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Articles

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Rethinking Student Press in the “Marketplace of Ideas” After *Hosty*: The Argument for Encouraging Professional Journalistic Practices

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Until the Seventh Circuit decided *Hosty v. Carter*, no court had upheld *Hazelwood*’s application to independent student speech at a public university. However, in *Hosty*, the Seventh Circuit broke from precedent by granting qualified immunity to a university dean who called the printers to stop publication of a student newspaper. This note will examine the *Hosty* decision and Seventh Circuit’s unfortunate interpretation of *Hazelwood* to find that the university administrator’s actions did not violate “clearly established” law. It will provide a critical legal analysis of the Seventh Circuit’s majority decision by illustrating how the court confuses government funding for an open forum with government funding for its own speech. It will argue that the court relied on its own disingenuous forum analysis—accomplished by isolated examinations of funding, age, and educational status—to demonstrate that the students’ claims were based on unsettled law.

THE FIRST AMENDMENT AND COLLEGE STUDENT NEWSPAPERS: APPLYING *HAZELWOOD* TO COLLEGES AND UNIVERSITIES

LOUIS M. BENEDICT*

I. INTRODUCTION

College and university student newspapers present a particular problem for First Amendment analysis. On the one hand, higher education should promulgate the values of freedom of speech and freedom of the press. On the other hand, the college or university is the publisher and subsidizes the operation of the newspaper for educational purposes. In the case of a state college or university, public funds are being utilized to subsidize the student newspaper. The fundamental question is: How should a court examine whether a public college or university has violated students' First Amendment rights by editing¹ the student newspaper?

The United States Supreme Court has not analyzed the extent of editorial control that college and university officials can exercise over student newspapers without violating the First Amendment. The Court has, however, decided a case dealing with administrative control of a high school newspaper in *Hazelwood School District v. Kuhlmeier*.² Since the Court decided *Hazelwood* in 1988, there has been considerable debate on whether and to what extent it applies to college and university student newspapers. Although the Court limited its holding in *Hazelwood* to K-12 schools, it left open its application to college and university

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1. Often the terms "censored" or "edited" are used when newspaper articles are deleted or changed. Although there is no clear legal definition, the former is often used when arguing against deleting or changing the article, while the latter is often used when arguing for responsible removal of the article or changing the article to meet some journalistic, ethical, or publishing standard.

2. 484 U.S. 260 (1988).

student newspapers.³ The lower federal courts are split on the applicability of *Hazelwood* to colleges and universities. Only one circuit has decided a case applying *Hazelwood* to college and university student newspapers.⁴

This paper will examine the applicability of *Hazelwood* to college and university newspapers. In doing so, the paper will review other cases, especially from the United States Supreme Court, for additional guidance in addressing First Amendment concerns relating to college and university student newspapers.

Pre-*Hazelwood* decisions will be discussed in Part II. This section will discuss college and university student newspaper cases. For additional guidance, it will also discuss Supreme Court school case decisions prior to *Hazelwood*. Because *Hazelwood* applied public forum analysis to student free speech cases at state colleges and universities, this section will also discuss the Supreme Court's decision postulating its public forum analysis methodology.

The Supreme Court's *Hazelwood* decision will be examined in more detail in Part III. This section will also discuss cases that demonstrate how federal courts of appeal have applied or specifically not applied *Hazelwood* to colleges and universities.

Part IV will utilize *Hazelwood*'s public forum analysis to apply the First Amendment free speech clause to college and university student newspapers. Because the Supreme Court and lower courts have emphasized the importance of whether a school newspaper is a public forum in deciding the degree of administrative control, this section will also utilize the Supreme Court's forum analysis decisions.

II. PRE-HAZELWOOD DECISIONS

In the recent Seventh Circuit's en banc decision of *Hosty v. Carter*,⁵ where the majority found that *Hazelwood*'s framework is applicable to subsidized college and university newspapers,⁶ the dissent cited a number of prior opinions for the proposition that “[p]rior to *Hazelwood*, courts were consistently clear that university administrators could not require prior review of student media or otherwise censor student newspapers.”⁷ The dissent further stated that “*Hazelwood* did not change this well-established rule.”⁸ Because the Supreme Court did not specifically decide the issue of whether *Hazelwood* was applicable to college and university student newspapers, the holdings of these cases have not been overruled. However, many of these early cases did not have the benefit of the Supreme Court's subsequent opinions (including *Hazelwood*) applying the First Amendment to student speech.⁹ These subsequent student speech cases provide

3. *Id.* at 273 n.7.

4. *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1330 (2006).

5. *Id.* See *infra* notes 548–576 and accompanying text.

6. *Hosty*, 412 F.3d at 735.

7. *Id.* at 742 (Evans, J., dissenting).

8. *Id.* at 743 (Evans, J., dissenting).

9. See, e.g., Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000) (holding that if a university determines that its mission is well served by diverse student

important guidance to us today as we analyze college and university student newspapers under the First Amendment. Additionally, the college and university student newspaper decisions have ignored the Supreme Court's forum analysis opinions¹⁰ for any guidance in analyzing college and university student newspaper cases.

These early court cases also relied heavily on the United States Supreme Court's 1969 decision in *Tinker v. Des Moines Independent Community School District*,¹¹ which was concerned with individual non-government subsidized student speech, and not school newspapers. In *Tinker*, the Court held that a school regulation prohibiting individual students from wearing black armbands on school premises to protest the Vietnam war infringed on the First Amendment free speech rights of those students, where there was no evidence that the authorities had reason to anticipate that the wearing of armbands would substantially interfere with the work of the school or impinge upon the rights of others. This "substantial disruption" test is cited repeatedly in college and university student newspaper cases, even though it was applied in *Tinker* to individual student expression and not school subsidized college and university newspapers that could be perceived to bear the imprimatur of the school.

Many of the court decisions finding that college and university student

viewpoints, it may impose a mandatory fee to support diverse viewpoints as long as the method of funding these groups is viewpoint neutral); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (holding that if a state university provides funds for campus groups to print group publications, it cannot deny funds for an approved religious group merely because the group's newspaper will promote a distinctly religious viewpoint); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (holding that high school officials may regulate the style and content of school-sponsored publications, theatrical productions, and other expressive activities that are part of the educational curriculum, or that are perceived to bear the imprimatur of the school, whether or not it is in a traditional classroom setting); *Bethel Sch. Dist. No. 43 v. Fraser*, 478 U.S. 675 (1986) (holding that a school may prohibit the use of lewd, indecent, vulgar, or offensive speech in a school-sponsored assembly, as it could undermine the school's basic educational mission); *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a state university that creates a forum open to student groups may not exclude a group desiring to use the facilities for religious discussion, unless the university demonstrates such exclusion is necessary to serve a compelling state interest).

10. E.g., *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (analyzing school property when not in use for school purposes under the First Amendment, and finding a designated or limited forum existed in which content-based regulations were permissible, but viewpoint discrimination was not); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (analyzing the various types of forums and the government regulation of those forums consistent with the First Amendment, and finding that a school district's internal mail system was not a public forum); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (analyzing a city's refusal to accept political advertising on a city owned mass transit system while accepting other advertising, and finding that such refusal did not violate the First Amendment because a city owned mass transit system was not a public forum); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (analyzing the area immediately surrounding a school and finding that a public forum did not exist, and that students, teachers, and anyone else do not have an absolute constitutional right to use school facilities or its immediate environs for unlimited expressive purposes).

11. 393 U.S. 503 (1969).

newspapers cannot be controlled by school administrators are based on the mistaken notion that college and university newspapers are the same as private (non-government subsidized) newspapers. Much of the confusion over the application of the First Amendment's freedom of speech clause to college and university student newspapers resulted from the state of the law with regard to freedom of the press when these cases were decided. The 1960s and early 1970s saw a number of United States Supreme Court cases expanding the rights of free speech and freedom of the press.¹²

One of the earliest cases that applied the First Amendment to college and university journalists was the 1967 decision of *Dickey v. Alabama State Board of Education*.¹³ Gary Dickey was the editor of a student newspaper at Troy State College in Alabama.¹⁴ After being told by the paper's faculty advisor and the college president that he could not print an editorial critical of the state Governor, Dickey printed the word "Censored" across a blank space where the editorial would have run in the newspaper.¹⁵ Dickey was expelled from school for deliberate insubordination.¹⁶ Dickey requested a preliminary injunction in federal district court, alleging that his substantive rights of due process had been deprived by reason of his expulsion from the college.¹⁷ The court found that Dickey's expulsion from the college was unconstitutional and ordered that he be immediately reinstated as a student.¹⁸

The district court cited *West Virginia State Board of Education v. Barnette*¹⁹ to conclude that "First Amendment rights extend to school children and students insofar as unreasonable rules are concerned."²⁰ The district court in *Dickey* explained:

Boards of education, presidents of colleges, and faculty advisors are not excepted from the rule that protects students against unreasonable rules and regulations. This Court recognizes that the establishment of an educational program requires certain rules and regulations necessary for

12. See, e.g., *New York Times v. United States*, 403 U.S. 713 (1971) (holding that the government bears a heavy burden of justifying any system of prior restraint or censorship of the private press); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that a state may not penalize advocacy of the use of force except where such advocacy is directed to incite imminent lawless action and is likely to incite such action); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (finding that freedom of speech and freedom of the press bars a civil libel suit for criticism of public officials unless the plaintiff shows malice); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (holding that a commission making informal recommendations to book distributors as to which publications were objectionable for sale to youths, where the book distributors were given no notice or hearing, represented unconstitutional censorship and prior restraint).

13. 273 F. Supp. 613 (M.D. Ala. 1967).

14. *Id.* at 614.

15. *Id.* at 616–17.

16. *Id.* at 617.

17. *Id.*

18. *Id.* at 619.

19. 319 U.S. 624 (1943) (finding that school students could not be compelled to salute the flag in violation of their religious beliefs).

20. *Dickey*, 273 F. Supp. at 617.

maintaining an orderly program and operating the institution in a manner conducive to learning. However, the school and school officials have always been bound by the requirement that rules and regulations *must be reasonable.*²¹

The president testified that the rule that Dickey violated was that the newspaper could not criticize the Governor of the state.²² The rule did not prohibit articles that were complimentary of the Governor.²³ The court went on to find that the invocation of this rule that resulted in Dickey's expulsion from the school was unreasonable.²⁴

The *Dickey* court recognized that students had First Amendment rights, but also that schools (including colleges and universities) could make rules that otherwise would violate the First Amendment if the rules were reasonable. However, this "reasonable" rules and regulations standard was transformed in later college and university student newspaper cases into the requirement that rules and regulations must be "necessary in maintaining order and discipline" for schools to limit First Amendment rights. Part of this subsequent disregard of the *Dickey* court's reasonable rules standard can be traced to the fact that the *Dickey* court also found that "[r]egulations and rules which are necessary in maintaining order and discipline are always considered reasonable."²⁵ The court, however, was directing this statement to the expulsion of Dickey for his act of "insubordination."²⁶ This was not a case of Dickey accusing the school of censoring his journalistic speech, but rather a case of the school punishing Dickey for his speech under the guise of insubordination. The court found that "[t]he attempt to characterize Dickey's conduct, and the basis for their action in expelling him, as 'insubordination' requiring rather severe disciplinary action, does not disguise the basic fact that Dickey was expelled from Troy State College for exercising his guaranteed right of academic and/or political expression."²⁷ Consequently, the court found that the "insubordination" for which Dickey was accused and severely punished was not necessary to maintain order and discipline.²⁸ The court was not saying that the school could not control the operations of the college student newspaper. This can be shown by the *Dickey* court's statement:

The argument by defendants' counsel that Dickey was attempting to take over the operation of the school newspaper ignores the fact that there was no legal obligation on the school authorities to permit Dickey to continue as one of its editors. As a matter of fact, there was no obligation on the school authorities to operate a school newspaper.²⁹

21. *Id.* at 617–18.

22. *Id.* at 618.

23. *Id.* at 616.

24. *Id.* at 618.

25. *Id.*

26. *Id.* at 615.

27. *Id.* at 618.

28. *Id.*

29. *Id.*

In the 1970 decision of *Antonelli v. Hammond*,³⁰ the issue involved whether a newly appointed faculty advisory board could impose any prior restraints on the campus newspaper.³¹ The district court found that because the administration “has not shown that circumstances attributable to the school environment make necessary any more restrictive measures than generally permissible by the First Amendment,” that prior submission to the advisory board of material intended to be published could not be constitutionally required.³² Citing *Bantam Books, Inc. v. Sullivan*,³³ the district court held that “[n]o matter how narrow the function of the advisory board, it constitutes a direct previous restraint of expression and as such there is a ‘heavy presumption against its constitutional validity.’”³⁴ The court also relied on *Near v. Minnesota*³⁵ finding that the liberty of the press has historically meant immunity from previous restraints or censorship.³⁶ However, *Near* and *Bantam Books* concerned private publications that were censored by state law,³⁷ whereas *Antonelli* involved a state-subsidized college newspaper.

The *Antonelli* court found, however, that the First Amendment rights of college and university students may be limited. The court stated: “Free speech does not mean wholly unrestricted speech and the constitutional rights of students may be modified by regulations reasonably designed to adjust these rights to the needs of the school environment.”³⁸ Nevertheless, the court, relying on *Tinker* as the only Supreme Court case to date that discussed when a student’s constitutional speech may be limited, found that the “exercise of rights must yield when they are incompatible with the school’s obligation to maintain the order and discipline necessary for the success of the educational process.”³⁹ However, *Tinker*’s material and substantial disruption test applied to private individual student speech and not that of a school-sponsored newspaper.⁴⁰ Thus, the *Antonelli* court not only

30. 308 F. Supp. 1329 (D. Mass. 1970).

31. *Id.* at 1334.

32. *Id.* at 1337–38.

33. 372 U.S. 58 (1963).

34. *Antonelli*, 308 F. Supp. at 1335 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

35. 283 U.S. 697 (1931).

36. *Antonelli*, 308 F. Supp. at 1335.

37. *Near*, decided in 1931, is the leading case on prior restraints. The case involved a local newspaper that charged that certain public officials had been protecting local gangsters and called for a grand jury investigation. Acting under a state statute, the local government obtained an injunction preventing the newspaper from circulating any malicious or scandalous publication, with the burden placed on the newspaper to prove that any articles were true and published with good motives. The Supreme Court found that, although a rule against prior restraints is not absolute, there are few exceptions to it. *Near*, 283 U.S. at 716. *Bantam Books* involved a state juvenile delinquency commission that made informal recommendations to private book distributors as to which publications were objectionable for sale to youths. Because the private book distributors were given no notice or hearing, the Court found unconstitutional censorship and unconstitutional prior restraint. *Bantam Books*, 372 U.S. at 64.

38. *Antonelli*, 308 F. Supp. at 1336.

39. *Id.*

40. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (citing *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966); *Burnside* is also cited by *Antonelli*).

applied private newspaper cases to a subsidized college newspaper, but also lacked the additional First Amendment student speech guidance later provided by the Supreme Court's jurisprudence in *Bethel School District No. 403 v. Fraser*⁴¹ and *Hazelwood* that distinguished individual student speech as found in *Tinker* from student speech that is sponsored by the school.

The *Antonelli* analysis was utilized in the 1971 opinion of *Trujillo v. Love*.⁴² In *Trujillo*, a student editor of a state college newspaper claimed that the administration's censorship and her subsequent suspension was an unconstitutional interference with her rights as guaranteed by the First Amendment.⁴³ The events unfolded after Southern Colorado State College announced over the summer of 1970 that it was taking control of the newspaper from the students, operating it under the auspices of its journalism department, and appointing a faculty advisor from the mass communications department.⁴⁴ In the fall, the faculty advisor viewed a cartoon about the school's president and felt "that the caption was potentially libelous and a violation of journalism's canons of ethics."⁴⁵ He brought his concerns to the department faculty and the acting chairperson of the department ordered the printer to delete the cartoon and caption.⁴⁶ About a month later, the managing editor, Dorothy Trujillo, submitted a proposed editorial on campus parking, which the advisor viewed as libelous and unethical in its attack on the school's board of trustees.⁴⁷ Trujillo and the editor-in-chief agreed to revise the editorial; however, the faculty advisor suspended Trujillo and the parking editorial was printed as revised by the faculty advisor.⁴⁸ Trujillo brought suit seeking a declaration that the defendants' conduct in censoring her writing and suspending her was an interference with her rights guaranteed by the Constitution.⁴⁹ She also sought reinstatement to the position of managing editor, with back pay, and temporary and permanent injunctions restraining defendants from interfering in her freedom of speech.⁵⁰

The district court found that the announcement of the policy change in the summer of 1970 "was not thereafter put into effect with sufficient clarity and consistency to alter the function of the newspaper."⁵¹ The court noted that no advice or help was thereafter extended to the newspaper staff, no writing supervision was provided, no standards were promulgated, and the newspaper staff

41. 478 U.S. 675 (1986). See *infra* notes 227–54 and accompanying text.

42. 322 F. Supp. 1266 (D. Colo. 1971).

43. *Id.* at 1267.

44. *Id.* at 1267–68.

45. *Id.* at 1268.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 1267.

50. *Id.*

51. *Id.* at 1270. However, the court noted that had the newspaper not served as a student newspaper prior to it coming under the control of the journalism department, "the questions posed by this litigation might never have arisen." *Id.* at 1271.

writers were told that they themselves should judge what is controversial.⁵² The district court relied on the *Antonelli* opinion (among others) to hold 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.”⁵³ The *Trujillo* court went on to cite *Tinker* for this high standard, holding 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.’”⁵⁴ The court indicated that libel may be a substantial interference with the work of the school or discipline.⁵⁵ The court noted the faculty advisor suggested that he was concerned about libel, but made no effort to show that Trujillo’s writings were libelous as a matter of Colorado law, and thus he was not entitled to First Amendment protection.⁵⁶

In 1972, the United States Supreme Court decided *Healy v. James*,⁵⁷ a First Amendment case involving the denial of recognition of a student organization at a state college. The case began when a group of students at Central Connecticut State College sought to organize a “local chapter” of Students for a Democratic Society (SDS) and applied to the college for recognition as an official student organization.⁵⁸ The Student Affairs Committee, while satisfied with the proposed organization’s statement of purpose, was concerned over the relationship between the proposed local group and the national SDS organization because of the national organization’s connection to violent campus disruptions.⁵⁹ The students assured the committee that the group was not under the dictates of the national SDS, and the committee eventually approved the application and recommended to the college president that the organization be officially recognized.⁶⁰ In approving the application, the committee noted that “its decision was premised on the belief that varying viewpoints should be represented on campus and that since the Young Americans for Freedom, the Young Democrats, the Young Republicans, and the Liberal Party all enjoyed recognized status, a group should be available with which ‘left wing’ students might identify.”⁶¹ The committee also noted that it relied on

52. *Id.* at 1270.

53. *Id.*

54. *Id.* (quoting *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 511 (1969)).

55. *Id.* at 1271.

56. *Id.*

57. 408 U.S. 169 (1972).

58. *Id.* at 172. The SDS was a controversial organization at that time, with some factions advocating bombings and violence to accomplish its goals. However, the *Healy* Court found that the college and the lower courts had acknowledged that the SDS was “loosely organized, having various factions and promoting a number of diverse social and political views only some of which call for unlawful action.” *Id.* at 186. The Court also noted that in hearings before the House of Representatives in 1972, J. Edgar Hoover, the former Director of the FBI, stated that while violent factions have spun off from the SDS, its then-current leadership was critical of bombing and violence. *Id.* at 186 n.14.

59. *Id.* at 172.

60. *Id.* at 173–74.

61. *Id.* at 174.

the organization's claim of independence and "admonished the organization that immediate suspension would be considered if the group's activities proved incompatible with the school's policies against interference with the privacy of other students or destruction of property."⁶²

Despite the approval and admonitions of the Student Affairs Committee, the college president rejected the committee's recommendation.⁶³ The president issued a statement that in his judgment the proposed local SDS student chapter carried full adherence to at least some of the major tenets of the national organization that included the published aims and philosophy of disruption and violence, which were contrary to the approved college policy.⁶⁴ The students subsequently filed suit seeking declaratory and injunctive relief based on the denial of First Amendment rights of expression and association resulting from the denial of campus recognition.⁶⁵ After a clarifying issue was settled,⁶⁶ the district court dismissed the case.⁶⁷ The Second Circuit affirmed the district court's judgment based on the theory that the students had failed to avail themselves of the due process accorded them, and that they had failed to meet their burden of complying with the college standards for organization recognition.⁶⁸

Upon review, the Supreme Court initially reaffirmed its holding in *Tinker* that neither students nor teachers shed their First Amendment rights at the schoolhouse gate.⁶⁹ It also reaffirmed *Tinker*'s holding that First Amendment rights must always be applied in light of the special characteristics of the environment in each particular case.⁷⁰ The Court also reaffirmed *Tinker*'s holding that where state-operated educational institutions are involved, the state and school officials have a comprehensive authority, consistent with constitutional safeguards, to prescribe and control conduct in the schools.⁷¹

The Court found, however, that the First Amendment right of individuals to associate had been violated by the college in this case.⁷² The Court explained the wide-ranging consequences of nonrecognition in this case:

62. *Id.*

63. *Id.*

64. *Id.* at 174–75.

65. *Id.* at 177.

66. While retaining jurisdiction, the district court ordered the college to hold a hearing in order to determine whether the local organization was in fact independent from the national SDS, and, if not, the college was permitted to review the "aims and philosophy" of the national organization. At that hearing, the student applicants reiterated that the local chapter would have no connection to the structure of the national SDS. The hearing officer also entered transcripts from the congressional investigation of the activities of the national SDS. After this hearing, the college president reaffirmed his prior decision to deny recognition of a student SDS organization. *Id.* at 177–78.

67. *Id.* at 178.

68. *Id.*

69. *Id.* at 180.

70. *Id.*

71. *Id.*

72. *Id.* at 181.

There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes. The practical effect of nonrecognition was demonstrated in this case when, several days after the President's decision was announced, petitioners were not allowed to hold a meeting in the campus coffee shop because they were not an approved group.

Petitioners' associational interests also were circumscribed by the denial of the use of campus bulletin boards and the school newspaper. If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial.⁷³

The Court next turned to the college president's rationale for denying recognition to the proposed student group. It held that the president's mere disagreement with the proposed student group's philosophy was no reason to deny it recognition.⁷⁴ The Court stated that it "has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization."⁷⁵

The Court noted that the president also based his denial of recognition on a conclusion that this particular group would be a disruptive influence at the college.⁷⁶ In examining the record, the Court found no basis for this conclusion.⁷⁷ Much of the president's justification for this was speculation based on the reputation of the national SDS. However, the Court found that the students filed an application in conformity with the rules and requirements of the college, which included the declaration that the organization would obey the rules and regulations of the college.⁷⁸ The students also indicated in questioning by the Student Affairs Committee that the local SDS student chapter would not be controlled by the national organization.⁷⁹ Consequently, the Court held that "in accord with the full record, that there was no substantial evidence that these particular individuals acting together would constitute a disruptive force on campus."⁸⁰ The Court

73. *Id.* at 181–82 (footnote omitted).

74. *Id.* at 187.

75. *Id.* at 185–86 (emphasis added).

76. *Id.* at 188.

77. *Id.* at 190.

78. *Id.* at 184.

79. *Id.* at 176.

80. *Id.* at 190–91.

qualified this holding, stating: "If this reason, directed at the organization's activities rather than its philosophy were factually supported by the record, this Court's prior decisions would provide a basis for considering the propriety of nonrecognition."⁸¹

The Supreme Court went on to cite *Tinker* for the proposition that, in the context involving the special characteristics of the school environment, the power of the government to prohibit "lawless action" is not limited to acts of a criminal nature, but also those actions which materially and substantially disrupt the work and discipline of the school.⁸² Although disruption of the school environment was the primary reason given for nonrecognition in this case, the Court did not limit its holding to find that a material and substantial disruption is the only reason for nonrecognition of a student group. The *Healy* Court held that "[a]ssociational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."⁸³ The failure of a student organization to follow reasonable campus rules and regulations would be acceptable for nonrecognition of a proposed group and suspension of an established student organization under First Amendment scrutiny. The Court explained:

A college administration may impose a requirement, such as may have been imposed in this case, that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform to reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition.⁸⁴

The Supreme Court in *Healy* found that because it could not conclude from the record that petitioners were willing to abide by reasonable campus rules and regulations, it ordered the case remanded for determination of this issue.⁸⁵

In the 1973 decision of *Joyner v. Whiting*,⁸⁶ the Fourth Circuit not only relied on *Antonelli, Trujillo, Brandenburg*, and *Tinker*, but also included *Healy* in its analysis.⁸⁷ In *Joyner*, the editor of the official student newspaper of North

81. *Id.* at 188.

82. *Id.* at 189 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1972)).

83. *Id.*

84. *Id.* at 193.

85. *Id.* at 194.

86. 477 F.2d 456 (4th Cir. 1973).

87. In *Papish v. Board of Curators of University of Missouri*, 410 U.S. 667 (1973), the Supreme Court decided a First Amendment case involving student distribution of an outside newspaper on a university campus. Despite the fact that *Papish* was decided on March 19, 1973 and *Joyner* was decided on April 10, 1973, *Papish* was not discussed by the Fourth Circuit in *Joyner*.

Carolina Central University, a predominantly black state university, published an editorial advocating strong opposition to the admission of white students.⁸⁸ The president of the University believed the article did not meet standard journalistic integrity criteria nor did it fairly represent the full range of views of the campus, thus he threatened to withdraw future funds from the newspaper unless an agreement could be reached regarding the standards to which future publications would adhere.⁸⁹ No agreement could be reached and the president, on advice from counsel, irrevocably terminated the paper's financial support and refunded to each student the pro rata share of the activities fee previously allotted to the student paper.⁹⁰ Johnnie Joyner, the editor of the campus newspaper, and Harvey Lee White, the president of the University's student government association, sued the president of the University, seeking declaratory and injunctive relief to secure reinstatement of University financial support for the newspaper.⁹¹ The district court denied their application for declaratory and injunctive relief.⁹² The district court also permanently enjoined Albert Whiting, the University president, and his successors in office from granting any future financial support to any campus newspaper.⁹³

Upon appeal, the Fourth Circuit first noted that it was traveling through "well charted waters to determine whether the permanent denial of financial support to the newspaper because of its editorial policy abridged the freedom of the press."⁹⁴ The court cited *Healy* for the proposition that as an instrumentality of the state, a state university may not restrict speech simply because it finds the views expressed by any group to be abhorrent.⁹⁵ The court found: "The principles reaffirmed in *Healy* have been extensively applied to strike down every form of censorship of student publications at state-supported institutions."⁹⁶ The court went on to note lower court cases relating to K–12 schools and colleges and universities that supported its assertion without elucidation, including *Antonelli* and *Trujillo* as examples.⁹⁷

The Fourth Circuit did state in *Joyner* that "the freedom of the press enjoyed by students is not absolute or unfettered."⁹⁸ The court found such limits were espoused in *Brandenburg v. Ohio*⁹⁹ and *Tinker*. The court cited *Brandenburg* for the restriction that "[s]tudents, like all other citizens, are forbidden advocacy which 'is directed to inciting or producing imminent lawless action and is likely to incite

88. *Joyner*, 477 F.2d at 458–59.

89. *Id.* at 459.

90. *Id.*

91. *Id.* at 458.

92. *Id.*

93. *Id.*

94. *Id.* at 460.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 461.

99. 395 U.S. 444 (1969). *See supra* note 12 and accompanying text.

or produce such action.”¹⁰⁰ The court found that *Tinker* “expressly limits the free and unrestricted expression of opinion in schools to instances where it does not ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.’”¹⁰¹ School subsidized newspapers were analyzed as individual free speech cases that involved only disruption or incitement to violence.

In *Joyner*, the Fourth Circuit also addressed the issue of prior restraints and relied on the guidance provided by *New York Times v. United States*¹⁰² and *Near v. Minnesota*.¹⁰³ The Fourth Circuit stated: “Twice in the history of the nation the Supreme Court has reviewed injunctions that imposed prior restraints on the publication of newspapers, and twice the Court has held the restraints to be unconstitutional.”¹⁰⁴ Again, prior restraints as applied to subsidized college and university student newspapers were analyzed by utilizing case law that addressed private newspapers.

Additionally, the *Joyner* court ignored the Supreme Court’s guidance in *Healy* as to what school regulations are permissible under the First Amendment. *Healy* involved the denial of recognition of a student organization based on the college administration’s disagreement with the group’s philosophy—conduct which the Supreme Court found violated the First Amendment.¹⁰⁵ Nevertheless, the Supreme Court in *Healy* noted that a proper basis for nonrecognition would have been acceptable under the First Amendment by showing that the group refused to comply with reasonable campus regulations.¹⁰⁶ The Fourth Circuit in *Joyner* never addressed the reasonableness of the university’s regulation of the newspaper.

In the 1975 case of *Schiff v. Williams*,¹⁰⁷ the president of a Florida Atlantic University dismissed the editors of the school newspaper because he believed that the level of editorial responsibility and competence had deteriorated to the extent that it embarrassed the University.¹⁰⁸ Among other things, President Kenneth Williams asserted that the student newspaper reflected a standard of grammar, spelling, and language-expression that was unacceptable in any publication, especially in an upper-level graduate university.¹⁰⁹ He also criticized the paper’s editorial policy as being misleading and inaccurate, as well as the editorials themselves as degenerating into immature diatribes.¹¹⁰ The editor, Ed Schiff, and two associate editors, Tom Vickers and Carin Litman, sued the president (and his successors) for injunctive and declaratory relief and sought back pay and

100. *Joyner*, 477 F.2d at 461 (quoting *Bradenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

101. *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

102. 403 U.S. 713 (1971). *See supra* note 12 and accompanying text.

103. 283 U.S. 697 (1931). *See supra* note 37 and accompanying text.

104. *Joyner*, 477 F.2d at 462.

105. *Healy v. James*, 408 U.S. 169, 187 (1972).

106. *Id.* at 193–94.

107. 519 F.2d 257 (5th Cir. 1975).

108. *Id.* at 259.

109. *Id.*

110. *Id.* at 259–60.

compensatory damages alleging that the president had dismissed them from their positions as editors in violation of their First Amendment rights.¹¹¹ The students also requested general, special, and punitive damages, as well as attorney fees for the alleged violation.¹¹² The district court found that the First Amendment barred the defendants' action, and ordered plaintiffs reinstated with back pay, nominal compensatory damages, and attorney fees.¹¹³

The Fifth Circuit upheld the reinstatement of the three student editors with back pay and nominal compensatory damages, but reversed the award of attorney fees.¹¹⁴ The court relied on *Healy* to conclude that by firing the student editors, the administration was exercising direct control over the student newspaper and thereby restricting free speech.¹¹⁵ The Fifth Circuit cited *Antonelli* for its finding that courts have refused to recognize as permissible any regulation infringing free speech when not shown to be necessary for the maintenance of order and discipline in the educational process.¹¹⁶

The Fifth Circuit also cited the United States Supreme Court's decision in *Papish v. Board of Curators of the University of Missouri*¹¹⁷ for support of its holding that poor grammar, spelling, and language could not lead to a significant disruption on the campus or the educational process that would allow the administration to exercise control over the student newspaper.¹¹⁸ However, *Papish* involved an outside private newspaper that was distributed on campus.¹¹⁹ In *Papish*, a graduate student was expelled for distributing this outside newspaper on campus because it included a political cartoon that depicted a policeman raping the Statue of Liberty and another article that contained indecent language.¹²⁰ The student was expelled for violating a school regulation that required students to observe generally accepted standards of conduct and prohibited indecent speech. The Supreme Court found that the newspaper had been authorized by the University's business office and had been distributed on campus for four years.¹²¹ The Court held that the University's action in expelling the student could not be upheld under the First Amendment as a nondiscriminatory application of the school rules where the University disapproved of the content of the outside publication rather than the time, place, or manner of its distribution.¹²²

In the 1981 case of *Mazart v. New York*,¹²³ the New York Court of Claims stated that a policy of prior approval of items to be published in a student

111. *Id.* at 260.

112. *Id.*

113. *Id.*

114. *Id.* at 259.

115. *Id.* at 260.

116. *Id.* at 261.

117. 410 U.S. 667 (1973).

118. *Schiff*, 519 F.2d at 261.

119. *Papish*, 410 U.S. at 667.

120. *Id.* at 667–68.

121. *Id.*

122. *Id.* at 670.

123. 109 Misc.2d 1092 (N.Y. Ct. Cl. 1981).

newspaper, even if directed only to restraining the publication of libelous material (similar to the attempted restraint in *Trujillo*), would run afoul of the Supreme Court's holding in *Near* that provided that the press is usually protected from previous restraints or censorship.¹²⁴ The *Mazart* court also cited *Joyner* and *Antonelli* for its statement that any form of financial aid to the newspaper cannot be traded for editorial control.¹²⁵ Again, *Brandenburg* ("producing imminent lawless action") and *Tinker* (material and substantial interference with appropriate discipline) were cited for situations in which colleges and universities can restrict "the freedom of the press enjoyed by students."¹²⁶ Nevertheless, the court found that "these considerations are hardly relevant in the instant claim."¹²⁷ Instead, the court dismissed the claim based on the negligence elements of foreseeability and duty.¹²⁸

The claimants, Gary Mazart and Selmar Bringsjord, were students at the State University of New York at Binghamton.¹²⁹ A letter was written to the editor of the student newspaper denouncing an anti-gay incident that happened in a student residential dormitory and had the signatures of the claimants on it, stating that they were writing as "members of the gay community."¹³⁰ The letter actually was written by other students who were victimized by the incident.¹³¹ The letter was published in the "Letters" section of the student newspaper and specifically identified the claimants as the writers of the letter.¹³²

The claimants brought suit against the State of New York and the State University of New York at Binghamton in the New York State Court of Claims for damages, alleging that the published letter was "false, defamatory and libelous per se."¹³³ The court, *sua sponte*, held that the State University of New York was "not a proper party defendant" to the suit and "deleted the University from the title of both claims."¹³⁴ The court found that the claimants were libeled per se.¹³⁵ The court also found that the editors of the student newspaper "acted in a grossly irresponsible manner by failing to give due consideration to the standards of information gathering and dissemination."¹³⁶ It explained that the editors did not attempt to verify, nor did the newspaper have any standard policy of verification of the authorship of letters to the editor.¹³⁷

The court held however, that "[h]aving concluded that the claimants have been

124. *Id.* at 1100.

125. *Id.* at 1101.

126. *Id.* at 1100.

127. *Id.* at 1101.

128. *Id.* at 1103–04.

129. *Id.* at 1092.

130. *Id.* at 1093.

131. *Id.*

132. *Id.*

133. *Id.* at 1094.

134. *Id.* at 1092 n.1.

135. *Id.* at 1097.

136. *Id.* at 1098.

137. *Id.*

libeled and that the libel was not qualifiedly privileged, it does not necessarily follow that the State of New York must respond in damages.”¹³⁸ The court concluded that the University had no duty to supply news gathering and dissemination guidelines to the student newspaper because the student editors were presumed to already know those commonsense verification guidelines and chose to ignore them.¹³⁹ The court found that “[t]he editors’ lack of knowledge of or failure to adhere to standards which are common knowledge and ordinarily followed by reasonable persons was not reasonably foreseeable.”¹⁴⁰ Accordingly, the court dismissed the claims against the State of New York.¹⁴¹

The 1983 decision in *Stanley v. Magrath*¹⁴² involved a university changing the method of funding the student newspaper to allow students to obtain a refund of this fee.¹⁴³ The University of Minnesota student newspaper had traditionally received part of its funding from the Board of Student Publications, which in turn received its funding from a non-refundable student-service fee that students were charged as a condition of registration.¹⁴⁴ On May 9, 1980, the Board of Regents of the University of Minnesota passed a resolution “that constituted a refundable fee system for a one-year trial period, allowing objecting students to obtain a refund of that part of the service fee allotted to the Board of Student Publications.”¹⁴⁵ The resolution also increased the Board of Student Publications fee.¹⁴⁶ Former editors of the student newspaper brought suit in federal district court against the President of the University and the members of the Board of Regents alleging that, among other things, the Regents’ change in funding policy was motivated by public opposition to the contents of the previous “Humor Issue” of the student newspaper that included a satire of Christ and of the Roman Catholic Church, and that used explicit and implicit references to sexual acts.¹⁴⁷ The issue resulted in vehement criticism and the Regents passed a resolution deplored the issue’s content.¹⁴⁸ After a trial to the court, the district court dismissed the complaint.¹⁴⁹ The trial court held that the Regents’ action rational and the First Amendment had not been violated.¹⁵⁰

On appeal, the Eighth Circuit found that the change in funding would not have occurred absent complaints over the offensive contents of the newspaper.¹⁵¹ The court concluded that reducing the revenues to the student newspaper was

138. *Id.*

139. *Id.* at 1103.

140. *Id.* at 1104 (citations omitted).

141. *Id.* at 1105.

142. 719 F.2d 279 (8th Cir. 1983).

143. *Id.* at 280.

144. *Id.* at 281 n.2.

145. *Id.* at 281.

146. *Id.*

147. *Id.* at 280–81.

148. *Id.* at 280.

149. *Id.* at 281.

150. *Id.* at 282.

151. *Id.* at 280.

prohibited by the First Amendment and ordered an injunction restoring the former system of funding.¹⁵² The court relied on *Joyner*, *Antonelli*, and *Papish* to find that a university may not take adverse action against a student newspaper because it disapproves of the content of the paper.¹⁵³ The Eighth Circuit also relied on *Papish* for the proposition that “offense to good taste, no matter how great, does not justify restriction of speech.”¹⁵⁴ *Papish*, however, involved a private newspaper that was distributed (with prior permission of the school) on university property.¹⁵⁵ Regulating a private newspaper containing articles of bad taste is quite different from regulating bad taste in articles that are part of a state subsidized school newspaper.

Despite the fact that the United States Supreme Court decided *Widmar v. Vincent*,¹⁵⁶ a First Amendment free speech case involving a university student organization, on December 8, 1981, the Eighth Circuit’s 1983 opinion in *Stanley* never even mentioned *Widmar*. In *Widmar*, a state university’s attempt to avoid an establishment clause violation resulted in it violating the free speech clause. The case began when a student religious organization at the University of Missouri at Kansas City that had previously received permission to conduct its meetings in University facilities was informed that it could no longer do so because of a University regulation prohibiting the use of University buildings or grounds for religious purposes.¹⁵⁷ Several students who were members of the religious group brought suit alleging that the University discriminated against religious activity and violated their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments.¹⁵⁸ The district court upheld the challenged regulation on summary judgment, holding that the regulation was required by the establishment clause of the Federal Constitution.¹⁵⁹ The Eighth Circuit reversed, holding that the University regulation was content-based discrimination against religious speech for which there was no compelling justification, and that the establishment clause does not bar a policy of equal access in which facilities are open to all kinds of groups and speakers.¹⁶⁰

Upon review, the Supreme Court affirmed the Eighth Circuit’s decision.¹⁶¹ The Court took notice of the fact that the registered student religious group regularly sought and received University permission to conduct its meetings from 1973 until 1977, despite the fact that the University regulation prohibiting the use of facilities

152. *Id.*

153. *Id.* at 282 (citing *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667 (1973); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970)).

154. *Stanley*, 719 F.2d at 283.

155. *Papish*, 410 U.S. 667.

156. 454 U.S. 263 (1981).

157. *Id.* at 263–64.

158. *Id.* at 266.

159. *Id.* at 266–67.

160. *Id.* at 267.

161. *Id.*

by religious groups was enacted in 1972.¹⁶² The Court found that “[t]hrough its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under constitutional norms.”¹⁶³ Relying on its public forum jurisprudence, the Court noted that the campus of a public university may possess many of the characteristics of a public forum.¹⁶⁴ However, the Court also noted that its “cases have recognized that First Amendment rights must be analyzed ‘in light of the special characteristics of the school environment.’”¹⁶⁵ The Court discussed the unique role of a university as compared to other public forums:

A university differs in significant respects from public forums such as streets and parks or even municipal theaters. A university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.¹⁶⁶

In determining the reasonableness of the University’s regulation prohibiting religious groups, the Court first examined the purpose of the forum created by the University. It found that the University’s purpose was to provide a forum in which students could exchange ideas.¹⁶⁷ The Court addressed the University’s argument that the use of the forum for religious speech would undermine its secular mission. It found that by creating a forum for multiple views, the University does not thereby endorse or promote any of the particular ideas aired there.¹⁶⁸ The Court distinguished this case from past cases “in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but *not* by others.”¹⁶⁹ The *Widmar* Court explained that “[i]n those cases the school may appear to sponsor the views of the speaker.”¹⁷⁰ The Court agreed that the interest of the University in complying with constitutional obligations such as not violating the establishment clause is a compelling interest.¹⁷¹ However, it found that an “equal access” policy could be compatible with the establishment clause if it passed the three-pronged test¹⁷² elaborated by the Court in *Lemon v. Kurtzman*.¹⁷³

162. *Id.* at 265.

163. *Id.* at 267.

164. *Id.* at 267 n.5.

165. *Id.* (quoting *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

166. *Id.*

167. *Id.* at 271 n.10.

168. *Id.* at 271.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. 403 U.S. 602 (1971). This (“Lemon”) test required that: (1) the government policy or regulation must have a secular purpose; (2) its principal or primary effect must be one that neither

The Supreme Court in *Widmar* found that an equal access policy would meet these criteria.¹⁷⁴ The Court concluded that in the University's mistaken efforts to prevent an establishment clause infringement, the University impermissibly engaged in (religious) content discrimination in violation of the free speech clause of the First Amendment.¹⁷⁵ The Court noted that under the applicable constitutional standard of review for discriminatory content-based exclusions, the University "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."¹⁷⁶ The rejection of the University's establishment clause argument eliminated the compelling state interest argument advanced by the University.

The Supreme Court in *Widmar* provided additional guidance in analyzing college and university student First Amendment free speech cases. It analyzed such institutions of higher learning as a special type of public forum.¹⁷⁷ Although it noted that a university possesses some of the same characteristics of a public forum generally, the Court also noted that there are special characteristics associated with the school environment: a university's mission is one of education; university facilities exist to further its educational goals; reasonable rules and regulations are necessary to accomplish this purpose.¹⁷⁸ Any First Amendment analysis must take this unique purpose into consideration.

Although *Widmar* came to the Supreme Court through the Eighth Circuit, the Eighth Circuit chose not to utilize the Supreme Court's guidance in *Widmar* in its subsequent opinion in *Stanley*.¹⁷⁹ The Eighth Circuit in *Stanley* did not consider the special characteristics of the university environment, nor did it consider that a university may make reasonable rules and regulations to accomplish its educational mission and purpose. The *Stanley* court determined that university action based on any content was impermissible, even general content that was offensive to almost everyone.¹⁸⁰ The university's educational rationale in terms of its reasonableness was not evaluated nor was the specific newspaper content the university was seeking to prohibit. Regulating the language content of newspaper articles that even the court of appeals found offensive to anyone of good taste¹⁸¹ could be considered a compelling state interest in a college or university environment. Nevertheless, the *Stanley* court stated that it was an unqualified rule that a public university may not constitutionally take adverse action against a student newspaper because it disapproves of the content of the paper.¹⁸² However, the Supreme Court

advances nor inhibits religion; and (3) the policy must not foster an excessive government entanglement with religion. *Id.* at 612–13.

174. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).

175. *Id.* at 269.

176. *Id.* at 270.

177. *Id.* at 274 n.5 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

178. *Id.*

179. *Stanley*, 719 F.2d 279.

180. *Id.* at 282.

181. *Id.* at 280.

182. *Id.* at 282.

in *Widmar* stated that a content-based regulation is permissible if the university shows that it is necessary to serve a compelling state interest and it is narrowly drawn to achieve that end.¹⁸³ The *Stanley* court did not discuss whether the university's regulation addressed a compelling state interest or if it was narrowly drawn to that end. It is possible that the university's regulation addressed only its compelling educational interest in good journalistic writing, and that its regulation was narrowly drawn to limit it to that end and did not restrict any content except the writing style or language used, and not the actual substantive content of the articles.

The Supreme Court in *Widmar* found that reasonable rules and regulations were permissible in a university environment.¹⁸⁴ The Eighth Circuit in *Stanley* did not examine the reasonableness of the university's rules and policies in light of the educational purpose of the forum. The *Stanley* court found any university regulation that affected any content of the newspaper to be impermissible.¹⁸⁵

Although the Supreme Court characterized a university as a special type of public forum in *Widmar*, it was not until 1983 that the Court formally promulgated its forum classification as a method (referred to as "public forum analysis") for First Amendment analysis of free speech on public property. In *Perry Education Ass'n v. Perry Local Educators' Ass'n*,¹⁸⁶ a rival union and two of its members brought a civil action against the certified union and individual members of the school board, contending that the certified union's preferential access to the school district's internal mail system, which included teachers' mail boxes, violated the First Amendment.¹⁸⁷ The Court, relying on *Tinker* and *Healy*, initially noted that neither students nor teachers shed their constitutional rights at the schoolhouse gate.¹⁸⁸ The Court, citing *Grayned v. City of Rockford*,¹⁸⁹ also noted at the outset that it has nowhere suggested that students, teachers, or anyone else has an absolute right to use all parts of a school building or its immediate environs for unlimited expressive purposes.¹⁹⁰ The *Perry* Court held: "The existence of a right of access to public property and the standard by which limitations upon such right must be evaluated differ depending on the character of property at issue."¹⁹¹

183. *Widmar*, 454 U.S. at 270.

184. *Id.* at 276–77.

185. See *Stanley*, 719 F.2d at 282–83. The *Stanley* court held that "[a] public university may not constitutionally take adverse action against a student newspaper, such as withdrawing or reducing the paper's funding, because it disapproves of the content of the paper." *Id.* at 282. The court also held that "it is clear that the First Amendment prohibits the Regents from taking adverse action against the *Daily* [the student newspaper] because the contents of the paper are occasionally blasphemous or vulgar." *Id.* at 283.

186. 460 U.S. 37 (1983).

187. *Id.* at 37–38.

188. *Id.* at 38.

189. 408 U.S. 104 (1972). In *Grayned*, the Supreme Court held that the area immediately surrounding a school may be closed to expressive activity which may disrupt or be incompatible with normal school activities. *Id.* at 114–15.

190. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

191. *Id.*

The Court indicated that the first step for analyzing speech restrictions on government property is to determine the character of the property.¹⁹² The Court identified three different general classifications of public property.¹⁹³ Each category of property was then associated with a different level of permissible government control related to the type of use the property was intended to serve.¹⁹⁴ These classifications are the starting point for determining the scope of state regulation permitted on public property. Each category or “forum” classification has a different level of government regulation that is permissible under First Amendment scrutiny. The type of regulation permitted is related to the purpose of the forum.

The Court defined the first category as consisting of “streets and parks which ‘have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.’”¹⁹⁵ This category is referred to as a traditional public forum. The *Perry* Court found that “[i]n these quintessential public forums, the government may not prohibit all communicative activity.”¹⁹⁶ The *Perry* Court explained:

For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open alternative channels of communication.¹⁹⁷

The *Perry* Court defined the second category of forums as consisting “of public property which the State has opened for use by the public as a place for expressive activity.”¹⁹⁸ This category is referred to as a “designated” or “limited” public forum. The Court cited several of its cases¹⁹⁹ where these limited or designated public forums were created by the government, including university meeting facilities,²⁰⁰ a school board meeting,²⁰¹ and a municipal theater.²⁰² The Court noted that “[a] public forum may be created for a limited purpose, . . . e.g., *Widmar v. Vincent* (student groups) or for the discussion of certain subjects, e.g., *City of Madison Joint School District v. Wisconsin Public Employment Relations*

192. *Id.*

193. *Id.* at 44–45.

194. *Id.*

195. *Id.* at 45 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

196. *Id.*

197. *Id.* (citations omitted).

198. *Id.*

199. *Id.*

200. *Widmar*, 454 U.S. 263.

201. *City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n*, 429 U.S. 167 (1976).

202. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

Commission (school board business).²⁰³ The *Perry* Court stated:

Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.²⁰⁴

The third category of forums that the Court identified is a nonpublic forum. The *Perry* Court found that “[p]ublic property which is not by tradition or designation a forum for public communication is governed by different standards.”²⁰⁵ Citing its opinion in *United States Postal Service v. Council of Greenburgh Civic Associations*,²⁰⁶ the Court noted that it has “recognized that the ‘First Amendment does not guarantee access to [public] property simply because it is owned or controlled by the government.’”²⁰⁷ In regard to the type of regulations permitted, the Court stated: “In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”²⁰⁸ The *Perry* Court held that similar to a private owner of property, the government has the power to preserve the property under its control for the use to which it is lawfully dedicated.²⁰⁹

Upon examination of the school mail facilities in *Perry*, the Court found that the mail system was a nonpublic forum.²¹⁰ The Court found that the school district’s “internal mail system, at least by policy, is not held open to the general public.”²¹¹ The Supreme Court noted the district court’s finding that the normal and intended function and purpose of the school mail system was to facilitate internal communications of school-related matters to teachers.²¹² The Court next addressed the argument that the school mail facilities became a “limited” public forum because of the periodic use of the system by private non-school-connected groups, and the fact that the rival union used the mail system prior to the other

203. *Perry*, 460 U.S. at 45 n.7.

204. *Id.* at 46.

205. *Id.*

206. 453 U.S. 114 (1981). In *Greenburgh*, the Court found that a private letterbox approved by the U.S. Postal Service for receipt of mail is not a public forum, and the deposit of unstamped communications in such boxes could interfere with the safe and efficient delivery of the mail and may be prohibited by the Postal Service. *Id.* at 128–29.

207. *Perry*, 460 U.S. at 46 (citing *Greenburgh*, 453 U.S. at 129).

208. *Id.*

209. *Id.* The Supreme Court in *Perry* noted that its statement is a reiteration of its holding in *Greer v. Spock*. *Id.* (citing *Greer v. Spock*, 424 U.S. 828, 836 (1976) (finding that military bases may be closed to political speeches and distribution of leaflets as long as there was no viewpoint discrimination, as a military base is not a public forum); *Adderly v. Florida*, 385 U.S. 39, 47 (1966) (finding that the jailhouse grounds are not a public forum)).

210. *Perry*, 460 U.S. at 46.

211. *Id.* at 47.

212. *Id.* at 46–47.

union's certification as exclusive bargaining representative.²¹³ The Court found neither of these arguments persuasive.²¹⁴ Its discussion provides guidance in deciding whether a public or nonpublic forum exists. The *Perry* Court stated:

If by policy or by practice the Perry School District had opened its mail system for indiscriminate use by the general public, then PLEA [the rival uncertified union] could justifiably argue a public forum has been created. This, however, is not the case. As the case comes before us, there is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public. Permission to use the system to communicate with teachers must be secured from the individual building principal. There is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material. We can only conclude that the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. This type of selective access does not transform government property into a public forum.²¹⁵

The Court next responded to the argument that a limited public forum was created because the school district had previously permitted both unions access to the mail system. The Supreme Court disagreed with the court of appeals' view that the school district's access policy favored one viewpoint over another.²¹⁶ Thus, the Court concluded that strict scrutiny was not mandated.²¹⁷ The Court found that the school district's previous policy of allowing both groups to use the school mail facilities was consistent with the school district's preservation of the facilities for government-related business.²¹⁸ However, the Court concluded that after one union was certified as the exclusive bargaining representative of the teachers, the status of the non-certified union had changed.²¹⁹ The Supreme Court found that the access policy was based on the status of the respective unions rather than their views.²²⁰ The Court explained:

Implicit in the concept of the nonpublic forum is the right to make

213. *Id.* at 47.

214. *Id.*

215. *Id.* The Supreme Court in *Perry*, cited *Greer v. Spock*, 424 U.S. 828 (1976) and *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), as examples of the proposition that selective access does not transform government property into a public forum. In *Greer*, the Court found that the fact that other civilian speakers had sometimes been invited to speak at Fort Dix did not convert the military base into a public forum. *Greer*, 424 U.S. at 838 n.10. In *Lehman*, the Court found that a city transit system's rental of space in its vehicles for commercial advertising did not make it a public forum, and thus did not require it to accept partisan political advertising. *Lehman*, 418 U.S. at 303.

216. *Perry*, 460 U.S at 48–49.

217. *Id.*

218. *Id.*

219. *Id.* at 49.

220. *Id.*

distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum, but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issues serves.²²¹

The Court went on to find that that the differential access was reasonable because it was consistent with the school district's legitimate interest in preserving the property for the use to which it was dedicated.²²² The Court found that providing exclusive access to the school mail facilities by the official union while excluding a rival uncertified union, is a reasonable and legitimate interest.²²³

The *Perry* Court's discussion also provides guidance in defining the extent of the First Amendment right of access to a "limited" public forum:

[E]ven if we assume that by granting access to the Cub Scouts, YMCA's, and parochial schools, the School District has created a 'limited' public forum, the constitutional right of access would in any event extend only to other entities of similar character. . . . that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as PLEA [the rival uncertified union], which is concerned with the terms and conditions of teacher employment.²²⁴

The *Perry* Court clarified the differing standards of constitutional review for a public versus a nonpublic forum:

In a public forum, by definition, all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to single class of speakers, a single viewpoint, or a single subject.

. . . Conversely on government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used.²²⁵

In this case, the Court found the difference in status between the exclusive bargaining representative and its rival to be such a permissible distinction.²²⁶

Perry's public forum analysis provides the framework for analyzing speech restrictions on government property. However, *Perry* was not decided until 1983, after the earlier student newspaper cases discussed in this section were already decided. Utilizing the Supreme Court's public forum analysis as articulated in *Perry* might have resulted in different outcomes in these earlier cases. At a

221. *Id.*

222. *Id.* at 50.

223. *Id.*

224. *Id.* at 48.

225. *Id.* at 55.

226. *Id.*

minimum, federal courts of appeal would have discussed the application of public forum analysis in their First Amendment student free speech cases as they did in the subsequent cases discussed in Part III of this article.

Additionally, the United States Supreme Court decided a First Amendment student speech case after *Papish* but prior to *Hazelwood* that provides further guidance to analyzing student speech under the First Amendment. In *Bethel School District No. 403 v. Fraser*,²²⁷ the Supreme Court distinguished the individual non-disruptive student political speech of *Tinker* from student speech that is made to the public with some support by the school. The Court also provided insight into what may constitute compelling reasons for a school's restriction of speech.²²⁸ The special purpose of the education of students is the vital consideration for determining what speech restrictions are permissible under the First Amendment.²²⁹ The *Fraser* Court also determined that it would give school officials great deference as to what manner of speech is consistent with its educational mission and goals.

On April 26, 1983, a high school student, Matthew Fraser, delivered a speech nominating a fellow student for student government at a school assembly.²³⁰ The assembly was part of a school-sponsored educational program on self-government and approximately 600 students were in attendance.²³¹ The speech referred to the candidate "in terms of an elaborate, graphic, and explicit sexual metaphor."²³² Fraser had discussed the contents of his speech with two of his teachers in advance and they had informed him that the speech was inappropriate and his delivery of it might result in severe consequences.²³³ The next day after delivering the speech, Fraser met with the assistant principal who informed him that he was in violation of the school disciplinary rule forbidding obscene and related language and gestures.²³⁴ Fraser invoked the school's grievance procedure and the hearing officer found that his speech fell within the ordinary definition of "obscene" as used in the disruptive-conduct rule.²³⁵ As a result, Fraser was suspended for three days and his name was removed from the list of candidates for graduation speaker at the school's commencement exercises.²³⁶

Fraser sued in federal district court alleging a violation of his First Amendment right to freedom of speech.²³⁷ The district court awarded Fraser damages, litigation costs, and attorney fees, and enjoined the school district from preventing him from speaking at commencement.²³⁸ The Ninth Circuit affirmed the district

227. 478 U.S. 675 (1986).

228. *Id.* at 683.

229. *Id.* at 686.

230. *Id.* at 677–78.

231. *Id.* at 677.

232. *Id.* at 678.

233. *Id.*

234. *Id.*

235. *Id.* at 679.

236. *Id.* at 678.

237. *Id.* at 679.

238. *Id.*

court, holding that Fraser's speech was indistinguishable from the armband protest in *Tinker*.²³⁹

Upon review, the Supreme Court reversed.²⁴⁰ The Court initially distinguished this case from *Tinker*.²⁴¹ The Court found a “marked distinction between the political ‘message’ of the armbands in *Tinker* and the sexual content of respondent’s [Fraser’s] speech,” which the Court noted had been given little weight by the court of appeals.²⁴² The Court held that it was a highly appropriate function of public education to inculcate values of civility and prohibit the use of vulgar and offensive terms in public discourse.²⁴³ The Court found that “[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions.”²⁴⁴ The Supreme Court in *Fraser* “reaffirmed that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”²⁴⁵

The Court made a key point here in that First Amendment rights in government forums must be determined in light of the purpose of that property.²⁴⁶ In the instance of all educational institutions, the special purpose is education. Constitutional rights are not necessarily the same for students (or anyone on school property) in an educational institution as they are for anyone in a non-school setting. A college or university student may be subject to less government restriction on the sidewalk outside of the Supreme Court building²⁴⁷ than on the campus of a state college or university. While the Court will not defer totally to school administration, school officials are given a great degree of deference in imposing speech restrictions that promote the institution’s educational purpose. The *Fraser* Court held that “[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”²⁴⁸

Although the Court in *Fraser* noted that it had “also recognized an interest in protecting minors from exposure to vulgar and offensive spoken language,”²⁴⁹ the Court’s holding demonstrates that the inculcation of values in accord with the educational purpose of schools is not limited to high school students. The *Fraser* Court referred to Thomas Jefferson’s Manual of Parliamentary Practice that prohibited the use of “impertinent” speech during debate that governed the

239. *Id.*

240. *Id.* at 680.

241. *Id.*

242. *Id.*

243. *Id.* at 683.

244. *Id.*

245. *Id.* at 682 (emphasis added).

246. *Id.* at 681.

247. See *United States v. Grace*, 461 U.S. 171 (1983) (finding that the sidewalk outside of the Supreme Court building is a traditional public forum and there was insufficient justification for a regulation prohibiting the carrying of signs and banners on the public sidewalk surrounding the building).

248. *Fraser*, 478 U.S. at 683.

249. *Id.* at 684.

proceedings in the United States House of Representatives.²⁵⁰ The Court queried: “Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?”²⁵¹ Justice Brennan indicated in his concurring opinion in *Fraser* that the Court’s decision did not depend on the age of the audience (or the speaker), but on the ability of a school to regulate campus speech in furtherance of its educational mission.²⁵² Justice Brennan wrote:

If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate . . . the Court’s opinion does not suggest otherwise. . . . Respondent’s speech may well have been protected had he given it in school but under different circumstances, where the school’s legitimate interests in teaching and maintaining civil public discourse were less weighty.²⁵³

Thus, the key decisional basis in *Fraser* is not that Fraser was speaking to minors (or that he himself was a minor), but that the school was constitutionally permitted to restrict student speech made at a school sanctioned assembly involving a student audience in accord with its legitimate educational interests and values.

The Supreme Court in *Fraser* distinguished the personal individual speech of students (as found in *Tinker*) from student speech made as part of school sanctioned activities. The Court recognized that the school’s educational mission be taken into consideration when analyzing speech that is sanctioned by the school. It acknowledged that the school must be given a great degree of deference in imposing speech restrictions that promote its educational purpose.²⁵⁴

These earlier cases illustrate that once college and university student

250. *Id.* at 681–82.

251. *Id.* at 682.

252. *Id.* at 688–89 (Brennan, J., concurring).

253. *Id.* (citation omitted).

254. The Court also examined the imposition of personal penalties against Fraser. It held that the “School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech.” *Id.* at 685. The Court distinguished this from *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503 (1969), finding that “[u]nlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint.” *Fraser*, 478 U.S. at 685. Thus, *Fraser* is distinguishable from the district court’s decision in *Dickey v. Ala. State Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967), where the court found that the student editor was suspended from school for violating a rule that the governor of the state could not be criticized. See *supra* notes 13–29 and accompanying text. The Court also found Fraser’s vagueness and notice arguments with regard to the assessment of penalties “wholly without merit.” *Fraser*, 478 U.S. at 686. The Court stated:

We have recognized that “maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the teacher-student relationship.” Given the school’s need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school’s disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.

Id. (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985)).

newspapers had been analyzed by the courts as private newspapers for First Amendment purposes, subsequent opinions reinforced earlier decisions and made it difficult to modify that analysis. *Tinker* reinforced expanding First Amendment protection for student speech, albeit it focused on individual speech that occurs on school grounds. *Tinker* was a K–12 speech case that was applied to college and university students. Similarly, the more recent jurisprudence of *Hazelwood* and other Supreme Court school and public forum analysis decisions can be applied to college and university student newspapers.²⁵⁵

III. HAZELWOOD AND FEDERAL APPELLATE COURT APPLICATIONS OF HAZELWOOD TO COLLEGES AND UNIVERSITIES

The United States Supreme Court first addressed First Amendment free speech analysis and student newspapers in *Hazelwood School District v. Kuhlmeier*,²⁵⁶ albeit high school newspapers. In its now famous footnote in *Hazelwood*, the Court stated: “We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”²⁵⁷ This statement has been interpreted differently by different courts. Consequently, the Supreme Court has left the extent of the application of *Hazelwood* to colleges and universities, if any, to the lower courts. Nevertheless, in any First Amendment college or university student newspaper case, a court must either apply the *Hazelwood* analysis or hold that *Hazelwood* does not apply. Thus, an examination of *Hazelwood* is important.

A. Hazelwood

Hazelwood involved an appeal by three former Hazelwood East High public school students who were staff members of *Spectrum*, the student newspaper. Those students contended that school officials violated their First Amendment rights by deleting two pages of articles from the May 13, 1983 issue of *Spectrum*.²⁵⁸ *Spectrum* was written and edited by the Journalism II class at Hazelwood East High School in Missouri and published approximately every three weeks during the 1982–1983 school year.²⁵⁹ “More than 4,500 copies of the newspaper were distributed during that year to students, school personnel, and members of the community.”²⁶⁰ Funds for the newspaper were allocated by the Board of Education from its annual budget for the printing of the *Spectrum*.²⁶¹ Although these funds were supplemented by sales of the newspaper, revenue did

255. It is important to note that some of these earlier cases may not have been decided differently if *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), and more recent forum cases had been utilized for guidance. However, college newspapers would not have been analyzed as private individual speech.

256. *Id.*

257. *Id.* at 273 n.7.

258. *Id.* at 262.

259. *Id.*

260. *Id.*

261. *Id.*

not cover the cost of the printing.²⁶² The Board of Education also contributed other costs associated with the newspaper, including supplies, textbooks, and a portion of the journalism teacher's salary.²⁶³

The practice at Hazelwood East High School at that time was for the journalism teacher to submit page proofs of each *Spectrum* issue to the school principal for review prior to publication.²⁶⁴ On May 10, the journalism teacher delivered the proofs for the May 13 issue to the high school principal, Robert Reynolds.²⁶⁵ The principal objected to two of the articles.²⁶⁶ One article described the experiences of three Hazelwood East students in regard to their pregnancies; the other article discussed the impact of divorce on students.²⁶⁷ Principal Reynolds was concerned that, although the pregnancy article used false names, students and others could still identify the pregnant students.²⁶⁸ He was also concerned that the issues of sexual activity and birth control were inappropriate for some of the younger students at the school.²⁶⁹ Additionally, Principal Reynolds was concerned that a student identified by name had complained in the divorce article that his father was not spending enough time with him, and that his father always argued with his mother.²⁷⁰ He believed that the student's parents should have been provided with an opportunity to respond to these allegations.²⁷¹ Because the principal believed that there was no time to make the needed changes to the newspaper before the scheduled press run, and that a delay might cause the paper not to be printed at all before the end of the school year, he decided to eliminate the last two pages on which the offending articles appeared.²⁷² The principal's superiors were informed of his decision, and they concurred.²⁷³

The students brought suit in federal district court, alleging that their First Amendment rights had been violated, and asked for injunctive relief and monetary damages.²⁷⁴ The court denied the injunction and "concluded that school officials may impose reasonable restraints on students' speech in activities that are 'an integral part of the school's educational function'—including the publication of a school-sponsored newspaper by a journalism class—so long as the their decision has 'a substantial and reasonable basis.'"²⁷⁵ Given the small number of pregnant

262. *Id.*

263. *Id.* at 262–63.

264. *Id.* at 263.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* The school principal was unaware that the teacher had deleted the student's name from the final article. *Id.*

272. *Id.* at 263–64. The principal testified that he had no objection to the other articles on those two pages. *Id.* at 264 n.1.

273. *Id.* at 264.

274. *Id.*

275. *Id.* (quoting *Frasca v. Andrews*, 463 F. Supp. 1043, 1052 (E.D.N.Y 1979)).

students at the high school, the court found that the principal's concern that their anonymity would be lost and their privacy invaded was "legitimate and reasonable."²⁷⁶ Moreover, the court found that the principal's action was justified to avoid the impression that the school endorsed the sexual norms of the subjects.²⁷⁷ The district court also found that the deletion of the article on divorce was a reasonable response to the invasion of privacy concern, especially when the parents were not given an opportunity to respond as journalistic fairness would require.²⁷⁸

The Court of Appeals for the Eighth Circuit reversed.²⁷⁹ It found that the school newspaper was not only a part of the school curriculum, but was also a public forum because the newspaper was intended to be operated as a conduit for student viewpoint.²⁸⁰ Relying on *Tinker v. Des Moines Independent Community School District*,²⁸¹ the court "concluded that *Spectrum*'s status as a public forum precluded school officials from censoring its contents except when 'necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others.'"²⁸² The court found no evidence that the deleted articles or any material in the articles could have materially disrupted class work or caused disorder in the school.²⁸³ It held that the school officials were entitled to censor the articles only if their publication could have resulted in tort liability to the school.²⁸⁴ However, the court concluded that "no tort action for libel or invasion of privacy could have been maintained against the school by subjects of the two articles or by their families."²⁸⁵ For these reasons, the Eighth Circuit held that school officials violated the students' First Amendment rights by deleting the two pages in question from the newspaper.²⁸⁶

Upon review, the United States Supreme Court initially reiterated its holding in *Tinker* that "[s]tudents in the public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"²⁸⁷ However, the *Hazelwood* Court went on to state:

They [students] cannot be punished merely for expressing their personal views on the school premises—whether "in the cafeteria, on the playing field, or on the campus during the authorized hours,"²⁸⁸—unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the

276. *Id.*

277. *Id.* at 264–65.

278. *Id.* at 265.

279. *Id.*

280. *Id.*

281. 393 U.S. 503 (1969). *See* text accompanying note 11.

282. *Hazelwood*, 484 U.S. at 265 (omission in original) (quoting *Tinker*, 393 U.S. at 511).

283. *Id.*

284. *Id.* at 265–66.

285. *Id.* at 266.

286. *Id.*

287. *Id.* (citation omitted) (quoting *Tinker*, 393 U.S. at 506).

288. *Id.* (citation omitted) (quoting *Tinker*, 393 U.S. at 512–13).

rights of other students.”²⁸⁹

The Court then qualified this statement. Citing its decision in *Bethel School District No. 403 v. Fraser*,²⁹⁰ the *Hazelwood* Court stated that “[w]e have nonetheless recognized that the First Amendment rights of students in public schools ‘are not automatically coextensive with the rights of adults in other settings,’²⁹¹ and must be ‘applied in light of the special characteristics of the school environment.’”²⁹² Accordingly, the Supreme Court held that “[a] school need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ even though the government could not censor similar speech outside the school.”²⁹³ The Court concluded that it is in this context that this case must be considered.²⁹⁴

The *Hazelwood* Court next turned to the specific analysis it would utilize. The Court stated that it must “deal first with the question of whether *Spectrum* may appropriately be characterized as a forum for public expression.”²⁹⁵ Finding that “public schools do not possess all of the attributes of streets, parks, and other traditional public for[a],”²⁹⁶ the Court concluded that “school facilities may be deemed to be public for[a] only if school authorities have ‘by policy or by practice’ opened those facilities ‘for indiscriminate use by the general public,’²⁹⁷ or by some segment of the public, such as student organizations.”²⁹⁸

In examining the findings of the trial court, the *Hazelwood* Court found that the policy of the school officials was that school-sponsored publications were developed within the curriculum, and the lessons to be learned included those of journalistic skill.²⁹⁹ The Court also found that school officials had not deviated in practice from the policy that production of *Spectrum* was part of the educational curriculum and a regular classroom activity.³⁰⁰ Therefore, the Supreme Court found that the students’ assertion that they could publish practically anything in *Spectrum* was not credible.³⁰¹

Next, the Court found that the evidence relied upon by the court of appeals in finding *Spectrum* to be a public forum was “equivocal at best.”³⁰² The Court also found that the School Board policy statement, which stated that the school “will not restrict free expression or diverse viewpoints within the rules of responsible

289. *Id.* (quoting *Tinker*, 393 U.S. at 509).

290. 478 U.S. 675 (1986). *See supra* notes 227–253 and accompanying text.

291. *Hazelwood*, 484 U.S. at 266 (citing *Fraser*, 478 U.S. at 682).

292. *Id.* (quoting *Tinker*, 393 U.S. at 506).

293. *Id.* (citation omitted) (quoting *Fraser*, 478 U.S. at 685).

294. *Id.* at 267.

295. *Id.*

296. *Id.*

297. *Id.* (quoting *Perry*, 460 U.S. at 47).

298. *Id.* (citation omitted) (quoting *Perry*, 460 U.S. at 46 n.7).

299. *Id.* at 268.

300. *Id.*

301. *Id.*

302. *Id.* at 269.

journalism,” might reasonably infer from the complete policy statement that school officials retained ultimate control of what comprised “responsible journalism.”³⁰³ The Court also found that the “Statement of Policy” published in *Spectrum*, which “declared that ‘Spectrum, as a student-press publication, accepts all rights implied by the First Amendment,’ . . . suggests at most that the administration will not interfere with the students’ exercise of those First Amendment rights that attend the publication of a school-sponsored newspaper.”³⁰⁴ The Court stated that this declaration “does not reflect an intent to expand those rights by converting a curricular newspaper into a public forum.”³⁰⁵ It also found that to permit students to exercise some authority over content is consistent with the educational purpose but “hardly implies a decision to relinquish school control over that activity.”³⁰⁶ The Supreme Court held that the evidence relied on by the court of appeals failed to show a clear intent by the school to create a public forum.³⁰⁷ Thus, the Court concluded that it is the standard espoused in *Perry Education Ass’n v. Perry Local Educators’ Ass’n*,³⁰⁸ rather than *Tinker*, that should govern this case.³⁰⁹ In distinguishing *Hazelwood* from *Tinker*, the Supreme Court stated:

The question whether the First Amendment requires a school to tolerate particular student speech—the question we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question concerns educators’ ability to silence a student’s personal expression that happens to occur on school premises. The latter question concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.³¹⁰

The *Hazelwood* Court also held that a school in its capacity as publisher of a student newspaper or producer of a school play, is entitled to exercise greater control over this form of student expression to prevent speech that would substantially interfere with its work or impinge upon the rights of others.³¹¹ The Court held that the school may also exercise greater control over speech “that is, for example, ungrammatical, poorly written, inadequately researched, biased or

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* at 270.

307. *Id.*

308. 460 U.S. 37 (1983). *See supra* notes 186–226 and accompanying text.

309. *Hazelwood*, 484 U.S. at 270.

310. *Id.* 270–71.

311. *Id.* at 271.

prejudiced, vulgar or profane, or unsuitable for immature audiences.”³¹² Accordingly, the Court concluded that, “the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to dissemination of student expression.”³¹³ Thus, the Supreme Court reversed the court of appeals and held “that educators 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.”³¹⁴ The Court also held that school officials are permitted to exercise prepublication control over school-sponsored publications without the existence of specific written authorization regulations.³¹⁵ The *Hazelwood* Court held that it is only when a decision to censor a school-sponsored publication, theatrical production, or other student expression has no valid educational purpose that the First Amendment is implicated as to require judicial intervention to protect student rights.³¹⁶ In conclusion, the *Hazelwood* Court held that the school principal had acted reasonably in requiring the deletion of the two pages that were at issue in the litigation.³¹⁷

B. Applications of *Hazelwood* to Colleges and Universities by Federal Courts of Appeal

The federal circuit courts have discussed the application of *Hazelwood* to several cases at the college and university level. However, only the Seventh Circuit has decided a college/university student newspaper case involving the First Amendment by applying *Hazelwood*.

1. The First Circuit

In *Student Government Ass'n v. Board of Trustees of the University of Massachusetts*,³¹⁸ three students and three student organizations sued the University’s Board of Trustees and four University officials for conspiring to violate the plaintiffs’ First Amendment rights to speak and associate freely, by first prohibiting the school’s Legal Services Organization (“LSO”) from engaging in any litigation, and then abolishing the LSO completely.³¹⁹ The LSO, established by the University’s Board of Trustees in 1974, represented both students and student organizations.³²⁰ The LSO was financed almost exclusively by mandatory

312. *Id.*

313. *Id.* at 272–73.

314. *Id.* at 273.

315. *Id.* at 273 n.6.

316. *Id.* at 273.

317. *Id.* at 274.

318. 868 F.2d 473 (1st Cir. 1989).

319. *Id.* at 474.

320. *Id.*

student activity fees.³²¹ In 1975, the Board authorized the LSO to represent students in criminal matters and engage in litigation against the University.³²² In 1986, the Board of Trustees rescinded the LSO's authority to represent students in criminal cases and in suits against the University of Massachusetts and its employees.³²³ In 1987, the Board abolished the LSO, and replaced it with the Legal Services Center ("LSC"), which was prohibited from engaging in any litigation.³²⁴

The district court entered summary judgment for the defendants, holding that the plaintiffs did not state a First Amendment violation.³²⁵ The district court also held that although the LSO was a limited public forum, the content neutrality of the Board's action made the issue of the type of forum irrelevant.³²⁶ The United States Court of Appeals for the First Circuit affirmed the district court's grant of summary judgment for the defendants.³²⁷ However, the court of appeals held that "[f]orum analysis is inappropriate in this case because the LSO is not a forum for purposes of the First Amendment."³²⁸ The court explained that "forums are channels of communication"³²⁹ and that in this case the channel of communication between students and those against whom they have filed lawsuits was the court system.³³⁰ The court explained that the "[f]orum doctrine was developed to monitor government regulation of access to publicly-owned real property for speech purposes."³³¹ The court found that the "LSO merely represents an in-kind speech subsidy granted by the UMass to students who use the court system."³³² Thus, the First Circuit held that the dispute was a subsidy case and not a forum case.³³³ It found that the University had not attempted to restrict the First Amendment rights of students; it had simply stopped subsidizing the exercise of those rights.³³⁴ Students were free, the court said, to seek other legal counsel who would litigate criminal matters or sue the University or its employees.³³⁵

In discussing the inapplicability of forum analysis to this case, the First Circuit briefly mentioned the *Hazelwood* decision as involving channels of communication and therefore properly analyzed under forum analysis.³³⁶ The First Circuit referred to *Hazelwood* in a footnote: "*Hazelwood*, in which the Court held

321. *Id.* at 475.

322. *Id.* at 474.

323. *Id.* at 475.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* at 474.

328. *Id.* at 476.

329. *Id.*

330. *Id.*

331. *Id.* at 477.

332. *Id.* at 476.

333. *Id.* at 477.

334. *Id.*

335. *Id.* at 479.

336. *Id.* at 480 n.6.

that a high school newspaper whose production was part of educational curriculum was not a public forum, is not applicable to college newspapers.”³³⁷ Because the court found that forum analysis cases like *Hazelwood* did not apply in *Student Government Ass’n*, and because the court did not discuss *Hazelwood* beyond this cursory statement in the footnote, it is not known whether the First Circuit would currently give any precedential value to this February 1989 case footnote.³³⁸

2. The Eleventh Circuit

In *Alabama Student Party v. Student Government Ass’n of the University of Alabama*,³³⁹ the Eleventh Circuit affirmed a district court order against a First Amendment challenge of certain election regulations of the University of Alabama Student Government Association. The plaintiffs, individual students and an association of students (“Alabama Student Party”) interested in running for student government office challenged the Student Government Association (“SGA”) regulations that: (1) restricted the distribution of campaign literature to no earlier than three days prior to the election and none the day of the election; (2) restricted campaign literature distribution to residences or outside of campus buildings; and (3) limited open forums for candidates to present their views to the week of the election.³⁴⁰ The district court first determined that the SGA was a state actor and therefore subject to the same constitutional restrictions as the University itself.³⁴¹ Utilizing the framework established by *Perry Education Ass’n v. Perry Local Educators’ Ass’n*,³⁴² the district court “concluded that the challenged regulations met the reasonableness standard used to measure the constitutionality of speech restrictions in a non-public forum.”³⁴³

The Eleventh Circuit agreed with the district court that the challenged student regulations should be evaluated under a reasonableness standard, but did not believe that *Perry* was applicable in this instance.³⁴⁴ The court stated that the school setting cases that applied *Perry* dealt “with situations where some student group is seeking access, or funding, or some similar treatment that other student groups [were] already receiving.”³⁴⁵ This was not the case here. Instead, the court found that “[t]he proper analysis centers on the level of control a university may

337. *Id.* (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)).

338. Adding to this is the fact that the case originated on summary judgment from the district court in 1987, the year before *Hazelwood* was decided. Therefore, the parties would not have developed their arguments (and included relevant evidence) in light of the *Hazelwood* decision. See *Student Gov’t Ass’n v. Bd. of Trs. of the Univ. of Mass.*, 676 F. Supp. 384 (D. Mass. 1987). Because the First Circuit found that *Hazelwood* was not applicable to the analysis, there was no effort to discuss this issue in any detail, nor was there any necessity to remand the case in light of the Supreme Court’s decision in *Hazelwood*.

339. 867 F.2d 1344 (11th Cir. 1989).

340. *Id.* at 1345.

341. *Id.*

342. 460 U.S. 37 (1983). *See supra* notes 186–226 and accompanying text.

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

344. *Id.*

345. *Id.*

exert over the school-related activities of its students.”³⁴⁶ Relying on *Widmar v. Vincent*,³⁴⁷ the court of appeals noted that the United States Supreme Court has affirmed the right of state universities to make internal academic judgments as part of their educational mission.³⁴⁸ The court found that “[t]he central justification for a student government organization is that it supports the educational mission of the University.”³⁴⁹

The Eleventh Circuit stated that the issue in this case was “whether it is unconstitutional for a university, which need not have a student government association at all, to regulate the manner in which the Association runs its elections.”³⁵⁰ Acknowledging that “academic qualifications for public office could never withstand constitutional scrutiny in the ‘real world,’” the court explained that “this is a university, whose primary purpose is *education*, not electioneering.”³⁵¹ Thus, the court concluded that “[c]onstitutional protections must be analyzed with due regard to that educational purpose.”³⁵²

In viewing student government as part of the college and university educational experience, the Eleventh Circuit held that “student government and the campaigns associated with it do not constitute a forum generally open to the public, or a segment of the public, for communicative purposes, but rather constitute a forum reserved for its intended purpose, a supervised learning experience for students interested in politics and government.”³⁵³ The court compared this holding to the Supreme Court’s decision in *Hazelwood*, where the school in *Hazelwood* was not required to establish a newspaper. Equally clear was that “the mere establishment of the newspaper [in *Hazelwood*] does not then magically afford it all the First Amendment rights that exist for publications outside of a school setting.”³⁵⁴ The court of appeals distinguished the *Alabama Student Party* facts from the circumstances in *Tinker*, stating that the school regulation in *Tinker* “selected out a particular message, which just happened to occur on school premises, for punishment.”³⁵⁵ The Eleventh Circuit found that this was not the case here, where regulations affecting student government were more akin to *Hazelwood*’s learning laboratory than the student speech in *Tinker*, noting that the Supreme “Court recognized . . . a difference between speech a school must tolerate [*Tinker*] and speech a school must affirmatively promote [*Hazelwood*.]”³⁵⁶ The court of appeals stated that the “University should be entitled to place reasonable restrictions on this learning experience.”³⁵⁷ Thus, the Eleventh Circuit affirmed the district court’s

346. *Id.* at 1345–46.

347. 454 U.S. 263 (1981). *See supra* notes 156–176 and accompanying text.

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

349. *Id.*

350. *Id.* at 1346.

351. *Id.*

352. *Id.*

353. *Id.* at 1347.

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

dismissal of the suit because these student regulations were reasonable, the University's interest in minimizing the disruptive effect of campus electioneering was legitimate, and "[t]here was no evidence that the regulations were anything but viewpoint-neutral."³⁵⁸ The court also held that university judgments on matters such as these should be accorded great deference by the courts.³⁵⁹ The Eleventh Circuit added that "[i]n the present case, and in other school cases raising similar First Amendment challenges, these principles translate into a degree of deference to school officials who seek to reasonably regulate speech and campus activities in furtherance of the school's educational mission."³⁶⁰

In *Bishop v. Aronov*,³⁶¹ the Eleventh Circuit was again faced with a First Amendment free speech challenge, but this time by a faculty member.³⁶² Professor Phillip Bishop, an assistant professor at the University of Alabama who taught exercise physiology, had occasionally referred to his religious beliefs in class, referring to them as his personal bias, and suggesting to students that his religious beliefs were more important to him than academic productivity.³⁶³ Professor Bishop organized after-class meetings for his students and other interested persons in which he discussed various aspects of the evidence of God in human physiology.³⁶⁴ In one meeting attended by five of his students and one professor, Bishop concluded that man was created by God and was not a by-product of evolution.³⁶⁵ Although attendance at these meetings was optional and did not affect grades, the University contended that timing the meetings before final exams contributed to a coercive effect upon his students.³⁶⁶ After some students complained about Bishop's in-class comments and after-class meetings, the University prepared a memo to Professor Bishop requesting that he stop interjecting his religious beliefs into his in-class lectures, and that he discontinue the optional after-class meetings at which he advanced a Christian perspective of academic topics.³⁶⁷ Through his legal counsel, Professor Bishop requested that the

358. *Id.*

359. *Id.*

360. *Id.*

361. 926 F.2d 1066 (11th Cir. 1991).

362. *Id.* at 1068.

363. *Id.*

364. *Id.*

365. *Id.* at 1069.

366. *Id.*

367. *Id.* The University administration memo to Dr. Bishop regarding "Religious Activities in a Public Institution" stated:

Foremost, I want to reaffirm our commitment to your right of academic freedom and freedom of religious belief. This communication should not be construed as an attempt to interfere with or suppress your freedoms. From discourse with you and others, I feel that certain actions on your behalf are unwarranted at a public institution such as The University of Alabama and should cease. Among these actions that should be discontinued are: 1) the interjection of religious beliefs and/or preferences during instructional time periods and 2) the optional classes where a "Christian Perspective" of an academic topic is delivered. I must also remind you that religious beliefs and/or the strength of a belief can not be utilized in the decisions concerning the recruitment,

University rescind the order.³⁶⁸ After the University refused to rescind the order, Bishop filed suit in federal district court against the Board of Trustees of the University seeking declaratory and injunctive relief for violations of his free speech rights and free exercise rights.³⁶⁹

After cross motions for summary judgment, the district court, relying on *Widmar v. Vincent*,³⁷⁰ found that the University had created an open forum for students and their professors to engage in a free exchange of ideas, and therefore Bishop's speech at the after-class meetings was part of the open exchange of ideas between faculty and students.³⁷¹ The district court also found the memo sent to Bishop to be overbroad and vague.³⁷² The district court enjoined the University from taking any action restricting Professor Bishop's freedom of speech and religion.³⁷³ Bishop was also to be permitted to hold his optional after-class meetings as long as a blind grading system was utilized.³⁷⁴

On appeal, the Eleventh Circuit first examined the district court's finding that an open forum existed. The court disagreed with the finding that a university classroom is an open forum during class time.³⁷⁵ The Eleventh Circuit relied on *Hazelwood* to conclude that:

While the University may make its classrooms available for other purposes, we have no doubt that during instructional periods the University's classrooms are "reserved for other intended purposes," *viz.*, the teaching of a particular university course for credit. Thus, we first hold that Dr. Bishop's classroom is not an open forum.³⁷⁶

After first determining that no open forum existed, the Eleventh Circuit turned to the "next issue" of "whether the University by its memo has reasonably restricted Dr. Bishop's speech or exercise rights."³⁷⁷ The court initially considered Professor Bishop's charges of overbreadth and vagueness. The court found the memo to be neither overbroad nor vague, but susceptible to a narrow construction.³⁷⁸ The court concluded that "the University's restrictions as expressed in its memo are sufficiently narrow and clear to put Dr. Bishop on notice of what he [can and] cannot do and do not reach otherwise protected speech."³⁷⁹

Next, the Eleventh Circuit turned to the heart of the matter, "to what degree a school may control classroom instruction before touching the First Amendment

admissions or retention of graduate students. *Id.*

368. *Id.*

369. *Id.* at 1070.

370. 454 U.S. 263 (1981). *See supra* notes 156–176 and accompanying text.

371. *Bishop*, 926 F.2d at 1070.

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.* at 1071.

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

rights of a teacher.”³⁸⁰ The court noted that “[b]ecause there are no cases satisfactorily on point with this one to adopt as controlling, we must frame our own analysis to determine the sufficiency of the University’s interests in restricting Dr. Bishop’s expression in the classroom.”³⁸¹ The court determined that it would need to balance the interests of the teacher with the interests of the school.³⁸² The court found that *Hazelwood* should be utilized as the “polestar” for this balancing analysis.³⁸³ It determined that *Hazelwood*’s concern for the “basic educational mission” of the school gives the school the authority to use “reasonable restrictions” over in-class speech that it could not censor outside of the school.³⁸⁴ The Eleventh Circuit stated:

Kuhlmeier [*Hazelwood*], like most cases we have encountered, dealt with students at the secondary level. Yet, insofar as it covers the extent to which an institution may limit in-school expressions which suggest the school’s approval, we adopt the [Supreme] Court’s reasoning as suitable to our ends, even at the university level.³⁸⁵

Using this balancing test, the Eleventh Circuit concluded that the University’s restrictions with respect to Dr. Bishop’s classroom conduct did not infringe on his free speech or free exercise rights.³⁸⁶ However, the court noted that “balanced against the interests of academic freedom, the memo cannot proscribe Dr. Bishop’s conduct to an extent any greater than we have indicated in our opinion.”³⁸⁷ The court also found that a university’s interest as a public employer is greater where there is a possibility of coercing students into attending an after-class meeting, especially where there is the appearance of endorsement by the university. The court concluded that, although the University could not prevent Dr. Bishop from organizing such meetings after class, “[s]hould Dr. Bishop again conduct such meetings and invite his students, the University may direct that Dr. Bishop make it clear to students that the meeting is neither required for course credit nor sanctioned by the University and that Dr. Bishop employ blind-grading and so assure students.”³⁸⁸

Bishop involved the balancing of unsubsidized individual speech with the legitimate interests of the school.³⁸⁹ Nevertheless, the Eleventh Circuit was concerned that Bishop’s individual speech may appear to be endorsed by the University.³⁹⁰ Although the *Bishop* court found Bishop’s after-class personal speech to be constitutionally protected, it concluded that the school may impose

380. *Id.* at 1073.

381. *Id.* at 1074.

382. *Id.* at 1072.

383. *Id.* at 1074.

384. *Id.*

385. *Id.*

386. *Id.* at 1078.

387. *Id.*

388. *Id.*

389. *Id.* at 1074–78.

390. *Id.* at 1074.

certain rules that may otherwise be impermissible outside of the school setting.³⁹¹

3. The Sixth Circuit

In *Kincaid v. Gibson*,³⁹² an en banc review by the Sixth Circuit reversed an order of the district court granting summary judgment upholding the Kentucky State University's confiscation and distribution ban of a student yearbook.³⁹³ The previous panel of the Sixth Circuit had upheld summary judgment for the University.³⁹⁴ The suit was instituted by two students, Charles Kincaid and Capri Coffer,³⁹⁵ who alleged that the University's confiscation and failure to distribute the 1992–1994 student yearbook violated their rights under the First and Fourteenth Amendments.³⁹⁶

Capri Coffer served as editor of the yearbook ("The Thorobred") for the 1993–1994 academic year.³⁹⁷ A student photographer and at least one other student assisted her, but eventually the other students lost interest and Coffer organized and put together the yearbook by herself.³⁹⁸ Coffer designed a purple cover using foil.³⁹⁹ Coffer also gave the yearbook a theme, "Destination Unknown," based on the uncertainty of the time.⁴⁰⁰ She included pictures in the yearbook depicting various political and other events relating to the Kentucky State University community and the nation.⁴⁰¹ The yearbook covered not only the 1993–1994 academic year but also 1992–1993 academic year because the students working on the 1992–1993 yearbook "had fallen behind schedule."⁴⁰² Although the yearbook was projected to contain 224 pages, the final product contained only 128 pages because Coffer did not have enough pictures and "because the university administration took no interest in the publication."⁴⁰³ The yearbook was completed several thousand dollars under budget and was sent to the printer in May or June of 1994.⁴⁰⁴

When the yearbook came back from the printer in November 1994, Betty Gibson, the Vice President of Student Affairs, objected to several aspects of it and found it "to be of poor quality and 'inappropriate.'"⁴⁰⁵ Specifically, Gibson

391. *Id.* at 1078.

392. 236 F.3d 342 (6th Cir. 2001).

393. *Id.* at 357.

394. *Id.* at 342.

395. The two named plaintiffs sued "individually and on behalf of all others similarly situated." *Id.* at 342. Kincaid was not a member of the yearbook staff, but the court noted that "the First Amendment protects his right to read." *Id.* at 353 n.15.

396. *Id.* at 345.

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

objected to the yearbook's purple cover (the school's colors are green and gold), the "Destination Unknown" theme, the lack of captions under some of the photos, and the inclusion of events not directly related to the University.⁴⁰⁶ Gibson met with the University president, Mary Smith, and they decided to confiscate the yearbooks and withhold them from everyone.⁴⁰⁷ This suit followed.

The district court applied forum analysis and found that the Kentucky State University yearbook was a nonpublic forum.⁴⁰⁸ The court then held that the University officials' refusal to distribute the yearbook based on the grounds that the yearbook was of poor quality and did not represent the school was reasonable.⁴⁰⁹ The district court relied in part on *Hazelwood* in finding that the yearbook was a nonpublic forum and that the actions of the University officials were reasonable.⁴¹⁰ A divided panel of the Sixth Circuit affirmed the district court's decision.⁴¹¹

The Sixth Circuit granted en banc review to determine whether the panel and district court erred in applying *Hazelwood* to a university setting and to determine whether the district court erred in finding that the yearbook was a nonpublic forum.⁴¹² The court noted that because the yearbook was a limited public forum and *Hazelwood* involved a nonpublic forum, *Hazelwood* could not be directly applied to this case.⁴¹³ Upon review, the Sixth Circuit initially noted:

The parties essentially agree that *Hazelwood* applies only marginally to this case. Kincaid and Coffer argue that *Hazelwood* is factually inapposite to the case at hand; the KSU [Kentucky State University] officials argue that the district court relied upon *Hazelwood* only for guidance in applying forum analysis to student publications. Because we find that a forum analysis requires that the yearbook be analyzed as a limited public forum—rather than a nonpublic forum—we agree with the parties that *Hazelwood* has little application to this case.⁴¹⁴

In determining that the student yearbook was a limited (or designated) public forum, the court analyzed the actions of the University officials with respect to the yearbook "under strict scrutiny," and concluded "that the officials' confiscation of the yearbooks violated Kincaid's and Coffer's First Amendment rights."⁴¹⁵

The Sixth Circuit found that the forum in question was the yearbook itself.⁴¹⁶ After discussing the various types of forums, the court noted that the parties agreed

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.* at 346.

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.* at 346 n.5.

414. *Id.*

415. *Id.* at 347.

416. *Id.* at 348.

that the yearbook was not a traditional public forum.⁴¹⁷ Next, the court stated that to determine whether the yearbook was a limited public forum, it had to decide “whether the government intended to open the forum at issue.”⁴¹⁸ “To determine whether the government intended to create a limited public forum,” the court stated, “we look to the government’s policy and practice with respect to the forum, as well as to the nature of the property at issue and its ‘compatibility with expressive activity.’”⁴¹⁹ In examining the University’s policy, the court found that, “[f]irst and foremost, the policy places editorial control of the yearbook in the hands of a student editor or editors.”⁴²⁰ “[O]nce a student is appointed editor, editorial control of the yearbook’s content belongs to her.”⁴²¹ The court did note that a Student Publication Advisor who is a University employee is assigned to the yearbook, but that the advisor’s role is limited to “assuring that the . . . yearbook is not overwhelmed by ineptitude and inexperience.”⁴²² It further noted that any changes by the advisor are limited to form or the time and manner of expression, rather than content.⁴²³ The court concluded that this “self-imposed restraint” was strong evidence of the University’s “intent to create a limited public forum, rather than to reserve to itself the right to edit or determine” the content of the yearbook.⁴²⁴ The court next examined the actual practice of the University, to determine whether it intended to create a limited public forum in the yearbook.⁴²⁵ It found that both the administration and the Student Publications Board never attempted to control the content of the yearbook.⁴²⁶ Thus, the court concluded that by policy and practice, the University’s intent was to make the yearbook a limited public forum.⁴²⁷

The Sixth Circuit next examined the nature of the forum and its compatibility with expressive activity.⁴²⁸ The court found that the yearbook existed for the purpose of expressive activity.⁴²⁹

There can be no serious argument about the fact that, in its most basic form, the yearbook serves as a forum in which student editors present pictures, captions, and other written material, and that these materials constitute expression for purposes of the First Amendment. As a creative publication, the yearbook is easily distinguished from other government fora whose natures are not so compatible with free

417. *Id.*

418. *Id.* at 348–49.

419. *Id.* (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

420. *Id.* at 349.

421. *Id.*

422. *Id.*

423. *Id.* at 350.

424. *Id.*

425. *Id.* at 351.

426. *Id.*

427. *Id.* at 349.

428. *Id.* at 349–51.

429. *Id.*

expression.⁴³⁰

The court distinguished this case from *Hazelwood*, stating that the yearbook was not “a closely-monitored classroom activity in which an instructor assigns student editors a grade, or in which a university official edits content.”⁴³¹

The court also found that the context within which this case arose indicated the yearbook constituted a limited public forum.⁴³² The court noted that the nature of the university environment as the “marketplace of ideas” makes it especially important to merit heightened First Amendment protection.⁴³³ In addition to the nature of the university setting, it was relevant that the editors and the readers of the yearbook were likely to be young adults rather than impressionable younger students as were the students in *Hazelwood*.⁴³⁴ Thus, the court concluded that “the fact that the forum at issue arises in the university context mitigates in favor of finding that the yearbook is a limited public forum.”⁴³⁵

The court summed up its forum analysis and its next step:

[O]ur review of KSU’s policy and practice with regard to *The Thorobred* [the yearbook], the nature of the yearbook and its compatibility with expressive activity, and the university context in which the yearbook is created and distributed, all provide strong evidence of the university’s intent to designate the yearbook as a limited public forum. Accordingly, we must determine whether the university officials’ actions with respect to the yearbook were constitutional.⁴³⁶

Relying on *Perry Education Ass’n v. Perry Local Educators’ Ass’n*,⁴³⁷ the *Kincaid* court noted that for First Amendment purposes, “the government may impose only 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.”⁴³⁸ The Sixth Circuit found that the University’s confiscation of the yearbooks, and its refusal to distribute them after the yearbooks were returned from the printer, was not a reasonable time, place, or manner regulation.⁴³⁹ The court asserted that confiscation was one of the purest forms of content alteration.⁴⁴⁰

However, the *Kincaid* court went on to note that even if the yearbook was a nonpublic forum, the confiscation of the yearbook would still violate the plaintiffs’ free speech rights.⁴⁴¹ The court, relying on *Perry*, stated: “Although the

430. *Id.*

431. *Id.* at 352.

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.* at 354.

437. 460 U.S. 37 (1983). *See supra* notes 186–226 and accompanying text.

438. *Kincaid*, 236 F.3d at 354.

439. *Id.*

440. *Id.* at 355.

441. *Id.*

government may act to preserve a nonpublic forum for its intended purposes, its regulation of speech must nonetheless be reasonable, and it must not attempt to suppress expression based on the speaker's viewpoint."⁴⁴² The court explained that an editor's choice of theme and selection of specific pictures are examples of the editor's viewpoint, and therefore University officials violated the First Amendment under nonpublic forum analysis as well.⁴⁴³ Thus, the Sixth Circuit concluded that because "of the clearly established contours of the public forum doctrine and the substantially developed factual record in this case," it had to reverse the ruling of the district court and find in favor of the plaintiffs.⁴⁴⁴

The Sixth Circuit's basis for finding that *Hazelwood* had little application (or applied only marginally) to *Kincaid* was that forum analysis required that the yearbook in this case be analyzed as a limited public forum rather than a nonpublic forum.⁴⁴⁵ Indeed, the *Kincaid* court indicated that college and university publications are not usually part of a supervised classroom assignment and therefore are not usually analyzed as a nonpublic forum as in the case of the high school newspaper in *Hazelwood*.⁴⁴⁶ Nevertheless, the Sixth Circuit did indicate that even if a student publication was a nonpublic forum, regulation of speech must be reasonable and suppression of that speech must not be based on the speaker's viewpoint.⁴⁴⁷

The facts in *Kincaid* are very exceptional, and the Sixth Circuit recognized these material facts as undisputed in its decision.⁴⁴⁸ The court discussed Coffer's work on the yearbook in laudatory detail throughout its opinion and directly relied upon Coffer's testimony for many of its findings.⁴⁴⁹ The court found that, "[i]n fact, Coffer testified that Cullen [the student publications advisor] had helped her come up with the yearbook's apparently contentious theme and pick out its allegedly scandalous cover."⁴⁵⁰ With no help or assistance from the school administrator and in the face of neglect by the previous year's staff, Capri Coffer completed a yearbook combining two years primarily on her own. The court found that Gibson's proffered reasons for the confiscation of the completed yearbook were because she personally objected to the color of the cover, the theme of "Destination Unknown" as inappropriate, the lack of captions under some of the photos, and the inclusion of current events not directly connected to the University.⁴⁵¹ The court stated that Gibson testified she found many pictures in the yearbook that looked like those in *Life* magazine and the pictures of current events were not exactly what she thought should be included.⁴⁵² The court also found that

442. *Id.*

443. *Id.* at 356.

444. *Id.* at 357.

445. *Id.* at 346 n.5.

446. *Id.* at 346 n.3.

447. *Id.* at 355.

448. *Id.* at 346.

449. *Id.* at 344–46.

450. *Id.* at 356.

451. *Id.* at 345.

452. *Id.* at 354–55.

University officials never even consulted the student publications advisor before seizing the yearbooks.⁴⁵³ Utilizing *Hazelwood*, the Sixth Circuit could have found that there was no legitimate pedagogical concern for confiscating and holding the completed yearbooks.⁴⁵⁴ Given the University's policy and practice, the administration's apathy and neglect in the yearbook production, and the reasons provided for the confiscation of an already produced yearbook, the almost single-handed efforts of Capri Coffer appear to represent a positive pedagogical example. Thus, the application of *Hazelwood* would not mean that every proffered reason for editing a publication advanced by college and university administrators would automatically be accepted by a court as a legitimate pedagogical reason. The specific facts in the case would be vital to any decision.

Nevertheless, the Sixth Circuit emphasized the applicability of *Perry*'s public forum analysis to students at all levels, including those at public colleges and universities.⁴⁵⁵ The *Kincaid* court cited several cases, including *Hazelwood*, for the proposition that "the Supreme Court has often applied a forum analysis to expressive activity within educational settings."⁴⁵⁶ The court also distinguished its application of the public forum doctrine to college and university yearbooks, from its application of the doctrine to college and university newspapers. The Sixth Circuit in *Kincaid* noted that its decision to apply the forum doctrine to the student yearbook had "no bearing on the question of whether and the extent to which a public university may alter the content of a student newspaper."⁴⁵⁷

4. The Ninth Circuit

In *Brown v. Li*,⁴⁵⁸ the United States Court of Appeals for the Ninth Circuit held that *Hazelwood* articulated the standard for reviewing college and university students' curricular-related speech. Christopher Brown was a master's degree candidate in the Department of Material Sciences at the University of California at Santa Barbara.⁴⁵⁹ To complete his master's degree, he was required to write a thesis.⁴⁶⁰ The rules governing the thesis were contained in the University's Graduate Student Handbook and in the University's Guide to Filing Theses and Dissertations.⁴⁶¹ The Handbook made the student writing the thesis—in conjunction with the faculty supervising the thesis—responsible for the quality of scholarship in the thesis, including presentation that conformed to the standards of the discipline.⁴⁶² The Handbook instructed the faculty not to approve a thesis that

453. *Id.* at 356.

454. *Id.* at 346 n.3.

455. *Id.* at 347.

456. *Id.* (citations omitted).

457. *Id.* at 348 n.6.

458. 308 F.3d 939 (9th Cir. 2002).

459. *Id.* at 942.

460. *Id.*

461. *Id.*

462. *Id.*

did not meet disciplinary or departmental standards.⁴⁶³ A “Dedication and/or Acknowledgements” section of a student thesis was optional.⁴⁶⁴ The Guide provided the general criteria for this optional section: “You may wish to dedicate this work to someone special to you or to acknowledge particular persons who helped you. Within the usual margin restrictions, any format is acceptable for these pages.”⁴⁶⁵

In the spring of 1999, Brown received his committee’s final approval of his thesis. Brown did not include any acknowledgements section in the document approved by the committee.⁴⁶⁶ After obtaining the signature page from his committee to insert in his thesis, Brown inserted an additional two-page section into his thesis without the knowledge of his committee.⁴⁶⁷ The section was entitled “Disacknowledgements.”⁴⁶⁸ It began: “I would like to offer special *Fuck You’s* to the following degenerates for of [sic] being an ever-present hindrance during my graduate career.”⁴⁶⁹ It then identified the Dean and staff of the University’s graduate school, the managers of the University’s library, former California Governor Wilson, the Regents of the University of California, and “Science” as having been particularly obstructive to Plaintiff’s progress toward his graduate degree.⁴⁷⁰

The University required that graduate students file their approved theses or dissertations in the University library as a prerequisite to obtaining a degree.⁴⁷¹ When Brown attempted to file his thesis in the library, Dean Li of the University’s Graduate Division was alerted. Dean Li referred the matter to Brown’s thesis committee.⁴⁷²

In June and July of 1999, Brown met with members of his thesis committee, Dean Li, the University Ombudsperson, and with the Dean of the School of Engineering.⁴⁷³ Brown drafted an alternative version of the section that did not contain any profanity. However, the committee agreed that even with the profanity eliminated, the “Disacknowledgements” section did not meet professional standards for publication in the field.⁴⁷⁴ The committee notified Brown of its conclusions in a memorandum dated August 5, 1999.⁴⁷⁵ In that memorandum, the committee also noted that “it had consulted with counsel and determined that a thesis or other scientific manuscript is not a ‘public forum.’”⁴⁷⁶ Dean Li also

463. *Id.* at 942–43.

464. *Id.* at 942.

465. *Id.*

466. *Id.* at 943.

467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.*

471. *Id.*

472. *Id.*

473. *Id.*

474. *Id.*

475. *Id.*

476. *Id.* at 944.

wrote a letter to Brown on August 5, 1999, which stated that his degree would be conferred upon approval of his thesis.⁴⁷⁷ Dean Li's letter also noted that approval of his thesis would be made as soon as Brown removed his "Disacknowledgements" section.⁴⁷⁸

Brown refused to remove the section and filed suit, alleging, among other things, that the Dean of the Graduate Division, the Chancellor, the members of his thesis committee, and the Director of the University Libraries had violated his First Amendment rights by withholding his degree and refusing to grant his degree unless he removed the "Disacknowledgements" section.⁴⁷⁹ The federal district court granted summary judgment for the University and Brown appealed.⁴⁸⁰

The Ninth Circuit stated that the key issue in this case was whether the University defendants had violated Brown's First Amendment rights when they refused to approve his "Disacknowledgements" section.⁴⁸¹ The court, noting that it could find no precedent directly on point, found that *Hazelwood* "demonstrates that educators can, consistent with the First Amendment, restrict student speech provided that the limitation is reasonably related to a legitimate pedagogical purpose."⁴⁸²

The *Brown* court found that the 1995 Sixth Circuit case of *Settle v. Dickson County School Board*,⁴⁸³ "more strongly resembles the present case."⁴⁸⁴ *Settle* involved a junior high school teacher accused of violating the free speech rights of one of her ninth grade students. One student, Brittney Settle, originally signed up and was approved to write a paper on "Drama."⁴⁸⁵ Without the teacher's approval, the student submitted an outline for a paper entitled "The Life of Jesus Christ."⁴⁸⁶ The teacher refused to accept Settle's outline and told the student she would have to select another topic.⁴⁸⁷ When the student's father got involved, the teacher told him that she would accept a paper on religion as long as it did not deal solely with Christianity or the life of Christ.⁴⁸⁸ The student, however, attempted to submit another outline with the title "A Scientific and Historical Approach to Jesus Christ," which the teacher also rejected.⁴⁸⁹ Ultimately, the principal and the school board supported the teacher's decision, finding that the teacher had not exceeded her discretion.⁴⁹⁰ At a hearing before the school board and in depositions for this case, the teacher stated her reasons for refusing to accept the topics submitted by

477. *Id.*

478. *Id.*

479. *Id.* at 945–46.

480. *Id.* at 946.

481. *Id.* at 947.

482. *Id.*

483. 53 F.3d 152 (6th Cir. 1995).

484. *Brown*, 308 F.3d at 948.

485. *Settle*, 53 F.3d at 154.

486. *Id.*

487. *Id.*

488. *Id.*

489. *Id.*

490. *Id.*

the student. The reasons included the fact that the student did not receive permission to write on the topic, and that the teacher felt it would be difficult for her to evaluate a research paper on a topic related to Jesus Christ.⁴⁹¹

In *Settle*, the district court relied on *Hazelwood* to dismiss the case on summary judgment.⁴⁹² In affirming the district court's decision, the Sixth Circuit explained:

The censorship in the *Hazelwood* case, referred to earlier, involved a school newspaper, a kind of open forum for students, and even there the Supreme Court said that 'educators do not offend the First Amendment by exercising editorial control over the style and context of student speech in school-sponsored activities so long as their actions are reasonably related to legitimate pedagogical concerns.'⁴⁹³

Applying *Hazelwood* to this case, the Sixth Circuit held that:

Where learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forum. So long as a teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts will not interfere.⁴⁹⁴

The *Settle* court held that it is not for the court to overrule the teacher's view that students should learn to write research papers on a topic other than their own theology.⁴⁹⁵ After examining the allegation that the teacher limited Settle's speech based on hostility to the student's religion, the Sixth Circuit concluded that there was no real dispute about the teacher's motives in refusing to accept the topic, and the decision of the district court dismissing the case on summary judgment was affirmed.⁴⁹⁶

The Ninth Circuit in *Brown* found that "*Hazelwood* and *Settle* lead to the conclusion that an educator can, consistent with the First Amendment, require that a student comply with the terms of an academic assignment."⁴⁹⁷ The court stated that "[t]hose cases also make clear that the First Amendment does not require an educator to change the assignment to suit the student's opinion or to approve the work of a student that, in his or her judgment, fails to meet a legitimate academic standard."⁴⁹⁸ The Ninth Circuit noted that it realized that the Supreme Court left open the question of whether *Hazelwood* applied to the same extent in a college or university level assignment.⁴⁹⁹ However, the court stated that although it is "an open question whether *Hazelwood* articulates the standard for reviewing a university's assessment of a student's academic work," "[w]e conclude that it

491. *Id.*

492. *Id.* at 155.

493. *Id.* (citation omitted).

494. *Id.*

495. *Id.* at 156.

496. *Id.*

497. *Brown v. Li*, 308 F.3d 939, 949 (9th Cir. 2002).

498. *Id.*

499. *Id.*

does.⁵⁰⁰ The Ninth Circuit found that the standard, as articulated by the Supreme Court in *Hazelwood*, is that ““educators 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.””⁵⁰¹ The court found that, “under the Supreme Court’s precedents, the curriculum of a public educational institution is one means by which the institution itself expresses its policy, a policy with which others do not have a constitutional right to interfere.”⁵⁰²

The Ninth Circuit went on to address the argument that a student’s age should limit the application of *Hazelwood*:

The Supreme Court’s jurisprudence does not hold that an institution’s interest in mandating its curriculum and in limiting a student’s speech to that which is germane to a particular *academic* assignment diminishes as students age. Indeed, arguably the need for academic discipline and editorial rigor increases as a student’s learning progresses.

To the extent that the Supreme Court has addressed the difference between a university’s regulation of curricular speech and a primary or secondary school’s regulation of curricular speech, it has implied that a university’s control may be broader.⁵⁰³

The Ninth Circuit concluded that “[i]n view of a university’s strong interest in setting the content of its curriculum and teaching that content, *Hazelwood* provides a workable standard for evaluating a university student’s First Amendment claim stemming from curricular speech.”⁵⁰⁴ The court viewed the master’s thesis as a curricular assignment. The court held that “[a]pplying the *Hazelwood* standard to the facts of this case, and viewing those facts in favor of Plaintiff, we conclude that Plaintiff cannot show a violation of his First Amendment rights.”⁵⁰⁵ The court found that the University’s “decision was reasonably related to a legitimate pedagogical objective: teaching Plaintiff the proper format for a scientific paper.”⁵⁰⁶

The application of *Hazelwood* to a college or university student speech case does not automatically require a finding that the school is justified in its regulation of speech. The Ninth Circuit found that the dedication/acknowledgments section was part of the thesis standards and must meet faculty approval as part of an assignment. However, the court could just have easily found that the dedication section was not part of the curriculum or technically part of the required assignment. Instead, the court could have found that the dedication section was to be a free and open speech area for the student to express his views, and serve as a

500. *Id.*

501. *Id.* (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)).

502. *Id.* at 951.

503. *Id.*

504. *Id.* at 951–52.

505. *Id.* at 952.

506. *Id.*

personal statement related to the student's personal work. Nevertheless, even if there were no guidelines for the dedication/acknowledgments section, it would be unlikely that the type of disacknowledgement at issue in *Brown* would be acceptable. Much would depend on the policy and practice.

5. The Tenth Circuit

In *Axson-Flynn v. Johnson*,⁵⁰⁷ the United States Court of Appeals for the Tenth Circuit held that speech in a college or university classroom should be analyzed under the *Hazelwood* standard. The controversy began when Christina Axson-Flynn entered the University of Utah's Actor Training Program in 1998.⁵⁰⁸ Axson-Flynn was a Mormon who claimed her religious beliefs would not permit her to say the word "fuck" or take the name of God in vain during classroom acting exercises.⁵⁰⁹ She had indicated this at her audition for the program.⁵¹⁰ Nevertheless, she was admitted to the Actor Training Program.⁵¹¹

In the fall of 1998, Axson-Flynn was assigned a monologue to perform in class.⁵¹² It included the words "goddamn" and "shit."⁵¹³ She substituted other words for "goddamn," but otherwise performed the monologue as written.⁵¹⁴ Her instructor did not notice the change and Axson-Flynn received an "A" for her performance.⁵¹⁵ As part of another class exercise two weeks later, Axson-Flynn refused to use the words "goddamn" and "fucking."⁵¹⁶ The instructor asked why she had no concerns with similar language in the previous monologue.⁵¹⁷ Axson-Flynn explained that she had omitted the offensive words from the other monologue.⁵¹⁸ The instructor informed Axson-Flynn that she would have to perform the piece as written or get a zero for the exercise.⁵¹⁹ Because Axson-Flynn persisted in her refusal, the instructor eventually allowed her to omit any language that was offensive to her.⁵²⁰ At the end of the semester, however, several of the program's instructors told Axson-Flynn at her semester review that her request for accommodation was unacceptable and that she would have to decide whether she wanted to continue in the program.⁵²¹ At the beginning of her second semester in January of 1999, those instructors informed her that she would have to

507. 356 F.3d 1277 (10th Cir. 2004).

508. *Id.* at 1281.

509. *Id.*

510. *Id.*

511. *Id.*

512. *Id.*

513. *Id.*

514. *Id.*

515. *Id.*

516. *Id.* at 1282.

517. *Id.*

518. *Id.*

519. *Id.*

520. *Id.*

521. *Id.*

change her values or leave the program.⁵²² Axson-Flynn withdrew from the program in late January of 1999.⁵²³

Axson-Flynn filed suit in February 2000, alleging a violation of her free speech and free exercise rights under the First Amendment.⁵²⁴ The federal district court found no constitutional violations and granted summary judgment for the University defendants.⁵²⁵ Axson-Flynn appealed, alleging that forcing her to utter words she found offensive constituted an effort to compel her speech in violation of the First Amendment's free speech clause, and that forcing her to say certain offensive words, the utterance of which she considered a sin, violated the First Amendment's free exercise clause.⁵²⁶

The Tenth Circuit stated that “[a]t the outset we must determine whether the ATP’s [Actor Training Program’s] classroom should be considered a traditional public forum, designated public forum, or nonpublic forum for free speech purposes.”⁵²⁷ Relying on *Hazelwood* to note that public schools do not possess all of the attributes of traditional public forums, the court found:

Nothing in the record leads us to conclude that under that [*Perry*’s public forum analysis] standard, the ATP’s classroom could reasonably be considered a traditional public forum. Neither could the classroom be considered a designated public forum, as there is no indication in the record that “school authorities have ‘by policy or practice’ opened [the classroom] ‘for indiscriminate use by the general public,’ or by some segment of the public, such as student organizations.”⁵²⁸

The Tenth Circuit found that the Actor Training Program “classroom constitutes a nonpublic forum, meaning that school officials could regulate the speech that takes place there ‘in any reasonable manner.’”⁵²⁹

Next, the Tenth Circuit examined the type of speech at issue in this case. Reiterating its holding in *Fleming v. Jefferson County School District R-1*,⁵³⁰ a case that involved high school students at Columbine High School, the *Axson-Flynn* court stated that “[t]here are three main types of speech that occur within a

522. *Id.*

523. *Id.* Although she had not been asked to leave, she apparently believed that she eventually would be asked to leave. *Id.* at 1283.

524. *Id.*

525. *Id.*

526. *Id.*

527. *Id.* at 1284–85.

528. *Id.* at 1285 (second alteration in original) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 n.7, 47 (1983)).

529. *Id.* (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988)).

530. 298 F.3d 918, 923 (10th Cir. 2002). This case involved an art project in which students designed and painted tiles in the hallway of Columbine High School. Some of these tiles included religious and other symbols that school officials deemed inappropriate for a public school building hallway. The Tenth Circuit found that this “tile project” was school-sponsored speech as defined by *Hazelwood*, and that the religious tiles were subject to prohibition without violating the students’ First Amendment rights. *Id.*

school setting.”⁵³¹ The court explained that the first is school speech that happens to occur on school premises, such as the black armbands in *Tinker*.⁵³² The *Axson-Flynn* court found that this clearly was not the type of speech at issue in the instant case because it occurred in a classroom setting in the context of a class exercise, and did not just happen to occur on school property.⁵³³ “The second type of speech in a school setting is ‘government speech, such as that of a principal speaking at a school assembly.’”⁵³⁴ The Tenth Circuit found that because Axson-Flynn was a student, her speech did not fit into this category of speech either.⁵³⁵

The third type of speech that occurs in a school setting is school-sponsored speech that is promoted, rather than merely tolerated, by the school.⁵³⁶ The *Axson-Flynn* court found this to be the type of speech defined in *Hazelwood* as speech that the public might reasonably perceive as bearing the imprimatur of the school.⁵³⁷ The *Axson-Flynn* court again cited its earlier opinion in *Fleming* to state that “‘the imprimatur concept covers speech that is so closely connected to the school that it appears the school is somehow sponsoring the speech,’” and that “[t]he ‘pedagogical’ concept merely means that the activity is ‘related to learning.’”⁵³⁸

The Tenth Circuit went on to find that in *Axson-Flynn*, “there is no doubt that the school sponsored the use of the plays with the offending language in them as part of its instructional technique.”⁵³⁹ It concluded “that Axson-Flynn’s speech in this case constitutes ‘school sponsored speech’ and is thus governed by *Hazelwood*.⁵⁴⁰ Applying the United States Supreme Court’s analysis in *Hazelwood*, along with its own analysis in *Fleming*, the Tenth Circuit explained:

The particular plays containing such language were specifically chosen by the school and incorporated as part of the school’s official curriculum. Furthermore, if a school newspaper and a project to paint and post glazed and fired tiles in a school hallway can be considered school-sponsored speech, then surely student speech that takes place inside a classroom, as part of a class assignment, can also be considered school-sponsored speech.⁵⁴¹

The Tenth Circuit also utilized the Sixth Circuit’s analysis in *Settle v. Dickson County School Board*.⁵⁴² The *Axson-Flynn* court went on to find the reasoning of

531. *Axson-Flynn*, 356 F.3d at 1285.

532. *Id.*

533. *Id.*

534. *Id.* (quoting *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 923 (10th Cir. 2002)).

535. *Id.*

536. *Id.*

537. *Id.*

538. *Id.* at 1286 (quoting *Fleming*, 298 F.3d at 925).

539. *Id.*

540. *Id.* at 1285.

541. *Id.* at 1286.

542. 53 F.3d 152 (6th Cir. 1995). The reasoning of this case was also relied upon by the Ninth Circuit. *See supra* notes 483–496 and accompanying text.

Fleming, Settle, Brown,⁵⁴³ and *Bishop*⁵⁴⁴ persuasive.⁵⁴⁵ The Tenth Circuit concluded that “[a]ccordingly we hold that the *Hazelwood* framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum.”⁵⁴⁶ The *Axson-Flynn* court also added that:

The school’s methodology may not be *necessary* to the achievement of its goals and it may not even be the most effective means of teaching, but it can still be “reasonably related” to pedagogical concerns. A more stringent standard would effectively give each student veto power over curricular requirements, subjecting the curricular decisions of teachers to the whims of what a particular student does or does not feel like learning on a given day. This we decline to do.⁵⁴⁷

6. The Seventh Circuit

In February 2006, the United States Supreme Court denied a writ of certiorari to a decision by the Seventh Circuit regarding whether *Hazelwood* was applicable to a university’s student newspaper. In *Hosty v. Carter*,⁵⁴⁸ the controversy began shortly after Jeni Porsche became editor-in-chief of the *Innovator*, the school’s student newspaper at Governors State University.⁵⁴⁹ After articles written under Margaret Hosty’s byline attacked the integrity of the Dean of the College of Arts and Sciences, the Dean and the president of the University issued statements accusing the *Innovator* of irresponsible and defamatory journalism.⁵⁵⁰ When the *Innovator* refused to retract factual statements that the administration asserted were false or to even print the administration’s responses, Patricia Carter, Dean of Student Affairs and Services, told the printer not to print any issues that she had not reviewed or approved in advance.⁵⁵¹ Because the printer was not willing to risk not being paid and the editorial staff refused to submit to prior review,

543. See *supra* notes 458–506 and accompanying text.

544. See *supra* notes 361–388 and accompanying text.

545. *Axson-Flynn*, 356 F.3d at 1289.

546. *Id.* However, the Tenth Circuit held that viewing the evidence in a light most favorable to Axson-Flynn for summary judgment, there was a genuine issue of material fact as to whether the teacher’s justification was truly pedagogical or whether it was a pretext for religious discrimination. Therefore, the Tenth Circuit reversed the district court’s grant of summary judgment and remanded it for further proceedings to determine if pretext existed. *Id.*

547. *Id.* at 1292.

548. 412 F.3d 731 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1330 (2006).

549. *Id.* at 732.

550. *Id.* at 733.

551. *Id.* Because this case involved an interlocutory appeal regarding the defendants’ motion for summary judgment on the issue of qualified immunity, the Seventh Circuit interpreted all facts in the light most favorable to the plaintiffs (those asserting an injury). However, the district court stated that Dean Carter denied she demanded prior approval, and that she contended she had instructed the printer to call regarding the newspaper so that a faculty member could review the paper for journalistic quality. She maintained that this was necessary because the newspaper’s faculty advisor was at a new post four hours away and not readily available to assist the paper’s staff. *Hosty v. Governors State Univ.*, No. 01-C500, 2001 WL 1465621 (N.D. Ill. Nov. 13, 2001), *rev’d*, *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005).

publication of the *Innovator* ceased in November 2000.⁵⁵²

Former editor Porsche and former reporters Hosty and Steven Barba, sued the University, all of its trustees, most of the administration, and several members of its staff for prior restraint in violation of the First Amendment, seeking equitable relief, and punitive damages.⁵⁵³ The defendants moved for summary judgment and the district court granted the motion with respect to all except Dean Carter.⁵⁵⁴ The district court found that the evidence could support a conclusion that Carter's threat to withdraw the paper's financial support violated the Constitution.⁵⁵⁵ The district court stated that the *Hazelwood* decision was limited to high school newspapers published as part of course work, and was inapplicable to student newspapers edited by college or university students as extracurricular activities.⁵⁵⁶ In denying Dean Carter's qualified immunity, the district judge added that these distinctions were so clearly established that no reasonable person in Dean Carter's position could have believed she could shut down the school paper and remain consistent with the Constitution.⁵⁵⁷ When Dean Carter filed an interlocutory appeal to pursue her claim of qualified immunity, a panel of the Seventh Circuit affirmed the denial of qualified immunity.⁵⁵⁸ However, the Seventh Circuit granted a hearing en banc and reversed the district court's denial of qualified immunity to Dean Carter.

The en banc Seventh Circuit in *Hosty* found that "*Hazelwood* provides our starting point" for analysis.⁵⁵⁹ The *Hosty* court cited *Hazelwood* for the proposition that "[w]hen a school regulates speech for which it also pays, the [Supreme] Court held, the appropriate question is whether the 'actions [of school officials] are reasonably related to legitimate pedagogical concerns.'"⁵⁶⁰ The *Hosty* court also cited *Hazelwood*'s definition of "legitimate" concerns that the school could regulate, which "include setting 'high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the 'real' world—and [the school] may refuse to disseminate student speech that does not meet those standards.'⁵⁶¹

The *Hosty* court went on to address the plaintiffs' argument and the district court's holding "that *Hazelwood* is inapplicable to university newspapers and that post-secondary educators therefore cannot ever insist that student newspapers be submitted for review and approval."⁵⁶² It examined the Supreme Court's footnote

552. *Hosty*, 412 F.3d at 733.

553. *Governors State Univ.*, No. 01-C500, 2001 WL 1465621 at *2.

554. *Hosty*, 412 F.3d at 733.

555. *Id.*

556. *Id.*

557. *Id.*

558. *Id.*

559. *Id.* at 734.

560. *Id.*

561. *Id.* (alteration in original).

562. *Id.*

in *Hazelwood* where the Court declined to decide whether the same degree of deference is appropriate with respect to school-sponsored activities at the college and university level.⁵⁶³ The Seventh Circuit explained:

Yet this footnote does not even hint at the possibility of an on/off switch: high school newspapers reviewable, college newspapers not reviewable. It addresses the degrees of deference. Whether *some* review is possible depends on the answer to the public-forum question, which does not (automatically) vary with the speaker's age. Only when courts need assess the reasonableness of the asserted pedagogical justification in non-public-forum situations does age come into play . . .⁵⁶⁴

The court found that “speech at a non-public forum, and underwritten at public expense, may be open to reasonable regulation even at the college level.”⁵⁶⁵ The *Hosty* court went on to “hold, therefore, that *Hazelwood*’s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools.”⁵⁶⁶ Thus, the Seventh Circuit held that *Hazelwood* was applicable to college and university newspapers even if the newspaper is an extracurricular activity.

Having held that *Hazelwood* is applicable, the court stated that “*Hazelwood*’s first question remains our principal question as well: was the reporter a speaker in a public forum (no censorship allowed?) or did the University either create a nonpublic forum or publish the paper itself (a closed forum where content may be supervised)?”⁵⁶⁷ The court found that there is no constitutional bright line between curricular speech and all other speech.⁵⁶⁸ The court explained that “although, as in *Hazelwood*, being part of the curriculum may be a *sufficient* condition of a nonpublic forum, it is not a *necessary* condition. Extracurricular activities may be outside any public forum . . . without also falling outside all university governance.”⁵⁶⁹

In examining whether the University established the *Innovator* as a public forum, the Seventh Circuit found that it was not possible on the record to determine what kind of forum was established.⁵⁷⁰ The court stated that the facts, when taken in a light most favorable to the plaintiffs, “would permit a reasonable trier of fact to conclude that the *Innovator* operated in a public forum and thus was beyond the control of the University’s administration.”⁵⁷¹ However, the court stated:

The *Innovator* did not participate in a traditional public forum. Freedom of speech does not imply that someone else must pay. The

563. See *supra* text accompanying note 257.

564. *Hosty*, 412 F.3d at 734.

565. *Id.* at 735.

566. *Id.*

567. *Id.* at 735–36.

568. *Id.* at 736.

569. *Id.*

570. *Id.* at 737.

571. *Id.*

University does not hand out money to everyone who asks. But by establishing a subsidized student newspaper the University may have created a venue that goes by the name of “designated public forum” or “limited purpose public forum.”⁵⁷²

The court noted that it could go no further in its forum analysis even with interpreting facts in the light most favorable to the plaintiffs, “because other matters are cloudy.”⁵⁷³ There was not enough evidence in the record to determine if the newspaper participated in a limited (or designated) public forum or if it was a nonpublic forum.

Nevertheless, the Seventh Circuit held that the issue of qualified immunity disposed of the case. The only issue that remained on appeal was the question of Dean Carter’s qualified immunity. The court held that “[q]ualified immunity nonetheless protects Dean Carter from personal liability unless it should have been ‘clear to a reasonable [public official] that his conduct was unlawful in the situation he confronted.’”⁵⁷⁴ Reversing the district court, the Seventh Circuit held that the United States Supreme Court had reserved the question of *Hazelwood*’s applicability to colleges and universities.⁵⁷⁵ Therefore, the court concluded that it was “inappropriate to say that any reasonable person in Dean Carter’s position in November 2000 had to know that demand for review before the University would pay the *Innovator*’s printing bills violated the First Amendment.”⁵⁷⁶

IV. APPLYING *HAZELWOOD*’S FORUM ANALYSIS TO FIRST AMENDMENT CASES INVOLVING COLLEGE AND UNIVERSITY STUDENT NEWSPAPERS

In *Hazelwood*, the United States Supreme Court found that the starting point for determining whether school officials have violated the students’ First Amendment rights is to determine whether the student newspaper is a public forum. Federal courts of appeal have found that forum analysis is the initial and most important stage of the analysis in dealing with litigation resulting from alleged administrative interference with student publications at public colleges and universities.⁵⁷⁷ Free speech is a fundamental right in our society, but it is not an absolute right and is subject to valid regulation. The type of government regulation that is permissible under the First Amendment depends to a certain extent on the nature of the public

572. *Id.*

573. *Id.*

574. *Id.* at 738 (alteration in original) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

575. *Id.*

576. *Id.* at 739.

577. See *id.* at 735–36 (finding that in regard to a student newspaper that “*Hazelwood*’s first question therefore remains our principal question as well: was the reporter a speaker in a public forum (no censorship allowed?) or did the University either create a nonpublic forum or publish the paper itself (a closed forum where content may be supervised)?”); *Kincaid v. Gibson*, 236 F.3d 342, 347 (6th Cir. 2001) (finding that the Supreme Court has adopted a forum analysis for use in determining whether a state-imposed restriction on public property is constitutionally permissible, and finding that forum analysis is appropriate in this case); *Student Gov’t Ass’n v. Bd. of Trs. of Univ. of Mass.*, 868 F.2d 473, 480 (1st Cir. 1989) (stating that student newspapers involve channels of communication to which forum analysis is applicable).

property in question and its intended use. The type of forum helps determine what government regulation is permissible.

As discussed in Part II of this article, in *Perry Education Ass'n v. Perry Local Educators' Ass'n*⁵⁷⁸ the Supreme Court detailed its framework for analyzing speech restrictions on government property, known as public forum analysis.⁵⁷⁹ *Perry* identified three different forum classifications for evaluating a government regulation under the First Amendment: (1) the traditional public forum; (2) the limited or designated public forum; and (3) the nonpublic forum.⁵⁸⁰ Ascertaining the type of forum classification is the starting point for determining the scope of state regulation permitted.

The type of forum determines the type and extent of regulation permitted by the government under the First Amendment. In traditional public forums, government regulation affecting speech is subject to more scrutiny than in designated (or limited) public forums. Government regulation of speech in nonpublic forums is much less restricted by the First Amendment than is speech in either of the public forum categories.

The first category identified in *Perry* is the traditional public forum. Certain public property is so associated with free speech that it cannot be totally closed off to public expression. Public streets and parks have traditionally been regarded as forums for assembly and discussion of public issues from colonial times.⁵⁸¹ This classification is limited to those traditional areas of public property that have been historically open to all for communication or discussion of issues. Consequently, most government property today is not considered a traditional public forum. Public college or university property has not historically been a traditional public forum. College and university student newspapers have not been open for communication and discussion of issues by the public by long tradition or government fiat. The Supreme Court found, in *Widmar v. Vincent*,⁵⁸² that “[a] university differs in significant respects from public forums such as streets and parks or even municipal theaters.”⁵⁸³ Thus, a public college or university’s official student newspaper is not a traditional public forum.

The right of a state to limit speech in a traditional public forum is sharply circumscribed.⁵⁸⁴ The government may not prohibit all communicative activity in those areas and any regulation is carefully scrutinized.⁵⁸⁵ However, even in a (traditional) public forum, content regulation is permissible. But, as the Court stated in *Perry*: “For the State to enforce a content-based exclusion it must show

578. 460 U.S. 37 (1983).

579. See *supra* notes 186–226 and accompanying text.

580. Because traditional government forums only refer to very specific public property, courts often use the term “public forum” when they are referring to or discussing a limited or designated public forum, or distinguishing a limited or designated public forum from a nonpublic government-owned forum.

581. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

582. 454 U.S. 263 (1981).

583. *Id.* at 267 n.5.

584. *Perry*, 460 U.S. at 45.

585. *Id.*

that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”⁵⁸⁶ The *Perry* Court also noted that in a public forum, “[t]he State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”⁵⁸⁷

The second category of public forum is a “limited” or “designated” public forum.⁵⁸⁸ The primary difference between this category and the traditional public forum is that the government does not have to open this property for any expressive activity. The *Perry* Court defined the second category of forum as consisting “of public property which the State has opened for use by the public as a place for expressive activity.”⁵⁸⁹ The government can create the forum for a designated purpose or it can limit the forum for a discussion of certain subjects.⁵⁹⁰ Examples of this forum category are school property that is opened up for meetings or other events when not in use for its primary educational purpose.⁵⁹¹

The First Amendment “forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.”⁵⁹² Nevertheless, a state is not required to indefinitely retain the open character of a limited or designated public forum, but so long as it does so, it is bound by the same standards that apply to a traditional public forum:⁵⁹³ “Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.”⁵⁹⁴

A public college or university’s student newspaper may be a designated (or limited) public forum. *Hazelwood* provides guidance in determining whether a college or university student newspaper is a designated public forum or a nonpublic forum.⁵⁹⁵ *Hazelwood* first instructs us to examine the school policy

586. *Id.*

587. *Id.*

588. The terms “designated” or “limited” are interchangeable. A court may prefer one or the other as more descriptive of the specific nature of the public forum created.

589. *Perry*, 460 U.S. at 45.

590. *Id.* at 45 n.7.

591. See *Widmar v. Vincent*, 454 U.S. 263 (1981) (involving college and university student organization meetings); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (involving community group events).

592. *Perry*, 460 U.S. at 45 (citing *Widmar*, 454 U.S. at 270 (involving a university meeting facility); *City of Madison Joint Sch. Dist v. Wis. Employment Relations Comm’n*, 429 U.S. 167 (1976) (involving a school board meeting); and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (involving a municipal theater)).

593. *Id.* at 46.

594. *Id.* (citing *Widmar*, 454 U.S. at 269–70).

595. Often when the government property at issue is clearly not a traditional public forum (as very little public property is classified as a traditional public forum), the court will simply use the term “public forum” to refer to a limited (or designated) public forum. This is especially the case where it must be determined whether the forum is a designated (limited) public forum or a nonpublic forum.

with respect to the control of the student newspaper.⁵⁹⁶ The more that school policy reserves control of the newspaper to school officials, the more the newspaper moves toward becoming a nonpublic forum. However, in determining the type of forum, *Hazelwood* also considers the actual practice of the established school policy. If the school has a policy statement that vests control in the hands of school officials, but those officials do not actually assert this control, then a limited public forum may be established by practice. This is what was found by the Sixth Circuit in *Kincaid*, where the administration took no interest and did not actually supervise the production of the student yearbook.⁵⁹⁷

However, a college or university yearbook is significantly different from the college or university newspaper and *Kincaid* noted this fact when it specifically refused to extend its yearbook finding to college and university student newspapers.⁵⁹⁸ College and university yearbooks are creative artistic works, much like poetry or fine art. The yearbook is more comparable to a student art exhibit than to the college or university newspaper. Although the college or university yearbook should have some relation to the school and students, it does not represent the viewpoint of the school or of the students, nor is there any perception that it does. The yearbook is also not perceived to follow ethical and other journalistic standards. Those reading the yearbook do not expect it to follow any strict reporting standards. Nevertheless, the college or university can exercise control over the yearbook by policy and practice. In *Kincaid*, the university did neither.

On the other hand, the college or university newspaper appears to bear the imprimatur of the school and the student body. The opinions of the paper and the "facts" of reported events are generally regarded as being published with the sanction of the school under ethical and other journalistic standards. The reputation of the school and the student body is reflected by the school newspaper. The biases and prejudices of the editors of the school newspaper have a greater influence, especially where the official school newspaper is the only news publication that the school publishes, and is one that many students and the community read. For the official college or university newspaper, policy and practice are important but are not determinative of all alleged First Amendment free speech violations. The school as publisher and provider of public funds can exert control over the content of a designated public forum if the regulation is narrowly drawn to effectuate a compelling state interest.

If a college or university newspaper is considered a limited public forum, then any suppression of articles (speech) based solely on viewpoint would violate the First Amendment. Additionally, any content-based prohibition must be narrowly drawn to effectuate a compelling state interest. In the case of a student newspaper, the phrase "compelling state interest" can be interpreted by utilizing *Hazelwood*'s education related phrase of "legitimate pedagogical concern." Thus, using the

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

597. *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001). See *supra* notes 392–444 and accompanying text.

598. *Id.* at 348 n.6.

Court's holding in *Hazelwood*, educators 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 action is reasonably related to legitimate pedagogical concerns.

The Court defined the third category of forum as “[p]ublic property which is not by tradition or designation a forum for public communication.”⁵⁹⁹ In a nonpublic forum, the state has the same right of control as a private owner of property, to reserve the property under its control for the use to which it is dedicated.⁶⁰⁰ The *Perry* Court stated: “We have recognized that the ‘First Amendment does not guarantee access to property simply because it is owned or controlled by the government.’”⁶⁰¹ The Court held that in a nonpublic forum, “[i]n addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”⁶⁰² In *Lamb’s Chapel v. Center Moriches Union Free School District*,⁶⁰³ the Supreme Court stated:

[A]lthough a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . , the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject.⁶⁰⁴

Therefore, even if a college or university student newspaper is deemed a nonpublic forum, school administrators cannot edit (or censor) an article *solely* to suppress the speaker’s point of view. For example, it would be difficult for college and university administrators to justify allowing only positive comments about the school president to be printed in the school newspaper while restricting (censoring) all negative comments.

In *Perry*, the Court found that an internal mail system among schools within a district was not a public forum.⁶⁰⁵ The Court noted that it would have been a relevant consideration if “by policy or practice” the school district had “opened its mail system for indiscriminate use by the general public,” in which case it could have been justifiably argued that “a public forum had been created.”⁶⁰⁶ However, the Court added that even if the schools allowed an outside organization access,

599. *Perry*, 460 U.S. at 46.

600. *Id.*

601. *Id.* (quoting *United States Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129 (1981)).

602. *Id.*

603. 508 U.S. 384 (1993).

604. *Lamb’s Chapel*, 508 U.S. at 394 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

605. *Perry*, 460 U.S. at 47.

606. *Id.*

“selective access does not transform government property into a public forum.”⁶⁰⁷

As the primary method of mass communication to the internal constituency, the college or university newspaper is similar to the mail system in *Perry*. In *Perry*, there were other methods of communication available, but the school mail facilities were so unique that the mail facilities were considered the forum to be analyzed. The United States Supreme Court found that the internal school mail system in *Perry* was not opened by policy or practice for indiscriminate use by the general public and therefore was not a public forum.⁶⁰⁸ The Court found that “[i]n a public forum, by definition, all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject.”⁶⁰⁹ The Court also found that the school mailboxes and delivery system were not a limited public forum even though some select parties were given access to it. The Court also held that even selective access does not transform government property into a limited public forum.⁶¹⁰ The Court concluded that the school’s mail system was a nonpublic forum.⁶¹¹

A college or university newspaper is a similarly unique communicative mode. There are alternative methods of disseminating communication besides the school mail system and the college or university newspaper. However, both are somewhat unique in efficiency and delivery of messages. Most, if not all, college and university newspapers restrict access to a single class of speakers and all speech contained in the newspaper is selected or approved by the student editor. The content and viewpoint espoused by the college or university newspaper is controlled by the student editor. Thus, similar to the internal mail system in *Perry*, the college or university student newspaper itself represents the forum for public forum analysis purposes.

*Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*⁶¹² involved somewhat similar issues. The case involved the Combined Federal Campaign (“CFC”), an annual charitable fundraising drive conducted in federal offices mainly through the voluntary efforts of federal employees.⁶¹³ In *Cornelius*, the United States Supreme Court upheld an Executive Order limiting the organizations that could participate in CFC to voluntary, tax-exempt, nonprofit charitable agencies that provide direct health and welfare services to individuals.⁶¹⁴ In doing so, the Court found that the forum for purposes of First Amendment analysis was the CFC itself and not the federal workplace.⁶¹⁵ Having identified the forum, the Court went on to find that the CFC was a nonpublic forum.⁶¹⁶ The Court

607. *Id.*

608. *Id.*

609. *Id.* at 55.

610. *Id.* at 47.

611. *Id.* at 46.

612. 473 U.S. 788 (1985).

613. *Id.* at 790.

614. *Id.* at 813.

615. *Id.* at 801.

616. *Id.* at 805.

explained that the “government does not create a forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”⁶¹⁷

Even before *Perry*, the Supreme Court also found this type of forum in *Lehman v. City of Shaker Heights*.⁶¹⁸ In *Lehman*, the Court found that a city’s refusal to accept political advertising on a city owned mass transit system while accepting other advertising, did not violate the First Amendment. The Court explained “[w]ere we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician.”⁶¹⁹

Similarly, the college or university student newspaper is not open to every would-be journalist. The student editor or editors are frequently selected by a committee of students and administrators. These editors (and sometimes other student positions on the student newspaper) are often paid by the college or university. Thus, being an editor of a student newspaper more resembles an employer-employee relationship than an independent student organization. College and university editors can utilize the student newspaper to address personal concerns and silence the voice of those who do not control the newspaper. Student editors censor the content and viewpoint of college and university newspapers every day. They decide what to print and what viewpoint to take. It is hoped that student editors use this power (and control) to address wrongs and important issues that have detrimental effects on society or the student body, or to provide a forum for exchange of diverse viewpoints on important societal concerns. However, student editors are individuals with power and this power could be utilized to address personal agendas. The student newspaper is often the only newspaper read by students on campus, especially if it is free. Outsiders reading the school paper could easily consider the student newspaper as representing the opinion and concerns of the student body, even if it is only the editor’s opinion. In most instances, there is no alternative means of communication except the one official school newspaper. Not all administrators or newspaper advisors want to censor articles critical of the administration or articles that take controversial views. Not all student editors want to expose corruption or write on issues that affect society. Nevertheless, the official college or university student newspaper represents a unique form of student organization.

The United States Supreme Court analyzed a student organization publication in *Rosenberger v. Rector & Visitors of the University of Virginia*.⁶²⁰ *Rosenberger* involved the publication (“Wide Awake”) of a student organization with a specific religious purpose and viewpoint. The student organization, Wide Awake Productions, was specifically established to publish a magazine of Christian philosophical and religious expression to foster an atmosphere of sensitivity and tolerance to Christian viewpoints. and to provide a unifying focus for Christians of

617. *Id.* at 802.

618. 418 U.S. 298 (1974).

619. *Id.* at 304.

620. 515 U.S. 819 (1995).

multicultural backgrounds.⁶²¹ It was recognized as a student group eligible to apply for student activities funds.⁶²² The organization's stated goal was to provide a Christian perspective on personal issues, especially those relevant to University of Virginia students:⁶²³ "The editors committed the paper to a two-fold mission: 'to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means.'"⁶²⁴ Thus, the avowed purpose of this student organization was to advance a Christian perspective. The publication did not represent a journalistic educational endeavor that was supposed to represent the school and the student body as the official school newspaper would, but rather, was established to advance a specific Christian educational message. The end of each article or review was marked with a cross.⁶²⁵ The advertisements "also reveal[ed] the Christian perspective" of the paper and the advertisers were, for the most part, "churches, centers for Christian study, or Christian bookstores."⁶²⁶ There was no perception that *Wide Awake* bore the imprimatur of the school.⁶²⁷

The *Rosenberger* Court found that *Wide Awake* Productions existed in the limited public forum of student organizations that were eligible to receive funding from the student activities fund.⁶²⁸ The Court further found that the student activities fund was "a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."⁶²⁹ There was no evidence that this was the only religious organization eligible for funding by the school. Indeed, the Court would likely find a First Amendment violation if one religious group's publication was funded, but other religious groups were denied funding for their publications.⁶³⁰ Funding only one religious organization or religious publication

621. *Id.* at 825–26.

622. *Id.* at 825.

623. *Id.* at 826.

624. *Id.*

625. *Id.*

626. *Id.*

627. However, imprimatur perception concerns might arise if the title of a religious paper includes the name of the school as the main name on its letterhead, so as to give the indication that it is the one official newspaper of the college or university, and the college or university therefore officially promotes (only) that religious view. For example, perception of the school's imprimatur might have arisen in this case if the name of the paper was *The University of Virginia News* or *Wide Awake, the Official Newspaper of the University of Virginia*, and the paper contained only religious articles and editorials favoring the Christian viewpoint. This type of paper would have given the appearance that the articles and editorials represent the values and opinions of the student body or the school generally, rather than giving the appearance of a paper that expresses the values and opinions of a specific religious student organization.

628. *Rosenberger*, 515 U.S. at 829–30. An organization that seeks student activities fund support "must submit its bills to the Student Council, which pays the organization's creditors upon determining that the expenses are appropriate. No direct payments are made to the student groups." *Id.* at 825.

629. *Id.* at 830.

630. See Bd. of Regents of the Univ. of Wis. v. Southworth, 529 U.S. 217 (2000) (holding that student activities fees may be used to support student political and ideological beliefs that are offensive to students as long as the program of funding is viewpoint neutral); *Widmar v. Vincent*,

would not only raise First Amendment establishment clause issues, but also a First Amendment free speech clause viewpoint discrimination issue. However, usually there is only one official college or university student newspaper that is funded by the school. Therefore, unlike the religious publication in *Rosenberger*,⁶³¹ the forum for the purposes of most college and university student newspapers is not student organizations generally, but the newspaper itself.

Additionally, even if other student organizations create a publication, that publication cannot compete on the same par with the official school newspaper. Even outside newspapers have difficulty competing with the school newspaper. College and university student newspapers do not bear the financial costs or other risks of non-subsidized speech. College and university newspapers, for the most part, do not have to print something that people are willing to pay for to survive. The school newspaper is funded by the college or university. It bears the official name of the college or university. It is distributed freely all over the campus. It often has specific areas on campus with racks that are dedicated for its distribution alone. Even if there are some spaces for other newspapers, the school paper has usually many more spaces.⁶³² The official student newspaper often has a virtual monopoly on campus.⁶³³ Many, if not most school newspapers, are funded by the school either through student activity fees or other public funds. The student editor and other student staff positions are often funded and paid a set salary (stipend) by the college or university.⁶³⁴ Even if the paper does obtain much of its revenue from advertising, being the one official school newspaper and being given out for free, ensures that a certain amount (if not most) of the advertising revenue for products and services be directed toward the college or university's students.

Therefore, most college and university student newspapers could likely be considered nonpublic for[a]. However, this determination would also depend on the policy and practice of the state college or university with regard to that

454 U.S. 263 (1981) (holding that a state university that creates a forum open to all student organizations may not exclude a student religious organization unless the university shows that this is necessary to serve a compelling state interest).

631. *Rosenberger*, 515 U.S. 819. See *supra* notes 620–29 and accompanying text.

632. See *Rosenberger*, 515 U.S. 819 (reporting that the chief executive of a new newspaper to be distributed to college and university students complained that the Ohio State University reneged on its deal to allow him to distribute the paper at 150 indoor locations on campus; instead, the number of indoor locations was reduced to sixty-three racks, which increased his costs dramatically because he was required to install distribution boxes at public locations, and he had to hire students to distribute the paper).

633. See, e.g., Elizabeth Jensen, *Starting a Newspaper War (of sorts) in a University Town*, N.Y. TIMES, Nov. 14, 2005, at C8. The article reported on the difficulty of a non-school-sponsored campus newspaper trying to compete with a university's official student newspaper:

Journalism students at Ohio State University expected to get a real-world lesson in competition this school year, courtesy of two media engineers who see national business potential in taking on student-run campus newspapers. But with the rollout of the new paper called U Weekly, they are getting a lesson in campus politics as well. *Id.*

634. This also raises an issue of whether student editors and other staff should be considered state employees of the public college or university, especially where the payment to the student is not part of a financial aid package, and the student would not be entitled to or receive this payment unless the student worked on the newspaper.

forum.⁶³⁵ This policy and/or practice should not just involve a dichotomous decision by the administration to either have a student newspaper or not. A college or university should have more options than either allowing editors to print anything they want, or eliminating the school newspaper entirely.

Most of a state college or university's facilities are for educational purposes. A classroom is used for a specific educational purpose and is not an open forum when a class or a class activity is meeting in it.⁶³⁶ Students cannot just arbitrarily speak on whatever subject or topic they feel like in a class. Likewise, a college or university newspaper that is produced as part of a class should clearly be considered a nonpublic forum. A newspaper that is produced as part of a journalism class is similar to any other class assignment, and students' speech can be circumscribed by the instructor, including specifying the subject matter.⁶³⁷ The Eleventh Circuit,⁶³⁸ the Ninth Circuit,⁶³⁹ and the Tenth Circuit⁶⁴⁰ have all held that in regard to curricular speech, a nonpublic forum exists.

However, even if the college or university student newspaper is not produced as part of a class, it may still be a nonpublic forum. The policy and practice of the college or university is important. As held in *Perry*, the state has to deliberately open the forum for use by the public to create a limited or designated forum. Even then, the state is not required to retain the open character of the forum. As the Seventh Circuit held in *Hosty*, extracurricular publications are not necessarily limited public for[a].⁶⁴¹ A college or university may produce a number of publications that are not part of a class. Students may write for other college or university publications without those publications being regarded as public forums.

Thus, the policy and practice of the college or university with regard to the student newspaper is important in determining whether it is a designated or limited public forum, or whether the newspaper is a nonpublic forum. This is the threshold question that determines the level and extent of First Amendment

635. As a result of the Seventh Circuit's decision in *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005), the Student Press Law Center is suggesting that top school administrators include language indicating that their school's student media are "designated public for[a]." Student Press Law Center, <http://www.splc.org/legalresearch.asp?id=78> (last visited February 21, 2007). However, as the United States Supreme Court has stated, courts will not only look to the government policy, but will also look to the practice of the government to ascertain what type of forum has been established. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

636. *Bishop v. Aronov*, 926 F.2d 1066, 1071 (11th Cir. 1991).

637. See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1286–87 (10th Cir. 2004) (applying *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995), to a college setting and holding that speech that takes place inside a college classroom, as part of a class assignment, is considered school-sponsored speech and school officials may place restrictions on that speech as long as their actions are reasonably related to legitimate pedagogical concerns); *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002) (finding that *Settle* was directly applicable to college student academic assignments); and *Settle*, 53 F.3d 152 (6th Cir. 1995) (holding that student speech can be more circumscribed in a classroom than in an open forum).

638. *Bishop*, 926 F.2d 1066. See *supra* notes 361–369 and accompanying text.

639. *Brown*, 308 F.3d 939. See *supra* notes 458–506 and accompanying text.

640. *Axson-Flynn*, 356 F.3d 1277. See *supra* notes 507–547 and accompanying text.

641. *Hosty v. Carter*, 412 F.3d 731, 736 (7th Cir. 2005).

analysis. *Hazelwood* provides specific guidance in analyzing whether a school-sponsored activity that is both subsidized by the state and perceived to bear the imprimatur of the university, is a nonpublic or designated public forum. Once the forum is decided, only then can it be determined what regulation a state college or university can impose in restricting speech (writing). If a nonpublic forum is found, the holding in *Hazelwood* can be directly applied. If a limited public forum is found, content-based prohibitions are much more difficult to justify and viewpoint restrictions are highly suspect. Content-based prohibition must have a legitimate pedagogical purpose and be narrowly applied.

As the above court cases and discussion demonstrate, the type of forum is not determined by the age of the speaker. There is no mention that age should or is to be taken into consideration in determining the type of forum. It is the nature of the forum and the government's purpose in creating the forum that is determinative of the type of public forum. Because the type of forum classification does not depend on the age of the person utilizing the forum, *Hazelwood* should apply equally to public college or university student newspapers as it does to public high schools in determining the type of forum. The *Hosty* court has held that the public forum question does not vary with age.⁶⁴² The *Brown* court has even found that a university's need for academic discipline and editorial rigor is greater than a secondary school's, and consequently a university's control may be broader.⁶⁴³

However, a younger-aged readership, as found in *Hazelwood*, may make some additional control over speech reasonable and have a legitimate pedagogical purpose. For example, even with no specific regulation, policy, or practice, high school officials may be able to justify removing an article from a school newspaper that advocates marijuana use or legalization. This may be done because of the impressionable age of the readers, who may be more susceptible to a school newspaper's influence, and the fact that a high school newspaper may have a primary goal of promoting values. However, the same article in a college or university student newspaper may not be subject to deletion because college and university students are thought of as less prone to the influence of a school newspaper article. Additionally, lewd or obscene language may be more likely to cause less problems (if used sparingly) in a college or university newspaper than in a high school newspaper. Nevertheless, a college or university may also have an educational goal of inculcating certain values in its students, and one of those values may be to abide by the law or to avoid the indiscriminate use of lewd or obscene language.⁶⁴⁴

642. See *supra* text accompanying note 564.

643. See *supra* text accompanying note 503.

644. It is difficult to imagine that if the editor of an official college or university newspaper wanted to print line after line of lewd language for no purpose, that the college or university would be powerless to remove (edit) that specific language. However, those who advocate that any control over a college or university newspaper is prohibited by the First Amendment would have us believe that if a student editor chose to print the entire paper with lewd words, there would be nothing the administration could do to prevent the newspaper from being circulated with this language included. This raises a host of other issues: Could a student editor repeatedly call for the extermination of the Jews? Could a student editor continually write about the

V. CONCLUSION

In determining whether a public college or university official has violated the First Amendment in editing a college or university student newspaper, the primary analysis involves determining what type of forum exists. This is accomplished by utilizing the United States Supreme Court's public forum analysis, as adapted for school-sponsored speech in the *Hazelwood* decision. *Hazelwood* incorporates the unique nature of school-sponsored speech that is both subsidized by the state and is perceived to bear the imprimatur of the college or university. It also encompasses the legitimate pedagogical concerns of the educational institution that allows the college or university to regulate student newspapers (and other activities) while allowing students to enjoy the rights afforded by the First Amendment. In short, *Hazelwood* provides the criteria for balancing the educational mission of the college or university with the free speech rights of the Constitution.

Hazelwood encourages schools, including colleges and universities, to perform their educational duties while guarding against efforts by schools to restrict student speech for reasons that have nothing to do with education. College and university administrators should promote the highest journalistic standards, while promoting the educational mission of the school and safeguarding the rights of those students (and the community) who have no editorial control over the school newspaper. Editorial control should be consistent with both good journalism and the educational mission of the school. If students disagree with the policy and practice of the college or university, they should be free to distribute alternative views on campus. If the official college or university newspaper is merely used as a tool of the administration, then alternative independent student newspapers can arise to find a market. Competition promotes quality journalism, and having more alternatives rather than one viewpoint is educationally desirable.

Some colleges or universities may find it easier to provide no guidance to student journalists under the guise that the First Amendment prevents them from regulating student newspapers. However, as *Kincaid* demonstrates and *Hazelwood* tells us, when a school, by policy or practice, ignores its educational duty and opens the forum, it relinquishes a certain amount of control.⁶⁴⁵ The solution is not for state college or university administrators to distance themselves from any regulation and control, but to provide regulation and control consistent with legitimate pedagogical concerns for the benefit of the students, the school, and the public.

inferiority of certain racial minorities? If there was a school publications board, but the board by practice had never made any content changes and left complete control to the student editor, would the board now be powerless to make any changes?

645. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988).

DEFENDING THE IVORY TOWER: A TWENTY-FIRST CENTURY APPROACH TO THE *PICKERING-CONNICK* DOCTRINE AND PUBLIC HIGHER EDUCATION FACULTY AFTER *GARCETTI*

KEVIN L. COPE*

“If the teachers of mankind are to be cognizant of all that they ought to know,
everything must be free to be written and published without restraint.”

—John Stuart Mill, *On Liberty*¹

I. INTRODUCTION

During the second half of the twentieth century, courts dramatically broadened the scope of the free expression doctrine, significantly expanding the range of activities that invoke First Amendment consideration.² One such activity is the exercise of academic freedom. Since the Supreme Court first mentioned the term in a dissent to *Adler v. Board of Education*,³ academic freedom has slowly gained acceptance among courts and scholars as a proper subject of First Amendment jurisprudence.

In acknowledging that academic freedom merits First Amendment protection, courts have used numerous analytical approaches including public forum doctrine,⁴ the *Pickering-Connick*⁵ “public concern” dichotomy, and traditional content distinction analysis. All of these approaches have treated public college and

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1. JOHN STUART MILL, *ON LIBERTY* 101 (Penguin Books 1985) (1859).

2. See, e.g., Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1287–88 (1984) (listing examples of the broadening of the First Amendment, including symbolic speech, indecent material, and commercial advertising).

3. *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952) (Douglas, J., dissenting).

4. See generally Derek P. Langhauser, *Drawing the Line Between Free and Regulated Speech on Public College Campuses: Key Steps and the Forum Analysis*, 181 EDUC. L. REP. 339 (2003).

5. *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

university faculty similarly to other public education teachers or to public sector employees generally. As a result, courts have analyzed faculty scholarly research in a manner not much different than they would a secondary school teacher's lesson plan. While some courts have discussed (and rejected) the notion that faculty should receive more First Amendment protection than other state employees, no court and only a few scholars have acknowledged that public college and university faculty members' duties are unique from those of all other public educators.

But they are unique. Unlike primary and secondary teachers, whose principal duty is intra-institutional knowledge dissemination, major public college and university faculty members' primary duty is the creation and *public*, i.e., *extra*-institutional, dissemination of knowledge. Recognizing this fact, a few scholars have suggested tests for analyzing the academic freedom rights of these college and university faculty members. Such tests include balancing the First Amendment academic freedom rights with those of the institution as well as a "functional necessity" test to determine if the state's restriction on faculty speech is necessary for the proper functioning of the school. Yet even these analyses fail to distinguish between faculty teaching responsibilities on one hand and faculty research on the other.

The September 11, 2001 attacks on the World Trade Center and the Pentagon ushered in a period of general wariness over national and personal security unknown in the United States since the heart of the Cold War. The subsequent news of growing casualties and horrific executions in the aftermath of the United States-led invasions of Afghanistan and Iraq, as well as additional terrorist attacks in Spain, Great Britain, and other countries, further exacerbated the national and international trepidation. Repeating a common historical phenomenon, this climate increased intolerance for dissent perceived as contrary to national security objectives.

Other recent cultural trends—though unrelated—have produced similar effects. Well before the events of September 2001, the 1990s witnessed increasing efforts to foster a cultural environment conducive to racial and sexual diversity, particularly on college and university campuses throughout the nation. A natural byproduct of this trend was a corresponding decrease in tolerance for speech thought inconsistent with such an environment. In response to this trend and the collegiate "culture wars" that ensued, some interest groups and other members of the public began to demand that such public institutions better reflect their own political and cultural views.⁶

Each of these phenomena—enhanced American nationalism, the appearance of politically sensitive speech and behavior codes, and the rising influence of popular sentiment regarding issues of public concern on colleges and universities—have

6. Jon B. Gould, Note, *Look Who's (Not) Talking: The Real Triumph of Hate Speech Regulation*, 8 GREEN BAG 2d 367 (2005); John K. Wilson, *Myths and Facts: How Real is Political Correctness?*, 22 WM. MITCHELL L. REV. 517 (1996); Richard Bernstein, *On Campus, How Free Should Speech Be?*, N.Y. TIMES, Sept. 10, 1989, at D5; Alan M. Dershowitz, *Censorship on Campus—Free Express: Danger on the Left*, SEATTLE TIMES, May 2, 1989, at A-11.

proponents and detractors. Whether these trends are healthy or detrimental, their confluence has endangered campus academic freedom to a degree unprecedented since the McCarthy era. Compounding the problem, in 2006 the Supreme Court held in *Garcetti v. Ceballos*⁷ that “when public employees make statements pursuant to their official duties”⁸—as public college and university faculty do with their scholarship—the First Amendment offers no protection.

This article shows how the Supreme Court’s failure to establish a coherent academic freedom approach may have adverse consequences not just for First Amendment jurisprudence or educational institutions, but also for society’s economic and cultural vitality. The article begins by examining how courts have treated government action tending to inhibit academic freedom at public institutions of higher education over the past fifty years.⁹ It then shows how the Cold War era jurisprudence represented a meaningful advance for academic freedom and provided substantial protection of such expression. It concludes by illustrating how the recent political trends discussed above demand a new analytical framework to protect academic freedom.

II. THE ORIGINS AND EVOLUTION OF ACADEMIC FREEDOM DOCTRINE

A. Principles of Academic Freedom

“Academic freedom”¹⁰ is not a singular concept; scholars and courts use the term to convey two different, though interrelated, notions.¹¹ First, it is used in a purely legal sense, as in the degree to which the Constitution protects the rights of academics, students, and academic entities to be free of government restrictions on their academic-related speech. Second, the term conveys an ethical value, that is, a set of goals and ideals contemplated by academics and philosophers and codified by the American Association of University Professors (AAUP) in its 1915 *Declaration of Principles*¹² and later AAUP documents. *The Oxford Companion*

7. 126 S. Ct. 1951 (2006).

8. *Id.* at 1960.

9. While academic freedom is a salient issue at both private and public colleges and universities, this article considers the issue with regard only to public institutions. Because public colleges and universities are considered state actors for the purpose of constitutional analysis, the thesis presented here applies mainly to public institutions. For a discussion of faculty freedom of expression at private colleges and universities, see Gabriel J. Chin & Saira Rao, *Pledging Allegiance to the Constitution: The First Amendment and Loyalty Oaths for Faculty at Private Universities*, 64 U. PITTS. L. REV. 431 (2003).

10. This article does not undertake a comprehensive theoretical treatment of the meaning of academic freedom. For such a discussion, see, e.g., J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment*, 99 YALE L.J. 251 (1989); Mark G. Yudoff, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831 (1987).

11. Rebecca Gose Lynch, *Pawns of the State or Priests of Democracy? Analyzing Professors’ Academic Freedom Rights Within the State’s Managerial Realm*, 91 CAL. L. REV. 1061, 1066 (2003).

12. ASS’N UNIV. PROFESSORS, GEN. REPORT OF THE COMM. ON ACADEMIC FREEDOM & ACADEMIC TENURE (1915), reprinted in 53 LAW & CONTEMP. PROBS. 393 (1990).

to Philosophy affirms this view of academic freedom, defining it as “the right of teachers in universities and other sectors of education to teach and research as their subject and conscience demands.”¹³ While the former meaning is most relevant to the ideas discussed here, a basic understanding of the philosophical roots of academic freedom is instructive in contemplating the evolution of the concept’s relationship to the First Amendment.

1. First Amendment Doctrine and Philosophical Roots of Free Expression

The European Enlightenment produced the conviction that intellectual curiosity, if unfettered, would produce knowledge that would serve to benefit society generally.¹⁴ *Lehrfreiheit*, the German concept meaning that public college and university professors enjoy the legal right to undertake their research and teaching without government interference, is the chief inspiration for American notions of academic freedom.¹⁵ This concept’s importance was perhaps most famously articulated during the nineteenth century in John Stuart Mill’s *On Liberty*, in which he declared, “If the teachers of mankind are to be cognizant of all that they ought to know, everything must be free to be written and published without restraint.”¹⁶

Mill’s notion of academic freedom derived from principles underlying the First Amendment and free speech generally. Mill thought that freedom of speech facilitated a “search for truth” and believed that academic inquiry was a vanguard in that search.¹⁷ Another approach, advanced most notably by Alexander Meiklejohn, holds that the most significant value of free speech is to improve our ability to self-govern.¹⁸ In Meiklejohn’s view, the First Amendment “is not the guardian of unregulated talkativeness.”¹⁹ Therefore, the primary duty of free speech is not to require that everyone who wants to speak is permitted to do so, but to ensure that every point of view is heard.²⁰ Robert Bork expounded on this theory, but took a more extreme view, arguing that the First Amendment should protect only political speech. Bork claims that while expression may serve purposes other than political ones, such as personal development, speech is not unique in its ability to serve a political purpose, and therefore no principled reason exists to protect speech while not protecting other expression.²¹ This philosophy has been criticized for its narrow view of free speech by scholars such as

13. Anthony O’Hear, *Academic Freedom*, in THE OXFORD COMPANION TO PHILOSOPHY (Ted Honderich ed., 1995).

14. Neil W. Hamilton, *Academic Freedom*, in THE OXFORD COMPANION TO UNITED STATES HISTORY (Paul S. Boyer ed., 2001).

15. *Id.*

16. MILL, *supra* note 1.

17. GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 9 (1999).

18. *Id.*

19. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948).

20. See STONE ET AL., *supra* note 17, at 11.

21. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 25 (1971).

Professors David Richards²² and Martin Redish,²³ who have advanced various approaches emphasizing the importance of self-realization or autonomy as an underlying free speech value. Others have also posited several lesser-known philosophies.²⁴

All of these views provide some support for First Amendment recognition of academic freedom. Bork's narrow approach, however, would support academic freedom only for scholarship of interest to the electorate in making political decisions. The autonomy/self-realization rationale, mindful of the rights of the scholar (though not necessarily the audience), would strongly protect all forms of scholarship. But in doing so, academic freedom would not be a substantially greater First Amendment concern than other forms of self-realization that do not reach an audience. Meiklejohn's "town hall" principle is consistent with the value-to-society goal of academic freedom, but only to the extent that ideas are not duplicated. Of the various approaches, Mill's "search for truth" appears most targeted at academic freedom. His insistence that free speech helps society discover true knowledge is similar to the academic's goal of knowledge production through science, objectivity, and intellectual rationalism.

2. The Birth of the American Association of University Professors

This last principle, that free speech is necessary to facilitate the search for truth, gained growing urgency at the beginning of the nineteenth century as scholars began an unprecedented challenge to popular philosophical and scientific beliefs.²⁵ College and university officials soon recognized this, and many institutions voluntarily gave their faculty the contractual right to pursue their research and teaching without fear of administrative retribution for the viewpoints expressed in their work.²⁶

Not all college and university officials did so, however. In 1900, Stanford University's sole trustee dismissed a professor who had published work supporting the "free silver" movement.²⁷ Eight other professors eventually resigned in protest or were terminated for supporting the professor.²⁸ This incident eventually gave rise to a movement among professors at Johns Hopkins University to found an association of academics that would work to protect the academic freedom of faculty nationwide.²⁹ In 1915, the American Association of University Professors

22. See David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

23. See Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

24. These include the "safety valve," see THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); the "tolerant society," see LEE BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986); and the "checking value," see Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

25. Hamilton, *supra* note 14.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

(AAUP) was born.³⁰

In 1940, the AAUP, together with the Association of American Colleges (AAC), published a manifesto describing the fundamental values inherent in academic freedom, entitled the *Statement of Principles on Academic Freedom and Tenure*.³¹ The statement set forth detailed expectations for America's colleges and universities with respect to the academic freedom of faculty members.³² It identified three principle components of academic freedom: "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action."³³

The statement itself is, of course, not binding law, as it has never been expressly incorporated into any state or federal statute or judicial decision.³⁴ It has, however, been incorporated into most faculty handbooks and college and university mission statements.³⁵ The statement has also been a source of influence for academic freedom principles which federal courts began to recognize in the early 1950s.

Thus, the American tradition of faculty academic freedom began as a defensive reaction to suppression of research originating at the college and university level. It should not be surprising that research is the first value listed among the three; the AAUP's formation was a direct response to college and university officials punishing faculty for the viewpoints expressed in their scholarly works.

B. Brief History of Government Treatment of Academic Freedom

Before the research suppression that triggered the AAUP's founding, federal, state, and local government officials had routinely targeted domestic dissent that they claimed was a menace to public order and security. A common target of this war is knowledge-producing information thought inconsistent with the state's security objectives—activity which has historically come in disproportionately high numbers from America's colleges and universities.

From the country's founding through the first part of the twentieth century,

30. *Id.*

31. *Declaration of Principles on Academic Freedom and Tenure*, 1 BULL. AM. ASS'N U. PROFESSORS 1 (1915), reprinted in 40 BULL. AM. ASS'N U. PROFESSORS 90 (1954).

32. *Id.*

33. *Id.*

34. Because the statement has been incorporated into some college and university handbooks and employment contracts, it may have legal force—even at private institutions—to the extent that the principles contained therein represent binding contractual terms between the college or university and its faculty members.

35. See, e.g., UNIV. OF CAL. REVISED ACADEMIC PERSONNEL MANUAL, ACADEMIC FREEDOM, (Sept. 29, 2003), available at <http://www.ucop.edu/acadadv/acadpers/apm/apm-010.pdf>; KAN. UNIV. FACULTY HANDBOOK, ACADEMIC FREEDOM, § C.2.a.4 (1998), available at <http://www.ku.edu/~unigov/fachand1998.html>; UNIV. OF MICH. FACULTY HANDBOOK, FUNDAMENTAL TENETS STATEMENT, § 1A (June 18, 1990), available at <http://www.provost.umich.edu/faculty/handbook/>; UNIV. OF WASH. FACULTY HANDBOOK VOL. 2, A STATEMENT OF PRINCIPLE: ACADEMIC FREEDOM AND RESPONSIBILITY, §§ 24–33 (May 27, 1992), available at <http://www.washington.edu/faculty/facsenate/handbook/Volume2.html>; UNIV. OF WASH. ROLE AND MISSION STATEMENT, (Feb. 1998) available at <http://www.washington.edu/home/mission.html>.

government officials seeking to neutralize activity thought to undermine national policy used official coercion, in some instances going so far as to criminalize dissent.³⁶ As activists and commentators began to call for strengthened First Amendment protection of expression critical of the government after World War I, many federal and state officials began employing an alternate strategy: building unity of national conscience against anti-patriotic and anti-government speech by using popular sentiment as its own agent, while minimizing the risk of violating constitutional liberties. This phenomenon was illustrated in the early to middle Cold War periods, the years often referred to as the McCarthy era.³⁷

1. The Espionage Act of 1917

Before the First Amendment's expansion in the mid-twentieth century, direct suppression was both available and routinely employed by the government. In the weeks before the United States officially entered into World War I, President Woodrow Wilson sharply condemned domestic dissent and warned that disloyalty must be "crushed out."³⁸ He directed Assistant Attorney General Charles Warren to draft a bill that, after some congressional modification, would become the Espionage Act of 1917.³⁹ Among other things, the Act forbade anyone to "willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States" during times of war.⁴⁰ The Justice Department used the Act to wage the most aggressive campaign on dissent in American history. Two thousand dissenters were prosecuted, and many received lengthy prison sentences of up to twenty years.⁴¹

36. The best examples are the Sedition Act of 1789 and the Espionage Act of 1917. The Sedition Act stemmed from a 1789 diplomatic fiasco with France commonly known as the XYZ affair. The incident sparked anti-French sentiment in the United States and prompted the Federalist Party to take measures in preparation for a potential war with France. David Jenkins, *The Sedition Act of 1789 and the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM J. LEGAL HIST. 154, 155–56 (2001). Republicans, who constituted a minority of Congress, thought such posturing was unwise and played into the hands of Britain, who was still at war with France. *Id.* at 156. The Republicans began assailing the Federalists' policy in the press. Citing such attacks as hostile to American interests and having the tendency to undermine national security, the Federalists pushed through the Alien and Sedition Acts. The Sedition Act punished the publication of criticism of the government, although a showing that the criticism was true was an absolute affirmative defense. *Id.*

37. See generally ELLEN SCHRECKER, MANY ARE THE CRIMES (1998).

38. President Woodrow Wilson's Third Annual Message to Congress (Dec. 7, 1915), quoted in DAVID M. KENNEDY, OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY 67 (1980). See also Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335, 336 (2003).

39. PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES 53 (1979).

40. Espionage Act of 1917, Ch. 30, 40 Stat. 217, 219 (1917).

41. Stone, *supra* note 38, at 337. One such person was the editor of the Jewish Daily News, Rose Pastor Stokes. In a speech to the Women's Dining Club of Kansas City, she stated that she was "for the people, while the government is for the profiteers." *Stokes v. United States*, 264 F. 18, 20 (8th Cir. 1920). The government argued that the military could "operate and succeed only so far as they are supported and maintained by the folks at home," and that Ms. Stokes' speech

In addition to the numerous individuals whom the government silenced with prosecution and incarceration, colleges and universities were similarly responsible for quashing academic scholarship. Illustrative is the ironic case of Harvard free speech scholar Zechariah Chafee, Jr.⁴² Chafee was targeted as a junior faculty member after publishing a law review article criticizing the Espionage and Sedition Acts.⁴³ The Justice Department, led by Anti-Radical Division Chief J. Edgar Hoover, responded by prompting Harvard officials to subject Chafee to an academic inquisition determining his fitness to remain at Harvard.⁴⁴ Although he was acquitted and retained by one vote, the incident sent a clear, chilling message through the American academy.⁴⁵

2. Early Cold War/McCarthy Era

During the early years of the Cold War, faculty members were again targeted as subversives.⁴⁶ Many public and private college and university academics, especially more vulnerable untenured junior faculty members, lost their positions, were denied tenure, or in some cases, were effectively exiled from academia altogether.⁴⁷ These academics were selected chiefly for their past or present relationship with the Communist Party, their leftist political leanings, or their refusal to satisfactorily testify before the House Un-American Activities Committee.⁴⁸ While most of these academics were targeted because of their political affiliations, many drew attention with their research or other professional activity. One such case is that of Yale law professor Vern Countryman.

Countryman had come to Yale from the University of Washington, where he published a study critical of the state congressional Canwell Committee⁴⁹ and had been ostracized in Seattle as a result.⁵⁰ In addition to his scholarship, Countryman routinely represented Communists in legal matters.⁵¹ This reputation followed him

could “chill enthusiasm . . . and retard cooperation” of the women’s club members who heard it. Stone, *supra* note 38, at 339. She was convicted and sentenced to ten years in prison, although the Eighth Circuit later overturned the sentence on procedural grounds. *Stokes*, 264 F. at 26. (finding that trial judge’s jury instructions had impermissibly lowered the burden of proof by including a factual discussion).

42. Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons From History*, 87 MASS. L. REV. 72, 76–77 (2002).

43. Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1918–19).

44. *Id.*

45. *Id.*

46. See ELLEN SCHRECKER, NO IVORY TOWER 219–64 (1986).

47. *Id.* at 241–64.

48. *Id.* at 219–40.

49. The Canwell Committee was, in a sense, the State of Washington’s version of the House Un-American Activities Committee. Albert Canwell was a state representative who chaired a “fact-finding” committee which, starting in 1946, worked to expose communists in Washington’s private organizations and colleges and universities. *Id.* at 94–112.

50. *Id.* at 252.

51. *Id.*

to Yale.⁵² Just two years after arriving, the law school faculty board unanimously approved Professor Countryman for a full professor position.⁵³ However, the dean and president of Yale denied him tenure.⁵⁴ They justified their decision in a *New York Times* article, claiming that Countryman's Canwell Committee work was not sufficiently scholarly and that the position of tenured "professor must be zealously guarded" at Yale.⁵⁵ Countryman soon left Yale and entered private practice.⁵⁶

These tactics of covertly undermining the careers of faculty with political views outside the mainstream inhibited academic freedom just as direct criminalization of seditious libel did during the World War I era. Cold War historian Ellen Schrecker has argued that the chilling effect of the inquisition must be measured not only by the scholarship that was deterred, but also by the scholarship which was produced: "The fifties were . . . the heyday of consensus history, modernization theory, structural functionalism, and the new criticism. Mainstream scholars celebrated the status quo, and the end of ideology dominated intellectual discourse."⁵⁷ According to Schrecker, "there is considerable speculation that the devastating effects of the [Institute of Pacific Relations]⁵⁸ hearings on the field of East Asian Studies made it hard for American policy-makers to get realistic advice about that part of the world" in the period leading up to the Vietnam War.⁵⁹

The McCarthy era was not the last time the state brought its powers to bear on the academy. Shifting trends in domestic cultural politics and American foreign policy beginning in the 1990s have again threatened academic freedom. To examine how the constitutional jurisprudence might address these threats, this article reviews academic freedom doctrine from its origins to the present.

III. ACADEMIC FREEDOM JURISPRUDENCE: 1892–2006⁶⁰

In a line of seminal cases beginning in 1952 and continuing into the late 1960s,

52. *Id.*

53. *Id.*

54. *Id.*

55. Tad Szulc, *Professor Quits; Yale is Accused*, N.Y. TIMES, Dec. 30, 1954, at 6.

56. SCHRECKER, *supra* note 46, at 253. Countryman later accepted a tenured position at Harvard Law School. *Id.*

57. *Id.* at 339. Schrecker acknowledges the inherent speculation in attributing causation to this phenomenon and notes that the issue needs further study.

58. The Institute of Pacific Relations was a private research organization comprised mainly of academics (including most of the academics in that field), which was targeted by the FBI beginning in 1951. *Id.* at 161–67.

59. *Id.*

60. For a complete historical treatment of courts' First Amendment academic freedom jurisprudence, see PEGGIE J. HOLLINGSWORTH, ED., *UNFETTERED EXPRESSION: FREEDOM IN AMERICAN INTELLECTUAL LIFE* (Univ. of Mich. 2000); Richard H. Hiers, *Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J.C. & U.L. 35 (2002); Gary Pavela, *A Balancing Act: Competing Claims for Academic Freedom*, 87 ACADEME 21 (2001); William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79 (1990); Ralph R. Fuchs, *Academic Freedom—Its Basic Philosophy, Function and History*, 28 LAW & CONTEMP. PROBS. 431, 433 (1963).

various members of the Supreme Court lent their support—explicitly or implicitly—to the notion that academic freedom is a value appropriate for constitutional recognition.⁶¹ A half a century before, courts began considering issues that would lay the groundwork for the recognition of academic freedom as a First Amendment concern.

A. The Judicial Foundation for *Pickering–Connick*

In the 1892 Massachusetts Supreme Judicial Court case *McAuliff v. Mayor of New Bedford*, Oliver Wendell Holmes introduced the “right-privilege” distinction into the then primitive body of free-speech laws.⁶² McAuliff was a city police officer who had been fired for soliciting political funds and being a member of a political committee in violation of local police regulations.⁶³ There was no evidence that he did these things while on duty or on department grounds.⁶⁴ Justice Holmes found for the city, holding that McAuliff “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”⁶⁵ Holmes further held that “there is nothing in the Constitution . . . to prevent the city from attaching obedience to [the rule prohibiting political solicitation] as a condition to the office of policeman.”⁶⁶ As a result, Holmes reasoned, the government was free to deny public employees free speech rights as a prerequisite to employment.⁶⁷

This reasoning was later termed the “right-privilege” distinction.⁶⁸ This principle holds that where a person seeks to obtain a benefit from the government that the Constitution does not otherwise guarantee him, i.e., a *privilege*, the government may require the person to waive some *right* to obtain that privilege.⁶⁹ Had this principle survived, it would have precluded the development of constitutionally-protected academic freedom of state teachers and professors.

Fortunately for the academic freedom doctrine, however, the right-privilege distinction did not survive. In 1925, in adjudicating a claim brought by a trucking company against the local railroad commission, the Supreme Court endorsed what came to be called the “unconstitutional conditions” doctrine.⁷⁰ A state statute conditioned private truckers’ use of California highways on their assuming the

61. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Adler v. Bd. of Educ.*, 342 U.S. 485, 508 (1952).

62. *McAuliff v. Mayor of New Bedford*, 29 N.E. 517, 517–18 (Mass. 1892).

63. *Id.* at 517.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. See generally William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

69. *Id.*

70. *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 599 (1925).

duties and burdens of a common carrier.⁷¹ The truckers argued that the law constituted a taking of private property without just compensation and without due process of law, in violation of the Fourteenth Amendment.⁷²

That due process forbids the legislature from converting a private carrier into a common carrier against his will, the Court held, is not in dispute.⁷³ Therefore, it instead framed the issue as: “whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, [may be] within the power of the state altogether to withhold if it sees fit to do so.”⁷⁴ The Court determined that it may not.⁷⁵ It reasoned that it would be a “palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution,” while upholding a law “by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.”⁷⁶ In essence, then, “[i]t is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.”⁷⁷

Although courts continued intermittent application of the right-privilege distinction rationale for decades,⁷⁸ *Frost*’s rebuke of that doctrine set the stage for full adoption of the unconstitutional conditions principle. This in turn would make way for the *Pickering-Connick* public employee doctrine and the development of the public teacher academic freedom doctrine.

The first notable explicit judicial mention of “academic freedom” came in a series of McCarthy-era cases dealing with public employee loyalty oaths. Although the majority holding rested on grounds other than the First Amendment in *Adler*,⁷⁹ *Updegraff*,⁸⁰ and *Sweezy*,⁸¹ the concurring and dissenting opinions are of interest both for their novel justification for First Amendment protection of academic freedom and because the opinions would prove influential in later majority holdings.

In *Adler v. Board of Education*, the Court considered the constitutionality of a New York statute that used various means to eliminate individuals holding certain beliefs from working in state government.⁸² The statute, called the Feinberg Law, prohibited public employees from advocating the use of violence to alter the form

71. *Id.* at 592.

72. *Id.* at 589.

73. *Id.* at 592.

74. *Id.* at 592–93.

75. *Id.* 593–94.

76. *Id.* at 593.

77. *Id.* at 594.

78. See, e.g., *Adler v. Bd. of Educ.*, 342 U.S. 485, 508 (1952) (using right-privilege distinction in upholding law prohibiting public employees from membership in subversive groups).

79. *Id.* at 485.

80. *Wieman v. Updegraff*, 344 U.S. 183 (1952).

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

82. *Adler*, 342 U.S. at 485.

of government, provided that membership in a “subversive” organization would be considered *prima facie* evidence of unfitness for employment, and required related oaths.⁸³ The Court upheld the law.⁸⁴ Relying on the right-privilege distinction rationale, it stated that “[teachers] are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.”⁸⁵

The dissenting opinion of Justice Douglas (himself a former academic) was based on academic freedom and the First Amendment. Douglas’ opinion claimed that the law impermissibly treaded on academic freedom by excluding an entire ideology from the classroom but without a showing that such exclusion is necessary to achieve the state’s objectives.⁸⁶ Second, Justice Douglas wrote that the law created a substantial chilling effect on academic freedom for existing teachers by making them leery and uncertain that some forms of expression could cost them their jobs.⁸⁷ Justice Douglas’ *Adler* dissent is memorable because it is the first to recognize academic freedom as a right protected by the First Amendment.⁸⁸ In his opinion, academic freedom is a distinct value of First Amendment jurisprudence.⁸⁹

In *Wieman v. Updegraff*, decided nine months after *Adler*, Justice Frankfurter further developed Justice Douglas’ reasoning.⁹⁰ This time the Court, in an opinion by Justice Clark, relied on a substantive due process rationale to overturn an Oklahoma law requiring a loyalty oath as condition of public employment.⁹¹ Justice Frankfurter, joined by Justice Douglas, concurred on First Amendment grounds.⁹²

Paul W. Updegraff was a “citizen and taxpayer” who sued to enjoin Oklahoma state officials from paying salaries to Oklahoma Agricultural and Mechanical College professors, teachers, and other employees who had not signed a state statutorily-imposed loyalty oath.⁹³ The oath required the subscriber to affirm that:

within the five (5) years immediately preceding the taking of this oath
(or affirmation) [he] ha[s] not been a member of . . . any agency, party,
organization, association, or group whatever which has been officially
determined by the United States Attorney General or other authorized
public agency of the United States to be a communist front or
subversive organization . . .⁹⁴

83. *Id.* at 486–91.

84. *Id.* at 496.

85. *Id.* at 492.

86. *Id.* at 509 (Douglas, J., dissenting).

87. *Id.* at 509–10.

88. See *Van Alstyne, supra* note 60, at 107.

89. *Id.*

90. *Wieman v. Updegraff*, 344 U.S. 183 (1952).

91. *Id.* at 183.

92. *Id.* at 194–98 (Frankfurter, J., concurring).

93. *Id.* at 183–86.

94. *Id.* at 186.

The state district court and the Supreme Court of Oklahoma held in favor of the plaintiff and enjoined the officials.⁹⁵ The state supreme court employed the right-privilege distinction in holding the law compatible with the Fourteenth Amendment. It reasoned that the teachers “have no constitutional right to be so employed The act does not purport to take away their right to teach. Public institutions do not have to hire nor retain employees except on terms suitable to them.”⁹⁶ On appeal, the United States Supreme Court overturned the holding on due process grounds.⁹⁷

Justices Black, Douglas, and Frankfurter agreed with the majority’s Fourteenth Amendment reasoning but concurred on First Amendment grounds in two separate opinions.⁹⁸ Justice Frankfurter’s opinion is noteworthy because it identified teachers, teaching, and scholarship as uniquely worthy of protection.⁹⁹ He argued that demanding homogeneity of association in our educators is uniquely worrisome because of their vital role in society.¹⁰⁰ He stated that the law irrationally narrowed the pool of academics that could be employed by the state and deterred even “qualified” academic employees from exercising legitimate academic freedom, thus creating a chilling effect.¹⁰¹ Without mentioning academic freedom explicitly, Justice Frankfurter endorsed the normative elements of the AAUP’s manifesto: he declared that the loyalty oath “has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.”¹⁰² He further stated, “The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations upon State and National power.”¹⁰³

Justice Frankfurter then reasoned that the state’s undisputed power to eliminate public educational institutions altogether does not give it the power to take the lesser step of curtailing the employees’ freedoms while the institutions are in existence.¹⁰⁴ In so doing, the concurring Justices reiterated Justice Douglas’ *Adler* view that the unconstitutional conditions doctrine, along with the First and Fourteenth Amendments, limited the power of the state to curtail academic freedom of public education employees.

Four years later, a controlling plurality of the Court used the same reasoning. In *Sweezy v. New Hampshire*, Chief Justice Warren made it clear that principles of academic freedom deserve some constitutional protection.¹⁰⁵ Paul Sweezy was an

95. Bd. of Regents of Okla. Agric. Coll. v. Updegraff, 237 P.2d 131 (Okla. 1951), *rev’d*, 344 U.S. 183 (1952).

96. *Id.* at 306.

97. Wieman v. Updegraff, 344 U.S. 183, 191 (1952).

98. *Id.* at 192–98.

99. *Id.* at 194–98 (Frankfurter, J., concurring).

100. *Id.* at 195–97.

101. *Id.* at 195.

102. *Id.*

103. *Id.* at 197.

104. *Id.*

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

instructor at the University of New Hampshire who had been summoned before the New Hampshire Attorney General to answer questions about his Communist affiliations, teachings, and beliefs.¹⁰⁶ Sweezy disavowed affiliation with the Communist party but admitted that he considered himself a “classical Marxist” and that he had written and still believed that socialism was morally superior to capitalism.¹⁰⁷ He refused, however, to answer other questions about his beliefs and the content of his lectures.¹⁰⁸ As a result, he was jailed for contempt, a charge the New Hampshire Supreme Court upheld.¹⁰⁹

In considering Sweezy’s appeal, Justice Warren declared:

The essentiality of freedom in the community of American universities is almost self-evident To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation Scholarship cannot flourish in an atmosphere of suspicion and distrust. 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.¹¹⁰

Despite this sweeping edict on academic freedom’s value, the Court ultimately dismissed the case on jurisdictional grounds.¹¹¹ Therefore, the case is most notable not for its result, but for Justice Frankfurter’s concurrence, in which he expounded on the value of academic freedom and found that the First Amendment should bar the state’s action. Justice Frankfurter, joined this time by Justice Harlan, wrote: “For society’s good—if understanding be an essential need of society—inquiries into [the social sciences], speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible.”¹¹² He continued:

These pages need not be burdened with proof . . . of the dependence of a free society on free universities. . . . [i.e.,] the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars¹¹³

He then laid out a rule for determining the constitutionality of laws restricting academic freedom: “Political power must abstain from intrusion into [social science inquiry], pursued in the interest of wise government and the people’s well-being, except for reasons that are exigent and obviously compelling.”¹¹⁴

Other Court decisions not obviously linked with education or scholarship would also prove significant to the development of constitutional academic freedom

106. *Id.* at 238–43.

107. *Id.* at 243.

108. *Id.* at 240–44.

109. *Id.* at 244–45.

110. *Id.* at 250.

111. *Id.* at 255.

112. *Id.* at 262 (Frankfurter, J., dissenting).

113. *Id.*

114. *Id.*

doctrine. For example, in a 1964 decision that one leading American constitutional scholar characterized as “an occasion for dancing in the streets,”¹¹⁵ the *New York Times Co. v. Sullivan* Court raised the standard for libel against public officials.¹¹⁶ The Court held that such claims require “actual malice,” i.e., knowledge of the claim’s falsity or recklessness with regard thereto.¹¹⁷ L.B. Sullivan, a public affairs commissioner for the City of Montgomery, Alabama, had sued three Alabama clergymen and the *New York Times* for publishing an ad that claimed that the commissioner had committed several outrageous acts in violation of student protestors’ civil rights.¹¹⁸ The ad was largely true but contained some misleading statements and exaggerations.¹¹⁹ The trial court found for Sullivan and awarded him \$500,000.¹²⁰ The Alabama Supreme Court upheld the judgment.¹²¹

The Supreme Court granted certiorari and reversed the Alabama Supreme Court’s decision.¹²² Writing for the Court, Justice William Brennan declared “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹²³ For the first time, the Court expressly repudiated the Sedition Act of 1789, stating that there was “a broad consensus” that the Act, “because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.”¹²⁴ *Sullivan* implicates academic freedom because it raised the government’s burden to punish criticism of a governmental body or official such that mere falsity of a statement is insufficient.¹²⁵

Just three years after *Sullivan*, in *Keyishian v. Board of Regents*, the Court majority adopted Justice Frankfurter’s reasoning from *Sweezy*.¹²⁶ *Keyishian* represented the first time that a majority of the Court powerfully endorsed the notion that academic freedom was worthy of First Amendment protection.¹²⁷ It did so in striking down the Feinberg Law, the same law the Court held constitutional fifteen years before in *Adler*.¹²⁸ The law continued to disqualify individuals deemed “subversive” from public school employment, “subversiveness” often being determined by membership in one of several

115. Harry Kalven, Jr., *The New York Times Case: A Note on “the Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 221 n.125 (quoting Alexander Meiklejohn).

116. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

117. *Id.*

118. *Id.* at 256.

119. *Id.*

120. *Id.*

121. *N.Y. Times Co. v. Sullivan*, 144 So. 2d 25 (Ala. 1962), *rev’d*, 376 U.S. 254 (1964).

122. *Sullivan*, 376 U.S. at 254.

123. *Id.* at 270.

124. *Id.* at 276 (internal citations omitted).

125. The decision may have also influenced the *Pickering* outcome, as *Sullivan* allowed the Court to overlook misstatements in *Pickering*.

126. *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

127. *See id.*

128. *Id.* at 608–09.

organizations compiled by the New York State Board of Regents.¹²⁹

In finding the law unconstitutional, Justice Brennan wrote:

Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern to the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools.¹³⁰

The Court based its holding squarely on the First Amendment, finding the law both unconstitutionally vague and overbroad.¹³¹ The law was unconstitutionally vague because it prohibited advocacy not just of violent overthrow of the government, but “treasonable or seditious” conduct.¹³² The Act was impermissibly broad because it lacked any element of intent.¹³³

In its holding, the Court cemented the unconstitutional conditions doctrine in its jurisprudence, stating, “The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.”¹³⁴ In so doing, the Court paved the way for its use of the unconstitutional conditions doctrine in the context of faculty dissent one year later.

B. *Pickering-Connick* and its Progeny

In 1968, four years after *Sullivan* and one year after *Keyishian*, the Court decided *Pickering v. Board of Education*,¹³⁵ the springboard for many later public college and university faculty academic freedom claims. In *Pickering*, the Court held that when public employees speak as citizens and on matters of public importance, they enjoy the protection of the First Amendment.¹³⁶ In the decades following *Pickering*, courts decided numerous cases with academic freedom implications. Below is a discussion of those cases most relevant to the proposal in Part VI of this article.

Marvin L. Pickering was a public high school teacher who was terminated after he wrote a letter to the editor in a local paper criticizing how the Board of Education was handling a school bond issue.¹³⁷ In the letter, Pickering caustically criticized the Board’s fund management and its allocation of funds to various school programs.¹³⁸ The letter’s factual assertions were largely accurate except for

129. Milton R. Konvitz, *Keyishian v. Board of Regents*, in THE OXFORD GUIDE TO UNITED STATES SUPREME COURT DECISIONS (Kermit L. Hall ed., 1999).

130. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (internal citations omitted).

131. *Id.* at 605.

132. *Id.* at 598.

133. *Id.* at 605.

134. *Id.* at 605–06.

135. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

136. *Id.* at 578.

137. *Id.* at 564.

138. *Id.* at 569.

three misstatements about the cost of athletics and school lunches.¹³⁹ Pickering identified himself as a teacher but disclaimed that he was signing as a “citizen, taxpayer and voter.”¹⁴⁰ The School Board voted to terminate him.¹⁴¹

After he was fired, Pickering filed a lawsuit alleging a violation of his First Amendment rights.¹⁴² An Illinois circuit court found for the school board and the Illinois Supreme Court affirmed.¹⁴³ The state supreme court utilized a form of right-privilege distinction reasoning to hold that because Pickering was a teacher-employee, he “is no more entitled to harm the schools by speech than by incompetency, cruelty, negligence, immorality, or any other conduct for which there may be no legal sanction.”¹⁴⁴ Pickering appealed to the United States Supreme Court.

The Supreme Court granted certiorari.¹⁴⁵ Finding for Pickering, Justice Thurgood Marshall wrote for a four-justice plurality.¹⁴⁶ Justice Marshall used a form of unconstitutional conditions principle, reasoning that “teachers may [not] be constitutionally compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest” even if the comments concern school matters and even if the comments criticize school policy.¹⁴⁷ In considering such claims, the Supreme Court held that courts must “arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”¹⁴⁸

Applying this rule to the facts, the Court found that allocation of school funds was a matter of public concern.¹⁴⁹ It stated, “On such a question free and open debate is vital to informed decision-making by the electorate.”¹⁵⁰ It recognized that “[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent.”¹⁵¹ The Court next found that the speech was “neither shown nor can be presumed to have in any way either impeded the teacher’s proper performance of his daily duties in the classroom or to have interfered with the

139. *Id.* at 578–82.

140. *Id.* at 578.

141. *Id.* at 564.

142. *Pickering v. Bd. of Educ.*, 225 N.E.2d 1 (Ill. 1967).

143. *Id.*

144. *Id.* at 6.

145. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

146. Justices Douglas and Black concurred in the decision. 391 U.S. at 575–82. Justice White dissented, arguing that a determination that the statements were made knowingly or recklessly should not warrant First Amendment protection regardless of the harm created. Moreover, Justice White felt that there was insufficient evidence in the record to conclude that the statements were not so made. *Pickering*, 391 U.S. at 582–84.

147. *Id.* at 578–81.

148. *Id.*

149. *Id.* at 571.

150. *Id.* at 571–72.

151. *Id.* at 572.

regular operation of the schools generally.”¹⁵² Finally, applying *Sullivan*, the Court found that the letter’s falsities were not made knowingly or recklessly.¹⁵³ As a result, the Court held that the First Amendment prohibited the school from disciplining Pickering for his speech: “in a case such as this . . . a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”¹⁵⁴

Although the opinion did not expressly mention academic freedom, it would nonetheless impact the doctrine. *Pickering* and *Sullivan* together gave public-institution faculty the right to criticize the government in good faith without substantial fear of losing their jobs as retribution, subject to the restrictions later holdings would impose.

The Court clarified and slightly narrowed the *Pickering* rule fifteen years later in *Connick v. Myers*.¹⁵⁵ *Connick* is significant because it clarified what type of speech implicates a matter of “public concern.”¹⁵⁶ In *Connick*, Sheila Myers, an Assistant District Attorney, learned that she was being considered for a transfer to another criminal court section.¹⁵⁷ Strongly objecting to the transfer, she circulated a questionnaire among her colleagues seeking opinions on various office policy matters, including the transfer.¹⁵⁸ Informed that the incident had created a “mini-insurrection,” Connick, the District Attorney, terminated Myers, ostensibly for refusing to accept the transfer and for causing the disruption.¹⁵⁹ Myers sued, alleging unlawful termination on the basis of protected free speech (circulating the questionnaire) under the First and Fourteenth Amendments.¹⁶⁰

Applying *Pickering*, the federal district court found that Myers’ activities touched on matters of public importance and did not substantially or materially interfere with the efficient and effective operation of the office.¹⁶¹ Because the employer was unable to show that it would have taken the same action but for the plaintiff’s protected conduct, the court found for Myers.¹⁶² The Fifth Circuit Court of Appeals affirmed, but the Supreme Court reversed.¹⁶³

In so holding, the Court stated that “[w]hether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.”¹⁶⁴ The speech should address an issue of “political, social, or other concern to the community.”¹⁶⁵ The Court

152. *Id.* at 572–73 (internal footnote omitted).

153. *Id.* at 573.

154. *Id.* at 574.

155. *Connick v. Myers*, 461 U.S. 138 (1983).

156. *Id.* at 142.

157. *Id.* at 140.

158. *Id.*

159. *Id.* at 140–41.

160. *Id.*

161. *Id.* at 142.

162. *Id.*

163. *Id.*

164. *Id.* at 147–48.

165. *Id.* at 146.

found only one of its statements to touch on a matter of public concern—a portion that questioned whether employees ever felt pressure to support office-endorsed political candidates.¹⁶⁶ It found that the other subjects were not of public concern.¹⁶⁷ Because the bulk of the speech was not of public concern, the Court balanced the value of that speech, which it found to be low, with the level of disruption that it caused.¹⁶⁸ Citing the supervisor's characterization of the result as a "mini-insurrection," the Court held for the government.¹⁶⁹

In the 1987 case *Rankin v. McPherson*, the Court further refined the *Pickering-Connick* standard, clarifying the workplace disruption prong of the analysis.¹⁷⁰ In March 1981, Ardith McPherson, a county constable's office clerical employee, was talking with a coworker about President Ronald Reagan's recent attempted assassination. McPherson said, "If they go for him again, I hope they get him."¹⁷¹ Another coworker overheard the comment and reported it to Constable Rankin.¹⁷² After confirming the comment with McPherson, Rankin immediately fired her.¹⁷³ The district court upheld the termination, the Court of Appeals for the Fifth Circuit overturned the decision, and the Supreme Court affirmed.¹⁷⁴

The Court began its analysis by reiterating *Pickering-Connick*'s balancing requirement "'between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"¹⁷⁵ It then held that speech may still not be protected if "the statement impairs discipline by superiors or harmony among co-workers" or if it has "a detrimental impact on close working relationships for which personal loyalty and confidence are necessary."¹⁷⁶ However, the Court held, "The inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern."¹⁷⁷

The Court found that McPherson's comment, however inappropriate, dealt with a matter of public concern.¹⁷⁸ Notably, the Court further held that the comment's private nature did not remove it from being a matter of public concern.¹⁷⁹ The Court employed the *Pickering* balancing test. It found that as a low-level employee not in a "confidential, policymaking, or public contact role," the remark

166. *Id.*

167. *Id.* at 149.

168. *Id.* at 150–52.

169. *Id.* at 151–54.

170. *Rankin v. McPherson*, 483 U.S. 378 (1987).

171. *Id.* at 381.

172. *Id.*

173. *Id.* at 382.

174. *Id.* at 378.

175. *Id.* at 384 (quoting *Pickering*) (brackets in original).

176. *Rankin*, 483 U.S. at 387.

177. *Id.*

178. *Id.* at 386.

179. *Id.* at 386 n.11.

did not disrupt the office's functioning or undermine its purpose.¹⁸⁰ The Court, therefore, held that McPherson's termination violated her First Amendment rights.

In a public employee speech case from 2004, the Court further clarified and narrowed the standard for determining whether speech is of "public concern."¹⁸¹ The case, *City of San Diego v. Roe*, involved a police officer who, while off-duty, made and distributed pornographic movies of himself.¹⁸² Richard Roe (a pseudonym) sold the movies, which did not identify him as affiliated with the San Diego Police Department, on the online auction website eBay.¹⁸³ One of his supervisors found the advertisement and recognized the officer. He was soon terminated.¹⁸⁴ Roe sued, claiming that his "off-duty, non-work related activities" were protected under the First Amendment and could not be grounds for termination.¹⁸⁵ Without applying the *Pickering* balancing test, the district court granted summary judgment to the city, finding that Roe had not demonstrated that his actions touched on a matter of public concern and, thus, that they were not protected speech.¹⁸⁶ The Court of Appeals for the Ninth Circuit reversed, finding that speech occurring outside of the work environment and unrelated to the employee's "status in the workplace" is protected under the public concern doctrine.¹⁸⁷

Granting certiorari, the Supreme Court reversed the circuit court, finding that although the officer's actions were unrelated to his employment and he was speaking as a private citizen, the speech was not of public concern; moreover, the employer sufficiently demonstrated a legitimate interest in restricting the activity.¹⁸⁸ In so doing, the Court held that the common law invasion of privacy standard should apply to public concern analysis. That is, the speech must concern something of "legitimate news interest" that is a "subject of general interest and of value and concern" to the public when it is published.¹⁸⁹

In a 2006 landmark ruling,¹⁹⁰ the Court solidified and bolstered the principle that when public employees speak pursuant to their duties, that speech is unprotected.¹⁹¹ Richard Ceballos was a supervising Deputy District Attorney in the Los Angeles County District Attorney's Office.¹⁹² After reviewing a search warrant in a case in which he was involved, Ceballos determined that the warrant

180. *Id.* at 389–91.

181. *City of San Diego v. Roe*, 543 U.S. 77, 79 (2004).

182. Courts generally treat movies and other creative media as speech. *See, e.g.*, *Heller v. New York*, 413 U.S. 483, 491 (1973).

183. *Roe v. City of San Diego*, 356 F.3d 1108, 1110 (9th Cir. 2004).

184. *Id.*

185. *Id.*

186. *Id.* at 1112, 1122.

187. *Id.* at 1120.

188. *Id.*

189. *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004).

190. *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

191. *Id.*

192. *Id.*

was based on factual misrepresentations.¹⁹³ He reported his findings to his supervisors, both orally and in a memorandum recommending that the office move to dismiss the case.¹⁹⁴ Nonetheless, Ceballos' supervisors decided to continue the prosecution.¹⁹⁵ In a later hearing in which Ceballos testified to his conclusions, the court denied the defense's motion to suppress the warrant.¹⁹⁶ Subsequently, according to Ceballos, he was subjected to a series of minor adverse actions, which he claimed were in retaliation for his protected speech on the warrant and the prosecution.¹⁹⁷ When his internal complaint was dismissed, Ceballos sued.¹⁹⁸

The district court granted summary judgment for the defendant, holding that Ceballos was speaking pursuant to his duties as an employee and that his speech was therefore unprotected by the First Amendment.¹⁹⁹ Citing *Pickering* and *Connick*, the Ninth Circuit reversed, holding that the speech addressed a matter of public concern.²⁰⁰ The Supreme Court granted certiorari and reversed the circuit court. Writing for the majority, Justice Kennedy rejected the notion that "the First Amendment shields from discipline the expressions employees make pursuant to their professional duties."²⁰¹ Finding that Ceballos wrote his memo as an employee, the Court determined that his speech was unprotected by the First Amendment. Justice Stevens, writing in dissent, opined that there was "no adequate justification for the majority's line categorically denying *Pickering* protection to any speech uttered 'pursuant to . . . official duties.'"²⁰²

Garcetti is particularly relevant to academic freedom because, as is argued in Part VI below, faculty members disseminating their scholarship nearly always do it pursuant to their "official duties." If this is true, then the Supreme Court's current academic freedom jurisprudence would provide faculty scholarship with almost no First Amendment protection whatsoever. Although Justice Kennedy warned that the Court had not decided whether its analysis "would apply in the same manner to a case involving speech related to scholarship or teaching,"²⁰³ none of the Court's prior holdings suggest that it would not.

In recent decades, lower courts have struggled to interpret the Supreme Court's limited academic freedom jurisprudence. In failing to adopt a reliable approach, they have put individual academic freedom on shaky ground and limited the degree to which faculty may rely on its protection in defending their academic expression.

In *Hetrick v. Martin*, the Court of Appeals for the Sixth Circuit considered Eastern Kentucky University's (EKU) decision not to renew the contract of a non-tenured teacher whose teaching style was at odds with the university-endorsed

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. Ceballos v. Garcetti, 361 F.3d 1168 (9th Cir. 2004).

201. *Garcetti*, 126 S. Ct. at 1962.

202. *Id.* at 1965 (Stevens, J., dissenting).

203. *Id.* at 1962.

approach.²⁰⁴ The professor, Phyllis Hetrick, adopted a pedagogical approach that she claimed would teach students “how to think rather than merely to accept and parrot what they heard,” rather than the “by the book” approach that EKU demanded.²⁰⁵

EKU had offered Hetrick a one-year, non-tenured position teaching English for the 1969–70 academic year, which she accepted on the mutual anticipation that the contract would be renewed until she acquired tenure.²⁰⁶ In her classes, she discussed her familial status and her views on the Vietnam War and the draft.²⁰⁷ On February 27, 1970, EKU informed her that it did not intend to renew her contract for the following academic year.²⁰⁸ She requested and was denied a hearing and written reasons for the decision, although the head of the English Department testified before the district court that the decision was made because he believed Hetrick assigned too light of a workload and because she did not complete her Ph.D. until the second semester, when EKU believed she would complete it during her first semester.²⁰⁹ Hetrick sued EKU, alleging that she was fired in retaliation for expressing her views during class.²¹⁰ The district court held that EKU’s actions were not retaliation.²¹¹

The Sixth Circuit affirmed, holding that a professor’s general in-class approach to educating students is accessible to college and university administration in determining whether to renew contracts and is not broadly protected under the First Amendment.²¹² The court of appeals stated that “[w]hatever may be the ultimate scope of the [professor’s] amorphous ‘academic freedom,’²¹³ it “does not encompass the right of a nontenured teacher to have her teaching style insulated from review” by the institution.²¹⁴ The court claimed to have little guidance in this area, and thus undertook a sort of “functional necessity”²¹⁵ analysis, that is, determining whether it was necessary to EKU’s functioning to regulate the professor’s speech in this manner. The court distinguished *Pickering*’s citizen speech categorization. While *Hetrick* is limited to academic freedom’s coverage of classroom curriculum and does not purport to address scholarship, the holding nonetheless demonstrates the self-confessed lack of guidance that courts receive in deciding academic freedom matters generally.

In *Jeffries v. Harleston*, the Court of Appeals for the Second Circuit considered,

204. *Hetrick v. Martin*, 480 F.2d 705 (6th Cir. 1973) (hereinafter *Hetrick II*).

205. *Id.* at 707.

206. *Id.* at 706–07; *Hetrick v. Martin*, 322 F. Supp. 545, 545–46 (E.D. Ky. 1971) (hereinafter *Hetrick I*).

207. *Hetrick II*, 480 F.2d at 706.

208. *Hetrick I*, 322 F. Supp. at 546.

209. *Hetrick II*, 480 F.2d at 707; *Hetrick I*, 322 F. Supp. at 546.

210. *Hetrick II*, 480 F.2d at 707.

211. *Id.*

212. *Id.* at 709.

213. *Id.*

214. *Id.*

215. Lynch, *supra* note 11, at 1086.

on remand from the Supreme Court,²¹⁶ the right of a City University of New York (CUNY) professor to retain his department chair position.²¹⁷ CUNY had attempted to demote Leonard Jeffries following public controversy over a lecture he had given.²¹⁸ Jeffries, the chair of the Black Studies Department, had made a public speech in 1991 in which he had degraded Jews.²¹⁹ Jeffries devoted much of his speech to "an explication of the . . . role of 'rich Jews' in the enslavement of Africans."²²⁰ He also referred to his CUNY colleague, Bernard Sohmer, as "the head Jew at City College,"²²¹ and argued that "negative images of African peoples in the film industry were the result of: a conspiracy, planned and plotted and programmed out of Hollywood, [which comprised] people called Greenberg and Weisberg and Trigliani and whatnot . . ."²²²

At trial, CUNY denied that it had demoted Jeffries for his speech. University officials testified that the University had actually demoted him for "tardiness in arriving at class and sending in his grades, and for . . . brutish behavior."²²³ The jury disagreed and found for Jeffries.²²⁴ On appeal, the Second Circuit, while rejecting CUNY's justification, nonetheless found that it had not violated Jeffries' rights.²²⁵ The court held that because he had made the speech in his position as department chair and not as professor and because the only sanction was a demotion, his academic freedom had not been infringed.²²⁶ The Second Circuit's reasoning is noteworthy, in part, because it departs from the well-established employment law principle that a demotion usually constitutes an adverse employment action,²²⁷ which may not be based on the employee's engaging in a federally protected activity.

In 2000, the Court of Appeals for the Fourth Circuit ruled in *Urofsky v. Gilmore* that a Virginia law restricting state employees, including all public college and university professors, from accessing certain kinds of on-line research material was not a violation of the First Amendment.²²⁸ Six faculty members employed by

216. The Supreme Court remanded *Jeffries* in its decision of *Waters v. Churchill*, 511 U.S. 661 (1994), an unrelated case where a plurality of the Court indicated that the government could fire an employee based on a reasonable prediction that the speech will cause disruption. *Id.* at 674–75.

217. *Jeffries v. Harleston*, 52 F.3d 9 (2d Cir. 1995).

218. *Id.* at 9.

219. *Id.* at 14.

220. Brief of Defendant-Appellant at *10, *Jeffries v. Harleston* (2d Cir. 1995) (No. 93-7876), 1993 WL 13030296.

221. *Id.*

222. *Id.* at *9.

223. *Jeffries v. Harleston*, 828 F. Supp. 1066, 1071 (S.D.N.Y. 1993).

224. *Id.* at 1071.

225. *Jeffries*, 52 F.3d at 14–15.

226. *Id.*

227. See, e.g., *Noviello v. City of Boston*, 398 F.3d 76, 88 (1st Cir. 2005); *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 376 (4th Cir. 2004), cert. denied, 543 U.S. 959 (2004); *Doe v. DeKalb County Sch. Dist.*, 145 F.3d 1441, 1448 (11th Cir. 1998); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 992 (10th Cir. 1994).

228. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000).

various colleges and universities brought suit, challenging that the law prohibited access to sexually-explicit content on state-owned computers and violated their academic freedom under the First Amendment.²²⁹ Because the court determined that the law was aimed only at state employees and not citizens in general, it pursued the non-public concern employee speech prong of *Pickering-Connick*²³⁰ and, predictably, found for the state.²³¹ Most strikingly, the court found that no constitutional academic freedom for faculty members did exist or ever had existed.²³²

C. The Present State of Academic Freedom Doctrine

Although the Supreme Court has made clear that academic freedom is “a special concern to the First Amendment” and is worthy of constitutional protection,²³³ it has given very little additional guidance. As a result, the lower courts have interpreted the Court’s scarce language on the subject in different ways and have brought various approaches to cases implicating academic freedom rights. Consequently, the present state of academic freedom doctrine is murky at best. This absence of coherent jurisprudence amplifies the chilling effect that faculty members might experience. Without a clear pronouncement on what conduct is protected, faculty members may be deterred from treading near the edge of protected behavior.

In the words of Professor William Van Alstyne writing in 1990, “it would . . . be quite incorrect to suggest that the protection of academic freedom is reasonably secure. Assuredly it is not.”²³⁴ In light of the Fourth Circuit’s 2000 declaration in *Urofsky*, that “to the extent the Constitution recognizes any right of ‘academic freedom’ . . . the right inheres in the University, not in individual professors,”²³⁵ and *Garcetti*’s pronouncement that “when public employees make statements pursuant to their official duties . . . the Constitution does not insulate their communications from employer discipline,”²³⁶ there is little cause to think that Professor Van Alstyne’s assessment is any less valid today.

IV. EXPANDING STATE ENCROACHMENT ON ACADEMIC FREEDOM OVER THE PAST TWO DECADES

While courts have been undermining academic freedom’s doctrinal foundation, various political and sociological developments have encouraged state actors to

229. *Id.* at 403.

230. *Id.* at 406–09.

231. *Id.* at 404. Notably, the court suggested that it would have been an infringement of rights had the restriction been applied to the public generally. *Id.* at 406. Therefore, the court appears to imply that restricting information to the public on a content basis may violate the First Amendment, though not when applied to a particular subset of the public. *See id.*

232. *Id.* at 415–16.

233. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

234. Van Alstyne, *supra* note 60, at 153.

235. *Urofsky*, 216 F.3d at 410.

236. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006).

begin eroding faculty members' academic freedom in practice. This encroachment has come chiefly from two separate and intuitively diametric forces: a climate of increased American nationalism following the events of September 11, 2001 and the subsequent American military actions, and the heightened sensitivity toward sexual and racial issues—sometimes termed “political correctness”—which has led American colleges and universities to adopt policies designed to encourage this sensitivity. In addition, legislatures and the general public have paid greater attention to various “hot button” issues such as gay rights and race relations on campus.²³⁷ This confluence has begun to infiltrate academia, thereby threatening faculty academic expression.

A. Government Has Increasingly Sought to Curb Expression and to Regulate Academic Knowledge Since 9/11

As during the Cold War and other periods when the nation has perceived an imminent threat from an external enemy, the post-9/11 period has precipitated a decreased tolerance for academic and other expression that might suggest leniency toward—or even empathy for—the national adversary. Included in this category is language deemed inconsistent with the government’s view of proper security policy objectives or their means of execution.

After the September 2001 attacks on the World Trade Center and the Pentagon, President George W. Bush’s administration and other government leaders began a campaign to unite the American public behind the administration’s policies, particularly (although not exclusively) those policies designed to execute the newly-declared “War on Terror.” One feature of this campaign was that appointed and elected officials began admonishing those who criticized the administration or otherwise expressed opinions deemed counterproductive to the War on Terror.²³⁸ These officials routinely denounced such expressions as unpatriotic, dangerous, or even disloyal. One of the most significant effects of these tactics was a

237. For example, in several states in the mid-1990s, political groups lobbied for measures aimed at cutting or denying public funding to gay organizations and limiting gay-rights laws. Public institutions watched these trends with concern, wary that they and sub-institutions would be affected, especially “in constraints placed on curriculum content, college policies and services, and use of institutional facilities for meetings.” Jeff Carmona, *Anti-Gay Initiatives Cause Anxiety on State Campuses*, CHRON. OF HIGHER EDUC., Mar. 30, 1994, at A32. In fact, one initiative in the State of Washington would have prohibited public educational institutions, including colleges and universities, from teaching that homosexuality is morally acceptable. *Id.* In Oregon, an amendment to the state constitution was proposed that would prohibit state employees from “expressing approval for homosexuality.” *Id.* University of Oregon President Myles Brand (now president of the NCAA) said that the measure, if passed, would “[a]t the very least . . . create a chilling environment [on the university].” *Id.*

238. Bill Carter & Kelcity Barringer, *A Nation Challenged: Speech And Expression; In Patriotic Time, Dissent is Muted*, N.Y. TIMES, Sept. 28, 2001, at 1. See also Dan Eggen, *Ashcroft Defends Anti-Terrorism Steps; Civil Liberties Groups’ Attacks ‘Only Aid Terrorists,’ Senate Panel Told*, WASH. POST, Dec. 7, 2001, at A01 (describing Attorney General John Ashcroft’s declaring “[t]o those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to . . . enemies and pause to . . . friends.”).

correspondingly decreasing tolerance among the public for these forms of dissent. As will be shown, the effects of this change in popular sentiment did not stop at the campus gates; academics, whose job is to publicize candidly the results of their research, were frequently among the targeted dissenters.

1. The American Council of Trustees and Alumni Report

The American Council of Trustees and Alumni (ACTA) is a “nonprofit, educational organization committed to academic freedom, excellence and accountability at America’s colleges and universities.”²³⁹ The organization was founded by Senator Joseph Lieberman²⁴⁰ and Vice President Dick Cheney’s wife, Lynne Cheney.

Approximately two months after September 11, 2001, ACTA released a report entitled “Defending Civilization: How Our Universities Are Failing America and What Can Be Done About It.”²⁴¹ The report claims that college and university faculty are out of touch with the rest of America’s response to the attack.²⁴² The publication criticizes America’s colleges and universities as bastions of un-Americanism²⁴³ and makes three key points. First, it contrasts college and university-associated opinions on matters related to 9/11 and U.S. foreign policy with those of the American public in general, implying that such dissonance is probative of the academy’s dangerous disconnect with the country.²⁴⁴ The report implies that dissent among academics is undesirable per se, stating that “many professors failed [to condemn the attacks], and even used the occasion to find fault with America. And while faculty should be passionately defended in their right to academic freedom, that does not exempt them from criticism.”²⁴⁵

The report lists 115 quotes from individuals “associated” with colleges and universities²⁴⁶ that purport to demonstrate the “Blame America First” mentality that the report claims now pervades institutions of higher learning.²⁴⁷ Those quoted are mainly academics such as the Dean of the Woodrow Wilson School at Princeton²⁴⁸ but also include journalists and guest speakers.²⁴⁹ While one of those

239. American Council of Trustees & Alumni, About ACTA: Mission, http://www.goacta.org/about_acta/mission.html (last visited Mar. 6, 2007).

240. Lieberman once denied being a co-founder, although ACTA continues to claim otherwise. *See infra* note 262.

241. *See* JERRY L. MARTIN & ANN D. NEAL, AM. COUNCIL OF TRS. & ALUMNI, DEFENDING CIVILIZATION: HOW OUR UNIVERSITIES ARE FAILING AMERICA AND WHAT CAN BE DONE ABOUT IT (2002).

242. *Id.* at 1–4.

243. *Id.* at 4–5.

244. *Id.*

245. *Id.* at 4.

246. The “associations” are as close as a college dean and as attenuated as reporters covering campus events. *Id.* at 13–29.

247. *Id.* at 3.

248. *Id.* at 2.

249. *Id.* at 3.

quoted expresses actual support for the attack on the Pentagon,²⁵⁰ most are far less controversial. More typical are statements such as: “[I]ntolerance breeds hate,”²⁵¹ “We need to hear more than one perspective on how we can make the world a safer place,”²⁵² and, “We have to learn to use courage for peace instead of war.”²⁵³ The report also calls for colleges and universities to teach more American (rather than world) history: “We call upon all colleges and universities to adopt strong core curricula that include rigorous courses on the great works of Western civilization as well as courses on American history.”²⁵⁴ The report expresses general disapproval of colleges and universities that have expanded course offerings in Islamic or Arab history studies.²⁵⁵

To address these problems, which the report views as symptomatic of college and universities’ failings,²⁵⁶ the authors urge alumni, donors, and trustees to take action.²⁵⁷ Unless officials at institutions containing faculty members who espouse the “Blame America First” view and other “un-patriotic” rhetoric take preemptive steps to address the failings, the report recommends that donors to those institutions cut funding.²⁵⁸

The report has been both praised and criticized. In a December 15, 2001, *Washington Times* opinion column titled, “How Universities Can Help the War Effort,” one commentator extolled the ACTA report and declared, “Even as flags are exhibited throughout the nation in this time of grief and conflict, naysayers on campus have their acolytes. In many instances, they point an accusatory finger at America . . .”²⁵⁹ The column went on to criticize “[the naysayers’] hatred of the nation that offers a sanctuary for the pursuit of their scholarship.”²⁶⁰

Although ACTA is officially and nominally independent,²⁶¹ ACTA’s founders’ government ties have led some commentators to view the report as quasi-governmental action. First, ACTA itself touts its close association with government officials. According to the ACTA website, “ACTA was launched by former National Endowment for the Humanities chairman Lynne V. Cheney, former Governor Richard D. Lamm of Colorado, Senator Joseph I. Lieberman of Connecticut,” and others.²⁶²

250. *Id.* (“Anyone who can blow up the Pentagon gets my vote.”)

251. *Id.* at 19.

252. *Id.* at 21.

253. *Id.* at 16.

254. *Id.* at 8.

255. *Id.* at 6–7.

256. *Id.*

257. *Id.* at 8.

258. *Id.*

259. Herbert London, *How Universities Can Help the War Effort*, WASH. TIMES, Dec. 15, 2001, at A12. Herbert London is president of the Hudson Institute and is the John M. Olin Professor of Humanities at New York University.

260. *Id.*

261. Lynne Cheney is also the former head of the National Endowment for the Arts.

262. American Council of Trustees & Alumni, *supra* note 239 (listing Senator Lieberman as a co-founder of ACTA). Senator Lieberman has said that he disagrees with the report and has said that he is “incorrectly” listed as a co-founder. Joe Lieberman, *Letter to ACTA*, THE NATION,

In addition, some scholars have compared ACTA's tactics to those of McCarthy-era government officials. For example, Tufts University History professor Martin J. Sherwin likened the ACTA report to historical government attempts to suppress dissent. In an advertisement published as an open letter in *The Nation*, Sherwin quipped, "ACTA's report does not have the cachet of President Nixon's 'Enemies List,' nor the intimidating force (yet?) of Senator Joseph McCarthy's too-numerous-to-list lists . . ."²⁶³ Others view ACTA and the report similarly. A San Jose State University professor compared ACTA's report to Senator McCarthy's inquisitions, writing, "The targeting of scholars who participate in civic debates might signal the emergence of a new McCarthyism directed at the academy."²⁶⁴ Gonzalez went on to characterize the report's "official accusations of anti-Americanism" as a form of "fascism."²⁶⁵

Moreover, ACTA has not always operated independently from the government. On at least one occasion, a conservative-led government has summoned ACTA to help facilitate change in academia. In the summer of 2001, Florida Governor Jeb Bush called on ACTA officials to organize the orientation for the state colleges' and universities' new gubernatorial-appointed trustees.²⁶⁶ Anne Neal, an ACTA vice president and "Defending Civilization" co-author, was one of the key speakers.²⁶⁷ After the orientation sessions, one of the new Bush-appointed public trustees remarked, "[ACTA] gave us just the advice we need to get started."²⁶⁸

To the extent that it is a quasi-governmental publication designed to elicit popular support for its authors' efforts to change the academy, the ACTA report is not unprecedented. In 1947, former FBI agents began publishing *Counterattack*, a newsletter whose stated purpose was "expos[ing] and combat[ing] Communist activities."²⁶⁹ *Counterattack* focused largely on alleged subversives in Hollywood, but also targeted colleges and universities and leftist faculty therein.²⁷⁰ For example, on March 6, 1953, a headline read "Can Colleges and Universities be Counted On to Deal With Communist Infiltration?"²⁷¹ Another article that ran that same month asked "When Will Columbia University Do Something About Germ Warfare Gene?"²⁷² The headline referred to feminist Columbia University anthropology lecturer Gene Weltfish, who the year before had claimed that the

Dec. 18, 2001, available at <http://www.thenation.com/doc/20020128/lieberman20020117>.

263. Martin J. Sherwin, *Tattletales for an Open Society: An Open Letter to Dr. Lynne Cheney and Senator Joseph Lieberman*, THE NATION, Jan. 21, 2002, at 40, available at <http://www.thenation.com/doc/20020121/sherwin20020109>.

264. Roberto J. Gonzalez, *Lynne Cheney-Joe Lieberman Group Puts Out a Blacklist*, SAN JOSE MERCURY NEWS, Dec. 13, 2001.

265. *Id.*

266. American Council of Trustees & Alumni, *Florida Joins Accountability Movement*, INSIDE ACADEME, Spring/Summer 2001, at 1, available at http://www.goacta.org/publications/newsletters/acta_2001-spring-summer.pdf.

267. *Id.* at 4.

268. *Id.* at 5.

269. SCHRECKER, *supra* note 46, at 152 (quoting *Counterattack*, Mar. 6, 1953).

270. *Id.*

271. *Id.*

272. *Id.* at 256 (quoting *Counterattack*, Mar. 27, 1953).

United States had used germ warfare in Korea.²⁷³ She had been at Columbia for seventeen years.²⁷⁴ Three months after the article ran, Columbia declined to renew her contract.²⁷⁵

It is difficult to ascertain the degree of influence ACTA and *Counterattack* gained by virtue of their affiliation with the Vice Presidency/Senate and FBI, respectively. Nonetheless, as the ACTA and *Counterattack* cases demonstrate, when government-affiliated entities set out to influence academia, the effect is not always benign.

2. Faculty Harassment

While nothing approaching the McCarthy era's assault on college and university faculty has occurred in the post-9/11 era, the recent threats to academic freedom have not been completely idle. Numerous faculty members have been threatened with job retribution or otherwise intimidated as a result of beliefs they expressed, either orally or in writing, following the events of September 11, 2001.²⁷⁶

In the days following the attacks, University of New Mexico (UNM) associate history professor Richard M. Berthold told his class that "anyone who can blow up the Pentagon" had his support.²⁷⁷ After much of the University community reacted hostilely, Berthold quickly apologized for the remark.²⁷⁸ Nonetheless, Berthold was banned from teaching freshman-level classes, was issued a letter of reprimand by UNM, and was subjected to a post-tenure review.²⁷⁹ Some state legislators, feeling that this discipline was insufficient, tried (unsuccessfully) to repeal Professor Berthold's salary from the state budget.²⁸⁰

On September 12, 2001, Professor Charles Fairbanks of Johns Hopkins University publicly blamed Palestinians for 9/11 and told his class that he would "bet a Koran" that Osama bin Laden would not be captured.²⁸¹ As a result, the University demoted Dr. Fairbanks, but he was later reinstated following protests from professor groups.²⁸²

On October 2, 2001, some faculty members at City University of New York held a teach-in.²⁸³ The purpose was to discuss the causes of the terrorists

273. *Id.*

274. *Id.*

275. *Id.*

276. R. Kenton Bird & Elizabeth Barker Brandt, *Academic Freedom and 9/11: How the War on Terrorism Threatens Free Speech on Campus*, 7 COMM. L. & POL'Y 431, 450 (2002).

277. *Id.* at 450.

278. Richard M. Berthold, *Letter to the Editor*, UNIV. OF N.M. DAILY LOBO, Sept. 24, 2001 (on file with author).

279. Bird & Brandt, *supra* note 276.

280. *Id.*

281. *Id.* at 453.

282. *Id.*

283. *Id.* at 452.

attacks.²⁸⁴ Some faculty members who conducted research in relevant fields criticized American policy during the event.²⁸⁵ Soon thereafter, the Board of Trustees passed a resolution that condemned the entire event, calling it “seditious.”²⁸⁶

One of the most high-profile cases of post-9/11 suppression of faculty expression is that of Dr. Sami Al-Arian, a Computer Science professor at the University of South Florida.²⁸⁷ Al-Arian, an outspoken advocate for Palestinian independence, had urged the waging of Jihad on the Fox News Network’s “The O’Reilly Factor.”²⁸⁸ Host Bill O’Reilly also repeatedly accused him of being involved with terrorists.²⁸⁹ Following massive protest and demands for his removal from public and state officials, the University fired Al-Arian.²⁹⁰ After threats of sanction from the AAUP, the University relented and restored Al-Arian to his former position.²⁹¹

Similar incidents have continued on America’s campuses in the years following September 2001. Ward Churchill, a tenured Native American scholar and faculty chair of the Ethnic Studies Department at the University of Colorado, published a book in 2003 containing an essay in which he argued that the United States’ foreign policy was largely responsible for the September 11 attacks. In the book, *On the Justice of Roosting Chickens: Reflections on the Consequences of U.S. Imperial Arrogance and Criminality*,²⁹² Churchill condemned the attacks. He also claimed, however, that many of the World Trade Center victims could not legitimately be called “innocent.”²⁹³ This was so, he argued, because some of the victims were like “little Eichmans,”²⁹⁴ in that, like the notorious leader of German industrialists, they were technocrats serving the corporate and governmental

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* For a complete narrative and analysis of the Al-Arian incident through 2004, see Jeffrey S. Strauss, Note, *Dangerous Thoughts? Academic Freedom, Free Speech, and Censorship Revisited in a Post-September 11th America*, 15 WASH. U. J.L. & POL’Y 343 (2004).

288. Bird & Brandt, *supra* note 276, at 454.

289. Strauss, *supra* note 287, at 343.

290. *Id.*

291. *Id.* Al-Arian was fired again in 2003 after he was indicted on numerous criminal counts flowing from alleged financial support for Palestinian terrorists, perjury, and immigration violations. Eric Lichtblau, *Setback for U.S. in Terror Trial*, N.Y. TIMES, Dec. 7, 2005, at A1. After a five-month federal trial that ended in December 2005, a jury either deadlocked or acquitted him on each charge. *Id.* The Justice Department brought the charges again, and in February 2006, Al-Arian entered into a plea agreement in which he pleaded guilty to one of the eight charges against him. Under the terms of the agreement, he will serve some time in prison and then be deported. Elaine Silvestrini, *Al-Arian to be Deported*, TAMPA TRIB., Apr. 15, 2006, at 1. Between the time of his appearance on “The O’Reilly Factor” and the University of South Florida’s resulting efforts to terminate him, however, Al-Arian had not been charged with any crimes.

292. WARD CHURCHILL, *ON THE JUSTICE OF ROOSTING CHICKENS: REFLECTIONS ON THE CONSEQUENCES OF U.S. IMPERIAL ARROGANCE AND CRIMINALITY* (2003).

293. *Id.* at 19.

294. *Id.*

entities chiefly responsible for the offending foreign policy.²⁹⁵

The writing received little attention until January 2005, when Hamilton College in New York asked Churchill to come to speak on his views.²⁹⁶ This engagement drew awareness to his writings and prompted widespread outrage, ultimately resulting in Hamilton's canceling Churchill's speaking engagement.²⁹⁷ In the meantime, Churchill and various Hamilton College officials received death threats, Churchill's vehicle was vandalized and painted with a swastika, and several state and federal officials called for—and tried to effectuate—Churchill's termination.²⁹⁸ The Colorado state legislature passed measures condemning him²⁹⁹ and (perhaps taking a page from the New Mexico legislature's playbook) unsuccessfully sought to repeal Churchill's salary from the state budget.³⁰⁰ The governor of Colorado called for his termination, a Board of Regents member declared that "he can be fired,"³⁰¹ and New York Governor George E. Pataki said of Hamilton College's invitation to host Churchill: "[t]here's a difference between freedom of speech and inviting a bigoted terrorist supporter."³⁰² Churchill soon resigned his post as department chair.³⁰³

Soon thereafter, the University Board of Regents began an investigation to determine whether Churchill should be fired, ostensibly investigating evidence of his plagiarism and other misconduct.³⁰⁴ As of July 2006, a University panel had found him guilty of misconduct, but the case was still pending.³⁰⁵ Nonetheless, even if the allegations of plagiarism are valid, it seems clear that they would not

295. *Id.*

296. Patrick D. Healy, *College Cancels Speech Over 9/11 Remarks*, N.Y. TIMES, Feb. 2, 2005, at B1.

297. *Id.*

298. Michelle York, *Professor is Assailed by Legislature and Vandals*, N.Y. TIMES, Feb. 3, 2005, at B6.

299. H.R.J. Res. 1011, 65th Leg. (Colo. 2005); S.J. Res. 010, 65th Leg. (Colo. 2005); Richard T. DeGeorge, *Purely Academic: Even Professors Misinterpret This Freedom*, WASH. POST, May 15, 2005, at B3; Mike Littwin, *Now, It's All Ward Churchill, All The Time*, ROCKY MOUNTAIN NEWS, Feb. 10, 2005, at 7A.

300. Dave Curtin, *A College in Crisis*, DENVER POST, Mar. 11, 2005, at A1.

301. *Id.*

302. Michelle York, *Professor Quits a Post Over a 9/11 Remark*, N.Y. TIMES, Feb. 1, 2005, at B8.

303. *Id.*

304. Kirk Johnson, *Incendiary in Academia May Now Find Himself Burned*, N.Y. TIMES, Feb. 11, 2005, at A13.

305. In early 2005, a five-member faculty committee found that the academic misconduct allegations against Churchill had merit, and recommended dismissal. The eleven-member Standing Committee on Research Misconduct also recommended dismissal. Churchill appealed the determination to the Faculty Senate Committee on Privilege and Tenure on July 5, 2006, alleging retaliation over statements made in his book. The Committee will convene a panel to hear arguments and make its recommendation to University of Colorado President Hank Brown, which will take anywhere from two weeks to several months. Brown will decide whether to forward the recommendation on to the Board of Regents, which will then take a final public vote on whether to dismiss Churchill. Sara Burnett, *Churchill Appeals Pending Dismissal: Retaliation Over Free Speech Alleged*, ROCKY MOUNTAIN NEWS, July 6, 2006, at 6A; Manny Gonzales, *Churchill Appeals Suggestion That CU Fire Him*, DENVER POST, July 6, 2006, at B1.

have been brought but for the uproar that Churchill's controversial views provoked. One Hamilton College senior said of the incident, "I think it's no longer about free speech—it's turned into this kind of thing that we can't talk about September 11 . . . [but] [t]he fact that [Churchill] is so extreme challenges people to think more."³⁰⁶

It is difficult to gauge the precise extent to which these actions by federal, state, and public college and university officials in recent years have abridged scholars' academic freedom of speech. None of these incidents, nor any other incident in which a faculty member was penalized for his or her expression, has been grounds for a civil lawsuit to date. Nonetheless, history and conventional wisdom teach us that the actions by these government officials may well have chilled faculty productivity and inhibited the otherwise relatively unfettered environment for expression. That this effect cannot yet be easily measured does not diminish its potential significance.

According to free speech scholars R. Kenton Bird and Elizabeth Barker Brandt, "the reluctance of U.S. faculty members to engage in constructive criticism of the Bush Administration and its policies stems from a realization that their presidents are less likely to defend free speech in this climate."³⁰⁷ Because of their views, the government threatened both Churchill and Al-Arian with losing their jobs. Moreover, Churchill felt compelled to resign his department chair as a result of the firestorm surrounding his essay. As these cases demonstrate, "the informal mechanisms designed to promote hegemony and deter dissent are working effectively."³⁰⁸ Bird and Brandt attribute the effectiveness of these "informal mechanisms" to "the failure of colleges and universities to defend the importance of academic freedom in the face of the public climate of intolerance for dissent"³⁰⁹ and claim that "prominent leaders within academia have believed it necessary . . . to take action against campus critics of U.S. policy."³¹⁰ Such actions may have created a chilly climate for the production of ideas. As faculty members have become increasingly unsure of the extent to which they will face retribution for statements that could be thought to undermine national foreign policy, the environment for their candid expression has become quite unfriendly. To the extent scholars are wary of the incongruity of current academic freedom doctrine, this awareness—inadequate redress in the courts—surely contributes meaningfully to the campus chilling effect.

B. Speech Codes and Heightened Political Sensibilities Have Curbed Academic Freedom

Threats to academic freedom in recent years have not come solely from college and university officials reflecting traditional values of patriotism or support for a conservative-leaning federal administration. Since the early 1990s, higher

306. Johnson, *supra* note 304.

307. Bird & Brandt, *supra* note 276, at 459.

308. *Id.*

309. *Id.* at 458.

310. *Id.*

education culture has increasingly embraced a set of progressive principles sometimes collectively described (especially by their critics) as “political correctness.” These principles purport to support “broad social, political, and educational change, especially to redress historical injustices in matters such as race, class, gender, and sexual orientation”³¹¹ and hold that “language and practices which could offend political sensibilities . . . should be eliminated.”³¹² Many colleges and universities have changed their codes of conduct to include prohibitions of speech and behavior thought to be inconsistent with these values. Some such regulations have, in various ways, sought to prohibit the use of language deemed to “offend political sensibilities.”

Predictably, such regulations have clashed with First Amendment principles in both debates over their prudence and litigation over their legality.³¹³ While speech codes that have faced court challenges have consistently been declared unlawful,³¹⁴ colleges and universities continue to employ codes that are either of questionable legality and go unchallenged, or that are potentially lawful as written but enforced unlawfully.³¹⁵ The existence of such codes—even when the codes are ultimately struck down—exerts a strong speech-chilling effect on members of the academic community.³¹⁶ Moreover, although many such codes are usually codified and target student conduct, unwritten, implied speech mores, along with written codes, have directly affected faculty members and their research. Two notable cases are typical.

David Ayers was a conservative assistant professor of sociology at Dallas

311. AMERICAN HERITAGE DICTIONARY 1401 (3d ed. 2000).

312. MERRIAM-WEBSTER COLLEGiate DICTIONARY (11th ed. 2001).

313. For a thorough discussion of the constitutional implications of college and university speech codes, see generally J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399 (1991).

314. See, e.g., *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370–72 (M.D. Pa. 2003) (holding that the following provisions of a university’s speech code were unconstitutionally overbroad: provisions prohibiting “acts of intolerance”; provisions directing students to “communicate their beliefs ‘in a manner that does not provoke, harass, intimidate or harm another [sic]’”; provisions prohibiting one from “maliciously intend[ing] to engage in activity . . . that causes subordination” on listed grounds; and provisions requiring “every member of the [Shippensburg University] community to ensure that the principles of [Shippensburg’s] ideals were mirrored in their attitudes and behaviors”); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wisc. Sys.*, 774 F. Supp. 1163, 1166 (E.D. Wis. 1991) (holding speech code impermissibly vague and overbroad, and not lawful under the First Amendment’s “fighting words” exception where code prohibited speech that was “racist or discriminatory,” “directed at an individual,” “[d]emean[ed] the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual addressed,” and “[c]reate[d] an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity”); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 856, 858 (E.D. Mich. 1989) (ruling that policy prohibiting, *inter alia*, “creat[ing] an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities” was overbroad and unconstitutionally vague where sanctionable conduct included, e.g., a male student saying in class, “[w]omen just aren’t as good in this field as men”).

315. See, e.g., *Doe*, 721 F. Supp. at 865 (holding that policy was overbroad in part because it was “consistently applied to reach protected speech”).

316. See, e.g., *Bair*, 280 F. Supp. 2d at 365.

Baptist University.³¹⁷ His research included critiques of modern feminism.³¹⁸ In one of his articles, he presented cross-cultural research supporting his claims that the roots of patriarchy are biological and that efforts to establish a gender-neutral society are unnatural.³¹⁹ The essay³²⁰ was published in a book that was named Book of the Year by *Christianity Today*.³²¹

After Ayers presented his work at an on-campus colloquium, outrage among campus feminists sparked the organization of another colloquium, at which Ayers' work was harshly criticized and a paper equally critical of him was distributed.³²² When Professor Ayers learned that he was being disparaged by faculty members in other classes, he distributed a copy of the critical paper and put the recordings of both his and his critics' lectures (all of which were already publicly available) on reserve at the school's library.³²³ The University soon charged Ayers with "defaming a faculty member" and with disclosing the "confidential materials" from a faculty colloquium.³²⁴ Ayers' dean, John Jeffrey, who was made responsible for investigating the matter, ultimately defended Ayers, saying that "[e]ven if all the charges [the University president] has made against Dave Ayers were true, none would represent any perceivable wrongdoing in light of our Faculty Handbook, and the AAUP guidelines . . ."³²⁵ Jeffrey cited academic freedom concerns and refused to investigate the matter further.³²⁶ One week later, with no reason given, both Ayers and Dean Jeffrey were terminated.³²⁷

Judith Kleinfeld was a professor of psychology at the University of Alaska-Fairbanks specializing in the study of the indigenous peoples of Alaska.³²⁸ At a lecture she was invited to give by a University regent and a dean, she suggested that there were "equity pressures on professors to graduate native students" before they were truly prepared to graduate.³²⁹ When the content of her lecture circulated, campus groups organized demonstrations with the purpose of protesting views they considered racist.³³⁰ The University suspended her from teaching while it conducted an investigation into the matter.³³¹ Various members of the University

317. ALAN CHARLES KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES 122 (1998).

318. *Id.*

319. *Id.*

320. David Ayers, *The Inevitability of Failure*, in RECOVERING BIBLICAL MANHOOD AND WOMANHOOD: A RESPONSE TO EVANGELICAL FEMINISM 312 (John Piper & Wayne A. Grudem, eds., 1991).

321. KORS & SILVERGLATE, *supra* note 317.

322. *Id.* at 122–23.

323. *Id.* at 123.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* at 124.

328. *Id.* at 127–28.

329. *Id.* at 127.

330. *Id.* at 128.

331. *Id.*

filed charges with the U.S. Department of Education Office of Civil Rights.³³² Both investigations eventually concluded that there were no grounds for action, but not before Kleinfeld had spent thousands of dollars in legal fees defending herself.³³³ According to Kleinfeld, she now refrains from addressing “in even the broadest terms the educational issues that affect native students” (her academic focus) as a result of the University and government actions.³³⁴

The actions of these officials to reprimand or otherwise admonish faculty for the viewpoints articulated in their scholarly expression both violate the academic freedom of the professors involved and create a universal chilling effect on expression considered outside the mainstream. Indeed, faculty academic freedom has been besieged in recent years from those traditionally thought to occupy both the right and the left of the political spectrum.

V. A BRIEF REVIEW OF SELECTED ACADEMIC FREEDOM SCHOLARSHIP

Several law commentators have addressed the issue of whether and to what extent the First Amendment should protect academic freedom at public colleges and universities.³³⁵ Some have also considered what standards are most appropriate for college and university faculty versus primary and secondary school faculty. Three relevant recent works are described below.

Writing in the *California Law Review* in 2003, Commentator Rebecca Gose Lynch argues that faculty expression cases analyzed under *Pickering-Connick* should only be deemed to involve academic freedom if the faculty member is not speaking as a citizen and the public employee prong is used.³³⁶ Moreover, Lynch

332. *Id.*

333. *Id.*

334. *Id.*

335. See, e.g., Lynch, *supra* note 11, at 1107; Hiers, *supra* note 60 (recognizing the failure of the Supreme Court to address “whether the severely restrictive standards developed in the . . . line of cases [concerning public school teachers and other public employees] must also apply to academic free speech,” and concluding that the struggle between individual and institutional academic freedom has been overblown, and that court holdings can be read to endorse both); Karen Daly, *Balancing Act: Teachers’ Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1 (2001) (arguing that courts have construed the definition of “public concern” too narrowly and urging courts to recognize the need for classrooms to be free from “indoctrination,” the student’s right to obtain information, and the need for structural protections when teachers are faced with student complaints concerning their teaching); Karin Hoppmann, *Concern with Public Concern: Towards a Better Definition of the Pickering/Connick Threshold Test*, 50 VAND. L. REV. 993 (1997); Richard Hiers, *New Restrictions on Academic Free Speech: Jeffries v. Harleston II*, 22 J.C. & U.L. 217 (1995); Stacy E. Smith, Note, *Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities*, 59 WASH. & LEE L. REV. 299 (2002); Ailsa W. Chang, Note, *Resuscitating the Constitutional “Theory” of Academic Freedom: A Search for a Standard Beyond Pickering and Connick*, 53 STAN. L. REV. 915, 938 (2001) (recognizing inherent problems in applying *Pickering-Connick* public employee speech analysis to academic contexts and noting that professors, unlike most other employees, “share a significant amount of managerial power at a university,” and arguing that the “mechanistic” *Pickering-Connick* approach “cannot effectively take into account the university’s institutional academic freedom interests as a public employer”).

336. Lynch, *supra* note 11, at 1066.

argues, in cases that involve true academic freedom when the professor is speaking as an employee, the expression is within the state's "managerial realm" and the state therefore has a "managerial interest" in the speech.³³⁷ In that case, courts should use a "functional necessity" analysis. That is, it should be determined "whether restricting the speech is functionally necessary to realization of the state or institutional goals." If so, then the employer is free to limit the expression.³³⁸ Lynch's novel approach, however, could restrict speech where doing so is necessary to realize "state goals" that are constitutionally illegitimate, for example, quashing incendiary speech such as Ward Churchill's work.

Professor Edgar Dyer, writing in 1997, identifies the inherent problem of not recognizing a "distinction between higher education and primary/secondary education" in applying *Pickering-Connick* to college and university faculty.³³⁹ He urges giving "the utmost protection to the spoken, written, or artistic expressions of an academician who is engaging in such expression as an academician," who is speaking within his or her field of expertise, and who "speak[s] or express[es] for the purpose of advancing the truth."³⁴⁰ Those speakers meeting these criteria would be afforded special treatment by the courts; those faculty who do not meet each of the criteria would be subject to traditional *Pickering-Connick* analysis.³⁴¹

Dyer wisely acknowledges the inadequacy of *Pickering-Connick* as applied to public college and university faculty. But his three-part approach raises several questions and provides little guidance to courts in fashioning a more appropriate model.

First, Dyer proposes a special standard for academicians, but does not define the term. The status of some speakers as academicians is obvious, but the status of most speakers is less obvious. What of those employees of teaching-focused institutions, particularly "instructors" or "lecturers," who do not engage in scholarship? Dyer makes much of *Pickering-Connick*'s inapplicability to higher education. But are not, for instance, the duties of an instructor at a technical educational institution (while they certainly are critical to society) more like those of a high school teacher than a research professor?

Dyer's approach also protects too many types of speech. Under his proposal, "utmost protection" would apparently even be provided to the content of classroom curriculum. This would effectively strip institutions of all control over curriculum, raising several problems. For example, because it is the institution and not the professor who contracts with students to provide a certain standard of education, those institutions must assume responsibility for delivering the educational product. To remove control of pedagogy from the institution would turn public higher education on its head.

337. *Id.*

338. *Id.*

339. Edgar Dyer, *Collegiality's Potential Chill Over Faculty Speech: Demonstrating the Need for a Refined Pickering and Connick for Public Higher Education*, 119 EDUC. L. REP. 309, 318 (1997).

340. *Id.* at 319–20.

341. *Id.* at 320.

Dyer's approach also is problematic in its requirement that the academician's purpose must be "advancing the truth." Apart from the inherent difficulty in ascertaining a scholar's actual purpose for research, the standard significantly overprotects scholars and scholarship. Using this approach, scholarship riddled with major methodological errors and procedural blunders could be fully protected, so long as it is well-intentioned. As a result, this standard could bar institutions from using any consideration of scholarship quality in making hiring, firing and tenure decisions. So while Dyer deserves credit for recognizing that the public concern test has not adequately served higher education, his approach would prove untenable.

In *A New Balance of In-Class Speech: No Longer Just a "Mouthpiece,"* Professor Todd DeMitchell takes a limited view of academic freedom, urging that to the extent it exists at all, state interests should take priority.³⁴² DeMitchell argues that the approach of another commentator, Karen Daly, "distances the public from their public schools."³⁴³ DeMitchell claims that "[s]chools serve the public good and are answerable to the public through elections and budget sessions."³⁴⁴ Therefore, he concludes, public institutions should not be a "forum for educators" but should "meet the needs of the public."³⁴⁵

DeMitchell's argument makes the mistake of failing to distinguish between primary and secondary institutions on one hand, and institutions of higher education on the other. The thesis centers on the various roles of teachers, administrators, and the public in public education. But with no mention of the role of faculty research, he implicitly extends his conclusion to cover all higher education faculty conduct. DeMitchell's position is one of many that considers only the rights of secondary school faculty, thereby limiting the scope of academic freedom and failing to recognize the very different role and responsibilities of college and university faculty.

Where DeMitchell discusses higher education, he acknowledges an academic freedom right in faculty members, but claims that it is always subordinate to the academic freedom of the institution: "[E]mployee speech which . . . interferes with, or is in conflict with the institution's pursuit of academic freedom, must yield to the institution."³⁴⁶ Because, as we have seen, it is usually the institution (sometimes under pressure from the state) seeking to limit professors' academic freedom, the scope of faculty academic freedom under his approach is almost negligible. Moreover, DeMitchell's approach is under-inclusive because the underlying values of academic freedom, as conceived by Enlightenment philosophers, the AAUP founders and many modern scholars—to shield faculty research from government censorship *based on its viewpoint*—are not sufficiently served.

342. Todd A. DeMitchell, *A New Balance of In-Class Speech: No Longer Just a "Mouthpiece,"* 31 J.L. & EDUC. 473, 481 (2002).

343. *Id.* at 473.

344. *Id.* at 479.

345. *Id.* at 481.

346. *Id.*

VI. A NEW APPROACH: THE RESEARCH DERIVATIVE TEST AND RESEARCH VIEWPOINT ANALYSIS

Although *Pickering* concerned a public school teacher and its holding purported to stem in part from academic freedom principles, the *Pickering-Connick* analysis was intended to apply to public employees generally. It did not address the unique free speech interests of academics. Some courts and scholars have scoffed at the notion of faculty members receiving special First Amendment protection not afforded to other public employees.³⁴⁷ This position, however, fails to consider the underlying principles of free speech theory. Faculty speech should receive protection not because of the speaker's title or status, but because the kind of expression that faculty (and others) often provide is among the most valuable of all speech.

As discussed above, one school of free speech theory holds that speech must be protected because it permits individuals to "self-realize."³⁴⁸ That is, it allows individuals to develop their faculties, achieve a unique identity, and so on.³⁴⁹ Viewed from this perspective, scholarly research is a form of self-expression deserving of protection, but not necessarily more protection than other forms of self-realizing expression, such as discussing a favorite baseball team or playing the guitar.

Two other schools of free speech theory, however, both stress that the most important basis for protecting speech is its social and political utility. According to Alexander Meiklejohn, speech is valuable to the extent that it serves to educate and inform those who hear it and gives them the opportunity to make choices that improve their lives.³⁵⁰ According to John Staurt Mill, free speech is important to maintain the "marketplace of ideas" and the search for truth, but Mill also valued the results that are derived from society's hearing and weighing various viewpoints. If one accepts that either of these is the primary justification (or even just a valid independent justification) for free speech protection, then scholarly research is perhaps the most valuable of all speech.³⁵¹ Again viewed from the audience's perspective, scholarship is, in a sense, professional speech. The purpose of scholarship—and a chief motivator for most scholars—is the creation

347. See, e.g., *Urofsky v. Gilmore*, 216 F.3d 401, 415 (4th Cir. 2000) (concluding Supreme Court jurisprudence does not extend a right to professors beyond the rights protected for all public employees), *cert. denied*, 531 U.S. 1070 (2001).

348. See *supra* text accompanying notes 22–23.

349. *Id.*

350. See *supra* text accompanying note 18–20.

351. Critics may respond that other forms of speech—e.g., pamphlets exposing human rights abuses or government corruption—are of equal or greater value than scholarship. This category of speech, which includes revealing government wrongdoing, is certainly among the most valuable speech. No doubt, the value of some individual revelations in this category will often trump the value of *individual* pieces of scholarship. However, it is the author's belief—and this article's assumption—that scholarship as a broad *category* of speech is more important than all other individual categories. A complete defense of this position is outside the scope of this article. As the argument briefly goes, scholarship is the most valuable mode of speech because, from a systemic perspective, it is the nerve center of society. In the marketplace of ideas, scholars are not just the traders, but the craftsmen as well.

and expression of novel information that will in some way serve the public. Economists tell us what actions will maximize our welfare; those studying public policy predict how various policy choices will affect other people, states, and nations; microbiologists and chemists tell us how to make better medicines; law professors explain what rules of law will result in the most just outcome; and so on. Justice Earl Warren left no doubt of the importance to society he attached to scholarship when he wrote in *Sweezy v. New Hampshire* that scholars “must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”³⁵²

The *Pickering-Connick* holdings created a dichotomy in freedom of expression doctrine for public school employees. It identified a class of speech of the “citizen, commenting upon matters of public concern,” and speech that concerns only private or employment-related matters generated by the employee, acting strictly as an employee.³⁵³ The former category is heavily protected under *Pickering-Connick*; the latter, under *Garcetti*,³⁵⁴ receives no protection. This analytical framework, while readily applicable to many primary and secondary school teachers, is not so easily applied to public college and university faculty members.

Under *Pickering-Connick* and *Garcetti*, one is deemed either a citizen who is commenting on matters of public concern or an employee who is commenting on matters that are not of public concern. The doctrine appears not to contemplate a *citizen* commenting on matters of *non-public* concern, or more critically, an *employee* commenting (as an employee) on matters of *public* concern. As Justice Stevens noted in his *Garcetti* dissent, a dichotomy that “categorically den[ies] *Pickering* protection to any speech uttered ‘pursuant to . . . official duties’” is unjustified.³⁵⁵

This dichotomy is problematic, especially for college and university faculty. As employees whose job it is both to produce knowledge and to disseminate it (via the classroom, publication, and public lecture), professors’ craft does not fit neatly into the *Pickering-Connick* paradigm, as it actually falls into both of the Court’s categories: faculty members are almost always employees commenting on matters of public concern.

This is true because, in theory, the information that faculty members produce and disseminate through publication and scholarly lecture necessarily involves some matter of public concern. Otherwise, it is of little value. The academic’s work need not bear on a contemporary political issue, but it must, at a minimum, potentially influence some sector of society. This holds for every academic discipline, from molecular genetics to ancient Greek. Considering only this aspect of faculty members’ research, such expression—disseminated orally or in writing—would fall into the citizen-speaker category of *Pickering-Connick*. But the nature of faculty academic research can also be framed in a different way.

In addition to representing expression that deals with matters of public concern,

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

353. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

354. *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

355. *Id.* (Stevens, J., dissenting).

researching and publishing is at the very heart of the faculty members' job description. The academic is being paid to do this work; but for her employment with the institution, she might be unwilling or unable to engage in such endeavors. In this sense, the expression is more akin to the second *Pickering-Connick* category, because the expression comes solely from the employee's position as an employee and is actually one of the employee's listed responsibilities. It is distinguishable from the first category in that the faculty member cannot be understood to be "speaking" only as a citizen. But the academic's job duties are entirely unlike any other government worker; per the generally accepted AAUP principles, it is understood that the academic's job duties are to bring his intellect and expertise to bear in thinking freely, employing valid methodology, and divulging, in good faith, the intellectual product of this process. So while the academic performs his work pursuant to his employment contract, he runs afoul of his duties only when he behaves dishonestly, ceases to exert a good faith effort toward his goals, or clearly treads outside the boundaries of his field.

Thus, in disseminating research, the academic is at once speaking about public concerns and discharging his contractual employment obligations to the state. As such, the academic's work product shares traits from both the protected and unprotected categories of *Pickering-Connick*, leaving academic research freedom in a precarious position within the *Pickering-Connick* analytical framework. The approach that *Pickering-Connick* and its progeny have created, which effectively lumps employee behavior into either citizen-public concern speech or employment-related speech, appears to have been constructed with the liberty rights of the speaker in mind. But by focusing exclusively on the right of the speaker, the approach overlooks the benefit of the speech to the listener.

Considering only the facts of *Pickering* (a secondary school teacher writing about the school's bond levy), *Connick* and *Garcetti* (district attorney's offices), and *Rankin* (a law enforcement agency), it is understandable that the Court would fashion a rule that does not identify scholarly research as occupying a unique place in First Amendment doctrine. But as courts have demonstrated,³⁵⁶ a rule that ignores the benefits of academic speech for academic research will most certainly under-protect such speech. Therefore, only an approach to scholarly research that is mindful of the uniquely significant value of such expression to society will be adequately protective. A new approach is needed.

A. Approach Overview

For the reasons discussed above, when considering restrictions on the speech of public institution faculty, courts should acknowledge the difference between restriction of classroom speech and that of scholarship speech. The traditional *Pickering-Connick* analysis is adequate for instances where the speech being restricted clearly involves the faculty member acting in her personal capacity, for speech touching on matters of public concern, and when the speech clearly involves the faculty member as classroom teacher. However, the test does not

356. See, e.g., *Jeffries v. Harleston*, 52 F.3d 9 (2d Cir. 1995).

satisfactorily apply to faculty scholarly research. Therefore, when such speech is implicated, a third standard should be utilized. The standard would closely mimic traditional First Amendment viewpoint-sensitive analysis by seeking the basis on which the speech is being regulated. That finding would determine the standard of scrutiny to be applied. The approach introduced here has two parts: (1) the research derivative test and (2) research-viewpoint analysis.

Unlike many other suggested approaches,³⁵⁷ the analytical approach recommended here is not unduly complex to employ. Moreover, instead of giving special rights to a class of people, it utilizes the well-established First Amendment practice of considering a *form of speech*—in this case, scholarship—to be of higher value than others.³⁵⁸ That is, it alters the *Pickering-Connick* doctrine to require full First Amendment protection for the *types of speech* that faculty members are largely responsible for producing.

B. The Research Derivative Test

Lumping research speech and teaching speech into the same group ignores the significant differences between the two endeavors. Consequently, it fails to provide the separate analytical schemes that are appropriate for the two distinct behaviors. Despite this, courts have historically considered the fruits of faculty research to be in one of the two *Pickering-Connick* categories. When faculty undertake traditional research within the campus walls, courts have generally treated it under the employee/non-public concern *Pickering-Connick* prong.³⁵⁹ When a faculty member speaks publicly (even when she is speaking pursuant to her scholarship), courts treat it as public concern speech.³⁶⁰ This is an incoherent approach.

The research derivative test significantly expands the scope of public concern speech. Under the test, all scholarly speech—either oral or written—that is derived from state-sponsored scholarship or from research performed pursuant to a public employee's duties is classified as scholarship and considered not as private employee speech but as speech of public concern. It is then subjected not to traditional *Pickering-Connick* balancing, but to the *research viewpoint analysis* described below.

This standard should be afforded only to speech deriving from research within the scholar's field of expertise.³⁶¹ When faculty members speak on matters in

357. See *supra* text accompanying notes 339–41.

358. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (discussing low value speech in holding that “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which [do not] raise any Constitutional problems”).

359. See, e.g., *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000).

360. See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 564 (1968).

361. For example, the test would not protect the comments made by former Harvard University President Lawrence H. Summers (even assuming he were employed by a public institution). Summers, an economist, said at a January 2005 academic conference that biological differences between men and women may partially explain why men have historically enjoyed more success in the sciences than women. Sam Dillon, *Harvard Chief Defends His Talk on Women*, N.Y. TIMES, Jan. 18, 2005, at 16. The resulting uproar was a factor in his resignation in

which they have no particular expertise or those that cannot reasonably be considered to be within their field, such statements should fall under the private employee speech category.³⁶²

The *Jeffries* case shows how the secondary school *Pickering-Connick* analysis fails to perform properly when applied to higher education faculty.³⁶³ Deciding the case on remand from the Supreme Court,³⁶⁴ the Second Circuit used the public concern prong of *Pickering-Connick*, and in so doing, found that because of Jeffries' public statements and the resulting reaction, the college had acted with reasonable belief that allowing Jeffries to maintain his position would have been disruptive to the operation of the campus.³⁶⁵

Although the speech of both Pickering and Jeffries dealt with matters of public concern, Jeffries' statements are easily distinguishable from Pickering's. Although Pickering acquired the information expressed in his letter in part through his position with the school, he was, nonetheless, acting as a citizen, speaking on a subject wholly unrelated to his professional duties. Jeffries, however, was speaking on a subject related to his academic duties.³⁶⁶ He was describing the findings of his professional research—required behavior for college and university faculty. Therefore, under the research derivative approach, Jeffries was engaged in research pursuant to his academic duties and would accordingly receive the protection of academic freedom doctrine.

The David Ayers Dallas Baptist University incident,³⁶⁷ although it occurred at a private university and resulted in no litigation, is also illustrative. David Ayers

February 2006. Alan Finder et al., *President of Harvard Resigns, Ending Stormy 5-Year Tenure*, N.Y. TIMES, Feb. 22, 2006, at 1. Because Summers was not speaking as a scholar (as he had done no work in that field), the research derivative test would be inapplicable.

362. Under the functional necessity approach recommended by Lynch, *supra* note 11, the test for the validity of an academic freedom “managerial realm” speech restriction is similar to the test for a restriction affecting an employee-citizen speaking on a matter of public concern. Both involve the assessment of the degree to which the speech interferes with the functioning of the institution. Because teaching and speaking as a citizen sit at opposite ends of the academic freedom spectrum (the former being the most within the state’s managerial realm and therefore of most concern to it, the latter most *outside* the managerial realm and therefore of *least* concern to it), it is counterintuitive that they should undergo the same analysis. Nonetheless, they function adequately because public concern speech that is at odds with the institution’s priorities typically interferes less with the functioning of the institution than does, say, classroom speech that contradicts the school’s pedagogical mission or speech critical of an office’s functioning.

363. *Jeffries*, 52 F.3d 9. See *supra* notes 216–27 and accompanying text.

364. In considering the case the second time, the Second Circuit was bound by the Supreme Court’s recent decision in *Waters v. Churchill*, 511 U.S. 661 (1994). *Waters* held that a government employee may be terminated for speaking on a matter of public concern where “(1) the employer’s prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech.” *Jeffries*, 52 F.3d at 13. *Waters* altered the *Jeffries* analysis by requiring the court to consider what disruption the college or university reasonably believed would likely result from the speech, not merely the disruption that actually occurred. *Id.* at 10.

365. *Jeffries*, 52 F.3d at 9.

366. *Id.*

367. See *supra* notes 317–27 and accompanying text.

was apparently terminated because some of his colleagues found the conclusions of his research objectionable. Moreover, the action was taken by the administrators of a conservative Baptist university. If, hypothetically, this incident had taken place at a public school, because the incident stemmed from a speech he gave, traditional *Pickering-Connick* analysis might apply the public concern test to Ayers. This would balance the disruption to the institution against his free speech rights, producing an uncertain outcome. Alternatively, courts, especially after *Garcetti*, might consider the lecture as part of his public employee duties (he was invited to give it by the college vice president), thus giving Ayers no hope of prevailing on any First Amendment claim.³⁶⁸ The research derivative test, however, would do neither; it would consider the lecture to flow naturally from his scholarly work and would analyze it under the more scrutinizing research viewpoint analysis test described below.

C. Research Viewpoint Analysis

Speech that is determined to flow from research or scholarship should be analyzed using what is termed, for purposes of this article, as research viewpoint analysis, an approach that relies on traditional First Amendment viewpoint distinction analysis.³⁶⁹

368. Cf. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000).

369. Viewpoint distinction is a narrower form of content distinction and is recognized as the “most pernicious of all distinctions based on content.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 895 (1995) (Souter, J., dissenting). The viewpoint distinction principle, as the term implies, holds that a regulation may not “discriminate against speech on the basis of its viewpoint.” *Id.* at 829. See also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785–86 (1978) (“Especially where . . . the legislature’s suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.”) (footnote omitted).

To better comprehend the viewpoint distinction principle, a brief discussion of the First Amendment content distinction doctrine is instructive. The content distinction doctrine arose out of a line of cases beginning with *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), and *Schacht v. United States*, 398 U.S. 58 (1970). The doctrine holds that where the government seeks to limit speech based on its content, courts should use strict scrutiny in reviewing the constitutionality of the law that provided the warrant for the state’s action. On the other hand, when a law restricts speech without regard for content, i.e., is “content-neutral,” a less rigorous standard of review should be applied. So a ban on all public expression outside of a polling place during an election is content neutral, warranting low scrutiny, while a ban on speech related to a given levy issue is content discriminatory, triggering strict scrutiny. The distinction is grounded in the premise that restrictions on speech that discriminate based on the type of speech being conveyed are more obnoxious to free speech principles than are restrictions that limit only the method of delivery.

Although this approach has been criticized as unprincipled by some legal commentators, see Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981) (arguing that the content distinction is an illogical method of analysis), the Supreme Court as recently as 2003 has continued to endorse its use. See *McConnell v. FEC*, 540 U.S. 93 (2003). For a complete discussion of content and content-based doctrine, see Steven J. Heyman, *Spheres Of Autonomy: Reforming The Content Neutrality Doctrine In First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647 (2002); Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme*

This approach would meaningfully increase judicial protection of faculty scholarship. When a public college or university seeks to restrict scholarship by taking adverse action against its producer, the first step of the analysis would ask the justification for the restriction. If it is viewpoint neutral, then the decision would not receive strict scrutiny. Because the approach would give more deference toward restrictions that are merely content sensitive, the institution would retain the power, as described in *Lamb's Chapel*,³⁷⁰ to control the general subject matter of its faculty members' scholarship. In this case, the institution's desire to preserve its reputation for exemplary scholarship, to prioritize certain disciplines or subject matters, or to clear room for more productive research would all suffice as valid objectives accomplished through means such as termination of the scholar or other adverse action calculated to discourage poor quality work.

If, on the other hand, the restriction is determined to be viewpoint-sensitive, that is, based on the scholar's view or message, then it would receive the highest level of scrutiny. While it would be difficult to sustain restrictions falling into this category, it would not be impossible. A showing by the state that the restriction was the only way to curtail massive, sustained disruption or impending violence would likely be sufficient.³⁷¹

In the *Jeffries* case, if it was determined that disagreement with his scholarly views or the resulting public reaction motivated the University's action, this approach would have mandated strict scrutiny. It would have required the University to show that the adverse action against Jeffries was necessary to prevent major disruption of the University's functioning, even if the only deprivation was Jeffries' removal as department chair.³⁷²

Court's Application, 74 S. CAL. L. REV. 49 (2000); Redish, *supra*.

Speech that discriminates on the basis of viewpoint is even less tolerable to the Constitution than content discrimination. *Rosenberger*, 515 U.S. at 829–30 (“Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.”). For example, then, a law that prohibited pro-life speech would likely be held invalid even under circumstances under which a law that prohibited all abortion-related speech might be permitted. In the context of secondary schools, restrictions on speech “can be based on subject matter . . . so long as the distinctions drawn are reasonable . . . and are viewpoint neutral.” *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–93 (1993).

370. See *Lamb's Chapel*, 508 U.S. at 392–93.

371. See *Waters v. Churchill*, 511 U.S. 661 (1994) (plurality opinion).

372. On remand, the Second Circuit hinted that had the sanction been more severe, it might have required applying a higher standard than that used in *Waters*. *Jeffries v. Harleston*, 52 F.3d 9, 14–15 (2d Cir. 1995). The court stated:

[A]n amicus curiae argues . . . as a faculty member in a public university, [Jeffries] deserves greater protection from state interference with his speech than did the nurse in *Waters* who complained about the obstetrics division of the hospital. We recognize that academic freedom is an important First Amendment concern. Jeffries' academic freedom, however, has not been infringed here. . . . Jeffries is still a tenured professor at CUNY, and the defendants have not sought to silence him, or otherwise limit his access to the “marketplace of ideas” in the classroom.

In the case of Richard Ayers, the result would have been similar. Although the University ostensibly took action against Ayers for improperly distributing a faculty member's material, the court would have likely seen this as pretext for discrimination on the basis of viewpoint. (Recall that the faculty members who distributed *his* paper were not sanctioned.) Again, faced with strict scrutiny, the University would have been hard-pressed to justify its actions.

And in the Ward Churchill case, Churchill composed his essay as part of his scholarly endeavors; the initial negative reaction to it was quite obviously because of its viewpoint. While the University maintains that its investigation into his research methodology was content neutral, a court would be responsible for resolving this factual dispute. To the extent any adverse action was the result of Churchill's viewpoint, it would be unlawful.

D. Criticism Addressed

Some may respond that this viewpoint analysis approach is unworkable because of the difficulty in distinguishing between adverse action against a faculty member or his research because of its poor quality on one hand, and because its results or conclusions render it objectionable on the other. Critics may suggest that a typical evaluator determining the "worth" of research will inevitably consider both the degree to which the final product resonates with him and the quality of the work that underlies the result. Very often, the two are inseparable, the argument would go; as a result, attempting to classify an evaluation of a research product as solely based either on its "quality" or its viewpoint is a generally futile undertaking.

However, scholars have already suggested methods for distinguishing faculty endeavors that should be considered protected by academic freedom and those that should not. Florida State University College of Law Dean Donald J. Weidner has characterized academic freedom as:

[T]he freedom of a teacher or researcher in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or the instruction of students, without interference from political or ecclesiastical authority, or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or contrary to professional ethics.³⁷³

College and university officials and faculty review committees, the majority of whom presumably value academic freedom and self-regulate against its infringement, routinely make these hard decisions,³⁷⁴ as do faculty members in

Id. (internal citations omitted).

373. Donald J. Weidner, *Academic Freedom and the Obligation to Earn It*, 32 J.L. & EDUC. 445, 447 (2003).

374. See, e.g., UNIV. OF COLO., REPORT OF THE INVESTIGATIVE COMM. OF THE STANDING COMM. ON RESEARCH MISCONDUCT AT THE UNIV. OF COLO. AT BOULDER CONCERNING ALLEGATIONS OF ACAD. MISCONDUCT AGAINST PROF. WARD CHURCHILL (May 9, 2006), available at <http://www.colorado.edu/news/reports/churchill/churchillreport051606.html>.

evaluating the quality of their students' research. They are obliged to assign a grade, and in many cases are forced to distinguish their personal feelings about the conclusion from the objective quality of the work: the former should not be considered in assigning the grade, the latter must be. Whether it is possible to draw a bright line between the quality of work and the degree to which it resonates with a given person or persons, the fact remains that doing so is an essential part of the administration of a scholarship-producing entity. If academics can do it, then courts, with the expert advice and assistance of scholars, can as well.

There are many cases—during the Cold War and today—where the action taken against the professors was transparently based solely on the viewpoint they expressed and not on any concern with the quality of their work. In most of these cases administrators, including deans, provosts, and presidents, may have recognized and respected the academic work from a scholarly standpoint, but felt compelled to act to suppress it for fear of retribution from outside forces, whether the state legislature, federal law enforcement, or private and corporate donors.

One highly probative indicator of an action being taken due to the content of the professor's expression is that the adverse action appears to occur as a result of a group's overt display of disapproval with the individual and her work. This may take the form of public criticism or protests, boycotts, petition drives, condemnation by public officials, and so on. People and groups are unlikely to engage in these types of active public displays where they approve of the result but take exception to the methodology. The people and groups expressing their outrage will admit as much in their statements, their literature, and any other communication they use to rally support against the professor. So cases such as that of Yale law professor Vern Countryman, CUNY faculty member Leonard Jeffries, and Alaska-Fairbanks professor Judith Kleinfeld, where sanctions against the professor occurred only after the institution was pressured to do so, are obviously based on content not quality, and courts should have little difficulty making this determination from the circumstantial evidence available to them.

Concededly, there will also be some more difficult cases in which there is a paucity of evidence of the motivation for the adverse action and the facts could point to either conclusion. In many such cases, the faculty member, bearing the burden of persuasion, may indeed have a difficult time proving that the action was based on improper motives. But this fact should not prevent us from adopting the analysis. A similar problem faces Title VII³⁷⁵ discrimination plaintiffs challenging an employer's defense that their termination was based on factors other than sex, race, etc. But by introducing circumstantial evidence such as the treatment of similarly-situated individuals, these plaintiffs are sometimes able to prevail, and it would be similar with faculty members bringing claims for wrongful employment action based on First Amendment grounds. To the extent such claims enjoyed any success in the courts, the suits would create a deterrent against colleges and universities taking action against faculty for the content of their scholarship. Despite the difficulty of prevailing, the standard would certainly provide faculty

375. Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (2006) (prohibiting employment discrimination on the basis of race, color, religion, sex and national origin).

more academic freedom protection than the various disjointed and unreliable approaches that courts currently employ.

In the case of Yale law professor Vern Countryman (setting aside, for a moment, that he worked at a private university), establishing that his denial of tenure was due to his politics would have been difficult, but not impossible. The faculty board voted unanimously to promote him; if he could show that no one had ever been denied tenure under such circumstances before, he could arguably establish a *prima facie* case. At the very least, the deterrent effect would be strong; with such a standard in place, the president might have opted to avoid the expense and public embarrassment that litigation would create and simply have promoted him.

VII. CONCLUSION

The First Amendment protection afforded to academic freedom that was developed during the Cold War was an important step in staving off inappropriate government oversight of the academy. But as academic freedom has again come under siege and courts have begun to veer from recognizing college and university faculty members' right to academic freedom, a new approach is required.

In the wake of *Garcetti*, courts must take advantage of the opening that Justice Kennedy provided when he wrote that “[t]here is some argument that expression related to academic scholarship . . . implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”³⁷⁶ Adopting the approach introduced here would fully satisfy that “additional constitutional interest” to which the Court alluded.

Although it may still sometimes prove difficult for faculty-plaintiffs to prevail in a civil action, this approach is superior to those currently being used and to any that have been proposed. It would alleviate concerns that affording faculty members a special First Amendment privilege would prohibit institutions from terminating faculty members who are conducting poor quality work. It would preserve the institutional academic freedom and institutional autonomy, whose importance recent court decisions have stressed. It would also protect unpopular viewpoints from censorship originating in a climate that, in the past several years, has become decreasingly tolerant of dissent, particularly when concerning matters of foreign policy, American nationalism, or cultural politics.

Ellen Schrecker argues, “The academy did not fight McCarthyism. It contributed to it.”³⁷⁷ Professors Bird and Brandt assert that since September 11, “prominent leaders within academia have believed it necessary . . . to take action against campus critics of U.S. policy.”³⁷⁸ These academic leaders did not and do not act out of disdain for academic freedom, but rather out of fear of the ramifications their institutions face due to inaction. In these cases, the courts must enforce the counter-majoritarian doctrine upon which the government was

376. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1962 (2006).

377. SCHRECKER, *supra* note 46, at 340.

378. Bird & Brandt, *supra* note 276, at 458.

founded. When fear for public safety creates a political climate increasingly intolerant of dissent, courts must be ever more vigilant in protecting the civil liberties of expression generally and academic freedom specifically.

The social and political events of recent years have created such a climate. Judicial complacency, if it continues, will have serious consequences. It will leave America's most vital producers of knowledge vulnerable to Mill's "tyranny of the majority,"³⁷⁹ a corrupting force to which our public officials—including university officials—too often fall victim.

379. MILL, *supra* note 1, at 62.

THE CONSTITUTIONAL RIGHTS OF POLITICALLY INCORRECT GROUPS: *CHRISTIAN LEGAL SOCIETY V. WALKER* AS AN ILLUSTRATION

CHARLES J. RUSSO* & WILLIAM E. THRO**

INTRODUCTION

As *Christian Legal Society v. Walker*¹ illustrates, controversy often arises in public colleges and universities when student-led political or religious (“politically incorrect”) groups espouse viewpoints or advocate practices that differ from, or are allegedly offensive to, others in campus communities.² When politically incorrect

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1. 453 F.3d 853 (7th Cir. 2006).

2. In a legal culture that emphasizes individual constitutional rights, the lay public and

student groups exist, their politically correct opponents within the student body, the faculty, and even the administration may urge college or university officials to refuse to grant them formal recognition, demand that they no longer advocate their beliefs or cease their allegedly discriminatory practices, refuse to allow them access to facilities, and/or deny them funding.³ Yet, as the Seventh Circuit held in *Walker*, politically incorrect student organizations have substantial constitutional rights that public institutions may not deny.⁴

The purpose of this article is to explore the constitutional rights of politically incorrect organizations through the lens of the Seventh Circuit's decision in *Walker*. In so doing, it seeks to provide guidance to public college and university counsel and administrators who confront demands to do something about those groups that are offensive. This article's purpose is accomplished in two parts. Part I discusses *Walker* and the reasoning of both the Seventh Circuit and the dissent. Part II draws upon *Walker* and Supreme Court case law to offer some reflections on the rights of politically incorrect student organizations.

I. CHRISTIAN LEGAL SOCIETY V. WALKER

A. Background

The facts in *Walker* are straightforward. The dispute involved the Christian Legal Society ("CLS") and the dean of the law school, joined by other officials, at Southern Illinois University ("University"), a public institution.⁵ CLS, a nation wide organization of Christian professionals and students, require members to subscribe to the moral principles in its statement of faith, which forbids them from engaging in, or approving, sexual activity outside of marriage, whether by

many lawyers frequently forget that the Constitution generally does not apply to the actions of private parties, but rather, it applies only to "state actions." See *The Civil Rights Cases*, 109 U.S. 3 (1883). As such, while public institutions are subject to the Constitution, private institutions do not face similar restrictions. Practically, this means that private institutions are generally free to ignore the values embodied in the Constitution and the requirements imposed by case law. At the same time, the authors are not suggesting that private institutions should exercise this freedom, especially because state law and/or church law may limit their actions. Moreover, even absent church or state laws, institutions, as a matter of policy, may choose to abide by some of the requirements.

3. *Walker* involved a group that sought to exclude those who engaged in sexual activity outside of traditional marriage, meaning that it would not permit individuals who engaged in homosexual activity or heterosexuals who engaged in non-marital intercourse from serving as voting members or leaders, even though they could attend its meetings. These conflicts notwithstanding, the law is unclear on their outcome as there is a surprising dearth of relevant litigation. The situation is further exacerbated because the small number of directly applicable Supreme Court cases is divided evenly on both sides of the issue.

4. Specifically, the Seventh Circuit ruled that a state college or university's interest in preventing discrimination against homosexuals did not outweigh the organization's interest in expressing its disapproval of homosexual activity by barring active homosexuals (and others) from serving as voting members or serving in leadership capacities even though they participate in the group's activities. *Walker*, 453 F.3d at 857–67.

5. *Id.* at 857.

homosexuals or heterosexuals.⁶ While anyone who wished to do so could attend CLS meetings, only those who subscribed to the organization's statement of faith could become voting members or serve in leadership positions; individuals who did not comply with these beliefs could regain their eligibility by repenting their past conduct.⁷

When the controversy arose during the 2004–2005 academic year, the University's law school recognized seventeen student groups, including the CLS.⁸ Organizations that the law school formally recognized could use its list-serve or e-mail data base, post information on bulletin boards, be identified in an official list of organizations on its website and publications, reserve conference rooms along with meeting and storage space, have a faculty advisor, and receive funding.⁹ Recognition by the law school did not bestow the same benefits from the overall University, a step that would have conferred even greater rights, including more funding; it was unclear how much additional assistance University recognition would have added.¹⁰

In February 2005, an unnamed individual complained to the University officials over CLS's membership requirements.¹¹ Following an investigation, when CLS refused to change its policy on the basis that it was part of the national organization's tenets, the dean of the law school revoked its recognition for violating two of the University's policies.¹² First, the dean charged that CLS violated the University's Affirmative Action/Equal Employment Opportunity ("EEO") policy.¹³ Second, the dean alleged that CLS violated a University policy that required all groups to comply with appropriate federal and state non-discrimination and equal opportunity laws.¹⁴ After having its status revoked, CLS could still meet, but not privately, since others could be present.¹⁵ In addition, the revocation meant that CLS lost privileges such as having a faculty advisor, being identified as a recognized group, and receiving funding.¹⁶

B. District Court Proceedings

Not surprisingly, CLS filed suit in a federal trial court in Illinois in an attempt to have its status as a recognized group restored. CLS sought a temporary injunction claiming that the University violated CLS's First Amendment rights to expressive association, free speech, and free exercise of religion and denied its rights to due process and equal protection. In response, the district court, in an unpublished

6. *Id.* at 857–58.

7. *Id.* at 858.

8. *Id.* at 857.

9. *Id.*

10. *Id.*

11. *Id.* at 858.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

opinion, denied the motion on the ground that the CLS was unlikely to succeed on the merits of its claim.¹⁷ The court did not think that CLS suffered an irreparable harm, describing its injury as speculative, insofar as it was still present on campus, except that it lacked the benefits of official recognition.¹⁸

C. Appeal to the Seventh Circuit

Unhappy with the trial court's rejection of its request for injunctive relief, the CLS appealed, focusing primarily on expressive association and public forum doctrine claims.¹⁹ Deciding that the CLS had both a reasonable likelihood of success on the merits of its claims and that it demonstrated that it suffered irreparable harm, a divided Seventh Circuit, in a two-to-one judgment, reversed in its favor.²⁰

1. Majority Opinion

At the outset of its analysis, the Seventh Circuit, relying on its own precedent, reviewed the four elements that a party requesting a preliminary injunction must prove.²¹ First, the court of appeals explained that a party must demonstrate that it would have a reasonable chance of success on the merits of a claim.²² Second, the court of appeals stated that a party must establish that the harm it would suffer if the injunction were denied would outweigh any harm that the nonmoving party would have experienced if relief were granted.²³ Third, the Seventh Circuit remarked that a party must show that there is no adequate remedy at law.²⁴ Fourth, it specified that a party must establish that granting an injunction would not harm the public interest.²⁵ The Seventh Circuit also reiterated the general rule that if a party meets its burden, a trial court must weigh the merits of granting its request.²⁶

Noting that the dispute involved the First Amendment, the court of appeals indicated that it had to review the case *de novo* since such issues are fact-specific.²⁷ It added that its task was simplified to a degree because only two elements related to granting an injunction were in dispute.²⁸ More specifically, the appellate

17. See *Christian Legal Soc'y v. Walker*, No. Civ. 05-4070-GPM, 2005 WL 1606448 (S.D. Ill. July 5, 2005).

18. *Id.* at *3.

19. *Walker*, 453 F.3d at 859.

20. *Id.* at 857. The Seventh Circuit's opinion was written by Judge Sykes and joined by Judge Kanne.

21. *Joelner v. Village of Wash. Park*, 378 F.3d 613, 619 (7th Cir. 2004) (affirming partially the denial of an adult bookstore owner's request for a preliminary injunction in a dispute over enforcement of specified adult entertainment ordinances).

22. *Walker*, 453 F.3d at 859.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

tribunal observed that when dealing with irreparable harm under the First Amendment, it cannot be remedied by money and that injunctions designed to protect such rights are always in the public interest.²⁹

Turning to the likelihood of CLS's success on the merits of its claim, the Seventh Circuit set forth its three reasons for asserting that the organization was entitled to the requested relief before detailing its rationale on each point.³⁰ First, it was unclear whether CLS even violated any of the University's policies, which was the reason proffered by the University for revoking its status as an organized student group.³¹ Second, the tribunal was satisfied that CLS demonstrated the likelihood of proving that the University impermissibly infringed on its right of expressive association.³² Third, it determined that CLS proved that it was likely that the University violated its right to free speech in removing it from a forum in which it had a right to be present.³³

Considering whether CLS failed to follow the disputed University policies, the court of appeals rejected the allegation that the organization violated the directive that all recognized groups had to comply with appropriate federal and state non-discrimination and equal opportunity laws.³⁴ To this end, since the University was unable to identify a federal or state law that CLS violated both in an initial brief pending the appeal and at oral arguments, at the very least, the law school's actions raised the specter of its acting on a pretext, leaving it no choice but to drop this claim.³⁵

The Seventh Circuit next disagreed with the University's claim that CLS violated the University's Affirmative Action/EEO policy since the organization required members to conform to specific standards in accord with its belief system relating to sexual conduct but did not exclude individuals due to their sexual orientations.³⁶ In fact, the court of appeals reiterated that CLS's policies were based on belief and behavior, not status, insofar as it excluded both heterosexuals and homosexuals who refused to comply with its rules.³⁷ The court was even more skeptical of the University's contention that CLS violated the policy since it neither employed anyone nor was it clear that membership was an educational opportunity for members or prospective members.³⁸ To the extent that CLS was a private organization, not an extension of the University, the Seventh Circuit did not think that it was fair to characterize the group as speaking on behalf of the University.³⁹ As such, the court of appeals was satisfied that CLS demonstrated the likelihood of success on the merits of its claim that neither of the University's

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 860–61.

34. *Id.* at 860.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 861.

reasons for revoking its recognition was valid.⁴⁰

At the outset of its review of the First Amendment claim, the Seventh Circuit relied on Supreme Court precedent stretching back more than thirty years in acknowledging that implicit in the freedom of speech, assembly, and petition clauses is the ability to associate freely.⁴¹ Reiterating that this freedom guarantees that the majority cannot force its will on the minority, the Court explained that the government burdens the right to associate in many ways.⁴² The court thus highlighted that the government, qua the administration of a public college or university, impermissibly burdens a group's right of free association by “impos[ing] penalties or withhold[ing] benefits from individuals because of their membership in a disfavored group” and ‘interfer[ing] with the internal organization or affairs of the group.’⁴³ The court added that governmental interference is heightened when “a regulation . . . forces [a] group to accept members it does not desire”⁴⁴ because in so doing, it “affects in a significant way the group’s ability to advocate.”⁴⁵

As part of its deliberations, the court acknowledged that because freedom of expressive association is not absolute, it is subject to strict scrutiny, meaning that it can be limited only if justified by a compelling governmental interest.⁴⁶ CLS claimed that the University unconstitutionally intruded on its right by focusing on the related issues of whether it was an expressive association, whether forcibly requiring the group to admit sexually active homosexuals would have significantly affected its ability to criticize the gay lifestyle, and whether its interest outweighed the University’s desire to eliminate discrimination against gay people.⁴⁷

As to whether CLS was an expressive association, the Seventh Circuit declared that the answer to this threshold issue was a *sine qua non* of whether the case could proceed.⁴⁸ Based on the tenets in CLS’s belief statement, especially its prohibition of non-marital sexual activity, the court of appeals conceded that because neither party disputed the fact, the court was satisfied that it would be difficult to reach any other position than to treat CLS as an expressive association.⁴⁹

The tribunal maintained that simply asking whether the enforcement of the University’s anti-discrimination policy would have significantly affected its ability to voice its disapproval of gay activity all but answered the inquiry.⁵⁰ In light of CLS’s requirement that voting members and officers subscribe to its statement of

40. *Id.* at 860–61.

41. *Id.* at 861 (citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1311–12 (2006); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000); *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); *Healy v. James*, 408 U.S. 169, 181 (1972)).

42. *Id.* at 861–62.

43. *Id.* at 861 (citing *Roberts*, 468 U.S. at 623).

44. *Id.* (citing *Roberts*, 468 U.S. at 623).

45. *Id.* (citing *Dale*, 530 U.S. at 648).

46. *Id.* at 862.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

beliefs, even though its meetings remained open to all, the Seventh Circuit interpreted the University's revocation of the group's recognition as nothing more than an attempt to alter its standards.⁵¹ The court of appeals reasoned that had the University succeeded in forcing CLS to make such a change, then it would have impaired the group's expressive right to be critical of active homosexuals.⁵² As CLS is a faith-based organization, which, at the heart of its beliefs includes the defining value that sexual contact outside of marriage, whether by heterosexuals or homosexuals, is immoral, the court was satisfied that the University's application of its anti-discrimination policy impermissibly burdened CLS's ability to express its opinions.⁵³

Turning to the inquiry over whose interest was greater, the Seventh Circuit began by noting that the University's policy not only had to be justified by a compelling state interest but also could neither be related to suppressing CLS's ideas nor accomplished in a less restrictive manner.⁵⁴ Relying on *Boy Scouts of America v. Dale*⁵⁵ and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,⁵⁶ both of which held that anti-discrimination policies cannot be used to limit expressive conduct if doing so suppresses a group's beliefs or promotes a given point of view, the court of appeals interpreted the University's enforcement of its policy as a coercive attempt to force CLS to change its beliefs or suffer the penalty of losing official recognition.⁵⁷

Because CLS established the likelihood of success on the merits of its claim that the University violated its substantial interest in exercising its First Amendment rights, the court rejected the University's argument that this was not a case of forced inclusion and therefore distinguishable from the precedent that the Seventh Circuit relied on.⁵⁸ Rather than compel the group to do anything, it merely revoked its recognition.⁵⁹ Relying specifically on *Healy v. James*,⁶⁰ where the Supreme Court ruled that a public university must extend recognition to a group with offensive views, the Seventh Circuit interpreted the two disputes as legally indistinguishable.⁶¹ The court of appeals explicated its position, noting that in both instances, the University violated the rights of the student organizations by depriving them of benefits such as channels of communication, funding, and access to facilities.⁶² As such, reasoning that college and university officials could not do indirectly what they may not do directly, the court was satisfied that CLS met its burden of proving that it had a reasonable likelihood of success on the

51. *Id.* at 863.

52. *Id.*

53. *Id.*

54. *Id.*

55. 530 U.S. 640 (2000).

56. 515 U.S. 557 (1995).

57. *Walker*, 453 F.3d at 863.

58. *Id.* at 864.

59. *Id.*

60. 408 U.S. 169 (1972).

61. *Walker*, 453 F.3d at 864.

62. *Id.*

merits of its claim that the University violated its right to expressive association.⁶³

At the start of the final part of its analysis on the likelihood of CLS's success on the merits of its claim, the court reiterated the basic principle of constitutional analysis that if the government excludes a speaker from a forum that the speaker is entitled to be in, then it violated the Free Speech Clause.⁶⁴ Further, the court noted that insofar as the University had not only created such a forum but also granted other benefits, as discussed above about recognized groups, CLS alleged that officials violated the group's rights to free speech by excluding it from the forum without a compelling governmental interest.⁶⁵

As a necessity for its rationale under the public forum doctrine, the court briefly reviewed the three types of fora that the government can create and the level of scrutiny required to exclude speakers from each.⁶⁶ In an open or traditional forum, typically public property such as parks, streets, and sidewalks, the court of appeals indicated that governmentally imposed restrictions are subject to strict scrutiny.⁶⁷ This means that state actors can limit free speech rights only if their actions are narrowly constructed to achieve a compelling government interest. Similarly, in the second type of forum, a designated or limited forum, public property that is opened up for public use as a place of expressive activity, the court maintained that limitations on speech are judged by the same strict scrutiny standard as applied to a traditional forum.⁶⁸ The court explained that the third kind of forum, a nonpublic forum, including locations such as classrooms or college or university meeting facilities, "is not by tradition or designation a forum for public communication," so it is subject to the lowest level of scrutiny.⁶⁹ This means that pursuant to public forum analysis, governmental officials can impose reasonable restrictions on speakers as long as their rules are viewpoint neutral.⁷⁰ The court of appeals added that once the government creates a particular type of forum, whether a physical location or a theoretical classification such as the recognized status at issue, it must follow its own rules when granting access to groups.⁷¹

Having reviewed the types of fora, the Seventh Circuit found that there was some doubt as to whether the University's organizational recognition rule created a limited public forum.⁷² However, the court conceded that even assuming that the University created a nonpublic forum, which would have been subject to the lowest level of scrutiny, CLS had the better argument since it alone was singled

63. *Id.*

64. *Id.* at 865.

65. *Id.*

66. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

67. See, e.g., *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998).

68. *Forbes*, 523 U.S. at 677.

69. *Perry*, 460 U.S. at 46.

70. *Id.* at 46.

71. *Walker*, 453 F.3d at 866.

72. *Id.*

out for sanctions.⁷³ Put another way, even assuming that the University's Affirmative Action/EEO policy was facially viewpoint neutral, there was strong evidence that it was not applied in such a manner.⁷⁴ To this end, the court of appeals observed that the University acted improperly insofar as officials did not sanction other groups that operated with restrictive membership requirements.⁷⁵ More specifically, the court wrote that the Muslim Students' Association limited its membership to Muslims, the Adventist Campus Ministry was open only to members of the Seventh Day Adventist faith, and the Young Women's Coalition was restricted to women.⁷⁶ Observing that the University sanctioned only CLS for its membership restrictions while leaving other groups unscathed, the court summarily rejected the University's claim that the other organizations would have ceased their discriminatory practices if threatened with loss of recognition as a "nonstarter" because the policy at issue remained in place.⁷⁷

Based on the record, the Seventh Circuit observed that it was unable to evaluate the reasonableness of the University's policy in light of the purposes that the forum served because the purposes were unclear and the court was unwilling to speculate what officials might have intended.⁷⁸ Even so, reiterating that it was not necessary to reach such an outcome at this point because of the "spartan" record before it, the court was satisfied that CLS demonstrated the likelihood of success on the merits of its claim because it was the only group that the University singled out for loss of recognition.⁷⁹

The Seventh Circuit briefly reviewed the balance of harms, finding that the trial court erred when it reasoned that the group did not suffer an injury because it would not have been forced to include anyone in order to comply with the University's non-discrimination policy.⁸⁰ Instead, the court of appeals reasoned that the University's denial of official recognition for CLS was a significant infringement on its right of expressive association and that the trial court misinterpreted the appropriate legal standards when it rejected CLS's request for relief.⁸¹ Accordingly, the Seventh Circuit concluded that the trial court failed to consider whether the University, not CLS, would have been harmed if it had granted the requested preliminary injunction. In so ruling, the court thus rejected the University's claim on appeal that it would have been injured by having to recognize a group that purportedly violated its anti-discrimination policy. The University would not actually have suffered an injury at all insofar as CLS demonstrated that it was likely to succeed on the merits of its claim.⁸² The Seventh Circuit thus reversed, directing the trial court to enter a preliminary

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 886.

77. *Id.*

78. *Id.*

79. *Id.* at 867.

80. *Id.*

81. *Id.*

82. *Id.*

injunction in favor of CLS.⁸³

2. Dissent

Judge Wood's dissent would have dissolved the Seventh Circuit's temporary injunction and would have permitted the University to apply its policy to CLS.⁸⁴ Yet, she also believed that had CLS been able to show that the University's policy had been enforced unevenly, then it would have been entitled to an injunction.⁸⁵ The dissent, which was divided into three parts, proceeded to argue that the majority misinterpreted *Healy* in granting CLS's request for relief.⁸⁶

In the first part of the dissent, Judge Wood essentially argued that, given the record before the Seventh Circuit, there was no reason to grant CLS an injunction.⁸⁷ She noted that there were a variety of uncorroborated allegations by CLS, including that it was the only student group to have lost its recognition.⁸⁸ Although it is clear that many non-Christian religions also disapprove of homosexual behavior and sexual intercourse outside of marriage,⁸⁹ she asserted that it was all but impossible for CLS to have had direct knowledge of the internal policies of the other organizations.⁹⁰ Regardless, Judge Wood would have required the parties to engage in more extensive discovery so that the court could have weighed more carefully whether CLS was the only group to have been sanctioned.⁹¹

In the second part, Judge Wood contended that the majority placed misguided emphasis on *Hurley*.⁹² Instead, she would have applied *Goodman v. Illinois Department of Financial & Professional Regulation*,⁹³ a case involving a chiropractor's challenge to a state regulation prohibiting the telemarketing of medical services.⁹⁴ Under Judge Wood's reading of *Goodman*, a trial court's order

83. *Id.*

84. *Id.* at 867–68 (Wood, J., dissenting).

85. *Id.* at 868–69.

86. *Id.*

87. *Id.* at 868.

88. *Id.*

89. In light of SIU's concern over CLS's stance with regard to premarital sexual activity involving homosexuals (and heterosexuals), it is interesting that officials ignored the fact that Islam, and presumably the Islamic student's organization on campus, express explicit hostility toward homosexuals. Such overt application of a double standard is troubling to say the least. *See, e.g.*, THE QUR'AN, The Poets: 165–66 (Arthur J. Arberry trans., 1955) ("What, do you come to male beings, leaving your wives that your Lord created for you? Nay, but you are a people of transgressors."); THE QUR'AN, The Ant: 56 (Arthur J. Arberry trans., 1955) ("What, do you approach men lustfully instead of women? No, you are a people that are ignorant."). *See also* Nicholas Heer, Homosexuality in the Qur'an, The International Lesbian and Gay Association (July 31, 2000), http://www.ilga.info/Information/Legal_survey/Summary%20information/homosexuality_in_the_quran.htm.

90. *Walker*, 453 F.3d at 870 (Wood, J., dissenting).

91. *Id.* at 869.

92. *Id.* at 870.

93. 430 F.3d 432 (7th Cir. 2005).

94. *Id.* at 437.

can be reviewed only for an abuse of discretion, a situation that was not present, rather than for an independent review of the record when the dispute is over alleged harm to interests protected by the First Amendment.⁹⁵ She contended that had the majority applied what it described as the appropriate standard, in what it admitted was a close case, then the trial court would not have been susceptible to being accused of abusing its discretion.⁹⁶ In fact, the dissent remarked that the closer a case is, then the more discretion that a trial court should be entitled to exercise, which is an approach that, if applied consistently or to its logical conclusion, runs the risk of tying the hands of appellate panels.⁹⁷

The final section of Judge Wood's dissent, which reviewed the likelihood of success on the merits of the First Amendment claims and the balancing of harms, disagreed that CLS succeeded in meeting its burden of proof.⁹⁸ Declaring that the record failed to support the majority's interpretation of the facts that the University violated CLS's First Amendment rights, she again placed great weight on the notion that the three other student groups had yet to testify as to whether they suffered from discrimination based on their membership policies.⁹⁹

When seeking to balance the harms, Judge Wood argued that the University did nothing directly to impede CLS's freedom of expressive association.¹⁰⁰ Moreover, in her view, the University's actions had at most a mild, if indirect, impact on CLS in light of the University's strong interest in providing equal treatment, coupled with its compelling interest in ensuring a diverse student body.¹⁰¹ Interestingly, Judge Wood had no similar concerns over ensuring the diversity of opinions that CLS might have provided, nor did she even concede that there was a lack of testimony over the alleged actions of the other groups that were admittedly non-parties to the litigation.¹⁰²

Rounding out her opinion, Judge Wood relied on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*,¹⁰³ in which the Supreme Court held that Congress could require colleges and universities to give access to military recruiters even though the military's policy of sexual orientation discrimination is offensive to many institutions.¹⁰⁴ Judge Wood relied on *Rumsfeld* to advance the position that the University law school had its own interest in protecting its speech

95. *Walker*, 453 F.3d at 870–71 (Wood, J., dissenting).

96. *Id.* at 871.

97. *Id.*

98. *Id.* at 872.

99. *Id.* at 870.

100. *Id.* at 874–75.

101. *Id.* at 875.

102. *Id.*

103. 126 S. Ct. 1297 (2006).

104. *Id.* at 1313. For a discussion of *Rumsfeld* and its significance for higher education, see William E. Thro, *The Constitutionality and Current Status of the Solomon Amendment*, 4 NACUA NOTES, Aug. 31, 2006, (on file with author). For a discussion of one aspect of *Rumsfeld*, see William E. Thro, *The Spending Clause Implications of Rumsfeld v. Forum for Academic and Individual Rights*, ENGAGE: J. OF FEDERALIST SOC'Y PRAC. GROUPS, Oct. 2006, at 81, available at <http://www.balch.com/resources/publications/Engage.pdf>.

and associational rights.¹⁰⁵ She argued that in contrast to the military recruiters whom the Supreme Court characterized as outsiders in *Rumsfeld*, here CLS sought to force its way into insider status as a recognized student organization despite the fact that the University did not wish to include the CLS opinions as a part of the University's academic community.¹⁰⁶ As such, the dissent would have affirmed the denial of CLS's request for a preliminary injunction on the grounds that the organization failed to demonstrate the likelihood of success on its claims and the trial court did not abuse its discretion in so ruling.¹⁰⁷

III. REFLECTIONS

As *Walker* demonstrates, there is an inevitable tension between the freedom of association and a college or university's desire to prevent discrimination.¹⁰⁸ On the one hand, *Healy* holds that a public college or university may not deny recognition to a student group simply because that group is offensive.¹⁰⁹ *Widmar v. Vincent*¹¹⁰ mandates that if the college or university allows recognized groups to use institutional facilities, then a recognized student group cannot be denied access because of its views.¹¹¹ In *Board of Regents of the University of Wisconsin System*

105. *Walker*, 453 F.3d at 873 (Wood, J., dissenting).

106. *Id.* at 876 (citing *Rumsfeld*, 126 S. Ct. at 1312).

107. *Id.*

108. Of course, there is no obligation for a college or university to recognize student groups. However, if a college or university chooses to do so, then it must treat all student groups the same. See WILLIAM A. KAPLIN & BARBARA H. LEE, 2 THE LAW OF HIGHER EDUCATION § 10.1.1 (4th ed. 2006). The fact that a group is offensive does not constitute a basis for denying recognition.

109. As the Supreme Court explained:

The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of "destruction" thus becomes immaterial. The College, acting here as the instrumental of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.

Healy v. James, 408 U.S. 169, 187–88 (1971).

110. 454 U.S. 263 (1981). The Supreme Court addressed "whether a state university, which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion." *Id.* at 264–65.

111. Rejecting the notion that a University can close its facilities, the Court concluded:

Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.

The University's institutional mission, which it describes as providing a "secular education" to its students, does not exempt its actions from constitutional scrutiny. With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state

v. *Southworth*,¹¹² the Supreme Court held that if a public college or university provides funds to student organizations,¹¹³ funding decisions must be made in a viewpoint-neutral manner.¹¹⁴

Thus, a group that holds racist, sexist, homophobic, anti-Semitic, or other offensive views, including those that mock Christianity,¹¹⁵ is entitled to recognition, access to facilities, and funding.¹¹⁶ Similarly, *Dale* and *Hurley*, both

universities.

Here the [institution] has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Id. at 267–70 (citations and footnotes omitted).

112. 529 U.S. 217 (2000).

113. Many, if not most, public colleges and universities provide funding to recognized student groups by using the proceeds of mandatory student fees. *See generally id.* (Souter, J., concurring). Under such an arrangement, students end up indirectly funding groups that they find objectionable. *Id.* at 243. These student objections to funding objectionable groups resulted in the *Southworth* litigation. In rejecting the student objections, the Supreme Court observed:

The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support. . . . Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected. We conclude that the University . . . may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle.

Id. at 233–34 (citations omitted).

114. Of course, the Court's analysis begged the question of what constitutes viewpoint neutrality. Unfortunately, insofar as the parties in *Southworth* stipulated that the university allocated funds in a viewpoint-neutral manner, the Court did not address this issue. The Court did suggest that the university's policy of allowing the general student body to overturn funding decisions through a referendum was unconstitutional. *Id.* at 235. Simply stated, the Court refused to permit the will of the political majority to substitute for viewpoint neutrality, reflecting Justice O'Connor's well-stated observation that "we do not count heads before enforcing the First Amendment." *McCreary County v. ACLU*, 545 U.S. 844, 884 (2005) (O'Connor, J., concurring) (striking down a public display of the Ten Commandments at a courthouse).

115. In light of concerns when Christian groups seek funding, the lack of an outcry over religious bigotry, especially anti-Christian, is underwhelming. *See, e.g.*, Steve Duin, *Up in Arms Over the Jesus Cartoons*, OREGONIAN (Portland, Or.), May 21, 2006, at C01, available at 2006 WLNR 8823054 (reporting that officials at the University of Oregon refused to punish a student newspaper that published cartoons that mocked the crucified Jesus).

116. However, while the institution may not refuse recognition because of the student organization's viewpoint, the institution may require the organization to (1) obey the campus rules; (2) refrain from disrupting classes; and (3) obey all applicable federal, state, and local laws. *See* 2 KAPLIN & LEE, *supra* note 108, § 10.1.1, at 1052–53 (interpreting *Healy v. James*, 408 U.S. 169 (1972)).

As a practical matter, this means that the institution can impose some neutral criteria for recognition, such as having a faculty advisor, having a constitution, and having a certain number of members. However, the institution cannot deny recognition simply because the institution or a

of which allowed private organizations to exclude homosexuals, support the proposition that broad non-discrimination policies cannot be applied to student organizations.¹¹⁷

On the other hand, the Supreme Court in *Healy* held that student organizations can be required to obey generally applicable laws and regulations, which supports the proposition that non-discrimination policies can be applied to student organizations.¹¹⁸ *Roberts v. United States Jaycees*¹¹⁹ and *Board of Directors of Rotary International v. Rotary Club of Duarte*,¹²⁰ in both of which the Supreme Court held that a private organization's freedom of association was trumped by the compelling interest of eliminating societal discrimination, reinforce this conclusion. Yet, upon further reflection, resolving the tension becomes relatively easy and certain principles emerge.

First and perhaps most importantly, there is a constitutionally significant distinction between a student organization's discrimination based on belief and discrimination based on immutable characteristics.¹²¹ As the Supreme Court has made clear, discrimination based on belief is entitled to absolute protection.¹²² "While the law is free to promote all sorts of conduct in place of harmful behavior,

significant part of the campus community dislikes the organization. Moreover, *Healy* also states that the institution may not deny recognition because members of the organization at other campuses or in the outside community have engaged in certain conduct. *Healy*, 408 U.S. at 185–86.

117. This conclusion is reinforced by *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996), where the Second Circuit held that

[W]hen a sectarian religious club discriminates on the basis of religion for the purpose of assuring the sectarian religious character of its meetings, a school must allow it to do so unless that club's specific form of discrimination would be invidious (and would thereby violate the equal protection rights of other students), or would otherwise disrupt or impair the school's educational mission.

Id. at 872–73. For a commentary on this case, see Charles J. Russo & Ralph D. Mawdsley, *Hsu v. Roslyn Union Free School District No. 3: An Update on the Rights of High School Students Under the Equal Access Act*, 114 EDUC. L. REP. 359 (1997).

118. *Healy*, 408 U.S. at 181.

119. 468 U.S. 609 (1984).

120. 481 U.S. 537 (1987).

121. To use an extreme example, the College Chapter of the Ku Klux Klan may not exclude African-Americans simply because they are African-Americans. However, it may exclude anyone who refuses to endorse the group's perverted philosophy of racial and anti-Catholic bigotry. Thus, if there is an African-American who endorses the group's irrational ideology of hatred, the group must accept that individual.

122. Indeed, the fact that a group has offensive views does not constitute a basis for denying recognition to a student organization. See 2 KAPLIN & LEE, *supra* note 108, § 10.1.1. As the Supreme Court explained:

The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of "destruction" thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.

Healy, 408 U.S. at 187–88.

it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.”¹²³ “[A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.”¹²⁴ Indeed, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”¹²⁵ Thus, regardless of whether an organization may discriminate based on immutable characteristics, it may discriminate based on belief. In other words, the Democrats can exclude Republicans, the Muslims can exclude the Christians and Jews, the Catholics can exclude Protestants, and the Students for Abstinence until Marriage can exclude those who believe in casual sex. An institution may not deny recognition, access to facilities, or funding because of a group’s beliefs.¹²⁶

Second, for purposes of freedom of association cases, there probably is a constitutionally significant distinction between discrimination based on race or gender and discrimination based on other immutable characteristics.¹²⁷ The Equal

123. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 579 (1995).

124. Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 124 (1981).

125. Thomas v. Review Bd., 450 U.S. 707, 714 (1981).

126. The only real judicial guidance on the issue whether funding is viewpoint neutral emerged in the subsequent litigation in *Southworth*. *Southworth v. Bd. of Regents of the Univ. of Wis. Sys.*, 307 F.3d 566 (7th Cir. 2002). Following the Supreme Court’s decision, the objecting students withdrew their stipulation that the university’s actions were viewpoint neutral and unsuccessfully challenged the funding system. *Id.* at 568. Rejecting the students’ claim that the funding system lacked viewpoint neutrality, the Seventh Circuit focused on the amount of discretion that the university granted to the student government association to allocate fees. *Id.* at 581–92. The Seventh Circuit held that if the student government association had unbridled discretion, a term that originated in the Court’s jurisprudence involving the denial of licenses and permits, then the University violated the requirement of viewpoint neutrality. *Id.* at 580–84.

Assuming that the Seventh Circuit’s analysis was correct, viewpoint neutrality essentially requires a mechanical approach, then three observations necessarily follow. First, if funding decisions are made using mathematical formulae, then viewpoint neutrality is achieved. For example, if funding requests are approximately twice the amount of the available funds and a college or university grants each student organization one-half of the amount requested, then the allocation is viewpoint neutral. Second, since the Supreme Court acknowledged that scarce resources such as access to money or the ability to participate in a political debate could be denied to those who do not demonstrate a certain level of support, see *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998), then student organizations with large memberships could receive more money than those with small memberships. By way of illustration, an organization with 300 members could be given more money than an organization with ten. Third, since the Court suggested that viewpoint neutrality is lost when decisions are based on politics, the practice of student politicians meeting and negotiating acceptable allocations of fees is unacceptable. Viewpoint neutrality means that an organization should not have to worry about its level of political influence in a student government.

127. Of course, there is a profound debate about whether sexual orientation is an immutable characteristic. Put another way, is it genetic or is it a choice or some combination? This question is well beyond the scope of this article or, for that matter, our current level of knowledge regarding genetics or human behavior. Moreover, the question is irrelevant. As explained *infra* notes 138–141 and accompanying text, even if sexual orientation is an immutable characteristic,

Protection Clause,¹²⁸ which applies to “*persons*, not *groups*,”¹²⁹ is “essentially a direction that all persons similarly situated . . . be treated alike.”¹³⁰ The “general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”¹³¹ At the same time, this general rule gives way in those rare instances when statutes infringe upon fundamental constitutional rights or utilize “suspect” or “quasi-suspect” classifications.¹³² To the extent that racial classifications “are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality”¹³³ and “call for the most exacting judicial examination,”¹³⁴ they are, regardless of their purpose,¹³⁵ “constitutional only if

discrimination because of sexual orientation is subjected to rational basis scrutiny.

128. U.S. CONST. amend. XIV, § 1.

129. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). *See also* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279–80 (1986) (Powell, J., joined by Burger, C.J., Rehnquist, J., concurring). Indeed, “[t]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.” *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (citation omitted). If a program treats everyone equally, there is no equal protection violation. *Romer v. Evans*, 517 U.S. 620, 623 (1996) (explaining that the Equal Protection Clause enforces the principle that the Constitution neither knows nor tolerates classes among its citizens).

130. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

131. *Id.* at 440; *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).

132. *Cleburne*, 473 U.S. at 440–41; *Graham v. Richardson*, 403 U.S. 365 (1971); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

133. *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). *Cf. United Jewish Orgs. v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring) (“[A]n explicit policy of assignment by race may serve to stimulate our society’s latent race consciousness.”); *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting) (“Here the individual is important, not his race, his creed, or his color.”).

134. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (Powell, J., joined by White, J.). *See also Adarand*, 515 U.S. at 227 (“Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”); *Croson*, 488 U.S. at 500–01. Moreover, “the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’” *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand*, 515 U.S. at 227).

135. Indeed, the Court has “insisted on strict scrutiny in every context, even for so-called ‘benign’ racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation.” *Johnson*, 543 U.S. at 505. *See also Adarand*, 515 U.S. at 226 (“[D]espite the surface appeal of holding ‘benign’ racial classifications to a lower standard, because ‘it may not always be clear that a so-called preference is in fact benign.’” (quoting *Bakke*, 438 U.S. at 298)); *Croson*, 488 U.S. at 500 (“But the mere recitation of a ‘benign’ or legitimate purpose for a racial classification is entitled to little or no weight. Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.” (citation omitted)). As Justice Thomas observed:

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government’s racial classifications are drawn by those who wish

they are narrowly tailored to further compelling governmental interests.”¹³⁶ Similarly, classifications based on gender are subject to “quasi-strict scrutiny” and are upheld only if they (1) serve important governmental objectives; and (2) are substantially related to the achievement of those objectives.¹³⁷ In contrast, classifications based upon age,¹³⁸ disability,¹³⁹ sexual orientation,¹⁴⁰ or income¹⁴¹ are subjected merely to rational basis scrutiny.

Distinctions between and among strict scrutiny, quasi-strict scrutiny, and rational basis scrutiny, which is determinative in Equal Protection cases, may also be dispositive in freedom of association cases.¹⁴² Freedom of association cases

to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution.

Adarand, 505 U.S. at 240 (Thomas, J., concurring). In other words, if the government “denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race,” the citizens’ right “to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.” *Croson*, 488 U.S. at 493 (O’Connor, J., joined by Rehnquist, C.J., White & Kennedy, JJ., announcing the judgment of the Court).

Further, the history of racial classifications suggests that great deference to governmental findings simply leads to further discrimination. Cf. *Korematsu v. United States*, 323 U.S. 214, 235–40 (1944) (Murphy, J., dissenting). Indeed, the entire notion of under-representation “rests upon the ‘completely unrealistic’ assumption that minorities will [make a particular choice] in lockstep proportion to their representation in the local population.” *Croson*, 488 U.S. at 507 (quoting *Sheet Metal Workers Int’l Ass’n v. EEOC*, 478 U.S. 421, 494 (1986) (O’Connor, J., concurring in part and dissenting in part)). Consequently, in only rare instances will there be sufficient evidence to justify a finding of present-day effects of prior intentional discrimination. See *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

136. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). “‘Absent searching judicial inquiry into the justification for such race-based measures,’ we have no way to determine what ‘classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.’” *Id.* (quoting *Croson*, 488 U.S. at 493).

137. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976). Applying this standard, the Supreme Court generally upheld statutes that seem to be a reasonable means of compensating one gender for past societal discrimination. See *Califano v. Webster*, 430 U.S. 313 (1977) (upholding a statute that allowed women to use a different method of calculating retirement benefits). Moreover, the Court has invalidated those statutes that appear to be based on a sexist stereotype. See *United States v. Virginia*, 518 U.S. 515 (1996) (invalidating exclusion of women from state operated military academy); *Orr v. Orr*, 440 U.S. 268 (1979) (invalidating a statute that allowed alimony from men to women but prohibited alimony from women to men); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (invalidating a provision that exempted women from the requirement of proving dependency in order to collect survivor benefits). But see *Nguyen v. INS*, 533 U.S. 53 (2001) (upholding a federal statute that treated the foreign-born children of male U.S. citizens differently from the children of female U.S. citizens).

138. *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

139. *Cleburne*, 473 U.S. at 439–40.

140. *Romer v. Evans*, 517 U.S. 620, 623 (1996).

141. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18–21 (1973).

142. Of course, Equal Protection cases necessarily are limited to classifications by the government. See *The Civil Rights Cases*, 109 U.S. 3 (1883).

involve evaluating whether the government's interest in preventing discrimination is sufficiently compelling to trump the private group's freedom of association. While *Roberts* and *Rotary Club* demonstrate that preventing gender discrimination trumps the freedom of association, and while it is logical to assume that preventing racial discrimination also trumps the freedom of association, it is by no means certain that preventing discrimination based on age, disability, or sexual orientation trumps freedom of association. In other words, preventing discrimination based on suspect or quasi-suspect classifications might be more compelling than preventing discrimination against people within those classifications subject to rational basis review. If so, then a college or university may not force student groups to refrain from age, disability, and sexual orientation discrimination. The ability to force student organizations to refrain from discrimination may be limited to race and gender.

Third, while the federal Free Exercise Clause¹⁴³ does not compel a public college or university to treat a religious organization differently than a non-religious organization,¹⁴⁴ there is no constitutional distinction between religious

143. U.S. CONST. amend. I. Before 1990, the U.S. Supreme Court interpreted the Free Exercise Clause in a manner that generally favored religious rights. Specifically, any governmental policy that burdened the free exercise of religion was struck down unless the State could show a compelling governmental interest. *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963). Thus, for example, the Court ruled that the Amish could refuse to send their older children to public schools even though Wisconsin law required that children younger than sixteen attend school. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Under this approach, it was quite likely that a public college or university would be required to accommodate a student's religious objections to curriculum. For example, requiring a student to attend class on a holy day certainly burdens religion and the college or university's interest in having the student attend on that particular day seems far from compelling.

In 1990, the Supreme Court effectively rewrote its Free Exercise Clause Jurisprudence. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court abandoned its previous undue burden/compelling governmental interest standard. Instead, the Court declared, “[T]he right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). Put another way, “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

As a practical matter, this means that if a statute, policy, or regulation applies to everyone and is motivated by some concern other than a desire to discriminate against religion, then the Free Exercise Clause does not require accommodation of religion. In other words, if the professor's attendance policy applies to everyone and has some purpose other than discriminating against religion, then the fact that it interferes with the religious practices of some students is irrelevant. The college or university *will not be required* to excuse the students. However, the college or university could *choose* to excuse the students.

144. *Smith*, 494 U.S. at 879. The result in *Smith* was extremely controversial and upsetting to many religious communities. In response to *Smith*, many States passed legislation mandating that state and local government follow the pre-*Smith* standard. See, e.g., ALA CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. § 41-1493 (2004 & Supp. 2006); CONN. GEN. STAT. ANN. § 52-571b (West 2005 & Supp. 2006); FLA. STAT. ANN. §§ 761.01–761.05 (West 2005 & Supp. 2007); R.I. GEN. LAWS §§ 42-80.1-1–4 (2006); S.C. CODE ANN. §§ 1-32-10–60 (2005 & Supp.

and non-religious organizations.¹⁴⁵ In other words, while the Federal Constitution does not compel public colleges and universities to give preferential treatment to religious groups,¹⁴⁶ it does prohibit public colleges and universities from treating

2006). By passing the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, Congress attempted to reinstate the pre-*Smith* standard. Yet, the Supreme Court invalidated that statute. See *City of Boerne v. Flores*, 521 U.S. 507 (1997). Because of *Flores*, the *Smith* case remains the applicable standard for public colleges and universities.

145. There is an important exception to the *Smith* standard. *Smith*, 494 U.S. at 878–79. When a Free Exercise claim is combined with another separate and independent constitutional claim, such as a Free Speech claim, a different standard applies. In these “hybrid” situations, the constitutional standard is the standard that would be utilized in the independent constitutional claim. *Id.* at 882 & n.1. Thus, if a Free Exercise claim is combined with a Free Speech claim, the claim should be evaluated using the Free Speech analysis.

This exception for hybrid claims allows religious organizations to discriminate based on gender and race if such discrimination is mandated by their religion.

146. However, in some states, it may be that the state constitution requires preferential treatment for religious organizations. To explain, state constitutions are significantly different from the Federal Constitution. See Robert F. Utter, *Freedom and Diversity In a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 239, 241–42 (B. McGraw ed., 1984). Specifically, the Federal Constitution represents a delegation of power to the Federal Government while the state constitutions represent a limitation on power of the states. The highest court of New York observed:

The Federal Constitution is one of delegated powers and specified authority; all powers not delegated to the United States or prohibited to the States are reserved to the States or to the people. Great significance accordingly is properly attached to rights guaranteed and interests protected by express provision of the Federal Constitution. By contrast, because it is not required that our State Constitution contain a complete declaration of all powers and authority of the State, the references which do appear touch on subjects and concerns with less attention to any hierarchy of values

Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 366 n.5 (N.Y. 1982). See also Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 785 (Md. 1983).

Most importantly for present purposes, the state constitutions can provide greater protections for individual liberties than the Federal Constitution. In other words, the federal standard is a floor but the state standard can be a ceiling. Over the past thirty years, there have been numerous instances where state courts have interpreted state constitutional provisions as providing greater protection for civil liberties. A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976). Indeed, Justice Brennan, alarmed at the unwillingness of the Burger Court to expand federal constitutional rights, explicitly called for an increased reliance on state constitutional law. William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (“[A]lthough in the past it might have been safe . . . to raise only federal constitutional issues . . . it would be most unwise these days not also to raise the state constitutional questions.”). Because state constitutional provisions can provide more protection than the Federal Constitution, it is possible that religious issues will be decided differently under the State Constitution than under the Federal Constitution.

Consequently, a state equivalent to the Free Exercise Clause may well demand that religious groups be treated more favorably than non-religious groups. Most obviously, some state courts have declared that the state’s Free Exercise Clause utilizes the pre-*Smith* standard. In those States, any undue burden on the free exercise of religion must be justified by a compelling governmental interest. As a practical matter, this means that a college or university generally must accommodate a student’s religious-based request to be excused from an assignment.

religious groups worse than non-religious groups.¹⁴⁷ Thus, in *Widmar*, the public institution was obligated to provide access to the religious organization.¹⁴⁸ Similarly, in *Rosenberger*, the public institution was obligated to provide funding to the religious publication.¹⁴⁹ If a college or university provides any benefit to

147. As an agency or institution of a State, a public college or university has the authority to make religious policy subject only to the commands of the Constitution. Originally, this authority was quite broad. Prior to the adoption of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1, the Establishment Clause, like other provisions of the Bill of Rights, limited only the Federal Government. *See Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833). Thus, the states were free to do whatever they wished with respect to religion, subject only to the commands of their own state constitutions. *See Locke v. Davey*, 540 U.S. 712, 723 (2004) (describing the history of state constitutional restrictions on the establishment of religion). Now that the Fourteenth Amendment has made both the Establishment and Free Exercise Clauses applicable to the States, see *Everson v. Bd. of Educ.*, 330 U.S. 1, 17–18 (1947) (incorporating the Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause), the states are restricted substantially in their authority to make religious policy. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 214–15 (1972) (stating that the free exercise clause allows parents to refuse to send children to school beyond the age of thirteen); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (explaining that the Establishment Clause prohibits the practice of daily reading from the Bible in the public schools, even where students are allowed to absent themselves upon parental request). However, because there is “play in the joints” between what the Establishment Clause prohibits and what the Free Exercise Clause requires, *Locke*, 540 U.S. at 718, the states retain substantial sovereign authority to make religious policy.

Several examples demonstrate the point. A state college or university professor may excuse a Jewish student from class for Yom Kippur while refusing to excuse the student who wishes to attend a political protest. A police department may allow a female officer, who is Jehovah’s Witness, to wear a skirt while forcing other female officers to wear pants. A public school cafeteria may offer Muslim students an alternative to pork while refusing to offer alternative meals to those students who simply dislike pork. In each instance, the government is not constitutionally required to accommodate the religious exercise, see *Smith*, 494 U.S. at 879, but is not constitutionally prohibited from doing so.

148. *Widmar v. Vincent*, 454 U.S. 263, 267–70 (1981). *See also id.* at 264–65.

149. The Court concluded that such viewpoint discrimination was unconstitutional when it observed:

We conclude, nonetheless, that here, as in *Lamb’s Chapel*, viewpoint discrimination is the proper way to interpret the University’s objections to [the religious publication]. By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995). Moreover, the Court emphasized that provision of money was no different than the right to obtain recognition or to access space when it noted that:

The University urges that, from a constitutional standpoint, funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not. Beyond the fact that in any given case this proposition might not be true as an empirical matter, the underlying premise that the University could discriminate based on viewpoint if demand for space exceeded its availability is wrong as well. The government cannot justify viewpoint discrimination among private

non-religious organizations, it must provide those benefits to religious organizations as well.¹⁵⁰

Fourth, the Establishment Clause¹⁵¹ does not mandate a constitutional

speakers on the economic fact of scarcity. Had the meeting rooms in *Lamb's Chapel* been scarce, had the demand been greater than the supply, our decision would have been no different. It would have been incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible.

Id. at 835. In sum, if the University chooses to fund student groups, it may not refuse to fund a group simply because that group has a religious viewpoint.

150. In short, there is a mandate for viewpoint neutrality. As the Court, in upholding the constitutionality of mandatory student activity fees, observed:

The University must provide some protection to its students' First Amendment interests, however. The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support. Viewpoint neutrality was the obligation to which we gave substance in *Rosenberger v. Rector & Visitors of Univ. of Va.* There the University of Virginia feared that any association with a student newspaper advancing religious viewpoints would violate the Establishment Clause. We rejected the argument, holding that the school's adherence to a rule of viewpoint neutrality in administering its student fee program would prevent "any mistaken impression that the student newspapers speak for the University." While *Rosenberger* was concerned with the rights a student has to use an extracurricular speech program already in place, today's case considers the antecedent question, acknowledged but unresolved in *Rosenberger*: whether a public university may require its students to pay a fee which creates the mechanism for the extracurricular speech in the first instance. When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others. There is symmetry then in our holding here and in *Rosenberger*: Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected. We conclude that the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle.

Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 233–34 (2000) (citations omitted).

151. U.S. CONST. Amend. I ("Congress shall make no law respecting an establishment of religion . . ."). The Establishment Clause has a Libertarian aspect, which limits the power of the Federal Government and the states with regard to the people. The Libertarian purpose of the Establishment Clause mandates "a freedom from laws instituting, supporting, or otherwise establishing religion." Philip Hamburger, *SEPARATION OF CHURCH AND STATE* 2 (2002). Contrary to popular belief, the Establishment Clause "does not say that in every and all respects there shall be a separation of Church and State." *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). Rather, the Establishment Clause must be viewed "in the light of its history and the evils it was designed forever to suppress," *Everson*, 330 U.S. at 14–15, and must not be interpreted "with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Walz v. Tax Comm'n*, 397 U.S. 664, 671 (1970). That constitutional objective is clear:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or

distinction between religious organizations and non-religious organizations.¹⁵² If a

non-attendance.

Everson, 330 U.S. at 15–16. In short, the Establishment Clause “does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises . . . as to have meaningful and practical impact.” *Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., joined by Harlan, J., concurring). It permits “not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion.” *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., joined by Rehnquist, C.J., White & Scalia, JJ., concurring). Indeed, as Justice Scalia has observed, “there is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.” *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring). Moreover, the history is equally clear—“[w]e are a religious people whose institutions presuppose a Supreme Being.” *Zorach*, 343 U.S. at 313. “The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.” *Schempp*, 374 U.S. at 213.

152. In addition to the Libertarian aspect described *supra* note 151, the Establishment Clause has a Federalism aspect that limits the power of the Federal Government with regard to states. See William H. Hurd & William E. Thro, *The Federalism Aspect of the Establishment Clause*, ENGAGE: J. OF FEDERALIST SOC’Y PRAC. GROUPS, Oct. 2004, at 62. The Federalism aspect of the Establishment Clause mandates that the Federal Government may not interfere with the states’ ability to make religious policy subject only to the limitations imposed by the Constitution. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring) (“The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with [the States’ religious policy choices].”) See also Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2357 (1997) (“Congress has no power to dictate a position on religion . . . for states. It has no power to dictate church-state relations at all—where ‘state’ refers to the governments of the several states. This is the core meaning of the Establishment Clause.”). Thus, when the states exercise their sovereign authority to make religious policy, the federal government may not interfere. See *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., joined by Rehnquist C.J. White, & Thomas JJ., dissenting) (noting that the Establishment Clause was adopted, in part, “to protect state establishments of religion from federal interference”). See also 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1879 (1833) (stating that the Establishment Clause was intended “to exclude from the national government *all power* to act upon the subject [of religion]” (emphasis added)); *id.* (“[T]he whole power over the subject of religion is left *exclusively* to the State governments, to be acted upon according to their own sense of justice and the State constitutions” (emphasis added)). Moreover, this limitation on the powers of the Federal Government was recognized widely at the time of the Framing. See James Madison, General Defense of the Constitution (June 12, 1788), in 11 THE PAPERS OF JAMES MADISON 129, 130 (Robert A. Rutland, et al. eds., 1977) (“There is not a shadow of right in the general government to intermeddle with religion. Its least interference with [religious policy of the States] would be a most flagrant usurpation.”); James Iredell, Debate in North Carolina Ratifying Convention (June 30, 1788), in 5 THE FOUNDERS’ CONSTITUTION 89, 90 (Philip B. Kurland & Ralph Lerner eds., 1987) (stating that the Federal Government “certainly [has] no authority to interfere in the establishment of any religion whatsoever”). Indeed, as one of America’s leading constitutional historians observed:

[A] widespread understanding existed in the states during the ratification controversy that the new central government would have no power whatever to legislate on the subject of religion. This by itself does not mean that any person [sic] or state understood an establishment of religion to mean government aid to any or all religions or churches. It meant rather that religion as a subject of legislation was reserved exclusively to the states.

public college or university treats religious organizations like non-religious organizations,¹⁵³ there is no Establishment Clause violation.¹⁵⁴ In *Widmar*, the

LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 74 (1986). Similarly, Professor Schragger has explained:

[T]he Religion Clauses emerged from the Founding Congress as local-protecting; the clauses were specifically meant to prevent the national Congress from legislating religious affairs while leaving local regulations of religion not only untouched by, but also protected from, national encroachment.

Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1823 (2004). See also AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32–42 (1998).

The principle that the Federal Government may not interfere with the states' sovereign authority to make religious policy is demonstrated easily. Most obviously, prior to the adoption of the Fourteenth Amendment, the states had the sovereign authority, subject only to their respective state constitutions, to establish or disestablish a church. Had Congress, in the exercise of its Article I powers, attempted to force the States to establish or disestablish a church, Congress would have acted unconstitutionally. In other words, Congress could not have passed a statute requiring the states to choose between receiving federal funds and establishing or disestablishing a church. Similarly, after the adoption of the Fourteenth Amendment, the states have the sovereign authority to choose to fund religious activity indirectly. The Establishment Clause does not prohibit the indirect funding of religion. See *Zelman*, 536 U.S. at 652 (school choice vouchers may be used at private schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13–14 (1993) (disabled student at private religious school could receive special education services); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986) (the state could provide funds for the education of a blind student studying for the ministry). The Free Exercise Clause does not require that the states indirectly fund religious education or activity. See *Locke*, 540 U.S. at 712. If Congress, in the exercise of its Article I powers, attempts to force the states to fund or not to fund indirectly religious activity, then Congress acts unconstitutionally. In other words, Congress could not pass a statute requiring the States to choose between receiving federal funds and allowing religious schools to participate in a school choice program.

153. Of course, in some states, the state constitution may mandate a different standard. A practice that is perfectly acceptable under the federal Establishment Clause may be prohibited by the state Establishment Clause. In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Supreme Court held that the Federal Constitution allowed a state to operate a “school choice” program that included private religious schools. However, many state constitutions contain provisions, called “Blaine Amendments,” which explicitly state that no public money can ever be provided to a religious school. See Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL’Y 657 (1998). In the college and university context, this means that it is possible that a state Establishment Clause could forbid a public college or university from providing access or funding to a student religious organization. In other words, the scope of what the college or university *may* do will vary depending upon the nature of the state constitution.

154. There may be an exception to this rule when a college or university provides direct funding to religious services. Although colleges and universities are obligated to fund religious groups, colleges and universities also may refuse to fund certain broad classes of activities. This necessarily begs the question of whether a college or university may distinguish between “religious activities” and “non-religious activities” of a religious group. For example, if a college or university regularly funds “refreshments” for meetings can it refuse to fund communion wafers and wine for a religious group because a communion service is a “religious activity?”

This is an extraordinarily difficult issue. On the one hand, a direct funding of religious services would seem to be a *per se* violation of the Establishment Clause. It seems clear that government cannot give a direct subsidy to a religious organization for non-secular activities.

Court rejected a public institution's argument that it would violate the Establishment Clause by allowing religious groups to use its facilities.¹⁵⁵

Although the Supreme Court avoided the issue in *Lamb's Chapel* by deciding the case on narrower grounds, it seems likely that the government could exclude religious worship services from a limited public forum. Given the Supreme Court's analogy between student organizations and limited public forums, it seems logical that a college or university could refuse to fund religious worship activities.

On the other hand, determining what is sacred or secular to an individual group necessarily requires of the college or university a large degree of inquiry into the affairs and beliefs of the group. The Supreme Court has suggested that such inquiries may violate the Establishment Clause. See *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) ("It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs."). Moreover, it seems nonsensical that the constitutionality of funding a specific activity would depend entirely on whether the group thought the activity was sacred. If it is acceptable for the French Club to eat French bread and drink French wine as part of its activities, then why is it unacceptable for a Christian group to do the same.

155. In *Widmar*, the Court observed:

The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech. In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.

We are not oblivious to the range of an open forum's likely effects. It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion.

We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases.

Widmar, 454 U.S. at 273–74 (citations omitted).

Acting in large part in response to the stimulus provided by *Widmar*, Congress enacted the Equal Access Act, 20 U.S.C. §§ 4071–74 (2000). Under the terms of the Equal Access Act, if any public secondary school receives federal financial assistance and permits non-curriculum related student groups to meet on school premises during non-instructional time, the school cannot withhold the privilege of gathering because of the religious, political, philosophical, or other content of the speech at such meetings. *Id.* The Supreme Court upheld the Equal Access Act in *Bd. of Educ. of Westside Cnty. Schs. v. Mergens*, 496 U.S. 226 (1990). Relying on statutory interpretation rather than the constitutional question, the Court interpreted Congressional intent as recognizing that most high school students could understand that allowing a religious club to function in school does not imply endorsement of religion. *Id.* at 250. Yet, because Congress did not define "noncurriculum related," the Court thought it necessary to do so in order to ascertain the status of some student groups. *Id.* at 237–39. The Court found that insofar as several existing clubs failed to satisfy the criteria, the religious group was entitled to meet in school. *Id.* at 246–47.

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993), another case set in the context of public elementary and secondary education, reinforced the Establishment Clause analysis from *Widmar* and *Mergens*. *Id.* at 395. *Lamb's Chapel* arose when a local school board in New York allowed its facilities to be used for "social, civic, and recreational purposes" but banned all use for "religious purposes." *Id.* at 386. A religious group that was denied the opportunity to use school facilities, not for worship, but to show a film that presented a religious perspective on child rearing unsuccessfully challenged the policy. *Id.* at 387–89, 390 n.4. On further review of rulings in favor of the board, the Supreme Court, in a rare unanimous opinion, reversed in favor of the group. *Id.* at 397. However, the Supreme Court avoided the issue of

Similarly, in *Rosenberger*, the Court disagreed with a public institution's argument that it would violate the Establishment Clause by funding a religious publication.¹⁵⁶ Moreover, a college or university may treat a religious organization *more favorably* than non-religious organizations without violating the

whether banning activities with a "religious purpose" was constitutional. *Id.* at 390 n.4. Instead, in a hybrid situation wherein it treated religious speech as a form of free speech, the Court essentially extended *Mergens'* rationale. More specifically, the Court maintained that since the school board created a limited public forum by allowing films or lectures on child rearing in general, it violated the group's free speech rights by engaging in viewpoint discrimination simply because organizers of the event sought to address the same topic from a religious perspective. *Id.* at 394. *See also* *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703 (4th Cir. 1994) (deciding that a board regulation in Virginia, which allowed officials to charge churches an escalating rate for the use of school facilities, discriminated both against religious speech and interfered with or burdened the church's right to speak and practice its religion); *Shumway v. Albany County Sch. Dist.* No. 1, 826 F. Supp. 1320 (D. Wyo. 1993) (similar result).

Eight years later, a similar dispute arose in a second case from New York, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), when officials refused to permit a non-school-sponsored club to meet during non-class hours so that members and moderators could discuss child-rearing along with character and moral development from a religious perspective. Even though officials forbade the religious club from meeting, they allowed three other groups to gather because although they addressed similar topics, they did so from a secular perspective.

Reversing in favor of the club, the Supreme Court reasoned not only that the board violated its rights to free speech by engaging in impermissible viewpoint discrimination when it refused to permit it to use school facilities for its meetings, which were not worship services, but also that such a restriction was not justified by fears of violating the Establishment Clause. *Id.* at 107–09, 112–13. *See also* *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 400 F. Supp. 2d 581 (S.D.N.Y. 2005) (enjoining enforcement of a policy that would have refused to allow the outside religious group to use school facilities on Sundays for religious services and worship as it violated the First Amendment as a form of religious viewpoint discrimination).

156. The Court observed:

It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises. This is so even where the upkeep, maintenance, and repair of the facilities attributed to those uses are paid from a student activities fund to which students are required to contribute. The government usually acts by spending money. Even the provision of a meeting room, as in *Mergens* and *Widmar*, involved governmental expenditure, if only in the form of electricity and heating or cooling costs. The error made by the Court of Appeals, as well as by the dissent, lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient. If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then *Widmar*, *Mergens*, and *Lamb's Chapel* would have to be overruled. Given our holdings in these cases, it follows that a public university may maintain its own computer facility and give student groups access to that facility, including the use of the printers, on a religion neutral, say first-come-first-served, basis. If a religious student organization obtained access on that religion-neutral basis and used a computer to compose or a printer or copy machine to print speech with a religious content or viewpoint, the State's action in providing the group with access would no more violate the Establishment Clause than would giving those groups access to an assembly hall.

Rosenberger, 515 U.S. at 842–43 (citations omitted).

Establishment Clause.¹⁵⁷

IV. CONCLUSION

In sum, the constitutional rights of the politically incorrect student organizations largely trump a public college or university's desire to prevent student groups from engaging in discrimination. Discrimination on the basis of belief is absolutely protected.¹⁵⁸ While a college or university can force non-religious organizations to refrain from discrimination based on race and gender, it might not be able to prohibit discrimination because of other immutable characteristics such as age, disability, or sexual orientation.¹⁵⁹ Religious organizations *must* be treated at least as favorably as non-religious organizations, *can* receive more favorable treatment, and, in some instances, might be constitutionally entitled to treatment that is more favorable.¹⁶⁰

157. See *Cutter v. Wilkinson*, 544 U.S. 709, 719–24 (2005) (stating the Religious Land Use and Institutionalized Persons Act, which requires preferential treatment for religion, does not violate the Establishment Clause); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) ("[W]e in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause."); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (recognizing that the government may sometimes accommodate religious practices without violating the Establishment Clause).

158. See *supra* notes 124–26 and accompanying text.

159. See *supra* notes 138–41 and accompanying text.

160. As discussed *supra* notes 145 and 155, it is possible that a "hybrid free exercise" claim under the Federal Constitution or a claim under the State Constitution would lead to this result.

STATE UNIVERSITY V. STATE GOVERNMENT: APPLYING ACADEMIC FREEDOM TO CURRICULUM, PEDAGOGY, & ASSESSMENT

JEFF TODD*

I. INTRODUCTION

Outside interference with college and university governance has come from business, in the form of conditions attached to grants and endowments,¹ and from religion because historically, most colleges and universities had a church affiliation.² The federal government also has some impact, such as via regulation that affects colleges and universities as employers³ or via immigration laws that restrict faculty hiring.⁴ For issues of curriculum, pedagogy, and assessment, however, modern state colleges and universities face the most pressure from other state entities. State legislatures that have constitutional authority over colleges and universities use their power of the purse to politicize education.⁵ Boards of regents, typically a group of appointed individuals and high government officials who provide oversight for a single institution or university system,⁶ may lack understanding of the profession of education “and the character of a true university.”⁷ Further, because these boards typically oversee a system that

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1. Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1277 (1988).
2. Matthew W. Finkin, *On “Institutional” Academic Freedom*, 61 TEX. L. REV. 817, 822 (1983).
3. HARRY T. EDWARDS, *HIGHER EDUCATION AND THE UNHOLY CRUSADE AGAINST GOVERNMENTAL REGULATION* 9 (1980).
4. John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481, 1485 (1988).
5. Metzger, *supra* note 1, at 1277.
6. E.g., CAL. CONST. art. IX, § 9(a). States often call the members of their governing boards by different titles, including trustees and curators, but for clarity, I will use “regent” as a generic term unless referring to a specific institution or case.
7. Metzger, *supra* note 1, at 1278.

includes numerous colleges and universities,⁸ the priorities of the board may not coalesce with those of each member institution. Finally, some state agencies are charged specifically with regulating higher education,⁹ and other agencies may indirectly influence curriculum, as with professional programs like teaching that require state certification.¹⁰

In an ideal world, these law- and rule-making entities would not infringe on the individual college or university's academic freedom. As a former professor, however, I have observed that some state requirements, such as enacting a standardized core curriculum that is transferable among state institutions, may run counter to the judgment of the institution's faculty and administration. When an individual college or university administration feels that legislation or regulation harms its curriculum, pedagogy, or assessment, it normally does what any other professional or business organization would do—lobby the legislature or agency for concessions.¹¹ As government regulation has increased in all facets of life over the last century, colleges and universities have of necessity become more effective at helping to craft the laws that affect them.¹² Sometimes, though, an individual institution cannot persuade lawmakers to change the law, whether because of political pressure or financial constraints or adverse effects on other state universities. This prompted me to ask what legal means a state college or university administration might employ to challenge unwanted interference by state government entities that affect purely academic areas.

The strongest legal right may be the institution's First Amendment claim of academic freedom. Numerous scholarly works over the past seventy-five years have addressed the legal contours of academic freedom.¹³ The consensus is that as a legal concept, academic freedom is vaguely defined by the Supreme Court and therefore difficult to apply.¹⁴ Accordingly, these scholars and commentators have

8. For example, the Board of Regents of the University System of Georgia oversees every public university in the state. GA. CONST. art. 8, § 4, para. I(a)–(b).

9. The purpose of the Texas Higher Education Coordinating Board is “to provide leadership and coordination for the Texas higher education system, institutions, and governing boards.” TEX. EDUC. CODE ANN. § 61.002(a) (Vernon 2006).

10. E.g., CAL. EDUC. CODE § 44227(a) (West 2006) (permitting California Commission on Teacher Credentialing to accept recommendations of teacher education programs that meet the Commission's standards).

11. EDWARDS, *supra* note 3, at 45.

12. *Id.* at 2–3, 45.

13. The earliest legal examination looked more to faculty-university relationships. Comment, *Academic Freedom and the Law*, 46 YALE L.J. 670 (1937). Broader scholarly examinations followed the Supreme Court's first mention of academic freedom in the 1950's. See, e.g., WALTER P. METZGER, ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY (1961). The 1980's saw more interest in academic freedom as it applies to colleges and universities as institutions. E.g., David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227 (Summer 1990); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251 (1989); Metzger, *supra* note 1; Finkin, *supra* note 2. Scholars have continued to maintain a steady interest in academic freedom, particularly its application at an institutional level. See *infra* notes 15–17, 22.

14. See, e.g., Rabban, *supra* note 13, at 236.

explored its limits and attempted to fill in the gaps, particularly with regard to institutional versus individual academic freedom, such as professor-institution disputes over the authority to assign grades¹⁵ or student-institution disputes over diversity in admissions.¹⁶ Only two rather recent articles have explored in any depth a public college or university's academic freedom as against other state entities,¹⁷ and none have singled out state laws that affect day-to-day operations regarding curriculum, pedagogy, and assessment.¹⁸ Unlike the drama that swirls around diversity admissions or unjust terminations, these three areas appear quite tame. Yet they are the academic bread and butter of a college or university; state actions that affect curriculum, pedagogy, and assessment affect every administrator, professor, and student.

Another legal protection for colleges and universities results from academic abstention, which involves judicial deference to academic decision-making. Because of the unique functions of colleges and universities, courts desire to avoid excessive judicial oversight in purely academic matters.¹⁹ When forced to decide, a court tends to defer to the expertise of college and university administrators and will uphold actions that relate to academic matters.²⁰ Although courts could potentially be state actors that infringe on academic freedom, they usually do not because of academic abstention. As a judicial doctrine,²¹ it does not afford the

15. E.g., Rebecca Gose Lynch, Comment, *Pawns of the State or Priests of Democracy? Analyzing Professors' Academic Freedom Rights Within the State's Managerial Realm*, 91 CAL. L. REV. 1061, 1092 (2003); David M. Dumas et al., Case Comment, *Parate v. Isibor: Resolving the Conflict Between the Academic Freedom of the University and the Academic Freedom of University Professors*, 16 J.C. & U.L. 713 (1990).

16. Richard H. Hiers, *Institutional Academic Freedom—A Constitutional Misconception: Did Grutter v. Bollinger Perpetuate the Confusion?*, 30 J.C. & U.L. 531 (2004).

17. Karen Petroski, *Lessons for Academic Freedom Law: The California Approach to University Autonomy and Accountability*, 32 J.C. & U.L. 149 (2005) (discussing tensions between university faculty and regents); Laura A. Jeltema, Comment, *Legislators in the Classroom: Why State Legislatures Cannot Decide Higher Education Curricula*, 54 AM. U. L. REV. 215, 220 (2004) (arguing that universities "should be afforded the academic freedom to make curriculum decisions without legislative interference").

18. Of the three terms that are the subject of this Note, curriculum embraces individual courses as well as their sequencing and subject matter: "1 : the courses offered by an educational institution[;] 2 : a set of courses constituting an area of specialization." MERRIAM-WEBSTER'S COLLEGIALE DICTIONARY 307 (11th ed. 2003). Pedagogy relates to classroom practice, the "art, science, or profession of teaching." *Id.* at 912. I chose the term "assessment" over "grading" because it connotes standards for evaluation and because it encompasses non-graded evaluation such as clinical performance.

19. EDWARDS, *supra* note 3, at 25.

20. E.g., Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978) (deferring to expertise of educators in making academic decisions). Judicial deference to official decision-making and action is not limited to the college and university setting; courts have also deferred to military officers and prison wardens. STEVEN G. POSKANZER, *HIGHER EDUCATION LAW: THE FACULTY* 282 n.3 (2002).

21. Even though courts continually apply academic abstention with consistent results, "doctrine" may be too strong a word for academic abstention "because courts have never developed a consistent or thorough body of rationales or followed a uniform group of leading cases." Byrne, *supra* note 13, at 323.

same protection as the constitutional right of academic freedom. This doctrine, however, resonates with the same justifications undergirding academic freedom²² and could function as its corollary. Because many decisions have invoked it, the parameters and results for academic abstention are fairly well-understood.²³ Another legal concept that could supplement academic freedom is separation of powers: a few state constitutions grant constitutional status to their regents, making these bodies co-equal with state legislatures.²⁴

This Note explores the extent to which administrators at individual state colleges and universities could apply a combined concept of academic freedom and academic abstention to challenge the actions of law- and rule-making state entities. Section II summarizes the current concepts of academic freedom, noting how it applies to state colleges and universities, state governments, and curriculum, pedagogy, and assessment. Then, Section III presents some of the limitations of academic freedom as an applicable legal concept. Section IV discusses academic abstention to show how this judicial doctrine can function as a corollary to make academic freedom more usable; it also discusses the limited applicability of separation of powers between legislatures and regents. Section V then discusses the particular features of the college or university's relationship with each of the three main state entities: legislatures, regents, and regulatory bodies. The Note closes in Section VI with sample applications: the considerations faced by an individual college or university's administration in applying this augmented concept of academic freedom to challenge current state laws and regulations that affect curriculum, pedagogy, and assessment.

II. CURRENT CONCEPTS OF ACADEMIC FREEDOM

The Supreme Court has called academic freedom a "special concern of the First Amendment."²⁵ Although one might think that a First Amendment right applies more to faculty members and students as individuals,²⁶ the reverse is true for academic freedom: this legal principle has developed so that the college or university as an institution has the most explicit right against interference by outside bodies.²⁷ This section explores the background for institutional academic

22. *Id.* at 323–37; Edward N. Stoner II & J. Michael Showalter, *Judicial Deference to Educational Judgment: Justice O'Connor's Opinion in Grutter Reapplies Longstanding Principles, as Shown by Rulings Involving College Students in the Eighteen Months Before Grutter*, 30 J.C. & U.L. 583, 584–85 (2004); Leland Ware, *Strict Scrutiny, Affirmative Action, and Academic Freedom: The University of Michigan Cases*, 78 TUL. L. REV. 2097, 2110 (2004).

23. Byrne, *supra* note 13, at 323.

24. *Id.* at 327.

25. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

26. Metzger, *supra* note 1, at 1318; William A. Kohlburn, Note, *The Double-Edged Sword of Academic Freedom: Cutting the Scales of Justice in Title VII Litigation*, 65 WASH. U. L.Q. 445, 449 (1987).

27. The Fourth Circuit wrote, "The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs." *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000). See Petroski, *supra* note 17, at 165–66; Rabban, *supra* note 13, *passim* (comparing and contrasting individual and institutional concepts of academic freedom); Metzger, *supra* note 1, at 1316. But

freedom in America and subsequent Supreme Court decisions that transformed this theory into a constitutionally-protected area. We turn first to scholarly definitions of academic freedom.

A. Institutional Academic Freedom Defined

One of the principal points among scholars is that academic freedom as a legal concept is hazy and complex;²⁸ much theoretical backing and several explanations exist, however, that provide some framework. Academic speech encompasses both scholarship and teaching.²⁹ Because of “its commitment to truth . . . , its honesty and carefulness, its richness of meaning, its doctrinal freedom, and its invitation to criticism,” academic speech must be allowed the utmost free expression.³⁰ Such freedom helps preserve the “unique functions” of the college and university as an institution, above individual student or faculty freedoms.³¹

Accordingly, one explanation of academic freedom is a “conscious deference by judicial or other governmental authorities to a college or university . . . on decisions that are fundamentally academic in content.”³² Another states that it “represents the ability to make decisions concerning internal affairs free from outside interference.”³³ One eminent scholar, Walter P. Metzger, traces the current concept to nineteenth-century German *Freiheit der Wissenschaft*, or academic self-government, which is “the university’s right, under the direction of its senior professors organized into separate faculties and a common senate, to control its internal affairs.”³⁴ J. Peter Byrne writes, “constitutional academic freedom should primarily insulate the university in core academic affairs from interference by the state.”³⁵ Finally, “the most basic conception of academic freedom inheres in the notion that educational institutions, acting through their constituent faculties, have the right to determine their own teaching and research agenda.”³⁶

These explanations share several important features. First, the individual college or university is autonomous; it operates apart from other colleges and universities and state entities. Second, this separation is limited to academic concerns like teaching and research and does not extend to governmental functions

see Hiers, *supra* note 16, *passim* (arguing that institutional academic freedom is a constitutional misconception).

28. E.g., David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1408 (1988) (calling the traditional conception of academic freedom “complex”); Metzger, *supra* note 1, at 1318 (“[T]he Court has not given academic freedom for institutions a specific constitutional rationale.”).

29. Byrne, *supra* note 13, at 258.

30. *Id.* at 259–60.

31. *Id.* at 262–63. Steven G. Poskanzer uses similar language when he refers to the “critical functions” of a university in preserving old knowledge and disseminating all knowledge via teaching and publication. POSKANZER, *supra* note 20, at 67.

32. POSKANZER, *supra* note 20, at 65.

33. Dumas et al., *supra* note 15, at 713.

34. Metzger, *supra* note 1, at 1270.

35. Byrne, *supra* note 13, at 255.

36. Scanlan, *supra* note 4, at 1481.

like health and safety. Finally, we see the basic association between academic freedom and academic abstention: as government entities, courts should ordinarily defer to college and university decisions and actions based on purely academic grounds.

B. Professional Theories and Practical Concerns

Following the Civil War, American colleges and universities underwent a paradigm shift. Rather than adhering to religious principles to prepare young men to be upstanding citizens by following a classics-oriented education, private colleges and universities and the growing number of state colleges and universities embraced an intellectual orientation of relative truths continuously revised by scientific endeavor.³⁷ Several sources contributed to this shift. One was the model of the German university.³⁸ In theory, this was a collection of faculty drawn together to exchange research and ideas free from any external control, including that of the state.³⁹ A second, more practical contribution came from the Morrill Land Grant Act, which provided states with land for colleges and universities dedicated to practical, society-improving fields, such as agriculture and mechanical arts like mining and engineering.⁴⁰ Scientific pursuits such as these require conditions for research and study that are free from political interference or oversight.⁴¹ These changes attracted more and better-credentialed faculty to colleges and universities, so the intellectual life of the institutions continued to expand.⁴²

From these roots of academic freedom, the American Association of University Professors (“AAUP”) formulated a concise statement in 1915.⁴³ This report announced that the modern college and university was the home of three fields of human inquiry—natural science, social science, and philosophy and religion—which, though they sound limited, encompass liberal arts, hard and applied sciences, and professional studies.⁴⁴ “In all of these domains of knowledge, the first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results. Such freedom is the breath in the nostrils of all scientific activity.”⁴⁵ Notably, the 1915 Report did not promote the freedom of the individual faculty member *per se*; rather, the AAUP was interested in keeping the college and university as a whole free from the actions of “bodies not composed of

37. Byrne, *supra* note 13, at 270–71.

38. *Id.* at 270.

39. Metzger, *supra* note 1, at 1270–71.

40. Byrne, *supra* note 13, at 270.

41. *Id.* at 273.

42. *Id.* at 272.

43. *Id.* at 276; see AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, REPORT OF THE COMMITTEE ON ACADEMIC FREEDOM AND TENURE (1915), reprinted in 2 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 860, 860 (Richard Hofstadter & Wilson Smith eds., 1961) [hereinafter 1915 REPORT].

44. 1915 REPORT, *supra* note 43, at 867.

45. *Id.*

members of the academic profession.”⁴⁶

C. Supreme Court Recognition of University Academic Freedom: A Special Concern of the First Amendment and the Four Essential Freedoms

Several Supreme Court cases reveal that state colleges and universities have a constitutional right, derived from the First Amendment, to the four essential freedoms of “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”⁴⁷ This right has limits, such as when the institution makes decisions not based on academic grounds or acts in a way that impermissibly infringes on an individual’s constitutional rights, as well as when the state has exigent and compelling reasons to intrude.⁴⁸ Although the language of the Court could encompass both public and private colleges and universities, this subsection covers the application of academic freedom for state colleges and universities. One reason is that the focus of this Note is on the position of a state college or university relative to other state entities; private institutions usually are not subject to specific legislative and regulatory control of curriculum, pedagogy, and assessment.⁴⁹ Another reason is that some scholars question whether private institutions can even claim academic freedom under the First Amendment, a topic worthy of separate treatment beyond this article.⁵⁰ Finally, the relevant Supreme Court cases have all involved state colleges and universities.

The Court first addressed academic freedom in the 1950’s in *Sweezy v. New Hampshire*.⁵¹ In that case, Paul Sweezy was summoned to testify before the state attorney general under authority of state anti-subversion statutes.⁵² He refused to answer numerous questions, including those related to a lecture he had delivered for the humanities course at the public University of New Hampshire.⁵³ When the attorney general petitioned a state court to propound the same questions, Sweezy continued to refuse to answer. The court convicted him of contempt and ordered him incarcerated, and the New Hampshire Supreme Court affirmed.⁵⁴ The United States Supreme Court reversed this conviction, holding that the state had violated Sweezy’s liberties in the areas of academic freedom and political expression when

46. *Id.* at 872.

47. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (citation omitted). For a general discussion of the history of Supreme Court jurisprudence regarding academic freedom, see William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79 (Summer 1990).

48. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315, 319–20 (1978).

49. Rabban, *supra* note 13, at 266–71 (discussing how public universities have more constraints than private universities).

50. See e.g., Comment, *Testing the Limits of Academic Freedom*, 130 U. PA. L. REV. 712, 712 (1982).

51. 354 U.S. 234 (1967).

52. *Id.* at 238–42.

53. *Id.* at 243.

54. *Id.* at 244–45.

it compelled him to disclose the subject of his teaching.⁵⁵ In a plurality opinion announcing the judgment of the Court, Chief Justice Warren based this reversal in part on violations of academic freedom:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. 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.⁵⁶

This case involved the rights of an individual against state laws, but Chief Justice Warren hinted at the institutional aspect of academic freedom with phrases like an “atmosphere” for scholarship and “the community of American universities.”⁵⁷

Of more importance for the legal development of academic freedom is Justice Frankfurter’s concurrence.⁵⁸ He argued that intellectual pursuits like social sciences are based on “hypothesis and speculation” and that “inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible.”⁵⁹ To him, a free society depends on free colleges and universities, so that “[p]olitical power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people’s well-being, except for reasons that are exigent and obviously compelling.”⁶⁰ Ultimately, Frankfurter found that the anti-subversion statutes failed this exception: “When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate.”⁶¹

Frankfurter also quoted at length from a statement of The Open Universities in South Africa, which he called the “most poignant” and “latest expression on this subject”:

“In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. . . .”

. . .

“It is the business of a university to provide that atmosphere which is

55. *Id.* at 249–50.

56. *Id.* at 250.

57. *Id.*

58. *Id.* at 255 (Frankfurter, J., concurring).

59. *Id.* at 261–62.

60. *Id.* at 262.

61. *Id.* at 261.

most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”⁶²

This statement is significant because it established a line of demarcation between the individual college or university and the state. Although the state may have some influence over the college or university, the college or university is free to make its own judgments in matters that relate to education. These four essential freedoms embrace a wide range of concerns: hiring and termination, admissions and dismissal, and curriculum, pedagogy and assessment.

Less than a decade later in his majority opinion in *Keyishian v. Board of Regents of the University of the State of New York*,⁶³ Justice Brennan made the strongest statement about academic freedom when he called it “a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”⁶⁴ Borrowing from Justice Holmes, he called the classroom the “marketplace of ideas,” which must be protected against “authoritative selection” because the future of the nation “depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues.’”⁶⁵ He wrote that the nation “is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.”⁶⁶ The Court relied upon this grounding to strike down “complicated and intricate” New York anti-subversion statutes that had a “chilling effect” on free speech and restricted the “breathing space” of First Amendment freedoms.⁶⁷ This case therefore suggests that a court may act to protect a public college or university from the state when state action has a chilling effect upon First Amendment rights.

The four essential freedoms and the First Amendment came together in *Regents of the University of California v. Bakke*, where a non-minority applicant challenged the race-based set-asides for admission to the UC-Davis Medical School.⁶⁸ In his separate yet controlling opinion,⁶⁹ Justice Powell first noted that “[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”⁷⁰ He then

62. *Id.* at 262–63 (quoting The Open Universities in South Africa 10–12).

63. 385 U.S. 589 (1967).

64. *Id.* at 603.

65. *Id.* (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). One commentator has called this equation of the public university with the marketplace of ideas as a significant distinction between universities and other governmental bodies. Jeltema, *supra* note 17, at 227. This distinction is important because it gives public universities a reason to deserve more constitutional protection than other state agencies against the state itself.

66. 385 U.S. at 603.

67. *Id.* at 604.

68. 438 U.S. 265 (1978).

69. Byrne, *supra* note 13, at 313.

70. 438 U.S. at 312.

quoted the four freedoms from Frankfurter's *Sweezy* concurrence, thus making them part of this controlling opinion.⁷¹ Under the freedom of who may be admitted to study, Powell argued that a diverse student body promoted the atmosphere of "speculation, experiment and caution" essential to a college or university.⁷² The college or university's right to select students to achieve diversity therefore presented a First Amendment "countervailing constitutional interest" to the non-minority student's Fourteenth Amendment equal protection concerns.⁷³ Powell recognized that diversity admissions further a compelling state interest so that a state college or university could use race and ethnicity as a factor in admissions.⁷⁴ Powell also set a limit for academic freedom: the medical school could not show that setting aside a fixed number of seats open only to certain minorities was necessary to achieve the state's interest in diversity; therefore, it impermissibly infringed on the non-minority student's Fourteenth Amendment rights.⁷⁵ A majority of the Court in *Grutter v. Bollinger* specifically endorsed Powell's view when it held that the University of Michigan Law School's use of race as a "plus" factor in admissions was a narrowly tailored means to achieve a compelling state interest in a diverse student body.⁷⁶ *Grutter* is discussed more fully in Section IV, which explores the link between academic freedom and academic abstention.

One implication of *Bakke* and *Grutter* for this Note is that academic freedom provides public colleges and universities with a constitutional right that distinguishes them from other governmental entities. Typically, when state action is based on race, it can survive strict scrutiny only by showing that its actions are necessary for the compelling government interest in remedying past discrimination.⁷⁷ The sole interest that justifies a state college or university's consideration of race in admissions, however, is the attainment of a diverse student body.⁷⁸ Diversity is grounded not in a governmental function to benefit society but in the institution's own self-interest to preserve its First Amendment freedom of admissions.⁷⁹ When narrowly tailored, diversity admissions do not merely survive strict scrutiny. Rather, the institution has a constitutional right superior to an individual's: when college or university admissions programs properly "take race into account in achieving the educational diversity valued by the First Amendment," students not admitted "have no basis to complain of unequal treatment under the Fourteenth Amendment."⁸⁰ The institution's academic

71. *Id.* (citing *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)).

72. *Id.* (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)).

73. *Id.* at 313.

74. *Id.* at 315.

75. *Id.* at 319–20.

76. 539 U.S. 306, 329 (2003).

77. *Id.* at 328.

78. *Id.* at 324–25; *Bakke*, 428 U.S. at 311.

79. *Grutter*, 539 U.S. at 323–34.

80. *Bakke*, 428 U.S. at 316, 318. See also *Grutter*, 539 U.S. at 343 ("[T]he Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest *in obtaining the educational benefits* that flow from a

freedom is therefore akin to an individual constitutional right. The implication is powerful: “A state university is a unique state entity in that it enjoys federal constitutional rights against the state itself.”⁸¹

In *Regents of the University of Michigan v. Ewing*, the Supreme Court addressed the essential freedoms of “who may be admitted to study” and “how it shall be taught.”⁸² After repeated poor performance in various areas, Scott Ewing was dismissed from an accelerated medical school program, even though some students had been permitted a retest for one of the subjects.⁸³ The district court found no violation of Ewing’s due process rights because the University’s decision was not based on bad faith, ill will, or other ulterior motives; the Sixth Circuit reversed, holding that the University’s decision was inconsistent with its treatment of other students.⁸⁴ A unanimous Supreme Court reversed again, holding that the dismissal was an academic judgment based upon the student’s entire academic career.⁸⁵ Of note, the Court specifically recognized that academic freedom is an institutional right: “Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself.”⁸⁶ The Court thus recognizes a speech protection for individuals and something more for the college or university—an ability to make decisions unfettered by outside interference.⁸⁷

Combined, these cases reveal that state colleges and universities have a federal constitutional right, which may be enforceable against their creators and paymasters.⁸⁸ The Court has struck down legislation that has a “chilling effect” upon academic freedom.⁸⁹ This federal right makes state colleges and universities akin to individuals in many matters of hiring, admissions, curriculum, and pedagogy and assessment, so the Supremacy Clause could limit attempts by state law- and rule-makers to control individual state colleges and universities in these areas.⁹⁰

III. LIMITATIONS ON ACADEMIC FREEDOM AS AN APPLICABLE LEGAL CONCEPT

In trying to understand the contours of academic freedom as a First Amendment right, we turn first to the Supreme Court, which has the ultimate interpretive authority for the Constitution. The Court embraces the idea of academic freedom,

diverse student body.” (emphasis added)).

81. Byrne, *supra* note 13, at 300.

82. 474 U.S. 214, 226–28 (1985).

83. *Id.* at 215–17.

84. *Id.* at 220–21.

85. *Id.* at 227–28.

86. *Id.* at 226 n.12 (citations omitted).

87. *Keyishian*, 385 U.S. at 604.

88. Jeltema, *supra* note 17, at 253.

89. *Keyishian*, 385 U.S. at 604.

90. Jeltema, *supra* note 17, at 253 (“If universities and students do have rights under the First Amendment, these rights trump the state legislatures’ authority to establish curricula in public universities because of the Supremacy Clause.”).

but a state college or university counsel or administrator would have difficulty applying these decisions to resolve a dispute with a state entity. Scholars have pointed out that the grand style of the Court does not equal clarity of meaning: “The Court has been far more generous in its praise of academic freedom than in providing a precise analysis of its meaning.”⁹¹ Other problems further limit the utility of these Supreme Court decisions.

A. A Law of Concurrences and Footnotes

Academic freedom originated and developed through concurrences and footnotes.⁹² Some of the fullest statements of academic freedom therefore have limited precedential value. This fact suggests that the Court turns first to other legal doctrines on which to base its decisions, relegating academic freedom to a secondary position.

Although Chief Justice Warren noted the importance of academic freedom in *Sweezy*, only Justice Frankfurter’s concurrence addressed curriculum, pedagogy, and assessment.⁹³ Even the next major case, *Keyishian*, did not note the four essential freedoms;⁹⁴ Justice Powell brought them back up twenty years later in *Bakke*,⁹⁵ and they were not fully embraced by a majority of the Court until almost thirty years after that in *Grutter*.⁹⁶ The clearest statement of institutional academic freedom from any case is contained in a footnote in *Ewing*: “Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself.”⁹⁷

This trend continues, such as in cases where students have alleged violations of their First Amendment rights by colleges and universities. In *Widmar v. Vincent*, a religious group challenged the University of Missouri-Kansas City’s (“UMKC”) policy of excluding such groups from its facilities.⁹⁸ The Court ruled against UMKC, holding that since it had created an open forum, content-based exclusion of religious speech violated the First Amendment.⁹⁹ In one sentence, the majority mentioned that it did not question UMKC’s right to make academic judgments about allocating scarce resources or decisions related to the four freedoms.¹⁰⁰ The only analysis of academic freedom came in Justice Stevens’ concurrence.¹⁰¹ He

91. Byrne, *supra* note 13, at 257. See Rabban, *supra* note 13, at 230.

92. See Petroski, *supra* note 17, at 153.

93. 354 U.S. at 263 (Frankfurter, J., concurring).

94. 385 U.S. at 603.

95. 438 U.S. at 312.

96. 539 U.S. at 329.

97. 474 U.S. 214, 226 n.12 (1985).

98. *Widmar v. Vincent*, 454 U.S. 263, 265–66 (1981).

99. *Id.* at 277.

100. *Id.* at 276 (“Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources or ‘to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted study.’” (citing *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring))).

101. *Id.* at 278–80 (Stevens, J., concurring).

wrote that the “managers of a university” should be able to decide on academic grounds what content they find favorable to their educational mission, but that they must justify denial of individual constitutional rights.¹⁰²

Similarly, in *Board of Regents of the University of Wisconsin System v. Southworth*, students sued the University of Wisconsin over mandatory student fees, part of which funded organizations with which they disagreed.¹⁰³ The Court remanded after providing principles related to viewpoint neutrality.¹⁰⁴ Again, the only discussion of academic freedom comes in a concurrence, this time by Justice Souter.¹⁰⁵ Of note, the University did not argue the case on academic freedom grounds; nevertheless, Souter framed his concurrence in institutional academic freedom terms, saying, “protecting a university’s discretion to shape its educational mission may prove to be an important consideration in First Amendment analysis of objections to student fees.”¹⁰⁶ Also, this concurrence makes the most explicit statement of institutional academic freedom against other government entities in issues of curriculum, pedagogy, and assessment: “[W]e have spoken in terms of a wide protection for the academic freedom and autonomy that bars legislatures (and courts) from imposing conditions on the spectrum of subjects taught and viewpoints expressed in college teaching . . .”¹⁰⁷ As has been the history of academic freedom, this statement comes from a concurrence, and concurrence is not precedent. Both *Widmar* and *Vincent* implicate the limits of academic freedom—college and university administrative decisions that impermissibly infringe on individual constitutional rights—but the Court provided little guidance for applying academic freedom by failing to take up the concept more thoroughly.

B. Few Legal Challenges by Colleges & Universities Against Legislatures or Regents

Although the Supreme Court has validated a college or university’s academic freedom as a legal concept, this issue has reached the Court in only a few cases, none of which has included disputes between a public institution and the state that created it and that controls its resources.¹⁰⁸ For example, *Sweezy* and *Keyishian* used academic freedom concepts to reject McCarthy-era anti-subversion statutes, subjects that may be of historical interest only.¹⁰⁹ More recent decisions have addressed admissions and assessment, two of the four essential freedoms, but these were challenges by individuals against college and university authority.¹¹⁰ Metzger writes that although some lower courts have alluded to academic freedom in cases involving individual professors’ pedagogical choices, the majority of

102. *Id.*

103. Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000).

104. *Id.* at 235.

105. *Id.* at 237–239 (Souter, J., concurring).

106. *Id.* at 239.

107. *Id.* at 238–39.

108. Metzger, *supra* note 1, at 1319.

109. 354 U.S. at 254–55; 385 U.S. at 609–10.

110. E.g., *Bakke*, 438 U.S. 265.

courts do not mention this right.¹¹¹ Because “the Supreme Court has taken on such cases too infrequently to reveal its mind,”¹¹² a state college or university administration trying to resist legislation or regulation that relates to curriculum, pedagogy, or assessment has only limited legal arguments available. It can attempt to extend the concept of academic freedom contained in cases like *Bakke* and *Grutter*, or it can turn to more specific circuit and district court opinions. Only a handful of these latter opinions exist, so in most jurisdictions they would be merely persuasive, rather than mandatory, authority.

C. Questionable Constitutionality of Academic Freedom for Public Institutions

These shortcomings add up to the strongest criticism: academic freedom as a right inherent in the college or university, particularly for public institutions,¹¹³ may have no constitutional authority.¹¹⁴ Specific criticisms include that the First Amendment as applied to the states via the Fourteenth Amendment protects persons and not institutions of higher education, particularly where one government entity challenges another.¹¹⁵ This lack of authority stems from the origin of the concept: it received its first legal voice in a concurrence that cited professional theory rather than legal precedent.¹¹⁶ It has since been embraced by justices, and in turn by lower courts, but without the requisite critical inquiry to show exactly how the First Amendment protects academic freedom for government institutions.¹¹⁷ Hiers writes that this uncritical acceptance by the courts results from a desire to “acknowledge the important *public policy value of institutional autonomy* in matters requiring educational expertise” by granting constitutional authority, not just judicial deference, to academic decisions.¹¹⁸ We see this applied in cases like *Ewing*, where the Court mentions academic freedom in a footnote, but without explication and without applying it to the holding.¹¹⁹ Such treatment prompted Chancellor Yudof to write that “institutional academic freedom in the public sector is a make-weight. It does not allocate authority within the governing structure of universities, rather it is used only to emphasize the need to insulate the established order of governmental decision-making from challenges to its authority.”¹²⁰

Although the Court has not provided “a specific constitutional rationale”¹²¹ for the institutional theory of academic freedom, that does not mean that none exists.

111. Metzger, *supra* note 1, at 1319.

112. *Id.*

113. Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831, 855 (1987).

114. Hiers, *supra* note 16, at 531.

115. *Id.* at 557.

116. *Id.* at 577–78.

117. *Id.* at 578.

118. *Id.* at 532.

119. 474 U.S. at 226 n.12.

120. Yudof, *supra* note 113, at 857.

121. Metzger, *supra* note 1, at 1318.

Scholars have filled in the gaps by theorizing that institutions, through their administration, can claim the individual First Amendment rights of their students and faculty in the aggregate,¹²² most notably the right to receive information.¹²³ Perhaps the most compelling argument links the function of a college and university education with the rationale behind the First Amendment.¹²⁴ Colleges and universities offer not just practical skills but also liberal studies, “the capacity of such an education to liberate the student from provincial self-interest” by instilling “a capacity for mature and independent judgment.”¹²⁵ Liberal studies are therefore “necessary for the exchange of ideas contemplated by the First Amendment, and they exist in constant danger from majorities.”¹²⁶ The Supreme Court echoed this language when it referred to the “expansive freedoms of speech and thought associated with the university environment” in *Grutter v. Bollinger*,¹²⁷ discussed more fully below.

Even without such justifications, “a norm without a constitutional plank is not necessarily without constitutional weight.”¹²⁸ Metzger interpreted this statement to mean that the Court’s lack of explanation linking the First Amendment and institutional academic freedom “may have given it a footloose quality that increased its general influence” among lower courts.¹²⁹ The “plank / weight” statement suggests another interpretation: lack of a specific constitutional warrant does not mean denial of constitutional protection. Consider that entities as well as individuals have asserted aspects of the First Amendment, such as the free exercise clause, to invalidate infringing government laws.¹³⁰ And although some people have difficulty comprehending one state entity invoking First Amendment protection against another state entity—particularly when that other entity is the

122. *Testing the Limits of Academic Freedom*, *supra* note 50, at 724.

123. Edward F. Sherman, *The Immigration Laws and the “Right To Hear” Protected by Academic Freedom*, 66 TEX. L. REV. 1547, 1548 (1988). Among the cases cited by Sherman are *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the [constitutional] right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences”) and *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”). *Id.* at 1548 n.7. The aggregation approach is not without flaws. Sherman calls vicarious assertion a limited concept because it protects institutional academic freedom only to the extent it furthers these individual rights. *Id.* at 1548. And at least one state appellate court, in a case that did not involve a claim of institutional academic freedom, has denied a university’s vicarious assertion of constitutional rights on behalf of its students. Native Am. Heritage Comm’n v. Bd. of Trs., 59 Cal. Rptr. 2d 402, 408–09 (Cal. Ct. App. 1996). The court noted, however, that its holding would not apply if the students lacked notice of the affecting conduct or if they would otherwise be unable to assert their rights. *Id.*

124. Byrne, *supra* note 13, at 336.

125. *Id.* at 335.

126. *Id.* at 336.

127. 539 U.S. at 329.

128. Metzger, *supra* note 1, at 1319.

129. *Id.*

130. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525, 528 (1993) (invalidating a city ordinance banning animal sacrifice as infringing upon the free exercise clause right of petitioner church, a not-for-profit corporation).

legislature and hence its “paymaster”¹³¹—nothing in the Constitution forbids this result. After all, the Supreme Court has already declared that “a state university system is quite different in very relevant respects from primary and secondary schools.”¹³² Further, unlike other state units such as corrections and public safety, colleges and universities receive only a fraction of their funding from the state because much of it comes from tuition and private grants and endowments.¹³³

Such reasoning may address the criticisms of Chancellor Yudof and Professor Hiers on the surface, but we should not easily dismiss the heart of their complaints: academic freedom for public colleges and universities has received insufficient explanation from the Supreme Court, and circuit and district courts in turn have failed to develop the concept. College and university administrators do not know the extent of their institution’s academic freedom, state entities have little guidance in crafting laws, and trial courts have insufficient precedent from which to rule. Interestingly, both critics indicate—with themselves exploring—another stage of analysis: since courts wish to maintain the integrity of colleges and universities by deferring to academic decisions of college and university administrators, we can look to cases—both federal and state—that involve academic abstention to find support for public institutional academic freedom.

IV. ACADEMIC ABSTENTION AND SEPARATION OF POWERS: COROLLARIES TO INSTITUTIONAL ACADEMIC FREEDOM

“The constitutional right of institutional academic freedom appears to be a collateral descendent of the common law notion of academic abstention.”¹³⁴ In fact, courts justify academic abstention as necessary to maintain academic integrity, thus invoking the four essential freedoms.¹³⁵ One drawback with academic abstention standing alone is that it does not have a “coherent rationale” for application.¹³⁶ By looking at academic abstention through the lens of curriculum, pedagogy, and assessment, however, we can refine our understanding of this doctrine as a corollary that makes academic freedom more usable. Though limited to a few states, separation of powers is a second corollary that arises in states that grant constitutional status to their regents.

A. Academic Abstention: High Courts Defer to Academic Decision Making

Academic abstention is a judicial practice that affords the university freedom

131. Metzger, *supra* note 1, at 1318.

132. *United States v. Fordice*, 505 U.S. 717, 728–29 (1992).

133. For example, tuition at the University of Kansas pays for approximately one-third of the total cost of an in-state student’s attendance and 60 percent of an out-of-state student’s attendance. Also, appropriations from the state legislature account for only 24 percent of KU’s total annual revenue. Tuition: 2006–2007, The University of Kansas, <http://www.tuition.ku.edu> (last visited Feb. 13, 2007).

134. Byrne, *supra* note 13, at 326.

135. *Id.* at 326–37; see *Grutter v. Bollinger*, 539 U.S. 306, 328–29 (2003) (equating the freedom of whom to admit with judicial deference).

136. Byrne, *supra* note 13, at 325.

from judicial oversight in most cases.¹³⁷ “It describes the traditional refusal of courts to extend common law rules of liability to colleges where doing so would interfere with the college administration’s good faith performance of its core functions.”¹³⁸ Judges tend not to disturb the bona fide academic decisions of academics.¹³⁹ Byrne offers two rationales for this doctrine. First, academia is a realm separate from society as a whole; it pursues values related to collegial, pedagogical, or disciplinary models of personal relations.¹⁴⁰ “Second, judges feel themselves incompetent to evaluate the merits of academic decisions.”¹⁴¹

The leading Supreme Court case is *Curators of the University of Missouri v. Horowitz*, which involves assessment.¹⁴² In *Horowitz*, a medical student received poor performance evaluations in clinicals; after failing to improve while on probationary status, she was denied re-enrollment by the medical school.¹⁴³ She sued, alleging a violation of due process, but the district court found for the University; the Eighth Circuit reversed and remanded.¹⁴⁴ The Court sided with the University and held that the Due Process Clause requires neither notice nor a hearing before dismissing a student for academic reasons. Justice Rehnquist’s majority opinion held that an academic decision “requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.”¹⁴⁵ The Court recognized the “historic judgment of educators” and declined to enlarge the judicial presence in the academic community because to do so would “risk deterioration of many beneficial aspects of the faculty-student relationship.”¹⁴⁶

Federal courts following *Horowitz* have deferred to the decisions of college and university educators made on academic bases.¹⁴⁷ For example, the University of Illinois at Chicago (“UIC”) dismissed an anesthesiology intern after it learned that he had lied on his application about being dismissed from another internship program.¹⁴⁸ He brought suit in district court alleging violation of due process, and the district court granted summary judgment in UIC’s favor.¹⁴⁹ The Seventh Circuit affirmed.¹⁵⁰ After a discussion of *Horowitz*, it wrote, “We have no

137. *Id.* at 323.

138. *Id.*

139. *Id.* at 326.

140. *Id.* at 325.

141. *Id.*

142. 435 U.S. 78, 90 (1978).

143. *Id.* at 80–82.

144. *Id.* at 79–80.

145. *Id.* at 90.

146. *Id.* at 89–90.

147. See, e.g., *Wheeler v. Miller*, 168 F.3d 241, 248 (5th Cir. 1999) (holding that a school’s decision to terminate a student from its doctoral program satisfied the minimal due process requirements under *Horowitz* since it was based on careful and deliberate ratings of academic performance); *Harris v. Blake*, 798 F.2d 419 (10th Cir. 1986) (dismissing a graduate student for attendance was an academic rather than a disciplinary decision under *Horowitz*).

148. *Fenje v. Feld*, 398 F.3d 620, 621–22 (7th Cir. 2005).

149. *Id.* at 623–24.

150. *Id.* at 622.

difficulty concluding that Dr. Fenje's dismissal falls within the ambit of an academic dismissal.”¹⁵¹ The court also wrote, “As in *Horowitz*, this represents an academic judgment by school officials, expert in the subjective evaluation of medical doctors.”¹⁵²

State cases follow the federal approach, including a decision by the Alaska Supreme Court that specifically mentions curriculum and assessment.¹⁵³ In *Bruner v. Petersen*, a nursing student challenged the School’s decision that he take a basic English class before re-enrolling in a required nursing class that he had failed.¹⁵⁴ The Alaska Supreme Court affirmed the trial court’s finding that the School’s requirement was proper by writing that faculty are in the best position to determine how to help the student to succeed and must have the discretion necessary to maintain the integrity of the curriculum and the degree.¹⁵⁵ For these reasons, the Alaska Supreme Court affords college and university faculty and administrators substantial discretion “[i]n matters of academic merit, curriculum, and advancement.”¹⁵⁶ This and other state decisions indicate that courts, if confronted with litigation between a state and one of its colleges or universities, may consider activities that harm the faculty-student relationship as infringing upon academic freedom.

B. A Link Between Academic Abstention and Academic Freedom

Academic abstention can be the key to transform academic freedom into a concept usable for state college and university administrators. Byrne calls institutional academic freedom a “collateral descendent” of academic abstention.¹⁵⁷ He cites *Ewing* and *Sweezy* when he describes academic freedom as academic abstention raised to constitutional status, “so that judges can consider whether statutes or regulations fail to give sufficient consideration to the special needs or prerogatives of the academic community.”¹⁵⁸

Fourteen years after this characterization, the Supreme Court reinforced the link between academic freedom and academic abstention. The Court in *Grutter v. Bollinger* recognized a compelling state interest in a diverse student body in upholding the diversity admissions policies of the Law School of the University of Michigan.¹⁵⁹ As grounds for this compelling interest, the Court first turned to academic abstention, reiterating its tradition from *Ewing*, *Horowitz*, and *Bakke* of deference to “academic decisions” based on “complex educational judgments” that

151. *Id.* at 625.

152. *Id.*

153. *Bruner v. Petersen*, 944 P.2d 43 (Alaska 1997). See also *Yarcheski v. Reiner*, 669 N.W.2d 487, 492 (S.D. 2003) (“Evaluating academic performance is a venture beyond our expertise and our jurisdiction.”); *Swartley v. Hoffner*, 734 A.2d 915 (Pa. Super. Ct. 1999) (using similar language of judicial deference).

154. 944 P.2d at 48.

155. *Id.*

156. *Id.*

157. Byrne, *supra* note 13, at 326.

158. *Id.* at 327.

159. 539 U.S. 306, 328 (2003).

lie “primarily within the expertise of the university.”¹⁶⁰ In the next sentence, the Court wrote, “given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”¹⁶¹ The Court then cited the First Amendment as providing a constitutional dimension for “educational autonomy” and institutional judgments. It endorsed Justice Powell’s *Bakke* opinion and his discussion of the essential freedom of ‘who may be admitted to study’: “Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission . . .”¹⁶²

In *Gratz v. Bollinger*, a companion to *Grutter*, students who were denied admission to the University of Michigan’s College of Literature, Science and the Arts sued in district court, alleging the same causes of action as *Grutter*.¹⁶³ The district court certified two questions to the Sixth Circuit, but while they were still pending, the Supreme Court granted certiorari to resolve this case with *Grutter*.¹⁶⁴ Although the Court deferred to the judgment of the administrators in using diversity as a basis to consider race as a factor in admissions,¹⁶⁵ it recognized constitutional limits in effecting this goal: “Nothing in Justice Powell’s opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis.”¹⁶⁶ The Court applied strict scrutiny to strike down the college’s admission program, which awarded all minority applicants 20 points on a 150-point scale, because it was not narrowly tailored to account for individual applicants.¹⁶⁷

Combined, these cases reveal the interplay between academic abstention and academic freedom. Both make clear that the courts must scrutinize academic decisions that affect constitutional rights like equal protection, yet they both reinforce the judicial doctrine of abstention from the purely academic judgments of college and university educators. *Grutter* indicates the Court’s willingness to defer to certain academic decisions. A decision affecting the institutional mission and encompassed within the four essential freedoms will, by its nature, reflect a compelling state interest. *Gratz* likewise recognizes academic abstention but tells courts when to intervene: when those decisions involve means that are not

160. *Id.*

161. *Id.* at 329.

162. *Id.* at 328–29 (citing *Bakke*, 438 U.S. at 318–19). Academics have a split view of this recently-decided case. Because it did not provide sufficient analysis, Hiers sees this decision as perpetuating the confusion regarding the questionably constitutional institutional academic freedom and academic abstention. Hiers, *supra* note 16, *passim*. Stoner and Showalter, however, claim this decision applied long-standing principles of judicial deference. Stoner & Showalter, *supra* note 22.

163. *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

164. *Id.* at 259–60.

165. *Id.* at 268.

166. *Id.* at 275.

167. *Id.*

narrowly tailored to achieve a compelling state interest related to one of the four freedoms. Resisting state laws or rules that infringe on purely academic areas seems the most narrowly tailored means possible to preserve academic freedom.

C. Circuit Courts Defer to Institutional Decisions for Reasons that Justify Academic Freedom for Public Universities

One criticism of public college and university academic freedom is that, outside of diversity in admissions, the Supreme Court has not applied the concept of institutional academic freedom as essential to a holding.¹⁶⁸ If we turn to circuit court opinions that defer to the decisions of state institutions regarding pedagogy and assessment, however, we find that their reasoning implicates the essential freedoms. Although these opinions show how academic abstention is a powerful concept, one significant limitation is that they seldom—if ever—involve state entities as opposing parties. Viewing these cases through *Grutter* and *Gratz*, however, which united academic abstention and academic freedom under the First Amendment, application of these decisions against the state is plausible. An analysis of these opinions reveals a more thorough basis for constitutional authority for institutional academic freedom: each college or university has a mission that it expresses through hiring and admissions—and most importantly for this Note via institutional standards and norms for curriculum, assessment, and pedagogy—and that expression warrants protection against state action that has a chilling effect on this First Amendment right.

Although the courts have not addressed curriculum, several cases defer to institutions for the essential freedom of “how it shall be taught.” The Sixth Circuit confronted one aspect of this freedom directly and held that a college or university may terminate a teacher “whose pedagogical style and philosophy do not conform to the pattern prescribed by the school administration.”¹⁶⁹ Administrators at Eastern Kentucky University considered their students as having “somewhat restrictive backgrounds” and expected their faculty to teach on a more basic level by stressing fundamentals and conventional teaching patterns.¹⁷⁰ Because the teacher in question had emphasized student responsibility and freedom to organize in-class and out-of-class assignments, which generated numerous student complaints, the administration terminated her.¹⁷¹ The court affirmed the reasoning of the district court, which had held that “a State University has the authority to refuse to renew a non-tenured professor’s contract for the reason that the teaching methods of that professor do not conform . . . with those approved of by the University.”¹⁷²

168. Hiers, *supra* note 16, at 579–80. Although *Ewing* involved dismissal of a student and hence implicated assessment, Chancellor Yudof argues that academic freedom was not *essential* to the holding, since the only mention was in a footnote. Yoduf, *supra* note 113, at 857.

169. *Hetrick v. Martin*, 480 F.2d 705, 706 (6th Cir. 1973).

170. *Id.* at 707.

171. *Id.* at 706–07.

172. *Id.* at 708. A recent South Dakota Supreme Court opinion relied in part on *Hetrick* in holding that institutional academic freedom means that a university does not have to tolerate “any

Several circuit court decisions have addressed the second facet of “how it shall be taught,” assessment, and have placed a college or university’s authority in assessment standards above that of professors. For example, *Parate v. Isibor*, a Sixth Circuit case that has received some scholarly attention, involved a dispute between administrators at Tennessee State University and an engineering professor over his too-flexible grading policy, which led to a decision not to renew the professor.¹⁷³ The actual holding was that the assignment of a grade by a professor was symbolic communication protected by the First Amendment.¹⁷⁴ The Court noted, however, that Parate had “no constitutional interest in the grades which his students ultimately receive,” meaning that administrators could change a student’s final grade (such as when a student appeals).¹⁷⁵ In the First Circuit case *Lovelace v. Southeastern Massachusetts University*, a state university similarly declined to renew a non-tenured faculty member.¹⁷⁶ The court held that the University was justified in discharging the professor when he refused to change his individual grading standards, which conflicted with established policies.¹⁷⁷ Unlike the Sixth Circuit in *Parate*, the First Circuit found that the instructor had no First Amendment protection for his grading policies.¹⁷⁸ Both decisions nevertheless reinforce the ultimate authority of the college or university to determine institution-wide grading standards and policies.

Lovelace is important for another reason: in it, all four essential freedoms come together as integral to the holding. The Court declared that an institution must have academic freedom in curriculum, pedagogy, and assessment to effectuate its admissions policies:

Whether a school sets itself up to attract and serve only the best and the brightest students or whether it instead gears its standard to a broader, more average population is a policy decision which, we think, universities must be allowed to set. And matters such as course content, homework load, and grading policy are core university concerns, integral to implementation of this policy decision.¹⁷⁹

The court refused to acknowledge any First Amendment protection for the instructor’s grading policies, which conflicted with the University’s, because to do so “would be to constrict the university in defining and performing its educational

manner of teaching method a professor may choose to employ.” *Yarcheski v. Reiner*, 669 N.W.2d 487, 498 (S.D. 2003) (citing *Hetrick*, 480 F.2d at 707).

173. *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989). For a more thorough discussion of *Parate*, see Dumas et al., *supra* note 15.

174. 868 F.2d at 830.

175. *Id.* at 829.

176. *Lovelace v. Se. Mass. Univ.*, 793 F.2d 419, 425 (1st Cir. 1986).

177. *Id.* at 425–26.

178. *Id.* at 426. The Third Circuit has similarly rejected the *Parate* distinction between the faculty’s right to assign a grade and the university’s right to note the final transcript grade. *Brown v. Armenti*, 247 F.3d 69, 75 (3d Cir. 2001) (holding that “a public university professor does not have a First Amendment right to expression via the school’s grade assignment procedures”).

179. *Lovelace*, 793 F.2d at 425–26.

mission.”¹⁸⁰ Rather than mere dicta, this concept was central to the court’s holding that the University could dismiss a non-tenured professor because his grading standards were more rigorous than those adopted by the University.¹⁸¹

In another case that involved assessment and pedagogy, *Brown v. Armenti*, the Third Circuit cited *Lovelace*.¹⁸² Professor Brown refused to change a student’s “F” to “Incomplete” at the request of a state university’s president, Armenti; Brown was suspended and then terminated.¹⁸³ The district court denied Armenti’s motion for summary judgment,¹⁸⁴ but the Third Circuit reversed.¹⁸⁵ It quoted the Supreme Court’s decision in *Rosenberger*: “When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.”¹⁸⁶ *Rosenberger* thus recognized that a college or university has its “own speech, which is controlled by different principles.”¹⁸⁷ Because the university restricted speech but did not itself speak, the Court in *Rosenberger* did not reach those principles.¹⁸⁸ The Third Circuit, though, found that a college or university speaks when it or its proxy fulfills one of the functions involved in the four essential freedoms; it wrote, “Because grading is pedagogic, the assignment of the grade is subsumed under the university’s freedom to determine how a course is to be taught.”¹⁸⁹ Concluding that the University had this First Amendment right but that Brown had none, the Third Circuit invoked academic abstention and declined to interfere with the University’s grading policies.¹⁹⁰

Ultimately, *Lovelace* and *Brown* suggest a fusion of academic freedom and academic abstention that state college and university administrators could use to challenge other state actors. First, both cases involve public state institutions, Southeastern Massachusetts University¹⁹¹ and California University of Pennsylvania. Second, both cases invoked academic abstention by incorporating academic freedom, providing a foundation for deferring to institutional decisions related to the four freedoms: standards in these areas are speech because they express university policy. In other words, each institution has an identity, formulated in mission and policy statements, which is expressed as standards for

180. *Id.* at 426.

181. *Id.*

182. 247 F.3d at 75 (citing *Lovelace*, 793 F.2d at 426).

183. *Id.* at 72.

184. *Id.* at 71.

185. *Id.* at 72.

186. *Id.* at 74–75 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995)).

187. *Id.* (quoting *Rosenberger*, 515 U.S. at 834).

188. 515 U.S. at 834.

189. *Brown*, 247 F.3d at 75.

190. *Id.*

191. This school has since been renamed the University of Massachusetts Dartmouth. History of UMass Dartmouth, <http://www.umassd.edu/about/history.cfm> (last visited Feb. 13, 2007).

admissions, hiring, curriculum, pedagogy, and assessment. As *Bakke* and *Grutter* have indicated, expression of the institutional mission implicates the First Amendment;¹⁹² and the Court in *Keyishian* has already denied application of state laws when they had a chilling effect on the First Amendment.¹⁹³ Although neither *Lovelace* nor *Brown* involved action against the institution by the state, these considerations combine to suggest a test for academic freedom: because state action that has a chilling effect on institutional curriculum, pedagogy, and assessment standards infringes on a college or university's academic freedom, a court should defer to the judgment of college and university administrators who resist such action.

D. Indirect Infringement

The facts in the circuit court cases discussed in subsection C involve actions that directly implicate curriculum, assessment, or pedagogy.¹⁹⁴ Sometimes a state action may not directly target academics but may nonetheless create some burden upon a college or university's policies, such as when a court hears a lawsuit for breach of contract even when institutional rules make a termination decision final.¹⁹⁵ Finkin suggests a balancing test for indirect infringement: "In the absence of a direct infringement of freedom of teaching, research, and publication, the determination of whether a particular intervention is an impermissible invasion of autonomy should turn upon the relation of the constraint to the exercise of academic freedom and to the institution's intellectual life."¹⁹⁶ Because a lawsuit for breach of employment contract would not burden the academic or intellectual aspects of the institution, courts should not follow the doctrine of academic abstention in such circumstances.

E. Constitutional Authority of a Different Sort: Separation of Powers

The First Amendment is not the only constitutional protection available for college and university academic freedom. Some state constitutional provisions endowing state colleges and universities with the status of separate branches of government provide a second legal source for constitutional academic freedom.¹⁹⁷ Although separation of powers under the Federal Constitution does not extend to

192. *Grutter*, 539 U.S. at 329. Even before *Grutter*, the Supreme Court recognized that selection of newspaper content is an expression of editorial policy and therefore protected by the First Amendment. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). One scholar analogized that academic standards are an expression of a college or university's education policies. *Testing the Limits of Academic Freedom*, *supra* note 50, at 725–27.

193. 385 U.S. at 604.

194. See *supra* Part IV.C.

195. *Manes v. Dallas Baptist Coll.*, 638 S.W.2d 143 (Tex. App. 1982).

196. Finkin, *supra* note 2, at 854.

197. *Byrne*, *supra* note 13, at 327. The Supreme Court of Michigan has said its board of regents is not a separate branch of government; it has instead called it an independent branch of government. *Federated Publ'ns, Inc. v. Bd. of Trs. of Mich. State Univ.*, 594 N.W.2d 491, 497–98 (Mich. 1999).

state governments,¹⁹⁸ many state constitutions and court decisions interpreting them do provide for separation of powers between college and university regents and other state government entities.¹⁹⁹ In *Sterling v. Regents of the University of Michigan*, the Supreme Court of Michigan found that the Board of Regents and the state legislature were two “separate and distinct constitutional bodies.”²⁰⁰ Because the powers of the Regents were clearly defined, the court held that neither could “encroach upon [n]or exercise the powers conferred upon the other.”²⁰¹ This reasoning has been consistently applied through the decades, including a 1999 Michigan decision that upheld separation of powers for one of the academic freedoms, “who may teach.”²⁰² In that case, a newspaper company brought suit against the trustees of Michigan State University, which have constitutional authority, to enforce the state’s Open Meetings Act (OMA) for the university’s presidential hiring committee.²⁰³ The trial court found that the OMA did not apply to the university, but the court of appeals reversed, holding that the policy behind the OMA made it applicable to the university.²⁰⁴ The Supreme Court of Michigan reversed, holding: “Given the constitutional authority to supervise the institution generally, application of the OMA to the governing boards of our public universities is . . . beyond the realm of legislative authority.”²⁰⁵ The court wrote that “regulation cannot extend into the university’s sphere of educational authority.”²⁰⁶

Separation of powers as a basis for institutional administrators to challenge state action suffers from two drawbacks. First, the college and university systems in no more than eleven states enjoy constitutional status, so this strong protection does not apply to the majority of institutions.²⁰⁷ Second, college and university administrators can face a dilemma, whether or not their regents have constitutional authority. While regents can defend the institution from interference by the legislature, sometimes regents could be the rule-making body that the individual institution seeks to challenge. This dilemma is addressed more fully in the next section.

198. *Sweezy*, 354 U.S. at 255.

199. Byrne claims that specifying these state regents is difficult because some state courts have extended constitutional status to regents in the face of ambiguous constitutional language; he nevertheless includes California, Georgia, Hawaii, Idaho, Michigan, Minnesota, Montana, Nebraska, and Oklahoma. Byrne, *supra* note 13, at 327 n.303. Opinions from Mississippi and Utah have also confirmed that their constitutionally-created state regents have powers separate and distinct from other state agencies. *State ex rel. Allain v. Bd. of Trs. of Inst. of Higher Learning*, 387 So. 2d 89, 93 (Miss. 1980); *Univ. of Utah v. Bd. of Exam’rs of State of Utah*, 295 P.2d 348 (Utah 1956).

200. 68 N.W. 253, 257 (Mich. 1896).

201. *Id.*

202. *Federated Publications*, 594 N.W.2d 491.

203. *Id.* at 494.

204. *Id.* at 494–95.

205. *Id.* at 498.

206. *Id.* at 497.

207. Byrne, *supra* note 13, at 327 n.303.

V. UNDERSTANDING THE STATE COLLEGE OR UNIVERSITY'S RELATIONSHIPS WITH LEGISLATURES, REGENTS, AND GOVERNMENT REGULATORY AGENCIES

Though combining academic freedom with academic abstention and separation of powers makes for a more usable legal concept for college and university administrators, it does not offer a one-size-fits-all solution. As the Introduction suggests, the individual institution has different relationships with the various state actors.²⁰⁸ The ultimate effectiveness of academic freedom as a means of resisting state interference will depend to a great extent on the identity of the state actor. This section treats in turn the relationships between an individual state college or university and the state legislature, board of regents, and state regulatory agencies.

A. Limits of Legislative Authority over State Colleges and Universities

The legal and theoretical conceptions of college and university academic freedom describe this right in terms of the individual institution, such as the freedom of the University of California at Davis Medical School to consider diversity in admissions.²⁰⁹ Cases that deal with a college or university's challenge to a legislative mandate, however, typically involve a board of regents as representative of the college or university.²¹⁰ Further, not all boards of regents are created alike: they have constitutional authority in some states, but only legislative authority in others.²¹¹ Two concerns arise. First, what is the authority of a statutorily-created board compared to a constitutionally-created one in challenging a legislature? Second, what happens when an individual college or university wishes to challenge the legislature but does not have the support of its regents?

1. Constitutional Regents as University Representatives Have Strong Power

When their powers derive directly from a state constitution, regents "enjoy significant freedom from legislative control."²¹² The nineteenth-century Michigan case *Sterling* demonstrates this freedom.²¹³ For fifteen years after its founding, the University of Michigan, now one of the premier institutions in the nation, "was not a success under [the] supervision [of] the legislature."²¹⁴ At the state constitutional convention of 1850, power over the "control and management" of the University was taken from the legislature and given to a permanent board of regents.²¹⁵

208. See *supra* Part I.

209. *Bakke*, 438 U.S. at 272 (stating that the faculty of the Medical School had developed a special admissions process for disadvantaged minorities).

210. E.g., *Sterling*, 68 N.W. 253 (Mich. 1896).

211. Petroski, *supra* note 17, at 150. Compare MICH. CONST. art. VIII, §§ 6–8 (authorizing Board of Regents for University of Michigan via state constitution) with TEX. EDUC. CODE § 65.11 (Vernon 2006) (authorizing Board of Regents for University of Texas System via legislative statute).

212. Petroski, *supra* note 17, at 150.

213. 68 N.W. 253.

214. *Id.* at 254.

215. *Id.* at 254–55.

Removed from the political caprice of the legislature, the University thrived over the next forty years under the management of the regents, who at various points resisted the legislature.²¹⁶ Accordingly, the Michigan Supreme Court supported the regents' refusal to enforce a legislative act that would have moved the medical school from Ann Arbor to Detroit.²¹⁷ As backing for this holding, the court wrote that "the board of regents is a constitutional body, charged by the constitution with the entire control of that institution. . . . [and] was held not to be a state institution under the control and management of the legislature."²¹⁸ Further, this court said, where two different bodies are created from the same document, and different sets of powers are conferred upon each, then neither body may encroach upon the other.²¹⁹

Decisions from other states with constitutionally-created regents have similarly held that the boards have exclusive power over the management and control of the college or university.²²⁰ For example, the Mississippi Supreme Court interpreted the "management and control" language from its state constitution as giving the Board of Trustees, rather than the State Building Commission, exclusive authority over campus building construction.²²¹ California uses slightly different language—"full powers of organization and government"—but goes further when it describes policies established by the Board of Regents of the University of California ("UC") as enjoying a status equivalent to that of state statutes.²²² This affords the UC regents "a significant degree of legal autonomy from legislative control," including "immunity to state and local regulation."²²³ This extends to "internal university affairs," and thus to managerial and not just academic concerns.²²⁴

These broad grants of autonomy are not boundless, however, and they tend to dissolve the further one moves away from academic and administrative issues. In Michigan, for example, regents are subject to legislation that falls outside the "confines of the operation and the allocation of funds of the University," such as the state public employee relations act.²²⁵ The California constitution recognizes specific powers that the legislature retains by stating that the regents' authority is:

subject only to such legislative control as may be necessary to insure the

216. *Id.* at 255–56.

217. *Id.* at 258.

218. *Id.* at 257.

219. *Id.*

220. E.g., Bd. of Regents of Univ. of Okla. v. Baker, 638 P.2d 464, 469 (Okla. 1981); Bd. of Regents of Higher Educ. of State of Mont. v. Judge, 543 P.2d 1323, 1331–35 (Mont. 1975).

221. *Allain*, 387 So. 2d at 91, 93.

222. *Campbell v. Regents of the Univ. of Cal.*, 106 P.3d 976, 982 (Cal. 2005) (quoting CAL. CONST. art. IX, § 9(a)); *Regents of the Univ. of Cal. v. Benford*, 27 Cal. Rptr. 3d 441, 444 (Cal. Ct. App. 2005) (quoting CAL. CONST. art. IX, § 9(a)).

223. Petroski, *supra* note 17, at 179–80 (quoting *S.F. Lab. Council v. Regents of the Univ. of Cal.*, 608 P.2d 277, 279 (Cal. 1980)).

224. *Id.* at 181.

225. *Federated Publications*, 594 N.W.2d at 497 (citing *Regents of the Univ. of Mich. v. Employment Relations Comm.*, 204 N.W.2d 218, 224 (Mich. 1973)).

security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services.²²⁶

Similarly, the case law has recognized three general areas in which the legislature may limit college and university autonomy: authority over the appropriation of state monies; exercise of the general police power, such as workers' compensation laws; and legislation on matters of statewide concern not involving internal college or university affairs.²²⁷

2. Less Clear Authority of Statutorily-Created Regents or Individual Institutions against Legislature

The strong grants of authority described in the previous subsection may not apply to the boards of regents in most states because they are the product of their legislature rather than their constitution.²²⁸ In the few opinions where statutory regents have resisted legislation, those regents tend to lose in litigation. The dicta in these opinions nevertheless suggest that statutory regents and trustees can claim some level of autonomy. More importantly, for issues of curriculum, pedagogy, and assessment, both the regents and individual institutions can still assert their constitutional right to academic freedom.

The clearest suggestion that statutory regents may have less autonomy to resist the legislature comes from California: the Board of Regents for the University of California ("UC") has constitutional status, but the Board of Trustees for the California State University ("CSU") was created by statute.²²⁹ Accordingly, just as the courts have held that the UC regents enjoy autonomy from the California legislature, they have also held that the CSU trustees do not.²³⁰ In one case involving a CSU institution, an engineer at Sonoma State University who had left the University and returned to employment there two years later wanted to apply his prior-accrued sick leave; this accorded with state statute and regulations but contradicted trustee regulations.²³¹ In finding that the University must follow state law, and hence legislative mandate, over trustee regulation, the court contrasted the authority of the UC regents: "No such autonomy is accorded by the Constitution to the State University and Colleges. They have only such autonomy as the Legislature has seen fit to bestow."²³² The court also wrote that the Board of

226. CAL. CONST. art. IX, § 9(a).

227. 106 P.3d at 982.

228. E.g., TEX. EDUC. CODE ANN. §§ 65.11, 85.11, 111.20(a) (Vernon 2006) (authorizing boards of regents for University of Texas System, Texas A&M University System, and University of Houston System).

229. Compare CAL. CONST. art IX, § 9 with CAL. EDUC. CODE § 89030 (West 2006).

230. Slivkoff v. Bd. of Trs., 137 Cal. Rptr. 920 (Cal. Ct. App. 1977).

231. *Id.* at 921–22.

232. *Id.* at 924.

Trustees was not free from legislative regulation.²³³

Although *Slivkoff* suggests that statutory trustees have no autonomy compared with constitutional ones, a careful reading limits such a belief. First, even constitutional regents are subject to legislative authority in some areas; the regents in Michigan must follow the state public employee's act, similar to the provisions at issue in *Slivkoff*.²³⁴ Second, other states suggest that constitutional and statutory regents have equal footing. In New Mexico, for example, the state constitution empowered the legislature to create the board of regents, which it did by statute.²³⁵ The New Mexico Supreme Court recognizes the same level of autonomy for its regents as Michigan and California do for their constitutional regents.²³⁶ Finally, and most significantly, *Slivkoff* did not involve an issue of academic freedom: the word "attenuated" inadequately describes the argument that the freedom to decide who may teach creates a constitutional right to compute sick leave.

Recognition that regents may successfully challenge the legislature comes from dicta in older state cases that ironically enough denied the universities relief. The Missouri Supreme Court denied the authority of the curators of the University of Missouri to resist enforcing legislation that added engineering to the curriculum with the reasoning that "all legislative authority not denied the General Assembly by the Constitution resides in it."²³⁷ The court then stated that "the General Assembly certainly may legislate as it wills, *subject only to the limitations imposed by the Constitution of the United States.*"²³⁸ The Supreme Court of Mississippi, in upholding enforcement of an anti-fraternity law, wrote: "The trustees are mere instruments to carry out the will of the Legislature in regard to the educational institutions of the state. *Both the institutions and the trustees* are under the absolute control of the Legislature."²³⁹ In another part of the opinion, the court wrote: "All acts of a Legislature are valid *unless they conflict with the Constitution of the state or United States.*"²⁴⁰

In recognizing that the Supremacy Clause could limit legislative control, these cases offer the modern state college and university a link to assert academic freedom. First, these decisions assign equal power to resist unconstitutional legislation in constitutional curators, statutory trustees, and the state college or university itself. Second, both opinions state that the courts would have upheld the

233. *Id.* at 926.

234. *Federated Publications*, 594 N.W.2d at 498.

235. Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers, 962 P.2d 1236, 1250 (1998). The New Mexico Supreme Court, however, cites cases from three states with constitutional regents—Michigan, Montana, and Oklahoma—in recognizing that legislative exercise of its police power is acceptable but that intrusion on the regent's authority over educational policy is unconstitutional. *Id.*

236. *Id.*

237. *State v. Bd. of Curators of Univ. of Mo.*, 188 S.W. 128, 131 (Mo. 1916).

238. *Id.* (emphasis added).

239. *Bd. of Trs. of Univ. of Miss. v. Waugh*, 62 So. 827, 830 (Miss. 1913) (emphasis added). *Waugh* refers to the Mississippi Board of Trustees as statutory regents, but above I claimed they were constitutional regents; a 1944 amendment awarded them constitutional status. See *Allain*, 387 So. 2d at 91.

240. *Waugh*, 62 So. at 829 (emphasis added).

institutional challenges if the statutes were unconstitutional. Several decades after these opinions, the Supreme Court constitutionalized academic freedom in *Sweezy* and its progeny. The Missouri decision might have come out differently if litigated today since it involves the essential freedom of curriculum.

B. Regents: A Love-Hate Relationship

The functions, and hence relative places, of legislatures and colleges and universities as state entities are fairly clear. This is not so with regents, which in some states are constitutional and in others statutory;²⁴¹ which in some states have college and university administrators as members and in others only outside members.²⁴² As discussed in the previous subsection, regents represent their institutions to the world outside the college or university, but to an extent regents are themselves outsiders who regulate college and university affairs, approving, for example, fields of study much as legislatures approve budgets.²⁴³ In contrast to the more definitive conclusions when a college or university opposes the state legislature, we have more uncertain and hazy results when a college or university administration opposes its own regents.

To faculty members, regents are most often viewed as outsiders.²⁴⁴ Appointed boards of regents, trustees, and curators exert “considerable influence over institutional choice.”²⁴⁵ In fact, the AAUP developed its principles of academic freedom in large part because it was wary of the power of lay trustees over the institution.²⁴⁶ Metzger writes that, to the AAUP, “the most serious threats of violation from within were posed by members of academic governing boards who held dangerously errant views about the basis of their authority, the nature of the academic calling, and the character of a true university.”²⁴⁷ The *professional* concept of academic freedom thus sees the administration and faculty of the individual college or university as needing freedom from regents.

The *legal* concept, however, may be the reverse: the regents may possess academic freedom to which individual institutions are subject. Because both the state institution and its governing board of regents are usually statutory creations, courts may hold that regent regulations are an exercise of, not an infringement on, a college or university’s academic freedom. A New York state case bears this out. A community college of the City University of New York (“CUNY”) system required a basic writing exam, but administrators at one campus allowed a waiver of the test based upon passing intensive English courses.²⁴⁸ The board of trustees

241. Petroski, *supra* note 17, at 150.

242. Compare CAL. CONST. art. IX, § 9 (stating that the president of University of California is a member of Board of Regents) with GA. CONST. art. VIII, § 4, para. I(a) (providing for one member drawn from each congressional district plus five at-large regents).

243. See *supra* Part V.A.

244. Yudof, *supra* note 113, at 852.

245. Scanlan, *supra* note 4, at 1481.

246. Byrne, *supra* note 13, at 278.

247. Metzger, *supra* note 1, at 1278.

248. Mendez v. Reynolds, 665 N.Y.S.2d 402, 403 (N.Y. Sup. Ct. 1997).

denied graduation to several students who met the waiver but had failed the system-wide exam, even though they did not clarify that the test was an exit exam until a few days before graduation ceremonies.²⁴⁹ The students brought suit to enjoin the trustees from preventing their graduation; the lower court issued an injunction, reasoning that the trustees' actions were undertaken in bad faith and that their conduct was arbitrary and capricious.²⁵⁰ The appellate court reversed, holding, "The City University Board of Trustees possesses the sole and exclusive statutory authority to impose graduation and course requirements for all CUNY colleges."²⁵¹ The court wrote further that "individual colleges of the CUNY system . . . lack the authority to modify, unilaterally, course prerequisites."²⁵² These statements clearly subordinate the administration's actions at an individual institution, even in issues of curriculum and assessment, to its regents.

Despite this holding, a college or university administration wishing to deny the authority of its regents over curriculum, pedagogy, or assessment still has arguments available. For example, one may easily distinguish *Mendez*: individual students and not the institution itself brought the suit, and these students did not even challenge the authority of the trustees over curriculum and graduation.²⁵³ A different outcome could have occurred if the administration that had granted the waiver had challenged the regents on academic freedom grounds: authority granted to regents via state statute might yield to the First Amendment claims of institutional representatives based on the four essential freedoms.²⁵⁴

We find support for the proposition that administrators could represent the institution in litigation against all state entities, including regents, from Professor Byrne, who argues that institutional administrators have the strongest claim of academic freedom. To him, "constitutional academic freedom should primarily insulate the university in core academic affairs from interference by the state."²⁵⁵ He refers to the "corporate right of the university against the state,"²⁵⁶ a right wielded by the executives of this corporation, the administration. "Through its administration, a school makes choices about admissions, hiring, and expenditures which shape its educational character and mission."²⁵⁷ Accordingly, state officials cannot interfere with core academic administrative decisions without impairing academic freedom.²⁵⁸

Byrne bases this view on Justice Stevens' concurrence in *Widmar*, where Stevens argued that the substantive decisions of college and university administrators deserve to be protected as academic freedom because they create

249. *Id.*

250. *Id.* at 404.

251. *Mendez v. Reynolds*, 681 N.Y.S.2d 494, 496 (N.Y. App. Div. 1998) (citation omitted).

252. *Id.*

253. *Id.*

254. Petroski, *supra* note 17, at 212–14.

255. Byrne, *supra* note 13, at 255.

256. *Id.*

257. *Id.* at 316.

258. *Id.*

the atmosphere of a college or university.²⁵⁹ The Supreme Court elsewhere describes academic freedom in terms of individual institutions: the four essential freedoms inhere in the college or university,²⁶⁰ and academic freedom thrives in “autonomous decisionmaking by the academy itself.”²⁶¹ Justice Frankfurter in his *Sweezy* concurrence wrote that academic freedom is necessary to protect universities from “[p]olitical power.”²⁶² Though he spoke of a state legislature, regents are themselves government entities, composed primarily of individuals appointed from outside the institutions, and some members are state officials like the lieutenant governor and the secretary of education.²⁶³ Because one purpose of a board of regents is to govern from outside the institution, one can argue that they cannot simultaneously be part of the institution.

This concept of regents as an outside state entity breaks down in some instances, though. For example, some boards, such as the Board of Regents of the University of California, have administrators from individual institutions among their members.²⁶⁴ Not only can such boards not be characterized as wholly outside the college or university, but the regulations of these boards thus incorporate institutional views.

Even decisions that invoke academic abstention send mixed signals about the relative position of regents and institutional administration. Although academics might view the decisions only of those with academic credentials—such as a Ph.D., tenured or tenure-track, peer-reviewed publications, and classroom experience—as worthy of judicial deference, the language of some Supreme Court opinions indicates that deference should extend to a broader group of people. The Court in *Ewing* encouraged judges to “show great respect for the *faculty’s* professional judgment.”²⁶⁵ In *Horowitz*, however, the court acknowledged respect for the “academic judgment of school officials” while it “decline[d] to ignore the historic judgment of educators,” and it wished to refrain from enlarging “the judicial presence in the academic community.”²⁶⁶ At first glance, such language suggests deference toward the decisions of college and university administrators, but the task of regents to regulate colleges and universities makes them also “school officials” who are part of the “academic community.” If a college or university were to challenge or ignore the mandates of its regents, a court deciding the issue would not have clear guidance about whose “academic” decisions deserve its deference: administrator or regent.

C. Government Agencies: Strong Claims Against Actual Infringement

Seldom addressed in the scholarship about academic freedom, state agencies

259. *Widmar v. Vincent*, 454 U.S. 263, 280 (1981) (Stevens, J., concurring).

260. *Bakke*, 438 U.S. 265.

261. *Ewing*, 474 U.S. at 226 n.12 (citations omitted).

262. 354 U.S. at 262 (Frankfurter, J., concurring).

263. CAL. CONST. art. IX, § 9.

264. *Id.*

265. 474 U.S. at 225 (emphasis added).

266. 435 U.S. at 89–91.

have a tremendous influence upon state colleges and universities.²⁶⁷ Although numerous regulatory agencies affect non-academic aspects of a college or university, such as department of health regulations for on-campus dining, other state agencies that regulate professions like teaching, nursing, and even law establish standards that affect curriculum, assessment, and pedagogy. Whether claims of academic freedom are sufficient to resist this infringement depends largely on the type of agency that issues the regulation. A college or university could resist general regulatory agencies in the same way that it resists legislatures, but the college or university would have little justification for resisting agencies that indirectly infringe upon its academic freedom, such as those that promulgate educational standards for professional licensing.

On its face, colleges and universities seemingly have the strongest academic freedom claims against infringement of curriculum, pedagogy, and assessment by state agencies as compared to other state actors. Unlike regents, most state agencies do not represent institutions directly, so unlike *Mendez*, no statute grants them clear authority over colleges or universities.²⁶⁸ Also the language of the academic abstention doctrine, which requires deference to the academic decisions of educators, does not draw in the rule-making of regulators.²⁶⁹ Further, the broad language of the Supreme Court regarding academic freedom limits regulatory agencies: “government may regulate in the area only with narrow specificity.”²⁷⁰ Finally, just as regents may represent colleges and universities against the legislature, they could similarly represent the college or university against regulatory agencies. As mentioned above, claims by the regents on behalf of the college or university against another state entity may be strongest, particularly when those regents are constitutionally created.²⁷¹ For example, the Supreme Court of Mississippi held that the constitutional Board of Trustees of Institutions of Higher Learning of Mississippi was not subject to regulation by the State Building Commission.²⁷²

One First Circuit case has stated that courts would protect the constitutional rights of the college- or university-as-institution against state regulatory interference.²⁷³ In *Cuesnongle v. Ramos*, the Puerto Rican Department of Consumer Affairs heard and resolved several claims for tuition reimbursement by students related to lack of courses and a delayed semester start because of a faculty strike at the Universidad Central de Bayamon.²⁷⁴ Although the University

267. Harry T. Edwards addresses the topic of government regulation in the most depth, but his focus is on regulation by the federal, rather than the state, government. Edwards, *supra* note 3, at 3. Such regulation typically targets worker safety, social security, and financial accountability for grants, topics which have no relationship with curriculum, pedagogy, and assessment. *Id.*

268. 681 N.Y.S.2d at 496.

269. *Horowitz*, 435 U.S. at 89–91.

270. *Keyishian*, 385 U.S. at 604 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

271. See *supra* Part V.A.

272. *Allain*, 387 So. 2d at 93.

273. *Cuesnongle v. Ramos*, 835 F.2d 1486 (1st Cir. 1987).

274. *Id.* at 1487–88.

vigorously opposed the jurisdiction of the agency even to consider the claims,²⁷⁵ the court upheld the agency's authority to resolve what it characterized as contract claims.²⁷⁶ Significantly, the court wrote: "If a university is able to show that any particular decision, order, or compelled procedure of the agency impermissibly intrudes upon the academic freedom protected by the First Amendment, it may be afforded relief in federal court."²⁷⁷ This is an explicit statement by a court, albeit in dictum, that public colleges and universities have First Amendment protection against government regulatory agencies, and that colleges and universities can seek judicial remedies to enjoin state actions that violate academic freedom.

This seemingly straightforward proposition is complicated by agencies that have a specific purpose to regulate higher education. For example, the Texas Higher Education Coordinating Board oversees all state public colleges and universities by:

provid[ing] leadership and coordination for the Texas higher education system, institutions, and governing boards, to the end that the State of Texas may achieve excellence for college education of its youth through the efficient and effective utilization and concentration of all available resources and the elimination of costly duplication in program offerings, faculties, and physical plants.²⁷⁸

Because it represents "the highest authority in the state in matters of public higher education,"²⁷⁹ it functions as a sort of *über*-board of regents.

A Texas appellate court relied upon this statutory language in affirming the Board's denial of a proposed affiliation agreement between the public Texas A&M University and the private South Texas College of Law.²⁸⁰ The court found that the statute further granted the Board exclusive authority over initiation of new degree programs as well as mandatory approval over any change in the role or mission of a college or university.²⁸¹ Because Texas A&M's mission description did not include law or legal studies, the court said the University exceeded its own authority and infringed on the Board's.²⁸² This decision suggests two things. First, agencies tasked specifically with college and university oversight have some authority over college or university governance. Second, although a desire to have a Juris Doctor program certainly is curricular and thus invokes academic freedom, the affiliation agreement exceeded the University's mission statement, which delineates the boundaries of academic freedom as against another state entity.²⁸³

275. *Id.* at 1488.

276. *Id.* at 1502.

277. *Id.*

278. TEX. EDUC. CODE ANN. § 61.002(a) (Vernon 2006).

279. *Id.* § 61.051(a).

280. *S. Tex. Coll. of Law v. Tex. Higher Educ. Coordinating Bd.*, 40 S.W.3d 130, 136–37 (Tex. App. 2000).

281. *Id.* at 135; see TEX. EDUC. CODE ANN. §§ 61.051(d)–(e) (Vernon 2006).

282. *S. Tex. Coll. of Law*, 40 S.W.3d at 137–38.

283. See *supra* Part IV.C.

VI. APPLICATIONS OF AUGMENTED ACADEMIC FREEDOM CONCEPT

The previous section discussed the state college or university's relationships with other state entities to demonstrate how academic freedom would be more or less effective depending upon which state actor was involved. This section applies the augmented academic freedom concept to actual laws or rules that affect curriculum, assessment, or pedagogy at state institutions, discussing the merits and drawbacks to the various arguments available to an individual university. These laws and rules are drawn from the author's experiences as a professor in Texas and Georgia, as well as from California, which has both constitutional regents and statutory trustees for its state colleges and universities. This section aims not so much to flesh out every contour of academic freedom as applied by a state institution against a state actor; rather, it reveals how to start thinking about academic freedom as a usable concept.

A. Laws from the Legislature

1. Direct: Mandated Curricula in Texas and California

A college or university administration may have its strongest academic freedom claim against legislation that prescribes required subjects of study or particular classes. For example, the California legislature requires the regents of all three state systems—University of California, California State University, and California Community Colleges—to maintain a core curriculum of general education classes among state institutions.²⁸⁴ Any student who completes this core at one institution and then transfers to another will be considered to have completed it at the other state institution.²⁸⁵ The Texas Education Code also addresses the core curriculum, but it does so with specificity: it requires six hours of American History,²⁸⁶ three of which may be satisfied with Texas History,²⁸⁷ and six hours of government and political science²⁸⁸ for all undergraduates at colleges and universities that receive state funding. One can see why legislatures would pass such laws: they protect the interests of residents in pursuing a public education by aligning the basic standards at all state institutions, thus promoting easier transfer among institutions and ensuring that all graduates have studied certain subjects.

One can also immediately see why an individual state college or university might challenge these requirements. Most bachelor's degree programs require about 120 credit hours to graduate,²⁸⁹ so that the Texas 12-hour requirement comprises 10 percent of an undergraduate's total hours. Further, students must

284. See CAL. EDUC. CODE § 66720 (West 2006).

285. *See id.*

286. TEX. EDUC. CODE ANN. § 51.302 (Vernon 2006).

287. *Id.*

288. TEX. EDUC. CODE ANN. § 51.301 (Vernon 2006).

289. For example, the Bachelor of Arts, Plan I at the University of Texas requires 120 hours. THE UNIVERSITY OF TEXAS AT AUSTIN: UNDERGRADUATE CATALOG 2006–2008 295 (2006), available at <http://www.collegesource.org/displayinfo/pdflist.asp?institutionid=12112>.

typically take many hours in upper-division courses, particularly from their major and minor,²⁹⁰ and satisfy a core curriculum of math and science, social studies, communication, and liberal arts.²⁹¹ By requiring 12 hours of history and government, the Texas legislature forces institutions to make curricular choices: should the college or university satisfy this requirement via a large core curriculum, which then limits the number of electives students can take, or should it make room by eliminating second composition or math classes from the core curriculum?²⁹² At least Texas institutions have choices; in California, UCLA must have the same classes in its transfer core curriculum as Cal-Polytechnic and as every state community college.²⁹³

In challenging such curricular legislation, the Board of Regents of the University of California would have the strongest claims. After all, the Board has constitutional authority on a par with its legislature.²⁹⁴ It could resist legislation on grounds of separation of powers, even without asserting academic freedom. For example, a UC system employee was terminated, and the trial court held that she was not entitled to judicial relief because she had failed to exhaust the administrative remedies provided under Regent's regulations.²⁹⁵ She argued that the exhaustion rule should not apply to her since the damages remedies under legislatively-created statutes provided superior relief.²⁹⁶ The California Supreme Court treated the Regent's policy as a statute and held that the exhaustion doctrine applied, thus rejecting Campbell's argument that legislation was superior.²⁹⁷

The other boards of governors, as well as the administrators at individual institutions, also have strong claims of infringement of their academic freedom. Because the sole purpose of this legislation is to require that certain courses be taught by the institution, it obviously targets the essential freedom of what to teach. State cases acknowledge trustee and college and university authority to reject legislation that interferes with Constitutional rights.²⁹⁸ Applying the augmented academic freedom test discussed *supra* in Section IV.C, a court might defer to a college or university—either alone or via its regents—that defies such legislation if the college or university shows a chilling effect on institutional policy;²⁹⁹ the institution must accept the entire core curriculum of students who transfer in, even

290. Plan I students at UT must take 36 upper-division hours, and they are required to have a major and minor as well as meet other degree requirements. *Id.* at 268–69.

291. The Core Curriculum applicable to all undergraduates at UT requires forty-two total hours in nine different subject areas. *Id.* at 12–13.

292. *Id.* at 295–96. The twelve-hour requirement is complicated by the mandatory core curriculum requirements from the Texas Higher Education Coordinating Board. See *infra* Part VI.C.

293. See CAL. EDUC. CODE § 66720 (West 2006).

294. See *Campbell v. Regents of the Univ. of Cal.*, 106 P.3d 976, 982 (Cal. 2005) (quoting CAL. CONST. art. IX, § 9(a)); *Regents of the Univ. of Cal. v. Benford*, 27 Cal. Rptr. 3d 441, 444 (Cal. Ct. App. 2005) (quoting CAL. CONST. art. IX, § 9(a)).

295. See *Campbell*, 106 P.3d at 983–84.

296. *Id.* at 983.

297. *Id.*

298. See, e.g., *Waugh*, 62 So. at 829–30.

299. See *supra* Part IV.C.

when that core does not satisfy institutional standards. For example, a flagship engineering and agricultural university like Texas A&M might prefer more math and science for its students, while a regional university like Tarleton State might want its students to have more writing courses. Other justifications come from First Amendment arguments about individual aggregation of rights and the essential functions of a college or university: heavy basic course requirements prevent students from taking more upper level courses relevant to their fields of study, in effect prohibiting the free exchange of ideas within the college or university.

2. Indirect: Georgia's HOPE Scholarship

The Georgia HOPE (Helping Outstanding Pupils Educationally) Scholarship indirectly affects curriculum and assessment. This scholarship provides tuition, fees, and books to state colleges and universities for all Georgia residents who graduate from high school with at least a B average.³⁰⁰ To keep the scholarship, the statute authorizing HOPE requires students to maintain a 3.0 average on a 4.0 scale while in college.³⁰¹ As a result, students at Georgia state colleges and universities often pressure faculty members to change a high "C" to a "B"; in one 1997 article in *The Chronicle of Higher Education*, some professors admitted that their awareness of the 3.0 threshold factored into decisions to round grades up.³⁰² Further, the review for whether a student has maintained a 3.0 occurs after he or she has completed thirty, sixty, and ninety hours.³⁰³ This means that if a student takes fewer than the expected fifteen hours in each of the first two semesters, then he or she could enter the sophomore year with fewer than thirty hours, thereby retaining the HOPE Scholarship for another semester, no matter his or her grades. The thirty-hour review indirectly encourages students to take lighter semester loads and thereby reduces their chances for timely graduation. This result is troubling since many colleges and universities nationwide have implemented efforts to encourage timely graduation.³⁰⁴

300. GA. CODE ANN. § 20-3-519.2(a) (2005 & Supp. 2006).

301. *Id.* § 20-3-519.2(b)-(e).

302. Patrick Healy, *HOPE Scholarships Transform the University of Georgia*, CHRON. HIGHER EDUC., Nov. 7, 1997, <http://72.14.203.104/search?q=cache:7Lw0J5mQORgJ:chronicle.com/colloquy/97/inflation/background.htm+http://chronicle.com/colloquy/97/inflation/background.htm&hl=en&ct=clnk&cd=1&gl=us>.

303. GA. CODE ANN. § 20-3-519.2(b)-(e) (2005 & Supp. 2006).

304. For example, the Texas Board of Regents supported a plan by the Provost of the University of Texas System and the President of the University of Texas at Austin to impose a flat-rate tuition that would encourage timely graduation. In the College of Liberal Arts and College of Science, the number of students who did not complete 30 hours after their first year dropped from 1,000 to 400 under a flat-rate tuition program. The reason is that students who take more than the minimum flat-rate hours save money, whereas those who take fewer pay more per hour. Larry Faulkner, then-president of UT, had recommended a 15-hour flat-rate plan. See Melissa Mixon, *Regents Approve 14-Hour Flat-Rate Tuition*, DAILY TEXAN, Mar. 11, 2005, available at <http://media.www.dailytexanonline.com/media/storage/paper410/news/2005/03/11/TopStories/Re>

Here a college or university can make only tenuous claims for infringement on institutional freedom because, unlike the core curriculum statutes, the HOPE statute contains requirements for students and not institutions. Even if individual professors or students might take account of the scholarship in their grading and course selection, the law does not force colleges and universities to alter grading standards or curriculum sequences, so student admission policies remain unaffected. One could argue that, because some students take longer to graduate because of the HOPE incentives, the scholarship affects the number of incoming students who may be selected. Such a tenuous basis would not tip the balance as needed for the augmented academic freedom test advocated in this Note: even if this legislation affects admissions, it does not have a chilling effect on the institution's stated *standards* for admissions, assessment, or the other freedoms. Further, student access to courses remains intact, so the free exchange of ideas on the campus remains uninhibited; even if a student loses the scholarship, her standing in the college or university remains unaffected. The best remaining argument is for a college or university administration to challenge the 3.0 GPA or the thirty-hour review, or both, claiming not that individual students are burdened by these requirements but that institutional standards are affected in ways that reduce the quality of the education the student body receives. Even if the college or university can justify such a claim, it must still prove that HOPE, and not other factors, such as increased student employment or extracurricular involvement or a general desire to take fewer classes, leads to decreased timely graduation rates.

Rather than press such attenuated arguments, an institution could consider Finkin's test for indirect infringement that was discussed above: "In the absence of a direct infringement of freedom of teaching, research, and publication, the determination of whether a particular intervention is an impermissible invasion of autonomy should turn upon the relation of the constraint to the exercise of academic freedom and to the institution's intellectual life."³⁰⁵ If we apply the first prong of the test, the statute affects the exercise of academic freedom only slightly: pressure to give B's may influence some instructors to give fewer rather than more B's, and some students may try to get more "free" hours of courses by taking two heavy semesters their freshman year, thus balancing out those who take lighter loads.³⁰⁶ With respect to the second prong, the HOPE Scholarship actually increases the intellectual life of the college or university by attracting an overall brighter student body.³⁰⁷ If infringement of academic freedom involves a balancing test, on balance such indirect infringement does not warrant constitutional protection.

gents.Approve.14Hour.FlatRate.Tuition-892315.shtml.

305. Finkin, *supra* note 2, at 854.

306. See Healy, *supra* note 302.

307. For example, from 1999 to 2004, the student population at Georgia Southern increased from about 14,500 to about 16,100, while the average SAT for entering students rose almost 100 points, from a composite of 987 to 1080. GEORGIA SOUTHERN UNIVERSITY FACT BOOK 22, 30 (2004–2005), available at <http://services.georgiasouthern.edu/osra/fb0405.pdf>.

B. Regent Regulations

1. Georgia Regent's Review Course

The Regents of the University System of Georgia require a writing exam: college and university students must write a passing essay based on one of a number of topics; if they fail to take and pass the test before completing forty-five credit hours, they have to take a no-credit Regent's Review Course every semester until they pass the exam.³⁰⁸ Many writing faculty distrust standardized tests, particularly when they see no appreciable benefit from a single timed essay when composition theory favors drafting and collaboration and revision.³⁰⁹ Further, all students at Georgia Southern University already have to take two semesters of Composition.³¹⁰ Yet composition instructors routinely devote two class sessions to timed essay writing just so the students can pass the exam and be done with it. By altering their curriculum, they help students avoid the non-credit review course. This also serves college and university aims of promoting timely graduation by allowing students to avoid registering for courses that do not count toward the degree.³¹¹

An individual institution may have a good pedagogical reason to resist offering these courses: if students pass other writing courses, like composition, the institution may decide that those students have already met its expectations for effective writing. That institution might challenge the regent requirement, or it may simply refuse to offer these courses, thus prompting the regents to bring suit to enforce it.

The institution will probably lose. The Regent's Writing Course, though part of an exit requirement like the one at issue in *Mendez*, differs in that it requires each institution to offer courses. If we look further to the Board of Regent's power, we see that, although it does not have any college or university administrators as its members,³¹² it has the authority “[t]o exercise any power usually granted to such corporation, necessary to its usefulness, which is not in conflict with the Constitution and laws of this state.”³¹³ Such broad power certainly encompasses a system-wide aim of requiring basic proficiency for all students, especially since a court might defer as readily to the Board's as to the institution's academic

308. See BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA ACADEMIC AFFAIRS HANDBOOK § 2.08.01 (Aug. 4, 2004), available at <http://www.usg.edu/academics/handbook/>.

309. E.g., ERIKA LINDEMANN, A RHETORIC FOR WRITING TEACHERS 22–34 (3d ed. 1995) (summarizing steps of the writing process, including writing, rewriting, and social interaction).

310. Core Curriculum Requirements, Georgia Southern University, <http://academics.georgiasouthern.edu/fye/core.pdf> (last visited Jan. 24, 2007).

311. This discussion is based on my experience as a professor in the Department of Writing and Linguistics at Georgia Southern and as a rater for the Regents' writing exam.

312. GA. CONST. art. VIII, § 4, para. I(a).

313. GA. CODE ANN. § 20-3-31(4) (2005); see GA. CONST. art. VIII, § 4, para. I(b) (“The government, control, and management of the University System of Georgia and all of the institutions in said system shall be vested in the Board of Regents of the University System of Georgia.”).

judgment. Even if a court were to view regents as outsiders, the Regent's Review course is required only of students who do not pass the Regent's Writing Exam; in other words, it represents a curriculum and assessment standard of the Board, not of the college or university. College and university degree programs and assessment standards related to its courses remain unaffected; the only burdens are that the college or university must offer and staff several sections of the course and that some students who take the course might be delayed in finishing their degree. A court applying Finkin's indirect test might see on balance that such burdens are light: the course targets only students who have failed to pass the examination, it requires only one hour of instruction per semester until passage, and as a non-credit course it does not affect the student's degree or the college or university's regular academic offerings.

2. Whole Letter Grades in University System of Georgia

The individual college or university might have a stronger claim in another area: assessment. One suggestion for addressing potential grade inflation attributable to the HOPE Scholarship—a statutory provision—is for a college or university to alter its grading scale to include pluses and minuses.³¹⁴ Because pluses and minuses allow professors to assign grades with more precision, they would feel less pressure to round a 78 average to a 3.0 “B” since they can award a 2.33 “C+,” which is not as harmful to the student’s GPA as a 2.0 “C.” Currently, the Board of Regents for the University System of Georgia requires all institutions to assign whole letter grades for computing a student’s GPA: “A” equals 4 points, “B” 3 points, and so forth until a zero for “F.”³¹⁵ Any deviation would thus violate Regent policy.

Institutional grading norms are an assessment issue that falls clearly within the four essential freedoms. Circuit courts have addressed and upheld the college or university’s freedom to maintain the integrity of its institutional grading norms, particularly when those standards are tied to the college or university’s mission.³¹⁶ Ultimately, however, a college or university challenge here would probably also fail. The biggest hurdle remains the uncertainty about academic abstention: courts may view a system as an aggregation of the colleges and universities within it, and regents as educators as much as administrators and faculty, so courts may defer to the grading policy of the Board of Regents. Also, while the requirement for whole letter grades affects assessment, it does not infringe on the grading standards of an individual institution. In other words, although the Board requires the university to award “A’s,” “B’s,” and “C’s,” a college or university itself still determines what level of work merits an “A” as opposed to a “B” or a “C.” Further, the Regent policy specifically allows individual colleges and universities to apply different grading standards in addition to the official policy, though only for institutional

314. Healy, *supra* note 302.

315. UNIVERSITY SYSTEM OF GEORGIA ACADEMIC AFFAIRS HANDBOOK § 2.05 (Dec. 7, 1988), available at <http://www.usg.edu/academics/handbook/contents.phtml> [hereinafter HANDBOOK].

316. *Parate*, 868 F.2d at 829; *Lovelace*, 793 F.2d at 426.

purposes.³¹⁷ A college or university would have a hard time showing how the Regent policy has a chilling effect on assessment standards when that same policy permits the institution to set its own internal assessment standards.

C. Other Government Agencies: Professional Licensing v. Direct Curricular Regulation

1. Professional Licensing Does Not Infringe Academic Freedom

Even if regulatory agencies dictate standards for curriculum, pedagogy, and assessment, often individual colleges and universities will acquiesce for reasons related to professional licensing or certification. For example, the California Commission on Teacher Credentialing has authority over certification of primary and secondary school teachers.³¹⁸ It has established educational requirements for persons who wish to enter the profession, such as a bachelor's degree and completion of certain areas of study.³¹⁹ To receive automatic credentialing of its graduates, a college or university must have Commission approval of its teacher education program.³²⁰ Though the Commission possesses enormous leverage, it is unable to infringe on the college or university's academic freedom: the Commission has no direct authority over institutions, so a college or university could choose to ignore Commission guidelines and teach what it wants, how it wants. The downside is obvious: students who graduate from that college or university will not receive automatic certification. To serve the needs of this profession and of the students who wish to enter it, a college or university is likely to structure its programs to meet Commission requirements, although technically not required to do so.

2. Texas Higher Education Coordinating Board

A college or university may wish to challenge other types of regulation, however. For example, departments at West Texas A&M University ("WTAMU") had to suggest changes to the core curriculum based on new guidelines from the Texas Higher Education Coordinating Board. Those guidelines included minimum and maximum total hours and hours required for certain subject areas.³²¹ The purpose of the Board's core curriculum regulations is to facilitate transfer. A student at one state institution who fulfills the core curriculum can transfer credit for the entire core to another state college or university, even if particular courses in that institution's core are different.³²² As discussed in the section about regents,

317. HANDBOOK, *supra* note 315, § 2.05.

318. CAL. EDUC. CODE § 44225 (West 2006).

319. *Id.*

320. *Id.* § 44227(a).

321. 19 TEX. ADMIN. CODE, §§ 4.24–4.25 (West, WESTLAW through Oct. 31, 2005). This example comes from my experience on the Curriculum Committee of the Department of English and Modern Languages at WTAMU.

322. *Id.* § 4.21.

such requirements obviously limit a college or university's choice in curriculum, particularly when combined with the Texas legislative mandate for 12 hours in history and government.³²³ At WTAMU, the Board's mandates affected subjects like Western World Literature that had long been a staple of the undergraduate education at that institution.

As discussed above, the Board is a statutorily-authorized body tasked with regulating all public higher education in Texas. One could argue that for academic freedom and abstention purposes, it should be treated as a statutory board of regents. Accordingly, even if on balance these requirements infringe on the institution's academic freedom, a court might defer to the Board's academic judgment rather than that of the individual college or university.

The institution may have the better academic freedom argument, though. Each university system in Texas has its own board of regents, so no argument can be made that the Coordinating Board serves the same function as regents. In fact, the regents of one system could challenge the Board on behalf of its member institutions, but the Board does not represent individual colleges or universities against other parties. Accordingly, while the regents have both insider and outsider status relative to each institution, the Board is a state government entity that stands completely outside the college or university and the college or university systems. As such, its decisions do not warrant academic abstention, so we should apply the academic freedom/academic abstention test from Section IV.C. Unlike the situation where the mission of Texas A&M did not account for a program in law, the Mission Statement at WTAMU provides for core liberal arts and sciences education as essential to preparation for each student's major field of study.³²⁴ Accordingly, WTAMU could argue that the Board's core curriculum has a chilling effect on college and university curricular standards that inhibit the educational policies articulated in the mission statement. *Cuesnongle* provides that a court would at least consider this claim of academic infringement.³²⁵ Rather than litigate, WTAMU might craft its own core curriculum in violation of Board policy, forcing the Board to bring suit, and a state court just might recognize the college or university's First Amendment rights in this purely academic decision and defer to the university's judgment.

VII. CONCLUSION

This Note has provided the foundation for turning academic freedom into a usable concept: what does the administrator at a state college or university do when faced with a law or rule that is unfavorable to the institution? Although it

323. TEX. EDUC. CODE ANN. §§ 51.301–51.302 (Vernon 2006).

324. "West Texas A&M University's major areas of emphasis include but are not limited to teacher preparation, business, agriculture, fine arts, health care and sciences. All programs shall be built upon a solid foundation of required courses in communication, history and political science, and studies which develop strong critical thinking and problem-solving skills as well as an understanding of cultural diversity and an appreciation for the fine arts and humanities." WEST TEXAS A&M UNIVERSITY: 2004–2005 ACADEMIC YEAR 6, available at <http://www.wtamu.edu/academic/catalog/>.

325. *Cuesnongle v. Ramos*, 835 F.2d 1486, 1502 (1st Cir. 1987).

has not answered this question conclusively, it has suggested ways in which to answer it. The administrator must consider several factors, including which state entity has promulgated the law or rule, whether state action affects purely academic aspects of the college or university, whether the regents support or oppose the institution, and whether the state action directly or indirectly infringes on college or university academic freedom. Section VI's analysis and applications indicated various approaches to address these factors by augmenting academic freedom with academic abstention and separation of powers. Although I framed the applications from a litigation standpoint of a college or university resisting state actions, my hope is that administrators, legislatures, regents, and agencies will better understand their respective rights and work together to fashion laws that improve curriculum, pedagogy, and assessment.

RETHINKING STUDENT PRESS IN THE “MARKETPLACE OF IDEAS”[†] AFTER *HOSTY*: THE ARGUMENT FOR ENCOURAGING PROFESSIONAL JOURNALISTIC PRACTICES

JACOB H. ROOKSBY*

I. INTRODUCTION

On February 21, 2006, the Supreme Court denied certiorari to Margaret L. Hosty, Jeni S. Porche, and Steven P. Barba, former student editors and staff writers of Illinois’ Governors State University (“GSU”) student newspaper, the *Innovator*.¹ By denying their petition, the Court effectively ended the trio’s five-year legal battle in which they sought 42 U.S.C. § 1983 relief from Patricia Carter, Dean of Students at GSU.² The students had argued that Dean Carter’s actions, which effectively required that they submit prospective issues of the *Innovator* to her office for administrative approval before going to press, violated their First Amendment rights by creating a prior restraint on speech.³ In a June 2005 en banc opinion of the Seventh Circuit Court of Appeals that overturned the appellate

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† The first reference to the “marketplace of ideas” concept is often traced to Justice Holmes dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), in which he wrote, “[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .” In *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967), the Court first used the concept in reference to colleges and universities, stating that “[t]he classroom is peculiarly the ‘marketplace of ideas.’” *Id.* at 603.

1. *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1330 (2006).
2. *Id.* at 733.
3. Reply Brief for the Petitioners, *Hosty v. Carter*, 126 S. Ct. 1330 (2006) (No. 05-377), 2006 WL 148596.

court's earlier panel decision,⁴ Judge Easterbrook held that *Hazelwood School District v. Kuhlmeier*,⁵ a case traditionally deemed to concern only secondary and elementary educational settings,⁶ provides a framework for limiting speech that applies to subsidized student newspapers at colleges and universities.⁷

The Seventh Circuit's decision—and the Supreme Court's subsequent denial of petitioners' petition for a writ of certiorari⁸—set off a storm of negative reactions among journalists, college media, and free speech advocates.⁹ As one commentator put it, “One must ask: How do we go from thinking of American college and university campuses as the ‘quintessential marketplace of ideas,’ as courts referred to them not so long ago, to places where state officials may now be permitted to censor student speech . . . ?”¹⁰ The Student Press Law Center (“SPLC”), a consummate defender of speech rights in student media, decried the appellate court's en banc decision as being “in stark contrast to over three decades of law that has provided strong free speech protection to college student journalists and protected them from censorship by school officials unhappy with what student media published.”¹¹ The *Chronicle of Higher Education* sent out an emergency

4. *Hosty v. Carter*, 325 F.3d 945 (7th Cir. 2003), *reh'g granted*, 412 F.3d 731 (7th Cir. 2005).

5. 484 U.S. 260 (1988).

6. *Hosty*, 412 F.3d at 733.

7. *Id.* at 735.

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

9. The Seventh Circuit's decision alone prompted much of this hand wringing. In an amicus brief filed by the Student Press Law Center on behalf of many others in support of the petitioners' petition for a writ of certiorari, the amici warned that the Seventh Circuit's decision to extend *Hazelwood*'s standard to college campuses, specifically college student media, would have “disastrous consequences.” Brief for Student Press Law Center et al. as Amici Curiae Supporting Petitioners at *2, *Hosty v. Carter*, 126 S. Ct. 1330 (2005) (No. 05-377), 2005 WL 2736314, available at <http://www.splc.org/pdf/hostypetitionbrf.pdf>. Another commentator, who made the following statement before the Supreme Court's decision to deny certiorari, stated that “[t]he decision of the en banc Seventh Circuit undermines the unique and critical role of the college campus as a marketplace of ideas.” Richard M. Goehler, *Hosty Is a “Recipe for Confusion and Conflict,”* 23 COMM. LAW. 21, 24 (2005). Only a case note in the *Harvard Law Review* seemed to urge caution, with the author stating that “the decision's effects will likely be limited,” and “those concerned about the decision will largely find their fears unwarranted.” *First Amendment—Prior Restraint—Seventh Circuit Holds that College Administrators Can Censor Student Newspapers Operated as Nonpublic Fora—Hosty v. Carter*, 119 HARV. L. REV. 915, 922 (2006) [hereinafter Recent Cases].

10. Mike Hiestand, *The Hosty v. Carter Decision: What it Means*, Associated Collegiate Press, TRENDS IN COLLEGE MEDIA, Jul. 6, 2005, <http://www.studentpress.org/acp/trends/~law0705college.html>. This same commentator later called the result of the *Hosty* decision “scary as hell.” Mike Hiestand, *Living in a Post-Hosty World*, Associated Collegiate Press, TRENDS IN COLLEGE MEDIA, Mar. 2, 2006, <http://www.studentpress.org/acp/trends/~law0306college.html>. Another commentator, this one also writing after the Supreme Court's decision not to hear the case, stated rather hyperbolically that the Seventh Circuit's decision had effectively “overrule[d] more than thirty years of First Amendment jurisprudence.” Virginia J. Nimick, Note, *Schoolhouse Rocked: Hosty v. Carter and the Case Against Hazelwood*, 14 J.L. & POL'Y 941, 996 (2006) (emphasis added).

11. *Supreme Court Announces It Will Not Hear Appeal in College Censorship Case*, STUDENT PRESS LAW CTR., Feb. 21, 2006, <http://www.splc.org/newsflash.asp?id=1190&year=>.

email bulletin to all its subscribers—something it does for an event only of the most pressing nature (this bulletin also announced the resignation of Harvard's president, Larry Summers)—the very day the Court denied certiorari in the case.¹²

Clearly there is much concern within higher education as to what this case might mean for free speech in the college and university community. However, by giving a closer inspection to the particular facts of this controversy and the court decisions surrounding it, I will argue that the decision should give free speech advocates and college and university student journalists (and their supporters) less cause for concern than what mainstream commentators have deemed may be warranted. I will also suggest ways in which college and university administrators can seek to influence student press quality and encourage professional journalistic practices within the proper legal framework. Part II will provide background information on the *Innovator*, its editors, and how this controversy came to fruition. Part III will discuss *Hazelwood* and its relevant progeny, and also look at how this line of cases was interpreted before *Hosty*. Finally, Part IV will address the framework laid out in Judge Easterbrook's *Hosty* opinion before coming to the conclusion that the scope and implications of the decision are much more limited than what the commentators cited above would have readers believe. This last part will also address how *Hosty* underscores a possible need for forging closer relationships between college and university administrations and student newspapers so as to ensure that student journalists leave college not only with an appreciation for a free press, but a professional one as well.

II. THE *INNOVATOR*, ITS EDITORS, AND HOW THIS CONTROVERSY CAME TO FRUITION

A. Background on Governors State University

GSU (located in University Park, Illinois, near Chicago) started in 1969 as a community college with no grades, no departments, and a strong focus on interdisciplinary studies.¹³ Since then, GSU—publicly funded and chartered by the Illinois General Assembly—has adopted many of the trappings of a modern university, with four colleges (arts and sciences, business and public

In the same press release, SPLC's executive director Mark Goodman warned that no matter where colleges and universities are located, "public college or university administrators looking to crack down on their student media had better be ready for a fight," and "[w]e will not hesitate to take other schools to court in defense of student press freedom." *Id.*

12. The email linked to an article by Sara Lipka, in which SPLC's Goodman was quoted as saying, "You can't teach journalism in an American democracy and have a censored press. That would be a great tool if you were trying to prepare students for life in China." Sara Lipka, *Advocates of Student-Press Freedom Denounce Supreme Court's Decision Not to Hear Censorship Case*, CHRON. OF HIGHER EDUC., Feb. 22, 2006, available at <http://chronicle.com/daily/2006/02/2006022202n.htm>.

13. Governors State Univ.: About GSU, <http://www.govst.edu/AboutGSU/> (last visited Mar. 7, 2007).

administration, education, and health professions)¹⁴ and a full-time faculty, most holding doctorates.¹⁵ At the same time, GSU boasts of being accessible to a wider swath of students than other institutions, styling itself as “a campus for working adults.”¹⁶ For example, GSU offers many classes in the evenings, on weekends, and online; provides financial aid to part-time students; enrolls a student body 38% minority, 71% women (including many single working mothers), with an average age of 34; and offers certificate programs in seventeen fields.¹⁷ GSU admits only students who are, in effect, in their junior or senior years of undergraduate study.¹⁸ For admission to GSU, a prospective student must possess at least an associate’s degree or, alternatively, must have amassed at least sixty semester hours of academic credit at another institution.¹⁹

On GSU’s student affairs’ web page that lists the clubs and organizations at the university, one finds an average number of honor societies, vocationally-related clubs (e.g., social work club, masters of public administration club, physical therapy student association, etc.), and student interest clubs (e.g., soccer club, computer science club, Bible students fellowship) for an institution of six-thousand largely non-traditional students.²⁰

B. The *Innovator*

Conspicuously absent from the listings, however, is any mention of the *Innovator*, the student-run newspaper at the heart of the *Hosty* dispute.²¹ Hosty

14. GSU Catalog 1999-2001: General Information, <http://www.govst.edu/apply/catalog/1999/gen.info.html> (last visited Mar. 7, 2007).

15. About GSU, *supra* note 13.

16. *Id.*

17. *Id.*

18. Undergraduate Admissions Requirements, <http://www.govst.edu/apply/undergrad.htm> (last visited Feb. 6, 2007).

19. *Id.*

20. Governors State University—Student Life—Clubs and Organizations, http://www.govst.edu/sas/t_sl.aspx?id=1314 (last visited Feb. 6, 2007).

21. There is a listing for the new student newspaper, fittingly called *The Phoenix*. With a perhaps not so subtle jab at what hastened the demise of its predecessor, the paper lists as its purpose: “To inform and entertain the university community in the production of a *responsible, non-biased newspaper*” (emphasis added). *Id.* Hosty cried foul at how the new paper was created, stating in an interview, “Certainly the creation of the new newspaper was a violation of due process, they did not open the interviews to the public, and [the new editors] were administrative appointments.” Jon Pike, *Free Speech vs Illinois*, CONFLUENCE, Jan.–Mar. 2003, at 2, available at <http://www.stlconfluence.org/article.asp?articleID=97> (last visited Feb. 6, 2007).

The Phoenix is currently the center of a new controversy at GSU involving student-administrator relations. On August 29, 2005, former Phoenix editor-in-chief Stephanie Blahut and former copy editor David Chambers filed suit in federal court in Illinois, claiming that GSU administrators were responsible for a move that put an adjunct faculty member in the editor-in-chief position at the paper, among other First Amendment, Fourteenth Amendment, civil conspiracy, and violation of the Open Meetings Act allegations. See Blahut v. Oden, No. 1:05-CV-04989, 2005 WL 261126, at *12–*17 (N.D. Ill. Aug. 29, 2005). The complaint also alleges that a photographer for the paper was barred by a campus police officer from taking pictures at a

and Porche²² were both graduate students in the Masters of English program when they took over as editors of the *Innovator* in 2000.²³ Porche served as editor-in-chief of the publication while Hosty served as managing editor. According to Dean of the College of Arts and Sciences Roger Oden, Hosty also served as news editor, features editor, opinions editor, ad manager, copy editor, columnist, and contributor.²⁴ By all accounts—their own included—these two women bore the brunt of the production responsibilities for the *Innovator*, which officially said it printed bimonthly, but in reality appeared less frequently.²⁵ Apparently, a dearth of volunteers forced the duo to write many of the articles that they otherwise would have assigned to others.²⁶ According to the paper's advisor Geoffroy de Laforcade, a former lecturer of history and integrative studies at GSU, "It was not the best student paper in the history of higher education . . . but it was on the way to becoming a very good one."²⁷ Participation in the *Innovator* was completely voluntary and was not part of any course or classroom activity. Its publication was funded largely by mandatory student activity fees that were levied on all students in the form of tuition, in addition to some advertising revenues generated by the newspaper.²⁸

Although de Laforcade served as advisor to the publication, his role in the eyes of GSU was to be a limited one, consisting chiefly of reviewing stories intended for publication at the request of the student editors, or advising them on "issues of journalistic standards and ethics," but never making content decisions.²⁹ De

commencement ceremony. *Id.* at *10. In its motion to dismiss filed February 10, 2006, the Illinois Attorney General's Office called the students' claims "patently frivolous," and wrote that the only claim with some merit (the issue of the photographer not being allowed to photograph commencement) was "so minor in nature and so content-neutral" that it should be disregarded by the court. Evan Mayor, *Governors State University Faces Another Lawsuit from Student Journalists*, STUDENT PRESS L. CTR., Feb. 23, 2006, <http://www.splc.org/newsflash.asp?id=1196&year=2006>.

22. Although Steven Barba has been a party to the litigation throughout all levels, for whatever reason he has been left out of media accounts and interviews. It is safe to assume that Hosty and Porche were at all times the most relevant actors in this dispute, and thus this section focuses exclusively on them.

23. See Jeffrey R. Young, *Censorship or Quality Control?*, CHRON. HIGHER EDUC., Aug. 9, 2002, at A36.

24. See Letter from Dr. Roger K. Oden, Dean of the Coll. of Arts & Sci. & Professor of Political Sci., Governors State Univ., to Governors State Univ. Students (Nov. 2, 2000), available at <http://collegefreedom.org/Oden.htm>.

25. See Young, *supra* note 23.

26. *Id.* at A37.

27. *Id.*

28. See *Hosty v. Carter*, 325 F.3d 945, 946 (7th Cir. 2003); Petition for Writ of Certiorari at *3, *Hosty v. Carter*, 126 S. Ct. 1330 (2005) (No. 05-377), 2005 WL 2330125.

29. See *Hosty v. Governors State Univ.*, No. 01-C-500, 2001 WL 1465621, at *1 (N.D. Ill. Nov. 15, 2001). See also Petition for Writ of Certiorari at *4, *Hosty*, 126 S. Ct. 1330 (2005) (No. 05-377), 2005 WL 2330125 (quoting President Fagan as saying "the newspaper would be reviewed, looked at by the faculty advisor but in no sense would the faculty advisor have a right to approve."). Although he agrees that it was never his job to make content decisions, de Laforcade hotly contests that the university had any set opinion on how he should do his job. Interview with Geoffroy de Laforcade, Assistant Professor of History, Longwood Univ. (Sept. 6,

Laforcade viewed his responsibilities similarly, although he has also stated that one of his primary functions was to be on the lookout for potentially libelous articles written by the student journalists, “to protect them and advise them of any possible liability,” in accordance with national newspaper advising guidelines.³⁰ He also assisted the paper by writing occasional columns and reviews, and by helping to get positive stories about GSU—such as faculty accomplishments and publications—on the radar screen of student journalists looking for news leads.³¹ The Student Communications Media Board (“SCMB”), a group consisting of students appointed by the student government, was responsible for overseeing all student media on campus; their written policy vis-à-vis the *Innovator* was that the *Innovator*’s student staff would “determine content and format of their respective publication[] without censorship or advance approval.”³² Thus, the student editors were given complete editorial control over the newspaper’s subject matter and content. A disclaimer on the masthead of each issue of the *Innovator* informed readers that the paper was edited and published by students, and that the views expressed in the paper “may not reflect the views of GSU,” and should not be regarded as such.³³

C. Controversy Brews

From the beginning of their time at the helm, Hosty and Porche established a reputation for bringing a hardcore, investigative approach to their writing.³⁴ According to Hosty, before she and Porche took over, the paper contained mostly public relations fluff that served the interests of the university; once in charge, they tried to bring a more critical edge to the paper’s journalism.³⁵ In one article she wrote, Hosty rebuked GSU’s financial aid office, which was supervised at the time by Respondent Patricia Carter, GSU’s Dean of Students.³⁶ Articles of this sort no doubt bothered the GSU administration, but it was a series of articles in the October 31, 2000 issue of the newspaper that provided the fodder for the instant controversy. In one article³⁷ from the news section of the issue, Hosty questioned the teaching abilities of Rashidah Jaami’ Muhammad, the chairwoman of the

2006). It was only when the paper displeased GSU administrators, he contends, that they then wanted him to supervise the students and police the content of the newspaper. *Id.* According to de Laforcade, one administrator even went so far as to instruct him to “reel them [the student journalists] in,” a suggestion he found ethically inappropriate to follow. *Id.*

30. See Interview with Geoffroy de Laforcade, *supra* note 29.

31. *Id.*

32. Hosty, 325 F.3d at 946.

33. Petition for Writ of Certiorari at *5, Hosty v. Carter, 126 S. Ct. 1330 (2005) (No. 05-377), 2005 WL 2330125.

34. See Young, *supra* note 23.

35. See *id.*

36. Petition for Writ of Certiorari at *5, *Hosty*, 126 S. Ct. 1330 (2005) (No. 05-377), 2005 WL 2330125.

37. M.L. Hosty, *Is Dr. Muhammad Failing Her Students?, A Trinity of Dubious Service*, THE INNOVATOR, Oct. 31, 2000, at 1 (a copy of the first page of the article is available at www.splc.org/pdf/innovator.pdf).

English department in which Hosty was a student (although she did not mention this fact in the article).³⁸ Hosty wrote, “The administration’s willful ignorance of the deplorable state of affairs in the English department with Muhammad at the mast is reminiscent of the blind leading the blind, and some students have minds and futures too bright to allow them to become entirely misled.”³⁹ The article also quoted students who accused Muhammad of making racial slurs and giving misinformation in her role as their academic advisor.⁴⁰ In this same issue, Hosty quoted a student who had been at a meeting of GSU administrators and who stated that he had heard an administrator comment that he was “tired of dealing with these punk [GSU] kids.”⁴¹ The administrator denied having ever said such a thing.⁴² In yet another controversial article in the October 31 issue, Hosty criticized Dean Oden for what she alleged was his role in not renewing the teaching contract of de Laforcade.⁴³

Needless to say, GSU officials found the accusations made in these articles a bit disconcerting, if not unfair. Their anger was compounded when editors of the *Innovator* refused to retract the factual statements in the articles that the administration deemed false, or even to print response letters offered by the administration.⁴⁴ The university made its first official statement with regard to the controversial issue on November 2, 2000, when Dean Oden wrote a “Response to *Innovator*, the Newspaper of Governors State University, October 31, 2000 Edition.” In this letter to all GSU students, faculty, and staff, Dean Oden aired the following grievance:

The *Innovator* of October 31, 2000 contains a letter to the editor by the *Innovator*’s Faculty Advisor, Geoffrey [sic] de Laforcade. The University terminated Geoffrey de Laforcade’s employment effective August 21, 2000. The newspaper contains an article entitled “De Laforcade’s Dispute Reaches 3rd Phase Arbitration,” under the byline of M.L. Hosty. . . . Geoffrey de Laforcade’s letter to the editor and M.L. Hosty’s article [are] a collection of untruths and I believe that they know they are untrue. I also believe they are being written with the intent and purpose to damage my reputation. I will vigorously defend my name, person, and reputation against defamation.⁴⁵

38. Young, *supra* note 23 (quoting Hosty, *supra* note 37).

39. *Id.* De Laforcade has said that he suggested to the editors that a student reporter not enrolled in the English department address the concerns raised by Hosty in regards to Muhammad. The student editors, however, allowed Hosty to go ahead and write the article, and de Laforcade did not see it as his duty to intervene, as the reporting was not libelous. Furthermore, “there was always the right of response.” Interview with Geoffroy de Laforcade, *supra* note 29.

40. Young, *supra* note 23 (quoting Hosty, *supra* note 37).

41. *Id.*

42. *Id.*

43. Petition for Writ of Certiorari at *5, Hosty v. Carter, 126 S. Ct. 1330 (2005) (No. 05-377), 2005 WL 2330125.

44. Hosty v. Carter, 412 F.3d at 733.

45. Letter from Dr. Oden, *supra* note 24. There is dispute among the parties as to why this

This letter proved to be the fountainhead for a flurry of debate that would continue for several months. In a letter to the editor of the *Innovator*—which, it is worth noting, editor-in-chief Porche contends was never delivered to her or the *Innovator*'s office⁴⁶—dated November 3, 2000, just a day after Dean Oden's statement, GSU President Stuart Fagan issued the following statement:

With few exceptions, the October 31st edition of the *INNOVATOR* [sic] just did not measure up to accepted journalistic standards of professionalism. . . . The *INNOVATOR* did not enlighten nor did it inform the GSU community through thoughtful, accurate and fair reporting. Instead of fairness in reporting, the reader was presented with an angry barrage of unsubstantiated allegations that essentially—and unfairly—excoriated some members of the university faculty and administration (myself included). The “Senate Brief” column is an example. For the record, at the October 18th strategic planning meeting referenced, there was never any discussion in which GSU students were referred to as “punk kids” or to which my response was complicit, conspiratorial laughter. That exchange just did not happen. . . . I have—and will always be—a proponent of the free press. . . . I respect the right of reporters to pursue the truth (as they perceive it). However, I will not sit idly by, without comment, and allow the reputation of this university to be sullied by newspaper reporting that is inaccurate, insulting, and that might be driven, in part, by self-interest. Let’s agree to disagree: with honor and fairness.⁴⁷

In the same document, President Fagan accused the paper's editors and writers of giving a “one-sided recitation of the issues,” and then taking “on the role of judge, jury, and executioner, without cause, with the wrong facts, and without due process.”⁴⁸ Although it was not willing to go quite as far in its criticism of the paper, the Illinois College Press Association—a representative body comprised of student journalists from four-year college student newspapers in Illinois⁴⁹—later conducted a review of the *Innovator*'s practices after the controversy became public and found that the newspaper had made “several ethical lapses.”⁵⁰

particular edition of the *Innovator* was offensive. When asked in an interview what some of the hot-button topics were that the October 31 issue addressed, Porche responded, “We don’t know. In my opinion, it’s never been pointed out to us exactly what problem if any the University had with this issue. The communication has never been that good from the University as to what the problem was.” Pike, *supra* note 21. Hosty added, “[GSU President Stuart] Fagan could not even say under oath, when he was deposed, he could not cite what he found so offensive in it. When they put the paper in front of him in court, he could not cite what was inaccurate in it or what was so offensive. They just said, ‘It was the general buzz on campus.’” *Id.*

46. Letter from Jeni Porche, former Editor-in-Chief, *Innovator*, to Stuart Fagan, President, Governors State Univ. (Nov. 16, 2000), available at <http://collegefreedom.org/Porche.htm>.

47. Letter from Stuart Fagan, President, Governors State Univ., to Governors State Univ. Cmtys. (Nov. 3, 2000), available at <http://collegefreedom.org/Fagan.htm>.

48. *Id.*

49. ILL. COLL. PRESS ASS’N, CONSTITUTION AND BYLAWS (2000), <http://www.icpaonline.net/ICPA%20Constitution%20and%20Bylaws.pdf>.

50. Young, *supra* note 23.

Because he wanted to defend the students and the paper that he felt were being unfairly attacked, de Laforcade sent an open letter to President Fagan the same day Fagan had issued his letter.⁵¹ In it, the *Innovator*'s faculty advisor, a former journalist himself, said that the students were "working hard in the pursuit of transparency and accountability, and for the durable creation of a first-class student medium of expression and discussion."⁵² He called the students' achievements "impressive" and said that "[w]ith limited resources, a true quest for improvement, immense effort and admirable dedication, they are doing their job: they are learning."⁵³ He has later stated that the GSU administration never took much interest in the *Innovator*, and that had it ignored any problems it had with the paper surrounding the October 31 issue, "they would have all gone away."⁵⁴ In his opinion, the administration was chiefly upset over Hosty's article concerning his termination as instructor at GSU.⁵⁵ Because of the confidential nature of de Laforcade's contract dispute with GSU, Hosty was not able to ascertain all of the facts relevant to the controversy, and her sympathy toward the paper's faculty advisor might have come across in her news reporting.⁵⁶ According to de Laforcade, as far as free speech was concerned, the crux of the controversy surrounding the October 31 edition of the paper was whether "when a faculty member's contract is not renewed, is that kind of personnel matter within the province of student reporting, or is it confidential? That's what this comes down to, and both the students and the [GSU] administration were on very different sides of that question."⁵⁷

D. Off to Court

Hosty, Poche, and Barba alleged a laundry list of grievances in their original complaint against GSU and several of its student affairs officials. Among them were contentions that they had been denied access to computer software and manuals; that the SCMB changed the *Innovator*'s office computers from IBM computers to Macintosh computers without the editors' permission; that the *Innovator* staff lacked a private facsimile machine or mailbox; that *Innovator*'s office phones had been suspiciously disconnected for approximately two hours on October 25, 2000; that a university employee destroyed *Innovator* advertisement forms and failed to process *Innovator* purchase orders; that important SCMB

51. Interview with Geoffroy de Laforcade, *supra* note 29.

52. Letter from Geoffroy de Laforcade, Faculty Advisor to the *Innovator*, to Stuart Fagan, President, Governors State Univ. (Nov. 3, 2000), available at <http://collegefreedom.org/Advisor.htm>.

53. *Id.*

54. Interview with Geoffroy de Laforcade, *supra* note 29.

55. *Id.* De Laforcade claims that he received no word concerning his termination until months after the internal deadline had passed for notifying untenured faculty of their employment status for the coming year. *Id.* He thus instituted grievance proceedings, and GSU eventually settled out of court with de Laforcade regarding this matter. *Id.*

56. *Id.*

57. *Id.* He also elaborated, "The message the administration sent the students seemed to be, 'You can talk about politics all you want, but not the politics of the university.'" *Id.*

meetings were cancelled; and that *Innovator* email messages were tampered with and deleted by an unknown party.⁵⁸ District Court Judge Conlon found that most defendants accused of committing these acts were entitled to qualified immunity and therefore she granted the defendants' motion for summary judgment.⁵⁹ Under the protections offered by the Eleventh Amendment to the United States Constitution, state employees performing discretionary functions are shielded from liability for civil damages and granted qualified immunity so long as their conduct does not violate clearly established statutory or constitutional rights that a reasonable person would have known.⁶⁰ In analyzing the alleged unconstitutional conduct of the defendants, Judge Conlon determined that the plaintiffs had failed to meet their burden of showing that the defendants' asserted conduct violated clearly established constitutional rights.⁶¹

Patricia Carter, dean of students at GSU, was the only defendant not granted summary judgment.⁶² Her continued involvement in the case stemmed from two phone calls that she placed in late October and early November of 2000—around the time of Dean Oden's, President Fagan's, and Professor de Lafoncade's letters to the GSU community—to Charles Richards, president of Regional Publishing Corporation, the self-proclaimed largest printer of high school and college newspapers in America, and the printer of the *Innovator*.⁶³ In a letter delivered to the *Innovator* staff in mid-November and addressed "To Whom It May Concern," Richards wrote the following:

Recently I received a phone call at my office from a person who said she was Dean Patricia Carter calling from Governors State University on behalf of the GSU administration. She told me that Regional Publishing was not to print any more issues of "The Innovator" [sic] without first calling her personally and then she, herself, or someone else from the administration department would come to our printing plant, read the student newspaper's contents, and approve the paper for

58. *Hosty v. Governors State Univ.*, No. 01-C-500, 2001 WL 1465621, at *1-*4 (N.D. Ill. Nov. 15, 2001).

59. *Id.* at *5-*7. Four defendants were also granted summary judgment because the plaintiffs had not alleged that these defendants were personally involved with any unconstitutional conduct. *Id.* at *4.

60. "[Q]ualified immunity shields government officials performing discretionary functions from civil litigation." *Brandt v. Bd. of Educ. of City of Chicago*, 420 F. Supp. 2d 921, 933 (N.D. Ill. 2006). To determine if it applies, a court "looks to whether a reasonable public official in the individual [defendant's] position[] would have understood that his or her actions were unlawful in the factual situation at hand." *Id.* at 934.

61. *Hosty*, 2001 WL 1465621, at *5-*7. For example, vis-à-vis the Macintosh computers with which the school replaced the *Innovator*'s IBM computers, the court plainly stated that "[p]laintiffs do not present any case law that establishes a right to a certain type of computer." *Id.* at *5. The fact that the plaintiffs listed many grievances that are easily recognizable to lawyers as not being constitutional torts covered under 42 U.S.C. § 1983 may be attributable to the fact that plaintiffs brought their action *pro se*.

62. *Id.* at *7.

63. Letter from Charles Richards, President, Reg'l Publ'g Corp., to *Innovator* staff (Nov. 14, 2000), available at <http://collegefreedom.org/Printer.htm>.

printing by us. The same person called back later and made the same request. I replied that I would call her but that my interpretation of the current law precludes such administrative approval prior to printing. It is my understanding that the entire cost of printing this newspaper comes from GSU student activity funds. However, I am not an attorney, so the final decision on the proper handling of this matter should not be left to me.⁶⁴

Dean Carter admitted to having made the phone calls, but contended that she instructed Richards to call her regarding the newspaper only so that a faculty member could review the paper for "journalistic quality."⁶⁵ In subsequent phases of the litigation, Dean Carter made clear that journalistic quality meant nothing more than checking for grammatical errors and the like, but not altering content.⁶⁶ She contended that such a step was necessary because Professor de Lafocade, the *Innovator*'s erstwhile advisor, had been dismissed in late August 2000 and that his replacement was not readily available to assist the *Innovator* staff because of his location far from campus.⁶⁷

For his part, de Lafocade still considered himself the advisor of the *Innovator*, even after he was no longer employed by GSU as an instructor. In a press statement he released on February 16, 2001, he stated, "As far as I am concerned, the editors regard me as their advisor, and I continue to perform the work of advisor. I will not step down until the university admits to its improprieties, establishes procedural transparency, and allows the paper to publish freely."⁶⁸

Whatever the nature of the advisory role de Lafocade played at that point to Porche and Hosty, it no longer pertained to advising them on publication of the *Innovator*. Although the SCMB authorized a printing of a December 2000 issue of the *Innovator*, Porche and Hosty felt there was no point in going to press with it as students had already left for winter vacation.⁶⁹ Furthermore, the students felt that

64. *Id.*

65. *Hosty*, 2001 WL 1465621, at *2.

66. *Id.*

67. *Id.* Interestingly, de Lafocade was never asked to testify or give a deposition in the case. Interview with Geoffroy de Lafocade, *supra* note 29.

68. Press Statement, Geoffroy de Lafocade (Feb. 16, 2001), available at <http://collegefreedom.org/Advisor21601.htm>. Although the official advisor to the *Innovator* for over a year, and then a self-proclaimed unofficial advisor for some time after his termination, de Lafocade claims never to have been contacted by President Fagan's office regarding issues or controversies pertaining to the newspaper. *Id.* He contends that the president's office ignored his efforts "to enter into a dialogue with them whenever the editors ran into difficulties," and that Dean Carter and Provost Keys never addressed him as advisor or sought him out to discuss matters pertaining to the newspaper, except once when through the university counsel, Alexis Kennedy, de Lafocade claims that they attempted to get him to convey to the editors the administration's anger regarding some of the *Innovator*'s publication policies. *Id.* In short, according to de Lafocade, the administration made no efforts to have any meetings with him or the student staff of the paper once it became evident that it was upset with the *Innovator*. Instead, the administrators went straight to writing campus-wide memos. Interview with Geoffroy de Lafocade, *supra* note 29.

69. *Hosty*, 2001 WL 1465621, at *3.

Regional Publishing would be hesitant to print another edition of the *Innovator* after Dean Carter's phone calls to the publisher. This hunch was later verified through the deposition of Regional Publishing's manager who stated that Regional Publishing did not want to risk printing the newspaper and not being paid by GSU.⁷⁰ Thus, the students filed suit in the Federal Court for the Northern District of Illinois, claiming that Dean Carter had committed a prior restraint on publication of the *Innovator*, thereby infringing the students' First Amendment rights.

Subsequently, all of the defendants moved for summary judgment. In denying that motion to Dean Carter, Judge Conlon found merit in the students' assertions, claiming "Dean Carter was not constitutionally permitted to take adverse action against the newspaper because of its content or because of poor grammar or spelling. Accordingly, there is a disputed issue of material fact as to whether Dean Carter's asserted conduct violated plaintiffs' clearly established First Amendment rights."⁷¹ She denied granting Dean Carter qualified immunity, denied granting her motion for summary judgment, and thereby marked that the real battle over free speech between the *Innovator* and the GSU administration had just begun.⁷²

III. THE INTERPRETATION OF HAZELWOOD AND ITS PROGENY, PRE-HOSTY

A. Background on *Hazelwood*

Judge Easterbrook begins section two of the Seventh Circuit's en banc decision in *Hosty* by stating, "*Hazelwood* provides our starting point."⁷³ He refers, of course, to *Hazelwood v. Kuhlmeier*,⁷⁴ the Supreme Court's seminal 1988 decision in which it held that educators (in the public primary- and secondary-school contexts) "do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so

70. *Id.* at *2.

71. *Id.* at *7.

72. At this point, well before the students had contemplated that their case might be appealed all the way to the Supreme Court, they seemed aware of the consequences that ongoing litigation can bring. In response to a question regarding what the personal cost of bringing the suit had been, Porche responded,

The Academic Community [sic] is a small one. Time and emotional currency. Letters of recommendation from our department, gone. We were outstanding students, I don't mind saying that. That's not something that you can make up in a few weeks someplace else. It's been interesting in terms of the schools we're applying for our doctorate degrees. How many people at those schools know people who know us from here, who have been misinformed about us? We were living in an unbelievably hostile environment around here. It felt like wartime around here.

Pike, *supra* note 21.

73. *Hosty*, 412 F.3d 731, 734. Interestingly, the famous *Hazelwood* case provided District Court Judge Conlon with her ending point. In the penultimate paragraph of her decision denying Dean Carter's motion for summary judgment, Judge Conlon called *Hazelwood* "distinguishable because it involved a high school as opposed to a university." *Hosty*, 2001 WL 1465621, at *7.

74. 484 U.S. 260 (1988).

long as their actions are reasonably related to legitimate pedagogical concerns.”⁷⁵ The Court left open, in its infamous footnote number seven, whether such wide censorship liberties are constitutionally available to administrators at the college and university level.⁷⁶ For the years following *Hazelwood* but before *Hosty*, many believed—given the different nature of higher education—that they were not.⁷⁷

The *Hazelwood* decision marked a departure from the seemingly wide protection of student speech that the Court had annunciated in *Tinker v. Des Moines School District*.⁷⁸ The *Tinker* Court held that student speech may be regulated if it “would substantially interfere with the work of the school or impinge upon the rights of other students.”⁷⁹ Applying this standard to the facts, the Court found that suspending students for wearing black armbands to school in protest of American involvement in the Vietnam War was not constitutionally permissible.⁸⁰

With *Tinker* as a backdrop, the plaintiffs in *Hazelwood* argued that a public high-school principal does not have the constitutional authority to delete pages from a school newspaper when such censorship serves no valid educational goal.⁸¹ The dispute arose over the decision of the principal at Hazelwood East High School in Saint Louis County, Missouri, to excise two full pages of the May 13, 1983 issue of the student newspaper *Spectrum*.⁸² Much of the material on those two pages that were removed was unobjectionable to the principal. As for the offending articles, he found the material “inappropriate, personal, sensitive, and unsuitable” for student consumption.⁸³

Spectrum was written by members of the Journalism II class at the high school and was supervised by the instructor who taught the journalism course. The fateful issue contained two articles that received a second glance by the principal’s watchful editorial eye. The first concerned several students’ experiences with teenage pregnancy, while the second dealt with a student’s reactions to his parents’ divorce. The principal worried that readers of the article on teenage pregnancy would be able to identify the students interviewed in the article, despite the use of anonymous quotes. He felt that this would be unfair to the two students, their boyfriends, and their parents. Moreover, he was concerned that the article would be read by younger students for whom the content might be inappropriate. As for the article on divorce, the principal objected because the author of the article

75. *Id.* at 273.

76. *Id.* at 273 n.7 (“We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”).

77. See, e.g., STUDENT PRESS LAW CENTER, LAW OF THE STUDENT PRESS 54 (2d ed. 1994) (“The Supreme Court’s 1988 decision in *Hazelwood School District v. Kuhlmeier* had no direct legal impact on the free press rights of college students.”).

78. 393 U.S. 503 (1968).

79. *Id.* at 509.

80. *Id.*

81. Brief for the Respondent at *34, *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1987) (No. 86-836), 1987 WL 864173.

82. *Hazelwood*, 484 U.S. at 264.

83. *Id.* at 278 (Brennan, J., dissenting).

openly criticized her father, who had not been given an opportunity to consent to the article's publication, or respond to some of the allegations and characterizations made in it. With little time remaining before the issue of *Spectrum* was to go to press, the principal decided to delete two entire pages from the newspaper that contained the offending articles without giving the student-authors any notice, opportunity to respond, or chance to change the articles.⁸⁴

As a result of the principal's actions, three former *Spectrum* staff members sued the school district and various school officials. The district court found no First Amendment violations and thus delivered a verdict in favor of the school district;⁸⁵ a divided Eighth Circuit reversed.⁸⁶ The Supreme Court, in a 5-3 decision, reversed the appellate court and upheld the district court's findings. Justice White wrote for the majority, couching his opinion in two underpinnings: one concerning forum analysis⁸⁷, the other addressing the toleration/promotion distinction.⁸⁸

B. Dissecting *Hazelwood*: Forum Analysis

The Court's decision in *Perry Education Association v. Perry Local Educators' Association*⁸⁹ outlines its approach to forum analysis. There the Court demarcated the three different types of fora. Places such as parks, streets, and courthouse squares are traditional public fora, as they are "places which by long tradition or by government fiat have been devoted to assembly and debate."⁹⁰ It is very difficult for the government to impose content-based speech restrictions in the traditional public forum, and any regulation of that sort must pass strict scrutiny. The government, however, may institute a time, place, or manner restriction, so long as it is content-neutral, narrowly tailored to serve a significant government interest, and leaves open ample alternative channels for communication.⁹¹

Limited public fora (also called designated public fora⁹²) are those public properties (in the broad sense) that the government has opened on a limited basis for expressive use by the public.⁹³ Although the government is not required to create such fora, if it does, "it is bound by the same standards as apply in a

84. *Id.* at 263–65.

85. See 607 F. Supp. 1450 (E.D. Mo. 1985).

86. See 795 F.2d 1368 (8th Cir. 1986).

87. C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL'Y REV. 343, 371 (1989).

88. Bruce C. Hafen & Jonathan O. Hafen, *The Hazelwood Progeny: Autonomy and Student Expression in the 1990s*, 69 ST. JOHN'S L. REV. 379, 397 (1995).

89. 460 U.S. 37 (1983).

90. *Id.* at 45.

91. *Id.*

92. Although many lower courts (like the Ninth Circuit, for example) distinguish limited public fora from designated public fora (requiring the latter to pass strict scrutiny, while the former need only pass a reasonableness test), the Supreme Court seems to use them interchangeably, as will this Note. See *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001).

93. *Perry*, 460 U.S. at 46.

traditional public forum,”⁹⁴ and thus any content-based restrictions imposed on speech in one of those fora must pass strict scrutiny. Examples of this type of forum include public libraries⁹⁵ and state fairgrounds.⁹⁶ In these fora, the government can limit use to certain groups or confine speech to certain subject matter.⁹⁷

The final type of forum is a nonpublic forum which, by definition, is not open to the general public.⁹⁸ Examples in this category include military installations⁹⁹ and prisons.¹⁰⁰ In nonpublic fora, “the State may reserve the forum for its intended purposes . . . as long as the regulation . . . is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”¹⁰¹ Time, place, and manner regulations are also permitted in the nonpublic forum.¹⁰² Here, too, it is important to keep in mind the Court’s admonition that “[t]he 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.”¹⁰³

As two commentators put it, “When speech takes place in the ‘nonpublic forum’ the result is generally preordained: the government wins, the speaker loses.”¹⁰⁴ Thus, the first issue that Justice White addressed in his opinion was the determinative one. The *Spectrum* was not the sort of forum that could be considered a traditional public forum. The question, then, was whether it was a limited public forum or a nonpublic forum. If *Spectrum* were a limited public forum, the student journalists would be afforded more leeway to make editorial decisions and could not be constitutionally subjected to the censorship that their school principal had rendered. If *Spectrum* were a nonpublic forum, however, then the principal would be afforded more deference by the Court, and the principal’s actions could be explained as merely a reasonable effort to limit the subject matter that was covered in *Spectrum*, not an attempt to suppress expression because of the principal’s distaste for the journalists’ viewpoints.

Justice White conducted a forum analysis by weighing the evidence presented by each side to sway the Court into finding that *Spectrum* either was or was not a

94. *Id.*

95. See *Faith Ctr. Church Evangelistic Ministries v. Glover*, 462 F.3d 1194 (9th Cir. 2006) (holding that a library meeting room is a limited public forum).

96. See *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640, 655 (1981) (finding that “[t]he Minnesota State Fair is a limited public forum”).

97. *Perry*, 460 U.S. at 46.

98. *Id.* at 47.

99. See *Greer v. Spock*, 424 U.S. 828 (1976) (holding that military installation is not a public forum).

100. See *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119 (1977) (holding that a prison is not a public forum).

101. *Perry*, 460 U.S. at 46.

102. *Id.*

103. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

104. Dienes & Connolly, *supra* note 87, at 372.

limited public forum.¹⁰⁵ In light of *Spectrum*'s curricular nature and the content-control and general supervision exercised by the paper's advisor (the journalism teacher) and school principal, Justice White found *Spectrum* to be "a supervised learning experience for journalism students," and "[a]ccordingly, school officials were entitled to regulate the contents of *Spectrum* in any reasonable manner."¹⁰⁶

C. Dissecting *Hazelwood*: The Toleration/Promotion Distinction

In regards to the second underpinning for the decision, the toleration/promotion distinction, Justice White wrote, "The question whether the First Amendment requires a school to *tolerate* particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to *promote* particular student speech."¹⁰⁷ Under this rationale, a school is not allowed to affirmatively curtail the expression of students,¹⁰⁸ but it is allowed to "disassociate itself" from "speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."¹⁰⁹ Herein lies the distinction that Justice White drew between tolerating speech, a la *Tinker*, and promoting it. Whether a school is *actually* promoting the speech of students in a particular case is debatable; however, the danger lies, according to the majority, in a community's reasonably perceiving its school as sponsoring speech that is harsh, vulgar, embarrassing, or otherwise "inconsistent with 'the shared values of a civilized social order.'"¹¹⁰ In short, a community is not likely to view a school decision to permit students to wear black armbands in protest of a war as equivalent to school support for the students' cause; a community is more likely, however, to view a school decision to print a newspaper containing edgy or unprofessional articles as bearing the imprimatur of the school.

D. *Hazelwood's* Legacy

Hazelwood is important in the history of education law not just to the extent that it limits *Tinker*, but also to the extent that it expanded the conception of school curricula. As two commentators noted soon after the Court's landmark decision, "'Curriculum' is no longer limited to the basic subjects taught, but includes marginal activities like school plays, school newspapers, and clubs, as well as any activity that might give the appearance that it might be sanctioned by the school. . . . *Hazelwood* [severely limits] the occasions when *Tinker* applies."¹¹¹

105. *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 267–70 (1988).

106. *Id.* at 270.

107. *Id.* at 270–71 (emphasis added).

108. Unless such expression "'materially and substantially interferes with the requirements of appropriate discipline in the operation of the school . . . or impinges upon the rights of other students.'" *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

109. *Hazelwood*, 484 U.S. at 271.

110. *Id.* at 272 (quoting from *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

111. Dienes & Connolly, *supra* note 87, at 375.

The decision, with its dual underpinnings, also implied that forum analysis *alone* is not enough to compel a determination in every case of school limitation of speech. For example, had the *Tinker* Court applied forum analysis to the classroom in which the black armband was worn, it no doubt would have had to conclude that such a setting was a nonpublic forum, in which case school censorship of political speech could be allowed. Setting aside the issue of political/symbolic speech (and the greater deference it receives) that was also present in *Tinker*, the dual underpinnings of *Hazelwood* show the importance of looking at the nature of the school action (is it passive or active?) in context (where/in what type of forum did it occur?), while also asking whether the action, or lack of it, gives to the public the appearance of school sponsorship or approval.

Not everyone was pleased with the Court's decision in *Hazelwood*. One author called the outcome "philosophically flawed [in that it] promotes a stilted view of public education."¹¹² Another critiqued the majority's decision on a variety of grounds, calling the public forum doctrine the Court employed "a flawed analytical tool that focuses a court's attention on classification of the place involved in a First Amendment dispute rather than on the constitutional rights, values, and interests at stake."¹¹³ The same author alleged that the Court reached the wrong outcome in its application of the public forum doctrine, and that the Court's distinction between individual expression and school-sponsored expression ignored and de-emphasized the balancing methodology the Court employed in *Tinker*, which he felt should have been faithfully applied to the two excised articles in question.¹¹⁴

These complaints echo some of the criticisms that Justice Brennan unleashed on the majority in his rather ferocious dissent, joined by Justices Marshall and Blackmun. Justice Brennan characterized the majority's opinion as camouflaging invidious viewpoint discrimination against the promotion of "irresponsible sex" as "'mere' protection of students from sensitive topics."¹¹⁵ Instead of applying forum analysis, Justice Brennan argued for a stricter application of the *Tinker* standard than the majority rendered; applying *Tinker*, Justice Brennan would have held that the censorship was not in response to any material disruption of class work, nor was it necessary to prevent student expression from invading the rights of others, and that therefore, the censorship could not be maintained.¹¹⁶ The dissent also found the Court's finding of a distinction between personal expression and school-sponsored expression unsubstantiated based on prior cases such as *Tinker* and *Bethel School District Number 403 v. Fraser*;¹¹⁷ the dissent regarded this distinction as illusory at best.¹¹⁸ Finally, the dissent contended—even if the

112. W. Wat Hopkins, *Hazelwood v. Kuhlmeier: Sound Constitutional Law, Unsound Pedagogy*, 16 N. KY. L. REV. 521, 521 (1989).

113. Jeffrey D. Smith, *High School Newspapers and the Public Forum Doctrine*: *Hazelwood School District v. Kuhlmeier*, 74 VA. L. REV. 843, 856 (1988).

114. *Id.* at 857, 861.

115. *Hazelwood*, 484 U.S. at 288 (Brennan, J., dissenting).

116. *Id.*

117. 478 U.S. 675 (1986) (sustaining the suspension of a student who used a sexual reference in a student assembly address while supporting another student for elective office).

118. *Hazelwood*, 484 U.S. at 281.

censorship were permissible—that more delicate means of censoring the newspaper could have been deployed, and that the principal’s “brutal manner” in which he censored the paper showed “[s]uch unthinking contempt for individual rights [that] is intolerable from any state official.”¹¹⁹

E. Applying *Hazelwood* to the College/University Level?

Although the *Hazelwood* Court noted that its framework may or may not apply to the higher education setting,¹²⁰ some warily (and perhaps rightly) read the Court’s dictum in footnote seven to mean that there is no guarantee that the Court would not extend the same federal rationale to the college or university campus.¹²¹ Others, however, confidently predicted that the decision would have no bearing on collegiate-level student newspapers.¹²²

Drawing from the Court’s jurisprudence in the area of free speech on privately-owned shopping centers, one commentator suggested that educational speech policy should be established on the state level, thus taking the *Hazelwood* decision effectively out of the picture.¹²³ Giving force to this rationale was the Court’s 1980 decision in *Robins v. PruneYard Shopping Center*¹²⁴ in which it upheld the California Supreme Court’s determination that its own state constitutional guarantee of free expression exceeded federal constitutional protection and granted an affirmative right to individuals to use privately-owned shopping centers for non-disruptive speech activities.¹²⁵ Central to the Court’s decision was the statement that a state has the “sovereign right and the police power to adopt by statute or constitution individual liberties more expansive than those found in the Federal Constitution.”¹²⁶ Because many states have constitutional provisions that provide *affirmative* free speech rights¹²⁷ (as contrasted by the mere *restraint* on

119. *Id.* at 290.

120. *Id.* at 273 n.7.

121. See Nancy J. Meyer, *Assuring Freedom for the College Student Press After Hazelwood*, 24 VAL. U. L. REV. 53 (1989).

122. See Arval A. Morris, Commentary, *Censoring the School Newspaper*, 45 ED. LAW REP. 1, 17 (1988) (“[I]t is most unlikely that the *Hazelwood* precedent would apply to most college or university newspapers”); J. Marc Abrams & S. Mark Goodman, Comment, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L. J. 706, 728 (1988) (arguing that “the older age of college newspaper reporters, the concomitantly higher age of these newspapers’ readers, the increased independence generally granted to students in higher education, and the acknowledgement that such students are, in fact, young adults with full legal rights in our system,” are the reasons why courts will limit *Hazelwood*’s impact to the high-school level).

123. Meyer, *supra* note 121, at 76.

124. 447 U.S. 74 (1980).

125. *Id.*

126. *Id.* at 81.

127. See, e.g., CAL. CONST. art. I, § 2(a) (“Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right”); COLO. CONST. art. II, § 10 (“[E]very person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty”); ME. CONST. art. I, § 4 (“Every citizen may freely speak, write and publish sentiments on any subject, being responsible for the

state action embodied in the federal First Amendment), free speech actions brought under state law would be more likely to find ultimate deference to the speaker. Such reliance on state law would help alleviate some of the inequalities brought about by the public/private distinction in that once a private educational institution established a newspaper for student expression, those using it would not be burdened by the federal ‘state action’ doctrine and would thus enjoy the same affirmative speech rights given to all those in the particular state.¹²⁸

Most free speech cases at the college and university level, however, have continued to be brought under the federal First Amendment. Although courts have been tempted to extend and apply *Hazelwood* to the college and university setting,¹²⁹ few, if any, have fully done it.¹³⁰ No doubt this has occurred for good

abuse of this liberty”); PA. CONST. art. I, § 7, (“The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty”).

128. Meyer, *supra* note 121, at 76. Interestingly, in the wake of *Hosty*, at least one state has already affirmatively expanded college student speech rights through state law, and others are considering it. In August of 2006, California Governor Arnold Schwarzenegger signed into law a bill that prohibits prior restraint and other forms of censorship of the college and university press. Mike Hiestand, *California Leads Way With “Anti-Hosty” Laws*, Associated Collegiate Press, TRENDS IN COLLEGE MEDIA, Nov. 1, 2006, <http://www.studentpress.org/acp/trends/~law1006college.html> [hereinafter Hiestand, *California Leads*]. The bill was approved by a vote of 31–2 in the California Senate and was unanimously passed by the California Assembly. Evan Mayor, *California Governor Signs College Student Press Freedom Bill*, STUDENT PRESS LAW CTR., Aug. 28, 2006, http://www.splc.org/newsflash_archives.asp?id=1316&year=2006. According to the legal counsel for the California Newspaper Publishers Association, the bill was drafted in response to the *Hosty* decision, *id.*, thus leading some commentators to call it the first anti-*Hosty* law. Hiestand, *California leads*. Similar laws have been proposed in other states, including Illinois. See Erica Hudock, *Washington State House of Representatives Approves Free Student Press Bill*, STUDENT PRESS LAW CTR., Mar. 13, 2007, <http://www.splc.org/newsflash.asp?id=1473>; Erica Hudock, *Oregon Legislator Prepares Free Press Bill Modeled After Washington State Bill*, STUDENT PRESS LAW CTR., Mar. 2, 2007, <http://www.splc.org/newsflash.asp?id=1456>; Brian Hudson, *Illinois Senate Passes College Press Freedom Bill*, STUDENT PRESS LAW CTR., Mar. 15, 2007, <http://www.splc.org/newsflash.asp?id=1479>.

129. See, e.g., Cohen v. San Bernardino Valley Coll., 883 F. Supp. 1407, 1413 & n.8 (C.D. Cal. 1995) (noting in a dispute involving a community college professor’s First Amendment challenge of a disciplinary sanction based on his sexually-charged teaching style, that “cases dealing with high school students may not fully apply in the college or university context. . . . Nonetheless, many of the First Amendment concerns remain the same, regardless of the education level.”); Silva v. Univ. of N.H., 888 F. Supp. 293, 313 (D.N.H. 1994) (using *Hazelwood* only to the extent that it provides insight into whether a governmental regulation—here, the discipline doled out to a professor for his use of sexually explicit language and metaphors in the classroom—is reasonably related to legitimate pedagogical concerns); DiBona v. Matthews, 269 Cal. Rptr. 882, 893–94 (Cal. Ct. App. 1990) (questioning and ultimately declining to apply *Hazelwood*’s ‘school sponsorship’ rationale in the context of community college administrators’ cancellation of a drama class because of a controversial play that was to be performed); Walko v. Kean Coll. of N.J., 561 A.2d 680, 687 n.5 (N.J. Super. Ct. Law Div. 1988) (stating that there is “no need in this case to consider the key question of the applicability of *Hazelwood* . . . to a state college’s student paper” in a First Amendment claim brought by a community college professor allegedly defamed in a “spoof” edition of the college’s newspaper). The dissent in *DiBona*, however, argued for a more stringent application of *Hazelwood*, stating, “*Hazelwood* clearly

reason: the underlying goals of K-12 and higher education are drastically different. The former, being compulsory, concerns itself with imparting discrete bodies of knowledge; the latter, being entirely optional, concerns itself with the creation, articulation, and dissemination of new knowledge. The former aims to inculcate community values and prepare students for participation in democracy, whereas the latter aims to question and explore the meaning of community values. The goals of both systems are different, if not at times opposing. Therefore, two commentators in 1996 were perhaps justified in their concern that “the cross application of cases from secondary to post-secondary education” would inevitably lead to the dilution of the notion that higher education is a “marketplace of ideas.”¹³¹

One pre-*Hazelwood* decision, *Healy v. James*,¹³² is particularly worth noting because of its clear elucidation of free speech rights in the unique context of colleges and universities. Although it involved a university’s denial of recognition to a student group and not censorship of a student newspaper,¹³³ it set the standard for how First Amendment issues at the college and university level were treated before *Hazelwood*. After *Hazelwood*, some courts disrupted the clarity *Healy* had established by being tempted to apply,¹³⁴ and in some cases partially applying,¹³⁵ *Hazelwood*’s forum analysis in reaching their conclusions in cases involving free speech disputes at colleges and universities. Incidentally, *Healy* is also the case that petitioners in *Hosty* urged the Court to rely on, instead of *Hazelwood*, in granting their petition for a writ of certiorari.¹³⁶ Although the Court declined to grant the petitioners a writ of certiorari, and the Seventh Circuit opinion did not address or cite *Healy* at all, it is still worth mentioning because of its strong language in support of freedom of speech at colleges and universities, as expressed in Justice Powell’s opinion of the Court:

[T]he 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

authorizes the kind of action taken by school administrators in this case.” *DiBona*, 269 Cal. Rptr. at 898.

130. See *infra* Part III.F.

131. Gail Sorenson & Andrew S. LaManque, *The Application of Hazelwood v. Kuhlmeier in College Litigation*, 22 J. C. & U. L. 971, 986 (1996).

132. 408 U.S. 169 (1972).

133. *Id.* at 170–71.

134. See *supra* note 129.

135. See *infra* Part III.F.

136. See Petition for Writ of Certiorari at *15, *Hosty v. Carter*, 126 S. Ct. 1330 (No. 05-377), 2005 WL 2330125 (stating “[t]he Seventh Circuit’s decision in this case cannot be reconciled with *Healy* and its progeny. . . . Nothing this Court held or wrote in *Hazelwood*, however, detracts from its holdings in *Healy* . . . or even arguably operates to excuse the otherwise unconstitutional conduct in which Dean Carter engaged in this case . . .”).

environs is peculiarly the “marketplace of ideas,” and we break no new constitutional ground in reaffirming this Nation’s dedication to safeguarding academic freedom.¹³⁷

The Court went on to hold that “[t]he College, acting here as the instrumentality of the State, may not restrict speech or association because it finds the views expressed by any group to be abhorrent.”¹³⁸ The Court made no mention of the concern that would later be part of the main focus in *Hazelwood* (albeit in the high school context), that of the school’s being seen as promoting offensive or questionable speech by students. The Court instead focused on how “the College’s denial of recognition [to the student group] was a form of prior restraint”¹³⁹ that was clearly impermissible absent some proof that the group intended to violate valid campus policies.¹⁴⁰

Later courts reaffirmed the general holding of *Healy*—that First and Fourteenth Amendment protections apply to students in the collegiate context. In *Papish v. Board of Curators of the University of Missouri*,¹⁴¹ where a student had been expelled for distributing a newspaper on campus that contained a crude cartoon and headlines, the Court found that “*Healy* makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name of ‘conventions of decency.’”¹⁴² Even though the offensive paper disseminated in *Papish* was not affiliated with the university, there is little reason to believe that the Court would have approached the case differently had there been an affiliation.

Circuit courts used these decisions to reach similar outcomes, pre-*Hazelwood*, in disputes involving student newspapers at colleges and universities. In *Joyner v. Whiting*,¹⁴³ the Fourth Circuit held that a college or university may not withdraw funding for a student newspaper because it disagrees with the paper’s editorial comment (even when that comment is segregationist, if not racist).¹⁴⁴ Similarly, in *Bazaar v. Fortune*,¹⁴⁵ the Fifth Circuit found that a college or university may not prevent publication and distribution of a student publication (here, a literary magazine) on the grounds that it contained inappropriate language that was generally in poor taste.¹⁴⁶ The Fifth Circuit also added that “[i]t seems a well-

137. *Healy*, 408 U.S. at 180–81 (citations omitted).

138. *Id.* at 187–88. The group at issue was Students for a Democratic Society (“SDS”), and the university was concerned with the group’s affiliation with the national SDS organization and the potential lawlessness associated with it in popular opinion. *See id.* at 172.

139. *Id.* at 184.

140. *Id.* at 193–94.

141. 410 U.S. 667 (1973) (per curiam).

142. *Id.* at 670.

143. 477 F.2d 456 (4th Cir. 1973).

144. *Id.* at 460.

145. 476 F.2d 570 (5th Cir. 1973).

146. *Id.* at 572, 580. Although the court does not reproduce the inappropriate language (as the defendants did not explicitly specify it), the court wrote that it surely included “use of ‘that four-letter word’ generally felt to be the most offensive in polite conversation. . . . and its derivatives.” *Id.* at 573.

established rule that once a University recognizes a student activity which has elements of free expression, it can act to censor that expression only if it acts consistent with First Amendment constitutional guarantees.”¹⁴⁷

These cases are undoubtedly foundational decisions in terms of establishing the judiciary’s willingness to recognize college students’ First Amendment rights as being nearly concomitant with those of lay members of society. *Hazelwood*, however, changed the landscape in that it left open the possibility that its deferential standard could potentially apply at the college and university level,¹⁴⁸ thereby inducing more than one administration to actually ask a court to apply it.

F. Applications of *Hazelwood* to Colleges and Universities

Only a few courts have been willing to take college and university administrations’ invitations (and indeed, only a few administrations have had occasion to make the invitation) to use *Hazelwood* in the post-secondary context, and in so doing, lend possibly undeserved deference to institutions of higher education. Most notable of these cases is *Bishop v. Aronov*¹⁴⁹ in which the Eleventh Circuit held that the University of Alabama did not violate the constitutional rights of a professor of exercise physiology when it prohibited him from voicing his religious preferences and opinions during class discussions, and also, from holding an optional, after-class meeting for his students and other interested persons at which he lectured on and discussed the topic, “Evidences of God in Human Physiology.”¹⁵⁰ The *Bishop* court acknowledged the difference between high school and college and university classroom settings, but nevertheless called *Hazelwood*’s reasoning “suitable to our ends, even at the university level . . . insofar as [*Hazelwood*] covers the extent to which an institution may limit in-school expressions which suggest the school’s approval.”¹⁵¹ Likening the facts at hand to the *Hazelwood* principal’s ability to limit school expressions that suggested the school’s approval, the Court found that the University of Alabama had dominion over what is taught by its professors in that “the University’s conclusions about course content must be allowed to hold sway over an individual professor’s judgments” when those judgments significantly bear on the curriculum and give the appearance of endorsement by the school.¹⁵² However, the Eleventh Circuit disagreed with the District Court’s conclusion that the professor’s classroom was an open forum during instructional time.¹⁵³ The Eleventh Circuit stated simply, “This is not a forum case,” and that the professor’s classroom “is not an open forum,” and left it at that.¹⁵⁴ Because the Eleventh Circuit found the classroom “not an open forum,” one might think that

147. *Id.* at 574.

148. *See supra* note 76.

149. 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992).

150. *Id.* at 1078.

151. *Id.* at 1074.

152. *Id.* at 1077.

153. *Id.* at 1071.

154. *Id.*

the court would next apply the nonpublic forum analysis used in *Hazelwood*. However, the Eleventh Circuit avoided any use of the term nonpublic forum, and did not use that rubric to ground its opinion.

Despite the Eleventh Circuit's use of the "fear of endorsement" rationale of *Hazelwood*, the facts in *Bishop* are crucially different from the context of *Hazelwood*; while *Hazelwood* involved a free speech dispute between *students* and administrators, *Bishop* involved a dispute between *faculty* and administrators. Therefore, ostensibly *Bishop* should provide less predictive value than one might think when it comes to how courts would apply *Hazelwood* to college-level newspapers (where the disputes are between students and administrators), assuming a court were willing to make that leap.

The more recent Tenth Circuit case, *Axson-Flynn v. Johnson*,¹⁵⁵ comes closer to approaching a fact situation that could be read as analogous to the underlying facts of *Hazelwood*, only on a collegiate level. In this case, a Mormon acting student refused to say the word "fuck" or take God's name in vain during various classroom acting exercises at the University of Utah's Actor Training Program.¹⁵⁶ Instructors in the program had told the student that she could choose to continue in the program if she modified her values, and that if she did not, she could leave.¹⁵⁷ She chose to leave (although she was never formally asked to do so) and filed suit on First Amendment grounds, claiming that the instructors had compelled her speech and violated her rights to free exercise of religion.

On appeal from the district court's award of summary judgment for the defendants, the Tenth Circuit found that the speech at issue constituted "'school-sponsored speech' and is thus governed by *Hazelwood*."¹⁵⁸ Taking note that—like in *Hazelwood*—the student's speech occurred within a curricular activity and could thus be seen as bearing the school's imprimatur, the court narrowly held that "the *Hazelwood* framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum."¹⁵⁹ Admitting the differences in maturity and sophistication between high school and college and university students, the court commented that such factors would help determine whether any restrictions on speech were reasonably related to legitimate pedagogical concerns.¹⁶⁰ In this case, the court found that it could not determine whether the university's justifications for trying to get the student to use language she objected to were truly pedagogical or rather mere pretexts for religious discrimination;¹⁶¹ therefore, the court remanded the case for further proceedings on the issue.¹⁶²

155. 356 F.3d 1277 (10th Cir. 2004).

156. *Id.* at 1280–81.

157. *Id.* at 1282.

158. *Id.* at 1285.

159. *Id.* at 1289.

160. *Id.*

161. The justifications the university offered included teaching students how to step outside their own values and characters by forcing them to assume very foreign characters and reciting offensive dialogue; teaching students to preserve the integrity of authors' works; and being able to measure true acting skills by gauging students' abilities to portray offensive parts. *Id.* at 1292.

162. *Id.* at 1293.

Outside of the curricular and faculty/administrator feud confines discussed above, no circuit court prior to the Seventh Circuit in *Hosty* ever had the occasion to apply *Hazelwood* in a collegiate context,¹⁶³ let alone to a collegiate newspaper.¹⁶⁴ The Sixth Circuit came rather close, however, sitting en banc in *Kincaid v. Gibson*.¹⁶⁵ The case involved the confiscation of the student-produced yearbook *The Thorobred* at Kentucky State University. The mass confiscation was fueled by administrators' concerns that the yearbook was of poor quality and that its contents were inappropriate.¹⁶⁶ Although the majority's opinion stated that it granted en banc review "to determine whether the panel and the district court erred in applying *Hazelwood* . . . to the university setting,"¹⁶⁷ the court did little to squarely answer that question, other than to state, in a footnote, that "*Hazelwood* is factually inapposite to the case at hand," and that "*Hazelwood* has little application to this case."¹⁶⁸ The court's conclusion in this regard seemed to stem from its finding that the yearbook should be analyzed as a limited public forum rather than a nonpublic forum, as the circuit panel and district courts had found.¹⁶⁹ Thus, the court seemed to state that, even though a collegiate publication was involved, *Hazelwood* is inapposite because forum analysis leads to the conclusion that *The Thorobred* is a limited public forum, and not a nonpublic forum, as was the case with *Spectrum* in *Hazelwood*.¹⁷⁰ The extent to which this decision signals Sixth Circuit disapproval for the application of *Hazelwood* to post-secondary student newspapers is unclear.

Although no circuit court case explicitly involved college or university level newspapers post-*Hazelwood* but pre-*Hosty*, one district court in Michigan did have occasion to deal with the potential applicability of *Hazelwood* to this medium. In *Lueth v. St. Clair County Community College*,¹⁷¹ the court used *Hazelwood* to help determine whether a college or university newspaper was a nonpublic or limited public forum.¹⁷² Looking at the factors that the Court found determinative in finding *Spectrum* to be a nonpublic forum, this court concluded that the student

163. Just because the Seventh Circuit was being asked to apply *Hazelwood* does not mean that it actually did, see *infra* Part IV.C–D.

164. This is not to say that no circuit passed judgment, *sua sponte*, on *Hazelwood*'s applicability to the college and university level. The First Circuit, in a footnote in a case involving a First Amendment suit brought by students in response to their school's decision to withdraw funding from a legal services organization that had previously allowed its members to sue on behalf of students, stated that the Court's *Hazelwood* decision "is not applicable to college newspapers." See *Student Gov't Ass'n v. Bd. of Trs. of the Univ. of Mass.*, 868 F.2d 473, 480, n.6 (1st Cir. 1989) (dictum).

165. 236 F.3d 342 (6th Cir. 2001) (en banc).

166. *Id.* at 345.

167. *Id.* at 346.

168. *Id.* at 346 & n.5.

169. *Id.* at 346.

170. The court did not mention or explore the toleration/promotion distinction aspect of *Hazelwood*.

171. 732 F. Supp. 1410 (E.D. Mich. 1990).

172. *Id.* at 1414–15.

newspaper at issue was clearly a “forum for public expression.”¹⁷³ However, as this case involved a community college administrator’s prohibition on publishing an advertisement for a Canadian strip club, commercial speech was implicated, unlike in *Hazelwood*. Thus, the court stated that the administrators must satisfy the Supreme Court’s requirements for regulation of commercial speech.¹⁷⁴ It used commercial speech doctrine to conclude not only that the administrators’ interest in regulating the ad in question was substantial, but also that the regulation itself—which involved indiscriminate exclusion of any publication of the offending ad, even though the school only found certain language in the ad to be inappropriate—was not narrowly tailored to serve that interest.¹⁷⁵ Other than using *Hazelwood* to find that this newspaper was a limited public forum, the court made no comments about *Hazelwood*’s general utility in the college and university newspaper context, and it did not indulge in any toleration/promotion discussion as found in *Hazelwood*. Ironically, the one case with facts quite similar to those presented in *Hosty* offers little insight into the controversial issue—the applicability of *Hazelwood* to the collegiate newspaper context—that Judge Easterbrook tackled head on.

IV. UNDERSTANDING *HOSTY* AND ITS IMPLICATIONS

A. Dissecting the Opinion

In the introduction to the majority’s discussion of the *Hosty* controversy, Judge Easterbrook tips his hand to the reader as to how the court was to rule in the case. The first paragraph reads, in entirety:

Controversy began to swirl when Jeni Porche became editor in chief of the *Innovator*, the student newspaper at Governors State University. None of the articles concerned the apostrophe missing from the University’s name. Instead the students tackled meatier fare, such as its decision not to renew the teaching contract of Geoffrey [sic] de Laforcade, the paper’s faculty adviser.¹⁷⁶

With *Hazelwood* as its starting point, the Seventh Circuit goes on to give a selected account of what the *Hazelwood* Court stated. Judge Easterbrook writes that the Court held that “[w]hen a school regulates speech for which it also pays” that the school can then regulate the speech so long as it is reasonably related to legitimate pedagogical concerns.¹⁷⁷ This somewhat overstates the more nuanced approach the Court actually took in *Hazelwood*. In *Hazelwood*, the issue was not merely that the school district paid for *Spectrum* and thus could reasonably regulate it pursuant to pedagogical concerns. Also important to the Court was that by virtue of its

173. *Id.* at 1415.

174. *Id.*

175. *Id.* at 1416.

176. *Hosty v. Carter*, 412 F.3d 731, 732 (7th Cir. 2005).

177. *Id.* at 734.

dissemination, *Spectrum* appeared to bear the imprimatur of the school.¹⁷⁸

This distinction is important to bear in mind, for one can easily see how a college or university student newspaper, paid for with public funds, does not necessarily give a reader the impression that the college or university endorses the paper or the views expressed in it. However, Judge Easterbrook's interpretation of *Hazelwood* starts from the premise that whoever pays for a paper might be able to regulate it, regardless of whether readers can discern if the payor in fact sponsors and vouches for the contents of the publication. Thus, Judge Easterbrook immediately ignores the toleration/distinction element of the *Hazelwood* analysis, focusing instead on the simpler issue of payment. This judicial sleight of hand gets the reader conditioned to where Judge Easterbrook wanted to go.

Judge Easterbrook next guides the reader through a discussion of forum analysis, noting how the Court itself has established that age does not control the forum question.¹⁷⁹ Using such cases as *Rosenberger v. Rector and Visitors of the University of Virginia*¹⁸⁰ for support,¹⁸¹ he states that no public school, at any level, may discriminate against religious speech in a public forum, including classrooms made available to extracurricular activities.¹⁸² From this statement of the status quo, he takes the reasoning one step further and states, "If private speech in a public forum is off-limits to regulation even when that forum is a classroom of an elementary school . . . then speech at a non-public forum, and underwritten at public expense, may be open to reasonable regulation even at the college level—or later."¹⁸³ Here, again, one notes how Judge Easterbrook touches on the issue of who pays the speaker's bill while overlooking the concomitant consideration, under *Hazelwood*, of whether one could reasonably conclude that the payor approved of or agreed with the speech for which it paid. He cites *Rust v. Sullivan*,¹⁸⁴ a Supreme Court case upholding limitations on physician speech regarding family planning in the government-funded Title X context, as further

178. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

179. *Hosty*, 412 F.3d at 735.

180. 515 U.S. 819 (1995) (holding that the University of Virginia could not discriminate based on viewpoint in underwriting the speech of student-run publications—in this case, a student newspaper from a Christian perspective).

181. Judge Easterbrook also cites for support *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (holding that a local Christian club could not be refused equal access and use of school rooms for engaging elementary school children in Christian songs, prayer, Bible readings, and the like immediately following the regular school day); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (holding that a school district impermissibly discriminated on the basis of viewpoint when it permitted public school property to be used for the presentation of all views about family issues and childbearing except those dealing with the subject matter from a religious standpoint); *Hedges v. Wauconda Community Unit School District Number 118*, 9 F.3d 1295 (7th Cir. 1993) (holding, *inter alia*, that a junior high school policy violated the First Amendment insofar as it prohibited distribution of religious material on school grounds which students would reasonably believe to be sponsored, endorsed or given official imprimatur by the school).

182. *Hosty*, 412 F.3d at 735.

183. *Id.*

184. 500 U.S. 173 (1991).

support for his reasoning. The federal government, however, was unquestionably regarded as the speaker in *Rust* as it unilaterally created the program and speech (i.e., the message) at issue; the same cannot be said of student newspapers at public colleges and universities, where students help initiate the creation of such fora and go on, in most cases, to unilaterally supply the speech contained in the newspapers. By relying on *Rust* for the principle that publicly-funded speech in nonpublic fora can be reasonably regulated, Judge Easterbrook seems to implicitly espouse the general belief that the government is reasonably seen as promoting any speech that it helps fund, regardless of the specific nature of the speech and forum at issue.

Next, he states the court's controversial conclusion "that *Hazelwood*'s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools."¹⁸⁵ This conclusion is much easier to reach if one focuses merely on who funds the student speech. If Judge Easterbrook had directly considered whether readers of the *Innovator* regarded the paper as bearing the imprimatur of GSU—analogous to the Supreme Court's consideration of whether readers of *Spectrum* regarded the paper as bearing the imprimatur of Hazelwood East High School—he might have arrived at a different conclusion regarding the feasibility of extending *Hazelwood* to the college setting.

Unlike other commentators who are bothered by Judge Easterbrook's conclusion, I am bothered not so much by the obvious differences between the nature of high school and college and university students,¹⁸⁶ but more so by the equally obvious distinction between high school and collegiate student journalism. Most readers (whether they are in college or not) would reasonably find high school newspapers to bear the imprimatur of the schools that pay for them while it is uncertain that the same could be said for college and university papers. This could depend on the nature of the relationship between the paper and the college or university, but in many cases it is doubtful that readers would perceive any school imprimatur of the student publication. For example, in addition to being editorially independent, many collegiate student newspapers are also financially and physically independent from the colleges and universities they serve, further tending to indicate ideological distance and separation from the institution, even though they may be supported by the school through indirect financial means.¹⁸⁷

185. *Hosty*, 412 F.3d at 735.

186. See Daniel A. Applegate, Note, *Stop the Presses: The Impact of Hosty v. Carter and Pitt News v. Pappert on the Editorial Freedom of College Newspapers*, 56 CASE W. RES. L. REV. 247, 273–276 (2005).

187. Indirect financial means could include free use of college or university office space, furniture, computer equipment, and the like. See, e.g., The Cavalier Daily, Overview, <http://www.cavalierdaily.com/about.asp> (last visited Feb. 6, 2007) (University of Virginia paper; financially independent but operates out of the basement in student union building); The Daily Tar Heel, A Brief History of the Tar Heel, <http://www.dailytarheel.com/history/> (last visited Feb. 6, 2007) (The University of North Carolina at Chapel Hill paper; financially independent, but operates out of the student union, for which it now pays the University a fee); The Independent Florida Alligator, About Us, <http://www.alligator.org/pt2/aboutus.php> (last visited Feb. 6, 2007) (University of Florida paper; financially and physically independent); The State News, About the State News, <http://www.statenews.com/aboutus.phtml> (last visited Feb. 6, 2007) (Michigan State University paper; financially and physically independent). These types of student newspapers are

Other state institutions, however, have student newspapers that are run by school organizations, almost like clubs, and are generally overseen by student publications boards.¹⁸⁸ Papers of these sort account for how the majority of student newspapers are structured. However, even with these types of papers where one could argue that there is more administrative oversight, it is also unlikely that a reader would believe that the publication bears the imprimatur of the college or university it serves.¹⁸⁹ As the Seventh Circuit has itself stated, post-*Hosty*, “subsidized student organizations at public universities are engaged in private speech, not spreading state-endorsed messages. . . . It would be a leap . . . to suggest that student organizations are mouthpieces for the university.”¹⁹⁰ Only at those few institutions where students receive credit for working on the student newspaper—or where such newspapers are closely ensconced with journalism programs—would it even seem plausible that readers could view the newspaper as bearing the imprimatur of the college or university.¹⁹¹ Despite these nuances, in reaching his conclusion, Judge Easterbrook instead focused on who foots the speaker’s bill, which is a much easier line of thought for the reader to follow when censorship, not readership, is what brought the parties to court.

B. What It All Means

So far, free speech and collegiate press advocates might find this all quite disturbing. However, it is not as disheartening as it appears on first glance. In essence, *Hosty* is a case about qualified immunity from liability in damages. Dean Carter filed an interlocutory appeal regarding the district court’s denial of her motion for summary judgment; therefore, the procedural posture of this case is

typically run by non-profit corporations on whose boards of directors students and faculty serve (in addition to others not affiliated with the institution). Such corporations typically include statements in their papers (and in online versions of their papers not housed on university servers) to the effect that the publication does not necessarily reflect the views of the university, faculty, or students that it serves, further enforcing the point that university administrators bear no responsibility for the paper’s contents.

188. See, e.g., The College of William and Mary Office of Student Activities, Publications Council, <http://www.wm.edu/studentactivities/funding/council.php> (last visited Feb. 6, 2007) (The Flat Hat, the College of William & Mary paper; semi-dependent financially and physically housed in the student union building); University of Wyoming, Student Publications Board, <http://www.uwyo.edu/studentpub/pubBoard/> (last visited Feb. 6, 2007) (The Branding Iron, the University of Wyoming paper; same as above). Many newspapers of this sort offer their content online; when they do, they often (but not always) do so using their college’s Web space as opposed to a stand alone Web site, which the papers mentioned *supra* in note 187 always use, in order to keep organizational separation.

189. Like completely independent student news organizations, these publications also tend to print disclaimers stating that the views expressed in their paper do not necessarily represent those of their affiliated university, its faculty, or its students. See, e.g., The Argonaut (The University of Idaho paper), Legal Information & Policies, <http://www.uiargonaut.com/content/view/42/73/> (last visited Feb. 6, 2007).

190. Christian Legal Soc’y v. Walker, 453 F.3d 853, 861 (7th Cir. 2006).

191. Although these sorts of institutions are scarce when it comes to daily student newspapers, they may be more common at institutions that publish their student newspaper less frequently (such as GSU), although no statistics on this are available. See *infra* note 216.

quite unique. The Seventh Circuit was not being asked to apply *Hazelwood* analysis.¹⁹² In fact, the panel's decision, written by Judge Evans, did not mention forum analysis or the toleration/promotion distinction at all. Instead, the Seventh Circuit was concerned with whether it was reasonable for Dean Carter to think that *Hazelwood* applied to the collegiate newspaper context such that her decision to censor the *Innovator* could entitle her to qualified immunity.¹⁹³ If her belief that the *Hazelwood* framework applied to the collegiate setting was not reasonable—as Judge Evans contended in both his panel opinion¹⁹⁴ and in his en banc dissent¹⁹⁵—then her appeal would fail. The Seventh Circuit ultimately found that *Hazelwood* does apply in the strict sense that its framework extends to the collegiate context, although the court conceded that a consensus has not been reached across circuits, and that the issue is cloudy.¹⁹⁶

This conclusion should not come as much of a surprise. As the history of *Hazelwood* and its progeny discussed above shows, *Hazelwood* has been used, partially used, commented upon, summarily dismissed, and flatly ignored in a variety of cases involving free speech in the college and university community. As the Seventh Circuit noted, "This circuit had not spoken on the subject until our panel's opinion, which post-dated Dean Carter's actions."¹⁹⁷ Therefore, when it comes to ruling on the precise question presented in this case—should the district court have found that Dean Carter was entitled to qualified immunity because the law regarding censorship of collegiate student newspapers was not clearly established—it does not seem illogical to find that her actions, even if

192. Two student commentators have already overstated the Seventh Circuit's opinion in this case, stating that "[t]he court went on to apply the *Hazelwood* framework to the case," and that "[t]he Seventh Circuit's decision in *Hosty v. Carter* represents the first unequivocal application of *Hazelwood* to post-secondary student press." Applegate, *supra* note 186, at 258; Nimick, *supra* note 10, at 967. This is simply not true. There is a difference between *applying* and *extending* the *Hazelwood* framework. The former would entail the court's determining that the *Innovator* was a nonpublic forum that contained speech that could reasonably be found to bear the imprimatur of GSU. If both these characterizations were true, the determinative issue would then become whether Dean Carter's censorship of the paper was reasonably related to legitimate pedagogical concerns, as per the discussion in *Hazelwood*. However, this multi-faceted analysis was not undertaken in *Hosty*. In light of the whole opinion, when the *Hosty* court opined that "*Hazelwood's* framework applies to subsidized student newspapers at colleges," it more precisely seems to mean, given the procedural posture of the case regarding the question of qualified immunity, that *Hazelwood's* reach is not necessarily limited to elementary- and secondary-school settings. *Hosty v. Carter*, 412 F.3d 731, 736 (7th Cir. 2005). That is to say, its framework *could* apply, or in fact *extends*, to the college setting. This is drastically different, though, than actually applying that framework. The Seventh Circuit did not have to address the question of whether *Hazelwood's* framework could have been applied successfully to defend Dean Carter's action.

193. See *Hosty*, 412 F.3d at 739 (en banc) ("Disputes about both law and fact make it inappropriate to say that any reasonable person in Dean Carter's position in November 2000 had to know that the demand for review before the University would pay the *Innovator's* printing bills violated the first amendment."); *Hosty v. Carter*, 325 F.3d 945, 947 (7th Cir. 2003) (panel decision) ("The pivotal issue for us is whether Dean Carter was entitled to qualified immunity.").

194. *Hosty*, 325 F.3d at 949–50.

195. *Hosty*, 412 F.3d at 745 (dissenting).

196. *Id.* at 738.

197. *Id.* at 739.

constitutionally deficient, were supportable if made in good faith.

In his dissenting opinion, Judge Evans makes much of the fact that *Hazelwood* was written with a high school setting in mind, and that high school students are different from college and university students, particularly when it comes to matters of maturity, in ways that would necessitate supervision in the high school setting but not in the collegiate setting.¹⁹⁸ Judge Evans also mentions the different missions that inform the respective institutions (the mission of colleges and universities being “to expose students to a ‘marketplace of ideas.’”).¹⁹⁹ Because of these differences, he felt it was inappropriate to extend *Hazelwood* to the collegiate setting.

C. Implications for the Future

The question then becomes, what precedent does this case establish for the future? Should college and university journalists really fear that the presses will be halted and their offices locked should they decide to print an article critical of a college official, or shed light on an administration’s underbelly? I think not.

A clearer statement of the court’s holding is the following: “*Hazelwood*’s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools” (the court’s language),²⁰⁰ *only to the extent that the forum in question is nonpublic* (my language). Judge Easterbrook is correct to point out that forum analysis in the educational setting should not be overly caught up in whether the speech occurs in a curricular context.²⁰¹ As support for this, he gives the hypothetical example of a group of students who are asked by a university’s alumni office to write an article for publication in the university’s alumni magazine.²⁰² Surely, he reasons, this is a nonpublic forum, yet the university would be free to print only those essays that best expressed the university’s own viewpoint.²⁰³ In forming this conclusion, though, he again neglects to mention the toleration/promotion distinction of *Hazelwood*. Although what he writes is true—“Extracurricular activities may be outside any public forum, as our alumni-magazine example demonstrates, without also falling outside all university governance”²⁰⁴—he fails to mention that this is also true because alumni magazines, which are usually mailed out directly from colleges/universities and are thought to have been created by administrators (not students), would bear the imprimatur of their schools, just as *Spectrum* did in the high school context.

The Seventh Circuit’s decision could be read as support for administrators who wish to say that they reasonably did not know that they were violating a

198. See *id.* at 739–42.

199. *Id.* at 741.

200. *Id.* at 735.

201. *Id.* at 738 (“*Hazelwood*’s framework . . . depends in large measure on the operation of public-forum analysis rather than the distinction between curricular and extracurricular activities.”).

202. *Id.* at 736.

203. *Id.*

204. *Id.*

constitutional right by instructing the printer of their college's or university's student newspaper to seek administrative approval before commencing publication.²⁰⁵ Indeed, as mentioned at the outset of this Note,²⁰⁶ many worry that *Hosty*'s legacy will be just that. However, this fear is irrational given that the majority opinion explicitly states that "[i]f the paper operated in a public forum, the University could not vet its contents."²⁰⁷ This statement makes administrations' censorial limitations quite clear: administrative content-control of student newspapers is impermissible if the paper operates as a limited public forum. To the extent that future Dean Carters wish to halt the presses, they will not be granted qualified immunity under *Hosty* so long as a reasonable person in their position would know that the student newspaper at issue operated as a limited public forum, and thus any efforts to vet its contents would be unlawful.

Although the court did "not think it possible on this record to determine what kind of forum the University established,"²⁰⁸ it admitted that many factors would seem to indicate that the control over the forum was in the students' hands, thereby making it a limited public forum.²⁰⁹ As discussed in Part II and in the court's opinion, the *Innovator*'s content was controlled by its own staff and the student-run SCMB.²¹⁰ The court does, however, mention two possible factors that could lead one to conclude that the *Innovator* was a nonpublic forum. These include a provision in the SCMB's charter stating that the newspaper is responsible to the director of student life—presumably a subordinate of Dean Carter's—and a provision that mandates that the newspaper have a faculty advisor.²¹¹ The court appropriately acknowledged both of these factors without rigorously examining either; the exact forum determination of the *Innovator* was not the real issue. However, given de Laforcade's professed lack of any control over the publication's content, the fact that SCMB's charter mentions a presumption of non-involvement by the director of student life, and the silence as to this person and his/her functions in the record, it is almost certain that the *Innovator* operated in a limited public forum and therefore should have been free from the censorship tactics employed by Dean Carter.

205. Commentators have made this point forcefully. See, e.g., Michael O. Finnigan, Jr., *Comment, Extra! Extra! Read All About It! Censorship at State Universities: Hosty v. Carter*, 74 U. CIN. L. REV. 1477, 1487, 1496 (2006) ("[P]ublic university officials now have a better argument for qualified immunity by relying on *Hosty* in support of a claim that a reasonable person would not have known that she was violating a constitutional right," and "[w]hereas Dean Carter was only able to rely on a high school newspaper case, *Hosty* now establishes a speech-restrictive precedent in the university context.").

206. *See supra* notes 9–12.

207. *Hosty*, 412 F.3d at 736–37.

208. *Id.* at 737. It is important to note that the court explicitly did not reach a determination on this issue of the *Innovator*'s forum status. *Contra Nimick, supra* note 10, at 992 (stating that the Seventh Circuit ultimately found that the *Innovator* was a designated or limited public forum).

209. *Hosty*, 412 F.3d at 737.

210. *Id.*

211. *Id.* at 737–38.

D. Moving Forward

More than anything, the *Hosty* opinion highlights the distinction between *extending Hazelwood* to the college and university context (i.e., stating that its framework could be applied in some instances) and actually *applying Hazelwood* to a collegiate forum (like a student newspaper). The latter would entail finding the forum in question to be nonpublic, determining that a person could reasonably believe that the speech conveyed in the forum bore the imprimatur of the school, and finding that the censorship exacted as a result of that speech was reasonably related to addressing a legitimate pedagogical concern. None of these conclusions was reached in *Hosty*, and therefore there should be little fear that this decision will have much impact on college and university student newspapers.²¹² As the president of the SPLC has admitted, most college and university newspapers, by designation or tradition, operate as limited public fora.²¹³ For this reason in particular, the reach of *Hosty* appears minimal.

Furthermore, the decision is binding only in the Seventh Circuit, so only colleges and universities in Illinois, Indiana, and Wisconsin are affected by it. Other circuits are free to accept it as persuasive or reject it as unpersuasive in future litigation involving conflicts between collegiate newspaper editors and administrators. Also, as previously stated, most college and university newspapers already function as limited public fora. The only action that could be taken on behalf of students to make certain that their newspaper remains a limited public forum would be to ensure that language to that effect is inserted into the policies and procedures of the student affairs office's documents concerning student groups (that is, if the newspaper is not already financially and organizationally independent). Indeed, the SPLC has spearheaded an effort to get college and university students in those three states comprising the Seventh Circuit "to call upon their schools to pledge their commitment to free speech by explicitly designating their student media as 'public forums' where student editors have the right to make editorial decisions free from administrative interference."²¹⁴

It is unlikely that a threat to a free student press exists at most colleges and universities, particularly at traditional four-year colleges and universities of a selective nature. Such campuses tend to place substantial faith in their students' ability to fully participate in student activities unfettered by administrative

212. Furthermore, there should be absolutely no fear that the *Hosty* decision will cast a chilling effect on faculty's curricular speech, as has been preposterously suggested by one commentator. See Nimick, *supra* note 10, at 993–95. The precepts of academic freedom—observantly recognized by the courts for decades and zealously protected by the American Association of University Professors (among other groups)—in addition to the narrowness of the *Hosty* decision itself, assure that no such incursions into faculty speech will occur as a result of this case.

213. *U.S. Court Throws Out Censorship Claim by Governors State U. Student Journalists*, STUDENT PRESS LAW CTR., June 20, 2005, <http://www.splc.org/newsflash.asp?id=1033>.

214. *Supreme Court Announces It Will Not Hear Appeal in College Censorship Case*, STUDENT PRESS LAW CTR., Feb. 21, 2006, <http://www.splc.org/newsflash.asp?id=1190>. See also Student Press Law Center, The Public Forum List, <http://www.splc.org/legalresearch.asp?id=91> (last visited Feb. 6, 2007).

intervention.²¹⁵ At colleges and universities where students are less likely to be

215. The University of Virginia is typical of such institutions. At Virginia, in order to receive university funds, student organizations must register for contracted independent organization ("CIO") status. See University of Virginia Student Activities Center, Explanation of Student Activities at UVA, http://www.virginia.edu/newcombhall/sac/cio_explanation.php (last visited Feb. 6, 2007). As the name suggests, CIOs are not part of the school but exist and operate independently. *Id.* According to the terms of CIO agreements, Virginia may exercise administrative control over a CIO's activities occurring on university property (e.g., use of university space) or over matters covered by the university honor or judicial systems. *Id.* Otherwise, the actual functioning and operation of CIOs is left completely to the students running them. *Id.* Although *The Cavalier Daily*, the student newspaper at Virginia, is not a CIO, other student newspapers and magazines function within the CIO system. See The University of Virginia Student Activities Center, Organization Search, http://www.virginia.edu/newcombhall/sac/search_list_cat.php (last visited Feb. 6, 2007) (listing student publications under the heading, "Fine Arts Organizations"). Furthermore, if CIOs only experience limited oversight from the college or university, obviously non-CIO student organizations that provide their own funding, such as *The Cavalier Daily*, are even further removed from any possible administrative intervention.

There are, however, a few notable exceptions to the level of administrative distance regarding student activities (particularly, student newspapers) that is typical at most selective colleges and universities. For example, students at the University of Texas at Austin are currently undergoing negotiations with the Texas Board of Regents as to whether *The Daily Texan*, their daily student newspaper, will remain subject to prior review by its advisors before publication. Karla L. Yeh, STUDENT PRESS LAW CTR., *Daily Texan Student Publications Board Pushing to End Mandatory Prior Review*, Dec. 6, 2006, http://www.splc.org/newsflash_archives.asp?id=1386&year=2006; Brian Hudson, STUDENT PRESS LAW CTR., *Texas Student Media Board Votes to Eliminate Prior Review*, Mar. 8, 2007, <http://www.splc.org/newsflash.asp?id=1460>. Under a policy in place since 1971, but recently eliminated by vote of the Texas Board of Regents, the paper's advisors review the paper before it goes to print, but after the students who work on the paper have left the office for the day. *Id.* At the University of Southern California, controversy recently arose when Michael L. Jackson, the Vice President for Student Affairs, overrode the staff of *The Daily Trojan*, the student newspaper, by blocking the appointment of the student the staff had selected to serve as their top editor. Elizabeth F. Farrell, *U. of Southern California Forces Out Student Editor of Campus Newspaper*, CHRON. OF HIGHER EDUC., Dec. 6, 2006, available at <http://chronicle.com/daily/2006/12/2006120604n.htm>. Jackson said he denied the student's reapplication for the job (the student was currently serving as editor-in-chief) because the student wanted to drastically change the duties of the position, giving the student newspaper more independence both financially and managerially, in contrast to the stated requirements for the position. *Id.* Jackson therefore invoked the heretofore unexercised authority granted to him by the paper's arrangement with the university's student media board to block the appointment. *Id.* At the behest of editors at *The Harvard Crimson*, eighteen collegiate student newspapers around the country published an editorial decrying Jackson's decision shortly after he made it. Marnette Federis, STUDENT PRESS LAW CTR., *College Student Newspapers Around the Country Run Editorial in Support of Former USC Editor*, Dec. 7, 2006, <http://www.splc.org/newsflash.asp?id=1388>.

It is important to remember that neither of these controversies involves the censorship (alleged or actual) by an administrator of student newspaper content. Although one might think that the former arrangement at the University of Texas at Austin meant that college and university officials had a watchful eye over what got printed, refusing to print articles they do not like, there was no hint of censorship under the arrangement, and all factors indicate that the review required by the regents was in fact purely perfunctory. At USC, the problem seems not to be that an administrator exerted power that he did not have, but rather exerted power that he (and his

involved in student activities (at less selective colleges, for example, some smaller colleges, non-residential colleges, or colleges with a large population of “non-traditional students” like GSU, or at community colleges), there might be a reason for more concern that the administration would want to flex its censorship muscles over a student newspaper. If a college or university’s paper is currently non-existent, fledgling, or otherwise requires more faculty involvement, administrators might be inclined to link involvement with the newspaper to receiving academic credit, so as to encourage participation. This would also, perhaps, lead them to want some control over content.

However, even this concern might be misplaced, for as one commentator has put it, “[M]ost college publications are under the primary control of students, with little or no oversight from college officials.”²¹⁶ As the *Hosty* opinion explicitly states, while “being part of the curriculum may be a *sufficient* condition of a non-public forum, it is not a *necessary* condition.”²¹⁷ Thus, there are surely other factors to consider in determining whether a college or university newspaper operates in a limited public or nonpublic forum, but having a curricular tie-in is prime among them. Other suggestions of what might come from this case—that administrators could condition school funding on the paper’s acquiescence to administrative editorial control, or that a school might dissolve its current funding scheme and create a new one whereby student publications are subject to school editorial control—commentators have rightfully dismissed as unfounded.²¹⁸

The *Hosty* decision is likely to have more of an impact on those collegiate student activities *other* than newspapers that are less clearly, either by tradition or designation, regarded as being limited public fora. Administrators wishing to levy content restrictions over other student fora that have quasi-school oversight—such as extra- and co-curricular speakers, discussion series, theatrical productions, and special events programming—might find the Seventh Circuit’s *Hosty* decision an invitation to do so. To the extent that these fora are not limited public fora but rather nonpublic fora at a given college or university, a court subscribing to the Seventh Circuit’s *Hosty* decision could uphold an administrator’s censorship in those, or similar, domains.

Those fearful of this case’s impact should also remember that few college and

predecessors) had not previously used. In my opinion, both the recently resolved situation at Texas and the ongoing one at USC should be characterized as struggles between students and administrators over the student newspaper’s structure (who ultimately oversees it) and direction (who should oversee it) as a student *organization*, not as a newspaper. The difference is crucial. There is nothing wrong with administrative intervention into the discussion and debate over how a student newspaper functions within a particular university framework; censorship arises only when that intervention crosses from organizational and structural questions into the realm of substantive newspaper content decisions. In these two cases, the former definitely happened, but the latter most certainly did not.

216. See 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) (referencing a 1997 survey that found only one out of one-hundred and one daily college newspapers to be closely related to a curriculum).

217. *Hosty v. Carter*, 412 F.3d 731, 736 (7th Cir. 2005).

218. See Recent Cases, *supra* note 9, at 920–21.

university administrators will likely *want* to exert content control over student press. Christine Helwick, general counsel for the University of California State System (“CSU”), was criticized in 2005 after the Seventh Circuit’s decision when she circulated a memo to CSU campuses telling administrators that “CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers.”²¹⁹ She later commented that she was merely reporting the court’s decision without making any policy recommendations, stating that having editorial control is not necessarily in the university’s interest.²²⁰ As she aptly noted, “Once you exercise control . . . you expose yourself to liability.”²²¹ Logic would indicate that few colleges and universities would want to exercise editorial control when the risks would be great while the payoff would likely be negligible.

Those fearful of the case’s impact should also not view the Supreme Court’s denial of certiorari to the petitioners’ petition in *Hosty* as tacit approval of the Seventh Circuit’s decision. The Court commonly waits for enough of the circuits to speak, and disagree to varying extents, before weighing in on an issue of contention. This reality, however, is probably of little consolation to Margaret Hosty, Jeni Porche, and Steven Barba. The real question, then, is whether an injustice was done to the plaintiffs in this case? To a certain extent, yes. Some would argue that Dean Carter—possibly with the support of her superiors—shot a cannon to kill a mouse.²²² Censorship, no matter the occasion, is always very serious medicine. When administered as it was at GSU, so as to curtail student speech that the administration found tasteless, unfounded, and offensive, one must question whether colleges and universities truly live up to their historic billing as being the “marketplace of ideas.”²²³ As this controversy shows, there are gradations when it comes to how far a school is willing to let the free speech of students reign.

E. Reflections and Commentary on Student Journalism

Although the SPLC, in an amicus brief it filed in the *Hosty* case, stated that “[s]tudent news organizations are an important training ground for professional journalists,”²²⁴ it is important to note that training does not have to come at the expense of professionalism. This is not to say that there is no place for errors or lapses of professional judgment in the training process. Naturally, such occurrences—although regretful—are bound to occur, and are indeed part of the

219. Sara Lipka, *Stopping the Presses*, CHRON. OF HIGHER EDUC., Mar. 3, 2006, at A36.

220. *Id.*

221. *Id.*

222. I use this metaphor, slightly retooled, paraphrased from Justice Blackmun’s quote in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting) (“Today the Court launches a missile to kill a mouse.”).

223. See Fiore, *supra* note 216.

224. Brief for Student Press Law Center et al. as Amici Curiae Supporting Petitioners, *Hosty v. Carter*, 126 S. Ct. 1330 (2005) (No. 05-377), 2005 WL 2736314, available at <http://www.splc.org/pdf/hostypetitionbrf.pdf>.

overall learning experience. I only suggest that when such errors become habitual or particularly egregious, such as when student editors do not seem to care that they are making them or fail to strive to learn from them, and when such errors implicate a college or university's pedagogical and reputation-related interests, it is not completely outlandish, from an administrator's perspective, to seek to mitigate such errors to the extent that one is legally able.

Some commentators might argue that administrators need not try to mitigate such errors because libel laws and market forces will bring accountability. Although these factors undoubtedly rein in unprofessional practices in commercial journalism, they are not appropriate tools for handling journalistic indiscretion in the college and university setting. Given the educational function of helping prepare students for fulfilling and meaningful contributions to society, it would be downright irresponsible for colleges and universities to idly allow their student journalists to print libelous articles, without any sort of formal reaction or guidance as to the professional expectations of the field (and the school). Not only would such laissez-faire administrating lead to unfortunate libel suits against students,²²⁵ the school would also suffer unneeded public relations consequences for declining to deal with a problem that it could have helped prevent. By providing student journalists with guidelines for professional journalistic practices and asking that student newspapers uphold them as part of what it means to print a newspaper, colleges and universities could help students understand the societal expectations placed on those in positions of trust and responsibility. This suggestion is not outlandish when one considers that most colleges and universities ask all students (not just student journalists), via policies stated in student handbooks, not to lie, cheat, steal, etc., during their time at the institution. In fact, students' continuation in higher education is contingent on their abiding by those rules, which also happen to be society's rules (both legal and moral). Is it then too much to expect of our student journalists—a self-selected group—that they strive to uphold established journalistic ethics as an underlying condition to their receiving monies and space to publish a student newspaper?

One could easily argue that “[n]ewspapers themselves are effective at determining what material should or should not be printed,”²²⁶ and that with

225. See, e.g., *Mazart v. State of New York*, 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981), where editors of the student newspaper *The Pipe Dream* at SUNY Binghamton were held personally liable for damages resulting from the printing of a libelous letter to the editor. The court found that the university had no duty to furnish guidance to the student editors as to news gathering guidelines or what constituted libel as the students were adults and therefore presumed to already know the law. *Id.* at 606. The university was thus found to be neither negligent nor vicariously liable. *Id.* This case shows that inaction by universities when it comes to informing student journalists of professional journalistic practices does not necessarily guarantee that colleges and universities will avoid potential litigation when students are sued. Minimal efforts on the part of administrators could seemingly ensure that neither student nor school is sued, as affirmatively providing student journalists with information on professional practices would lessen the likelihood that libelous pieces would be printed. Such efforts would not signal college or university control over publications but rather foresight in protecting the interests of its students in addition to its own.

226. Applegate, *supra* note 186, at 281–82.

college and university newspapers, the marketplace—not the administration—should hold journalists accountable for professional practices. Under this theory, if one newspaper has unpopular views, unprofessional reporting, or particularly shoddy practices, students may choose not to read it, and in fact, start a competing paper. Advertisers, always looking to reach the widest possible audience with their money, would follow the trend, thereby forcing the first paper to mend its unseemly ways or risk becoming irrelevant (or even obsolete).

But relying on market forces to correct indiscretions in student journalism is not a solution to the problem. Administrations relying on such forces to work could potentially waste valuable institutional time and resources of the student affairs department, trying to help the new publication get off the ground. Furthermore, assisting the formulation of a new publication—and ostensibly, eventually providing money for it should it be qualified to receive it—is taxing given the transient nature of students' time at institutions. Money given to these publications would take away from the total allocation given to other, worthier groups, not to mention that it would be duplicative if another newspaper were still functioning. Worse yet, if the new publication were to be a private, financially independent one (from the beginning), there would be even less hope of holding it accountable. On top of all this, by doing nothing, the college or university would again be subjecting its reputation to sully on account of having its student newspaper appear substandard to faculty, students, alumni, would-be students, and donors. In short, relying on market forces to encourage accountability in student journalism would be too slow, damaging, and unpredictable. Just as with a reliance on libel law, higher education administrations' leaving student journalism accountability to the market would mean shirking an educational and *legal* opportunity to promote professionalism in the student press.

F. The Argument for Encouraging Professional Journalistic Practices

In situations where the student press operates independently from administrative oversight, most college and university administrations are not likely to provide student journalists with information regarding the legal realities and responsibilities associated with journalism, even though doing so would be legal and in both parties' best interests. For example, in her November 16, 2000 response to President Fagan's letter addressed to her and the GSU community, Porche stated that "[i]t is the anger, confusion, and questioning of the people that provide the leads that give fire to certain articles. The journalist is only the instrument."²²⁷ Throughout her letter, Porche seems to subscribe to the view that a journalist's job is simply to retell reality as it has been conveyed to her by others. Lacking in her lengthy response is any acknowledgement of her right—even duty—to exercise editorial judgment and discretion as to what gets printed. In her words, "I have no right to discourage, let alone reject material that is not my 'taste.'"²²⁸ Yet, in the very next sentence, she claims to take full responsibility for

227. Letter from Porche, *supra* note 46.

228. *Id.*

all material in the *Innovator*.²²⁹ Porche goes to great lengths to explain the thorough job she and others do fact-checking; this may be the case, but it does not mitigate the reality that stories could be submitted that, while not factually incorrect as the actors remember them, could contain opinion masquerading as fact (e.g., the statement that President Fagan reacted to a colleague's comment with complicit, conspiratorial laughter, unless corroborated by President Fagan, is strictly a matter of opinion). When stories of this sort are suggested, many editors would reject them as too speculative, or perhaps too vindictive, to be true, thorough 'fact-checking' notwithstanding. When such submissions are received, editors must make a value judgment that, in a very real way, reflects their taste. Will their paper stand for unsubstantiated mudslinging passed off as fact, or equitable reporting of newsworthy events? It is specious to act as if taste plays no part in an editor's responsibility for content. Despite Porche's comments to the contrary, the two are inextricably intertwined, and I see it as part of a school's educational responsibility to alert student journalists to this professional reality, so as to help protect the student journalists' reputations, while at the same time protecting the university's own.

Students deciding to publish a shoddily written diatribe or poorly researched article for mass publication and distribution is different from wearing a jacket emblazoned with offensive language denouncing the draft in public.²³⁰ The former action will affect, to some extent, the reputation of the author's college or university,²³¹ whereas the latter action will not. There is a difference then, in testing boundaries on one's own time during college and testing them on somebody else's dime (i.e., the school's).

This is not to say that boundaries cannot be pushed through direct extracurricular involvement—they can.²³² But, with positions of responsibility comes accountability. Why should colleges and universities be unable to hold students accountable when they transgress or shirk their responsibilities? To the extent that those responsibilities coalesce with the mores of society or the academic community, there is answerability. Every day across this nation, students are held accountable for underage drinking, cheating, stealing, lying, and sexual assault, often times by a school's own internal honor system. Although many of these actions would be deemed illegal (or simply bad) by broader societal standards, not all of them would be. For example, students could be severely reprimanded by a

229. *Id.*

230. See *Cohen v. California*, 403 U.S. 15 (1971) (holding that a man wearing a jacket in public reading "Fuck the Draft" could not be convicted of a crime because of First Amendment protections, unless he intended to incite lawlessness and such disobedience actually occurred).

231. A college student-athlete's 'mooning' an opponent or an opponent's fans on the field of play, or presenting an outstretched middle finger to a referee, would also impact the reputation of one's college or university. In neither case would an independent observer believe that such an inappropriate action bore the imprimatur of the school, although such action would likely reflect poorly on the school's image.

232. Indeed, many supported student organizations are often formed on the basis of a controversial belief or agenda, such as Students for a Free Tibet, Students for a Sensible Drug Policy, or National College Students for Life, to name but three examples.

college or university honor committee (or similar body) for reading an English language version of a book required as part of a foreign language course, or for plagiarizing—short of copyright infringement—another scholar’s work, even though these infractions have no direct analogue outside of the higher education setting. All of these transgressions, however, reflect a broader consensus as to what comprises proper behavior. At colleges and universities, students are not immune from the accountability that comes with being responsible citizens of society, or the educational community. Adulthood entails responsibility whether one is in higher education or not.

So, how does this discussion factor into student decision-making as part of a college or university newspaper? Although I admit that Dean Carter shot a cannon, I would say that she was trying to kill something just a tad larger than a mouse. Maybe it was a rat. Regardless of the metaphor, the record indicates that Hosty and Porche practiced a few journalistic methods that were downright unprofessional and injurious to the paper’s reputation, not to mention their own. Passing off opinion as fact, writing “investigative” pieces in which the writer has a conflict of interest, and using one’s position of power to focus on personal causes, are all serious ethical issues in journalism. I am not suggesting that these boundaries of professional propriety are always upheld in the real world; as recent revelations of misdoings by *New York Times* reporter Jayson Blair show,²³³ even some of the world’s greatest newspapers are not immune from unprofessional conduct within. Many of the boundaries crossed are not even legal boundaries. Yet, society still expects these norms to be upheld, and seeks to enforce them when they are not. At the least, a journalist’s professional reputation is sullied, or a journalist might lose his job, when ethical bounds are transgressed. In more egregious cases, people are sued and held liable for any damages, financial or otherwise, that might result. Regardless of what ultimately happens, there are consequences for actions. My argument is that a college or university administration may step in if need be when student journalists persistently misunderstand the societal covenant that freedom of speech combined with responsibility begets accountability.

But I do not advocate firing a cannon when such situations arise.²³⁴ Consonant with an approach discussed by Judge Boggs in his concurring and dissenting opinion in *Kincaid v. Gibson*,²³⁵ I believe that administrators can use procedural mechanisms in dealing with limited public fora at their schools. In applying these devices to the facts in *Hosty*, GSU could have mandated in the *Innovator*’s bylaws

233. See, e.g., Cesar Soriano, *Jayson Blair Lands a Book Deal*, USA TODAY, Sept. 10, 2003, available at http://www.usatoday.com/life/books/news/2003-09-10-blair-book_x.htm.

234. Indeed, as the pre-*Hosty* decision of the Fourth Circuit established in *Joyner v. Whiting* in 1973, cannon shots that amount to censorship of constitutionally protected expression “cannot be imposed by suspending the editors, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorial oversight based on the institution’s power of the purse.” *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973). Some of these draconian tactics were deployed by Dean Carter and her colleagues to everyone’s detriment.

235. See *Kincaid v. Gibson*, 236 F.3d 342, 358 (6th Cir. 2001).

that the publication seek to interview for comment (when practicable) all persons whose actions were reported as fact in the newspaper, or mandated that the *Innovator* give all students and staff quoted in the paper the opportunity to verify the accuracy of the quotation before an issue went to print.²³⁶ GSU could also reasonably declare its expectation that all articles be spell-checked and proof-read for grammatical errors by a student editor before publication. So as to ensure equal access to participation in the paper, it could have mandated that each student only hold one position with the paper,²³⁷ or expressed a preference that only articles (not letters to the editor) written by students be printed in the paper.²³⁸ My point is that, because of its concern for Hosty's and Porche's understanding of the norms that society expects of journalists, GSU *should* have mandated some, if not all, of these things.²³⁹ Instead, GSU chose to "alter[] student expression by obliterating it,"²⁴⁰ which is never a prudent didactic, or legal, tool.²⁴¹

236. If a material dispute arose as to the accuracy of a quotation, the paper would be free to print its version of the quotation according to how its reporters heard/transcribed the quotation. However, this requirement would at least then put the quoted speaker on notice that her speech was about to be (in her opinion) misquoted or quoted out of context, and thus afford her the time and opportunity to prepare counter speech accordingly, if she so desired.

237. The American Society of Newspaper Editors, which maintains a collection of various organizations' and newspapers' codes of ethics, would be a good starting point for formulating further guidelines for encouraging journalistic professionalism in college student media. See AMERICAN SOCIETY OF NEWSPAPER EDITORS, CODES OF ETHICS (2006), available at <http://www.asne.org/index.cfm?id=387>; SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS (2006), available at <http://www.spj.org/ethicscode.asp>.

238. At least one court has mentioned that such a condition would be permissible. See *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970) ("For example, it may be lawful in the interest of providing students with the opportunity to develop their own writing and journalistic skills, to restrict publication in a campus newspaper to articles written by students. Such a restriction might be reasonably related to the educational process."). Although the SPLC maintains that school officials cannot "[b]an the publication or distribution by students of material written by non-students," see STUDENT PRESS LAW CENTER, LAW OF THE STUDENT PRESS 231 (2d ed. 1994), I believe that public forum analysis would support such a restriction, as the government can unquestionably limit the use of limited public fora to certain groups, see *supra* note 97, and would certainly be justified in doing so in order to prevent a *student* newspaper from becoming overwhelmed by articles written by *non-students*. Just like student yearbooks print headshot photos of all students (not just the headshot photos of some students with the addition of some non-student headshot photos) in order to receive funding, student newspapers could similarly be required to be chiefly *by* and *for* students to the extent that they only publish student-produced material (ideally this should be a preference and not an inflexible regulation, as reasonable exceptions should be allowed for recent former students who are not technically enrolled as current students for the semester but who still want to write for the newspaper—students studying abroad, participating in externships or internships, or merely taking a semester off, for example). This is not a regulation of content but rather one of form.

239. Indeed, many publications—most of them financially and organizationally independent (see *supra* notes 187–189)—have taken many of these obligations upon themselves voluntarily; others that have not should, at the school's instigation if need be.

240. *Kincaid v. Gibson*, 236 F.3d 342, 355 (6th Cir. 2001).

241. These suggestions are similar to the recommendations made by Nancy J. Whitmore regarding student press in the private university context in her excellent article, *Vicarious Liability and the Private University Student Press*, 11 COMM. L. & POL'Y 255 (2006). Whitmore argues that, contrary to SPLC suggestions, the adoption of formal policy statements that give

I am not advocating that any administrator, administrative board, or faculty advisor be permitted to supervise the content of student newspapers in any way. I am merely saying that administrations that help fund—directly or indirectly—a student newspaper should be entitled to expect professional journalistic practices from the newspaper. When it comes to enforcement of such standards, self-regulation by student journalists themselves should be the primary and ultimate goal. If for some reason this mode of enforcement fails or is a non-starter, college and university administrators would be permitted to step in. However, enforcing these standards does not mean that administrators have license to exercise prior restraint; rather, enforcing these standards means that administrators should be able to act through the appropriate media advisory board or other channel—when, *post hoc*, an editorial decision is deemed particularly egregious (and in violation of written policy), or an editor habitually contravenes established professional standards (as declared in written policy)—to request the student editors to take their own corrective action (i.e., demote or remove the parties responsible) consistent with the newspaper’s bylaws or charter,²⁴² as would be reasonable given the nature of the relationship between a public college or university and a student newspaper that receives public funding.

How do these proposed procedural mechanisms for the limited public forum differ from ‘pedagogical reasons’ that are permitted only in the nonpublic setting? They have nothing at all to do with viewpoint and everything to do with professionalism.²⁴³ As Judge Boggs noted in *Kincaid*, the case involving the

student journalists the right to make all content decisions will not insulate private schools from liability for torts committed by their dependent student presses because of trends in vicarious liability law. *Id.* She suggests that private colleges and universities, as publishers of student-produced content, must “work to implement a policy that not only mitigates the university’s liability risks but also provides a richer, more exhaustive experiential learning environment for the students.” *Id.* at 284. Many of the practices and conduct that she suggests be covered by a “communication tort policy,” such as rebuttals and corrections, fact checking and the red flagging of accusatory language, could also be implemented in the public university context—as I am indeed suggesting above—as mere procedural restrictions. Furthermore, there is no reason that her suggestion that “[t]he scope of corrective action may include the running of retractions or corrections to the record to the dismissal of student journalists” could not equally apply in the public university setting, as long as students in fact made those determinations. *Id.*

242. Of course, student journalists would be free to ignore these entreaties by the administration and risk that the college or university might reduce or remove its financial support of the publication at the start of the next funding cycle, as a result of the student journalists’ refusing to embody the professionalism that is required to make a newspaper a newspaper. But chances are that student journalists would be receptive to their school’s interest in enhancing the quality of the publication, so long as administrators do not overstep their bounds and make suggestions on content, which I emphatically believe would never be appropriate.

243. Implementing the professional journalism standards that I am suggesting would nominally affect content, in the strictest meaning of the word. For example, mandating that articles be spell-checked, or that all those persons whose actions are reported as fact be interviewed (when practicable) for comment, would mean that the paper’s contents might be changed in minor ways. These would all be cosmetic changes, however, that go to the heart of maintaining a newspaper’s professionalism. Such regulations would *not* be initiated out of concern for or disagreement with the newspaper’s underlying content, substance, or viewpoints expressed in its articles, and thus would be permissible.

confiscation of student yearbooks,

I believe some minimum standards of competence could be a reasonable ‘manner’ restriction. After all, if the students were to have chosen a ‘yearbook’ consisting of a sack of condoms, or 98% white space, or a reproduction of the more obscure portions of “Finnegan’s [sic] Wake,” the court’s decision that the administration had relinquished all control over even the *form* of the material in the yearbook would be much less compelling.²⁴⁴

In other words, requiring that a student newspaper actually use the school funds it is given to produce a student newspaper is not an impermissible regulation, even though the paper operates in a limited public forum.²⁴⁵ To the extent that the suggestions offered above are merely refinements of what it means to publish a newspaper (i.e., that it attempt to follow some modicum of journalistic integrity and professionalism), they should be viewed as permissible procedural devices as well.

G. Professional Collegiate Journalism in Practice

Thankfully, a recent controversy on a campus within the Seventh Circuit’s domain suggests that potential problems like the one presented in *Hosty* can be self-corrected by student journalists, as my approach envisions, without the need for significant administrative intervention. The editor-in-chief of *The Daily Illini*, the financially and organizationally independent student newspaper at the University of Illinois at Urbana-Champaign, brought controversy to his campus in early 2006 by publishing a Danish cartoon unfavorably depicting the Prophet Muhammad that infuriated Muslims around the world and incited violence in many areas.²⁴⁶ The newspaper’s bylaws state that inflammatory material must be

244. *Kincaid*, 236 F.3d at 358 (emphasis added) (concurring in part and dissenting in part). Judge Easterbrook, in his *Hosty* opinion, offered a similar example but for a different reason. In discussing a school’s right—because it foots the student newspaper’s bill—to exercise oversight of the newspaper if it is a nonpublic forum, he offered the following thought experiment: “Suppose the University had given the *Innovator* \$10,000 to publish a semester’s worth of newspapers, and Porche then had decided that the students would get more benefit from a booklet describing campus life and cultural activities in surrounding neighborhoods. Both paper and booklet are forms of speech, but the fact that the publication was not part of the University’s curriculum and did not carry academic credit would not have allowed Porche to divert the money from one kind of speech to the other.” *Hosty v. Carter*, 412 F.3d 731, 736 (7th Cir. 2005).

245. This argument is similar in its simplicity to the logic of *Olson v. State Board for Community and Occupational Education*, 759 P.2d 829 (Colo. Ct. App. 1988), where the Colorado Court of Appeals held that it was not impermissible for the administration of Pikes Peak Community College to de-fund its student newspaper because of the paper’s failure to comply with new budgetary application procedures, after finding that the defendant’s decision to de-fund the paper was not substantially motivated by any displeasure over the paper’s contents. *Id.* at 830–31. Similarly, nothing should prevent a college administration from de-funding a student newspaper if the paper’s editors consistently fail to produce what is recognizable—viewed from the standpoint of professional and standard student journalistic practices—as a student newspaper.

246. Amy Rainey, ‘*Daily Illini*’ Editor Who Published Controversial Cartoons Is Fired,

discussed in the newsroom before publication; the bylaws also require that the publisher, the Illini Media Company (IMC), be notified before any publication of such material so that it can prepare itself for any ensuing reaction.²⁴⁷ Acton Gorton, the newspaper's editor-in-chief, showed the page containing the controversial cartoon to some staff members, but did not invite discussion from other editors as to whether it should be published, as the paper's bylaws required him to do.²⁴⁸ He also failed to alert IMC that the paper would be publishing the controversial cartoon. Accordingly, when the cartoon's publication prompted outrage on the campus—particularly among its Muslim members—the IMC's board of directors conducted an investigation of the matter, focusing particularly on the editors' decision-making and communication.²⁴⁹ When the investigation confirmed that Gorton failed to follow procedure vis-à-vis the controversial cartoon, he was terminated from his position as editor-in-chief.²⁵⁰

What is most noteworthy about this situation is that the IMC board of directors consists of four student members and four faculty members.²⁵¹ Although the analogy is not perfect, one sees in practice how fellow students can, and will, hold their journalism peers accountable for the responsibilities that they have voluntarily undertaken. Although Gorton may claim that “[t]his is really an issue of trying to restrict my freedom of speech,”²⁵² it clearly is not—it is a simple issue of accountability. Just as the editors of newspapers across the world cannot publish controversial material like the cartoon in question without some fear of their readers' reaction, Gorton should not be insulated from the real-world consequences that often come to those in charge when such polemical publishing decisions are made.²⁵³

CHRON. OF HIGHER EDUC., Mar. 31, 2006, at A39, available at <http://chronicle.com/weekly/v52/i30/30a03902.htm>.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. Illini Media, <http://www.illinimedia.com/IMC/imedia.html> (last visited Feb. 6, 2007).

252. Rainey, *supra* note 246.

253. In another recent controversy involving a college student journalist—this one having nothing to do with an editorial decision—one further notes students' ability to self-police possible infractions of journalistic integrity in accordance with standards in place at a public college or university. At the University of Michigan at Ann Arbor, the editor-in-chief of *The Michigan Daily*, Donn M. Fresard, caused a stir when he decided to accept membership in a nameless secret society of sorts that has ties to a racially insensitive and exclusionary past. Samantha Henig, *The Editor and the Nameless Society*, CHRON. OF HIGHER EDUC., July 28, 2006, available at <http://chronicle.com/weekly/v52/i47/47a02501.htm>. Many alumni, students, and students on the publication's staff were outraged and felt that Fresard's affiliation with the club was not only distasteful, but also amounted to a conflict of interest, as the campus group is often the subject of news items and editorials. *Id.*

As would responsible and professional journalists, the editors of the student publication met and voted on the matter (pursuant to its bylaws), and while more than half of the editors felt that Fresard's involvement with the club would constitute a conflict of interest, this figure was shy of the two-thirds majority required to remove him from office. *Id.*; THE BYLAWS OF THE MICHIGAN DAILY (Nov. 11, 2005), available at

I am not advocating that controversial cartoons that touch on matters of deep international import have no place in collegiate student publications—they most certainly do, should students wish to publish them. In fact, of all times to follow procedural restrictions, a student newspaper should be most eager to do so in potentially controversial situations such as these. Abiding by such policies will only show the publication's commitment to journalistic professionalism and put it on firm footing in its relationship with the college or university's administration. Student journalists' likely inclination to want to follow such reasonable restrictions arrives at my overall point, that reasonable procedural restrictions—restrictions on the order of IMC's bylaws that require somewhat of an editorial board consensus before going to print with controversial material, in addition to requiring that prior notice be given to the publisher—can be legally, ethically, and professionally responsible solutions to curtailing what is often, essentially, irresponsible student journalism. Such provisions do not risk destroying the “marketplace of ideas” as they have nothing to do with the substantive content of expression.²⁵⁴ Rather, such provisions may offer the key to ensuring that the important “marketplace of ideas” continues to be imbued with the very integrity that underlies its survival.

<http://www.michigandaily.com/media/paper851/documents/dhsuvvts.pdf>.

The real issue to be concerned about here, in my opinion, was less that Fresard's involvement with the club would present a conflict of interest and more that it would “compromise [his] integrity or damage [his] credibility” (something journalists should avoid doing according to Section III.2 of the *Daily*'s bylaws), although this, too, was unlikely, given that the club in question is a prominent campus group. *Id.* With these considerations in mind, the outcome of the vote is understandable; although the club may be tied to a sordid past, Fresard's involvement in it would not likely sully the reputation of the student newspaper, nor would it present irresolvable conflicts of interest.

Regardless of the result of the vote, I find it encouraging that the student journalists felt committed enough to the publication and the responsibility that comes with their positions as editors to even *have* a vote. I would never suggest that a public college or university could *sua sponte* remove a student in a similar circumstance (nor would the University of Michigan even be able to do this here if it wanted to, as *The Michigan Daily* is a financially and organizationally independent non-profit corporation), but rather that it could—consistent with permissible procedural restrictions—expect the organization to have a vote pursuant to its bylaws. Otherwise, the publication could face losing some of its student activities funding during the next funding cycle for not living up to what it means to be a professional student newspaper.

254. Although the IMC policy required student consensus and advance notice regarding publication of controversial content, it does not follow that this regulation is therefore content-based and not content-neutral. The IMC policy does not reference specific categories of speech that it deems controversial; thus, regardless of *why* the material might be regarded as controversial, the IMC has its policy so as to prepare for the potential *consequences* of publishing controversial speech, no matter what the underlying controversy. This distinction is further justified by the Court's decision in *Renton v. Playtime Theatres*, 475 U.S. 41 (1986), in which it upheld a city's ordinance imposing particular zoning regulations on movie theaters showing adult films because the restrictions were justified by the “secondary effects” of such theaters on the surrounding neighborhoods, and not by an interest in suppressing adult films. Similarly, absent any indication to the contrary, IMC's policy is also designed to address the secondary effects of controversial speech, not to suppress controversial speech or speakers themselves.

HOW THE *HOSTY* COURT MUDDLED FIRST AMENDMENT PROTECTIONS BY MISAPPLYING *HAZELWOOD* TO UNIVERSITY STUDENT SPEECH

LAURA MERRITT*

INTRODUCTION

When the Supreme Court ruled that public school officials could control speech in school-sponsored activities if they had legitimate educational reasons for doing so, the majority explicitly reserved judgment on whether that same level of deference should be extended to college and university settings.¹ In the seventeen years since the decision, courts have relied on the *Hazelwood School District v. Kuhlmeier* standard to allow broad controls over expression in public elementary, middle, and high schools. In only one instance among newspapers not found to be a forum for student expression did a court find that school officials did not have a sufficient reason to control expression.² In the case, *Desilets v. Clearview Regional Board of Education*, the court invalidated a high school's attempts to block two movie reviews from appearing in the student newspaper because while the movies were R-rated, the reviews themselves were not objectionable.³ Otherwise, since the *Hazelwood* decision, courts have given educators broad discretion to control student expression and determine for themselves what will constitute an "educational reason" to control expression in contexts ranging from newspaper articles and advertisements to class T-shirts and school plays.

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1. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 & n.7 (1988) (noting that "we need not now decide" if the decision's standard applies in higher education).

2. *But see Dean v. Utica Cnty. Schs.*, 345 F. Supp. 2d 799, 806 (E.D. Mich. 2004) (holding that a high school principal could not prevent the publication of a school newspaper that existed as a limited public forum).

3. *Desilets v. Clearview Reg'l Bd. of Educ.*, 647 A.2d 150, 153–54 (N.J. 1994) (distinguishing the subject from the content used to address the subject).

Until the Seventh Circuit decided *Hosty v. Carter* in June 2005, no court had upheld *Hazelwood's* application to independent student speech at a public college or university.⁴ Instead, courts determined First Amendment protections for college and university students with the same forum analysis generally applied to speech cases.⁵ The Supreme Court has prevented colleges and universities from denying funding to student newspapers based on viewpoint once it created an open forum for communication⁶ and allowed colleges and universities to collect fees used to fund a viewpoint-neutral range of student expression.⁷ The few decisions where *Hazelwood* has been cited concerning college and university settings are limited to recognizing college and university authority over curricular activities or the schools' own speech.⁸ Further, courts have insulated public colleges and universities from liability for the content of student publications, acknowledging that the First Amendment prohibits colleges and universities from exercising editorial control over the publications.⁹

In *Hosty*, the Seventh Circuit broke from precedent by granting qualified immunity to a dean from Governors State University who called the printers to stop publication of a student newspaper.¹⁰ In the en banc decision, the court considered questions beyond the immunity decision being appealed and held that the *Hazelwood* framework "generally appli[ed]" to university student speech.¹¹

4. See *Hosty v. Carter (Hosty III)*, 412 F.3d 731, 739 (7th Cir. 2005), cert. denied, 126 S. Ct. 1330 (2006).

5. See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229–30 (2000) (determining that public forum cases were applicable "by close analogy" to extracurricular speech funded by mandatory student fees); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995) (engaging in a forum analysis).

6. *Rosenberger*, 515 U.S. at 835 ("Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints.").

7. *Southworth*, 529 U.S. at 234 (contending that the University created "what is tantamount to a limited public forum").

8. See *Axon-Flynn v. Johnson*, 356 F.3d 1277, 1285–87 & n.6 (10th Cir. 2004) (applying *Hazelwood* to a university student's speech that was part of a class assignment, occurred during class time, and took place in the classroom); *Brown v. Li*, 308 F.3d 939, 952 (9th Cir. 2002) (applying *Hazelwood* to a graduate student's thesis submission); *Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir. 1991) (applying *Hazelwood* to restrict a university professor's in-class speech to educational topics and limit his discussion of his personal religious beliefs). See also *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (en banc) (holding that *Hazelwood* had little application to the university yearbook in question because the university created a limited public forum).

9. See *Milliner v. Turner*, 436 So. 2d 1300, 1302 (La. Ct. App. 1983) (reversing a trial court decision to hold the Southern University of New Orleans liable for the content of its student newspaper); *McEvaddy v. City Univ. of N.Y.*, 220 A.D.2d 319 (N.Y. App. Div. 1995) (dismissing claim against the university because a student newspaper is not an agent of the university); *Mazart v. New York*, 441 N.Y.S.2d 600, 605-07 (N.Y. Ct. Cl. 1981) (holding that a public university cannot be held liable for the content of its student-operated newspaper through a theory of either *respondeat superior* or general negligence).

10. See *Hosty III*, 412 F.3d at 739 (explaining that public officials should not have to predict how constitutional questions will be interpreted by later courts).

11. See *id.* at 733, 738 (explaining that the threshold question in an interlocutory appeal for

Reviewing a qualified immunity decision required the court to view the facts in the light most favorable to the newspaper's editors, students Jeni Porche and Margaret Hosty. Given this view, the court found that the University had created a limited public forum, something that the University actually acknowledged.¹² Still the court decided that the confusion about *Hazelwood* was enough to grant immunity.¹³

This Note will examine the *Hosty* decision and the Seventh Circuit's unfortunate interpretation of *Hazelwood* to find that the University administrator's actions did not violate "clearly established" law. Part I will discuss the facts and procedural history of *Hosty* as well as First Amendment case law that played a significant role in the decision. Part II will provide a critical legal analysis of the Seventh Circuit's majority decision, its reasoning, and the dissenting opinion. This section will illustrate how the court confuses government funding for an open forum with government funding for its own speech. It will argue that the court relied on its own disingenuous forum analysis—accomplished by isolated examinations of funding, age, and educational status—to demonstrate that the students' claims were based on unsettled law. Finally, Part III will address the chilling effect the *Hosty* decision could have on student activities at public colleges and universities, and the potential increased liability colleges and universities could become subject to as a result of a perceived newfound authority over student expression. This section will recommend that future decisions in this area of law reject the *Hosty* decision and clarify that *Hazelwood*'s reasonableness standard should not be applied to public fora. It will alternately discuss some steps that college and university students and administrators can take to minimize conflicts between students and administrators.

I. BACKGROUND

A. Facts and Procedural History of *Hosty*

In the fall of 2000, administrators at Governors State University, a public university in Will County, Illinois, were upset with articles critical of the University printed in the student newspaper, the *Innovator*.¹⁴ Some of the articles focused on the English department and alleged racial biases in grading, unqualified teachers, and a lack of course variety. Other articles were critical of the decision

qualified immunity is whether the official violated an established constitutional right, and then whether that right was clearly established).

12. *Id.* at 744 (Evans, J., dissenting) ("Defendants concede that the [*Innovator*] serves as a public forum.") (quoting *Hosty v. Governors State Univ.*, 174 F. Supp. 2d 782, 786 (N.D. Ill. 2001)). *But see* Brief of Defendant-Appellant Patricia Carter at *20-*21, *Hosty v. Carter*, 325 F.3d 945 (7th Cir. 2003) (No. 01-4155) (contending that the *Innovator* did not constitute a public forum) [hereinafter *Brief*].

13. *Hosty III*, 412 F.3d at 738–39.

14. *See id.* at 732 (noting that none of the newspaper's critical articles were about the missing apostrophe in the University's title); Petition for Writ of Certiorari at *5, *Hosty v. Carter*, 126 S. Ct. 1330 (2006) (No. 05-377), 2005 WL 2736314 [hereinafter *Petition*].

of Patricia Carter, the dean of the College of Arts and Sciences, not to renew the teaching contract of the newspaper's faculty advisor. University President Stuart Fagan and Dean Carter issued public statements condemning the *Innovator*'s "irresponsible and defamatory journalism."¹⁵ President Fagan characterized the newspaper as "one-sided," "inaccurate," and "insulting" and said the newspaper "sullied" the reputation "of the [U]niversity and its faculty."¹⁶

While tensions about the newspaper were high, Dean Carter twice called the publisher, Regional Publishing, and ordered its owner not to print any more copies of the paper without calling her first so that she or another administrator could review the newspaper.¹⁷ After Dean Carter's phone calls, Regional Publishing's owner, Charles Richards, believed he would not be paid if he printed the paper without following her directions for administrative review. He told the newspaper's editors, Porche and Hosty, that he "did not want to be in a hissing contest between the paper and the administration because [he was running] a business . . . [and] the [U]niversity administration released the funds."¹⁸ He believed Dean Carter was ordering him and that he had to follow her instructions.¹⁹ After hearing about Dean Carter's demands from Richards, Porche and Hosty refused to submit any more issues to the printer.²⁰ Instead, in January 2001, they filed a lawsuit against the University, its trustees, and several administrators, alleging a First Amendment violation.²¹

Until its final issue on October 31, 2000,²² the *Innovator* existed as a student-run publication that received student activities fees through the seven-member Student Communications Media Board.²³ The board members were appointed by

15. *Petition, supra* note 14, at *5. Never has Dean Carter, the University, or anyone else made a legal claim against the *Innovator*, Hosty, or Porche for defamation because of these articles.

16. *Id.* (describing the relationship between the newspaper and the administration).

17. *See Brief, supra* note 12, at *6 (stating that her goal was to make sure the newspaper met journalistic standards as well as the University's standards for grammar, punctuation, and composition).

18. *Id.*

19. *Id.* at *11 (noting that Richards reported that Carter reminded him that "the University paid his company").

20. *Compare Hosty v. Governors State Univ. (Hosty I)*, 174 F. Supp. 2d 782, 787 (N.D. Ill. 2001) ("Editorial control is not required for a First Amendment claim; stifling freedom of speech in a forum opened for discussion is sufficient." (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983))) with *Brief, supra* note 12, at *8, *23 (asserting that the editors' own decision not to submit the paper to the printer negates their claims against Carter).

21. *See* First Amended Complaint, *Hosty v. Governors State Univ.*, 2001 U.S. Dist. LEXIS 18873 (N.D. Ill. Nov. 13, 2001) (No. 01 C 0500) (alleging additional violations of the Fourth, Fifth, Sixth, and Eighth Amendments; defamation; invasion of privacy; violation of the Illinois Open Meetings Act; and civil conspiracy) [hereinafter *First Amended Complaint*].

22. *See Richard Wronski, Court Rips Governors State University in Illinois for Censoring Newspaper*, CHI. TRIB., Apr. 11, 2003, at 6 (noting that the *Innovator* was founded in 1971 and has not been published since Carter's phone call to Regional Publishing).

23. *See Hosty III*, 412 F.3d at 737; *Petition, supra* note 14, at *4 (describing the relationship between the media board, the *Innovator*, and the University administration).

the Student Senate and oversaw the budget of campus media and handled the contracts with printing companies.²⁴ Dean Carter was not a member of the student media board nor did she have authority to review its decisions.²⁵ At the time, the University policy toward student publications provided that students will “determine [the] content and format of their respective publications without censorship or advance approval.”²⁶ Though the *Innovator* had a faculty advisor, he or she was used only as a resource for ideas and suggestions.²⁷ For the publication’s almost thirty years in print, the students retained final control of the paper’s content.²⁸

The district court found in favor of all of the defendants—either because they were not involved or were entitled to qualified immunity—except for Dean Carter.²⁹ The district court held that her actions were not justified by *Hazelwood*, noting that the University had opened the pages of the *Innovator* to indiscriminate student use, and that the *Innovator* was a university publication, not a high school publication.³⁰ Dean Carter appealed the district court’s decision, but a three-judge panel of the Seventh Circuit upheld the lower court’s decision.³¹ The panel rejected Dean Carter’s suggestion that *Hazelwood* muddled First Amendment protections because the Supreme Court had specifically reserved the question of its application to colleges and universities.³² Instead, the panel reasoned that Dean Carter should have recognized the broad First Amendment protections that college and university students traditionally enjoy.³³ Several months after the panel’s decision, a majority of the Seventh Circuit voted to vacate the panel decision and rehear the case en banc.³⁴ There, the court held that Dean Carter was entitled to qualified immunity and that *Hazelwood* “generally appl[ed]” to college and university student speech.³⁵ After Hosty and Porche filed a writ of certiorari, the Supreme Court requested a response brief from the Illinois attorney general, who represented the University.³⁶ However, the Supreme Court ultimately declined to

24. See sources cited *supra* note 23.

25. See sources cited *supra* note 23.

26. See *Petition*, *supra* note 14, at *4 (establishing that publications retained full editorial control). But see *Hosty III*, 412 F.3d at 737 (contending that Carter did not try to alter the newspaper’s operations).

27. *Petition*, *supra* note 14, at *4–*5.

28. See Wronski, *supra* note 22.

29. See *First Amended Complaint*, *supra* note 21, at *12–*22. See also *Hosty v. Carter (Hosty II)*, 325 F.3d 945, 947 (7th Cir. 2003) (characterizing the lower court’s treatment of the other defendants in a similar fashion).

30. See *First Amended Complaint*, *supra* note 21, at *21.

31. See *Hosty II*, 325 F.3d at 950 (holding that Carter’s alleged actions defied established constitutional protections of which she should have known).

32. *Id.* at 948.

33. See *id.* at 948–49 (characterizing attempts to censor student media as consistently suspect).

34. See *Order*, *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1330 (2006) (No. 01-4155), *vacating as moot*, 325 F.3d 945 (7th Cir. 2003) [hereinafter *Order*].

35. See *Hosty III*, 412 F.3d at 738.

36. See Lyle Denniston, *The Supreme Court Requested a Response from Governors State*

review the case.³⁷

B. First Amendment Protections in Educational Settings

The First Amendment prohibits government actors from abridging freedoms of speech and of the press.³⁸ Courts have applied the First Amendment to the states through the Fourteenth Amendment and generally hold government actors accountable to its standards.³⁹ To determine the extent of First Amendment protections, modern courts typically begin by looking at the situation that produced the speech or the physical setting in which the expression existed.⁴⁰ Speech in traditional public fora, including public parks, streets, and sidewalks, receives the greatest level of protection. In a public forum, courts have required that content-based restrictions be narrowly drawn to serve a compelling state interest.⁴¹ When the government has created a public forum by opening an area to indiscriminate use, the same standard applies.⁴² In a nonpublic forum, such as a courtroom, content-based restrictions are allowed so long as they are reasonable in light of the purpose of the forum and are viewpoint-neutral.⁴³ Additionally, in any of these fora, the government is permitted to make content-neutral time, place, and manner restrictions so long as they are reasonable.⁴⁴

University, SCOTUSBLOG, Oct. 31, 2005, <http://www.scotusblog.com/movabletype>.

37. 126 S. Ct. 1330 (2006).

38. U.S. CONST. amend. I (establishing rights to freedom of religion, speech, press, assembly, and freedom to petition the government).

39. See *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (requiring a company-owned town to comply with the requirements of the First and Fourteenth Amendments); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (applying First Amendment protections to state governments in addition to the federal government). But see *Hudgens v. NLRB*, 424 U.S. 507 (1976) (declining to apply a First Amendment analysis because the role and function of the property owners were distinguishable from that of those in *Marsh*); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 560–61 (1972) (allowing a mall owner to prohibit anti-war activists from distributing handouts at a mall because the content was not “directly related” to the purpose of the mall).

40. See, e.g., *Kincaid v. Gibson* 236 F.3d 342, 347 (6th Cir. 2001) (describing public forum analysis in the context of student publications); *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992) (articulating that speech regulations in a traditional public forum or a created public forum are allowed if they are narrowly tailored to achieve a compelling state interest); *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (reaffirming that time, place, and manner restrictions in a public forum “must be narrowly tailored to serve the government's legitimate content-neutral interests”); Lillian R. Bevier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79 *passim* (1992) (defending public forum analysis as an efficient judicial practice to protect First Amendment rights in the places where most likely to be threatened). But see Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 *passim* (1984) (criticizing public forum analysis as “geographic” at the expense of First Amendment principles, because rights often depend largely on where the speaker is located).

41. See *Kincaid*, 236 F.3d at 347; *Int'l Soc'y*, 505 U.S. at 678; *Ward*, 491 U.S. at 798.

42. See *Int'l Soc'y*, 505 U.S. at 678.

43. *Kincaid v. Gibson* 236 F.3d 342, 348 (6th Cir. 2001).

44. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Cnty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 648 (1981).

Courts have long recognized the importance of free expression in educational contexts.⁴⁵ For example, in refusing to allow a school district to force students to salute the American flag and recite the pledge, the Supreme Court reasoned that preparing students for citizenship was precisely why constitutional protections should be upheld.⁴⁶ The Supreme Court has described institutions of higher education as “peculiarly the ‘marketplace of ideas’”⁴⁷ and proclaimed that “the vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools.”⁴⁸ In the 1960s, college and university students succeeded in “acquiring a new status” as independent adults.⁴⁹ While colleges and universities had previously played a parental role in students’ lives, societal changes led students to demand and receive greater autonomy from colleges and universities.⁵⁰ After this shift, the Supreme Court articulated broad protections for student expression on campuses.⁵¹ The Court has refused to allow a college or university to discriminate against student groups because of their viewpoints,⁵² declared a student’s expulsion for distributing a controversial newsletter to be

45. See generally *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues (rather) than through any kind of authoritative selection.’” (citing *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))).

46. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”).

47. *Healy v. James*, 408 U.S. 169, 180–81 (1972) (citing *Keyishian*, 385 U.S. at 603).

48. *Healy*, 408 U.S. at 180 (citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)) (stating that First Amendment protections should apply with no less force at universities than in society at large); *Sweezy v. New Hampshire*, 354 U.S. 234, 249–50 (1957) (Warren, J., plurality opinion)).

49. See *Bradshaw v. Rawlings*, 612 F.2d 135, 138–40 (3d Cir. 1979) (characterizing the authoritarian role of the modern university administration as “notably diluted” from that of previous decades, when universities set standards for “general morals” with policies such as limited visiting hours in dorm rooms for members of the opposite sex); Jane A. Dall, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485 *passim* (2003) (explaining that “fundamental fairness” replaced “absolute, unchallenged authority” in the university-student relationship).

50. See Dall, *supra* note 49, at 490 (“Demands for student rights on campus corresponded with and grew out of demands for civil rights in the broader public forum.”).

51. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 270 (1981) (applying strict scrutiny to a university’s decision to deny a particular student group access to a facility it had designated for public use); *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) (reaffirming that “the mere dissemination of ideas,” even if offensive, cannot be prohibited at a public university in the name of decency alone with no suggestion that it was considered libelous or obscene); *Healy*, 408 U.S. at 189–90 (requiring a university to recognize a controversial student group unless the university had evidence to support the conclusion that the group “posed a substantial threat of material disruption”). Cf. *Keyishian*, 385 U.S. at 603 (evaluating the First Amendment rights of university professors by noting that the essentialness of freedom in universities was “almost self-evident”) (citing *Sweezy*, 354 U.S. at 250).

52. See *Widmar*, 454 U.S. at 267 (holding that the University must “justify its discriminations and exclusions under applicable constitutional norms”); *Rosenberg*, 515 U.S. 819.

unconstitutional,⁵³ and required a college or university to recognize a student group unless it had evidence that the group would disrupt learning.⁵⁴ In *Papish v. Board of Curators of the University of Missouri*, the Court noted that “the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech . . .”⁵⁵

Modern jurisprudence addressing speech within the secondary schoolhouse gates began in *Tinker v. Des Moines Independent Community School District* when the Supreme Court permitted students to wear an anti-war armband so long as it would not materially and substantially interfere with classroom activities.⁵⁶ In *Tinker*, however, the Court did not provide guidance about whether, or how, schools could control speech that was sponsored by or connected with the school.⁵⁷ The Supreme Court addressed this several years later in *Hazelwood* by allowing a high school principal to remove two pages of a student newspaper because his actions were “reasonably related to legitimate pedagogical concerns.”⁵⁸ The Court determined that the *Spectrum* newspaper at Hazelwood High School was not part of any open forum because it was produced during class time, for academic credit, and the teacher routinely made editorial decisions and submitted the newspaper to the principal.⁵⁹

Though the Court declined to decide whether *Hazelwood*’s reasonableness standard could ever be applied in college and university settings, many commentators and scholars believed courts would not extend the standard that far.⁶⁰ The current and former directors of the Student Press Law Center were

53. See *Papish*, 410 U.S. at 671 (resolving that the government’s legitimate and substantial purpose in protecting its education system cannot endanger fundamental personal liberties when there are less restrictive alternative methods to achieve those same goals).

54. See *Healy*, 408 U.S. at 184 (determining that the University’s refusal to grant the student group official recognition was a form of prior restraint).

55. *Papish*, 410 U.S. at 671 (rejecting the argument that the Constitution would grant universities greater leeway to control speech than other government entities).

56. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (rejecting high school administrators’ claims that students wearing armbands to protest the Vietnam war was a disruption of the school’s functions and invaded the privacy of others).

57. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71 (1988) (articulating the focus of the ruling as to whether the First Amendment requires a school to actively promote particular student speech, whereas *Tinker* was limited to whether the First Amendment requires a school to tolerate particular student speech).

58. See *id.* at 273 (noting that the articles about teenage pregnancy and students’ parents’ divorces were created in a nonpublic forum).

59. *Id.* at 268–69.

60. J. Marc Abrams & S. Mark Goodman, Comment, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood* School District v. Kuhlmeier, 1988 DUKE L.J. 706, 728 (1988). See also Alan E. Brownstein, Review Essay, *Alternative Maps for Navigating the First Amendment Maze*, 16 CONST. COMMENT. 101, 129 (1999) (proffering that leaving the university question open casts doubt on the idea that the *Hazelwood* decision was dependent on the custodial nature of secondary education). But see Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 117 (1998) (observing that the Court’s reference to the university question “serves as an acknowledgment of an institutional difference, but simultaneously reinforces the idea that the presumption would be against drawing

among those who predicted that courts would not apply *Hazelwood* to colleges and universities because the majority of college and university student journalists and much of their audience were older, legal adults.⁶¹ They reasoned that colleges and universities played less of a supervisory role over student activities than administrators did in secondary education.⁶²

Though several courts have applied *Hazelwood* to college and university settings, these decisions have been limited to discussions of college and university control of academic activities or the college or university's own speech. In *Axson-Flynn v. Johnson*, the Tenth Circuit, and in *Brown v. Li*, the Ninth Circuit, evaluated the level of control a university exerted over student speech by applying the *Hazelwood* standard, because the students' speech in both instances was aimed at achieving a curricular goal and occurred as part of an academic activity for which they received school credit.⁶³ In *Axson-Flynn*, the speech was dialogue in a play recited in a drama class, and in *Brown*, the speech was a graduate thesis submission.⁶⁴ In both instances, the court deferred to the university's authority and expertise to make academic decisions by utilizing the reasonableness standard and emphasizing that neither situation occurred in a public forum.⁶⁵ Additionally, in *Bishop v. Aronov*, the Eleventh Circuit invoked the *Hazelwood* standard to allow the University at issue to restrict an exercise physiology professor from discussing his religious biases and beliefs during class time.⁶⁶ The appeals court held that the speech in question was the University's own speech and did not occur in any type of public forum because the University had reserved the time for classroom instruction.⁶⁷

The post-*Hazelwood* case most analogous to *Hosty* is *Kincaid v. Gibson*.⁶⁸ In *Kincaid*, the Sixth Circuit held that a public administrator at the University at issue violated the First Amendment by ordering copies of a student-produced yearbook to be confiscated and prohibiting their distribution to students for more than six years. The school official was displeased that the student editor did not use the school's colors as a background color for the cover, included photos of national current events, and selected the theme "Destinations Unknown."⁶⁹ The appeals court recognized that the University had created a limited public forum and determined that the confiscation could not be justified as either a content-neutral regulation narrowly tailored for a compelling state interest or a reasonable time,

a doctrinal distinction").

61. Abrams & Goodman, *supra* note 60, at 728.

62. *Id.*

63. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285–87 & n.6 (10th Cir. 2004); *Brown v. Li*, 308 F.3d 939, 952 (9th Cir. 2002).

64. See generally *Axson-Flynn*, 356 F.3d 1277; *Brown*, 308 F.3d 939.

65. See generally sources cited *supra* note 60.

66. *Bishop v. Aronov*, 926 F.2d 1066, 1074–75 (11th Cir. 1991).

67. See *id.* at 1074 (adopting *Hazelwood*'s "basic educational mission" and "reasonable restrictions" standard as applicable for colleges and universities to shape their course offerings).

68. See *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (en banc) (rejecting *Hazelwood*'s application to confiscation of a university yearbook).

69. *Id.* at 345.

place, and manner restriction.⁷⁰ The *Kincaid* Court declined to apply the *Hazelwood* reasonableness standard explaining only that it is “factually inapposite.”⁷¹ The court did apply *Hazelwood*, however, for the limited role of providing guidance about how to analyze the type of forum.⁷²

Since the *Hazelwood* decision, the Supreme Court has continued to protect college and university student speech by holding that a college or university cannot engage in viewpoint discrimination when allocating funds for student activities in public fora⁷³ and allowing colleges and universities to collect fees used to fund a range of student expression.⁷⁴ In *Rosenberger v. University of Virginia*, the Supreme Court ruled that the University could not deny funding to a student newspaper based on its religious perspective once the school created a limited forum for student publications.⁷⁵ The Court rejected the argument that the University could prohibit all views on a certain topic, because the Court noted that excluding several views on a controversial topic is “just as offensive to the First Amendment” as excluding one.⁷⁶ The decision also reaffirmed that censorship in a college or university setting is a particularly offensive First Amendment violation because the state “acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.”⁷⁷ Again in *University of Wisconsin v. Southworth*, the Court recognized the “important and substantial purposes” in facilitating a wide range of speech by allowing the University to collect student fees for a variety of student groups, so long as it allocated the funds with viewpoint neutrality.⁷⁸ The Court did not allow students who were opposed to some of the student organizations’ messages to chill student activities once the University determined that opening a forum for student activities was consistent with its mission.⁷⁹

II. ANALYSIS

A. Majority Opinion

In the *Hosty* en banc decision, the Seventh Circuit was charged with determining whether Dean Carter should be granted qualified immunity.⁸⁰ This

70. *Id.* at 349–57.

71. *See id.* at 346 n.5.

72. *See id.*

73. *See Rosenberger*, 515 U.S. at 830.

74. *See Bd. of Regents v. Southworth*, 529 U.S. 217, 234 (2000) (contending that the University created “what is tantamount to a limited public forum”).

75. *Rosenberger*, 515 U.S. at 841.

76. *Id.* at 831 (rejecting the argument that the University could permissibly exclude any speech related to religion).

77. *Id.* at 835.

78. *Southworth*, 529 U.S. at 231 (displaying deference to the University’s articulated benefit of promoting extracurricular activities).

79. *Id.* at 234.

80. *Hosty III*, 412 F.3d at 733 (noting that interlocutory appeals are granted to qualified

determination required the court to examine whether the pleadings, viewed in light most favorable to the student editors, alleged that Dean Carter violated a constitutional protection.⁸¹ If the facts did allege a violation, the court then had to examine whether that constitutional protection was clearly established at the time the alleged violation occurred.⁸²

In examining whether the facts alleged a constitutional violation, the court grappled with several different modes of analysis on its roundabout path to conclude that the *Innovator* existed as a designated public forum.⁸³ In this portion of its analysis, the court concluded that *Hazelwood* was applicable to colleges and universities, but that speech protections were also dependent on a forum analysis.⁸⁴ The court's forum analysis incorrectly interpreted case law allowing government control of its own speech as allowing government control of any speech in a government-funded forum.⁸⁵ The court also engaged in a useless listing of a variety of forum-factor combinations, such as the age of the audience and whether the speech was part of a curricular program but failed to address which of them a proper forum analysis should consider.⁸⁶ It did not clarify the purpose of the list or whether it was suggesting a departure from the traditional practice of determining forum by looking at the totality of the situation. Then, in the second prong of its analysis, the court relied on its perplexing earlier discussions to cast doubt on whether a reasonable college or university administrator would have been able to determine if *Hazelwood* applied to a college or university or even, more basically, what type of forum existed.⁸⁷ Despite the court's recognition that the *Innovator* created a public forum, and despite its acknowledgment that even in a created public forum no censorship is allowed, the court determined that free speech protection for college and university students was an area of unsettled law.⁸⁸

immunity decisions because the immunity, if granted, protects the person from the suit itself, not just liability); *Order, supra* note 34, at 731.

81. See *Hosty III*, 412 F.3d at 733 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)) (explaining that qualified immunity should be determined by first looking at whether the facts allege a violation of a constitutional right, and second by looking at whether the right was clearly established in the context of the situation).

82. See *Saucier*, 533 U.S. at 201. See also *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982) (reiterating that reasonable public officials should know the laws guiding their actions).

83. See *Hosty III*, 412 F.3d at 734–38 (“[T]he 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.”).

84. See *id.*

85. See *id.* at 737.

86. *Id.* at 739.

87. See *id.* at 738–39 (doubting whether a reasonable college official would have been able to engage in a public forum analysis). But see *id.* at 744 (Evans, J., dissenting) (“Defendants concede that the *Innovator* serves as a public forum.” (quoting *Hosty I*, 174 F. Supp. 2d at 786)).

88. *Hosty III*, 412 F.3d at 738–39.

1. The Seventh Circuit Confused Government Funding for the Government's Own Speech, With Government Funding for a Public Forum

To determine whether the facts alleged a constitutional violation, the court began by stating that the *Hazelwood* decision would provide its starting point because the decision's standards apply whenever a school pays for speech.⁸⁹ This statement sets the tone for the entire decision, and it gets *Hazelwood* wrong. Though the East Hazelwood High School *Spectrum* was funded by the local school board, the Supreme Court did not regard payment as the only consideration in determining that the school did not create a public forum, and it did not hold that the forum test should even be applied in university settings.⁹⁰ Rather, the Court looked at the totality of the school's policies and practices, including the following: a) the *Spectrum* was part of a regular academic class during school hours; b) the newspaper's advisor made most editorial decisions; and c) the newspaper was routinely submitted to the principal for approval before publication.⁹¹

Though the *Innovator* did receive funding through student fees, the First Amendment does not allow the government to control private speakers' speech in a public forum simply because it provides some degree of financial support.⁹² This would incorrectly suggest, for example, that a city official could control a protester's sign in a public park because the city pays for the park's maintenance. While changing jurisprudence has allowed municipalities to recover costs from people who organize events at public facilities, the municipalities were still prohibited from editing the style of their handouts or changing the content of their chants, so long as the expressions were constitutionally protected speech.⁹³

89. *Id.* at 734 (stating that *Hazelwood* applies when a school pays for speech). *But see Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that it applies to "student speech in school-sponsored expressive activities").

90. *See Hazelwood*, 484 U.S. at 262, 268–70 (noting the school's financial support for the paper, but finding no need to even reference this fact in its full forum analysis). *See generally* 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, 493 (2001) (discussing *Hazelwood*'s examination of the newspaper's relationship to the curriculum, the fact that the teacher made most editorial decisions, and the fact that the newspaper was routinely submitted to the principal before publication, as evidence that it did not exist in a public forum).

91. *See* Peltz, *supra* note 90 (discounting the role that school financial support had on the Supreme Court's forum analysis in *Hazelwood*).

92. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118–19 (2001) (prohibiting a school district from denying access to its facilities to a religious group where it had created a public forum); *Rosenberger*, 515 U.S. 819 (prohibiting the University from denying funds to a newspaper based on its viewpoint where it had created a public forum); *Widmar v. Vincent*, 454 U.S. 263, 273–74 (1981) (prohibiting a university from denying access to its facilities for a student group based on viewpoint where it had created a public forum).

93. *See* *Cox v. New Hampshire*, 312 U.S. 569, 576–77 (1941) (allowing a state to charge a fee for use of its public fora). *See generally* David Goldberg, *A Reconsideration of Cox v. New Hampshire: Can Demonstrators Be Required to Pay the Costs of Using America's Public Forums?*, 62 TEX. L. REV. 403 *passim* (1983) (advocating that courts evaluate monetary

The Seventh Circuit further overlooked distinctions between a college or university paying for speech with its own money and a college or university supporting speech by collecting student fees that are then distributed to student groups on a viewpoint-neutral basis.⁹⁴ As the Supreme Court has recognized, student fees are distinguishable from actual college or university funds because they are collected with the express intent of being distributed back into student activities.⁹⁵ In many colleges and universities, the distribution of student fees is overseen by student government bodies, and the college's or university's role is limited to collection and establishing a bank account. The Court recognized this distinction in *Southworth* by allowing universities to require an activities fee from students even when that money was later distributed to groups that a student found objectionable.⁹⁶ The Court held that as long as the funding determinations were made without regard to viewpoints, funding did not violate students' rights of association or protections from forced speech.⁹⁷ Rather than acknowledge that the Student Communications Media Board at Governors State University distributed funds collected from student fees, the *Hosty* court declared simply that "freedom of speech does not imply that someone else must pay."⁹⁸

The Seventh Circuit cited *Rust v. Sullivan* and *National Endowment for the Arts v. Finley* as precedent for allowing governments to control speech when it provides financial support.⁹⁹ This line of reasoning, however, overlooks the distinction that the individuals in *Rust* were speaking on behalf of the government.¹⁰⁰ Additionally, in *Finley*, the government was acting as a patron for the arts, not creating any type of forum for art generally.¹⁰¹ In *Finley*, the Court determined that the National Endowment's guidelines could not alone disqualify an artist from receiving a government grant.¹⁰²

The government must be allowed to make viewpoint-based decisions when

obstacles to use of public fora by the same standards it reviews non-monetary obstacles).

94. See *Petition*, *supra* note 14, at *3 (indicating that the funding distributed by the Student Communications Media Board comes from a mandatory student activities fee). Compare *Hosty III*, 412 F.3d at 737 ("The University does not hand out money to everyone who asks.") with Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000) (distinguishing permissible viewpoint preferences in the University's speech from impermissible viewpoint preferences in allocating mandatory student fees).

95. See generally *Southworth*, 529 U.S. 217.

96. See *id.* at 229–30 (declaring that the viewpoint-neutral standard of public forum cases protects the interests of the objecting students). The Court also noted that the fees could be considered support of the fee distributing body which would have no First Amendment implications. *Id.* at 240 (Souter, J., concurring).

97. *Id.* at 221.

98. See *Hosty III*, 412 F.3d at 737.

99. See *id.* at 736 (interpreting cases about the government's own speech to apply to an individual's speech in a public forum).

100. See *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (allowing the government to produce viewpoint-discriminatory speech when it is representing its own policy views).

101. See generally *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

102. *Id.* at 585.

promoting its own policies through its own speech.¹⁰³ As the Supreme Court pointed out in *Rust*, “when Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.”¹⁰⁴ In order for policy decisions to have their intended results, the government must be allowed to fund speech it supports without the presumption of creating an open forum.¹⁰⁵ However, the *Innovator* cannot be considered Governors State University’s speech. The *Innovator* was established and run as a student organization independent of the University administration, and the funding it received came from student fees.¹⁰⁶ Additionally, it is unlikely anyone would mistake its “speech” for the University’s speech, particularly because the articles were highly critical of the University.

In *Finley*, the Court ruled that providing guidelines for how the government should distribute a limited amount of money did not constitute categorical viewpoint distinction.¹⁰⁷ The Court again noted that by creating the National Endowment for the Arts, the government had not created a public forum, but instead, was distributing limited funds for a specific policy goal.¹⁰⁸ The Court allowed the government to apply an “inherently content-based ‘excellence’ threshold” in funding decisions, because the government was not purporting to create an overall fund for arts.¹⁰⁹

Allowing funding to dictate whether a college or university will be held to the extremely deferential *Hazelwood* standard ignores the traditional mode of forum analysis that is prescribed by the *Hazelwood* decision itself. Concededly, *Hazelwood* stands for two different propositions: that 1) schools are presumed not to be public fora;¹¹⁰ and 2) schools may control the style and content of expression in nonpublic fora so long as the actions are reasonably related to legitimate educational concerns.¹¹¹ While the Seventh Circuit was not entirely clear in *Hosty* which of *Hazelwood*’s propositions it found applicable to universities,¹¹² it is clear

103. See *Rust*, 500 U.S. at 194 (determining that numerous government programs would be found unconstitutional if the government could not advance policy goals through viewpoint-selective funding decisions).

104. *Id.*

105. *Id.* at 192–93 (explaining that the government may implement its own viewpoint-based policy without offending the First Amendment). See also *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550–51 (1983) (allowing the federal government to subsidize lobbying efforts for some causes and not others).

106. See *Hosty III*, 412 F.3d at 737; *Petition*, *supra* note 14, at *4.

107. See *Finley*, 524 U.S. at 582–83 (explaining that “decency and respect” considerations could not be considered viewpoint discrimination).

108. *Finley*, 524 U.S. at 585.

109. *Id.* at 586.

110. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (establishing that secondary schools are not presumed to be public fora).

111. *Id.* at 273 (establishing that a school can exert editorial control over content “so long as their actions are reasonably related to legitimate pedagogical concerns”).

112. See *Hosty III*, 412 F.3d at 734 (“Whether some review is possible depends on the

that the court's emphasis on funding, even though it ultimately concludes that a public forum existed, may confuse those attempting a forum analysis in an educational context.¹¹³ Further, the court's failure to acknowledge that *Rust* and *Finely* did not involve a public forum—but rather involved the government's own speech beyond the forum analysis—has the potential to result in greater confusion and disagreements about First Amendment protections.

By noting *Hazelwood* as its starting point and then not following a traditional forum analysis to determine if *Hazelwood*'s standards should be applied, the *Hosty* court may cause confusion about the case's applicability to public fora. While referencing *Hazelwood*, the court simultaneously acknowledged that the *Innovator* could be viewed as existing in a public forum.¹¹⁴ One explanation for this seemingly inconsistent position is that the court might have meant that a college or university should not be presumed to be a public forum, as *Hazelwood* dicta posits that secondary schools are not presumed to be public fora.¹¹⁵ The unanswered questions provide little guidance for future cases, but rather, set the stage for the court's subsequent grant of qualified immunity based on uncertainty.

2. The Appeals Court Did Not Engage in a Comprehensive Forum Analysis But Rather Examined Isolated Factors and Engaged in Unhelpful Digressions

Beyond looking solely at funding, the *Hosty* court made some attempts to follow the traditional public forum analysis to determine what level of protection the *Innovator* should receive. It isolated age and education levels as inappropriate standards for determining which type of forum exists, without suggesting factors that should properly be considered.¹¹⁶ The court also rejected the notion that the distinction between curricular and extracurricular activities should determine what type of forum the newspaper existed in, again without discussing what a forum analysis *should* consider.¹¹⁷ Instead, the court discussed the variety of ways speech could exist in either a created forum or nonpublic forum by addressing various combinations of the forum factors.¹¹⁸

answer to the public-forum question, which does not (automatically) vary with the speakers' age.”).

113. See generally Postings of Adam Goldstein et al., <http://www.insidehighered.com/news/2005/06/21/governors> (June 21–July 27, 2005) (discussing that the *Hosty* decision provided immunity from civil liability but not talking about whether college officials have an “automatic right” to censor student publications); Memorandum from Christine Helwick, General Counsel for the California State University system, to CSU Presidents (June 30, 2005) (on file with author), available at <http://www.splc.org/csu/memo.pdf> (advising university presidents that *Hosty III* might provide CSU officials with “more latitude than previously believed to censor the content of subsidized student newspapers”).

114. See *Hosty III*, 412 F.3d at 737 (conceding that a reasonable trier of fact could conclude that the *Innovator* existed in a public forum).

115. See *supra* note 110 and accompanying text.

116. *Hosty III*, 412 F.3d at 735.

117. *Id.*

118. *Id.* at 737–38 (discussing possible facts that could alter the forum outcome, including

The court correctly stated that age does not determine whether speech occurs in a public or non-public forum, although it did not clarify if it was referring to the age of the speakers or the age of the audience.¹¹⁹ This is in accord with traditional public forum analysis that considers not one factor, such as age or funding, but the range of practices and policies affecting the situation.¹²⁰ The court also ruled out education level as a factor for determining the type of forum.¹²¹ The court then makes the illogical leap from requiring elementary schools to allow access to created public fora to allowing universities to exert influence over speech in a nonpublic forum.¹²² While both of these propositions are accurate, neither of them was determined by the speaker or audience's level of education, and the first proposition lends no support to the second. Rather, in both situations the Supreme Court first determined what type of forum existed and then looked at whether the government's actions were constitutional.¹²³ The Court continued this analysis by noting that *Rust* even allows the government to control adults' speech in non-public fora.¹²⁴ This statement, although accurate, does not directly acknowledge that the speech at question in *Rust* was considered the government's own speech.¹²⁵ This statement again provides no additional guidance for whether the *Innovator* was a public or nonpublic forum.¹²⁶ Instead, the court seemed to be listing a plethora of forum and educational variations in order to illustrate the complexity of determining what type of forum existed.¹²⁷

the possible role of Carter in supervising the Student Communications Media Board and the possible role of the newspaper's faculty adviser; but noting that "[n]one is on the record, however, so this possibility does not matter.").

119. *Id.* at 735 (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger*, 515 U.S. 819).

120. *Kincaid*, 236 F.3d at 349 (reviewing "the government's policy and practice . . . as well as to the nature of the property at issue and its 'compatibility with expressive activity'" and "the context within which the forum is found" to be determinative of the type of forum that existed) (citations omitted).

121. *Id.* at 735–36. See also *Good News Club v. Milford Cent. Sch.* 533 U.S. 98 (2001) (equating age with educational level). The Seventh Circuit's equation of age with education level is notable because opponents of college and university censorship normally argue that the age of the students should cast greater suspicion on censorship. Proponents of allowing a college or university to influence editorial content are more likely to posit that the school's interest in editorial control is part of its educational mission, which is not lessened by the older age of its students.

122. *Hosty III*, 412 F.3d at 735.

123. See *Good News Club*, 533 U.S. at 106 (holding that the state cannot base access to a limited public forum on the speaker's viewpoint). The Court rejected the argument that the public building being an elementary school has anything to do with granting groups access. *Id.* at 113–14. The Court found that the group's access had no effect upon the students because its meetings were after school hours, not sponsored by the school, and open to any student with his or her guardian's permission. *Id.*

124. See *Hosty III*, 412 F.3d at 735 (citing *Rust v. Sullivan*, 500 U.S. 173 (1991)) (overlooking that the Court considered adults' speech in *Rust* to be not only in a nonpublic forum, but also *government speech* expressing a legitimate policy preference).

125. See *id.*

126. See *id.*

127. See *id.* at 736 (raising tangential issues about the government's own speech and the

The majority also explores several hypothetical possibilities that would prevent the *Innovator*'s extracurricular status from determinatively indicating that the University had created a public forum. In stating that *Rust* and *Finley* would not make sense under a "bright line" test that divided all speech as either curricular or extracurricular, the court seemingly overlooked the possibility that whether something is curricular or extracurricular could be one of several features involved in determining the type of forum.¹²⁸ The court then again engages in a hypothetical exercise, describing how a publication could be outside of the college or university curriculum but still in a nonpublic forum.¹²⁹ The exception the court notes is that a college or university could hire students for the school's alumni magazine and then retain control over the content of the magazine.¹³⁰ Just as the court failed to recognize that *Rust* involved government speech, this example overlooks the determinative fact that the alumni magazine would still be the college or university's own speech. This discussion provides no guidance for how a court should conduct a forum analysis and merely serves as support for the court's later finding that attempting to engage in a forum analysis would have presented too many complexities for Dean Carter.

3. The Court's Own Perplexing Reasoning Muddles First Amendment Protections, But at the Time of the Censorship, the Law Was Settled

In the second prong of its analysis, the *Hosty* court looked at whether the students' First Amendment rights were clearly established at the time of Dean Carter's actions.¹³¹ To answer this question, the court largely relied on its own perplexing attempt at a forum analysis from the previous section, to conclude that Dean Carter should be granted qualified immunity.¹³² The court presumed that *Hazelwood* changed speech protections at colleges and universities and allowed Dean Carter to rely on that assumption.¹³³ In doing so, the court allowed Dean Carter to treat the *Innovator* as the least protected type of speech in an educational setting (speech that is part of a secondary school curricular activity) rather than speech that has traditionally enjoyed the greatest level of freedom (extracurricular speech in an institute of higher education). Additionally, the court failed to address the suggestion that Dean Carter may have actually known the *Innovator*

existence of nonpublic fora in the university context without clearly articulating the factors it would consider in a forum determination).

128. *See id.* (declaring that cases about the government's own speech, *Rust* and *Finley*, would be "inexplicable" if forum determinations were based on a curricular versus extracurricular distinction).

129. *Id.* (characterizing an alumni magazine as a publication outside the college and university curriculum, but not created as a public forum).

130. *Id.*

131. *See id.* at 739 (noting that "legal and factual uncertainties dog the litigation").

132. *See id.* at 738 (rationalizing that because the district court articulated two positions that the majority found inaccurate, Carter could not have been expected to correctly predict degrees of constitutional protections about which the judiciary was in disagreement).

133. *See id.* ("[T]he Supreme Court does not identify for future decision questions that have 'clearly established' answers.").

was a public forum.¹³⁴

When the Supreme Court declined to decide whether *Hazelwood*'s deference to educators was appropriate in college and university settings, it did not purport to alter First Amendment protections in colleges and universities.¹³⁵ Rather, the decision has spared college and university students from this lower standard, presumably for various reasons, including maturity differences, differing educational missions, and the traditions of free expression on college and university campuses.¹³⁶ Still, in *Hosty*, the court allowed Dean Carter to take the gamble that a court might rely on *Hazelwood* instead of cases from both before and after *Hazelwood* that protect college and university student speech rights.¹³⁷ Indeed, it failed to acknowledge one of its own prior rulings positing that the Supreme Court does not have to speak for law to be "clearly settled."¹³⁸ While the court asserted that the Supreme Court does not reserve settled areas of law for future decision,¹³⁹ it overlooked the protections the Court subsequently afforded student speech in cases such as *Rosenberger* and *Southworth*.

Though the court does list the three cases that have applied *Hazelwood* to university settings,¹⁴⁰ it makes no reference to the fact that each of those cases was about either the university controlling its own speech or exerting its authority over academic areas.¹⁴¹ Additionally, even in those few cases, the courts predominantly relied on the traditional practice, supported by *Hazelwood*, of leaving academic

134. See *supra* note 131 and accompanying text.

135. See *supra* note 1 and accompanying text.

136. See David G. Savage, *Justices OK Censorship by Schools; Say Educators Can Control Content of Pupil Publications*, L.A. TIMES, Jan. 14, 1988, at 1 (reporting that the decision did not apply to higher education); Stuart Taylor, *Court, 5-3, Widens Power of Schools to Act as Censors*, N.Y. TIMES, Jan. 14, 1988, at A1 (reporting that the Court "has suggested" that constitutional rights receive broader protections in university settings). See also sources cited *supra* note 60.

137. But see *Hosty III*, 412 F.3d at 743 (Evans, J., dissenting) (maintaining that the question should have been whether anything "after *Hazelwood* . . . would suggest to a reasonable person in Dean Carter's position that she could prohibit publication simply because she did not like the articles it was publishing?"). Cf. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (6-3 decision) (holding that officials can be on notice that their conduct violates the law in novel factual situations without prior caselaw involving "fundamentally similar" or "materially similar" facts); but cf. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (6-3 decision) (requiring that the contours of a right be "sufficiently clear" and that "in the light of pre-existing law the unlawfulness must be apparent" to deny qualified immunity).

138. See *Burgess v. Lowery*, 201 F.3d 942, 945 (7th Cir. 2000):

To rule that until the Supreme Court has spoken, no right of litigants in this circuit can be deemed established before we have decided the issue would discourage anyone from being the first to bring a damages suit in this court; he would be *certain* to be unable to obtain any damages.

Id.

139. *Hosty III*, 412 F.3d at 738. "The question had been reserved in *Hazelwood*, and the Supreme Court does not identify for future decision questions that already have "clearly established" answers." *Id.* (citations omitted).

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

141. See *Hosty III*, 412 F.3d at 738-39.

matters to the discretion of educators.¹⁴²

Finally, the court overlooked a reference indicating that Dean Carter may have actually known the *Innovator* was a public forum.¹⁴³ If true, this should have been enough to preclude immunity, regardless of the court's application of *Hazelwood* to a university setting.¹⁴⁴ Though the *Hosty* court's decision is less than clear about how, or even if, it would apply the *Hazelwood* standard to a public forum, the court itself noted earlier in the decision that in a public forum there is "no censorship allowed."¹⁴⁵ The court should have consistently applied that standard—even if it was unclear whether *Hazelwood* could have applied to universities—because in a public forum any controls over content must be narrowly tailored to meet a compelling state interest.

Whether *Hazelwood* currently applies in any way to college and university speech should not affect whether First Amendment protections were clear at the time of Dean Carter's actions. When Dean Carter called the printer, no court had analyzed content controls in a public forum, university or not, under the *Hazelwood* standard.¹⁴⁶ Still none have except the *Hosty* court. Further, even if *Hazelwood* applies generally in college and university settings, as the Seventh Circuit points out, its application "depends in large measure on the operation of a public-forum analysis."¹⁴⁷ This would require Dean Carter to evaluate her actions under a public forum analysis whether or not *Hazelwood* applied.¹⁴⁸ Although in a public secondary school *Hazelwood* supports the presumption that a school newspaper is a nonpublic forum unless the school has taken measures to turn it into one,¹⁴⁹ a reasonable public official should still make an initial inquiry to see

142. See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1292 n.14 (10th Cir. 2004) (citing Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985)); *Brown v. Li*, 308 F.3d 939, 950 (9th Cir. 2002) (citing Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978)); *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991) (entrusting the University to protect the academic freedom of its professors when creating policies about professors' in-class speech). Cf. *Ewing*, 474 U.S. at 225–26 & nn.11–12 (stating that judges may not reverse academic decisions unless they have sufficient evidence that the decisions are so far departed from academic norms to demonstrate that they were made with no actual exercise of professional judgment); *Horowitz*, 435 U.S. at 90 (accepting that academic decisions required expert evaluations and were "not readily adapted to the procedural tools of judicial or administrative decisionmaking").

143. See *Hosty III*, 412 F.3d at 744 (Evans, J., dissenting) ("Defendants concede that the *Innovator* serves as a public forum." (quoting *Hosty I*, 174 F. Supp. 2d at 786)). But see *Brief, supra* note 12, at *20–*21 (contending that the *Innovator* did not exist in a public forum).

144. See *Hosty III*, 412 F.3d at 733. Though the court does not indicate how it would evaluate a claim of qualified immunity when the official had actual knowledge of one of the elements of that constitutional right, it seems suspect that the majority disregarded this possibility.

145. See *id.* at 735 (declaring that in a public forum, no censorship is allowed). In making this statement, the court did not determine whether *Hazelwood* applies to universities. *Id.*

146. See *id.* at 743–44 (noting that all of the cases the majority cited applied to speech in either a curricular setting, or in a setting where the college or university was the speaker).

147. See *id.* at 738 (refuting its previous characterization of *Hazelwood* as allowing editorial control whenever a schools "pays").

148. See *id.*

149. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (declaring that a school

whether the school has taken any of these steps.

B. Dissenting Opinion

The *Hosty* dissent, written by Judge Evans, persuasively argued that Dean Carter should not have been afforded qualified immunity.¹⁵⁰ His basis for that determination was that the alleged constitutional violation was based upon a clearly established right.¹⁵¹ According to Judge Evans' analysis, until the majority's decision, no court had applied *Hazelwood* to an extracurricular activity in a university setting.¹⁵² While both the majority and dissenting opinions recognized that the Supreme Court left the question of *Hazelwood*'s applicability in college and university settings unanswered, Judge Evans recognized this to mean that Dean Carter should have realized that *Hazelwood* did not actually change the legal landscape protecting university speech. Additionally, Judge Evans accurately recognized that the few cases the majority cited for applying *Hazelwood* in a university setting were limited to determining the university's own speech or exerting its authority over academic matters.¹⁵³

Judge Evans took the position that the *Hazelwood* standard should have no place "in the world of college and graduate school" and suggested establishing a grade level cut-off for *Hazelwood*.¹⁵⁴ This position directly answers the question the Supreme Court alluded to in the footnote that had been looming over student media for nearly two decades.¹⁵⁵ By providing a straightforward analysis of the issues at hand, Judge Evans clearly articulated support for the marketplace of ideas at public colleges and universities.¹⁵⁶

facility should not be presumed to be a public forum because officials took no action to prevent it from becoming one or permitted limited discourse, but rather requiring that a school take intentional steps to open a forum).

150. See *Hosty III*, 412 F.3d at 739–44 (Evans, J., dissenting).

151. See *id.* at 740 (describing the First Amendment principles at stake as "clear").

152. See *id.* at 743–44 (citing *Student Gov't Ass'n v. Bd. of Trs. of Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (stating that *Hazelwood* is not applicable to university newspapers); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (en banc) (declining to apply the *Hazelwood* reasonableness standard to a university yearbook).

153. See *Hosty III*, 412 F.3d at 743–44.

154. See *id.* at 739 (noting that grade level is a "very good" indicator of age, which "has always defined legal rights").

155. See *Hazelwood*, 484 U.S. at 273 n.7 (1988) (noting "[w]e need not now decide" if the decision's standards apply in higher education).

156. See *Hosty III*, 412 F.3d at 740–42 ("[T]he 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." (quoting *Healy v. James*, 408 U.S. 169, 180 (1972))).

III. SIGNIFICANCE AND AFTERMATH OF *HOSTY*

A. Implications

The conflicts at Governors State University chilled speech at the campus.¹⁵⁷ The *Innovator* was never published after Dean Carter's phone calls.¹⁵⁸ When a new student newspaper was established several years later, the administration attempted to institute a formal prior review policy.¹⁵⁹ When the student editor of the new newspaper refused to comply with the prior review policy, a new conflict was born and the university refused to publicly discuss its policy toward student publications.¹⁶⁰

By allowing Dean Carter to escape liability without clearly articulating how *Hazelwood* should apply or without providing guidance for forum analysis in educational settings, the majority decision could become another looming threat over the heads of student media.¹⁶¹ Vague standards raise particular concerns in the context of the First Amendment because of their potentially irreversible chilling effects.¹⁶² An Illinois district court has relied on the *Hosty* decision to hold that “[m]any aspects of the law with respect to students' speech, not only the role of age, are difficult to understand and apply.”¹⁶³ The general counsel for the California State University system issued a memorandum to university presidents suggesting that they might have more authority than previously thought to control student speech.¹⁶⁴

To see how the *Hosty* decision could affect college and university media, one need only look at how *Hazelwood* has affected student media in secondary education. In the majority of instances, administrators have been permitted to control student media and turn it into a promotional tool for the schools, devoid of any educational element for its student participants.¹⁶⁵ As a result, students are not

157. See Joseph Sjostrom, *Paper Overlooked After Censorship Storm*, CHI. TRIB., July 8, 2003, at 1 (noting that the school was without a student newspaper for a year and that the replacement paper has struggled to become relevant); Joseph Sjostrom, *Student Editors' Lawsuit Delayed; Censorship Case Gets New Hearing*, CHI. TRIB, June 28, 2003, at 16.

158. See Wronski, *supra* note 22, at 6.

159. See sources cited *supra* note 157.

160. *Id.*

161. See generally, Mark J. Fiore, Comment, *Trampling the “Marketplace of Ideas”: The Case Against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915 *passim* (2002) (noting a 1997 study that found only one of 101 daily college newspapers surveyed was “strongly curriculum based”). This could suggest that many student newspaper editors believe they exist as a public forum and would be uncertain as to how *Hazelwood* or *Hosty* might apply to them. *Id.*

162. See *Reno v. ACLU*, 521 U.S. 844, 845 (1997) (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048–51 (1996)) (explaining the dangers in chilling speech through vagueness).

163. *Brandt v. Bd. of Educ. of City of Chi.*, 420 F. Supp. 2d 921, 935 (N.D. Ill. 2006) (granting an elementary school principal qualified immunity for disciplining students who wrote “gifties” on class T-shirt).

164. See Memorandum from Christine Helwick, *supra* note 113.

165. See generally Brief for Student Press Law Center et al. as Amici Curiae Supporting

encouraged to pursue hard-hitting stories and often leave a journalism education course with little practice or guidance on the proper ways one would pursue such stories. These results harm both journalism students and other students who lose exposure to how the media interacts with society.

The chilling effects of *Hosty* may not be limited to college and university media. As *Hazelwood* has been applied to allow control over student government campaign posters and to ban students from wearing certain T-shirts, these decisions could lend support for colleges and universities to prohibit student groups from displaying a particular sign on the campus green or from bringing a particular speaker to a campus rally.¹⁶⁶ Further, because the Seventh Circuit was unclear on the role of funding in a forum analysis, a court broadly interpreting the case could determine that independent newspapers and other speech benefiting from any college or university connection might be subject to the administration's controls.

Additionally, colleges and universities could become vulnerable to liability for the content of their student publications or even for the content of any student speech that was connected with the school.¹⁶⁷ While state colleges and universities have until now been insulated from any legal actions against their student press—based on the principle that they had no legal ability to control or review content¹⁶⁸—this would no longer be the case. With colleges and universities susceptible to liability, it is less likely that they would encourage students to pursue controversial stories, which are more likely to lead to libel claims. The interest of colleges and universities in avoiding liability, and their mission of education and encouraging a marketplace of ideas will be in direct conflict with each other. For this reason, legal protections for speech should be determined by judges not college and university administrators.

B. Recommendations

Because the Supreme Court denied certiorari, the best possible outcome from this decision is for future courts to recognize the flaws in the *Hosty* court's analysis, to reject its application of *Hazelwood* to university settings, and to recognize the broad First Amendment protections that college and university students have historically enjoyed. This may keep *Hazelwood* from being read as implying either that colleges and universities should be assumed to be nonpublic fora or that administrators can rely on pedagogical concerns to regulate the private

Petitioners, *Hosty v. Carter*, 126 S. Ct. 1330 (2005) (No. 05-377), 2005 WL 2736314 (noting that *Hazelwood* has been used to support regulating “virtually any form of teacher and student speech”) [hereinafter *Amicus Brief*]; Peltz, *supra* note 91, at 484 (describing student journalists as “cheerleaders, helplessly purveying school spirit” and no longer learning how to research or report stories, to the detriment of society’s future news media).

166. See *Amicus Brief*, *supra* note 165, at *12 (citing *Brandt v. Bd. of Educ. of City of Chi.*, 326 F. Supp. 2d 916, 921 (N.D. Ill. 2004) (campaign poster censorship); and *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004) (T-shirt censorship)).

167. See, e.g., *supra* note 9.

168. *Id.* See generally Nancy J. Whitmore, *Article: Vicarious Liability and Private University Student Press*, 11 COMM. L. & POL'Y 255 (2006).

speech of adult students.

Even if, as the *Hosty* court held, other circuits hold that *Hazelwood* applies to college and university settings, it is important to consider how the Seventh Circuit intended *Hazelwood* to apply. The *Hosty* court was unclear whether *Hazelwood* should apply to support the proposition that in college and university settings there should be a presumption against a public forum; or to support the proposition that its deferential reasonableness standard should apply to colleges and universities. The lesser of two evils would be to interpret *Hazelwood* narrowly as standing only for the proposition that a college or university may not automatically be considered a public forum. This would require administrators to review whether they had explicitly created an open forum where censorship is not permitted. This analysis should look at a variety of factors, including whether the speech is part of a curricular activity, whether the speech is college or university speech or student speech, and whether there has been a past practice or policy regarding the school's control of the speech.

Beyond judicial challenges, students and free-speech supporters can make efforts to establish a public forum on their campus by encouraging college and university leaders to sign pledges recognizing that they intend to let campus media exist without any influence or control of the school.¹⁶⁹ They can also lobby for state laws to provide a higher level of protection for speech.¹⁷⁰ Arkansas, California, Colorado, Iowa, Kansas, and Massachusetts have passed such laws to protect students' speech rights, and the Oregon and Illinois legislatures are considering proposing similar protections.¹⁷¹ Finally, students always have the option to take their speech off campus by producing their own newspapers or, more likely with today's technological advances, Web sites or blogs.¹⁷² While

169. See Student Press Law Center, *Hosty v. Carter* Information Page, <http://www.splc.org/legalresearch.asp?id=49> (last visited Mar. 7, 2007) (providing sample language for this type of agreement). According to the SPLC, five universities in the Seventh Circuit, including Illinois State University, Ball State University, the University of Southern Indiana, Indiana University Bloomington, and University of Wisconsin-Platteville, have signed this type of agreement.

170. See generally Chris Sanders, *Censorship 101: Anti-Hazelwood Laws and the Preservation of Free Speech at Colleges and Universities*, 58 ALA. L. REV. 159 (2006) (recommending state statutes as the best way to protect students' rights and discussing statute language).

171. ARK. CODE ANN. §§ 6-18-1201–6-18-1204 (2006); CAL. EDUC. CODE §§ 48907, 48950 (West 2006); COLO. REV. STAT. § 22-1-120 (1998); IOWA CODE § 280.22 (1996); KAN. STAT. ANN. §§ 72-1504–72-1506 (2005); MASS. GEN. LAWS ANN. ch. 71, § 82 (West 1996). See also *Oregon Legislator Prepares Free Press Bill Modeled After Washington State Bill*, STUDENT PRESS LAW CTR., March 2, 2007, <http://www.splc.org/newsflash.asp?id=1456> (describing efforts in Oregon to create a law protecting high school and college students from censorship); *Illinois State Legislators to Consider Collegiate Free Press Bill*, STUDENT PRESS LAW CTR., March 2, 2007, <http://www.splc.org/newsflash.asp?id=1455> (describing an Illinois bill that would reverse the effect of the *Hosty* decision in the State).

172. The ability of colleges and universities to control content on their Internet servers is likely a topic for another paper. Additionally, colleges and universities could attempt to control distributions on campus or create policies to discourage students from posting information on the internet. See generally Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student*

students do not shed their freedoms at the schoolhouse gate,¹⁷³ they have a much stronger grasp on them from the other side of it. While taking speech off campus is the ultimate foil to censorship, this decision has its own drawbacks. For example, once off campus, students may no longer receive the guidance of knowledgeable advisers and may miss out on important aspects of a traditional journalism education.

CONCLUSION

The *Hosty* decision allowed a university administrator to engage in the most egregious form of censorship, prior restraint.¹⁷⁴ By engaging in a shoddy forum analysis, the *Hosty* court was able to support its ultimate finding that First Amendment protections for student newspapers at public universities were unclear. The First Amendment lists the freedom of the press explicitly, and this textual distinction has become a part of why some consider governmental attacks on the press to be the epitome of a First Amendment violation. In 1978, Justice Potter Stewart posited that the separate textual reference for press and speech was “no constitutional accident, but an acknowledgment of the critical role played by the press in American society” and urged courts to recognize that “[t]he Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively.”¹⁷⁵

The *Hosty* decision is typical of the increasing hostility toward the media that has come from the Seventh Circuit. In the summer of 2005, Judge Posner, a member of the Seventh Circuit who joined the *Hosty* majority, rehashed critiques of the media on the front page of the New York Times book section.¹⁷⁶ While attributing the unsupported claims to groups such as “the right,” “liberals,” and “the media,” Posner used the opportunity to proclaim that the media simply responds to the market, and that the principles of self-governance and serving the public interest are merely lofty ideals. Previously, the Seventh Circuit had issued a broad opinion ridiculing the notion that the Constitution provides any support for a reporters’ privilege.¹⁷⁷ This decision has been cited by numerous courts, thus indicating the influence of the Seventh Circuit and some of its feelings toward media protections.¹⁷⁸ While perhaps the *Hosty* decision should not have been

Internet Speech, 89 VA. L. REV. 139 (2003).

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

174. See generally *New York Times v. United States*, 403 U.S. 713, 714–21 (1971) (Black, J., concurring) (describing the historical presumptions against prior restraints and the threats they have on individual liberties, because a prior restraint is both directly in conflict with the literal interpretation of the First Amendment, and strays from the presumption that speech is permissible).

175. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 17 (1978) (Stewart, J., concurring).

176. See Richard A. Posner, *Bad News, N.Y. TIMES*, July 31, 2005, §7, at 1.

177. See *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003) (opinion by Posner, J.) (refusing to stay an order compelling journalists to produce tape recordings of interviews).

178. See, e.g., *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004) (affirming a civil contempt order for a journalist who refused to answer questions posed by a special prosecutor); *New York Times v. Gonzales*, 382 F. Supp. 2d 457, 485 (S.D.N.Y. 2005), vacated and remanded

surprising given these circumstances, it has the potential to be nonetheless devastating.

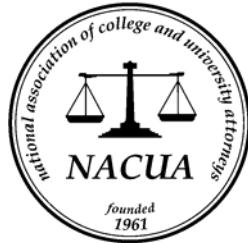
In 1972, long before many of today's college and university students were born, the Supreme Court declared in *Healy v. James* that it was "break[ing] no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."¹⁷⁹ The decision determined that a university could not deny a student group recognition out of fear that the group could cause campus disturbances.¹⁸⁰ Rather, it noted that denying the group recognition was an impermissible burden on the students' ability to participate in campus discourse.¹⁸¹ In *Hosty*, the University had not even claimed that the newspaper caused a disruption to the campus; only that the University had a right to censor it. If a case similar to *Healy* were to arise in another circuit today, the courts might rely on *Hosty* to defer to the college or university's determination about what would disturb the campus. Though the Court in *Healy* said it was breaking "no new constitutional ground" with its decision, for the next generation of college and university students, its First Amendment protections could be considered revolutionary.

by, 459 F.3d 160 (2d Cir. 2006) (denying a reporters' privilege protecting phone records); *Lentz v. City of Cleveland*, 410 F. Supp. 2d 673, 701 (N.D. Ohio 2006) (granting a motion to compel a reporter to reveal a confidential source).

179. See *Healy v. James*, 408 U.S. 169, 180–81 (1972) (describing its efforts to protect speech as upholding the traditional principles that have protected free speech within an educational context).

180. *Id.*

181. *Id.*



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