

THE CASE AGAINST EXTENDING *HAZELWOOD* V. *KUHLMEIER*'S PUBLIC FORUM ANALYSIS TO THE REGULATION OF UNIVERSITY STUDENT SPEECH

I. INTRODUCTION

Instead of publishing just the usual articles about upcoming football games and campus lectures, the editor of a student newspaper at a state university decides to publish some hard-hitting stories. He encourages one reporter to write a series of articles criticizing some policy decisions by university administrators. When the articles are published, one of the administrators demands a retraction. When the editor refuses, the administrator calls the paper's printer and tells it not to print any additional issues of the paper unless she preapproves their content.¹

Were the university administrator's actions permissible under the First Amendment?² For many years, the clear answer was no.³ However, the Seventh Circuit's recent decision in *Hosty v. Carter* suggests that the answer is not clear at all and that the administrator should have qualified immunity from a First Amendment claim.⁴ The Seventh Circuit held that the deferential standard applied to high school student newspapers since *Hazelwood School District v. Kuhlmeier*⁵ applies to college student newspapers as well.⁶ Under *Hazelwood*, school administrators can censor school-sponsored student newspapers as long as the restrictions are related to "legitimate pedagogical concerns" such as ensuring that students learn intended lessons, preventing students from being exposed to inappropriate material, or distancing the school from non-neutral political positions.⁷

The purposes of this Note are (1) to analyze whether the framework established in *Hazelwood* should be used to analyze student speech in

1. These facts are based on *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1330 (2006). The facts are presented in the light most favorable to the plaintiffs, as they were when the Court of Appeals considered them. *Id.* at 733.

2. The First Amendment to the United States Constitution 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 peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

3. See *infra* notes 21–24 and accompanying text.

4. *Hosty*, 412 F.3d at 738–39.

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

6. *Hosty*, 412 F.3d at 738–39.

7. *Hazelwood*, 484 U.S. at 271–73.

public universities, and (2) to suggest an alternative approach for assessing attempts to regulate student speech at the university level that takes into account both the university's educational and social functions. In Part II of this Note, I review the history of student free speech rights in public high schools and universities. I discuss early Supreme Court cases recognizing expansive student speech rights⁸ and then discuss the development of the "public forum doctrine" and the *Hazelwood* framework as ways to analyze restrictions on student speech.⁹ I also review post-*Hazelwood* cases applying public forum analysis to university speech restrictions.¹⁰ In Part III, I analyze the implications of the Seventh Circuit's recent decision in *Hosty v. Carter*, in which the court suggested that an extracurricular university newspaper might be a nonpublic forum. I argue that the *Hosty* court's decision to apply *Hazelwood*'s public forum analysis mechanically to university student speech is unwise because it provides no clear standards for students or administrators and places too much power in the hands of university officials to eliminate the speech rights of students. Furthermore, it raises the prospect that viewpoint discrimination might be allowed in a forum that has been long protected.¹¹ In Part IV, I discuss and evaluate alternative frameworks for analyzing university student speech. I propose a method based on a distinction between curricular and extracurricular speech that produces predictable results, preserves the right of educators to determine what they teach, and satisfies the policy goal of promoting First Amendment values on college campuses.¹²

II. HISTORY

A. *Early Student Speech Cases: An Expansive View of Student Free Speech Rights*

The expansive view of student free speech rights established in *Tinker v. Des Moines Independent Community School District*¹³ provides the basis for modern analysis of student speech issues.¹⁴ In *Tinker*, a group of high school students was disciplined for wearing black armbands to school

8. See *infra* Part II.A.

9. See *infra* Part II.B.

10. See *infra* Part II.C.

11. See *infra* Part III.

12. See *infra* Part IV.

13. 393 U.S. 503 (1969).

14. 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, 486-90 (2001).

to protest the Vietnam War, and the students sued the school district for violating their First Amendment rights.¹⁵ The Supreme Court began its analysis by stating, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁶ However, the Court recognized the countervailing need for schools to control conduct.¹⁷ To balance these concerns, the Court held that regulation of student speech is permissible only when allowing the speech would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”¹⁸ Finding that the school had made no such showing,¹⁹ the Court held that the school had violated the students’ constitutional rights.²⁰

Subsequent cases applied the *Tinker* ruling to state colleges and universities. In *Healy v. James*, a state college denied recognition to a proposed chapter of Students for a Democratic Society (SDS) on the grounds that “the organization’s philosophy was antithetical to the school’s policies.”²¹ Using the *Tinker* standard, the Court found that the denial of recognition was constitutionally impermissible.²² The Court stated:

15. *Tinker*, 393 U.S. at 504.

16. *Id.* at 506. The Court noted:

[S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that 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. at 511. The Court also noted that “school officials cannot suppress ‘expressions of feelings with which they do not wish to contend.’” *Id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

17. *Id.* at 507.

18. *Id.* at 509 (quoting *Burnside*, 363 F.2d at 749).

19. *Id.* The Court noted that school authorities had no reason to believe that allowing “the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.” *Id.* Instead, the Court found that the decision to ban the armbands was “based upon an urgent wish to avoid the controversy which might result from the expression.” *Id.* at 510.

20. *Id.* at 514.

21. *Healy v. James*, 408 U.S. 169, 175 (1972). Other SDS chapters had been involved in civil disobedience on campuses. *Id.* at 171. The president of the college was concerned that “[t]he published aims and philosophy of the Students for a Democratic Society, which include disruption and violence, are contrary to the approved policy” of the college. *Id.* at 174 n.4. Although the students claimed that their chapter would be independent of the national organization, the president was not persuaded. *Id.* at 174–75 n.4. The president also “concluded that approval should not be granted to any group that ‘openly repudiates’ the College’s dedication to academic freedom.” *Id.* at 175–76. Without recognition, the group was denied access to facilities such as campus newspapers and bulletin boards. *Id.* at 176.

22. *Id.* at 189–91.

[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 nowhere more vital than in the community of American schools.”²³

Subsequently, in *Papish v. Board of Curators of the University of Missouri*, the Court held that this broad protection applies even to indecent or offensive speech.²⁴

B. A Shift in the Treatment of Student Speech: Hazelwood School District v. Kuhlmeier and the Public Forum Doctrine

In *Hazelwood School District v. Kuhlmeier*, the Supreme Court significantly changed the manner in which it analyzed student speech in two ways.²⁵ First, the Court used the public forum analysis it had recently developed in non-school First Amendment cases²⁶ as a framework for deciding what level of protection to apply to student speech.²⁷ Second, at least in the case of school-sponsored speech at the high school level, the Court held that a higher degree of deference to school administrators’ decisions was appropriate, possibly even in cases involving viewpoint discrimination.²⁸

23. *Id.* at 180 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). The Court also noted that “state colleges and universities are not enclaves immune from the sweep of the First Amendment.” *Id.* It said that, as in public space generally, “the time, the place, and the manner” of speech could be regulated, but not the content.” *Id.* at 192–93.

24. In *Papish v. Board of Curators of the University of Missouri*, the Supreme Court gave First Amendment protection to a newspaper containing violent and sexual political cartoons, demonstrating that even indecent or offensive speech enjoys broad protection on college campuses. 410 U.S. 667, 670 (1973). In *Papish*, the University of Missouri expelled a student for circulating a newspaper that included a political cartoon “depicting policemen raping the Statue of Liberty and the Goddess of Justice” and containing an article entitled “M----f---- Acquitted.” *Id.* at 667. Applying *Healy*, the Court held that the University had violated the student’s First Amendment rights. *Id.* at 670. It noted that “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.’” *Id.*

Lower courts have also recognized broad First Amendment protections for university student publications. See *Stanley v. Magrath*, 719 F.2d 279, 284 (8th Cir. 1983) (holding that a state college could not reduce funds to a university newspaper in response to an issue it found offensive); *Schiff v. Williams*, 519 F.2d 257, 260 (5th Cir. 1975) (holding that “the right of free speech embodied in the publication of a college student newspaper cannot be controlled except under special circumstances”).

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

26. See *infra* notes 29–41 and accompanying text.

27. *Hazelwood*, 484 U.S. at 267.

28. *Id.* at 270–72. For a discussion of whether the *Hazelwood* framework allows schools to regulate speech on the basis of viewpoint, see *infra* note 59 and accompanying text.

1. *Public Forum Doctrine*

Because public forum analysis was central to the *Hazelwood* decision, an understanding of *Hazelwood* must begin with an examination of the public forum doctrine. The public forum doctrine, first developed in the 1930s, represents an attempt to balance citizens' right to speak on government property against the government's need to exert control over its property in order to function effectively.²⁹ The most-cited formulation of the doctrine was given in *Perry Educational Association v. Perry Local Educators' Association*.³⁰ Under the *Perry* formulation, speech that occurs on public property can be divided into three categories.³¹ In the first category are traditional public forums, which include parks, streets, and sidewalks.³² In traditional public forums, the government can place restrictions on the "time, place, and manner of expression" as long as those restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."³³ The second category is the limited public forum, which is "public property which the State has opened for use by the public as a place for expressive activity."³⁴ Once the government has created a

29. See Rosemary C. Salomone, *Public Forum Doctrine and the Perils of Categorical Thinking: Lessons from Lamb's Chapel*, 24 N.M. L. REV. 1, 11–12 (1994). Salomone notes that the idea of the public forum began in the 1930s and was developed in the 1960s and 1970s. *Id.* at 11–12. She describes the doctrine as "a categorical or formulaic approach that the Court uses to reconcile constitutional rights and government interests." *Id.* at 14; see also Richard B. Saphire, *Reconsidering the Public Forum Doctrine*, 59 U. CIN. L. REV. 739 (1991). Professor Saphire notes that the public forum doctrine provides a predictable alternative to "[u]nstructured interest balancing." *Id.* at 754–56.

30. 460 U.S. 37 (1983). In *Perry*, a public school provided teachers with mailboxes within the school buildings. *Id.* at 39. The mailboxes' purpose was "to transmit official messages among the teachers and between the teachers and the school administration." *Id.* Teachers also used the mailboxes for personal messages, and some principals allowed them to be used for messages from private organizations. *Id.* The official union had access, but unofficial unions did not. *Id.* at 40. An unofficial union argued that the policy violated its rights under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 41. The Court found that the rival union's rights had not been violated because the school had not "by policy or by practice . . . opened its mail system for indiscriminate use by the general public," thus creating no limited public forum. *Id.* at 47. It found that since the restriction was viewpoint-neutral, *id.* at 49, and "consistent with the District's legitimate interest in 'preserv[ing] the property . . . for the use to which it is lawfully dedicated,'" the restriction was constitutional. *Id.* at 50–51 (quoting *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 (1981)).

31. *Id.* at 45–47.

32. *Id.* at 45. The Court noted that these areas "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

33. *Id.*

34. *Id.*

limited public forum, it is bound by the same restrictions as “in a traditional public forum.”³⁵ The third category is the nonpublic forum, which is “[p]ublic property which is not by tradition or designation a forum for public communication.”³⁶ In such forums, the state may impose restrictions that are reasonable and viewpoint-neutral.³⁷

Later cases clarified two questions regarding when courts will determine that a limited public forum has been created. First, the fact that a forum is opened only to a particular group, such as students, does not defeat a finding that it is a limited public forum.³⁸ Second, in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, the Supreme Court stated that the *government’s intent* is the key determinant of whether a limited public forum has been created.³⁹

The public forum doctrine has been widely criticized. Commentators have noted that its category-based approach is overly formalistic and leads to unfair results.⁴⁰ The doctrine has also been criticized for placing too much control in the hands of government officials.⁴¹

35. *Id.* at 46.

36. *Id.*

37. *Id.* The Court stated that in a nonpublic forum, “the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.” *Id.*

38. *See, e.g.,* *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”).

39. 473 U.S. 788, 802 (1985) (“The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”)

40. *See, e.g.,* Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1224 (1984) (arguing that public forum analysis relies too much on categories and “distracts attention from the first amendment values at stake in a given case”); Peltz, *supra* note 14, at 552 (considering the problem of a university reserving the right to censor a newspaper and suggesting that “the limited public forum/nonpublic forum dichotomy does not offer the best analytical framework for college media and certainly does not offer a framework conducive to post-secondary educational objectives”); Salomone, *supra* note 29, at 11–13 (“Initially, the concept of the public forum was intended to be speech protective,” but has evolved into “a rigidly applied set of categorical rules which cover not only *access* by the general public to government property, but also the *use* of government property for expressive purposes by those who already enjoy rightful access such as students.”).

Others have praised the public forum analysis for its “potential to lend stability and structure to first amendment decisionmaking.” Saphire, *supra* note 29, at 757. Saphire argues that public forum analysis often provides “certainty and predictability,” whereas “[u]nstructured interest balancing” would cause administrative problems. *Id.* at 755.

41. *See, e.g.,* Salomone, *supra* note 29, at 15. Salomone notes that the limited public forum category “ha[s] the dangerous potential of placing almost unbridled discretion in the hands of government officials when defining the limits of those rights.” *Id.* She asks, “If the freedoms contained in the Bill of Rights are intended to serve as constraints on governmental abuse of authority, how can

2. *Hazelwood School District v. Kuhlmeier and the Introduction of the “Legitimate Pedagogical Concerns” Test*

Hazelwood involved a school-sponsored high school newspaper published as part of a journalism class.⁴² One issue of the paper included articles about divorce and pregnancy.⁴³ The principal, concerned about sexual references in the articles, removed the articles prior to publication.⁴⁴ The student journalists sued, claiming that their First Amendment rights had been violated.⁴⁵

The Court found that the paper was a nonpublic forum because the school had not demonstrated a “clear intent to create a public forum,” as required by *Cornelius*.⁴⁶ It emphasized the curricular nature of the newspaper and the degree of control exercised by the school over the newspaper.⁴⁷ It did not find dispositive policy statements suggesting that the newspaper would be free from restrictions on free expression.⁴⁸ Having found a nonpublic forum, the Court announced a new test for how the forum could be regulated: educators can exercise “control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”⁴⁹

the Court justify a doctrine that permits government to decide whether it chooses to be subject to such constraint?” *Id.*

42. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262–63 (1988). The newspaper, the *Spectrum*, was partially funded with school funds. *Id.* at 262.

43. *Id.* at 263. The articles contained discussions of students’ personal experiences with pregnancy and included references to birth control and sexual activity. *Id.*

44. *Id.* at 264.

45. *Id.*

46. *Id.* at 270 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)). In so finding, it disagreed with the conclusion of the Eighth Circuit, which found that the school had established a limited public forum. *Id.* at 265–66.

47. *Id.* at 268. The Court noted that the newspaper was part of the curriculum, was taught during normal school hours, involved grades and academic credit, and that the school established learning goals for the students working on the paper. *Id.* It also looked to the practice of school officials in exercising “a great deal of control” over the newspaper, including final editing. *Id.* (alteration in original).

48. *Id.* at 269. The school board had a policy statement that “[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism,” and the *Spectrum*’s published policy “declared that ‘*Spectrum*, as a student-press publication, accepts all rights implied by the First Amendment.’” *Id.*

49. *Id.* at 273. The Court stated:

Educators are entitled to exercise greater control over [school-sponsored speech] to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.

The Court mentioned four factors relevant to determining whether an educator's actions are reasonable: (1) the school's sponsorship of the newspaper, (2) the curricular nature of the newspaper, (3) the age of the student audience, and (4) the likelihood that the speech would be associated with the school.⁵⁰ Applying this test, the Court found that the principal had acted reasonably.⁵¹ It emphasized that the paper was part of the curriculum because it was developed as part of a class and the school sponsored it.⁵² It held that the principal's actions were motivated by a reasonable belief that the journalism students had not learned the lessons intended to be taught⁵³ and that it was inappropriate to expose younger students to sexual material.⁵⁴

The new standard for evaluating student speech announced in *Hazelwood* has been widely criticized.⁵⁵ The Court gave little justification for its decision to create a new standard for student speech,⁵⁶ and it altered

Id. at 271. The Court mentioned that examples of student speech which could be censored include "speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences," *id.*, or speech that might "associate the school with any position other than neutrality on matters of political controversy," *id.* at 272.

50. *Id.* at 271–72.

51. *Id.* at 272–73.

52. *Id.* at 271–72. The Court did not limit its holding to classroom exercises; it characterized as part of the curriculum any activities that are "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences," such as "publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271.

53. *Hazelwood*, 484 U.S. at 276, noting:

Reynolds could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community" that includes adolescent subjects and readers.

54. *Id.* at 274–75 ("It was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters.")

55. *See infra* notes 56–59.

56. In a dissent, Justice Brennan argued that the Court's distinction between school-sponsored and non-school-sponsored speech had no basis in the Court's precedents. *Hazelwood*, 484 U.S. at 277–91 (Brennan, J., dissenting). He also stated:

The Court offers no more than an obscure tangle of three excuses to afford educators "greater control" over school-sponsored speech than the *Tinker* test would permit: the public educator's prerogative to control curriculum; the pedagogical interest in shielding the high school audience from objectionable viewpoints and sensitive topics; and the school's need to dissociate itself from student expression. . . . *Tinker* fully addresses the first concern; the second is illegitimate; and the third is readily achievable through less oppressive means.

the public forum analysis in a way that makes it difficult for a court to find anything related to a school to be a public forum.⁵⁷ Furthermore, the deferential nature and malleability of the test seems to allow little or no review of schools' decisions.⁵⁸ Moreover, the *Hazelwood* Court did not address the question of whether its decision abolished the requirement that restrictions in nonpublic forums be viewpoint neutral.⁵⁹ *Hazelwood* has had a profoundly chilling effect on high school journalism.⁶⁰

Id. at 282–83. See also Scott Andrew Felder, *Stop the Presses: Censorship and the High School Journalist*, 29 J.L. & EDUC. 433, 448–49 (2000) (noting that the Court failed to justify its creation of a new standard).

57. David L. Dagley, *Trends in Judicial Analysis Since Hazelwood: Expressive Rights in the Public Schools*, 123 EDUC. L. REP. (West) 1, 35 (Mar. 19, 1998). Dagley argues that the *Hazelwood* test short-circuits the public forum inquiry, since courts tend to assume that any speech that might be considered part of the curriculum is a nonpublic forum and that nearly any control of curriculum by school officials will be considered sufficiently reasonable to be upheld. *Id.*

58. See S. Elizabeth Wilborn, *Teaching the New Three Rs—Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 137 (1995) (“[The *Hazelwood* test] translates into essentially no judicial review of the school authorities’ conduct.”); see also Felder, *supra* note 56, at 446–48 (discussing the vague and overbroad nature of the legitimate pedagogical concerns test).

59. The *Hazelwood* Court’s list of permissible reasons to censor suggests that some viewpoint discrimination may be permissible, since it includes “student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order’ or to associate the school with any position other than neutrality on matters of political controversy.” *Hazelwood*, 484 U.S. 272 (citation omitted) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)). Some criticized the *Hazelwood* Court for failing to address the viewpoint neutrality issue directly. See, e.g., William G. Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505, 513 (1989) (noting that the Court was “seemingly oblivious to the implications of viewpoint discrimination”). Some predicted that viewpoint discrimination would still be prohibited since the Court had not explicitly abolished the requirement. See, e.g., Martha M. McCarthy, *Post-Hazelwood Developments: A Threat To Free Inquiry in Public Schools*, 81 EDUC. L. REP. (West) 685, 689 (June 3, 1993). Subsequent commentators have noted that a split in the circuits has developed: the Sixth, Ninth, and Eleventh Circuits retain the viewpoint neutrality requirement, but the First and Third Circuits allow viewpoint discrimination in nonpublic forums under a *Hazelwood* analysis. See Janna J. Annett, Note, *Only the News That’s Fit to Print: The Effect of Hazelwood on the First Amendment Viewpoint-Neutrality Requirement in Public School-Sponsored Forums*, 77 WASH. L. REV. 1227, 1242–47 (2002); see also Denise Daugherty, Note, *Free Speech in Public Schools: Has the Supreme Court Created a Haven for Viewpoint Discrimination in School-Sponsored Speech?*, 20 GA. ST. U. L. REV. 1061, 1069–78 (2004).

60. Brief of Amici Curiae Student Press Law Center et al. in Support of Petition of Margaret L. Hosty, Jeni S. Potche, and Steven P. Barba for Writ of Certiorari at 2, *Hosty v. Carter*, 126 S. Ct. 1330 (2006) (No. 05–377), 2005 WL 2736314, at *2 [hereinafter SPLC amicus brief]. According to the Student Press Law Center (SPLC), a group providing information and support to student publications, there “has been a sharp rise in high school censorship incidents reported.” *Id.* at *14. The SPLC argues that *Hazelwood* “has given high school and elementary school officials far greater authority to censor the otherwise lawful speech of private citizens than is extended to any other group of government officials, except perhaps prison wardens.” *Id.* at *11. It describes numerous cases in which courts have used *Hazelwood* to uphold censorship. *Id.* at *11–12; see also Peltz, *supra* note 14, at 497 (citing lower court cases upholding censorship under *Hazelwood*). Peltz also discusses several censored stories that never reached trial, including a story reporting that the school superintendent had been arrested for drunk driving censored because the school did not want a newspaper that would be “critical of students

C. University Student Speech Rights Since Hazelwood

Hazelwood expressly left open the question of whether the level of deference the Court accorded high school administrators should be extended to the university context.⁶¹ However, since *Hazelwood*, courts have consistently applied public forum analysis to cases involving both curricular and extracurricular speech at public universities.⁶² At the university level, whether speech restrictions are upheld tends to turn on whether the speech occurs as part of the curriculum.⁶³

Generally, courts applying the *Hazelwood* analysis to restrictions on curricular speech at universities have upheld the restrictions.⁶⁴ In *Brown v. Li*, the Ninth Circuit held that a university could restrict a graduate student's negative statements in the "Acknowledgments" section of his master's thesis.⁶⁵ Although no two members of the panel agreed on a rationale for the decision, one member used *Hazelwood* to analyze the student's speech⁶⁶ and found that the thesis was a nonpublic forum because it was curricular in nature.⁶⁷ She also agreed with the university's

or staff" and a story about teachers who smoked on campus in violation of a school policy censored because it would have been embarrassing. *Id.* at 497–99 (quoting Brief Amici Curiae of Student Press Law Center et al. in Support of the Appeal of Charles Kincaid and Capri Coffey, *Kincaid v. Gibson*, 191 F.3d 719 (6th Cir. 1999) (No. 98-5385)).

61. *Hazelwood*, 484 U.S. at 274 n.7 ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.")

62. *See infra* notes 65–82 and accompanying text.

63. *See infra* notes 65–82 and accompanying text.

64. *See infra* notes 65–82 and accompanying text.

65. 308 F.3d 939 (9th Cir. 2002). *Brown*, a chemistry graduate student, replaced the "Acknowledgments" section of his master's thesis with a section entitled "Disacknowledgments," in which he offered "special *Fuck You's*" to individuals and entities he felt had hindered his graduate career. *Id.* at 943. The University refused to file his thesis with that section, arguing that "the entire paper . . . was subject to the review and approval of the thesis committee." *Id.* at 944. It found that his "Disacknowledgments" section "did not meet professional standards." *Id.* at 943. *Brown* was placed on academic probation and his thesis was not filed. *Id.* at 944–45. He sued, claiming, among other things, a violation of his First Amendment rights. *Id.* at 945–46.

66. *Id.* at 949. Two of the three judges on the panel denied the student's First Amendment claim, but they did so for different reasons. Judge Graber based her conclusion on a *Hazelwood* analysis, *id.*, while Judge Ferguson concluded that the student had been cheating and thus was not protected by the First Amendment, *id.* at 955–56 (Ferguson, J., concurring) (affirming the District Court decision and the remand on state issues). The third member, Judge Reinhardt, found that the student's First Amendment rights had been violated and that *Hazelwood* deference should not apply to college students. *Id.* at 957 (Reinhardt, J., concurring in part and dissenting in part).

67. *Id.* at 950. Judge Graber stated, "An academic thesis co-signed by a committee of professors is not a public forum, limited or otherwise." *Id.* at 954. She also stated, "The Supreme Court has suggested that core *curricular* speech—that which is an integral part of the classroom-teaching function of an educational institution—differs from students' *extracurricular* speech and that a public educational institution retains discretion to prescribe its curriculum." *Id.* at 950. She cited a Supreme

argument that encouraging the student to “conform to professional norms” was a legitimate pedagogical purpose that could trump the student’s free speech rights.⁶⁸

Similarly, in *Axson-Flynn v. Johnson*, the Tenth Circuit applied *Hazelwood* to uphold a university’s decision to require a student in an acting class to recite lines containing profanity over her protest that saying such words violated her religious beliefs.⁶⁹ Based on its curricular nature, the court found the speech to be in a nonpublic forum.⁷⁰ Applying *Hazelwood*, the court held that the university’s actions were permissible as long as they were related to the university’s asserted legitimate pedagogical purpose of preparing students for acting careers.⁷¹

Conversely, courts have upheld student speech rights in extracurricular settings, which they consider to be limited public forums rather than

Court opinion holding that a school board could not remove books containing ideas the school board disliked from a school library but limiting its holding to speech that was not curricular. *Id.* (citing Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982)). She also noted that other courts had held that “*extracurricular* activities, such as yearbooks and newspapers” were not subject to the same level of deference as curricular activities. *Id.* at 949.

68. *Id.* at 953–54. Judge Graber also found that even viewpoint discrimination was allowed if there was a legitimate pedagogical purpose for it. She noted, “*Hazelwood* and *Settle* establish that—consistent with the First Amendment—a teacher may require a student to write a paper from a particular viewpoint . . . so long as the requirement serves a legitimate pedagogical purpose.” *Id.* at 953. The second case to which Judge Graber referred, *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995), held that a high school teacher did not violate a student’s right to free speech by limiting the topics available to a student for a research paper.

In a sharp dissent, Judge Reinhardt argued that “the reasons underlying the deference with respect to the regulation of the speech rights of high school youths do not apply in the adult world of college and graduate students.” *Id.* at 957. He suggested alternative solutions, such as finding that the thesis was a limited public forum, or adopting an intermediate level of scrutiny in which “the university would have the burden of demonstrating that its regulation of college and graduate student speech was substantially related to an important pedagogical purpose.” *Id.* at 964.

69. 356 F.3d 1277 (10th Cir. 2004). In *Axson-Flynn*, a Mormon student in an acting class refused to take God’s name in vain or to say the word “fuck.” *Id.* at 1281. After several incidents involving refusal to say those words, her instructors told her that she could remain in the program only if she changed her values. *Id.* at 1282. Though she was never actually asked to leave, she left because she believed it was inevitable. *Id.* She sued, arguing that the university’s attempt to compel her to speak violated her First Amendment right to free speech. *Id.* at 1283. *Axson-Flynn* also claimed that the University had violated her rights under the free exercise clause of the First Amendment. *Id.* at 1283.

70. *Id.* at 1286–87. The court emphasized that learning was the focus of the exercise. It acknowledged “that some circuits have cast doubt on the application of *Hazelwood* in the context of university *extracurricular* activities.” *Id.* at 1286 n.6.

71. *Id.* at 1291–92. The University asserted that compelling acting students to say lines that might offend them served a legitimate pedagogical purpose because “(1) it teaches students how to step out outside their own values . . . ; (2) it teaches students to preserve the integrity of the author’s work; and (3) it measures true acting skills to be able convincingly to portray an offensive part.” *Id.* at 1291 (footnotes omitted). The court noted that the University’s actions would not have been permissible had the asserted pedagogical concerns been merely a pretext for religious discrimination. *Id.* at 1292–95.

nonpublic forums. In *Rosenberger v. Rector and Visitors of University of Virginia*, the Supreme Court used public forum analysis to hold that a university's student activity funding program could not specifically exclude religious activities.⁷² Because the funding program was extracurricular in nature, it was a limited public forum.⁷³ By banning religious activities from that forum, the university had engaged in impermissible viewpoint discrimination.⁷⁴ The Court emphasized the importance of free speech rights at universities, noting the danger of "chilling of individual thought and expression" in a 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."⁷⁵

In *Kincaid v. Gibson*, the Sixth Circuit relied on public forum analysis to find that a university could not withhold publication of a student yearbook produced as part of an extracurricular activity.⁷⁶ In *Kincaid*, a

72. 515 U.S. 819 (1995). The University of Virginia had established a system for funding the activities of student organizations. *Id.* at 824–25. The purpose of the funding program was "to support a broad range of extracurricular student activities that 'are related to the educational purpose of the University.'" *Id.* at 824 (citation omitted). However, certain activities, such as religious activities (defined as "any activity that primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality"), electioneering and lobbying, and social entertainment were excluded from funding. *Id.* at 825 (citation omitted). *Rosenberger* had formed a student group, Wide Awake Productions (WAP), whose mission was to "facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints." *Id.* at 825–26 (citation omitted). WAP was recognized as a student group and therefore was not considered a religious organization. *Id.* at 826. When WAP requested funding from the University to pay for the costs of printing its paper, the University found that the paper was a "religious activity" and thus excluded from the funding regime. *Id.* at 827 (citation omitted).

73. *Id.* at 829. The Court noted that the funding program "is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable." *Id.* at 830.

74. *Id.* at 829–30. The Court noted, "The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." *Id.* at 829. However, "[o]nce it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set." *Id.* The Court distinguished between "content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* at 830.

The Court acknowledged it had previously held that when the government is acting as the speaker, it has broad rights to fund that speech selectively. *Id.* at 833. In *Rust v. Sullivan*, the Court held that it was permissible for the government to prohibit its grant funds from being used to fund abortion counseling because "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." 500 U.S. 173, 193 (1991). The Court distinguished *Rust* in *Rosenberger* because in *Rosenberger* the government was not itself acting as the speaker. 515 U.S. at 834. The Court said, "A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles." *Id.*

75. *Id.* at 835.

76. *Kincaid v. Gibson*, 236 F.3d 342, 354 (6th Cir. 2001).

school official refused to distribute yearbooks she deemed “of poor quality.”⁷⁷ The Sixth Circuit, sitting en banc, held that the administrator had violated the student editors’ First Amendment rights.⁷⁸ The court examined four factors to determine whether the government had intended to open a limited public forum: (1) the school’s policy, (2) the school’s practice, (3) the compatibility of the yearbook with expressive activity, and (4) the context in which the yearbook was found.⁷⁹ The court found that the university’s policy statements putting control in student hands,⁸⁰ the practical control of the yearbook by the students, the compatibility of a yearbook with free expression,⁸¹ and the university context weighed in favor of finding that the yearbook was a limited public forum that allowed for greater student expression.⁸²

Commentators and student journalists generally celebrated the ultimate resolution of *Kincaid*.⁸³ However, the decision left open several concerning questions: (1) Could a court ever determine that an extracurricular, expressive student activity, such as a newspaper, is a nonpublic forum?⁸⁴ (2) If a nonpublic forum were found, would a court apply *Hazelwood*’s “legitimate pedagogical concerns” test in such a setting?⁸⁵ (3) If so, would the court find viewpoint discrimination permissible?⁸⁶ A recent Seventh Circuit decision, *Hosty v. Carter*, suggests that the answer to each of these questions could be yes.

77. *Id.* at 345. The Vice President for Student Affairs objected to the fact that the yearbook’s cover was not in the school colors, that its theme (“destination unknown”) was inappropriate, that its photographs were inadequately captioned, and that it included descriptions of current events unrelated to the activities of the school. *Id.* The district court, relying on *Hazelwood*, found that the yearbook was a nonpublic forum and upheld the administrator’s decision. *Id.* at 346 (describing the district court opinion). The district court held that “the yearbook was not intended to be a journal of expression and communication in a public forum sense, but instead was intended to be a journal of the ‘goings on’ in [a] particular year at [the school].” *Id.* A divided panel of the Sixth Circuit Court of Appeals affirmed. *Id.*

78. *Id.* at 357.

79. *Id.* at 349.

80. *Id.* at 349–50. The policy stated, “In order to meet the responsible standards of journalism, an advisor may require changes in the form of materials submitted by students, but such changes must deal only with the form or the time and manner of expressions rather than alteration of content.” *Id.* at 350 (citation and emphasis omitted). The court noted that this language “tracks the Supreme Court’s description of the limitations on government regulation of expressive activity in a limited public forum.” *Id.* (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)).

81. *Id.* at 351.

82. *Id.* at 352. The court also noted that, since the yearbook was a limited public forum, “*Hazelwood* has little application to this case.” *Id.* at 346 n.5.

83. *See, e.g., Peltz, supra* note 14, at 536.

84. *Id.* at 537.

85. *See supra* note 61.

86. *See supra* note 59.

D. Hosty v. Carter

Hosty v. Carter involved the *Innovator*, an extracurricular student newspaper funded by student activity fees at Governors State University in Illinois.⁸⁷ The *Innovator* ran some articles that attacked the integrity of the Dean of the College of Arts and Sciences.⁸⁸ The administration accused the students of “irresponsible and defamatory journalism” and asked the students to retract several factual statements or print the administration’s responses.⁸⁹ When the student editors refused, Patricia Carter, Dean of Student Affairs and Services, stopped printing of the paper.⁹⁰ The students sued Dean Carter, alleging that she had violated their First Amendment rights.⁹¹ Dean Carter claimed that she was entitled to qualified immunity because she had not violated a clearly established right of the students.⁹² Both the district court and a panel of the Seventh Circuit concluded that the Dean’s act of censorship violated the clearly established rights of the students.⁹³ The Seventh Circuit then elected to re-hear the case en banc.

87. 412 F.3d 731, 732 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1330 (2006). All facts are presented in the light most favorable to the plaintiffs, as they were when the Court of Appeals considered them. *Id.* at 733.

88. *Id.* at 732–33.

89. *Id.* at 733.

90. *Id.* The plaintiffs alleged that Dean Carter told the paper’s printer not to print any future issues without her approval, and the printer followed her orders. *Id.*

91. *Id.* at 733. The students also sued the University trustees, other administrators, and several staff members, all of whom prevailed on a summary judgment motion except Dean Carter. *Id.*

92. *Id.* The qualified immunity doctrine protects public officials from personal liability for unlawful conduct in cases where the official makes a reasonable mistake as to the law. *Saucier v. Katz*, 533 U.S. 194, 201–02 (2001). To determine whether an official has qualified immunity from a constitutional claim, the court engages in a two-step inquiry. *Hosty*, 412 F.3d at 733. First, the court asks whether “the facts alleged show the [public official’s] conduct violated a constitutional right?” *Id.* (quoting *Saucier*, 533 U.S. at 201). Second, the court asks whether that right was “clearly established.” *Saucier*, 533 U.S. at 201.

93. *Hosty*, 412 F.3d at 733. The district court rejected the defendants’ argument that *Hazelwood* applied to this case, noting that *Hazelwood* involved a supervised class activity, while the *Innovator* was an “autonomous student organization,” and that *Hazelwood* involved a high school rather than a university. *Hosty v. Governors State Univ.*, No. 01 C 500, 2001 WL 1465621 at *7 (N.D. Ill. Nov. 15, 2001). The panel of the Court of Appeals did not engage in any forum analysis, though it did note that the policy of the newspaper was that the student staff “will determine content and format of their respective publications *without censorship or advance approval.*” *Hosty v. Carter*, 325 F.3d 945, 946 (7th Cir. 2003). Instead of using forum analysis, the panel opinion focused on “whether the principles of *Hazelwood* apply to public college and university students.” *Id.* The court noted, “For several decades, courts have consistently held that student media at public colleges and universities are entitled to strong First Amendment protections.” *Id.* at 947. It cited pre-*Hazelwood* decisions as well as post-*Hazelwood* decisions in which university student speech in limited public forums was found to be protected. *Id.* (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) and *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (en banc)). The panel stated, “*Hazelwood*’s rationale for limiting the First Amendment rights of high school journalism students is not a good fit for

Writing “*Hazelwood* provides our starting point,”⁹⁴ the majority reversed the panel’s decision.⁹⁵

The court began by addressing the type of forum at issue.⁹⁶ It stated that the relevant question was whether the university’s policies and practices indicated that it had “declare[d] the pages of the student newspaper open for expression,” thereby creating a limited public forum.⁹⁷ The court rejected both the plaintiffs’ argument that age of the students should control the public forum question⁹⁸ and the bright-line distinction between curricular and extracurricular speech that appeared to have developed in some earlier cases.⁹⁹ The court found that, viewed in the light most favorable to the plaintiffs, the *Innovator* might be a public forum, but that additional facts might show otherwise.¹⁰⁰ Next, the court held that *Hazelwood*’s legitimate pedagogical concerns test should be applied at the college level; the more advanced age of the students did not warrant abandonment of the test.¹⁰¹ Rather, the court held, age should be a factor in assessing the reasonableness of some asserted pedagogical concerns.¹⁰²

students at colleges or universities,” emphasizing the difference in age and the long tradition of protecting university speech. *Id.* at 948.

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

95. *Id.* at 739.

96. *Id.* at 735–36. The court asked: “[W]as the reporter a speaker in a public forum (no censorship allowed?) or did the University either create a non-public forum or publish the paper itself (a closed forum where content may be supervised)?” *Id.*

97. *Id.* at 737. Unlike the court in *Kincaid*, the *Hosty* court did not explicitly list a series of factors to be considered. *See id.* at 737–38.

98. *Id.* at 734–35. In rejecting age as a controlling factor, the court pointed out that public forums had been found in elementary schools. *Id.* at 735. It noted, “If private speech at a public forum is off-limits to regulation even when that forum is a classroom of an elementary school . . . then speech in a non-public forum, and underwritten at public expense, may be open to reasonable regulation even at the college level—or later.” *Id.*

99. *Id.* at 736. “[I]f the Constitution establishes a bright line between curricular activities and all other speech, then decisions such as *Rust* and *Finley* are inexplicable, for they hold that speakers who have completed their education still must abide by the conditions attached to public subsidies of speech and other expressive activities.” *Id.* The court also noted that “being part of the curriculum may be a *sufficient* condition of a non-public forum,” but that “it is not a *necessary* condition.” *Id.*

100. *Id.* at 736–38. In finding that the *Innovator* might be a public forum, the court pointed out that the *Innovator* board’s policy was that the publication “will determine content and format . . . without censorship or advance approval.” *Id.* at 737. The court stated, “If this is all there is to it, then . . . a designated public forum has been established, and the faculty cannot censor speech within it.” *Id.* However, the court noted that the finding might be different if a trial were to reveal that the school had “established criteria for subsidized student publications” or if the faculty advisor exercised some control over the newspaper. *Id.* at 737–38.

101. *Id.* at 734–35.

102. *Id.* The court noted that when a school’s justification for censorship is a pedagogical concern based on the maturity of its students, “the difference between high school and university students may be important.” *Id.* at 734. On the other hand, when a school’s justification is based on “the desire to ensure ‘high standards for the student speech that is disseminated under [the school’s] auspices’” or a

Finally, the court concluded that, given the uncertainty of the state of the law, Dean Carter was entitled to qualified immunity.¹⁰³

Judge Evans, writing for the four dissenting judges, rejected the idea that *Hazelwood* should apply in this case, noting the differences between colleges and high schools¹⁰⁴ and the differences between extracurricular and curricular activities.¹⁰⁵ He concluded that “a reasonable person in Dean Carter’s shoes would have believed the *Innovator* operated as a public forum” and thus should not be entitled to qualified immunity.¹⁰⁶

The students petitioned for a writ of certiorari to the United States Supreme Court, but the petition was denied.¹⁰⁷

III. ANALYSIS

By extending *Hazelwood*’s framework to extracurricular activities, the *Hosty* court granted more power to public university officials to censor student speech than any court of appeals had done previously. Prior to *Hosty*, college students enjoyed broad free speech rights, at least with regard to their extracurricular activities,¹⁰⁸ which has allowed a thriving college journalism community to develop.¹⁰⁹ *Hosty* suggests that college

desire to “dissociat[e] the school from ‘any position other than neutrality on matters of political controversy,’ there is no sharp difference between high school and college papers.” *Id.* at 734–35 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271–72 (1988)). Even when age is a factor, however, the court noted that there was no bright-line age difference between high school and college students, since “many high school seniors are older than some college freshmen, and junior colleges are similar to many high schools.” *Id.* at 734.

103. *Id.* at 738–39. The court held that even if the district court had been correct in holding that *Hazelwood* does not apply to college newspapers, “it greatly overstates the certainty of the law to say that any reasonable college administrator had to know that rule.” *Id.* at 738. “Public officials need not predict, at their financial peril, how constitutional uncertainties will be resolved.” *Id.* at 739. The court emphasized that “[m]any aspects of the law with respect to students’ speech, not only the role of age, are difficult to understand and apply.” *Id.* It also noted that the question of the level of deference applicable to college newspapers had been reserved by the Supreme Court in *Hazelwood*, demonstrating that it was not “clearly established,” and mentioned that the approaches of the other circuits varied. *Id.* at 738. Finally, the court pointed out that the dean was not necessarily bound to know that the *Innovator* operated in a public forum. *Id.*

104. *Id.* at 740–42 (Evans, J., dissenting). Judge Evans emphasized the different missions of high schools and colleges. *Id.* at 741–42. He noted that “[e]lementary and secondary schools have ‘custodial and tutelary responsibility for children.’” *Id.* at 741 (quoting *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 829–30 (2002)). In contrast, “[a] university has a different purpose—to expose students to a ‘marketplace of ideas.’” *Id.* (quoting *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967)).

105. *Id.* at 743–44. Judge Evans called the classroom and the extracurricular activity “very different situations.” *Id.* at 743.

106. *Id.* at 744.

107. *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc), cert. denied, 126 S. Ct. 1330 (2006).

108. See *supra* Part II.A.

109. See SPLC amicus brief, *supra* note 60, at *5–*6.

journalists can no longer assume that they will be free from censorship. If followed by other courts, the *Hosty* approach will produce troubling results for several reasons.

First, the public forum doctrine, relied on in *Hosty*, places a great deal of control in the hands of public school administrators.¹¹⁰ In *Cornelius*, the Court stated, “We will not find that a public forum has been created in the face of clear evidence of a contrary intent.”¹¹¹ As Professor Peltz asks, “what happens when a college explicitly states its desire to control student media as nonpublic forums?”¹¹² Ostensibly, the *Hosty* and *Kincaid* decisions suggest that factors other than the university’s policy should be considered: actual practice, context, and the nature of the forum.¹¹³ However, given that all of these factors are merely ways of discerning the government’s intent to open a forum,¹¹⁴ it seems likely that a court would consider a clear statement of intent dispositive.¹¹⁵ In such a situation, a university would seem to have the ability to eliminate free speech rights merely by saying that it wishes to do so. Moreover, this creates the danger that a university could “create the appearance of a public forum in all practical respects but reserve to itself, via written policy alone, the discretion to shatter that appearance and intervene as censor whenever convenience dictates.”¹¹⁶

Second, current public forum doctrine fails to provide clear criteria for students or administrators to determine what is a nonpublic forum and what is a limited public forum, and thus what level of regulation is acceptable.¹¹⁷ Even the *Hosty* majority recognized this when it held that, although the facts in the record suggested that the *Innovator* was a public forum, it was reasonable for Dean Carter to believe she could censor it as if it were a nonpublic forum.¹¹⁸ Other cases demonstrate the difficulty in determining forum status in the university context as well; in *Kincaid*, for example, the district court found that the yearbook was a nonpublic forum,

110. See *supra* note 41 and accompanying text; see also Peltz, *supra* note 14, at 533–34.

111. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985).

112. Peltz, *supra* note 14, at 537 (italicized in original).

113. See *supra* notes 79–82 and accompanying text.

114. See *supra* notes 79–82 and accompanying text.

115. See Peltz, *supra* note 14, at 550–51. Paradoxically, the “practice” factor may actually encourage the school to interfere with the production of a publication to help it establish a practice of censorship. *Id.* at 551–52.

116. *Id.* at 551; see also Buss, *supra* note 59, at 526 (“If the school creates what appears to be an open forum for student expression but in fact has not done so, the audience might erroneously conclude that all ideas have been heard.”).

117. See, e.g., LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 987–88 (2d ed. 1988).

118. *Hosty v. Carter*, 412 F.3d 731, 738–39 (7th Cir. 2005) (en banc).

a divided panel of the Court of Appeals found that it was a nonpublic forum, and a divided en banc Court of Appeals found that it was a limited public forum.¹¹⁹ When courts are so divided, students and administrators will have great difficulty determining what their rights are.¹²⁰

Third, in applying a standard developed for high schools to colleges, the *Hosty* decision ignores the significant differences between college and high school students. Unlike secondary schools, universities are almost entirely composed of adults.¹²¹ The law treats children and adults differently in a variety of areas,¹²² and the *Hosty* decision ignores the more liberal free speech rights of adults by equating college students with schoolchildren. Moreover, the Supreme Court has held that “[t]he state’s authority over children’s activities is broader than over like actions of adults.”¹²³ To justify different standards based on age, the Supreme Court has noted 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.”¹²⁴ In addition, courts have noted that the missions of high schools and colleges are different.¹²⁵ High schools “have ‘custodial and tutelary responsibility for children.’”¹²⁶ Colleges, on the other hand, are supposed to serve as a “marketplace of ideas” in order to train future leaders “through wide exposure to [a] robust exchange of ideas.”¹²⁷

Fourth, the *Hosty* decision ignores the significant distinction between extracurricular and curricular activities. The *Hazelwood* decision rested in

119. See *supra* notes 77–82 and accompanying text.

120. See *supra* note 40.

121. U.S. CENSUS BUREAU, AGE DISTRIBUTION OF COLLEGE STUDENTS 14 YEARS OLD AND OVER, BY SEX: OCTOBER 1947 TO 2005 (TABLE A-6) (2005), <http://www.census.gov/population/www/socdemo/school.html>. According to the United States Census Bureau, 98.967% of students enrolled in colleges in 2005 were at least eighteen years old. *Id.*; see also Healy v. James, 408 U.S. 169, 197 (1972).

122. For example, children below certain ages are not permitted to vote, drive, marry, or serve in the military. Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 598 (2005). Similarly, the areas of criminal, contract, tort, and family law all have special rules regarding minors. *Id.* at 598–99; see also Martha McCarthy, *The Continuing Saga of Internet Censorship: The Child Online Protection Act*, 2005 BYU EDUC. & L.J. 83, 97–98 (2005) (discussing various contexts in which the law specifically protects minors).

123. Prince v. Massachusetts, 321 U.S. 158, 168 (1944). It has also said that minors’ constitutional rights “cannot be equated with those of adults.” Bellotti v. Baird, 443 U.S. 622, 634 (1979).

124. *Bellotti*, 443 U.S. at 635.

125. See, e.g., *Hosty v. Carter*, 412 F.3d 731, 741–42 (7th Cir. 2005) (en banc) (Evans, J., dissenting).

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

127. *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967).

part on this distinction.¹²⁸ Prior lower court decisions upholding restrictions on speech at the university level have confined their holdings to curricular speech.¹²⁹ Allowing greater control of curricular speech by universities makes sense in light of schools' need to impart specific information to students taking classes. Outside of a classroom, however, the school's interests should not weigh as heavily.¹³⁰

The *Hosty* court claims that not all extracurricular activities are necessarily free from government regulation, citing cases, outside the school context, in which the government was allowed to place conditions on speech funded by its grant money.¹³¹ Certainly not all government property outside of a curriculum is a public forum. However, that fact does not settle the question whether, in the university context, the curricular nature of the speech should be considered as a major factor in the analysis.

Fifth, a deferential test will have a chilling effect on college journalism. *Hazelwood* has had a dramatic and chilling impact on high school journalism.¹³² After *Hazelwood*, "[a]lmost without exception, courts upheld school officials' decisions to censor."¹³³ If *Hosty* is followed, a similar effect is likely on college campuses.¹³⁴ This would be problematic for several reasons. First, the absence of a free press is antithetical to the longstanding idea of the campus as a "marketplace of ideas."¹³⁵ Second, the consequences could reach beyond the confines of the college campus. University newspapers operate as training grounds for the professional journalists of the future. If student journalists are trained to avoid controversial or offensive subjects, they might lack the skills and

128. See *supra* notes 46–54 and accompanying text.

129. See *supra* notes 64–71 and accompanying text.

130. See James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1340 (2000). Ryan argues that schools have two functions, an academic one and a social one. *Id.* He argues that the Supreme Court tends to allow regulation of student rights when the academic function of the school is at issue, but not allow regulation when the social function of the school is at issue. *Id.*

131. See *supra* note 99 and accompanying text.

132. See *supra* note 60.

133. Peltz, *supra* note 14, at 497.

134. SPLC amicus brief, *supra* note 60, at *13–*17. Past college articles facing censorship attempts that might be upheld if *Hosty v. Carter* is followed include the following: "[a]n opinion piece opposing an upcoming referendum that would have provided the college with revenue collected from property taxes"; "[a]n article detailing the incoming university president's expenditure of state funds, including more than \$100,000 spent to remodel the president's home and pay for his inauguration"; and "[a]n editorial cartoon, featuring cartoon figures as university officials, commenting on a U.S. Department of Education report that found the school had misused public funds when it paid for a trip to Disney World by students and school officials." *Id.* at *16–*17.

135. See, e.g., SPLC amicus brief, *supra* note 60, at *7–*9; Peltz, *supra* note 14, at 535.

motivation to pursue such subjects when they enter the professional world.¹³⁶

Sixth, applying *Hazelwood* to the college context is problematic because it may permit viewpoint discrimination.¹³⁷ According to ordinary public forum analysis, viewpoint discrimination is impermissible even in a nonpublic forum.¹³⁸ The *Hazelwood* Court, however, did not mention any prohibition on viewpoint discrimination when it articulated its legitimate pedagogical concerns test, leading some courts to conclude that it is permissible.¹³⁹

IV. PROPOSAL

When the *Hazelwood* framework is used to assess university regulation of student speech, the critical step in the inquiry is the one that determines the status of the forum. Once a forum is designated nonpublic, the government has broad latitude to regulate. That was true even prior to the development of *Hazelwood*'s legitimate pedagogical concerns test; even under the general public forum analysis described in *Perry*, restrictions in a nonpublic forum need only be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."¹⁴⁰

Consequently, the best way to protect student speech rights is by either (a) abandoning public forum analysis in favor of some other framework, or (b) modifying the public forum analysis such that the majority of student speech that should be protected is categorized as a limited (or traditional) public forum.

136. See, e.g., Peltz, *supra* note 14, at 535 ("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 Estate in American society."). Peltz also questions whether a college editor who "decline[s] to pursue a story on a university president's use of public funds to remodel his home because the story would reflect negatively on the university's public image" would be likely to "aggressively pursue a story about a state governor spending public money on personal expenses." *Id.*

137. *Id.* at 508 (noting that "courts since *Hazelwood* have disregarded the viewpoint-discrimination prong of nonpublic forum analysis," at least in the case of student publications).

138. See *supra* note 37 and accompanying text.

139. See *supra* note 59 and accompanying text.

140. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1982); see also *supra* note 37 and accompanying text.

A. *Standards Based on Alternatives to Public Forum Analysis*

Several commentators have proposed replacing public forum analysis with pre-*Hazelwood* college free speech jurisprudence, arguing that the “material and substantial disruption” test developed in *Tinker* should provide the basis for evaluating regulations of student speech at universities.¹⁴¹ This test has several advantages: It allows universities to regulate speech when it would materially disrupt essential activities such as classroom learning. It is consistent with the early cases of *Healy* and *Papish*, which provided broad free speech rights for students.¹⁴² It also provides a fairly clear standard that allows students and administrators to understand their rights, particularly when compared to the complicated public forum analysis.¹⁴³ However, it is extremely unlikely that the Supreme Court, having used the public forum analysis in the university context,¹⁴⁴ would abandon it altogether in favor of the *Tinker* analysis.

Other courts and commentators have proposed an intermediate scrutiny test.¹⁴⁵ Under intermediate scrutiny, “the university would have the burden of demonstrating that its regulation of college and graduate student speech was substantially related to an important pedagogical purpose.”¹⁴⁶ This would provide less protection for student speech than a standard under which all student speech is analyzed as a limited or traditional public forum, but more protection than the *Hazelwood* analysis.¹⁴⁷ One major disadvantage of this option is that it provides no clear criteria for students or administrators and is likely to produce inconsistent results.¹⁴⁸

141. See, e.g., Karyl Roberts Martin, Note, *Demoted to High School: Are College Students' Free Speech Rights the Same as Those of High School Students?*, 45 B.C. L. REV. 173, 199–201 (2003).

142. See *supra* notes 21–24 and accompanying text.

143. See *supra* note 40.

144. See *supra* notes 72–75 and accompanying text.

145. See, e.g., *Brown v. Li*, 308 F.3d 939, 964 (9th Cir. 2002) (Reinhardt, J., concurring in part and dissenting in part); Martin, *supra* note 141, at 201–02; Laura K. Schulz, Note, *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, 1237–38 (2003).

146. *Brown*, 308 F.3d at 964 (Reinhardt, J., concurring in part and dissenting in part).

147. *Id.*

148. Martin, *supra* note 141, at 202; see also *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (“We have no established criterion for ‘intermediate scrutiny’ either, but essentially apply it when it seems like a good idea to load the dice.”).

B. Standards Based On Modified Public Forum Analysis

1. College Student Activities as Limited Public Forums

One possible solution is simply to declare that in the case of college students, all student newspapers or other expressive activities are limited public forums as a matter of law.¹⁴⁹ This would have the advantage of limiting schools' authority to censor. It would also seem to be consistent with early speech cases, which assumed that newspapers, at least, should be free from censorship.¹⁵⁰ However, as others have pointed out, courts will likely be reluctant to make a blanket statement of that kind.¹⁵¹ For one thing, it fails to take into account the fact that colleges may have a legitimate interest in speech regulations in classroom activities. Courts may be reluctant to say that a student's chemistry exam, for example, is a limited public forum where the teacher can impose only minimal limits on speech.

2. Modified Public Forum Analysis Based on Extracurricular/Curricular Distinction

A more realistic solution is to provide courts with a more predictable way of applying public forum analysis. I suggest that, instead of applying a complicated four-factor analysis involving written policy, practice, context, and compatibility with expression,¹⁵² courts should base their public forum analysis primarily on the extracurricular/curricular distinction. Under a test based on the extracurricular/curricular distinction, an extracurricular student activity at a university would be presumed to occur in a limited public forum. The university would then be able to put into place regulations based on the time, place, or manner of expression.¹⁵³ However, the university could rebut this presumption and show that the forum was inconsistent with the free expression of ideas.¹⁵⁴ For curricular activities, on the other hand, the presumption would be that the speech

149. *Brown*, 308 F.3d at 964 (Reinhardt, J., concurring in part and dissenting in part); Schulz, *supra* note 145, at 1237.

150. *See supra* notes 21–24 and accompanying text.

151. Schulz, *supra* note 145, at 1237.

152. *See supra* notes 79–82 and accompanying text.

153. *See supra* note 33 and accompanying text.

154. For example, in *Student Government Association v. Board of Trustees of University of Massachusetts*, 868 F.2d 473, 477 (1st Cir. 1989), the court found that the Legal Services Office of the university was not a forum of any kind. *Id.* In such a case, a court might find that the extracurricular activity was a nonpublic forum.

occurs in a nonpublic forum. In such cases, the university could establish restrictions on speech as long as they are related to legitimate pedagogical concerns and are not designed to suppress the speaker's viewpoint.¹⁵⁵ However, students could overcome this presumption by showing that the school expressed a clear intent to create a public forum, either by policy or by practice.

This test has several advantages. First, it allows the continued existence of free and independent student media on college campuses, since the overwhelming majority of college newspapers operate as part of extracurricular activities.¹⁵⁶ Second, it allows educators to control what goes on in classrooms, both out of concern for professors' academic freedom¹⁵⁷ and universities' goal of imparting specific knowledge to students.¹⁵⁸ Third, it is consistent with Supreme Court precedent suggesting that public forum analysis is the proper framework for scrutinizing student speech at universities.¹⁵⁹ Fourth, it is consistent with cases decided prior to *Hosty* that generally upheld restrictions on student speech that occurred as part of the curriculum and found impermissible restrictions occurring in extracurricular settings.¹⁶⁰ Even the *Hazelwood* Court limited its holding to curricular activities, albeit with a broad definition of curricular.¹⁶¹ Fifth, the proposed test provides clear guidelines for students and administrators concerning what can and cannot be regulated.

V. CONCLUSION

Since *Hazelwood* and the introduction of public forum analysis, student speech rights at all levels have been under fire. In *Hosty v. Carter*, the Seventh Circuit extended *Hazelwood's* analysis further than ever before by holding that an extracurricular university student newspaper might be a nonpublic forum and thus subject to extensive censorship. In so deciding,

155. See *supra* note 37 and accompanying text.

156. Mark J. Fiore, Comment, *Trampling the "Marketplace of Ideas": The Case Against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915, 1962 (2002) (citing a study finding that only one of 101 daily college newspapers is considered part of the curriculum).

157. See *Hosty v. Carter*, 412 F.3d 731, 736 (7th Cir. 2005) (en banc) ("[A]cademic freedom includes the authority of the university to manage an academic community and evaluate teaching and scholarship free from interference by other units of government.").

158. See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290–91 (10th Cir. 2004); see also Ryan, *supra* note 130, at 1340–41 (arguing that the Supreme Court's decisions in school cases can be explained by the principle that "schools are free to limit speech that would disrupt the learning process").

159. See *supra* notes 72–75 and accompanying text.

160. See *supra* Part II.C.

161. See *supra* note 52.

it brought into question several decades of commitment to the importance of free and independent student media on college campuses.

Hosty v. Carter's holding, that a dean who censored a newspaper could not reasonably have known that her actions were unconstitutional, illustrates the fundamental problem with how public forum analysis has been used to evaluate student speech. As currently applied, public forum analysis involves a complicated weighing of factors that students and administrators cannot be expected to understand. In the absence of a clear standard, administrators can act with impunity. Courts should develop a new framework that provides clear standards and also protects the long tradition of the university as a "marketplace of ideas."

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