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# Combatting Institutional Censorship of College Journalists: the Need for a "Tailored Public Forum" Category to Best Protect Subsidized Student Newspapers

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# NOTES

# Combatting Institutional Censorship of College Journalists: The Need for a "Tailored Public Forum" Category to Best Protect Subsidized Student Newspapers

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*College journalists are in a unique position. On one hand, they are typical college students, attending classes and cheering on the team at all the big games. On the other, they serve as investigative journalists, revealing the university's deepest flaws on the front page of their newspaper. These roles should not be mutually exclusive, but at an alarming rate, universities are attempting to rid themselves of bad press by censoring their own campus newspapers.*

*This Note argues that universities can get away with this because of the current structure of the public forum doctrine. This doctrine determines the extent to which the government can control speech on government property. Current jurisprudence leaves student newspapers, funded either wholly or in part by public universities, vulnerable to regulation by*

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*their administrations. This Note demonstrates that in order to prevent this, public forum doctrine should adapt to include a "Tailored Public Forum" category. This would allow universities to limit who can speak, but not what they can say. This change is critical to ensure that college newspapers can contribute to the marketplace of ideas and are afforded the degree of independence they deserve.*

## INTRODUCTION

*I'll make 'em tear it out and run the damn paper over.*
- Senator Huey P. Long, 1934[1]

When Senator Long reportedly[2] uttered the words above, he had just heard that the Louisiana State University student newspaper printed a scathing letter to the editor against him.[3] Seven student editors made the decision to print this letter on the opinion page of *The Reveille*—the same opinion page that bears the Louisiana State Seal.[4] Not only did Long stay true to his word and have the paper re-printed without the letter, he also enlisted police to destroy the first 4,000 copies[5] of the paper and had the LSU president appoint a local reporter as *The Reveille's* adviser.[6] The new adviser told the editorial staff that *The Reveille* was "not to show the University or its supporters in a bad light[,]"[7] and the seven editors were eventually expelled after refusing to apologize.[8] University administrators would not dare admit it at the time, but they had just committed an egregious violation of these students' First Amendment rights. In 1941, the LSU Board of Supervisors expunged the students' dismissal records, issued a formal apology, and inducted the seven students into LSU's Hall of Fame.[9]

The "Reveille Seven" have become a symbol of courage in the face of institutional censorship.[10] LSU and the Associated Collegiate Press established the "College Press Freedom Award" in honor

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[1] RONALD GARAY, THE MANSHIP SCHOOL: A HISTORY OF JOURNALISM EDUCATION AT LSU 95 (2009).

[2] *Id.*

[3] Andrea Gallo, *Reveille Rebels: Reveille Seven's Clash with Huey P. Long Leaves Lasting Legacy*, LSU REVEILLE (Oct. 23, 2013), http://www.lsureveille.com/news/reveille-rebels-reveille-seven-s-clash-with-huey-p-long/article_b7ff10aa-3c3a-11e3-b424-001a4bcf6878.html.

[4] *Id.*

[5] *Id.*

[6] GARAY, *supra* note 1, at 95.

[7] Gallo, *supra* note 3.

[8] *Id.*

[9] *Id.*

[10] *See* GARAY, *supra* note 1, at 106.

of them, which is given out each year to student reporters who stand up against violations of their First Amendment rights.[11] For example, in 2015 the award went to journalists at Fairmont State University, where the students protested the removal of their newspaper's faculty adviser[12] in the wake of reporting that brought attention to problems associated with mold on campus.[13] These student editors in 2015 were told essentially the same thing that the Reveille Seven were told in 1934: that under their leadership, the newspaper's tone was "unacceptably controversial and negative."[14]

The Reveille Seven and the journalists at Fairmont State are just two examples of college student newspapers facing censorship, retaliation, and harassment by administrators throughout the years.[15] Many cases never see the inside of a courtroom,[16] and the "plot against student newspapers" does not seem to show any signs of dissipating any time soon.[17] Instead, Frank LoMonte, director of the Student Press Law Center, describes an upward trend due to two

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[11] Press Release, Student Press Law Center, Award Recognizes Fairmont State College Journalists for Fighting Censorship, Retaliation (Nov. 1, 2015), http://www.splc.org/article/2015/11/fairmont-columns-college-press-freedom-award.

[12] Dana Neuts, the president of the Society of Professional Journalists, sent a letter to Fairmont State University President Marcia C. Bennett Rose following the adviser's removal. In the letter, Neuts wrote, "[n]o one at the university has adequately explained why it was necessary to let Mr. Kelley – a well-credentialed journalism adviser – go . . . [t]o not renew his contract because The Columns wrote stories that university officials feel put Fairmont State in a negative light is despicable." Press Release, Society of Professional Journalists, SPJ Calls for Reinstatement of Fairmont State University Student Newspaper Adviser (June 23, 2015), http://www.spj.org/news.asp?ref=1352.

[13] *See* Press Release, Student Press Law Center, *supra* note 11.

[14] *Id.*

[15] *See generally* Lisa Maria Garza, *College Newspapers Fight for Rights, Against Censorship*, USA TODAY (Aug. 21, 2012), http://college.usatoday.com/2012/08/21/college-newspapers-fight-for-rights-against-censorship/.

[16] Many students suing universities face problems continuing their litigation once they graduate because courts often dismiss their cases as moot. *See Don't be Mooted: A Student Plaintiff's Guide to Keeping Your Case Alive After Graduation*, SPLC, http://www.splc.org/article/2014/11/dont-be-mooted (last visited Jan. 13, 2016).

[17] *See* David R. Wheeler, *The Plot Against Student Newspapers?*, THE ATLANTIC (Sept. 30, 2015), http://www.theatlantic.com/education/archive/2015/09/the-plot-against-student-newspapers/408106/.

distinct issues: "[C]olleges are more obsessed with 'protecting the brand' than they've ever been before, and journalism as an industry is weaker and less able to defend itself than ever before."[18]

Perhaps the reason the industry is less able to defend itself now, more than ever before, is due to the uncertainty of the Supreme Court's views on institutional content regulation in the college newspaper setting. Concern about litigation surrounding this area gained significant national attention with the *Hazelwood v. Kuhlmeier* decision in 1988, which held that a high school principal could censor the school's student newspaper, *Spectrum,* so long as his actions were "reasonably related to pedagogical concerns."[19] Crucial to the holding was the Supreme Court's determination that the newspaper was a nonpublic forum because it was part of the high school journalism curriculum.[20] This was a significant finding, as the public forum concept recognizes that "not all government property can be equally open for individual speakers' expressive use."[21] In *Hazelwood*'s nonpublic forum, school officials were entitled to regulate the contents of *Spectrum* in any manner reasonably related to an educational goal.[22] This is a lower level of scrutiny than if *Spectrum* had been deemed any other type of public forum, which requires that content regulations be narrowly tailored to serve a compelling state interest.[23] Due to this important determination, *Hazelwood* is seen as threatening to college newspapers,[24] and the decision has caused anxiety for those unsure of its consequences at the university level.[25] Still, the Supreme Court has yet to hear a college

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[18] *Id.*

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

[20] *Id.* at 270.

[21] Frank LoMonte, *What Public Forum Doctrine Means For Your Student Publication*, SPLC (July 31, 2014), http://www.splc.org/article/2014/07/what-public-forum-doctrine-means-for-your-student-publication.

[22] *Hazelwood*, 484 U.S. at 270.

[23] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

[24] The Student Press Law Center runs a campaign entitled, "Cure Hazelwood." On its website, the Center states that Hazelwood is an "infectious disease no one talks about." *See Cure Hazelwood*, SPLC, http://www.splc.org/section/cure-hazelwood (last visited Jan. 14, 2016).

[25] *See* John K. Wilson, *The Case of the Censored Newspaper*, INSIDE HIGHER ED (June 24, 2005), https://www.insidehighered.com/views/2005/06/24/case-

newspaper censorship case. Therefore, this Note attempts to solve the question of *Hazelwood*'s applicability—particularly the public forum doctrine—to the college newspaper setting.

Overall, due to both lack of clarity as well as the absence of a proper forum category for the needs and purposes of a college newspaper, this Note argues that no current public forum category fits. Instead, this Note argues that the Court should establish a hybrid forum for college newspapers called the "Tailored Public Forum." This forum would allow a university to regulate *who* can speak in the forum (for example, current students on the newspaper staff/editorial board and any staff-approved guests). However, once the class of speakers is established, a university cannot regulate *what* they can say, subjecting any content regulation to strict scrutiny and disallowing any viewpoint discrimination. While perhaps courts have aimed to create this type of forum with previous designated or limited public forum decisions, formal acknowledgement of this category would dissipate any confusion and protect the First Amendment rights of college journalists.

Part I of this Note explains public forum analysis and discusses its application in the landmark decision of *Hazelwood.* Part II examines how different circuits have applied *Hazelwood*'s public forum framework to college publications since. This discussion includes the most recognized cases of *Kincaid v. Gibson*, where the Sixth Circuit held that a college newspaper was a limited public forum,[26] and *Hosty v. Carter*, where the Fifth Circuit held that the *Hazelwood* framework applied, but left those in college media puzzled after the court chose not to declare the exact forum classification.[27] The second part also discusses non-press cases that employ other *Hazelwood* tests. Part III further explores the misunderstandings in current public forum doctrine and proposes a hybrid forum called the Tailored Public Forum, which aims to combine the best characteristics of designated and limited public forums. Finally, Part IV argues that all subsidized college newspapers should be considered Tailored Public Forums in light of the role of publicly funded institutions, as

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censored-newspaper ("The misguided *Hazelwood* decision has been an unmitigated disaster for high school journalists, and the possibility of extending it to college students is terrifying.").

[26] Kincaid v. Gibson, 236 F.3d 342, 346 (6th Cir. 2001).

[27] Hosty v. Carter, 412 F.3d 731, 735 (7th Cir. 2005).

well as the dissimilarities between college newspapers and the *Hazelwood* case.

## I. PUBLIC FORUM DOCTRINE AND *HAZELWOOD* AS THE STARTING POINT

The Court in *Hazelwood* began its opinion by discussing the public forum doctrine, an analysis that the Supreme Court typically conducts to evaluate any government restrictions of private speech occurring on government property.[28] However, before discussing how the Court applied it in the context of *Hazelwood*, it is important to understand what the doctrine is. The extent to which the government can control speech on government property depends on the nature of the forum at question,[29] or more specifically, depends on how the property is categorized.[30] Generally, while *content* restrictions are constitutionally permissible in one particular type of forum, the government can never discriminate based on the *viewpoints* expressed in either public or nonpublic forums.[31]

### A. *The Three (or Four) Types of Public Forums*

Public forum doctrine has conventionally been split into three types of forums: traditional, designated, and nonpublic.[32] More recently, however, a fourth type has been added to the equation: the limited public forum.[33] To make matters more confusing, the "designated public forum" has sometimes been called a "limited public

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[28] Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S.Ct 2239, 2250 (2015).

[29] Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

[30] Norman T. Deutsch, *Does Anybody really Need a Limited Public Forum?*, 82 ST. JOHN'S L. REV. 107, 107 (2008).

[31] *See* Rosenberger v. Rector and Visitors of U. Virginia, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

[32] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983). The three traditional types of forums in *Perry* were the traditional public forum, the public forum created by government designation, and the nonpublic forum, to use the exact language. *Id.* at 46.

[33] *See generally* Deutsch, *supra* note 30, at 108.

forum," but then the "limited public forum" has also been used interchangeably with the "nonpublic forum."[34] The bottom line is the courts have been very inconsistent with the terminology, which could cause great uncertainty for future courts and the government.

A traditional public forum is one that has been traditionally used for expression, such as a park or public street.[35] This forum has "immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[36] In this forum, any content regulation or speaker exclusion is subject to strict scrutiny.[37] The state must show that any regulation on communication is necessary to serve a compelling state interest and the regulation is narrowly drawn to achieve that end.[38] In these forums, the government may only impose reasonable, content-neutral time, place, and manner restrictions.[39] One author writes that an example of such a restriction would be "closing a city street to demonstrations during rush hour if the presence would place an intolerable burden on traffic[;]"[40] however, the city could not ban demonstrations in particular because it would not be neutral with regard to the content of the speech in the forum.[41] Overall, traditional public forums are important because they set the standard of review for other types of public forums (strict scrutiny), and they are also the most protected forum.[42]

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[34] *Id.* at 108–109 ("[The limited public forum's] continued existence has caused doubt and confusion among the [circuits] particularly as to its relationship to the designated public forum and the nonpublic forum. The prevailing view in those courts is that it is a subset of the former, but there is also authority that it is a subset of the latter.").

[35] Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S.Ct 2239, 2250 (2015).

[36] *Perry*, 460 U.S. at 45 (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

[37] Deutsch, *supra* note 30, at 111.

[38] *Perry*, 460 U.S. at 45.

[39] *Id.* at 46.

[40] Kerry L. Monroe, *Purpose and Effects: Viewpoint-Discriminatory Closure of a Designated Public Forum*, 44 U. MICH. J. L. REFORM 985, 988 (2011).

[41] *Id.*

[42] Nathan W. Kellum, *If It Looks Like a Duck . . . .Traditional Public Forum Status of Open Areas on Public University Campuses*, 33 HASTINGS CONST. L.Q. 1, 3 (2005).

A designated public forum exists where the government intentionally opens up public property that has not traditionally been regarded as a public forum specifically for that purpose.[43] These are subject to the same regulations and standard of review as traditional public forums,[44] and are created only by purposeful government action.[45] An example of this type of forum would be a school designating a particular bulletin board as available for postings by any member of the public,[46] or a municipal theater designated for expression through performances.[47]

A nonpublic forum is an area that the state has reserved for other governmental purposes (not free public expression), but nonetheless allows some speech.[48] Here, the state can regulate subject matter and speakers so long as the regulation is reasonable in light of the purpose of the forum and is not an effort to suppress expression based on viewpoint (similar to a rational basis test).[49] The *Walker* case described a nonpublic forum to exist "where the government is acting as a proprietor, managing its internal operations."[50] The nonpublic forum operates at a much lower level of scrutiny, which is important because the reasonableness of the government's restriction of access to the nonpublic forum must be assessed in light of the purpose of the forum and the surrounding circumstances.[51] This point is especially important in the Court's analysis of the *Hazelwood* case.

Finally, while the limited public forum is technically the fourth added category, it can be considered somewhere in-between the des-

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[43] Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S.Ct 2239, 2250 (2015).

[44] Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998).

[45] *See* Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 802 (1985) ("The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse.").

[46] Monroe, *supra* note 40, at 988.

[47] *See generally* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1976).

[48] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

[49] *Id.* at 49.

[50] Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S.Ct 2239, 2251 (2015). (citing Int'l Soc. for Krishna Consciousness, Inc. v. Lee*,* 505 U.S. 672, 678–679 (1992)).

[51] Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 789 (1985).

ignated public forum and the nonpublic forum because different circuits have placed it on varied points of that spectrum.[52] This forum is the most unclear of them all, as it has been subject to many different interpretations and causes much confusion about the public forum doctrine.[53] The third part of this Note will explore the differences between the limited public forum, designated public forum, and nonpublic forum, if any; these differences are significant because as mentioned, the standard of review for content regulation could change if a limited public forum is more like a nonpublic forum than a designated public forum. Overall, the basic understanding is that a limited public forum occurs where the government has reserved a forum for certain groups or for the discussion of certain topics.[54]

### B. *Applying Public Forum Doctrine in Hazelwood*

Similar to the Reveille Seven and Fairmont State University examples above, the *Hazelwood* case involved student editors' decisions and administrators who disagreed with them.[55] This case revolved around the censorship of *Spectrum*, a newspaper written and edited by the Journalism II class at Hazelwood East High School.[56] The Board of Education allocated funds from its annual budget for the printing of *Spectrum*, which was combined with the proceeds from newspaper sales to fund the newspaper.[57] The standard practice was that the Journalism II teacher would submit page proofs of each *Spectrum* issue to Principal Robert Eugene Reynolds for his review prior to publication.[58]

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[52] *See* Marc Rohr, *The Ongoing Mystery of the Limited Public Forum,* 33 NOVA L. REV. 299, 332 (2009) ("The federal courts of appeals remain strikingly divided with respect to their understanding of what it means to pin the label 'limited public forum' upon a governmentally controlled property or channel of communication.").

[53] *See generally id.*

[54] Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S.Ct 2239, 2250 (2015) (citing Rosenberger v. Rector and Visitors of U. of Va., 515 U.S. 819, 829 (1995)).

[55] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 264 (1988).

[56] *Id.* at 262.

[57] *Id.*

[58] *Id.* at 263.

In this particular issue, Reynolds had a problem with two individual articles—one about students' experiences with pregnancy and one about the impact of divorce on students at the school.[59] Reynolds objected to the pregnancy story on the grounds that the students might be identified from the text and that the references to sexual activity might be inappropriate for some of the younger students.[60] Reynolds objected to the divorce articles because a student was identified and he believed it was wrong that the student's parents had not been given the opportunity to respond to their child's remarks.[61] Rather than addressing the problems with the students, Reynolds decided that there was no time to make changes, and simply deleted the two pages that contained the stories.[62] Because of these actions, former high school students on the staff filed suit in Federal District Court against the school and officials, as well as the school district, for violation of their First Amendment rights.[63]

The Court began its analysis by determining what type of forum *Spectrum* was.[64] Based on the simple definitions, it is clear that newspapers are not traditional public forums.[65] Continuing through the categories, the Court determined that school facilities are only to be deemed designated public forums if school authorities have "by policy or practice" opened those facilities for "indiscriminate use by the general public" or some segment of the public, such as student organizations.[66] If the school has not done that, then "no public forum has been created," and schools may impose reasonable restrictions on students' speech.[67] The Court turned to the policy and practice first.

According to Hazelwood School Board Policy 348.51 and the Hazelwood East Curriculum Guide, school sponsored publications

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[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* at 263–64.
[63] *Id.*
[64] *Id.* at 267
[65] *Id.* ("The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that 'time out of mind, have been used for purposes of assembly, communicating, thoughts between citizens, and discussing public questions.") (citing Hague v. CIO, 307 U.S. 496, 515 (1939)).
[66] *Id.* at 267.
[67] *Id.*

are developed within the adopted curriculum, and this particular Journalism II course was described as a "laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I."[68] A faculty member taught the course during regular class hours and the students received grades for their performance in the course.[69] As far as putting this policy into practice, the Court determined that the journalism teacher exercised a great deal of control over *Spectrum*, selecting the editors, scheduling publication dates, deciding the number of pages for each issue, assigning story ideas, editing the stories, and more.[70] The Court disagreed with the lower court's characterization of *Spectrum* as a public forum for that reason, writing that it seemed clear the school officials retained ultimate control over what constituted "responsible journalism" in a school-sponsored newspaper.[71] Therefore, under this reasoning, the Court determined *Spectrum* was a nonpublic forum and subject to content regulation in any reasonable manner given the purpose of the forum, which was teaching journalism.[72]

### C. *Hazelwood's Other Tests*

Due to the characterization of *Spectrum* as a nonpublic forum, the Court then had to determine if the regulation there was "reasonable."[73] This reasonableness analysis resulted in two other subsets of analysis—the pedagogical purpose test and the government speech test; the former set out to determine whether the censorship was reasonably related to legitimate pedagogical concerns[74] whereas the latter set out to determine whether the speech could be attributed to the school[75] and therefore constitute government speech.

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68 *Id.* at 268.
69 *Id.*
70 *Id.*
71 *Id.* at 269.
72 *Id.* at 270.
73 *Id.*
74 *Id.* at 273.
75 *Id.* at 271.

### 1. PEDAGOGICAL PURPOSE

The Court found that the intended purpose of the newspaper in *Hazelwood* was not to create a designated public forum, but instead was to reserve the forum as a supervised learning experience for journalism students.[76] As such, school officials would not violate the First Amendment if their actions were reasonably related to legitimate pedagogical concerns; here, those concerns dominated.[77] The Court has long recognized that First Amendment rights of students in public schools are not "automatically coextensive with the rights of adults in other settings."[78] Instead, schools are a "principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[79] Furthermore, educators are entitled to exercise control over student expression to assure participants learn lessons they are supposed to and to ensure students are not exposed to material that may be inappropriate for their level of maturity.[80]

In the context of this case and the deleted articles, the Court determined Principal Reynolds acted reasonably and had legitimate pedagogical concerns.[81] In regards to the student pregnancy article, the Court determined the principal acted reasonably because the article could have easily identified the pregnant students, and it failed to take into account privacy interests of the students' boyfriends and parents.[82] The article also contained information about the students' sexual histories, which would have been inappropriately placed into the hands of 14-year-old freshmen if allowed to print.[83] In regard to the divorce article, the Court also determined the principal acted reasonably because the article characterized one of the identified student's father as inattentive, but did not give him an opportunity to

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[76] *Id.* at 270.

[77] *Id.* at 273 ("This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.").

[78] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

[79] Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988) (quoting Brown v. Board of Education, 347 U.S. 483, 493 (1954)).

[80] *See Fraser*, 478 U.S. at 685.

[81] *Hazelwood*, 484 U.S. at 274.

[82] *Id.*

[83] *Id.* at 274–275.

defend himself as a matter of "journalistic fairness."[84] In light of these legitimate pedagogical concerns and the circumstances surrounding the tight deadline, the Court saw no problem with the complete deletion of two pages of *Spectrum*.[85]

### 2. GOVERNMENT SPEECH

The Court intertwined its government speech analysis with its pedagogical purpose reasoning, but seemed to present it as another factor to consider in a nonpublic forum. In *Hazelwood*, the Court did not view the question as whether the principal had authority to silence the students' personal expression on school premises, but instead viewed it as a question of the principal's authority over a school-sponsored publication that "the public might reasonably perceive to bear the imprimatur of the school."[86] This is especially concerning if the activity is part of a school curriculum like *Spectrum* was here. Just as educators are entitled to exercise control over the lessons students learn from exposure to this school-sponsored content, they also are entitled to exercise control so that the views of an individual speaker are not "erroneously attributed to the school."[87] Therefore, a school may "disassociate itself" from speech that interferes with its work or is "poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences"[88] because a school should be able to set standards for speech disseminated under its auspices.[89] This government speech analysis is important to consider and will be discussed later in this Note; especially important is whether it changes depending on funding, perception, and the education level.

Overall, the pedagogical purpose and government speech tests have sometimes been considered separate justifications for determining the forum, but they are most effectively used in conjunction

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84 *Id.* at 275.
85 *Id.* at 276.
86 *Id.* at 271.
87 *Id.*
88 *Id.*
89 *Id.* at 271–272.

with the determination of a nonpublic forum. This is because nonpublic forums are viewed in light of all the circumstances and the purpose of the forum.[90]

## II. APPLYING *HAZELWOOD* TO CASES SINCE

In Footnote 7 of the *Hazelwood* opinion, the Court explicitly stated, "[w]e 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."[91] However, the Court's decision to delay has caused much disarray in the years since, and it has yet to take an opportunity to clarify. In fact, in 2005 after the Seventh Circuit decided *Hosty v. Carter*, discussed in Part II B. *infra*, the Supreme Court had the perfect opportunity[92] to grant certiorari to review and clarify what was already a puzzling circuit decision, but ultimately the Court denied certiorari.[93] In typical fashion, the Court did not expand on its reasoning to decline, but in the wake of the decision, a professor interviewed by a concerned Tufts Daily student newspaper said "one should not conclude that [justices on the Supreme Court] agree or disagree with the ruling."[94]

While the Supreme Court's stance on *Hazelwood*'s applicability to college cases may be unclear, two circuits in particular have tried to take a stance. In 2001, one circuit found that college yearbooks were not nonpublic forums like high school newspapers, but were instead "limited" public forums.[95] Four years later, another circuit

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[90] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

[91] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 274 n.7 (1988).

[92] Mark Goodman, then-executive director of the Student Press Law Center, was one of the student press advocates pushing for the Court to grant certiorari. He said, "[t]he Supreme Court in *Hazelwood* in a footnote delayed the time until it had to clarify whether or not its ruling extended to college and university campuses . . . [w]ell, it's been almost 20 years, and we've seen that now is the time for the Court to decide this issue." *Supreme Court Asked to Take Up College Press Case*, FIRST AMENDMENT CTR. (Sept. 20, 2005), http://www.firstamendmentcenter.org/supreme-court-asked-to-take-up-college-press-case.

[93] Hosty v. Carter, 412 F.3d 731, 736 (7th Cir. 2005), *cert. denied*, 546 U.S. 1169 (2006).

[94] *A 'Disturbing Trend' Towards Censorship?,* TUFTS DAILY (Apr. 6, 2006), https://tuftsdaily.com/archives/2006/04/06/a-disturbing-trend-towards-censorship/.

[95] *See* Kincaid v. Gibson, 236 F.3d 342, 346 (6th Cir. 2001).

suggested that college newspapers may well be akin to high school newspapers, though it was ultimately unclear what type of forum the court characterized them to be.[96] Overall, courts have used the public forum analysis applied in *Hazelwood*, but there is no set dispositive factor that determines what type of forum a college publication may be, which highlights the need for clarity and notice.

### A. *College Publications as Limited Public Forums*

Today *Kincaid v. Gibson* is considered a win for the college media community, but it did not start that way. In 1999, the Sixth Circuit decided that a student-run college yearbook was parallel to the high school newspaper in *Hazelwood*, determining that the college administrators were held to the same lenient standard as the high school principal, and that the yearbook was a nonpublic forum.[97] However, the Sixth Circuit granted a rehearing and ruled *en banc* in 2001 that the previous panel had erred; the yearbook was not a nonpublic forum, but instead a limited[98] public forum.[99] One law review author cannot emphasize the importance of this decision enough, writing:

> [h]ad the en banc majority not stepped in to reverse the prior decisions, the Sixth Circuit could have become ground zero for a censorship tsunami. Had college deans followed the lead of high school principals, many would have seized the opportunity to squash vital journalistic enterprises at the college level and transform them into cheerleaders, helplessly purveying school spirit . . . [s]tudents who followed the rules would have learned mistakenly that journalists are servants of the state. Students who

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[96] *See* Hosty v. Carter, 412 F.3d 731, 735 (7th Cir. 2005).

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

[98] This "limited public forum" terminology is admittedly confusing as the use of this vocabulary is the subject of this Note. Consider the limited public forum in this context only as the Sixth Circuit has described it. It seems that the circuit defined the limited public forum as either synonymous or a subcategory to the designated public forum, not a nonpublic forum.

[99] Kincaid v. Gibson, 236 F.3d 342, 346 (6th Cir. 2001).

> dared defy suppression of their expression—if they survived as journalists—would have been forced underground to practice on a shoestring with limited campus access, no advice, and no accountability.[100]

However, what did the *Kincaid* court in 2001 see that the court did not in 1999? What exactly did the opinion mean by a limited public forum? Why was this a win for college media?

The publication at issue in *Kincaid* was *The Thorobred*, a student yearbook at Kentucky State University composed and produced by students with limited advice from the university's publications adviser.[101] The censorship took place when KSU's President and Vice President for Student Affairs confiscated the student-produced yearbooks once they came back from the printer and withheld them from the community.[102] In particular, the administration objected to the purple cover of the yearbook (not the official school colors), its "destination unknown" theme that revolved around the uncertainty in students' lives, the lack of captions under photos, and the inclusion of current national and world events unrelated to the university.[103]

To determine whether the officials violated the students' First Amendment rights when confiscating the yearbooks, the *Kincaid* court turned to the public forum analysis just like the Supreme Court in *Hazelwood*.[104] From the outset, the students maintained that *The Thorobred* was a limited public forum (in this context they equated limited to the designated public forum standard) while the university officials maintained that it was a nonpublic forum subject "to all reasonable regulations that preserve the yearbook's purpose."[105] To determine which was correct, the court evaluated KSU's policy and

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100 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, 484 (2001).

101 *Kincaid*, 236 F.3d at 344–345.

102 *Id.* at 345.

103 *Id.*

104 *Id.* at 347.

105 *Id.* at 348.

practice, the nature of the yearbook and its compatibility with expressive activity, and the context in which the yearbook was found.[106]

The court found that both the university's written policy and the structure it created to oversee the yearbook showed KSU intended it to be a limited public forum.[107] The policy put editorial control in the hands of the student editor or editors, and even limited the appointed adviser's role to "assuring that the . . . yearbook is not overwhelmed by ineptitude and inexperience."[108] The university tried to counter the court's policy interpretation by pointing to a disclaimer on the student newspaper, which read that the views expressed were not necessarily that of the university.[109] Officials argued that because there was no such disclaimer on the yearbook, the logic was that the university intended to maintain control over the yearbook even if it did not maintain control over the newspaper.[110] The court dismissed this argument, calling it "inferential gymnastics."[111] Furthermore, the court determined that practice echoed the policies, as the school had never before confiscated or censored any of the yearbook's content.[112]

The *Kincaid* court did add one particularly strong argument to support its limited public forum determination, going "out of its way" to write about the University setting in particular.[113] The court wrote that the context solidified this categorization because "[t]he university is a special place for purposes of First Amendment jurisprudence," describing it as a quintessential place for the "marketplace of ideas."[114] As Professor Richard J. Peltz wrote in his law review article, this court distinguished its forum analysis from *Hazelwood* in two ways: First, contrasting the yearbook with a class-

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106 *Id.* at 349.
107 *Id.* at 351.
108 *Id.* at 349.
109 *Id.* at 350.
110 *Id.*
111 *Id.* at 351.
112 *Id.*
113 Peltz, *supra* note 100, at 530.
114 *Kincaid*, 236 F.3d. at 352.

room activity where assignments are instructed and graded; and second, emphasizing that college students are not immature audiences, but instead adults.[115]

Overall, while this decision was considered favorable in the college media world, Peltz suggests that careful interpretation of the decision could provide a "roadmap for university administrators to seize control of their student media" due to its concentration on written policy and disclaimers.[116] By that logic, universities can learn from KSU's mistakes exactly how to word their student media policies so that they can retain control. On balance, however, *Kincaid* certainly emphasizes the importance of expressive freedom in the college context that other cases have failed to do.

### B. *The Confusion of Hosty v. Carter*

While many debate the meaning of the Seventh Circuit's *Hosty v. Carter* decision, one thing seems to hold true: *Hosty* suggests that an extracurricular college newspaper *could* be categorized as a non-public forum depending on the circumstances.[117] Countless authors have written about the negative implications of *Hosty v.* Carter, describing the decision as "paradoxical"[118] and "unwise"[119] with "chilling effects,"[120] just to name a few. The court in *Hosty* also faced much criticism for its infamous line in which it stated that

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[115] Peltz, *supra* note 100, at 530.

[116] *Id.* at 536.

[117] *Hosty v. Carter*, 412 F.3d 731, 736 (7th Cir. 2005) ("Now take away the course credit and assume that the alumni magazine hires students as stringers and pays by the word for any articles accepted and printed. The University would remain the operator of this non-public forum and could pick and choose from among the submissions, printing only those that best expressed the University's own viewpoint. Thus although, as in *Hazelwood*, being part of the curriculum may be a *sufficient* condition of a non-public forum, it is not a *necessary* condition.").

[118] Jessica B. Lyons, *Defining Freedom of the College Press After Hosty v. Carter*, 59 VAND. L. REV. 1771, 1775 (2006).

[119] Jessica Golby, *The Case Against Extending Hazelwood v. Kuhlmeier's Public Forum Analysis to the Regulation of University Student Speech*, 84 WASH. U. L. REV. 1263, 1264 (2006).

[120] Laura Merritt, *How the Hosty Court Muddled First Amendment Protections by Misapplying Hazelwood to University Student Speech*, 33 J. C. & U. L. 473, 494 (2007).

there is "no sharp difference between high school and college papers."[121] Ultimately, the case was not decided on the forum analysis question, but instead qualified immunity.[122] The dean received qualified immunity because the court determined that the law regarding college publications was sufficiently unclear such that a reasonable person in the dean's position could not be expected to know how to handle the situation.[123] This Note argues that this statement in itself is a red flag that indicates the need for clarity in college publication cases.

Like so many other college publication cases, *Hosty v. Carter* began with a determined editor-in-chief of the *Innovator* student newspaper who encouraged her student reporters to write about "meatier"[124] issues going on at the university. The Governors State University administration took "intense interest" in the paper after Margaret Hosty, one of these reporters, wrote an article criticizing the integrity of Roger K. Oden, the Dean of the College of Arts and Sciences.[125] After the paper refused to retract factual statements the administration deemed false or print the administration's response, a university dean called the *Innovator's* printer and told it not to print any issues that she had not reviewed and approved in advance.[126] Publication ceased when the editors refused this deal, and litigation ensued.[127]

The court began its opinion by holding that the *Hazelwood* framework applies to subsidized newspapers at colleges as well as elementary and secondary schools, and therefore started with the public forum doctrine.[128] The court dismissed the plaintiffs' argument that the *Innovator* was an extracurricular activity—not part of any curriculum like the paper in *Hazelwood*—and due to that fact alone it was beyond all control.[129] Instead, the court presented a scenario where an extracurricular newspaper could still be a nonpublic forum, such as an alumni magazine that hires students as stringers

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121 *Hosty*, 412 F.3d at 735.
122 *Id.* at 739.
123 *Id.*
124 *Id.* at 732.
125 *Id.* at 732–733.
126 *Id.* at 733.
127 *Id.*
128 *Id.* at 735.
129 *Id.* at 736.

and pays by the word for articles that express the University's viewpoint.[130] However, the court also went through several different scenarios where a newspaper could be considered a designated public forum (the court also called this a limited-purpose public forum); for example, it compared a newspaper to the decision of *Good News Club*,[131] where classrooms used for after-school meetings were limited public forums (designated public forums limited to certain groups) and any student group could use the space.[132] The court wrote, "[i]n the same way, a school may declare the pages of the student newspaper open for expression and thus disable itself from engaging in viewpoint or content discrimination while the terms on which the forum operates remain unaltered."[133] Even though the court seemed to side with this argument, writing "the editors were empowered to make their own decisions, wise or foolish, without fear that the administration would stop the presses,"[134] the qualified immunity part of the decision released the Dean from all liability.[135]

Critics of the *Hosty* case point to its unclear forum analysis and ramifications for future application of *Hazelwood* to college newspapers.[136] Jessica B. Lyons wrote that *Hosty* merely held that college newspapers *could* be designated public forums, not that they *always* are.[137] Yet, *Hosty*'s hypothetical scenarios left gaping holes that make it impossible to predict when a future court would determine a newspaper is a designated public forum, especially considering the *Hosty* court's lackluster attempts at discussing financials and how school subsidization comes into play. Lyons also argues that this case ignores *Kincaid*, yet suggests there should be a presumption that college newspapers are designated public forums.[138] This characterization seems out of place, as *Hosty* and *Kincaid* may both be suggesting the same thing: that college newspapers are better classified as designated public forums (or limited according to the terminology used in *Kincaid*, but the court still meant the same). If

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130 *Id.*
131 *Id.* at 737.
132 *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001).
133 *Hosty*, 412 F.3d at 737.
134 *Id.* at 738.
135 *Id.*
136 *See, e.g.*, Merritt, *supra* note 120, at 489; Lyons, *supra* note 118, at 1775.
137 *See* Lyons, *supra* note 118, at 1786.
138 *Id.*

*Hosty* suggests that *Kincaid* got it right, why do we consider *Hosty* to have declined to follow *Kincaid*?[139] These questions are difficult to answer as case law stands now, which is why the two most prominent college publication cases provide no firm guidance on whether *Hazelwood* applies to college newspapers or not.

### C. *Non-Press Cases Emphasizing Hazelwood's Other Tests*

Several circuit cases, though not specifically related to college publications, have used the educational mission of the universities and their control to permit regulating speech, which then impacted the forum characterization.[140] These cases are interesting, as *Hazelwood* is interpreted to apply these tests *after or at the same time* the court determines it is a nonpublic forum, whereas these cases use these factors *beforehand* in order to determine the type of forum. In the following cases, *Hazelwood's* secondary tests seem to be used as the primary tests to determine a nonpublic forum in the first place. One case seems to turn on student campaign literature being a nonpublic forum because it was part of a curriculum,[141] while the other case focuses on the campus speech actually being the school's own speech[142] and therefore regulable.

In *Alabama Student Party v. Student Government Ass'n*, students interested in running for office brought suit against their student government association for regulations regarding campaign literature distribution and debates.[143] The court determined that the proper analysis centers on the level of control a university may exert over school-related activities of its students, and the question was whether the university could regulate the student government association.[144] Further, the court compared this case to the *Hazelwood* decision and even stated that in depositions the university claimed it views its student government association, including the elections, as a "learning laboratory" similar to a student newspaper.[145] Because

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139 *Id.*

140 *See generally* Alabama Student Party v. Student Gov't Ass'n, 867 F.2d 1344 (11th Cir. 1989); Cummins v. Campbell, 44 F.3d 847 (10th Cir. 1994).

141 *Alabama Student Party*, 867 F.2d at 1347.

142 Cummins, 44 F.3d at 853.

143 *Alabama Student Party*, 867 F.2d at 1345.

144 *Id.* at 1345–46.

145 *Id.* at 1347.

of that direct comparison, the court wrote that the statements constituted a supervised forum reserved for an intended purpose.[146] This was a fascinating way to get to the conclusion the court did, and it seemed the court almost placed academic order on an equal footing, if not more important, than the marketplace of ideas argument from *Kincaid*. The court very tellingly quoted *Regents of University of Michigan v. Ewing*, saying universities should be given great deference because "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself."[147] Therefore, the court in *Alabama Student Party* appeared to primarily use *Hazelwood's* pedagogical purpose test to determine that there was a nonpublic forum.

The Tenth Circuit in *Cummins v. Campbell* used a similar roundabout reasoning, this time justifying its decision with *Hazelwood's* government speech prong.[148] In *Cummins*, Oklahoma State University temporarily banned the showing of a controversial film called "The Last Temptation of Christ" by the Student Union Activities Board.[149] At a Regents meeting, the Regents questioned whether the film should be shown partly because of concerns about entanglement between a state university and religion since the Student Union Activities Board was sponsored through OSU funds, personnel, office, and theatre use.[150] The Regents did not want it to seem as if the school was sponsoring the movie.[151] The Court agreed with the Regents' point of view, and cited to *Hazelwood*[152] in holding that the Regents did not restrain anyone's speech but its own.[153] The SUAB was not an independent student organization, but rather an *agent* of

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146 *Id.*

147 *Id.* (quoting Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985)).

148 Cummins v. Campbell, 44 F.3d 847, 853 (10th Cir. 1994).

149 *Id.* at 849.

150 *Id.*

151 *Id.*

152 *Id.* at 853.

153 *Id.* at 852 ("The Regents' decision whether to allow the film to be shown may be viewed as nothing more than OSU deciding whether *it* wanted to speak or to sponsor specific speech.").

OSU.[154] This decision completely eliminated the need to even categorize the SUAB as a type of forum, instead simply stating no censorship existed because an entity cannot censor itself.[155]

## III. DECIPHERING CONVOLUTED PUBLIC FORUM DOCTRINE

As this Note has demonstrated up until this point, courts have engaged in forum analyses like the Court in *Hazelwood* to determine if there has been unconstitutional censorship. While some courts may have come to similar to conclusions, the results leave ambiguity simply because of a misunderstanding regarding the public forum vocabulary. One author even goes as far as to simply declare anything in-between traditional and nonpublic forums as the "middle forum" due to the "muddled" public forum doctrine.[156] When college press advocates consider what forum would best protect college newspapers, they often encourage students to have their universities declare them designated public forums.[157] In fact, LoMonte of the Student Press Law Center stated that under no circumstances should college newspapers push to be considered limited public forums because there is too much confusion surrounding the term, even in spite of the *Kincaid* court determining limited public forums are equal to designated public forums.[158] The goal should be to create a place for expression where journalists are protected from content regulation, and any regulation is subject to strict scrutiny. With that in mind, is LoMonte's warning about limited public forums misplaced or justified? This part of the Note supports the latter.

### A. *The Supreme Court's Guidance, or Lack Thereof*

First, it is important to consider the most recent decisions and how the Court currently distinguishes designated public forums and limited public forums, if at all. In the 2015 case *Walker v. Texas*, the Court *seemed to* separately define these two terms, briefly writing:

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154 *Id.* at 853.

155 *Id.*

156 Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140, 2141 (2009) [hereinafter *Middle Forum*].

157 *See* LoMonte, *supra* note 21.

158 *See id.*

It is equally clear that Texas' specialty plates are neither a 'designated public forum,' which exists where 'government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose,' . . . nor a 'limited public forum,' which exists where a government has 'reserv[ed a forum] for certain groups or for the discussion of certain topics.'[159]

However, note that this description does not discuss whether the limited and designated forums are in fact separate entities, or if the limited forum is a subcategory of the designated public forum, or a subcategory of the nonpublic forum. This is necessary to understand in order to determine if either is fitting to classify a subsidized student newspaper.

In "The Ongoing Mystery of the Limited Public Forum," Professor Marc Rohr writes that circuits are "strikingly divided" over the correct definition.[160] Rohr writes that some circuits consider the limited public forum a "subset of the designated public forum," which exists where "the government opens up a nonpublic forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subject[s]," while other circuits simply use the limited public forum synonymously with the nonpublic forum.[161] To make it worse, Rohr also writes that one panel of the Tenth Circuit stated in a decision that a "designated public forum for a limited purpose" and a limited public forum are not interchangeable terms like the former understanding would suggest, complicating matters to an "intolerable degree."[162] This statement can be demonstrated through the *Hosty* case, where the Seventh Circuit equated a designated public forum to a limited-purpose public forum.[163] Clearly, it is a mess.

The average person may ask why the terminology even matters, but whether the limited public forum leans more toward designated public forums or more toward nonpublic forums is critical. As one author notes, "one elevates the middle forum to a status equivalent

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159 Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S.Ct. 2239, 2250 (2015) (citing Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

160 Rohr, *supra* note 52, at 332.

161 *Id.* at 332, 334.

162 *Id.* at 335.

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

to the traditional public forum, while the other protects speech no more than in nonpublic fora."[164] The importance of this distinction is especially evident in light of decisions such as *Hosty*, where an administrator received qualified immunity because it was impossible for a reasonable person to understand the law.[165] Unfortunately, these categories, specifically the designated/limited distinction, have been unclear since their inception.

*Perry Education Ass'n v. Perry Local Educator's Ass'n*[166] has long been considered the leading case on forum analysis. *Perry* was the first formal introduction to the types of forums: traditional, designated, and nonpublic,[167] but in this opinion Justice White also introduced the fourth category of the limited public forum.[168] It is unclear the exact definition, however, because Justice White discussed the limited public forum in rather broad terms in the body of the opinion, but also introduced a rather narrow definition in a footnote, which stated, "[a] public forum may be created for a limited purpose such as use by certain groups."[169] A Note in the Harvard Law Review states that *Perry* results in two ideas of the limited public forum: the one described in the body of the opinion where a previously closed space is opened up to the public generally for the purposes of expressive activity, and the one described in the footnote where the government has opened up to a selected group of speakers chosen by identity or subject matter on which they will speak.[170] The Supreme Court's later decision in *Rosenberger v. Rectors and Visitors of University of Virginia*[171] seemed to lean toward the limited concept in the *Perry* footnote, but again left the law ambiguous because that case was decided based on viewpoint discrimination, which is unconstitutional—no matter the forum.[172]

Every author that writes on this subject has his or her own opinion about which way the limited public forum leans on the designated to nonpublic spectrum. Some even argue that it is time to

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164 *Middle Forum*, *supra* note 156, at 2146.
165 *Hosty*, 412 F.3d at 739.
166 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).
167 *Id.* at 45–46.
168 *Id.* at 46–47.
169 *Id.* at 46, n.7.
170 *Middle Forum*, *supra* note 156, at 2145–46.
171 Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995).
172 *See Middle Forum*, *supra* note 156, at 2147.

"bury the limited public forum as a separate and distinct category because as a practical matter it serves no useful purpose."[173] Perhaps they are all right, and that is the problem with the limited public forum. At this point in the history of public forum jurisprudence, no one can say with certainty what the limited public forum is. Therefore, when LoMonte says that student newspapers should veer away from pushing to be classified as limited public forums,[174] he is giving sound advice. However, in my opinion his advice falls short in pushing these same student newspapers to look for designated public forum classification, primarily because it is difficult to persuade courts to recognize them as such. The fact is that all of this terminology that falls into the "middle forum" of categorization is too dangerous, even though designated public forums offer high protection. Ideally, we want to live in a world where no college administrator could be exonerated of liability by claiming that the law is too hazy, so it is time to make it clear, at least when it comes to college newspapers.

Moreover, one must also account for the way that the current jurisprudence is so deferential to government, allowing for manipulation. Even if all student newspapers were to come out tomorrow and declare themselves presumed designated public forums, this, too, presents an opportunity for abuse. As Jessica Golby writes in her law review article, public forum doctrine places a great deal of control in the hands of public school administrators and the government in general.[175] She points to an excerpt from the Supreme Court's decision in *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, where the Court stated, "[w]e will not find that a public forum has been created in the face of clear evidence of a contrary intent."[176] If a university were to explicitly state its desire to control student media as nonpublic forums, even in light of other factors such as actual practice, context, and the nature of the forum, she argues that

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173 Deutsch, *supra* note 30, at 109.

174 *See* LoMonte, *supra* note 21.

175 Golby, *supra* note 119, at 1279.

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

it is likely a court would "consider a clear statement of intent dispositive."[177] How then would that coincide with a student newspaper that came out with a contrary statement such as the Mustang Daily News did at California Polytechnic State University?[178] This student newspaper released a column after *Hosty v. Carter* to protect itself, writing, "[t]he Mustang Daily is a public forum. It is a medium where student views are expressed without censorship."[179] Would this carry any weight if a university-written policy said the opposite? Overall, it would be ideal if newspapers could be considered designated public forums, but this effort could be futile in the end.

Here lies the problem with the public forum doctrine. This Note has shown that courts apply the forum categories differently, and even when deciding on one category, the fight may not be over. A new, clearly defined category will address the confusion of the limited public forum as well as the deference problem in designated public forum analysis. This category, the Tailored Public Forum, should be the starting point for any college newspaper censorship case—no matter how much funding a newspaper receives from its university. In fact, all college newspapers should be *presumed* to be Tailored Public Forums. There would be no discussion of intent, no examination of written policies and actions; college newspapers would simply be Tailored Public Forums. If universities are not willing to open up these forums, they should not have college newspapers, and then face the consequences of limiting the marketplace of ideas in their colleges.

### B. *Introducing the Tailored Public Forum*

The name of a public forum should describe itself, which is exactly what the Tailored Public Forum would do. It is "tailored" because the government could regulate the speakers in the forum, limiting it to only student newspaper staff members and any staff-approved guests, for example. However, once the public forum has been tailored to that group, any content regulation would be subject to strict scrutiny just as in a traditional or designated public forum.

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177 *Id.*

178 *From the Editor: Mustang Daily is a Public Forum*, MUSTANG DAILY (Nov. 8, 2005), http://mustangnews.net/mustangdailyisapublicforum/.

179 *Id.*

The students thus would have complete editorial control, subject to content-neutral time, place, and manner restrictions.

This classification would clarify forum doctrine and protect student journalists. Professor Peltz wrote in his article that "the best defense of the college press is a good offense" because "[g]overnment officials in public colleges and universities invariably will try to . . . water down the news or to whitewash memories of real life ups and downs."[180] Why must we accept this unnecessary and blatant violation of the First Amendment and leave the burden on college newspapers to be proactive preventing their own censorship? This must change.

## IV. WHY COLLEGE NEWSPAPERS DESERVE A TAILORED PUBLIC FORUM CATEGORY

### A. *Colleges Should Operate Under the Spheres of Neutrality Approach*

Professor David Cole presents one of the best perspectives on government-funded speech in his spheres of neutrality approach.[181] In this approach, he states that publicly funded institutions play a role in maintaining a robust dialogue and autonomous citizenry, and as such he argues that the government should be required to afford a degree of independence to institutions and speakers, even if they only exist as a result of government funding, "toward the end of ensuring a vigorous public debate and avoiding the perils of indoctrination."[182] In the context of public forum doctrine and the press specifically, he stated that the "government cannot avoid first amendment scrutiny by arguing that it has no obligation to subsidize the exercise of constitutional rights."[183] He further stated that it should be possible for universities to insulate decisions such as teaching history or editing the news from "the political actors most likely to indoctrinate or otherwise dominate the market."[184] All of his points

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180 Peltz, *supra* note 100, at 555.

181 *See* David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 681 (1992).

182 *Id.*

183 *Id.*

184 *Id.* at 738.

illustrate why society needs a Tailored Public Forum category for college newspapers.

Professor Cole also pointed out that the Court has said the press "plays a unique role as a check on government abuse,"[185] and the college press is no different. Today, universities struggle to find the balance Professor Cole speaks of when it comes to political actors. It is no surprise that universities would rather their student newspapers be nonpublic forums so that they can justify regulation of their content. Bad press could affect admission applications,[186] donations,[187] and general satisfaction at these colleges, and if the student newspaper is writing about the chancellor who was fired or the fundraiser who embezzled money, it could have a negative impact on the university. Classifying college newspapers as nonpublic forums, like *Hazelwood*, results in none of the government independence Professor Cole would advocate for.[188] Instead, it could "diminish students' appetite for the truth, depress the vigor of campus media, or least of all, worsen the quality of professional journalism."[189]

### B. *College Newspapers Are Dissimilar to Hazelwood and Should Not Be Nonpublic Forums*

Contrary to *Hosty*'s famous words,[190] there is a sharp difference between high school and college papers because there is a sharp difference between high schools and colleges. The Tailored Public Forum presumption is necessary because as the public forum jurisprudence stands now, there is a possibility a court could misinterpret a college newspaper as a nonpublic forum, which would be improper.

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185 *Id.* at 731 (quoting Leathers v. Medlock, 499 U.S. 439, 445 (1991)).

186 *See* Michael McDonald & John Lauerman, *Dartmouth Applications Drop After Tumultuous Year of Protests*, BLOOMBERG (Feb. 11, 2014), https://www.bloomberg.com/news/articles/2014-02-10/dartmouth-freshman-applications-drop-14-prompting-scrutiny.

187 *See* Kristen Chung, *How is UNC's Brand Doing After Years of Scandal?*, THE DAILY TAR HEEL (Apr. 15, 2014, 5:20 PM), http://www.dailytarheel.com/article/2014/04/how-is-uncs-brand-doing-after-years-of-scandal.

188 *See generally* Cole, *supra* note 181.

189 Peltz, *supra* note 100, at 555.

190 Hosty v. Carter, 412 F.3d 731, 735 (7th Cir. 2005).

### 1. ABSENCE OF SOLE FUNDING AND INCORPORATION INTO CURRICULUM

The Court determined that the high school newspaper in *Hazelwood* was a nonpublic forum largely due to the fact that *Spectrum* was funded as part of the class curriculum, and students received grades for their assignments.[191] On the contrary, college newspapers should be opened up as Tailored Public Forums and afforded the protection of traditional public forums because very few are part of a college curriculum, even if they are subsidized, and funding alone should not deem the newspaper's actions government speech. Many student newspapers are funded in part by student fees, which arguably should not give the university a stake in the content.

*The Daily Targum* at Rutgers University, for example, is funded by student fees but considered "independent"; on the Rutgers' website it states the newspaper "is not funded by the university and does not request funds from government associations, university groups, or departments for its operating costs. This keeps the editorial content free of influence."[192] Instead, the students have the right to waive the fee if they do not wish to support the newspaper.[193] However, the balance of power might change at a university where hypothetically the school funds half of the newspaper's operating budget and the student fees fund the other half. If students are paying fees toward funding the newspaper, does the interest of the students in receiving unbiased and thoughtful journalism, no matter how damaging to the university's brand, outweigh the university's desire to avoid bad press? The way public forum doctrine stands now, this would be an incredibly difficult question to answer.

### 2. ABSENCE OF INSTITUTIONAL OVERSIGHT

Aside from the funding, college newspapers also have less oversight than high school newspapers do. Even where there are advisers, they play more supportive roles rather than exercise editorial control like the journalism teacher in *Hazelwood*.[194] For example,

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191 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 268 (1988).

192 *Tuition and Fees*, RUTGERS, http://studentabc.rutgers.edu/tuition-and-fees (last visited Jan. 22, 2017).

193 *Id.*

194 *Hazelwood*, 484 U.S. at 268.

one adviser at the University of Minnesota Duluth wrote in a blog post:

> In general, we are not the editor of the student newspaper, nor are we the coach. I must refrain under almost all circumstances from telling the student newspaper what to do . . . [t]he advisor's role is very limited in order to allow the students their legal rights to a free press.[195]

There is even a formal College Media Association Adviser's Code of Ethics, which states that advisers are under an obligation to teach without censoring, editing, or directing, and that, "[a]dvisers should be keenly aware of the potential for conflict of interest between their teaching/advising duties and their roles as university staff members and private citizens."[196] In other words, advisers are discouraged from using their positions as university staff members to influence editorial decisions. Therefore, whereas in *Hazelwood* and *Cummins* there seemed to be clear institutional involvement that resulted in government speech, that type of involvement is minimal at a college newspaper.

### 3. AGE & ABSENCE OF PEDAGOGICAL PURPOSE

Finally, the pedagogical purpose test loses much of its strength in the college setting. As Martin Redish and Kevin Finnerty articulated, most students in college have achieved "majority status," and therefore are more capable of using their judgment in evaluating speech than minors are.[197] There is no need for the university to ensure that "readers or listeners are not exposed to material that may be inappropriate for their level of maturity,"[198] because these are adults in a college audience. Furthermore, "colleges historically

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[195] Drew Digby, *The Journalism Advisor's Role*, UNI. OF MINN. DULUTH (Jan. 16, 2006), http://www.d.umn.edu/~ddigby/advising.htm.

[196] *CMA's Code of Ethical Behavior*, COLLEGE MEDIA ASS'N, http://www.collegemedia.org/about_cma/code_of_ethics/ (last visited Jan. 22, 2017).

[197] Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 82 n.80 (2002).

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

have taken it upon themselves to cultivate creativity, experimentation, and a 'marketplace of ideas,' and such free expression rights are less recognized in primary and secondary schools."[199]

### C. *The Institution's Role in Educating Young Journalists*

Another argument that weighs against college newspapers being nonpublic forums is one that focuses on a different pedagogy—that of the student journalists. In his writing, Professor Peltz imagines a world where the censorship tsunami (that would have been caused by *Kincaid* had the court ruled the other way) produces a "generation of college-trained journalists with no practical experience handling controversial subject matter[s]."[200] Professor Peltz argues that professional journalism already takes a hit because he states it is the lowest-paying job to require college training, and this would have caused it to decline even further.[201] For example, he writes that the same journalist discouraged from pursuing a story about the university president's use of public funds to remodel his home would, as a professional, fail to pursue a story about the state governor spending public money on personal expenses.[202]

Professor Peltz's point is valid, as college newspapers have the two-fold job of providing a public service and also training the next generation of journalists. One college newspaper editor-in-chief echoed this sentiment at the University of Houston, writing that college newspapers are tasked with being the voice of the students.[203] She wrote that there is value in an editorially independent student newspaper because "[n]ot only does it allow for journalists-to-be to train for the workforce, but [it] enables them to have a safe place to make mistakes, learn about all aspects of media and becom[e]

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[199] Mark J. Fiore, *Trampling The "Marketplace of Ideas": The Case Against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915, 1955 (2002).

[200] Peltz, *supra* note 100, at 535.

[201] *Id.*

[202] *Id.*

[203] Glissette Santana, *Letter From the Editor: There's Value in a Student Newspaper*, THE COUGAR (Oct. 7, 2015), http://thedailycougar.com/2015/10/07/letter-editor-theres-value-student-newspaper/.

deeper embedded in the university and education they are getting."[204] While this argument may only pertain to the students on the newspaper and not the greater good of the university, it certainly cannot be dismissed.

### D. *Recent Progress in this Area and What to Do in the Meantime*

This Note demonstrates the need for a Tailored Public Forum to best protect college newspapers from the ambiguity of current public forum doctrine, but that is easier said than done. Of course, to create such a forum in the eyes of the law by the judicial route, the Supreme Court would need to grant certiorari to a college newspaper appeal and change public forum doctrine in its opinion to reflect this standpoint. That may be years away, but there is something to be done in the meantime.

At the time this Note was edited, ten states had laws limiting the censorship discretion of school officials,[205] but the most admirable is that of the Illinois College Campus Press Act.[206] Not only does this Act clearly state that all university newspapers in the state of Illinois are public forums, but it also curbs any thoughts of using a government speech defense in litigation, stating: "Expression made by a collegiate student, journalist, collegiate student editor, or other contributor in campus media is neither an expression of campus policy nor speech attributable to a state-sponsored institution of higher learning."[207]

At the time the Illinois State Legislature passed the bill, the bill's sponsor and State Senator Susan Garrett said, "It just made sense to me that college journalists should have the same types of opportu-

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[204] *Id.*

[205] Email from Frank LoMonte, Executive Director, Student Press Law Center, to author (Dec. 20, 2016, 9:21 AM) (on file with author) ("To be more specific, there are five states with statutes that comprehensively protect press freedom at both the college and K-12 levels (California, Oregon, North Dakota, Illinois, Maryland) and five that protect only K-12 (Arkansas, Iowa, Kansas, Colorado, Massachusetts).").

[206] College Campus Press Act, Illinois Gen. Assemb., Public Act No. 095-0580, http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=095-0580 (last visited Jan. 22, 2017).

[207] *Id.* at § 25.

nities to present their material as journalists in the professional media," also commenting that student newspapers "shouldn't be subjected to prior review by public university administrations, because that really stifles free speech."[208] Therefore, in the meantime, all states should enact a similar law, and could even delve further into the public forum definitions. While the Illinois College Campus Press Act does state that all college media fall into the public forum category, if the language were to detail the aspects of a Tailored Public Forum, that would provide even more clarity. The description could specify, for example, that a university may restrict the forum to the college newspaper staff and staff-approved guests, but any content regulation would be subject to strict scrutiny in the courts.

States enacting legislation similar to Illinois' is a strong solution to the censorship that colleges face, but that, too, would take time. The legislatures may not move quickly enough to protect student newspapers, but universities can. Therefore, this Note's last suggestion is that in the short term, each college newspaper editor should push his or her university to state that its college publications have the qualities of Tailored Public Forums. We know that courts look to the written policy and practice, so this is the very least universities can do, even though the Free Speech Clause ought to protect students without all of this legislation to begin with.

## CONCLUSION

Interpretation of the public forum doctrine is ridden with inconsistencies, and it is no wonder that college newspapers are unable to protect themselves in light of it. If the Supreme Court were to create a Tailored Public Forum category for college newspapers, this would eliminate the need to debate whether *Hazelwood* applies, whether *Kincaid* was correct, or what *Hosty* even decided. To reiterate this Note's arguments, this change is not just necessary for courts to rule correctly. Instead, this change is necessary so that all administrators know what they can and cannot do, and all students can operate their newspapers without fear of retaliation. The value of college newspapers is tremendous, but that value will diminish if

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[208] Luke Sheahan, *Illinois State Legislature Passes Student Press Bill*, FIRE.ORG (June 8, 2007), https://www.thefire.org/illinois-state-legislature-passes-student-press-bill/.

we allow student newspapers to spend chunks of their budgets on litigation, only to be told in the end that their editorial freedom is a façade.