NOTE

THE COLLEGE STUDENT MEDIA AS HOUSE ORGAN: REFLECTIONS ON AN OFF-KEY DECISION IN *HOSTY V. CARTER**

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I. INTRODUCTION

From its beginnings 180 years ago,[1] the public college and university student media have enjoyed the full legal protections of the First Amendment.[2] An opinion by the en banc U.S. Court of Appeals for the Seventh Circuit, however, threatens to erode those protections. The court's recent decision in *Hosty v. Carter*[3] signals a potential sea change in the law governing the free press rights of college students, causing alarm for members of the student media nationwide.[4]

Students' alarm stems from the Seventh Circuit's application in *Hosty* of the U.S. Supreme Court's controversial holding in *Hazelwood School District v. Kuhlmeier*[5] in determining whether a public college administrator[6] has the power to censor a student newspaper for engaging in unwelcome—though constitutionally protected—speech.[7] By answering that question in the affirmative, the Seventh Circuit became the first federal court of appeals to send the restrictive Hazelwood Doctrine to college.[8]

Prior to *Hosty*, courts applied the *Hazelwood* standard only to certain speech in public elementary, middle, or high schools.[9] The *Hazelwood* case arose when the principal at Hazelwood East High School refused to allow the publication of student-written articles about teenage pregnancy and the impact of divorce in a newspaper created as part of a journalism class at the school.[10]

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1. Established in 1826, the student-run newspaper at Miami University of Ohio, *The Miami Student*, claims to be the oldest student newspaper in the United States. Miami Student, http://www.miamistudent.net/home/generalinformation (last visited Mar. 3, 2007).

2. *See infra* Part III.A (analyzing cases involving the First Amendment rights of student-run publications).

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

4. *See infra* note 85 and accompanying text.

5. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

6. Private colleges and universities are not state actors and thus have the power to censor the student newspapers they sponsor, notwithstanding the First and Fourteenth Amendments. Brian J. Steffen, *Freedom of the Private-University Student Press: A Constitutional Proposal*, 36 J. MARSHALL L. REV. 139, 139 (2002) (noting that private institutions of higher education are "largely immune from the free expression commands of the Constitution").

7. *Hosty*, 412 F.3d at 734–35 ("*Hazelwood* provides our starting point.").

8. *See* 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, 511–12 (2001).

9. *See id.* at 508–09.

10. *Hazelwood*, 484 U.S. at 263. Principal Robert Reynolds said he felt the stories were "too sensitive" and that it was "simply inappropriate" for students to publish articles

Determining that such action did not violate the First Amendment, the Supreme Court declared that primary and secondary school administrators "must be able to take into account the emotional maturity of the intended audience in determining whether to [censor] student speech on potentially sensitive topics."[11] Under *Hazelwood*, a school thus may regulate "school-sponsored" speech, such as student publications, "so long as [the regulations] are reasonably related to legitimate pedagogical concerns."[12]

In its famous footnote seven, the *Hazelwood* Court explicitly declined to decide whether its newly enunciated standard determined the extent to which school officials could censor "school-sponsored expressive activities at the college and university level."[13] Answering the question left open by footnote seven, the Seventh Circuit asserted that the *Hazelwood* standard was, in fact, appropriate at the college and university level,[14] thereby drastically deviating from the courts' long-standing tradition of recognizing the nation's college campus as a marketplace of ideas. Before *Hosty*, courts had held unequivocally that Supreme Court precedent "leave[s] 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."[15]

In an era of declining respect for and protection of students' free expression rights,[16] supporters of a free and independent press on college campuses have good reason to fear that *Hosty* will gain favor among higher education administrators nationwide. Many worry that *Hosty* will arm officials with an effective weapon with which to silence some of their most vocal critics: the college student media.[17] Indeed, college officials have already begun to realize that

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about divorce. STUDENT PRESS LAW CTR., LAW OF THE STUDENT PRESS 38 (2d ed. 1994).

11. *Hazelwood*, 484 U.S. at 272 (citing examples of such "potentially sensitive topics" as discussions of teenage sexuality and the existence of Santa Claus).

12. *Id.* at 273.

13. *Id.* at 273 n.7.

14. Hosty v. Carter, 412 F.3d 731, 735 (7th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1330 (2006).

15. Healy v. James, 408 U.S. 169, 180 (1972). For a discussion of how *Hosty* conflicts with First Amendment case law, see *infra* Part III.A.

16. According to a 2005 study by the John S. and James L. Knight Foundation, which analyzed the opinions of more than 100,000 high school students, about three-fourths of those surveyed were ambivalent about the First Amendment or admit they take it for granted. JOHN S. AND JAMES L. KNIGHT FOUND., FUTURE OF THE FIRST AMENDMENT 3 (2005), http://www.knightfdn.org/publications/futureoffirstamendment/FoFA_Key_Findings_final.pdf. More than one-third of students surveyed believed the First Amendment "goes too far." *Id.* Only half of the respondents who were not members of the student media felt that journalists should be able to report on controversial stories without governmental approval. *Id.* at 4.

17. Of course, the *Hosty* decision is only precedent within the jurisdiction of the

the traditional conciliatory policies demanded of them by the First Amendment may no longer be required.[18] For the reasons stated herein, the restrictive *Hazelwood* standard should not, as a matter of law and policy, apply to public college campuses; accordingly, the Seventh Circuit wrongly decided *Hosty*.

This Note is organized in five parts. Part II discusses the *Hosty* opinion, exploring the factual and procedural background of the case and examining how the court reached its decision. Part III takes issue with the Seventh Circuit's decision, finding fault with the majority's opinion on three grounds. First, the *Hosty* majority failed to recognize that its holding directly and irreconcilably conflicts with Supreme Court precedent respecting the First Amendment rights of college students. Second, the decision in *Hosty* imposes an inapplicable standard. The *Hazelwood* standard for student expression was intended only in the narrow circumstances of a publication existing as a nonpublic forum and produced as part of the school's educational curriculum—not a publication such as the *Innovator*, the student newspaper at issue in *Hosty*. Finally, the Seventh Circuit majority ignored the compelling and distinct differences between the roles of primary and secondary schools and the role of universities in the educational spectrum.

Part IV considers the implications of the *Hosty* decision. By importing *Hazelwood* to the university setting, the Seventh Circuit has encouraged censorship of the college student media, silencing an institution that helps protect the ideal of the college and university campus as a marketplace of ideas. Part IV further contends the Seventh Circuit's decision will likely inhibit the education and development of tomorrow's professional journalists. Part V concludes this Note.

II. CASE RECITATION: *HOSTY V. CARTER*

A. Factual and Procedural History

Hosty v. Carter began when Jeni S. Porche, Margaret L. Hosty, and Steven P. Barba,[19] leaders of the student newspaper

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Seventh Circuit (Illinois, Indiana, and Wisconsin). *See* U.S. Courts, Circuit Map, http://www.uscourts.gov/courtlinks (last visited Mar. 3, 2007). Given the seminal nature of its holding, however, it is possible that the opinion's rationale could take root elsewhere.

18. *See infra* note 157 and accompanying text (discussing a memo from the general counsel of the California State University System concerning the *Hosty* decision).

19. Porche served as Editor in Chief, Hosty as Managing Editor, and Barba as Staff Reporter for the *Innovator*, the university's student newspaper. Hosty v. Carter, 325 F.3d 945, 946 (7th Cir. 2003), *rev'd en banc*, 412 F.3d 731 (2005), *cert. denied*, 126 S. Ct. 1330 (2006). They were appointed by the university's Student Communications Media Board,

at Governors State University,[20] chose not to tackle such issues as "the apostrophe missing from the University's name," but instead focused the newspaper's coverage on "meatier fare."[21] Indeed, the university empowered the student journalists to publish such "meatier fare" by having a stated policy of granting students complete authority to "determine [the] content and format of their respective publications *without censorship or advance approval*."[22] Later actions by members of the Governors State administration, however, would lead the students to question the university's commitment to student press freedom.[23]

From its inception in 1971,[24] the *Innovator* functioned as a typical American college newspaper. Funding for the *Innovator*'s publication came from student "activity fees" and advertising revenue.[25] Membership on the newspaper's staff was limited to Governors State students, but participation was strictly voluntary and extracurricular.[26] The *Innovator* contracted with a private publishing company to print two issues of the newspaper each month.[27]

When Porche and Hosty were appointed to lead the *Innovator* during the 2000–2001 school year, the two pledged to change the tone of the newspaper's coverage.[28] Instead of focusing on "all fluff and stuff" and serving as a media relations tool, or house organ, for the university,[29] Porche and Hosty sought to

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which acted as the newspaper's publisher and retained control of the *Innovator*'s budget. GOVERNORS STATE UNIV., STUDENT HANDBOOK 2000–2001 (2000), http://webserve.govst.edu/users/gsas/studenthandbook2000-2001.

20. Governors State University, located in University Park, Illinois, is a publicly funded institution of higher education with an enrollment of about 6,000 students. Governors State University, Facts and Figures, http://www.govst.edu/aboutgsu/t_aboutgsu.aspx?id=204 (last visited Mar. 3, 2007). Described as a "campus for working adults," Governors State admits only undergraduate students who have earned at least an associate's degree or at least 60 hours of academic credit from another institution. Governors State University, About GSU, http://www.govst.edu/AboutGSU (last visited Mar. 3, 2007); Governors State University, Undergraduate Admissions Requirements, http://www.govst.edu/apply/undergrad.htm (last visited Mar. 3, 2007).

21. *Hosty*, 412 F.3d at 732.

22. *Hosty*, 325 F.3d at 946 ("Although the newspaper's faculty adviser often read stories intended for publication at the request of the student editors, the adviser did not make content decisions. Only advice was offered.").

23. Jeffrey R. Young, *Censorship or Quality Control?*, CHRON. HIGHER EDUC. (Wash., D.C.), Aug. 9, 2002, at A36.

24. INNOVATOR, Oct. 31, 2000, at 1, *available at* http://www.splc.org/pdf/innovator.pdf (proudly proclaiming that the *Innovator* has been published "Since 1971").

25. *Hosty*, 412 F.3d at 737; *see also* GOVERNORS STATE UNIV., *supra* note 19.

26. *Hosty*, 412 F.3d at 736.

27. *See* Young, *supra* note 23.

28. *Id.*

29. *Id.* Or, as Judge Evans put it in his *Hosty* dissent: "The *Innovator*, as opposed to

cover the Governors State administration with a more critical eye.[30] They hoped "to spark more public debate at the institution."[31]

In four issues published between July and November 2000, the *Innovator* did just that. An article appearing in the October 31 edition of the *Innovator* raised questions about the qualifications of the English department chairwoman, quoting students who accused her of making racial slurs.[32] Another article critical of the Governors State administration quoted one student who alleged that an administrator told him he was "tired of dealing with these punk kids," referring to Governors State students.[33] Another article openly criticized the dean of the university's College of Arts and Sciences for deciding not to renew the teaching contract of the *Innovator*'s faculty adviser.[34]

In response to those articles and others like them, the Governors State administration accused the *Innovator* of "irresponsible and defamatory journalism."[35] Meanwhile, Patricia Carter, the university's dean of student affairs, contacted Charles Richards, president of the company that printed the *Innovator*.[36] Dean Carter informed Richards that his company was no longer

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writing merely about football games, actually chose to publish hard-hitting stories." *Hosty*, 412 F.3d at 742 (Evans, J., dissenting).

30. *See* Young, *supra* note 23. Porche and Hosty did not have to strain to see problems at Governors State. For instance, the university had come under fire for various missteps in 2000, including "the failure of a graduate social work program to be accredited." *Governors State Sued by 2 Student Editors*, CHI. TRIB., Jan. 25, 2001, § 2, at 3.

31. Young, *supra* note 23.

32. M.L. Hosty, *Is Dr. Muhammad Failing Her Students?*, INNOVATOR, Oct. 31, 2000, at 1 ("The administration's willful ignorance of the deplorable state of affairs in the English department with [chairwoman Rashidah Jaami'] Muhammad at the mast is reminiscent of the blind leading the blind, and some students have minds and futures too bright to allow them to become entirely misled . . . .").

33. *See* Young, *supra* note 23.

34. *Hosty*, 412 F.3d at 732.

35. *Id.* at 733. In an open letter to the Governors State community, university president Stuart I. Fagan called the *Innovator*'s coverage "an angry barrage of unsubstantiated allegations that essentially—and unfairly—excoriated some members of the university faculty and administration (myself included)." Letter from Stuart I. Fagan, President, Governors State Univ., to the Governors State University Community (Nov. 3, 2000) (on file with the Houston Law Review). He also condemned the student journalists for engaging in a "one-sided recitation of the issues" and for taking "on the role of judge, jury, and executioner." *Id.* Indeed, the Illinois College Press Association, conducting an independent review of the controversy, noted "several ethical lapses" by the *Innovator*'s staff, including the appearance of "a conflict of interest with the editors writing investigative stories about an English department coordinator who also is one of their teachers." Letter from Jim Killam, President, Ill. Coll. Press Ass'n, to Jeni S. Porche, Editor in Chief, Innovator, et al. (Mar. 2001) (on file with the Houston Law Review).

36. Hosty v. Carter, 325 F.3d 945, 947 (7th Cir. 2003), *rev'd en banc*, 412 F.3d 731 (2005), *cert. denied*, 126 S. Ct. 1330 (2006).

authorized to print the newspaper unless a university official had reviewed and approved its content.[37] Richards responded by informing Dean Carter that requiring prior review[38] of a student-run university newspaper was, to his knowledge, unconstitutional.[39] Dean Carter nevertheless reiterated her instructions, further demanding that Richards contact her before printing the next issue of the newspaper and reminding him that Governors State paid his company to print the *Innovator*.[40] The *Innovator* ceased publication in November 2000 after Richards informed the newspaper's editors of his communications with Dean Carter.[41] The journalists refused to submit the newspaper to prior review,[42] and the *Innovator* has not been published since.[43]

In January 2001, Porche, Hosty, and Barba filed suit against Governors State University, its board of trustees, Dean Carter, and fourteen other Governors State administrators in the U.S. District Court for the Northern District of Illinois.[44] The student journalists alleged a "litany of grievances" in their complaint[45]

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37. *Id.*

38. In the context of a student newspaper, "prior review" is defined as "the practice of school officials—or anyone in a position of authority outside the editorial staff—demanding that they be allowed to read (or preview) copy prior to publication and/or distribution." Mike Hiestand, Prior Review vs. Prior Restraint (June 4, 2002), http://www.studentpress.org/nspa/trends/~law0602hs.html. "Prior restraint" occurs when a school official or anyone in a position of authority "actually does something to inhibit, ban, or restrain its publication." *Id.*

39. Letter from Charles Richards, President, Reg'l Publ'g Corp. (Nov. 14, 2000) (on file with the Houston Law Review); Hosty v. Governors State Univ., No. 01-C-500, 2001 WL 1465621, at *2 (N.D. Ill. Nov. 13, 2001), *aff'd in part sub nom.* Hosty v. Carter, 325 F.3d 945 (7th Cir. 2003), *rev'd en banc*, 412 F.3d 731 (2005), *cert. denied*, 126 S. Ct. 1330 (2006).

40. *Hosty*, 2001 WL 1465621, at *2.

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

42. *Id.*

43. *Appeals Court Extends* Hazelwood *to Colleges*, REPORT, Fall 2005, at 24, *available at* http://www.splc.org/report_detail.asp?id=1239&edition=37. Students at Governors State, however, are currently publishing a new newspaper, appropriately called the *Phoenix*. Governors State University, Clubs and Organizations, http://www.govst.edu/sas/t_sl.aspx?id=1314 (last visited Mar. 3, 2007).

44. *See* Hosty v. Governors State Univ., 174 F. Supp. 2d 782, 783 (N.D. Ill. 2001); *see also Editors File Lawsuit Against State University for Actions Designed to Paralyze Publication*, REPORT, Spring 2001, at 10 [hereinafter *Editors File Lawsuit*], *available at* http://www.splc.org/report_detail.asp?id=661&edition=18.

45. *See Hosty*, 325 F.3d at 947. In addition to Dean Carter's demand for prior review of the newspaper, the students complained about the actions of various administrators, including allegations that officials "tampered with their mail, locked them out of the newspaper office, replaced a computer without consent and denied them access to equipment and supplies" and failed to pay Porche and Hosty "'several thousand [dollars] a piece'" in past wages. *See Editors File Lawsuit*, *supra* note 44 (quoting Jeni Porche, Editor in Chief, Innovator) (alteration in original); *see also* Letter from Margaret L. Hosty,

and sought declaratory and injunctive relief and damages pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2202.[46] The gravamen of the students' claims was that the defendants had violated the students' First Amendment rights by imposing an unconstitutional system of prior review and restraint on the *Innovator*.[47]

On April 30, 2001, the district court dismissed all claims against Governors State University and its board of trustees on the ground that, as arms of the state of Illinois, the two were entitled to sovereign immunity pursuant to the Eleventh Amendment.[48] Moreover, the district court dismissed the claims for money damages against the Governors State administrators in their official capacity on the ground that the court lacked jurisdiction to hear those claims under 42 U.S.C. § 1983.[49] The court, however, denied a motion to dismiss the claims for equitable relief against the administrators in their official capacity[50] as well as all claims asserted against the administrators in their personal capacity.[51]

The administrators then moved for summary judgment on all remaining claims,[52] advancing two arguments. First, the administrators claimed that except for Dean Carter, the student journalists "fail[ed] to establish individual involvement on the part of each defendant, and therefore the § 1983 claims must

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Managing Editor, Innovator, to Members of the GSU Student Senate (Feb. 26, 2001) (on file with the Houston Law Review) (cataloging grievances allegedly suffered by the *Innovator* and its editors).

46. *Hosty*, 174 F. Supp. 2d at 783. Title 42, § 1983 of the U.S. Code allows actions for the deprivation of civil rights. *See* 42 U.S.C. § 1983 (2000). Title 28, § 2202 authorizes declaratory and equitable relief. *See* 28 U.S.C. § 2202 (2000).

47. *Hosty*, 174 F. Supp. 2d at 783–84; *see also* Student Press Law Ctr., Editors Sue University for First Amendment Violations (Mar. 30, 2001), http://www.splc.org/newsflash.asp?id=259&year=2001 (reporting that the students sought "compensatory damages in excess of $75,000 and punitive damages in excess of $1,000,000").

48. *Hosty*, 174 F. Supp. 2d at 784. The Eleventh Amendment prohibits private federal lawsuits against a state, a state agency, or a state official in certain circumstances. *See* U.S. CONST. amend. XI.

49. *Hosty*, 174 F. Supp. 2d at 784–85 ("The allegations against the university officials arise out of their official duties, and they are immune from suit for retrospective relief under § 1983.").

50. *Id.* at 785 (citing *Ex Parte* Young, 209 U.S. 123 (1908)).

51. *Id.* at 785–86 (rejecting defendants' arguments that plaintiffs sued the administrators only in their official capacity and that the defendants were entitled to qualified immunity because they had no notice that their behavior was "probably unlawful").

52. Hosty v. Governors State Univ., No. 01-C-500, 2001 WL 1465621, at *1 (N.D. Ill. Nov. 13, 2001), *aff'd in part sub nom.* Hosty v. Carter, 325 F.3d 945 (7th Cir. 2003), *rev'd en banc*, 412 F.3d 731 (2005), *cert. denied*, 126 S. Ct. 1330 (2006).

fail."[53] Second, they argued that the doctrine of qualified immunity barred all claims against the administrators because their behavior "did not violate clearly established constitutional rights."[54]

In an unpublished decision, the district court on November 13, 2001, granted summary judgment for all remaining administrators except Dean Carter.[55] In so holding, the court reasoned that although the students established the individual involvement of seven of the remaining defendants,[56] all of the defendant administrators except Dean Carter were entitled to qualified immunity.[57] The court thus dismissed all the student journalists' claims except those asserted against Dean Carter.[58]

The district court found that Dean Carter was not entitled to qualified immunity because she probably violated the student journalists' clearly established constitutional rights when she prohibited publication of the *Innovator* without prior administrative review and approval.[59] Persuaded in part by the Fifth Circuit's decision in *Schiff v. Williams*,[60] the court found that "Dean Carter was not constitutionally permitted to take adverse action against the newspaper because of its content."[61] Importantly, the court also found that Dean Carter had erroneously relied on *Hazelwood School District v. Kuhlmeier*[62] when she argued that the prohibition against the prior review and restraint of a student newspaper was not "clearly

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53. *Id.* at *4. In claims arising under 42 U.S.C. § 1983, such as those asserted in *Hosty*, "an individual cannot be held liable unless he caused or participated in the asserted constitutional violation." *Id.* (citing Zimmerman v. Tribble, 226 F.3d 568, 574 (7th Cir. 2000)).

54. *Id.* at *5–7. Under the doctrine of qualified immunity, government officials performing discretionary functions are not liable unless they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at *5 (quoting Upton v. Thompson, 930 F.2d 1209, 1211–12 (7th Cir. 1991)).

55. *Id.* at *7.

56. The court found that the students presented no evidence that Governors State President Stuart Fagan, Provost Paul Keys, Interim Associate Provost Peggy Woodward, and Professor Jane Wells participated in the alleged constitutional violations. *Id.* at *4.

57. *Id.* at *5–7.

58. *Id.* at *7.

59. *Id.* at *6–7.

60. Schiff v. Williams, 519 F.2d 257, 261 (5th Cir. 1975) (concluding that the president of a public university violated the First Amendment when he dismissed the editors of the student newspaper because the editors' poor grammar, spelling, and syntax could have embarrassed the school).

61. *Hosty*, 2001 WL 1465621, at *7. ("[T]he 'right of free speech embodied in the publication of a college student newspaper cannot be controlled except under special circumstances.'" (quoting *Schiff*, 519 F.2d at 260)).

62. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); *see supra* notes 10–12 and accompanying text (discussing the Supreme Court's holding in *Hazelwood*).

established" under existing First Amendment jurisprudence.[63] The court readily distinguished the facts of *Hazelwood* by noting that unlike *Hazelwood*, the instant case involved a newspaper created extracurricularly by college students who retained full authority to make all editorial decisions.[64]

Dean Carter then pursued an interlocutory appeal before the U.S. Court of Appeals for the Seventh Circuit.[65] Confronting the controlling question of "whether the principles of *Hazelwood* apply to public college and university students,"[66] a three-judge panel of the Seventh Circuit affirmed the district court's decision that Dean Carter was not entitled to qualified immunity.[67] In an opinion written by Judge Terrence T. Evans,[68] the panel engaged in a searching review of First Amendment jurisprudence as applied to the college student media. In so doing, the court found that:

> [f]or several decades, courts have consistently held that student media at public colleges and universities are entitled to strong First Amendment protections. . . . Attempts by school officials, like Dean Carter here, to censor or control constitutionally protected expression in student-edited media have consistently been viewed as suspect under the First Amendment.[69]

Moreover, the Seventh Circuit panel agreed with the district court that the restrictive First Amendment standard in *Hazelwood* was clearly inapplicable to a university setting.[70] Thus, the Seventh Circuit panel rejected Dean Carter's argument that the doctrine of qualified immunity barred the students' suit because the "law was not clearly established that her request to review and approve the *Innovator* prior to printing might violate the student editors' rights under the First Amendment."[71]

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63. *Hosty*, 2001 WL 1465621, at *7.

64. *Id.* (citing *Hazelwood*, 484 U.S. at 273 n.7).

65. Hosty v. Carter, 325 F.3d 945, 946 (7th Cir. 2003), *rev'd en banc*, 412 F.3d 731 (2005), *cert. denied*, 126 S. Ct. 1330 (2006).

66. *Id.*

67. *Id.* at 950.

68. *Id.* at 946.

69. *Id.* at 947.

70. *Id.* at 949 (observing that "[w]hile *Hazelwood* teaches that younger students in a high school setting must endure First Amendment restrictions, we see nothing in that case that should be interpreted to change the general view favoring broad First Amendment rights for students at the university level").

71. *Id.* at 947.

Undeterred, Dean Carter petitioned the Court of Appeals for the Seventh Circuit for rehearing en banc.[72] The full Seventh Circuit granted her petition, vacated the panel's decision,[73] and heard oral arguments on January 8, 2004.[74] The Seventh Circuit's en banc decision is the subject of this Note.

B. The Court's Reasoning

In a 7-4 decision, the en banc Court of Appeals for the Seventh Circuit reversed the three-judge panel's denial of summary judgment for Dean Carter.[75] Judge Frank H. Easterbrook, writing for the majority, succinctly stated the crux of the court's conclusion: "*Hazelwood*'s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools."[76] Accordingly, the majority held that Dean Carter was entitled to summary judgment on qualified immunity grounds because "both legal and factual uncertainties dog the litigation," especially with respect to the application of *Hazelwood* to the university setting.[77]

In arriving at its conclusion, the majority began by noting the procedural framework it considered in reaching the merits of the case, the law of qualified immunity.[78] The test required by qualified immunity is: first, whether "the facts alleged show the [public official's] conduct violated a constitutional right," and if so, "whether the right was clearly established."[79]

Moving to the merits of the case, the majority answered the first question in the affirmative.[80] The majority reached this conclusion by engaging in the traditional public-forum analysis

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72. Hosty v. Carter, 412 F.3d 731, 733 (7th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1330 (2006).

73. *Id.*

74. *Court Hears Arguments in Governors State Case*, REPORT, Spring 2004, at 24, *available at* http://www.splc.org/report_detail.asp?id=1100&edition=29.

75. *See Hosty*, 412 F.3d at 739.

76. *Id.* at 735 (citing Axson–Flynn v. Johnson, 356 F.3d 1277, 1289 (10th Cir. 2004); Bishop v. Aranov, 926 F.2d 1066, 1071 (11th Cir. 1991)).

77. *Id.* at 739. The court elaborated: "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 [F]irst [A]mendment." *Id.* Indeed, the court noted that it had not confronted the subject of whether *Hazelwood* applies to a university student newspaper before Dean Carter presented the question in this case. *Id.* at 738–39.

78. *Id.* at 733 (describing the two-step inquiry required by the doctrine of qualified immunity).

79. *Id.* (alteration in original) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).

80. *Id.* at 737–38.

established by First Amendment case law.[81] The majority ultimately agreed with the student journalists that a reasonable trier of fact could conclude that the *Innovator* was a designated public forum in which the "editors were empowered to make their own decisions, wise or foolish, without fear that the administration would stop the presses."[82] Having thus found that the students' allegations of Dean Carter's demand for prior review represented a violation of constitutional rights, the majority confronted the second step of the inquiry, i.e. whether the constitutional rights Dean Carter allegedly violated were "clearly established."[83]

The majority answered this question in the negative.[84] In so holding, the majority issued the most controversial aspect of its decision, eliciting outrage among the college student media nationwide.[85] The controversy resulted because the court—for the first time—applied the *Hazelwood* framework to a student publication at a college or university.[86] *Hazelwood*, the majority observed, concerned a student newspaper created as part of a journalism class at a high school.[87] The majority noted that the

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81. *Id.* at 736–37 ("What, then, was the status of the *Innovator*? Did the University establish a public forum? Or did it hedge the funding with controls that left the University itself as the newspaper's publisher?"). "Public forum analysis" is defined as "a legal doctrine the courts have developed to evaluate the legality of government restrictions on expression on government-owned property such as a civic auditorium or an airport," or, *inter alia*, student media sponsored by a publicly funded university. *See* STUDENT PRESS LAW CTR., *supra* note 10, at 35; *see also* Bd. of Regents v. Southworth, 529 U.S. 217, 229–30 (2000) (discussing and applying the traditional public forum analysis).

82. *Hosty*, 412 F.3d at 738. In so holding, the majority considered the identity of the *Innovator*'s publisher and whether the university had declared, through its policies or practices, that the *Innovator* was a public forum. *Id.* at 737. The majority, however, noted the ambiguity of some of the Student Communications Media Board's policies and the identity and function of the *Innovator*'s faculty adviser at the critical time. *Id.* at 737–38. As such, it was not possible "on this record to determine what kind of forum the University established or [to] evaluate Dean Carter's justifications." *Id.* at 737. However, viewing the matters in the light most favorable to the students, as it must do on interlocutory appeal, the majority nevertheless determined the *Innovator* was a designated public forum. *Id.*

83. *Id.* at 738.

84. *See id.* at 738–39.

85. *See* Whitney Allen et al., *Decision Erodes Freedom of Expression on Campus*, INDIANAPOLIS STAR, July 6, 2005, at 11A ("The ruling, if allowed to stand, will do great damage to nearly 40 years of First Amendment protection for student publications."); *Court Threatens Student Voice*, DAILY TEXAN, June 22, 2005, at A4 ("[B]y even invoking the rules of *Hazelwood* to a case concerning college presses, the court has threatened the independence of student journalists everywhere."); Harvey A. Silverglate, *Assault on College Press*, NAT'L L.J. (N.Y.), Oct. 17, 2005, at 23 ("If the 7th Circuit opinion stands, student newspapers could quickly become house organs, like alumni magazines, rather than independent forums of news and opinion.").

86. *See supra* note 76 and accompanying text.

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

Hazelwood Court held that school-funded speech may be regulated, and censored, when "reasonably related to legitimate pedagogical concerns."[88] The *Hosty* majority added, in a footnote, that the *Hazelwood* Court declined to decide whether the "substantial deference" lower federal courts accorded educators' decisions about the content of school-sponsored newspapers was appropriate at the post-secondary level.[89] Moreover, the majority observed that the Tenth[90] and Eleventh[91] Circuits "have used *Hazelwood* as the framework for evaluating the acts of colleges as well as high schools."[92] In addition, the majority noted that the "Supreme Court does not identify for future decision questions that already have 'clearly established' answers."[93] Thus, the majority reasoned, Dean Carter was entitled to qualified immunity because the issue of whether *Hazelwood* applied to college and university student speech in November 2000 was sufficiently cloudy; therefore, her behavior could not be said to violate the student journalists' "clearly established" rights.[94]

In so holding, the en banc majority rejected the student journalists' attempts to distinguish *Hazelwood*, as well as those by the district court and the three-judge panel.[95] Instead, the Seventh Circuit found that "there is no sharp difference between high school and college papers" with respect to the pedagogical need for school administrators to ensure "'high standards for the student speech that is disseminated under [the school's]

88. *See id.* (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).

89. *Id.* at 734–35.

90. *See generally* Axson–Flynn v. Johnson, 356 F.3d 1277, 1289 (10th Cir. 2004) (holding that *Hazelwood* allows a university to compel student speech even if that speech conflicts with the student's religious beliefs, as long as the speech occurs in a classroom as part of a class curriculum).

91. *See* Bishop v. Aranov, 926 F.2d 1066, 1074 (11th Cir. 1991) (holding *Hazelwood* allows a university to control a professor's speech during classroom instruction because "'educators do not offend the First Amendment by exercising editorial control over the style and content of student [or professor] speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns'" (alteration in original) (quoting *Hazelwood*, 484 U.S. at 273)).

92. *Hosty*, 412 F.3d at 738. *But see id.* (noting that the First Circuit, relying solely on *Hazelwood*'s footnote 7, found that the Supreme Court itself recognized that the Hazelwood Doctrine *does not* apply to universities (citing Student Gov't Ass'n v. Bd. of Trs., 868 F.2d 473, 480 n.6 (1st Cir. 1989))).

93. *Id.* (citing Wilson v. Layne, 526 U.S. 603, 614–18 (1999)).

94. *Id.* at 737–39.

95. The en banc majority admonished the district court and three-judge panel for, in its view, overstating the certainty of the law governing student speech at the college and university level. *Id.* at 738–39 ("Many aspects of the law with respect to students' speech . . . are difficult to understand and apply . . . .").

auspices'" or to "disassociat[e] the school from 'any position other than neutrality on matters of political controversy.'"[96]

The student journalists sought to distinguish *Hazelwood* from the circumstances of their case on two grounds: first, *Hazelwood* involved speech by high school students; and second, *Hazelwood* involved speech in a curricular setting.[97] Rejecting the students' first argument, that *Hazelwood*'s footnote seven meant that prior review was appropriate for elementary through high school publications but not university publications, the majority observed that the *Hazelwood* footnote discussed only "degrees of deference."[98] *Hazelwood* declared that "whether *some* review is possible depends on the answer to the public-forum question, which does not (automatically) vary with the speakers' age," the court stated.[99] Turning to the students' second argument, that prior review is inappropriate for publications produced by extracurricular student organizations, the majority concluded, again, that the issue "depends in large measure on the operation of public-forum analysis rather than the distinction between curricular and extra-curricular activities."[100]

Four of the court's eleven judges dissented.[101] In a single opinion written by Judge Terrence T. Evans, the dissent concluded that the majority erroneously extended *Hazelwood*, which the Supreme Court intended to apply only in the narrow circumstances of elementary and secondary education.[102] The dissent recognized important legal distinctions between college and high school students. First, the dissenting judges reasoned that "[a]ge, for which grade level is a very good indicator, has

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96. *Id.* at 734–35 (first alteration in original) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271–72 (1988)).

97. *Id.*

98. *Id.* at 734 (noting that the "footnote does not even hint at the possibility of an on/off switch" that renders college newspapers ineligible for prior review, and commenting that that "many high school seniors are older than some college freshmen, and junior colleges are similar to many high schools").

99. *Id.*

100. *Id.* at 738. For examples of school-sponsored extracurricular speech—such as that of the *Innovator*—in which a right to control might be evident, e.g. a student's "puff piece" in the university alumni magazine for which the school offered course credit, see *id.* at 736.

101. *Id.* at 739 (Evans, J., dissenting). Two circuit judges, Judges Evans and Rovner, who participated in the original panel, dissented, joined by Judges Wood and Williams. *Id.*; Hosty v. Carter, 325 F.3d 945, 946, 950 (7th Cir. 2003), *rev'd en banc*, 412 F.3d 731 (2005), *cert. denied*, 126 S. Ct. 1330 (2006). Judge Coffey, who had ruled for the student journalists in the panel proceeding, agreed with the majority en banc. *Hosty*, 412 F.3d at 732; *Hosty*, 325 F.3d at 946, 950.

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

always defined legal rights."[103] They further found that the majority improperly applied *Hazelwood* because the environment of a university differs substantially from that of a high school.[104] Thus, the dissent concluded that Dean Carter was not entitled to qualified immunity because "*Hazelwood* did not change th[e] well-established rule" that "university administrators could not require prior review of student media or otherwise censor student newspapers."[105]

The student journalists filed a petition for writ of certiorari to the U.S. Supreme Court on September 16, 2005.[106] On February 21, 2006, the Supreme Court denied the writ.[107]

III. WHY *HOSTY* WAS WRONGLY DECIDED

Until *Hosty*, the law of the college student press was well-established. College and university student journalists had enjoyed plenary First Amendment protection for almost four decades.[108] Federal courts had consistently and unequivocally struck down acts of student press censorship by college and university administrators.[109] The Seventh Circuit's opinion

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103. *Id.* at 739–40 (footnote omitted).

104. *See id.* at 741 (describing the purpose and mission of elementary and secondary schools as "custodial and tutelary," whereas colleges and universities emphasize exposure to and exchange of ideas).

105. *Id.* at 742–43.

106. Petition for Writ of Certiorari, *Hosty*, 126 S. Ct. 1330 (No. 05-377), 2005 WL 2330125.

107. *Hosty*, 126 S. Ct. 1330.

108. *See, e.g.*, Papish v. Bd. of Curators, 410 U.S. 667, 670 (1973) (per curiam) (declaring that the dissemination of ideas was protected in a collegiate publication despite its offensive nature).

109. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828–32 (1995) (finding viewpoint discrimination of a religious student publication violated the First Amendment); Kincaid v. Gibson, 236 F.3d 342, 354–56 (6th Cir. 2001) (en banc) (holding that arbitrary confiscation of yearbooks constituted viewpoint discrimination and violated First Amendment protections); Stanley v. Magrath, 719 F.2d 279, 283–84 (8th Cir. 1983) (prohibiting discrimination based on allegedly "blasphemous or vulgar" content in student publication); Miss. Gay Alliance v. Goudelock, 536 F.2d 1073, 1078–80 (5th Cir. 1976), (declaring that censored advertisement did not fall within allowable limitations on free speech); Schiff v. Williams, 519 F.2d 257, 260–61 (5th Cir. 1975) (finding that firing of student editors was unconstitutional control of speech); Joyner v. Whiting, 477 F.2d 456, 460–61 (4th Cir. 1973) (delineating protection afforded in the university setting regarding freedom of speech and exceptions to this protection); Bazaar v. Fortune, 476 F.2d 570, 573 (5th Cir.) (noting that First Amendment rights are not lost in the university environment), *modified en banc*, 489 F.2d 225 (5th Cir. 1973); Lueth v. St. Clair County Cmty. Coll., 732 F. Supp. 1410, 1416 (E.D. Mich. 1990) (concluding that the constraint on speech was unconstitutional because it was not "narrowly tailored" to serve the defendant's interest); Sinn v. Daily Nebraskan, 638 F. Supp. 143, 146–48 (D. Neb. 1986) (holding that the press cannot be compelled to print and noting that editorial freedom should prevail), *aff'd*, 829 F.2d 662 (8th Cir. 1987); Antonelli v. Hammond, 308 F. Supp.

potentially has changed the landscape. The decision in *Hosty* was wrong for several reasons. First, *Hosty* directly and irreconcilably conflicts with Supreme Court precedent. Next, *Hosty* imposes a standard for student expression intended only for publications in a nonpublic forum produced as part of a school's educational curriculum, not in publications such as the *Innovator*. Finally, the Seventh Circuit failed to recognize the compelling and distinct differences between the roles of primary and secondary schools and the role of universities in the educational spectrum.

A. Hosty *Directly and Irreconcilably Conflicts with Supreme Court Precedent*

The U.S. Supreme Court, beginning with its decision in *Healy v. James*, has long subscribed to the view that a public college or university must unequivocally protect the First Amendment rights of its students.[110] In *Healy*, the Court ruled that a Connecticut university president's refusal—on ideological grounds—to recognize a polarizing student group as an official student organization constituted a form of prior restraint in violation of the First Amendment.[111] The Court noted that it applied "well-established First Amendment principles"[112] in determining that:

> [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." The college classroom with its surrounding environs is peculiarly the "marketplace of ideas," and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.[113]

1329, 1335–36 (D. Mass. 1970) (finding that obscenity is insufficient justification for restricting speech and that review process implemented was too restrictive).

110. Healy v. James, 408 U.S. 169, 187–88 (1972) (acknowledging that the college could not restrict the speech of the group simply because of disagreement with or dislike of the content); *see also* Widmar v. Vincent, 454 U.S. 263, 268–69 (1981) (recognizing that there is "no doubt that the First Amendment rights of speech and association extend to the campuses of state universities").

111. *Healy*, 408 U.S. at 184. For a good discussion of *Healy*, see STUDENT PRESS LAW CTR., *supra* note 10, at 52.

112. *Healy*, 408 U.S. at 170.

113. *Id.* at 180–81 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

One year later, *Papish v. Board of Curators* followed *Healy* in extending broad First Amendment protection to student-run newspapers published at public colleges and universities.[114] Barbara Papish, a graduate journalism student at the University of Missouri, was expelled from school for publishing and circulating a controversial newspaper on campus.[115] In a per curiam opinion, the Court held that the expulsion violated the First Amendment, reiterating its conclusion that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech."[116]

More than three decades have passed since the decisions in *Healy* and *Papish*, and the Court has not retreated from its belief that college students are entitled to broad First Amendment protection. Indeed, in the 1995 case *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court held that college administrators violated the First Amendment when they denied funding to an extracurricular student publication on the ground that the publication espoused a particular unwelcome viewpoint.[117] In so holding, the Court recognized that:

> The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.[118]

The Seventh Circuit's decision in *Hosty* directly and irreconcilably conflicts with the precedents of *Healy*, *Papish*, and *Rosenberger*. These precedents are clearly relevant,[119] yet the en

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114. Papish v. Bd. of Curators, 410 U.S. 667, 671 (1973) (per curiam).

115. *Id.* at 667–68. The newspaper contained an editorial cartoon that depicted police raping the Statue of Liberty and an article headlined "Motherfucker Acquitted" that discussed criminal charges against a member of the group "Up Against the Wall, Motherfucker." *Id.*; *see also* STUDENT PRESS LAW CTR., *supra* note 10, at 52.

116. *Papish*, 410 U.S. at 671.

117. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 827, 837 (1995) (reflecting that the magazine's religious perspective was an important consideration in the denial of the request). The publication at issue was called *Wide Awake*, which expressed a Christian message. *Id.* at 825–26.

118. *Id.* at 835.

119. *See* STUDENT PRESS LAW CTR., *supra* note 10, at 52 (discussing the relevance of *Healy* and *Papish* to determinations of the level of First Amendment protection due students on college campuses).

banc majority opinion does not cite or otherwise address *Healy* or *Papish* and only nominally addresses *Rosenberger*.[120] This is not the work of a principled court. Rather, the majority follows the Supreme Court's opinion in *Hazelwood*, which as the dissent correctly notes,[121] presents an inappropriate framework in which to analyze the free press rights of college students.[122] The majority's reliance on *Hazelwood* and its failure to address relevant precedent is particularly befuddling because *Hazelwood* does not cast doubt on the Supreme Court's conviction in the propriety of *Healy*, *Papish*, or *Rosenberger*.[123]

Not only does Supreme Court precedent weigh against applying *Hazelwood* to the university setting, but opinions in the lower federal courts have also negated college administrators' attempts to censor the student press.[124] Two of the Seventh Circuit's sister courts have explicitly declined to use the *Hazelwood* framework when analyzing the rights of the college student media, articulating the rationale of *Healy*, *Papish*, and *Rosenberger*.[125]

As the Supreme Court established in *Healy*, college students should have no fewer free speech rights than the general public.[126] The Seventh Circuit in *Hosty*, however, flatly ignored the well-settled body of precedent respecting the need for unrestricted student expression and enlightenment at college

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120. *See* Hosty v. Carter, 412 F.3d 731, 735, 737 (7th Cir. 2005) (en banc) (citing *Rosenberger* only to the extent of the general rule prohibiting discrimination against religious speech in public schools and more specifically the funding of such speech through student fees), *cert. denied*, 126 S. Ct. 1330 (2006).

121. *Id.* at 742–44 (Evans, J., dissenting) (noting that *Hazelwood* only applies to universities when the regulated speech occurs within the classroom setting).

122. *See* discussion *infra* Part III.B.

123. *See* STUDENT PRESS LAW CTR., *supra* note 10, at 54.

124. *See* Stanley v. Magrath, 719 F.2d 279, 283–84 (8th Cir. 1983) (preventing the University of Minnesota from changing its system of funding the student newspaper after the publication of controversial satirical articles); Joyner v. Whiting, 477 F.2d 456, 462–64 (4th Cir. 1973) (disallowing North Carolina Central University's withdrawal of its funding of a student publication because of an editorial arguing against integration); Bazaar v. Fortune, 476 F.2d 570, 572, 581 (5th Cir.) (rejecting the University of Mississippi's prior restraint of a student magazine because it sought to publish articles containing "'earthy' language" and an article about an interracial relationship), *modified en banc*, 489 F.2d 225 (5th Cir. 1973).

125. *See* Kincaid v. Gibson, 236 F.3d 342, 346 nn.4–5 (6th Cir. 2001) (refusing to apply *Hazelwood* in holding that university officials violated the First Amendment when they confiscated student yearbooks); Student Gov't Ass'n v. Bd. of Trs., 868 F.2d 473, 480 n.6 (1st Cir. 1989) (finding that *Hazelwood* is not applicable to college student newspapers).

126. *See* Healy v. James, 408 U.S. 169, 180 (1972) (rejecting the claims that a need for order diminishes protections afforded to college students).

and university campuses.[127] For this reason, the decision in *Hosty* was wrong.

B. The Hazelwood Doctrine Is Inapplicable to College Student Media

Before the Supreme Court's decision in *Hazelwood*, the standard established by *Tinker v. Des Moines Independent Community School District* governed the constitutionality of all acts of censorship of student expression by school officials at all levels of education.[128] The *Tinker* case is best remembered for its admonition that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[129] *Tinker* showed that the Court had a deep respect for students' expressive rights.[130] In *Hazelwood*, however, the Supreme Court dramatically changed course.[131] *Tinker* favored significant deference to students' expressive rights by school officials, while *Hazelwood* permitted primary and secondary school administrators to restrict student expression that they considered, for example, "poorly written," or "biased or prejudiced."[132]

But the factual context in which *Hazelwood* was decided makes clear that, when properly applied, the decision is limited to student expression at the primary and secondary school levels and does not reach colleges and universities. First, college and

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127. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (emphasizing importance of the exchange of and exposure to a variety of ideas and noting that freedom transcends teachers in educational environment); Shelton v. Tucker, 364 U.S. 479, 487 (1960) (urging "vigilant protection" of freedoms in schools).

128. *See* Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (prohibiting students from wearing armbands to protest the Vietnam hostilities was an unconstitutional denial of expression); STUDENT PRESS LAW CTR., *supra* note 10, at 51. The *Tinker* Court held that school officials may censor student speech only when they reasonably expect that the speech will "'materially and substantially'" disrupt school activities or invade the rights of others. *Tinker*, 393 U.S. at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

129. *Tinker*, 393 U.S. at 506.

130. *See* DANIEL A. FARBER, THE FIRST AMENDMENT 193–94 (2d ed. 2003); *cf.* Kay S. Hymowitz, Tinker *and the Lessons from the Slippery Slope*, 48 DRAKE L. REV. 547, 565 (2000) (observing that "anticultural assumptions behind decisions like . . . *Tinker*, far from advancing freedom, threaten its foundations").

131. *See* Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 530 (2000) (reviewing *Tinker* and its progeny and concluding that "[t]he judiciary's unquestioning acceptance of the need for deference to school authority leaves relatively little room for protecting students' constitutional rights").

132. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271–72 (1988) (allowing schools to consider the emotional maturity of the audience and citing examples in elementary and high school settings).

university students are fundamentally different from those at primary and secondary schools; accordingly, differing standards are warranted. Second, because the educational mission of primary and secondary schools stands in stark contrast to that of colleges and universities, which serve as the quintessential "marketplace of ideas,"[133] a standard that permits restriction of the free flow of ideas has no place on post-secondary campuses. Thus, because the Seventh Circuit applied the restrictive *Hazelwood* standard to the college student media, the decision in *Hosty* was wrong.

1. One Size Does Not Fit All. Hazelwood restricts the First Amendment rights of students for the purpose of helping school officials protect children.[134] The *Hazelwood* Court's premise was that primary and secondary school administrators must be able to consider "the emotional maturity of the intended audience in determining whether to [censor] student speech on potentially sensitive topics."[135] Indeed, extensive First Amendment jurisprudence recognizes the need to limit the First Amendment rights of children to protect them from exposure to material inappropriate for them because of their youth.[136] Application of this rationale, however, to college-age students via *Hosty* is malapropos.

First and most obviously, college and university students are not children. Therefore, they do not require special treatment under the law. Only 1% of students attending the nation's colleges and universities are younger than eighteen.[137] The

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133. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (describing the "marketplace of ideas").

134. *Hazelwood*, 484 U.S. at 271–72.

135. *Id.* at 272.

136. *See id.*; Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 684–85 (1986) (upholding the punishment of a high school student for using vulgar speech); Bellotti v. Baird, 443 U.S. 622, 636–37 (1979) (recognizing the need to limit children's First Amendment rights because of their immaturity); FCC v. Pacifica Found., 438 U.S. 726, 749 (1978) (approving of sanctions for broadcasting "dirty words" to children). Many commentators, however, have observed that this paternalistic rationale is flawed and that even children should enjoy broader First Amendment rights. *See* Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CAL. L. REV. 1269, 1342 (1991) ("The prevailing Supreme Court understanding of the educational mission of the schools as inculcation fails to adequately take into account the value of student speech in school settings."); Katherine Lush, Comment, *Expanding the Rights of Children in Public Schools*, 26 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 95, 123 (2000) ("To outright censor a newspaper . . . sends the wrong message to students about the role the Constitution and specifically First Amendment freedoms should play in their lives.").

137. *See* U.S. Census Bureau, Table A-6, Age Distribution of College Students 14 Years Old and Over, by Sex: October 1947 to 2005, http://www.census.gov/population/socdemo/school/TableA-6.xls (last visited Mar. 3, 2007).

average age of students enrolled at Governors State University—and hence the average age of the *Innovator*'s readers—is thirty-four.[138] The Supreme Court itself has recognized this fact, most explicitly in *Widmar v. Vincent*,[139] when it observed: "University students are, of course, young adults. They are less impressionable than younger students . . . ."[140]

Likewise, even strident advocates of restricting free speech to protect against objectionable expression agree that "the costs of free expression are experienced more through their effects on children than on adults. Reducing those costs by imposing limitations only in this area . . . can benefit society while leaving the greatest benefits, adult-to-adult communication, free."[141]

On the other side of the spectrum, John Stuart Mill, a true champion of free expression, recognized that although society may enforce limits on speech to benefit children, it is unacceptable for society to act paternalistically toward adults.[142] *Hosty* endorses an unabashed act of paternalism toward adults—the prior review and restraint of college student-produced publications.

Despite the Seventh Circuit's claim that there is no prior review "on/off switch" based on the audience's maturity,[143] both First Amendment case law and many other areas of the law recognize a clear distinction in the treatment of children and of adults, such as those attending public colleges and universities. Concurring in the judgment of *Board of Regents v. Southworth*,[144] Justice Souter noted that the "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 . . . from their counterparts in

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138. Governors State University, About GSU, *supra* note 20.

139. Widmar v. Vincent, 454 U.S. 263 (1981).

140. *Id.* at 274 n.14.

141. KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 6 (2003) (arguing that the First Amendment's limitations on our ability to restrict the influences children face are among the roots of society's failure to meet its duty to children).

142. *See* George Kateb, *A Reading of* On Liberty, *in* JOHN STUART MILL, ON LIBERTY 58, 60–62 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

143. Hosty v. Carter, 412 F.3d 731, 734 (7th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1330 (2006).

144. Bd. of Regents v. Southworth, 529 U.S. 217, 236 (2000) (Souter, J., concurring). The *Southworth* majority held that the First Amendment permitted a public university to charge its students an activity fee used to fund a program that facilitated extracurricular student speech so long as the program was viewpoint neutral in the allocation of funding support. *Id.* at 221 (majority opinion).

college education."[145] Indeed, the Seventh Circuit's esteemed Judge Posner, who sided with the majority in *Hosty*, has forcefully argued in previous cases that, with the right to vote accruing on Americans' eighteenth birthday, it is vital that those approaching that age develop their own ideas in order to be independent voters and that this requires complete First Amendment rights.[146] Along with the right to vote, college students, because of their age and corresponding maturity, are granted several other legal rights unavailable to students who have not reached college age.[147] Contrary to the Seventh Circuit's claim, there is substantial authority that an "on/off switch" does, in fact, exist with regard to fundamental legal rights, including the First Amendment right to a free press. Accordingly, the Seventh Circuit was wrong to turn the prior review switch to the "on" position.

2. Differing Missions, Differing Standards. Another glaring flaw in *Hosty* is the majority's failure to consider the educational missions of colleges and universities and how those missions differ from those of primary and secondary schools—the only institutions at issue in *Hazelwood*.[148] The mission of a public university in America is substantially different from that of a primary or secondary school, and the Seventh Circuit's decision granting university officials the power to censor works against the goal of universities.

Many scholars agree that public primary and secondary schools exist in large measure for indoctrination, or the "preparation of individuals for participation as citizens, . . . inculcating fundamental values necessary to the maintenance of a democratic political system."[149] In such an

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145. *Id.* at 238 n.4 (Souter, J., concurring) (internal citations omitted). Justice Souter distinguished *Hazelwood* because it concerned free speech restrictions for students younger than college-age. *Id.*

146. *See* Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577, 580 (7th Cir. 2001) (ordering an injunction against the enforcement of an ordinance limiting access by those under eighteen to violent video games).

147. For example, most college students are typically of legal age to drive, a right that is available to fewer public high school students. College students also have reached the age to see R-rated movies (seventeen years old), and even the age to see X-rated movies (eighteen years old), as well as the age to serve in the military (eighteen years old). *Cf.* Greg C. Tenhoff, Note, *Censoring the Public University Student Press: A Constitutional Challenge*, 64 S. CAL. L. REV. 511, 535 (1991) ("At some point, society needs to send its young adults to face the world, with all its unpleasantries and hazards.").

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

149. Lisa Shaw Roy, *Inculcation, Bias, and Viewpoint Discrimination in Public Schools*, 32 PEPP. L. REV. 647, 651–52 (2005) (quoting Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982) (internal quotation marks omitted)); *see also* Martin H. Redish & Kevin

environment, students' educational development is hindered by a school setting that is "overly tolerant" of student speech.[150]

At public colleges and universities, however, scholars find an altogether different mission. In stark contrast to the high school's need to indoctrinate, a university exists to encourage the freedom of inquiry and discussion about *all* topics, without regard to the inculcation of society's fundamental values.[151] Indeed, "[o]f all institutions that should tolerate varied, even offensive speech, universities are foremost."[152]

Similarly, First Amendment jurisprudence also recognizes the need for differing standards of student expression because of the differing roles of primary, secondary, and post-secondary institutions. The Supreme Court has long held that while "[t]he role and purpose of the American public school system [is to] . . . 'inculcate the habits and manners of civility as values in themselves,'"[153] the university campus is meant to provide an "atmosphere of 'speculation, experiment, and creation.'"[154] Thus, unlike the declining free speech protection at primary and secondary schools,[155] the Court has consistently and broadly affirmed the value of free speech on college campuses. This value was most authoritatively articulated by the Court in 1957:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played

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Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 66–68 (2002) (arguing that the indoctrination model of most public school curricula is paradoxical to the First Amendment rights of students).

150. *See* Beverly L. Hall, *Parameters of Student Conduct*, 69 ST. JOHN'S L. REV. 515, 516 (1995) (contending that "most students in our public schools appreciate boundaries and are themselves not happy or productive in an atmosphere where they feel that 'anything goes'" with regard to student expression); Hymowitz, *supra* note 130, at 554 ("What is often forgotten in the contemporary scholarly literature on childhood is that a society must shape the childhood it needs.").

151. *See* Charles Alan Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1051–53 (1969). *Contra* JOHN K. WILSON, THE MYTH OF POLITICAL CORRECTNESS: THE CONSERVATIVE ATTACK ON HIGHER EDUCATION 107 (1995) (arguing that "[t]he university is not a soapbox; its purpose is to educate students, not to promote absolutely free speech or ensure that every point of view has equal representation").

152. TIMOTHY C. SHIELL, CAMPUS HATE SPEECH ON TRIAL 46 (1998) (quoting Matt Nelson, *UW Blasted for Rule Barring 'Hate' Speech*, WIS. ST. J., Mar. 18, 1992, at 4D) (alteration in original).

153. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting CHARLES A. BEARD & MARY R. BEARD, A BASIC HISTORY OF THE UNITED STATES 237 (1944)).

154. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978); *see also supra* note 113 and accompanying text (discussing the *Healy* opinion, which articulated the university's role as that of a "marketplace of ideas").

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

> by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[156]

In *Hosty*, the Seventh Circuit most assuredly imposed a strait jacket upon the *Innovator* when it approved of Dean Carter's demand for prior review and restraint. Given the nation's long tradition of viewing the university as a true marketplace of ideas, the *Hosty* decision was wrong.

IV. LIFE AFTER *HOSTY*

Only ten days after the release of the Seventh Circuit's *Hosty* decision, the college student media began feeling the ruling's potentially repressive effects, even outside the Seventh Circuit's jurisdiction. A memo from Christine Helwick, general counsel for the California State University System, informed the system's university presidents that they may now have "more latitude than previously believed to censor the content of subsidized student newspapers" because of the decision in *Hosty*.[157] Student journalists were thus on notice: The extension of a restrictive standard for student speech to the university setting would not be anomalous or immaterial.[158]

Indeed, *Hosty*'s implications are profound and immediate.[159] By importing *Hazelwood* to the university setting, the Seventh Circuit has encouraged censorship of the college student media, silencing an institution that helps protect the ideal of the college and university campus as a marketplace of ideas.[160] Moreover, the

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

157. Memorandum from Christine Helwick, Gen. Counsel, Cal. State Univ. Sys., to California State University Presidents (June 30, 2005), *available at* http://www.splc.org/csu/memo.pdf.

158. *See, e.g.*, Andy Guess, *Censorship and You 101*, CORNELL DAILY SUN, Oct. 23, 2005, *available at* http://www.cornellsun.com/node/15711 (predicting that college administrators will use *Hosty* as justification for instituting restrictions on the college student media).

159. Not surprisingly, the impact of *Hazelwood* on elementary and secondary student speech likewise was profound and immediate. *See* Shari Golub, Note, Tinker *to* Fraser *to* Hazelwood—*Supreme Court's Double Play Combination Defeats High School Students' Rally for First Amendment Rights:* Hazelwood School District v. Kuhlmeier, 38 DEPAUL L. REV. 487, 511 (1989) (reporting that one hour after the *Hazelwood* opinion was announced on the radio, a high school principal censored a student journalist's article on AIDS, citing the new ruling as his justification).

160. *See* Kincaid v. Gibson, 236 F.3d 342, 352 (6th Cir. 2001) (observing that a

Seventh Circuit's decision will likely inhibit the education and development of tomorrow's professional journalists.

A. Censorship and Self-Censorship

The importance of an independent press to the American form of democracy cannot be overstated. The press is the only profession expressly singled out for protection by the U.S. Constitution.[161] First Amendment case law therefore has repeatedly and passionately embraced the idea that the press acts as an agent of the people and as a fourth branch of government, checking abuses of power by the other branches.[162] Accordingly, the people have come to expect and demand a free press: for "[t]he truth does not exist for its own sake, but to make men free."[163] This expectation of truth and a free press exists not only in society at large, but also on college and university campuses, where student publications have flourished for almost two centuries.[164] Today, American college students publish more than 1,600 daily and weekly newspapers.[165] The college student press is alive and well.

Any practice that would hamper the free flow of ideas—no matter how objectionable[166]—necessarily causes the college

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college student-produced publication promoted "an atmosphere of free and responsible discussion and of intellectual exploration").

161. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom . . . of the press . . . ."); *see also* FREEING THE PRESSES: THE FIRST AMENDMENT IN ACTION 5 (Timothy E. Cook ed., 2005) (noting the explicit constitutional protection of the publishing business).

162. FREEING THE PRESSES: THE FIRST AMENDMENT IN ACTION, *supra* note 161, at 5–6; *see also* Bartnicki v. Vopper, 532 U.S. 514, 517–18, 535 (2001) (holding that when information is published that was obtained lawfully by the publisher but unlawfully from the publisher's source, the stranger's illegal conduct does not remove First Amendment protection when the speech is about a matter of public concern); N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (rejecting the U.S. government's attempt to enjoin publication of classified materials—the "Pentagon Papers"—in the *New York Times*); Near v. Minnesota, 283 U.S. 697, 716–19, 722–23 (1931) (declaring unconstitutional a Minnesota statute that restrained and censured publishers).

163. WILLIAM H. MARNELL, THE RIGHT TO KNOW: MEDIA AND THE COMMON GOOD xiii (1973) ("The citizen in a free society accepts as an axiom that a free press is an integral part of his society, a jealously guarded part, an indispensable part.").

164. *See* Miami Student, *supra* note 1 (claiming *The Miami Student*, founded in 1826, is the oldest college newspaper in the United States).

165. EDITOR & PUBLISHER, 2005 INTERNATIONAL YEARBOOK 17–36 (2005). Countless other forms of student-produced media, from underground pamphlets to television and radio shows to campus yearbooks, also make up the rich fabric of student expression on campuses nationwide. *See, e.g.*, Texas Student Media, http://www.tsp.utexas.edu (last visited Mar. 3, 2007) (noting that the student media at the University of Texas at Austin includes a daily newspaper, yearbook, humor magazine, radio station, and student television station).

166. *See* NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE 390–92 (1992)

student media to fail in achieving its two primary goals: serving as an independent watchdog over the university community[167] and helping foster a true marketplace of ideas.[168] A system of prior review and prior restraint on college campuses, as first contemplated by *Hazelwood* and now actualized by *Hosty*, is perhaps the most noxious form that such a practice may take.[169] Indeed, one need only look to the circumstances as they exist at public primary and secondary schools after *Hazelwood* to see what effect that decision's application to the university campus will have.

One indication of *Hazelwood*'s far-reaching and pervasive impact is the increase in the number of high school censorship acts reported to the Student Press Law Center, a Virginia-based nonprofit organization that helps high school and college student journalists know their rights.[170] The SPLC received 548 legal inquiries from members of the student media in 1988, when *Hazelwood* was decided.[171] By 2005, that number had increased to approximately 2,500.[172] Professor Peltz observed that after *Hazelwood*, "[f]ormerly bold and enterprising student publications have been subverted to principals' use as vehicles for public relations."[173] *Hazelwood* granted school administrators broad power to censor, for example, articles reporting that a school district superintendent was arrested for drunken driving,[174] that a school tennis coach embezzled more than $1,000 that students had paid for court time,[175] or that teachers were

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(discussing the folly of forbidding offensive speech in general and especially on college and university campuses).

167. *See* Peltz, *supra* note 8, at 533–34 (listing examples of the high-quality watchdog journalism being practiced by college student journalists).

168. *See supra* note 113 and accompanying text (discussing *Healy*'s reaffirmation of colleges as a marketplace of ideas).

169. Hosty v. Carter, 412 F.3d 731, 742 (7th Cir. 2005) (en banc) (Evans, J., dissenting) (citing Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976); Near v. Minnesota, 283 U.S. 697, 713 (1931)), *cert. denied*, 126 S. Ct. 1330 (2006).

170. STUDENT PRESS LAW CTR., *supra* note 10, at 3–4, 46.

171. *Id.* at 46.

172. Student Press Law Center, About the Student Press Law Center, http://www.splc.org/about.asp (last visited Mar. 3, 2007).

173. Peltz, *supra* note 8, at 483; *see also Hosty*, 412 F.3d at 742 (Evans, J., dissenting) ("The majority's holding . . . is particularly unfortunate considering the manner in which *Hazelwood* has been used in the high school setting to restrict controversial speech.").

174. STUDENT PRESS LAW CTR., *supra* note 10, at 46. The official who censored the article reasoned that, "The focus of a school newspaper is to be positive, to build pride in a school. I would not want to see [the student newspaper] used as a forum that would be critical of students or staff." *Id.*

175. *Id.*

illegally smoking cigarettes in a room next door to an occupied classroom.[176]

As devastating as *Hazelwood* has been for high school journalism,[177] its effect on journalism at the post-secondary level would likely be even more damaging given the stakes involved. Many college administrators, armed with the *Hosty* precedent, are undoubtedly poised to wield their newfound power "to censor the content of subsidized student newspapers,"[178] muzzling the watchdogs on many college campuses.[179]

By any measure, the application of *Hazelwood* to the college student media will likely prove malapropos. Extending *Hazelwood*'s reach to college and university campuses is a recipe for encouraging censorship that would dramatically inhibit the production of quality journalism and the free flow of ideas. Such restriction runs afoul of the First Amendment and should not be tolerated.

B. Hosty *as Inhibitor of Democracy*

Allowing officials to engage in prior review and restraint of the college student media guarantees failure for college journalism, whose goal it is to incubate young journalists. As a result, tomorrow's professional journalists, trained at college student newspapers where *Hosty* controls, will be less likely to challenge authority, less likely to practice ethical and responsible journalism, and less likely to report on controversial topics of societal importance. As a result, society will be harmed.

Horace Mann, the "Father of American Education," long ago observed that:

> The great moral attribute of self-government cannot be born and matured in a day; and, if school-children are not trained to it, we only prepare ourselves for disappointment

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176. *Id.* The principal who censored the article told student journalists that the article "would be an embarrassment." *Id.*

177. *See* Peltz, *supra* note 8, at 483.

178. *See supra* note 157 and accompanying text. Some enlightened college administrators, however, will no doubt see the value of a free, independent student press and take official steps to preserve students' First Amendment rights. *See, e.g.*, Editorial, *No. 1 in the Hood, G: Chancellor Moeser's Move to Affirm the Freedom of the Press on UNC's Campus Is Good News for Anybody Who Supports the First Amendment*, DAILY TARHEEL, Sept. 29, 2005, at 14, *available at* http://www.dailytarheel.com/media/storage/paper885/news/2005/09/29/OpinionsboardEditorials/No.1-In.The.Hood.G-1366405.shtml (student newspaper at the University of North Carolina at Chapel Hill).

179. *See* Peltz, *supra* note 8, at 533–34 (listing a "sample of real college journalism stories that would have been fair game for censorship" under the *Hazelwood* standard if applied to the university setting).

> if we expect it from grown men. . . . As the fitting apprenticeship for despotism consists in being trained to despotism, so the fitting apprenticeship for self-government consists in being trained to self-government . . . .[180]

Likewise, training for the practice of journalism must begin long before a journalist attends his or her first press conference as a professional. The *Hosty* decision, however, inhibits journalism training in a real-world setting, in which prior review and governmental regulation of content is forbidden.[181]

A college newspaper that functions just like a newspaper in the "real world" is an important teaching tool—in fact, the best teaching tool[182]—for student journalists who wish to become professional journalists.[183] Survey data obtained after the Supreme Court's decision in *Hazelwood*, however, show that students practicing journalism under that restrictive regime were more likely to engage in self-censorship. In a survey of Indiana high school student journalists, 60% reported that they were "less likely to publish controversial and/or investigative articles because of fear of recrimination and censure as a result of *Hazelwood*."[184] High school journalism educators reported an increasing student acceptance of *Hazelwood*'s restrictions and administrative censorship of student media.[185] The result is that many high school journalists are reluctant to challenge authority.[186] There is no reason to believe that, over time, the same chilling effect will not result among the college student media.

Thus, college student journalists who retain autonomy and assume full responsibility for what they disseminate in their

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180. 4 HORACE MANN, LIFE AND WORKS OF HORACE MANN 37 (Boston, Lee & Shepard 1891); *see also* Mike Hiestand, The *Hosty v. Carter* Decision: What It Means (July 6, 2005), http://www.studentpress.org/acp/trends/~law0705college.html.

181. *See, e.g.*, Near v. Minnesota, 283 U.S. 697, 713 (1931) ("[I]t has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's free press] guaranty to prevent previous restraints upon publication.").

182. *See* Peltz, *supra* note 8, at 482 ("[T]he student publication offers the single best avenue for training . . . for a career in professional journalism.").

183. *See id.* at 535 (arguing that professional journalism would suffer greatly if college student journalists were trained in an environment where the government acted as "thought police").

184. Rosemary C. Salomone, *Free Speech and School Governance in the Wake of* Hazelwood, 26 GA. L. REV. 253, 308–09 (1992) (citing Maria Kovacs, *The Impact of* Hazelwood *in the State of Indiana*, QUILL & SCROLL, Feb.–Mar. 1991, at 4).

185. *Id.* at 310.

186. *See* Carol S. Lomicky, *Analysis of High School Newspaper Editorials Before and After* Hazelwood School District v. Kuhlmeier*: A Content Analysis Case Study*, 29 J.L. & EDUC. 463, 471–73 (2000) (finding that after *Hazelwood*, self-censorship is rampant, with students publishing significantly fewer editorials critical of the school administration).

publications—without administrative interference or the threat thereof—are better prepared to enter the ranks of professional journalism.[187] Applying *Hazelwood* to the college student media would have disastrous effects. As Professor Peltz observes, "Imagine a generation of college-trained journalists with no practical experience handling controversial subject matter, nor with any more than an academic understanding of the role of the Fourth Estate in American society."[188] Such a hypothesis, easy to imagine under a *Hosty* regime, spells disaster not only for the journalism profession but also for those who consume mass media daily. After *Hosty*, indeed it is easy to imagine a scenario in which tomorrow's Bob Woodwards and Carl Bernsteins, lacking adequate real-world training about the proper role of the Fourth Estate, are content to accept the official version of the break-in at the Watergate Hotel as a mere "third-rate burglary."[189]

Under a *Hosty* regime, college student journalists would not only lack experience in a real-world setting, they would also suffer the chilling effects of a restrictive First Amendment standard. Such a practice of journalism surely is not something Horace Mann would condone.[190]

V. CONCLUSION

Notwithstanding the sound of rattling sabers emanating from the offices of California State University administrators,[191] it is uncertain whether the *Hosty* decision will become entrenched as a weapon used against college student journalists. And even if those in the nation's ivory towers seek to extend *Hazelwood*'s reach to the college student press via *Hosty*, no one can say for certain that their action would not inhibit students' desire for the truth, zap the energy of student media, or diminish the quality of professional journalism.

But a review of how *Hazelwood* has changed expressive activity, particularly journalism, in primary and secondary

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187. *See* Peltz, *supra* note 8, at 535 (noting the quality of professional journalism will suffer if students are trained in an environment that restricts student voice).

188. *Id.*

189. *See generally* Harry Ransom Center, The Woodward and Bernstein Watergate Papers, http://www.hrc.utexas.edu/exhibitions/online/woodstein (last visited Mar. 3, 2007).

190. *See supra* note 180 and accompanying text.

191. *See supra* note 157 and accompanying text (discussing a memo from the general counsel of the California State University system concerning the applicability of the *Hosty* decision).

schools shows that college student journalists have reason to be afraid. School officials have used *Hazelwood* to effectively muzzle the high school media and to erode minors' constitutional freedoms. By extending *Hazelwood* to the college and university setting and disregarding the significant distinctions between primary and secondary schools and institutions of higher education, the Seventh Circuit has opened the door to the possibility that the quintessential "marketplace of ideas" will be silenced.

College students and others in favor of a free and independent collegiate press should choose to act now, before a conflict such as the one confronted by the *Innovator* arises. The college student media can arm itself against the extension of *Hazelwood* by ensuring that their university policies explicitly designate school publications as "public forums," free from administrator intervention in content decisions. Otherwise, the nation's college and university students are in real danger of "shed[ding] their constitutional rights to freedom of speech or expression at the schoolhouse gate."[192]

Ryan D. Pittman

192. Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).