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GIVING CREDIT WHERE IT IS DUE? AN “ACKNOWLEDGMENT” OF HIGHER EDUCATION IN AMERICA

I. INTRODUCTION

As the theory goes, democracy encourages social and economic development, as well as invites intellectual ingenuity. It was the suppression of ideas and individualism, after all, that in part, prompted President George W. Bush to oust Saddam Hussein from power in Iraq and push for a democratic infrastructure.¹

While President Bush encourages other nations around the world to view the United States as the template for developing and sustaining an effective democracy, it is ironic that some U.S. institutions push the democratic envelope on American soil. The United States Court of Appeals for the Ninth Circuit recently rendered an opinion in *Brown v. Li*² that certainly will test the mettle of democratic freedoms on university campuses. The Ninth Circuit’s decision in *Brown* challenges the extent of a public university student’s right to free speech and ideological creativity, as well as brings scrutiny to the professor-student relationship.

It is not surprising that the malleable boundaries of democracy in the United States have been tested. It is alarming, however, that the boundaries of intellectual and ideological freedom have been tested at the public university level. Institutions of higher education are traditionally recognized for fostering scholastic environments that encourage creative intellectual development.

In *Brown v. Li*, the Ninth Circuit upheld the right of a thesis committee to withdraw its original approval of a graduate student’s thesis after the student later added a controversial acknowledgments

1. See Johanna McGeary, *Looking Beyond Saddam: If Invading Troops Topple Iraq’s Dictator, Washington Will Inherit Responsibility for a Bitter, Factions Country. Here’s Time’s Look at the Blueprint for Remaking the Nation—and the Middle East*, TIME, Mar. 10, 2003, at 26.

2. 308 F.3d 939 (9th Cir. 2002).

section, called "Disacknowledgments," without the thesis committee's consent. The Disacknowledgments section is a profanity-laced chastisement of a host of school and state officials for impeding Brown's scholastic growth. The shocking aspect of the *Brown* holding embeds itself in the Ninth Circuit validating the decision of a thesis committee to withdraw approval of a graduate thesis for reasons unrelated to the thesis's substantive research conclusions.

The *Brown* ruling has serious implications that may puncture the idea of the United States as a perfectly fortified democracy. *Brown* dramatically threatens the dynamic and vibrant nature of students' speech in public universities.

II. CASE HISTORY

A. *Factual Developments*

Plaintiff Christopher Brown (Brown) attended the University of California at Santa Barbara (UCSB) in pursuit of his master's degree from the Department of Material Sciences.³ For Brown to earn his master's degree, he was required to write a thesis under the guidance of a designated thesis committee.⁴

The UCSB Guide to Filing Theses and Dissertations (Guide) outlined one of the pedagogical purposes of a master's student writing a thesis.⁵ The Guide stated: "The essence of academic research is shared results. Each discipline has a relatively standard method of presenting research results so that other researchers can find and build on past work."⁶ In other words, the pedagogical purpose expressed by UCSB concerned content, recognizing that quality substantive research enhances previous discoveries and findings.

In addition to outlining the substantive purposes of the thesis project, the Guide also addressed procedural issues. Foremost, the Guide elaborated upon the expected relationship dynamic between student and thesis committee during the thesis writing process. The

3. *Id.* at 941-42.

4. *Id.* at 942.

5. *Id.*

6. *Id.* (quoting UCSB GUIDE TO FILING THESES AND DISSERTATIONS 1 (1998)).

Guide, in part, stated: “You *and your committee* are responsible for everything between the margins. The organization, presentation, and documentation of your research should meet the standards for publishing journal articles or monographs in your field.”⁷ The Guide did not further define what constitutes “between the margins.”⁸

The Guide also afforded graduate students the option of writing an acknowledgments section.⁹ In the event that a student opted to include an acknowledgments section, the Guide elucidated “general criteria” for stylistic assistance.¹⁰ The Guide stated: “You *may* wish to dedicate this work to someone special to you or to acknowledge particular persons who helped you. Within the usual margin restrictions, *any format* is acceptable for these pages.”¹¹ To solidify otherwise flexible standards for writing an acknowledgments section, the Guide referenced several style manuals.¹²

In the spring of 1999, Brown submitted his thesis to the thesis committee for final approval.¹³ When Brown submitted his thesis, entitled “The Morphology of Calcium Carbonate: Factors Affecting Crystal Shape,” he did not include an acknowledgments section.¹⁴ Brown’s thesis received approval from all members of the thesis committee, which then gave Brown a signature page indicating the

7. *Id.* (quoting UCSB GUIDE TO FILING THESES AND DISSERTATIONS 1 (1998)).

8. “Between the margins” is terminology often used to describe the substantive ideas of a thesis or paper.

9. *Brown*, 308 F.3d at 942.

10. *Id.*

11. *Id.* (emphasis added) (quoting UCSB GUIDE TO FILING THESES AND DISSERTATIONS (1998)).

12. *Brown*, 308 F.3d at 942. The Guide referenced Kate L. Turabian’s “A Manual for Writers of Term Papers, Theses, and Dissertations” as one style manual to consult. In Turabian’s style manual, the section about acknowledgments explained: “Although one *might* wish to acknowledge special assistance such as consultation on technical matters or aid in securing special equipment and source materials, one *may* properly omit formal thanks for the routine help given by an adviser or a thesis committee.” KATE L. TURABIAN, A MANUAL FOR WRITERS OF TERM PAPERS, THESES, AND DISSERTATIONS § 1.26 (6th ed. 1996) (emphasis added).

13. *Brown*, 308 F.3d at 943. The thesis committee consisted of the following people: Dr. Galen Stucky, Brown’s thesis advisor; Dr. Daniel Morse; and Dr. Fred Lange. *Id.* at 942.

14. *Id.* at 943.

successful completion of the thesis project.¹⁵ Pursuant to UCSB rules, the signature page became the second page of his thesis.¹⁶

After affixing the signature page into his thesis, he then added a two-page section entitled "Disacknowledgments."¹⁷ The thesis committee never read or consented to the addition of the Disacknowledgments section to the otherwise approved thesis.¹⁸ The Disacknowledgments section read as follows:

I would like to offer special *Fuck You's* to the following degenerates for of [sic] being an ever-present hindrance during my graduate career¹⁹

Brown identified Charles Li, Dean of the Graduate Division, and staff of the UCSB graduate school, among others,²⁰ for obstructing his scholastic development in pursuit of his graduate degree.²¹

As a prerequisite to being conferred a master's degree at UCSB, graduate students must file their approved theses or dissertations with the university library.²² Brown attempted to file his thesis, containing the Disacknowledgments section, with the university library.²³ Dean Li, however, became apprised of the Disacknowledgments section in Brown's thesis. Thereafter, Dean Li referred the matter to Brown's thesis committee.²⁴

To avoid major dispute, Brown agreed to submit an alternative version of the Disacknowledgments section, which removed the profanity, but preserved the sentiment.²⁵ Even after this modification, the thesis committee determined that Brown's thesis no longer met the professional criteria for publication.²⁶ The thesis

15. *Id.*

16. *Id.* The signature page read, "[t]his Thesis of Christopher Brown is approved." *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Others targeted in the Disacknowledgments section included: the staff of the UCSB Graduate School, the managers of the Davidson Library, former California Governor Pete Wilson, and the Regents of the University of California. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

committee stated firmly in a memorandum that the “addition or removal of material from a dissertation after the examination, evaluation and signed approval of the original materials that are presented by the candidate to the Committee” constituted unacceptable conduct.²⁷ The thesis committee, furthermore, emphasized that a thesis does not serve as a “public forum” to air disparaging feelings.²⁸

Dean Li then wrote a letter to Brown explaining that his master’s degree would not be conferred unless he received approval from his thesis committee.²⁹ Thesis approval for Brown necessitated the removal of the Disacknowledgments section.³⁰

Infuriated by the thesis committee’s stance, Brown declined to remove the Disacknowledgments section and submitted a written appeal to the Academic Affairs Committee (AAC) of the Department of Material Sciences.³¹ The AAC unanimously rejected the appeal, claiming that a proper thesis should be evaluated not only on substantive ideas, but also on structure—including the appropriateness of an acknowledgments section.³² Persistently, Brown then appealed his case to the UCSB Graduate Council, only to face a similar rejection on the same grounds—that the entirety of a thesis is subject to approval.³³

Frustrated with repeated rejection, Brown elected to file a grievance with the Academic Freedom Committee (AFC).³⁴ After Brown presented the specifics of his grievance orally and in writing, the AFC rejected his claim.³⁵ The AFC felt that restricting the style of an acknowledgments section in a thesis does not unfairly restrict a student from the enjoyment of academic freedom.³⁶

In January 2000, Brown exceeded the time requirement for completing his master’s program and consequently, UCSB placed

27. *Id.* at 944.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 945.

34. *Id.*

35. *Id.*

36. *Id.*

him on academic probation.³⁷ Upon hearing murmurs about a potential denial of free speech on the UCSB campus with respect to Brown's Disacknowledgments section, a producer from "ABC's Nightly News with Peter Jennings" contacted Brown on May 11, 2000 to inquire further.³⁸ On May 15, 2000, ABC interviewed Brown.³⁹

On May 16, 2000, Brown received a letter via Federal Express stating that the Department of Material Sciences had changed its posture, recommending that he receive his master's degree based upon the original version of his thesis, which excluded the Disacknowledgments section.⁴⁰ The thesis committee honored that request and awarded Brown his master's degree.⁴¹ Brown never filed the approved version of his thesis, which omitted the Disacknowledgments section, with the university library.⁴²

B. Procedural History

Brown then initiated a lawsuit in the United States District Court for the Central District of California based upon three claims: (1) a violation of his First Amendment rights to free speech; (2) a violation of his procedural due process rights because he never received a formal hearing with proper discovery and available witnesses; and (3) a violation of article I, section 2 of the California Constitution.⁴³ This Comment focuses solely on the First Amendment issues pertaining to free speech in public universities.

The defendants,⁴⁴ who moved for summary judgment on the federal claims, argued that they were entitled to qualified immunity

37. *Id.*

38. *Id.* at 966 (Reinhardt, J., concurring in part and dissenting in part).

39. *Id.* (Reinhardt, J., concurring in part and dissenting in part).

40. *Id.* at 945, 966 (Reinhardt, J., concurring in part and dissenting in part).

41. *Id.* at 945.

42. *Id.*

43. *Id.* at 939, 945-46. With respect to Brown's third claim, article I, section 2(a) of the California State Constitution reads: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. I, § 2(a).

44. The defendants were Charles Li, in his individual and official capacity as Dean, Graduate Division, UCSB; Henry Yang, in his individual and official capacity as Chancellor, UCSB; Galen Stucky, in his individual and official capacity as Professor of Chemistry and Materials, UCSB; Daniel E. Morse, in

because UCSB is a public school and thus a state actor.⁴⁵ The district court allowed Brown to conduct limited discovery.⁴⁶ The district court later granted summary judgment in favor of the defendants.⁴⁷ The Ninth Circuit affirmed the judgment of the district court, finding summary judgment appropriate on all the federal claims.⁴⁸

III. THE NINTH CIRCUIT'S RATIONALE: ATTEMPTING TO FIND A PRECEDENT

The U.S. Supreme Court has never expressly ruled on the free speech limitations that public university administrators and faculty members can impose upon students in pursuit of curricular endeavors.⁴⁹ In the absence of firm legal precedent,⁵⁰ the Ninth Circuit in *Brown* analogized to the U.S. Supreme Court's decision in *Hazelwood School District v. Kuhlmeier*.⁵¹ The Ninth Circuit, in fact, expressly acknowledged in *Brown* that *Hazelwood* "appears to be the most analogous to the present case."⁵²

In *Hazelwood*, three former students, who had been staff members of the high school newspaper, alleged that the principal violated their First Amendment rights to free speech by electing not to publish two controversial articles in the high school newspaper.⁵³ One story pertained to three high school students' experiences with pregnancy.⁵⁴ Although the story used false names, the principal nevertheless feared that the girls' identities might still be ascertainable.⁵⁵ Moreover, the principal expressed concern that

his individual and official capacity as Professor of Molecular Genetics and Biochemistry, UCSB; Fred Lange, in his individual and official capacity as Chair of the Materials Department, UCSB; and Sarah Pritchard, in her individual and official capacity as Director of the Davidson Library, UCSB. *Brown*, 308 F.3d at 939.

45. *Id.* at 946.

46. *Id.*

47. *Id.*

48. *Id.* at 955.

49. *Id.* at 949.

50. *See id.* at 951.

51. 484 U.S. 260 (1988).

52. *Brown*, 308 F.3d at 951.

53. *Hazelwood*, 484 U.S. at 262-63.

54. *Id.* at 263.

55. *Id.*

references to "sexual activity and birth control were inappropriate for some of the younger students at the school."⁵⁶

The other controversial story regarded the impact of divorce upon students.⁵⁷ The principal felt that prior to dissemination, the effected parents deserved a chance to review the article.⁵⁸ Erring on the side of caution, the principal ordered the exclusion of these articles from the high school newspaper.⁵⁹

In *Hazelwood*, the U.S. Supreme Court first ruled that a high school newspaper did not serve as a "public forum" deserving of maximum free speech protection under the U.S. Constitution.⁶⁰ The Court stated: "[P]ublic schools do not possess all of the attributes of streets, parks, and other traditional public forums"⁶¹ Public forums require complete openness for "indiscriminate use by the general public"⁶² Hence, the curricular aims that schools attach to forums carrying students' speech prove fatal to their consideration as public forums.⁶³

The U.S. Supreme Court in *Hazelwood* next decided the constitutionality and extent of an educator's right to silence forms of speech at the high school level. The Court applied a constitutional standard of scrutiny akin to rational basis review:

[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.⁶⁴

The aforementioned *Hazelwood* standard exemplifies the deference courts afford to parents and educators, who strive to groom

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 263-64.

60. *Id.* at 267.

61. *Id.*

62. *Id.* (quoting *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 47 (1983)).

63. *Id.* at 267-68. No party in *Brown* contested that a graduate thesis does not operate as a public forum. Consistent with *Hazelwood*, the UCSB graduate curriculum required that Brown write a master's thesis; thus Brown's thesis did not serve as a public forum for indiscriminate public use. *Brown*, 308 F.3d at 942.

64. *Hazelwood*, 484 U.S. at 273.

productive citizens in a democratic culture.⁶⁵ The U.S. Supreme Court's application of the *Hazelwood* standard, moreover, recognizes that educators stand in a better position to evaluate the very individualized learning needs of students.⁶⁶

Aside from analogizing to *Hazelwood* for legal precedent, the Ninth Circuit in *Brown* referenced a Sixth Circuit case, *Settle v. Dickson County School Board*,⁶⁷ for its strong factual resemblance.⁶⁸ In *Settle*, per the assignment instructions, a high school student initially submitted a research topic on "Drama" to the teacher for review, which received approval.⁶⁹ The student later changed her topic to "The Life of Jesus Christ" without the teacher's consent or knowledge.⁷⁰ The teacher refused to approve the student's new topic, at which point the father intervened.⁷¹ The teacher compromised with the father and allowed the student to write a paper on religion, but not solely on the life of Christ.⁷² The student submitted a revised topic, which did not comport to the father-teacher compromise.⁷³ The teacher subsequently gave the student a grade of zero.⁷⁴

The Sixth Circuit in *Settle* relied on the *Hazelwood* standard to hold that the teacher reserved the curricular right to curb a student's speech if doing so reasonably related to a legitimate pedagogical purpose.⁷⁵ The Sixth Circuit in *Settle* stated: "The free speech rights of students in the classroom must be limited because effective education depends not only on controlling boisterous conduct, but also on maintaining the focus of the class on the assignment in question."⁷⁶ In other words, the Sixth Circuit believed that instructing high school students to follow assignment instructions,

65. *See id.*

66. *See id.* As expressed by the Court in *Hazelwood*, "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." *Id.*

67. 53 F.3d 152 (6th Cir. 1995).

68. *Brown*, 308 F.3d at 948.

69. *Settle*, 53 F.3d at 154.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 155.

75. *Id.*

76. *Id.*

sometimes at the expense of students' free speech, typifies a legitimate pedagogical purpose.

Based upon *Hazelwood* and *Settle*, the Ninth Circuit held in *Brown* that a thesis committee did not unconstitutionally infringe on Brown's right to free speech when it withdrew approval of his graduate thesis, after he added a Disacknowledgments section, without the thesis committee's consent.⁷⁷ Applying the *Hazelwood* standard, arguably a brand of rational basis review, the Ninth Circuit deferred to the thesis committee's determination that its stance reasonably related to a legitimate pedagogical purpose: "[T]eaching [Brown] the proper format for a scientific paper."⁷⁸ Similar to *Settle*, the Ninth Circuit in *Brown* found merit in the notion that instructing students, albeit graduate students, to follow "proper" formatting guidelines—sometimes at the expense of their free speech—serves important educational interests.

The Ninth Circuit in *Brown* did not give much credence to the argument that Brown had a First Amendment right to draft an acknowledgments section from *any* viewpoint.⁷⁹ In fact, the Ninth Circuit boldly stated that so long as a legitimate pedagogical purpose is served, the thesis committee may venture so far as to "require" that the acknowledgments section recognize those who made a positive contribution to the thesis project.⁸⁰

Consistent with the aforesaid rationale, the Ninth Circuit affirmed the grant of summary judgment in favor of the defendants.⁸¹

IV. FAILING TO "ACKNOWLEDGE" THE NINTH CIRCUIT'S REASONING

The Ninth Circuit conceded that no binding precedent can appropriately answer the question posed in *Brown v. Li*: the extent to which public universities can regulate students' speech pertaining to curricular activity.⁸² In *Hazelwood School District v. Kuhlmeier*,⁸³ the U.S. Supreme Court explicitly left unanswered the question "whether the same degree of deference is appropriate with respect to

77. *Brown*, 308 F.3d at 944, 952.

78. *Id.* at 952.

79. *Id.* at 953.

80. *Id.*

81. *Id.* at 955.

82. *Id.* at 949.

83. 484 U.S. 260 (1987).

school-sponsored expressive activities at the college and university level.”⁸⁴ Precisely because no precedent lends clarity to this legal predicament, the Ninth Circuit should not have declared summary judgment in favor of the defendants.

A. Failing to Appreciate the Real Differences Between Lower Level Education and University Level Education

The Ninth Circuit in *Brown* erred upon applying the deferential *Hazelwood* standard. The Ninth Circuit failed to distinguish a critical point that makes the factual premises in *Hazelwood* and *Brown* starkly different: the educational setting where the students’ speech occurred. In *Hazelwood*, the students’ speech occurred in high school,⁸⁵ whereas the student’s speech in *Brown* took place in a public university.⁸⁶

Historically, the U.S. Supreme Court has considered, very seriously, the location where speech occurs when rendering First Amendment decisions concerning education. In *Tinker v. Des Moines Independent Community School District*,⁸⁷ the U.S. Supreme Court stated that First Amendment rights of students must be “‘applied in light of the special characteristics of the school environment.’”⁸⁸ The U.S. Supreme Court similarly stated in *Widmar v. Vincent*⁸⁹ that perhaps university students should enjoy greater First Amendment protections because “[u]niversity students are, of course, young adults. They are less impressionable than younger students.”⁹⁰ Such holdings elucidate the necessity of contextualized analyses with respect to the relationship between students’ free speech and students’ levels of education.

In failing to distinguish *Brown* from *Hazelwood* on the basis of the educational venue where students’ speech occurs, not only did the Ninth Circuit ignore the influence of past U.S. Supreme Court decisions, but it also neglected prior Ninth Circuit dicta. In

84. *Id.* at 273–74 n.7.

85. *Id.* at 262.

86. *Brown*, 308 F.3d at 941–42.

87. 393 U.S. 503 (1969).

88. *Hazelwood*, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 506).

89. 454 U.S. 263 (1981).

90. *Brown*, 308 F.3d at 961 (Reinhardt, J., concurring in part and dissenting in part) (quoting *Widmar*, 454 U.S. at 274 n.14).

Nicholson v. Board of Education Torrance Unified School District,⁹¹ the Ninth Circuit stated:

“[D]ifferent considerations govern application of the first amendment on the college campus and at lower level educational institutions. The activities of high school students, for example, may be more stringently reviewed than the conduct of college students, as the former are in a much more adolescent and immature stage of life and less able to screen fact from propaganda.”⁹²

Hence, at one point in time, the Ninth Circuit appreciated how the maturity levels of high school students and university students can lead to very different educational experiences.

Judge Reinhardt, who concurred in part and dissented in part in the Ninth Circuit *Brown* decision, felt that real differences between high school and university students are dispositive.⁹³ Critical of the Ninth Circuit’s application of the *Hazelwood* standard in *Brown*, Judge Reinhardt remarked: “[T]he reasons underlying the deference with respect to the regulation of the speech rights of high school youths do not apply in the adult world of college and graduate students, an arena in which academic freedom and vigorous debate are supposed to flourish”⁹⁴ Thus, as a student ages and matures to become more attuned to “the shared values of a civilized social order,”⁹⁵ that student should also enjoy greater constitutional freedom to express opinions and thoughts, especially in public universities.

B. An “Illegitimate” Pedagogical Purpose

A greater appreciation for the true differences between high school and university students should have led to the conclusion that different levels of education give rise to different pedagogical purposes.

91. 682 F.2d 858 (9th Cir. 1982).

92. *Brown*, 308 F.3d at 961–62 (Reinhardt, J., concurring in part and dissenting in part) (quoting *Nicholson*, 682 F.2d at 863 n.4 (internal quotations omitted)).

93. *See id.* at 957 (Reinhardt, J., concurring in part and dissenting in part).

94. *Id.* (Reinhardt, J., concurring in part and dissenting in part).

95. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

Reasonable minds can differ as to whether requiring Brown, a graduate student, to abide by established practices for writing an optional acknowledgments section in a thesis serves a legitimate pedagogical purpose. The UCSB Guide to Filing Theses and Dissertations only provided, at best, “general criteria” about the appropriate format for writing an acknowledgments section.⁹⁶ The Guide merely advised: “‘Within the usual margin restrictions, *any format* is acceptable’”⁹⁷ Thus, the regulations for writing an acknowledgments section appeared very flexible, which raises an important question: how could the Ninth Circuit find a legitimate pedagogical purpose in mandating close conformance to “proper” thesis standards when the UCSB Guide itself expressed ambivalence about how to write an appropriate acknowledgments section? Perhaps the Ninth Circuit overstepped its judicial boundaries in finding important what the UCSB Guide did not.

Alternatively, the legitimacy of the pedagogical purpose in *Brown* should be called into question because an acknowledgments section, in any form, does not contain research or substantive findings that lend value to the academic community. According to the Guide, the real pedagogical purpose of any thesis project is its scholastic usefulness: “‘The essence of academic research is shared results. Each discipline has a relatively standard method of presenting research results so that other researchers can find and build on past work.’”⁹⁸ The explicit purpose of the thesis project, based upon the Guide, places quality content as the paramount objective. As such, the Ninth Circuit trivially equates in importance the style of an acknowledgments section with substantive research conclusions in a thesis.

C. Finding a Precedent That Respects the Very Real and Distinct Characteristics of University Education

The application of the *Hazelwood* standard to the facts in *Brown* proves disconcerting because of its potential impact on free speech in public universities. The deferential nature of the *Hazelwood*

96. *Brown*, 308 F.3d at 942.

97. *Id.* (emphasis added) (quoting UCSB GUIDE TO FILING THESES AND DISSERTATIONS (1998)).

98. *Id.* (quoting UCSB GUIDE TO FILING THESES AND DISSERTATIONS 1 (1998)).

standard means that educators can restrict students' free speech in public universities so long as they can conjure a legitimate pedagogical purpose. Such a deferential constitutional standard of scrutiny means that rarely will a court need to examine the motives of public universities when they restrict students' speech. The Ninth Circuit in *Brown* certainly did not scrutinize the illusory nexus promulgated by Brown's thesis committee: that teaching conformance to professional standards for writing a graduate thesis reasonably relates to a legitimate pedagogical purpose.

The Ninth Circuit should have applied a constitutional standard of scrutiny that does not lend such vast deference to educators at the public university level. Acknowledging the vibrant nature of university education, the U.S. Supreme Court has repeatedly paid respect to unique forums carrying university students' speech. In *Rosenberger v. Rector and Visitors of the University of Virginia*,⁹⁹ for example, the U.S. Supreme Court stated that free speech is essential in the university setting to the "background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition"¹⁰⁰ It is, after all, the cultural dynamic in public universities that invites intellectual and ideological freedom.

A judicial commitment to the preservation of intellectual dynamism in public universities requires the adjudication of *Brown* under a different constitutional rubric. The Ninth Circuit should have applied a constitutional formula that affords university students wider latitude for expressional experimentation. Outlined below are two different constitutional standards that reflect this ideal.

First, in his opinion in *Brown* that concurs in part and dissents in part, Judge Reinhardt suggested that an intermediate scrutiny standard would serve as an appropriate constitutional benchmark.¹⁰¹ Under an intermediate scrutiny standard, "the university would have the burden of demonstrating that its regulation of college and graduate student speech was substantially related to an important pedagogical purpose."¹⁰² The intermediate scrutiny standard

99. 515 U.S. 819 (1995).

100. *Brown*, 308 F.3d at 961 (Reinhardt, J., concurring in part and dissenting in part) (quoting *Rosenberger*, 515 U.S. at 835).

101. *Id.* at 964 (Reinhardt, J., concurring in part and dissenting in part).

102. *Id.* (Reinhardt, J., concurring in part and dissenting in part) (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

provides greater protection to students' speech in public universities, while still allowing a mechanism for public universities to make content-based restrictions on speech that serves no important educational purpose.¹⁰³

Second, the U.S. Supreme Court outlined a "material disruption" standard in *Tinker v. Des Moines Independent Community School District*.¹⁰⁴ The *Tinker* standard presumes the constitutionality of speech unless it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others . . ." ¹⁰⁵ In *Tinker*, the U.S. Supreme Court upheld the right of student activists to protest the Vietnam War by wearing armbands in school, because this display of antiwar sentiment represented passive resistance, as opposed to unruly conduct.¹⁰⁶ Similarly, Brown's Disacknowledgments section exhibited a non-confrontational, non-disrupting, and non-disorderly method of expressing his disdain towards the school and state officials he felt impeded his scholastic growth.

Both of the aforementioned alternative constitutional tests call for the inverse treatment of the principal players relevant in a *Hazelwood* inquiry at the public university level. Instead of deferring to the discretion of educators to restrict students' speech, these tests presume tolerance of university students' speech. In this context, expressing a negative sentiment towards another, even towards university professors, does not raise constitutional concerns. To suggest otherwise is censorship, converting universities into "enclaves of totalitarianism."¹⁰⁷

V. CONCLUSION

As the United States emphasizes the values of democracy to countries around the world, *Brown v. Li* may restrict a crucial democratic virtue here at home. The Ninth Circuit in *Brown* may have set the tone for educators to restrict students' speech they dislike by conjuring a legitimate pedagogical purpose—even one as weak as requiring conformance to professional standards of

103. See *id.* (Reinhardt, J., concurring in part and dissenting in part).

104. 393 U.S. 503 (1969).

105. *Id.* at 513.

106. *Id.* at 513–14.

107. *Id.* at 511.

formatting an *optional* acknowledgments section. Such a holding undermines the very mission of universities—to serve as forums of free exchange to express a vast array of ideological and intellectual opinions. Unquestionably, the Disacknowledgments section included in Brown's graduate thesis demonstrated poor taste. Nevertheless, criticizing school and state officials should not trigger constitutional concerns. Public universities foster a uniquely open setting for intellectual exploration and experimentation; likewise, forums carrying students' speech in public universities should remain equally liberalized.

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