EXTRA! EXTRA! READ ALL ABOUT IT! CENSORSHIP AT STATE UNIVERSITIES: *HOSTY V. CARTER*

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I. INTRODUCTION

In November 2000, the administration of Governors State University in Illinois (the University or GSU) pulled the plug on its student-run, extra-curricular newspaper, the *Innovator*.[1] The administration's action came in the wake of several articles and editorials published in the *Innovator* between July and November that questioned the decisions of various University officials and departments.[2] Topics covered in the controversial articles included the College of Arts and Sciences's decision not to renew the teaching contract of the *Innovator*'s faculty advisor, various shortcomings of the University's Financial Aid Office, and student complaints about the coordinator of the English Department alleging a lack of varied course offerings, hiring of unqualified instructors, and racial bias in grading.[3] In response to the articles, both the dean of the College of Arts and Sciences and the University's president issued statements that accused the *Innovator* of irresponsible journalism and defamation.[4] When the staff of the *Innovator* refused to print the administration's responses or to retract any of the factual allegations made in the controversial articles, Patricia Carter, in her capacity as dean of Student Affairs and Services, contacted Charles Richards, the owner and president of the company that printed the *Innovator*, and instructed him not to print any further issues without her prior written approval of the content.[5] Richards indicated to Dean Carter that her order was "probably unconstitutional," but when reminded that the administration, and not the students, controlled the funds that paid the printing bill, he agreed not to publish any unapproved issues.[6] When the student editors of the *Innovator* learned of Dean Carter's demand

1. Hosty v. Carter, 412 F.3d 731, 733 (7th Cir. 2005), *cert. denied,* 126 S. Ct. 1330 (2006).
2. *Id.*
3. Petition for Writ of Certiorari at 5, *Hosty*, 412 F.3d 731 (No. 05-377).
4. *Hosty*, 412 F.3d at 733.
5. *Id.*
6. Petition for Writ of Certiorari, *supra* note 3, at 6.

from Richards, they refused to submit the paper for prior review, and as a result, publication ceased.[7]

In January 2001, the students sued the University, its trustees, and various administration officials and staff members, including Dean Carter, in the U.S. District Court for the Northern District of Illinois. The students alleged that the actions taken against the paper amounted to an unconstitutional prior restraint in violation of their rights under the First and Fourteenth Amendments.[8] The district court granted the University's motion to dismiss on the grounds that the Eleventh Amendment[9] rendered it immune from suit.[10] All of the remaining defendants moved for summary judgment on various grounds and the motions were granted with respect to every defendant but Dean Carter. The court decided that a genuine issue of material fact existed as to whether a reasonable person in Dean Carter's position would have known that she was committing a First Amendment violation by revoking the *Innovator*'s funding based on its content.[11] Carter appealed to the U.S. Court of Appeals for the Seventh Circuit, reiterating that qualified immunity shielded her from liability for actions taken in her official capacity. A three-judge panel from the Seventh Circuit affirmed the district court's decision. Carter then petitioned for a rehearing en banc, and convinced the full Seventh Circuit to allow her another day in court. The court en banc reversed the previous decisions and held that, under *Hazelwood School District v. Kuhlmeier*,[12] school officials and faculty could exercise control over the content of a student newspaper based on legitimate pedagogical concerns. The case against Dean Carter was dismissed based on the reasoning that she committed no constitutional violation, and that even if she did, she was entitled to qualified immunity because a reasonable person in her position might not have known she was acting unlawfully.[13]

The *Hosty* decision departed from a long line of federal cases from the 1960s, 1970s, and 1980s that protected student newspapers at state universities from censorship and editorial control by the administration. Part II of this Casenote examines some of those prior decisions in more

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

8. Petition for Writ of Certiorari, *supra* note 3, at 6.

9. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

10. Petition for Writ of Certiorari, *supra* note 3, at 7.

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

12. 484 U.S. 260 (1988). *See infra* Part II.

13. Petition for Writ of Certiorari, *supra* note 3, at 9.

detail to determine how *Hosty* would have been decided in that era. Part III discusses how decisions from the First, Sixth, and Ninth Circuits, which discuss the applicability of *Hazelwood* to college students, differ from the Seventh Circuit's application in *Hosty*. Part IV argues that *Hazelwood* was meant to apply only in the primary and secondary school context, and that *Hosty*'s reliance on it was misplaced in light of the established body of precedent addressing student speech specifically in the context of state universities. Part V points out various problems with the ruling in *Hosty* and their possible effects on future cases. Part VI concludes that the Supreme Court should resolve the growing circuit split in the area of speech rights at public universities.

II. THE DELEGATED EDITORIAL AUTHORITY DOCTRINE

Beginning in the late 1960s, federal courts encountered cases involving First Amendment speech issues on university campuses. Many of the cases involved university officials attempting to exercise editorial control over student newspapers. The results in these cases were consistently speech-protective, and led to the development of the "delegated editorial authority" doctrine for the application of free speech rights in a post-secondary setting during the 1970s and early 1980s.[14]

A. Early College Newspaper Cases

In 1967, the administration of Troy State University in Alabama tried to stop the editor of its student paper from finishing his senior year in retaliation for a controversial editorial decision he made the previous year.[15] The controversy arose when the student editor, Gary Dickey, attempted to weigh in on a situation occurring on another Alabama campus, ironically involving a student publication.[16] The president of Alabama State University was the subject of intense criticism and debate when he took a public stand in support of the rights of his students to publish unpopular material.[17] Dickey wrote an editorial supporting Alabama State's president, but was told by his faculty advisor that the editorial was unsuitable for publication.[18] When his advisor provided Dickey with an alternative article to fill the space that would have been

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

15. Dickey v. Ala. State Bd. of Educ., 273 F. Supp. 613, 615–17 (M.D. Ala. 1967), *vacated as moot*, 402 F.2d 515 (5th Cir. 1968).

16. *Id.* at 616.

17. *Id.*

18. *Id.*

occupied by the editorial, one covering relatively benign subject matter, Dickey took the action that irked the Troy State University administration.[19] Instead of incorporating the replacement article, he left the designated space blank, save for the title of his original editorial and the word "censored" placed diagonally over the blank space.[20] The university characterized this behavior as an act of direct insubordination warranting a one-year suspension from Troy State.[21]

The U.S. District Court for the Middle District of Alabama, however, characterized Dickey's behavior differently, namely as constitutionally protected speech.[22] In ruling for Dickey, the court emphasized the unique position universities hold in a democratic society as centers for the dissemination of ideas.[23] The court reasoned that allowing censorship of the sort engaged in by Troy State officials could have a serious chilling effect that could threaten the very purpose and function of the university.[24]

A few years after Dickey's victory in Alabama, another clash between a student editor and the administration of a state university made its way into federal court. In *Antonelli v. Hammond*, the U.S. District Court for the District of Massachusetts ruled that the president of Fitchburg State College in Massachusetts could not use his power over the purse to establish a system of prior review over the content of the college's student paper, the *Cycle*.[25] According to the court, the president violated the First Amendment rights of his students by threatening to revoke funding to the *Cycle* unless he was given a chance to approve each issue.[26] In so ruling, the court emphasized that "[b]ecause of the potentially great social value of a free student voice in an age of student awareness and unrest, it would be inconsistent with basic assumptions of First Amendment freedoms to permit a campus paper to be simply a vehicle for ideas the state or the college administration deems appropriate."[27]

The growing trend of federal courts invalidating the attempts of university officials to censor student publications continued one year later at Southern Colorado State College. In *Trujillo v. Love*, the U.S.

19. *Id.*
20. *Id.* at 617.
21. *Id.* at 615.
22. *Id.* at 618.
23. *Id.* at 619.
24. *Id.*
25. 308 F. Supp. 1329, 1337–38 (D. Mass. 1970).
26. *Id.*
27. *Id.* at 1337.

District Court for the District of Colorado ordered the university to reinstate the editor of its student paper, Dorothy Trujillo, after she had been suspended following clashes with the paper's faculty adviser over controversial content published under her direction.[28] The court held that, having established a campus paper and given editorial control to the students, the school may not then limit the content of the paper unless justified by "an overriding state interest."[29]

These cases illustrate the speech-protective stance district courts took even without clear guidance from the Supreme Court. Each court recognized that a university could not properly function if the free flow of information and spirit of debate were restricted by censorship.

B. Supreme Court Rules on First Amendment Rights on State University Campuses

In 1972, the Supreme Court spoke definitively on the implications of the First Amendment at state universities in *Healy v. James*.[30] The Court ruled that a state-supported college could not deny official recognition to a student group because of content-based concerns over the group's message or philosophy.[31] The case was largely a vehicle for the Court to give notice to state university officials that because "the college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,'" there would be a strong presumption against the appropriateness of any action taken to restrict constitutionally protected student speech.[32] Justice Douglas wrote a compelling concurrence in which he lamented the growing clash between students desiring change and faculty members who have become attached to the status quo.[33] He encouraged faculty members to adapt to changing times and to open themselves up to students who come to college with fresh perspectives on the modern world. Recognizing that America is "a society which traditionally has reflected a spirit of rebellion," Douglas stated that when students seek change, they "speak in the tradition of Jefferson and Madison and the First Amendment."[34]

A year after the Supreme Court's decision in *Healy*, the Court

28. 322 F. Supp. 1266, 1271 (D. Colo. 1971).

29. *Id.* at 1270.

30. 408 U.S. 169 (1972).

31. *Id.* at 169–70.

32. *Id.* at 180 (quoting Keyishian v. Bd. of Regents of the Univ. of State of N.Y., 385 U.S. 589, 603 (1967)).

33. *Id.* at 197.

34. *Id*.

addressed similar First Amendment issues in *Papish v. Board of Curators of the University of Missouri*, a case addressing a newspaper written and distributed by students at a state university.[35] The case differed slightly from the newspaper cases discussed above because the student in *Papish* was expelled for distributing a paper, the *Free Press Underground*, which was not funded by the school.[36] However, the school had officially authorized the sale of the paper on campus for more than four years, thereby likening the situation to one in which a university allows students to independently establish a campus paper as an extra-curricular activity.[37] The Court, in a per curiam opinion, ruled that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[38] Because the university's actions were based on distaste for the content of the student publication, and "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech,"[39] the Court ordered the university to reinstate the expelled student.

When the Supreme Court issued its opinions in *Healy* and *Papish*, it sent a clear message that the First Amendment could not be avoided or watered down in the university context. The rights of college students were held to be co-equal with those of the adult population at large.

C. Circuits Apply the Precedent and Develop the Doctrine

Following the decisions of the Supreme Court in *Healy* and *Papish*, circuit courts had little difficulty in handling cases involving limitations placed on student speech. During this era, stretching from the early 1970s until the late 1980s, editors and writers for student publications were consistently vindicated when the faculty or administration of their schools tried to censor their writings or otherwise exhibit editorial control over the student press.

In *Joyner v. Whiting* the Fourth Circuit specifically recognized:

> The principles reaffirmed in *Healy* have been extensively applied to strike down every form of censorship of student publications at state-supported institutions. Censorship of constitutionally protected expression cannot be

35. 410 U.S. 667, 667 (1973).
36. *Id*.
37. *Id.*
38. *Id*. at 670.
39. *Id*. at 671.

> imposed by suspending the editors, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorial oversight based on the institution's power of the purse.[40]

Similar decisions involving student publications came out of the Fifth Circuit in 1973[41] and 1975[42] and the Eighth Circuit in 1983.[43] These decisions each referred to the existence of a well-established rule in favor of students in cases of conflict over editorial authority. Together, they made clear that before *Hazelwood*, it was unquestionably unlawful for state officials to censor student publications based on content. The question thus becomes whether the Supreme Court's decision in *Hazelwood* altered or overruled the substantial body of precedent granting college-level student publications First Amendment protection on par with that given to independent newspapers.

III. CIRCUIT SPLIT FORMS

The majority in *Hosty* examined several post-*Hazelwood* cases and concluded that the circuits were split with respect to *Hazelwood*'s relevance in a university setting.[44] This Part will show that many, if not all of the majority's interpretations of these cases are incorrect, and that no circuit besides the Seventh has held that *Hazelwood*'s framework is applicable to extra-curricular speech at state universities.

A. Circuit Cases in Conflict with the Seventh Circuit

Soon after the decision in *Hazelwood*, the First Circuit discounted its applicability to college newspapers in *Student Government Association v. Board of Trustees of the University of Massachusetts*.[45] Although the case did not directly involve a student newspaper,[46] the court engaged in

40. 477 F.2d 456, 460 (4th Cir. 1973).

41. Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973) (upholding an injunction ordering University of Mississippi officials to cease interfering with the content of the student magazine *Images*).

42. Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975) (ordering the reinstatement and an award of back pay to student editors who were dismissed by the president of Florida Atlantic University based on disapproval of content published under their direction).

43. Stanley v. McGrath, 719 F.2d 279 (8th Cir. 1983) (holding that University of Minnesota officials could not reduce funding allocated to its student paper in retaliation for the publication of material deemed "blasphemous or vulgar").

44. Hosty v. Carter, 412 F.3d 731, 738–40 (7th Cir. 2005).

45. 868 F.2d 473, 480 (1st Cir. 1989).

46. *Student Government Association* involved a university-funded student Legal Services Office at the University of Massachusetts. The University replaced the Legal Services Office, which had the authority to sue the University and its employees on behalf of students, with a Legal Services Center,

a brief discussion of past cases involving student publications when addressing some of the plaintiffs' arguments. The court collectively referred to these cases as "the delegated editorial authority doctrine."[47] According to the court, the general rule to be discerned from the delegated editorial authority doctrine cases is that "[o]nce the state has created a forum, it may not condition access to the forum on the content of the message to be communicated, or close the forum solely because it disagrees with the message being communicated in it."[48] In the midst of its discussion of college newspaper cases, the court unequivocally stated in a footnote that *Hazelwood* "is not applicable to college newspapers."[49]

In 2001, the Sixth Circuit examined *Hazelwood* issues in a university setting in *Kincaid v. Gibson*, a case involving a student yearbook at Kentucky State University (KSU).[50] The vice president of student affairs at KSU confiscated the completed, student-produced yearbooks before they could be distributed to the student body.[51] The editor of the yearbook, along with another student, sued KSU for violating their First and Fourteenth Amendment rights.[52] The U.S. District Court for the Eastern District of Kentucky granted summary judgment to the university, finding that the yearbook was a non-public forum, relying in part on *Hazelwood*.[53] A divided panel of the Sixth Circuit affirmed the ruling, but the decision was overturned when the court granted en banc review.[54] After summarizing the facts of the case, the court began its discussion by stating that it had "granted en banc review to determine whether the panel and the district court erred in applying *Hazelwood*—a case that deals *exclusively* with the First Amendment rights of students in a high school setting—to the university setting."[55] As evidence of their belief that *Hazelwood* was meant to apply exclusively to high school students, the court included a footnote that referenced the Supreme Court's footnote in *Hazelwood*, stating, "We need not now

which was prohibited from engaging in litigation of any sort and was only authorized to provide students with legal advice and counseling. The court held that the University's actions did not violate its students' First Amendment rights because the Legal Services Office was not a public forum and the state was not compelled to continue subsidizing students' litigation expenses. *Id*. at 474–75, 482.

47. *Id.* at 480.

48. *Id.*

49. *Id.* at 480 n.6.

50. 236 F.3d 342, 346 (6th Cir. 2001).

51. *Id.*

52. *Id.* at 345.

53. *Id.* at 345–46.

54. *Id.* at 346.

55. *Id.* (emphasis added).

decide whether the same degree of deference is appropriate with respect to school-sponsored activities at the college and university level."[56] In light of such limitations inherent in *Hazelwood*, the court discounted its applicability to their decision.[57] It went on to hold that KSU's yearbook was a limited public forum, and as such, the university could not censor it based on objections to its content.[58] The decisions of the district court and the divided panel were reversed, and the en banc court directed judgment for the student plaintiffs.[59]

B. Cases Applying Hazelwood *in the University Setting to Curricular or Classroom Speech*

The Ninth Circuit weighed in on *Hazelwood*'s applicability in a university setting when it decided *Brown v. Li* in 2002.[60] The case involved curricular speech, namely a graduate thesis, which the court distinguished from extra-curricular speech such as a student newspaper or yearbook.[61] With respect to extra-curricular speech, the court agreed with the First and Sixth Circuits that *Hazelwood* did not govern such speech at the university level.[62] This reasoning was bolstered by the Ninth Circuit's own precedent, which recognized that "different considerations govern the application of the first amendment on the college campus . . . and that activities of high school students may be reviewed more stringently than those of college students."[63] One of the panel judges filed an opinion concurring in part and dissenting in part because he felt that *Hazelwood* should not even apply to curricular speech at the university level because "the deference with respect to the regulation of the speech rights of high school youths do not apply in the adult world of college and graduate students, an arena in which academic freedom and vigorous debate are supposed to flourish."[64] When the two opinions are taken together, they clearly demonstrate the

56. *Id*. at 346 n.4 (quoting 484 U.S. 260, 273 n.7 (1988)).

57. *Id*. at 346 n.5.

58. *Id*. at 346.

59. *Id.*

60. 308 F.3d 939 (9th Cir. 2002).

61. *Id.* at 941, 949.

62. The court decided that *Hazelwood* could be used in a college setting with respect to curricular speech such as a graduate thesis because a school's curriculum is "one means by which the institution itself expresses its policy" and the institution has a right to control its own expression based on legitimate concerns. *Id.* at 951.

63. *Id.* at 949 (citing Nicholson v. Bd. of Educ. Torrance Unified Sch. Dist., 682 F.2d 858, 863 n.4 (9th Cir. 1982)).

64. *Id.* at 957.

Ninth Circuit's position: that *Hazelwood* can be applied in a university setting only with respect to curricular speech.

The position taken by the Ninth Circuit is identical to the position articulated by the Eleventh Circuit a decade earlier in the 1991 case *Bishop v. Aronov*.[65] In *Bishop*, the plaintiff was a university professor at the University of Alabama who brought a First Amendment action against the school when he was ordered to cease interjecting his religious beliefs into classroom lectures.[66] The court ruled in favor of the school, citing *Hazelwood* in support of its conclusion that no constitutional violation had occurred.[67] However, the court limited its decision in two ways. First, it noted that the speech of a professor could be regulated more broadly than that of a student because "[w]hile a student's expression can be more readily identified as a thing independent of the school, a teacher's speech can be taken as directly and deliberately representative of the school."[68] Second, the court noted that unlike many other decisions involving First Amendment rights on college campuses, in *Bishop* it was dealing with curricular speech that occurred within the classroom. Specifically, the court explained its limited reliance on *Hazelwood* by stating that it was taking that case's "concern for the 'basic educational mission' of the school which gives it authority by the use of 'reasonable restrictions' over *in-class* speech that it *could not censor outside the classroom*."[69]

The Tenth Circuit also held that *Hazelwood* could be applied to university students with respect to in-class, curricular speech in *Axson-Flynn v. Johnson*.[70] The plaintiff in that case was a Mormon theater major at the University of Utah.[71] The controversy arose when the student claimed that her religious beliefs precluded her from acting out parts containing certain profane words. When the school attempted to force her to adhere to the school's curriculum, even if it required her to utter the words that she found offensive, the student left the program and filed suit.[72] The court first held that the school could apply the *Hazelwood* framework in regulating curricular speech in "any

65. 926 F.2d 1066 (11th Cir. 1991).

66. *Id.* at 1069 (holding that the university was able to place reasonable restrictions on the content of curricular speech disseminated in the classroom by a professor so that the public institution could maintain the appearance of neutrality on religious issues).

67. *Id.* at 1071, 1078.

68. *Id.* at 1073.

69. *Id.* at 1074 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266–67 (1988)) (emphasis added).

70. 356 F.3d 1277 (10th Cir. 2004).

71. *Id.* at 1280.

72. *Id.* at 1282–83.

reasonable manner" because the classroom constituted a non-public forum.[73] However, it ultimately ruled in favor of the student because the school had not shown any reasonable basis for its actions.[74] In discussing the curricular nature of the speech at issue, the court acknowledged in a footnote that both *Kincaid* and *Student Government Association* held that *Hazelwood* was inapplicable to extracurricular activities in the university setting.[75] The court explained that its decision was not in conflict with those cases by stating "because Axson-Flynn's speech occurred as part of a *curricular* assignment during class time and in the classroom, we need not reach any analysis of university students' extracurricular speech."[76]

What becomes clear when these cases are examined together is that no court has ruled that *Hazelwood* is applicable to extra-curricular activities, such as student newspapers, in the university context. Some courts hold that *Hazelwood* cannot be applied in any way to university students, and those that have applied *Hazelwood* at the university level have done so only with respect to speech that is actually disseminated within the classroom as part of the school's curriculum. The Seventh Circuit is alone in its belief that *Hazelwood* has muddled the landscape surrounding free-speech rights with regard to extra-curricular outlets for student expression. The most unfortunate aspect of the Seventh Circuit's departure from the holdings of the other circuits on this issue is that *Hosty* arguably muddles the landscape in the way the court claimed *Hazelwood* did. That is, public university officials now have a better argument for qualified immunity by relying on *Hosty* in support of a claim that a reasonable person would not have known that she was violating a constitutional right.

IV. *HOSTY*'S MISPLACED RELIANCE ON *HAZELWOOD*

In order to determine whether *Hazelwood* was meant to have any effect on the free-speech rights of college students, this Part will begin with a brief summary of the majority opinion, and will then proceed to note some explicit and implicit limitations included in the opinion that seem to suggest that the case applies only to curricular publications in public high schools. The Part will conclude with an in-depth look at the Seventh Circuit's opinion in *Hosty*, focusing on its central reliance on *Hazelwood*.

73. *Id*. at 1285.
74. *Id.* at 1293.
75. *Id.* at 1286 n.6.
76. *Id*.

A. Summary of Hazelwood

The controversy in *Hazelwood* arose when the principal of a public high school edited his school's student newspaper before publication to remove material he found objectionable.[77] The paper, *Spectrum*, was written and edited by a Journalism class at Hazelwood East High School in St. Louis, Missouri.[78] During the 1982–1983 school year, the paper was published approximately every three weeks with funding allocated from the Board of Education's annual budget.[79] The practice surrounding publication called for page proofs to be submitted to the school's principal, Robert Eugene Reynolds, for his review before the paper was sent off for printing.[80] In Spring 1983, page proofs for the final edition of the paper were submitted to Principal Reynolds three days before the paper was slated for publication. He objected to two of the articles, one involving accounts of three of Hazelwood's students' experiences with teenage pregnancy, and the other dealing with the impact of divorce on students at the school.[81] He felt that despite the use of assumed names, the students in the pregnancy article might still be identifiable from the text.[82] His objection to the divorce article centered around quotes in the article where a student criticized her father for not being around enough. Principal Reynolds believed that the article should not be printed because the parents of the students had not been given a chance to respond to the quotes.[83] Because the paper was so close to publication, and any delay in its printing would not allow the paper to be distributed before the end of the school year, Principal Reynolds deleted the two pages containing the articles and submitted the remaining four pages to the printer.[84]

Three of the students who made up the paper's staff sued the school district, Principal Reynolds, and various other school officials, claiming censorship in violation of their First Amendment rights.[85] The students prevailed in the Eighth Circuit, but the Supreme Court, in an opinion by Justice White, reversed that decision, holding that a curricular high

77. 484 U.S. 260, 260–62 (1988).

78. *Id*. at 262–63.

79. *Id.*

80. *Id*. at 263.

81. *Id*.

82. The court does not explain why possible identification would be highly problematic. The court also fails to acknowledge that the students' physical changes and/or absence from school had quite possibly already led to widespread knowledge of their pregnancies. *See id*.

83. *Id*.

84. *Id.* at 263–64.

85. *Id*. at 264.

school newspaper is essentially an educational tool and that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[86]

B. Explicit & Implicit Limitations in Hazelwood *Suggesting its Intended Applicability*

The decision in *Hazelwood* represented a significant departure from established First Amendment jurisprudence,[87] yet its applicability outside the high school context is highly questionable in light of limiting language contained in the opinion.[88] The opening words of the opinion are: "This case concerns the extent to which educators may exercise editorial control over the contents of a *high school newspaper produced as part of the school's journalism curriculum*."[89] Nearly every time the Court discusses student publications, it includes "high school" as a qualifier. Furthermore, a footnote specifically states that "[w]e 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."[90] If this express language is not enough to clarify the Court's intention to limit its decision to school-sponsored activities at the high school level, the practical fact remains that if the decision were to apply to universities, the Court would have been overturning the considerable body of precedent outlined in Part II above, yet Justice White makes no mention of doing so.

C. Hosty's *Reliance on* Hazelwood

Despite the limitations within the *Hazelwood* decision, the Seventh

86. *Id*. at 273.

87. Prior to *Hazelwood*, the speech rights of high school students were governed by *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969), which only allowed restriction of student speech if the speech "would materially and substantially disrupt the work and discipline of the school." One commentator has argued that *Hazelwood* may have gone too far toward allowing viewpoint discrimination in schools. *See* Susannah Barton Tobin, *Divining Hazelwood: The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217 (2004).

88. For a discussion of why *Hazelwood* should not be applied to universities, see Karyl Roberts Martin, *Demoted to High School: Are College Students' Free Speech Rights the Same as Those of High School Students?*, 45 B.C. L. REV. 173 (2003).

89. *Hazelwood Sch. Dist.*, 484 U.S. at 262 (emphasis added).

90. *Id*. at 273 n.7.

Circuit in *Hosty* relied on it heavily in justifying its grant of summary judgment to Dean Carter. A combination of procedural and constitutional issues framed the standard of review in *Hosty*. The case came before the Seventh Circuit in the first instance on an interlocutory appeal of the district court's denial of summary judgment to Dean Carter. A three-judge panel of the appellate court upheld the decision of the district court, but on motion of Dean Carter, that decision was vacated and the entire Seventh Circuit assembled for a rehearing en banc.[91] Because the case was before the court on Dean Carter's motion for summary judgment, all facts on the record were examined in a light most favorable to the student plaintiffs. Dean Carter asserted that the constitutional defense of qualified immunity should excuse her from liability for her actions, since they were performed in her official capacity as an employee of the state. The court described the qualified immunity analysis as follows: If after examining the facts in a light most favorable to the injured party, the court finds that a constitutional violation could be proven, the next step is to determine whether the right was so clearly established that any reasonable person in Dean Carter's position would have known that her "conduct was unlawful in the situation [s]he confronted."[92] Only then could the official be held liable for the constitutional violation. So, while the plaintiffs enjoyed an advantage in that the court was compelled to accept their version of the events, Dean Carter enjoyed her own advantage in that she could not be held liable for violating the plaintiff's rights unless they were "clearly established."[93]

The panel opinion first noted that prior to *Hazelwood*, the plaintiff's rights were clearly established, then proceeded to ask whether *Hazelwood* had "muddled the landscape to such an extent that the law has become unclear."[94] The en banc decision approached the case from an entirely different premise. After grudgingly accepting that a constitutional violation had occurred, the court assumed that *Hazelwood* had either changed the law or at the very least muddled it, then asked whether any decisions after *Hazelwood* had "clearly established" that university officials may not interfere with student newspapers.[95] It examined several post-*Hazelwood* decisions (many of which are discussed in Part III above) and held that none of them clearly established such a rule—that Dean Carter could not have reasonably

91. Hosty v. Carter, 412 F.3d 731, 733 (7th Cir. 2005) (en banc).

92. *Id.* at 738 (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)).

93. *Id*.

94. Hosty v. Carter, 325 F.3d 945, 948 (7th Cir. 2003), *vacated by* 412 F.3d 731 (7th Cir. 2005).

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

predicted that her actions were unlawful, and thus, she was entitled to qualified immunity from liability.[96]

The en banc court's reliance on *Hazelwood* resulted from a fairly strained reading of that opinion, as well as a blatant manipulation of the case's holding combined with a complete disregard for all cases prior to *Hazelwood* specifically addressing student newspapers in a university setting. The court began by declaring inapplicable any language in *Hazelwood* that justified the degree of deference given to high school educators based on the age and maturity of high school students. While it is not entirely clear how the court arrived at that conclusion, it claimed that "[o]nly when courts need assess the reasonableness of the asserted pedagogical justification in *nonpublic-forum situations* does age come into play."[97] While this statement is not completely false, it was taken out of context. Early in the *Hazelwood* decision, the Supreme Court held that the high school paper in that case was a non-public forum[98] because the school had always retained control over its content.[99] For this reason, the principal was able to exercise editorial authority based on legitimate pedagogical concerns.[100] The Supreme Court then used the potential immaturity of a high school audience, varying in age from fourteen to eighteen years old, as one legitimate concern an educator may have in limiting certain types of speech.[101] What the Seventh Circuit did not say is that every concern used to justify the censorship in *Hazelwood* applied only to non-public forum papers because the public would be more likely to assume that, since the school retained control over content, the speech in such circumstances was endorsed by the school.[102] Next, the Seventh Circuit declared "that age does not control the public-forum question."[103] While this is true, it has little relevance to the case because the paper in *Hosty* was found to be at least a

96. *Id.* at 738–40.

97. *Id*. at 734 (emphasis added).

98. The Supreme Court has described the public forum analysis as comprised of three categories: the public forum, the limited (or designated) public forum, and the non-public forum. A public forum is government property that has traditionally served as an outlet for expression or the exchange of ideas (public parks and sidewalks, town hall meetings, etc.). A limited/designated public forum consists of public property that has been opened up to a class of individuals (e.g., students and faculty) for expressive activity, but not to the general public. Regulations on speech in these first two categories must survive strict scrutiny (be narrowly tailored to meet a compelling state interest). The third category is the non-public forum, and it is made up of all public property not in the first two categories. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678–79 (1992).

99. 484 U.S. 260, 270 (1988).

100. *Id.*

101. *Id*. at 274–75.

102. *See id*. at 271.

103. Hosty v. Carter, 412 F.3d 731, 735 (7th Cir. 2005).

designated public forum.[104] Finally, the court admits that the public forum question is the principal question before them, just as it was the principal question before the Supreme Court in *Hazelwood*.[105] However, even upon finding that the *Innovator* served as a designated public forum, it essentially decided that either answer to the "principal question" would lead to a loss for the students. This inequitable result stemmed from the court's decision that the qualified immunity question had become "whether Dean Carter was bound to know that the *Innovator* operated in [a public] forum."[106]

The court apparently concluded that Dean Carter was not bound to know the forum status[107] of the *Innovator*, and that no post-*Hazelwood* decision had changed the uncertainty fostered by that case. However, as demonstrated in Part III above, none of the other circuits that had addressed the issue encountered much uncertainty. The court's conclusion is contrived at best, for reasons that will become clear in Part V below.

V. WHY HOSTY IS WRONG

A. It Misapplies Hazelwood

The first and most legally significant reason why *Hosty* was incorrectly decided is its misplaced reliance on *Hazelwood*. As outlined above, the Supreme Court explicitly limited its decision in *Hazelwood* to speech in the high school and elementary school context.[108] Nevertheless, the majority in *Hosty* sufficiently confuses the holding by ignoring the limiting language; saying that it "does not even hint at the possibility of an on/off switch: high school papers reviewable, college papers not reviewable. It addresses degrees of deference."[109] The court's statement is partially true in that the Supreme Court was not suggesting an on/off switch. Instead, it suggested that its decision in *Hazelwood* was not meant to apply to extra-curricular activities at the

104. In fact, the defendants admitted that the *Innovator* was a public forum in the district court. *Id.* at 744 (Evans, J., dissenting).

105. *Id*. at 735–36.

106. *Id*. at 738.

107. The court apparently decided that a reasonable person in Dean Carter's position would not have known that the *Innovator* had been opened up to the students for expressive activity or had traditionally served as such an outlet. *See id.* This contradicts the school's own policy, which states that the student staff "will determine content and format of their respective publications without censorship or advance approval." *Id*. at 744 (Evans, J., dissenting).

108. 484 U.S. 260, 273 n.7 (1988).

109. 412 F.3d 731, 734 (7th Cir. 2005).

university level. If the Seventh Circuit had read the footnote and the case as a whole in a way that was consistent with the reading given to it by every other circuit that has addressed the issue, then *Hosty* would have come out differently.

Even without the footnote, the facts and reasoning in *Hazelwood* are so different than the facts in *Hosty* that it is hard to understand how the majority was able to bypass the contrasts. For instance, the Supreme Court in *Hazelwood* went to great lengths to justify its more restrictive standard for regulating student speech by pointing to the "emotional immaturity" of the audience.[110] In addition, great weight was given to the fact that the paper in *Hazelwood* was a non-public forum[111] because it was produced as a part of the school's journalism curriculum.[112] In contrast, the paper in *Hosty* was found to be a limited public forum with no connection to the school's curriculum.[113] When read alongside *Hazelwood* and the other circuit cases that address the relevance of *Hazelwood* in the university context, *Hosty* is erroneous because it declines to follow the path of the other circuits and vastly distorts the reasoning of the Supreme Court itself.

B. It Ignores All Decisions Besides Hazelwood

In choosing *Hazelwood* as its "starting point,"[114] the Seventh Circuit ignored a large and well-developed body of decisions specifically addressing free-speech rights in relation to extra-curricular college newspapers in favor of a case that concerns a curricular high school paper published as part of a journalism class. The dissent in *Hosty* picks up on this point, noting, "no court, both before or after *Hazelwood*, has held that a university may censor a student newspaper."[115] The majority found that a reasonable person in Dean Carter's position would not have known that she was violating a constitutional right by censoring the *Innovator* based on its content, yet *Hosty* itself is the only decision that has declined to hold a university official liable for such censorship.

110. 484 U.S. at 272.

111. For an explanation of the public forum analysis, see *supra* note 98.

112. 484 U.S. at 270.

113. 412 F.3d at 737.

114. *Id.* at 734.

115. *Id.* at 744.

C. It Defies Common Sense

1. Differences Between High School & College Students

While there are ample grounds to question the legal reasoning of the Seventh Circuit's decision in *Hosty*, perhaps the most compelling reasons to question the decision are based on sheer common sense. After all, there are reasons why the Supreme Court has allowed greater restrictions on speech in the high school environment. At the forefront of these reasons is the long-standing principle that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."[116] Courts have consistently recognized that high school students are typically minors who "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,"[117] and that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[118] For these reasons "[a]ge, for which grade level is a very good indicator, has always defined legal rights."[119] The Supreme Court reiterated this principle in *Hazelwood*, emphasizing that high school students are young and impressionable, and that the principal was entitled to shield them from frank and mature subject matter in the school's newspaper.[120]

In sharp contrast to the more protective speech environment established in elementary and secondary schools, the "college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,'"[121] where First Amendment freedoms apply with no less force "than in the community at large."[122] Against this backdrop of homage to academic freedom and the unfettered exchange of ideas, courts have consistently ruled against actions that infringe on the First Amendment rights of university students, as evidenced by the several college publication cases outlined above in Part II. The distinction has much to do with the relative age differences of high school and college students. While high school students range in age from approximately fourteen to

116. Ginsberg v. New York, 390 U.S. 629, 638 (1968) (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)) (upholding a New York statute banning the sale of sexually oriented material to minors, even though the material was entitled to First Amendment protection with respect to adults).

117. Bellotti v. Baird, 443 U.S. 622, 635 (1979).

118. Lee v. Weisman, 505 U.S. 577, 592 (1992).

119. Hosty v. Carter, 412 F.3d 731, 739 (7th Cir. 2005).

120. 484 U.S. 260, 274–75 (1988).

121. Healy v. James, 408 U.S. 169, 180 (1972) (quoting Keyishian v. Bd. of Regents of the Univ. of State of N.Y., 385 U.S. 589, 603 (1967)).

122. *Id*. at 180.

eighteen years old, "only about one percent of those enrolled in American colleges and universities in 2002 were under the age of eighteen."[123] Having reached the age of majority, adult college students enjoy many rights under the law that minors do not.[124] Only by downplaying these important distinctions does the majority in *Hosty* arrive at its result.

2. Dean Carter Should Have Known her Actions Were Unconstitutional

A reasonable person in Dean Carter's position would have known that the extreme action of establishing a system of content-based prior restraint on a university newspaper such as the *Innovator* was unconstitutional. In fact, when Dean Carter instructed the printer, Charles Richards, not to print any more issues of the paper until she granted her approval, he told her that what she was doing was "probably unconstitutional."[125]

The court in *Hosty* seems to equate the reasonableness of an official's action for qualified immunity purposes on the existence of case law that could be read to support or excuse the action. In order for Dean Carter's actions to be reasonable, she would have had to ignore the conclusions of virtually every case involving college newspapers[126] and rely solely on *Hazelwood*, further ignoring that opinion's strong limiting language.

What is especially unfortunate is that *Hosty* was decided on summary judgment without ever reaching a jury. A jury would have been more suited to decide whether a reasonable person in Dean Carter's position would have known that they were violating constitutional rights because the jury presumptively is made up of average, reasonable people.

D. It Makes for Bad Policy

A lingering question remains after reading the majority opinion in *Hosty*: When are people supposed to learn of their constitutional rights?

123. *Hosty*, 412 F.3d at 739 n.1 (citing 2002 U.S. Census Bureau Current Population Survey (CPS) Rep., Table A-6, "Age Distribution of College Students 14 years Old and Over, by Sex: October 1947-2002."). Interestingly, Governors State University describes itself as a "campus for working adults" and the average age of its students is thirty-three. Governors State University, About GSU, http://www.govst.edu/aboutgsu/t_aboutgsu.asp?id=191 (last visited Sept. 9, 2005).

124. For example, the Twenty-Sixth Amendment guarantees citizens of the United States eighteen years of age and older the right to vote. U.S. CONST. amend. XXVI.

125. Hosty v. Governors State Univ., No. 01 C 500, 2001 WL 1465621, at *2 (N.D. Ill Nov. 15, 2001).

126. "[C]ensorship or prior restraint of constitutionally protected expression in student publications at State-supported institutions has been uniformly proscribed by the Courts." Mazart v. State, 441 N.Y.S.2d 600, 605 (N.Y. Ct. Cl. 1981).

When barred from exercising them fully in high school and college, they will be hard-pressed to learn how to be good journalists because they are being taught censorship at every level of their development in the profession.[127] Does the Seventh Circuit expect them to graduate from college and magically realize that now it is acceptable to question authority and government decisions?

The more likely effect of decisions like *Hosty* is to water down the public perception of constitutional rights in an environment where they are most essential: university campuses.[128] By ruling in favor of Dean Carter, the Seventh Circuit further muddled the landscape surrounding freedom of speech in college publications so that future officials will be more likely to succeed in obtaining qualified immunity for any acts that would otherwise be prohibited by the First Amendment. Whereas Dean Carter was only able to rely on a high school newspaper case, *Hosty* now establishes a speech-restrictive precedent in the university context.

VI. CONCLUSION

The decision in *Hosty* represents a significant departure from established decisions supporting the First Amendment rights of students who write for college newspapers. The Seventh Circuit is the first Court of Appeals to apply *Hazelwood* to extra-curricular speech in the university context, and the majority's reliance on *Hazelwood* is arguably flawed in several respects.

The U.S. Supreme Court erred by denying the plaintiffs' petition for certiorari and failing to reverse the Seventh Circuit. Such a reversal would have stated definitively that media censorship has no place on the campuses of our nations' state colleges and universities. By declining to do so, the Court has implicitly invited further unfortunate results, which could eventually lead to a circuit split. The Court may have also lost a chance to gain credibility in a time of political distrust. After all, freedom of speech is a core American value crucial to the maintenance of our democratic tradition. It is also peculiarly the province and duty of the Supreme Court to interpret and protect constitutional rights against infringement by the state, which is exactly what occurred in *Hosty v. Carter*.

127. For a passionate reaction to the *Hosty* decision touching on this point, see Mike Hiestand, *The Hosty v. Carter Decision: What it Means*, ASSOCIATED COLLEGE PRESS, July 6, 2005, http://www.studentpress.org/acp/trends/~law0705college.html.

128. "[I]n the university setting . . . the state acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophical tradition." Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 835 (1995).