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Defining Freedom of the College Press After "Hosty v. Carter"

Jessica B. Lyons

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I. INTRODUCTION

The application of the First Amendment to public universities[1] has long been a source of confusion and frustration for both universities and courts. In particular, application of the First Amendment to student publications such as newspapers, magazines, and yearbooks has led to a great deal of litigation and controversy. The protection afforded by the First Amendment to these publications at the university level is extremely unclear and the circuit courts' inconsistent treatment of the college press has further confused the issue.

How should the First Amendment apply to public universities? An instinctive response is that a college student should enjoy the same, if not greater, protections than the average citizen. After all, "[t]he very mission of a college or university depends upon broad latitude for viewpoints in the pursuit of truth and understanding. So of all places in society where people may express controversial views, should not the university campus be the most open and speech the

1. This Note will not address the free speech rights of students at private colleges and universities, as they are outside the scope of the constitutional discussion contained herein. Private schools, because they are not state actors, have much greater authority to censor the content of their school publications. Such censorship does not run afoul of the First Amendment, and, for this reason, discussing private schools in this Note would only further confuse an already complicated area of law. However, it is important to note that some private universities are subject to the First Amendment. For example, private universities in California have been subjected to the First Amendment by statute. CAL. EDUC. CODE § 94367 (West 2006). Private universities that are subjected to the First Amendment, such as Stanford University, would be treated the same as a state university should a student allege a violation of his or her First Amendment rights.

freest?"[2] In general, courts have also recognized the importance of First Amendment protections for public school students. For instance, the Supreme Court has held that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[3]

On the contrary, the schoolhouse gate has historically served as a barrier between American students and full protection under the First Amendment, as the First Amendment rights of minor students in public schools "are not automatically coextensive with the rights of adults."[4] Courts have recognized a limitation on students' First Amendment rights "in light of the special characteristics of the school environment."[5] Much of this has to do with the age of the students, for in many situations minors are not entitled to the same legal rights as those recognized as legal adults.[6] Even speech on college campuses, however, has been more closely regulated than speech in the community at large because "the values inherent in certain campus communities impose on speech a higher standard than does society at large."[7]

Students at public colleges and universities thus occupy a confusing middle ground in terms of First Amendment application. These students are usually legal adults, yet they remain in an educational environment. Just as college serves as a developmental stepping-stone between childhood and adulthood, the legal status of college students is often one of finding middle ground between the rights of children and the rights of adults who are no longer enrolled in school. For this reason, the status of these students under the First Amendment warrants special analysis to determine whether courts should classify students at public colleges and universities as children, as adults, or as holding an intermediate status.

The extent to which freedom of the press is protected on college campuses is a difficult issue to analyze because of the variety of forms that speech may take in the college community. It is critical to note the distinction between student speech connected to a university simply because the speech is uttered there and speech connected to a classroom environment or to a university-supported extracurricular activity. For example, there is a great difference between a speech

2. ROBERT O'NEIL , FREE SPEECH IN THE COLLEGE COMMUNITY vii (1997).

3. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

4. Bethel Sch. Dist. No. 403 v. Fraser, 478 US 675, 682 (1986).

5. *Tinker*, 393 U.S. at 506.

6. Gregory C. Lisby, *Resolving the* Hazelwood *Conundrum: The First Amendment Rights of College Students in* Kincaid v. Gibson *and Beyond*, 7 COMM. LAW & POL'Y 129, 130-31 (2002).

7. O'NEIL, *supra* note 2, at ix.

given by a student in the middle of the campus and an editorial written by a student and printed in a university-supported student publication. Courts classify the former as political speech unconditionally protected by the First Amendment, but the latter's status is much less clear. Thus, when courts consider student-produced publications at the university level, they consistently hold that "independent" or "underground" campus media—media that is produced by students and distributed on campus but otherwise has no affiliation with the university—must be free from regulation by a university.[8] On the other hand, courts are divided as to what control a university may exercise over a student publication to which it provides financial support in some way.

The Supreme Court has decided one particularly significant case involving a student publication at a public high school. [9] In *Hazelwood School District v. Kuhlmeier*, the Court held that an educator may exercise editorial control over a school-sponsored student publication so long as the educator's actions are "reasonably related to legitimate pedagogical concerns."[10] In a footnote, the Court declined to decide whether its holding also applied to colleges and universities.[11] *Hazelwood* became the governing standard for high school publications, while the legal status of collegiate publications remained unclear.

Until recently, no court had extended *Hazelwood* to a student-controlled publication at a public college or university. That changed on June 20, 2005, when the United States Court of Appeals for the Seventh Circuit issued its holding in *Hosty v. Carter*, a case involving an administrator's prior review of a student-produced newspaper at Governors State University in University Park, Illinois.[12] In reaching its decision that the university's actions were constitutional, the court found that "there is no sharp difference between high school and college papers" and therefore that *Hazelwood*'s framework applied at the university level as well.[13] The plaintiffs in *Hosty* appealed their

8. *See* Solid Rock Found. v. Ohio State Univ., 478 F. Supp. 96, 101 (S.D. Ohio 1979) (stating that Ohio State University's ability to regulate distribution of an underground campus paper is limited to reasonable time, place, or manner restrictions); Channing Club v. Bd. of Regents, 317 F. Supp. 688, 692 (N.D. Tex. 1970) (holding that Texas Tech University violated the First Amendment by prohibiting the distribution of an independent satire publication on campus).

9. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).

10. *Id.* at 273.

11. *Id.* at 273 n.7.

12. Hosty v. Carter (*Hosty II*), 412 F.3d 731, 732-33 (7th Cir. 2005) (en banc).

13. *Id.* at 735-36.

case to the Supreme Court, and the Court declined to review the case on February 21, 2006.[14]

The *Hosty* holding creates additional confusion regarding *Hazelwood*'s applicability in the college setting. Although the court purported to apply the *Hazelwood* framework to the facts of *Hosty*, it later acknowledged that many college newspapers are limited-purpose public fora in which administrators may not interfere.[15] In doing so, it echoed the sentiments of an earlier Sixth Circuit case, *Kincaid v. Gibson*,[16] which flatly rejected the application of *Hazelwood* at the college level. The *Hosty* holding is thus a paradoxical one that creates further confusion regarding *Hazelwood*'s applicability in the college setting.[17]

The crux of the *Hosty* controversy is the First Amendment status of students at public colleges and universities and, in particular, the status of the publications they produce. *Hosty* has once again raised the question of how much authority a university should have over its student-produced publications. On one hand, *Hosty* erred by stating that there was no sharp difference between high school and college publications under the First Amendment. In fact, college and high school newspapers are very different, as are the college and high school environments. On the other hand, *Hosty* was correct in holding that universities do have some interest in their student-produced publications. Therefore, the court might have correctly applied one element of *Hazelwood*'s holding to college campuses. For this reason, the application of *Hazelwood* to colleges and universities, if done properly, will not be as catastrophic as free press advocates fear.

Part II of this Note explores the history of freedom of the press at both the college and high school levels and, in particular, the impact of *Hazelwood* and *Hosty* on this freedom. Part III of this Note outlines three possible standards of review to apply when evaluating the legal status of student newspapers at colleges and universities: (1) the *Hosty/Hazelwood* standard, (2) the "intermediate scrutiny" standard, and (3) the standard applied to professional journalists. Part IV of this Note explains why all three standards are inappropriate in this situation, highlighting the danger of upholding

14. Hosty v. Carter, 126 S. Ct. 1330 (2006).

15. *Hosty II*, 412 F.3d at 735, 737.

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

17. *See Hosty II*, 412 F.3d at 737 (stating that a school may declare a student newspaper open for expression as a designated public forum and therefore disable itself from engaging in viewpoint or content discrimination); *Kincaid*, 236 F.3d at 346 n.5, 348-49 (holding that a university creates a designated public forum when it opens a forum for use by the public for the discussion of certain subjects, that the student yearbook in this case was a designated public forum, and therefore *Hazelwood* had little application).

the Seventh Circuit's holding in *Hosty*. Finally, Part V of this Note articulates and analyzes a new test that at once incorporates elements of precedent, recognizes a university's interest in the publications it supports, and grants broad First Amendment protection to college journalists.

II. A HISTORY OF FREEDOM OF THE PRESS ON COLLEGE AND HIGH SCHOOL CAMPUSES

Over the past forty years, the federal courts have conducted an extensive analysis of the First Amendment's application to schools and colleges. This Part will provide an overview of that history, focusing on the courts' treatment of college students and their free press rights. In particular, how *Hosty* and *Hazelwood* have altered the legal landscape regarding student speech rights will be examined closely.

*A. The Pre-*Hazelwood *Trend of Broad First Amendment Protection*

Students gained substantial First Amendment protection after the Supreme Court's 1969 decision in *Tinker v. Des Moines Independent Community School District*, which established a test that would protect students' free speech rights so long as their speech did not constitute a material and substantial disruption of the educational environment.[18] *Tinker* involved three students, two in high school and one in middle school, who wore black armbands to school to protest the Vietnam War.[19] The principals of the Des Moines public schools had established a rule that any student wearing an armband to school would be asked to remove it, and if a student refused, the school would suspend the student until the student returned to school without the armband.[20] The plaintiffs were all suspended pursuant to this policy.[21]

Holding that the school district's policy was a violation of the students' First Amendment rights, the Supreme Court stated that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression" and that "this sort of hazardous freedom . . . is the basis of our national strength and of the independence and vigor of Americans."[22] The Court held that the school district's actions could not be justified by a mere desire to avoid controversy. A policy restricting students' freedom of expression was

18. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).
19. *Id.* at 504.
20. *Id.*
21. *Id.*
22. *Id.* at 508-09.

only permissible when such expression would materially and substantially disrupt the work and discipline of the school.[23]

Although *Tinker* has never been expressly overruled, the "material and substantial disruption" test suffered a major legal blow in 1986 when the Supreme Court decided *Bethel School District No. 403 v. Fraser*.[24] The Court in *Bethel* distinguished *Tinker* on the basis that *Tinker* involved passive political speech while the present case involved more disruptive speech,[25] holding that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission."[26]

Perhaps the most important pre-*Hazelwood* case expressly establishing the First Amendment rights of college students is *Healy v. James*, in which the Central Connecticut State College chapter of Students for a Democratic Society challenged the college administration's rejection of its application to obtain recognition as a campus organization.[27] Holding that the administration's actions violated the students' First Amendment rights, the Supreme Court stated that "[t]he mere disagreement of the President with the group's philosophy affords no reason to deny it recognition."[28] Although the Court recognized the need for educators to have authority over their students, it noted that "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[29] Therefore, *Healy* suggested that college students enjoy the same freedom of speech as adults not enrolled in school, while at the same time hinting at the fact that the university has an interest over the student organizations it sponsors.

Numerous lower courts have rendered decisions granting expansive First Amendment rights to student publications at colleges and universities. In *Trujillo v. Love*, for instance, a Southern Colorado State College student successfully challenged her suspension by the college as managing editor of the student newspaper after she wrote

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23. *Id.* at 509, 514.

24. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

25. *Id.* at 680. This case involved a student election campaign speech delivered by a student at a high school assembly which contained "an elaborate, graphic, and explicit sexual metaphor." *Id.* at 677-78.

26. *Id.* at 685.

27. Healy v. James, 408 U.S. 169, 172 (1972).

28. *Id.* at 187.

29. *Id.* at 180.

articles critical of the administration.[30] The court held that "[h]aving established a particular forum for expression, officials may not then place limitations upon the use of that forum which interfere with protected speech and are not unjustified by an overriding state interest."[31] In reaching its decision, the court applied *Tinker*'s "material and substantial interference" test and found that the college could not justify its actions under this standard.[32] In *Arrington v. Taylor*, the Middle District of North Carolina held that for First Amendment purposes, a campus newspaper is part of the "press," and the state may not restrict expression because of the paper's message, ideas, contents, or subject matter.[33] Likewise, the Fifth Circuit held that Florida Atlantic University violated three students' First Amendment rights when the university's president fired them from the school newspaper after he became dissatisfied with the quality of the paper.[34] In *Stanley v. Magrath*, the Eighth Circuit found that the University of Minnesota violated the First Amendment when it reduced funding to the campus newspaper after the paper published a particularly controversial "Humor Issue."[35] In so holding, the court reaffirmed the then-universally acknowledged principle that a public university violates the First Amendment when it takes adverse action against a student publication because it disapproves of the publication's content.[36]

Cases such as *Healy* and *Tinker*, therefore, led to a series of victories in the federal courts for college student publications.[37] However, the most significant case dealing with First Amendment protections to student publications involved a high school, not a college, publication, and it reduced, rather than expanded, students' rights.

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30. Trujillo v. Love, 322 F.Supp. 1266, 1267-69, 1271 (D. Colo. 1971).

31. *Id.* at 1270.

32. *Id.*

33. Arrington v. Taylor, 380 F. Supp. 1348, 1365 (M.D. N.C. 1974).

34. Schiff v. Williams, 519 F.2d 257, 259 (5th Cir. 1975).

35. Stanley v. Magrath, 719 F.2d 279, 280 (8th Cir. 1983).

36. *Id.* at 282.

37. *See, e.g.*, Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973) (citing *Healy* for the proposition that "a college . . . "may not restrict speech . . . simply because it finds the views expressed by any group to be abhorrent.' "); *Trujillo*, 322 F. Supp. at 1270 (finding that "[i]n the context of an educational institution, a prohibition on protected speech, to be valid, must be necessary to avoid material and substantial interference with schoolwork or discipline."); Antonelli v. Hammond, 308 F. Supp. 1329, 1336 (D. Mass 1970) (applying the *Tinker* "material and substantial disruption" test to a college newspaper and finding that the school was not justified in taking action).

B. Hazelwood *and Its Potential Extension to College Campuses*

The Supreme Court first addressed the issue of administrators' authority to control the content of student publications in *Hazelwood School District v. Kuhlmeier*, finding that a high school principal was justified in deleting two pages of articles in a student newspaper that discussed divorce and teen pregnancy.[38] The principal felt that the articles violated students' privacy and contained material inappropriate for the school's younger students.[39] In reaching its conclusion, the *Hazelwood* opinion declined to apply the *Tinker* standard to student publications, stating that high schools may regulate student speech in a different manner when the school attaches its name and resources to the dissemination of the speech.[40] Instead, the Court formulated a two-prong forum analysis test to determine whether a secondary school may control the content of a student publication.

Forum analysis is a central component of First Amendment litigation. The extent to which a government may regulate speech is limited by the speech's setting. There are three possible fora: a public forum, a nonpublic forum, and a designated public forum. A public forum is defined as a place "which by long tradition or by government fiat have been devoted to assembly and debate,"[41] such as a park or a sidewalk. In a public forum, the government's ability to suppress speech is "sharply circumscribed."[42] On the other hand, speech in a nonpublic forum is subject to all reasonable regulations imposed by the government.[43] A designated public forum, also referred to as a limited-purpose public forum, is a forum created by the government that is deemed by the government to be a place open to various forms of expression.[44]

The *Hazelwood* Court concluded that high school newspapers were not public fora because of their place in the school's curriculum.[45] Consequently, the court addressed the question that would become the second prong of the *Hazelwood* test: the circumstances under which a school may regulate speech in a nonpublic forum. According to the Court, the rationales for its decision in *Hazelwood* revolved around the

38. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988).
39. *Id.* at 263.
40. *Id.* at 272-73.
41. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
42. *Id.*
43. *Hazelwood,* 484 U.S. at 267.
44. Hosty v. Carter (*Hosty II*), 412 F.3d 731, 737 (7th Cir. 2005) (en banc).
45. *Hazelwood*, 484 U.S. at 269.

age of the students and a school's duty to play the role of 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."[46] Thus, the Court held that "[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[47]

Critics of the *Hazelwood* decision decried it as overly sweeping, and the Student Press Law Center argued that the case "didn't merely adjust the First Amendment balance between administrative authority and student free speech rights, it pretty much tossed out the scale."[48] There was a silver lining, however, in a footnote to the majority opinion in which the Court stated that it "need not decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."[49]

In the years following *Hazelwood*, there was great concern that its holding would be applied to colleges and universities.[50] The Student Press Law Center, on the other hand, remained confident that such an event was unlikely to take place, stating in its legal guide to student journalists:

> If some day a college or university journalism department does go to court to argue that the *Hazelwood* decision should be extended to the college press, it will find itself in a politically awkward position. For a court to do what the school requests, it would have to ignore or overrule over 20 years of established First Amendment decisions that emphasize the importance of freedom of the press. One can imagine that few schools concerned with the respect of their academic and professional peers and their ability to attract students interested in a quality journalism education will be inclined to take such a precipitous step.[51]

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46. *Id.* at 272 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

47. *Id.* at 261. Listed by the Court as activities related to legitimate pedagogical concerns were ensuring that students in a journalism program learn lessons appropriate to the activity, maintaining a high standard of quality in student publications, preventing sensitive subject matter from reaching a young audience, prohibiting the advocacy of illegal or inappropriate conduct, preventing the association of the school with non-neutral positions on matters of political controversy, and protecting the privacy of students and their families. *Id.* at 271-72, 274-75. Although not all of these activities and concerns are "pedagogical" in that they do not all relate to the traditional teaching and learning process, they are nonetheless classified as such by the Court.

48. Mike Hiestand, *The* Hosty v. Carter *Decision: What It Means*, TRENDS IN COLLEGE MEDIA, July 6, 2005, http://www.studentpress.org/acp/trends/~law0705college.html.

49. *Hazelwood*, 484 U.S. at 273 n.7.

50. O'NEIL, *supra* note 2, at 129.

51. STUDENT PRESS LAW CTR., LAW OF THE STUDENT PRESS 56 (2d ed. 1994).

Interestingly, while *Hazelwood* declined to decide whether its First Amendment analysis applied to college students, the opinion took great pains to emphasize that the age and maturity of the students were major factors in the decision,[52] thereby implying that the issue of college students' rights would require a different analysis. This viewpoint is consistent with courts' long-standing "fundamental assumption" that college students are less impressionable than students in primary and secondary school and thus require different levels of First Amendment protection.[53]

The holding in *Hazelwood*, while sweeping with regard to high school students, left a legal hole surrounding the college press. Thus, while *Hazelwood* was viewed as a major blow to freedom of the press in public high schools, college students were, for the time being, spared the same fate.

*C. College Publications Post-*Hazelwood

In the years since the Supreme Court decided *Hazelwood*, the lower federal courts have differed in their treatment of college publications and other free speech issues associated with public colleges and universities. The First Circuit was the first to address *Hazelwood*'s applicability at the college level, holding that *Hazelwood* was inapplicable to college newspapers.[54] In *Kincaid v. Gibson*, a 2001 case involving Kentucky State University's student yearbook, the Sixth Circuit stated that "*Hazelwood* has little application to this case."[55] The court found that the yearbook was a limited-purpose public forum, not a nonpublic forum.[56] In a limited-purpose public forum, the government opens the forum for use by the public for assembly and speech.[57] *Kincaid* held that in a limited-purpose public forum, such as the student yearbook at the center of the case, the government: (1) may impose only reasonable time, place, and manner regulations; (2) may not impose viewpoint regulations; and (3) may impose content regulations that are narrowly drawn to effectuate a

52. *Hazelwood*, 484 U.S. at 272.

53. Deanna N. Pihos, Note, *Assuming Maturity Matters: The Limited Reach of the Establishment Clause at Public Universities*, 90 CORNELL L. REV. 1349, 1363 (2005) (discussing how a fundamental assumption that college students are more mature and less impressionable than high school students drives courts' scrutiny of school prayer at these institutions).

54. Student Gov't Ass'n v. Bd. of Tr. of the Univ. of Mass., 868 F.2d 473, 480 n.6 (1st Cir. 1989).

55. Kincaid v. Gibson, 236 F.3d 342, 346 n.5 (6th Cir. 2001).

56. *Id.* at 346 n.5.

57. *Id.* at 348.

compelling state interest.[58] The court in *Kincaid* declined to extend its standard to student newspapers at the college level.[59]

Other circuits have issued more confusing opinions. Both the Tenth and Eleventh Circuits have applied *Hazelwood* to college campuses, but both circuits dealt solely with student speech within the classroom, rather than speech contained in an extracurricular publication.[60] For example, the Tenth Circuit applied *Hazelwood* because "[n]owhere is [*Hazelwood*'s reasoning] more true than in the context of a school's right to determine what to teach and how to teach it in its classrooms."[61] The Eleventh Circuit similarly focused on in-class activities and the authority of educators to control their curricula.[62] Consequently, while these courts held *Hazelwood* applicable to the university setting, they left the door open to apply a different framework when the speech at issue occurs outside of the classroom.

Additionally, the Ninth Circuit applied *Hazelwood* to a public university in its majority opinion in *Brown v. Li*.[63] In *Brown*, the plaintiff was a student at a public university, the University of California at Santa Barbara, and was challenging the university's refusal to file the student's thesis in the university library.[64] The reason for the university's disapproval was a "Disacknowledgements" section in the student's graduate thesis which included profanity directed at various persons, including the dean of the student's graduate program and the former governor of California.[65] The court applied *Hazelwood* as the standard for reviewing a university's assessment of a student's academic work.[66] However, the precedential force of *Brown* is somewhat confusing and ambiguous, as the members of the appellate panel set forth three "distinct and incompatible views"[67] of *Hazelwood*'s applicability in the collegiate setting.[68]

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58. *Id.* at 354.

59. *Id.* at 348 n.6.

60. *See* Axson-Flynn v. Johnson, 356 F.3d 1277, 1285 (10th Cir. 2004) (holding that *Hazelwood* supplies the framework when determining the degree of First Amendment protection granted to a student's speech in a classroom exercise); Bishop v. Aronov, 926 F.2d 1066, 1071 (11th Cir. 1991) (using *Hazelwood*'s definition of a public forum to determine that a professor's in-class speech was subject to reasonable regulation by university administrators).

61. *Axson-Flynn*, 356 F.3d at 1284.

62. *Bishop*, 926 F.2d at 1074.

63. Brown v. Li, 308 F.3d 939, 947 (9th Cir. 2002).

64. *Id.* at 943.

65. *Id.*

66. *Id.* at 949.

67. The three-judge panel that decided *Brown* consisted of Judges Warren J. Ferguson, Stephen Reinhardt, and Susan P. Graber. *Id.* at 940. Judge Graber wrote the opinion of the court and applied *Hazelwood* to decide the case. *Id.* at 941, 949. Judge Ferguson agreed that the

D. The Application of Hazelwood *to College Newspapers*: Hosty v. Carter

In 2005, the United States Court of Appeals for the Seventh Circuit decided *Hosty v. Carter*, a case that revisited the issue of whether a public university's administrators could control the content of a student-run newspaper. As the first decision to apply *Hazelwood* to college newspapers, *Hosty* is a landmark First Amendment case.

The three plaintiffs in *Hosty* were appointed by the Governors State University's Student Communications Media Board to serve as editor-in-chief, managing editor, and staff reporter for the *Innovator*, the university's newspaper, which was supported by student fees.[69] During her tenure at the *Innovator*, plaintiff Hosty authored several articles critical of the university's administration; in particular, she wrote articles attacking the integrity of Roger K. Oden, the Dean of the College of Arts and Science at Governors State.[70] The newspaper later refused to retract statements that the administration deemed false.[71] Tension between the *Innovator*'s staff and university administration rose, and Dean of Student Affairs and Services Patricia Carter told the *Innovator*'s printer not to print any issues of the paper without her review and approval.[72] The newspaper refused to submit to prior review, and publication of the newspaper ceased in November 2000.[73]

The plaintiffs sued the University, its trustees, and several administrators and staff members for damages, alleging a violation of their First Amendment rights, and the district court granted summary judgment to all defendants except Dean Carter.[74] In a panel decision, the Court of Appeals for the Seventh Circuit affirmed the district court's holding, stating that "Dean Carter's contention that she could not reasonably have known that it was illegal to order the *Innovator's* printer to halt further publication of the newspaper or to require prior

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plaintiff's First Amendment rights were not violated and concurred in the judgment, but did not apply *Hazelwood* and instead said that the plaintiff's speech constituted deception. *Id.* at 955-56. Judge Reinhardt concurred in part and dissented in part, stating that *Hazelwood* had no application at the college level. *Id.* at 956-57.

68. Hosty v. Carter (*Hosty II*), 412 F.3d 731, 739 (7th Cir. 2005) (en banc).

69. Hosty v. Carter (*Hosty I*), 325 F.3d 945, 946 (7th Cir. 2003); *Hosty II*, 412 F.3d at 732-33. Because the two Seventh Circuit opinions in *Hosty* were selective in their presentation of the facts, both opinions are cited to present all of the relevant facts.

70. *Hosty II*, 412 F.3d at 731, 732-33.

71. *Id.* at 733.

72. *Id.*

73. *Id.*

74. *Id.*

approval of the newspaper's content defies existing, well-established law."[75]

In 2005, the Seventh Circuit reheard the case en banc and reversed its earlier decision.[76] Writing for the majority, Judge Easterbrook stated that "there is no sharp difference between high school and college papers" and proceeded to apply the *Hazelwood* standard to this case, setting the precedent that *Hazelwood* would apply to subsidized student newspapers at public colleges.[77] The court held that Dean Carter was entitled to qualified immunity because the law regarding college publications was sufficiently unclear such that a reasonable person in her position could not be expected to know how to handle the situation.[78] Because the Seventh Circuit decided *Hosty* on qualified immunity grounds,[79] Judge Easterbrook did not finish his *Hazelwood* analysis. He did, however, make clear that he intended to set a precedent of applying *Hazelwood* at the university level.[80] The three plaintiffs appealed their case to the Supreme Court on September 16, 2005, and the Court declined to review the decision on February 21, 2006.[81]

Response to the *Hosty* decision was immediate and impassioned, as critics feared that "[students'] rights ha[d] taken a permanent vacation."[82] Although courts have applied *Hazelwood*'s reasoning to First Amendment issues at public universities in the past,[83] *Hosty* was the first case to apply the *Hazelwood* framework to a student newspaper at the university level. It was also the first case to apply *Hazelwood* to student expression outside the classroom. In doing so, *Hosty* marked a departure from a substantial body of pre- and post-*Hazelwood* law that prevented university administrators from requiring prior review of student media.[84]

Hosty also prompted concrete responses from its critics. For example, the Student Press Law Center has urged colleges and universities in the Seventh Circuit to grant public forum status

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75. *Hosty I*, 325 F.3d 945, 948 (7th Cir. 2003).

76. *Hosty II*, 412 F.3d at 732, 739.

77. *Id.* at 735.

78. *Id.* at 738.

79. *Id.* at 738-39. Qualified immunity protects government officials performing discretionary functions from liability when their conduct does not clearly violate established statutory or constitutional rights of which a reasonable person would have been aware. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

80 *Id.* at 735.

81. Hosty v. Carter, 126 S. Ct. 1330 (2006).

82. Greg Lukianoff, *Wronging Student Rights*, BOSTON GLOBE, Sept. 3, 2005, at A17.

83. *See supra* note 60 and accompanying text.

84. *Hosty II*, 412 F.3d at 742-43 (Evans, J., dissenting).

(thereby making the forum a designated public forum) to their student-run publications.[85] Additionally, on February 24, 2006, California State Assembly members Leland Yee and Joe Nation introduced A.B. 2581, a bill which sought to prohibit state university officials from placing prior restraints on student publications.[86] Under the proposed law, college journalists would have the same free speech rights as professional journalists.[87] Universities would, however, retain the authority to discipline students for publishing hate speech, and college newspapers would remain subject to libel and slander laws.[88] California Governor Arnold Schwarzenegger signed A.B. 2581 into law on August 28, 2006.[89] The California statute, the first to extend First Amendment protections to college journalists, will take effect on January 1, 2007.[90]

Despite the backlash, *Hosty* may not be as severe a blow to students' First Amendment rights as critics may think. *Hosty* was ultimately decided on qualified immunity grounds, not under the *Hazelwood* test.[91] In fact, the court in *Hosty* noted that "the Board established the *Innovator* in a designated public forum, where the editors were empowered to make their own decisions, wise or foolish, without fear that the administration would stop the presses."[92] Therefore it seems possible, even likely, that had qualified immunity not been at issue, the court would have found that the newspaper should have been free from interference from the university's administration. For this reason, *Hosty* is unlikely to "spark a torrent of censorship on university campuses," as so many critics of the holding fear.[93]

Hosty remains significant, however, for applying *Hazelwood* to universities. By so doing, *Hosty* opened the door to censorship of student publications. *Hosty*'s internal inconsistency regarding college newspapers makes its legacy unclear. At one point, the court states that there is "no sharp difference" between high school and college

85. Student Press Law Center, The Public Forum List, http://www.splc.org/legalresearch.asp?id=91 (last visited Sept. 19, 2006).

86. A.B. 2581, 2005-06 Assemb., Reg. Sess. (Cal. 2006).

87. *Id.*

88. The Associated Press, *Calif. Senate Votes to Protect Rights of College Journalists*, FIRST AMENDMENT CENTER, Aug. 11, 2006, http://www.firstamendmentcenter.org/news.aspx?id=17267.

89. *Id.*

90. *Id.*

91. Hosty v. Carter (*Hosty II*), 412 F.3d 731, 739 (7th Cir. 2005) (en banc).

92. *Id.* at 738.

93. Douglas Lee, Hosty *Ruling on College Press Leaves Heads Scratching*, FIRST AMENDMENT CENTER, June 29, 2005, http://www.firstamendmentcenter.org/commentary.aspx?id=15495.

newspapers, suggesting that university administrators have the same power to restrict a publication's content as their high school counterparts.[94] Later in the opinion, however, the court states that a university newspaper, unlike a high school newspaper, could serve as a designated public forum with which university administrators may not interfere.[95]

Perhaps *Hosty*'s greatest significance is that it further muddies the landscape of college students' free speech rights. The Supreme Court's refusal to decide whether *Hazelwood* should apply at the collegiate level has led to a great deal of confusion, and *Hosty* compounds that confusion by applying *Hazelwood* in a new setting. The court's statement that there is "no sharp difference" between high school and college newspapers opens the door to a blurring of the line between high school and college rights, potentially leading to an erosion of collegiate free speech rights across the board. This statement by *Hosty* also implies that universities would have the same "legitimate pedagogical concerns" as high schools.

Hosty is also confusing because of its unclear forum analysis. The court's statements regarding limited-purpose public fora were not as prominently featured in the case as in the *Hazelwood* analysis, and it is unclear whether courts applying *Hosty* would apply its discussion of limited-purpose public fora. In fact, *Hosty* merely held that college newspapers *may* be limited-purpose public fora, not that they always are.[96] *Hosty* explicitly declined to extend *Kincaid* to college newspapers on the grounds that *Kincaid* was decided after Dean Carter had imposed restrictions on the *Innovator*.[97] Given that *Hosty* explicitly extends *Hazelwood* to college newspapers, and *Kincaid* explicitly rejects the application of *Hazelwood* to college campuses, it would seem impossible for *Hosty* to uphold both *Hazelwood* and *Kincaid* in their entirety. Therefore, the most logical interpretation of the messy *Hosty* holding is that the *Hazelwood* test governs and that the *Kincaid*-like analysis mentioned in *Hosty*'s dicta does not. That being said, another court could interpret this language differently and state that under *Hosty*'s "college *Hazelwood*" test, a college newspaper that is a limited-purpose public forum may not be subject to prior review. Because *Hosty* has left such confusing precedent, it is critical that the Supreme Court formulate a clear standard of review that will

94. *Hosty II*, 412 F.3d at 735.
95. *Id.* at 738.
96. *Id.* at 737.
97. *Id.* at 738-39.

ameliorate the legal ambiguities that have surrounded the college press since *Hazelwood*.

III. POSSIBLE STANDARDS OF REVIEW

Courts' holdings in cases such as *Hosty*, *Hazelwood*, and *Brown* have bred great confusion as to the status of the student press at public colleges and universities. For this reason, courts have considered various standards of review to determine the free speech rights of college students participating in an extracurricular student publication. This Part will explore three possible standards.[98] The first is the Seventh Circuit's holding in *Hosty*. In particular, the first standard seizes on *Hosty*'s holding that there is "no sharp difference" between high school and college newspapers. The second is an "intermediate scrutiny" standard used in a variety of cases involving public universities. The third is the standard applied to professional journalists in the community at large.

A. Hosty, Hazelwood, *Reasonableness, and Legitimate Pedagogical Concerns*

Under *Hosty*'s assertion that there is "no sharp difference" between high school and college newspapers and that *Hazelwood* applies to colleges, the test for whether a university administrator can place a prior restraint on the content of a student publication would be a collegiate version of the *Hazelwood* forum analysis test.[99] Under this potential *Hosty* test, [100] the first question for courts would be whether the journalist in question is a speaker in a public forum.[101] If so, then the First Amendment would prohibit censorship of the publication.[102] However, a newspaper or other similar publication's status as an extracurricular activity, as opposed to a part of the curriculum, would not suffice to establish status as a public forum.[103] If instead a court

98. In addition, a fourth standard that has been considered by scholars is a revival of *Tinker* at the university level. Karyl Roberts Martin, Note, *Demoted to High School: Are College Students' Free Speech Rights the Same as Those of High School Students?*, 45 B.C. L. REV. 173, 199-200 (2003). Because *Tinker* has experienced substantial judicial erosion over the years and because it was decided with regard to high schools, not colleges, I have opted not to analyze this standard.

99. *Hosty II*, 412 F.3d at 735.

100. As stated above, *Hosty's* unclear language could lead to multiple interpretations of the case's actual holding. *See supra* Part II.D.

101. *Hosty II*, 412 F.3d at 735.

102. *Id.*

103. *Id.* at 736.

were to find that the publication is a non-public forum, then the university could supervise its content.[104] The only limit on the university's control in that situation would be the requirement that its actions must be reasonably related to legitimate pedagogical concerns.[105] In analyzing whether a university's control over a student publication is appropriate, a court applying this test would apply the same "legitimate pedagogical concerns" as it would when analyzing the actions of a high school,[106] the one possible exception being a consideration of the maturity of the student body.[107]

The *Hosty* court reasoned that a college newspaper could serve as a limited-purpose public forum and thus be subject to greater First Amendment protection under the *Kincaid* standard, rather than the more restrictive *Hazelwood* standard.[108] For reasons discussed *supra*, analysis of a potential *Hosty* test under the "no sharp difference" reasoning should not presume that *Hosty* would allow a student newspaper at the college level to be classified as a limited-purpose public forum. Until another court decides to the contrary, *Kincaid* will continue to be inapplicable to newspapers at the college level. Furthermore, *Hosty* explicitly holds that *Hazelwood* is the governing test, a test that *Kincaid* explicitly rejects.

Thus, *Hosty* held that based on the facts available, the *Innovator* likely was a limited-purpose public forum and as a result could not be censored by University administration.[109] As such, *Hosty* on its face appears not to place many restrictions on college newspapers. However, it does not definitively hold that a college newspaper is a limited-purpose public forum, just that it may be one.[110] Furthermore, even if future interpretations of *Hosty* treat college newspapers as limited public fora, its "no sharp difference" language remains, allowing for a blurring of the line between high school and college free speech rights both inside and outside of the classroom.

In sum, the *Hosty* standard is a complete extension of *Hazelwood* at the university level. Under such a standard, a

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104. *Id.*

105. *Id.* at 737.

106 *See supra* note 47 and accompanying text.

107. *Hosty II*, 412 F.3d at 734-35.

108. *See id.* at 737 ("But by establishing a subsidized student newspaper the University may have created a venue that goes by the name . . . 'limited purpose public forum.' ").

109. *Id.* at 738. This finding by the court makes its ultimate holding confusing as the court ultimately decided in favor of the University. However, it is important to note that the University won on qualified immunity grounds, not directly on the merits of its case that it had the right to control the content of the newspaper. *Id.* at 738-39.

110. *Id.* at 737.

university may control the content of its student newspaper as long as the newspaper is not a public forum and there is a reasonable educational purpose for the university's actions.[111] Since *Hazelwood* holds that "[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns," a direct application of *Hazelwood* will allow university administrators to wield broad power over any school-sponsored publication that is not intentionally opened as a forum for public discourse.[112] A court applying *Hosty* would allow universities to assert the same set of "legitimate pedagogical concerns" as high schools, as *Hosty* implicitly held that universities had the same pedagogical concerns as high schools, the one possible exception being a consideration of students' maturity.

B. Brown *and Intermediate Scrutiny*

The intermediate scrutiny test provides a compromise between limiting college journalists to *Hosty* rights and granting them the expansive rights of professional journalists. Intermediate scrutiny has not been used by a court with regard to an extracurricular collegiate publication, but the dissenting opinion in *Brown v. Li* advocated this approach as a possible alternative when determining the First Amendment rights of college students.[113] In another case, *United States v. Virginia*, the Supreme Court applied this standard to a university in the context of gender discrimination.[114]

Under intermediate scrutiny as applied to the First Amendment, a university seeking to control the content of a student publication must demonstrate that its regulation was substantially related to an important state interest and that the regulation serves such an interest.[115] Under this approach, the justification offered by the government—in this case the university—must be genuine, not hypothesized, and it cannot be an invented post hoc response to litigation.[116] For instance, *Virginia* held that the Virginia Military Institute's males-only admission policy violated the Fourteenth

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

112. *Id.*

113. Brown v. Li, 308 F.3d 939, 964 (9th Cir. 2002) (Reinhardt, J., concurring in part and dissenting in part).

114. United States v. Virginia, 518 U.S. 515, 533 (1996).

115. *Brown*, 308 F.3d at 964.

116. *Virginia*, 518 U.S. at 533.

Amendment because the university showed "no 'exceedingly persuasive justification' " for its policy.[117]

This standard of review would be more protective of students' rights than the "reasonableness" standard introduced in *Hazelwood* and followed in *Hosty*.[118] On the other hand, intermediate scrutiny allows a university to maintain some control over its student publications. This approach is similar to *Kincaid* in that it requires a compelling governmental interest; however, it affords more deference to educators' content-based decisions than does the strict scrutiny standard that applies under a limited-purpose public forum analysis.[119]

C. New York Times *and Expansive Rights*

Finally, a third approach would be to return to courts' pre-*Hazelwood* treatment of student publications at colleges and universities and grant them full First Amendment protection, using the standard applied to professional journalists as a guide.[120] Under this approach, student newspapers at public colleges and universities would enjoy the full range of First Amendment protections granted to professional journalists in the "real world." This standard would also be in line with the reasoning of the federal courts in the line of pre-*Hazelwood* college press cases that held that the First Amendment rights of college journalists were no less than those in the community at large.[121]

The First Amendment grants professional journalists substantial protection. The first Supreme Court case dealing with the "press clause" of the First Amendment, *Near v. Minnesota*, granted extensive rights to professional journalists by stressing the importance of freedom of the press and holding that the government

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117. *Id.* at 534

118. *Brown*, 308 F.3d at 963-64.

119. *Id.* at 964.

120. As stated above, California has granted college journalists the same First Amendment rights as professional journalists via statute. A state may of course, through statute, grant free speech protections to its citizens above and beyond what is required by the U.S. Constitution. This Note will consider the appropriateness of granting college journalists expansive rights as a constitutional matter, not as a statutory matter. Furthermore, California is a historical outlier with regard to education law. In 1992, the California State Assembly passed a law stating that students at private universities in the state are subject to the same First Amendment protections as their public school counterparts. CAL. EDUC. CODE § 94367 (West 2006). Fourteen years later, no state has passed a comparable statute. Given this history, it seems likely that other states will not address the question of college journalists' free press rights via statute.

121. *See supra* Part II.A.

may not place a prior restraint on a publication.[122] More than thirty years later, the Supreme Court further protected the rights of the press when it held in *New York Times v. Sullivan* that "the Constitution accords citizens and press an unconditional freedom to criticize official conduct."[123] In particular, the Court established that false statements of fact were absolutely protected so long as they were not made with "actual malice."[124] In another case, *New York Times v. United States*, the Court held that newspapers had the right to publish the "Pentagon Papers," which consisted of classified government documents,[125] despite the fact that some of the justices predicted that this publication would be harmful to the United States.[126] In coming to its conclusion, the Court reaffirmed that any prior restraint on publication is presumed to be invalid under the Constitution.[127]

Today, the protection of professional journalists from prior restraint is one of the strongest rights granted to the press under the First Amendment, but this freedom is not absolute. Although the press has substantial constitutional freedom, it is limited in other ways. Professional journalists, though protected from censorship, are nonetheless subject to criminal and civil laws such as invasion of privacy and libel.[128] Additionally, newspapers may face internal pressure from advertisers, news sources, and their own management to print or not print a particular story.[129] While the press in the community at large is subject to several internal and external constraints, it is nonetheless far more "free" than the press at the high school or college level.

Therefore, under this standard, college journalists would not be completely unrestricted. They would be subject to the same level of liability as commercial publications, but they would not be subject to prior restraint. Under this standard, any content-based regulation by a public university of its student newspaper would be a violation of the First Amendment.

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122. Near v. Minnesota, 283 U.S. 697, 719 (1931).

123. N.Y. Times v. Sullivan, 376 U.S. 254, 305 (1964).

124. *Id.* at 279-80. *New York Times v. Sullivan* defines "actual malice" as "knowledge that [the statement] was false" or "reckless disregard of whether it was false or not." *Id.* at 280.

125. N.Y. Times v. United States, 403 U.S. 713, 714 (1971).

126. *Id.* at 731 (White, J., concurring).

127. *Id.* at 714.

128. PAUL SIEGEL, COMMUNICATION LAW IN AMERICA 82-83, 159 (2002).

129. *Id.* at 265-70.

IV. ANALYSIS OF THE THREE STANDARDS

A. Hosty*'s Error and Why* Hosty *Is an Inappropriate Standard*

The crux of *Hosty* is its assertion that there is "no sharp difference" between high school and college newspapers.[130] *Hosty* is problematic because it blurs the line between these two distinct types of newspapers and the line between high school and college students, when the two institutions historically and legally have been viewed as very different environments. These distinctions undermine *Hosty*'s central premise—that the high school and college environments are similar enough to justify giving them the same First Amendment protections—and call for a different standard to apply to freedom of speech at the college level. For this reason, even if *Hosty* does not spark a "torrent of censorship," as some critics fear, it still lays the groundwork to treat high schools and universities in the same manner under the First Amendment.[131] Furthermore, whatever *Hosty*'s persuasive precedential value may be, it is founded on an inaccurate premise.

1. *Hosty* Ignores Major Factual Differences Between High School and Collegiate Newspapers

In coming to the conclusion that there is "no sharp difference" between high school and college newspapers, the Seventh Circuit implied that there was no sharp difference between the *Innovator*, the paper involved in *Hosty*, and *Spectrum*, the newspaper at issue in *Hazelwood*.[132] In fact, numerous factual distinctions between high school and college newspapers, as illustrated by the differences between the *Innovator* and *Spectrum*, make this connection, if any, a tenuous one at best.

The *Innovator* was an independent publication organized and published by students and funded by student activity fees.[133] The *Innovator* was not a part of the university's academic curriculum and was classified as an extracurricular activity.[134] Although there was a faculty advisor to the paper, this advisor neither taught a class to the

130. Hosty v. Carter (*Hosty II*), 412 F.3d 731, 735 (7th Cir. 2005) (en banc).

131. Lee, *supra* note 93 (finding that *Hosty* is unlikely to spark a "torrent of censorship" on campus).

132. *Hosty II*, 412 F.3d at 735.

133. *Id.* at 744 (Evans, J., dissenting).

134. *Id.*

students involved with the paper nor controlled the paper's content.[135] Indeed, the university's express policy stated that the staff of the *Innovator* would "determine content and format of their respective publications without censorship or advance approval."[136]

By contrast, *Spectrum* was a publication written and edited by a high school journalism class that received academic credit for working for the paper.[137] The class that published the newspaper met during regular school hours with the teacher who ultimately made the major decisions regarding the paper.[138] Students submitted their articles to the teacher, who in turn delivered them to the school's principal for review.[139]

Consequently, the factual differences between the two newspapers are substantial, and these distinctive features cut to the heart of the holdings in both *Hosty* and *Hazelwood*. *Hazelwood*'s "legitimate pedagogical concerns" test was tied to the notion that the newspaper comprised a part of the school's curriculum. The newspaper's status gave the school a strong interest in regulating it because the newspaper was part of the teaching and learning process reached by the "legitimate pedagogical concerns" test.[140] The connection between the school's interest and *Hazelwood*-style censorship of a publication is much more tenuous in *Hosty* because the paper in *Hosty* was not a part of the curriculum at all. Perhaps more importantly, the newspapers involved in the *Hazelwood* and *Hosty* decisions are largely representative of newspapers at the high school and college levels, respectively. In fact, a 1997 study found that of 101 daily college student newspapers, only one was "strongly curriculum-based."[141] For these reasons, *Hosty*'s statement that there is no sharp difference between high school and college newspapers is erroneous.

Despite a university newspaper's absence from the curriculum, however, the university still bears some interest in its content. After all, most college newspapers receive financial support from the university, support often funded by student fees. This support funds necessities such as office space and equipment.[142] Additionally, campus newspapers "are seen as speaking for or representing the

135. *Id.*

136. *Id.*

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

138. *Id.*

139. *Id.* at 263.

140. *Id.* at 271.

141. Mark J. Fiore, Comment, *Trampling the "Marketplace of Ideas": The Case Against Extending* Hazelwood *to College Campuses*, 150 U. PA. L. REV. 1915, 1962 (2002).

142. O'NEIL, *supra* note 2, at 125.

campus community."[143] The titles of many college newspapers include the name of the university, creating a link between the voices of the students and those of university administrators. For these reasons, it is understandable that a university would be concerned with the content of its publications even if such publications have no connection with a university's curriculum. Collegiate publications often serve as a reflection of the university itself, and for this reason a reader may use his impression of a publication to evaluate the university as a whole.

Such regulatory interests, however, do not justify the court's rationale in *Hosty*. Even if one acknowledges an interest by a university in regulating its student publications, *Hosty* erred in its "no sharp difference" language because the "legitimate pedagogical concerns" at the high school level are very different from those at the college level. The court failed to recognize this difference.

2. The University's Unique Role as a "Marketplace of Ideas" Sets It Apart from the High School Environment

Hosty's assertion that there is no fundamental difference between high school and college newspapers under the First Amendment runs afoul of the historical character of the university as a unique marketplace of ideas distinct from the high school environment. Due to this role, which both courts and educators have articulated, it would be inappropriate to blur the legal line between the two institutions.

The notion of the marketplace of ideas dates back to the earliest First Amendment jurisprudence. In his dissenting opinion in *Abrams v. United States*, Justice Holmes noted that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . [t]hat at any rate is the theory of our Constitution."[144] The need for a viable marketplace of ideas is the underlying principle of most First Amendment protections, both within the university and the greater community.

Courts have consistently recognized the special role of the university as a marketplace of ideas deserving special constitutional protection. In *Keyishian v. Board of Regents for the University of the State of New York*, the Supreme Court noted that "[t]he Nation's future depends upon leaders trained through wide exposure to that

143. *Id.*

144. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

robust exchange of ideas."[145] In another case, *Sweezy v. New Hampshire*, the Court stated that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . . Teachers and students must always remain free to inquire; to study and to evaluate, to gain new maturity and understanding, otherwise our civilization will stagnate and die."[146]

In contrast, this "marketplace of ideas" approach has not been accepted at the elementary or secondary school level. In fact, because of the age of the students involved, scholars have remarked:

> Part of the educator's function is to give students a sense of both the range and limits of ongoing public debate: students must be shown that there exists a middle ground between blind adherence to a monolithic orthodoxy and the nihilistic belief that no idea is better than any other.[147]

Similarly, in *Ambach v. Norwick*, the Supreme Court noted that "[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions."[148] The Court has also held that the nation's public schools have a special mission: the "custodial and tutelary responsibility for children."[149] This view of a secondary school's purpose is in sharp contrast to the Court's view of the university in *Keyishian*.

The contrasting concepts of the missions of colleges and universities undercut the notion that they may be treated the same under the First Amendment. If a marketplace of ideas is to function properly, First Amendment protections must be extremely strong.[150] Perhaps nowhere is the protection of the marketplace more important than for student newspapers, as these publications are college students' primary source for information regarding current events on

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145. Keyishian v. Board of Regents for the University of the State of New York, 385 U.S. 589, 603 (1967).

146. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

147. Malcolm Stewart, *The First Amendment, the Public Schools, and the Inculcation of Community Values*, 18 J.L. & EDUC. 23, 26-27 (1989).

148. Ambach v. Norwick, 441 U.S. 68, 76 (1979).

149. Bd. of Educ. v. Earls, 536 U.S. 822, 829-30 (2002).

150. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. . . . I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.").

their campuses.[151] Should a college newspaper be subject to prior restraint, as in *Hosty*, its contribution to the marketplace of ideas could be severely limited, as administrators will have the authority to censor viewpoints with which they do not agree.

The notion that American colleges and universities have a mission to serve as marketplaces of ideas alone undercuts the *Hosty* reasoning, as *Hazelwood*—and by extension *Hosty*—instead gives educators the power to set pedagogical objectives and restrict speech that violates those ends. When the "marketplace" notion is contrasted with the objective of secondary schools, it becomes clear that the application of *Hazelwood* to colleges and universities is based on flawed logic. If *Hosty* were to become the standard for treatment of publications at the university level, one of the fundamental missions of the American university will be greatly inhibited.

3. Establishment Clause Jurisprudence Establishes a Strong Contrast Between High School and College Environments

Another major flaw in the *Hosty* court's assertion that the college and high school environments can be construed as essentially the same is the substantial body of law regarding the Establishment Clause that draws a different conclusion. A major factor in creating the *Hazelwood* test, the standard utilized in *Hosty*, was the notion that high school students' lack of maturity gave the school authority to restrict students' First Amendment rights. Establishment Clause jurisprudence, however, suggests that a parallel assumption is invalid at the university level, as these cases draw a sharp distinction between college and high school.

The nature of the college environment has led courts to be less fearful of establishment of religion on college campuses than of similar activities at the secondary school level. For example, in upholding the Higher Education Facilities Act of 1963, which granted federal aid to church-related colleges, the Supreme Court noted in *Tilton v. Richardson* that "college students are less impressionable and less susceptible to religious indoctrination."[152] The Sixth Circuit drew this indoctrination distinction more sharply in *Chaudhuri v. Tennessee*, stating that there is "subtle coercive pressure" to conform to state-directed programs at the elementary and secondary levels that is "simply not present" at the university level.[153] In permitting the practice of prayer at a university commencement, the Seventh Circuit

151. O'NEIL, *supra* note 2, at 126.

152. Tilton v. Richardson, 403 U.S. 672, 686 (1971).

153. Chaudhuri v. Tennessee, 130 F.3d 232, 238-39 (6th Cir. 1997).

similarly noted that those present at the event were "mature" and therefore were less susceptible to indoctrination.[154] Thus, the general consensus among the courts is that college students' relative maturity allows for less restrictive Establishment Clause protection at the university level.

By contrast, courts have been much more concerned with the establishment of religion at the elementary or secondary school level. *Lee v. Weisman*, a leading case on the subject of establishment of religion at secondary schools, involved a middle school graduation ceremony in which members of the clergy were invited to give invocations and benedictions.[155] The Supreme Court held this practice unconstitutional as a violation of the Establishment Clause.[156] In its holding, the Court noted research that "supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention."[157]

At first glance, it may seem unclear how this line of Establishment Clause caselaw bears on the issue of freedom of the press. What is key about Establishment Clause litigation is the importance placed on the age and maturity of the students involved. Repeatedly, courts have decided that the same approaches cannot be applied to both high school and college students as a result of this maturity gap. Comparing *Hosty* with Establishment Clause jurisprudence exposes an inconsistency in the classification of college and high school students under the First Amendment.

The controversy that led to *Hazelwood*—the removal of certain articles from the Hazelwood East High School newspaper—arose out of the principal's belief that those articles were inappropriate for the school's younger students.[158] The Supreme Court agreed, noting that educators must be able to take into account the emotional maturity of students and that the school had a duty to awaken children to cultural values.[159] The "legitimate pedagogical concerns" test took into account the special role schools play in the development of minors and the need to give secondary schools leeway to fulfill this mission. Admittedly, the Seventh Circuit acknowledged this distinction in *Hosty* when it stated that the difference between high school and college newspapers may be important when the issue relates to

154. Tanford v. Brand, 104 F.3d 982, 985 (7th Cir. 1997).

155. Lee v. Weisman, 505 U.S. 577, 581 (1992).

156. *Id.* at 599.

157. *Id.* at 593.

158. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 263 (1988).

159. *Id.* at 272.

students' maturity.[160] This line of Establishment Clause cases, however, underscores the point that courts have classified—and should continue to classify—high school and college students differently under the First Amendment. Therefore, *Hosty*'s statement that there is "no sharp difference" is highly dubious as a justification for limiting the rights of college students. If Establishment Clause precedent is correct in asserting that college students' maturity sets them apart from their high school counterparts, it would necessarily mean that *Hazelwood*'s standard would be inapplicable at the university level.

The major weakness of *Hosty*, therefore, is the assertion that college and high school are essentially the same and that a student's maturity should not be given consideration under most circumstances. Creating such inconsistency within the ambit of the First Amendment will lead to further confusion for the courts as to where college students stand in the realm of freedom of speech.

B. The Flaws of Intermediate Scrutiny

As stated above, the intermediate scrutiny standard as applied to the First Amendment would allow a university to control the content of a student publication if it could demonstrate that the regulation was substantially related to an important state interest and that the regulation served such an interest. In proposing the intermediate scrutiny test as an alternative to *Hazelwood*, the dissent in *Brown* noted that such a test would cast a better balance between students' and educators' interests than the traditional forum analysis models.[161] However, this standard is flawed because it is murky, likely to confuse student journalists, and prone to abuse by university administrators.

One major flaw in the intermediate scrutiny test is that it allows a university to prevail if it provides a compelling governmental interest for its actions.[162] Such a standard will breed confusion for student journalists, college administrators, and the courts. A system that hinges free speech rights on something as vague as a "compelling governmental interest" could lead to inconsistent application and greater censorship down the road because a public educational institution, as an arm of the government, will naturally want to serve

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

161. Brown v. Li, 308 F.3d 939, 964 (9th Cir. 2002) (Reinhardt, J., concurring in part and dissenting in part).

162. *Id.* (discussing that the state has the burden of showing a legitimate pedagogical purpose).

its own interests and frame what it believes are "compelling" interests accordingly.

Furthermore, such a test is not as stringent as it might appear on its face and therefore is subject to the whim of the courts. A university seeking to censor a student publication under this test must demonstrate a connection between this interest and its actions. The first prong of such analysis, the identification of a compelling interest, has historically been an easy one for the governmental unit to satisfy.[163] Courts have also set a low bar for the connection between a compelling governmental interest and a challenged regulation, holding that such a regulation satisfies the compelling interest test if the interest is more likely to be achieved with the regulation than without it.[164]

Justice Kennedy has warned of the danger of applying the compelling governmental interest standard to speech issues in several of his First Amendment opinions, stating that the compelling governmental interest test has "no real or legitimate place" in First Amendment jurisprudence.[165] Applying a test containing a "compelling governmental interest" component to college newspapers is dangerous to apply to any free speech issue because "resort[ing] to the test might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so."[166] However, such a standard would be especially troublesome in an educational environment, where there is already a power imbalance between the state and the students. Even though most college students are legal adults, the nature of the college environment often subjects them to the control of administrators.

Because the intermediate scrutiny standard would allow public university administrators, as officials of the state, to assert the state's substantial interest, such interests would be prone to modification and inconsistent application, creating confusion for student journalists as to their rights. Such confusion will lead to self-censorship by student

163. Kevin Francis O'Neill, *Disentangling the Law of Public Protest*, 45 LOY. L. REV. 411, 438 (1999).

164. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 297 (1994) (stating that "[i]f the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment.").

165. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 124 (1991) (Kennedy, J., concurring); *see also* Burson v. Freeman, 504 U.S. 191, 211 (1992) (Kennedy, J., concurring) (questioning the Court's past statements that a state may regulate speech in the pursuit of a compelling interest).

166. *Simon & Schuster*, 502 U.S. at 124-125 (Kennedy, J., concurring).

journalists attempting to prevent controversy or avoid disciplinary action. This standard would further muddy what is already an exceptionally confusing situation in the federal courts.

C. A Return to Full Protection Seems Ideal, but Lacks a Proper Foundation

On the surface, granting full First Amendment protection to college journalists seems like the correct answer to courts' dilemma regarding college students' free press rights. College newspapers seem much more similar to professional newspapers than to high school newspapers, and courts have routinely held that college campuses enjoy strong First Amendment protection. However, applying the legal standard for professional journalists to college publications (via either common law or statute) reaches the right result—heightened First Amendment protection for college newspapers—for the wrong reason and is therefore an inappropriate standard to apply.

1. A Blanket Grant of Full First Amendment Protection to College Newspapers is Inappropriate

If *Hosty* is focused on aligning college students' rights with a more defined set of rights that is factually similar, on the surface, it makes much more sense to link college journalists' rights to those of professional journalists rather than to those of high school journalists.[167] It is true that there are many factual similarities between college newspapers and commercial newspapers, but there are not enough to govern the two types of publications under the same legal standard.

The vast majority of college newspapers exist completely separate from the university's academic curriculum. Instead, these publications are typically classified as extracurricular activities and are supported by student activity fees. It is clear that many student journalists think of themselves as professionals and attempt to carry themselves as such in the course of their work. In reaction to the June 2005 *Hosty* decision, for instance, the editor-in-chief of Eastern Illinois University's *The Daily Eastern News*, stated, "[A]s a student journalist, you need to conduct yourself in a manner that is as much like a professional journalist as you can."[168]

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167 *Hosty* held that there is "no sharp difference" between high school and college newspapers. *See* supra Part IV.A.1.

168. Mike Hart, *Student Journalists*, STUDENT PRESS LAW CENTER, June 28, 2005, http://www.splc.org/newsflash.asp?id=1045.

However, there is one major factual difference between a college newspaper and a commercial newspaper such as the *New York Times*: commercial newspapers are financially independent, while state governments, through public universities, lend their name and financial resources to their students' publications. This fact should allow greater government regulation of a public university newspaper than a commercial newspaper. Although "state financial support alone is not enough to prevent application of the [F]irst [A]mendment to student newspapers,"[169] courts have held that when a university pays for forums for student expression such as student publications and extracurricular activities, it maintains some regulatory interest even though the activity in question receives strong First Amendment protection. For example, the Supreme Court held in *Rosenberger v. Rector & Visitors of the University of Virginia* that when a university creates or supports a forum for student expression, it maintains regulatory interests, such as making sure the forum meets the purpose for which it was created.[170]

For these reasons, college newspapers may be distinguished from commercial publications and thus subject to a different legal standard. A non-independent student newspaper at a college or university is not similar enough to a commercial publication that it can enjoy the same legal rights as those publications. A more appropriate comparison at the college level can be drawn between an independent, or "underground," newspaper and a commercial newspaper; both, as independent publications, enjoy full First Amendment protection. A university-affiliated newspaper, on the other hand, requires a different standard.

2. The Underlying Precedent Supporting a Grant of Full Protection Relies on Invalid Assumptions

The First Amendment's application to students at public universities has become extremely unclear due to varying interpretations by the federal appellate courts. Action of some sort by the Supreme Court is necessary to ensure that university students are aware of their rights, and therefore that university administrators cannot have a safety net of qualified immunity if they violate students' First Amendment rights. Granting full First Amendment protection to college journalists appears to be the proper outcome, as this is, on the surface, consistent with two major holdings of the Court: *Healy v.*

169. *Developments in the Law—: Academic Freedom*, 81 HARV. L. REV. 1128, 1130 (1968).

170. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 US 819, 829 (1995).

James and *Rosenberger v. Rector & Visitors of the University of Virginia*. However, both cases assume that the speech in question takes place in a public forum or is independent student speech, an assumption that cannot automatically be made regarding college newspapers.

Both *Healy* and *Rosenberger* held that First Amendment protections should apply on university campuses to the same extent that they would in the community at large.[171] Both cases, however, can be distinguished from the situation of a university newspaper. *Rosenberger* presumed that the newspaper involved in that case was a public forum, a fact that is often true but cannot be assumed in every case.[172] Had the newspaper not been deemed a public forum by the court, *Rosenberger*'s reasoning, analysis, and ultimate legacy would have been very different, even if the Court ended up reaching the same conclusion in the case at bar.

Rosenberger explicitly stated that the speech at issue was made in a public forum, and *Healy* was essentially the same in that the student speech at issue was independent from the university. *Healy* involved an independent student group that was seeking benefits from the university in the form of official university recognition and associated privileges.[173] By withholding these benefits from the group on the basis of its constitutionally protected message, the university was imposing an unconstitutional condition on the use of its resources.[174] *Healy* would have applied to the situation at hand in *Hosty* if the newspaper had been completely independent from the university and the university had prevented the paper from accessing university resources on the basis of its message. In *Hosty*, however, the newspaper was already sponsored by the university.

The holdings in *Healy* and *Rosenberger* were correct as applied to independent student speech. For example, in the case of an independent newspaper or a speech given by a student in the middle

171. Healy v. James, 408 U.S. 169, 180-81 (1972); *Rosenberger*, 515 U.S. at 835.

172. *Rosenberger*, 515 U.S. at 829.

173. *Healy*, 408 U.S. at 172-73.

174. *Perry v. Sindermann* articulates the doctrine of unconstitutional conditions as follows:

> [E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

of the campus, the First Amendment should apply with the same force that it does in the outside world. A university-affiliated student newspaper, however, is a different situation. The distinction between situations like *Healy* and *Rosenberger* and that in *Hosty* is significant because it again illustrates the important difference between independent student speech and student speech affiliated with or supported by a university.

Until *Hazelwood*'s emergence onto the legal landscape, the lower federal courts had held consistently that university administrators could not interfere with the college press.[175] By asserting that the same law should not apply to college newspapers and commercial newspapers in the same way, this Note does not argue that the courts reached the wrong conclusion in these cases. Rather, the *New York Times* standard should not apply because of the unique relationship between a university and its student publications, a relationship that has no counterpart outside of an educational environment. College journalists should have a right to broad First Amendment protection, but the *New York Times* line of cases is not the proper route to take to get there.

V. A NEW STANDARD: GRANTING BROAD FIRST AMENDMENT PROTECTION WHILE RECOGNIZING THE NEEDS OF AN EDUCATIONAL SETTING

The Supreme Court should articulate a clear, universally applicable standard with regard to college publications. *Hazelwood* and *Hosty* may provide guidance in articulating such a standard. The following proposed standard of review combines elements of *Hosty*, *Hazelwood*, and *Kincaid*, creating a new two-prong test that, when applied, will increase the free speech rights of college journalists while allowing universities to retain some control under appropriate circumstances.

175. *See, e.g.*, Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973) (citing *Healy* for the proposition that "a college . . . "may not restrict speech . . . simply because it finds the views expressed by any group to be abhorrent.' "); Trujillo v. Love, 322 F. Supp. 1266, 1270 (D. Colo. 1971) (finding that " '[i]n the context of an educational institution, a prohibition on protected speech, to be valid, must be necessary to avoid material and substantial interference with schoolwork or discipline.' "); Antonelli v. Hammond, 308 F. Supp. 1329, 1337 (D. Mass 1970) (applying the *Tinker* interference test to a college newspaper and finding that the school was not justified in taking action).

A. Prong One: The Designated Public Forum Presumption

When evaluating the First Amendment status of a university newspaper under the proposed test, a court should first ask whether the newspaper is a designated public forum. Both *Kincaid* and the dicta in *Hosty* discuss the implications of the designated public forum,[176] and forum analysis has long been an important element of First Amendment application.

In creating a student publication or other student organization, a university may create a designated public forum if it declares ex ante the forum open to speech and therefore free from censorship ex post, should the university decide that a particular type of speech is unwelcome.[177] In a designated public forum, a university "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."[178]

Generally, the test for whether a forum is a designated public forum is the intent of the government in creating it.[179] In the wake of *Hosty*, the Student Press Law Center called upon all public universities in the Seventh Circuit to adopt formal statements designating their student newspapers as public fora,[180] but to date only four universities have done so.[181] The others have remained silent, therefore leaving the door open for pro-censorship interpretation by university administrators and courts.

Because the university is regarded as a marketplace of ideas open to student expression, courts should presume that student-run, university-affiliated publications are designated public fora. Should a university desire to regulate its student publications, it should bear the burden of proving that the publication is not a designated public forum. A university could satisfy this burden by demonstrating a formal affiliation between the publication and an academic

176. Hosty v. Carter (*Hosty II*), 412 F.3d 731, 737 (7th Cir. 2005) (en banc); Kincaid v. Gibson, 236 F.3d 342, 348-49 (6th Cir. 2001).

177. *Hosty II*, 412 F.3d at 737.

178. *Id.*; *see also Kincaid*, 236 F.3d at 354-56 (holding that university administrators' actions were not permissible given the yearbook's designated public forum status).

179. *Id.*

180. Student Press Law Center, *supra* note 84 (detailing 7th Circuit universities that designated campus papers as puhlic fora).

181. *Id.* Additionally, some universities outside of the Seventh Circuit, such as the University of North Carolina at Chapel Hill, have adopted formal public forum statements regarding their student publications in the wake of *Hosty*. Kim Peterson, *University Head Affirms Students' Free Press Rights*, STUDENT PRESS LAW CENTER, Sept. 30, 2005, http://www.splc.org/newsflash.asp?id=1085& (last visited Sept. 19, 2006).

department or by showing a history of administrative or faculty review of the publication. Along these same lines, a university could change a publication's status from a designated public forum to a non-public forum by creating these conditions.[182] However, a university would likely face several challenges from its students, faculty, alumni, and other interested parties if it attempted to transform its publications to non-public fora.[183]

Therefore, under the first prong of this test, the question is whether the university may rebut the presumption that the publication at issue is a designated public forum. If the university cannot meet this burden, "the power granted to college and university officials in *Hosty* has no force" and the publication will thus "not be subject to censorship."[184] Instead, the publication will receive the protections granted to a designated public forum. If the university meets this burden and the publication is not a designated public forum, then analysis must continue under the second prong of this proposed test.

B. Prong Two: The New Pedagogical Concerns Test

Should a university successfully rebut the presumption that a student newspaper is a designated public forum, then such a newspaper would be categorized as a non-public forum. In a non-public forum, speech is subject to all reasonable regulations of the government.[185] In order to articulate this standard in the context of student newspapers, one must determine what interest a university has in its student publications. Perhaps surprisingly, *Hazelwood* provides some guidance in this area.

As stated above, universities maintain an interest in extracurricular student publications even if a particular publication is not a part of a university's curriculum. University resources are allocated to such publications, and these publications often bear the university's name and brand. Additionally, some authors have argued that universities have an educational interest in student extracurricular activities because recognition of student groups "reflects the view that a full range and variety of student groups and activities may contribute almost as much to the student's total educational experience as academic curriculum."[186] In creating and

182. Recent Case, Hosty v. Carter, 119 HARV. L. REV. 915, 919-21 (2006).

183. *Id.* at 920-22.

184. *Id.* at 918-19.

185 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988) (emphasis added).

186. O'NEIL, *supra* note 2, at 110.

supporting student groups and publications, a university acts in a manner consistent with its role as a marketplace of ideas.

For this reason, when a student newspaper at the university level is found to be a nonpublic forum, courts should ask if the university's regulation is related to legitimate pedagogical concerns. This test seems, at first blush, to be a straightforward application of *Hazelwood* to the college setting. In fact it is not, and *Hazelwood*'s applicability ends here. The question remains the same, but the answer is very different. This test is not a strict application of *Hazelwood* because a university has sharply different pedagogical concerns from those of a high school. *Hosty* cited one example of these differing pedagogical concerns when it stated that a consideration of students' maturity is not applicable at the university level. *Hosty* erred, however, in implying that this should be the only difference between the tests applied to high schools and colleges.

Because the "legitimate pedagogical concerns" of a university are very different from those of a high school, the proper application of this test at the university level will result in broad freedoms to college journalists. As stated above, the university has a unique role as a marketplace of ideas, a role that the high school does not share. *Rosenberger* in particular articulated the special role of the university:

> The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. . . . The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. *For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life*, its college and university campuses.[187]

Contrast this vision of the American university with the Supreme Court's interpretation of the mission of public elementary and secondary schools:

> The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." . . . These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration

187. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 835 (1995) (internal citations omitted) (emphasis added).

> of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted *freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest* in teaching students the boundaries of socially appropriate behavior.[188]

Therefore, because one of the pedagogical purposes of the university, unlike the secondary school, is to facilitate the marketplace of ideas, there is no place for regulation of a university newspaper unless the regulation is viewpoint-neutral.

The next inquiry concerns which viewpoint-neutral regulations are in line with a university's pedagogical purpose. *Kincaid* provides some guidance, even though the court ultimately held that the publication in question was a designated public forum. In analyzing the situation in *Kincaid*, the court noted that a university could place "minimum standards of competence" on its publications. *Kincaid* set the competence bar very low; for instance, one *Kincaid* judge opined that a yearbook that was 98 percent blank or consisted of a sack of condoms would not meet minimum standards of competence, implying that it would be nearly impossible for a university to argue that a publication did not meet the minimum competency standard.[189]

As for other content-neutral regulations, a university may have a regulatory interest in student speech that constitutes plagiarism or otherwise violates a university's honor code. Additionally, if a university can demonstrate an interest in training responsible journalists, it might, in contrast with the *New York Times v. Sullivan* standard for professional journalists, be able to regulate negligently-made false statements of fact. Such a regulation would only be permissible in accordance with this test if the newspaper was not a public forum and was instead aligned with a journalism curriculum. A university cannot claim to have a legitimate pedagogical commitment to training journalists if it does not in fact train them. Furthermore, a university that only regulates those negligent statements of fact connected to particular viewpoints is engaging in impermissible viewpoint regulation.

Of course, this prong shares the same disadvantage as every other First Amendment test: it is prone to exploitation by clever and opportunistic governmental officials. Therefore, in applying this test, courts must keep a sharp eye on the motives of the university and not permit viewpoint-based regulations masked as viewpoint-neutral pedagogical objectives to stand.

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188. Bethel Sch. Dist. No. 403 v. Fraser, 478 US 675, 681 (1986) (internal citations omitted) (emphasis added).

189. Kincaid v. Gibson, 236 F.3d 342, 358 (6th Cir. 2001) (Boggs, J., concurring in part and dissenting in part).

C. Application of the New Test to Hosty v. Carter

As stated above, the Seventh Circuit's holding in *Hosty* revolved around qualified immunity. However, removing the qualified immunity element of *Hosty* and applying the proposed test to the facts of the case illustrates the test's effectiveness and its protectiveness of student speech as expressed via a college newspaper. Under the proposed test, the *Hosty* plaintiffs almost certainly would have prevailed under the first prong: the public forum presumption. The facts, namely that the university's Student Communications Media Board had a policy of non-censorship, strongly suggest that the *Innovator* was a designated public forum. As a result of these facts, it would be nearly impossible for administrators to rebut the presumption that the *Innovator* is a designated public forum.

Even if (hypothetically) the *Hosty* facts did not satisfy the first prong of the proposed test, the protections granted by the second prong would have required a decision in favor of the student plaintiffs. In this case, Dean Carter tried to force the paper to submit to prior review after it printed articles and editorials critical of university administration. In doing so, defendant Carter argued that the paper made false statements of fact, which, if the allegations were true, could allow the university to regulate the speech at issue. Given the circumstances of the case, however, it seems likely that the administration's attempted regulations were not viewpoint-neutral, as university officials had only expressed interest in regulating the paper after the newspaper printed articles critical of administrators. Furthermore, even the alleged falsity of the statements made in the *Innovator* would not allow the university to place a prior restraint on all subsequent issues of the paper. *Hosty* is a prime example of a viewpoint regulation masked as a neutral one.

The application of the proposed test to the facts of *Hosty* demonstrates its commitment to students' First Amendment freedoms and how the Seventh Circuit erred: had it applied *Hazelwood* properly, it would have reached the opposite result. Despite scholars' concerns about the application of *Hazelwood* at the college level, applying a pedagogical concerns test that accounts for the differences between colleges and universities would in fact enhance and clarify the First Amendment freedoms of college students.

VI. CONCLUSION

Had the Supreme Court granted certiorari, *Hosty v. Carter* would have been the stage for a debate eighteen years in the making. Ever since *Hazelwood* declined to address the First Amendment status of college publications, free press advocates have waited with bated breath for the issue to be resolved once and for all. Their wait will continue until the Supreme Court grants review to a similar case. At some point, the Court must determine the rights of college journalists. For far too long, student publications at public colleges and universities have been in legal limbo under the First Amendment, and those few courts that have faced the issue have been able to use qualified immunity to dodge the real problem at hand.

For the reasons outlined above, *Hosty* fully extended *Hazelwood* to university newspapers based on flawed logic, logic which could have a drastic effect on students' free press rights. Given the widespread confusion over the application of the First Amendment to college campuses, intermediate standards of review, though more protective of students' rights than the pure application of *Hazelwood* at the college level, would only make a bad legal situation worse.

The two-prong test outlined in this Note thus provides the best possible balance among students' First Amendment rights, universities' regulatory interests, and courts' prior holdings. By presuming that student-run publications at public universities are designated public fora, courts would protect students from opportunistic administrators and would also have an easier time interpreting the facts of individual cases. As for those publications that are non-public fora, applying the *Hazelwood* inquiry of whether the university has a legitimate pedagogical concern, but not *Hazelwood*'s narrow answer, would allow courts to take into account the unique nature of the collegiate environment and protect student speech accordingly. High schools and colleges are different communities, each with its own set of pedagogical concerns. In articulating this difference, the only correct holding is that viewpoint-based regulation of college newspapers is a violation of the First Amendment.

In the eighteen years since the Supreme Court decided *Hazelwood*, the question of college newspapers' First Amendment status has perplexed the federal courts. For nearly two decades, free press advocates have feared *Hazelwood*'s application to college media, presuming that such an application would lead to widespread censorship. By declining to hear *Hosty*, the Supreme Court extended

this controversy and forced student journalists, especially those in the Seventh Circuit, to face an uncertain future. The time for college journalists to receive these First Amendment freedoms is long overdue.

Jessica B. Lyons[*]

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