard.

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

191. *See, e.g.*, *Brown v. Li*, 308 F.3d 939, 951–52 (9th Cir. 2002) (opinion of Graber, J.) (concluding that a student's master's thesis "was subject to a reviewing committee's reasonable regulation" because it was "fairly . . . characterized as part of the . . . curriculum" (alterations in original) (quoting *Hazelwood*, 484 U.S. at 271)).

192. *See, e.g.*, *Keefe v. Adams*, 840 F.3d 523, 527–28 (8th Cir. 2016) (discussing ethics guidelines for nurses); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 875–76 (11th Cir. 2011) (discussing ethics guidelines for counselors); *Oyama v. Univ. of Haw.*, 813 F.3d 850, 868 (9th Cir. 2015) (discussing professional standards for teachers); *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 522–23 (Minn. 2012) (discussing professional standards for morticians).

193. 813 F.3d 850 (9th Cir. 2015).

194. *Id.* at 871–72; *see also Tatro*, 816 N.W.2d at 523 (concluding that academic program rules were narrowly tailored when used to expel a student for inappropriate Facebook posts).

195. *See Keefe*, 840 F.3d at 531 (arguing that "the concept [of legitimate pedagogical concerns] has broader relevance to student speech," even if it isn't school-sponsored).

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

E. “*Substantial Disruption*” and “*The Rights of Others*”

Substantial disruption and rights of others are both terms that were critical to *Tinker*’s original substantial-disruption test but left largely undefined. I provide some quick definitional guidance in this subpart.

Substantial disruption, as the concept was formulated in *Tinker*, corresponds with the part of the common standard that allows schools to regulate student speech that would likely materially and substantially disrupt an activity in the curricular context serving a legitimate pedagogical purpose or prevent appropriate discipline in the curricular context or in school facilities. To fall within these categories, the speech has to directly implicate the school’s interest in educating students or maintaining orderly school facilities. Thus, the disruption caused by the speech must meaningfully and adversely disrupt the educational process or normal school operations. The disruption must be substantial enough that it cannot be easily redressed, allowing the school to function in the immediate term as if no disruption took place. Most notably, as *Tinker* originally articulated, schools cannot suppress or punish students for expressing themselves in a way that only makes others uncomfortable or causes an ephemeral distraction.¹⁹⁷

I define the rights of others as *legal* rights of others in the common standard.¹⁹⁸ For the likely consequences of a student’s speech to implicate the government’s interest in protecting rights, the rights have to be legally recognizable as such. Individual rights recognized and protected in spheres such as tort law and criminal law can be protected.¹⁹⁹ For example, rights against sexual harassment have been periodically invoked under *Tinker* by lower courts.²⁰⁰ School officials can also take action to prevent speech they reasonably believe would constitute defamation,²⁰¹ and students’ “right to a sound, basic education . . . could [] justify some restrictions.”²⁰²

197. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969); *see also* RESTATEMENT OF CHILD. AND THE L. § 8.10 cmt. b (AM. L. INST., Tentative Draft No. 3, 2021) (“School authorities cannot suppress speech or punish speakers simply because the speech . . . causes some distraction.”).

198. RESTATEMENT OF CHILD. AND THE L. § 8.10 cmt. c. (AM. L. INST., Tentative Draft No. 3, 2021).

199. *Id.*

200. *E.g., id.* at illus. 8; *see also* notes 106–10 and accompanying text.

201. *E.g., id.* at illus. 7.

202. *Id.* at cmt. c.

F. Anticipated Counterarguments

With the common standard fully explicated, there are two potential lines of criticism that merit some additional commentary.²⁰³

The first criticism is that the common standard does not distinguish between disciplinary practices—e.g., suspending a student for shouting at a teacher in class—and academic assessment—e.g., lowering a student’s grade for factual errors in a written assignment. Both of these situations would fall under the common standard’s curricular-context prong, which requires school speech policies to be reasonably related to legitimate pedagogical purposes. The problem as some might see it is that this prong is insufficiently deferential to how teachers and professors make grading decisions. In this view, assigning grades is a teacher’s speech protected by their First Amendment rights to freedom of speech and academic freedom.²⁰⁴

Assuming teachers’ academic freedom gives them substantial latitude in how they assess student performance, it does not follow that a standard even more lenient than the curricular-context prong’s reasonableness test is appropriate. Assessing a student more poorly by virtue of their speech is still in essence discipline for speech that implicates the student’s procedural due process rights. The fact that a teacher enforces that discipline via speech of their own does not change that analysis. Although “[c]ourts are particularly ill-equipped to evaluate academic performance,”²⁰⁵ they must be responsive when academic decisions are truly baseless and arbitrary to validate students’ First Amendment rights.

The second criticism is that despite the definitions and clarification of certain terms above, the common standard is too vague to sufficiently protect students’ speech rights. As the argument goes, courts will seize on fuzzy and general terms like “reasonable” and “substantial” and be overly deferential to the rationales proffered by school administrators. While true to some extent, this argument does not suggest that there is a better alternative to the common standard. A certain degree of vagueness is inevitable whenever one formulates a legal standard that tries to accomplish two goals in tension with each other: (1) apply to a broad array of situations and (2) identify what government policies are and are not constitutionally appropriate in a nuanced

203. A further criticism—that the common standard is insufficiently protective of speech by university students—is addressed in depth in Part II.

204. *See, e.g., Parate v. Isibor*, 868 F.2d 821, 828–29 (6th Cir. 1989) (holding that a public university “may not [] compel[]” a professor “to change a grade that the professor previously assigned to her student”). *But see Brown v. Armenti*, 247 F.3d 69, 75 (3d Cir. 2001) (holding that the First Amendment does not protect a professor’s grading decisions).

205. *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 92 (1978).

and accurate way. Bright-line alternatives are inconsistent with the general thrust of *Tinker* and inherently incompatible with the complexity and diversity of situations and policies implicating student speech rights.

G. *Applying the Common Standard*

Since the 2018 nationwide protests discussed in this Note's introduction, students have increasingly used walkouts to express themselves on any number of issues, from the national²⁰⁶ to the local.²⁰⁷ This subpart will analyze how the common standard would apply to a typical walkout scenario to illustrate how the standard applies in different situations. In this scenario, 50% of students in a lecture class walk out of the room and the building before eventually returning some time later. I stipulate additional facts—such as whether the class is at a high school or university and whether the walkout lasts for a few minutes or a few hours—as needed to indicate relevant distinctions.

As a preliminary matter, it should be readily apparent that the speech/protest action took place in a curricular context. As a faculty-supervised instructional activity with an overt curricular purpose, a class session is the prototypical curricular context defined in subpart III(A). This means that the standard's more deferential prong applies, and regulations connected with the walkout are legitimate so long as they are reasonably related to legitimate pedagogical concerns. Typical forms of discipline (recording the students as absent, deducting points from their final grades in the class) would likely be upheld as appropriate and related to the school's pedagogical interest in ensuring that students regularly attend class to learn from their teachers or professors. However, it would not be pedagogically legitimate to treat the walkout worse than any other unapproved absence from a class, as doing so would likely entail unconstitutional content

206. See, e.g., Hannah Murdock, *Students Across the U.S. Walk Out of Schools Demanding Action on Gun Safety*, DESERET NEWS (Apr. 6, 2023, 8:48 AM), <https://www.deseret.com/u-s-world/2023/4/6/23672426/students-across-the-us-walk-out-of-schools-demanding-action-on-gun-safety> [<https://perma.cc/FFM2-RKPM>] (describing a wave of student walkouts calling for stricter gun control laws at more than 300 schools nationwide).

207. See, e.g., Tracy Loew, *North, South High School Students Walk Out to Protest District Inaction on Alleged Abuse*, SALEM STATESMAN J. (June 2, 2023, 2:17 PM), <https://www.statesmanjournal.com/story/news/2023/06/02/north-south-high-school-students-to-walkout-today-to-protest-district-inaction-on-abuse/70281290007/> [<https://perma.cc/G5K9-LHYD>] (describing a walkout at two high schools over a local sexual abuse scandal); Jayden Brannon, *Booker T. Washington High School Students Take a Stand with Walkout*, NEWS9 (Aug. 24, 2023, 4:13 PM), <https://www.news9.com/story/64e7c1bcc8fec072807e9e4/booker-t-washington-high-school-students-take-a-stand-with-walkout> [<https://perma.cc/N8C6-2HWY>] (describing a walkout at a single high school over a local accreditation debate).

discrimination.²⁰⁸ A particularly short walkout comparable in duration to a restroom break might not be disciplinable at all under these circumstances. Additionally, in a college environment where regular attendance is neither expected nor required, even a long absence might be exempt from regulation, at least under the curricular-context prong.

As a variant, what if the students staged a walkout outside of the curricular context, leaving campus in the middle of lunch but returning before class resumes? The outside-curricular-context prong allows speech regulations to the extent necessary to avoid three issues: material and substantial disruption to the curricular context, a breakdown in appropriate discipline, and interference with the legal rights of others. Of these three rationales, the most directly implicated by a walkout is maintaining discipline. Assuming the walkout does not involve harassment and does not prevent other students from attending class, the rights-of-others rationale is unlikely to be implicated. Similarly, a walkout during a lunch break does not create substantial disruption in a curricular context because no classes or other pedagogical activities are currently taking place.

This scenario is one where differences between lower education and higher education can be contingent, making speech regulations legitimate in one context but not the other. At a typical college, there is no expectation that students will remain on campus at all times during the day and no policy to that effect, so there is no threat to appropriate discipline when a large number of students decide to leave at the same time. In an elementary school, however, officials may have much stronger justifications for keeping students on site. In particular, an important function of primary schools is supervising and caring for young children. If those children are not physically at school, officials cannot execute that function, meaning that appropriate discipline has not been maintained.

As a generalized rule of law, the common standard has broad applicability to a range of factual scenarios involving all levels of education. By clarifying the substance of and relationship between the more deferential *Hazelwood* test and the less deferential *Tinker* test, the common standard provides a workable alternative that courts can apply to live controversies involving student speech.

208. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.” (first citing *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); then citing *id.* at 124 (Kennedy, J., concurring in judgment); then citing *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n* 447 U.S. 530, 536 (1980); and then citing *Police Dept. v. Mosley*, 408 U.S. 92, 95 (1972))).

Conclusion

The Supreme Court's precedents on student freedom of speech have often been a source of confusion for lower courts. With the exception of *Mahanoy*, the Court has not issued decisions that clarify how *Tinker*'s substantial-disruption test applies and what its elements mean. Rather, the Court has promulgated a series of disjointed exceptions that function as alternate standards. *Hazelwood*, the most substantial of these alternate standards, has become almost equal in prominence to *Tinker*. Lower courts have thus needed to apply multiple tests that are highly vague, creating uncertainty for both students and school officials. Clarity is needed regarding what educational institutions the standards apply to, what they mean, and how they relate to each other.

The common standard formulated in this Note is a workable alternative to the competing and conflicting tests articulated in *Tinker* and *Hazelwood*. It elaborates on their respective elements and eliminates their most egregious flaws, most notably the school-sponsored requirement. I accept *Hazelwood*'s premise that there are legal and policy justifications for applying more deference to curricular speech regulations than to the noncurricular speech restrictions at issue in *Tinker* and *Mahanoy*. *Hazelwood*'s mistake, corrected by the common standard, was blurring the distinction by imposing an unnecessary school-sponsored requirement that has overcomplicated subsequent First Amendment jurisprudence and stymied reasonable regulations of curricular speech.

Additionally, the common standard reflects the reality that the Court's precedents support applying *Tinker* and *Hazelwood* outside lower education. Despite the hostility of past legal scholarship to applying these standards to colleges and universities, there is no true circuit split concerning *Tinker* and *Hazelwood*'s use in higher education. Only one appellate case has outright rejected using *Hazelwood* and did so in dicta.

It took the Supreme Court fifty-two years after *Tinker* to issue *Mahanoy*, the first of its decisions to clarify *Tinker*'s elements instead of creating a new standard like *Hazelwood*. And yet, the Court embraced a minimalist approach, touching as little as possible on the substantive and foundational questions this Note identifies. Any elaboration of *Tinker* was limited at best. This sustained failure to provide clarity on student speech rights has served neither the American judiciary nor American students and educators well. The Court should not wait another half-century to explain what *Tinker* and *Hazelwood*'s elements mean and when they apply. The Court should adopt a common standard that, like the one this Note proposes, brings past precedents together and provides appropriate guidance for the future.