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Schoolhouse Rocked: *Hosty v. Carter* and the Case Against *Hazelwood*

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SCHOOLHOUSE ROCKED: *HOSTY V. CARTER* AND THE CASE AGAINST *HAZELWOOD*

*Virginia J. Nimick**

> *I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.*[1]

INTRODUCTION

The federal courts have long held that public schools serve as "the cradle of our democracy,"[2] and have recognized the special status of public schools resulting from the particular educational mission with which they are entrusted.[3] Unlike any other

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[1] Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961) (Black, J., dissenting).

[2] James v. Bd. of Educ., 461 F.2d 566, 568 (2d Cir. 1972).

[3] Brown v. Bd of Educ., 347 U.S. 483, 493 (1954).

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is

governmental body, our public schools are charged with two potentially incompatible tasks: encouraging independent thought and cultivating the "marketplace of ideas"[4] while, at the same time, instilling the values necessary to create productive members of society.[5] With this in mind, public colleges and universities across the country have, for the most part, broadly embraced the First Amendment.[6] There are times, however, when the free expression rights embodied in the First Amendment clash with administrative attempts to limit student speech. One such conflict arose in the fall of 2000 at Governors State University when school administrators required student journalists to obtain official approval before publishing the school's student-run paper.[7]

In the resulting lawsuit, *Hosty v. Carter*, student journalists alleged that such prior review and restraint violated their First Amendment rights of free speech and expression.[8] Ultimately, the Court of Appeals for the Seventh Circuit held that the interests of the college trumped the rights of the students,[9] resulting in alarm

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> the principle incident in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Id.

[4] This "marketplace of ideas" concept can be traced in federal jurisprudence to Justice Holmes' dissenting opinion in Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

[5] Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853, 864-65 (1982). For a more detailed discussion of this potential conflict, see, e.g., William G. Buss, *School Newspapers, Public Forum and The First Amendment*, 74 IOWA L. REV. 505, 505 (1989).

[6] The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[7] Hosty v. Carter, 412 F.3d 731, 732 (7th Cir. 2005) (en banc), *cert. denied*, 164 L. Ed. 2d 47 (2006).

[8] *Id.*

[9] *Id.*

and outrage among free speech advocates across the country.[10] Prior to the decision in *Hosty*, the standard derived from the seminal First Amendment case of *Hazelwood School District v. Kuhlmeier*[11] had been applied only to student speech in primary and secondary schools. *Hosty* represents the first extension of the restrictive *Hazelwood* framework to post-secondary student speech, and stands in direct conflict with decisions from both the First and Sixth Circuits. [12]

According to the *Hazelwood* standard, school officials may regulate "school-sponsored expressive activities" (such as a student newspaper) as long as their actions are "reasonably related to legitimate pedagogical concerns."[13] Not only does *Hazelwood*'s application in *Hosty* place the Seventh Circuit in direct conflict with its sister Circuits, it represents a break from the deeply entrenched tradition of recognizing college and university campuses as a marketplace of ideas.

Though it did not endorse the idea, the Supreme Court did not foreclose the possibility of extending the *Hazelwood* framework to college campuses. Instead, in what has become an increasingly problematic footnote, the Court declined to address *Hazelwood*'s relevance outside of primary and secondary education.[14] Given the

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[10] *See, e.g.,* Student Press Law Center, News Flash: Free Speech Groups Worry *Hosty* Ruling Will Scale Back Students' First Amendment Rights, *available at* http://www.splc.org/newsflash.asp?id=1042 (quoting Greg Lukianoff, director of public and legal advocacy for the Foundation for Individual Rights in Education (FIRE), explaining, "[a]s much as people like to think they value free speech, as soon as there's a loophole that people can take advantage of to silence their critics or opinions they think are wrong, they will jump on them. This opinion creates tremendous opportunities for administrators and other students who want to infantilize students or deny them their basic rights.").

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

[12] Student Gov't Ass'n v. Board of Trustees of Univ. of Mass., 868 F.2d 473, 480 n.6 (1st Cir. 1989) (holding that *Hazelwood* "is not applicable to college newspapers."); Kincaid v. Gibson, 236 F.3d 342, 346 (6th Cir. 2001) (en banc) (finding that *Hazelwood* "has little application to this case.").

[13] *Hazelwood*, 484 U.S. at 273.

[14] *Id.* at 273 n.7 ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at

impact an extension of the reasoning in *Hosty* could have on First Amendment free speech rights, *Hazelwood* framework should not, as a matter of law and policy, be applied to higher education.

Parts I.A and B of this Note discuss the development of free speech rights of students in primary and secondary public schools.[15] Part I.C focuses on the development of student speech in post-secondary public institutions. Part II concerns the Seventh Circuit's decision in *Hosty*, representing the first unequivocal application of *Hazelwood* to the student press outside of the high school setting. Part III questions the applicability of an extension of *Hazelwood* to post-secondary education. In addition, Part III sets forth several arguments, grounded in both law and policy, questioning the ruling in *Hosty* and discussing the practical effect of the decision on future student speech.

I. FREE SPEECH RIGHTS OF STUDENTS IN PUBLIC SCHOOLS

The Supreme Court has had occasion to address the rights of students in public institutions on numerous occasions.[16] Parts A and B of this section address students' First Amendment rights in public primary and secondary schools, while Part C explores the rights of students enrolled in undergraduate or graduate institutions.

A. Student Speech in Primary and Secondary Schools

The free speech rights of students in primary and secondary schools have been shaped by three cases: *Tinker v. Des Moines*

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the college and university level.").

[15] For purposes of this discussion, "post-secondary" is used to refer to those students who have graduated from high school, and includes those students enrolled at both undergraduate and graduate institutions.

[16] The First Amendment applies with particular force to public institutions, as they are acting as an arm of the state. Accordingly, this Note deals only with students enrolled in the public education system. A discussion of the free speech rights of students in private institutions is beyond the scope of this Note. For an excellent starting point for such a discussion, see, e.g., Nancy J. Meyer, *Assuring Freedom for the College Student Press After* Hazelwood, 24 VAL. U. L. REV. 53 (1989).

Independent School District,[17] *Bethel School District v. Fraser*,[18] and *Hazelwood*. *Tinker*'s now infamous declaration, "[i]t can hardly be said that students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[19] stands as a strong affirmation of students' rights. However, in the years since *Tinker*, the Supreme Court has severely circumscribed those rights with its decisions in *Fraser* and *Hazelwood*.[20]

1. Tinker v. Des Moines*: Material and Substantial Disruption*

Tinker involved three young teenagers: John Tinker, Christopher Eckhardt, and John's younger sister, Mary Beth Tinker. In December 1965, a group of adults and students met at the Eckhardt home and resolved to publicize their objections to the Vietnam War by wearing black armbands during the holiday season.[21] The students did so despite a school district-wide ban.[22] For this expression, Eckhardt and Mary Beth Tinker were suspended; John Tinker was sent home without a formal suspension.[23] Through their parents, the students sued the school district alleging that their First Amendment rights of free speech and expression had been violated.[24]

In a 7-2 decision, the Supreme Court sided with the students.[25] Justice Fortas, writing for the majority, began by noting that school

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[17] 393 U.S. 503 (1969).

[18] 478 U.S. 675 (1986).

[19] *Tinker*, 393 U.S. at 506.

[20] *See* discussion *infra* Parts I.A.2-3.

[21] *Tinker*, 393 U.S. at 504.

[22] *Id.* (The principals of the Des Moines schools became aware of this plan and adopted a policy stating that any student wearing an armband to school would be asked to remove it and, if he refused, would be suspended until he agreed to return without it).

[23] JOHN W. JOHNSON, THE STRUGGLE FOR STUDENT RIGHTS: TINKER V. DES MOINES AND THE 1960S 18, 20, 25 (1997).

[24] *Tinker*, 393 U.S. at 504.

[25] *Id.* at 513-14.

boards, as agents of the State, were not above the Bill of Rights.[26] Quoting Justice Jackson, he wrote: "[t]hat [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[27] The Court reasoned that in order for school officials to justify a prohibition against a particular type of expression, they must demonstrate that their actions were fueled by something more than the "desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[28] Thus, restriction of expressive activity is appropriate only when it can be shown that the conduct in question would "materially and substantially interfere" with the operation of the school.[29]

Applying that standard to the facts of *Tinker*, the Court concluded that the armbands had not "materially and substantially interfer[ed]" with the school's educational mission.[30] Only a few of the nearly 20,000 students in the school system wore the armbands and only five were suspended for it.[31] Noting the importance of respecting constitutionally protected rights in the nation's public schools, Justice Fortas concluded "state-operated schools may not

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[26] *Id*. at 508.

[27] *Id.* (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

[28] *Id.* at 509.

[29] *Id.* The dissent reached the opposite conclusion:

> The original idea of schools, which I do not believe is yet abandoned as worthless or not of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the Nation has outworn the old-fashioned slogan that 'children are to been seen not heard,' but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach.

Id. at 522 (Black, J. dissenting).

[30] *Tinker*, 393 U.S. at 513-14.

[31] *Id.* at 514. *See also* JOHNSON, *supra* note 23, at 166 (discussing court notes in which the clerk observed in the record a total lack of violent incidents related to the armbands).

be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under the Constitution."[32]

Though *Tinker* involved student speech apart from journalism, less than three months later, its reasoning was expanded to prohibit censorship of the student press.[33] A federal court in New York applied *Tinker* to a high school newspaper, holding that "[i]t is patently unfair in light of the free speech doctrine to close to the students the forum which they deem effective to present their ideas. *The rationale of Tinker carries beyond the facts in that case*."[34]

2. Bethel School District v. Fraser*: The Beginning of the Retreat*

The lower courts spent the next twenty years fleshing out the "material and substantial disruption" test.[35] In 1985, the Supreme

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[32] *Id.* at 511. Justice Fortas continued:

> In our system, students may not be regarded as closed-circuit recipients of only that which the States chooses to communicate. They may not be confined to the expression of those sentiments what are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

Id.

[33] Interestingly, *Tinker* grew out of an instance of censorship of a student newspaper. Three days before the students wore their armbands and before the school district banned them, a school administrator censored an article in Eckhardt's school newspaper. Another student, Ross Peterson, had submitted the article to the paper explaining the purpose of the planned protest and calling for support of a truce. After prohibiting publication of the article, school administrators "hastily" met and banned armbands from the schools. *See*, JOHNSON, *supra* note 23 at 5-6; *Tinker*, 393 U.S. at 504.

[34] Zucker v. Panitz, 299 F. Supp. 102, 105 (S.D.N.Y. 1969) (emphasis added) (internal citations omitted).

[35] The lower federal courts followed *Tinker* in some instances, while in others, they strayed. *See, e.g.,* Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 DRAKE L. REV. 527 (2000). As Professor Chemerinsky explains, "There are literally dozens of lower federal court cases over the last thirty years dealing with student speech. They follow no consistent pattern; some are quite speech-

Court's decision in *New Jersey v. T.L.O.*, limited the Fourth Amendment rights of minors in public schools and signaled a shift toward conservatism in the Court.[36] Just one year later, in *Bethel School District No. 403 v. Fraser*,[37] the Supreme Court broadened its changing philosophy to encompass students' First Amendment rights as well. The dispute began when Matthew Fraser delivered a sexually suggestive speech in support of a student government candidate at a school assembly.[38] After delivering the speech, Fraser faced suspension for violating a school policy prohibiting the use of profane language.[39] He ultimately served a two-day suspension and filed suit claiming a violation of his First Amendment free speech rights.[40]

In a 7-2 decision, the Court upheld the suspension and recognized the first exception to *Tinker*, holding that schools may determine what constitutes appropriate speech in classrooms and school assemblies.[41] Chief Justice Burger, though acknowledging *Tinker*'s proclamation that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'"[42] declared that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[43] While noting the importance of permitting the expression of a variety of

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protective and follow *Tinker*'s philosophy as well as its holding, while others are very restrictive of student speech and treat *Tinker* as if it has been overruled." *Id.* at 542.

[36] 469 U.S. 325, 327 (1985) (balancing school officials' need to search and students' Fourth Amendment rights); *see also*, JOHNSON, *supra* note 23, at 206-07.

[37] 478 U.S. 675 (1986).

[38] *Id.* at 677-78.

[39] The Bethel High School disciplinary rule provided that "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.* at 678.

[40] *Id.* at 679.

[41] *Id.* at 683.

[42] *Id.* at 680 (quoting *Tinker*, 393 U.S. at 506).

[43] *Fraser*, 478 U.S. at 683 (referring to New Jersey v. T.L.O., 460 U.S. 325, 340-42 (1985)).

viewpoints,[44] the Court deferred to the administration's determination that Fraser's speech had seriously undermined the school's educational mission.[45] Reasoning that the school's primary function was to "inculcate the habits and manners of civility,"[46] the Court concluded that the school was not required to tolerate "lewd, indecent, or offensive speech and conduct such as that indulged by [Fraser]."[47]

The Court further highlighted the differences between *Tinker* and *Fraser*. First, unlike the armbands at issue in *Tinker*, Fraser's speech was not political in nature, but was merely "lewd and indecent."[48] Where children are concerned, the Court held that the Constitution affords less protection to lewd and obscene expression.[49] Second, because Fraser's speech was given at a school assembly, the Court found it perfectly appropriate for the school to disassociate itself from the speech by punishing it.[50]

Based on these distinctions, the Court declined to apply *Tinker*'s substantial and material interference test, and instead utilized a balancing test.[51] The Court reasoned that Fraser's First

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[44] *Id.* at 682-83.

[45] *See id.* at 681. "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Id.* at 681.

[46] *Id.* Chief Justice Burger, quoting two historians, described the role and purpose of the American public school: "[Public] education must prepare pupils for citizenship in the Republic . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." *Id.* (quoting CHARLES A. BEARD & MARY M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

[47] *Id.* at 683.

[48] *Id.* at 685. "Unlike the sanctions imposed on the students wearing the armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint." *Id.*

[49] *Fraser*, 478 U.S. at 684-85. Chief Justice Burger explicitly stated, "The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality." *Id.* at 683.

[50] *Id.* at 685.

[51] *Id.* at 681-86.

Amendment interest in his freedom of expression must be weighed against the school's interest in "[inculcating] fundamental values necessary to the maintenance of a democratic political system."[52] Here, Fraser's interest in his freedom of expression was outweighed by the school's need to preserve order and civility.[53] Chief Justice Burger went so far as to quote with approval from Justice Black's dissent in *Tinker*: "'I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.'"[54]

3. Hazelwood School District v. Kuhlmeier:[55] *Legitimate Pedagogical Concern*

While Matthew Fraser was giving his speech at Bethel High School in April 1983,[56] the students at the *Spectrum*, the student newspaper published in conjunction with the Journalism II class at Hazelwood East High School in St. Louis, Missouri, were preparing two pages of articles concerning teen pregnancy, marriage, juvenile delinquency, and divorce.[57] One article contained quotes from several students, identified by name, about the impact of their parents' divorce.[58] Other articles concerned three Hazelwood students (who were not identified by name) who had become pregnant and discussed, in detail, their sexual activity and birth control practices.[59]

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[52] *Id.* (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)).

[53] *Id.* at 685. "[Such] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

[54] *Id.* at 686 (quoting *Tinker*, 393 U.S. at 526) (Black, J., dissenting).

[55] 484 U.S. 260 (1988).

[56] *Id.* at 677.

[57] *Id.* at 264 n.1.

[58] *Id.* at 263.

[59] *Id. See also*, MAY IT PLEASE THE COURT: THE FIRST AMENDMENT 101 (Peter Irons ed. 1997).

On May 10th, in accordance with established practice,[60] the proof pages for the May 13th edition were submitted to Principal Robert E. Reynolds for prior review.[61] Mr. Reynolds reviewed the proof and on May 11th determined that two articles—one concerning teen pregnancy and the other the impact of divorce on high school students—were inappropriate for the *Spectrum*.[62] In order to remove the offending articles and still meet the press deadline, Reynolds decided to cut two pages from the six page proof, deleting a total of seven articles.[63] Several students brought suit in United States District Court for the District of Missouri in January 1984, alleging that their First Amendment rights had been violated.[64] After a bench trial, the district court concluded that the students' First Amendment rights of freedom of speech and expression had not been violated.[65] The United States Court of Appeals for the Eighth Circuit reversed in January 1986[66] and the Supreme Court granted certiorari in January 1987.

In a 5-3 decision,[67] the Supreme Court reversed the Eighth Circuit, ruling in favor of the school district. The Court narrowly framed the issue as "the extent to which educators may exercise

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[60] *Hazelwood*, 484 U.S. at 263.

[61] *Id*.

[62] *Id.*

[63] *Id.* at 263-64. *See also*, Andrew H. Utterback, Hazelwood School District v. Kuhlmeier, *in* FREE SPEECH ON TRIAL: COMMUNICATION PERSPECTIVES ON LANDMARK SUPREME COURT DECISIONS 250, 251 (Richard A. Parker ed. 2003).

[64] *Hazelwood*, 484 U.S. at 264. The students alleged that Principal Reynolds' actions amounted to an illegal, content-based prior restraint. More specifically, they claimed that the articles did not violate any pre-existing, established standard for editing articles from the *Spectrum*—none of the articles would have caused material and substantial disruption to the work. *See* Kuhlmeier v. Hazelwood School District, 578 F. Supp. 1286, 1289 (D.C. Mo. 1984).

[65] Kuhlmeier v. Hazelwood Sch. Dist., 607 F. Supp. 1450, 1467 (D.C. Mo. 1985).

[66] Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1370 (8th Cir. 1986).

[67] *Hazelwood*, 484 U.S. at 262. The unusual 8-Justice vote was due to the fact that Justice Lewis Powell had just retired and Justice Anthony Kennedy had not yet been seated.

control over the contents of a high school newspaper produced as part of a school's journalism class."[68] Acknowledging *Tinker* and *Fraser*, Justice White noted that although "[s]tudents in public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'"[69] a school is not required to tolerate speech that is "inconsistent with its 'basic educational mission.'"[70]

Central to the Court's analysis was the impact of the public forum doctrine.[71] Applying the public forum framework,[72] the

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[68] *Id.*

[69] *Id.* at 266 (quoting *Tinker*, 393 U.S. at 506).

[70] *Id*. (quoting *Fraser*, 478 U.S. at 685).

[71] *Id.* at 267 ("We deal first with the question whether *Spectrum* [the school newspaper] may appropriately be characterized as a forum for public expression."). This type of public forum analysis is frequently used by the federal courts to determine the scope of First Amendment protections in situations involving public property. *See, e.g.*, Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481 (2005); Thomas J. Davis, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 IND. L.J. 267 (2004); *see also*, Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW §12-24 (2nd ed. 1988).

[72] *Id.* In Perry Educ. Ass'n v. Perry Local Educator' Ass'n, 460 U.S. 37, 45-56 (1983), the Court defined the scope of the three categories of public forums. First, there are "traditional public forums"—places such as streets and parks that have "immemorially been held in trust for the use of the public." *Id*. at 45. In these "quintessential" public forums, the government may only impose restrictions on expressive activity if the regulation is narrowly tailored to effectuate a compelling state interest. *Id*. The government may also impose reasonable, content-neutral time, place and manner restrictions. *Id.* A limited public forum is public property that the State has opened for limited use by the public for certain expressive activity. *Id.* The government is not required to open this forum but, once it has, the same First Amendment standards apply as in a traditional public forum. *Id.* at 46. Non-public fora include government property that has been reserved for a specific purpose, based on the idea that "the State, no less than a private owner of property, has power to reserve the property under its control for the use to which it has been lawfully dedicated." *Id.* Regulations here need only to be viewpoint-neutral and rationally related to a government interest. *Id.*

Two years later, in Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788, 802 (1985), the Court, quoting *Perry*, held that:

Court concluded that the *Spectrum*, as a "school-sponsored publication," was a non-public forum, and as a result, school officials were entitled to regulate its contents in any "reasonable manner."[73] First and foremost, the Court looked to school board policy which provided that "[s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities."[74] The Court went on to highlight other factors evincing government control: (1) the faculty advisor exercised a great deal of editorial control over the paper; (2) the *Spectrum* was published in conjunction with the Journalism II class for which students received grades and academic credit; and (3) it was established policy that the paper be submitted to the school principal for prior review.[75] School administrators had reserved the paper for the specific purpose of teaching students about journalism under the guidance of an academic advisor.[76] As such, they were constitutionally within their rights to "exercise editorial control over style and content" so long as their actions were "reasonably related to a legitimate pedagogical concern."[77]

> [t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.

(quoting *Perry*, 460 U.S. at 47) (internal citations omitted).

[73] *Hazelwood*, 484 U.S. at 267-70. Justice White stated that because public schools do not possess all the attributes of streets, parks and other "traditional public forums" that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* at 267 (quoting Hague v. C.I.O., 307 U.S. 496, 515 (1939)). Thus, school facilities are only considered public forums if school officials have "by policy or practice" opened those facilities "for indiscriminate use by the general public," or some segment of the public, such as the student body. *Id.*

[74] *Id.* at 268 (alterations in original) (citing *Hazelwood School Board Policy*).

[75] *Id*. at 268-69.

[76] *Id.* at 268.

[77] *Id.* at 273.

The Court explicitly distinguished its holding in *Tinker*, which related to a "student's personal expression that happen[ed] to occur on the school premises."[78] In contrast, the Court in *Hazelwood* was concerned with whether the First Amendment required a school "affirmatively to promote particular student speech."[79] *Hazelwood* involved school-sponsored student speech that students, parents, and members of the community might "reasonably perceive to bear the imprimatur of the school."[80] To ensure that the "views of the individual speaker are not erroneously attributed to the school," the Court held that school officials should have greater latitude to regulate such expressive activities.[81]

Justice Brennan dissented,[82] proclaiming that Principal Reynolds "used a paper shredder" on the free speech rights of the students without so much as considering obvious alternatives.[83] He wrote, "[s]uch unthinking contempt for individual rights is intolerable from any state official. It is particularly insidious from the one to whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees."[84]

Brennan also found fault with what he termed the Court's

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[78] *Id.* at 270-71.

[79] *Hazelwood*, 484 U.S. at 271.

[80] *Id*.

[81] *Id.* at 270-72. The Court went on to say that "A school must be able to set high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world—and may refuse to disseminate student speech that does not meet those standards." *Id.* at 272. As such, "a school in its capacity as a publisher of a school newspaper or producer of a school play may "disassociate itself," not only from speech that would "substantially interfere with [its] work. . .or impinge upon the rights of other students," but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." *Id.* (internal citations omitted).

[82] For a more in-depth discussion of Justice Brennan's dissent, see, e.g., Scott Andrew Felder, *Stop the Presses: Censorship and the High School Journalist*, 29 J.L. & EDUC. 443, 448-51 (2000).

[83] *Hazelwood*, 484 U.S. at 290 (Brennan, J., dissenting).

[84] *Id.*

"taxonomy of school censorship"—concluding that *Tinker* applies to one type of speech and not another.[85] He took issue with the majority's distinction between a "student's personal expression that happens to occur on the school premises" (as in *Tinker*), and school-subsidized or sponsored expression that the public might "reasonably believe to bear the imprimatur of the school."[86] He argued that "[t]he Court does not, for it cannot, purport to discern from our precedents the distinction it creates."[87] Brennan agreed that a school should be able to disassociate itself from speech that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced," but that to reach such a conclusion, the Court need not abandon *Tinker*, but apply it.[88] He argued, "[t]he educator may, under *Tinker*, constitutionally 'censor' poor grammar, writing, or research because to reward such expression would 'materially disrup[t] the newspaper's curricular purpose."[89]

In a line now famous to student journalists, Justice Brennan concluded, "[t]he young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today."[90]

B. Reaction to Hazelwood

Despite *Hazelwood's* pronouncement that public schools could censor speech, the government does not retain absolute power to censor a nonpublic forum.[91] The Court still requires that the

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[85] *Id.* at 281.

[86] *Id.*

[87] *Id.* Justice Brennan went on to explain that nowhere in *Tinker* did the Court touch on the personal nature of the speech. Moreover, "personal expression that happens to occur on school premises" does not accurately describe Fraser's speech. He did not just "happen" to give his speech on school grounds. Quoting *Fraser*, Justice Brennan concluded "if ever a forum for student expression was 'school-sponsored,' Fraser's was." Yet, despite this apparent contradiction, the *Fraser* Court faithfully applied *Tinker*. *Id.* at 281-82.

[88] *Id.* at 283.

[89] *Hazelwood*, 484 U.S. at 284 (Brennan, J., dissenting) (alteration in original).

[90] *Id.* at 291.

[91] *See e.g.,* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S.

censorship be "reasonably related to legitimate pedagogical concerns."[92] The rule of *Hazelwood* appears to be that unless the school is involved in the funding or promotion of the speech, expression by students must be tolerated. Nonetheless, legal scholars wondered whether there might be any limit to the "legitimate pedagogical concern" standard.[93] Many questioned whether *Hazelwood* had effectively overruled *Tinker*.[94] One

37, 45-46 (1983).

[92] *Hazelwood*, 484 U.S. at 273.

[93] *See, e.g.,* Walter E. Forehand, *Constitutional Law—Tinkering with* Tinker*: Academic Freedom in the Public Schools*—Hazelwood School District v. Kuhlmeier, 16 FLA. ST. U. L. REV. 159, 182 (1988) (stating that *Hazelwood* does "not establish a sufficiently clear standard of evaluation for school board conduct"); Shari Golub, Tinker *to* Fraser *to* Hazelwood—*Supreme Court's Double Play Combination Defeats High School Students' Rally for First Amendment Rights:* Hazelwood School District v. Kuhlmeier, 38 DEPAUL L. REV. 487, 513 (1989) (critiquing "the vague and broad 'legitimate pedagogical concern' standard"); Reene E. Rothauge, *Seen But Not Heard: In What Forum May High School Students Exercise First Amendment Rights After* Hazelwood?, 25 WILLIAMETTE L. REV. 197, 218 (1989) ("Students' First Amendment rights will be subject to the parochial whims of district school boards.").

[94] *See e.g.,* Erwin Chemerinsky, *supra* note 35 (arguing that despite *Hazelwood* and *Fraser*, there remain First Amendment protections for non-curricular student speech and poses no threat of disruption); Mark Yudof, Tinker *Tailored: Good Faith, Civility, and Student Expression*, 69 St. JOHN'S L. REV. 365 (1995) (noting that although *Fraser* and *Hazelwood* did not specifically overrule *Tinker*, they have greatly altered its holding); Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 645 (2002) ("Certainly, neither *Fraser* nor *Kuhlmeier* explicitly overruled *Tinker*, and it more than arguable that neither implicitly overruled it); J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of* Hazelwood School District v. Kuhlmeier, 1988 DUKE L.J. 706, 707 ("[*Hazelwood*] eviscerates the Supreme Court's decision in *Tinker*, overrules many lower-court decisions protective of the student press, and curtails student press rights established for well over a generation."); Thomas C. Fischer, *Whatever Happened to Mary Beth Tinker and other Sagas in the Marketplace of Ideas*, 23 GOLDEN GATE U. L. REV. 351, 411 (1993) (arguing that current jurisprudence is more closely akin to Justice Black's dissenting view in *Tinker*, "[a]ll this without *Tinker* being reversed, or even cited unfavorably."); Clay Wiesenberger, *Constitution or Conformity: When the Shirt Hits the Fan in Public Schools*, J.L. & EDUC. 51, 55 (2000) ("It can be argued that *Tinker* has been overruled, at least partially.").

commentator even went so far as to describe *Hazelwood* as a "tsunami that has wiped out all that existed before."[95]

Despite the confusion, *Hazelwood*'s impact was immediate.[96] Less than an hour after the Court's decision was announced on the radio, a high school principal censored an article on AIDS.[97] That same day, in another high school, the entire staff of a school-sponsored newspaper resigned, and instead began work on an underground newspaper.[98] In fact, the Student Press Law Center (SPLC), a non-profit group that provides legal support and advice to student media outlets, has reported an increase in the number of inquiries concerning censorship it has received for every year since *Hazelwood*. In 1996, SPLC received a record 221 requests for legal help from high school student journalists or their advisors.[99] In 2002, SPLC recorded 529 such requests—an increase of nearly 240%.[100] SPLC Executive Director Mark Goodman attributes the continual increase to the Court's decision in *Hazelwood*, noting that it has "essentially gutted the First Amendment in many of America's High Schools."[101]

Since *Hazelwood* was handed down, its rationale has been expanded to encompass all forms of student expression. High school teachers and administrators have broadly interpreted *Hazelwood* as a grant of authority to "control student expression for the sake of preserving the institutional and educational integrity of public schools."[102] Its reasoning has been extended beyond the

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[95] *See*, Abrams & Goodman, *supra* note 94, at 728.

[96] For a general analysis of the impact of *Hazelwood*, see e.g., Carol S. Lomicky, *Analysis of High School Newspaper Editorials Before and After* Hazelwood School District v. Kuhlmeier: *A Content Analysis Case Study*, 29 J.L. & EDUC. 463 (2000).

[97] WASH. POST, Jan. 23, 1988, at A27.

[98] L.A. TIMES, Jan. 22, 1988, at 8.

[99] *High School Censorship Calls Soar in '97*, STUDENT PRESS L. CENTER REP., Fall 1998, at 3.

[100] *Legal Requests to the SPLC Continue to Grow: Censorship Questions from College Journalists Show Dramatic Increase*, STUDENT PRESS L. CENTER REP., Fall 2003, at 3.

[101] *High School Censorship Calls Soar in '97*, *supra* note 99, at 3.

[102] Bruce O. Hafen & Jonathan O. Hafen, *The* Hazelwood *Progeny: Autonomy and Student Expression in the 1990s*, 69 ST. JOHN'S L. REV. 379, 396

realm of the student press and applied to a variety of First Amendment issues,[103] including student attire and appearance,[104] school mascots,[105] curriculum decisions,[106] faculty speech,[107] academic freedom,[108] and student speech at school assemblies and graduation ceremonies.[109]

Moreover, although the Court's decision in *Hazelwood* allowed for censorship of student speech, local officials remain free to determine the appropriate level of regulation.[110] In the years after

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(1995). *See also* Rosemary Salomone, *Free Speech and School Governance in the Wake of* Hazelwood, 26 GA. L. REV. 253, 274-306 (1993) (the decisions typically grant to school officials "broader legal discretion in molding student thought and opinion and consequently expression into a shape that conforms with the dominant values of the community.") *Id.* at 315; Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX L. REV. 1, 86 (1990) (arguing that the use of *Hazelwood* to restrict certain expression is likely send students "mixed signals about the intellectual traits that citizens require.") *Id.*

[103] For a more detailed discussion of case law in the wake of *Hazelwood*, see, e.g., Laura K. Shulz, *A "Disacknowledgment" of Post-Secondary Student Free-Speech*—Brown v. Li *and the Applicability of* Hazelwood v. Kuhlmeier *to the Post-Secondary Setting*, 47 ST. LOUIS U. L. J. 1185 (2003); Martha M. McCarthy, *Post*-Hazelwood *Developments: A Threat to Free Inquiry in Public Schools*, 81 ED. LAW REP. 685 (1993); Floyd G. Delon, "*The More Things Change. . .": Re-Emerging Student First Amendment Rights Issues*, 59 ED. LAW REP. 963 (1990); Hafen & Hafen, *supra* note 102; Mark J. Fiore, *Trampling the "Marketplace of Ideas": The Case Against Extending* Hazelwood *to College Campuses*, 150 U. PA. L. REV. 1915 (2002).

[104] *See, e.g.,* Chandler v. McMinnville Sch. Dist., 978 F.2d 524 (9th Cir. 1992); Baxter v. Vigo Country Sch. Dist., 26 F.3d 728 (7th Cir. 1994); Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465 (6th Cir. 2000).

[105] *See, e.g.,* Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988).

[106] *See, e.g.,* Virgil v. Sch. Bd. of Columbia Cty., 862 F.2d 1517 (11th Cir. 1989); Kirkland v. Northside Independent Sch. Dist., 890 F.2d 794 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990).

[107] *See, e.g.,* Ward v. Hickey, 996 F.2d 448 (1st Cir. 1993); Miles v. Denver Public Sch., 994 F.2d 773 (10th Cir. 1991).

[108] *See, e.g.,* Webster v. New Lenox Sch. Dist. No. 122, 917 F.2d 1004 (7th Cir. 1990).

[109] *See, e.g.,* Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989), *cert. denied*, 493 U.S. 1021 (1989); Brody v. Spang, 957 F.2d 1108 (3d Cir. 1992).

[110] *See, e.g.,* SPLC, STATE ANTI-*HAZELWOOD* LEGISLATION FACES

Hazelwood, numerous states passed legislation establishing various degrees of protection.[111] Most recently, legislatures in three states have considered changes to laws governing student speech and expression.[112]

Finally, though numerous lower federal courts have contemplated *Hazelwood*'s applicability at the university level,[113]

SUCCESSES, DEFEATS, REPORT, Spring 1999, at 12; SPLC, ANTI-HAZELWOOD CAMPAIGNS LAUNCHED IN 3 STATES, Spring 2005, at 4, *available at* http://splc.org/report_edition.asp?id=36.

[111] Iowa's Student Exercise of Free Expression statute is typical. IOWA CODE ANN. §280.22 (2005), enacted May 11, 1989, clearly states, "students of the public schools have the right to exercise freedom of speech, including the right of expression in official school publications." *Id.* § 280.22(1). The Code limits student expression in so far as it may not include materials which are obscene, libelous or slanderous, or which encourage students to commit unlawful acts, violate school rules, or cause the material and substantial disruption of the operation of the school. *Id.* § 280.22(2). *See also* Arkansas Student Publications Act, ARK. CODE ANN. § 6-18-1201 – 6-18-1204 (2005); Rights of Free Expression for Public School Students, COLO. REV. STAT. ANN. § 22-1-120 (2005); The Student Publications Act, KAN. STAT. ANN. § 72-1504 – 1506 (2004); MASS. GEN. LAWS ANN. ch.71, § 82 (West 2005); The California Student Free Expression Law, CAL. EDUC. CODE §48907 (West 2005); The Pennsylvania Administrative Code on Student Rights and Responsibilities, 22 PA. CODE § 12.9 (2005); The Washington Administrative Code on Student Rights, WASH. ADMIN. CODE 180-40-215 (2005).

[112] SPLC Report, ANTI-HAZELWOOD CAMPAIGNS LAUNCHED IN 3 STATES, *supra* note 110.

[113] *See* Vanderhurst v. Colo. Mountain Coll. Dist., 208 F.3d 908, 915 (10th Cir. 2000) ("We need not decide definitively, however, whether that framework does in fact govern a public college or university's control over the classroom speech of a professor or other instructor."); Cummins v. Campbell, 44 F.3d 847 (10th Cir. 1994); Bishop v. Aronov, 926 F.2d 1066, 1074 (11th Cir. 1991) ("[I]nsofar as [*Hazelwood*] covers the extent to which an institution may limit in-school expressions which suggest the school's approval, we adopt the Court's reasoning as suitable to our ends, even at the university level."); Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala., 867 F.2d 1344 (11th Cir. 1989) (applying *Hazelwood's* framework to determine that a university's student government association did not constitute a public forum); Welker v. Cicerone, 174 F. Supp. 2d 1055, 1065 n.6 (C.D. Cal. 2001) (citing *Hazelwood* for the proposition that there exists a "relaxed First Amendment standard" on college campuses.); Lueth v. St. Clair County Cmty. Coll., 732 F. Supp. 2d 1410 (E.D. Mich. 1990) (employing a critical comparison of student-run newspapers in high

no consensus has yet been achieved. As one commentator noted, "the only consistency that is apparent . . . is confusion."[114]

C. Student Speech in Post-Secondary Education

The *Hazelwood* Court did not address the First Amendment rights of college and university students. However, the *Hazelwood* court did briefly mention the issue of free speech and higher education in a footnote:

> A number of lower federal courts have . . . recognized that educators' decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference. We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.[115]

In fact, until the recent decision in *Hosty v. Carter*, *Hazelwood* had never been read as controlling outside the high school setting.

The ratification of the Twenty-Sixth Amendment in 1971,[116] lowering the voting age to eighteen, essentially transformed college students into legal adults. Accordingly, courts have generally afforded college and university students broad First Amendment protections. In the early 1970s, the Supreme Court decided two cases that defined the free speech rights of students on college and university campuses. Unlike *Hazelwood*, these cases stood for the proposition that the First Amendment should apply with equal force, both on and off campus. While the Court emphasized the need for order and control, it held university officials to a much more strict standard than that articulated in *Hazelwood*.

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schools and colleges, and concluding that *Hazelwood* is not applicable in a post-secondary setting.).

[114] Schulz, *supra* note 103, at 1198.

[115] *Hazelwood*, 484 U.S. at 273 n. 7 (citations omitted).

[116] "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. CONST. amend. XXVI, §1.

The first of these decisions, *Healy v. James*,[117] was handed down in 1972. In *Healy*, Central Connecticut State College denied official recognition to a group of students who wanted to form a local chapter of Students for a Democratic Society (SDS).[118] Pursuant to procedures established by the College, the students petitioned the Student Affairs Committee for recognition.[119] The Committee, while satisfied with the stated purposes of the group,[120] harbored some concern over the relationship between the proposed local chapter and the National SDS organization.[121] Ultimately, though the Committee voted to approve the group, the President of the College rejected the recommendation.[122] As a result, the students filed suit in district court claiming a violation of their First Amendment rights of expression and association stemming from the denial of recognition.[123]

The district court found for the school, holding that the First Amendment did not require the College to approve of an organization it believed "likely to cause violent acts of disruption."[124] The Court of Appeals for the Second Circuit affirmed.[125] The Supreme Court reversed.[126] The Court identified

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[117] Healy v. James, 408 U.S. 169 (1972).

[118] *Id.* at 170.

[119] *Id.* at 172.

[120] *Id.* The group's petition specified three distinct purposes: "It would provide a forum of discussion and self-education for students developing an analysis of American society; it would serve as an agency for integrating thought with action so as to bring about constructive changes; and it would endeavor to provide a coordinating body for relating the problems of leftist students with other interested groups on campus and in the community." *Id.* (internal citations omitted).

[121] The Court began by noting that the setting for this case was 1969-1970, a period of unrest and often violence on campuses across the country. The conflict in Vietnam sparked widespread civil disobedience and, noted the Court, "SDS chapters on some of those campuses had been a catalytic force during this period." *Id.* at 171. Information on the SDS movement throughout the country is available at http://www.sds.revolt.org/index.htm.

[122] *Healy*, 408 U.S. at 175.

[123] *Id.* at 177.

[124] Healy v. James, 319 F. Supp. 113, 116 (D.C. Conn. 1970).

[125] Healy v. James, 445 F.2d 1122 (2d Cir. 1971).

the conflicting interests at stake as those of students, faculty, and administrators in maintaining an "environment free from disruptive interference with the educational process,"[127] and the "interest in the widest latitude for free expression and debate consonant with the maintenance of order."[128]

Justice Powell's analysis began with *Tinker*, acknowledging that the First Amendment applies at the collegiate level.[129] Further, Powell noted that it is well established that both the State and school officials have a need "consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools,"[130] and, as per *Tinker*, to prohibit actions which "materially and substantially disrupt the work and discipline of the school."[131] The Court, however, went on to distinguish *Healy* from *Tinker*, noting that college students deserved the same constitutional protections as the general public:

> [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is no where more vital than in the community of American schools." The college classroom with its surrounding environs is peculiarly the "marketplace of ideas," and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.[132]

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[126] Healy v. James, 408 U.S. 169, 180 (1972).

[127] *Id.* at 171.

[128] *Id.*

[129] *Id.* at 180. "At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment. 'It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Id.* (quoting Tinker v. Des Moines, 393 U.S. 503, 506 (1969)).

[130] *Id.* (internal citations omitted).

[131] *Id.* at 189. (quoting *Tinker*, 393 U.S. at 513).

[132] *Healy*, 408 U.S. at 180-81. (internal citations omitted). *See also* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (holding "[o]ur Nation

The Court noted that while a college's "legitimate interest in preventing disruption on campus"[133] might justify certain restraints, a "heavy burden rests on the college to demonstrate the appropriateness of the action."[134] That burden, said the Court, is not met simply because the college declares the views expressed by a particular group to be "abhorrent."[135]

Less than one year after *Healy*, the Supreme Court again addressed the issue of university student speech in *Papish v. Board of Curators of the University of Missouri*.[136] Barbara Papish, a graduate student at the University of Missouri School of Journalism, was expelled for distributing on campus an outside newspaper that contained a cartoon depicting a policeman raping the Statue of Liberty and the Goddess of Justice.[137] Below the cartoon was a caption that read "With Liberty and Justice for All."[138] The issue also contained an article entitled "Motherfucker

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is deeply committed to safeguarding academic freedom."); United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (holding "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection."); Sweezy v. State of N.H., 354 U.S. 234, 250 (1957):

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

[133] Healy v. James, 404 U.S. 169, 184 (1972).

[134] *Id.*

[135] *Id.* at 187-88.

[136] 410 U.S. 667 (1973).

[137] *Id.* at 667.

[138] *Id.*

Acquitted," which discussed the trial and acquittal of a New York City youth who was a member of an organization called "Up Against the Wall, Motherfucker."[139] Papish was expelled for violation of the bylaws of the Board of Curators.[140] She sued, claiming that her activities were protected by the First Amendment.[141]

In a *per curiam* opinion, the Court first noted that although university officials undoubtedly have an ability to enforce reasonable standards of student conduct, "*Healy* makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency'" alone.[142] The record demonstrated that Papish was expelled because the school disapproved of the content of the newspaper.[143] Accordingly, the University's actions could not be viewed as a legitimate exercise of its authority to enforce reasonable restrictions.[144] The Court concluded that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech."[145]

In the more than thirty years since *Healy* and *Papish*, the Supreme Court has not wavered. Rather, more recent decisions emphasize the Court's commitment to upholding First Amendment rights on college and university campuses. For example, in

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[139] *Id.* at 667-68.

[140] *Id.* at 668. The bylaws stated, in pertinent part:

> Students enrolling in the University assume an obligation and are expected by the University to conduct themselves in a manner compatible with the University's functions and missions as an educational institution. For that purpose students are required to observe generally accepted standards of conduct . . . . [I]ndecent conduct or speech . . . are examples of conduct which would contravene this standard.

Id. (quoting Papish v. Board of Curators of the Univ. of Missouri, 464 F.2d 136, 138 (8th Cir. 1972)) (alterations in original).

[141] *Id.* at 669.

[142] *Papish*, 410 U.S. at 670.

[143] *Id.*

[144] *Id.*

[145] *Id.* at 671.

Rosenberger v. Rector & Visitors of the University of Virginia,[146] the Court held that the First Amendment prohibited a university from denying funding to student publications, produced as extracurricular activities, based on the views expressed therein.[147]

At issue in *Rosenberger* was a student-run publication, *Wide Awake*, which provided a Christian perspective on community issues.[148] When Wide Awake Productions (WAP) requested money from the Student Activity Fund (SAF) to cover the cost of printing,[149] its request was denied on the ground that *Wide Awake* was a "religious activity" within the meaning of the school's guidelines.[150] Unable to obtain funding, several members of the group sued the University alleging that refusal to authorize payment of printing costs violated their rights to freedom of speech and press, to the free exercise of religion, and to equal protection of the law.[151]

The Supreme Court held in favor of the students.[152] The Court found that because the University had offered to pay third-party contractors on behalf of private speakers to convey their own messages, it was not entitled to "silence the expression of selected

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[146] 515 U.S. 819 (1995).

[147] *Id.* at 845.

[148] *Id.* at 825-26. *Wide Awake* was published by a student group known as "Wide Awake Productions" (WAP). WAP was established "[t]o publish a magazine of philosophical and religious expression," "[t]o facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints," and "[t]o provide a unifying focus for Christians of multicultural backgrounds." *Id.* (citing party brief).

[149] The University had established a Student Activity Fund (SAF) into which all students were required to pay a fee. According to University guidelines, the Student Council was authorized to disburse the funds to a variety of student groups and organizations. *Id.* at 824-25.

[150] *Id.* at 826. Excluded from Student Activity Fund support were religious activities and political activities, among others. The Guidelines defined a "religious activity" as any activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." *Id.* at 825. (internal citations omitted).

[151] *Id.* at 827.

[152] *Papish*, 410 U.S. at 845-46.

viewpoints."[153] Accordingly, WAP could not constitutionally be denied funding on the ground that it espoused a certain religious perspective. Justice Kennedy explained:

> Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.[154]

The Court concluded that the University's viewpoint-based denial of funding for certain student expression amounted to "suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."[155]

Five years later in *Board of Regents of the University of Wisconsin System v. Southworth*,[156] the Supreme Court again examined the First Amendment issues surrounding student-funded speech. In *Southworth*, several students brought a First Amendment claim against the University arguing that the imposition of a mandatory activity fee violated their First Amendment rights to free speech, free association, and free exercise.[157]

The Supreme Court, balancing the First Amendment rights of those students forced to subsidize the "objectionable speech of others" against the University's mission of encouraging a wide range of speech,[158] rejected the idea that the University should be

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[153] *Id.* at 835.

[154] *Id.* (citing, *Healy*, 408 U.S. at 180-81; *Keyishian*, 385 U.S. at 683-84; *Sweezy*, 354 U.S. at 250).

[155] *Id.* at 836.

[156] 529 U.S. 217 (2000).

[157] *Id.* at 227.

[158] *Id.* at 231. The Court went on to reaffirm the idea that college and university campuses represent the "quintessential marketplace of ideas," and the

required to restrict the types of ideas exchanged on campus.[159] Justice Kennedy explained, "[t]he speech at the University . . . is distinguished not by discernable limits but by its vast, unexplored bounds."[160] Thus, requiring a school to limit student expression "would be contrary to the very goal the University seeks to pursue."[161]

II. *HOSTY V. CARTER*[162]

James Tidwell, journalism professor and acting chair of the department of journalism at Eastern Illinois University, recently said, "In college and professional media, when a big decision comes down, we tend to go around screaming, 'The sky is falling.'. . . When of course it isn't."[163] The sky might not be falling, but the storm clouds are certainly gathering. The Seventh Circuit's decision in *Hosty v. Carter* represents the first unequivocal application of *Hazelwood* to post-secondary student press,[164] and stands in direct conflict with decisions in both the

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school, as an agent of the State, seeks to "stimulate the whole universe of speech and ideas." *Id.* at 232.

[159] *Id.* at 231.

[160] *Id.* at 232.

[161] *Id.*

[162] 412 F.3d 731 (7th Cir. 2005) (en banc), *cert. denied*, 164 L. Ed. 2d 47 (2006).

[163] SPLC News Flash, Student Media Experts React to Governors State University Ruling, June 22, 2005; *available at* http://www.splc.org/newsflash.asp?id=1039.

[164] In Brown v. Li, 308 F.3d 939 (9th Cir. 2002), *cert. denied*, 538 U.S. 908, the Ninth Circuit applied *Hazelwood*, upholding as constitutional the University of Santa Barbara's refusal to grant a degree and file a master's thesis in its library system until Brown, a candidate for a master's degree, removed two pages of "disacknowledgments." *Id.* at 943. The disacknowledgments page began, "I would like to offer special Fuck You's to the following degenerates." *Id.* Although the court applied *Hazelwood's* framework, this case dealt with speech that was decidedly part of the curriculum and that was considered indecent. Therefore, although analogous in some respects to *Hosty*, because it did not deal with student press, further discussion is beyond the scope of this note. For a more comprehensive analysis of *Brown*, see e.g., Tom Saunders, *The Limits on University Control of Graduate Student Speech*, 112 YALE L.J. 1295

First and Sixth Circuits.[165] The case has a lengthy procedural history, including an unreported district court decision[166] which was affirmed by a Seventh Circuit panel.[167] The full Seventh Circuit, however, vacated the panel decision, and after rehearing the case *en banc*, reversed the district court, holding in favor of the University.[168] On February 21, 2006, the United States Supreme Court denied the students' petition for certiorari, allowing the Seventh Circuit's decision to stand.[169] The ruling carries with it strong implications for the future of student speech and, especially when viewed in light of the historical development of students' free speech and press rights, is cause for alarm.

A. The Facts of Hosty v. Carter

As is true with most cases implicating the free speech rights of students, *Hosty* involved a clash between a school's administration and its students. Governors State University (hereinafter "Governors State" or "GSU") is a state-run institution in University Park, Illinois.[170] With a student population of over 6,000, the school defines itself as an "upper-level university," offering undergraduate courses at the junior and senior level leading to completion of a baccalaureate degree and graduate level courses leading to a master's degree.[171] The now defunct

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(2003).

[165] Student Gov't Ass'n v. Bd. of Trs. of the Univ. of Mass, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (holding that *Hazelwood* "is not applicable to college newspapers."); Kincaid v. Gibson, 236 F.3d 342, 346 n.5 (6th Cir. 2001) (en banc) (holding that *Hazelwood* had "little application" to a case involving censorship of a college yearbook).

[166] Hosty v. Governors State Univ., No. 01-C-500, 2001 WL 1465621 (N.D. Ill. 2001).

[167] Hosty v. Carter, 325 F.3d 945 (7th Cir. 2003).

[168] *See Hosty*, 412 F.3d at 739 (determining that the school, and specifically Dean Carter, had not violated the students' First Amendment rights).

[169] Hosty v. Carter, 421 F.3d 731 (7th Cir. 2005), *cert. denied*, 164 L. Ed. 2d 47 (2006).

[170] Information regarding Governors State University is available on the University's website, http://www.govst.edu.

[171] *Id.*

INNOVATOR[172] is described as "the bimonthly student newspaper and [] the main source of information about campus life."[173] Controversy surrounding the publication and, in particular, its last issue, sparked the current lawsuit.

When the case began, the three plaintiffs in *Hosty*, Jeni Porche, Margaret Hosty, and Steven Barba, were students at Governors State, appointed in May 2000 by the school's Student Communications Media Board (SCMB) to serve as the *INNOVATOR's* editor-in-chief, managing editor, and staff reporter, respectively.[174] According to SCMB guidelines at the time, the staff of the *INNOVATOR* was responsible for determining the content and format of the paper "without censorship or advance approval."[175] The paper's faculty advisor, Geoffroy de LaForcade, often read stories intended for publication and offered guidance on issues of journalistic standards and ethics.[176] Although it was customary for the advisor to sign-off on each edition before it was sent to the printer, the student editors and writers were given complete editorial control concerning the paper's subject matter and content.[177] GSU had a contract with Regional Publishing Corporation to print the *Innovator* on a bi-monthly basis,[178] with the cost of publication covered entirely by money from Student Activity Fees.[179]

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[172] *Id.* The last issue was published on October 31, 2000 and, in the fall of 2002, a new incarceration of the newspaper appeared at GSU, calling itself the *Phoenix*.

[173] *Id.*

[174] *Hosty*, 325 F.3d at 946.

[175] *Id.*; *see also* the GSU Student Handbook, Student Media Policy (declaring that the "[t]he staff will determine the content and format of their respective publications without censorship or advance approval."), *available at*, http://www.collegefreedom.org/GSUhandbook.htm.

[176] *Hosty*, 2001 WL 1465621 at *1.

[177] *Id.*

[178] *Id.*

[179] According to the GSU website, "The Student Activity fee is $32 per trimester. The fee supports programs and activities to enrich the extracurricular life of students." This fee is mandatory and, once collected, is deposited into the Student Activity Fund. For a more thorough explanation of the collection and distribution of fees, see http://www.govst.edu/ sas/t_hb.asp?id=2995.

According de LaForcade, the *INNOVATOR* made "great strides as a serious newspaper and a voice for students' interests."[180] Porche, Hosty, and the rest of the staff were determined to establish a reputable, informative and critical publication—a goal they made clear in the premiere issue, published July 10, 2000, under an editorial entitled "New Beginnings."[181] The editorial read, in part, "[w]e look forward to having a productive year and raising important issues concerning life at GSU. By making these issues public, we hope to spark debates that will enhance the educational environment for everyone."[182]

After articles bearing Hosty's by-line attacked the integrity of Roger K. Oden, Dean of the College of Arts and Sciences, the University's administration began to take an interest in the paper.[183] On October 31, 2000, the *INNOVATOR* published a letter to the editor from de Laforcade whose employment with the University had been terminated effective August 31, 2000.[184] The same issue of the paper also contained an article entitled "De Laforcade's Contract Dispute Reaches 3rd Phase Arbitration," under the by-line of M.L. Hosty.[185] In response to the letter and article, both Dean Oden and Stuart Fagan, President of the University, issued statements accusing the *INNOVATOR* of irresponsible and defamatory journalism. Oden wrote, "Geoffrey de Laforcade's letter to the editor and M. L. Hosty's article is [sic] a collection of untruths and I believe that they know they are untrue."[186] President Fagan, describing the October 31st issue as "an angry barrage of unsubstantiated allegations," vowed not to

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[180] Press Statement by Faculty Advisor, Geoffroy de LaForcade (Feb. 16, 2001); *available at* http://www.collegefreedom.org/Advisor21601.htm.

[181] Email conversation with Margaret L. Hosty, Nov. 4, 2005. On file with author.

[182] *Id.*

[183] *Hosty*, 412 F.3d at 732-33.

[184] Dean Roger Oden's denunciation of the *INNOVATOR* (Nov. 2, 2000), *available at* http://www.collegefreedom.org/Oden.htm.

[185] The front page of the October 31, 2000 issue of the *INNOVATOR* is available on the Student Press Law Center's website at http://www.splc.org/pdf/innovator.pdf.

[186] Oden, *supra* note 184.

"sit idly by, without comment, and allow the reputation of the university to be sullied by newspaper reporting that is inaccurate, insulting, and that might be driven, in part, by self-interest."[187]

In late October and early November of 2000, Patricia Carter, Dean of Student Affairs and Services, twice called Charles Richards, president of Regional Publishing.[188] In those calls, Dean Carter told Richards not to print future issues of the *INNOVATOR* without prior approval of the newspaper's content by a GSU administrator.[189] She instructed Richards to call her when he received future issues.[190]

In a November 14, 2000 memo delivered to the staff at the *INNOVATOR*, Richards relayed the substance of his conversations with Dean Carter.[191] Richards stated that he had agreed to call Carter regarding future issues of the paper but noted that his understanding was that the law precluded a condition of approval prior to printing.[192] However, he also noted that he was "not an attorney, so the final decision on the proper handling of this matter should not be left to [him]."[193] The *INNOVATOR's* staff interpreted Richards' comments to mean that Regional Publishing would not print additional editions of the paper until the issue of prior review was settled.[194] A company representative confirmed that it was not willing to risk printing the paper and not getting paid[195] and publication stopped in November 2000.[196]

Carter's demand for prior review and approval prompted Hosty, Porche and Barba to file suit in April 2001 in United States

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[187] Governors State University President Fagan denounces the *INNOVATOR* (Nov. 3, 2000), *available at* http://www.collegefreedom.org/Fagan.htm.

[188] *Hosty*, 412 F.3d at 733.

[189] *Hosty*, 325 F.3d at 947.

[190] *Id.*

[191] *Id.*; a copy of this memo is available at http://www.collegefreedom.org/Printer.htm.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Hosty*, 325 F.3d at 947.

[196] *Id.*

District Court for the Northern District of Illinois, Eastern Division.[197] The students sued the University, the Board of Trustees, administrators and staff members, alleging prior restraint in violation of the First Amendment and entitlement to equitable relief and punitive damages.[198] Summary judgment was granted as to some defendants because, in the district court judge's view, they did not participate in the challenged conduct;[199] others were granted qualified immunity.[200] The district court found, however, that there was sufficient evidence to show that Dean Carter's phone calls amounted to an unconstitutional prior restraint and that her conduct was intentionally unlawful, negating her claim to qualified immunity.[201] Dean Carter appealed, and, on April 10, 2003, a panel of the Seventh Circuit unanimously affirmed the order of the district court and remanded the case for trial.[202] On June 23, 2003, however, the Seventh Circuit granted Carter's petition for a rehearing *en banc*, and vacated its April 10th decision.[203]

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[197] Hosty v. Governors St. Univ., 174 F. Supp. 2d 782 (N.D. Ill. Nov. 13, 2001).

[198] *Id.* at 783.

[199] *Hosty*, 2001 WL 1465621, *4 (N.D. Ill. Nov. 13, 2001). The students sued for alleged First Amendment violations pursuant to 42 U.S.C. §1983. As the district court noted, "In §1983 actions, an individual cannot be held liable unless he caused or participated in the asserted constitutional violation." *Id.* Plaintiffs claimed that certain individuals at the school failed to adequately investigate Dean Carter's phone calls. However, summary judgment was granted with respect to these individuals because, as the court noted, "[a] supervisor's negligence in detecting unconstitutional conduct is insufficient to hold the supervisor liable." *Id.*

[200] *Id.* at *5. As the district court noted, according to the doctrine of qualified immunity, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* (internal citations omitted).

[201] *Id.* at *7. Ultimately, the district court granted the motion for summary judgment to all except for Dean Patricia Carter.

[202] *Hosty*, 325 F.3d at 950.

[203] *Id.* at 731.

B. Hosty v. Carter*: Seventh Circuit En Banc Decision*

By a 7-4 vote, the full Seventh Circuit reversed the order of the district court and sent the seventeen-year-old *Hazelwood* doctrine to college.[204] Judge Easterbrook, writing for the majority, declared that *Hazelwood*'s footnote seven[205] was not dispositive.[206] Simply because the Supreme Court reserved the question did not mean that post-secondary educators may never insist that student newspapers be subject to prior approval. According to the majority, "this footnote does not even hint at the possibility of an on/off switch: high school papers reviewable, college papers not reviewable. . . . Whether *some* review is possible depends on the answer to the public forum question, which does not (automatically) vary with the speakers' age."[207] Because age is not dispositive where a public forum analysis applies, the court concluded that "*Hazelwood*'s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools."[208]

The court then addressed whether the *INNOVATOR* should be

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[204] *Hosty*, 412 F.3d at 731.

[205] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 n.7 (1988) ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.").

[206] *Hosty*, 412 F.3d at 734.

[207] *Id.*

[208] *Id.* at 735. In his analysis, Easterbrook noted that to the extent that the justification for editorial control hinges on the audience's maturity, the difference between high school and college students may be important. *Id.* at 734. Easterbrook hedged this declaration, however, reasoning that there could be no bright line between college and high school students, as many high school seniors are older than some college freshmen, and that many junior colleges are strikingly similar to high schools. *Id.* Further, the court concluded that to the extent that the justification for editorial control depends on other matters, such as the desire to ensure high standards of student speech, i.e., speech that might be deemed ungrammatical, poorly written, inadequately researched, vulgar or profane, or unsuitable for immature audiences, there is no sharp difference between student newspapers at the high school and college levels. *Id.* at 734-35. For a discussion of the public forum doctrine and its general applicability, *see supra* note 72.

characterized as a public forum.[209] If the paper had operated as a public forum, the First Amendment would have prohibited the University's prior restraint.[210] If, however, the *INNOVATOR* operated as a nonpublic forum, there could be no First Amendment violation as long as Dean Carter's insistence on prior review was motivated by "legitimate pedagogical concerns."[211] Based on the record, the majority found it impossible to determine what kind of forum the University had established or to evaluate Carter's motivation.[212] Viewing the evidence in the light most favorable to the student plaintiffs, however, the court concluded a reasonable finder of fact might have found that the *INNOVATOR* constituted a public forum and was, thus, beyond the control of University administrators.[213]

Ultimately, although the student paper did not operate as a traditional public forum, the court concluded that the University had established the *INNOVATOR* as a designated or limited public forum.[214] It was undisputed that the Student Communications Media Board dictated the terms on which the *INNOVATOR* operated.[215] The Board was the ultimate publisher of the *INNOVATOR* and other subsidized student media.[216] The Board determined how many publications it would underwrite, and its

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[209] *Id.* at 736.

[210] *Id.* at 737 (citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)); *see also*, Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983).

[211] *Id.* at 737.

[212] *Hosty*, 412 F.3d at 737.

[213] *Id.* The court notes here, as well as earlier in its opinion that, when entertaining an interlocutory appeal by a public official seeking the privilege of qualified immunity, the threshold question is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the [public official's] conduct violated a constitutional right?" *Id.* at 733 (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001) (alterations in original)).

[214] *Id.* ([t]he court held that the *INNOVATOR* constituted a designated public forum, "where the editors were empowered to make their own decisions, wise or foolish, without fear that the administration would stop the presses."). *Id.* at 738.

[215] *Id.* at 737.

[216] *Id.*

policy dictated that the staff of each funded publication would be free to determine content and format without censorship or advance approval.[217] The University had declared the pages of the student newspaper open for expression and had thereby relinquished its right to engage in viewpoint or content discrimination.[218]

Having established that *Hazelwood*'s applicability turned on a public forum analysis,[219] the court next addressed Dean Carter's claim of qualified immunity.[220] Even assuming that both the district court and the Seventh Circuit panel were correct in their reasoning that student media in high schools and colleges operate under different constitutional frameworks, the court concluded that it "greatly overstates the certainty of the law" to say that any reasonable college administrator would have known that rule.[221] Relying on what it perceived as a split among the circuits, the Court of Appeals found that post-*Hazelwood* decisions had not "clearly established" that college administrators may not regulate student media.[222] Citing *Axson-Flynn v. Johnson*[223] and *Bishop v. Arnov*,[224] the court concluded that at least two circuits had applied *Hazelwood* to the administrative actions at both the college and

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[217] *Id.* The court also noted that the funds for publications which the Board had conceded to underwrite were, as was the case in both *Southworth* and *Rosenberger*, derived entirely from student activity fees. For a discussion of *Rosenberger*, *Southworth*, and student speech subsidized by a mandatory student activity fee, see discussion *supra* Part IC.

[218] *Hosty*, 412 F.3d at 737. Judge Easterbrook explained that participants in a designated or limited public forum, such as the *INNOVATOR*, which was declared open to speech *ex ante*, "may not be censored *ex post* when the sponsor decides that particular speech is unwelcome." *Id.*

[219] *Id.* at 737-38.

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Axson-Flynn*, 356 F.3d 1277, 1289 (10th Cir. 2004) (holding that "the *Hazelwood* framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum.").

[224] *Bishop*, 926 F.2d 1066 (11th Cir. 1991) (holding that *Hazelwood's* framework allows a university to order a professor to stop interjecting his personal religious views into classroom discussion.).

high school levels.[225] The court relied on *Student Government Association v. University of Massachusetts,*[226] and *Kincaid v. Gibson*[227] to highlight the circuit split.[228] Given this apparent confusion among the circuits regarding that applicability of *Hazelwood* to post-secondary education, and despite the fact that the *INNOVATOR* was operating as a limited public forum and thus exempt from university control, the court concluded that Dean Carter was entitled to qualified immunity.[229]

C. Hosty v. Carter*: The Dissent*

In a vigorous dissent, Judge Evans attacked the majority's contention that there is no legal distinction between college and high school students.[230] He noted that, in reality, "[t]he Court has long recognized that the status of minors under the law is unique in many respects."[231] Age, according to the Supreme Court, has always defined legal rights:

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. The Court, indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults.[232]

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[225] *Hosty*, 412 F.3d at 738.

[226] 868 F.2d 743, 480 n.6 (1st Cir. 1989) (asserting, in reliance on *Hazelwood's* footnote 7, that the Supreme Court has held that *Hazelwood's* approach does not apply to post-secondary education.).

[227] 236 F.3d 342, 345 n.5 (6th Cir. 2001) (en banc) (holding that, in reliance on the parties' agreement, *Hazelwood* has "little application" to collegiate publications.).

[228] *Hosty*, 412 F.3d at 738-39. The majority also cited Brown v. Li, 308 F.3d 939 (9th Cir. 2002), to illustrate the claim that many aspects of the law with respect to student speech are difficult to understand and apply. *Id.* at 739.

[229] *Id.* at 739.

[230] *Id.* (Evans, J., dissenting).

[231] *Id.* (quoting Bellotti v. Baird, 443 U.S. 622, 633 (1979)).

[232] *Id.* at 740. (quoting Planned Parenthood of Missouri v. Danforth, 428

Citing *Healy* and its progeny, Evans noted that the Supreme Court has consistently drawn a bright line between high school and college students and that age has always defined the extent of a student's right to freedom of speech.[233]

According to the dissent, this distinction between high school students and college students who are, for all intents and purposes, "young adults," [234] has been drawn because students in high school are less mature than their collegiate counterparts and the missions of secondary schools and institutions of higher learning are vastly different.[235] Analysis of these differences render *Hazelwood* inapplicable outside of the high school context.[236]

The dissent addressed the maturity distinction first, arguing that "[i]t is self-evident that, as a general matter, juveniles are less mature than adults."[237] It continued, "[a]t least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[238] It was this reasoning that dictated the outcome in *Hazelwood* and *Fraser*.[239] In *Hazelwood*, the Supreme Court stressed that, because in a high school setting the students are young, immature, and more

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U.S. 52, 74 (1976)) (internal citations omitted).

[233] *Id.* For further discussion of *Healy*, *Rosenberger* and *Southworth*, see discussion *supra* Part IC.

[234] *Hosty*, 421 F.3d at 739 (citing Widmar v. Vincent, 454 U.S. 263, 274 n. 14 (1981)).

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] *Id.* (quoting Ginsberg v. New York, 390 U.S. 629, 649-650 (1968) (Stewart, J., concurring) (footnote omitted)); *see also* Tilton v. Richardson, 403 U.S. 672, 686 (1981) (holding that as a general rule, college students are less impressionable than students in primary and secondary schools); Lee v. Weisman, 505 U.S. 577, 592 (1992) (noting that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."); *Bellotti*, 443 U.S. at 635 (holding that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.").

[239] *Hosty*, 412 F.3d at 740.

vulnerable to inappropriate influence, a more restrictive First Amendment standard was appropriate.[240] Given the maturity level of the audience involved, it was reasonable for the school to restrict publication of articles concerning divorce, juvenile delinquency, and teen pregnancy.[241] Similarly, in *Fraser*, where the Court permitted the school to sanction a lewd and suggestive speech given by a student at a school-sponsored assembly, the Court stressed that "[t]he speech could well be seriously damaging to its *less mature* audience."[242] The dissent in *Hosty* argued that these "same concerns simply do not apply to college students, who are certainly (as a general matter) more mature, independent thinkers."[243]

The dissent also compared the respective missions of high schools and those of colleges and universities and found the two were vastly different.[244] Elementary and secondary schools have "custodial and tutelary responsibilities for children"[245] and are, in large part, concerned with the "inculcation" of "values."[246] A university, on the other hand, represents the quintessential "marketplace of ideas"[247]—seeking to "facilitate a wide range of speech."[248] Citing *Healy*'s teaching that "[t]he precedents of [the

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[240] *Id.* (citing *Hazelwood*, 484 U.S. at 272).

[241] *Id.*

[242] *Id.* (citing *Fraser*, 478 U.S. at 683-84) (emphasis added).

[243] *Id.* at 741.

[244] *Id.*

[245] *Id.* (quoting Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 829-30 (2002)).

[246] *Id.* (citing *Fraser*, 478 U.S. at 683).

[247] *Id.* (citing Keyishian v. Bd. of Regents of the Univ. of N.Y., 385 U.S. 589, 603 (1967)).

[248] *Id.* (citing *Southworth*, 529 U.S. at 231). For further support, the dissent cites to *Rosenberger*, 515 U.S. at 836 (holding that permitting such censorship on college and university campuses "risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life."); *see also*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (arguing that an atmosphere of "speculation, experiment and creation" is "essential to the quality of higher education.") (internal citations omitted); *Widmar*, 454 U.S. at 267-68 n. 5 (holding that "[t]he college classroom with its surrounding environs is peculiarly the marketplace of ideas.").

Supreme Court] leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large," the dissent in *Hosty* contended that it is inappropriate to extend *Hazelwood* to post-secondary education.[249] "This court," it declared, "gives the green light to school administrators to restrict student speech in a manner inconsistent with the First Amendment."[250]

Finally, the dissent rejected the majority's conclusion that Dean Carter was entitled to qualified immunity.[251] Prior to *Hazelwood*, courts consistently held that university administrators could not require prior review of student media.[252] *Hazelwood*, the dissent reasoned, did not change this rule. For purposes of qualified immunity, then, the question was whether any case following *Hazelwood* could have suggested to a reasonable person in Dean Carter's position that she could prohibit publication of a student newspaper simply because she was opposed to its content.[253] For the dissent, the answer was clearly "no."[254] In support of this conclusion, the dissent cited directly contradicting authority from *Student Government Association* and *Kincaid*.[255] The dissent also explicitly rejected the majority's reliance on *Bishop* and *Axson-Flynn*, noting that both concerned free speech rights in the classroom.[256] Furthermore, although the Court of Appeals for the Tenth Circuit in *Axson-Flynn*, acknowledged that some courts (namely the First and Sixth) had cast doubt on *Hazelwood*'s application to extracurricular curricular activities, it

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[249] *Hosty*, 412 F.3d at 741-42. For a more in-depth discussion of *Healy* and its progeny, see *supra* Part IC.

[250] *Hosty*, 412 F.3d. at 742.

[251] *Id.*

[252] *Id.*

[253] *Id.* at 743.

[254] *Id.* Whereas the majority picked up on *Hazelwood's* footnote seven and asked whether post-*Hazelwood* decisions had "clearly established that college administrators must keep hands off all student newspapers," the dissent framed the question differently. It asked whether decisions after *Hazelwood* said anything to suggest that college administrators *could* censor school newspapers. *Id.* at n. 3.

[255] *Id.* at 743.

[256] *Hosty*, 412 F.3d at 743.

explicitly stated that "because Axson-Flynn's speech occurred as part of a *curricular* assignment during class time and in the classroom, [it would] not reach any analysis of university's students' extracurricular speech."[257] In sum, because it was "clearly established" that the University could not deny funding to the student paper simply because it found its contents offensive and, accordingly, the dissent concluded Dean Carter's request for immunity should have been denied.[258]

D. The Aftermath of the Seventh Circuit's Pronouncement

Reaction to the proceedings in *Hosty* has been extensive. Citing the effect that the ruling could have on student free speech rights, both the student and popular press have written extensively on the topic. Praising the now vacated Seventh Circuit panel's decision, Mark Goodman, executive director of the Student Press Law Center, stated that it reaffirmed the last thirty years of college censorship cases.[259] He hoped that this ruling would "dissuade—once and for all—college officials who are inclined to censor from engaging in that unconstitutional behavior."[260] The Chicago Tribune reported that the student plaintiffs were "stunned and thrilled by the ruling."[261] Jim Killam, former president of the Illinois College Press Association called the panel's decision "an overwhelming confirmation . . . that these students were right."[262]

Reaction continued following the Seventh Circuit's *en banc* ruling. This time, however, the reaction was mainly hostile. "Beware the ruling that opens with a condescending joke,"[263]

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[257] *Id.* at 743-44 (quoting *Axson-Flynn*, 356 F.3d at 1286 n.6 (emphasis added) (internal citations omitted)).

[258] *Id.* at 744.

[259] SPLC Press Release, SPLC Praises Appellate Court Decision that Upholds College Press Rights, Apr. 10, 2003; *available at* http://www.splc.org/newsflash.asp?id=598.

[260] *Id.*

[261] Richard Wronski, *Court Rips College for Censoring Paper; Appeals Panel Decides Against Governors State*, CHI. TRIB., Apr. 11, 2003, at 6 (Metro).

[262] *Id.*

[263] Judge Easterbrook wrote, "[c]ontroversy began to swirl when Jeni

began one commentator, concluding that "*Hazelwood* is now inside the gates."[264] Mark Goodman noted that although student newspapers have traditionally been presumed to operate as public forums, the decision "gives schools the chance to argue that's not what they intended."[265] Greg Lukianoff, Director of Legal and Public Advocacy for the Foundation for Individual Rights in Education ("FIRE"), opined that "[t]he summer of 2005 will be remembered as a rough season for student rights."[266] Margaret Hosty, the titular student plaintiff, called the decision "disastrous" and worried that it would not be limited to journalists, but might be extended to other areas of student expression.[267] Some even went so far as to say that "[i]ndependent college journalism may soon be a relic of the past—on par with typewriters and eight-track cassette players—in at least three states, and potentially throughout the country."[268]

Although the majority of the commentary on the *Hosty* decision has been negative—even alarmist—others are not as concerned. The decision in *Hosty* was based, in large part, on the *INNOVATOR's* status as a limited public forum. Scholars have surmised that "a vast majority of college newspapers would be found to be public forums," and, as such, have concluded that *Hosty* might not have a "great negative impact."[269] A

Porche became editor in chief of the *INNOVATOR,* the student newspaper at Governors State University. None of the articles concerned the apostrophe missing from the University's name. Instead the students tackled meatier fare." *Hosty,* 412 F.3d at 732.

[264] "Hazelwood" *Goes to College; Another Seventh Circuit Ruling, Another Defeat for the Press*, CHICAGO READER, Vol. 34, Iss. 40. July 1, 2005.

[265] Student Media Experts React to Governors State University Ruling, *supra* note 163.

[266] Greg Lukianoff, *Wronging Student Rights*. BOSTON GLOBE, Sept. 3, 2005, OP-Ed, at A17.

[267] Rudolph Bush, *College Paper Lawsuit Fails; Federal Court Backs Governors State Dean*. CHI. TRIB., June 21, 2005, Metro, at 1.

[268] Harvey A. Silverglate, *Assault on College Press; FIRST AMENDMENT*. NAT'L L. J., Oct. 17, 2005, Vol.27, No.56, at 23. Mr. Silverglate's reference to "at least three states" refers to the states within the jurisdiction of the Seventh Circuit – Wisconsin, Illinois and Indiana.

[269] *See* Student Media Experts React to Governors State University Ruling,

determination of forum status might be much more difficult of other student-funded expressive activities.[270] So, while most student media enjoy a history of operating as a public forum, "[a] student group that brings speakers or shows films on campus may not have easily demonstrated that same tradition."[271] The real fear then, is not what will happen to student-run newspapers on college campuses, but how *Hazelwood* might be expanded to censor all forms of speech.[272]

III. THE CASE AGAINST APPLYING *HAZELWOOD* TO INSTITUTIONS OF HIGHER LEARNING

With the historical backdrop of First Amendment jurisprudence in mind, it becomes clear that the Seventh Circuit's decision in *Hosty* was wrongly decided and that *Hazelwood*'s framework should not be applied to student speech on college and university campuses. In *Hazelwood*, the Court held 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 concerns are reasonably related to legitimate pedagogical concerns."[273] For a number of reasons, such a restrictive standard is inappropriate and ultimately unworkable at the collegiate level.

A. Inherent Fundamental Differences Between High School and College Students

The significant differences between high school students and their collegiate counterparts weigh heavily against applying *Hazelwood* outside of the confines of secondary education. First, high school students are almost exclusively minors, while college students are almost exclusively adults.[274] The Supreme Court has

supra note 163.

[270] *Id.*

[271] *Id.*

[272] *See* discussion *infra* Part III.

[273] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

[274] According to the U.S. Census Bureau, only .9% of undergraduate

regularly highlighted the importance of this distinction. In *Widmar v. Vincent*,[275] the Court held that "[u]niversity students are, of course, young adults. They are less impressionable than younger students."[276] Nine years earlier in *Healy v. James*, Justice Douglas wrote, "[s]tudents—who, by reason of the Twenty-Sixth Amendment, become eligible to vote when 18 years of age—are adults who are members of the college or university."[277]

Numerous lower courts have recognized the significance of this difference as well. For example, in upholding a high school's prohibition of the distribution of an unofficial newspaper on its campus, the Court of Appeals for the Eighth Circuit cautioned that its decision only applied to "minors," and not to university students, because "few college students are minors, and colleges are traditionally places of virtually unlimited free expression."[278] In *Bradshaw v. Rawlings*, the Court of Appeals for the Third Circuit highlighted some of the many ways in which college students are treated as adults:

> College students today are no longer minors; they are now regarded as adults in almost every phase of community life. They may vote, marry, make a will, qualify as a personal representative, serve as a guardian of the estate of a minor, wager at racetracks, register as a public accountant, practice veterinary medicine, qualify as

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students are below the age of 18. *See* 2003 U.S. Census Bureau Current Population Survey (CPS) Rep., Table E, College Enrollment by Selected Characteristics: October 2003.

[275] 454 U.S. 263 (1981).

[276] *Id.* at 274 n. 14.

[277] Healy v. James, 408 U.S. 169, 197 (1972); *see also* Bellotti v. Baird, 443 U.S. 622, 635 (1979) (holding that "minors often lack the experience perspective, and judgment to recognize and avoid choices that could be detrimental to them."); Tilton v. Richardson, 403 U.S. 672, 686 (1971) (upholding a federal law that provided funding to church-related colleges and universities for the construction of facilities to be used exclusively for secular educational purposes, the Court noted that while pre-college students may not have the maturity to make their own decisions concerning such weighty matters such as religion, "college students are less impressionable and less susceptible to religious indoctrination."). *See also* discussion *supra* Part IC.

[278] Bystrom v. Fridley High Sch., 822 F.2d 747, 750 (8th Cir. 1987).

> a practical nurse, drive trucks, ambulances and other official fire vehicles, perform general fire-fighting duties, and qualify as a private detective. [At age eighteen] criminal acts are no longer treated as those of a juvenile, and eighteen year old students may waive their testimonial privilege protecting confidential statements to school personnel.[279]

Similarly, the Ninth Circuit, upholding a high school's decision to prohibit advertisements for Planned Parenthood in its school publications, recognized that "educators must have the ability to consider the 'emotional maturity of the intended audience.'"[280] It was this very concern for the maturity level of the speaker and the intended audience that concerned the Supreme Court in both *Fraser and Hazelwood*.

In *Fraser*, the Supreme Court's central focus was the immaturity of the audience subject to Fraser's sexually suggestive speech. The Court noted that, "The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality."[281] Similar concerns were raised by the Court in *Hazelwood*:

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[279] 612 F.2d 135, 139 (3d Cir. 1979) (internal footnotes omitted); *see also*, Thompson v. Oklahoma, 487 U.S. 815, 853 (1988) (noting that "[l]egislatures recognize the relative immaturity of adolescents, and we have often permitted them to define age-based classes that take account of this qualitative difference between juveniles and adults.") (O'Connor, J., concurring).

[280] Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817, 829 (9th Cir. 1991) (quoting *Hazelwood*, 484 U.S. at 272); *see also* Sypniewski v. Warren Reg'l Bd. of Educ., 307 F.3d 243, 267 (3d Cir. 2002) (holding that the public school setting is "fundamentally different" from the university setting because high school students are "minors."); Beach v. Univ. of Utah, 726 P.2d 413, 418 (Utah 1986) (holding that "[we] do not believe that [a college student] should be viewed as fragile and in need of protection simply because she had the luxury of attending an institution of higher learning."); R.A.V. v. City of St. Paul, 505 U.S. 377, 429-30 (1992) (noting "the distinctive character of a university environment, or a secondary school environment, influences our First Amendment analysis.") (Stevens, J., concurring).

[281] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683-84 (1986) (internal citations omitted).

> A school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting.[282]

The Court's heavy reliance on age and maturity level in deciding these cases make it clear that *Hazelwood*'s framework is inapplicable in a college setting. Seizing on this difference, the dissent in *Hosty* argued that the majority had failed to recognize this distinction.[283] The dissent highlighted the fact that the students in *Hazelwood* were high school students while those in *Hosty* were in college, and that the *Hazelwood* Court itself had acknowledged the potential for different treatment of college students.[284] Noting the emphasis the Supreme Court has consistently placed on the maturity level of the speaker and audience at issue, the dissent concluded that "[t]he same concerns simply do not apply to college students, who are certainly (as a general matter) more mature, independent thinkers."[285] This distinction, it argued, made it "clear that *Hazelwood* does not apply beyond high school contact."[286]

In other words, "the university campus should be considered to society at large."[287] College students are afforded far more rights than their high school counterparts,[288] and the typical college experience is devoid of most of the traditional features of pre-college life.[289] Moreover, because attendance is not compulsory,

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[282] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988).

[283] *Hosty*, 412 F.3d at 739 (Evans, J., dissenting) ("The majority's conclusion flows from an incorrect premise—that there is no legal distinction between college and high school students.").

[284] *Id*. at 739-40.

[285] *Id.* at 741.

[286] *Id.* at 740.

[287] Greg C. Tenhoff, *Censoring the Public University Student Press: A Constitutional Challenge*, 64 S. CAL. L. REV. 511, 535 (1991).

[288] *Id.* ("American society bestows upon new adults full legal rights and responsibilities; with these rights and responsibilities, unfortunately, comes exposure to the unpleasant elements of society.").

[289] *See* Fiore, *supra* note 103, at 1957.

college and university students should not be considered a "captive audience."[290] As one commentator put it, "[i]n the university context, the focus is not on children in the public schools who need to be sheltered from harms inherent in the community at large . . . . At some point, society needs to send its young adults to face the world, with all its unpleasantries and hazards."[291]

B. The Respective Missions of High Schools and Universities

In a similar vein, the respective missions of universities and high schools are entirely different. In *Fraser*, the Supreme Court recognized that primary and secondary schools "must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[292] By contrast, the Supreme Court, in *Healy*, recognized that "the college classroom with its surrounding environs is peculiarly the "'marketplace of ideas.'"[293] As one commentator concluded, "While inculcating values in children is arguably necessary to an orderly society, such a purpose

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[290] Tenhoff, *supra* note 287 ("university students are not a captive audience as are high school students.").

[291] *Id. See also* Bd. of Educ. v. Pico, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring in part); Ambach v. Norwick, 441 U.S. 68, 77 (1979) (holding "[t]oday, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.") (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

[292] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986) (internal citations omitted).

[293] Healy v. James, 408 U.S. 169, 180 (1972); *see also* Keyishian v. Bd. of Regents of the Univ. of N.Y., 385 U.S. 589, 603 (1967) (holding that "[t]he classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection.") (internal citations omitted).

has no place in the world of adults. Adults must be considered to have the ability to shape their own values outside the realm of institutional coercion."[294]

Hosty involved students on a university campus. In fact, more than a typical college or university, Governors State defines itself as "An upper-division university: [offering] undergraduate courses at the junior and senior level leading to completion of a baccalaureate degree and graduate level courses leading to a master's degree."[295] The average age of the students at GSU is 33 and 71% of the student body are women, many of whom are single working mothers.[296] Certainly these students, many of them parents themselves, should not be subject to the same restrictive *Hazelwood* standard applicable to their younger, high school counterparts. Extending *Hazelwood* in such circumstances opens the door for censorship of student speech not only at the undergraduate level, but at the post-graduate level as well. Taken to this extreme, even students studying for a masters degree in journalism might be subject to administrative censorship. Commenting on this absurdity, one scholar noted, "[with the ruling in *Hosty*] we're going to have students learning journalism for eight years under conditions that bear no resemblance to real conditions."[297]

Moreover, GSU states as one of its missions (a statement that is typical of most colleges and universities),[298] "To cultivate and enlarge a diverse and intellectually stimulating community of learners guided by a culture that embodies: Openness of

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[294] Tenhoff, *supra* note 287, at 530.

[295] Governors State University website, Facts and Figures, http://www.govst.edu/aboutgsu/t_aboutgsu.asp?id=204.

[296] *Id.*

[297] Irwin Gratz, president of the Society of Professional Journalists, in the Student Press Law Center Fall 2005 Report, at 24; *available at* http://www.splc.org/report_detail.asp?id=1239&edition=37.

[298] The Foundation for Individual Rights in Education ("FIRE"), a non-profit organization dedicated to the protection of free speech rights on campuses across the country, provides a service on its website that allows visitors to search for any college or university in the nation. Once a school is selected, FIRE's website provides links to relevant school policies such as sexual harassment policies, speech codes, and mission statements. *See* http://www.thefire.org.

communication; diversity of backgrounds, experiences, and perspectives; mutual respect and cooperation; critical inquiry, constant questioning, and continuing assessment."[299] Given this, censoring student speech, simply because it offends the administration, is not only an unconstitutional violation of the First Amendment, but also runs afoul not only of the stated mission of the school but also the well-established view of the nation's universities as the quintessential marketplace of ideas.

C. Application of a Public Forum Analysis

Application of the public forum doctrine in the context of college student publications is improper.[300] Forum analysis presumes that simply by virtue of proximity to or financial control over the expressive venue, the government may lawfully control otherwise constitutionally protected speech. In *Hazelwood*, the Supreme Court applied a public forum analysis, concluding that because the student newspaper in question was a non-public forum, school officials were within their rights to control its content.[301] Traditional public forum analysis, while logical when applied to a high school setting, is simply unworkable at the university level. Rarely have courts relied on public forum analysis in order to determine the level of First Amendment protections to which collegiate student speech is entitled.[302] Instead, although most court decisions suggest some type of forum analysis, it is apparent that courts have simply assumed that as editors of a student publication, college-aged students are given the authority to determine the content of the medium.[303]

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[299] Governors State University website, Mission Statement, http://www.govst.edu/sas/t_hb.asp?id=2933.

[300] For a more detailed discussion of the public forum doctrine, see *supra* note 72.

[301] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 269-70 (1988). In making its determination, the Court considered several factors. For a more detailed discussion of the Court's considerations, see discussion *supra* Part IA3.

[302] Student Press Law Center, Law of the Student Press 53 (2nd ed. 1994).

[303] *Id.; see also*, Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973) (holding "[b]ut if a college has a student newspaper, its publication cannot be

Most courts have suggested that to deem a college student publication a non-public forum would be illogical.[304] Based on a heavy presumption in favor of protection for the college student press, courts have upheld students' rights to publish a wide variety of potentially controversial material.[305] A majority of courts insist that unless school administrators are able to demonstrate that publication of the material in question would satisfy *Tinker*'s substantial disruption requirement, censorship of the expression is prohibited by the First Amendment.[306]

Where the issue has been addressed, courts have uniformly—until *Hosty*—declined to extend *Hazelwood*'s framework to college student publications. To date, two Circuits have explicitly refused to do so. In *Student Government Association v. Board of Trustees*

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suppressed because college officials dislike its editorial content."); Stanley v. McGrath, 719 F.2d 279, 282 (8th Cir. 1983) (holding, "[a] public university may not constitutionally take adverse action against a student newspaper, such as withdrawing or reducing the paper's funding, because it disapproves of the content of the paper."); Schiff v. Williams, 519 F.2d 257, 260 (5th Cir. 1975) (noting that "the right of free speech embodied in the publication of a college student newspaper cannot be controlled except under special circumstances.").

[304] *Id.; see e.g.,* Antonelli v. Hammond, 308 F. Supp. 1329, 1336 (D. Mass. 1970) (holding "[t]he university setting of college-age students being exposed to a wide range of intellectual experience creates a relatively mature marketplace for the interchange of ideas, so the underlying assumption that there is a positive social value in an open forum seems particularly appropriate."); Bazaar v. Fortune, 476 F.2d 570, 574 (5th Cir. 1973) (holding "[i]t seems a well established rule that once a university recognizes a student activity that has elements of free expression, it can act to censor that expression only if it acts consistent with First Amendment constitutional guarantees.").

[305] For examples of such publications, *see e.g.*, Thonen v. Jenkins, 491 F.2d 722 (4th Cir. 1973) (concerning a letter published in the student newspaper ending with a "four-letter vulgarity" referring to the college president); Korn v. Elkins, 317 F. Supp. 138 (D. Md. 1970) (allowing publication of a student feature magazine featuring a burning American flag on the cover); Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967) (permitting student publication of criticisms of the Governor of the State of Alabama and the State Legislature); Panarella v. Birenbaum, 32 N.Y.2d 108 (N.Y. 1973) (allowing publication of several articles (that the court itself termed "derogatory, profane, and blasphemous") in a student-run college newspaper.).

[306] *See, e.g., Korn*, 317 F. Supp. at 142; *Mazart*, 441 N.Y.S.2d at 118; *Antonelli*, 308 F. Supp. at 1336.

of the University of Massachusetts,[307] the Court of Appeals for the First Circuit held that a university's decision to close its student legal services office did not violate the First Amendment, even if the decision was prompted by lawsuits the office had filed against the school on the students' behalf.[308] In doing so, the court distinguished student newspapers, which operate as open or limited public forums and are consequently granted broad First Amendment protections, from the legal services office which did not operate as a public forum.[309] In a footnote, the court stated, "*Hazelwood* . . . is not applicable to college newspapers."[310] More recently, the Court of Appeals for the Sixth Circuit addressed the issue in *Kincaid v. Gibson*.[311] Applying a public forum analysis, the court determined that the *Thorobread*, the student yearbook at Kentucky State University, should be classified as a limited public forum.[312] Because the yearbook did not fall into the non-public forum category, the court determined that "*Hazelwood* [had] little application to [the] case."[313]

Ultimately, public forum analysis where college student publications are concerned simply does not fit. To begin, in determining that the *Spectrum* was a non-public forum, the Supreme Court in *Hazelwood* emphasized the fact that the paper was controlled by the school through financial assistance and editorial oversight.[314] Such is not the case with collegiate student publications. The vast majority of newspapers at public colleges and universities are largely or completely financially independent of the school, and almost all exist apart from the school's curriculum and are editorially autonomous.[315] Moreover, the

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[307] 868 F.2d 473 (1st Cir. 1989).

[308] *Id.* at 477.

[309] *Id.* at 480 ("the [Legal Services Office] is not a channel of communication and forum analysis is therefore inapplicable.").

[310] *Id.* at 480 n.6.

[311] 236 F.3d 342 (6th Cir. 2001) (en banc).

[312] *Id.* at 346 n.5.

[313] *Id.*

[314] Hazelwood Sch. Dist. v. Kulhmeier, 484 U.S. 260, 262-63 (1988).

[315] Brief Amici Curiae of the Student Press Law Center, in Support of Plaintiffs-Appellees Margaret Hosty, et. al., (No. 01-4155), reprinted in SPLC,

Hazelwood Court stressed the fact that the high school newspaper was part of the curriculum.[316] Again, such is not typical of student publications in a post-secondary setting. In fact, "a 1997 study found that only one of the 101 daily college student newspapers surveyed could be classified as strongly curriculum based."[317]

Central to *Hazelwood*'s public forum analysis were several factors. In *Lueth v. St. Clair County Community College*,[318] a federal district court considered these factors in determining whether *The Gazette*, a student-run college newspaper, should be considered a public forum. Comparing the operation of the student paper at issue in *Hazelwood* and that of the *Gazette*, the court found significant differences between the two:

> First, the *Gazette* does not operate in a "laboratory situation," in that the *Gazette* is not operated under the guise of a specific academic course, and exists under formal school policy as a student administered activity and not within the defendant community college's "adopted curriculum." Second, the *Gazette* is not created under the direction of a faculty member, but is instead operated entirely by student participants, particularly the Editor-in-Chief. In fact, the Editor-in-Chief, per express terms of the Rules and Regulations of the *Gazette*, fulfills most of the

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Brief of the Student Press Law Center and 24 other media, First Amendment, and journalism education organizations (visited Nov. 30, 2005), *available at* http://www.splc.org/pdf/gsuamicus.pdf (hereinafter SPLC Hosty Brief) (citing Lillian Lodge Kopenhaver, CAMPUS MEDIA OPERATIONS, College Media Review (Winter 2002), at 6. (noting that a 2001 survey found that more than 70% of newspapers at public four-year institutions received more than half of their funding and revenue from advertising. The study also found that almost one-fifth of all college student newspapers generate 90% or more of their own funds through advertising.)); *see also* Tenhoff, *supra* note 287, at 514 (noting that the vast majority of a university newspaper's funding comes from its own advertising and citing the fact that, in some instances, newspapers only receive university funding when their advertising income is insufficient).

[316] *Hazelwood*, 484 U.S. at 268.

[317] SPLC Hosty Brief, *supra* note 315 (citing John Bodle, *The Instructional Independence of Daily Student Newspapers*, JOURNALISM & MASS COMM. EDUCATOR, Winter 1997, at 16).

[318] 732 F. Supp. 1410 (E.D. Mich. 1990).

> obligations attributed to the [*Hazelwood*] teacher. Finally, the *Gazette* is freely distributed throughout the local community, and seeks outside advertisers to aid in the funding of the paper's publication.[319]

Given these differences, the unique nature of college student media should not be subject to a strict and unyielding public forum analysis. Rather, as the Supreme Court has indicated,[320] courts presented with First Amendment free speech and press challenges should engage in a careful review of the nature and context of the student speech in question.

Despite its inappropriateness and impropriety, application of a public forum analysis in *Hosty* reveals the *INNOVATOR* as a designated or limited public forum. Though the Seventh Circuit ultimately reached this conclusion, it did so grudgingly.[321] The *INNOVATOR* was financially independent, funded entirely from the Student Activities Fees.[322] Moreover, although there was a faculty advisor in place, the students were editorially autonomous—charged with determining the format and content of the paper—and were not, according to school policy, subject to

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[319] *Id.* at 1414-15.

[320] *See, e.g.*, Arkansas Educational Television Commission v. Forbes, 523 U.S. 666, 672-73 (1998) (holding that "the public forum doctrine should not be extended in a mechanical way to the very different context of public television broadcasting."); Cornelius v. NAACP Legal Defense Fund and Educational Fund, Inc., 473 U.S. 788, 802 (1985) (stating that the Court will not ignore the special nature and function of the federal workplace in evaluating the limits that may be imposed on an organization's right to participate in a fundraising forum.); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) (holding that "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.").

[321] Hosty v. Carter, 412 F.3d 731, 737 (7th Cir. 2005). Easterbrook, writing for the majority, noted, "[w]e do not think it possible on this record to determine what kind of forum the University established . . . [But the question is] whether the evidence makes out a constitutional claim when taken in a light most favorable to the plaintiff." *Id.* Accordingly, the majority conceded that the record would permit a reasonable fact finder to conclude that *INNOVATOR* operated in a public forum.

[322] *Id.* at 738.

prior review.[323] The *INNOVATOR*, operating as a limited public forum, was beyond the purview of the University, and Dean Carter's demand for prior review and approval amounted to a violation of the students' First Amendment rights.

D. Potential Chilling—The Practical Effect of Hosty

By questioning the traditional presumption of independence of college student media, the *Hosty* court introduced a dangerous ambiguity to the rights of all students engaged in any form of expression. As Mark Goodman, executive director of the Student Press Law Center noted, "Traditionally, student newspapers were presumed by their very nature to be forums for free expression . . . [*Hosty*] gives schools the chance to argue that's not what they intended."[324] Goodman went on to suggest that determining forum status for other school-funded student activities, such as speakers and films, might be even more difficult since those forms of expression do not enjoy the traditional presumption of operating as a public forum.[325] For example, in November 2004, Indian River Community College (FL) refused to allow the film *The Passion of the Christ* on campus. The College claimed an unwritten blanket ban on R-rated movies, despite the fact that at around the same time, the school had allowed theatrical productions that would have garnered an R rating and had sponsored at least one other R-rated film.[326]

Writing for the majority in *Hosty*, Judge Easterbrook noted, "Let us not forget that academic freedom includes the authority of the university to manage an academic community and evaluate teaching and scholarship free from interference."[327] Clearly suggesting that determining the content of a school-funded newspaper might be a proper exercise of the university's academic

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[323] *Id.* at 737-38.

[324] Student Media Experts React to Governors State University Ruling, *supra* note 163.

[325] *Id.*

[326] More information about this case is available on FIRE's website at http://www.thefire.org/index.php/case/661.html.

[327] *Hosty*, 412 F.3d at 736.

freedom, the *Hosty* majority ignored the possibility that an extension of *Hazelwood*'s framework to the post-secondary level might also chill faculty members' exercise of First Amendment rights. *Hazelwood* has been interpreted by numerous lower courts to apply to both student and teacher speech.[328] Courts have granted high school administrators broad[329] and, in at least one case, apparently unlimited[330] authority to dictate curriculum and presentation of material in the classroom. At least one court, recognizing the potentially devastating implications of extending *Hazelwood* to faculty speech, explicitly refused to reach the

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[328] *See, e.g.,* Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons From the "College* Hazelwood*" Case*, 68 TENN. L. REV. 481, 483 (2001) (reasoning that "*Hazelwood* has served as a springboard for lower courts to allow executive inroads not only into other student constitutional freedoms, but also into the sacrosanct realm of teachers' academic freedom.").

[329] *See, e.g.,* Webster v. New Lenox Sch. Dist. No. 122, 917 F.2d 1004 (7th Cir. 1990) (rejecting a high school teacher's claim that he should be permitted to teach a non-evolutionary theory in his social studies class.); Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993) (holding "[l]ike the newspaper, a teacher's classroom speech is part of the curriculum. Indeed, a teacher's principal classroom role is to teach students the school curriculum. Thus, schools may reasonably limit teachers' speech in that setting."); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 800 (5th Cir. 1998) ("Although the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula."); Miles v. Denver Public Schools, 944 F.2d 773, 779 (10th Cir. 1991) (holding "case law does not support [a] position that a secondary school teacher has a constitutional right to academic freedom."); Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Ed., 42 F.3d 719, 722 (2nd Cir. 1994), *cert. denied*, 515 U.S. 1160 (1995) (explaining that school officials are in the best position to ensure that their students "learn whatever lessons [an] activity is designed to teach, [and] that readers or listeners are not exposed to material that may be inappropriate for their level of maturity.") (internal citations omitted).

[330] Boring v. Buncombe County Bd. of Ed., 136 F.3d 364 (4th Cir. 1998) (en banc). Here, the court rejected a high school drama teacher's claim that her transfer to junior high was in retaliation for her selection of a controversial play. In dicta the court found that regulation of the curriculum is, by definition, a legitimate pedagogical concern, and that the teacher had no First Amendment right to control its makeup. *Id.* at 370.

issue.[331] Such an expansion of *Hazelwood*'s restrictive framework would effectively defeat the notion of the university as a "quintessential marketplace of ideas" and provide public school administrators with unprecedented authority to control faulty speech.

Finally, endorsement of *Hazelwood* beyond the high school setting will have a potentially destructive effect on the recruitment and training of future professional journalists. Research demonstrates that early participation on student newspapers is profoundly influential on student journalists' attitudes toward the press.[332] Not only is an uncensored college newspaper vital to attracting new journalism students, it provides those students with real-world training. Both large and small newspapers look highly favorably upon prior journalism experience and well-honed writing skills when hiring new reporters.[333] Moreover, apart from writing and reporting skills, by working for a college newspaper, aspiring journalists learn to accept responsibility for what they publish. For this reason, it is argued that "the student publication offers the single best avenue for training—superior even to the journalism school . . . for a career in professional journalism."[334] Extending *Hazelwood* to allow administrative control over these publications would defeat these goals. As Professor Peltz observed, "Imagine a generation of college-trained journalists with no practical experience handling controversial subject matter, nor with any more than an academic understanding of the role of the Fourth

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[331] Vanderhurst v. Colorado Mountain College Dist., 208 F.3d 908 (10th Cir. 2000) (holding "we need not decide definitively, however, whether that framework does in fact govern a public college or university's control over the classroom speech of a professor or other instructor.").

[332] *See generally*, Michael McDevitt *et al*., *The Making and Unmaking of Civic Journalists: Influences of Professional Socialization*, 79 JOURNALISM & MASS COMMC'N Q. 87 (2002); Jennifer Rauch, et al., *Clinging to Tradition, Welcoming Civic Solutions: A Survey of College Students' Attitude Toward Civic Journalism*, 58 JOURNALISM & MASS COMMC'N EDUCATOR 175 (2003).

[333] Barbara J. Hipsman & Stanley T. Wearden, SKILLS TESTING AT AMERICAN NEWSPAPERS, at 11-14 (Aug. 1989) (paper presented for Education in Journalism and Mass Communication, Newspaper Division).

[334] Peltz, *supra* note 328, at 482.

Estate in American society."[335]

CONCLUSION

On February 21, 2006, the Supreme Court denied certiorari in the matter of *Hosty v. Carter*, allowing the Seventh Circuit's ruling to stand. There is, on one hand, an argument to be made for upholding the decision. In *Hazelwood*'s infamous footnote seven, the Supreme Court acknowledged the possibility of extending its holding to post-secondary education: "We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."[336] If the Court had meant to confine *Hazelwood* to the high school setting, the note would be superfluous. Instead, its presence suggests that future courts, acting in much the same way as the Seventh Circuit, might be justified in extending the ruling to college student speech.

There are, however, stronger arguments in favor of limiting *Hazelwood* to the high school setting. Critical comparison of *Hosty* and *Hazelwood* reveals that the biggest similarity between the two is that they both involved a student newspaper. The similarities end there. As discussed in Part III, the differences between primary and secondary school students and their college counterparts are both numerous and profound. In order to justify its decision in *Hosty* and apply *Hazelwood* to speech on college campuses, the Seventh Circuit effectively had to overrule more than thirty years of First Amendment jurisprudence. First, the Seventh Circuit failed to address adequately the fundamental differences that exist between high school and college students. Further, the court cannot reconcile the profoundly different approaches that have been taken toward free speech in primary and secondary schools as compared to undergraduate and graduate institutions. Finally, any court wishing to extend *Hazelwood* would have to consider the inevitable chilling effect, not only on student journalists, but on all speech on the nation's university campuses. Allowing

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[335] *Id.*

[336] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 n.7 (1988).

Hazelwood's restrictive framework inside the college gates is to substantially disrupt the well-established ideal of the university as the "quintessential marketplace of ideas."