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Stop the Presses: The Impact of Hosty v. Carter and Pitt News v. Pappert on the Editorial Freedom of College Newspapers

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STOP THE PRESSES: THE IMPACT OF *HOSTY V. CARTER* AND *PITT NEWS V. PAPPERT* ON THE EDITORIAL FREEDOM OF COLLEGE NEWSPAPERS

"I could tell he was that type of macho guy, from his scowling, beefy face on the CNN pictures. Well, he got his wish . . . . This was a 'G.I. Joe' guy who got what was coming to him. That was not heroism, it was prophetic idiocy."[1]

INTRODUCTION

These words, criticizing the life and death of army ranger and ex-National Football League player Pat Tillman,[2] set off a backlash against the University of Massachusetts' student-run newspaper, *The Massachusetts Daily Collegian* ("*The Daily Collegian*"), threatening to bring an end to the publication. Criticism and condemnation came from a wide range of sources. The Massachusetts State Senate approved a resolution condemning the article, with one Senator calling the author a "nitwit."[3] Fellow students responded by flooding *The Daily Collegian's* web site, posting predominantly negative responses and causing the computer system to crash.[4] The university's Student Government Association voted to ask *The Daily Collegian* to "refund

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[1] Rene Gonzalez, Op-Ed., *Pat Tillman Is Not a Hero: He Got What Was Coming to Him*, MASS. DAILY COLLEGIAN (Amherst), Apr. 28, 2004, at 5, *available at* http://media.dailycollegian.com/pages/tillman_lobandwidth.html?in_archive=1.

[2] Pat Tillman was killed in combat in Afghanistan on April 22, 2004. Following the World Trade Center attack on September 11, 2001, Tillman retired from the National Football League and joined the army. More information about Pat Tillman is available from The Pat Tillman Foundation, http://www.pattillmanfoundation.net/ (last visited Sept. 22, 2005).

[3] *Crisis at* The Collegian*: Freedom of the Press in Peril at UMass Amherst*, MICH. DAILY (Ann Arbor), May 17, 2004, at 4 [hereinafter *Crisis at* The Collegian] (quoting Senator Robert Hedlund), *available at* http://www.michigandaily.com/vnews/display.v/ART/2004/05/17/40a85840e7838?in_archive=1.

[4] Marcella Bombardieri, *UMass Paper Under Fire for Tillman Column*, BOSTON GLOBE, Apr. 30, 2004, at B1.

the direct financial contributions from the SGA."[5] The article received widespread attention from mainstream media sources throughout the country, fueling the fire of criticism against the author and the newspaper.[6] The university president also made his feelings known, remarking that the article represented "a disgusting, arrogant and intellectually immature attack on a human being who died in service to his country."[7]

Within the university president's statement was a more important assessment of the article. While agreeing that the article may have been written in bad taste, he also acknowledged the author's right to free speech.[8] The president recognized that, although it was an unpopular view that he disagreed with and felt reflected poorly upon the university, the author nonetheless was entitled to express his viewpoint.[9] Other college newspapers rallied around *The Daily Collegian*, asserting that college publications are entitled to as much editorial freedom as any major publication, regardless of whether or not the university publically funds it.[10] In reality, it is unclear how much editorial freedom college newspapers at public colleges and universities actually enjoy. The Supreme Court, when given the opportunity to either reinforce or restrict the freedom of speech of student-run college publications, postponed that determination until a later date.[11]

Meanwhile, courts are reexamining the issue of restrictions on freedom of speech in college publications.[12] In *Hosty v. Carter*,[13] the Seventh Circuit determined that restrictions on the editorial freedom

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[5] Ferron Salniker, *SGA Questions Collegian's Independency*, MASS. DAILY COLLEGIAN (Amherst), May 4, 2004, at 1, *available at* http://www.dailycollegian.com/vnews/display.v/ART/2004/05/04/409731dfd45e5?in_archive=1.

[6] *See* Bombardieri, *supra* note 4; *see also* Leonard Pitts, *There's No Humor in Cartoon That Makes Joke of the Holocaust*, CHI. TRIB., May 4, 2004, at 25 (criticizing, among others, the Tillman article).

[7] MSNBC Sports, *College Columnist Apologizes for Rip Job on Tillman*, Apr. 30, 2004 (quoting UMass president Jack Wilson), http://www.msnbc.msn.com/id/4864412/.

[8] Bombardieri, *supra* note 4.

[9] *Id.*

[10] *See Crisis at* The Collegian, *supra* note 3, at 1. *The Michigan Daily's* slogan is "114 Years of Editorial Freedom" (time period as of 2005). *Id.*

[11] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273-74 n.7 (1988).

[12] It should be noted that state action is a prerequisite to the assertion of rights contained in the First Amendment. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1502 (4th ed. 2001). A public college or university is an arm of the state and can censor expression only if its acts are consistent with First Amendment constitutional guarantees. Bazaar v. Fortune, 476 F.2d 570, 574 (5th Cir. 1973), *aff'd en banc*, 489 F.2d 225 (5th Cir. 1973). The First Amendment, therefore, applies only to *public* colleges and universities through the Fourteenth Amendment. This Note does not consider the First Amendment rights of *private* college and university publications.

[13] 412 F.3d 731 (7th Cir. 2005) (en banc).

of college newspapers are permissible under certain circumstances. Following a panel decision in favor of the college newspaper, the Seventh Circuit vacated to have a rehearing en banc.[14] *Hosty* involved a college dean who censored articles criticizing the school's administration in the school's student-run newspaper.[15] In the Seventh Circuit panel's ruling that the students had a valid claim against the dean, the court thoroughly discussed the editorial freedom of college newspapers and affirmed that college students have the right to produce a newspaper free from school censorship.[16] While the panel's decision aligned with most other court rulings on the First Amendment rights of college publications, the Seventh Circuit's position following the rehearing creates more uncertainty than existed before.

In the 2004 case *Pitt News v. Pappert*,[17] the Third Circuit addressed a different form of free speech: the right of college newspapers to publish advertisements for alcoholic beverages.[18] The court held that a Pennsylvania statute violated the commercial speech rights of the newspaper by imposing a financial burden on media associated with colleges and universities.[19] Although different from the issue of editorial freedom, this rejection of a state's attempt to place restrictions on the right of college newspapers to sell and print advertisements constitutes another example of a court affirming the freedom of speech of college students and their newspapers.

The Supreme Court took a step towards restrictions on all student publications when it upheld restrictions on public high school newspapers in *Hazelwood School District v. Kuhlmeier*.[20] The Court ruled that high school officials retained the right to impose reasonable restrictions on the content of newspapers sponsored by high schools and published by high school students, "even though the government could not censor similar speech outside the school."[21] The Seventh Circuit is the first federal court of appeals to state that *Hazelwood* is not limited to high school publications. Neither the Supreme Court nor any other federal circuit court has extended *Hazelwood* to cover college publications, though at least one lower court applied the *Hazelwood* restrictions to a case involving college newspapers.[22]

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[14] Hosty v. Carter, 325 F.3d 945 (7th Cir. 2003), *rev'd en banc*, 412 F.3d 731 (7th Cir. 2005).

[15] *Id.* at 947, 949.

[16] *Id.* at 946-49.

[17] 379 F.3d 96 (3d Cir. 2004).

[18] *Id.* at 101.

[19] *Id.* at 109.

[20] 484 U.S. 260 (1988).

[21] *Id.* at 266, 272-73.

[22] Kincaid v. Gibson, No. 95-98 (W.D. Ky. Nov. 14, 1997), *aff'd*, 191 F.3d 719 (6th Cir.

Previously, however, no appellate court accepted that rationale on appeal.[23]

Without any guidance from the Supreme Court, lower courts are facing the question of whether or not the law should treat publications by students at colleges and universities in the same manner as their high school counterparts and become subject to the same or similar restrictions on freedom of speech. Although the Supreme Court noted in *Hazelwood* that it "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,"[24] the current trend of courts questioning whether or not to allow restrictions of editorial freedom in college newspapers indicates that lower courts are in need of guidance. The decision in *Hosty* and its creation of a circuit split demonstrates that the law is unsettled and that the Supreme Court should clarify the First Amendment rights of these publications.

This Note identifies the constitutional First Amendment rights of college newspapers and examines the differences between high school and college that justify judicial affirmation of the freedom of speech of college newspapers. Part I discusses the history of restrictions on freedom of speech at the high school and college levels and examines the current threat posed by the decision in *Hosty*. The relationship between commercial and noncommercial speech is explored as a means of illustrating how a recent court decision regarding commercial speech of a college newspaper could impact future decisions about editorial freedom of college publications. Part II focuses on the inherent differences between high school and college students and why these differences entitle college newspapers greater editorial freedom than high school newspapers. Additionally, this Note discusses the Supreme Court's use of studies and statistics regarding age and maturity, demonstrating the relevance the Court places on such studies and their applicability in cases concerning the First Amendment rights of college newspapers. Part III analyzes why the structure and public forum status of college newspapers affords them broader freedom of speech protection than their high school counterparts. Part IV examines other potential obstacles and aids to the freedom of

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1999), *rev'd en banc*, 236 F.3d 342 (6th Cir. 2001), *available at* www.splc.org/law_library.asp?id=17; *see* Mark J. Fiore, Comment, *Trampling the "Marketplace of Ideas": The Case Against Extending* Hazelwood *to College Campuses*, 150 U. PA. L. REV. 1915, 1915-16 (2002).

[23] Kincaid v. Gibson 246 F.3d 342 (6th Cir. 2001); *see also* Fiore *supra* note 22, at 1948-50.

[24] *Hazelwood Sch. Dist.*, 484 U.S. at 273 n.7.

speech of college newspapers in light of possible attacks and support from other sources.

I. COURT-SANCTIONED RESTRICTIONS ON FREEDOM OF SPEECH IN HIGH SCHOOLS AND COLLEGES

A. Hazelwood *and the Allowance of Restrictions on High School Newspapers*

To understand the current state of the issue in the courts, including the issue in *Hosty*, it is necessary to examine the restrictions of free speech at the high school and college levels. The starting point for this discussion of the freedom of speech of student-run newspapers is *Hazelwood School District v. Kuhlmeier*.[25] *Hazelwood* dealt with a public high school principal who censored the school's student newspaper by removing pages containing articles about divorced parents of students, teen pregnancy, and sexual histories of students at the school.[26] A journalism class produced the newspaper and school funds primarily paid for its publication.[27]

The Supreme Court in *Hazelwood* concluded that public high school teachers and administrators could exercise "editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[28] The Court determined that the high school's principal did not infringe on the First Amendment rights of the student staff because the censorship related to legitimate pedagogical concerns and appeared reasonable to protect the identity of the students featured in the article and to prevent young, impres-

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[25] 484 U.S. 260 (1988). Although there are some previous cases concerning the freedom of speech of student newspapers, these have been well documented by scholars and, for purposes of this Note, do not need to be discussed again in detail. *See* Fiore, *supra* note 22, at 1918-24 (discussing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986)); *see also* 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, 486-91 (2001) (examining the effects of *Tinker* and *Fraser*); Heather K. Lloyd, Note, *Injustice in Our Schools: Students' Free Speech Rights Are Not Being Vigilantly Protected*, 21 N. ILL. U. L. REV. 265, 266-74 (2001) (discussing, among others, *Tinker*, *Fraser*, and West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)); Laura K. Schulz, Note, *A "Disacknowledgement" of Post-Secondary Student Free Speech* – Brown v. Li *and the Applicability of* Hazelwood v. Kuhlmeier *to the Post Secondary Setting*, 47 ST. LOUIS L.J. 1185 (2003) (summarizing *Tinker* and *Fraser*). *See generally* Susannah Barton Tobin, Note, *Divining* Hazelwood*: The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217, 220-24 (2004) (examining the background of *Hazelwood*).

[26] *Hazelwood Sch. Dist.*, 484 U.S. at 263-65.

[27] *Id.* at 262-63.

[28] *Id.* at 273.

sionable students from exposure to such topics.[29] Several factors played into the Court's decision: the emotional maturity of students and the importance of not exposing them to speech that they should not encounter at their age and level of maturity, the interest of the school in ensuring that certain views of students are not attributed to the school, and the school's pedagogic interest in assuring that students learn the lessons that the class or activity is designed to teach.[30] The Court adopted a "public forum"[31] analysis and reasoned that public high schools are nonpublic forums, so long as the facilities have not been opened "for indiscriminate use by the general public."[32] This determination allowed for the regulation of speech that could not be regulated in a public forum or a limited public forum. The Court considered only high school newspapers while leaving open the possibility of extending such restrictions to the college level at a later time.[33]

B. The Threat of Hazelwood *to College Newspapers*

At the college level, there is comparatively little restriction on the freedom of speech of student-run newspapers. This can be seen by picking up any college newspaper and noticing the sometimes radical views expressed in editorial opinions.[34] Despite the appearance of boundless editorial freedom, college newspapers face uncertainty as to how much the law actually guarantees this freedom. There are many examples of challenges to the freedom of speech enjoyed by college newspapers, but courts, at least until recently, have consistently ruled in favor of that freedom.[35] In fact, many courts refused to apply *Hazelwood* to colleges when given an opportunity, choosing

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[29] *Id.* at 273-75.

[30] *Id.* at 271.

[31] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) ("[T]he Court identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum."); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (discussing the three types of fora).

[32] *Hazelwood Sch. Dist.*, 484 U.S. at 267 (quoting *Perry Educ. Ass'n*, 460 U.S. at 47).

[33] *Id.* 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.").

[34] *See, e.g.*, Gonzalez, *supra* note 1; Sari Eitches, *Sex on Tuesday: Pimp Your Ride*, DAILY CALIFORNIAN, (Berkley), Feb. 22, 2005, *available at* http://www.dailycal.org/article.php?id=17724; Rick Chan, *Ming Has Run Completely Afoul*, DAILY, (Seattle) Dec. 9, 2002, at 4, *available at* http://archives.thedaily.washington.edu/search.lasso?-database=DailyWebSQL&-table=Articles&-response=searchpage.lasso&-keyField=__Record_ID__&-keyValue=4716&-search (arguing that African-American NBA stars portray "animalistic barbarism" and that Yao Ming's participation is an affront to all Asian-Americans).

[35] See Fiore, *supra* note 22, at 1932-33 (looking at the history of First Amendment rights on college campuses); Peltz, *supra* note 25, at 510-12 (discussing aftermath of *Hazelwood* on college newspaper cases).

instead to forcefully state that the *Hazelwood* rule has no place at the college level.[36] Federal courts though, including a district court and a Sixth Circuit panel, have applied the standard of *Hazelwood* to college newspapers.[37] Generally, however, courts have allowed restrictions on college student media only when the speech is libelous, obscene, copyrighted, or when the administration demonstrates that a significant and imminent physical disruption of campus will result from the content of the publication.[38]

The first case involving a severe threat to editorial freedom of college publications occurred in 1997 when a U.S. District Court in Kentucky extended the *Hazelwood* restrictions to a college yearbook published by students at a public university. The court in *Kincaid v. Gibson*[39] ruled that the university administration could exercise editorial restrictions, specifically the confiscation of and refusal to distribute the school's yearbooks.[40] The court based its ruling on the reasoning of *Hazelwood* and determined that the yearbook was not a public forum, thereby enabling the administration to restrict the speech in the yearbook, so long as such restrictions were reasonable.[41]

On appeal, a panel of the Sixth Circuit affirmed, agreeing with the district court's determination that the yearbook was not a public forum.[42] The court explained that because the university's publication board possessed ultimate control over the yearbook, the yearbook was not intended to be a public forum, as administrators were to have the final say on the content.[43] Following this decision, the Sixth Circuit vacated its ruling and reheard the case en banc.

As a result of the Sixth Circuit's decision to vacate, academia responded with a number of articles about the troubling consequences if the court did not reverse its decision.[44] There was widespread criti-

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[36] Student Gov't Ass'n v. Bd. of Trustees of the Univ. of Mass., 868 F.2d 473, 480 n.6 (1st Cir. 1989); *see also* Fiore, *supra* note 22, at 1933 (discussing how courts declined to apply *Hazelwood* analysis to college newspapers).

[37] *See* Kincaid v. Gibson, 191 F.3d 719, 726 (6th Cir. 1999), *rev'd en banc*, 236 F.3d 342 (6th Cir. 2001).

[38] *See* Hosty v. Carter, 325 F.3d 945, 947 (7th Cir. 2003), (noting that "courts have held that school administrators can only censor student media if they show that the speech in question is legally unprotected or if they can demonstrate that some significant and imminent physical disruption of the campus will result from the publication's content"), *rev'd en banc*, 412 F.3d 731 (7th Cir. 2005).

[39] Kincaid v. Gibson, No. 95-98 (W.D. Ky. Nov. 14, 1997), *aff'd*, 191 F.3d 719 (6th Cir. 1999), *rev'd en banc*, 236 F.3d 342 (6th Cir. 2001), *available at* www.splc.org/law_library.asp?id=17.

[40] *Id.*

[41] *Id.*

[42] Kincaid v. Gibson, 191 F.3d 719, 728-30 (6th Cir. 1999), *rev'd en banc*, 236 F.3d 342 (6th Cir. 2001).

[43] *Id.* at 728.

[44] *See* Fiore, *supra* note 22, at 1937-46, 1961 (analyzing the *Kincaid* decisions at every

cism of the decision to apply the *Hazelwood* restrictions to college publications.[45] Rehearing the case en banc, the Sixth Circuit reversed its earlier decision and took the position that the yearbook was a limited public forum, thereby rejecting the panel's determination that it was a nonpublic forum.[46] To reach this conclusion, the court looked at the policy and practice of the college with respect to the yearbook, the nature of the yearbook and its expressive role, and the university context in which the yearbook was created and distributed.[47] Unlike the panel, the en banc Sixth Circuit determined that the university's publication board did not actually have ultimate control.[48] More importantly, the Sixth Circuit took notice of several Supreme Court cases that established the college or university environment as "the quintessential 'marketplace of ideas,' which merits full, or indeed heightened, First Amendment protection."[49] The court also examined *Hazelwood's* rationale that the restrictions at the high school level are necessary because of the general lack of maturity of high school students. The court noted that this has little or no application at the college level, where almost all students are the age of majority, and correspondingly, considered more mature than high school students.[50]

C. The Current Controversy: Hosty v. Carter

The latest battle for college newspaper freedom of speech occurred in the Seventh Circuit Court of Appeals in the case of *Hosty v. Carter*.[51] The Seventh Circuit recently made an important ruling in its en banc rehearing of the case. The plaintiffs in *Hosty* were three students at Governors State University, a public university in Illinois.[52] The school's Student Communications Media Board appointed students to positions on the college newspaper, the *Innovator*, as editor in chief, managing editor, and staff reporter.[53] Some of the articles

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level and also concluding that *Hazelwood* is "inapplicable to college publication[s]"); Lloyd, *supra* note 25 (concluding that federal courts are not vigilant enough in protecting free speech rights of students); Peltz, *supra* note 25, at 516-32, 537-55 (analyzing each of the *Kincaid* decisions in detail and arguing that *Hazelwood* should not be applied to college publications).

[45] *See* Peltz, *supra* note 25; Fiore, *supra* note 22; Lloyd, *supra* note 25.

[46] Kincaid v. Gibson, 236 F.3d 342 (6th Cir. 2001) (en banc).

[47] *Id.* at 349-52.

[48] *Id.* at 355-56.

[49] *Id.* at 352 (citing Healy v. James, 408 U.S. 169, 180 (1972)).

[50] *Id.*

[51] Hosty v. Carter, 325 F.3d 945, *rev'd en banc*, 412 F.3d 731 (7th Cir. 2005).

[52] *Id.* at 946 (7th Cir. 2003).

[53] *Id.*

they published criticized the college administration and faculty.[54] In 2000, one of the college's deans informed the off-campus publisher of the newspaper that a school official must approve the paper before publication.[55] When the students were informed of this, they sued to protect their editorial freedom.[56] The case previously appeared before a Seventh Circuit panel on an interlocutory appeal of the dean, who attempted to get the suit dismissed on a claim of qualified immunity.[57] The dean's claim centered on her belief that "the law was not clearly established that her request to review and approve the *Innovator* prior to printing might violate the student editors' rights under the First Amendment."[58] Thus, the court's discussion focused on the newspaper staff's First Amendment rights.[59]

1. The Seventh Circuit Panel Decision

The Seventh Circuit panel in *Hosty* adopted a similar line of reasoning as the en banc ruling by the Sixth Circuit in *Kincaid*. First, the panel addressed the fact that "courts have consistently held that student media at public colleges and universities are entitled to strong First Amendment protections."[60] The panel highlighted that the judicial record shows "that school administrators can only censor student media if they show that the speech in question is legally unprotected or if they can demonstrate that some significant and imminent physical disruption of the campus will result from the publication's content."[61] The panel continued, stating that "[a]ttempts by school officials . . . to censor or control constitutionally protected expression in student-edited media have consistently been viewed as suspect under the First Amendment."[62]

The panel cited *Bazaar v. Fortune*,[63] a pre-*Hazelwood* case in which the Fifth Circuit, sitting en banc, stated that college officials could not prohibit the publication of a school-sponsored literary

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[54] *Id.*

[55] *Id.* at 947.

[56] *Id.*

[57] *Id.* ("Qualified immunity protects government officials performing discretionary functions when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

[58] *Id.* The Seventh Circuit panel determined that "the district court was correct to decline [the dean's] request to exit the suit via qualified immunity, if *Hazelwood* has not muddled the landscape to such an extent that the law has become unclear." *Id.* at 948.

[59] *Id.* at 946-47.

[60] *Id.* at 947.

[61] *Id.*

[62] *Id.*

[63] 476 F.2d 570 (5th Cir. 1973) (en banc).

magazine because the officials did not approve of its "earthy language."[64] The court in *Bazaar* noted:

> The University here is clearly an arm of the state and this single fact will always distinguish it from the purely private publisher as far as censorship rights are concerned. It seems a well-established rule that once a University recognizes a student activity which has elements of free expression, it can act to censor that expression only if it acts consistent with First Amendment constitutional guarantees.[65]

The *Hosty* panel incorporated the sentiment of the Fourth Circuit as well, citing a pre-*Hazelwood* case in which the court stressed that censorship "cannot be imposed by suspending the editors, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorial oversight based on the institution's power of the purse."[66] The panel followed this line of reasoning and determined that the dean may not violate the First Amendment rights of students by exercising editorial control over the newspaper's publication.[67]

The panel then addressed the inapplicability of *Hazelwood* to student-run collegiate publications.[68] The court recognized that the "rationale for limiting the First Amendment rights of high school journalism students is not a good fit for students at colleges or universities."[69] The reasoning behind this was that the "differences between a college and a high school are far greater than the obvious differences in curriculum and extracurricular activities," including the fact that the "missions of each are distinct reflecting the unique needs of students of differing ages and maturity levels."[70] The panel referred to statistics indicating that only 1 percent of college students are under the age of majority and remarked that "[t]reating these students like 15-year-old high school students and restricting their First Amendment rights by an unwise extension of *Hazelwood* would be an extreme step for us to take absent more direction from the Supreme Court."[71] While using its judgment to determine that *Hazelwood* had

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[64] *Hosty*, 325 F.3d at 948 (quoting *Bazaar*, 476 F.2d at 572-73 (describing "earthy language" as "four-letter words" and "obscenities")).

[65] *Id.* (citing *Bazaar*, 476 F.2d at 574).

[66] *Id.* (citing Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973)).

[67] *Id.*

[68] *Id.* at 948-49.

[69] *Id.* at 948.

[70] *Id.*

[71] *Id.* at 948-49; *see* U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY: TABLE A-6, AGE DISTRIBUTION OF COLLEGE STUDENTS 14 YEARS OLD AND OVER, BY SEX: OCTOBER 1947

no application at the college level, the Seventh Circuit panel acknowledged that the Supreme Court could reach a different conclusion and extend *Hazelwood's* doctrine allowing restrictions on editorial freedom to college newspapers, yet refused to expand it themselves.

The Seventh Circuit panel also noted:

> The Supreme Court has recognized that where "vital" principles of the First Amendment are at stake, "[t]he 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."[72]

The court determined that these dangers "are especially threatening in the university setting, where the creative power of student intellectual life remains 'a vital measure of a school's influence and attainment.'"[73] The court concluded that "[w]hile *Hazelwood* teaches that younger students in a high school setting must endure First Amendment restrictions, we see nothing in that case that should be interpreted to change the general view favoring broad First Amendment rights for students at the university level."[74]

The dean of the college in *Hosty* attempted to use the university's control of the newspaper budget as a means to curb publication of the issues. The panel rejected the dean's argument that there had not been any actual restriction of the newspaper.[75] The panel referenced the dean's statement to the publishing company that the university controlled the newspaper's "purse strings" and mentioned the distinct possibility that the publisher would not print any future issues without the dean's approval.[76] This case illustrates how colleges can censor or influence editorial decisions of the student staff using money rather than by actually censoring or restricting the publication of materials.

TO 2002 (n.d.), *available at* http://www.census.gov/population/socdemo/school/tabA-6.pdf (Internet date Jan. 2004) [hereinafter U.S. CENSUS BUREAU, POPULATION SURVEY].

[72] *Hosty*, 325 F.3d at 949 (quoting Rosenberger v. Rector, 515 U.S. 819, 835 (1995)).

[73] *Id.* (quoting *Rosenberger*, 515 U.S. at 836).

[74] *Id.*

[75] *Id.*

[76] *Id.*

2. *The Seventh Circuit's En Banc Rehearing*

A few months following the panel's ruling, the full Seventh Circuit announced that it was vacating the *Hosty* decision and rehearing the case en banc. This raised a question about the position of the court on this issue regarding the extent of First Amendment protection for college newspapers. The answer came when a majority of the Seventh Circuit announced that the en banc court reached a different conclusion than the panel and determined that *Hazelwood* does apply to college newspapers.

The Seventh Circuit held "that *Hazelwood's* framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools."[77] A majority of the court rejected the argument that *Hazelwood* does not apply to colleges merely because the Supreme Court stated in *Hazelwood* that it was not considering the constitutionality of such restrictions at the college level. The majority stated that the *Hazelwood* decision did "not even hint at the possibility of an on/off switch" between high school and college newspapers.[78] The court based its decision on the fact that in other areas of the law involving a public forum analysis, such as religion in public schools, the Supreme Court does not differentiate between primary, secondary, and higher education.[79] The majority also examined the decisions of the four circuits that previously considered the application of *Hazelwood* to colleges and determined that, in its judgment, two ruled that *Hazelwood* applied to colleges, one ruled that it does not, and the remaining court ruled somewhere in the middle.[80]

In concluding that *Hazelwood* applies to college publications, the court declined to consider factors such as the age and maturity of the students and the nature of the newspaper as an extracurricular activity. According to the majority, these factors come into play only when determining whether sufficient pedagogical justification existed for exercising editorial control within a nonpublic forum.[81] The majority rejected the argument that these factors entitle college newspapers to more First Amendment protection than their high school counterparts.

The court went on to apply the *Hazelwood* framework to the case. To begin, the court looked at whether the newspaper was a public or

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[77] Hosty v. Carter, 412 F.3d 731, 735 (7th Cir. 2005) (en banc). The Seventh Circuit split seven to four in the decision. Two of the dissenting judges were part of the three judge panel that ruled in favor of the newspaper editors.

[78] *Id.* at 734.

[79] *Id.* at 735.

[80] *Id.* at 738-39.

[81] *Id.* at 734.

nonpublic forum. The court concluded that the newspaper was a limited public forum, primarily because the college placed the authority to establish and alter the terms on which the newspaper operated with the "Student Communications Media Board."[82] The board established a written policy ensuring that the newspaper staff was responsible for content and not subject to censorship or advance approval.[83] Because of this policy, the "editors were empowered to make their own decisions, wise or foolish, without fear that the administration would stop the presses."[84] The majority placed an emphasis on the fact that the media board oversaw the newspaper, rather than the dean or other college administrators. The court seemed to suggest that if the college administration exercised control over the media board or the newspaper then it would perhaps change the status of the newspaper as a limited public forum.[85]

Because the case was before the court on a question of qualified immunity, however, the ultimate question was whether any reasonable college administrator should have known that *Hazelwood* applied to colleges in addition to high schools. The majority determined that no reasonable person in the dean's position would have known at the time of the censorship of the newspaper that such action violated the First Amendment.[86] As a result, qualified immunity protected the dean from liability.

The dissent contended that restrictions along the lines of *Hazelwood* "have no place in the world of college and graduate school."[87] *Hazelwood*, the dissent said, involved "limitations on speech that the Supreme Court created for use in the *narrow* circumstances of elementary and secondary education."[88] The dissent disagreed with the majority's premise "that there is no legal distinction between college and high school students," noting several areas of the law in which age defines legal rights.[89]

The court also clashed over the majority's characterization of cases and their application of *Hazelwood* to college campuses. The dissent made the distinction that the cases cited by the majority apply *Hazelwood* to colleges only in the context of speech within the classroom, while the newspaper was an extracurricular activity.[90] Because no

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[82] *Id.* at 737.
[83] *Id.*
[84] *Id.* at 738.
[85] *Id.* at 737-38.
[86] *Id.* at 739.
[87] *Id.* (Evans, J., dissenting).
[88] *Id.*
[89] *Id.*
[90] *Id.*

court had extended *Hazelwood* to cover college publications at the time the censorship occurred, the dissent argued that a reasonable person in the dean's position should have known that censoring the newspaper violated the First Amendment rights of the students.[91] Following this reasoning, qualified immunity would not protect the dean.

The Seventh Circuit's decision created a clear circuit split on the issue of the First Amendment rights of college newspapers. The Supreme Court may be asked to finish what it started in the *Hazelwood* footnote and clarify the extent of the First Amendment rights of public college newspapers. Public college and university administrators and the college student media are bewildered by the muddled landscape created by *Hazelwood* and the subsequent conflicting interpretations of lower courts.

D. College Newspapers and Commercial Speech: Pitt News v. Pappert

In the Third Circuit case *Pitt News v. Pappert*, a college newspaper at the University of Pittsburgh, a public university, challenged the constitutionality of a Pennsylvania statute, claiming that it violated the First Amendment rights of the newspaper.[92] The statute effectively barred college newspapers from selling ads featuring alcohol.[93] *The Pitt News* derived all of its revenue from advertising and in 1998 alone lost $17,000 in revenue because of the restrictions, which resulted in a shortening of the paper's length and an inability to make capital expenditures.[94] The Third Circuit held that the law represented "an impermissible restriction" on speech and violated the commercial speech rights of the newspaper for two distinct reasons.[95]

The *Pitt News* court stated, "[i]mposing a financial burden on a speaker based on the content of the speaker's expression is a content-based restriction of expression and must be analyzed as such."[96] The court found that the statute did not satisfy the test for restrictions on commercial speech.[97] First, the statute did not meet the requirement

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[91] *Id.* at 744.

[92] 379 F.3d 96, 101 (3d Cir. 2004).

[93] *Id.* at 102 (prohibiting "any advertising of alcoholic beverages" in communications media affiliated with "any educational institution," including colleges and universities (citing 47 PA. STAT. ANN. § 4-498(e)(5), (g))).

[94] *Id.* at 101-03.

[95] *Id.* at 105.

[96] *Id.* at 106.

[97] *Id.* at 106-07. For a thorough explanation of the four-part analysis of restrictions on commercial speech, see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

In commercial speech cases, then, a four-part analysis has developed. At the outset,

that it alleviate the cited harm "to a material degree."[98] Specifically, it did not combat underage or abusive drinking, nor did it have "the effect of greatly reducing the quantity of alcohol beverage ads viewed by underage and abusive drinkers on the Pitt campus."[99] The statute applied only to "a very narrow sector of the media (i.e., media associated with educational institutions)," and there was no evidence suggesting that eliminating alcohol ads in this narrow sector would "do any good" when such advertising in other media outlets is not affected.[100] Second, the court held that the statute was not adequately tailored to achieve the commonwealth's objectives.[101] The statute was not narrowly tailored because it prevented the communication of truthful information to adults about products that they can legally purchase and use, as "more than 67% of Pitt students and more than 75% of the total University population is over the legal drinking age."[102] The court stated that there are more direct ways to combat underage and abusive drinking, such as the enforcement of alcoholic beverage control laws.[103] Enforcement of these laws was found to often be "half-hearted" on college campuses, and the commonwealth did not demonstrate any aggressive enforcement of alcohol laws on college or university campuses.[104]

The Third Circuit also held that the statute violated First Amendment rights of *The Pitt News* for a separate reason: "it unjustifiably impose[d] a financial burden on a particular segment of the media."[105] The court remarked, "The Supreme Court recognized long ago that laws that impose special financial burdens on the media or a narrow sector of the media present a threat to the First Amendment."[106] The Supreme Court acknowledged that when a state singles out the press through financial burdens, it "can operate as effectively as a censor to

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> we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id.

[98] *Pitt News*, 379 F.3d at 107 (quoting Fla. Bar v. Went For It, Inc., 515 U.S. 618, 624 (1998)).

[99] *Id.*

[100] *Id.*

[101] *Id.* at 108.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.* at 109.

[106] *Id.*

check critical comment by the press."[107] Laws that single out the press or a small group of speakers are presumptively invalid, and that presumption is overcome only by showing that the law is necessary to serve a compelling interest.[108] The *Pitt News* court held that the statute singled out a small group of speakers, namely media associated with educational institutions.[109] The court reasoned that in practice the scope of the statute "is undoubtedly even narrower" and singled out media associated with colleges and universities "[b]ecause newspapers and other media affiliated with elementary and secondary schools are most unlikely to seek to run alcoholic beverage ads."[110] Again the court determined that the commonwealth did not show that the statute discouraged or curbed underage or abusive drinking; nor was the statute the only, or even the most effective, means of achieving that objective.[111] As a result, the Third Circuit concluded that this additional independent reason violated the First Amendment rights of the college newspaper.[112]

Although different from the issue of editorial freedom, the court's denunciation of a state's attempt to place restrictions on the right of college newspapers to sell and print advertisements constitutes another example of a court rejecting restrictions on the freedom of speech of college student newspapers.

E. The Relationship Between Political Speech and Commercial Speech

Commercial speech has traditionally received less constitutional protection than the noncommercial speech that is the subject of cases such as *Hazelwood* and *Hosty*.[113] The Supreme Court observed that the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[114] The "Court's decisions on commercial expression have rested on the premise that

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[107] *Id.* at 110 (quoting Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585 (1983)).

[108] *Id.* at 111 (citing Leathers v. Medlock, 499 U.S. 439, 447 (1991); *Minneapolis Star & Tribune*, 460 U.S. at 582, 585).

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *See, e.g.*, Erwin Chemerinsky & Catherine Fisk, *What Is Commercial Speech? The Issue Not Decided in* Nike v. Kasky, 54 CASE W. RES. L. REV. 1143, 1145 (2004) ("The Supreme Court has consistently held that commercial speech is a distinct category of expression that is not afforded the same First Amendment protection as noncommercial speech.").

[114] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980).

such speech, although meriting some protection, is of less constitutional moment than other forms of speech."[115] In light of the generally more restrictive treatment of commercial speech, the *Pitt News* ruling may have important ramifications for the editorial freedom of college newspapers.

Pitt News struck down a state's attempt to impose commercial speech restrictions on college and university media, citing First Amendment violations.[116] This decision raises questions about the editorial freedom of college newspapers because of the historical relationship between commercial and noncommercial speech in the courts. If the government cannot impose restrictions on commercial speech contained within college newspapers, it would follow that a state, or an arm of the state (for example, public college administrators), would find it even more difficult to impose restrictions on the editorial content of newspapers. Again, the Supreme Court permits regulation of the content of commercial speech when "[i]n most other contexts, the First Amendment prohibits regulation based on the content of the message."[117] One reason that the statute in *Pitt News* violated the First Amendment rights of the newspaper is because it unjustifiably targeted the alcohol-based content of advertising in college media.[118] Because of the age composition of the college campus and other available methods for achieving the state goal of reducing underage and abusive drinking, the court held that the state could not restrict the content of the advertisements.[119] The fact that a state cannot meet the comparatively lesser burden of justifying restrictions on the content of commercial speech of college media indicates that a public college or university should have a difficult time convincing a court that restrictions on the editorial freedom of noncommercial speech within college newspapers do not violate the First Amendment.

In addition to the relationship between commercial and noncommercial speech, the analysis in *Pitt News* also supports the position that college newspapers should not be subjected to speech regulations along the lines of *Hazelwood*. The *Pitt News* court looked at factors that a court examining restrictions on editorial freedom of college newspapers may also examine. For instance, the court looked at the age of the media's audience in examining the overinclusiveness of the

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[115] *Id.* at 563 n.5.
[116] *Pitt News*, 379 F.3d at 105.
[117] *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564 n.6.
[118] *Pitt News*, 379 F.3d at 107.
[119] *Id.* at 107-09.

statute.[120] The statute targeted underage drinkers, yet the campus community predominantly consisted of legal-aged drinkers.[121] Courts examining the application of *Hazelwood* to college media, such as the courts in the *Hosty* and *Kincaid* panels, also considered age differences between students and discussed how these differences affect the need, or lack thereof, for speech restrictions on the media.[122] These courts reached the conclusion that the restrictions in question were not appropriate considering the age of the targeted audience of college students.[123]

II. THE INHERENT DIFFERENCES IN AGE AND MATURITY BETWEEN HIGH SCHOOL AND COLLEGE STUDENTS

A. The Age and Maturity of High School and College Students

There are inherent differences between high school and college students that justify granting college journalists more editorial freedom. Most apparent is the difference in the ages of the students. High school students generally do not reach the age of eighteen until their senior year, whereas college students are almost all eighteen years or older. In fact, according to U.S. Census Bureau statistics, "only 1 percent of those enrolled in American colleges or universities are under the age of 18, and 55 percent are 22 years of age or older."[124] This is significant in terms of the legal rights and responsibilities that are conferred upon students when they reach the age of majority. As the Supreme Court acknowledges, "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood."[125] By virtue of their age, almost all college students are treated by the law as adults and are able to vote and "exercise a panoply of rights not granted to most high school students."[126] Society as a whole expects these students to act as adults and to accept all the responsibilities that the law and society place on them as citizens, not just as

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[120] *Id.* at 108.

[121] *Id.*

[122] Hosty v. Carter, 325 F.3d. 945, 948-49 (7th Cir. 2003), *rev'd en banc*, 412 F.3d 731 (7th Cir. 2005); Kincaid v. Gibson, 236 F.3d 342, 352 (6th Cir. 2001).

[123] *Pitt News*, 379 F.3d at 108; *Hosty*, 325 F.3d at 948-49; *Kincaid*, 236 F.3d at 352.

[124] *Hosty*, 325 F.3d at 948-49 (acknowledging U.S. CENSUS BUREAU, POPULATION SURVEY, *supra* note 71).

[125] Roper v. Simmons, 125 S. Ct. 1183, 1198 (2005).

[126] Tom Saunders, Note, *The Limits on University Control of Graduate Student Speech*, 112 YALE L.J. 1295, 1299 (2003) (noting that, unlike high school students, almost all college students may vote, serve on juries, buy firearms, serve in the military, "drive, smoke, purchase pornography, sign legally binding contracts, marry without parental permission, and be tried as adults in the criminal justice system").

college students. As one commentator noted, "the university campus should be considered analogous to society at large."[127] This is because college students are "no longer minors, and they are imbued with all of the political and legal rights of adults."[128] Therefore, an argument that college students are not old enough to exercise their freedom of speech is inaccurate, as 99 percent have reached the age of majority and have attained the related legal rights and responsibilities.

Related to the age of the students is their maturity level. As the *Hazelwood* Court remarked:

> [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.[129]

Any such argument has greatly diminished force in a college setting. College students are inherently more mature than high school students, having graduated high school and attained the age of majority, at which time social norms specify that they are mature enough to become a true citizen. Colleges require incoming students to be high school graduates or the equivalent. College students face new challenges, encounter to new ideas, think critically, take on new responsibilities, and enter into a world without the shelter of home and parents.

College is an experience of greater freedoms for students. The social environment exposes students to a broad range of ideas, philosophies, and activities unavailable in high school. Colleges are designed to encourage expression of diverse viewpoints and to expose students to diverse thought. The Court recognizes the importance of a diverse college curriculum, remarking that the country'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.'"[130] States and their public colleges and universities have a strong interest in providing a medium, such as a student newspaper, that is substantially more ex-

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

[128] *Id.* at 530.

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

[130] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (quoting Keyishian v. Bd. of Regents, 358 U.S. 589, 603 (1967)).

pansive than a classroom for the expression and conveyance of diverse opinions and thoughts.

High school students do not have much choice when it comes to classes. States have curriculum requirements for their high schools dictating which classes a student must take in order to meet the qualifications for graduation.[131] Funding and space limitations may also severely restrict high school students' choice of electives. Finally, state certification tests and other state and national assessment tests create a need for schools to ensure that their students attain a sufficient comprehension of basic concepts, and this can result in students being compelled to take classes to ensure a minimum level of competence in certain subjects.[132]

The students themselves shape the college curriculum, in contrast to the more structured high school curriculum in which students have less choice. That is not to say that there are no core class requirements for college students; there are several introductory or basic courses that may be necessary for graduation or as a prerequisite to other classes. At the college level, however, students are able to choose a major and many of the classes they wish to take to fulfill the requirements for their major. Even within an area of concentration, students have a broad range of classes to select from when planning their schedules. Colleges entrust students to make decisions and use their judgment in selecting courses and the number of credits to take in a given semester, with some of the mentioned limitations. The decisions that college students make regarding their courses are extremely important in preparation for graduate school or in determining their postgraduation occupations. This demonstrates that colleges and universities realize that college students are mature and competent enough to exercise their own judgment in selecting their majors and courses.

Many college classes cannot be taught at the high school level because they require a heightened level of maturity. Examples of the more mature components of the college curriculum include classes covering sexuality and sexual activity,[133] a course entitled "How to Be Gay: Male Homosexuality and Initiation,"[134] art and drawing classes

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[131] MICHAEL IMBER & TYLL VAN GEEL, EDUCATION LAW 62 (2d ed. 2000) ("State statutes and regulations typically establish minimum course or credit requirements for graduation.").

[132] *See, e.g., id.* (noting further that statewide testing requirements often create an implicit syllabus for schools).

[133] *See* Brittany Adams, *Continuation of Sexuality De-Cal Classes Uncertain*, DAILY CALIFORNIAN (Berkley), Feb. 15, 2002, at 1, *available at* http://www.dailycal.org/article.php?id=7723 (discussing course that featured a field trip to a strip club and observation of instructors engaging in sexual acts).

[134] *See* Andrew Kaplan, *MSA Defends 'U' Autonomy Against Critics of 'Gay' Class*, MICH.

using nude models, and programs dealing with issues such as drug and alcohol abuse or prevention of the transmission of sexually transmitted diseases that may be more explicit than those found in high schools. Colleges thereby recognize the ability of students to deal with topics requiring a mature attitude, illustrating that such institutions acknowledge the higher maturity levels of college students compared to high school students.

Attending college is a choice, not a requirement. High schools, conversely, are an integral component of the compulsory education provided by the states. States have a significant interest in educating adolescents, as all states have compulsory education laws, with most requiring school attendance until the age of sixteen, while others require attendance until age eighteen or completion of high school.[135] States design their school systems to provide education for those who fall within the age constraints imposed by statute, and many state statutes compel schools to provide an education for those who fall outside of the age constraints and wish to attend school.[136]

In contrast to high school, attending college is an option and students are free to enroll or disenroll at any time. There are no compulsory education laws requiring college attendance,[137] nor do states guarantee a college education for everyone. Most college students are paying thousands of dollars for their education and all are expected to act as responsible people in their schoolwork and school related extracurricular activities. Courts should recognize that if college students are presumed to be mature enough to take on the responsibilities placed on them by society and the college, then student editors must also be presumed mature enough to exercise editorial freedom in their college newspapers, and the college audience must be presumed mature enough to be exposed to sensitive or controversial topics within those newspapers.

DAILY (Ann Arbor), Sept. 10, 2003, at 3, *available at* http://www.michigandaily.com/vnews/display.v/ART/2003/09/10/3f5eb42be6677?in_archive=1 (describing a resolution passed by the Michigan student assembly supporting the university's academic freedom to include the course); Joe Kort, *Viewpoint: Gay Initiation Classes Provide Vital Message*, MICH. DAILY (Ann Arbor), Sept. 11, 2003, at 4A, *available at* http://www.michigandaily.com/vnews/display.v/ART/2003/09/11/3f5ffce8eb2ab?in_archive=1 (emphasizing the importance of sexual orientation classes); Abike Martins, *"How to Be Gay" Class Draws Ire in 3rd Term*, MICH. DAILY (Ann Arbor), Sept. 8, 2003, at A3, *available at* http://www.michigandaily.com/vnews/display.v/ART/2003/09/08/3f5bfd7127e1e?in_archive=1 (describing the conservative criticisms of the course).

[135] IMBER & VAN GEEL, *supra* note 131, at 15-16.

[136] *Id.* at 16.

[137] *See id.* (noting that state laws typically only cover ages five or six to sixteen or seventeen).

B. Legal Significance of Age and Maturity

The Supreme Court frequently addresses the difference in age and maturity of secondary and postsecondary students in its analyses of Establishment Clause cases.[138] In terms of religion, college students are considered "mature enough to discern the difference between government sponsored religious speech and students exercising their rights to free speech," while high school students are "less able to discern between government endorsement" and students exercising their right to free speech.[139] The Court, concerned in Establishment Clause cases that the less mature high school students may be susceptible to coercion by exposure to religion in public schools, referenced psychological studies concluding that adolescents are less mature and more susceptible to peer pressure to conform.[140] In *Tilton v. Richardson*, the Court stated, "There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view, and Congress may well have entertained it."[141]

In another case, the Tenth Circuit, relying on expert testimony regarding developmental stages of children and adolescents, concluded that a limited public forum for children and adolescents "cannot compare to one created for adult university students" and that "an Establishment Clause violation weighs much more heavily when younger, more impressionable students are involved."[142]

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[138] *See* Lee v. Weisman, 505 U.S. 577, 593 (1992) ("We do not address whether that choice [between participating and protesting] is acceptable if the affected citizens are mature adults, but we think the state may not, consistent with the Establishment Clause, place primary and secondary school children in this position."); Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981) ("University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."); Tilton v. Richardson, 403 U.S. 672, 685 (1971) ("There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools.").

[139] Chris Brown, Note, *Good News? Supreme Court Overlooks the Impressionability of Elementary-Aged Students in Finding a Parental Permission Slip Sufficient to Avoid an Establishment Clause Violation*, 27 U. DAYTON L. REV. 269, 285 (2002) (citing, respectively, *Widmar*, 454 U.S. at 276, and *Lee*, 505 U.S. at 592).

[140] *Lee*, 505 U.S. at 593-94 (citing the following psychological studies: Clay V. Brittain, *Adolescent Choices and Parent-Peer Cross Pressures*, 28 AM. SOC. REV. 385 (1963); Donna Rae Clasen & B. Bradford Brown, *The Multidimensionality of Peer Pressure in Adolescence*, 14 J. OF YOUTH & ADOL. 451 (1985); B. Bradford Brown et. al., *Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self-Reported Behavior Among Adolescents*, 22 DEV. PSYCHOL. 521 (1986)).

[141] 403 U.S. 672, 686 (1971).

[142] Bell v. Little Axe Indep. Sch. Dist. No. 70, 766 F.2d 1391, 1407 (10th Cir. 1985) (referencing testimony of a psychology expert stating, "It is not until the age of 18 that the child fully develops the ability to make decisions independent of authority figures and peers").

The Court's analysis of the age and maturity differences between high school and college students is not limited to religious ideology in public schools. Having recognized that college students "are, of course, young adults," the Court followed that college students "are less impressionable than younger students."[143] College students "are adults who are members of the college or university community."[144] Court rulings that restrict the freedom of speech of high school students specifically mention the legitimate concerns regarding the maturity levels of students that age.[145] It is difficult to conceive how such reasoning and justification could be extended to colleges, despite the fact that colleges have occasional problems with the maturity of some of their students. As courts explained, the maturity argument set forth in *Hazelwood* has no merit when applied to college students, who are high school graduates and, as stated before, almost exclusively the age of majority or greater.[146] There is, therefore, a danger "that the application of *Hazelwood* to universities and graduate schools would 'seriously undermine the rights' of such students."[147] This is because "post-secondary students are typically more independent, and most enjoy greater legal freedoms than high school students, including, but not limited to, being able to purchase cigarettes, to marry, to join the military, to vote, and to legally consume alcohol."[148]

In its recent decision in *Roper v. Simmons*, the Supreme Court examined the differences between juveniles under eighteen and adults in finding that the death penalty constituted cruel and unusual punishment when applied to minors.[149] The Court discussed three general differences between juveniles and adults.[150] First, the Court noted, as scientific and sociological studies "tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults.'"[151] Second, the Court made a finding similar to previous conclusions in Establishment Clause cases, remarking that "juveniles are more vulnerable or susceptible to nega-

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[143] *Widmar*, 454 U.S. at 274 n.14 (citing *Tilton*, 403 U.S. at 685-86).

[144] Healey v. James, 408 U.S. 169, 197 (1972) (Douglas, J., concurring).

[145] *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271-72 (1988) (noting that high school educators may use greater control to ensure students are exposed to material within their maturity levels).

[146] *See* Hosty v. Carter, 412 F.3d 731, 739 (7th Cir. 2005) (Evans, J., dissenting); Hosty v. Carter, 325 F.3d 945, 948-49 (7th Cir. 2003), *rev'd en banc*, 412 F.3d 731 (7th Cir. 2005); Kincaid v. Gibson, 236 F.3d 342, 352 (6th Cir. 2001).

[147] Schulz, *supra* note 25, at 1216 (quoting Brown v. Li, 308 F.3d 939, 957 (9th Cir. 2002) (Reinhardt, J., dissenting)).

[148] *Id.*

[149] 125 S. Ct. 1183, 1195-98 (2005).

[150] *Id.* at 1195.

[151] *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

tive influences and outside pressures."[152] The third difference mentioned by the Court "is that the character of a juvenile is not as well formed as that of an adult" and "personality traits of juveniles are more transitory, less fixed."[153] Although not agreeing with the majority's decision in the case, the dissent in *Roper* acknowledged, "It is beyond cavil that juveniles as a class are generally less mature, less responsible, and less fully formed than adults."[154]

The Court understands that adults are more mature than juveniles or adolescents. The Court, however, recognizes that there are always exceptions to the rule; some adolescents are as mature as most adults, and some adults have not matured to a level greater than most adolescents. As the Court's decisions illustrate, these exceptions to the general rule do not impede the Court from relying on the difference in age and maturity of adults and adolescents in determining the applicability or inapplicability of laws and the Constitution.

The courts in *Hosty* and *Pitt News* examined the age and maturity levels of college students in analyzing the First Amendment questions. As mentioned before, the Seventh Circuit panel in *Hosty* declined to extend the *Hazelwood* standard to college students.[155] In so doing, the panel discussed the difference in age and maturity of those students and the inapplicability of the *Hazelwood* standard to colleges.[156] In contrast, the en banc Seventh Circuit majority stated that age and maturity are irrelevant with regard to the extension of *Hazelwood's* framework to the college level. The dissent, however, observed that the law treats high school students differently than college

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[152] *Id.* (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)). The Court in *Eddings* stated, "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be the most susceptible to influence and to psychological damage." 455 U.S. at 115.

[153] *Id.* (citing ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968)).

[154] *Id.* at 1212 (O'Connor, J., dissenting) (citing *Johnson*, 509 U.S. at 367, 376 (O'Connor, J., dissenting); *Eddings*, 455 U.S. at 115-16 ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, are generally less mature and responsible than adults."). Justice O'Connor also remarked "that at least *some* 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case." *Id.* at 1206. Justice Scalia, in a separate dissent, argued that psychological studies and state prohibitions on those under 18 voting, marrying, or serving on juries are "patently irrelevant" and offer scant "support for a categorical prohibition of the death penalty for murderers under 18." *Id.* at 1223-24 (Scalia, J., dissenting). Justice Scalia argues that

> it is 'absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards.' Serving on a jury or entering into marriage also involve decisions far more sophisticated than the simple decision not to take another's life.

Id. at 1224 (Scalia, J., dissenting) (quoting Stanford v. Kentucky, 492 U.S. 361, 374 (1989)).

[155] Hosty v. Carter, 325 F.3d 945, 948-49 (7th Cir. 2003), *rev'd en banc*, 412 F.3d 731 (7th Cir. 2005).

[156] *Id.*

students. The *Hosty* dissent argued that "[a]ge, for which grade level is a very good indicator, has always defined legal rights,"[157] and that the Supreme Court "long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults."[158] In the dissent's view, the difference in age and maturity makes clear that *Hazelwood* does not apply beyond high school.[159]

The *Pitt News* court also cited the relevance of the age of the students, noting that most of the students and the campus community in general were over the age of twenty-one and able to drink.[160] As a result, the state's restriction on advertising was not narrowly tailored to curb underage drinking, because underage students composed a minority of the campus population.[161] College students are more mature than high school students, possess the same rights as other adults, and are entitled to the same protection of these rights as granted to a noncollege student of the same age and maturity. The concern of the Court in *Hazelwood* regarding the age and maturity of the students is not present at the college level.

C. College as the "Marketplace of Ideas"

The Supreme Court frequently refers to college as the "marketplace of ideas."[162] In "reaffirming this Nation's dedication to safeguarding academic freedom,"[163] the Court noted, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[164] The Court has consistently afforded more protection to freedom of speech on college campuses than to high schools, with significant weight placed on the fact that colleges are places that cultivate and support the expression of ideas and thoughts as well as encourage discourse.

Following the Court's reasoning that colleges are vital as centers that encourage the cultivation and expression of thoughts and ideas, college newspapers play a more important role than high school newspapers and "have taken their place as a vital component of cam-

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[157] Hosty v. Carter, 412 F.3d 731, 739 (7th Cir. 2005) (Evans, J., dissenting).

[158] *Id.* at 740 (citing Planned Parenthood of Miss. v. Danforth, 428 U.S. 52, 74 (1976)).

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

[160] Pitt News v. Pappert, 379 F.3d 96, 108 (3d Cir. 2004).

[161] *Id.* at 108-09.

[162] *See, e.g.*, Healy v. James, 408 U.S. 169, 180-81 (1972) (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); Sweezy v. N.H. by Wyman, 354 U.S. 234, 249-50 (1957) (Warren, C.J., plurality)). The "marketplace of ideas" originated in Justice Holmes' dissent in Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[163] *Healy*, 408 U.S. at 180-81.

[164] *Id.* (citing Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

pus life."[165] College newspapers "not only provide the campus community with university-related information, but also allow students the editorial freedom to operate and publish their own press."[166] These publications serve the public "by monitoring the administration of higher education"; serve college communities "by commenting on and documenting campus politics and campus life, by provoking thought and discussion, and by simply entertaining"; and "offer[] the single best avenue for training . . . for a career in professional journalism."[167] In addition to providing training and preparation for future journalists, college newspapers act as the "fourth estate" on college campuses, keeping watch over the college itself. In order to fulfill this role, college newspapers must act as independent publications, free from administration control over content.

Their high school counterparts have no similar role. Teachers supervise and instruct the creation of high school newspapers. They are a part of the high school curriculum, and the goal is to teach students how to write and edit in the format and style of a newspaper. Articles generally cover high school news and events, issues relevant to students, and other noncontroversial topics. Although some high school newspapers do tackle controversial issues, they do so under the watchful eye and tutelage of teachers, who must keep in mind the age and maturity of the student journalists and the newspaper's audience. Even if high school newspapers wanted to act as a watchdog of school administration or to provoke thought and discussion on controversial topics, they could do so only within the editorial control permitted under *Hazelwood.*

The *Hosty* dissent placed an emphasis on the different missions of colleges and high schools. The dissent cited several cases discussing the importance of facilitating speech and fostering the intellectual curiosity of students on college campuses.[168] To illustrate the contrast in missions, the dissent cited Supreme Court decisions stating that primary and secondary institutions "have 'custodial and tutelary responsibility for children' and are largely concerned with the 'inculcation' of 'values.'"[169] In the dissent's judgment, the fact that colleges

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[165] Peltz, *supra* note 25, at 481.

[166] Janet E. Stone & Cynthia L. Zedalis, Comment, *Student Editorial Discretion, the First Amendment, and Public Access to the Campus Press*, 16 U.C. DAVIS L. REV. 1089, 1091 (1983).

[167] Peltz, *supra* note 25, at 481-82.

[168] Hosty v. Carter, 412 F.3d 731, 741-42 (7th Cir. 2003) (Evans, J., dissenting) (citing Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 231 (2000); Rosenberger v. Rector, 515 U.S. 819, 836 (1995); Widmar v. Vincent, 454 U.S. 263, 267-68 n.5 (1981); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978); *Healy*, 408 U.S. at 180-81; Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

[169] *Id.* at 741 (citing Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 829-

have a different mission than high schools and serve as the marketplace of ideas precludes the extension of *Hazelwood* to the college and university setting.[170]

Extending *Hazelwood* to college newspapers would strip college newspapers of their editorial freedom and autonomy and simply turn them into a branch or appendage of the college. The student editors would face an ever-present threat that the college could, at any time, undermine the publication's First Amendment rights. The college could accomplish this through censorship or by forcing or influencing the newspaper into presenting only those ideas and thoughts agreeable to the college. This would hinder the ability of the newspaper to encourage and cultivate expression and thoughts in the "marketplace of ideas."

III. THE DIFFERENT STRUCTURE OF COLLEGE NEWSPAPERS AND THEIR STATUS AS A PUBLIC FORUM

A. The Differences in the Structure of High School and College Newspapers

The structure of college newspaper programs fundamentally differs from those in high school. High schools newspapers are designed as a tool to teach journalism to students. A class creates the newspaper, a teacher instructs the students, and the faculty approves the articles prior to publication. College newspapers are not as curriculum based. A class does not create the newspaper nor does the faculty instruct or approve the publication. Simply put, the newspaper reflects the creations and expressions of the students, not the college. These structural differences entitle college newspapers to the greater freedom they possess in comparison with their high school counterparts.

High school newspapers involve a structured, curriculum-based program of instruction and in-class work performed during predetermined class times. For example, in *Hazelwood*, the Court paid special notice to the environment surrounding the paper's production.[171] Students wrote their articles in the classroom, during regular school hours, and under the supervision of a teacher.[172] In order to become a reporter or an editor, the school required the students to take an intro-

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30 (2002); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

[170] *Id.* at 741-42.

[171] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 268-70 (1988).

[172] *Id.* at 268.

ductory journalism class prior to taking the journalism class that produced the paper.[173] Finally, students were fully aware that school policy called for the teacher and the principal having the final say on the content of the newspaper.[174] In fact, the teacher was also responsible for assigning students to stories, so that the school had full control over what went into the newspaper.[175]

Conversely, a study of college newspapers showed that of 101 daily publications, only one could be classified as "strongly curriculum based."[176] College newspaper programs are generally much less structured and characterized by the fact that the students are not supervised by faculty and do not have to answer to instructors or submit their work for approval by any teachers or administrators.[177] On a day-to-day basis, the student editors are the highest authority in college newspaper programs, unlike in high school where the students have to answer to teachers and submit their work to receive approval and a grade. Editors of college newspapers are predominantly those with the most seniority on the staff, and a publications board composed of faculty and administration may select them for their editorial positions or the rest of the newspaper staff may elect them.[178] These student editors have the final say on the content of the newspapers, and, unlike high school student editors, their editorial decisions do not require the approval of a school administrator. A college newspaper

> reflects the collective views of its staff, and does not necessarily represent the views of the university as a whole. In this respect, a student newspaper is comparable to a privately owned newspaper which is characterized by the philosophies of its publisher, and not by the views of the city which it serves.[179]

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[173] *Id.*

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

[175] *Id.*

[176] *See* John V. Bodle, *The Instructional Independence of Daily Student Newspapers*, 52 JOURNALISM & MASS. COMM. EDUCATOR 16, 20-21 tbl.1 (1997).

[177] To learn more about the structure and operations of college newspapers, the author surveyed the editor-in-chiefs of the student newspapers at the following public universities: The University of Alabama, The University of California at Davis, The University of California at Los Angeles, The University of Michigan, Ohio State University, Oregon State University, Pennsylvania State University, and Texas A&M University. The author's survey updated a pre-*Hazelwood* study of the same newspapers that appears in Stone & Zedalis, *supra* note 166, at 1091-92 n.11 (describing their interviews with representatives of the aforementioned universities). The answers to the survey form the basis for the description of the structure of college newspapers (on file with the author).

[178] *See* J. WILLIAM CLICK, GOVERNING COLLEGE STUDENT PUBLICATIONS 47-48 (1980).

[179] Stone & Zedalis, *supra* note 166, at 1091-92 (citing Arrington v. Taylor, 380 F. Supp. 1348, 1359-60 (M.D.N.C. 1974), *aff'd*, 526 F.2d 587 (4th Cir. 1975), in which the court noted

Indeed, the Third Circuit in *Pitt News* noted the independence of the views expressed within the University of Pittsburgh's student newspaper.[180]

College newspapers receive their funding from several sources, including advertising, student fees, and, for major capital expenditures, the university.[181] Advertising revenue, however, comprises the majority of capital for college newspapers.[182] Advertisers purchase advertising space directly from the newspaper staff, not from the college or school officials. This is another example of the autonomy granted to student newspaper staffs to exercise control over the publication, free from administration interference and oversight.

The reasoning applied by the Court in *Hazelwood* again cannot be applied to college newspapers, as the structure of high school and college programs is too dissimilar. The Court stated that "[e]ducators are entitled to exercise greater control" over student expression in activities that "may be fairly characterized as part of the school curriculum . . . so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[183] As illustrated, college newspapers are not subject to supervision or classroom instruction by faculty members. Unlike high school newspapers, the college faculty and administration do not supervise or control the staff or content of college newspapers. The fact that college newspapers are written and edited solely by students and without the need of administrative approval is an important element of their right to be afforded greater freedom of speech than the Supreme Court set out for high schools. Several courts have prohibited any attempts by school officials to censor constitutionally protected material within college student publications because student editors are responsible for the content of their publications.[184] Even if

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that when a student newspaper adopts a position on a given subject, it acts more as an independent newspaper than as a state agency, and its position is that of its editors and writers and not that of the university or state government).

[180] Pitt News v. Pappert, 379 F.3d 96, 105 n.5 (3d Cir. 2004) ("[T]he Commonwealth does not suggest that *The Pitt News* represents the Commonwealth's own speech as opposed to independent student speech . . . .").

[181] *See* Stone & Zedalis, *supra* note 166, at 1092-93.

[182] *Id.* at 1092.

[183] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

[184] *See, e.g.*, Rosenberger v. Rector, 515 U.S. 819 (1995) (university cannot withhold funding to a student group based on the group's beliefs); Bazaar v. Fortune, 489 F.2d 225 (5th Cir. 1973) (university cannot censor student magazine); Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973) (university cannot withdraw funding from a student newspaper unless there is imminent danger of unrest or physical violence as a result of the publication); Antonelli v. Hammond, 308

a college chooses to retain some oversight over the newspaper, such as through the use of a publications board that can select and remove editors, this alone is an insufficient justification for a college violating the First Amendment rights of the publication by imposing restrictions and exercising editorial control.[185]

B. The Public Forum Status of College Newspapers

The determination by the Court in *Hazelwood* that high schools are nonpublic forums is not applicable to colleges. There are three categories of forums: public, limited public, and nonpublic.[186] Public forums include streets, parks, and other places "that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"[187] In a public forum, any regulation of speech by the government must be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end."[188] The government creates a limited public forum by opening public property on a limited basis for expressive use by the public.[189] When restricting speech in a limited public forum, the government "is bound by the same standards as apply in a traditional public forum."[190] A nonpublic forum is one where the facilities are not open to the general public but instead are "reserved for other intended purposes, 'communicative or otherwise.'"[191] In a nonpublic forum, reasonable restrictions or regulation is permissible so long as it is not "an effort to suppress expression merely because public officials oppose the speaker's view."[192] According to *Hazelwood*, school facilities are public forums "only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the

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F. Supp. 1329 (Dist. Mass. 1970) (university has no right to editorial control over school-sponsored student newspaper); *see also* Brief for Charles Kincaid & Capri Coffer as Amici Curiae Supporting Plaintiffs-Appellants, Kincaid v. Gibson, 236 F.3d 342 (6th Cir. 2001) (No. 98-5385), *available at* http://www.splc.org/kincaidbrief.asp.

[185] *See Kincaid*, 236 F.3d at 355-56 (holding university officials' actions unreasonable and arbitrary because officials did not consult with the publications board before seizing yearbooks).

[186] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985); *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

[187] *Hazelwood Sch. Dist.*, 484 U.S. at 267 (citing Hague v. CIO, 307 U.S. 496, 515 (1939)); *see also* Widmar v. Vincent, 454 U.S. 263, 267-68 (1981).

[188] *Perry Educ. Ass'n*, 460 U.S. at 45.

[189] *Id.*

[190] *Id.* at 46.

[191] *Hazelwood Sch. Dist*, 484 U.S. at 267.

[192] *Perry Educ. Ass'n*, 460 U.S. at 46.

general public,' or by some segment of the public, such as student organizations."[193]

The *Hazelwood* Court concluded that the high school's newspaper was a nonpublic forum because school officials did not have any intent to open the paper to indiscriminate use by the student reporters, editors, or the student body, and instead reserved the forum for its intended purpose: "a supervised learning experience for journalism students."[194] This determination resulted from the district school board's policy that school-sponsored publications, including the newspaper, "are developed within the adopted curriculum and its educational implications in regular classroom activities."[195] The Court placed great weight on the fact that students created the paper in a "laboratory situation" in the classroom.[196] The Court also stressed the fact that the class was designed to develop journalistic skills and to teach responsibility and acceptance of criticism for articles of opinion, as well as "the legal, moral, and ethical restrictions imposed upon journalists within the school community."[197] In addition, faculty taught the class, graded the students on their work, awarded academic credit, and retained all control over the editorial process.[198] This faculty control included selecting editors, assigning stories, advising students as they wrote articles, editing stories, and generally having "final authority with respect to almost every aspect of the production and publication of [the paper] including its content."[199] The school also made it clear beforehand that the newspaper required the principal's review and approval prior to publication.[200]

College newspapers are, at a minimum, limited public forums. Student editors control these papers. The newspapers are forums for expression by the students, created outside of the classroom, not subject to administrative editorial review, and not part of the school curriculum. College newspapers drastically differ from high school newspapers in that they are not school-sponsored works created in the classroom. *Hazelwood* specifically distinguished between school-sponsored works that are produced by a public institution and those produced off site and without public funding.[201] The *Kincaid* en banc

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[193] *Hazelwood Sch. Dist.*, 484 U.S. at 267 (citing *Perry Educ. Ass'n*, 460 U.S. at 47 (noting Widmar v. Vincent, 454 U.S. 263, 269-70 (1981))).

[194] *Id.* at 270.

[195] *Id.* at 268.

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.* at 269.

[201] *Id.* at 271.

decision relied upon the public forum doctrine to rebut the argument that *Hazelwood* would apply to colleges. In *Kincaid*, the court determined that college yearbooks are, at the very least, limited public forums because of their structure, their nature and role as an expressive media, the policy and practice of the college in opening the yearbook for expression, and the context in which the yearbook was founded as an expressive medium.[202] As a limited public forum, this put a greater burden on the administration to prove that their restrictions on freedom of speech were justified and narrowly tailored, which it was unable to do.[203] After concluding that *Hazelwood* applied to college newspapers, the en banc *Hosty* court also determined that the newspaper was a limited public forum because the university, by way of its media board, placed the final editorial control with the student editors.[204]

Other judicial opinions also reached the conclusion that college newspapers are public forums.[205] They arrived at this conclusion based on several factors, including the newspaper not being "operated under the guise of a specific academic course,"[206] the lack of direction or instruction of a faculty member, and no administrative control over the editorial board. Additional considerations included the fact that college newspapers "reach and interact with far more individuals"[207] than high school papers (including nonuniversity members), and "college newspapers and yearbooks today are widely acknowledged as outlets for student expression."[208] Structure, again, is an important distinction of college newspapers under the public forum doctrine. The administration does not subject student journalists in a college newspaper to editorial control, and the college opens the newspaper as a public forum.

A college newspaper is also opened for public expression when it publishes letters from readers in response to editorial columns. Anyone can read the paper or write in and potentially be published in the next newspaper, regardless of whether they are a college student or not. It is true that there may be some editorial judgment as to which letters to print, but, as with the articles, this is controlled by the student editors, not the administration. There are also college newspapers that maintain web sites and allow posting of comments which are

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[202] Kincaid v. Gibson, 236 F.3d 342, 352 (6th Cir. 2001).

[203] *Id.*

[204] Hosty v. Carter, 412 F.3d 731, 737 (7th Cir. 2005).

[205] *See* Bazaar v. Fortune, 489 F.2d 225 (5th Cir. 1973); Lueth v. St. Clair County Cmty. Coll., 732 F. Supp. 1410 (E.D. Mich. 1990).

[206] *Lueth*, 732 F. Supp. at 1414.

[207] Fiore, *supra* note 22, at 1962.

[208] *Id.*

not viewed or edited by the newspaper staff prior to appearing for all to see on the newspaper's web site. This suggests that the newspaper is a public forum, allowing anyone to post articles, messages, opinions, or rebuttals. In *Hazelwood*, the Court specifically took into consideration the fact that the journalism teacher "selected and edited the letters to the editor."[209] In college, the faculty does not have this control and has allowed college newspapers to be opened up for public discourse not only by the student journalists, but the newspaper audience as well.

IV. INDIRECT AVENUES FOR THE PROTECTION OR RESTRICTION OF THE EDITORIAL FREEDOM OF COLLEGE NEWSPAPERS

A. Legislatures as Both Friend and Foe of College Newspapers

1. The Threat Posed by Legislatures to Editorial Freedom

The response to the Pat Tillman article published in the University of Massachusetts newspaper raises questions as to the future freedom of speech that college newspapers will be afforded. Legislatures may be willing to oppose the editorial freedom of college newspapers when controversial opinions stir public discussion and disapproval. As previously noted, the Massachusetts State Senate passed a resolution condemning the student journalist.[210] While the legislature took no further action, legislatures are a potential threat to the editorial freedom of college journalists. Legislatures have already attempted to impose restrictions on the freedom of speech of college newspapers.[211] Statutes such as the one in *Pitt News* highlight the threat they pose to the First Amendment rights of college newspapers. Depending on how courts interpret these laws, such statutes could have the same effect as if the school administration censored the speech. Though *Pitt News* focused on commercial speech, it provides an analogy to the threat that legislatures pose to editorial freedom.

2. Legislatures as Protectors of Editorial Freedom

Support for freedom of speech in college publications can also come from legislatures. For instance, several states have enacted legislation protecting the freedom of speech of publications at both the

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[209] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 268 (1988).

[210] *See supra* note 3 and accompanying text.

[211] *See* Pitt News v. Pappert, 379 F.3d 96 (3d Cir. 2004).

college and high school levels.[212] As of 2001, five states had legislation protecting the expressive rights of high schools students.[213] California is the lone state with laws protecting the freedom of speech of college students.[214] Interestingly, the California law covers not only community colleges and state universities, but private colleges as well, even though private colleges are not affected by any government-imposed restrictions on free speech.[215] As one commentator noted, if the *Hazelwood* restrictions were extended to colleges, then adult college students in the states with laws protecting the expressive rights of high school students would have "more limited First Amendment rights than ninth graders."[216]

The Student Press Law Center developed "Model Legislation to Protect Student Free Expression Rights," one version of which is applicable to college publications.[217] This model statute would relieve courts from analyzing whether or not college newspapers are public forums by "stating explicitly" that they are public forums, and the statute "would supersede any contrary indication in a student handbook."[218] Legislation may be a last resort, called upon only if a court allowed restrictions on the editorial freedom of college newspapers.

B. Using the Purse Strings to Restrict the Editorial Freedom of College Newspapers

Another way that courts may attempt to restrict freedom of speech at the college level is to apply a standard based on the fact that public dollars are used to finance colleges. Newspapers have some defense against this since they generally sell advertising to cover their costs. Conversely, if the college owns and operates the facilities used by the newspaper, this may give administrators the ability to reach into its activities. Courts have protected the funding of student organizations in the past, ruling that mandatory student activities fees can be given to any organization, regardless of whether some students oppose the funding of certain organizations because of the organizations' viewpoints.[219] The Supreme Court determined that "recognition must be

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[212] *See* Peltz, *supra* note 25, at 537 (noting existing state legislation to protect high school students' right to free speech); Lloyd, *supra* note 25, at 310 (noting state legislation to protect high school or college students' rights to free speech).

[213] *Id.*

[214] *Id.* at 313.

[215] *Id.*

[216] Peltz, *supra* note 25, at 540 n.479.

[217] *Id.* at 537 n.476.

[218] *Id.* at 538.

[219] *See* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 221, 230 (1999) (permitting a public university to charge a student activity fee to fund programs facilitat-

given as well to the important and substantial purposes of the University, which seeks to facilitate a wide range of speech."[220] This may shed some insight on the importance that the Court places on the issue of the protection of free speech on college campuses when it involves student activities and organizations.

The Tillman article controversy at the University of Massachusetts also raises questions as to what happens if the school decides to cut off funding to the newspaper because it publishes articles with unpopular or controversial views. The actions by the student assembly in cutting off newspaper funding show how easy it can be for a group of fellow students to control the editorial freedom of the newspaper through the granting or withholding of funding. A portion of college newspaper budgets comes from the college itself, and if this money is used as a means of influencing the editorial decisions of the newspaper, it can have the same detrimental effect as if the college censored the content of the newspapers. A college reducing its funding to the newspaper would probably not be fatal, since the majority of newspaper funding comes through advertising. A legislative act that restricts the content of the advertising within a college newspaper, combined with a reduction in funding from the college, however, could make it extremely difficult for a college newspaper to generate enough revenue to continue publishing. *Pitt News* illustrates the problems created when a state restricts the revenue sources available to a college newspaper, as *The Pitt News*' revenue decreased to the extent that it affected the editorial content of the paper.[221] With less money, the paper could not afford to print as many pages, and in this manner the commercial speech restrictions had a direct impact on the editorial content of the paper.[222] The paper could not make capital expenditures to purchase new cameras and upgrade its computers, harming *The Pitt News*' ability to compete with newspapers not affiliated with the university, which were not subject to the restrictions on advertising.[223]

C. The Marketplace as a Restrictor and Protector of the Editorial Freedom of College Newspapers

Newspapers themselves are effective at determining what material should or should not be printed. As with traditional newspapers, the

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ing extracurricular student speech, even if some students find the speech "objectionable").

[220] *Id.* at 231.

[221] Pitt News v. Pappert, 379 F.3d 96, 103 (3d Cir. 2004).

[222] *Id.*

[223] *Id.*

marketplace, rather than the administration, will determine what material is fit for publication. Students in college are encouraged to be active members of the community and to join or create student groups and often create organizations to fill a void in the campus community. Along the same lines, students are able to start newspapers on campus, often in response to unpopular views expressed by the existing publication. Many college campuses have more than one student newspaper, frequently differentiated by style or political view.[224] In the marketplace of ideas, students are able to choose which newspaper they prefer to read. If one newspaper has unpopular views, students may choose not to read it and, in turn, advertisers may decide not to advertise in it but to advertise with a competitor. College newspapers may then face the consequences of questionable editorial decisions without having to deal with censorship by the college administration.

CONCLUSION

When the Supreme Court allowed restrictions to be imposed on high school newspapers produced by teenage students under the supervision of teachers, the Court chose not to address the question of whether the same restrictions would apply to older, more mature college students in the course of producing a college sponsored publication. The failure by the Court to either confirm that college newspapers are entitled to the same freedoms as the mainstream media, or to define restrictions that could be imposed on their freedom, is creating a disagreement in lower courts and uncertainty as to the standard that should be applied.

The Supreme Court should clarify the First Amendment rights of college newspapers and publications. As the *Hosty* panel noted, there is some question as to whether *Hazelwood* has "muddled the landscape" to an extent that the law is unclear.[225] The full Seventh Circuit agreed that the law was not clearly established. This observation continues to hold true in the wake of the *Hosty* decision and its creation of a circuit split on the question of *Hazelwood's* application to college publications. A close examination of the issue leads to a conclusion that the *Hazelwood* standard is inapplicable to colleges and universities. The recent decision by the Third Circuit in *Pitt News* that a state

[224] The University of Michigan, for example, has two student newspapers: *The Michigan Daily* and *The Michigan Review*. *The Michigan Review* is "the conservative student publication of The University of Michigan." *See The Michigan Review*, http://www.michiganreview.com (last visited Oct. 15, 2005).

[225] Hosty v. Carter, 325 F.3d 945, 948 (7th Cir. 2003), *rev'd en banc*, 412 F.3d 731 (7th Cir. 2005).

cannot single out the college media in regulating commercial speech indicates that a state would have an even more difficult time imposing editorial restrictions on college newspapers and satisfying a court's inquiry into their constitutionality.

Based on the Court's consistent reliance on studies that show inherent differences in age and maturity between high school and college students, the difference in structure of newspaper programs at those levels, and the fact that college newspapers are public forums, this Note concludes that *Hazelwood* has no application at the college level. Taking the *Hazelwood* analysis and looking at each element in light of the college environment and the structure of college newspaper programs, it is evident that when any court faces the question of whether college newspapers should be subject to any restrictions on their editorial freedom, the only answer is "no." Courts must see the importance of enabling college newspapers to have the utmost editorial freedom so they may act as facilitators and disseminators of thoughts and opinions in the marketplace of ideas that is the college environment.

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