
HOW THE *HOSTY* COURT MUDDLED FIRST AMENDMENT PROTECTIONS BY MISAPPLYING *HAZELWOOD* TO UNIVERSITY STUDENT SPEECH

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INTRODUCTION

When the Supreme Court ruled that public school officials could control speech in school-sponsored activities if they had legitimate educational reasons for doing so, the majority explicitly reserved judgment on whether that same level of deference should be extended to college and university settings.¹ In the seventeen years since the decision, courts have relied on the *Hazelwood School District v. Kuhlmeier* standard to allow broad controls over expression in public elementary, middle, and high schools. In only one instance among newspapers not found to be a forum for student expression did a court find that school officials did not have a sufficient reason to control expression.² In the case, *Desilets v. Clearview Regional Board of Education*, the court invalidated a high school's attempts to block two movie reviews from appearing in the student newspaper because while the movies were R-rated, the reviews themselves were not objectionable.³ Otherwise, since the *Hazelwood* decision, courts have given educators broad discretion to control student expression and determine for themselves what will constitute an "educational reason" to control expression in contexts ranging from newspaper articles and advertisements to class T-shirts and school plays.

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1. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 & n.7 (1988) (noting that "we need not now decide" if the decision's standard applies in higher education).

2. *But see Dean v. Utica Cmty. Schs.*, 345 F. Supp. 2d 799, 806 (E.D. Mich. 2004) (holding that a high school principal could not prevent the publication of a school newspaper that existed as a limited public forum).

3. *Desilets v. Clearview Reg'l Bd. of Educ.*, 647 A.2d 150, 153-54 (N.J. 1994) (distinguishing the subject from the content used to address the subject).

Until the Seventh Circuit decided *Hosty v. Carter* in June 2005, no court had upheld *Hazelwood*'s application to independent student speech at a public college or university.⁴ Instead, courts determined First Amendment protections for college and university students with the same forum analysis generally applied to speech cases.⁵ The Supreme Court has prevented colleges and universities from denying funding to student newspapers based on viewpoint once it created an open forum for communication⁶ and allowed colleges and universities to collect fees used to fund a viewpoint-neutral range of student expression.⁷ The few decisions where *Hazelwood* has been cited concerning college and university settings are limited to recognizing college and university authority over curricular activities or the schools' own speech.⁸ Further, courts have insulated public colleges and universities from liability for the content of student publications, acknowledging that the First Amendment prohibits colleges and universities from exercising editorial control over the publications.⁹

In *Hosty*, the Seventh Circuit broke from precedent by granting qualified immunity to a dean from Governors State University who called the printers to stop publication of a student newspaper.¹⁰ In the en banc decision, the court considered questions beyond the immunity decision being appealed and held that the *Hazelwood* framework "generally appli[ed]" to university student speech.¹¹

4. See *Hosty v. Carter (Hosty III)*, 412 F.3d 731, 739 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1330 (2006).

5. See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229–30 (2000) (determining that public forum cases were applicable "by close analogy" to extracurricular speech funded by mandatory student fees); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995) (engaging in a forum analysis).

6. *Rosenberger*, 515 U.S. at 835 ("Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints.").

7. *Southworth*, 529 U.S. at 234 (contending that the University created "what is tantamount to a limited public forum").

8. See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285–87 & n.6 (10th Cir. 2004) (applying *Hazelwood* to a university student's speech that was part of a class assignment, occurred during class time, and took place in the classroom); *Brown v. Li*, 308 F.3d 939, 952 (9th Cir. 2002) (applying *Hazelwood* to a graduate student's thesis submission); *Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir. 1991) (applying *Hazelwood* to restrict a university professor's in-class speech to educational topics and limit his discussion of his personal religious beliefs). See also *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (en banc) (holding that *Hazelwood* had little application to the university yearbook in question because the university created a limited public forum).

9. See *Milliner v. Turner*, 436 So. 2d 1300, 1302 (La. Ct. App. 1983) (reversing a trial court decision to hold the Southern University of New Orleans liable for the content of its student newspaper); *McEvaddy v. City Univ. of N.Y.*, 220 A.D.2d 319 (N.Y. App. Div. 1995) (dismissing claim against the university because a student newspaper is not an agent of the university); *Mazart v. New York*, 441 N.Y.S.2d 600, 605-07 (N.Y. Ct. Cl. 1981) (holding that a public university cannot be held liable for the content of its student-operated newspaper through a theory of either *respondeat superior* or general negligence).

10. See *Hosty III*, 412 F.3d at 739 (explaining that public officials should not have to predict how constitutional questions will be interpreted by later courts).

11. See *id.* at 733, 738 (explaining that the threshold question in an interlocutory appeal for

Reviewing a qualified immunity decision required the court to view the facts in the light most favorable to the newspaper's editors, students Jeni Porche and Margaret Hosty. Given this view, the court found that the University had created a limited public forum, something that the University actually acknowledged.¹² Still the court decided that the confusion about *Hazelwood* was enough to grant immunity.¹³

This Note will examine the *Hosty* decision and the Seventh Circuit's unfortunate interpretation of *Hazelwood* to find that the University administrator's actions did not violate "clearly established" law. Part I will discuss the facts and procedural history of *Hosty* as well as First Amendment case law that played a significant role in the decision. Part II will provide a critical legal analysis of the Seventh Circuit's majority decision, its reasoning, and the dissenting opinion. This section will illustrate how the court confuses government funding for an open forum with government funding for its own speech. It will argue that the court relied on its own disingenuous forum analysis—accomplished by isolated examinations of funding, age, and educational status—to demonstrate that the students' claims were based on unsettled law. Finally, Part III will address the chilling effect the *Hosty* decision could have on student activities at public colleges and universities, and the potential increased liability colleges and universities could become subject to as a result of a perceived newfound authority over student expression. This section will recommend that future decisions in this area of law reject the *Hosty* decision and clarify that *Hazelwood's* reasonableness standard should not be applied to public fora. It will alternately discuss some steps that college and university students and administrators can take to minimize conflicts between students and administrators.

I. BACKGROUND

A. Facts and Procedural History of *Hosty*

In the fall of 2000, administrators at Governors State University, a public university in Will County, Illinois, were upset with articles critical of the University printed in the student newspaper, the *Innovator*.¹⁴ Some of the articles focused on the English department and alleged racial biases in grading, unqualified teachers, and a lack of course variety. Other articles were critical of the decision

qualified immunity is whether the official violated an established constitutional right, and then whether that right was clearly established).

12. *Id.* at 744 (Evans, J., dissenting) ("Defendants concede that the [*Innovator*] serves as a public forum.") (quoting *Hosty v. Governors State Univ.*, 174 F. Supp. 2d 782, 786 (N.D. Ill. 2001)). *But see* Brief of Defendant-Appellant Patricia Carter at *20–*21, *Hosty v. Carter*, 325 F.3d 945 (7th Cir. 2003) (No. 01-4155) (contending that the *Innovator* did not constitute a public forum) [hereinafter *Brief*].

13. *Hosty III*, 412 F.3d at 738–39.

14. *See id.* at 732 (noting that none of the newspaper's critical articles were about the missing apostrophe in the University's title); Petition for Writ of Certiorari at *5, *Hosty v. Carter*, 126 S. Ct. 1330 (2006) (No. 05-377), 2005 WL 2736314 [hereinafter *Petition*].

of Patricia Carter, the dean of the College of Arts and Sciences, not to renew the teaching contract of the newspaper's faculty advisor. University President Stuart Fagan and Dean Carter issued public statements condemning the *Innovator's* "irresponsible and defamatory journalism."¹⁵ President Fagan characterized the newspaper as "one-sided," "inaccurate," and "insulting" and said the newspaper "sullied" the reputation "of the [U]niversity and its faculty."¹⁶

While tensions about the newspaper were high, Dean Carter twice called the publisher, Regional Publishing, and ordered its owner not to print any more copies of the paper without calling her first so that she or another administrator could review the newspaper.¹⁷ After Dean Carter's phone calls, Regional Publishing's owner, Charles Richards, believed he would not be paid if he printed the paper without following her directions for administrative review. He told the newspaper's editors, Porche and Hosty, that he "did not want to be in a hissing contest between the paper and the administration because [he was running] a business . . . [and] the [U]niversity administration released the funds."¹⁸ He believed Dean Carter was ordering him and that he had to follow her instructions.¹⁹ After hearing about Dean Carter's demands from Richards, Porche and Hosty refused to submit any more issues to the printer.²⁰ Instead, in January 2001, they filed a lawsuit against the University, its trustees, and several administrators, alleging a First Amendment violation.²¹

Until its final issue on October 31, 2000,²² the *Innovator* existed as a student-run publication that received student activities fees through the seven-member Student Communications Media Board.²³ The board members were appointed by

15. *Petition*, *supra* note 14, at *5. Never has Dean Carter, the University, or anyone else made a legal claim against the *Innovator*, Hosty, or Porche for defamation because of these articles.

16. *Id.* (describing the relationship between the newspaper and the administration).

17. *See Brief*, *supra* note 12, at *6 (stating that her goal was to make sure the newspaper met journalistic standards as well as the University's standards for grammar, punctuation, and composition).

18. *Id.*

19. *Id.* at *11 (noting that Richards reported that Carter reminded him that "the University paid his company").

20. *Compare* Hosty v. Governors State Univ. (*Hosty I*), 174 F. Supp. 2d 782, 787 (N.D. Ill. 2001) ("Editorial control is not required for a First Amendment claim; stifling freedom of speech in a forum opened for discussion is sufficient." (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983))) with *Brief*, *supra* note 12, at *8, *23 (asserting that the editors' own decision not to submit the paper to the printer negates their claims against Carter).

21. *See* First Amended Complaint, Hosty v. Governors State Univ., 2001 U.S. Dist. LEXIS 18873 (N.D. Ill. Nov. 13, 2001) (No. 01 C 0500) (alleging additional violations of the Fourth, Fifth, Sixth, and Eighth Amendments; defamation; invasion of privacy; violation of the Illinois Open Meetings Act; and civil conspiracy) [hereinafter *First Amended Complaint*].

22. *See* Richard Wronski, *Court Rips Governors State University in Illinois for Censoring Newspaper*, CHI. TRIB., Apr. 11, 2003, at 6 (noting that the *Innovator* was founded in 1971 and has not been published since Carter's phone call to Regional Publishing).

23. *See* Hosty III, 412 F.3d at 737; *Petition*, *supra* note 14, at *4 (describing the relationship between the media board, the *Innovator*, and the University administration).

the Student Senate and oversaw the budget of campus media and handled the contracts with printing companies.²⁴ Dean Carter was not a member of the student media board nor did she have authority to review its decisions.²⁵ At the time, the University policy toward student publications provided that students will “determine [the] content and format of their respective publications without censorship or advance approval.”²⁶ Though the *Innovator* had a faculty advisor, he or she was used only as a resource for ideas and suggestions.²⁷ For the publication’s almost thirty years in print, the students retained final control of the paper’s content.²⁸

The district court found in favor of all of the defendants—either because they were not involved or were entitled to qualified immunity—except for Dean Carter.²⁹ The district court held that her actions were not justified by *Hazelwood*, noting that the University had opened the pages of the *Innovator* to indiscriminate student use, and that the *Innovator* was a university publication, not a high school publication.³⁰ Dean Carter appealed the district court’s decision, but a three-judge panel of the Seventh Circuit upheld the lower court’s decision.³¹ The panel rejected Dean Carter’s suggestion that *Hazelwood* muddled First Amendment protections because the Supreme Court had specifically reserved the question of its application to colleges and universities.³² Instead, the panel reasoned that Dean Carter should have recognized the broad First Amendment protections that college and university students traditionally enjoy.³³ Several months after the panel’s decision, a majority of the Seventh Circuit voted to vacate the panel decision and rehear the case en banc.³⁴ There, the court held that Dean Carter was entitled to qualified immunity and that *Hazelwood* “generally appli[ed]” to college and university student speech.³⁵ After Hosty and Porche filed a writ of certiorari, the Supreme Court requested a response brief from the Illinois attorney general, who represented the University.³⁶ However, the Supreme Court ultimately declined to

24. See sources cited *supra* note 23.

25. See sources cited *supra* note 23.

26. See *Petition*, *supra* note 14, at *4 (establishing that publications retained full editorial control). But see *Hosty III*, 412 F.3d at 737 (contending that Carter did not try to alter the newspaper’s operations).

27. *Petition*, *supra* note 14, at *4–*5.

28. See *Wronski*, *supra* note 22.

29. See *First Amended Complaint*, *supra* note 21, at *12–*22. See also *Hosty v. Carter (Hosty II)*, 325 F.3d 945, 947 (7th Cir. 2003) (characterizing the lower court’s treatment of the other defendants in a similar fashion).

30. See *First Amended Complaint*, *supra* note 21, at *21.

31. See *Hosty II*, 325 F.3d at 950 (holding that Carter’s alleged actions defied established constitutional protections of which she should have known).

32. *Id.* at 948.

33. See *id.* at 948–49 (characterizing attempts to censor student media as consistently suspect).

34. See *Order, Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1330 (2006) (No. 01-4155), *vacating as moot*, 325 F.3d 945 (7th Cir. 2003) [hereinafter *Order*].

35. See *Hosty III*, 412 F.3d at 738.

36. See Lyle Denniston, *The Supreme Court Requested a Response from Governors State*

review the case.³⁷

B. First Amendment Protections in Educational Settings

The First Amendment prohibits government actors from abridging freedoms of speech and of the press.³⁸ Courts have applied the First Amendment to the states through the Fourteenth Amendment and generally hold government actors accountable to its standards.³⁹ To determine the extent of First Amendment protections, modern courts typically begin by looking at the situation that produced the speech or the physical setting in which the expression existed.⁴⁰ Speech in traditional public fora, including public parks, streets, and sidewalks, receives the greatest level of protection. In a public forum, courts have required that content-based restrictions be narrowly drawn to serve a compelling state interest.⁴¹ When the government has created a public forum by opening an area to indiscriminate use, the same standard applies.⁴² In a nonpublic forum, such as a courtroom, content-based restrictions are allowed so long as they are reasonable in light of the purpose of the forum and are viewpoint-neutral.⁴³ Additionally, in any of these fora, the government is permitted to make content-neutral time, place, and manner restrictions so long as they are reasonable.⁴⁴

University, SCOTUSBLOG, Oct. 31, 2005, <http://www.scotusblog.com/movabletype>.

37. 126 S. Ct. 1330 (2006).

38. U.S. CONST. amend. I (establishing rights to freedom of religion, speech, press, assembly, and freedom to petition the government).

39. See *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (requiring a company-owned town to comply with the requirements of the First and Fourteenth Amendments); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (applying First Amendment protections to state governments in addition to the federal government). *But see* *Hudgens v. NLRB*, 424 U.S. 507 (1976) (declining to apply a First Amendment analysis because the role and function of the property owners were distinguishable from that of those in *Marsh*); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 560–61 (1972) (allowing a mall owner to prohibit anti-war activists from distributing handouts at a mall because the content was not “directly related” to the purpose of the mall).

40. See, e.g., *Kincaid v. Gibson* 236 F.3d 342, 347 (6th Cir. 2001) (describing public forum analysis in the context of student publications); *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992) (articulating that speech regulations in a traditional public forum or a created public forum are allowed if they are narrowly tailored to achieve a compelling state interest); *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (reaffirming that time, place, and manner restrictions in a public forum “must be narrowly tailored to serve the government’s legitimate content-neutral interests”); Lillian R. Bevier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79 *passim* (1992) (defending public forum analysis as an efficient judicial practice to protect First Amendment rights in the places where most likely to be threatened). *But see* Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 *passim* (1984) (criticizing public forum analysis as “geographic” at the expense of First Amendment principles, because rights often depend largely on where the speaker is located).

41. See *Kincaid*, 236 F.3d at 347; *Int’l Soc’y*, 505 U.S. at 678; *Ward*, 491 U.S. at 798.

42. See *Int’l Soc’y*, 505 U.S. at 678.

43. *Kincaid v. Gibson* 236 F.3d 342, 348 (6th Cir. 2001).

44. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640, 648 (1981).

Courts have long recognized the importance of free expression in educational contexts.⁴⁵ For example, in refusing to allow a school district to force students to salute the American flag and recite the pledge, the Supreme Court reasoned that preparing students for citizenship was precisely why constitutional protections should be upheld.⁴⁶ The Supreme Court has described institutions of higher education as “peculiarly the ‘marketplace of ideas’”⁴⁷ and proclaimed that “the vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools.”⁴⁸ In the 1960s, college and university students succeeded in “acquiring a new status” as independent adults.⁴⁹ While colleges and universities had previously played a parental role in students’ lives, societal changes led students to demand and receive greater autonomy from colleges and universities.⁵⁰ After this shift, the Supreme Court articulated broad protections for student expression on campuses.⁵¹ The Court has refused to allow a college or university to discriminate against student groups because of their viewpoints,⁵² declared a student’s expulsion for distributing a controversial newsletter to be

45. See generally *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues (rather) than through any kind of authoritative selection.’” (citing *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))).

46. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”).

47. *Healy v. James*, 408 U.S. 169, 180–81 (1972) (citing *Keyishian*, 385 U.S. at 603).

48. *Healy*, 408 U.S. at 180 (citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)) (stating that First Amendment protections should apply with no less force at universities than in society at large); *Sweezy v. New Hampshire*, 354 U.S. 234, 249–50 (1957) (Warren, J., plurality opinion).

49. See *Bradshaw v. Rawlings*, 612 F.2d 135, 138–40 (3d Cir. 1979) (characterizing the authoritarian role of the modern university administration as “notably diluted” from that of previous decades, when universities set standards for “general morals” with policies such as limited visiting hours in dorm rooms for members of the opposite sex); Jane A. Dall, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485 *passim* (2003) (explaining that “fundamental fairness” replaced “absolute, unchallenged authority” in the university-student relationship).

50. See Dall, *supra* note 49, at 490 (“Demands for student rights on campus corresponded with and grew out of demands for civil rights in the broader public forum.”).

51. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 270 (1981) (applying strict scrutiny to a university’s decision to deny a particular student group access to a facility it had designated for public use); *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) (reaffirming that “the mere dissemination of ideas,” even if offensive, cannot be prohibited at a public university in the name of decency alone with no suggestion that it was considered libelous or obscene); *Healy*, 408 U.S. at 189–90 (requiring a university to recognize a controversial student group unless the university had evidence to support the conclusion that the group “posed a substantial threat of material disruption”). Cf. *Keyishian*, 385 U.S. at 603 (evaluating the First Amendment rights of university professors by noting that the essentialness of freedom in universities was “almost self-evident”) (citing *Sweezy*, 354 U.S. at 250).

52. See *Widmar*, 454 U.S. at 267 (holding that the University must “justify its discriminations and exclusions under applicable constitutional norms”); *Rosenberg*, 515 U.S. 819.

unconstitutional,⁵³ and required a college or university to recognize a student group unless it had evidence that the group would disrupt learning.⁵⁴ In *Papish v. Board of Curators of the University of Missouri*, the Court noted that “the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech”⁵⁵

Modern jurisprudence addressing speech within the secondary schoolhouse gates began in *Tinker v. Des Moines Independent Community School District* when the Supreme Court permitted students to wear an anti-war armband so long as it would not materially and substantially interfere with classroom activities.⁵⁶ In *Tinker*, however, the Court did not provide guidance about whether, or how, schools could control speech that was sponsored by or connected with the school.⁵⁷ The Supreme Court addressed this several years later in *Hazelwood* by allowing a high school principal to remove two pages of a student newspaper because his actions were “reasonably related to legitimate pedagogical concerns.”⁵⁸ The Court determined that the *Spectrum* newspaper at Hazelwood High School was not part of any open forum because it was produced during class time, for academic credit, and the teacher routinely made editorial decisions and submitted the newspaper to the principal.⁵⁹

Though the Court declined to decide whether *Hazelwood*’s reasonableness standard could ever be applied in college and university settings, many commentators and scholars believed courts would not extend the standard that far.⁶⁰ The current and former directors of the Student Press Law Center were

53. See *Papish*, 410 U.S. at 671 (resolving that the government’s legitimate and substantial purpose in protecting its education system cannot endanger fundamental personal liberties when there are less restrictive alternative methods to achieve those same goals).

54. See *Healy*, 408 U.S. at 184 (determining that the University’s refusal to grant the student group official recognition was a form of prior restraint).

55. *Papish*, 410 U.S. at 671 (rejecting the argument that the Constitution would grant universities greater leeway to control speech than other government entities).

56. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (rejecting high school administrators’ claims that students wearing armbands to protest the Vietnam war was a disruption of the school’s functions and invaded the privacy of others).

57. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71 (1988) (articulating the focus of the ruling as to whether the First Amendment requires a school to actively promote particular student speech, whereas *Tinker* was limited to whether the First Amendment requires a school to tolerate particular student speech).

58. See *id.* at 273 (noting that the articles about teenage pregnancy and students’ parents’ divorces were created in a nonpublic forum).

59. *Id.* at 268–69.

60. J. Marc Abrams & S. Mark Goodman, Comment, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L.J. 706, 728 (1988). See also Alan E. Brownstein, Review Essay, *Alternative Maps for Navigating the First Amendment Maze*, 16 CONST. COMMENT. 101, 129 (1999) (proffering that leaving the university question open casts doubt on the idea that the *Hazelwood* decision was dependent on the custodial nature of secondary education). But see Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 117 (1998) (observing that the Court’s reference to the university question “serves as an acknowledgment of an institutional difference, but simultaneously reinforces the idea that the presumption would be against drawing

among those who predicted that courts would not apply *Hazelwood* to colleges and universities because the majority of college and university student journalists and much of their audience were older, legal adults.⁶¹ They reasoned that colleges and universities played less of a supervisory role over student activities than administrators did in secondary education.⁶²

Though several courts have applied *Hazelwood* to college and university settings, these decisions have been limited to discussions of college and university control of academic activities or the college or university's own speech. In *Axson-Flynn v. Johnson*, the Tenth Circuit, and in *Brown v. Li*, the Ninth Circuit, evaluated the level of control a university exerted over student speech by applying the *Hazelwood* standard, because the students' speech in both instances was aimed at achieving a curricular goal and occurred as part of an academic activity for which they received school credit.⁶³ In *Axson-Flynn*, the speech was dialogue in a play recited in a drama class, and in *Brown*, the speech was a graduate thesis submission.⁶⁴ In both instances, the court deferred to the university's authority and expertise to make academic decisions by utilizing the reasonableness standard and emphasizing that neither situation occurred in a public forum.⁶⁵ Additionally, in *Bishop v. Aronov*, the Eleventh Circuit invoked the *Hazelwood* standard to allow the University at issue to restrict an exercise physiology professor from discussing his religious biases and beliefs during class time.⁶⁶ The appeals court held that the speech in question was the University's own speech and did not occur in any type of public forum because the University had reserved the time for classroom instruction.⁶⁷

The post-*Hazelwood* case most analogous to *Hosty* is *Kincaid v. Gibson*.⁶⁸ In *Kincaid*, the Sixth Circuit held that a public administrator at the University at issue violated the First Amendment by ordering copies of a student-produced yearbook to be confiscated and prohibiting their distribution to students for more than six years. The school official was displeased that the student editor did not use the school's colors as a background color for the cover, included photos of national current events, and selected the theme "Destinations Unknown."⁶⁹ The appeals court recognized that the University had created a limited public forum and determined that the confiscation could not be justified as either a content-neutral regulation narrowly tailored for a compelling state interest or a reasonable time,

a doctrinal distinction").

61. *Abrams & Goodman*, *supra* note 60, at 728.

62. *Id.*

63. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285–87 & n.6 (10th Cir. 2004); *Brown v. Li*, 308 F.3d 939, 952 (9th Cir. 2002).

64. *See generally Axson-Flynn*, 356 F.3d 1277; *Brown*, 308 F.3d 939.

65. *See generally* sources cited *supra* note 60.

66. *Bishop v. Aronov*, 926 F.2d 1066, 1074–75 (11th Cir. 1991).

67. *See id.* at 1074 (adopting *Hazelwood*'s "basic educational mission" and "reasonable restrictions" standard as applicable for colleges and universities to shape their course offerings).

68. *See Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (en banc) (rejecting *Hazelwood*'s application to confiscation of a university yearbook).

69. *Id.* at 345.

place, and manner restriction.⁷⁰ The *Kincaid* Court declined to apply the *Hazelwood* reasonableness standard explaining only that it is “factually inapposite.”⁷¹ The court did apply *Hazelwood*, however, for the limited role of providing guidance about how to analyze the type of forum.⁷²

Since the *Hazelwood* decision, the Supreme Court has continued to protect college and university student speech by holding that a college or university cannot engage in viewpoint discrimination when allocating funds for student activities in public fora⁷³ and allowing colleges and universities to collect fees used to fund a range of student expression.⁷⁴ In *Rosenberger v. University of Virginia*, the Supreme Court ruled that the University could not deny funding to a student newspaper based on its religious perspective once the school created a limited forum for student publications.⁷⁵ The Court rejected the argument that the University could prohibit all views on a certain topic, because the Court noted that excluding several views on a controversial topic is “just as offensive to the First Amendment” as excluding one.⁷⁶ The decision also reaffirmed that censorship in a college or university setting is a particularly offensive First Amendment violation because the state “acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.”⁷⁷ Again in *University of Wisconsin v. Southworth*, the Court recognized the “important and substantial purposes” in facilitating a wide range of speech by allowing the University to collect student fees for a variety of student groups, so long as it allocated the funds with viewpoint neutrality.⁷⁸ The Court did not allow students who were opposed to some of the student organizations’ messages to chill student activities once the University determined that opening a forum for student activities was consistent with its mission.⁷⁹

II. ANALYSIS

A. Majority Opinion

In the *Hosty* en banc decision, the Seventh Circuit was charged with determining whether Dean Carter should be granted qualified immunity.⁸⁰ This

70. *Id.* at 349–57.

71. *See id.* at 346 n.5.

72. *See id.*

73. *See Rosenberger*, 515 U.S. at 830.

74. *See Bd. of Regents v. Southworth*, 529 U.S. 217, 234 (2000) (contending that the University created “what is tantamount to a limited public forum”).

75. *Rosenberger*, 515 U.S. at 841.

76. *Id.* at 831 (rejecting the argument that the University could permissibly exclude any speech related to religion).

77. *Id.* at 835.

78. *Southworth*, 529 U.S. at 231 (displaying deference to the University’s articulated benefit of promoting extracurricular activities).

79. *Id.* at 234.

80. *Hosty III*, 412 F.3d at 733 (noting that interlocutory appeals are granted to qualified

determination required the court to examine whether the pleadings, viewed in light most favorable to the student editors, alleged that Dean Carter violated a constitutional protection.⁸¹ If the facts did allege a violation, the court then had to examine whether that constitutional protection was clearly established at the time the alleged violation occurred.⁸²

In examining whether the facts alleged a constitutional violation, the court grappled with several different modes of analysis on its roundabout path to conclude that the *Innovator* existed as a designated public forum.⁸³ In this portion of its analysis, the court concluded that *Hazelwood* was applicable to colleges and universities, but that speech protections were also dependent on a forum analysis.⁸⁴ The court's forum analysis incorrectly interpreted case law allowing government control of its own speech as allowing government control of any speech in a government-funded forum.⁸⁵ The court also engaged in a useless listing of a variety of forum-factor combinations, such as the age of the audience and whether the speech was part of a curricular program but failed to address which of them a proper forum analysis should consider.⁸⁶ It did not clarify the purpose of the list or whether it was suggesting a departure from the traditional practice of determining forum by looking at the totality of the situation. Then, in the second prong of its analysis, the court relied on its perplexing earlier discussions to cast doubt on whether a reasonable college or university administrator would have been able to determine if *Hazelwood* applied to a college or university or even, more basically, what type of forum existed.⁸⁷ Despite the court's recognition that the *Innovator* created a public forum, and despite its acknowledgment that even in a created public forum no censorship is allowed, the court determined that free speech protection for college and university students was an area of unsettled law.⁸⁸

immunity decisions because the immunity, if granted, protects the person from the suit itself, not just liability); *Order*, *supra* note 34, at 731.

81. See *Hosty III*, 412 F.3d at 733 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)) (explaining that qualified immunity should be determined by first looking at whether the facts allege a violation of a constitutional right, and second by looking at whether the right was clearly established in the context of the situation).

82. See *Saucier*, 533 U.S. at 201. See also *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982) (reiterating that reasonable public officials should know the laws guiding their actions).

83. See *Hosty III*, 412 F.3d at 734–38 (“[T]he Board established the *Innovator* in a designated-public forum, where the editors were empowered to make their own decisions, wise or foolish, without fear that the administration would stop the presses.”).

84. See *id.*

85. See *id.* at 737.

86. *Id.* at 739.

87. See *id.* at 738–39 (doubting whether a reasonable college official would have been able to engage in a public forum analysis). But see *id.* at 744 (Evans, J., dissenting) (“Defendants concede that the *Innovator* serves as a public forum.” (quoting *Hosty I*, 174 F. Supp. 2d at 786)).

88. *Hosty III*, 412 F.3d at 738–39.

1. The Seventh Circuit Confused Government Funding for the Government's Own Speech, With Government Funding for a Public Forum

To determine whether the facts alleged a constitutional violation, the court began by stating that the *Hazelwood* decision would provide its starting point because the decision's standards apply whenever a school pays for speech.⁸⁹ This statement sets the tone for the entire decision, and it gets *Hazelwood* wrong. Though the East Hazelwood High School *Spectrum* was funded by the local school board, the Supreme Court did not regard payment as the only consideration in determining that the school did not create a public forum, and it did not hold that the forum test should even be applied in university settings.⁹⁰ Rather, the Court looked at the totality of the school's policies and practices, including the following: a) the *Spectrum* was part of a regular academic class during school hours; b) the newspaper's advisor made most editorial decisions; and c) the newspaper was routinely submitted to the principal for approval before publication.⁹¹

Though the *Innovator* did receive funding through student fees, the First Amendment does not allow the government to control private speakers' speech in a public forum simply because it provides some degree of financial support.⁹² This would incorrectly suggest, for example, that a city official could control a protester's sign in a public park because the city pays for the park's maintenance. While changing jurisprudence has allowed municipalities to recover costs from people who organize events at public facilities, the municipalities were still prohibited from editing the style of their handouts or changing the content of their chants, so long as the expressions were constitutionally protected speech.⁹³

89. *Id.* at 734 (stating that *Hazelwood* applies when a school pays for speech). *But see* *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that it applies to "student speech in school-sponsored expressive activities").

90. *See Hazelwood*, 484 U.S. at 262, 268–70 (noting the school's financial support for the paper, but finding no need to even reference this fact in its full forum analysis). *See generally* Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons From the "College Hazelwood" Case*, 68 TENN. L. REV. 481, 493 (2001) (discussing *Hazelwood's* examination of the newspaper's relationship to the curriculum, the fact that the teacher made most editorial decisions, and the fact that the newspaper was routinely submitted to the principal before publication, as evidence that it did not exist in a public forum).

91. *See* Peltz, *supra* note 90 (discounting the role that school financial support had on the Supreme Court's forum analysis in *Hazelwood*).

92. *See, e.g.,* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118–19 (2001) (prohibiting a school district from denying access to its facilities to a religious group where it had created a public forum); *Rosenberger*, 515 U.S. 819 (prohibiting the University from denying funds to a newspaper based on its viewpoint where it had created a public forum); *Widmar v. Vincent*, 454 U.S. 263, 273–74 (1981) (prohibiting a university from denying access to its facilities for a student group based on viewpoint where it had created a public forum).

93. *See Cox v. New Hampshire*, 312 U.S. 569, 576–77 (1941) (allowing a state to charge a fee for use of its public fora). *See generally* David Goldberg, *A Reconsideration of Cox v. New Hampshire: Can Demonstrators Be Required to Pay the Costs of Using America's Public Forums?*, 62 TEX. L. REV. 403 *passim* (1983) (advocating that courts evaluate monetary

The Seventh Circuit further overlooked distinctions between a college or university paying for speech with its own money and a college or university supporting speech by collecting student fees that are then distributed to student groups on a viewpoint-neutral basis.⁹⁴ As the Supreme Court has recognized, student fees are distinguishable from actual college or university funds because they are collected with the express intent of being distributed back into student activities.⁹⁵ In many colleges and universities, the distribution of student fees is overseen by student government bodies, and the college's or university's role is limited to collection and establishing a bank account. The Court recognized this distinction in *Southworth* by allowing universities to require an activities fee from students even when that money was later distributed to groups that a student found objectionable.⁹⁶ The Court held that as long as the funding determinations were made without regard to viewpoints, funding did not violate students' rights of association or protections from forced speech.⁹⁷ Rather than acknowledge that the Student Communications Media Board at Governors State University distributed funds collected from student fees, the *Hosty* court declared simply that "freedom of speech does not imply that someone else must pay."⁹⁸

The Seventh Circuit cited *Rust v. Sullivan* and *National Endowment for the Arts v. Finley* as precedent for allowing governments to control speech when it provides financial support.⁹⁹ This line of reasoning, however, overlooks the distinction that the individuals in *Rust* were speaking on behalf of the government.¹⁰⁰ Additionally, in *Finley*, the government was acting as a patron for the arts, not creating any type of forum for art generally.¹⁰¹ In *Finley*, the Court determined that the National Endowment's guidelines could not alone disqualify an artist from receiving a government grant.¹⁰²

The government must be allowed to make viewpoint-based decisions when

obstacles to use of public fora by the same standards it reviews non-monetary obstacles).

94. See *Petition*, *supra* note 14, at *3 (indicating that the funding distributed by the Student Communications Media Board comes from a mandatory student activities fee). Compare *Hosty III*, 412 F.3d at 737 ("The University does not hand out money to everyone who asks.") with *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000) (distinguishing permissible viewpoint preferences in the University's speech from impermissible viewpoint preferences in allocating mandatory student fees).

95. See generally *Southworth*, 529 U.S. 217.

96. See *id.* at 229–30 (declaring that the viewpoint-neutral standard of public forum cases protects the interests of the objecting students). The Court also noted that the fees could be considered support of the fee distributing body which would have no First Amendment implications. *Id.* at 240 (Souter, J., concurring).

97. *Id.* at 221.

98. See *Hosty III*, 412 F.3d at 737.

99. See *id.* at 736 (interpreting cases about the government's own speech to apply to an individual's speech in a public forum).

100. See *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (allowing the government to produce viewpoint-discriminatory speech when it is representing its own policy views).

101. See generally *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

102. *Id.* at 585.

promoting its own policies through its own speech.¹⁰³ As the Supreme Court pointed out in *Rust*, “when Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.”¹⁰⁴ In order for policy decisions to have their intended results, the government must be allowed to fund speech it supports without the presumption of creating an open forum.¹⁰⁵ However, the *Innovator* cannot be considered Governors State University’s speech. The *Innovator* was established and run as a student organization independent of the University administration, and the funding it received came from student fees.¹⁰⁶ Additionally, it is unlikely anyone would mistake its “speech” for the University’s speech, particularly because the articles were highly critical of the University.

In *Finley*, the Court ruled that providing guidelines for how the government should distribute a limited amount of money did not constitute categorical viewpoint distinction.¹⁰⁷ The Court again noted that by creating the National Endowment for the Arts, the government had not created a public forum, but instead, was distributing limited funds for a specific policy goal.¹⁰⁸ The Court allowed the government to apply an “inherently content-based ‘excellence’ threshold” in funding decisions, because the government was not purporting to create an overall fund for arts.¹⁰⁹

Allowing funding to dictate whether a college or university will be held to the extremely deferential *Hazelwood* standard ignores the traditional mode of forum analysis that is prescribed by the *Hazelwood* decision itself. Concededly, *Hazelwood* stands for two different propositions: that 1) schools are presumed not to be public fora;¹¹⁰ and 2) schools may control the style and content of expression in nonpublic fora so long as the actions are reasonably related to legitimate educational concerns.¹¹¹ While the Seventh Circuit was not entirely clear in *Hosty* which of *Hazelwood*’s propositions it found applicable to universities,¹¹² it is clear

103. See *Rust*, 500 U.S. at 194 (determining that numerous government programs would be found unconstitutional if the government could not advance policy goals through viewpoint-selective funding decisions).

104. *Id.*

105. *Id.* at 192–93 (explaining that the government may implement its own viewpoint-based policy without offending the First Amendment). See also *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550–51 (1983) (allowing the federal government to subsidize lobbying efforts for some causes and not others).

106. See *Hosty III*, 412 F.3d at 737; *Petition*, *supra* note 14, at *4.

107. See *Finley*, 524 U.S. at 582–83 (explaining that “decency and respect” considerations could not be considered viewpoint discrimination).

108. *Finley*, 524 U.S. at 585.

109. *Id.* at 586.

110. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (establishing that secondary schools are not presumed to be public fora).

111. *Id.* at 273 (establishing that a school can exert editorial control over content “so long as their actions are reasonably related to legitimate pedagogical concerns”).

112. See *Hosty III*, 412 F.3d at 734 (“Whether some review is possible depends on the

that the court's emphasis on funding, even though it ultimately concludes that a public forum existed, may confuse those attempting a forum analysis in an educational context.¹¹³ Further, the court's failure to acknowledge that *Rust* and *Finely* did not involve a public forum—but rather involved the government's own speech beyond the forum analysis—has the potential to result in greater confusion and disagreements about First Amendment protections.

By noting *Hazelwood* as its starting point and then not following a traditional forum analysis to determine if *Hazelwood's* standards should be applied, the *Hosty* court may cause confusion about the case's applicability to public fora. While referencing *Hazelwood*, the court simultaneously acknowledged that the *Innovator* could be viewed as existing in a public forum.¹¹⁴ One explanation for this seemingly inconsistent position is that the court might have meant that a college or university should not be presumed to be a public forum, as *Hazelwood* dicta posits that secondary schools are not presumed to be public fora.¹¹⁵ The unanswered questions provide little guidance for future cases, but rather, set the stage for the court's subsequent grant of qualified immunity based on uncertainty.

2. The Appeals Court Did Not Engage in a Comprehensive Forum Analysis But Rather Examined Isolated Factors and Engaged in Unhelpful Digressions

Beyond looking solely at funding, the *Hosty* court made some attempts to follow the traditional public forum analysis to determine what level of protection the *Innovator* should receive. It isolated age and education levels as inappropriate standards for determining which type of forum exists, without suggesting factors that should properly be considered.¹¹⁶ The court also rejected the notion that the distinction between curricular and extracurricular activities should determine what type of forum the newspaper existed in, again without discussing what a forum analysis *should* consider.¹¹⁷ Instead, the court discussed the variety of ways speech could exist in either a created forum or nonpublic forum by addressing various combinations of the forum factors.¹¹⁸

answer to the public-forum question, which does not (automatically) vary with the speakers' age.”).

113. See generally Postings of Adam Goldstein et al., <http://www.insidehighered.com/news/2005/06/21/governors> (June 21–July 27, 2005) (discussing that the *Hosty* decision provided immunity from civil liability but not talking about whether college officials have an “automatic right” to censor student publications); Memorandum from Christine Helwick, General Counsel for the California State University system, to CSU Presidents (June 30, 2005) (on file with author), available at <http://www.splc.org/csu/memo.pdf> (advising university presidents that *Hosty III* might provide CSU officials with “more latitude than previously believed to censor the content of subsidized student newspapers”).

114. See *Hosty III*, 412 F.3d at 737 (conceding that a reasonable trier of fact could conclude that the *Innovator* existed in a public forum).

115. See *supra* note 110 and accompanying text.

116. *Hosty III*, 412 F.3d at 735.

117. *Id.*

118. *Id.* at 737–38 (discussing possible facts that could alter the forum outcome, including

The court correctly stated that age does not determine whether speech occurs in a public or non-public forum, although it did not clarify if it was referring to the age of the speakers or the age of the audience.¹¹⁹ This is in accord with traditional public forum analysis that considers not one factor, such as age or funding, but the range of practices and policies affecting the situation.¹²⁰ The court also ruled out education level as a factor for determining the type of forum.¹²¹ The court then makes the illogical leap from requiring elementary schools to allow access to created public fora to allowing universities to exert influence over speech in a nonpublic forum.¹²² While both of these propositions are accurate, neither of them was determined by the speaker or audience's level of education, and the first proposition lends no support to the second. Rather, in both situations the Supreme Court first determined what type of forum existed and then looked at whether the government's actions were constitutional.¹²³ The Court continued this analysis by noting that *Rust* even allows the government to control adults' speech in non-public fora.¹²⁴ This statement, although accurate, does not directly acknowledge that the speech at question in *Rust* was considered the government's own speech.¹²⁵ This statement again provides no additional guidance for whether the *Innovator* was a public or nonpublic forum.¹²⁶ Instead, the court seemed to be listing a plethora of forum and educational variations in order to illustrate the complexity of determining what type of forum existed.¹²⁷

the possible role of Carter in supervising the Student Communications Media Board and the possible role of the newspaper's faculty adviser; but noting that "[n]one is on the record, however, so this possibility does not matter.").

119. *Id.* at 735 (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger*, 515 U.S. 819).

120. *Kincaid*, 236 F.3d at 349 (reviewing "the government's policy and practice . . . as well as to the nature of the property at issue and its 'compatibility with expressive activity'" and "the context within which the forum is found" to be determinative of the type of forum that existed) (citations omitted).

121. *Id.* at 735-36. *See also* *Good News Club v. Milford Cent. Sch.* 533 U.S. 98 (2001) (equating age with educational level). The Seventh Circuit's equation of age with education level is notable because opponents of college and university censorship normally argue that the age of the students should cast greater suspicion on censorship. Proponents of allowing a college or university to influence editorial content are more likely to posit that the school's interest in editorial control is part of its educational mission, which is not lessened by the older age of its students.

122. *Hosty III*, 412 F.3d at 735.

123. *See Good News Club*, 533 U.S. at 106 (holding that the state cannot base access to a limited public forum on the speaker's viewpoint). The Court rejected the argument that the public building being an elementary school has anything to do with granting groups access. *Id.* at 113-14. The Court found that the group's access had no effect upon the students because its meetings were after school hours, not sponsored by the school, and open to any student with his or her guardian's permission. *Id.*

124. *See Hosty III*, 412 F.3d at 735 (citing *Rust v. Sullivan*, 500 U.S. 173 (1991)) (overlooking that the Court considered adults' speech in *Rust* to be not only in a nonpublic forum, but also *government speech* expressing a legitimate policy preference).

125. *See id.*

126. *See id.*

127. *See id.* at 736 (raising tangential issues about the government's own speech and the

The majority also explores several hypothetical possibilities that would prevent the *Innovator*'s extracurricular status from determinatively indicating that the University had created a public forum. In stating that *Rust* and *Finley* would not make sense under a "bright line" test that divided all speech as either curricular or extracurricular, the court seemingly overlooked the possibility that whether something is curricular or extracurricular could be one of several features involved in determining the type of forum.¹²⁸ The court then again engages in a hypothetical exercise, describing how a publication could be outside of the college or university curriculum but still in a nonpublic forum.¹²⁹ The exception the court notes is that a college or university could hire students for the school's alumni magazine and then retain control over the content of the magazine.¹³⁰ Just as the court failed to recognize that *Rust* involved government speech, this example overlooks the determinative fact that the alumni magazine would still be the college or university's own speech. This discussion provides no guidance for how a court should conduct a forum analysis and merely serves as support for the court's later finding that attempting to engage in a forum analysis would have presented too many complexities for Dean Carter.

3. The Court's Own Perplexing Reasoning Muddles First Amendment Protections, But at the Time of the Censorship, the Law Was Settled

In the second prong of its analysis, the *Hosty* court looked at whether the students' First Amendment rights were clearly established at the time of Dean Carter's actions.¹³¹ To answer this question, the court largely relied on its own perplexing attempt at a forum analysis from the previous section, to conclude that Dean Carter should be granted qualified immunity.¹³² The court presumed that *Hazelwood* changed speech protections at colleges and universities and allowed Dean Carter to rely on that assumption.¹³³ In doing so, the court allowed Dean Carter to treat the *Innovator* as the least protected type of speech in an educational setting (speech that is part of a secondary school curricular activity) rather than speech that has traditionally enjoyed the greatest level of freedom (extracurricular speech in an institute of higher education). Additionally, the court failed to address the suggestion that Dean Carter may have actually known the *Innovator*

existence of nonpublic fora in the university context without clearly articulating the factors it would consider in a forum determination).

128. *See id.* (declaring that cases about the government's own speech, *Rust* and *Finley*, would be "inexplicable" if forum determinations were based on a curricular versus extracurricular distinction).

129. *Id.* (characterizing an alumni magazine as a publication outside the college and university curriculum, but not created as a public forum).

130. *Id.*

131. *See id.* at 739 (noting that "legal and factual uncertainties dog the litigation").

132. *See id.* at 738 (rationalizing that because the district court articulated two positions that the majority found inaccurate, Carter could not have been expected to correctly predict degrees of constitutional protections about which the judiciary was in disagreement).

133. *See id.* ("[T]he Supreme Court does not identify for future decision questions that have 'clearly established' answers.").

was a public forum.¹³⁴

When the Supreme Court declined to decide whether *Hazelwood's* deference to educators was appropriate in college and university settings, it did not purport to alter First Amendment protections in colleges and universities.¹³⁵ Rather, the decision has spared college and university students from this lower standard, presumably for various reasons, including maturity differences, differing educational missions, and the traditions of free expression on college and university campuses.¹³⁶ Still, in *Hosty*, the court allowed Dean Carter to take the gamble that a court might rely on *Hazelwood* instead of cases from both before and after *Hazelwood* that protect college and university student speech rights.¹³⁷ Indeed, it failed to acknowledge one of its own prior rulings positing that the Supreme Court does not have to speak for law to be "clearly settled."¹³⁸ While the court asserted that the Supreme Court does not reserve settled areas of law for future decision,¹³⁹ it overlooked the protections the Court subsequently afforded student speech in cases such as *Rosenberger* and *Southworth*.

Though the court does list the three cases that have applied *Hazelwood* to university settings,¹⁴⁰ it makes no reference to the fact that each of those cases was about either the university controlling its own speech or exerting its authority over academic areas.¹⁴¹ Additionally, even in those few cases, the courts predominantly relied on the traditional practice, supported by *Hazelwood*, of leaving academic

134. See *supra* note 131 and accompanying text.

135. See *supra* note 1 and accompanying text.

136. See David G. Savage, *Justices OK Censorship by Schools; Say Educators Can Control Content of Pupil Publications*, L.A. TIMES, Jan. 14, 1988, at 1 (reporting that the decision did not apply to higher education); Stuart Taylor, *Court, 5-3, Widens Power of Schools to Act as Censors*, N.Y. TIMES, Jan. 14, 1988, at A1 (reporting that the Court "has suggested" that constitutional rights receive broader protections in university settings). See also sources cited *supra* note 60.

137. But see *Hosty III*, 412 F.3d at 743 (Evans, J., dissenting) (maintaining that the question should have been whether anything "after *Hazelwood* . . . would suggest to a reasonable person in Dean Carter's position that she could prohibit publication simply because she did not like the articles it was publishing?"). Cf. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (6-3 decision) (holding that officials can be on notice that their conduct violates the law in novel factual situations without prior caselaw involving "fundamentally similar" or "materially similar" facts); but cf. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (6-3 decision) (requiring that the contours of a right be "sufficiently clear" and that "in the light of pre-existing law the unlawfulness must be apparent" to deny qualified immunity).

138. See *Burgess v. Lowery*, 201 F.3d 942, 945 (7th Cir. 2000):

To rule that until the Supreme Court has spoken, no right of litigants in this circuit can be deemed established before we have decided the issue would discourage anyone from being the first to bring a damages suit in this court; he would be *certain* to be unable to obtain any damages.

Id.

139. *Hosty III*, 412 F.3d at 738. "The question had been reserved in *Hazelwood*, and the Supreme Court does not identify for future decision questions that already have "clearly established" answers." *Id.* (citations omitted).

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

141. See *Hosty III*, 412 F.3d at 738-39.

matters to the discretion of educators.¹⁴²

Finally, the court overlooked a reference indicating that Dean Carter may have actually known the *Innovator* was a public forum.¹⁴³ If true, this should have been enough to preclude immunity, regardless of the court's application of *Hazelwood* to a university setting.¹⁴⁴ Though the *Hosty* court's decision is less than clear about how, or even if, it would apply the *Hazelwood* standard to a public forum, the court itself noted earlier in the decision that in a public forum there is "no censorship allowed."¹⁴⁵ The court should have consistently applied that standard—even if it was unclear whether *Hazelwood* could have applied to universities—because in a public forum any controls over content must be narrowly tailored to meet a compelling state interest.

Whether *Hazelwood* currently applies in any way to college and university speech should not affect whether First Amendment protections were clear at the time of Dean Carter's actions. When Dean Carter called the printer, no court had analyzed content controls in a public forum, university or not, under the *Hazelwood* standard.¹⁴⁶ Still none have except the *Hosty* court. Further, even if *Hazelwood* applies generally in college and university settings, as the Seventh Circuit points out, its application "depends in large measure on the operation of a public-forum analysis."¹⁴⁷ This would require Dean Carter to evaluate her actions under a public forum analysis whether or not *Hazelwood* applied.¹⁴⁸ Although in a public secondary school *Hazelwood* supports the presumption that a school newspaper is a nonpublic forum unless the school has taken measures to turn it into one,¹⁴⁹ a reasonable public official should still make an initial inquiry to see

142. See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1292 n.14 (10th Cir. 2004) (citing *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)); *Brown v. Li*, 308 F.3d 939, 950 (9th Cir. 2002) (citing *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978)); *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991) (entrusting the University to protect the academic freedom of its professors when creating policies about professors' in-class speech). Cf. *Ewing*, 474 U.S. at 225–26 & nn.11–12 (stating that judges may not reverse academic decisions unless they have sufficient evidence that the decisions are so far departed from academic norms to demonstrate that they were made with no actual exercise of professional judgment); *Horowitz*, 435 U.S. at 90 (accepting that academic decisions required expert evaluations and were "not readily adapted to the procedural tools of judicial or administrative decisionmaking").

143. See *Hosty III*, 412 F.3d at 744 (Evans, J., dissenting) ("Defendants concede that the *Innovator* serves as a public forum." (quoting *Hosty I*, 174 F. Supp. 2d at 786)). But see *Brief, supra* note 12, at *20–*21 (contending that the *Innovator* did not exist in a public forum).

144. See *Hosty III*, 412 F.3d at 733. Though the court does not indicate how it would evaluate a claim of qualified immunity when the official had actual knowledge of one of the elements of that constitutional right, it seems suspect that the majority disregarded this possibility.

145. See *id.* at 735 (declaring that in a public forum, no censorship is allowed). In making this statement, the court did not determine whether *Hazelwood* applies to universities. *Id.*

146. See *id.* at 743–44 (noting that all of the cases the majority cited applied to speech in either a curricular setting, or in a setting where the college or university was the speaker).

147. See *id.* at 738 (refuting its previous characterization of *Hazelwood* as allowing editorial control whenever a schools "pays").

148. See *id.*

149. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (declaring that a school

whether the school has taken any of these steps.

B. Dissenting Opinion

The *Hosty* dissent, written by Judge Evans, persuasively argued that Dean Carter should not have been afforded qualified immunity.¹⁵⁰ His basis for that determination was that the alleged constitutional violation was based upon a clearly established right.¹⁵¹ According to Judge Evans' analysis, until the majority's decision, no court had applied *Hazelwood* to an extracurricular activity in a university setting.¹⁵² While both the majority and dissenting opinions recognized that the Supreme Court left the question of *Hazelwood*'s applicability in college and university settings unanswered, Judge Evans recognized this to mean that Dean Carter should have realized that *Hazelwood* did not actually change the legal landscape protecting university speech. Additionally, Judge Evans accurately recognized that the few cases the majority cited for applying *Hazelwood* in a university setting were limited to determining the university's own speech or exerting its authority over academic matters.¹⁵³

Judge Evans took the position that the *Hazelwood* standard should have no place "in the world of college and graduate school" and suggested establishing a grade level cut-off for *Hazelwood*.¹⁵⁴ This position directly answers the question the Supreme Court alluded to in the footnote that had been looming over student media for nearly two decades.¹⁵⁵ By providing a straightforward analysis of the issues at hand, Judge Evans clearly articulated support for the marketplace of ideas at public colleges and universities.¹⁵⁶

facility should not be presumed to be a public forum because officials took no action to prevent it from becoming one or permitted limited discourse, but rather requiring that a school take intentional steps to open a forum).

150. See *Hosty III*, 412 F.3d at 739–44 (Evans, J., dissenting).

151. See *id.* at 740 (describing the First Amendment principles at stake as "clear").

152. See *id.* at 743–44 (citing *Student Gov't Ass'n v. Bd. of Trs. of Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (stating that *Hazelwood* is not applicable to university newspapers); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (en banc) (declining to apply the *Hazelwood* reasonableness standard to a university yearbook).

153. See *Hosty III*, 412 F.3d at 743–44.

154. See *id.* at 739 (noting that grade level is a "very good" indicator of age, which "has always defined legal rights").

155. See *Hazelwood*, 484 U.S. at 273 n.7 (1988) (noting "[w]e need not now decide" if the decision's standards apply in higher education).

156. See *Hosty III*, 412 F.3d at 740–42 ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large." (quoting *Healy v. James*, 408 U.S. 169, 180 (1972))).

III. SIGNIFICANCE AND AFTERMATH OF *HOSTY*

A. Implications

The conflicts at Governors State University chilled speech at the campus.¹⁵⁷ The *Innovator* was never published after Dean Carter's phone calls.¹⁵⁸ When a new student newspaper was established several years later, the administration attempted to institute a formal prior review policy.¹⁵⁹ When the student editor of the new newspaper refused to comply with the prior review policy, a new conflict was born and the university refused to publicly discuss its policy toward student publications.¹⁶⁰

By allowing Dean Carter to escape liability without clearly articulating how *Hazelwood* should apply or without providing guidance for forum analysis in educational settings, the majority decision could become another looming threat over the heads of student media.¹⁶¹ Vague standards raise particular concerns in the context of the First Amendment because of their potentially irreversible chilling effects.¹⁶² An Illinois district court has relied on the *Hosty* decision to hold that "[m]any aspects of the law with respect to students' speech, not only the role of age, are difficult to understand and apply."¹⁶³ The general counsel for the California State University system issued a memorandum to university presidents suggesting that they might have more authority than previously thought to control student speech.¹⁶⁴

To see how the *Hosty* decision could affect college and university media, one need only look at how *Hazelwood* has affected student media in secondary education. In the majority of instances, administrators have been permitted to control student media and turn it into a promotional tool for the schools, devoid of any educational element for its student participants.¹⁶⁵ As a result, students are not

157. See Joseph Sjostrom, *Paper Overlooked After Censorship Storm*, CHI. TRIB., July 8, 2003, at 1 (noting that the school was without a student newspaper for a year and that the replacement paper has struggled to become relevant); Joseph Sjostrom, *Student Editors' Lawsuit Delayed; Censorship Case Gets New Hearing*, CHI. TRIB., June 28, 2003, at 16.

158. See Wronski, *supra* note 22, at 6.

159. See sources cited *supra* note 157.

160. *Id.*

161. See generally, Mark J. Fiore, Comment, *Trampling the "Marketplace of Ideas": The Case Against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915 *passim* (2002) (noting a 1997 study that found only one of 101 daily college newspapers surveyed was "strongly curriculum based"). This could suggest that many student newspaper editors believe they exist as a public forum and would be uncertain as to how *Hazelwood* or *Hosty* might apply to them. *Id.*

162. See *Reno v. ACLU*, 521 U.S. 844, 845 (1997) (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048–51 (1996)) (explaining the dangers in chilling speech through vagueness).

163. *Brandt v. Bd. of Educ. of City of Chi.*, 420 F. Supp. 2d 921, 935 (N.D. Ill. 2006) (granting an elementary school principal qualified immunity for disciplining students who wrote "gifties" on class T-shirt).

164. See Memorandum from Christine Helwick, *supra* note 113.

165. See generally Brief for Student Press Law Center et al. as Amici Curiae Supporting

encouraged to pursue hard-hitting stories and often leave a journalism education course with little practice or guidance on the proper ways one would pursue such stories. These results harm both journalism students and other students who lose exposure to how the media interacts with society.

The chilling effects of *Hosty* may not be limited to college and university media. As *Hazelwood* has been applied to allow control over student government campaign posters and to ban students from wearing certain T-shirts, these decisions could lend support for colleges and universities to prohibit student groups from displaying a particular sign on the campus green or from bringing a particular speaker to a campus rally.¹⁶⁶ Further, because the Seventh Circuit was unclear on the role of funding in a forum analysis, a court broadly interpreting the case could determine that independent newspapers and other speech benefiting from any college or university connection might be subject to the administration's controls.

Additionally, colleges and universities could become vulnerable to liability for the content of their student publications or even for the content of any student speech that was connected with the school.¹⁶⁷ While state colleges and universities have until now been insulated from any legal actions against their student press—based on the principle that they had no legal ability to control or review content¹⁶⁸—this would no longer be the case. With colleges and universities susceptible to liability, it is less likely that they would encourage students to pursue controversial stories, which are more likely to lead to libel claims. The interest of colleges and universities in avoiding liability, and their mission of education and encouraging a marketplace of ideas will be in direct conflict with each other. For this reason, legal protections for speech should be determined by judges not college and university administrators.

B. Recommendations

Because the Supreme Court denied certiorari, the best possible outcome from this decision is for future courts to recognize the flaws in the *Hosty* court's analysis, to reject its application of *Hazelwood* to university settings, and to recognize the broad First Amendment protections that college and university students have historically enjoyed. This may keep *Hazelwood* from being read as implying either that colleges and universities should be assumed to be nonpublic fora or that administrators can rely on pedagogical concerns to regulate the private

Petitioners, *Hosty v. Carter*, 126 S. Ct. 1330 (2005) (No. 05-377), 2005 WL 2736314 (noting that *Hazelwood* has been used to support regulating “virtually any form of teacher and student speech”) [hereinafter *Amicus Brief*]; Peltz, *supra* note 91, at 484 (describing student journalists as “cheerleaders, helplessly purveying school spirit” and no longer learning how to research or report stories, to the detriment of society's future news media).

166. See *Amicus Brief*, *supra* note 165, at *12 (citing *Brandt v. Bd. of Educ. of City of Chi.*, 326 F. Supp. 2d 916, 921 (N.D. Ill. 2004) (campaign poster censorship); and *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004) (T-shirt censorship)).

167. See, e.g., *supra* note 9.

168. *Id.* See generally Nancy J. Whitmore, *Article: Vicarious Liability and Private University Student Press*, 11 COMM. L. & POL'Y 255 (2006).

speech of adult students.

Even if, as the *Hosty* court held, other circuits hold that *Hazelwood* applies to college and university settings, it is important to consider how the Seventh Circuit intended *Hazelwood* to apply. The *Hosty* court was unclear whether *Hazelwood* should apply to support the proposition that in college and university settings there should be a presumption against a public forum; or to support the proposition that its deferential reasonableness standard should apply to colleges and universities. The lesser of two evils would be to interpret *Hazelwood* narrowly as standing only for the proposition that a college or university may not automatically be considered a public forum. This would require administrators to review whether they had explicitly created an open forum where censorship is not permitted. This analysis should look at a variety of factors, including whether the speech is part of a curricular activity, whether the speech is college or university speech or student speech, and whether there has been a past practice or policy regarding the school's control of the speech.

Beyond judicial challenges, students and free-speech supporters can make efforts to establish a public forum on their campus by encouraging college and university leaders to sign pledges recognizing that they intend to let campus media exist without any influence or control of the school.¹⁶⁹ They can also lobby for state laws to provide a higher level of protection for speech.¹⁷⁰ Arkansas, California, Colorado, Iowa, Kansas, and Massachusetts have passed such laws to protect students' speech rights, and the Oregon and Illinois legislatures are considering proposing similar protections.¹⁷¹ Finally, students always have the option to take their speech off campus by producing their own newspapers or, more likely with today's technological advances, Web sites or blogs.¹⁷² While

169. See Student Press Law Center, *Hosty v. Carter* Information Page, <http://www.splc.org/legalresearch.asp?id=49> (last visited Mar. 7, 2007) (providing sample language for this type of agreement). According to the SPLC, five universities in the Seventh Circuit, including Illinois State University, Ball State University, the University of Southern Indiana, Indiana University Bloomington, and University of Wisconsin-Platteville, have signed this type of agreement.

170. See generally Chris Sanders, *Censorship 101: Anti-Hazelwood Laws and the Preservation of Free Speech at Colleges and Universities*, 58 ALA. L. REV. 159 (2006) (recommending state statutes as the best way to protect students' rights and discussing statute language).

171. ARK. CODE ANN. §§ 6-18-1201–6-18-1204 (2006); CAL. EDUC. CODE §§ 48907, 48950 (West 2006); COLO. REV. STAT. § 22-1-120 (1998); IOWA CODE § 280.22 (1996); KAN. STAT. ANN. §§ 72-1504–72-1506 (2005); MASS. GEN. LAWS ANN. ch. 71, § 82 (West 1996). See also *Oregon Legislator Prepares Free Press Bill Modeled After Washington State Bill*, STUDENT PRESS LAW CTR., March 2, 2007, <http://www.splc.org/newsflash.asp?id=1456> (describing efforts in Oregon to create a law protecting high school and college students from censorship); *Illinois State Legislators to Consider Collegiate Free Press Bill*, STUDENT PRESS LAW CTR., March 2, 2007, <http://www.splc.org/newsflash.asp?id=1455> (describing an Illinois bill that would reverse the effect of the *Hosty* decision in the State).

172. The ability of colleges and universities to control content on their Internet servers is likely a topic for another paper. Additionally, colleges and universities could attempt to control distributions on campus or create policies to discourage students from posting information on the internet. See generally Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student*

students do not shed their freedoms at the schoolhouse gate,¹⁷³ they have a much stronger grasp on them from the other side of it. While taking speech off campus is the ultimate foil to censorship, this decision has its own drawbacks. For example, once off campus, students may no longer receive the guidance of knowledgeable advisers and may miss out on important aspects of a traditional journalism education.

CONCLUSION

The *Hosty* decision allowed a university administrator to engage in the most egregious form of censorship, prior restraint.¹⁷⁴ By engaging in a shoddy forum analysis, the *Hosty* court was able to support its ultimate finding that First Amendment protections for student newspapers at public universities were unclear. The First Amendment lists the freedom of the press explicitly, and this textual distinction has become a part of why some consider governmental attacks on the press to be the epitome of a First Amendment violation. In 1978, Justice Potter Stewart posited that the separate textual reference for press and speech was “no constitutional accident, but an acknowledgment of the critical role played by the press in American society” and urged courts to recognize that “[t]he Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively.”¹⁷⁵

The *Hosty* decision is typical of the increasing hostility toward the media that has come from the Seventh Circuit. In the summer of 2005, Judge Posner, a member of the Seventh Circuit who joined the *Hosty* majority, reshaped critiques of the media on the front page of the New York Times book section.¹⁷⁶ While attributing the unsupported claims to groups such as “the right,” “liberals,” and “the media,” Posner used the opportunity to proclaim that the media simply responds to the market, and that the principles of self-governance and serving the public interest are merely lofty ideals. Previously, the Seventh Circuit had issued a broad opinion ridiculing the notion that the Constitution provides any support for a reporters’ privilege.¹⁷⁷ This decision has been cited by numerous courts, thus indicating the influence of the Seventh Circuit and some of its feelings toward media protections.¹⁷⁸ While perhaps the *Hosty* decision should not have been

Internet Speech, 89 VA. L. REV. 139 (2003).

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

174. See generally *New York Times v. United States*, 403 U.S. 713, 714–21 (1971) (Black, J., concurring) (describing the historical presumptions against prior restraints and the threats they have on individual liberties, because a prior restraint is both directly in conflict with the literal interpretation of the First Amendment, and strays from the presumption that speech is permissible).

175. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 17 (1978) (Stewart, J., concurring).

176. See Richard A. Posner, *Bad News*, N.Y. TIMES, July 31, 2005, §7, at 1.

177. See *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003) (opinion by Posner, J.) (refusing to stay an order compelling journalists to produce tape recordings of interviews).

178. See, e.g., *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004) (affirming a civil contempt order for a journalist who refused to answer questions posed by a special prosecutor); *New York Times v. Gonzales*, 382 F. Supp. 2d 457, 485 (S.D.N.Y. 2005), *vacated and remanded*

surprising given these circumstances, it has the potential to be nonetheless devastating.

In 1972, long before many of today's college and university students were born, the Supreme Court declared in *Healy v. James* that it was "break[ing] no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."¹⁷⁹ The decision determined that a university could not deny a student group recognition out of fear that the group could cause campus disturbances.¹⁸⁰ Rather, it noted that denying the group recognition was an impermissible burden on the students' ability to participate in campus discourse.¹⁸¹ In *Hosty*, the University had not even claimed that the newspaper caused a disruption to the campus; only that the University had a right to censor it. If a case similar to *Healy* were to arise in another circuit today, the courts might rely on *Hosty* to defer to the college or university's determination about what would disturb the campus. Though the Court in *Healy* said it was breaking "no new constitutional ground" with its decision, for the next generation of college and university students, its First Amendment protections could be considered revolutionary.

by, 459 F.3d 160 (2d Cir. 2006) (denying a reporters' privilege protecting phone records); *Lentz v. City of Cleveland*, 410 F. Supp. 2d 673, 701 (N.D. Ohio 2006) (granting a motion to compel a reporter to reveal a confidential source).

179. See *Healy v. James*, 408 U.S. 169, 180–81 (1972) (describing its efforts to protect speech as upholding the traditional principles that have protected free speech within an educational context).

180. *Id.*

181. *Id.*

