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

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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 State 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. Cmty. 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 instituted 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 deploring 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. Cmty. 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. Cmty. 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 Coffey,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 Coffey 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 Coffey organized and put together the yearbook by herself.³⁹⁸ Coffey designed a purple cover using foil.³⁹⁹ Coffey 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 Coffey 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 Coffey 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 Coffey'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 Coffey's work on the yearbook in laudatory detail throughout its opinion and directly relied upon Coffey's testimony for many of its findings.⁴⁴⁹ The court found that, "[i]n fact, Coffey 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 Coffey 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 Coffey 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 play⁵⁶⁴

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).

