

## COMMENTS

### **BAIT AND SWITCH IN *HOSTY V. CARTER*: THE SEVENTH CIRCUIT'S RECIPE FOR LIMITING FREE SPEECH RIGHTS OF COLLEGE JOURNALISTS BY EXTENDING THE “HAZELWOOD DOCTRINE” AND MISUSING QUALIFIED IMMUNITY**

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#### INTRODUCTION

The scope of free speech rights of public school students has been at issue for more than a century.<sup>1</sup> Although freedom of speech is a fundamental American right,<sup>2</sup> it often conflicts with other interests when public officials control the purse strings of student media.<sup>3</sup> The device the Supreme Court has crafted to mediate such disputes is the public forum doctrine.<sup>4</sup> In 1988, the

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<sup>1</sup> For a narrative of the tensions between student speech and communal values since the rise of the common school movement in the nineteenth century, see Rosemary C. Salomone, *Free Speech and School Governance in the Wake of Hazelwood*, 26 GA. L. REV. 253, 255–59 (1992). As examples of such conflicts, see *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 677 (1986), challenging the disciplinary response to a lewd address at a school assembly, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969), concerning the wearing of black armbands as a protest against the Vietnam War, and *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626, 630 (1943), addressing a refusal to comply with the mandatory salute to the American flag.

<sup>2</sup> The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” U.S. CONST. amend. I. *see also* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (describing “freedom of expression upon public questions” as “‘a fundamental principle of our constitutional system’”) (citing *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

<sup>3</sup> *See infra* notes 69–74 and accompanying text (discussing governmental interest in allocating public monies with care).

<sup>4</sup> “[T]he Court has adopted a forum analysis as a means of

Court applied this doctrine in the context of a high school newspaper and held that public school administrators have great discretion in overseeing curricular student publications.<sup>5</sup> The Court so far has declined to address how the doctrine would apply to student journalists at the university level.<sup>6</sup>

Filling that jurisprudential vacuum,<sup>7</sup> the Seventh Circuit in a recent case purported to apply the public forum doctrine in a dispute between student journalists and a university administrator. In *Hosty v. Carter*,<sup>8</sup> the court announced that the decisional framework at the university level should be the same as the “*Hazelwood* framework” established by the Supreme Court for the high school level.<sup>9</sup>

Many commentators have criticized the Seventh Circuit’s reasoning, warning that the decision poses a danger to First Amendment speech rights of college journalists.<sup>10</sup> A closer look

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determining’ . . . how First Amendment interests are to be analyzed with respect to Government property.” U.S. v. Kokinda, 497 U.S. 720, 726 (1990) (internal quotation marks omitted). For the elements and basic operation of the public forum doctrine, see *infra* notes 26–28 and accompanying text.

<sup>5</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267, 270, 273 (1988).

<sup>6</sup> See *id.* at 273 n.7 (“We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”).

This Comment will use the terms “college” and “university” interchangeably and will use the terms “secondary level” and “secondary schools” to refer to high schools and junior high or middle schools. A non-specific reference to “school” or “schools” can refer to any level and will be clear by context. This Comment will also use “forums” rather than “fora” as the plural of “forum.”

<sup>7</sup> In the absence of explicit guidance by the Supreme Court, several circuit courts have addressed the issue and have come to varying conclusions. Compare *Kincaid v. Gibson*, 236 F.3d 342, 346 n.5 (6th Cir. 2001) (finding that *Hazelwood* had “little application” to the case’s university setting), and *Student Gov’t Ass’n v. Bd of Tr. of the Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (“*Hazelwood* . . . is not applicable to college newspapers.”), with *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284–85 (10th Cir. 2004) (applying *Hazelwood* to the university setting and finding that the classroom “constitutes a nonpublic forum”), and *Bishop v. Aronov*, 926 F.2d 1066, 1071 (11th Cir. 1991) (finding that *Hazelwood* applied generally to “school newspaper[s],” without distinguishing between university and high school settings).

<sup>8</sup> 412 F.3d 731 (7th Cir. 2005) (7–4 decision), *cert. denied*, 126 S. Ct. 1330 (2006).

<sup>9</sup> See *id.* at 735 (“We hold, therefore, that *Hazelwood*’s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools.”).

<sup>10</sup> See, e.g., Brief for Ass’n for Education in Journalism and Mass Communication et al. as Amici Curiae Supporting Petitioners at 8, 12–19, *Hosty v. Carter*, 126 S. Ct. 1330 (2006) (No. 05-377), available at <http://www.splc.org/pdf/journalismbrief.pdf> [hereinafter Brief for Ass’n for Educ. in Journalism and Mass Comm’n]; Brief for Foundation for Individual Rights in Education et al. as Amici Curiae Supporting Petitioners at 16–20, *Hosty v. Carter*, 126 S. Ct. 1330 (2006) (No.

reveals that the case does pose a threat, but not for the reasons most critics articulate. The court's preliminary decision that the public forum doctrine should apply at the college level strikes the right balance between the speech rights of students and the legitimate institutional interests of public school administrators.<sup>11</sup> It is the court's subsequent misuse of qualified immunity that represents a blueprint for future bad faith violations of student speech rights.<sup>12</sup>

In the fall of 2000, Margaret Hosty and her co-plaintiffs were student writers and editors for the *Innovator*, the student newspaper at Governors State University (the "University"), a state-run institution in University Park, Illinois.<sup>13</sup> After the students started working on articles critical of the school administration,<sup>14</sup> defendant Patricia Carter—Dean of Student Affairs and Services at the University—contacted the *Innovator's* outside printer and allegedly<sup>15</sup> threatened to withhold payment—the paper being funded from student activity fees controlled by the

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05-377), available at <http://www.thefire.org/pdfs/fffc2c0c035669e5e791e2d08016712c.pdf> [hereinafter Brief for Found. for Individual Rights in Educ.]; Brief for Student Press Law Center et al. as Amici Curiae Supporting Petitioners at 17–18, *Hosty v. Carter*, 126 S. Ct. 1330 (2006) (No. 05-377), available at <http://www.splc.org/pdf/hostypetitionbrf.pdf> [hereinafter Brief for Student Press Law Ctr.]; John K. Wilson, *The Case of the Censored Newspaper*, INSIDE HIGHER ED, June 24, 2005, <http://insidehighered.com/views/2005/06/24/wilson> (calling the case "what may be the worst decision for college student rights in the history of the federal judiciary"); Sean Hill, Student Press Law Ctr., *Free Speech Groups Worry Hosty Ruling Will Scale Back Students' 1st Amendment Rights* (June 23, 2005), <http://www.splc.org/newsflash.asp?id=1042> (quoting media and free speech groups critical of *Hosty's* likely effect of increasing censorship on campuses).

<sup>11</sup> For discussion in favor of extending the *Hazelwood* framework to the college level, see *infra* Part II.B–C.

<sup>12</sup> "Qualified 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." *Hosty*, 412 F.3d at 739 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)). For discussion of how the Seventh Circuit misapplied this doctrine in *Hosty*, see *infra* Part III.B.

<sup>13</sup> See *Hosty*, 412 F.3d at 732–33; *Hosty v. Governors State Univ.*, 2001 U.S. Dist. LEXIS 18873, at \*2 (N.D. Ill. Nov. 13, 2001), *rev'd*, 412 F.3d 731 (7th Cir. 2005).

<sup>14</sup> The plaintiffs were investigating alleged misappropriation of university funds and illegal hiring practices. *Hosty*, 2001 U.S. Dist. LEXIS 18873, at \*5.

<sup>15</sup> Carter contests the facts as alleged by the plaintiffs. See *id.* at \*6. Crucially, the standard of review upon motion for summary judgment requires the court to "consider[] the record as a whole and draw[] all reasonable inferences in the light most favorable to the party opposing the motion." *Id.* at \*11 (citing *Bay v. Cassens Transp. Co.*, 212 F.3d 969, 972 (7th Cir. 2000)). The importance of this standard of review is addressed further *infra* Part III.B.

administration—unless given the opportunity to review and approve the paper in advance of publication.<sup>16</sup> The student editors refused to cede editorial control, so the *Innovator* ceased publication in November of 2000.<sup>17</sup>

The aggrieved students sued the University, its board of directors, Carter, and other University officials in federal district court, charging violations of their First Amendment rights of freedom of speech and press.<sup>18</sup> The defendants moved for summary judgment, and the Northern District of Illinois, Eastern Region, granted the motion for all the defendants except Carter.<sup>19</sup> In maintaining the claim against Dean Carter, the court distinguished *Hazelwood School District v. Kuhlmeier*,<sup>20</sup> the 1988 Supreme Court case allowing prior restraint of curricular school newspapers at the secondary and elementary school levels, as applicable only in the pre-college setting.<sup>21</sup>

A panel of the Seventh Circuit affirmed,<sup>22</sup> and the Circuit then granted Carter's petition for rehearing en banc.<sup>23</sup> The full Seventh Circuit ultimately held that Carter—like her individual former co-defendants—was protected by the doctrine of qualified immunity,

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<sup>16</sup> *Hosty*, 2001 U.S. Dist. LEXIS 18873, at \*5–6.

<sup>17</sup> See *Hosty*, 412 F.3d at 733. The *Innovator* has since been reborn as an official student organization under a new name. *Id.*; Governors State University, Clubs & Organizations, [http://www.govst.edu/sas/t\\_sl.aspx?id=1314](http://www.govst.edu/sas/t_sl.aspx?id=1314) (last visited Jan. 27, 2007) (listing *Phoenix*, “a responsible, non-biased newspaper,” as a student organization chartered annually through the University's Office of Student Life).

<sup>18</sup> *Hosty*, 2001 U.S. Dist. LEXIS 18873, at \*2–3. The plaintiffs originally alleged many infractions against the various defendants, including suspending the *Innovator's* budget, denying plaintiffs access to the paper's offices, and removing or destroying files, papers, emails, and other materials; these claims were dismissed by the district court. See *Hosty v. Governors State Univ.*, 174 F. Supp. 2d 782, 784 (N.D. Ill. 2001); *Hosty*, 2001 U.S. Dist. LEXIS 18873, at \*4–10.

<sup>19</sup> *Hosty*, 412 F.3d at 733. The University and its board, as state government entities, successfully invoked the right of sovereign immunity under the Eleventh Amendment to withhold consent to be sued in federal court by a private party. *Hosty*, 174 F. Supp. 2d at 784; see also U.S. CONST. amend. XI. The individual defendants in their official capacities were also covered by the cloak of sovereign immunity, but in their personal capacities they had to rely on the defense of qualified immunity. See *Hosty*, 174 F. Supp. 2d at 784–85.

<sup>20</sup> 484 U.S. 260 (1988).

<sup>21</sup> See *Hosty*, 2001 U.S. Dist. LEXIS 18873, at \*21–22.

<sup>22</sup> *Hosty v. Carter*, 325 F.3d 945 (7th Cir. 2003), *rev'd en banc*, 412 F.3d 731 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1330 (2006).

<sup>23</sup> *Hosty*, 412 F.3d at 733.

and therefore granted her motion for summary judgment.<sup>24</sup> The Supreme Court subsequently denied certiorari.<sup>25</sup>

Before reaching the issue of qualified immunity, the Seventh Circuit first addressed the plaintiffs' constitutional claims using *Hazelwood* and the public forum doctrine.<sup>26</sup> Under that doctrine, a property or other instrument of expression is categorized either as a public forum, where government interference is viewed under strict scrutiny,<sup>27</sup> or a nonpublic forum, where government interference is scrutinized merely for "reasonableness."<sup>28</sup> In *Hazelwood*, the Supreme Court found a newspaper published as part of a public high school journalism class to be a nonpublic forum.<sup>29</sup>

The *Hosty* plaintiffs argued that university newspapers, as a class, are exempt from governmental control and so no public forum analysis need be applied.<sup>30</sup> They based their argument on the difference in age and maturity between writers and readers of high school newspapers, as in *Hazelwood*, and the *Innovator's* college journalists and audience. The Seventh Circuit rejected that argument and held that "*Hazelwood's* framework<sup>31</sup> applies to subsidized student newspapers at colleges as well as elementary and secondary schools."<sup>32</sup>

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<sup>24</sup> *Id.* at 739.

<sup>25</sup> *Hosty v. Carter*, 126 S. Ct. 1330 (2006).

<sup>26</sup> *See Hosty*, 412 F.3d at 734.

<sup>27</sup> *See U.S. v. Grace*, 461 U.S. 171, 177 (1983) ("[Content restrictions] will be upheld only if narrowly drawn to accomplish a compelling governmental interest."). Additionally, "the government may enforce reasonable time, place, and manner regulations as long as the restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.* (internal quotation marks omitted). A public forum can be either a "traditional" public forum, "which by long tradition or by government fiat have been devoted to assembly and debate," such as public streets and parks, *Cornelius v. NAACP*, 473 U.S. 788, 802 (1985) (internal quotation marks omitted), or a "designated" or "limited" public forum, "public property which the State has opened for use by the public as a place for expressive activity," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

<sup>28</sup> *See Cornelius*, 473 U.S. at 806 ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.").

<sup>29</sup> 484 U.S. 260, 270 (1988).

<sup>30</sup> *See Hosty*, 412 F.3d at 734.

<sup>31</sup> *See infra* Part I (exploring the various meanings attached to the term "*Hazelwood* framework").

<sup>32</sup> *Hosty*, 412 F.3d at 735. The court rejected an "on/off switch" distinction between high school and college contexts after reasoning that there is significant age

The Seventh Circuit then inquired as to the appropriate forum designation for the *Innovator*.<sup>33</sup> The district court, in finding it a public forum, had pointed to the distinction between the classroom context of the *Hazelwood* paper and the purely extracurricular nature of the *Innovator*.<sup>34</sup> The Seventh Circuit, however, rejected any such “bright line between curricular activities and all other speech.”<sup>35</sup> In the absence of such a determinative rule, the court applied the substance of the public forum doctrine to the facts at hand. Key to the analysis was the procedural posture of the case—an interlocutory appeal from a motion for summary judgment—where all reasonable inferences are drawn in the light most favorable to the plaintiffs.<sup>36</sup> The Seventh Circuit accepted the district court’s determination that the *Innovator* could be deemed a public forum.<sup>37</sup> Given that categorization, the University would not be entitled to interfere with the newspaper absent a compelling government interest.<sup>38</sup>

The court then turned to the question of qualified immunity. The district court had found that a reasonable official in Carter’s position should have known that her actions were a constitutional violation based on the premise that *Hazelwood* was distinguishable, applying only to the pre-college level and involving

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overlap between both kinds of students and that other factors—such as the government’s interest in maintaining journalistic standards and in avoiding school entanglement in political controversies—are not age dependent. *See id.* at 734–35.

<sup>33</sup> *See id.* at 735–38.

<sup>34</sup> *See id.* at 736; *Hosty v. Governors State Univ.*, 2001 U.S. Dist. LEXIS 18873, at \*21 (N.D. Ill. Nov. 13, 2001).

<sup>35</sup> *Hosty*, 412 F.3d at 736. To contradict such a binary test, the court cited *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (holding that the government may condition grants to doctors on use of the funds for only the kind of speech intended by the government) and *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (finding that government grants to artists may be conditioned by “decency” restrictions). *Hosty*, 412 F.3d at 736. The court also analogized to a non-curricular alumni magazine where the state would maintain editorial control and explained that being part of the curriculum is a sufficient—but not a necessary—condition of a nonpublic forum. *Id.*

<sup>36</sup> *See Hosty*, 412 F.3d at 733, 737–38; *Hosty*, 2001 U.S. Dist. LEXIS 18873, at \*11. Disputed facts accepted in the plaintiffs’ favor included the identity and role of the *Innovator*’s faculty adviser at the time of the controversy. The plaintiffs contended that the adviser merely offered advice, whereas Carter asserted that the adviser exercised some control. *Hosty*, 412 F.3d at 738.

<sup>37</sup> *See Hosty*, 412 F.3d at 737–38.

<sup>38</sup> *See id.* at 738. Assuming the *Innovator* to be a public forum, “the editors were empowered to make their own decisions, wise or foolish, without fear that the administration would stop the presses.” *Id.*

a classroom setting as opposed to the extracurricular context of *Hosty*.<sup>39</sup> The Seventh Circuit, however, having rejected both distinguishing premises,<sup>40</sup> referred specifically to those legal errors in granting Carter the protection of qualified immunity from liability.<sup>41</sup> If the law was too difficult for the lower court to apply properly, the Seventh Circuit reasoned, it was not fair to penalize Carter for the same failing.<sup>42</sup>

Four judges joined in a dissent that disagreed with the court both on extending *Hazelwood*<sup>43</sup> and on granting qualified immunity to Dean Carter.<sup>44</sup> They argued against extending *Hazelwood* based on the differences between college students and younger students<sup>45</sup> and between the missions of the institutions.<sup>46</sup> The dissent also emphasized the public policy grounds against extending *Hazelwood*, criticizing the court's decision as "particularly unfortunate considering the manner in which *Hazelwood* has been used in the high school setting to restrict controversial speech."<sup>47</sup> In opposing qualified immunity for Dean Carter, the dissent argued that the law in this area had been settled; therefore, there

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<sup>39</sup> See *Hosty*, 2001 U.S. Dist. LEXIS 18873, at \*21–22.

<sup>40</sup> See *Hosty*, 412 F.3d at 738.

<sup>41</sup> See *id.* at 738–39.

<sup>42</sup> See *id.* at 739 ("Disputes about both law and fact make it inappropriate to say that any reasonable person in Dean Carter's position in November 2000 had to know that the demand for review before the University would pay the *Innovator's* printing bills violated the first amendment.").

<sup>43</sup> See *id.* at 740 (Evans, J., dissenting).

<sup>44</sup> See *id.* at 743 (Evans, J., dissenting).

<sup>45</sup> See *id.* at 740 (Evans, J., dissenting) ("[H]igh school students are less mature and the missions of the respective institutions are different.").

<sup>46</sup> See *id.* at 741 (Evans, J., dissenting) ("Elementary and secondary schools have custodial and tutelary responsibility for children, and are largely concerned with the inculcation of values," whereas the purpose of a university is "to expose students to a marketplace of ideas.") (internal quotation marks and citations omitted). The dissent favorably cited *Healy v. James*, 408 U.S. 169, 180–81 (1972):

[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

*Id.* at 740–41.

<sup>47</sup> *Hosty*, 412 F.3d at 742 (Evans, J., dissenting) (citing *Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991) (allowing ban on family planning advertisements in high school newspapers), *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 737–38 (7th Cir. 1994) (affirming prohibition of shirts with messages such as "Unfair Grades" and "Racism" in elementary school), and *Poling v. Murphy*, 872 F.2d 757, 764 (6th Cir. 1989) (upholding exclusion of a student from a student council race because of his rude comment in a school assembly speech)).

was no reason an administrator in Carter's position should have believed that she had the authority to prohibit publication.<sup>48</sup>

This Comment asserts that while the Seventh Circuit was correct to extend *Hazelwood* generally to the college level, it prematurely granted qualified immunity to Dean Carter. Part I reviews the *Hazelwood* decision and clarifies what is meant by the "*Hazelwood* framework." Part II discusses the arguments for and against extending *Hazelwood* to the university level and contends that the doctrine should be so extended. Part III reviews *Hosty*'s public forum analysis and illustrates how the Seventh Circuit erroneously granted qualified immunity to Carter based on a misapprehension of the legal uncertainty surrounding *Hazelwood*. Part IV examines the legal and policy implications of the *Hosty* decision. Finally, this Comment concludes by recommending that the Supreme Court resolve the extent of *Hazelwood*'s reach.

### I. WHAT IS THE "HAZELWOOD FRAMEWORK"?

The elusive term "*Hazelwood* framework" is used frequently by both the majority and the dissent in *Hosty*, unfortunately without adequate explanation.<sup>49</sup> To properly appreciate *Hosty*,

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<sup>48</sup> See *Hosty*, 412 F.3d at 743 (Evans, J., dissenting). The majority and the dissenters both cited footnote seven in *Hazelwood*, but they interpreted its meaning in opposite ways. The footnote reads, "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." 484 U.S. 260, 273 n.7 (1988). The majority noted that "[t]he question had been reserved in *Hazelwood*, and the Supreme Court does not identify for future decision questions that already have clearly established answers." *Hosty*, 412 F.3d at 738 (internal quotation marks omitted). It thus inferred an intention by the Supreme Court to leave open the question of the power granted to someone in Dean Carter's position. See *id.* The dissent, on the other hand, concluded that because the Supreme Court chose not to address the university level, previous decisions still governed in that context. See *id.* at 742-43 (Evans, J., dissenting).

Prior to *Hazelwood*, courts were consistently clear that university administrators could not require prior review of student media or otherwise censor student newspapers. . . . *Hazelwood* did not change this well-established rule. So, the question becomes, did anything after *Hazelwood* occur that 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? The answer is clearly "no."  
*Id.* (internal citations omitted).

<sup>49</sup> The dissent seemed to interpret it as a *conclusion* that school newspapers are nonpublic forums. See *Hosty*, 412 F.3d at 739, 742 (Evans, J., dissenting) (lamenting the extension of "limitations on speech that the Supreme Court created for use in the narrow circumstances of elementary and secondary education," and "the green light [the majority gives] to school administrators to restrict student speech in a manner

therefore, it is necessary first to understand *Hazelwood*. In *Hazelwood*, a principal ordered two pages of a high school newspaper be deleted because they contained material on divorce and teen pregnancy, subjects he thought inappropriate for some of the paper's younger student readers. The newspaper was published as part of a journalism class, was subject to regular operational and editorial control by faculty, and had a majority of its budget funded by the school district.<sup>50</sup> The Supreme Court cited those facts in determining that the school district had not evinced a "clear intent to create a public forum."<sup>51</sup>

The true significance of *Hazelwood* was the Court's decision to address the case using public forum analysis rather than the more student-friendly framework of *Tinker v. Des Moines Independent Community School District*.<sup>52</sup> That choice was grounded on the distinction that *Tinker* involved "pure" student speech that happened to take place in a school setting,<sup>53</sup> in contrast to student speech promulgated through a school-sponsored medium, as in *Hazelwood*.<sup>54</sup> Although *Hazelwood's*

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inconsistent with the First Amendment"). The majority interpreted the term to mean that public forum analysis is required to determine the proper category for a particular college instrument of expression. *See id.* at 738 ("*Hazelwood's* framework is generally applicable and depends in large measure on the operation of public-forum analysis . . .").

<sup>50</sup> *See Hazelwood*, 484 U.S. at 268–69.

<sup>51</sup> *Id.* at 270 (quoting *Cornelius v. NAACP*, 473 U.S. 788, 802 (1985)).

<sup>52</sup> 393 U.S. 503 (1969). The standard the Court articulated in *Tinker* was that "[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that" the student "conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id.* at 509 (internal quotation marks omitted). For a discussion of *Hazelwood* as "a giant step on [the Court's] developmental path toward a view of schooling that is firmly grounded in community power and values inculcation," see Salomone, *supra* note 1, at 266–69; see also Brief for Student Press Law Ctr., *supra* note 10, at 10–11 (stating that until the Court's decision in *Hazelwood*, the *Tinker* standard "had uniformly been applied to censorship of all student expression at high schools. . . . *Hazelwood* drastically shifted the balance"). Professor Salomone also points out that *Tinker* itself had been "a startling shift not only in legal doctrine but also in judicial attitude" from earlier Court practice of balancing "student's speech interests against the school's interests in indoctrination." Salomone, *supra* note 1, at 262.

<sup>53</sup> *Tinker*, 393 U.S. at 504 (describing the students' wearing of black armbands on school grounds to protest the war in Vietnam); *id.* at 505–06, 508 (describing the wearing of armbands as "akin to 'pure speech'").

<sup>54</sup> The *Hazelwood* Court distinguished the standards governing expression of student speech, as in *Tinker*, and the promotion of such speech, as in *Hazelwood*. 484 U.S. at 272–73 (explaining that the *Tinker* standard "need not also be the standard for determining when a school may refuse to lend its name and resources

final disposition (i.e., its narrow legal holding) is often cited as the Court's significant pronouncement,<sup>55</sup> the passages embodying the holding are merely standard public forum mechanics particularized for the facts of that case.<sup>56</sup> The "*Hazelwood*

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to the dissemination of student expression").

Public forum analysis emerged as a doctrine in the 1970s and quickly achieved widespread use. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1714 (1987). One could view the application of public forum analysis in the *Hazelwood* context as a policy-based departure in favor of school administrators. See, e.g., Salomone, *supra* note 1, at 263–66, 319 (positioning *Hazelwood* as the culmination of the Court's movement since the 1970s away from a focus on student speech rights and toward a view of schools as shapers of community values); *The Supreme Court, 1987 Term: Leading Cases*, 102 HARV. L. REV. 143, 276–79 (1988) (same). Because the public forum doctrine is applicable to many types of government-created or sponsored vehicles, see generally *Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (airport), *U.S. v. Kokinda*, 497 U.S. 720 (1990) (Post Office), *Cornelius v. NAACP*, 473 U.S. 788 (1985) (federal charity drive), another view—either alternative or complementary—would be to see the doctrine as a more consistent, and therefore preferable, mode of analysis than the narrower, school-centered standards such as *Tinker*. See Mark G. Yudoff, *Tinker Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN'S L. REV. 365, 375–76 (1995) ("The *Hazelwood* decision simply clarifies the distinction between personal and government expression."). *Contra* Brief for Student Press Law Ctr., *supra* note 10, at 10 (characterizing *Hazelwood* as *sui generis*). If one accepts the propriety of using the public forum doctrine in the school context, then *Hazelwood* seems more mechanically-ordained outcome than ideological departure from precedent.

<sup>55</sup> See, e.g., Samuel P. Jordan, Comment, *Viewpoint Restrictions and School-Sponsored Student Speech: Avenues for Heightened Protection*, 70 U. CHI. L. REV. 1555, 1555 (2003) ("In *Hazelwood School District v. Kuhlmeier*, the Supreme Court determined that restrictions on school-sponsored student speech—defined to include speech that is in some respect affirmatively promoted by the school—are permissible if reasonably related to valid pedagogical purposes."); Recent Case, *First Amendment—Prior Restraint—Seventh Circuit Holds That College Administrators Can Censor Student Newspapers Operated as Nonpublic Fora*, 119 HARV. L. REV. 915, 915 (2006) ("[I]n *Hazelwood* . . . , the Supreme Court held that . . . public high school administrators can censor school-sponsored student newspapers that are nonpublic fora if the censorship is reasonably related to legitimate pedagogical concerns." (internal citations omitted)). Cf. Brief for Ass'n for Educ. in Journalism and Mass Comm'n, *supra* note 10, at 12 (discussing *Hazelwood's* holding as allowing administrators to engage in prior restraint of student newspapers).

<sup>56</sup> For example, *Hazelwood* clearly "holds" that for educators to exercise editorial control over student speech in school-sponsored expressive activities, their actions must be "reasonably related to legitimate pedagogical concerns." 484 U.S. at 273. Rather than being a novel jurisprudential concept, this language is really just another way of saying that the state only has to meet rational basis review appropriate for any nonpublic forum. Compare *Hazelwood* with *Cornelius*, 473 U.S. at 806 (holding that control over a nonpublic forum is permitted "so long as the distinctions drawn are reasonable in light of the purpose served by the forum"). See S. Elizabeth Wilborn, *Teaching the New Three Rs—Repression, Rights, and Respect: Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 122 (1995) (describing the

framework” therefore is not the determination of liability in the case (*Hazelwood*’s principal committed no constitutional violation),<sup>57</sup> nor even the articulation of the legal standard (to control student media, educators only have to show that their actions are “reasonably related to legitimate pedagogical concerns”);<sup>58</sup> rather, it is the decisional process, i.e., public forum doctrine is to be used, not the *Tinker* framework.<sup>59</sup>

## II. THE “HAZELWOOD FRAMEWORK” / PUBLIC FORUM DOCTRINE SHOULD APPLY AT THE COLLEGE LEVEL

### A. *Argument Not to Extend Hazelwood*

Some critics argue that a university’s mission of serving as a “marketplace of ideas” is different than a secondary or elementary school’s purpose of inculcating values.<sup>60</sup> They point to *Hazelwood*’s alleged chilling effect on students at the pre-college level and warn that similar effects would occur at universities if the doctrine were extended.<sup>61</sup>

### B. *Public Forum Doctrine Poses Little Threat to College Journalists*

Given that the “*Hazelwood* framework” is merely the performance of a public forum analysis, this argument loses its bite. As discussed above, public forum analysis is a generally-applicable doctrine suitable to many contexts.<sup>62</sup> The expansive

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*Hazelwood* test as “essentially a rational basis test”). The Court’s poor drafting probably led to this confusion as to the nature of *Hazelwood*’s holding: it first clearly announced that it would use a standard different from *Tinker*, but then gave a facially-narrow holding—“[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns”—more than two pages after any reference to the broader terms of public forum doctrine. *Hazelwood*, 484 U.S. at 270–73.

<sup>57</sup> *Hazelwood*, 484 U.S. at 275–76.

<sup>58</sup> *Id.* at 273.

<sup>59</sup> *See id.* at 270.

<sup>60</sup> *See, e.g.*, *Hosty v. Carter*, 412 F.3d 731, 739–40 (7th Cir. 2005) (Evans, J., dissenting); *see also* Brief for Found. for Individual Rights in Educ., *supra* note 10, at 5–7.

<sup>61</sup> *See* Brief for Student Press Law Ctr., *supra* note 10, at 2, 11–15 (listing numerous adjudicated cases and reported instances nationwide of school censorship since *Hazelwood* and warning the same could happen at the college level).

<sup>62</sup> *See supra* note 54. The doctrine is not, however, applicable to all free speech disputes involving government resources. *See U.S. v. Am. Library Ass’n, Inc.*, 539

authority given to school administrators in *Hazelwood* represents a conclusion extrapolated from the facts of that particular case; it is not a universal holding. Applying the doctrine at the college level usually will yield the opposite result—a denial of government authority to censor<sup>63</sup>—*precisely because of* the distinguishing characteristics the critics cite. That is, the maturity and independence of college students vis-à-vis elementary and secondary school students militate in favor of finding that a student newspaper is a public forum, with that holding's attendant editorial freedom.<sup>64</sup> Likewise, when courts

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U.S. 194, 205–09 (2003) (“Just as forum analysis and heightened judicial scrutiny are incompatible with the role of public television stations and the role of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions.”); 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 n.98 (2001) (“It remains difficult today to distinguish a nonpublic forum speaker under public forum doctrine from a nonforum, or government-contractor, speaker under the government-as-speaker doctrine.”).

Although the doctrine provides consistency, it does lack nuance. Its binary nature provides a stark choice between strict scrutiny for public forums and rational basis review for nonpublic forums. See *supra* notes 26–28 and accompanying text. Perhaps it would be better to have a more flexible array of options for reviewing state control of student speech by expanding the public forum doctrine to provide for a third, intermediate tier of scrutiny. For one such proposal, see Wilborn, *supra* note 56, at 123, 147–54 (advocating for a content-based standard that differentiates between political, scholastic, and obscene or indecent speech); see also *Brown v. Li*, 308 F.3d 939, 963–64 (9th Cir. 2002) (Reinhardt, J., concurring in part and dissenting in part) (discussing two standards, including intermediate scrutiny, “that are more protective of student speech than the *Hazelwood* standard, and yet still respect a university’s need to further its legitimate pedagogical purposes”); Jordan, *supra* note 55, at 1571–79 (proposing two versions of intermediate scrutiny). This Comment asserts that the vast majority of student newspapers at the college level would be deemed public forums, so the greater protection provided by a third, intermediate tier is needed more at the primary and secondary school levels, where improper suppression of student speech has been more pervasive. See *supra* note 61 and accompanying text.

<sup>63</sup> See Recent Case, *supra* note 55, at 919. “[M]ost college student publications are going to be considered designated public forums, because that’s the way they’ve been operating for decades.” Student Press Law Ctr., *U.S. Court Throws Out Censorship Claim by Governors State U. Student Journalists*, (June 20, 2005), <http://www.splc.org/newsflash.asp?id=1033> (quoting Mark Goodman, Executive Dir., Student Press Law Ctr.) (internal quotation marks omitted).

<sup>64</sup> The *Hosty* court asserted that consideration of the students’ age and maturity is not a factor in determining the type of forum but is pertinent only for gauging the reasonableness of the government’s actions if a forum is found to be nonpublic. *Hosty*, 412 F.3d at 734–35. But the government is more likely to intend to create a public forum when those using it do not need state supervision. Elementary and secondary school administrators, acting *in loco parentis*, have a greater

seek to divine the government's intent for creating a forum, it would be odd for them to ignore the type of mission attached to the institution that the forum serves.<sup>65</sup> And finally, the fact that most college newspapers—unlike most at the elementary and secondary school levels—are not published as part of a class and are operated without significant school oversight should contribute to a finding of a public forum.<sup>66</sup>

### C. *Why Bother with Public Forum Analysis at All?*

If this Comment is correct that the vast majority of college-level newspapers would be deemed public forums, a natural question is whether they should be granted that designation as a class. Such a per se rule would provide legal certainty as well as reduce litigation. Furthermore, critics warn that if *Hazelwood* is extended to the college level, school administrators will inevitably be tempted to manipulate their oversight of newspapers so as to change their designation to nonpublic.<sup>67</sup>

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responsibility to supervise their young students than do college administrators to oversee their older students. See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684–85 (1986) (“A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.”).

<sup>65</sup> Isn't it more likely that the state would create a public forum, open to all, when the mission is to serve as a marketplace of ideas (at the college level), rather than when the mission is to inculcate a fixed set of values in impressionable minds (at the secondary level)?

<sup>66</sup> Student Press Law Ctr., *Hosty Q&A*, Spring 2006, [http://www.splc.org/report\\_detail.asp?id=1279&edition=39](http://www.splc.org/report_detail.asp?id=1279&edition=39); see also Arval A. Morris, *Censoring the School Newspaper*, 45 EDUC. L. REP. 1, 17 (1988); Mark J. Fiore, Comment, *Trampling the “Marketplace of Ideas”: The Case Against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915, 1962 (2002). The Seventh Circuit denied that the curricular nature of a newspaper was determinative, *Hosty*, 412 F.3d at 736, but it clearly was an important factor in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 268–70 (1988).

*Hazelwood* is likely to prove more troublesome for college media other than newspapers. According to the Executive Director of the Student Press Law Center, “[a]t least most student media have a history of operating as a forum . . . . A student group that brings speakers or shows films on campus may not have easily demonstrated that same tradition.” Rebecca McNulty, *Student Media Experts React to Governors State University Ruling*, Student Press Law Ctr. (June 22, 2005), <http://splc.org/newsflash.asp?id=1039> (internal quotation marks omitted).

Some fear that faculty academic freedom will also suffer if *Hazelwood* is extended to universities. See Brief for Ass'n for Educ. in Journalism and Mass Comm'n, *supra* note 10, at 19–20 (citing similar consequences for high school faculty as a result of *Hazelwood* and citing Peltz, *supra* note 62, at 483, 534).

<sup>67</sup> See Hill, *supra* note 10 (quoting media and free speech groups predicting that “some college administrators may look at student newspapers as more of an extension of the school's public relations function than as a newspaper”); Recent

### 1. Arguments Not to Extend *Hazelwood*: Legal Certainty

There is merit to the above arguments. Legal certainty is indeed generally desirable as a means of providing behavioral guidance, the end being to avoid disputes and litigation.<sup>68</sup> But exempting college newspapers as a class from public forum analysis ignores legitimate government interests. While freedom of the press is a vital American value that deserves protection,<sup>69</sup> government's right—and duty—to allocate public monies with care and deliberation is also an important principle.<sup>70</sup> This latter interest would be impinged if all university student journalists automatically received near-total editorial independence. Given the expansive scope of modern government,<sup>71</sup> the state requires the flexibility to choose whether to speak in its own voice,<sup>72</sup> to hire

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Case, *supra* note 55, at 920.

<sup>68</sup> Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 812–15 (2002) (asserting that “clarity in the meaning and effect of law provides affirmative benefits to individual legal actors, and thus in the aggregate to society in general”).

<sup>69</sup> A right by definition is an interest that deserves protection, BLACK'S LAW DICTIONARY (8th ed. 2004) (defining “right” as a “power, privilege, or immunity secured to a person by law”), but rights are not absolute. *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (noting that First Amendment principles are not absolute). For an account of the modern rise of the “Illusion of Absoluteness” of rights in America, see MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 18–46 (1991).

<sup>70</sup> See *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (“[A] State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for . . . public education, or any other program.”), *overruled on other grounds by* *Edelman v. Jordan*, 415 U.S. 651 (1974). See also Nicole B. Cásarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 502 (2000) (“[T]he budgeting of taxpayers’ money—determining which programs to support and by how much, and which to abandon—largely constitutes the very essence of government.”).

<sup>71</sup> See, e.g., Cásarez, *supra* note 70, at 501 (“[I]t would be impossible to list all the government benefits or subsidies that affect our lives today.”).

<sup>72</sup> See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) (“[I]t seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.”); William G. Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505, 524 (1989) (“[A] school is clearly permitted to create a ‘newspaper’ which has no purpose other than to transmit the school’s views to students.”); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 155 (1996) (“When the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.” (quoting *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 833 (1995))).

others to speak for it,<sup>73</sup> or to open a forum to foster a diversity of voices.<sup>74</sup>

The Supreme Court held in *Cornelius v. NAACP* that “[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”<sup>75</sup> While this principle governs the analysis of a forum, it also logically applies to the question of whether such analysis is necessary in the first place. Even if the vast majority of university student newspapers—upon individual inspection—turn out to be public forums, the government may choose to create and operate the exceptional few as nonpublic.<sup>76</sup> A categorical assumption that all such papers are

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<sup>73</sup> See Buss, *supra* note 72, at 524 (“[A] school is constitutionally free to engage students as agents to communicate the school’s views through the operation of the newspaper.”); Post, *supra* note 72, at 154–55 (“When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when . . . it enlists private entities to convey its own message.” (quoting *Rosenberger*, 515 U.S. at 833)).

<sup>74</sup> See, e.g., *Southworth*, 529 U.S. at 229 (attributing the University of Wisconsin’s raising of student fees “for the sole purpose of facilitating the free and open exchange of ideas”).

<sup>75</sup> 473 U.S. 788, 802 (1985). One could argue that a newspaper by its very nature is a traditional public forum, like “streets, parks, and other traditional public forums that time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (internal quotation marks omitted). The Supreme Court in *Hazelwood*, however, examined the high school newspaper at issue under the rubric of “school facilities” and concluded that they “do not possess all of the attributes of” traditional public forums. *Id.* Nor did the *Hosty* plaintiffs make that argument. Instead they asserted that, if a forum analysis need be done at all, the *Innovator* was a limited public forum, for which government intervention is examined under strict scrutiny. Response Brief of Plaintiffs-Appellees at 39, *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (No. 01-4155), available at <http://www.splc.org/pdf/hostystudentbrief.pdf>.

<sup>76</sup> In *Cornelius v. NAACP*, 473 U.S. 788 (1985), the Supreme Court explained that it looks to “the policy and practice of the government” and to “the nature of the property and its compatibility with expressive activity to discern the government’s intent” to create a designated public forum. *Id.* at 802. The communicative nature of student newspapers and their necessary compatibility with expressive activity (could there be a non-expressive newspaper?) would seem to militate in favor of their being public forums. That presumption could be negated, however, if government policies and procedures at a particular school affirmatively served to retain sufficient editorial control. The defense argued that such was the case in *Hosty* because of the University’s practice of having the faculty adviser sign off on the paper before publication. Brief of Defendant-Appellant at 21, *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (No. 01-4155), available at <http://www.splc.org/pdf/hostyagbrief.pdf>.

public forums irrespective of government intent improperly robs the state of necessary policy flexibility.<sup>77</sup>

## 2. Arguments Not to Extend *Hazelwood*: Bad Faith Manipulation by School Administrators

As for the fear that school administrators might be tempted to convert public forums into nonpublic ones, it is an open question whether they could do so successfully. Some commentators believe that the structure and practice of most university-level newspapers would lead courts to find them public forums anyway, despite school officials' machinations.<sup>78</sup> Moreover, even if school officials were initially successful, they would pay a price. In today's transparent and hyper-competitive market for higher education, a college's reputation is a key form of currency.<sup>79</sup> These market forces—and the spotlight shone by

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<sup>77</sup> *Hosty*, 412 F.3d at 736 (“[A]cademic freedom includes the authority of the university to manage an academic community . . . .”); see also *Cásarez*, *supra* note 70, at 543 (“Common sense dictates that the government must be allowed to use its resources to promote its own policies and objectives.”); Post, *supra* note 72, at 164 (“[T]he state can regulate speech within public educational institutions so as to achieve the purposes of education.”).

<sup>78</sup> For that viewpoint in the post-*Hosty* context, see *Hosty Q&A*, *supra* note 66 and, Recent Case, *supra* note 55, at 920–22. For an earlier analysis reaching the same conclusion, see J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L.J. 706, 726 (“[A]ttempts to convert a publication from forum to nonforum for the stated or intended purpose of gaining editorial control over the publication would . . . be found unconstitutional.”). *But see* *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (“[A] State is not required to indefinitely retain the open character of the facility.”). Absent an ongoing controversy giving rise to improper motives by school administrators, universities should be allowed to change the forum status of a student newspaper. See Ricky Ribeiro, *Public College Institutes Mandatory Prior Review Policy on Student Newspaper*, Student Press Law Ctr., (Feb. 21, 2006) available at <http://splc.org/newsflash.asp?id=1194> (reporting that student editors are “happy with the changes” after initial concerns following the move of the student newspaper at the University of Louisiana at Monroe from the communication department to the English department and the institution of a prior review policy). *But see id.* (quoting faculty and commentator warning of the potential for prior restraint).

<sup>79</sup> See Nicholas Thompson, *The Best, The Top, The Most*, N.Y. TIMES, Aug. 3, 2003, at 4A-24 (surveying the various rankings of American colleges that drive admissions criteria); Robert J. Morse & Samuel Flanigan, *America’s Best Colleges 2007: How We Do the Rankings*, U.S. NEWS & WORLD REPORT, available at [http://www.usnews.com/usnews/edu/college/rankings/about/07rank\\_brief.php](http://www.usnews.com/usnews/edu/college/rankings/about/07rank_brief.php) (explaining that reputation in the form of “peer assessment” counts for 25% of the magazine’s ranking).

press-freedom advocates—will discourage most schools from bad-faith manipulation.<sup>80</sup>

### III. THE *HOSTY* COURT'S BAIT AND SWITCH: RIGHT ON PUBLIC FORUM ANALYSIS, WRONG ON QUALIFIED IMMUNITY

#### A. *The Seventh Circuit's Grudging Application of the "Hazelwood Framework" / Public Forum Doctrine to Hosty*

The Seventh Circuit pointedly made no final determination as to the *Innovator's* forum status because the factual record was incomplete.<sup>81</sup> The court instead conducted a public forum analysis, asking whether the facts of the case—seen in the light most favorable to the plaintiffs as required at the interlocutory stage<sup>82</sup>—“would permit a reasonable trier of fact to conclude that the *Innovator* operated in a public forum and thus was beyond the control of the University's administration.”<sup>83</sup> Although the overall tone of *Hosty* evinced an underlying skepticism toward the students' position,<sup>84</sup> the court eventually accepted that the plaintiffs had established a constitutional claim,<sup>85</sup> thus satisfying the first prong of the interlocutory appeal. In addressing the second prong—determining whether Carter was entitled to immunity—the court's latent hostility was not so benign.

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<sup>80</sup> The Student Press Law Center has sponsored a drive to lobby colleges in the Seventh Circuit to announce formally that their student media are designated public forums. See Student Press Law Ctr., The Public Forum List, <http://splc.org/legalresearch.asp?id=91> (last visited Jan. 28, 2007) (providing model language and listing colleges that have and have not already complied).

<sup>81</sup> *Hosty*, 412 F.3d at 737.

<sup>82</sup> *Id.* at 733 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

<sup>83</sup> *Id.* at 737.

<sup>84</sup> For example, the court speculated about facts not in the record that might be helpful to Carter if a trial were to be held. *Id.* at 737–38 (“Perhaps the Director of Student Life (who appears to be one of Dean Carter's subordinates) has established criteria for subsidized student publications.”).

<sup>85</sup> *Id.* at 738 (“[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.”).

B. *The Seventh Circuit Improperly Applied Qualified Immunity in Hosty*

1. Settling Legal Uncertainties in Carter's Favor Should Trigger a Public Forum Analysis, Not Summary Judgment

Qualified immunity "protects . . . [a public official] from personal liability unless it should have been 'clear to a reasonable [public official] that his conduct was unlawful in the situation he confronted.'"<sup>86</sup> If a plaintiff can show that the official violated his constitutional rights, the second step is to ask "whether the right[s] [were] . . . clearly established."<sup>87</sup>

*Hosty* is predicated on a flawed application of the qualified immunity doctrine to the legal uncertainty surrounding *Hazelwood's* reach. The unsettled issue had been whether the "*Hazelwood* framework" applied to student newspapers at the university level, i.e., whether all such papers were public forums, thus rendering forum analysis unnecessary (the position of both the plaintiffs<sup>88</sup> and dissent<sup>89</sup>), or whether it was necessary to perform public forum analysis to determine the constitutional category of a given paper.<sup>90</sup> The latter choice does not ensure success for a defendant; it merely grants her the possibility of prevailing—in other words, the possibility that a paper will be deemed a nonpublic forum—depending on the facts of the case.<sup>91</sup> The Seventh Circuit resolved this uncertainty by choosing the latter option, holding that *Hazelwood* does extend to student newspapers at the university level.<sup>92</sup> Yet this holding does not mean that such papers are automatically entitled to a nonpublic forum designation; there is simply no presumption either way—public or nonpublic.<sup>93</sup>

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<sup>86</sup> *Id.* at 738 (quoting *Saucier*, 533 U.S. at 202).

<sup>87</sup> *Saucier*, 533 U.S. at 201.

<sup>88</sup> See Response Brief of Plaintiffs-Appellees, *supra* note 75, at 34 ("No Public Forum Analysis is Required for the Collegiate Press.").

<sup>89</sup> See *Hosty*, 412 F.3d at 743 n.3 (Evans, J., dissenting) ("[T]he law was clearly established that college administrators could not control school newspapers . . .").

<sup>90</sup> See *id.* at 738 ("*Hazelwood's* framework is generally applicable and depends in large measure on the operation of public-forum analysis . . .").

<sup>91</sup> *Hazelwood* itself began its analysis by asking "whether . . . [the high school newspaper there] may appropriately be characterized as a forum for public expression." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988). Hence, the "*Hazelwood* framework."

<sup>92</sup> *Hosty*, 412 F.3d at 735.

<sup>93</sup> The Illinois Solicitor General, who represented the state in *Hosty*, interpreted

How does (or should) this affect Dean Carter? First, it means that she does not automatically lose. The *Innovator*, as a student newspaper at the university level, is not given a per se designation as a public forum<sup>94</sup> (and the concomitant strict scrutiny that would likely doom any defense).<sup>95</sup> But contrary to the Seventh Circuit's ultimate grant of Carter's motion for summary judgment, nor should this broad holding of law mean that she automatically wins.

The *Hosty* court itself pointed out that qualified immunity must be determined on the particular facts of a case, not generally.<sup>96</sup> Thus even though the law ultimately was settled in her favor, Carter still should have been judged pursuant to her responsibility to ask what kind of forum the *Innovator* was and to act accordingly. Her litigation strategy of conceding that the *Innovator* was a public forum<sup>97</sup> must not obscure the crucial question of whether Carter should have known that designation at the time of her alleged wrongdoing. For a disposition at this level—interlocutory appeal from a motion for summary judgment—the facts must be seen in the light most favorable to the plaintiffs, and all inferences must be drawn in their favor.<sup>98</sup>

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the holding as meaning that “the extent to which the administration may have input into the content of newspapers depends upon the individual circumstances at each school,” and “[t]he degree of autonomy enjoyed by college newspapers will depend upon how those newspapers are set up and what internal university rules govern their operations.” McNulty, *supra* note 66 (internal quotation marks omitted).

<sup>94</sup> See *id.*

<sup>95</sup> Although the maxim “strict in theory, but fatal in fact” does not always hold true in First Amendment cases, see *Landell v. Sorrell*, 382 F.3d 91, 112 (2d Cir. 2002), there is only “a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right,” *Burson v. Freeman*, 504 U.S. 191, 213 (1992) (Kennedy, J., concurring). Carter's professed reason for halting publication, to ensure it was reviewed for quality, *Hosty v. Governors State Univ.*, 2001 U.S. Dist. LEXIS 18873, at \*6 (N.D. Ill. Nov. 13, 2001), hardly qualifies as a “compelling governmental interest” required by strict scrutiny, *U.S. v. Grace*, 461 U.S. 171, 177 (1983), nor do the means seem “narrowly drawn,” *id.*

<sup>96</sup> *Hosty*, 412 F.3d at 738. (“This inquiry . . . must be undertaken in light of the specific context of the case, not as a broad general proposition.”) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

<sup>97</sup> *Hosty v. Governors State Univ.*, 174 F. Supp. 2d 782, 786 (N.D. Ill. 2001).

<sup>98</sup> *Hosty*, 2001 U.S. Dist. LEXIS 18873, at \*11. Although when dealing with the status of the *Innovator* the court initially acknowledged that the facts in this kind of interlocutory appeal must be “[t]aken in the light most favorable to the party asserting the injury,” *Hosty*, 412 F.3d at 733 (quoting *Saucier*, 533 U.S. at 201), the court then ignored that procedural posture when deciding Carter's personal liability, see *id.* at 739 (emphasizing that “both legal and factual uncertainties dog the litigation” and that “[d]isputes about both law and fact” justify qualified immunity

The facts viewed as such justify finding that the *Innovator* was a public forum,<sup>99</sup> and, critically, that Carter should have known it;<sup>100</sup> the facts would make it “clear to a reasonable [public official in Carter’s position] that his conduct was unlawful in the situation he confronted.”<sup>101</sup> Accordingly, Carter’s motion for summary judgment should have been denied.

## 2. Carter Might Have Violated the Plaintiffs’ Rights Even Under the Reasonableness Standard of a Nonpublic Forum

The Seventh Circuit also implicitly overstated the unsettled nature of the law by failing to inquire whether Carter’s actions were constitutionally improper even if the *Innovator* were deemed a nonpublic forum. Within a nonpublic forum, speakers still have *some* protection; while not under the heavy burden of strict scrutiny, the government’s explanation for interference still must pass the test for reasonableness.<sup>102</sup> The Supreme Court has explained that educators may exercise editorial control “so long as their actions are reasonably related to legitimate pedagogical concerns,”<sup>103</sup> and “‘not an effort to suppress expression merely because [they] oppose the speaker’s view.’”<sup>104</sup>

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for Carter).

<sup>99</sup> *Hosty*, 412 F.3d at 737 (“[T]aken in the light most favorable to the plaintiff . . . [the] facts would permit a reasonable trier of fact to conclude that the *Innovator* operated in a public forum . . .”).

<sup>100</sup> Although the court makes a veiled criticism of the public forum doctrine, *id.* at 739 (“Many aspects of the law with respect to students’ speech . . . are difficult to understand and apply . . .”), it does not explicitly state that the inherent difficulty of applying the doctrine would, in and of itself, absolve a public official from having to abide by its strictures. Perhaps it should have. See *infra* note 120 and accompanying text.

<sup>101</sup> See *Hosty*, 412 F.3d at 738. “Participants in . . . a [public] forum . . . may not be censored . . . when the sponsor decides that particular speech is unwelcome.” *Id.* at 737. Here, the plaintiffs’ version of the disputed facts was that Carter censored them precisely *because* their speech—the *Innovator*’s upcoming stories—was decidedly unwelcome. See Response Brief of Plaintiffs-Appellees, *supra* note 75, at 24, 26–28.

<sup>102</sup> See, e.g., *U.S. v. Kokinda*, 497 U.S. 720, 726–27 (1990).

<sup>103</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (“[T]he First Amendment is so ‘directly and sharply implicate[d]’ . . . as to require judicial intervention to protect students’ constitutional rights” when “the decision to censor a school-sponsored publication . . . has no valid educational purpose.” (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))).

<sup>104</sup> *Kokinda*, 497 U.S. at 730 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)).

While the reasonableness standard may be easier to meet at trial—where a defendant’s evidence is viewed in the same light as that of the plaintiff—it is markedly more difficult to meet at the summary judgment stage. Here, the pleadings of Hosty and her fellow student plaintiffs allege that Carter’s demand for prior review of the *Innovator* was, in reality, an attempt to suppress articles critical of the administration, not an innocuous effort aimed at editorial quality control<sup>105</sup>—and hardly an action “reasonably related to legitimate pedagogical concerns.” Dean Carter, on the other hand, offered little more than assertions of fact or explanation that, at this procedural stage, should have been discounted as in conflict with the plaintiffs’ accounts.<sup>106</sup> The bulk of the allegations and inferences left standing indicate that Carter violated the First Amendment rights of the students even under the *Hazelwood* framework, and even in the context of a nonpublic forum.<sup>107</sup>

### 3. The Case Should Have Been Remanded

The court made clear its disapproval of the prospect of Carter’s having to “predict, at [her] financial peril, how constitutional uncertainties will be resolved.”<sup>108</sup> The proper solution to that valid concern was not to exaggerate the legal uncertainty surrounding *Hazelwood* as a means of justifying a premature grant of qualified immunity. Instead, the court should have remanded the case for trial to determine the facts against which the law would be applied.<sup>109</sup> A trial would have allowed the plaintiffs to press their

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<sup>105</sup> Response Brief of Plaintiffs-Appellees, *supra* note 75, at 26–28.

<sup>106</sup> For example, Carter “denies she demanded prior approval and contends she instructed [the printer] to call her regarding the newspaper so that a faculty member could review the paper for journalistic quality, *e.g.*, grammatical mistakes,” purportedly because the newspaper’s faculty adviser was unavailable. *Hosty v. Governors State Univ.*, 2001 U.S. Dist. LEXIS 18873, at \*6 (N.D. Ill. Nov. 13, 2001).

<sup>107</sup> *See Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (stating that judges may override the professional judgment of academic faculty when the decision in question “is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment”); *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995) (acknowledging that intervention by the federal courts is required when a teacher’s circumscription of a student’s speech is “a pretext for punishing the student . . . on the basis of inadmissible factors”).

<sup>108</sup> *Hosty v. Carter*, 412 F.3d 731, 739 (7th Cir. 2005).

<sup>109</sup> *See* 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE § 2716 (3d ed. 2005) (“[A] reviewing court must exercise caution in directing the entry of

case fully, would have put Carter on an even plane with them,<sup>110</sup> and would have served the public interest by developing clear guideposts for public forum analysis in the student/government context.<sup>111</sup>

If Carter were to lose in district court, she would be free to raise the defense of qualified immunity after trial—a defense based not on the facts as alleged by the plaintiffs before trial, but as developed thoroughly at trial.<sup>112</sup> If the facts justified her actions, then she was entitled to exoneration. But if her claims were mere pretext, then she rightfully should have been held accountable.<sup>113</sup>

#### IV. THE SIGNIFICANCE (AND INSIGNIFICANCE) OF *HOSTY*

The extension of *Hazelwood* to the college level poses no wide-scale danger to student journalists.<sup>114</sup> It is the court's qualified immunity decision that poses the real threat. By prematurely granting Carter qualified immunity at the pre-trial stage, the Seventh Circuit not only did a disservice to the instant plaintiffs,<sup>115</sup> but created a Catch-22 whereby similarly-situated

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summary judgment in order to avoid denying one side the right to a trial. . . . In most instances, therefore, the court simply will remand the case for further proceedings.”); *id.* at n.22 (“When summary judgment is granted on one issue, the appellate court may not extend the judgment to another issue under the guise of affirming the ‘result below’ when the effect is to preclude the losing party from disputing facts material to the claim.”).

<sup>110</sup> See *Hosty*, 412 F.3d at 737–38 (discussing factual scenarios that “have the potential to cast matters in a different light if a trial were to occur”); 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 63 (2d ed. 2005) (“[T]he person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims.”).

<sup>111</sup> See, e.g., *U.S. v. Kokinda*, 497 U.S. 720, 727–29 (1990) (analyzing the status of a forum based on the Court’s categorization of other types of property in prior cases).

<sup>112</sup> See FED. R. CIV. P. 12(a)(4)(A) (setting time standards for defense motions when the court postpones disposition until trial on the merits).

<sup>113</sup> See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1292–93 (10th Cir. 2004) (“[W]e may override an educator’s judgment where the proffered goal or methodology was a sham pretext for an impermissible ulterior motive.”).

<sup>114</sup> See *supra* Part II.B.

<sup>115</sup> The court stated that qualified immunity “ensure[s] that . . . uncertainties are resolved by prospective relief rather than by financial exactions from public employees,” *Hosty*, 412 F.3d at 739, but any prospective relief in this case is illusory. The individual plaintiffs, students all, presumably have graduated or moved on and thus lost the opportunity to complete their tenure at the student newspaper. See Michael Miner, “Hazelwood” Goes to College, CHI. READER, July 1, 2005 (stating that the two main plaintiffs, Jeni Porche and Margaret Hosty, were graduate students in

student plaintiffs will be unable to attain redress. The court effectively froze pertinent Seventh Circuit common law in establishing, by implication, that public forum analysis is so fact dependent that a school administrator can never know the legality of her actions in advance;<sup>116</sup> because no public official will ever go to trial, no precedent will develop to guide the actions of future defendants or to judge them at trial.<sup>117</sup>

While the public forum doctrine has been criticized as confusing and unsound,<sup>118</sup> it remains the law of the land in various contexts.<sup>119</sup> If the Seventh Circuit thought the doctrine so unworkable as to require absolution for offending public officials, the court should have said so explicitly.<sup>120</sup> Instead, the court's

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2000 when they served as *Innovator* editors).

<sup>116</sup> See *Hosty*, 412 F.3d at 736–37 (“We do not think it possible on this record to . . . evaluate Dean Carter’s justifications.”).

<sup>117</sup> Other student journalists who might need to vindicate their rights in the face of future meddling by the University’s administration cannot point to any res judicata effect from this case because Dean Carter’s concession that the *Innovator* was a public forum, see *Hosty v. Governors State Univ.*, 174 F. Supp. 2d 782, 786 (N.D. Ill. 2001), was never established as a matter of law—it was only assumed to be true at the summary judgment stage. See *Hosty*, 412 F.3d at 737–38 (describing contested facts that “have the potential to cast matters in a different light [from the plaintiffs’ assertions] if a trial were to occur”).

<sup>118</sup> See, e.g., *U.S. v. Kokinda*, 497 U.S. 720, 741 n.1 (1990) (Brennan, J., dissenting) (listing scholarly articles that have “roundly criticized” the Court’s public forum jurisprudence); Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 80–81 (1992) (“There is considerable scholarly support for the view that the Court’s public forum decisions . . . have failed to sustain an appropriately uninhibited, robust, wide-open debate on public issues.”) (internal quotation marks and citation omitted); Post, *supra* note 72, at 1715 (calling the doctrine a “byzantine scheme of constitutional rules” that is “virtually impermeable to common sense”). Public forum doctrine in the particular form of the “*Hazelwood* standard” has been criticized as “vague and difficult to apply outside the specific factual context in which it arose.” Brief for Student Press Law Ctr., *supra* note 10, at 10–13.

<sup>119</sup> See, e.g., *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322 (2002) (using public forum doctrine to examine whether a municipal permitting ordinance is constitutional); *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 176 (2002) (Rehnquist, C.J., dissenting) (critiquing majority decision in religious door-to-door canvassing case using public forum doctrine).

<sup>120</sup> The Seventh Circuit is of course well known for its frequent exegeses of legal doctrines ranging from historical curiosities, see, e.g., *Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir. 1982) (explaining and applying the probate exception to federal diversity jurisdiction, “one of the most mysterious and esoteric branches of the law”), to routine economic issues, see, e.g., Daniel P. Shapiro & Tracy E. Katz, *Judge Easterbrook’s New Look at Proving Class Claims of Deception*, CLASS ACTION LITIG. REP., Dec. 21, 2001, available at <http://litigationcenter.bna.com/pic2/lit.nsf/id/NWIN-56NNWF?OpenDocument> (describing Judge Easterbrook’s criticism and rejection of

muddled opinion obfuscates more than it illuminates.

#### CONCLUSION

Where the public finances student newspapers, surely public officials entrusted with administering such monies should have the option of choosing *ex ante* to maintain some oversight over the use of those funds. And if those officials affirmatively choose to establish an independent student voice, the law should be clear enough to protect *ex post* the students' First Amendment rights. The public forum doctrine, as unwieldy as it is, can enable either option.

The *Hosty* plaintiffs and their supporters would prefer the certain protection of a categorical rule rather than the unpredictable analysis of the public forum doctrine. At the other extreme, the Seventh Circuit's sleight of hand as to the uncertainty of *Hazelwood's* reach disables any protection for students. The Supreme Court should strike the proper balance by clarifying that the public forum doctrine is the proper method for determining the competing rights and interests of both students and state. The Court has provided the public forum doctrine as a means to adjudicate disputes between the government and speakers in state-sponsored vehicles. If the doctrine is to remain viable, the Court must play its institutional role of reconciling circuit splits, addressing important legal controversies, and policing imprudent lower court decisions.

Hopefully there will soon be a case that authoritatively and judiciously settles the question of the "degree of

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the "least sophisticated consumer" standard in Fair Debt Collection Practices Act cases and his development of the replacement "unsophisticated consumer" standard). If the targeted doctrine happens to have a Supreme Court pedigree, the Seventh Circuit certainly knows how to lobby for reform while nonetheless following binding precedent. *See, e.g.*, *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 734, 742 (7th Cir. 1986) (applying the *Enelow-Ettelson* doctrine after calling for the Supreme Court to reject it as obsolete); *Khan v. State Oil Co.*, 93 F.3d 1358, 1363–64 (7th Cir. 1996) (criticizing but following the "increasingly wobbly, moth-eaten foundations" of a Supreme Court antitrust decision), *rev'd*, 522 U.S. 3, 20 (1997) ("The [Seventh Circuit] was correct in applying [the criticized] principle despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents."). *But see* Fred S. McChesney, *Talking 'Bout My Antitrust Generation: Competition For and In the Field of Competition Law*, 52 EMORY L.J. 1401, 1409–10 (2003) (chiding Judge Easterbrook for his "unabashed judicial nullification" in "pretending that there is no Supreme Court decision of relevance" in a different antitrust case).

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deference . . . appropriate with respect to school-sponsored expressive activities at the college and university level.”<sup>121</sup> *Hosty v. Carter* is not that case. Until then, press freedom advocates have less to fear from the extension of the “*Hazelwood* framework” than from the creation of the “*Hosty* subterfuge.”

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<sup>121</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988).