

A House Divided: How Judicial Inaction and a Circuit Split Forfeited the First Amendment Rights of Student Journalists at America's Universities

by RICHARD BRADLEY NG*

I. Introduction

In *Hazelwood School District v. Kuhlmeier*,¹ the Supreme Court of the United States examined whether or not a high school principal's review and censorship of a student newspaper offended the First Amendment.² Although the Court held that high school administrators were accorded a high degree of deference in such circumstances,³ the Court expressly left the question open over whether or not the analytical framework of *Hazelwood* was applicable to the university setting.⁴ Without clear

* J.D. Candidate 2008, University of California, Hastings College of the Law; B.A. History and Political Science 2005, University of California, Los Angeles. I would like to first thank my family for all of their unconditional love and support. My heartfelt appreciation also goes to Brittany Yang, Nikol Kim, Emilio Gancayco, Raj Singh Badhesha, Jarrod Martin, and Armen Adzhemyan for all of their comments, support, and laughs. I would like to also thank Paul Keller for his thoughtful comments and help. Finally, I would like to sincerely thank Assistant United States Attorney Tom Moore for all his support and, most importantly, for concealing me from our then division chief, Jay Weill, for most of the work day to give me the precious time to finish this note before the deadline. This Note is dedicated to all who have sworn to uphold and protect the Constitution, but most importantly, my younger brother, Cadet Andrew Ng (U.S.M.A. – West Point), First Lieutenant Rishi Srinivasan (U.S.M.C.), and First Lieutenant Santino Maffei (U.S.A.).

1. 484 U.S. 260 (1988).

2. *Id.* at 262.

3. *Id.* at 271-73.

4. *Id.* at 273 n.7 (“A number of lower federal courts have similarly recognized that educators’ decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference.”); *see, e.g.*, *Nicholson v. Bd. of Educ., Torrance Unified Sch. Dist.*, 682 F.2d 858 (9th Cir. 1982); *Seyfried v. Walton*, 668 F.2d 214 (3d Cir. 1981); *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978); *Frasca v. Andrews*, 463 F. Supp. 1043 (E.D.N.Y. 1979) (“We need

guidance from the Supreme Court, the federal circuit courts have split on whether or not the *Hazelwood* framework is applicable to the university setting,⁵ leading to the current state of affairs in the United States: where geographic location determines both the scope of public university student journalists' First Amendment rights and the states' authority to regulate university-sponsored speech at state-sponsored universities.

Since the circuits have split on the applicability of *Hazelwood* to the university setting, geography defines the extent of both a student journalist's First Amendment rights and the states' ability to regulate university-sponsored speech at public universities.⁶ Although the Court adopted a "wait-and-see" approach⁷ in *Hazelwood*,⁸ the time has come for the Supreme Court to address the issue. Not only has the circuit split created geographic disparities in the application of the First Amendment to

not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.").

5. See generally *Student Gov't Ass'n v. Bd. of Trs. of Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (holding that *Hazelwood* is not applicable to student newspapers at public universities); *Kincaid v. Gibson*, 236 F.3d 342, 346 n.5 (6th Cir. 2001) (en banc) (suggesting, without deciding, that *Hazelwood* is not applicable to the college context); *Hosty v. Carter*, 412 F.3d 731, 735 (7th Cir. 2005) (en banc) (holding that *Hazelwood*'s framework applies to subsidized student newspapers at public universities); *Hudson v. Craven*, 403 F.3d 691, 700-01 (9th Cir. 2005) (explicitly reserving the question of the extent *Hazelwood* applies to the university setting); *Brown v. Li*, 308 F.3d 939, 949 (9th Cir. 2002) (holding that *Hazelwood* is applicable to a university's regulation of a student's curricular speech); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1288-89 (10th Cir. 2004) (holding that *Hazelwood* is applicable to curricular speech in a university setting); *Bishop v. Aronov*, 926 F.2d 1066, 1071 (11th Cir. 1991) (holding that *Hazelwood* is applicable to the university setting); see also *Urofsky v. Gilmore*, 216 F.3d 401, 433 (4th Cir. 2000) (en banc) (Wilkinson, C.J., concurring) (suggesting that the approach and rationale of *Hazelwood* is equally applicable to the university context).

6. Since the First Amendment applies only against the federal and state governments, *Hazelwood* could only apply to public universities, and as such, this note will not discuss the interplay between university administrators' ability to regulate and student journalists' First Amendment interests at private universities. See generally *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 114 (1973); *Public Util. Comm'n v. Pollak*, 343 U.S. 451, 461 (1952); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). For discussion on student journalists' rights in the private university context, see generally Nancy J. Whitmore, *Vicarious Liability and the Private University Student Press*, 11 COMM. L. & POL'Y 255 (2006).

7. See generally *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (holding that the Court is without jurisdiction on grounds of mootness, refusing to pass upon constitutionality of affirmative action policies, yet vacating the decision of the Washington Supreme Court rather than simply dismissing the writ of certiorari for want of jurisdiction); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

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

university student journalists,⁹ but, most importantly, the split has opened a qualified immunity loophole that can easily be exploited by university administrators who can claim, somewhat legitimately, that *Hazelwood* and the subsequent circuit split on the applicability of the *Hazelwood* standard to the college context has left the law unsettled.¹⁰ Hence, as shown in *Hosty v. Carter*,¹¹ under *Saucier v. Katz*,¹² any public university official who exercises a prior restraint on university-sponsored student publications will escape 42 U.S.C. § 1983 liability¹³ through qualified immunity¹⁴ because the law is not “clearly established.”¹⁵ Ultimately, the Supreme Court’s failure to address whether *Hazelwood* is applicable to public universities, and the resulting circuit split has constructively forfeited university student journalists’ remedies against First Amendment encroachments by university officials. Hence, the Court must address the issue and either reject or accept the application of *Hazelwood* to the university context. By devising a uniform rule,¹⁶ the Supreme Court can both clarify the rights and obligations of students and universities regarding university-sponsored publications. Most importantly, by making the law clearly established, the Court will close the qualified immunity loophole and restore university student journalists’ First Amendment rights.

This note will begin by exploring the background and application of *Hazelwood*,¹⁷ briefly touching upon First Amendment forum analysis,¹⁸ and

9. *Hosty*, 412 F.3d at 738-39; *see also supra* note 5.

10. *Hosty*, 412 F.3d at 738-39; *see also Brown*, 308 F.3d at 954.

11. *Hosty*, 412 F.3d at 731-39.

12. 533 U.S. 194 (2001).

13. 42 U.S.C. § 1983 (2007) provides that: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.” Essentially, § 1983 creates a remedy, be it an action at law, suit in equity, or other proper proceeding for redress, to parties deprived of their constitutional rights by an official’s abuse of his or her position. *See, e.g., Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978); *Monroe v. Pape*, 365 U.S. 167 (1961).

14. Qualified immunity exists to protect governmental officials from being liable for damages when “their conduct does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added); *see also infra* Part IV.A.

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

16. *See infra* Part V.

17. *See infra* Part II.

laying out the legal arguments made on both sides of the *Hazelwood* debate.¹⁹ The note will then discuss how federal appellate courts, without guidance from the Supreme Court, have split on the applicability of *Hazelwood* to the university context,²⁰ and the implications of that circuit split on university student journalists' First Amendment rights in the context of qualified immunity. The note then points out that as long as the circuit courts remain split on the applicability of *Hazelwood* to the college setting, qualified immunity protects administrative infringement of university student journalists' First Amendment rights.²¹ The note concludes by urging the Supreme Court to close the qualified immunity loophole by granting certiorari and settling whether or not *Hazelwood* applies to the university setting.²²

II. The Background and Application of *Hazelwood*

In *Hazelwood*, the principal of Hazelwood East High School removed articles from a school-sponsored newspaper for various pedagogical reasons.²³ The Court upheld the constitutionality of this action, holding that a "school must be able to set 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 may refuse to disseminate student speech that does not meet those standards."²⁴ Under *Hazelwood*, high school administrators are allowed to edit or censor student speech when the speech is promulgated in a non-public forum, such as a school-subsidized newspaper.²⁵ Furthermore, the Court held that the school retained the authority to refuse to sponsor student speech that could be construed to associate the school with inappropriate conduct or any position other than neutrality on issues of controversy.²⁶ The Court expressly reserved judgment as to whether or not

18. See *infra* Part II.A.

19. See *infra* Part II.B.

20. See *infra* Part III.

21. See *infra* Part IV.

22. See *infra* Part V.

23. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263-64 (1988).

24. *Id.* at 271-72.

25. *Id.* at 269.

26. *Id.* at 272 ("A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order,' *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986), or to associate the school with any position other than neutrality on matters of political controversy.").

the *Hazelwood* standard would be applicable to the college setting.²⁷ As a result, the various circuit courts have adopted different rules regarding the applicability of *Hazelwood* to the college setting, some applying *Hazelwood* entirely,²⁸ some rejecting *Hazelwood* entirely,²⁹ others limiting its application of *Hazelwood*,³⁰ and others refusing to pass upon the issue, instead waiting for the Supreme Court to provide guidance.³¹

A. Distinguishing Various Fora

Often, as was the case in *Hazelwood* and *Hosty*, the crucial analytical juncture for a court in student media First Amendment cases is determining whether the student media³² at issue is a public forum or a non-public forum.³³ In determining the level of restriction the government can place on property³⁴ it controls, the Supreme Court has promulgated a two-part forum analysis.³⁵ The Court must first determine whether the forum at issue is public or non-public and then evaluate whether or not the speech restrictions in question meet the required standard for that type of forum.³⁶ In the context of First Amendment free speech jurisprudence, the Court has established three categories of fora: the traditional public forum, the

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

28. *Bishop v. Aronov*, 926 F.2d 1066, 1074-75 (11th Cir. 1991); *Hosty v. Carter*, 412 F.3d 731, 735 (7th Cir. 2005) (en banc).

29. *Kincaid v. Gibson*, 236 F.3d 342, 346 (6th Cir. 2001) (en banc); *Student Gov't Ass'n v. Bd. of Trs. of Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989).

30. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004); *Brown v. Li*, 308 F.3d 939, 949-51 (9th Cir. 2002).

31. *Hudson v. Craven*, 403 F.3d 691, 700-01 (9th Cir. 2005); see also *Urofsky v. Gilmore*, 216 F.3d 401, 433 (4th Cir. 2000) (en banc) (Wilkinson, C.J., concurring) (suggesting, without holding, that the approach and rationale of *Hazelwood* is equally applicable to the university context, a point the majority did not address).

32. Although the *Hazelwood* Court, along with the courts in *Axson-Flynn*, *Brown*, *Hosty*, *Kincaid*, and *Student Gov't Ass'n*, all discussed various forms of written or print expression, the analytical structure and rationale for these decisions would be just as applicable to other forms of student media, such as radio or television, as it is to student newspapers. See *Hazelwood*, 484 U.S. at 273 ("school-sponsored publication, theatrical production, or other vehicle of student expression") (emphasis added); *Bishop*, 926 F.2d at 1070-71 (applying *Hazelwood* to a university classroom and instructor oral speech); see also *Hosty*, 412 F.3d at 737-38.

33. *Hazelwood*, 484 U.S. at 267-68; *Hosty*, 412 F.3d at 735-37.

34. A newspapers' publisher, like any other business, is considered a property interest. See *United States v. Patrick*, 372 U.S. 53, 55 (1963). Additionally, "[t]he publication of a newspaper or magazine is strictly a private business that may be started or discontinued at the will of the publisher." 58 AM. JUR. 2D *Newspapers, Periodicals, and Press Associations* § 7 (2006); see also *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951).

35. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

36. *Id.*

designated public forum, and the non-public forum.³⁷ These distinctions are crucial, as the scope of governmental power to regulate speech is defined by the type of forum involved;³⁸ restrictions exceeding the scope of that power run afoul of the First Amendment.³⁹

1. *Traditional Public Fora*

Traditional public fora include places that have traditionally been open to public expression,⁴⁰ such as sidewalks or public plazas.⁴¹ The Supreme Court made clear that any content regulation of speech in a traditional public forum was subject to strict scrutiny:⁴² The regulation of speech must serve a compelling governmental interest and be narrowly drawn to achieve that interest.⁴³ Moreover, in a traditional public forum, “[t]he State may also enforce [content-neutral] regulations of the time, place, and manner of expression which are . . . narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”⁴⁴ In effect, the strict scrutiny standard, as applied to First Amendment free speech claims, means, as the *Hosty* court noted, “no censorship [is] allowed.”⁴⁵

2. *Designated Public Fora*

The second category, designated public fora, is composed of property the government has intentionally opened to the general public for expressive activity.⁴⁶ The creation of a designated public forum is not accidental, but rather, as the Supreme Court made clear in *Cornelius*, “[t]he government does not create a public forum by inaction or by permitting

37. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-47 (1983).

38. *Id.* at 44-47.

39. *Id.*; see also *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515-16 (1939).

40. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995); see also *Perry*, 460 U.S. at 45; 16A AM. JUR. 2D *Constitutional Law* § 519 (2006).

41. *Perry*, 460 U.S. at 45 (citing *Hague*, 307 U.S. at 515); see also *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).

42. See, e.g., *Carey v. Brown*, 447 U.S. 455, 461-62 (1980); see also 16A AM. JUR. 2D *Constitutional Law* § 387 (2006).

43. *Perry*, 460 U.S. at 45 (citing *Carey*, 447 U.S. at 461) (“In these quintessential public forums, the government may not prohibit all communicative activity. 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.”).

44. *Id.* at 45 (citing *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981); *Consolidated Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 535-36 (1980); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Cantwell v. Conn.*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939)).

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

46. *Perry*, 460 U.S. at 45-46.

limited discourse, but only by intentionally opening up a forum for public discourse.”⁴⁷ The government can create a designated public forum for the limited purposes of use by specific groups, or for the discussion of certain topics.⁴⁸ Likewise, the government is not required to retain the open nature of the forum for perpetuity,⁴⁹ but as long as it does, “it is bound by the same standards as apply in a traditional public forum.”⁵⁰ Hence, as in a traditional public forum, “[r]easonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.”⁵¹ Although the government may engage in content discrimination⁵² to preserve the limits of the designated public forum, the government cannot engage in viewpoint discrimination, even in a designated public forum of its own creation.⁵³

The Court has made it clear that the right to free speech in a public forum extends to public universities,⁵⁴ and hence, determining whether a student publication⁵⁵ can be classified as a public forum, either traditional or designated,⁵⁶ or a non-public forum, necessarily defines the scope of First Amendment protection available to the student publication and university authority to regulate student speech.⁵⁷

3. *Non-Public Fora*

Finally, the third category of government property is the non-public forum, which is composed of places that have not traditionally been

47. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

48. *Perry*, 460 U.S. at 45 n.7 (citing *Widmar v. Vincent*, 454 U.S. 263 (1981); *City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm’n*, 429 U.S. 167 (1976)).

49. *Id.* at 46.

50. *Id.*

51. *Id.*

52. Content-based discrimination must be narrowly drawn and serve a compelling governmental interest. *See Perry*, 460 U.S. at 46.

53. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-30 (1995); *see also id.* at 829 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)) (“When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant . . . [v]iewpoint discrimination is thus an egregious form of content discrimination.”).

54. *Widmar*, 454 U.S. at 268; *see also* 16A AM. JUR. 2D *Constitutional Law* § 522 (2006); *cf. Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

55. The *Hazelwood* framework is equally applicable to other forms of student media. *See supra* note 32.

56. *See supra* text accompanying notes 49-51.

57. *See supra* text accompanying notes 38-39.

designated for public expressive activity.⁵⁸ The Supreme Court has made clear that the “First Amendment does not guarantee access to property simply because it is owned or controlled by the government.”⁵⁹ Rather, in a non-public forum the government is given wide regulatory latitude.⁶⁰ As the *Perry* Court made clear, “[i]n addition to time, place, and manner regulations, the [government] 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.”⁶¹ Thus, as long as a governmental regulation on free speech is reasonable and not tantamount to viewpoint discrimination, the regulation will stand,⁶² for state educators, at all levels, this standard allows for an enormous amount of judicial deference.⁶³

4. *Hazelwood Only Applies to Non-Public Fora*

Hence, in the university context, student media classified as non-public fora are subject to administrative review.⁶⁴ Administrative review of student media is proper, as long as the rationale for the review is reasonable and not meant to suppress opposing viewpoints.⁶⁵ It is within this category, and this category alone, that *Hazelwood* is applicable.⁶⁶

58. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

59. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129 (1981); *see also United States v. Kokinda*, 497 U.S. 720, 725 (1990); 16A AM. JUR. 2D *Constitutional Law* § 518 (2006).

60. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985); *Perry*, 460 U.S. at 46; *see also* 16A AM. JUR. 2D *Constitutional Law* § 519 (2006).

61. *Perry*, 460 U.S. at 46; *see also Adderley v. Florida*, 385 U.S. 39, 47 (1966) (“[the] State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”).

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

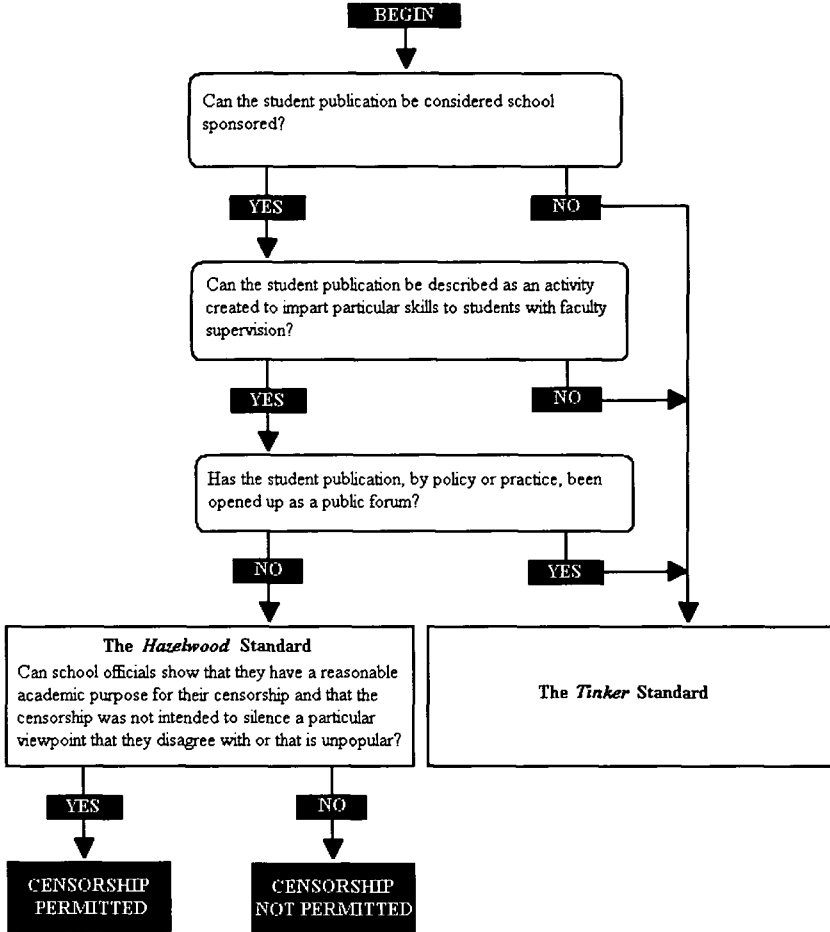
63. *See generally Grutter v. Bollinger*, 539 U.S. 306, 328 (2003); *Hazelwood Sch. Dist v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985); *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96 n.6 (1978); *Wood v. Strickland*, 420 U.S. 308, 325 (1975); *Nicholson v. Bd. of Educ., Torrance Unified Sch. Dist.*, 682 F.2d 858 (9th Cir. 1982); *Seyfried v. Walton*, 668 F.2d 214 (3d Cir. 1981); *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978).

64. *Hosty v. Carter*, 412 F.3d 731, 736-37 (7th Cir. 2005) (en banc); *see also Bishop v. Aronov*, 926 F.2d 1066, 1074-75 (11th Cir. 1991).

65. *Hosty*, 412 F.3d at 737; *see also Perry*, 460 U.S. at 46.

66. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000); *Hosty*, 412 F.3d at 735-36, 738.

Analytically, the application of *Hazelwood* is contingent upon the determination that the student media at issue is a non-public forum, as illustrated below.⁶⁷



In keeping with the Supreme Court’s well-established non-public fora jurisprudence,⁶⁸ *Hazelwood* articulates “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

67. Student Press Law Center, *First Amendment Rights of Public High School Student Journalists After Hazelwood School District v. Kuhlmeier*, <http://splc.org/pdf/hazdiagram.pdf> (last visited Mar. 7, 2007) (modified from original and edited for relevance).

68. See *supra* note 61 and accompanying text.

actions are *reasonably related to legitimate pedagogical concerns*.⁶⁹ Hence, *Hazelwood* reaffirms the Court's well-established standard for non-public fora, reasonable regulation of speech with no intention to suppress expression,⁷⁰ while clarifying the application of the standard to the educational context.⁷¹ In *Hazelwood*, the Court made clear that that editorial control over student media must be "reasonably related"⁷² to a legitimate state interest, which, in the educational context, includes "legitimate pedagogical concerns."⁷³ Hence, as the *Bishop, Brown*, and *Hosty* courts noted, *Hazelwood* provides a useful framework for courts to apply to non-public fora in the educational context.⁷⁴

B. The Legal Arguments

Since the Supreme Court has yet to address the issue,⁷⁵ to determine whether the deferential *Hazelwood* standard should apply to the university setting, lower federal courts are forced to balance two competing traditions, both of which are grounded in well-established Supreme Court jurisprudence: first, judicial deference to the academic decisions of public school officials,⁷⁶ and second, the necessity of protecting free speech and expression by curtailing governmental regulation on the exercise of the right.⁷⁷ It is within the context of this delicate balancing act that advocates for both sides find traction.

1. The Argument for Applying *Hazelwood* to the University Setting

Because *Hazelwood* follows in the Court's tradition of judicial deference to the decisions of public school officials,⁷⁸ it should come as no

69. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (emphasis added).

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

71. *Hazelwood*, 484 U.S. at 273; *see also Santa Fe Indep. Sch. Dist.*, 530 U.S. at 302; *Hosty*, 412 F.3d at 734.

72. *Hazelwood*, 484 U.S. at 273.

73. *Id.* at 273; *see also Hosty*, 412 F.3d at 734.

74. *Bishop v. Aronov*, 926 F.2d 1066, 1074-75 (11th Cir. 1991); *Brown v. Li*, 308 F.3d 939, 951 (9th Cir. 2002); *Hosty*, 412 F.3d at 735.

75. *Hazelwood*, 484 U.S. at 273 n.7; *Brown*, 308 F.3d at 949; *Hosty*, 412 F.3d at 734.

76. *See generally Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985); *Wood v. Strickland*, 420 U.S. 308, 325 (1975).

77. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270-72 (1964); *see also Rosenbloom v. Metromedia*, 403 U.S. 29, 41-43 (1971); *Pennekamp v. Florida*, 328 U.S. 331, 346-47 (1946); 16A AM. JUR. 2D *Constitutional Law* §§ 451-53 (2007).

78. *Hazelwood*, 484 U.S. at 273 ("This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges"); *see also id.* at 273 n.7 ("A number of lower federal courts have similarly recognized that educators' decisions with regard to the content

surprise that public university officials and educational organizations⁷⁹ would argue for its application at the university level. Hence, that argument begins with the premise that the *Hazelwood* standard should be applied to school-sponsored expressive activities on college campuses because the standard reflects the Supreme Court's traditional deference to the academic decisions of college administrators and faculty.⁸⁰

a. The *Hazelwood* Standard Is Concurrent With the Traditional Deference the Court Has Shown School Administrators and Faculty

The Court has traditionally granted deference to the decisions of public school officials, both high school⁸¹ and college,⁸² holding that judges should not override academic decisions unless the conduct is such a radical departure from norms that it demonstrates the official responsible failed to exercise professional judgment.⁸³ The Court also has held "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion."⁸⁴ The *Wood* Court makes it clear that federal courts lack the expertise to resolve questions of educational policy.⁸⁵ Thus, as the *Axson-Flynn*, *Bishop*, *Brown*, and *Hosty* decisions indicate, it stands to reason that federal courts also lack the expertise to resolve questions of university administrative policy regarding school-subsidized publications.⁸⁶ Not only has the Court deferred to the judgment of school officials in the administrative context, but also the Court has given public school officials wide latitude on issues of major constitutional importance.⁸⁷ Even in a

of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference.").

79. *Id.* at 262. (The National School Boards Association ("NSBA") filed an amicus curiae brief in *Hazelwood*, supporting the principal's decision to exercise editorial control over the student newspaper and urging the Court to hold that there was no First Amendment violation).

80. *See Ewing*, 474 U.S. at 225-26.

81. *See, e.g., Wood*, 420 U.S. at 326; *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

82. *See, e.g., Ewing*, 474 U.S. at 225-26; *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978).

83. *Ewing*, 474 U.S. at 225-26.

84. *Wood*, 420 U.S. at 326.

85. *Id.*

86. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1288-93 (10th Cir. 2004); *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991); *Brown v. Li*, 308 F.3d 939, 951-52 (9th Cir. 2002); *Hosty v. Carter*, 412 F.3d 731, 736 (7th Cir. 2005) (en banc); *cf. Ewing*, 474 U.S. at 225-26; *Horowitz*, 435 U.S. at 90.

87. *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955). This decision is commonly referred to as *Brown II* but because this note also discusses the Ninth Circuit's decision in *Brown*, 308

subject as constitutionally important as school desegregation, the Court⁸⁸ deferred to the judgment of public school officials.⁸⁹ Rather than order the lower federal courts to actively supervise the remedial implementation, the Court essentially remanded the remedial implementation to the public school officials who were responsible for segregating the public school in the first place.⁹⁰ Thus, even in the context of fundamental constitutional rights, the Court defers to the judgment of public school administrators.⁹¹ Hence, the application of the *Hazelwood* standard to the college setting further affirms the Court's longstanding policy of substantially deferring to the decisions of school officials as in *Ewing* and *Wood*.⁹²

b. The School's Interests Described in *Hazelwood* Are Equally Applicable to Both the High School and College Setting

Both the high school in *Hazelwood* and public universities have similar interests regarding school-subsidized newspapers, which suggests that the *Hazelwood* standard is equally applicable.⁹³ In *Hazelwood*, the Court held that high school officials were entitled to exercise editorial control over school-subsidized speech.⁹⁴ In *Papish*, the Court held that university officials could not impose sanctions against a student for distributing an off-campus, non-school-subsidized newspaper.⁹⁵ As the

F.3d 939, *Brown II* will hereafter be referred to as *Brown v. Bd. II*. Likewise, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (commonly known as *Brown I*) will be referred to as *Brown v. Bd. I*.

88. It should be noted that Chief Justice Earl Warren wrote the highly deferential *Brown v. Bd. II* opinion. Chief Justice Warren, as the reader is probably aware, was widely considered one of the most liberal and progressive Supreme Court justices in the history of the United States. Moreover, Chief Justice Warren believed the Court's proper place was the active defense of civil liberties. See Oyez.com, Earl Warren – Biography, http://www.oyez.org/justices/earl_warren/ (last visited March 8, 2007); see generally ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN (ED CRAY ED., SIMON & SCHUSTER) (1997). Hence, it is rather striking that even he, an activist progressive justice, would defer to the judgment of (usually racist) public school officials in the school desegregation context.

89. *Brown v. Bd. II*, 349 U.S. at 299.

90. *Id.* ("Full implementation of these constitutional principles may require solution of varied local school problems. *School authorities have the primary responsibility* for elucidating, assessing, and solving these problems.") (emphasis added).

91. *Id.*

92. See *supra* note 86.

93. *Hosty v. Carter*, 412 F.3d 731, 734-36 (7th Cir. 2005) (en banc).

94. *Hazelwood Sch. Dist v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

95. *Papish v. Univ. of Mo. Bd. of Curators*, 410 U.S. 667, 670-671 (1973); cf. *Rust v. Sullivan*, 500 U.S. 173, 196-200 (1991) ("When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.").

Hosty court noted, age is not a dispositive distinction.⁹⁶ Rather, the distinguishing factor is whether or not the school subsidized the student speech.⁹⁷ Often, student publications are subsidized by the university⁹⁸ and supervised by a faculty member.⁹⁹ Thus, if university officials cannot sanction non-school-subsidized speech in *Papish*,¹⁰⁰ the logical corollary is that university officials, under the *Hazelwood* holding, can exercise greater control over school-subsidized student speech.¹⁰¹ In that vein, the Court reasoned that school officials have an interest in ensuring that student speech published under its auspices meets the high standards of journalistic integrity.¹⁰² As the *Hosty* court noted, this concern is equally applicable to the university setting;¹⁰³ college officials have just as much of an interest in ensuring that student media published under the auspices of the university meet proper journalistic standards.¹⁰⁴

For example, the Code of Ethics for the Society of Professional Journalists provides that journalists should “be honest, fair and courageous in gathering, reporting and interpreting information.”¹⁰⁵ It also provides that journalists should “[a]void conflicts of interest, real or perceived,” and “[d]isclose unavoidable conflicts.”¹⁰⁶ In *Hosty*, the university dean justified her decision to exercise administrative review over the student newspaper, stating that she wanted a faculty advisor to “to check for journalistic quality, including grammar and spelling,” in light of the student editors’ “fail[ure] to follow journalistic standards for fairness and good grammar.”¹⁰⁷ Likewise, the Illinois College Press Association (“ICPA”)

96. *Hosty*, 412 F.3d at 734 (“Not that any line could be bright; many high school seniors are older than some college freshmen, and junior colleges are similar to many high schools.”); see also *id.* at 735 (citing Symposium, *Do Children Have the Same First Amendment Rights As Adults?*, 79 CHI.-KENT L. REV. 3-313 (2004) (“The Supreme Court itself has established that age does not control the public-forum question.”)).

97. *Hazelwood*, 484 U.S. at 271 n.3.

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

99. *Id.*; see also CONST. UCLA COMMC’NS BD. art. III, § A, available at <http://www.studentmedia.ucla.edu/constitution.pdf>.

100. *Papish*, 410 U.S. at 670-671.

101. *Hazelwood*, 484 U.S. at 273; *Hosty*, 412 F.3d at 736.

102. *Hazelwood*, 484 U.S. at 271.

103. *Hosty*, 412 F.3d at 735-36.

104. *Id.*

105. CODE OF ETHICS (Soc’y of Prof’l Journalists 1996), available at <http://www.spj.org/pdf/ethicscode.pdf>.

106. *Id.*

107. Jeffrey R. Young, *Censorship or Quality Control? Lawsuit by Student-Newspaper Editors Tests How Much Oversight Administrators Can Assert*, CHRON. HIGHER EDUC., Aug. 9, 2002, at Students 36.

determined that the student editors in *Hosty* had committed numerous ethical violations.¹⁰⁸ Specifically, the ICPA pointed out that the student editors had numerous conflicts of interest, that the faculty advisor's use of an editorial to advance a personal agenda was improper, and that the line between news and commentary was blurred at times.¹⁰⁹ Hence, in *Hosty*, it was reasonable for the university administration to have an active interest in ensuring that the student newspaper complied with journalistic standards,¹¹⁰ an interest *Hazelwood* identifies as legitimate.¹¹¹

Moreover, the Supreme Court has given the government wide latitude to regulate speech when the government itself is the speaker.¹¹² The *Hazelwood* Court held that school officials had the prerogative to ensure that school-sponsored student speech did not associate the school with conduct inconsistent with "the shared values of a civilized social order,"¹¹³ or with any viewpoint other than neutrality on issues of controversy.¹¹⁴ Like the high school principal in *Hazelwood*, university officials have an interest in ensuring that their school's media do not associate the university with inappropriate conduct or any viewpoint other than neutrality on controversial issues in order to maintain an inclusive academic environment for the entire university population.¹¹⁵ Additionally, like school officials in *Hazelwood*, university officials also have a significant interest in exercising editorial control over student publications to ensure inappropriate or false content was not printed under the school's auspices.¹¹⁶

Likewise, in *Rosenberger*, the Court made clear that it has "permitted the government to regulate the content of what is or is not expressed when it is the speaker."¹¹⁷ In the same vein, the Court has upheld conditional governmental funding contingent on speech regulation.¹¹⁸ In *Rust*, the Court permitted the government to prohibit recipients of federal funds for

108. *Id.*; see also March 2001 Memorandum From Illinois College Press Association, <http://collegefreedom.org/ICPA.htm> (last visited March 8, 2007).

109. See *supra* note 103.

110. Young, *supra* note 102; see also *Hosty v. Carter*, 412 F.3d 731, 734-36 (7th Cir. 2005) (en banc).

111. *Hazelwood Sch. Dist v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988).

112. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

113. *Hazelwood*, 484 U.S. at 272 (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986)). Such conduct includes "drug or alcohol use" and "irresponsible sex." *Id.*

114. *Id.*

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

116. *Id.* at 735; see also *Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir. 1991).

117. *Rosenberger*, 515 U.S. at 833.

118. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

family planning counseling from providing abortion-related advice.¹¹⁹ Like *Hazelwood* and *Rosenberger*, the *Rust* Court “recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”¹²⁰ Taken together, these cases stand for the well-established proposition that the government is given considerable latitude to regulate speech when the speech is offered on behalf of the government.

Although universities could adopt an even-handed policy allowing all voices to be expressed in the school-sponsored publication, universities are not required to do so.¹²¹ Aside from the practical difficulties of implementing such a policy,¹²² it runs contrary to the well-established propositions that the government may regulate speech when it is the speaker,¹²³ and that public schools may retain the authority to decide with which positions it will associate itself.¹²⁴ Taken as a whole, the interests of administrators at both the high school and college level that pertain to school-subsidized student speech are very similar. As the Seventh Circuit held in respect to this issue, “there is no sharp difference between high school and college papers.”¹²⁵ Because of the Supreme Court’s tradition of showing substantial deference to the academic decisions of educators and because the interests involved are very similar, applying the *Hazelwood* framework to the university setting continues the Court’s jurisprudential tradition of deferring to the decisions of public school officials.

2. *The Argument Against Applying Hazelwood to the University Setting*

On the other hand, the Supreme Court has always closely guarded the First Amendment’s guarantee of free speech. In fact, “[t]he safeguarding

119. *Id.* at 173.

120. *Id.* at 194.

121. See *Rosenberger*, 515 U.S. at 833; *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993); *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 928 (10th Cir. 2002); cf. *Rust*, 500 U.S. at 193.

122. For example, if public schools, both high schools and colleges, are required to adopt such an even-handed policy (as opposed to one where the school can exercise discretion to ensure neutrality) then the school-sponsored publication must counterbalance every view on a controversial subject with the opposite view on that subject. Aside from being impractical, it is simply not required. See *Fleming*, 298 F.3d at 928 (holding that there is “[n]o doubt the school could promote student speech advocating against drug use, without being obligated to sponsor speech with the opposing viewpoint.”).

123. *Rosenberger*, 515 U.S. at 833.

124. *Fleming*, 298 F.3d at 928 n.8.

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

of free speech and a free press is a national constitutional policy.”¹²⁶ Both the Supreme Court and the lower federal courts have repeatedly reaffirmed that the freedom of speech is one of the most fundamental and important rights in an open, democratic society.¹²⁷ Hence, students’ rights and free speech advocacy groups have continued to urge the Court to protect the free speech rights of public school students.¹²⁸

a. *Hazelwood* Censorship is Inconsistent With a University’s Purpose as “Marketplaces of Ideas”

As an initial matter, it is argued that the application of *Hazelwood* is incongruent with universities’ central purpose as the “vital centers for the Nation’s intellectual life” that have traditionally been “voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn.”¹²⁹ In fact, the Supreme Court frequently refers to the college setting as the “marketplace of ideas.”¹³⁰ The *Healy* Court went on to note that “the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”¹³¹ More recently, the Court has observed that the university’s key purpose was to facilitate a wide range of speech.¹³² Hence, the restrictive standard of *Hazelwood* stands in direct contrast to the Court’s well-established tradition of protecting college students’ free speech rights. Since the mission of public high schools is the “inculcation of . . . values,”¹³³ the *Hazelwood* standard is appropriate. In the college context, however, where the mission is the free exchange of ideas,¹³⁴ the *Hazelwood* standard is not only inappropriate, but is in complete disharmony with the Court’s “reaffirm[ations of] this

126. 16A AM. JUR. 2D *Constitutional Law* § 451 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Bridges v. Cal.*, 314 U.S. 252 (1941)).

127. *Id.* at §§ 451-53.

128. For example, the American Civil Liberties Union (“ACLU”) filed an amicus brief in support of the high school journalism students in *Hazelwood*. 484 U.S. at 262. Likewise, the Student Press Law Center (“SPLC”) filed an amicus brief supporting the student editors in *Hosty*. 412 F.3d at 732.

129. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995).

130. *See, e.g., Healy v. James*, 408 U.S. 169, 180-81 (1972) (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)); *Sweezy v. N.H. by Wyman*, 354 U.S. 234, 249-50 (1957)).

131. *Healy*, 408 U.S. at 180 (citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

132. *Bd. of Regents of the Univ. of Wis. v. Southworth*, 529 U.S. 217, 231 (2000) (“Recognition must be given as well to the important and substantial purposes of the University, which seeks to facilitate a wide range of speech.”).

133. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986).

134. *See supra* notes 129-32 and accompanying text.

Nation's dedication to safeguarding academic freedom."¹³⁵ On one hand, the Supreme Court has articulated a clear line of cases that are based on the underlying notion that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,"¹³⁶ and that those rights must be "applied in light of the special characteristics of the school environment."¹³⁷ On the other hand, the Court has articulated a separate line of cases that articulate that college students and campuses are to be accorded the same free speech protections as the general public.¹³⁸ *Hazelwood* followed the *Fraser* and *Tinker* line of decisions and was premised on the need for public school officials to exercise editorial control to protect "immature audiences."¹³⁹ Moreover, *Hazelwood* was also based on the role public school officials have "as 'a principal instrument in awakening *the child* to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.'"¹⁴⁰ Thus, the underlying rationale is simply not applicable in the college context, especially in light of the Court's proclamation that "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."¹⁴¹

b. The Rationale of *Hazelwood* Is Inapplicable to the University Setting

In addition to having different core educational missions,¹⁴² numerous fundamental differences exist between the high school context and the university context. Although the Supreme Court has noted that age is not a dispositive factor,¹⁴³ in *Hazelwood*, the Court suggested that the maturity of the audience was a relevant consideration.¹⁴⁴ The *Hazelwood* Court held that censorship in the high school context was reasonable in light of the

135. *Healy*, 408 U.S. at 180-81.

136. *Fraser*, 478 U.S. at 682; see also 16A AM. JUR. 2D *Constitutional Law* § 469.

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

138. See *Healy*, 408 U.S. at 180-81; *Papish v. Univ. of Mo. Bd. of Curators*, 410 U.S. 667, 670 (1973); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995); *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981).

139. *Hazelwood Sch. Dist v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

140. *Id.* at 272 (quoting *Brown v. Bd. I*, 347 U.S. at 493) (emphasis added).

141. *Healy*, 408 U.S. at 180.

142. Compare *Fraser*, 478 U.S. at 683 with *Healy*, 408 U.S. at 180-81.

143. See Symposium, *supra* note 96.

144. *Hazelwood*, 484 U.S. at 271-72.

relative immaturity of the audience.¹⁴⁵ That rationale is not applicable to the college context. In fact, the Supreme Court has granted broad First Amendment protection to the university setting because college students are more mature.¹⁴⁶ The Court has explicitly recognized this inherent distinction, observing that “college students are less impressionable and less susceptible to religious indoctrination [than high school students],”¹⁴⁷ and that “[u]niversity students are, of course, young adults. They are less impressionable than younger students.”¹⁴⁸

In fact, society’s expectations of high school students and college students are fundamentally different.¹⁴⁹ As common knowledge suggests, while high school students are required to attend school and follow a proscribed curriculum,¹⁵⁰ college students have much more latitude in determining the course of their education.¹⁵¹ Or, as Justice Souter noted,

“[o]ur . . . cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, whose students and their schools’ relation to them are different and at least arguably distinguishable from their counterparts in college education.”¹⁵²

Reinforced by the very different missions of public high schools and public universities,¹⁵³ the fundamental differences between high school and college students suggests that the underlying rationale of *Hazelwood*—the need to protect younger students from inappropriate speech¹⁵⁴—is entirely inappropriate for the university setting. As one commentator has suggested, “if college students are presumed to be mature enough to take on the responsibilities placed on them by society and the college, then

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

146. Daniel A. Applegate, Note, *Stop the Presses: The Impact of Hosty v. Carter and Pitt News v. Pappert on the Editorial Freedom of College Newspapers*, 56 CASE W. RES. L. REV. 247, 264-71 (2005) (discussing both the inherent differences between high school and college students in terms of age and the legal significance of attaining the age of majority).

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

148. *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981).

149. Applegate, *supra* note 146, at 265-67; see also Karyl Roberts Martin, Note, *Demoted to High School: Are College Students’ Free Speech Rights the Same as Those of High School Students?*, 45 B.C. L. REV. 173, 195-97 (2003).

150. Applegate, *supra* note 146, at 266.

151. *Id.*

152. *Bd. of Regents of the Univ. of Wis. v. Southworth*, 529 U.S. 217, 239 (2000) (Souter, J., concurring) (internal citations omitted).

153. See *supra* notes 129-34 and accompanying text.

154. *Hazelwood Sch. Dist v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988).

student editors must also be presumed mature enough to exercise editorial freedom in their college newspapers, and the college audience must be presumed mature enough to be exposed to sensitive or controversial topics within those newspapers.”¹⁵⁵

Moreover, an increasing number of states are in agreement,¹⁵⁶ enacting legislation to minimize the effects of *Hazelwood*.¹⁵⁷ While *Hazelwood* reduced the scope of First Amendment free speech protection available to high school student journalists,¹⁵⁸ each of the states that passed “anti-*Hazelwood*” legislation expanded the free speech protection for student journalists under state law, giving student journalists a state court forum to litigate infringements upon their right to free speech.¹⁵⁹ In the context of the university setting, immediately following the decision in *Hosty*, an attorney for the California State University (“CSU”) system sent a memorandum to CSU administrators, advising them that “CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers.”¹⁶⁰ In a bill introduced by Assemblyman Leland Yee and signed by Governor Arnold Schwarzenegger, the State of California responded to the *Hosty* decision by passing legislation that effectively denies the application of the *Hazelwood* standard to the university setting while reaffirming that California university student journalists enjoy the same extensive free speech protection¹⁶¹ that California high school students enjoy.¹⁶²

155. Applegate, *supra* note 146, at 267.

156. The following states have passed “anti-*Hazelwood*” laws: Arkansas, California, Colorado, Iowa, Kansas, Massachusetts, Pennsylvania, and Washington. See Student Press Law Center, State Student Free Expression Laws, <http://splc.org/stateantihazlaws.asp> (last visited Mar. 8, 2007).

157. ARK. CODE ANN. §§ 6-18-1201 to -1204 (2006); CAL. EDUC. CODE § 48907 (Deering 2006); COLO. REV. STAT. § 22-1-120 (2007); IOWA CODE § 280.22 (2006); KAN. STAT. ANN. §§ 72-1504-1506 (2006); MASS. GEN. LAWS CH. 71, § 82 (2006); 22 PA. CODE § 12-9 (2006); WASH. ADMIN. CODE 180-40-215 (2006); see also Mike Hiestand, *Understanding “anti-Hazelwood” laws*, TRENDS IN HIGH SCHOOL MEDIA, January 23, 2001, <http://www.studentpress.org/nsipa/trends/~law0101hs.html> [hereinafter *Understanding*].

158. *Understanding*, *supra* note 157.

159. *Id.*

160. Mike Hiestand, *California leads way with “anti-Hosty” laws*, TRENDS IN COLLEGE MEDIA, Nov. 1, 2006, <http://www.studentpress.org/acp/trends/~law1006college.html> [hereinafter *California Leads*].

161. See CAL. EDUC. CODE § 48907 (Deering 2006).

162. Press Release, Office of the Governor, Governor Schwarzenegger Signs Legislation to Protect Student Freedom of Speech (Aug. 28, 2006), available at <http://gov.ca.gov/index.php?/press-release/3659/>; see also *California Leads*, *supra* note 160.

Hence, as recognized by both scholarly commentators¹⁶³ and an increasing number of state governments,¹⁶⁴ it is arguably clear that the *Hosty* court inappropriately applied the *Hazelwood* standard to the university setting, a setting distinguishable from public high schools.

III. A House Divided: Federal Circuits Split in Applying *Hazelwood*

Advocates on both sides of the *Hazelwood* issue have propounded compelling, appealing arguments, both grounded in well-established Supreme Court precedence.¹⁶⁵ Hence, it is no surprise that federal appellate jurists have balanced the competing interests¹⁶⁶ differently and split on the applicability of the *Hazelwood* standard.¹⁶⁷ Because the Supreme Court expressly reserved judgment as to whether or not the *Hazelwood* standard would be applicable to the college setting,¹⁶⁸ federal appellate jurists have been forced to predict whether or not the Supreme Court would apply *Hazelwood* to the university setting.¹⁶⁹ As a result, both inter- and intra-circuit conflicts exist on whether or not the *Hazelwood* framework for free speech analysis is applicable to the university setting, which, when coupled with *Hazelwood*'s express reservation of the issue, had opened a qualified immunity loophole for nefarious university administrators who may seek to unconstitutionally censor student media.¹⁷⁰

163. See Applegate, *supra* note 146; Martin, *supra* note 149; see also Virginia J. Nimick, Note, *Schoolhouse Rocked: Hosty v. Carter and the Case Against Hazelwood*, 14 J.L. & POL'Y 941 (2006); Laura K. Schulz, Note, *A "Disacknowledgment" of Post-Secondary Student Free Speech – Brown v. Li and the Applicability of Hazelwood v. Kuhlmeier to the Post-Secondary Setting*, 47 ST. LOUIS U. L.J. 1185 (2003).

164. See *supra* notes 156-62 and accompanying text.

165. See *supra* Part II.B.1-2.

166. Those competing interests being the tradition of judicial deference to the decisions of public school officials, see, e.g., *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985), versus the need for limited restriction on the First Amendment free speech guarantee in the context of public universities. See, e.g., *Healy v. James*, 408 U.S. 169, 180-81 (1972).

167. See *supra* note 5.

168. *Hazelwood Sch. Dist v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988).

169. *Brown v. Li*, 308 F.3d 939, 951 (9th Cir. 2002) ("We do not know with certainty that the Supreme Court would hold that *Hazelwood* controls the inquiry.")

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

A. Courts That Apply *Hazelwood* To The University Setting

The Tenth and Eleventh Circuits have both held that *Hazelwood* is applicable to the college setting.¹⁷¹ In *Axson-Flynn*, the Tenth Circuit, while admitting that it was “not unmindful of the differences in maturity between university and high school students” still “appl[ie]d *Hazelwood* to [the] university context.”¹⁷² The *Axson-Flynn* court found it persuasive that the speech occurred within the curricular setting,¹⁷³ lending support to the proposition that university-sponsored student newspapers, if overseen by a faculty member, would be subject to editorial control by the administration for legitimate academic purposes. Likewise, in *Bishop*, the Eleventh Circuit applied *Hazelwood* to curricular speech within a college classroom,¹⁷⁴ and noted that although *Hazelwood* and its progeny had not been applied to the college context, the rationale of *Hazelwood* was applicable “insofar as it covers the extent to which an institution may limit in-school expressions which suggest the school’s approval.”¹⁷⁵ Hence, the Eleventh Circuit’s decision also lends considerable support to the proposition that a school-sponsored student newspaper (as an “expression which suggest[s] the school’s approval”)¹⁷⁶ would be subject to administrative editorial control.

However, that proposition finds its strongest support from the Seventh Circuit’s ruling in *Hosty*.¹⁷⁷ In *Hosty*, the circuit panel held that *Hazelwood* was not applicable to the college setting.¹⁷⁸ The court, sitting en banc, overturned the decision, holding that *Hazelwood* was applicable to the university context¹⁷⁹ and that it applied specifically to university student newspapers that operated in a non-public forum.¹⁸⁰ The Seventh Circuit reasoned that in terms of the interests of the school,¹⁸¹ there was no sharp

171. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1288-89 (10th Cir. 2004); *Bishop v. Aronov*, 926 F.2d 1066, 1071 (11th Cir. 1991).

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

173. *Id.*

174. *Bishop*, 926 F.2d at 1071, 1074.

175. *Id.* at 1074.

176. *Id.*

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

178. *Id.* at 733.

179. *Id.* at 735.

180. *Id.*

181. *Id.* at 734-35 (“To the extent that the justification depends on other matters—not only the desire to ensure ‘high standards for the student speech that is disseminated under [the school’s] auspices’ (the Court particularly mentioned ‘speech that is . . . ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences’, *Hazelwood Sch. Dist v. Kuhlmeier*, 484 U.S. 260, 271 (1988)) but also the

difference between public high schools and public colleges.¹⁸² Moreover, the *Hosty* court reasoned that “[i]f private speech in a public forum is off-limits to regulation even when that forum is a classroom of an elementary school . . . then speech at a non-public forum, and underwritten at public expense, may be open to reasonable regulation even at the college level.”¹⁸³ The *Hosty* court further reasoned that if “the federal government may insist that physicians,” who are clearly mature adults entitled to full First Amendment protection, “use grant funds only for the kind of speech required by the granting authority,” then it stood to reason that university-sponsored student newspapers must submit to administrative editorial control.¹⁸⁴

B. Courts That Reject *Hazelwood* In the University Setting

The Sixth Circuit, on the other hand, took the opposite course of the Seventh Circuit, initially ruling that *Hazelwood* was applicable to the college setting,¹⁸⁵ only to reverse itself en banc.¹⁸⁶ There, the *Kincaid* court glossed over the issue of *Hazelwood*'s applicability to the university setting, and instead reasoned that “[b]ecause we find that a forum analysis requires that the yearbook be analyzed as a limited public forum—rather than a non-public forum—we agree with the parties that *Hazelwood* has little application to this case.”¹⁸⁷ Although the Sixth Circuit chose to distinguish *Hazelwood* on other grounds, namely forum classification,¹⁸⁸ the Sixth Circuit supported their reasoning by citing the First Circuit's decision in *Student Government Association v. Board of Trustees of University of Massachusetts*.¹⁸⁹

In *Student Gov't Ass'n*, the First Circuit held that *Hazelwood* was not applicable to college newspapers.¹⁹⁰ However, the First Circuit provided no rationale for the holding, except for a citation to the *Hazelwood* Court's footnote that expressly reserved the question of applicability to the

goal of dissociating the school from ‘any position other than neutrality on matters of political controversy,’ *id.* at 272—there is no sharp difference between high school and college papers.”).

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

183. *Id.* at 735 (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001)).

184. *Hosty*, 412 F.3d at 735 (citing *Rust v. Sullivan*, 500 U.S. 173 (1991); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998)).

185. *Kincaid v. Gibson*, 236 F.3d 342, 346 (6th Cir. 2001) (en banc).

186. *Id.* at 346 n.5.

187. *Id.*

188. *Id.*

189. *Id.*

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

university setting.¹⁹¹ The text of *Hazelwood*'s footnote is unambiguous: "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."¹⁹² From this language, as the *Hosty* court pointed out in criticism,¹⁹³ the First Circuit decided that the Supreme Court *held* that the standard does not apply to the university setting. Hence, without any support for its proposition, the rationale of the *Student Gov't Ass'n* court is ambiguous. Likewise, as the *Hosty* court also pointed out in criticism,¹⁹⁴ the rationale of the *Kincaid* court, which cited *Student Gov't Ass'n*, is ambiguous.

C. The Ninth Circuit's Inconsistency on *Hazelwood*

The Ninth Circuit, in contrast to either side of the *Hazelwood* debate, has approached the issue in an inconsistent manner. In *Brown*, decided in 2002, the three judge panel issued three separate opinions.¹⁹⁵ While the opinion for the court applied the *Hazelwood* standard to the university setting,¹⁹⁶ the *Hosty* court adeptly pointed out that "the members of the [*Brown*] panel articulated three distinct and incompatible views about whether *Hazelwood* applies to collegiate settings and how the [F]irst [A]mendment affects relations between college faculty and students' expression."¹⁹⁷ Despite this, *Brown* stood for the proposition that, in the Ninth Circuit, *Hazelwood* applied to the university setting when the student speech involved was curricular in nature.¹⁹⁸

However, three years later and in spite of *Brown*'s holding, the Ninth Circuit, in *Hudson*, applied *Hazelwood* for the proposition that "[colleges] ha[ve] a strong and recognized interest in maintaining [their] political neutrality as an educational institution,"¹⁹⁹ but then declared that the court "need not consider whether a college necessarily has the same leeway as a high school to preserve that neutrality."²⁰⁰ At best, *Hudson* and *Brown* can

191. *Id.*

192. *Hazelwood Sch. Dist v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988) (emphasis added).

193. *Hosty v. Carter*, 412 F.3d 731, 738 (7th Cir. 2005) (en banc).

194. *Id.* at 738-39 ("[*Kincaid*] stat[ed], in reliance on the parties' agreement, that *Hazelwood* has 'little application' to collegiate publications but [did] not explain what this means, or how a constitutional framework can apply 'just a little.'").

195. *Brown v. Li*, 308 F.3d 939, 939-66 (9th Cir. 2002).

196. *Id.* at 949.

197. *Hosty*, 412 F.3d at 739.

198. *Brown*, 308 F.3d at 949-50.

199. *Hudson v. Craven*, 403 F.3d 691, 700 (9th Cir. 2005).

200. *Id.* at 701.

be reconciled to indicate that the Ninth Circuit has decided *Hazelwood* is applicable to the university setting, but has yet to decide the extent to which *Hazelwood* actually applies. At worst, the two decisions indicate that the Ninth Circuit, the largest and, arguably, most diverse circuit court in terms of judicial composition,²⁰¹ cannot settle on a consistent standard regarding the applicability of *Hazelwood* to the university setting.

IV. The Qualified Immunity Loophole

A. An Overview of Qualified Immunity

When considering qualified immunity for a public official, the Supreme Court promulgated a two part test: first, whether or not, if taken in a light most favorable to the complainants, the conduct of the official violated a constitutional right, and, if it did, whether or not that right was clearly established.²⁰² Essentially, qualified immunity exists to protect governmental officials from liability for damages when “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”²⁰³ The Supreme Court recently summarized the purpose of qualified immunity when it stated that “[q]ualified immunity shields an official from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.”²⁰⁴ Or, as the *Hosty* court phrased the issue: “[p]ublic officials need not predict, at their financial peril, how constitutional uncertainties will be resolved.”²⁰⁵

B. The Qualified Immunity Loophole Is Wide Open for College Administrators

In the context of university student media, when a college administrator does violate student journalists’ First Amendment rights, the next step in the *Saucier* qualified immunity test is to ask whether those rights were clearly established at the time the public official committed the allegedly unconstitutional act.²⁰⁶ In the context of qualified immunity,

201. See Symposium, *Ninth Circuit Conference: Introduction*, 48 ARIZ. L. REV. 221, 221-23 (2006); see also U.S. Court of Appeals for the Ninth Circuit, List of the Ninth Circuit Judges, [http://www.ca9.uscourts.gov/ca9/Documents.nsf/519a025470af2daf88256406008016b7/3c0c3c8feae803ec882572b8005fd216/\\$FILE/judgeWeb.pdf](http://www.ca9.uscourts.gov/ca9/Documents.nsf/519a025470af2daf88256406008016b7/3c0c3c8feae803ec882572b8005fd216/$FILE/judgeWeb.pdf) (last visited Oct. 12, 2007).

202. *Saucier v. Katz*, 533 U.S. 194, 201 (2001)..

203. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

204. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (citing *Saucier*, 533 U.S. at 206).

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

206. *Saucier*, 533 U.S. at 201.

“clearly established” means that “the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”²⁰⁷

In *Hazelwood*, the Court expressly reserved the question of whether university administrators were entitled to the same level of deference as high school administrators in regulating school-subsidized newspapers.²⁰⁸ As the *Hosty* court pointed out by citing *Wilson v. Layne*, “the Supreme Court does not identify for future decision questions that already have ‘clearly established’ answers.”²⁰⁹ In *Wilson*, the Supreme Court held that “[i]f judges . . . disagree on a constitutional question, it is unfair to subject [the government] to money damages for picking the losing side of the controversy.”²¹⁰

Without direction from the Supreme Court, federal circuit courts are split on whether or not *Hazelwood* applies to the university setting.²¹¹ If federal appellate jurists cannot agree on what it is “clearly established” law, it seems presumptive to expect a university administrator to be aware of what the law is. Hence, the *Hazelwood* Court’s inaction coupled with the circuit split has left the law unsettled,²¹² which in turn, opened a qualified immunity loophole that can easily be exploited by any public university official whom exercises a prior restraint on university-sponsored student publications to escape 42 U.S.C. § 1983 liability.²¹³ As *Wilson* made clear, where judges disagree, the government, even if acting unconstitutionally, will escape liability through qualified immunity. In the context of university student media, the Court’s failure to address whether *Hazelwood* is applicable to the college context has led the circuits to sharply disagree on the law. Under *Saucier* and *Wilson*, this has ultimately resulted in a constructive forfeiture of university student journalists’ remedies against First Amendment encroachments by university officials. One needs to look no further than the *Hosty* decision to see this loophole in action. Even when the court conceded that it was possible for the student newspaper to have been operating as a designated public forum,²¹⁴ the Seventh Circuit

207. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

208. *Hazelwood Sch. Dist v. Kuhlmeier*, 484 U.S. 260, 271 n.3 (1988).

209. *Hosty*, 412 F.3d at 738 (citing *Wilson v. Layne*, 526 U.S. 603, 614-18 (1999)).

210. *Wilson*, 526 U.S. at 618.

211. *See supra* note 5.

212. *Hosty*, 412 F.3d at 738-39.

213. *See id.*

214. *Id.* at 737-38.

held that the university dean²¹⁵ was entitled to qualified immunity, in spite of an alleged egregious constitutional violation, because the law was not clearly established.²¹⁶

Therefore, to the extent that students' First Amendment rights are not clearly established with respect to university-sponsored publications, the lack of a uniform law on the subject effectively allows university administrators to hamper students' ability to express their ideas without being subjected to § 1983 liability.

V. The Solution to the *Hazelwood* Problem

The Court should first take the issue under review (which it declined to do in *Hosty*)²¹⁷ and clarify whether or not *Hazelwood* is applicable to the university setting. Advocates on both sides of the debate have advanced compelling arguments.²¹⁸ Given the current Court's disposition, with the more conservative Justice Alito replacing the moderate Justice O'Connor,²¹⁹ it is likely that the Court will weigh the long-standing tradition of substantial deference to the decisions of public school officials more heavily than student journalists' First Amendment rights. Hence, should the Court take up the issue, it is likely to hold that *Hazelwood* is applicable to the university setting and clarify that university administrators are entitled to the same degree of deference as high school administrators in regulating school-subsidized publications.

However the Court rules on the issue, the key is that the Court *actually rule* on the applicability of *Hazelwood* to the university setting. Whether the Court applies *Hazelwood* to the university context,²²⁰ rejects it as an unworkable standard for America's colleges,²²¹ or fashions an entirely new standard,²²² until the Court addresses the issue, the qualified immunity

215. The university dean had arguably exercised a prior restraint against the student newspaper when she called the student newspaper's printer and ordered that no edition be printed until a university official had reviewed it for content. *See id.* at 733, 738.

216. *Hosty*, 412 F.3d at 738-39.

217. *Id.* at 731, *cert. denied*, 546 U.S. 1169 (2006).

218. *See supra* Part II.B.1-2.

219. David G. Savage, *Enter Stage Right: Scalia is Poised to Lead; 2 Decades After Joining Court, Justice Likely to be Pivotal Voice for Conservative Majority*, CHI. TRIB., Feb. 22, 2007, at C4 ("the retirement of centrist Justice Sandra Day O'Connor and her replacement by Justice Samuel Alito Jr. figure to tip the court to the right.").

220. *See supra* Part II.B.1.

221. *See supra* Part II.B.2.

222. For an example of a possible alternative standard, *see* Jeff Sklar, Note, *The Presses Won't Stop Just Yet: Shaping Student Speech Rights in the Wake of Hazelwood's Application to Colleges*, 80 S. CAL. L. REV. 641, 683-95 (2007).

loophole will remain a vehicle by which unscrupulous (or simply inept) college administrators can suppress student journalism without fear of liability. Although student journalists' free speech rights could likely become more constrained in non-public fora, *Hazelwood* would leave their free speech rights in other fora undisturbed,²²³ and, most importantly, close the qualified immunity loophole. By clarifying the law with respect to the applicability of *Hazelwood* to the university setting, the Court will conclusively close the qualified immunity loophole, allowing university student journalists to enforce their First Amendment rights when university officials infringe upon their exercise of free speech. Until the Court decides to examine the issue, however, university student journalists²²⁴ are individuals with a First Amendment right to free speech without a remedy.

223. For example, university student journalists are free to follow the well-thought-out example set by student journalists at the University of California, Berkeley. At U.C. Berkeley, the main student newspaper on campus, THE DAILY CALIFORNIAN, became an independent student newspaper, run by an independent corporation, in 1971. The only remaining vestige, and a poor one at that, of university control is that the newspaper is printed as THE DAILY CALIFORNIAN pursuant to a *licensing agreement* with the University of California Board of Regents. Even without funding from the university or the student government, THE DAILY CALIFORNIAN has continued to publish and serve as the main paper at U.C. Berkeley. See THE DAILY CALIFORNIAN, *About the Daily Californian*, <http://www.dailycal.org/about.php> (last visited Mar. 8, 2007). This example offers a realistic alternative to university control should the Court rule that *Hazelwood* is applicable to the university setting.

224. With the limited exception of those student journalists in states that have enacted broader free speech protections, see *supra* notes 156-62 and accompanying text.

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