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To Speak or Not to Speak: Theoretical Difficulties of Analyzing Compelled Speech Claims under a Restricted Speech Standard

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TO SPEAK OR NOT TO SPEAK: THEORETICAL DIFFICULTIES OF ANALYZING COMPELLED SPEECH CLAIMS UNDER A RESTRICTED SPEECH STANDARD

I. INTRODUCTION

Fifty years have passed since Justice Frankfurter famously announced that it is the "business of a university" to provide "an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[1] Although Justice Frankfurter's proposal appears to be relatively straightforward, defining the contours of these "four essential freedoms" when they conflict with the "essential freedoms" of other actors becomes overwhelmingly complicated.

Since Justice Frankfurter's pronouncement, courts at all levels have struggled to define exactly where the freedoms of the university end and where the freedoms of other actors begin. This tension between the freedoms of the university and the freedoms of the individual coalesced in the recent Tenth Circuit case *Axson-Flynn v. Johnson*.[2] In *Axson-Flynn*, an acting student asserted her First Amendment right against a university's attempt to compel her to recite a script as written, even though the script contained words to which she fundamentally objected.[3] Although the lower court decided this case using Supreme Court precedent recognizing a person's freedom against compelled speech, the Tenth Circuit rejected that approach, asserting that a person's interest in compelled speech merited no different analysis than that of restricted speech.[4] Instead, the Tenth Circuit adopted the standard announced in *Hazelwood School District v. Kuhlmeier*, a

1. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (citation omitted).
2. 356 F.3d 1277 (2004).
3. *Id.* at 1281.
4. *Id.* at 1284 n.4.

standard that referees the boundary between a student's right to free speech and a school's right of academic freedom by analyzing whether the student speech "bears the imprimatur of the school."[5] If the student speech could reasonably be perceived to bear the school's sanction, the speech can be limited as long as the school's actions "reasonably relate[] to legitimate pedagogical concerns."[6]

Although the *Hazelwood* rationale is a sound approach to refereeing the boundary between student speech and an administrator's need to protect the reputation of the institution, adopting the *Hazelwood* rationale in this particular instance is fraught with shortcomings. The *Hazelwood* standard was developed in response to an administrative decision to restrict potentially embarrassing student speech in a school-financed publication that bore the school's name,[7] whereas *Axson-Flynn* involved a professor compelling a student to speak as part of a course requirement.[8] By refusing to acknowledge the differences between compelled and restricted speech, the Tenth Circuit established a dangerous precedent that gives the school tremendous deference. Following *Axson-Flynn*, although students certainly do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[9] a college student may shed significant speech rights at the classroom door.

This paper will discuss the *Axson-Flynn* decision and its implications for free speech and education. Part II includes the factual background and procedural history of the *Axson-Flynn* controversy and a discussion of the Tenth Circuit opinion. Part III analyzes the Tenth Circuit's rationale and offers several critiques of the court's use of *Hazelwood* as its primary analysis. Part IV offers a brief conclusion to the arguments presented in this paper.

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5. *Id.* at 1285 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988)).

6. *Id.*

7. *See Hazelwood*, 484 U.S. at 263 (noting that the school principal was concerned that publishing two student articles would be offensive to the student paper's readership).

8. *See Axson-Flynn*, 356 F.3d at 1280 (noting that Axson-Flynn refused to say words she found offensive during "classroom acting exercises").

9. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

II. AXSON-FLYNN V. JOHNSON

A. Factual Background

Prior to fall semester, Christina Axson-Flynn applied to the Actor Training Program ("ATP") at the University of Utah. At her audition with the program's admissions committee, she informed the committee that she would not say certain words which she deemed offensive to her religious beliefs. Although the committee pressed her on her religious objections, the committee ultimately admitted her to the program.[10]

Once Axson-Flynn commenced the program, it did not take long before her religious objections and the requirements of the ATP conflicted. In fact, her first assignment of the semester contained two expletives that she had objected to previously.[11] Without informing her instructor, she modified the script, performed the scene, and received an "A" on the assignment.[12] Later that semester, Axson-Flynn once again had to don a role that contained language to which she objected.[13] As this script had substantially more objectionable language, she voiced her concern to her professor.[14] Her professor, knowing the earlier role had similar language, questioned her as to why this had not come up during her previous assignment.[15] She informed the professor she had modified the earlier script and that apparently nobody had noticed.[16] This enraged the professor and he told her that she must perform the script as written or receive a "zero" on the assignment.[17] The next day Axson-Flynn informed the professor that even though taking a zero on that assignment would allow her to receive a course grade no higher than a "C," she would not retract from her previous stance and refused to recite the script as written.[18] Impressed by her character, the professor retreated from his previous stance and

10. *Axson-Flynn*, 356 F.3d at 1281.
11. *Id.*
12. *Id.*
13. *Id.* at 1282.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*

allowed her to adjust not only that script, but any others throughout the semester to which she objected.[19]

At her semester review, Axson-Flynn was once again confronted about her language concerns and was strongly urged to modify her stance.[20] Deeming her behavior as unacceptable, the professors told her to "talk to some other Mormon girls who are good Mormons, who don't have a problem with this."[21] When she refused, the committee told her, "You can choose to continue in the program if you modify your values. If you don't, you can leave. That's your choice."[22] Seeing this situation as irreconcilable, she withdrew from the program.[23]

B. The District Court

Axson-Flynn brought suit against the University of Utah and the ATP for violation of her free exercise and free speech rights under the First Amendment.[24] In analyzing her claims, the court found that the case "presents a novel question with regard to the regulation of speech in the educational forum: does required participation in a University's curriculum constitute compelled speech . . . ?"[25] To decide this question, the court stated the following:

> The relevant test to determine whether compelled speech is constitutionally impermissible is: 1) whether as a threshold matter, the speech is compelled, and 2) if so, whether such compulsion "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[26]

Although the court found it difficult to precisely define the "sphere of intellect and spirit" of the First Amendment, the court did find that the analysis hinges on whether the State

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19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Axson-Flynn v. Johnson, 151 F.Supp.2d 1326, 1327-28 (D.Utah 2001), *rev'd*, 356 F.3d 1277 (10th Cir. 2004). Plaintiff's contentions under the free exercise clause are beyond the scope of this paper and will not be addressed.

25. *Id.* at 1334.

26. *Id.* at 1335 (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

action "forces the individual to become 'an instrument for fostering public adherence to an ideological point of view he finds unacceptable.'"[27]

In applying this analysis to the *Axson-Flynn* controversy, the court found that the ATP's course requirements did not compel Axson-Flynn to espouse any particular ideology, but rather required her to recite lines which she found offensive.[28] Thus, finding that the actions of the ATP failed to rise to the level of invasion prohibited by the First Amendment, the court dismissed the claim by granting summary judgment for the University.[29]

C. The Tenth Circuit Opinion

On appeal, the Tenth Circuit rejected the lower court's compelled speech approach.[30] In an extended footnote, the Tenth Circuit claimed that although the First Amendment prohibits a government actor from compelling a person to speak, that prohibition does not hinge on whether the speech is ideological in nature.[31] Instead, the First Amendment prohibits "both what to say and what not to say,"[32] regardless of the content of the speech. Thus, although there is certainly a difference between compelled speech and restricted speech, the distinction is ultimately "irrelevant."[33]

Having rejected the reasoning of the lower court, the Tenth Circuit engaged in a detailed analysis of the varying types of speech that can occur in school settings.[34] The court concluded that campus speech can be divided into three groups: "student speech that 'happens to occur on the school premises'"; "government speech," which includes speech by those authorized to speak in behalf of the school; and "school-sponsored speech," which constitutes student speech the school "affirmatively . . . promotes."[35] As Axson-Flynn's speech

27. *Id.* (quoting Wooley v. Maynard, 430 U.S. 705, 715 (1977)).
28. *Id.*
29. *Id.* at 1336.
30. Axson-Flynn, 356 F.3d at 1284 n.4.
31. *Id.*
32. *Id.* (quoting Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796-98 (1988)).
33. *Id.* at 1290 n.9.
34. *Id.* at 1285.
35. *Id.* (quoting Fleming v. Jefferson County Sch. Dist., R-1, 298 F.3d 918, 923

occurred within the classroom and was a course requirement adopted and promoted by the school, The Tenth Circuit concluded that Axson-Flynn's speech fell within the third category of "school-sponsored speech."[36]

According to the Tenth Circuit, school-sponsored speech is governed by *Hazelwood School District v. Kuhlmeier*.[37] In *Hazelwood*, the Court upheld a school administrator's decision to eliminate two pages from a student newspaper because the content could potentially embarrass the school and its associates.[38] Because the student speech "might reasonably [be] perceive[d] to bear the imprimatur of the school,"[39] the student speech could be restricted, provided that such restrictions are "reasonably related to legitimate pedagogical concerns."[40] Thus, student speech that the school actively promotes—opposed to speech it merely tolerates—can be quite restricted provided the school has a legitimate reason for so doing.[41]

In applying this standard to the case at hand, the Tenth Circuit reasoned that "[f]ew activities bear a school's 'imprimatur' and 'involve pedagogical interests' more significantly than speech that occurs within a classroom setting as part of a school's curriculum."[42] Under the *Hazelwood* standard, "substantial deference" is given to "educators' stated pedagogical concerns."[43] Operating under such deference, the court found that the school's interest in "teach[ing] students how to step outside their own values . . . by forcing them to . . . recite offensive dialogue[,] teach[ing] students to preserve the integrity of the author's work[,] and measur[ing] true acting skills [by the student's ability to] convincingly . . . portray an offensive part" was reasonably related to the ATP's interest in training professional actors.[44] Thus, the court held that as long as the educational goal or pedagogical concern was not in

(10th Cir. 2002)).

36. *Id.*

37. *Id.*

38. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 263 (1988).

39. *Id.* at 271.

40. *Id.* at 273.

41. *Id.* at 270-71, 273.

42. *Axson-Flynn*, 356 F.3d at 1289 (citation omitted).

43. *Id.* at 1290 (quoting *Fleming*, 298 F.3d at 925).

44. *Id.* at 1291-92.

actuality a pretext for punishing the student in unconstitutional ways, it will not be second guessed. But since there was still a genuine issue of material fact in this case as to whether ATP's actions were simply a pretext for religious discrimination against Axson-Flynn, the court reversed the grant of summary judgment and remanded the case for further proceedings on the remaining factual issue.[45]

The Tenth Circuit warned that requiring any greater scrutiny of pedagogical concerns would "effectively give each student veto power over curricular requirements, subjecting the curricular decisions of teachers to the whims of what a particular student does or does not feel like learning on a given day. This we decline to do."[46]

III. ANALYSIS

A. Compelled Speech vs. Restricted Speech

Despite the Tenth Circuit's detailed opinion, the application of the *Hazelwood* standard appears to be a marked departure from other compelled speech cases. By deciding a compelled speech case under the wholesale adoption of a restricted speech standard, the court inadvertently limited a student's compelled speech protection.

In *Axson-Flynn,* the court suggests that the difference between compelled and restricted speech is without constitutional significance and consequently, the two types of speech should be treated identically. To support this notion, the Tenth Circuit cites *Riley v. National Federation of the Blind of North Carolina, Inc.* in which the Supreme Court noted that "[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."[47] Standing alone, this clearly supports the Tenth Circuit's notion that compelled and restricted speech

45. *Id.* at 1293.

46. *Id.*

47. *Id.* at 1284 n.4 (quoting *Riley*, 487 U.S. at 796-98).

should be treated identically. Placed in its original context, however, a much different interpretation emerges.[48] In *Riley*, the Court was not forever eliminating the analytical difference between compelled speech and restricted speech, but rather it was responding to North Carolina's assertion that compelled speech is entitled to less protection than instances of restricted speech.[49] In light of this context, the Supreme Court reaffirmed that both areas of speech are protected and that simply because a government actor is compelling an individual to speak does not entitle the government to any greater deference than if the government was instead restricting the individual from speaking.[50]

On a practical level, the operation of compelled speech is quite unique from that of compelled silence. The motivations behind restricting the speech of another could be quite varied. To name a few: disagreement with the viewpoint,[51] the content is offensive,[52] or the time, place, or manner is inappropriate.[53] In contrast, the motivations behind compelling someone to speak would be quite different. Motivations to compel speech could be as mundane as creating the appearance that the citizenry upholds a particular viewpoint,[54] to more offensive motives such as attempting to actually mandate compliance with a particular viewpoint.[55] As noted in the lower court's opinion in *Axson-Flynn*, the Supreme Court has in several cases recognized the analytical and motivational difference between being compelled to speak and being compelled to remain silent.[56] Despite the fact that this line of cases has

48. *See Riley*, 487 U.S. at 796-98.

49. *See id.*

50. *See id.*

51. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504-505 (1969) (holding that suspending students because they wore black arm-bands).

52. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (holding that a student's vulgar and profane speech at a school assembly could be restricted).

53. *See* N.J. Coal. Against War in the Middle East v. JMB Realty Corp., 650 A.2d 757 (N.J. 1994) (holding that a large regional shopping center can restrict free-speech demonstrations to an appropriate time, place and manner).

54. *See* Wooley v. Maynard, 430 U.S. 705, 715 (1977) (holding that a state statute requiring individuals to display the motto "Live Free or Die" on vehicle license plates violated the First Amendment as an unnecessary compulsion of speech).

55. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (striking down a school regulation that mandated students to salute the flag and recite the Pledge of Allegiance on threat of suspension).

56. *Axson*-Flynn v. Johnson, 151 F.Supp.2d 1326, 1335 (2001) (referring to

never been explicitly overruled, the Tenth Circuit rejects this approach and conflates two radically different aspects of free speech protection.[57]

B. The Danger of Hazelwood in the Compelled Speech Context

By rejecting the compelled speech doctrine, the Tenth Circuit had to look to the restricted speech cases for guidance.[58] The result was not only awkward, but may prove to completely eviscerate compelled speech claims from the Tenth Circuit.

Perhaps the greatest danger that *Hazelwood* presents to compelled speech claims is its "substantial deference" to the administrative decisions of educators.[59] The Tenth Circuit asserts that speech within a classroom is entitled to such deference because it inherently bears the imprimatur of the school and relates to pedagogical concerns.[60] Thus, under *Hazelwood*, the only protection to the student is that the restriction must reasonably relate to pedagogical concerns.[61] To be sure, the Tenth Circuit added one qualification to the deferential *Hazelwood* standard that the educator's pedagogical concern cannot be a pretext for invidious discrimination.[62] But given the broad deference of the *Hazelwood* standard, save blatantly arbitrary restrictions, an institution is free to restrict student speech within the classroom.

Extending this analysis to compelled speech cases, however, may potentially allow unconstitutional motivations to compel student speech to be used as the very pedagogical concerns that justify such compulsion. The potential shortcomings of this approach are illuminated once we reevaluate the *Barnette* case under the principles announced in *Axson-Flynn*.

In *Barnette*, the West Virginia State Board of Education had adopted a resolution that required all students to participate "in the salute honoring the Nation represented by

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Barnette, 319 U.S. 624, and *Riley*, 487 U.S. 781).

57. *See* Axson-Flynn v. Johnson, 356 F.3d 1277, at 1284 n.4 (10th Cir. 2004).

58. *Id.* at 1284-85.

59. *Id.* at 1290 (citing Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 925 (10th Cir. 2002)).

60. *Id.*

61. *Id.* at 1290-92.

62. *Id.* at 1292-93.

the Flag" while reciting the Pledge of Allegiance.[63] Refusal to do so should be regarded as "insubordination," punishable by expulsion.[64] A family of devout Jehovah's Witnesses brought suit against the school board seeking an injunction to restrain enforcement of this law—participating in these activities is against the tenets of their religion and would require their children to either participate or be expelled.[65]

Under the doctrine announced in *Axson-Flynn*, the first step would be to evaluate whether the requirement to salute the flag and recite the pledge was a curricular requirement—thus constituting "school-sponsored speech."[66] As the Board of Education's resolution stated that the salute and recital shall become "a regular part of the program" of the schools, the requirement would likely be construed as a curricular requirement.[67] The conclusion that this is "school-sponsored speech" is further bolstered by the fact that failure to participate resulted in expulsion.[68] The second and final step would be to determine whether such compulsion reasonably relates to pedagogical concerns.[69] In passing the resolution, the school board was inspired by a recent amendment to the West Virginia education statute which required that students be taught history and civics "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government."[70] As the standard announced in *Axson-Flynn* is substantially deferential, it is difficult to argue how saluting the flag and reciting the Pledge of Allegiance is not at least reasonably related to the pedagogical concern of civic duty.

Thus, under the *Axson-Flynn* doctrine the resolution would be upheld as a curricular requirement reasonably related to pedagogical concerns. In *Barnette*, however, the Court found that these pedagogical concerns—namely the West Virginia

63. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943).
64. *Id.* at 629.
65. *Id.* at 629-30.
66. *Axson-Flynn*, 356 F.3d at 1285.
67. *Barnette*, 319 U.S. at 626.
68. *Id.* at 629.
69. *Axson-Flynn*, 356 F.3d at 1287-91.
70. *Barnette*, 319 U.S. at 625.

School Board's definition of civic duty—were the very motivations that violated the First Amendment.[71] To the Court in *Barnette*, the question was not whether such compulsion was a curricular requirement, but whether the curricular requirement invaded "the sphere of intellect and spirit" proscribed by the First Amendment.[72] Unfortunately, under *Axson-Flynn's* deferential standard, evaluating whether the course requirement invades the sphere of intellect and spirit proscribed by the First Amendment is impossible.

C. Barnette and School-Mandated Speech

Based on principles derived from *Barnette* and other Supreme Court precedent, a more workable standard arises. In *Axson-Flynn*, the Tenth Circuit recognized three types of speech that occur on campus: student speech that happens to occur on campus, government speech, and school-sponsored student speech.[73] Instead of grouping compelled speech claims into the latter group, a more workable standard would be to recognize a fourth area of campus speech: school-mandated speech.

Unlike "school-sponsored speech" where the student speech bears the school's imprimatur and encouragement, school-mandated speech is actually required by the school through curricular or other requirements. Instead of focusing on the curricular requirements and whether the restriction reasonably relates to pedagogical concerns, the analysis of school-mandated speech would mirror the analysis employed by the lower court in the *Axson-Flynn* controversy. The court would first decide whether the speech is in fact compelled, and if so, whether the compulsion "invades the sphere of intellect and spirit" proscribed by the First Amendment.[74]

The difficulty with this standard, however, is defining what exactly is the sphere of intellect and spirit protected by the First Amendment.[75] As correctly noted by the Tenth Circuit in *Axson-Flynn*, "the First Amendment's proscription of compelled

71. *Id.* at 642.
72. *Id.*
73. 356 F.3d at 1285.
74. *Barnette*, 319 U.S. at 642.
75. Axson-Flynn v. Johnson, 151 F.Supp.2d 1326, 1335 (D. Utah 2001).

speech does not turn on the ideological content of the message that the speaker is being forced to carry."[76] Thus, in defining the "sphere of intellect and spirit" of the First Amendment, whether the content of the speech is ideological is entirely irrelevant.[77] Instead, the focus of the analysis should be whether the government action compels *espousal* of any particular view, belief, or ideology.[78] In effect, what offends the First Amendment is not the compulsion of any particular type of speech, but rather compulsion that requires espousal or endorsement of any particular idea.[79] By focusing the analysis on whether the compulsion requires espousal of a particular idea, the court is able to better distinguish between permissible and impermissible instances of compelled speech. The utility of this standard was highlighted recently in *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*.[80] Although this case did not involve an instance of school-mandated speech, the analytical approach of the court is nonetheless instructive. In *Forum for Academic & Institutional Rights*, law schools and individual faculty members challenged the constitutionality of a statute that allowed the Secretary of Defense to deny federal funding to law schools that prevented military recruiters from recruiting on campus.[81] Among other claims, the schools asserted that, by effectively requiring the schools to allow military recruiters to recruit on campus, the statute was compelling the schools to endorse the military's recruiting message.[82] In evaluating the compelled speech claims, the court found that requiring recruiters to come on campus did "not present the scenario of directly requiring a private speaker to participate in the dissemination of a particular message."[83] Indeed, the school was still free to disclaim any message of the

76. *Axson-Flynn*, 356 F.3d at 1284 n.4.

77. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected.").

78. *See* Phelan v. Laramie County Cmty. Coll. Bd. of Tr., 235 F.3d 1243, 1247 (10th Cir. 2000) ("The crucial question is whether . . . the government is compelling others to espouse or suppress certain ideas and beliefs.").

79. *Id.*

80. 291 F.Supp.2d 269 (D.N.J. 2003).

81. *Id.* at 274-75.

82. *Id.* at 309.

83. *Id.*

military with which it disagreed.[84] To the court, proscribed compulsion involves "an outright regulation on speech and a patent attempt by the government to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'"[85] The military requirements fell short of this sort of proscribed prescription.[86]

Applying the school-mandated standard to *Axson-Flynn*, the first question is whether the school requirements compelled Axson-Flynn to speak. As recognized by the Tenth Circuit, in order to pass the class and fulfill the program requirements, she had to recite the play as written.[87] Thus, if she wanted to graduate from the ATP, Axson-Flynn had no choice but to say the offensive words.[88] By requiring Axson-Flynn to recite certain words, the ATP clearly compelled Axson-Flynn to speak.[89] The question then becomes whether the school's requirements forced Axson-Flynn to espouse or endorse a particular idea or belief. In forcing Axson-Flynn to recite the play as written, the faculty had no intention of her actually endorsing or espousing the viewpoints expressed within the script.[90] Intriguingly, the fact that she would never endorse such views was precisely why the faculty felt it so important for her to recite the play as written.[91] The faculty never intended Axson-Flynn to espouse any particular viewpoint, but rather wanted to see if she could accurately portray a character with

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84. *Id.*

85. *Id.* at 309-10 (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

86. For cases that employ a similar test for compelled speech protection, see Gay Rights Coal. of Georgetown v. Georgetown Univ., 536 A.2d 1 (D.C. 1987) (rejecting as a violation of the First Amendment a gay rights group's efforts to require the government to force Georgetown to grant them university recognition); Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1 (1986) (plurality opinion) (rejecting as a violation of the First Amendment a state law that required a utility company to distribute potentially adverse propaganda with billing statements); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (rejecting as a violation of the First Amendment a state law that required a newspaper to provide space to political candidates it opposes).

87. Axson-Flynn v. Johnson, 356 F.3d 1277, 1290 (2004) ("There is no question in the instant case, Defendants attempted to compel Axson-Flynn to speak.").

88. *Id.* at 1282.

89. *Id.* at 1290.

90. *See id.* at 1291-92.

91. *Id.* at 1291 (noting the ATP's belief that requiring students to portray characters with which they disagreed helped measure "true acting skills").

which she morally disagreed.[92] Thus, although the program requirements compelled Axson-Flynn to speak words she found offensive, the school's mandate falls short of the espousal proscribed by the First Amendment.

IV. CONCLUSION

Despite the evident shortcomings of the Tenth Circuit's opinion, in finding for the University, the court nonetheless decided the case correctly. Notwithstanding, the Tenth Circuit's rejection of the compelled speech doctrine in favor of a new standard based on *Hazelwood* stands as a dangerous precedent that could potentially limit the effectiveness of compelled speech claims in school settings in the future.

One of the fundamental freedoms afforded to universities is the ability to decide what is to be taught. This ability, however, is not universal. Although universities should be granted broad discretion when making and enforcing curricular requirements, the university should be restricted from compelling a student to adopt a particular idea, belief, or viewpoint. In evaluating these actions, "[t]he crucial question is whether . . . the government is compelling others to espouse . . . certain ideas and beliefs."[93] By focusing on this crucial question, courts will be able to better determine when school-mandated speech exceeds the boundaries of permissible curricular requirements and violates the First Amendment's proscription of compelled speech.

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92. *Id.* at 1291-92.

93. Phelan v. Laramie County Cmty. Coll. Bd. of Tr., 235 F.3d 1243, 1247 (10th Cir. 2000).

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