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### Stop the Presses! Seventh Circuit Censors College Student Media

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**STOP THE PRESSES!  
SEVENTH CIRCUIT CENSORS  
COLLEGE STUDENT MEDIA**

JULIA R. LISSNER<sup>\*</sup>

Cite as: Julia R. Lissner, *Stop the Presses! Seventh Circuit Censors College Student Media*, 1 SEVENTH CIRCUIT REV. 182 (2006), at <http://www.kentlaw.edu/7cr/v1-1/lissner.pdf>.

INTRODUCTION

For over the last three decades, the United States Supreme Court has consistently held that officials at public colleges and universities must operate within the confines of the First Amendment, and are thus generally precluded from impinging upon the fundamental rights of college and university students to freedom of speech and freedom of the press.<sup>1</sup> Nonetheless, in June, 2005, the Court of Appeals for the

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<sup>1</sup> See *Rosenberger v. Rector*, 515 U.S. 819 (1995) (university officials constitutionally prohibited from denying funding to religious student magazine based on content); *Papish v. Bd. of Curators*, 410 U.S. 667 (1973) (state university's expulsion of student for disseminating student newspaper that officials deemed indecent was unconstitutional); *Healy v. James*, 408 U.S. 169 (1972) (universities cannot refuse to recognize controversial campus groups or speakers); see also, e.g., *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983) (university acted unconstitutionally by attempting to restructure funding to student newspaper because of controversial

Seventh Circuit rendered a decision that runs contrary to the spirit of the Supreme Court's precedent and the Court's commitment to protecting free speech at institutions of higher learning.<sup>2</sup> In *Hosty v. Carter*,<sup>3</sup> a 7-4 decision *en banc*, the Seventh Circuit extended the Supreme Court's high school-specific standard set forth in *Hazelwood School District v. Kuhlmeier*<sup>4</sup> to review a student newspaper censorship claim at Governors State University ("GSU"), a public university in Illinois.<sup>5</sup> The decision *en banc* overturned the earlier judgment of a unanimous three-judge panel of the Seventh Circuit that held that, given the more than 30 years of law providing strong First Amendment protection to the college student press, the *Hazelwood* standard was limited to primary and secondary education.<sup>6</sup> In addition, the majority in the decision *en banc* discounted the significance of *Hazelwood*'s footnote seven, in which the Supreme Court stated that it "need not now decide whether the same degree of deference [to the decisions of high school administrators] is appropriate with respect to school-sponsored expressive activities at the college and university level."<sup>7</sup>

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issue); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975) (university could not censor student newspaper and dismiss student editors for alleged poor grammar and spelling); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973) (university may not withdraw support for student newspaper because university disagrees with views expressed in publication); *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir. 1973) (university may not prevent publication and distribution of student yearbook on grounds that publication contained language that is "inappropriate and in bad taste"); *Troy State Univ. v. Dickey*, 402 F.2d 515 (5th Cir. 1968) (university acted unconstitutionally by suspending editor of student newspaper editor for content-related reasons).

<sup>2</sup> See *Hosty v. Carter (Hosty II)*, 412 F.3d 731 (7th Cir. 2005) *en banc*.

<sup>3</sup> *Id.*

<sup>4</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (permits high school administrators to censor school-sponsored speech if their actions are supported by "legitimate pedagogical concerns").

<sup>5</sup> *Hosty II*, 412 F.3d at 731.

<sup>6</sup> *Id.*; *Hosty v. Carter (Hosty I)*, 325 F.3d 945 (7th Cir. 2003) *reh'g en banc granted, opinion vacated.*

<sup>7</sup> *Hazelwood*, 484 U.S. at 273 n.7.

This Comment will contend that the Seventh Circuit erred in extending the *Hazelwood* analysis to college and university campuses absent more direction from the Supreme Court. Section I will recount the *Hazelwood* decision and detail the *Hosty* litigation. Section II will compare the Seventh Circuit's analyses to how other circuit courts have interpreted and applied the *Hazelwood* holding. Section III will examine the differences in age and maturity level between high school and college students, as well as the distinct missions of their respective educational institutions. Section IV will further discuss the difficulties in reconciling the *Hosty* decision *en banc* with Supreme Court precedent relating to subsidized funding and prior restraints.

## I. HAZELWOOD AND ITS APPLICATION BY THE SEVENTH CIRCUIT

*Hazelwood School District v. Kuhlmeier* is a unique, fact-specific holding that is distinguishable from the college newspaper censorship claim at issue in *Hosty v. Carter*. In the 1988 *Hazelwood* decision, the Supreme Court held that high school administrators have broad powers to censor school-sponsored newspapers if their actions are supported by "legitimate pedagogical concerns."<sup>8</sup> However, the Supreme Court explicitly left open the question of whether this First Amendment standard is appropriate with respect to censoring college student speech<sup>9</sup>— as was the issue before the Seventh Circuit in *Hosty*.<sup>10</sup>

### A. Pre-*Hazelwood* Decisions

The Supreme Court decisions leading up to *Hazelwood*, namely *Tinker v. Des Moines Independent Community School District*<sup>11</sup> and

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<sup>8</sup> *Id.* at 261.

<sup>9</sup> *Id.* at 273 n.7.

<sup>10</sup> *See generally*, *Hosty v. Carter (Hosty II)*, 412 F.3d 731 (7th Cir. 2005) *en banc*,

<sup>11</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

*Bethel School District No. 403 v. Fraser*,<sup>12</sup> evince an important distinction between school-sponsored speech, and speech that merely occurs on campus. This distinction is critical to understanding the Supreme Court's *Hazelwood* decision, and is now at issue in evaluating the Seventh Circuit's *Hosty* decision *en banc*.

Before the Supreme Court decided *Hazelwood* in 1988, the Court applied the "material and substantial interference" standard to evaluate educational decisions challenged on First Amendment grounds.<sup>13</sup> As the Court explained in the 1969 case of *Tinker v. Des Moines Independent Community School District*, a school can permissibly censor its students where student conduct "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school."<sup>14</sup> In *Tinker*, the court held that the high school officials acted unconstitutionally in suspending students who refused to remove armbands symbolizing their disapproval of the Vietnam War.<sup>15</sup> The Court stated that the record failed to evidence any facts which might have reasonably led school officials "to forecast substantial disruption of or material interference with school activities" when the students donned the armbands, and that "no disturbances or disorders on the school premises in fact occurred."<sup>16</sup>

Yet, the Supreme Court narrowed the *Tinker* standard in the 1986 case of *Bethel School District No. 403 v. Fraser*.<sup>17</sup> In *Bethel*, the Court held that the First Amendment does not prevent schools from determining when lewd and vulgar speech undermines the school's basic educational mission, and that it is "perfectly appropriate for the school to disassociate itself" from this sort of speech.<sup>18</sup> In particular, the Court found that the *Bethel* high school acted properly by imposing a two day suspension on a student who gave a lewd speech

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<sup>12</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

<sup>13</sup> *Tinker*, 393 U.S. at 510.

<sup>14</sup> *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

<sup>15</sup> *Tinker*, 393 U.S. at 514.

<sup>16</sup> *Id.*

<sup>17</sup> *Bethel*, 478 U.S. at 675.

<sup>18</sup> *Id.* at 685.

at a school assembly.<sup>19</sup> The Court explained that a high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.<sup>20</sup>

The significance of *Tinker* and *Bethel* in understanding the Supreme Court's *Hazelwood* decision, and in now evaluating the Seventh Circuit's *Hosty* decision *en banc*, is that the Supreme Court in *Bethel* drew a distinction between the speech in *Tinker* and *Bethel*.<sup>21</sup> Notably, the acceptable speech at issue in *Tinker* was a political message that *did not intrude upon the mission of the schools* or the rights of other students, whereas the censorable speech at issue in *Bethel* was the sexual content of a school assembly speech that *undermined the school's basic educational mission*.<sup>22</sup> Thus, the Court marked the emergence of a distinction between school-sponsored curricular speech, and speech that merely occurs on campus.<sup>23</sup>

### *B. Hazelwood School District v. Kuhlmeier*

This curricular/non-curricular distinction later resonated through the Court's 1988 *Hazelwood* decision.<sup>24</sup> *Hazelwood* involved a high school student newspaper, written in the course of and as a curricular component of a high school journalism class.<sup>25</sup> The high school's curriculum guide described the class, titled Journalism II, as a "laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I."<sup>26</sup> The teacher oversaw the style and content of the high school newspaper,

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<sup>19</sup> *Id.* at 686.

<sup>20</sup> *Id.* at 685-86.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *See id.*

<sup>24</sup> *See generally* *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

<sup>25</sup> *Id.* at 268.

<sup>26</sup> *Id.*

and was required to submit proof pages to the high school's principal before publication.<sup>27</sup>

*Hazelwood* arose after the principal objected to two articles awaiting publication in the high school newspaper: one story reporting on three high school students' experiences with pregnancy, and a second story describing the impact of divorce on students at the school.<sup>28</sup> The principal objected to the pregnancy article due to concern that pregnant students might be identifiable from the text (though unidentified by name), and that "the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school."<sup>29</sup> The principal objected to the divorce article because an identified student disparaged her father in the article, and the article's author did not provide the father an opportunity to respond to his daughter's remarks.<sup>30</sup> Believing that there was no time to alter the stories before the paper went to press, the principal withheld the two pages of the issue that contained these two stories in dispute.<sup>31</sup>

In response to the principal's decision, a journalism student sued the school district on the grounds that the principal violated her First Amendment rights by withholding the two pages from publication.<sup>32</sup> Despite this claim, the Supreme Court ruled that the principal acted reasonably in finding that the two articles were unsuitable for the high school newspaper because the students were not operating in a public

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 263.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 263-64. The Court stated:

The two pages deleted from the newspaper also contained articles on teenage marriage, runaways, and juvenile delinquents, as well as a general article on teenage pregnancy. [The principal] testified that he had no objection to these articles and that they were deleted only because they appeared on the same pages as the two objectionable articles..

*Id.* at 264 n.1.

<sup>32</sup> *Id.* at 264.

forum and thus the school could reasonably curtail the students' First Amendment rights.<sup>33</sup> The Court explained that the high school's facilities may be deemed to be public fora only if school authorities have by policy or by practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations.<sup>34</sup> However, if the facilities have instead been reserved for other intended purposes, "communicative or otherwise," such as a curricular, instructional environment, "then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community."<sup>35</sup> The Court explained that a school "does not create a public forum by inaction or by permitting limited discourse," as in a journalism class for example, but rather "only by intentionally opening a nontraditional forum for public discourse."<sup>36</sup>

The Supreme Court, accordingly, held that the high school principal's actions did not offend the journalism students' First Amendment rights, because: (1) the newspaper was produced by a journalism class and had not been opened by the school as a public forum for student expression; (2) as a nonpublic forum, school officials would be allowed to censor such student speech if their actions were "reasonably related to legitimate pedagogical concerns;" and (3) the principal's objections to the articles were reasonably related to legitimate pedagogical concerns.<sup>37</sup> What is more, the Court limited its holding in the case to censorship of student media in lower education, and dropped a footnote explicitly explaining that the Court did not intend for its "legitimate pedagogical concerns" test to extend to higher education:

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<sup>33</sup> *Id.* at 276.

<sup>34</sup> *Id.* at 267 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983)).

<sup>35</sup> *Hazelwood*, 484 U.S. at 267.

<sup>36</sup> *Id.* (citing *Cornelius v. NAACP*, 473 U.S. 788, 802 (1985)).

<sup>37</sup> *Id.* at 270-72, 274; see Brief for Student Press Law Center, et. al. as Amici Curiae in Support of Petitioners Margaret L. Hosty, Jeni S. Porche, and Steven P. Barba, 126 S.Ct. 1330 (2006) (No. 05-377).



FN7. A number of lower federal courts have similarly recognized that educators' decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference. *We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.*<sup>38</sup>

With this footnote, the Court explicitly left open the question of whether the *Hazelwood* First Amendment standard is appropriate with respect to censoring college student speech,<sup>39</sup> and such now becomes the crux of the controversy with respect to the Seventh Circuit's decision *en banc* in the case of *Hosty v. Carter*.<sup>40</sup>

### *B. Hosty v. Carter*

#### 1. From "Innovators" to Litigators

In January, 2001, three student journalists, proceeding *pro se*, sued officials at Governors State University, alleging prior restraint violations of their First Amendment rights.<sup>41</sup> Editor Margaret Hosty, Managing Editor Jeni Porche, and Staff Reporter Steven Barba filed suit after the Dean of Student Affairs and Services Patricia Carter ordered their newspaper's printer to hold future issues of the publication until a school official could give approval to the paper's contents.<sup>42</sup> The university student newspaper, the *Innovator*, had occasionally published news stories and editorials critical of the

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<sup>38</sup> *Hazelwood*, 484 U.S. at 273 n.7 (internal citations omitted) (emphasis added).

<sup>39</sup> *Id.*

<sup>40</sup> *Hosty v. Carter (Hosty II)*, 412 F.3d 731 (7th Cir. 2005) *en banc*,

<sup>41</sup> *Id.*; *Hosty v. Carter Information Page*, Student Law Press Center, <http://www.splc.org/legalresearch.asp?id=49> (last visited April 14, 2006).

<sup>42</sup> *Hosty II*, 412 F.3d at 733.

administration.<sup>43</sup> Dean Carter issued the directive for prepublication review despite the public university's policy that student newspaper staff "will determine content and format . . . without censorship or advance approval."<sup>44</sup>

On August 30, 2001, the U.S. District Court for the Northern District of Illinois allowed the students' case to go forward, denying the university's motion to dismiss for lack of jurisdiction and failure to state a claim.<sup>45</sup> Then, on November 15, 2001, on motion for summary judgment, the federal district court held that all university officials named in the suit— except Dean Carter— were entitled to qualified immunity.<sup>46</sup> The court cited a question of fact as to the dean's actions in halting future publication of the *Innovator*.<sup>47</sup>

Shortly thereafter, Dean Carter appealed the decision of the district court.<sup>48</sup> In support of her interlocutory appeal, Illinois Attorney General Jim Ryan asked the Seventh Circuit to apply and extend the Supreme Court's *Hazelwood* decision— which set forth the standard under which high school administrators could permissibly censor school-sponsored speech— to the university context.<sup>49</sup>

## 2. First Draft: Seventh Circuit's Three-Judge Panel

On April 10, 2003, a three-judge panel of the Seventh Circuit issued a decision in favor of the college free press, and unanimously upheld the district court's refusal to grant summary judgment in favor

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<sup>43</sup> *Id.* at 732, 742. The articles included report on university's decision not to renew teaching contract of newspaper's faculty advisor, and commentaries critical of other university officials, including the dean of the College of Arts and Sciences. *Id.*

<sup>44</sup> *Id.* at 744.

<sup>45</sup> *Hosty v. Governors State Univer.*, 174 F. Supp.2d 782 (N.D. Ill. 2001).

<sup>46</sup> *Hosty v. Governors State Univer.*, No. 01 C 500, 2001 WL 1465621, at \*1 (N.D. Ill. Nov. 15, 2001) (*rev'd by Hosty II*, 412 F.3d 731).

<sup>47</sup> *Id.* at \*7.

<sup>48</sup> *See generally Hosty v. Carter (Hosty I)*, 325 F.3d 945 (7th Cir. 2003),

<sup>49</sup> *See Brief for Defendant-Appellant Patricia Carter*, 325 F.3d 945 (7th Cir. 2003) (No. 01-4155).

of Dean Carter.<sup>50</sup> The panel, composed of Judges Coffey, Rovner, and Evans ruled that college and university students possess greater press freedoms than high school students, and refused to grant qualified immunity to Dean Carter.<sup>51</sup> Writing for the unanimous panel, Judge Evans explained that “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.”<sup>52</sup> The panel rejected Dean Carter's argument that she could not reasonably have known that it was illegal to order the *Innovator's* printer to halt publication of the newspaper or to require prior approval of the newspaper's content in light of the existing, well-established law.<sup>53</sup> In particular, the unanimous panel emphasized the more than three decades of precedent supporting First Amendment protections across college and university campuses, and thus declined to extend the Supreme Court's *Hazelwood* standard for censoring high school speech to apply to the college student media censorship claim at issue in the case.<sup>54</sup>

In response to the decision, Illinois Attorney General Lisa Madigan filed a petition on behalf of Dean Carter for a rehearing *en banc*.<sup>55</sup> Rehearings *en banc* are generally rare and not favored by the courts; as such, they require a majority of the circuit judges who are in regular active service to order the rehearing by the full court.<sup>56</sup> A rehearing *en banc* will typically only be ordered when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or when the proceeding involves a question of exceptional

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<sup>50</sup> See generally *Hosty I*, 325 F.3d 945.

<sup>51</sup> *Id.* at 949 (general view is to favor “broad First Amendment rights for students at the university level”).

<sup>52</sup> *Id.* at 947.

<sup>53</sup> *Id.* at 948.

<sup>54</sup> See generally *id.*

<sup>55</sup> Petition of Defendant-Appellant Patricia Carter for Rehearing with Suggestions for Rehearing *en banc*, 325 F.3d 945 (7th Cir. 2003) (No. 01-4155).

<sup>56</sup> See FED. R. APP. P. 35(a).

importance.<sup>57</sup> In support of the *Hosty* rehearing *en banc*, Madigan argued that the three-judge panel overlooked previous decisions that demonstrate that the law governing free speech rights for college and university students is not clearly established.<sup>58</sup>

On June 25, 2003, a majority of the active Seventh Circuit judges granted the petition for a rehearing *en banc* and vacated the unanimous judgment of the three-judge panel.<sup>59</sup> Despite the arguments put forth by Madigan, the Seventh Circuit likely ordered the rehearing because the case involved a “question of exceptional importance”: notably, the extension of a Supreme Court standard applied to First Amendment censorship claims.<sup>60</sup> On its face, the case appears to be merely a procedural posture—an appeal of a summary judgment decision denying Dean Carter qualified immunity.<sup>61</sup> However, beneath the surface, the outcome of the case could possibly define and inhibit college student speech both within the Seventh Circuit, and through the rest of the country because of its interpretation and application of the Supreme Court’s *Hazelwood* decision.<sup>62</sup>

This underlying question of extending the Supreme Court’s high school-specific holding in *Hazelwood*, and applying it in the university context (as in *Hosty*), should—and likely will—come before the Supreme Court for clarification due to the lack of direction from the Court in *Hazelwood* (most specifically in footnote seven).<sup>63</sup> Thus it is possible that the Seventh Circuit granted the rehearing *en banc* in order to set forth a more deliberate decision to submit to the Supreme Court so that the Court may fully elucidate its *Hazelwood* standard with respect to college student speech. Whereas the unanimous

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<sup>57</sup> *Id.*

<sup>58</sup> Petition of Defendant-Appellant Patricia Carter for Rehearing with Suggestions for Rehearing *en banc*, 325 F.3d 945 (7th Cir. 2003) (No. 01-4155).

<sup>59</sup> See *Hosty I*, 325 F.3d at 945.

<sup>60</sup> See FED. R. APP. P. 35(a).

<sup>61</sup> *Hosty I*, 325 F.3d at 945.

<sup>62</sup> *Id.*

<sup>63</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988); *but see Hosty v. Carter*, 126 S.Ct. 1330 (Mem.) (Feb. 21, 2006) (denying certiorari on *Hosty v. Carter (Hosty II)*, 412 F.3d 731 (7th Cir. 2005) *en banc*).

decision of the three-judge panel was neither blatantly wrong, nor undermining of the uniformity of Seventh Circuit decisions, the three-judge panel's ruling was somewhat sparse, in that it did not explicitly address *Hazelwood's* footnote seven and did not address any sort of forum analysis.<sup>64</sup> For these reasons, the Seventh Circuit may have granted the rehearing *en banc* in order to better satisfy the Supreme Court by putting forth a more comprehensive analysis on this issue that will likely go before the high court at some point for much needed clarification.

### 3. Editing the Story: Seventh Circuit's Decision *En Banc*

On January 8, 2004, an eleven-judge panel of the Seventh Circuit sat *en banc* to rehear oral arguments.<sup>65</sup> The full panel handed down a decision, on June 25, 2005, supporting the university, and starkly opposing the previous decision of the original three-judge panel.<sup>66</sup> In a seven-judge majority, the Seventh Circuit extended the Supreme Court's *Hazelwood* decision to the collegiate level, yet declined to define the First Amendment rights of college journalists.<sup>67</sup> With regards to the *Hazelwood* footnote in which the Supreme Court left open the issue of extending the "legitimate pedagogical concerns" test to the college and university setting, the Seventh Circuit majority contended that the "footnote does not even hint at the possibility of an on/off switch: high school papers reviewable, college papers not reviewable. It addresses degrees of deference."<sup>68</sup> The majority opinion, written by Judge Easterbrook, further asserted that *Hazelwood's* framework depends in large part on the public-forum analysis, and (in contrast to the vacated decision of the unanimous three-judge panel) does not necessarily vary depending upon the

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<sup>64</sup> See *Hosty I*, 325 F.3d at 945.

<sup>65</sup> *Hosty v. Carter Information Page*, Student Law Press Center, <http://www.splc.org/legalresearch.asp?id=49> (last visited April 14, 2006).

<sup>66</sup> *Hosty II*, 412 F.3d at 744.

<sup>67</sup> *Id.* at 735.

<sup>68</sup> *Id.* at 734.

speakers' age/level of education, or upon the distinction between curricular and extracurricular activities.<sup>69</sup> Judge Easterbrook cited the possibility that some "high school seniors are older than some college freshmen," and also declared that many "junior colleges are similar to many high schools."<sup>70</sup>

The majority concluded that the *Innovator* did not participate in a traditional public forum because the newspaper received student funding, and because "[f]reedom of speech does not imply that someone else must pay."<sup>71</sup> Relying upon the Supreme Court's decisions in *Rust v. Sullivan*<sup>72</sup> and *National Endowment for the Arts v. Finley*,<sup>73</sup> the majority stated that *Hazelwood's* framework for free speech analysis applies to subsidized student newspapers at elementary and secondary schools, as well as subsidized student newspapers at colleges and universities, like the *Innovator* at GSU.<sup>74</sup> Further, the majority suggested that even if GSU created a "designated public forum" or "limited-purpose public forum" for the *Innovator*, Dean Carter is still entitled to qualified immunity for damages because she could not have reasonably known that the limitations of the *Hazelwood* judgment and because she should not be held liable for "constitutional uncertainties."<sup>75</sup>

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<sup>69</sup> *Id.* at 738.

<sup>70</sup> *Id.* at 734-35 ("The Supreme Court itself has established that age does not control the public-forum question. *See generally* Symposium: *Do Children Have the Same First Amendment Rights as Adults?*, 79 CHI.-KENT L.REV. 3 (2004) (including many articles collecting and discussing these decisions)").

<sup>71</sup> *Id.* at 737.

<sup>72</sup> *Rust v. Sullivan*, 500 U.S. 173 (1991) (family planning restrictions did not violate free speech rights of Title X funding recipients by imposing conditions on government medical subsidies).

<sup>73</sup> *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (statute requiring National Endowment of the Arts to consider decency and respect when judging grant applications did not violate artists' First Amendment rights because statute not directly aimed at regulating speech).

<sup>74</sup> *Hosty II*, 412 F.3d at 735.

<sup>75</sup> *Id.* at 737. However, the *Innovator* was published by the GSU Student Communications Media Board, which was made up of four students, two faculty members, and one civil service or support employee of the university. The Board

In contrast, the dissent of Judges Rovner, Williams, Wood, and Evans contended that the majority's conclusion stemmed from the "incorrect premise - that there is no legal distinction between college and high school students."<sup>76</sup> Writing for the dissent, Judge Evans<sup>77</sup> set forth two reasons why the law draws a distinction between high school and college level students: 1) high school students are less mature than their college counterparts, and 2) the missions of their respective institutions are different.<sup>78</sup> The dissent concluded that "no pedagogical concerns can justify suppressing the student speech" in this case because the Supreme Court created *Hazelwood* for the "narrow circumstances of elementary and secondary education."<sup>79</sup> In addition, the dissenting opinion disagreed with the majority's holding that Dean Carter is entitled to qualified immunity since decisions prior to *Hazelwood* consistently established that university officials cannot "require prior review of student media or otherwise censor student publications."<sup>80</sup> The dissent explained that neither *Hazelwood*, nor post-*Hazelwood* decisions, changed this well-established rule, and that Dean Carter "violated clearly established First Amendment law in censoring the student newspaper."<sup>81</sup>

#### 4. Further Revisions Necessary

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laid down the rules for publication and established that "each funded publication will determine content and format . . . without censorship or advance approval." *Id.*

<sup>76</sup> *Id.* at 740 (Evans, J. dissenting). Judge Coffey, who ruled in favor of the student journalists at the first hearing, evidently changed his position and ruled in favor of the university at the rehearing *en banc*.

<sup>77</sup> Judge Evans also wrote the decision for the original three judge panel. See *Hosty v. Carter (Hosty I)*, 325 F.3d 945 (7th Cir. 2003) *reh'g en banc granted, opinion vacated*,

<sup>78</sup> *Hosty II*, 412 F.3d at 740 (Evans, J. dissenting).

<sup>79</sup> *Id.* at 739, 744 (Evans, J. dissenting).

<sup>80</sup> *Id.* at 742 (Evans, J. dissenting).

<sup>81</sup> *Id.* at 743-44 (Evans, J. dissenting).

On September 16, 2005, the student journalists filed a petition for writ of certiorari to the U.S. Supreme Court.<sup>82</sup> The Illinois Attorney General's office declined to respond to the students' petition, which prompted the Supreme Court to specifically request that the office file a response.<sup>83</sup> Some legal commentators have viewed this as favorable for the student journalists because the Supreme Court typically only asks for a response if the Court believes that the petition likely has merit.<sup>84</sup> Thus, this request demonstrated the high court's interest in the case, and arguably illustrates that the *Hosty* decision *en banc* is worthy of review.<sup>85</sup>

### 5. BREAKING NEWS: Petition for Writ of Certiorari Denied

On February 21, 2006, the Supreme Court denied the student journalists' petition for writ of certiorari.<sup>86</sup> However, this denial does not establish that Seventh Circuit correctly extended the *Hazelwood* analysis and that the decision *en banc* is not worthy of skepticism by the legal community. If anything, it may suggest that the Supreme Court wishes to wait and see how more circuit courts will interpret the *Hazelwood* standard in future cases.

Inevitably, the Supreme Court will have to accept a petition for writ of certiorari on this issue of whether the Supreme Court's *Hazelwood* standard for addressing censorship claims relating to high school speech can be extended to censorship in higher education. This is a critical First Amendment controversy, stemming from the Supreme

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<sup>82</sup> Petition for Writ of Certiorari, 126 S.Ct. 1330 (2006) (No. 05-377).

<sup>83</sup> *Supreme Court requests response in Hosty case*, Student Press Law Center (2005), <http://www.splc.org/newsflash.asp?id=1115> (last visited April 14, 2006). ("Although your office has waived the right to file a response to the petition for a writ of *certiorari* . . . The Court nevertheless has directed this office to request that a response be filed," stated a letter from the Supreme Court clerk to the Illinois Attorney General's office dated Oct. 27, 2005.)

<sup>84</sup> *Id.* (quoting excerpt from *Supreme Court Practice* faxed to Student Press Law Center by Supreme Court's public information office).

<sup>85</sup> *Id.*

<sup>86</sup> *Hosty v. Carter*, 126 S.Ct. 1330 (Mem.) (Feb. 21, 2006).



Court's own elaboration of a standard for addressing high school censorship claims, and further confused by the Court's inclusion of footnote seven which leaves the door open with respect to a standard for evaluating college censorship claims.<sup>87</sup> The lack of direction from the Supreme Court up to this point has greatly confused the circuit courts, as evidenced in the *Hosty* decisions, and has led to a circuit split.<sup>88</sup> Thus, even though the Court has now declined to hear *Hosty*, First Amendment jurisprudence requires the high court to clarify the underlying issue of the case. For the reasons set forth in the remainder of this Comment, once the Supreme Court does accept a petition for writ of certiorari on the issue of applying the Court's *Hazelwood* analysis in the university context, the Court should establish that *Hazelwood* does not apply in higher education, as the Court half-heartedly tried to establish by dropping footnote seven in its *Hazelwood* decision.

## II. THE SEVENTH CIRCUIT OVERLOOKS CURRICULAR/NON-CURRICULAR SPEECH DISTINCTION AND ERRONEOUSLY APPLIES FORUM ANALYSIS

The *Hosty* decision *en banc* conflicts with the *Hazelwood* interpretations of several other circuit courts.<sup>89</sup> Whereas circuit court decisions have reflected the growing confusion in extending the *Hazelwood* analysis to institutions of higher learning, no circuit has interpreted the Supreme Court decision to extend to such lengths as the Seventh Circuit's decision *en banc*— notably non-curricular speech in an institution of higher education.<sup>90</sup> Specifically, several

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<sup>87</sup> Cf. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988).

<sup>88</sup> See *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004); *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991); *Student Gov. Ass'n v. Bd. of Trs.*, 868 F.2d 473 (1st Cir. 1989).

<sup>89</sup> See *Hazelwood*, 484 U.S. at 260; *Kincaid*, 236 F.3d at 342; *Student Gov.*, 868 F.2d at 473.

<sup>90</sup> See, e.g., *Axson-Flynn*, 356 F.3d at 1277; *Brown*, 308 F.3d at 939; *Kincaid*, 236 F.3d at 342; *Bishop*, 926 F.2d at 1066; *Student Gov.*, 868 F.2d at 473.

circuits have declined to extend *Hazelwood*'s high-school specific analysis to evaluate censorship of college student speech,<sup>91</sup> and the circuits that have extended *Hazelwood* have limited their holdings to curricular speech in higher education.<sup>92</sup>

In the nearly two decades since the Supreme Court set forth its "legitimate pedagogical concerns" test in *Hazelwood*, circuit courts have for the most part been reluctant to extend *Hazelwood* to the university realm.<sup>93</sup> For instance, the First Circuit implicitly declined to extend *Hazelwood* in *Student Government Association v. Board of Trustees*, on the grounds that *Hazelwood* "is not applicable to college newspapers."<sup>94</sup> Likewise, the Sixth Circuit, in *Kincaid v. Gibson*, explicitly declined to extend *Hazelwood* into the university context, holding that university officials violated the First Amendment rights of two college yearbook editors by confiscating and refusing to distribute the student-published yearbook.<sup>95</sup> The Second Circuit explained that *Hazelwood* has little application in *Kincaid* because forum analysis requires that the yearbook be analyzed as a limited (or designated) public forum rather than a nonpublic forum.<sup>96</sup> Because the yearbook was a limited public forum, university officials did not impose reasonable time, place and manner restrictions by confiscating all copies of the yearbook on the grounds that the quality was lacking.<sup>97</sup>

The few circuits that have applied *Hazelwood* to the college environment are factually distinguishable from *Hosty* because the speech at issue was exclusively free speech rights *within* the classroom, and thus would not be thought of as a public forum or

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<sup>91</sup> See *Kincaid*, 236 F.3d at 342; *Student Gov.*, 868 F.2d at 473.

<sup>92</sup> See *Axson-Flynn*, 356 F.3d at 1277; *Brown*, 308 F.3d at 939; *Bishop*, 926 F.2d at 1066.

<sup>93</sup> See, e.g., *Kincaid*, 236 F.3d at 342; *Student Gov.*, 868 F.2d at 473.

<sup>94</sup> *Student Gov.*, 868 F.2d at 480 n.6.

<sup>95</sup> *Kincaid*, 236 F.3d at 347.

<sup>96</sup> *Id.* at 346 n.5.

<sup>97</sup> *Id.* at 354-56.

limited public forum.<sup>98</sup> For instance, the Eleventh Circuit suggested that *Hazelwood* has some relevance at the college level in such limited circumstances as religious speech in the classroom environment.<sup>99</sup> The circuit court explained in *Bishop v. Aronov* that university classrooms do not operate as public fora during instructional periods because they are reserved for the limited purpose of teaching a particular university course for academic credit.<sup>100</sup> Likewise, the Tenth Circuit, in *Axson-Flynn v. Johnson*, chose to extend *Hazelwood* to address college speech at issue in the case because the speech occurred as part of a mandatory curricular assignment during class time and in the classroom.<sup>101</sup> The Tenth Circuit explained that the classroom of the university's actor training program constituted a nonpublic forum, where university officials could regulate speech in any reasonable manner; and that the classroom could not reasonably be considered a traditional public forum, or a designated public forum, absent more direction from the university authorities.<sup>102</sup> Yet, the Tenth Circuit explicitly recognized "that some circuits have cast doubt on the application of *Hazelwood* in the context of university *extracurricular* activities," and that their *Axson-Flynn* decision did not need to put forth analysis on this distinction because of the exclusively curricular speech at issue in the case.<sup>103</sup> The Ninth Circuit is also cited, though less frequently, for extending the *Hazelwood* analysis to the university realm in *Brown v. Li*.<sup>104</sup> However, the Ninth Circuit's extension of

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<sup>98</sup> See *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004); *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991).

<sup>99</sup> *Bishop*, 926 F.2d at 1071. *Bishop* held that a memo instructing a university professor to refrain from interjecting religious beliefs during instructional periods did not infringe professor's free speech rights. *Id.* at 1078.

<sup>100</sup> *Id.* at 1071.

<sup>101</sup> *Axson-Flynn*, 356 F.3d at 1290. *Axson-Flynn* held that an acting student at the university could be required to say script lines that conflict with the student's Mormon faith as part of the curriculum. *Id.*

<sup>102</sup> *Id.* at 1285.

<sup>103</sup> *Id.* at 1287 n.6.

<sup>104</sup> *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002). *Brown* held that a masters student did "not have a First Amendment right to have his nonconforming thesis

*Hazelwood* is extremely narrow— only one judge on the three-judge panel explicitly approved of the application of *Hazelwood*, while another judge explicitly disproved of the *Hazelwood* application.<sup>105</sup> Still, the one judge to rely on the *Hazelwood* ruling qualified his application by stating that “[we] do not know with certainty . . . that *Hazelwood* controls the inquiry into whether a university’s requirements for and evaluation of a [graduate] student’s curricular speech infringe that student’s First Amendment rights.”<sup>106</sup>

In contrast to the facts of both *Hazelwood* and cases where circuit courts have applied the *Hazelwood* analysis, *Hosty* does not involve curricular speech.<sup>107</sup> Rather, the GSU college student newspaper was an autonomous extracurricular activity and not part of the university’s curriculum.<sup>108</sup> The *Innovator* was overseen by a Board made up of “four students, two faculty members, and one civil service or support employee of the university.”<sup>109</sup> The Board set up rules for publication, and determined that the *Innovator* would establish “its content and format . . . without censorship or advance approval from the administration.”<sup>110</sup> Furthermore, Dean Carter’s complaints were not pedagogical in nature<sup>111</sup> (as to render the objections falling under *Hazelwood*’s “legitimate pedagogical concerns” test) and a university

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approved, nor did he have a right to a formal hearing with respect to his committee’s academic decision not to approve the thesis.” *Id.* at 955.

<sup>105</sup> *Id.* at 950 (one judge writing opinion, one judge concurring, and one judge partially concurring, partially dissenting).

<sup>106</sup> *Id.* at 951.

<sup>107</sup> Compare *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004); *Brown*, 308 F.3d at 939; *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) with *Hosty v. Carter (Hosty I)*, 325 F.3d 945, 946-47 (7th Cir. 2003); see also *Lueth v. St. Clair*, 732 F. Supp. 1410, 1412 (E.D. Mich. 1990) (declining to apply *Hazelwood* because high school student newspaper was not part of curriculum and not under principal’s ultimate authority).

<sup>108</sup> See *Hosty v. Carter (Hosty II)*, 412 F.3d 731, 737-38 (7th Cir. 2005) *en banc*.

<sup>109</sup> *Id.* at 737.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 733. GSU officials complained that articles in the *Innovator* were irresponsible and defamatory journalism. *Id.*

should not suppress student speech merely because it dislikes editorial comments.<sup>112</sup> Thus, because several circuits have refused to extend *Hazelwood* to apply to college level speech, and because the *Hosty* decision *en banc* is factually distinguishable from the circuit courts that have applied *Hazelwood* to the university realm, the Seventh Circuit likely erred in extending the Supreme Court decision to assess the censorship claims involving non-curricular speech in higher education.

Moreover, the *Hosty* decision *en banc* is grounded upon an “overly mechanistic application of public forum analysis,”<sup>113</sup> as opposed to the curricular/non-curricular distinction, discussed above.<sup>114</sup> Rather than relying on the “longstanding presumption that student media is not merely a public forum but an independent forum,” the Seventh Circuit majority instead examined whether the GSU student newspaper was operating in a public forum, a non-public forum, or a closed-forum.<sup>115</sup> Nonetheless, the Seventh Circuit’s forum analysis is likely inappropriate with respect to the GSU students’ censorship claim which involved an extracurricular college student newspaper. To compare, in *Hazelwood*, there was an actual need to go through this forum analysis due to the question of whether or not the high school student newspaper was a public forum because it was also part of a class curriculum.<sup>116</sup> Such was also the case in the Ninth,

<sup>112</sup> See *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973) (holding that university’s president violated First Amendment by irrevocably withdrawing financial support from official student newspaper that had segregationist editorial policy).

<sup>113</sup> Brief for the Foundation for Individual Rights in Education and Support for Academic Freedom as *Amicus Curia* in Support of Petitioners, 126 S.Ct. 1330 (2006) (No. 05-377).

<sup>114</sup> See, e.g., *Kincaid v. Gibson*, 236 F.3d 342, 346 n.5 (6th Cir. 2001); *Student Gov. Ass’n v. Bd. of Trs.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1287 n.6 (10th Cir. 2004).

<sup>115</sup> Brief for the Foundation for Individual Rights in Educ., *et. al.*, and Supp. for Academic Freedom in Supp. of Pet’rs, *Hosty*, 126 S.Ct. 1330 (05-377).

<sup>116</sup> Greg Lukianoff & Samantha Harris, *FIRE Policy Statement on ‘Hosty v. Carter,’* Foundation for Individual Rights in Education, <http://www.thefire.org/index.php/article/6269.html> (last visited April 14, 2006).

Tenth, and Eleventh circuit court decisions, discussed above, that extended the *Hazelwood* standard to assess censorship claims relating to curricular speech in higher education.<sup>117</sup> In addition, the Supreme Court found the forum analysis necessary in *Hazelwood* because there was concern that the two questionable student articles might be viewed as being endorsed by the high school.<sup>118</sup> However, in *Hosty*, the Seventh Circuit was not pressed to go through a forum analysis—the court was presented with the classic college student newspaper operating as an extracurricular activity, and freedom of student presses is generally presumed without the need to elaborate upon a forum analysis.<sup>119</sup> Thus, rather than engaging in the overly-complicated forum analysis, the Seventh Circuit should have first evaluated the student journalists' censorship claim through a simple factual examination of whether the *Innovator* constituted a curricular or extracurricular publication.

Yet, even if the forum analysis was necessary in deciding whether there was a First Amendment violation in *Hosty*, the decision *en banc* should have still found a violation on the GSU students' First Amendment rights. After reviewing the record, it appears likely that the *Innovator* was operating in a public forum.<sup>120</sup> The student newspaper was an extracurricular activity, governed by a Board who established its rules for publication and who explicitly determined that the *Innovator* would “determine its content and format without censorship or advance approval from the administration.”<sup>121</sup> Hence,

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<sup>117</sup> See *Brown v. Li*, 308 F.3d at 939 (9th Cir. 2002); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991); *Axson-Flynn*, 356 F.3d at 1277.

<sup>118</sup> See Brief for Student Press Law Center, et. al. as Amici Curiae in Support of Petition of Margaret L. Hosty, Jeni S. Porche, and Steven P. Barba for Writ of Certiorari, 126 S.Ct. 1330 (No. 05-377).

<sup>119</sup> See *Hosty v. Carter (Hosty I)*, 325 F.3d 945 (7th Cir. 2003); see also, e.g., *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973) (“if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment”); *Kincaid*, 236 F.3d at 342 (college student yearbook is a limited public forum).

<sup>120</sup> See *Hosty v. Carter (Hosty II)*, 412 F.3d 731, 737-38 (7th Cir. 2005).

<sup>121</sup> *Id.* at 737.

this university policy explicitly created a public forum for indiscriminate use by the student newspaper organization.<sup>122</sup> However, even if the *Innovator* operated in a limited (or designated) public forum, as discussed by the decision *en banc*, the Second Circuit's *Kincaid* decision suggests that the Seventh Circuit should have still held that *Hazelwood* is inapplicable to assess the GSU students' censorship claim.<sup>123</sup> If the *Innovator* operated in a limited (or designated) public forum, like the yearbook in *Kincaid*, then the GSU student newspaper could only be permissibly limited by reasonable time, place and manner restrictions, and thus Dean Carter still would not have been permitted to abruptly halt the presses at whim.<sup>124</sup> Therefore, the forum analysis of the Seventh Circuit's decision *en banc* remains questionable in light of the extracurricular college speech at issue in the case, and the GSU policy apparently opening the forum for indiscriminate use by *Innovator's* staff.

### III. THE SEVENTH CIRCUIT OVERLOOKS HIGH SCHOOL/COLLEGE DISTINCTION

Although the majority in the *Hosty* decision *en banc* asserted that *Hazelwood* provided their "starting point,"<sup>125</sup> the Seventh Circuit also improperly extended that Supreme Court's decision by ignoring the fundamental distinctions between high school and college students, and the different missions of the respective institutions— both of which Judge Evans noted in the vacated decision of the three-judge panel and in his dissent to the decision *en banc*.<sup>126</sup> Instead of engaging in a forum analysis like the majority in the decision *en banc*, the original panel and the dissent of the decision *en banc* found this

<sup>122</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (citing *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 47 (1983)).

<sup>123</sup> See *Kincaid*, 236 F.3d at 342.

<sup>124</sup> *Id.*

<sup>125</sup> Cf. *Hosty II*, 412 F.3d at 734.

<sup>126</sup> See *id.* at 743-44 (Evans, J. dissenting); *Hosty v. Carter (Hosty I)*, 325 F.3d 945 (7th Cir. 2003).

analysis to be inapplicable to deciding the facts presented before them, as they were charged with ruling upon the First Amendment rights of highly educated adults in a historically free and open educational institution.<sup>127</sup>

*A. The Hosty decision en banc ignores the relevant age and maturity distinctions between high school and college students.*

The majority in the *Hosty* decision *en banc* failed to regard the important dichotomy between high school student speech and college level speech.<sup>128</sup> The courts have consistently looked to this distinction in determining constitutional freedoms, and this distinction underscores the fundamental inapplicability of extending *Hazelwood* into the university context.<sup>129</sup> “[T]he status of minors under the law is unique in many respects,” and age (for which grade is a good indicator) has been a tool the courts have regularly used to define legal rights.<sup>130</sup>

The Supreme Court has explained that the First Amendment rights of elementary and secondary students in the public schools “are not automatically coextensive with the rights of adults in other settings,” and thus must be applied in light of the special characteristics of the educational environment.<sup>131</sup> In particular, in *Hazelwood*, the Supreme Court emphasized the emotional immaturity of high school-age

<sup>127</sup> See *Hosty II*, 412 F.3d at 743-44 (Evans, J. dissenting); *Hosty I*, 325 F.3d at 948.

<sup>128</sup> See *Nicholson v. Bd. of Educ.*, 682 F.2d 858, 863 n. 4 (9th Cir. 1982) (stating that “[d]ifferent considerations govern application of the First Amendment on the college campus and at lower level educational institutions [and that] activities of high school students” may be reviewed more stringently than those of college students because “the former are in a much more adolescent and immature stage of life and less able to screen fact from propaganda”).

<sup>129</sup> See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

<sup>130</sup> See *Hosty II*, 412 F.3d at 740 (Evans, J. dissenting); *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (“during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them”).

<sup>131</sup> *Bellotti*, 443 U.S. at 682.



students, and specifically explained that “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.”<sup>132</sup>

Though *Hazelwood* informs the courts that younger students in a high school setting must endure First Amendment restrictions, nothing in that case changes “the general view of favoring broad First Amendment rights for students at the university level.”<sup>133</sup> College students are distinguishable from high school students because college students are more mature, rational and independent thinkers.<sup>134</sup> “According to the U.S. Census Bureau, only one percent of those enrolled in American colleges and universities in 2000 were under the age of 18,” and over half of those enrolled are over the age of 22.<sup>135</sup> University students are not children; they are young adults, and are less impressionable than elementary and secondary school students.<sup>136</sup> As the three-judge panel in the original *Hosty* decision explained, treating college and university students “like 15-year-old high school students and restricting their First Amendment rights by an unwise extension of *Hazelwood* [is] an extreme step for [the Seventh Circuit] to take absent more direction from the Supreme Court.”<sup>137</sup> Thus, the Seventh Circuit’s *Hazelwood* application in the university setting undermines the distinction between high school and college students, and infantilizes some of the most mature students in our nation’s

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<sup>132</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272-73 (1988) (citing potentially sensitive topics such as the existence of Santa Claus and discussions of teenage sexual activity).

<sup>133</sup> *Hosty v. Carter (Hosty I)*, 325 F.3d 945, 949 (7th Cir. 2003); *see also Hazelwood*, 484 U.S. at 272-73.

<sup>134</sup> *See Tilton v. Richardson*, 403 U.S. 672, 686 (1971) (upholding federal law that provided funding to church-related colleges and universities for construction of facilities for secular educational purposes; noting that pre-college students may not have the maturity to make their own decisions on religion, and that college students are less impressionable).

<sup>135</sup> *Hosty II*, 412 F.3d at 740 n.1 (Evans, J. dissenting); *see also Hosty I*, 325 F.3d at 948-49.

<sup>136</sup> *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981); *Tilton*, 403 U.S. at 686.

<sup>137</sup> *Hosty I*, 325 F.3d at 949.

educational system.

*B. The Hosty decision en banc ignores the distinct mission of higher education.*

The Seventh Circuit's decision *en banc* additionally underestimates the special importance that the Supreme Court has placed on free and open exchange in higher education.<sup>138</sup> The Supreme Court has long recognized that the college classroom with its surrounding environs is the paradigmatic "marketplace of ideas."<sup>139</sup> Colleges and universities seek to expose adult students to a wide range of viewpoints and strive to facilitate vibrant debates of "philosophical, religious, scientific, social and political subjects in [both their classrooms and] their extracurricular campus life outside the lecture hall."<sup>140</sup> In contrast, primary and secondary schools have a custodial and tutelary responsibility for their young students.<sup>141</sup> Elementary schools and high schools constitute a principal instrument in "awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust more normally to his environment."<sup>142</sup>

The Seventh Circuit's decision *en banc* ignores the long-recognized and long-supported relationship between higher education

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<sup>138</sup> Healy v. James, 408 U.S. 169, 180 (1972); *see also* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

<sup>139</sup> Bd. of Regents of the Univ. of Wisconsin v. Southworth, 529 U.S. 217, 233 (2000).

<sup>140</sup> Southworth, 529 U.S. at 231. "[Wisconsin] law defines the University's mission in broad terms: 'to develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses and to serve and stimulate society by developing in students heightened intellectual, cultural and humane sensitivities . . . and a sense of purpose.'" *Id.* at 221.

<sup>141</sup> Bd. of Educ. v. Earls, 536 U.S. 822, 823 (2002) (holding that Fourth Amendment rights are different in public schools than elsewhere).

<sup>142</sup> Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

and free speech,<sup>143</sup> and thus extending *Hazelwood* at the university level risks the suppression of ideas and creative inquiry that is so vital to the nation's intellectual life.<sup>144</sup> This decision could have a snowball effect or, yet worse, a "tsunami effect"— spawning censorship of any school-sponsored student activity, and requiring students to gain prior approval in the realm of student government, theater, speakers, films, and a host of other expressive activities that are traditionally weaved into university life.<sup>145</sup> In addition, the disastrous consequences of applying *Hazelwood* to the university context could "extend outside the ivy-covered walls."<sup>146</sup> A *Hazelwood* regime at the college level could turn "college newspapers into the timid house organs that most high school newspaper have [now] become."<sup>147</sup> Post-*Hazelwood* studies evidence "that high school newspapers suffered a severe chilling effect" after the high court's decision and that students avoided covering controversial issues.<sup>148</sup> At the college level, this "chilling effect" could further hinder the flow of ideas to the off-campus readership, and also "chill" students' post-college/on-the-job

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<sup>143</sup> See *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983) (holding that a public university may not constitutionally take adverse action against a student newspaper such as withdrawing or reducing the paper's funding because it disapproves of the content of the paper).

<sup>144</sup> *Rosenberger v. Rector*, 515 U.S. 819, 836 (1995) (decided eight years after *Hazelwood* and involving challenge to university's refusal to sponsor a Christian student group with funds intended to support a broad range of extracurricular student activities that are related to educational purpose of institution).

<sup>145</sup> Brief for Student Press Law Center, et. al. as Amici Curiae in Support of Petition of Margaret L. Hosty, Jeni S. Porche, and Steven P. Barba for Writ of Cert., 126 S.Ct. 1330 (No. 05-377).

<sup>146</sup> Brief for the Association for Education in Journalism and Mass Commcation and the Association of Schools of Journalism and Mass Commcation as Amici Curiae in Support of Petitioner, 126 S.Ct. 1330 (2006) (No. 05-377).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* (citing Carol S. Lomicky, *Analysis of High School Newspaper Editorials Before and After Hazelwood School District v. Kuhlmeier: A Content Analysis Case Study*, 29 J.L. & EDUC. 462 (2000)).

reporting by interfering with campus newspapers' "recruitment and training of tomorrow's professional journalists."<sup>149</sup>

Fortunately, college and university officials in the states composing the Seventh Circuit have not yet used the *Hosty* decision *en banc* as an absolute license to censor, and instead many universities have employed the Seventh Circuit's ruling as a platform to advocate for the college free press.<sup>150</sup> In particular, the administrators at four public colleges/universities<sup>151</sup> in the three states composing the Seventh Circuit have formally designated their school's student newspapers as public fora— explicitly enabling student editors to make all content decisions without the threat of censorship or necessity for prepublication approval from the universities.<sup>152</sup> Most recently, administrators at Illinois Central College have shielded their students from the *Hosty* decision *en banc* by declaring that students

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<sup>149</sup> See Brief for the Association for Education in Journalism and Mass Communication and the Association of Schools of Journalism and Mass Communication as Amici Curiae in Support of Petitioner, 126 S.Ct. 1330 (2006) (No. 05-377).

<sup>150</sup> Amicus Curia briefs were filed by two dozen media organizations, First Amendment organizations, and journalism education organizations, including colleges and universities. See, e.g., Answer of Student Press Law Center and Amici Listed on Reverse Side as Amici Curiae in Response to Defendant-Appellant Patricia Carter's Petition for Rehearing with Suggestions for Rehearing *en banc*, 325 F.3d 945 (7th Cir. 2003) (No. 01-4155); Brief for the Foundation for Individual Rights in Education and Support for Academic Freedom et al. as Amici Curiae in Support of Petitioners, 126 S.Ct. 1330 (No. 05-377).

<sup>151</sup> *The Public Forum List*, Student Press Law Center, <http://www.splc.org/publicforumcolleges> (last visited April 14, 2006). (Illinois State University, University of Southern Indiana, University of Wisconsin Platteville operate in public fora; University of Illinois's daily student newspaper is fully independent of the school and a public forum statement is therefore unnecessary); Matthew Chayes, *College paper's editors given control over content*, CHICAGO TRIBUNE, March 30, 2006 at p.4 (Students at Illinois Central College will have final say over what is published).

<sup>152</sup> *University of Southern Indiana president signs public forum statement*, Student Press Law Center, <http://www.splc.org/newsflash.asp?id=1070> (last visited April 14, 2006); *The Public Forum List*, Student Press Law Center (2005), <http://www.splc.org/publicforumcolleges> (last visited April 14, 2006).

will have the final authority over the student newspaper decisions.<sup>153</sup> However, there remain over 80 public colleges and universities in this region, and countless private schools, that have yet to follow suit, and it is unfortunate that such lengths need to be taken by educational institutions that have historically operated as free and open fora that encourage and promote a diversity of viewpoints.<sup>154</sup> But unless the administrations of all colleges and universities in the Seventh Circuit states follow this sort of example and explicitly declare that the publications are public fora,<sup>155</sup> the suspect forum analysis of the *Hosty* decision *en banc* will still threaten the college free press and still undermine the fundamental mission of higher education.

#### IV. THE SEVENTH CIRCUIT FURTHER MISAPPLIES SUPREME COURT PRECEDENT

*Hazelwood* is a factually-distinct standard that is problematic to apply outside the specific context in which it arose— that of curricular, high school speech.<sup>156</sup> Hence, once the Seventh Circuit majority decided to extend *Hazelwood* to non-curricular speech in higher education, the court’s suspect decision-making did not stop there. Instead, the majority’s logic in the *Hosty* decision *en banc* continued to fly in the face of Supreme Court precedent, as the

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<sup>153</sup> Matthew Chayes, *College paper’s editors given control over content*, CHICAGO TRIBUNE, March 30, 2006, at p.4. A faculty adviser at Illinois Central College threatened to shut down the campus paper after the student editors resisted the advisor’s demands to control the content. *Id.*

<sup>154</sup> *The Public Forum List*, Student Press Law Center, <http://www.splc.org/publicforumcolleges> (last visited April 14, 2006).

<sup>155</sup> *See id.* (The Student Press Law Center is encouraging students in Illinois, Indiana and Wisconsin to call upon their schools to pledge their commitment to free speech by explicitly designating their student media as “public fora” where student editors have the right to make editorial decisions free from administrative interference).

<sup>156</sup> *See* Brief for Student Press Law Center, *et. al.* as Amici Curiae in Support of Petition of Margaret L. Hosty, Jeni S. Porche, and Steven P. Barba for Writ of Certiorari, 126 S.Ct. 1330 (No. 05-377).

Seventh Circuit misapplied the high court's analysis regarding subsidized funding and prior restraints.

*A. The Hosty decision en banc confuses student fees and government subsidies.*

The Seventh Circuit appears to have also ignored the critical distinction between funding from mandatory student fees and government subsidies.<sup>157</sup> The *Hosty* decision *en banc* transformed student money into government money— “forc[ing] students to pay into a student activities funds earmarked for a student-run newspaper only to have [the funds] used to finance an administrati[ve] mouthpiece.”<sup>158</sup> Because the *Innovator* was an extracurricular activity supported by student activity fees,<sup>159</sup> “[t]he Seventh Circuit directly contradicted Supreme Court precedent by applying doctrines relevant to institutionally ‘subsidized’ speech.”<sup>160</sup>

In particular, the Seventh Circuit improperly treated the mandatory student activity fees as a conventional governmental subsidy, diametrically opposed to the Supreme Court's recent decisions.<sup>161</sup> Under the high court's analyses in *Board of Regents v. Southworth*<sup>162</sup> and *Rosenberger v. Rector*,<sup>163</sup> student fees are

<sup>157</sup> See Greg Lukianoff & Samantha Harris, *FIRE Policy Statement on 'Hosty v. Carter,'* Foundation for Individual Rights in Education, <http://www.thefire.org/index.php/article/6269.html> (last visited April 14, 2006).

<sup>158</sup> Brief for The Foundation for Individual Rights in Education and Supp. for Academic Freedom et al. as Amici Curiae in Support of Petitioners, 126 S.Ct. 1330 (No. 05-377).

<sup>159</sup> *Hosty v. Carter (Hosty I)*, 325 F.3d 945, 946 (7th Cir. 2003).

<sup>160</sup> Brief for The Foundation for Individual Rights in Education and Supp. for Academic Freedom et al. as Amici Curiae in Support of Petitioners, 126 S.Ct. 1330 (No. 05-377)

<sup>161</sup> *Id.*

<sup>162</sup> *Bd. of Regents of the Univ. of Wisconsin v. Southworth*, 529 U.S. 217, 233 (2000) (group of students challenged use of mandatory student fees to fund speech with which they disagreed).

<sup>163</sup> *Rosenberger v. Rector*, 515 U.S. 819 (1995) (Christian student publication sought student fee funding).

considered to be part of a pool of student money to encourage a diversity of views from private speakers, and “are not considered part of a university’s discretionary funds.”<sup>164</sup> The majority’s analysis in the *Hosty* decision *en banc* cannot be reconciled with the Supreme Court’s decision in *Rosenberger*, for example, where the high court held that the First Amendment prohibits a public university from denying funding to a student publication because of its religious or political message.<sup>165</sup> Under the majority’s analysis in *Hosty*, the university in *Rosenberger* could demand both the right to review the Christian student publication at issue and to censor its religious contents “once the publication accepted any funding.”<sup>166</sup> However, this is not what the Supreme Court held in *Rosenberger*, and thus evinces how the Seventh Circuit misconstrued the high court’s precedent in the *Hosty* decision *en banc*.

*B. The Hosty decision en banc undermines “prior restraint” jurisprudence.*

In concluding that Dean Carter is entitled to qualified immunity for ordering the printer to stop publishing the *Innovator*, the Seventh Circuit has further undermined the long-standing, widely-accepted premise that prior restraints are repugnant to the basic values of our society.<sup>167</sup> As the dissent of the decision *en banc* explained, the law prior to *Hazelwood* consistently established that university officials

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<sup>164</sup> Brief for The Foundation for Individual Rights in Education and Supp. for Academic Freedom et al. as Amici Curiae in Support of Petitioners, 126 S.Ct. 1330 (No. 05-377) (citing *Southworth*, 529 U.S. 217; *Rosenberger*, 515 U.S. 819).

<sup>165</sup> See generally *Rosenberger*, 515 U.S. 819.

<sup>166</sup> . Brief for Student Press Law Center, et. al. as Amici Curiae in Support of Petition of Margaret L. Hosty, Jeni S. Porche, and Steven P. Barba for Writ of Certiorari, 126 S.Ct. 1330 (No. 05-377)

<sup>167</sup> See Answer of Student Press Law Center and Amici Listed on Reverse Side as Amici Curiae in Response to Defendant-Appellant Patricia Carter’s Petition for Rehearing with Suggestions for Rehearing *en Banc*, 325 F.3d 945 (7th Cir. 2003) (No. 01-4155); Brief for the Foundation for Individual Rights in Education and Support for Academic Freedom et al. as Amici Curiae in Support of Petitioners, 126 S.Ct. 1330 (No. 05-377).

could not require prior review of student media; and the law after *Hazelwood* did not change this well-established rule.<sup>168</sup> The U.S. Supreme Court has steadily held that prior restraints on expression are presumptively unconstitutional,<sup>169</sup> and the courts have long equated and analyzed state-mandated prepublication reviews as prior restraints.<sup>170</sup> The Supreme Court has moreover asserted that public officers, like the GSU administrators, “whose character and conduct remain open to debate and free discussion in the press, [must] find their remedies . . . under libel laws providing for redress and punishment, and not in proceedings to restrain publication.”<sup>171</sup>

Contrary to the majority’s logic in the *Hosty* decision *en banc*, *Hazelwood* was not generally understood to grant officials the authority to regulate college student media, at the time when Dean Carter ordered the *Innovator*’s printer to stop the presses;<sup>172</sup> and Dean Carter, or anyone in a similar position of authority, would have reasonably understood such an action to constitute an impermissible

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<sup>168</sup> *Hosty v. Carter (Hosty II)*, 412 F.3d 731, 742-43 (7th Cir. 2005) *en banc* (Evans, J. dissenting).

<sup>169</sup> See *Neb. Free Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976) (“prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights”); *N.Y. Times Co. v. U.S.*, 403 U.S. 713, 717 (1971) (“Both the history and language of the First Amendment support the view that the press must be left to publish the news . . . without censorship, injunction or prior restraints”); *Near v. State of Minn.*, 283 U.S. 697, 713 (1931) (“[I]t has been generally, if not universally, considered that it is the chief purpose of the [First Amendment’s] guaranty to prevent previous restraints upon publication”).

<sup>170</sup> See Answer of Student Press Law Center and Amici Listed on Reverse Side as Amici Curiae in Response to Defendant-Appellant Patricia Carter’s Petition for Rehearing with Suggestions for Rehearing *en Banc*, 325 F.3d 945 (7th Cir. 2003) (No. 01-4155) (citing *Fujishima v. Bd. of Educ.*, 460 F. 2d 1355 (7th Cir. 1972) (rule prohibiting students from distributing any publication on school grounds without prior approval of superintendent violated First Amendment)).

<sup>171</sup> *Near v. State of Minn.*, 283 U.S. 697, 718-19 (1931).

<sup>172</sup> See Brief for the Foundation for Individual Rights in Education and Support for Academic Freedom et al. as Amici Curiae in Support of Petitioners, 126 S.Ct. 1330 (No. 05-377) (explaining that even the “most comprehensive text dealing with higher education law does not even mention *Hazelwood* as a case that is applicable” to college student media).



prior restraint. In addition, as the Dean of Student Affairs and Services, Carter would have been reasonably informed of the GSU policy “that each funded publication ‘will determine content and format . . . without censorship or advance approval.’”<sup>173</sup> Yet, despite the rather obvious warnings that her actions were improper, the *Hosty* decision *en banc* granted qualified immunity to Dean Carter upon the arguably faulty premise that she could not have known that she was acting improperly in issuing her directive for mandatory prepublication review of the contents of the GSU student newspaper.<sup>174</sup>

### CONCLUSION

The Seventh Circuit’s extension of the U.S. Supreme Court’s *Hazelwood* decision was an extreme step for the court to take, absent more direction from the Supreme Court, and in light of contrary decisions from several circuit courts. Even though the Supreme Court has recently declined to review the Seventh Circuit’s decision *en banc*, *Hosty v. Carter* is still worthy of critical and cautious acceptance from the legal community. The decision *en banc* conflicts with the *Hazelwood* interpretations of several circuit courts, preemptively extends the *Hazelwood* holding to college student media, and runs contrary to the spirit of Supreme Court precedent.

As a result of the *Hosty* litigation, the *Innovator* no longer publishes at Governor’s State University or in any other forum,<sup>175</sup> and with the Seventh Circuit’s *Hazelwood* interpretation still intact, it will not be surprising if the presses of other collegiate newspapers are likewise forced to shut down. For now, the only choice that college student journalists have is to petition their administrations to explicitly declare that their student publications operate as fully public fora, so

<sup>173</sup> *Hosty II*, 412 F.3d at 737 (Evans, J. dissenting) (quoting the Communications Media Board’s policy statement).

<sup>174</sup> *Id.* at 739.

<sup>175</sup> First Amendment Center, *Full 7th Circuit upholds college against newspaper*, <http://www.firstamendmentcenter.org/news.aspx?id=15452> (last visited April 14, 2006).

as to protect themselves from *Hosty*'s questionable forum analysis and suspect extension of *Hazelwood*'s standard for evaluating censorship claims in the university context.

As a consequence of the *Hosty* decision *en banc*, the law regarding the censorship of college student media remains unclear in the Seventh Circuit. Thus, without further direction from the Supreme Court, courts throughout the country will inevitably muddle the *Hazelwood* analysis in future applications and misapplications of this factually-distinct, high school-specific Supreme Court decision.

