

POLICY, PRACTICE AND INTENT: FORUM ANALYSIS AND THE UNCERTAIN STATUS OF THE STUDENT PRESS AT PUBLIC COLLEGES AND UNIVERSITIES

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*The ruling of the United States Court of Appeals for the Seventh Circuit in *Hosty v. Carter*, which used forum analysis to determine that subsidized college and university student newspapers could be subject to prior review, raised a number of questions about the First Amendment rights of the student press. In *Hosty and Kincaid v. Gibson* federal courts of appeal ruled that university-subsidized publications are subject to forum analysis, and it is the policy, practices, and intent of administrators toward the publications that determine that forum status. However, the courts' inconsistency in interpreting those policies and practices has led to a great deal of confusion. This article posits that consistently applying strict scrutiny to non-curricular student publications at public colleges and universities would reduce confusion and better protect the free expression rights of students.*

In June 2005, the United States Court of Appeals for the Seventh Circuit, sitting *en banc*, ruled that a student-run newspaper, *The Innovator*, at Governors State University could be subject to pre-publication review by the dean of student affairs. In *Hosty v. Carter*,¹ the court ruled that it was possible² that the *Innovator* was

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¹412 F.3d 731 (7th Cir. 2005).

²The matter before the court was not whether the *Innovator* could be censored, but rather whether Dean Patricia Carter should have known it was not subject to review under the decision of the Supreme Court of the United States in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988). The court did not need to decide if the *Innovator* was subject to review, but only if a student-run newspaper at a public university could possibly be subject to review.

subject to review by the school's administrators because it was funded by the school. The ruling applied the rationale of *Hazelwood School District v. Kuhlmeier*,³ the 1988 landmark case from the Supreme Court of the United States dealing with a high school student newspaper, to a university student newspaper for the first time. In *Hazelwood*, the Supreme Court used forum analysis to determine that a student newspaper at Hazelwood East High School was subject to review by the administration because it was part of the curriculum.

The Seventh Circuit's decision in *Hosty* garnered widespread criticism from free speech and student press advocates.⁴ It also raised a number of questions about school administrators' ability to limit the First Amendment rights of the student press at public colleges and universities.

But was the Seventh Circuit's decision as radical as the Student Press Law Center, the Foundation for Individual Rights in Education and other commentators have suggested? For almost twenty years the use of the term "Hazelwood" in the same sentence as "college press" has evoked outrage, fear and predications of dire consequences. In addition, a number of articles have presented arguments as to why *Hazelwood* should not apply to the student press at public colleges and universities.⁵ Was *Hosty* really the first time *Hazelwood* had ever been applied to a university setting? Was the Seventh Circuit's opinion really as outrageous as many argue? And, perhaps,

³484 U.S. 260 (1988).

⁴See, e.g., Don Corrigan, *Appellate Court Levels Blow Against College Press Rights*, 35 ST. LOUIS JOURNALISM REV. 21, 21 (2005) (contending that "the *Hosty v. Carter* decision flies in the face of rulings in other appellate jurisdictions, where judges have made a distinction between high school and college publications. Courts have held that state university administrators cannot require press preview and exercise censorship on student publications."); FIRE Policy Statement on *Hosty v. Carter* (2005), <http://www.thefire.org/index.php/article/6269.html> (contending that the Seventh Circuit court's finding in *Hosty* "would open up virtually any student publication or other student group that receives any benefit from the university to the possibility of heavy-handed content-based regulation by university administrators"); Press Release, Student Press Law Center, Appeals Court Ruling Invites Havoc says Student Press Law Center (June 20, 2005), <http://www.splc.org/newsflash.asp?id=1034> (arguing that after the court's decision "it's just a matter of time before a university prohibits a student group from bringing an unpopular speaker to campus or showing a controversial film based on the *Hosty* decision. Such actions invite havoc on college campuses.").

⁵See, e.g., Mark J. Fiore, Comment, *Trampling the "Marketplace of Ideas": The Case Against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915, 1932 (2002); Gregory C. Lisby, *Resolving the Hazelwood Conundrum: The First Amendment Rights of College Students in Kincaid v. Gibson and Beyond*, 7 COMM. L. & POL'Y 129 (2002).

most importantly, was the Seventh Circuit's decision an aberration or a sign of things to come?

This article analyzes U.S. circuit court of appeals cases involving student publications at public colleges and universities in which forum analysis has been used by the courts. The purpose of the article is to both determine how the courts have decided forum analysis was the proper framework to use in these cases and how the courts applied forum analysis to student publications to decide when administrators at public colleges and universities have the right to review student publications prior to publication. It also examines the legal and constitutional implications of the courts' decisions in those cases. First, the article reviews the legal concepts relevant to the topic and briefly reviews the Supreme Court's decision in *Hazelwood*. Second, it describes the two circuit court cases in which the courts used forum analysis to determine when administrators had the right to review student publications at public colleges and universities. Third, the article analyzes those cases and discusses the impact of the rulings on the student press at public universities and colleges. Finally, the article critiques applying forum doctrine to non-curricular student publications and offers an alternative framework for evaluating restrictions on non-curricular student publications at public colleges and universities that would reduce confusion and better protect the free expression rights of students.

HAZELWOOD AND PUBLIC FORUM ANALYSIS

Traditionally, students have enjoyed significant free expression rights in both high school and university settings.⁶ However, starting in 1986 with the Supreme Court's decision in *Bethel School District No. 403 v. Fraser*,⁷ courts began to narrow the First Amendment rights of students. When courts have limited the free speech rights of students they have attempted to balance those rights with administrators' need to preserve the integrity of a school's educational mission.⁸ However, how the courts have balanced these two important principles is not always clear or consistent. The Supreme Court has never established precisely when and where student expression can

⁶See *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969) (declaring that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

⁷478 U.S. 675, 682 (1986) (holding that the First Amendment rights of students "are not automatically coextensive with the rights of adults in other settings").

⁸See Lisby, *supra* note 5, at 130-44 for a discussion of the legal rights of minors generally and the First Amendment rights of minors in a school setting.

be censored.⁹ Courts have ruled differently depending on the age of the speaker, the location of the speech, whether the expression is disruptive and other key elements.

According to legal scholar Susan Dente Ross, today courts primarily use three different frames when deciding if restrictions placed on student speech can pass First Amendment scrutiny.¹⁰ The first is the disruptive speech frame in which courts have ruled that schools may infringe upon students' First Amendment rights when student speech disrupts the school or violates other students' rights.¹¹ The second is the low value speech frame. Using this frame courts have ruled that schools have the authority to regulate expression that conflicts with the school's function, the public's values, or is simply lewd.¹² The final frame is the school-sponsored speech frame. Using this frame, courts have determined that schools can regulate speech subsidized by the school in order to avoid school entanglement in the expression and to maintain school control over school-sponsored publications, events and activities. This frame is based on the Supreme Court's decision in *Hazelwood*.¹³

In *Hazelwood*, the Supreme Court ruled that the *Spectrum*, a student newspaper at Hazelwood East High School, was subject to review by the principal. In its decision, the Court relied on forum analysis to determine when a high school student newspaper could be subjected to administrative review. Courts have recognized three types of forums: traditional public forums, designated or limited public forums, and non-public forums.¹⁴ Traditional public forums are places where the communication of thoughts and the discussion of issues of public importance have always been conducted.¹⁵ Traditional public forums include streets, parks and sidewalks. In these "quintessential public forums," to enforce a content-based regulation the government must show that the regulation is necessary to serve a

⁹See Susan Dente Ross, *Silenced Students: The Uncertain but Extensive Power of School Officials to Control Student Expression*, 79 JOURNALISM & MASS COMM. Q. 172, 172 (2002).

¹⁰*Id.* at 178-79.

¹¹*Id.* at 179. Ross contends that this frame is based on the Supreme Court's decision in *Tinker*, 393 U.S. 503, 509 (1969).

¹²*Id.* Ross argues that this frame is based on the Supreme Court's decisions in *Bethel School District*, 478 U.S. 675 (1986), and *Hazelwood*, 484 U.S. 260 (1988).

¹³*Id.*

¹⁴For a detailed discussion of public forum doctrine, see, e.g., Thomas J. Davis, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 IND. L.J. 267, 270 (2004); Calvin Masey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309 (1999).

¹⁵*Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983).

compelling state interest and that it is narrowly drawn to achieve that end.¹⁶ The government may also enforce time, place and manner restrictions, which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.¹⁷ A designated or limited public forum is created by government action. Simple governmental toleration of expression does not create a designated public forum; rather the government must take an affirmative step to create the designated forum.¹⁸ Designated public forums can be open to all expression, only expression by specific groups,¹⁹ or for discussion on only specific topics.²⁰ As in traditional public forums, reasonable time, place and manner regulations, and narrowly drawn content-based regulations to effectuate a compelling state interest are allowed in designated public forums.²¹ Finally, all forums that are not traditional public forums or designated public forums are considered to be non-public forums. Speech restrictions in non-public forums must only be reasonable in light of the purpose that the forum serves and viewpoint neutral.²² In *Hazelwood*, the Court used this framework to decide if a principal at a high school had violated his students' First Amendment rights when he edited their high school newspaper.²³

In 1983, a journalism teacher at Hazelwood East High School in St. Louis County, Missouri, submitted a proof of the student newspaper, *Spectrum*, to Principal Robert Reynolds for review.²⁴ Reynolds objected to two of the articles contained in the proof.²⁵ Believing there was not time to make editorial changes, Reynolds directed Em-

¹⁶Carey v. Brown, 477 U.S. 455, 461 (1980).

¹⁷United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 132 (1981).

¹⁸See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (holding that "the government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse").

¹⁹See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981) (student groups).

²⁰See, e.g., *City of Madison Joint Sch. Dist. v. Wisconsin Pub. Employment Relations Comm'n*, 429 U.S. 167 (1976) (school board business).

²¹See *Widmar*, 454 U.S. at 269-70.

²²See *Davis*, *supra* note 14, at 270.

²³484 U.S. 260, 265-70 (1988).

²⁴*Id.* at 263.

²⁵*Id.* Reynolds was concerned about a story on student pregnancy because the article was written in a way in which the identities of the pregnant students might be discernable. Reynolds also found the story to be inappropriate for some younger students. The principal was also concerned about a story on divorce because a student identified in the story by name made several comments about her parents' divorce. The principal wanted to give the student's parents the opportunity to respond to the comments or the ability to consent to the article. *Id.*

erson to eliminate the two pages of the newspaper that contained the offending stories.²⁶ Asserting that their First Amendment rights had been violated, three student staff members of *Spectrum* commenced action in the U.S. District Court for the Eastern District of Missouri seeking injunctive relief and monetary damages.²⁷

The district court denied injunctive relief and concluded that school officials may impose legitimate and reasonable restraints on student expression in activities that are integral to the educational function of the school. The court found Reynolds's concerns were both legitimate and reasonable.²⁸ The court also held that Reynolds's actions were justified in order to avoid any impression that Hazelwood East High School endorsed the sexual conduct described in an article about a student's pregnancy.²⁹ On appeal, the U.S. Court of Appeals for the Eighth Circuit reversed. The court relied on sections of Hazelwood School Board Policy and on *Spectrum's* own Statement of Policy to find the school district had intended to create a student newspaper that was both a part of the school curriculum and a public forum.³⁰ The Eighth Circuit held that *Spectrum's* status as a public forum precluded administrators from censoring its content.³¹ The school district then appealed the decision to the Supreme Court.

In an opinion by Justice Byron White, joined by Chief Justice William Rehnquist and Justices John Paul Stevens, Sandra Day O'Connor and Antonin Scalia, the Supreme Court reversed. The Court held that educators do not offend the First Amendment when they exercise editorial control over "school-sponsored" expression when the school's decision to censor is reasonably related to legitimate pedagogical concerns.³² The Court reasoned that if the school-sponsored speech took place in a non-public forum, it could be regulated.

In deciding *Spectrum's* status, the Supreme Court examined the policy and practice of school officials toward the student newspaper to determine if the school had created a public forum.³³ The Court found that school facilities may be deemed public forums only if "school authorities have 'by policy' or 'by practice' opened those fa-

²⁶*Id.* at 264.

²⁷*Id.*

²⁸*Id.*

²⁹*Id.* at 264–65.

³⁰*Id.* at 269–70.

³¹*Id.* at 265.

³²*Id.* at 273.

³³*Id.* at 267.

cilities ‘for indiscriminate use by the general public’ or by some segment of the public such as student organizations.”³⁴ Otherwise the facility must be found to be a non-public forum, where school officials could impose reasonable restrictions on the speech of students. The *Hazelwood* Court reasoned that these reasonable restrictions could be used to assure that students learned an intended lesson or were not exposed to inappropriate material, or to allow school officials to disassociate the school from expression they did not want attributed to the school or to school officials.³⁵

Relying upon the Hazelwood School Board Policy and the Hazelwood East High School Curriculum Guide, the Court held that *Spectrum* was part of the established educational curriculum of the school and a regular classroom activity.³⁶ The Court determined that *Spectrum* was not intended to be a designated public forum. The class *Spectrum* was produced for was a “laboratory situation” in which students were to learn journalistic skills from a faculty member during regular class hours for academic credit.³⁷ Justice White further noted that “school officials did not deviate in practice from their policy that production of the *Spectrum* was to be part of the educational curriculum.”³⁸ It was the practice of the instructor of the class to select the editors of *Spectrum*, schedule publications, decide on the length of each issue, assign stories to students, edit those stories, and deal with the quality of the printing, all without consulting students.³⁹ The instructor also regularly submitted the paper to Principal Reynolds for approval prior to publication.⁴⁰

In its decision, the Court focused almost exclusively on the curricular nature of *Spectrum*. The Court did not address the forum status of an extracurricular student publication that was subsidized by a school. Neither did the Court address the appropriateness of applying *Hazelwood*’s rationale to college and university student publications. In a footnote the Court wrote:

A number of lower federal courts have ... recognized that educators’ decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference We need not now decide whether the same

³⁴*Id.*

³⁵*Id.* at 271.

³⁶*Id.* at 268.

³⁷*Id.*

³⁸*Id.*

³⁹*Id.* at 268–69.

⁴⁰*Id.* at 269.

degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.⁴¹

While the Court did not specifically state that its new standard did not apply to expression at the university level, the Student Press Law Center (SPLC) found that in the years following the *Hazelwood* decision, few lower courts used the analysis in cases involving the university student press.

In a 1991 report, the SPLC stated, "The courts have indicated that they would never allow restrictions on the free expression of students at colleges and universities similar to those imposed on high school publications in *Hazelwood*."⁴² The center found that only a handful of cases involving the First Amendment rights of college students decided between 1988 and 1991 even mentioned *Hazelwood*,⁴³ and those that did declined to apply it to the college press or found that it was not needed to reach their decisions.⁴⁴ These cases followed a strong tradition of supporting the free expression rights of university students established before *Hazelwood*. Gregory C. Lisby found that in cases decided prior to *Hazelwood*—*Healy v. James*,⁴⁵ *Papish v. Board of Curators of the University of Missouri*⁴⁶ and *Antonelli v. Hammond*,⁴⁷ for example—courts gave broad protection to the First Amendment rights of college students.⁴⁸

However, more recently, Ross found the use of the *Hazelwood* frame in student expression cases involving high school and college

⁴¹*Id.* at 273 n.7 (citations omitted).

⁴²*Hazelwood and the College Press*, STUDENT PRESS L. CENTER PACKET, 1991, at 1.

⁴³*See* Student Gov't Ass'n v. Bd. of Trustees of the Univ. of Massachusetts, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (stating in a footnote to a case regarding the termination of the state university's legal services office that *Hazelwood* "is not applicable to college newspapers"); *Lueth v. St. Clair County Cmty. College*, 732 F. Supp. 1410 (E.D. Mich. 1990) (holding that a community college's prohibition of an advertisement for a nude dancing club was a violation of the First Amendment rights of the editor of the student run newspaper); *DiBona v. Matthews*, 269 Cal. Rptr. 882 (Cal. Ct. App. 1990) (finding that administrators at a community college violated the First Amendment by canceling a drama class due to the controversial content of a play the class was to perform); *Walko v. Kean College of New Jersey*, 561 A.2d 680 (N.J. Super. Ct. Law Div. 1988) (finding that in a libel case there was no need to consider the applicability of *Hazelwood* to the state college student newspaper).

⁴⁴*Hazelwood and the College Press*, *supra* note 42, at 2.

⁴⁵408 U.S. 169, 180 (1972) (holding that the First Amendment did not "apply with less force on college campuses than in the community at large").

⁴⁶410 U.S. 667, 671 (1973) (finding that there was no "dual standard" which could be applied to the First Amendment on college campuses).

⁴⁷308 F. Supp. 1329 (D. Mass. 1970) (holding that a college president was not the final authority for what could be printed in a student newspaper).

⁴⁸Lisby, *supra* note 5, at 145.

students began to increase in 2000.⁴⁹ Since then, forum analysis has been used in cases that examined a variety of situations at high schools and universities, including the right of school officials to control expression on bulletin boards, at graduation ceremonies, in school elections, in high school undergrounds newspapers, in advertisements on the school's athletic fields, and in a student yearbook.⁵⁰ In addition, according to a recent article by Edward L. Carter, Kevin R. Kemper and Barbara L. Morgenstern, of the thirteen federal circuit court cases that addressed the issue of applying *Hazelwood* to a college or university setting, only one held that *Hazelwood* absolutely did not apply to a university or college setting.⁵¹

Ross also found that courts have been inconsistent in determining when sponsorship creates a public forum.⁵² She argued that in the circuit courts, school expression case law has developed into a "jumbled jurisprudence of labels,"⁵³ in which any expression a court happens to deem inappropriate may be quashed.⁵⁴ Carter also found that federal circuit courts' rulings have left a number of unanswered questions.⁵⁵

This research identified two federal court cases, *Kincaid v. Gibson*⁵⁶ and *Hosty v. Carter*,⁵⁷ in which the courts applied *Hazelwood* to university student publications. *Kincaid* was decided by a panel of the Sixth Circuit Court of Appeals on September 8, 1999. The Sixth Circuit then heard the case *en banc* and issued its decision on January 5, 2001. *Hosty* was decided by a panel of the Seventh Circuit on January 7, 2003. The Seventh Circuit heard the case *en banc* and issued its decision on June 20, 2005.⁵⁸

⁴⁹Ross, *supra* note 9, at 181.

⁵⁰*Id.*

⁵¹Edward L. Carter, et al., *Applying Hazelwood to College Speech: Forum Doctrine and Government Speech in the U.S. Courts of Appeals*, 48 S. TEX. L. REV. (157, 159 2006).

⁵²Ross, *supra* note 9, at 176 (writing that the Supreme Court suggested these inconsistencies could be explained by "significant differences among those who are likely to hear or to be required to hear the speech in question").

⁵³*Id.* at 181.

⁵⁴*Id.*

⁵⁵Carter, *supra* note 51, at 171.

⁵⁶*Kincaid v. Gibson*, No. 95-98 (E.D. Ky. Nov. 14, 1997), *aff'd*, *Kincaid v. Gibson*, 191 F.3d 719 (6th Cir. 1999), *rev'd en banc*, 236 F.3d 342 (6th Cir. 2001).

⁵⁷*Hosty v. Governors State Univ., et al.*, 2001 U.S. Dist. Lexis 18873 (N.D. Ill. Nov. 13, 2001) (mem.), *aff'd sub nom.*, *Hosty v. Carter*, 325 F.3d 945 (7th Cir. 2003), *rev'd en banc*, 412 F.3d. 731 (7th Cir. 2005).

⁵⁸Cases were identified for analysis using the Westlaw Key Cite function to locate cases in the Westlaw computerized database in which *Hazelwood* was cited by the majority opinion. *Hazelwood* was used as the starting point based on the Seventh Circuit's reliance on the case in *Hosty*. See *Hosty v. Carter* 412 F.3d 731, 734 (7th Cir.

KINCAID V. GIBSON

In 1993, Capri Coffey was the student editor of *The Thorobred*, the Kentucky State University (KSU) student yearbook.⁵⁹ Though *The Thorobred* was composed and produced entirely by students, with limited advice from the university's student publications advisor, its production and distribution costs were funded by KSU.⁶⁰ Deciding to do "something different" with the yearbook, Coffey created a purple cover (KSU's school colors were green and gold), gave the yearbook a theme, and included picture of celebrities, the surrounding community, and political and current events.⁶¹

In November 1994, when the yearbook came back from the printer, Betty Gibson, KSU's vice president for student affairs, objected to the publication.⁶² Gibson found the yearbook to be of poor quality and inappropriate. She objected to the purple cover, the theme of "destination unknown," the lack of captions for many of the photos, and the inclusion of events unrelated to KSU. In consultation with KSU's president, Mary Smith, Gibson decided to confiscate the yearbooks and not distribute them to the KSU community. In November 1995, when the university had still not distributed the yearbooks, Coffey and Charles Kincaid, a student at KSU, sued Gibson, Smith and the individual members of the KSU Board of Regents under the U.S. Civil Rights Acts⁶³ for damages and injunctive relief, alleging that the university's confiscation of the yearbook violated their rights under the First and Fourteenth Amendment to the United States Constitution.⁶⁴

The U.S. District Court for the Eastern District of Kentucky applied forum analysis to the students' claims and found that *The Thorobred* was a non-public forum. The court held the yearbook was solely for KSU students. The court found that the yearbook was not intended to be a "journal of expression and communication in a public forum sense" but instead was intended only to be a "journal of the 'goings on' in a particular year at KSU."⁶⁵ The students appealed to

2005) (writing "*Hazelwood* provides our starting point"). The cases were then manually searched to identify cases that involved student publications at colleges and universities. Westlaw is an online database of legal documents maintained by the West Publishing Company.

⁵⁹*Kincaid*, 236 F.3d at 345.

⁶⁰*Id.* at 344–45.

⁶¹*Id.* at 345.

⁶²*Id.*

⁶³42 U.S.C. § 1983 (2005).

⁶⁴*Kincaid*, 236 F.3d at 345.

⁶⁵*Id.* at 345–46.

the Sixth Circuit Court of Appeals. The court heard the case on March 18, 1999. A divided three-judge panel of the court upheld the district court's use of *Hazelwood's* forum analysis and its decision that *The Thorobred* was a non-public forum. Senior Circuit Judge Alan Norris delivered the opinion of the court, in which Senior Circuit Judge James Ryan joined.⁶⁶ Circuit Judge R. Guy Cole Jr. delivered a separate opinion, concurring in part and dissenting in part.⁶⁷ The full Sixth Circuit heard the case on May 30, 2000.

This time writing for the majority, Judge Cole somewhat reluctantly applied *Hazelwood*. Although Cole noted that *Hazelwood* had "little application" to a university setting, he nonetheless found that the school-sponsored speech frame that relied upon forum analysis was the proper framework to use in the case.⁶⁸ Cole stated two reasons for this decision. First, because KSU was a state-funded institution and *The Thorobred* was created with state funds, the case was inherently about restricting access to state property used for expressive purposes. The majority held that because the Supreme Court had adopted forum analysis for these types of cases it was appropriate in *Kincaid*.⁶⁹ Second, the court cited a number of cases⁷⁰ in which the Supreme Court had applied forum analysis to expressive activity within educational settings and, therefore, found that forum analysis was the correct framework for the case.⁷¹

Like the Supreme Court majority in *Hazelwood*, Cole included an important footnote in his decision:

Our decision to apply forum doctrine to the student yearbook at issue in this case has no bearing on the question of whether and the extent to which a public university may alter the content of a student newspaper. Likewise, we note that a college yearbook with features akin to a university student newspaper might be analyzed under a framework other than the forum framework.⁷²

⁶⁶*Kincaid v. Gibson*, 191 F.3d 719 (6th Cir. 1999), *rev'd en banc*, 236 F.3d 342 (6th Cir. 2001).

⁶⁷*Id.* at 730 (Cole, J., concurring and dissenting)

⁶⁸*Kincaid*, 236 F.3d 342, 346 n.5 (6th Cir. 2001) (*en banc*).

⁶⁹*Id.* at 347.

⁷⁰*See Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) (applying forum analysis to university student activities fund); *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988) (applying forum analysis to high school newspaper); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (applying forum analysis to school district's internal mail system); *Widmar v. Vincent*, 454 U.S. 263 (1981) (applying forum analysis to university meeting forums).

⁷¹236 F.3d at 347.

⁷²*Id.* at 348 n.6 (citations omitted).

On its face, the footnote does not make much sense. The court did not note what features would make a yearbook more akin to a student newspaper or what features made *The Thorobred* different from a newspaper. Although it is unclear what Cole meant when he wrote *Hazelwood* had little applicability to a university setting or what would make a yearbook more akin to a newspaper, the majority's opinion did make it clear that it was not seeking to extend the use of forum analysis to student newspapers.

In deciding the type of forum *The Thorobred* constituted, the Sixth Circuit analyzed four factors: the school's policy toward the forum, the school's practice toward the forum, the nature of the forum and its compatibility with expressive activity, and the context within which the forum was found.⁷³

In examining the school's policy toward the yearbook, the court found the policy "[f]irst and foremost, places editorial control of the yearbook in the hands of a student editor or editors" and that editorial control of the yearbook belonged solely to that editor.⁷⁴ Furthermore, the policy's wording directed the university's chosen advisor to the yearbook to refrain from editing and limit himself or herself to matters of administration.⁷⁵ To the majority, the policy of the school clearly established that the university intended the yearbook to be a limited public forum.

The court also found that the university's practice toward the yearbook established that the student editor was ultimately responsible for the content of the yearbook. The court noted that neither Coffey nor the university's Student Publication Board (SPB) exercised editorial control over the yearbook and the school's advice was limited to issues such as advertising rates.⁷⁶ The court concluded that "the record before us is clear that, in actual practice, student editors—not KSU officials, not the student publication advisor, and not the SPB—determined the content of KSU's student yearbook."⁷⁷

Moving to the nature of the forum, the court found that the fact that a yearbook's nature was compatible with expressive activity further indicated that KSU intended *The Thorobred* to be a limited public forum. The court found that the KSU yearbook was a student publication that existed for the purpose of expressive activity. The court also reasoned that there was no serious argument that a yearbook

⁷³*Id.* at 349.

⁷⁴*Id.* at 349–50.

⁷⁵*Id.* at 350.

⁷⁶*Id.* at 351.

⁷⁷*Id.*

was not a creative publication easily distinguished from other government forums. The majority also relied on the non-curricular nature of the publication to determine the nature of the forum was compatible with free expression.⁷⁸

Finally, the court turned to the context in which the forum was found and addressed the university setting of the yearbook. Relying both on the inherent characteristics of a university and the age of university students, the majority held that universities are special places for the purpose of First Amendment jurisprudence. Cole wrote:

The university environment is the quintessential “marketplace of ideas,” which merits full, or indeed heightened, First Amendment protection. In addition to the nature of the university setting, we find it relevant that the editors of *The Thorobred* and its readers are likely to be young adults—Kincaid himself was thirty-seven at the time of his March 1997 deposition. Thus, there can be no justification for suppressing the yearbook on the grounds it might be “unsuitable for immature audiences.” Accordingly, we find that the fact the forum at issue arises in the university context mitigates in favor of finding that the yearbook is a limited public forum.⁷⁹

The court held that the four factors provided strong evidence of the university’s intent to designate the yearbook as a limited public forum. It then considered if the university officials’ action with respect to the yearbook violated the students’ First Amendment rights.

The court held that because the government “may only impose reasonable time, place, and manner regulations, and content-based regulations that are narrowly drawn to effectuate a compelling state interest on expressive activity in a limited public forum,” the actions of the KSU officials ran afoul of these restrictions.⁸⁰ The court found that withholding the yearbooks from distribution for nearly six years was not a reasonable time, place or manner regulation and that the “wholesale confiscation of printed materials” was as broadly sweeping regulation as possible. In addition, the court held that the actions of the state left no alternative grounds for expression because there was no record of an alternative student forum containing “words and pictures” that reflected the experience of KSU students during 1992 through 1994.⁸¹ Thus, the majority held that the KSU officials had no

⁷⁸*Id.* at 352.

⁷⁹*Id.* (citations omitted).

⁸⁰*Id.* at 354.

⁸¹*Id.*

constitutionally valid reason to withhold the yearbooks. In a strongly worded statement, Cole wrote for the majority:

We will not sanction a reading of the First Amendment that permits government officials to censor expression in a limited public forum in order to coerce speech that pleases the government. The KSU officials present no compelling reason to nullify Coffey's expression or to shield it from Kincaid's view and, accordingly, the officials' actions violate the Constitution.⁸²

The majority reversed and remanded the case with instructions to enter judgment in favor of Kincaid and Coffey.

Judges Ryan, Norris and Danny J. Boggs all wrote opinions in the case. Having a change of heart from his panel opinion, Judge Ryan wrote a concurring opinion joined in part by Judge Boggs. Ryan simply noted that his initial decision to concur with Judge Norris's panel opinion was in error.⁸³ Boggs's concurred and dissented. He wrote that there were two factual issues remaining that needed to be settled by the district court. Boggs concurred with the majority's decision that a student yearbook could be a limited public forum. However, he wrote that even such a forum was subject to some minimum standard of competence under the manner provision of time, place and manner restrictions. Boggs wrote there was some evidence the KSU officials' actions were motivated by a desire to keep the quality of the publication above a minimum standard. However, Boggs also noted that there was substantial evidence that the administrators' actions were motivated by viewpoint discrimination. Therefore, Boggs believed that under either legal analysis factual issues remained, and there should be a new trial rather than an order for judgment for the plaintiffs.⁸⁴

Norris was unmoved by the majority's decision. In an extremely short opinion, he wrote that he continued to believe that the record supported his earlier panel opinion that the university did not create a limited public forum.⁸⁵

In sum, the majority found that forum analysis applied to student publications regardless of the age or maturity of the students involved in the case. However, the age and maturity of the students was an important factor in the majority's decision that the administra-

⁸²*Id.* at 355.

⁸³*Id.* at 358 (Ryan, J., concurring).

⁸⁴*Id.* (Boggs, J., concurring and dissenting).

⁸⁵*Id.* at 359 (Norris, J., dissenting).

tors at KSU intended to create a public forum. While free speech advocates were happy with the court's decision that *The Thorobred* was a limited or designated public forum, there was still a great deal of uneasiness over the court's decision that forum analysis was the appropriate framework to decide the case.⁸⁶ Their uneasiness was justified because the case did not end the debate over the applicability of forum analysis to student publications at public colleges and universities.

HOSTY V. CARTER

In fall of 2000, Patricia Carter, dean of student affairs and services at Governors State University in Illinois, called Charles Richards, president of Regional Publishing, the company that printed the school's newspaper, the *Innovator*.⁸⁷ Dean Carter told Richards that in the future a school official would review all issues of the *Innovator* before they could be printed.⁸⁸ She also referenced the university's control of the *Innovator*'s funds.⁸⁹ Carter's concerns were centered on articles by Margaret Hosty. Hosty's articles attacked the integrity of Roger K. Oden, dean of the College of Arts and Sciences. In addition, Carter objected to the *Innovator*'s failure to retract factual statements the administration deemed false or print the administration's response to the charges against Oden.⁹⁰ Richards relayed the substance of his conversations with Dean Carter to the editors of the newspaper and affirmed that his company did not want to risk printing the newspapers without getting paid. The student editors—Margaret Hosty, Jeni Porche and Steven P. Baron—filed suit against seventeen separate defendants in the U.S. District Court for the Northern District of Illinois seeking damages.⁹¹

The defendants in the case moved for summary judgment and the district court dismissed all defendants from the suit except Carter.⁹² The court found that the evidence in the case could support the conclusion that Carter's threat to withdraw financial support from the

⁸⁶See, e.g., Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons From the "College Hazelwood" Case*, 68 TENN. L. REV. 481, 551–53 (2001).

⁸⁷*Hosty v. Carter*, 325 F.3d 945, 947 (7th Cir. 2003), *rev'd en banc*, 412 F.3d. 731 (7th Cir. 2005).

⁸⁸*Id.*

⁸⁹*Id.* at 949.

⁹⁰*Hosty v. Carter*, 412 F.3d 731, 732–33 (7th Cir. 2005) (*en banc*).

⁹¹*Hosty*, 325 F.3d at 947.

⁹²*Hosty*, 412 F.3d at 733.

Innovator violated the First Amendment rights of the plaintiffs.⁹³ Carter argued that she was entitled to qualified immunity from damages because the law did not clearly establish that her request for review of a university newspaper was a violation of the students' First Amendment rights.⁹⁴ The district court found that because *Hazelwood* was limited to high school settings and because this was clearly established, no reasonable person in Carter's position could have thought herself entitled to prior review of the *Innovator*.⁹⁵ Therefore, the court found that Carter was not entitled to qualified immunity. Carter appealed the decision to the U.S. Seventh Circuit Court of Appeals. A panel of the Seventh Circuit heard the case on January 7, 2003. In a unanimous opinion by Judge Terence Evans, joined by Senior Circuit Judge John Coffey and Judge Ilana Rovner, the panel affirmed the district court's decision not to grant Carter qualified immunity.⁹⁶ Dean Carter petitioned the Seventh Circuit for a rehearing *en banc*.⁹⁷ The full Seventh Circuit heard the case on January 8, 2004.

The issue before the full court was still Carter's claim to qualified immunity. At no point was the court considering if Carter's actions violated the First Amendment rights of the students. The court was only deciding if a reasonable person in Carter's position should have known that *Hazelwood* was not applicable to a university newspaper.

The majority's opinion, written by Judge Frank Easterbrook, asserted that the district court was in error when it based its entire decision on the *Hazelwood* footnote stating that the Court need not address the issue of expressive activities at colleges and universities.⁹⁸ The full court of appeals did not find the footnote to expressly delineate a difference between high school and college newspapers. Easterbrook wrote:

[T]his footnote does not even hint at the possibility of an on/off switch: high school papers reviewable, college papers not reviewable. It addresses degrees of deference. Whether *some* review is possible depends on the answer to the public-forum question, which does not (automatically) vary with the speakers' age. Only when courts need

⁹³*Id.*

⁹⁴*Hosty*, 325 F.3d at 947.

⁹⁵*Hosty*, 412 F.3d at 733.

⁹⁶*Hosty*, 325 F.3d at 947.

⁹⁷*Hosty v. Carter*, 2005 U.S. App. LEXIS 13195 (7th Cir. Ill., June 25, 2003) (*reh'g granted*).

⁹⁸*Hosty*, 412 F.3d at 734.

assess the reasonableness of the asserted pedagogical justification in non-public-forum situations does age come into play.⁹⁹

The court focused on the subsidized nature of the *Innovator*, rather than on its extracurricular nature or the ages of its editors and audience. Although the *Innovator* was not part of established classroom curriculum, this fact in itself did not end forum analysis. The court wrote that while being part of the curriculum “may be a *sufficient* condition” to transform a student publication into a non-public forum, it was not a *necessary* condition.¹⁰⁰ Finding that the Constitution did not “establish a bright line” between curricular activities and all other types of government-funded speech, the Seventh Circuit held the university’s financial sponsorship of the *Innovator* established that public forum analysis was the correct framework to use.¹⁰¹ The court noted that the Supreme Court, in several cases, had established that sponsorship of expression transformed it from private expression into government expression, which the government was allowed to control.¹⁰² According to the majority, when assessing the applicability of public forum analysis, the Supreme Court had previously established that age does not control the decision to use forum analysis in cases involving the use of school funds or premises for expression.¹⁰³

The appeals court noted that in *Rust v. Sullivan*¹⁰⁴ and *National Endowment for the Arts v. Finley*¹⁰⁵ the Supreme Court held that expression underwritten by the government may be regulated even beyond the age of college.¹⁰⁶ In 1991, in *Rust v. Sullivan*, the Court ruled that the government can selectively decide to fund expression, and, therefore, a federal law that forbade the government from making public health grants that would be used to counsel abortion as a method of family planning was constitutional. The Court reasoned that when the government appropriates funds to establish a pro-

⁹⁹*Id.*

¹⁰⁰*Id.* at 736.

¹⁰¹*Id.* at 735.

¹⁰²*Id.* at 736 (citing *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005); *University of Wisconsin v. Southworth*, 529 U.S. 217, 229 (2000); *Keller v. State Bar*, 496 U.S. 1, 12–13 (1990)).

¹⁰³*Id.* at 735.

¹⁰⁴500 U.S. 173 (1991) (holding that the government may insist that physicians use grant funds only for the kind of speech required by the granting authority).

¹⁰⁵524 U.S. 569 (1998) (holding the government can selectively decide to fund expression it believes to be in the public interest, without at the same time funding alternative expression).

¹⁰⁶*Hosty*, 412 F.3d at 735.

gram, it is allowed to establish the limits of that program.¹⁰⁷ In its 1998 decision in *NEA v. Finley*, the Court held that the National Endowment for the Arts could require artists to meet decency standards in order to receive federal funding. Citing *Rust*, the Court reiterated that Congress may selectively fund expression.¹⁰⁸

The Seventh Circuit relied on *Rust* and *NES* to determine that age does not limit forum analysis when government funding is involved. It concluded that age was not the deciding factor when considering *Hazelwood's* applicability to the student press at public colleges and universities. In the opinion for the court, Easterbrook explained it quite simply: "Hazelwood's framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools."¹⁰⁹

While the Seventh Circuit found that forum analysis was the proper framework to use and the *Innovator* was definitely not a traditional public forum, the court found there was insufficient evidence in the record to determine whether the *Innovator* was a designated public forum or a non-public forum.¹¹⁰ Nor was there enough evidence to determine if Dean Carter's concerns over the contents of the newspaper were sufficient to warrant censorship if the newspaper was a non-public forum.¹¹¹ The court noted that the rules put in place by the university's Student Communication Media Board, although ambiguous, seemed to indicate the *Innovator* was a designated public forum. The board was the publisher of the *Innovator*, the membership of the board was determined by the student senate, and the board's policy was that each publication would determine its content and format without censorship or advance approval.¹¹² However, the court also noted that the charter of the board made the board responsible to the director of student life and a faculty advisor. This indicated the newspaper was a non-public forum. Yet, because the issue before the court was only Carter's claim to qualified immunity, the court did not need to decide if the *Innovator* was a designated public forum. It only needed to decide if Dean Carter should have reasonably known the paper was not subject to review. The court simply ended its opinion by noting that while many aspects of the law with respect to students' speech may be difficult to apply, post-*Hazelwood* decisions had not clearly established

¹⁰⁷500 U.S. at 194.

¹⁰⁸524 U.S. at 588.

¹⁰⁹*Hosty*, 412 F.3d at 734.

¹¹⁰*Id.* at 737.

¹¹¹*Id.*

¹¹²*Id.*

that the university student press was not subject to review by administrators.¹¹³ Therefore, according to the majority, Dean Carter was entitled to qualified immunity.

Unlike the previous panel decision in the case, the *en banc* decision was not unanimous. Evans, again joined by Circuit Judge Rovner and now by Judges Diane Wood and Ann Williams, wrote a strongly worded dissent. Evans began by declaring that the majority inappropriately extended limitations on speech the Supreme Court created for use in the narrow circumstances of elementary and secondary education. Evans supported his argument by citing a footnote from the Supreme Court's ruling in *Board of Regents of the University of Wisconsin System v. Southworth*:¹¹⁴ “[T]he right of teaching institutions to limit expressive freedom of students has been confined to high schools whose students and their schools’ relation to them are different and at least arguably distinguishable from their counterparts in college education.”¹¹⁵

Echoing his earlier panel opinion in the case, Evans attacked the majority's reasoning based both on the age difference between high school and university students and on the differing institutional missions of high schools and universities.¹¹⁶ He wrote that in *Hazelwood* and *Bethel School District v. Fraser*,¹¹⁷ the Supreme Court emphasized that a different First Amendment standard applied only because the high school students involved were young, emotionally immature, and more likely to be influenced by school-sponsored speech. The dissent also emphasized that in *Tilton v. Richardson*,¹¹⁸ a case in which the Court upheld a federal law that provided funding to church-related colleges and universities for the construction of facilities, the Court noted that college students are less impressionable than high school students.¹¹⁹

Evans supported his points about the differing educational missions of high school and universities by citing a number of Supreme Court cases.¹²⁰ He wrote that in these cases the Court held that a uni-

¹¹³*Id.* at 738–39.

¹¹⁴529 U.S. 217 (2000).

¹¹⁵*Hosty*, 412 F.3d at 740 (Evans, J., dissenting) (quoting *Univ. of Wisconsin v. Southworth*, 529 U.S. 217, 238 n.4 (2000)).

¹¹⁶*Id.* at 739–42.

¹¹⁷478 U.S. 675 (1986).

¹¹⁸403 U.S. 672 (1971).

¹¹⁹*Hosty*, 412 F.3d at 740–41 (Evans, J., dissenting).

¹²⁰*Id.* at 741–42 (citing *Bd. of Regents v. Southworth*, 529 U.S. 217, 231 (2000) (“Recognition must be given as well to the important and substantial purposes of the University, which seek to facilitate a wide range of speech.”); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995) (noting that intellectual curios-

versity has a different purpose than a high school, that is, that while high schools are concerned with the inculcation of values, universities are concerned with exposing students to the marketplace of ideas. Based on these decisions, Evans asserted that it was inappropriate for the Seventh Circuit to extend *Hazelwood* to college and universities.¹²¹

Evans concluded by addressing the question of Carter's request for qualified immunity. Prior to *Hazelwood*, Evans argued, federal circuit and district courts consistently held that university administrators could not require prior review of student-run media.¹²² Therefore, only one question remained: Did anything occur after *Hazelwood* that would suggest to a reasonable person in Dean Carter's position that she could prohibit publication of a university student-run newspaper? To Evans the answer was no.¹²³

To support his answer, Evans turned to the other federal circuit courts of appeal. He wrote that the First Circuit had expressly declined to extend *Hazelwood* and both the Tenth and Eleventh Circuits had cited *Hazelwood* as the framework for evaluating student expression on college campuses but not in cases related to student publications or extracurricular speech.¹²⁴

In 1989, in *Student Government Association v. University of Massachusetts*,¹²⁵ the First Circuit Court of Appeals found that *Hazelwood* did not apply to a university setting. In a case involving the university's decision to disband the Legal Services Office, three

ity of students remains today a central determination of a university's success and asserting that restriction of that curiosity "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"); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (noting that an atmosphere of "speculation, experiment and creation" is "essential to the quality of higher education"); *Keyishian v. Bd. of Regents of the Univ. of New York*, 385 U.S. 589, 603 (1967) (emphasizing that the "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas").

¹²¹*Id.* at 742.

¹²²*Id.* at 742-43. Evans cited *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975); *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973); *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir. 1973), *adopted en banc* 489 F.2d 225 (5th Cir. 1973); *Trujillo v. Love*, 322 F. Supp. 1266 (D. Colo. 1971); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970); *Dickey v. Alabama St. Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967), *vacated as moot sub nom.* *Troy St. Univ. v. Dickey*, 402 F.2d 515 (5th Cir. 1968); *Panarella v. Birenbaum*, 296 N.E.2d 238 (N.Y. 1973); *Mazart v. State*, 441 N.Y.S. 2d 600 (N.Y.Ct.Cl. 1981); *Milliner v. Turner*, 436 So. 2d 1300 (La. Ct. App. 1983).

¹²³*Id.* at 743.

¹²⁴*Id.*

¹²⁵868 F.2d 473 (1st Cir. 1989).

students and three student organizations sued the university's Board of Trustees and four university officials seeking declaratory and injunctive relief. The First Circuit asserted that the Supreme Court's footnote indicated that the Court did not intend for *Hazelwood* to apply to post-secondary educational settings.¹²⁶

In 1991, in *Bishop v. Aronov*¹²⁷ the Eleventh Circuit used the *Hazelwood* Court's rationale to find the University of Alabama did not create a public forum in a classroom. Therefore, a professor was not free to interject his personal beliefs into the curriculum. In this case the Eleventh Circuit held that *Hazelwood* allows regulation of expression when the audience might infer the school's approval of that expression.¹²⁸

In 2004, in *Axon-Flynn v. Johnson*¹²⁹ the Tenth Circuit used forum analysis to determine that the University of Utah had not created a designated public forum in the school's Actor Training Program classrooms.¹³⁰ The university could thus compel a Mormon student to utter script lines that conflicted with her faith. The court held that the *Hazelwood* framework allowed regulation of the student's speech only because of the curricular nature of the expression.¹³¹ The Tenth Circuit specifically noted that it did not intend for its decision to apply to any student extracurricular expression.¹³²

These cases led Evans to conclude that "no court, before or after *Hazelwood*, has held that a university may censor a student newspaper, and the only authorities to suggest otherwise are not directly on point."¹³³ Therefore, Evans wrote that no pedagogical concern could justify suppressing the students' speech and Dean Carter clearly violated well established First Amendment law.¹³⁴

Although free speech and student press advocates were much happier with the results of *Kincaid* than they were with *Hosty*, the final outcomes of the two cases were similar. All thirteen judges of the Sixth Circuit who heard arguments in *Kincaid* agreed that *Hazelwood* should apply to a student-published yearbook at a public college or university. The only disagreement any of the judges expressed was whether KSU had intended to create a designated public

¹²⁶*Id.* at 480 n.6.

¹²⁷926 F.2d 1066 (11th Cir. 1991).

¹²⁸*Id.* at 1076-77.

¹²⁹356 F.3d 1277 (10th Cir. 2004).

¹³⁰*Id.* at 1285.

¹³¹*Id.* at 1286-87.

¹³²*Id.* at 1287 n.6.

¹³³*Hosty*, 412 F.3d 731, 744 (7th Cir. 2005) (*en banc*) (Evans, J., dissenting).

¹³⁴*Id.*

forum. In *Hosty*, only four of the eleven judges who heard arguments believed that it was inappropriate to apply *Hazelwood* to a public university's student-run newspaper.

DISCUSSION AND ANALYSIS

The fundamental flaw in both the Sixth and Seventh Circuits' analyses was their presumption that government funding of student expression makes it appropriate to apply *Hazelwood*'s framework to that expression. There are four major problems with this approach. First, the two courts did not recognize that the curricular nature of the *Spectrum* was a decisive factor in *Hazelwood*. Second, the Seventh Circuit's claim that student publications can be regulated because of government sponsorship did not acknowledge that the Supreme Court has made it clear that the government is only entitled to a greater level of control when it is seeking to regulate its own speech or a private entity that is conveying a government message. Third, applying a forum framework to non-curricular student publications forced the courts to place too much emphasis on interpreting policy and practice to determine government intent and not enough on First Amendment values. Finally, in applying *Hazelwood* the two courts failed to recognize the unique nature of non-curricular student publications, the important role they have historically played at public colleges and universities, and forty years of Supreme Court precedent acknowledging that "[t]he college classroom with its surrounding environs is peculiarly the 'market-place of ideas.'"¹³⁵ Applying strict scrutiny to content-based regulations on non-curricular student publications would reduce confusion and better promote free speech on college campuses.

The Supreme Court came to the conclusion in *Hazelwood* that the *Spectrum* was not a traditional public forum not only because it was funded by the school, but also because it was part of the curriculum. When it relied upon the Hazelwood School Board Policy and the Hazelwood East High School Curriculum Guide, the Court focused on the fact that the *Spectrum* was part of the established educational curriculum of the school and a classroom activity.¹³⁶ The Court emphasized that the *Spectrum* was produced in a "laboratory situation" in which students were to learn journalistic skills for academic credit.¹³⁷

¹³⁵*Id.* at 742 (quoting *Healy v. James*, 408 U.S. 169, 180–81 (1972) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960))).

¹³⁶484 U.S. 260, 268 (1988).

¹³⁷*Id.*

When courts consider applying *Hazelwood* to non-curricular student expression they should realize that the Supreme Court has held it is inappropriate to equate non-curricular expression with expression that is part of established school curriculum. In its 1982 decision in *Board of Education v. Pico*, the Court held that a local school board could not remove books from a school library solely because members of the school board disapproved of their content.¹³⁸ A plurality of the Court reasoned that because the school board was not seeking to impose limitations upon curricular expression, but rather on library books that were optional rather than required reading, the board was not allowed to remove the books.¹³⁹ The Court's distinction between regulation of curricular and non-curricular speech supports the conclusion that non-curricular student publications at public colleges and universities deserve a different standard of review.

In its majority opinion in *Hosty*, the Seventh Circuit made the leap from curricular to non-curricular speech by drawing an analogy between a hypothetical university alumni magazine and *The Innovator*. The court reasoned that since the university would be able to exercise control over the content of an alumni magazine, it should be able to control the content of *The Innovator* because both would be funded by the university with content provided by student employees.¹⁴⁰ As noted above, in both *Rust v. Sullivan*¹⁴¹ and *National Endowment for the Arts v. Finley*¹⁴² the Court has held that expression underwritten by the government may be open to reasonable regulations because when the government appropriates public funds to establish a program it is entitled to define the limits of the program even beyond the age of school. However, the Seventh Circuit did not acknowledge that the Supreme Court has made it clear that the government is only entitled to a greater level of control when it is seeking to regulate its own speech or a private entity that is conveying a government message.

*Rosenberger v. Rector and Visitors of University of Virginia*¹⁴³ involved a First Amendment challenge to the University of Virginia's use of student fees. The Court held that the university violated students' First Amendment rights by refusing to provide funds to make

¹³⁸457 U.S. 853, 869 (1982) (stating that the school board was attempting to improperly "extend [its] claim of absolute discretion" beyond the classroom environment and into the school library).

¹³⁹*Id.* at 872.

¹⁴⁰412 F.3d at 736.

¹⁴¹500 U.S. 173 (1991).

¹⁴²524 U.S. 569 (1998).

¹⁴³515 U.S. 819 (1995)

payments to outside contractors for printing costs for a publication created by a religious student organization. Writing for the majority, Justice Anthony Kennedy affirmed that when the government disburses funds to convey a governmental message, it may take legitimate steps to ensure its message is clear.¹⁴⁴ Kennedy also affirmed, however, that when a university does not itself speak or subsidize transmittal of a message it favors the university may not regulate the expression it funds based on content.¹⁴⁵ While it made the hypothetical comparison between the fictional alumni magazine and *The Innovator*, Easterbrook's majority opinion left unexplored the factual question of to whom readers would attribute *The Innovator's* message. This type of exploration would have allowed the court to distinguish between a school's legitimate interest in controlling its own expression and an unlawful intent to control protected student expression based on content.

When they extended a forum framework to situations that were factually very different from *Hazelwood*, the Sixth and Seventh Circuits were forced to focus almost entirely on government intent. This necessarily led the courts to primarily fact-based analyses which did little to clarify students' free expression rights and placed a great deal of discretion in the hands of judges. Administrators' intentions are determined by the courts' interpretations of the policy and practices of university administrators. While these factors are supposed to serve as tools to help the courts determine to what extent the government intended to establish a public forum, it is unclear which factors are the most important, and different courts have interpreted the facts of similar cases very differently. Courts have also been unclear on the role age should play in public forum analysis at public colleges and universities.

In *Hazelwood*, the Supreme Court did not agree with the Eighth Circuit's interpretation of either the school board's policy or the Statement of Policy published in the *Spectrum*.¹⁴⁶ In regards to the policy, Justice White wrote, "One might reasonably infer from the full text of Policy 348.51 that school officials retained ultimate control over ... a school-sponsored newspaper."¹⁴⁷ He also wrote that the *Spectrum's* Statement of Policy only "suggests at most that the administration will not interfere with the students' exercise of those First Amendment rights that attend the publication of a

¹⁴⁴*Id.* at 833.

¹⁴⁵*Id.* at 833-34.

¹⁴⁶484 U.S. 260, 269 (1988).

¹⁴⁷*Id.*

school-sponsored newspaper ... and does not reflect an intent to expand those rights by converting a curricular newspaper into a public forum.”¹⁴⁸ The Court found the evidence relied upon by the lower court to hold that the *Spectrum* was a public forum to be “equivocal at best.”¹⁴⁹ In *Hosty*, the situation was even worse. The court was left to interpret the university’s Student Communications Media Board Policy, but the facts were muddy at best. The parties disagreed about the role of the faculty advisor to the student newspaper and could not even agree on the identity of the student advisor.¹⁵⁰

Additionally, some courts have considered the age of the students and differing educational missions of schools, but others have not. In *Hazelwood*, the Court noted that one of the reasons educators are entitled to exercise greater control over student expression at high schools is to ensure that readers or listeners are not exposed to messages inappropriate for their maturity level.¹⁵¹ The Court noted that expression that is appropriate in a high school may not be appropriate in an elementary school.¹⁵² Extending this logic would lead one to conclude that expression that is appropriate at a university might not be appropriate in a high school. Although the Court noted other reasons why educators might be entitled to censor student expression, this reason suggests that a different standard should apply to students who are more mature than high school students.

In *Kincaid*, however, the panel’s majority opinion never discussed the students’ ages. Only Judge Cole, in his partial dissent, indicated he believed college and university students are more mature than high school students.¹⁵³ While the Sixth Circuit’s *en banc* opinion did not address the age of students, it did take note of the special setting of the university, stating, “The University is a special place for purposes of First Amendment jurisprudence and the danger of ‘chilling ... individual thought and expression ... is especially real in the University setting.”¹⁵⁴ Judge Cole also wrote that the university was the

¹⁴⁸*Id.*

¹⁴⁹*Id.*

¹⁵⁰412 F.3d. 731, 737 (7th Cir. 2005) (*en banc*).

¹⁵¹484 U.S. at 271–72.

¹⁵²*Id.* (“[A] school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting.”).

¹⁵³191 F.3d 719, 730 n.1 (6th Cir. 1999) (Cole, J., dissenting in part).

¹⁵⁴236 F.3d 342, 352 (6th Cir. 2001) (*en banc*).

quintessential marketplace of ideas and a place where free expression should be protected.¹⁵⁵

In *Hosty*, Evans's majority panel decision and dissenting *en banc* decision specifically state that the age of college students made *Hazelwood* inapplicable.¹⁵⁶ Evans, in his panel decision, also noted the Supreme Court's recognition that censorship at universities was especially dangerous¹⁵⁷ and spent a considerable space discussing the educational mission of universities in his *en banc* dissent.¹⁵⁸ However, the majority's *en banc* decision determined that age only mattered when assessing the reasonableness of the asserted pedagogical justification for regulation of speech in a non-public forum.¹⁵⁹

This lack of consistency and clarity by the courts means that both administrators and students are understandably confused and will remain so. Focusing on a school's policy, practice and intent creates different types of student-run publications. The most important distinction is between those that are funded by a school and those that are financially independent. Under an uncertain doctrine where courts are free to interrupt the intent of the government, the only sure way for a student publication at a public college or university to know it is free from prior review is to be financially independent of school subsidies. If a publication is truly independent from the school—receives no financial support, does not use school facilities, and has no faculty adviser—no forum analysis need take place.

Unfortunately this solution does not help those many students who work diligently to create college publications that cannot be financially independent, and it does nothing to affirm those students' First Amendment rights. While publications at larger universities or

¹⁵⁵*Id.*

¹⁵⁶325 F.3d 945, 948 (7th Cir. 2003) ("The differences between a college and a high school are far greater than the obvious differences in curriculum and extracurricular activities. The missions are distinct reflecting the unique need of students of differing ages."); 412 F.3d 731, 740 (7th Cir. 2005) (*en banc*) (Evans, J., dissenting) ("The principle is clear with respect to free speech rights, where the Court has delineated a consistent line between high-school-age students and those at the university level.").

¹⁵⁷*Id.* at 949 (citing the Supreme Court's recognition in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995) that the corollary dangers of giving the state the power to examine publications and chilling free speech are "especially threatening in the university setting, where the creative power of student intellectual life remains "a vital measure of a school's influence and attainment").

¹⁵⁸412 F.3d 731, 741 (7th Cir. 2005) (*en banc*) (Evans, J., dissenting) ("Not only is there a distinction between college and high school students themselves, the missions of the two institutions are quite different.").

¹⁵⁹*Id.* at 734 ("Only when courts need assess the reasonableness of the asserted pedagogical justification in non-public-forum situations does age come into play, and in a way suggested by the passage we have quoted from *Hazelwood's* text.").

in larger media markets should strive to be financially independent, it is unrealistic to expect that a student newspaper—much less a literary magazine or yearbook—at a small public university in a rural community could support itself on advertising revenue.

Thus, the vast majority of student publications under the *Hosty* rationale would be either designated public forums or non-public forums. First, those that are funded by a school, part of the curriculum, and controlled by faculty would be non-public forums. Second, those that are not part of the curriculum but are under the control of students, even though they may be subsidized or supervised by administrators, could be designated public forums or might be non-public forums, depending on how a judge interprets the policy, practice and intent of school officials. Under the standards now in place in the Seventh Circuit, it is impossible to tell how courts will interpret the intent of administrators and the forum status of these publications.

Applying a forum framework to university publications also creates additional confusion because it leaves open the door that a student publication's status might change over time. It is a quite possible that when a new university president is appointed at a school with a policy that supports a student publication's right to free expression he or she will simply refuse to recognize the publication as a public forum. No matter how well written a policy statement might be, it would not create a designated public forum in perpetuity. The Supreme Court has held that the state is not bound to indefinitely hold open a designated public forum.¹⁶⁰ Although lower federal courts have held that it is inappropriate to remove funding from a student newspaper based on protected content,¹⁶¹ the Supreme Court has never specifically addressed the question of when a designated public forum can be closed.

The final flaw in the Sixth and Seventh Circuits' approach is their failure to recognize the unique role colleges play in the marketplace of ideas and the role student publications play on those campuses. The Supreme Court has long held college campuses are special places in American society. As early as the 1960s the Court recognized that the nation's future depended upon leaders exposed to a robust exchange of ideas.¹⁶² More recently, in *Rosenberger*¹⁶³ the Court noted

¹⁶⁰*Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983) ("A State is not required to indefinitely retain the open character of the facility.")

¹⁶¹*See, e.g., Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973).

¹⁶²*Keyishian v. Bd. of Regents of the Univ. of New York*, 385 U.S. 589, 603 (1967).

¹⁶³515 U.S. 819 (1995)

that government restrictions on expression are especially dangerous at colleges and universities. The Court wrote that government restrictions on the First Amendment are especially grave in university settings where the state acts “against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.”¹⁶⁴ In addition, the Court wrote, “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.”¹⁶⁵ In its 2000 decision in *Board of Regents of the University of Wisconsin System v. Southworth*, the Court again emphasized that one of the most important purposes of a university is to facilitate a wide range of speech.¹⁶⁶ In his *Hosty* dissent, Evans summarized the Court’s precedents by quoting Justice Powell’s majority opinion in *Healy v. James*:

“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. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’ The college classroom with its surrounding environs is peculiarly the ‘market-place of ideas,’ and we break no new constitutional ground in affirming this Nation’s dedication to safeguarding academic freedom.”¹⁶⁷

The unique nature of non-curricular student publications on university campuses also makes it inappropriate to automatically apply forum analysis. The Supreme Court has recognized that mechanically extending forum analysis to all situations is inappropriate and courts must take into account the special nature and context of expression.¹⁶⁸ Student publications at public colleges and universities, unlike curricular-based high school publications such as the

¹⁶⁴*Id.* at 835.

¹⁶⁵*Id.* at 836.

¹⁶⁶529 U.S. 217, 231 (2000).

¹⁶⁷412 F3d 731, 742 (7th Cir. 2005) (Evans, J., dissenting) (quoting *Healy v. James*, 408 U.S. 169, 180–81 (1972) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960))).

¹⁶⁸*See, e.g.*, *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 672–73 (1998) (stating that forum analysis should not be extended in a mechanical way to public television broadcasting); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (stating the Court would not ignore the special nature and function of the federal workplace).

Spectrum, serve as forums for public debate, checks on school administrators, and watchdogs over student government. Student publications are often editorially independent, staffed almost entirely by students, and serve as forums for student news, ideas and controversy. The student reporters, editors, contributors and artists who create them are often given the freedom to determine content by their advisors, if they even have advisors, and operate in a very different context than their high school counterparts. Student produced, non-curricular publications should not be subjected to a doctrine that does not take into account these special attributes.

For these reasons, content-based regulations of non-curricular student publications should be subject to strict scrutiny. Universities should be required to show that any content-based regulation of a non-curricular student publication is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Consistently applying this standard to non-curricular student publications would recognize the difference between curricular and non-curricular student expression, still allow the government to take legitimate steps to ensure its own messages remain clear, reduce confusion and uncertainty among students and administrators, place greater emphasis on First Amendment values, and recognize the role student publications have historically played at public colleges and universities.

CONCLUSION

The only logical conclusions are that courts are using forum analysis with great frequency, and courts are allowing the government to control expression for which it pays to a greater degree. While no other circuit courts have applied *Hazelwood* to non-curricular student publications, the decision to use forum analysis in cases of student expression at the university level is not unique to the Sixth or Seventh circuits. According to the recent research of Carter, Kemper and Morgenstern, the Second,¹⁶⁹ Ninth,¹⁷⁰ Tenth¹⁷¹ and Eleventh¹⁷²

¹⁶⁹See *Vega v. Miller*, 273 F.3d 460, 479 (2d Cir. 2001) (relying on *Hazelwood*'s standard of a reasonable relationship to "legitimate pedagogical concerns" but then modifying the standard depending on the "age and sophistication of the students" in a college class).

¹⁷⁰See *Brown v. Li*, 308 F.3d 939, 949–50 (9th Cir. 2002) (concluding that *Hazelwood* could be applied to a university student's expression within the curriculum, although perhaps not to extracurricular university student speech).

¹⁷¹See *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004); *Cummins v. Campbell*, 44 F.3d 847, 853 (10th Cir. 1994) (citing and relying on *Hazelwood* in a case involving a lawsuit against a university).

¹⁷²See *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991).

circuits have all applied *Hazelwood* to some form of student or faculty speech at the college or university level.¹⁷³

Yet, as noted above, there are numerous problems with this approach, and there is still a great deal of uncertainty related to student expression. The Sixth and Seventh circuits did not recognize the differences between curricular and non-curricular expression, and the courts failed to recognize Supreme Court precedent recognizing the special role student publications have historically played in the quintessential marketplace of ideas—public colleges and universities in America. As the Seventh Circuit noted in *Hosty*, divergent rulings have created a situation in which administrators do not know how to conduct themselves and students are unsure of their First Amendment rights. Perhaps most disturbing is the overwhelming emphasis courts have placed on government funding and intent, rather than focusing on First Amendment values. Courts considering applying to *Hazelwood* should instead apply strict scrutiny in order to protect expression in the marketplace of ideas that is the hallmark of public colleges and universities.

¹⁷³See Carter, *supra* note 51, at 170.

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