From *Hazelwood* to *Hosty*: Student Publications as Public Forums

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The extent to which students enjoy First Amendment protections in the educational setting has been long debated in the judicial system. Generally speaking, students at all levels of schooling, especially college and university students, have received liberal free speech protection. Since 1969, when the Court eloquently affirmed student rights in the school environment, the Court has held that "[it] can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1] This signature passage, although referring to a secondary school, is equally applicable to the university setting, if not more so, as the Supreme Court's decision in *Healy v. James* would suggest.[2] In this 1972 decision, the Court unanimously ruled that college students are entitled to the same First Amendment protections as the general public.[3] In 1981, the Court again stated that there is "no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."[4] Nevertheless, more recent decisions by both the Supreme Court and the lower federal courts have indicated an intent to narrowly define students' rights in cases where the speech itself is subsidized by the school, as was the case in *Hazelwood East School District v. Kuhlmeier* and recently by the Seventh Circuit Court of Appeals, sitting *en banc*, in *Hosty v. Carter.*

Despite these apparent trends toward greater deference, there remains a great deal of ambiguity as to the appropriate *standard* of evaluating speech in determining the rights of college and university students.[5] Extending the "reasonability test" in *Hazelwood* to college campuses could result in a chilling effect, severely restricting student expression.[6] While it would be inappropriate to automatically assume that students at the university level as compared with secondary school students should be regulated with the same degree of deference, employing the same test to determine the very nature of student expression would not result in significant ramifications affecting the "marketplace of ideas," as some critics have argued.[7] In *Hazelwood*, the Supreme Court correctly decided, based on the application of the public forum analysis to the specific circumstances of the case, that the student newspaper *Spectrum* did not exist in a traditional or limited purpose public forum and thus did not qualify for significant First Amendment protection. Applying the same analysis to the facts in *Hosty v. Carter,* one can reasonably hypothesize, based on the rulings of the District Court and a panel of the Seventh

Circuit Court of Appeals, that the student publication in question would be found to exist in a limited purpose public forum and thus deserving of First Amendment protection.

This paper will highlight the fundamental lack of an explicit standard with which to evaluate student speech at the collegiate level through a detailed analysis of two strikingly similar cases involving student expression in which the Appellate Courts employed different standards of review and thus arrived at very different conclusions as to the extent of First Amendment protection. This paper will argue that *Hazelwood* provides the appropriate standard for review of student publications on university campuses not with regard to the degree of deference apportioned to school administrators but concerning the methodology employed by the Supreme Court, that is, the public forum analysis. Utilizing this method as the standard of review, the Supreme Court has distinguished three types of fora within which expression can exist: traditional, limited or designated, and non-public. The first type, a traditional public forum, consists of open, public settings, such as streets and parks, in which expression can only be subject to content-based restriction when such restrictions serve a "compelling state interest."[8] Non-content-based regulation in traditional public forums is only permissible when such actions are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[9] Distinguishable from the traditional public forum is a limited or designated public forum, in which the government opens a forum "for use by the public for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."[10] While the government retains the right to terminate the existence of this forum at any time, while this type of forum does exist, it operates under the same content-based regulations as a traditional public forum. The final type forum is a non-public forum in which content-based restrictions may be imposed "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."[11]

The First Amendment Rights of Students

In *Tinker v. Des Moines*, the Supreme Court held that non-school sponsored, non-curricular student speech could only be regulated based on content if it "would substantially interfere with the work of the school or impinge upon the rights of other students."[12] Thus, the Court established "substantial material disruption" as the standard for content-related regulation of student press in the educational setting. In 1988, however, the issue of student publications

within the curriculum and with school sponsorship came before the Court in *Hazelwood v. Kuhlmeier*. Distinguishing away from *Tinker*, the Court reasoned that the *Hazelwood* case involved "educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[13] The Court further reasoned that the student publication in question, the *Spectrum*, was part of the school curriculum because it was supervised by faculty members and "designed to impart particular knowledge or skills to student participants and audiences."[14] Thus, unlike the student speech in *Tinker,* which constituted "a student's personal expression that happens to occur on the school premises,"[15] the standard for content-based regulation in *Hazelwood* is different because the speech is school-sponsored and part of the curriculum.

In the *Hazelwood* decision, the Court relied on a public forum analysis to determine the extent to which the student publication should receive First Amendment protection. After determining that the *Spectrum* did not exist in a traditional public forum,[16] that is, a forum reserved for purposes of communication subject only to content-based regulation when the speech falls into a category of legally unprotected speech, i.e. commercial speech, libel, etc, the Court then examined the policies, practices, and context within which the student newspaper existed. The Court determined that "school officials did not evince either 'by policy or practice' any intent to open the pages of *Spectrum* to 'indiscriminate use' by its student reports and editors, or by the student body generally."[17] Thus, because the newspaper existed not for the purposes of student expression but as a "faculty-supervised integral part of the school's journalism curriculum,"[18] the school retained content-based regulation of the speech if they could "demonstrate that there was a reasonable basis for the action taken."[19] Although the *Tinker* decision was not decided based on the public forum analysis utilized by the Court in *Hazelwood*, one can reasonably assume based on the distinctions drawn between the two cases that the student expression in *Tinker* did not exist within a "non-public forum" and thus was not subject to the same level of stringent regulation.

In both the *Tinker* decision protecting student rights and the *Hazelwood* decision limiting said rights, the Court ruled on the legality of free speech regulation at the elementary and secondary public school level. While there exists a great deal of case law regarding the rights of school administrators to regulate student speech at these levels of education, the Court has yet to

clearly define the scope of a public college or university to exercise control over student press in the post-secondary setting.

> [Our] cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, whose students and their school's relation to them are different and at least arguably distinguishable from their counterparts in college education.[20]

Indeed, when deciding *Hazelwood*, the Court unambiguously declined to consider whether such a standard of regulating speech could reasonably be applied to the college and university level.

> A number of lower federal courts have similarly recognized that educators' decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference. We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.[21]

In the absence of clear precedent, however, federal and appellate courts have had little choice except to utilize the standards set forth in *Tinker* and *Hazelwood*. As such, the extent to which college and university students receive First Amendment protection has varied greatly depending on which precedent each individual court chooses to employ.

College Newspapers and the First Amendment: *Kincaid* and *Hosty*

Two recent appellate court decisions clearly illustrate the disparity caused by a lack of an appropriate standard regarding free expression in the post-secondary setting. In 1999, a panel of the Sixth Circuit Court of Appeals, applying the *Hazelwood* standard, decided that a student yearbook, *The Thorobred*, produced by college students at Kentucky State University, a state-run, publicly funded university, could reasonably be subject to regulation by school administrators based on style and content. In this case, the students contend that a university administrator, Betty Gibson, violated their First Amendment rights by confiscating the yearbooks and disallowing their distribution on the campus at Kentucky State University.[22] The administration cited the "poor quality and 'inappropriate'" nature of the yearbook as well as the "yearbook's purple cover (KSU's school colors are green and gold), its 'destination unknown theme,' the lack

of captions under many of the photos, and the inclusion of current events ostensibly unrelated to KSU."[23]

Despite the fact that regulation of student press is specifically forbidden when content-related, the panel concluded that the college yearbook, as a school-sponsored, student publication receiving funding and advice from an employee of the university, existed in a non-public forum. The majority ruled that, "[*The Thorobred* was] a KSU-sponsored representation of student life at the university rather than as an open forum for student expression."[24] Thus, *The Thorobred* did not exist in a traditional public forum, and, like the student newspaper in *Hazelwood*, the Court found the student publication in this case to exist in a nonpublic forum. As Judge Cole highlighted in his dissent and subsequently in the majority opinion of the full Sixth Circuit, the application of the public forum analysis was not properly implemented under these circumstances, particularly because there existed evidence to suggest that *The Thorobred* existed in a limited public forum.[25] Thus, it was subject to the same "reasonability standard" and deference afforded to school administrators at the high school level.

The case, *Kincaid v. Gibson*, was reargued before the full Sixth Circuit in 2001, and the panel's decision was reversed. The majority reasoned that the panel failed to properly implement the public forum analysis provided for in *Hazelwood*, specifically in overlooking the possibility that the student yearbook existed in a limited purpose public forum.[26] Such a forum, while in existence, is subject to the same First Amendment protections as a traditional public forum; thus, under these circumstances, the Court reasoned, the student publication could only be regulated on the basis of content if it falls within one of the narrow categories of legally unprotected speech or if such restriction serves a "compelling state interest."[27] In addition, the Court ruled that when a student publication exists in a limited public forum, the university, as an agent of the state, "may impose only reasonable time, place, and manner regulations,"[28] but these regulations must not be content-related.

In this case, the Sixth Circuit, sitting *en banc*, decided that the *Hazelwood* framework for evaluating student speech was "only marginally applicable" to the facts of the case.[29] Nevertheless, the Appellate Court applied the public forum analysis and concluded that *The Thorobred* existed in a designated public forum based on the university's policy regarding student publications, their actual practice with regard to oversight, the nature of the property, whether it existed for the purpose of expressive activity or to achieve some other ends, and

finally the context within which the publication was created. The two major differences between *Kincaid* and *Hazelwood*, the Sixth Circuit reasoned, consisted of the obvious distinction between the high school and college setting within which the student speech took place, and perhaps more importantly, the extracurricular nature of *The Thorobred* as compared with the curricular nature of *Spectrum*. It was these distinctions that led the Sixth Circuit to rule in favor of the students because the publication existed in a limited public forum, subject to a "strict scrutiny legal analysis."[30]

In the second recent case, *Hosty v. Carter,* the Court of Appeals for the Seventh Circuit, sitting en banc, applied the "reasonability standard" invoked by the Supreme Court in *Hazelwood v. Kuhlmeier* to determine the rights of a public university administrator to exercise prior review over an extracurricular student publication funded by the university using student activity fees. Like the panel of the Sixth Circuit in *Kincaid*, the Seventh Circuit utilized the public forum analysis and concluded that the student newspaper, the *Innovator,* existed in a limited public forum, but that the university administrator, Patricia Carter, was entitled to qualified immunity because she could not have known that her requirement for prior review of the student publication violated the First Amendment rights of the students, despite the fact that content-based regulation has rarely received support from the courts. Even in *Hazelwood*, the content-based regulations were clearly and narrowly tailored to school-sponsored, curricular publications that existed in a non-public forum. Additionally, the limited nature of the *Hazelwood* precedent was echoed in *Kincaid*, and while the Supreme Court's general reasoning for the regulation of student speech in the *Hazelwood* decision could plausibly be extended to the university level in certain circumstances, the Seventh Circuit in *Hosty* erred in the implementation of such a standard as it pertains to the facts of this case, particularly in disregarding the inherent differences between a curricular publication at the high school level and an extracurricular publication at the college and university level.

In November 2001, Margaret Hosty, Jeni Porshe, and Steven Barba, all three students of Governors State University (GSU), a public university run by the state of Illinois, filed suit in the Federal District Court for the Northern District of Illinois.[31] In the lawsuit, *Hosty v. Governors State University, et. al*., the three plaintiffs accused several of the university's officers of violating their First Amendment rights by requiring prior review of the content of the student newspaper, allegedly after the students had published articles critical of the school's

administration.[32] The university officials being sued by the students included members of the media board as well as a number of GSU administrators and provosts.

During their time at Governors State, the three students were appointed to serve as editor-in-chief, managing editor, and staff reporter for the school newspaper, *The Innovator*, which had been supported financially by the university using mandatory student activity fees.[33] The students were appointed to their positions by the Student Communications Media Board (SCMB), which published *The Innovator* as well as other print and broadcast media on the Governors State campus. Among other things, the Board retained the authority to decide the types and quantities of publications it wished to fund, subject to the availability of appropriate capital and necessarily not content-related.[34]

In addition to funding *The Innovator*, the SCMB established as policy that the students running the school newspaper "'will determine content and format of their respective publications without censorship or advance approval.'"[35] The newspaper also had a faculty advisor; the Court found, however, that at no time did the faculty advisor participate in content-related decisions. In fact, a panel of the Seventh Circuit found that the faculty advisor was relegated to an advisory role only at the behest of the student editors.[36] In other words, if the students did not approach the faculty advisor seeking advice, it appears likely that the advisor would not even see the publication until it hit campus newsstands. As such, the university afforded the students almost unlimited freedom to make all decisions regarding the content, style, and publication of the *Innovator.*

The student editors operated the *Innovator* in this manner until the fall of 2000, at which time, the students allege that the university, represented by Vice President of Student Affairs Patricia Carter, placed undue restrictions on the content of their publication. According to the plaintiffs' claims made in the District Court bench trial, the students had been investigating news stories regarding "misappropriation of GSU funds and illegal hiring practices."[37] In subsequent weeks, Dean Carter, acting on behalf of the GSU administration, placed two phone calls to the *Innovator's* publisher, Regional Publishing, and allegedly ordered the company to refrain from printing any copies of the student newspaper until the contents had been approved by an administrator. Fearful that the company would not be paid if the newspapers were printed, the company's president, Charles Richards, acquiesced to Carter's demands. Dean Carter has admitted to making the phone calls, but insists that she only required that the newspaper be

reviewed by a faculty member for its "journalistic quality, *e.g.* grammatical mistakes."[38] In addition to the prior review complaint, the students also accused the university of violating their First Amendment rights by their inaction regarding broken facilities used by the paper and canceling SCMB meetings, thereby preventing the allocation of funds. While these issues contribute to the First Amendment violations alleged by the students, this discussion is much larger and thus deserves more detailed attention at a later time. The students' claims of content-based prior review as being in violation of the First Amendment, the determination of which correlates directly to the results of the public forum analysis with specific regard to the extracurricular nature of the newspaper, is the more pressing issue that deserves the most attention at this point in time.

After thoroughly investigating the claims made by the students, the District Court granted the motion for summary judgment for all defendants except Dean Patricia Carter, concluding that there was sufficient evidence to support a claim of unconstitutional prior restraints based on Dean Carter's phone calls to the publisher. In the decision, the District Court cited two cases dealing specifically with regulation of university publications. Citing *Antonelli v. Hammond,* 308 F.Supp.1329 (1970), the District Court reasoned that a university could not disallow the printing of future editions of a school-sponsored campus newspaper based on a lack of prior approval by an administrator regarding the content of the publication.[39] Furthermore, the District Court found to be irrelevant the fact that the newspaper was funded and created by the university.[40] Regarding Dean Carter's claim that she was simply ensuring the "journalistic quality" of the *Innovator*, the District Court referred to a decision by the Fifth Circuit Court of Appeals in *Schiff v. Williams*, which limited regulation of collegiate student publications to certain "special circumstances."[41] While these "circumstances" were not comprehensively defined, the Fifth Circuit was clear that "poor grammar and language expression" did not fall under a category within which the university could exercise control over the content.[42] Thus, the District Court reasoned that Dean Carter's motives, whether they included a desire to control the students' viewpoints or, as she claims, a wish to ensure the "journalistic quality" of the publication, were constitutionally suspect. Moreover, Carter's subsequent actions, effectively stopping the presses until prior restraints were implemented, constituted a clear violation of the students' First Amendment rights, the District Court ruled.

The District Court also made brief mention of the components of the public forum analysis with regard to the defendants' use of the *Hazelwood* decision and its applicability to college campuses. The District Court acknowledged that the Supreme Court's main reason for restricting student speech in the *Hazelwood* case was "the fact that the school never opened the pages of the paper to 'indiscriminate use' by student editors, but rather maintained the paper as a supervised learning experience."[43] Rather, the District Court, without actually stating an intent to analyze the nature of the public forum, argued that the *Innovator* is distinguishable from the *Spectrum* because "all editorial decisions were made by student editors and the *Innovator* was not part of a class, but was an autonomous student organization."[44] Thus, the District Court distinguished the type of forum in which the *Innovator* existed based on the policies and practices of the university with regard to the *Innovator*, which was afforded a great deal more editorial control regarding content and was not part of the curriculum; thus, the GSU newspaper did not exist in a non-public forum. The District Court, however, did not attempt to judge the type of forum in which the newspaper existed.

Dean Carter then brought her case before a panel of the Seventh Circuit Court of Appeals, which ruled 2-1 to affirm the District Court's denial of summary judgment. Like the District Court, the panel expressed a great deal of interest in the policies set forth by the SCMB regarding student publications. According to the panel's analysis, the university's policy granted the students free control over the content of the *Innovator* without fear of censorship or prior restraint.[45] In addition, just as the District Court had found, the university did not exercise regular control over the newspaper, but rather assigned a faculty advisor for advisory purposes only. Just as the District Court had done, the panel of the Seventh Circuit utilized the main tenets of the public forum analysis and discovered that the *Innovator* existed in something other than the non-public forum found in *Hazelwood*. Unlike the District Court, the panel also concluded that the *Innovator* existed in the unique setting of a university as an extracurricular expressive activity and thus should be afforded more protection than deemed appropriate in *Hazelwood*. In this manner, the panel distinguished the context within which the *Innovator* existed. Whereas the *Spectrum* existed in the high school setting as a "supervised learning experience for journalism students,"[46] the *Innovator* was created by the university and produced in the university setting as an extracurricular activity intended for the purposes of student expression. The inherent differences between the two cases could not possibly have caused

Dean Carter to believe that she had the right to require prior review of student publications at Governors State University.[47]

Dean Carter petitioned the Seventh Circuit for a rehearing before the full court, which was granted in late 2004. In reviewing the case, the full Seventh Circuit reversed the panel's decision, granting Dean Carter's petition for summary judgment. Unlike the District Court and Appellate panel decisions, the majority opinion for the *en banc* decision explicitly applied the *Hazelwood* standard to this case with special consideration for the public forum analysis. Dismissing the claims made by the plaintiffs and affirmed by the district court and a panel of the Seventh Circuit, the full Seventh Circuit concluded that *Hazelwood* could conceivably apply to colleges and universities, although to varying degrees. Particularly addressing footnote 7 in *Hazelwood,* the majority reasoned that the note "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. Whether *some* review is possible depends on the answer to the public-forum question, which does not (automatically) vary with the speakers' age."[48] Thus, for the first time in this case, the full Appellate Court pointedly stated that the extent to which the students were afforded First Amendment protection was directly correlated to the forum within which the student newspaper existed. The public forum analysis was the vehicle utilized by the Supreme Court in *Hazelwood*, and the Seventh Circuit believed such a test should be utilized when evaluating the status of college and university publications.

Having made this acknowledgement regarding the applicability of the public forum analysis, the Seventh Circuit failed to definitively determine the status of the *Innovator*. Instead, the majority of the full Seventh Circuit spoke in generalities to determine only that *The Innovator* did not exist in a traditional public forum, thereby strategically avoiding the question as to whether the newspaper existed in a limited public forum or a non-public forum. In the majority decision, the full Appellate Court reasoned that the public forum analysis does not draw a sharp distinction between curricular speech and extracurricular speech. Citing *Rust v. Sullivan,* and *National Endowment for the Arts v. Finley*, the Seventh Circuit stated their opinion that even "speakers who have completed their education still must abide by the conditions attached to public subsidies of speech and other expressive activities."[49] Thus, the Appellate Court reasoned, the fact that the *Innovator* was an extracurricular form of student expression did not necessarily bar the university from exercising some control over the contents of the publication.

Without actually determining the forum within which the *Innovator* existed, the Appellate Court concluded only that the student newspaper did not operate in a traditional public forum; the majority also purported, viewing matters in the most favorable light for the plaintiffs, that, "by establishing a subsidized student newspaper the University may have created a venue that goes by the name 'designated public forum' or 'limited-purpose public forum.'"[50] As such, the newspaper was entitled to liberal First Amendment protection, and the students "may not be censored *ex post* when the sponsor decides that particular speech is unwelcome."[51] Nevertheless, the Appellate Court granted Dean Carter's request for qualified immunity based on the fact that there exists enough ambiguity regarding the forum within which the *Innovator* operated. As such, Dean Carter could not possibly have known that her actions violated the First Amendment rights of the students; thus, the Seventh Circuit reasoned, she was entitled to qualified immunity. Even if the *Innovator* operated in a designated public forum and thus was entitled to extensive First Amendment protection, the school administrator could not have known that her actions were illegal.[52]

Regarding the en banc decision of the Seventh Circuit, the students filed a writ of certiorari to seek relief from the Supreme Court. On February 21, 2006, the Supreme Court denied to hear the case, effectively leaving unanswered questions of the extent to which First Amendment protections extend to college campuses.[53] As a result, the ruling of the full Seventh Circuit Court is binding for all public universities within that circuit. The freedom of press rights of students who attend public universities within this circuit are in danger of becoming more restrictive than the rights of students in other areas of the country where federal courts either have not considered the issue or have granted liberal First Amendment protection to college students.[54] Had the Court decided to take the case and implement the *Hazelwood* standard, the public forum analysis likely would have become the guiding and, more importantly, universal standard of evaluating the status of student press activities. As argued by the District Court and the panel of the Seventh Circuit, fundamental to such an analysis is the distinction between the curricular nature of the *Spectrum* in the *Hazelwood* decision and the extra-curricular nature of the *Innovator* in the *Hosty* decision. The majority of the full Seventh Circuit attempted to divorce this distinction from the public forum analysis, stating, "*Hazelwood's* framework is generally applicable and depends in large measure on the operation of the public forum analysis rather than the distinction between curricular and extra-curricular activities."[55] What the full Seventh

Circuit fails to realize, however, is that the very nature and context of the vehicles for student expression largely depend on whether the expression itself falls within the university curriculum. If so, the Supreme Court reasoned in *Hazelwood*, the expression could reasonably bear the "imprimatur" of the school.[56] If, however, the student expression takes place outside of the school curriculum, there often exists, as in this case, ample evidence to support the finding that the expression could reasonably take place in a limited purpose public forum.

College Newspapers as Public Forums

While the full Seventh Circuit was correct in suggesting that the *Innovator* could reasonably have existed within a public forum, they stopped short of actually classifying the newspaper as such, despite overwhelming evidence to support this finding. More importantly, however, the majority failed to recognize the fundamental difference between school-sponsored curricular publications and school-sponsored extracurricular publications, a distinction utilized by the District Court as supporting the existence of a limited public forum. The full Seventh Circuit bluntly stated their disagreement with the District Court regarding this distinction. "Plaintiffs contend, and the district court agreed, that the Court found a public forum missing in *Hazelwood* only because the paper was prepared as part of the journalism curriculum. By contrast, the *Innovator* was an extracurricular activity, and thus beyond all control, the district court concluded."[57]

The Seventh Circuit thus believed that the District Court was attempting to establish "a bright line" between curricular activities and other forms of expression. To refute this claim, the Circuit Court relied on *Rust v. Sullivan* which held that "the federal government may insist that physicians use grant funds only for the kind of speech required by the granting authority."[58] While the *Innovator* was in fact a university subsidized newspaper, the *Rust* precedent has little relevance in this case. The Seventh Circuit continued their argument, stating, "[even] speakers who have completed their education still must abide by the conditions attached to public subsidies of speech and other expressive activities."[59] In *Rust,* however, the government was subsidizing a particular type of speech, in this case, publications by physicians that address medical issues, particularly reproductive health issues.[60] If the physicians had spent the government money to write an article on a completely unrelated topic such as the health benefits of athletic activity, the government would surely have the right to demand a change in the content. In other words, the funding in *Rust* was allocated by the government not for the

purposes of opening a forum for physicians to express themselves, but for physicians to report the results of their research.[61] Use of the funding for any other purpose would violate the contingencies attached to the grant, and thus the government would be justified in requiring content changes. In the case of the *Innovator*, however, the government subsidies were being disseminated to the students for the particular purpose of establishing a forum for student publication without any expectation of specific content. The only requirement attached to the funding is that the monies be spent on the creation of a newspaper for the purposes of student expression. Thus, the *Rust* decision has little relevance to the *Innovator,* save for the fact that both are subsidized by the government.

The Seventh Circuit also suggested a hypothetical situation in which the student editors utilized university funds originally intended for the publication of newspapers to create a booklet about "campus life and cultural activities in the surrounding neighborhoods."[62] The Circuit Court argued that such a diversion of funds would be impermissible because the allocations would have been given to the students for the purposes of creating a particular medium of expression. The majority, however, again misunderstood the purpose of the university in funding the student publication, that is, the creation of a forum for a student press. The medium through which students choose to express themselves is irrelevant to the conditions of using the funding, so long as the students use the money for a student press activity. In effect, by granting the students funding, the university would be "intentionally opening a nontraditional forum for public discourse," [63] or a limited public forum. Once the university has taken such positive action in creating the limited public forum,[64] the school relinquishes the right to control or censor student speech, both content-related and with regard to style. Thus, the university would be creating a forum which, "by its very nature, exists for the purpose of expressive activity."[65] Both the newspaper and the booklet would accomplish these purposes; thus, the student editors in this situation would not be misusing university funds.

The Seventh Circuit correctly acknowledged the University's right to control the content of student speech intended for an alumni magazine and created by journalism students who would receive course credit for their work. In this case, the Circuit Court reasoned, the contents of the speech belong to the university, and thus regulation by the university would be permissible because the speech exists within a non-public forum. The same standards of regulation would apply if students were paid by the magazine, instead of receiving course credit, to write articles.

The Court then mistakenly applied the latter example to an extracurricular activity that "may be outside any public forum, as our alumni magazine demonstrates, without also falling outside all university governance."[66] What the Seventh Circuit overlooks in the latter example is the fact that the student expression would still exist in a non-public forum. The students, as hired agents of the magazine, would be required to adhere to any content-based regulations the magazine sees fit. The articles in this case would be written for a pre-determined purpose as established by the magazine. In the case of an extracurricular activity, even one in which student editors are paid by the university, as is the case with the *Innovator*, the students would be writing articles for the purpose of student expression, regardless of the content. In other words, the students in the former case receive compensation for assisting in the expression of an institution's viewpoint, whereas the students in the latter case are being paid by the university to produce a newspaper that affords students the opportunity to express their personal views. Much like the *Rust* case, the magazine is interested in the content of the articles produced by the students; in creating an extracurricular student newspaper, however, the university is interested in creating a forum for student press.[67] It is the distinction between the purpose of the two publications that is critical to the public forum analysis.

Perhaps the biggest flaw in the Seventh Circuit's *en banc* decision was their inability to recognize the fact that the *Innovator* existed within a designated or limited public forum. Particularly, the Circuit Court ignored the inherent nature of the student publication as being an extracurricular activity, a fact which lends itself substantially to the existence of a limited public forum.

With regard to the policy of Governors State University dealing with student publications, the panel of the Seventh Circuit concluded that the university granted the student staff of the *Innovator* the right to "determine content and format of their respective publications *without censorship or advance approval."*[68] Once the school grants authority to students to make content-related decisions, thereby creating a limited public forum, it may only censor the student speech under "certain limited situations and when the control is content neutral under a strict scrutiny legal analysis."[69] Additionally, the university is not, by any means, required to maintain the forum for student publication; the school is entitled, as the creator of the forum, to shut the forum down and end school-sponsored student expression, even if the expression is extracurricular in nature, as a means of avoiding any possible liability.[70] However, as long as the

university maintains a policy of allowing student publications such as the *Innovator* to exist in a limited public forum, the university "is bound by the same standards as apply in a traditional public forum."[71]

Unlike the Hazelwood School District, GSU intended on creating and subsidizing the *Innovator* as a student extracurricular expressive activity. The *Spectrum* in the *Hazelwood* decision, on the other hand, existed in a non-public forum because the school had not intended, nor had they established the school-sponsored newspaper as open forum for "indiscriminate use."[72] Rather, the school had intended the newspaper to be a "curricular experience," supported by the policies established in the school's curriculum guide and the "active supervisory role played by the newspaper's advisor."[73] Furthermore, the university, unlike the high school in *Hazelwood*, granted funding for the expressed purpose of providing for a student publication on campus, as demonstrated by their policy of publishing the newspaper and compensating the editors for their work on the *Innovator*.[74] With regard to the university's policy of subsidizing student speech, however, there exists a great deal of case law indicating that content-based censorship is impermissible. In *Stanley v. Magrath*, the Eighth Circuit held that a "public university may not constitutionally take adverse action against a student newspaper, such as withdrawing funding or reducing the paper's funding, because it disapproves of the content of the paper."[75] Although Dean Carter did not actually refuse to fund the newspaper, the fact that she effectively halted the presses until prior restraints could be instituted amounts to the same effect: no student publication.

With regard to the practices of the university, the District Court noted that "the student editors were given "complete editorial control over the newspaper, including its subject matter and content."[76] Consistent with the Sixth Circuit's decision in *Kincaid v. Gibson*, the university, by allowing the editors to determine the content of the paper, thereby created a limited public forum. "If the school gave the students full reign over the publication's content, then the school has evinced an intent to create a public forum,"[77] the Sixth Circuit concluded. In addition, the fact that the newspaper was assigned a faculty advisor is irrelevant based on the practices regarding the relationship between the faculty member and the editors of the *Innovator*. The District Court acknowledged that the faculty member advises the students on "issues of journalistic standards and ethics."[78] The panel of the Seventh Circuit, however, ruled that, in practice, the advisor's role was minimal at best. Based on the evidence, the panel concluded that,

"although the newspaper's faculty advisor often read stories intended for publication at the request of the student editors, the advisor did not make content decisions. Only advice was offered."[79] Thus, the advisor was only involved in the publication at the request of the editors, and only offered non-content-related advice. In addition, there was no university policy that required the students to take the advice of the faculty member. Therefore, the Seventh Circuit panel concluded, the university's practices with regard to the *Innovator* did not deviate from their stated policy of establishing the student newspaper in a limited public forum.

Further proving the existence of a limited public forum in *Hosty v. Carter* is the fact that the newspaper was by its very nature an extracurricular activity for the sole purpose of student publication. Unlike the *Spectrum* in *Hazelwood,* which was designed as a "laboratory exercise"[80] for a high school journalism class, the *Innovator* was "a classic college student newspaper" that has "traditionally enjoyed rights more comparable to their counterparts on CNN or in the *New York Times* than to their counterparts in high school."[81] Thus, the nature of the *Spectrum* consisted of a newspaper that served as an educational tool to complement the Journalism II class. The nature of the *Innovator*, like the *Thorobred* in *Kincaid v. Gibson*, consisted of a vehicle for student expression. Therefore, by its nature as an expressive activity, the *Innovator* is distinguishable from the *Spectrum* and should be considered as existing in a limited public forum.

Finally, the context within which the *Innovator* was created also suggests that the newspaper existed in a limited purpose public forum. Using the public forum analysis set forth in *Hazelwood*, it is clear that the inherent differences between a college campus and a high school are the most obvious disparities in context. Aside from the fact that the missions of the two institutions are completely different,[82] the fact that the vast majority of college newspaper reporters as well as their readers are legally adults lends more weight to a ruling for greater First Amendment protection for student speech.[83] Furthermore, the fact that the *Innovator* operated outside the curriculum and in the unique setting of a college campus, as opposed to within the curriculum and in a high school, suggests that the newspaper did not exist in a non-public forum, as *Spectrum* did. Indeed, the Court has made the distinction between the context of the physical setting within which student speech takes place, stating in *Widmar v. Vincent,* "This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum."[84]

Given the numerous and significant distinctions between the *Innovator* and the *Spectrum*, the Seventh Circuit should reasonably have concluded that the GSU student newspaper operated within a limited public forum. Based on the factors of the public forum test, however, it would be difficult for any court to rule that extracurricular collegiate newspapers could conceivably exist in anything other than a limited public forum, especially considering the Supreme Court's emphasis on the curricular nature of the *Spectrum* as a primary reason for the finding of a non-public forum. Indeed, the vast majority of collegiate newspapers are not part of the college curriculum,[85] and thus exist for the sole purpose of student publication rather than a "learning experience." Additionally, the very nature of college newspapers as being extracurricular student expressive activities within the context of a university setting further suggests that newspapers such as the *Innovator* should receive more First Amendment protection than did the *Spectrum* in *Hazelwood*. Therefore, using the results of the public forum analysis to resolve the extent to which school-sponsored extracurricular student expressive activities are protected by the First Amendment, the Court would be wise to consider all such expressive activities, such as the *Thorobred* and the *Innovator*, to be within a limited public forum, and thus subject to "strict scrutiny." In this situation, a public university would have to demonstrate a desire to achieve a "compelling state interest" in order to regulate the speech based on content.[86] Other than the limited circumstances in which a university could possibly hope to achieve a state interest through the regulation of speech, the school-sponsored extracurricular student newspaper such as the *Innovator* can also be regulated based on the categories of legally unprotected speech. Aside from the limited circumstances in which content-based regulation is permissible, a university may also "impose reasonable time, place, and manner regulations.[87] Such was the framework utilized by the Sixth Circuit in *Kincaid v. Gibson* in determining the *Thorobred* to exist within a limited public forum. It is the same standard utilized by the Supreme Court in *Hazelwood* that found the *Spectrum* to exist in a non-public forum, and it is the standard that should be employed at all levels of the judicial system when evaluating First Amendment protection of student speech.

To be sure, these distinctions do not preclude the *Hazelwood* public forum test from all applicability on college campuses. The need for the Court to designate student expressive activities at the collegiate level as operating within limited public forums pertains only to extracurricular activities and even then only most of the time. Nevertheless, the general framework of *Hazelwood* and the public forum analysis can reasonably apply to colleges and

universities in certain circumstances. For example, if college students volunteered their time as student interns for the university's public affairs publication and were asked to submit articles and photographs for the publication, the university, under the public forum analysis, would retain the right to control the content of the articles. The policy and practice of the publication would suggest that the publication exists and operates as the "mouthpiece" of the university. In such a case, it would not be difficult for the contents of the publication to reasonably "bear the imprimatur"[88] of the university based on the context within which the publication was created, that is, the office of public affairs, which is charged with representing the official position of the university. Therefore, the publication would be deemed a non-public forum, despite the fact that the students were voluntarily participating in an activity that was not part of the curriculum, but took place within the college campus.

Another situation in which student speech might be reasonably regulated based on the public forum analysis might involve a publication that is part of the curriculum, such as a newspaper created by the journalism school of a major university. Suppose journalism students were required as part of their major requirements to participate in the production of the newspaper, which was published and distributed by the school of journalism. The students received one course credit for their participation, and utilized the school's facilities for their work on the newspaper. The goals stated in the course syllabus included instruction on the logistics of newspaper production as well as editorial techniques and layout design. The instructor frequently allowed the students to choose the content of their articles, but exercised some content-based control when necessary. Based on the facts of this hypothetical example, the university would again retain control over the content of the student expression. Using the public forum analysis, it is clear that the university created the newspaper as a forum for educational purposes regarding the creation of a newspaper rather than for student expression. In addition, the instructor adhered to the policy regularly. Finally, the fact that the publication existed within the context of the university curriculum, combined with the educational nature of the newspaper, supports a finding of the existence of a non-public forum. However, if the syllabus stated the goals of the course as including instruction on vigorous, hard-hitting journalism and investigative journalism and the instructor allowed the students "free reign" over the topics, the publication would be considered a limited public forum. Although still part of the

curriculum, the policy and practice of the university with regard to the publication would defeat the context within which the publication existed.

Yet another example of the extension of *Hazelwood* to college campuses is the 2002 decision by the Ninth Circuit Court of Appeals in *Brown v. Li*, in which a university failed to approve a revised version of a graduate student's masters thesis, which included a section that was critical of the university. The Court concluded that the student's speech could reasonably be regulated because it existed within the context of a curricular requirement.[89] Additionally, it was the policy of the school thesis advisors to review and approve all student writings before they could be filed in the university archives, a policy the school apparently adhered to. Although the majority did not utilize the public forum analysis to the extent that the Sixth Circuit did in *Kincaid*, one could easily apply such a test and reach the same conclusion as the Ninth Circuit, that the student expression existed in a non-public forum and thus was subject to content-based regulations based on the legitimate concerns of the thesis advisors.

Beyond student publications, the extent to which other forms of student expression on college campuses is protected remains unclear. In January 2006, for example, administration officials at Troy University censored the artwork of a student who had created nude photographs for an assignment on birth.[90] According to the university, the photographs were taken off display because they were not "consistent with our community's standards."[91] Despite the fact that the nude photographs did not meet the standards of obscene speech, the university removed the photographs from exhibition. Under the public forum analysis in this still evolving case, there are several factors to consider, not the least of which is the fact that Troy University is a public university. As a public university, and as such an arm of the state, the administrators are bound to uphold the constitutional rights of the students. Another factor to take into consideration is the context within which the artwork was created, that is, within the curriculum of the fine arts department. As an art major, the student who created the nude photographs had done so to satisfy the requirements of an assignment within the curriculum. The curricular nature of the work, however, does not automatically place the artwork within the realm of a non-public forum. The policies and practices of this university would have to be carefully examined to determine how the Troy University had treated the exhibition of student artwork in the past. If, in the past, the university had allowed students a wide range of discretion, both in policy and practice, in creating and displaying their work, even such work that was part of the curriculum, then the

actions taken by Troy University administrators could reasonably be called into question. On the other hand, if Troy University had made it a policy to enforce stringent restrictions on the content of student artwork within the curriculum, then the University would not face much difficulty in defending their decision to remove the artwork from exhibition. In the former instance, the university would be considered in violation of the student's First Amendment rights because they would have compromised the limited public forum which they had established through policy and practice. In the latter case, no such forum was created, and the University would be justified in regulating the student artwork.

Thus, it is clear that the *Hazelwood* framework can, in some cases, apply to colleges and universities. With regard to collegiate extracurricular expressive activities, however, the Court should rely upon the reasoning of the public forum analysis, and thus would discover the vast majority of such expressive activities to exist within a limited public forum. Therefore, it would be prudent for the courts to assume that such extracurricular student expression, regardless of school-sponsorship, should be considered within this type of forum unless there exists reasonable evidence to the contrary. This standard would allow for healthy, robust forums for discussion on college campuses; as a limited public forum created by the positive action of the state, however, the university would retain the right to close such forums as administrators see fit. Such decisions, however, would take place only in extreme circumstances, as most universities do not want to be viewed as suppressing the free expression of their students, an inevitable inference that would result from such action.

If the policy of treating all extracurricular expressive activities at the collegiate level proved implausible in practice, the most appropriate alternative standard would consist of a revival of the material disruption test in *Tinker*. Under this standard, a school could restrict the content of student speech if it "could reasonably anticipate a substantial and material disruption."[92] Disruption, however, does not include the mere "discomfort and unpleasantness that always accompany an unpopular viewpoint;"[93] rather, in order for a school to exercise content-related regulation, there must exist at least the possibility of "an actual break in the learning process [thereby] prevent[ing] the school from performing its educational mission.[94] Thus, only under the strict circumstances provided for in this alternative standard would a university have the right to regulate student speech on the basis of content. Such a standard

would afford university administrators more deference than a limited public forum, but would still grant students significant First Amendment protections.

To be sure, school-sponsorship must be considered within the forum analysis, but it is not an absolute factor and arguably deserves less consideration than the distinction between curricular and extracurricular speech, which serves as a better indicator with regard to the type of forum.

The Supreme Court found the student newspaper in *Hazelwood* to exist in a non-public forum and thus afforded school administrators substantial deference with regard to regulation of student speech within this forum. In *Kincaid,* however, the student publication was found to exist in a limited public forum largely because the publication was an extracurricular student activity; thus, the degree of deference afforded to school administrators is not the same as that of the high school principal. In applying the same standard of review to *Hosty v. Carter*, it is clear that *Hazelwood* can conceivably be extended to college campuses. However, the determination of the extent to which college administrators can impose content-based regulations should be based on the findings of the public forum analysis employed by the full Sixth Circuit in *Kincaid v. Gibson,* the main argument of which relied on the extracurricular nature of the student publication.

Based on a public forum analysis and a basic assumption that college level extracurricular expressive activities exist within a limited public forum, the Court refused an opportunity in *Hosty v. Carter* to set a standard that would provide for sufficient protection of the First Amendment rights of college students while affording public universities the ability to regulate the content of student speech to achieve a "compelling state interest."[95] Such a standard provides for the greatest degree of First Amendment protection as possible, short of granting college students the same rights as the public at large, while allowing public universities to maintain some control in extreme circumstances. If this standard were to prove inadequate or counteractive to the educational mission of the public university, one could easily defer to the *Tinker* standard of substantial material disruption, as a means of better balancing the authority of the school with the government's commitment to ensuring freedom of expression on college campuses. However, this essay argues that it is possible and, indeed, beneficial to designate all forms of extracurricular student publication at the university level as existing within a limited public forum and thus subject to the strict scrutiny analysis that affords students a great deal of

First Amendment protection while limiting the deference granted to university administrators to regulate said speech on the basis of content. Application of the *Hazelwood* public forum analysis would only confirm the status of the forum within which these types of expressive activities exist and, therefore, is the test that should be used by judicial courts in determining the public forum status of student expression and publication at all levels of education.

Notes

[1] *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 at 505-506 (1969).
[2] Gregory C. Lisby, "Resolving the *Hazelwood* Conundrum: The First Amendment Rights of College Student in *Kincaid v. Gibson* and Beyond," *Communication Law and Policy* 7 (Spring 2002), 145.
[3] *Healy v. James,* 408 U.S. 169 (1972).
[4] *Widmar v. Vincent,* 454 U.S. 263 at 268-269 (1981).
[5] Karyl Roberts Martin, "Note: Demoted to High School: Are College Students' Free Speech Rights the Same as Those of High School Students?" *Boston College Law Review* 45 (December 2003), 175.
[6] Mark J. Fiore, "Comment: Trampling the "Marketplace of Ideas": The Case Against Extending *Hazelwood* to College Campuses," *University of Pennsylvania Law Review* 150 (June 2002), 1965.
[7] Fiore, 1967.
[8] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 at 45 (1983).
[9] 460 U.S. 37 at 45 (1983).
[10] *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.,* 473 U.S. 788 at 802 (1985).
[11] 473 U.S. 788 at 806 (1985).
[12] 393 U.S. 503 at 508-509 (1969).
[13] *Hazelwood East School District v. Kuhlmeier,* 484 U.S. 260 at 270-271 (1988).
[14] 484 U.S. 260 at 270-271 (1988).
[15] 484 U.S. 260 at 270-271 (1988).
[16] 484 U.S. 260 at 267 (1988).
[17] 484 U.S. 260 at 270 (1988).
[18] Judge Wollman (dissenting), *Kuhlmeier v. Hazelwood School District*, 795 F.2d 1368 at 1378 (8th Cir. 1986).
[19] *Kuhlmeier v. Hazelwood East School District*, 607 F. Supp. 1450 at 1466 (E.D. Mo. 1985).
[20] Justice Souter (concurring), *Board of Regents of the University of Wisconsin v. Southworth,* 529 U.S. 217 at 239 (2000).
[21] 484 U.S. 260 at 273-274 n.7 (1988).
[22] 236 F.3d 342 at 345 (6th Cir. 2001).
[23] 236 F.3d 342 at 345 (6th Cir. 2001).
[24] *Kincaid v. Gibson,* 191 F.3d 719 at 728 (6th Cir. 1999).
[25] Judge Cole (dissenting), 191 F.3d 719 at 731 (6th Cir. 1999).
[26] Lisby, 151.
[27] 236 F.3d 342 at 354 (6th Cir. 2001).
[28] 236 F.3d 342 at 354 (6th Cir. 2001).
[29] 236 F.3d 342 at 346 (6th Cir. 2001).
[30] Lisby, 151.
[31] *Hosty v. Governors State University,* 2001 U.S. Dist. LEXIS 18873 (N.D. Ill. 2001).
[32] 2001 U.S. Dist. LEXIS 18873 at 5 (N.D. Ill. 2001)
[33] 2001 U.S. Dist. LEXIS 18873 at 7 (N.D. Ill. 2001).
[34] In *Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819 (1995), the Court ruled that a university may not make decisions regarding the dissemination of student activity funds based on the content. Similarly, in *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court ruled that a university may not prohibit a group from utilizing university facilities based on the contents of their expression, be it political, religious, etc.
[35] *Hosty v. Carter,* 325 F.3d 945 at 946 (7th Cir. 2003).
[36] 325 F.3d 945 at 946 (7th Cir. 2003).
[37] 2001 U.S. Dist. LEXIS 18873 at 5 (N.D. Ill. 2001).

[38] 2001 U.S. Dist. LEXIS 18873 at 5 (N.D. Ill. 2001).
[39] 2001 U.S. Dist. LEXIS 18873 at 19 (N.D. Ill. 2001).
[40] 2001 U.S. Dist. LEXIS 18873 at 19 (N.D. Ill. 2001).
[41] *Schiff v. Williams,* 519 F.2d 257 at 260 (5th Cir. 1975).
[42] 519 F.2d 257 at 261 (5th Cir. 1975).
[43] 2001 U.S. Dist. LEXIS 18873 at 21 (N.D. Ill. 2001).
[44] 2001 U.S. Dist. LEXIS 18873 at 21 (N.D. Ill. 2001).
[45] 325 F.3d 945 at 946 (7th Cir. 2003).
[46] 484 U.S. 260 at 270 (1988).
[47] 325 F.3d 945 at 8 (7th Cir. 2003).
[48] *Hosty v. Carter,* 412 F.3d 731 at 734 (7th Cir. 2005).
[49] 412 F.3d 731 at 736 (7th Cir. 2005).
[50] 412 F.3d 731 at 737 (7th Cir. 2005).
[51] 412 F.3d 731 at 737 (7th Cir. 2005).
[52] 412 F.3d 731 at 738 (7th Cir. 2005).
[53] *Hosty v. Carter,* 126 S. Ct. 1330 (2006).
[54] Ricky Ribeiro, "Student editors react to *Hosty* decision," February 28, 2006. Available at < http://www.splc.org/newsflash.asp?id=1198>.
[55] 412 F.3d 731 at 738 (7th Cir. 2005).
[56] 484 U.S. 260 at 270-271 (1988).
[57] 412 F.3d 731 at 736 (7th Cir. 2005).
[58] 412 F.3d 731 at 735 (7th Cir. 2005).
[59] 412 F.3d 731 at 736 (7th Cir. 2005).
[60] *Rust v. Sullivan,* 500 U.S. 173 at 178 (1991).
[61] 500 U.S. 173 at 180 (1991).
[62] 412 F.3d 731 at 736 (7th Cir. 2005).
[63] *Cornelius v NAACP Legal Defense and Education Fund,* 473 U.S. 788 at 802 (1985).
[64] William G. Buss, "School Newspapers, Public Forums, and the First Amendment," *Iowa Law Review* 74 (March 1989), 525.
[65] Lisby, 152 citing *Kincaid v. Gibson,* 236 F.3d 342 at 351 (6th Cir. 2001).
[66] 412 F.3d 731 at 736 (7th Cir. 2005).
[67] Buss, 524.
[68] 325 F.3d 945 at 946 (7th Cir. 2003).
[69] Lisby, 154.
[70] Marc J. Abrams and S. Mark Goodman, "End of an Era? The Decline of Student Press Rights in the Wake of *Hazelwood School District v. Kuhlmeier." Duke Law Journal* 1988 (September 1988), 726-727.
[71] 460 U.S. 37 at 46 (1983).
[72] 484 U.S. 260 at 270 (1988).
[73] Fiore, 1960-1961.
[74] 325 F.3d 945 at 946 (7th Cir. 2003).
[75] *Stanley v. Magrath,* 719 F.2d 279 at 282 (8th Cir. 1983).
[76] 2001 U.S. Dist. LEXIS 18873 at 3 (N.D. Ill. 2001).
[77] 191 F.3d 719 (6th Cir. 2000).
[78] 2001 U.S. Dist. LEXIS 18873 at 3 (N.D. Ill. 2001).
[79] 325 F.3d 945 at 946 (7th Cir. 2003).
[80] *Kuhlmeier v. Hazelwood East School District,* 607 F. Supp. 1450 at 1465 (E.D. Mo. 1985).
[81] Samantha Harris and Greg Lukianoff, "FIRE Policy Statement on *Hosty v. Carter,*" September 19, 2005. Available at <http://www.thefire.org/index.php/article/6269.html/print>.
[82] Judge Evans (dissenting), 412 F.3d 731 at 741 (7th Cir. 2005).
[83] Abrams and Goodman, 728.
[84] 454 U.S. 263 at 267 n. 5 (1981).
[85] Fiore, 1962.
[86] 460 U.S. 37 at 46 (1983).
[87] 460 U.S. 37 at 46 (1983).
[88] 484 U.S. 260 at 270-271 (1988).

[89] *Brown v. Li,* 308 F.3d 939 at 952 (9th Cir. 2002).
[90] "Student Files Suit After Troy University Censors Nude Photographs," *College Censorship InBrief,* Winter 2005-2006, p. 28. Available at <http://www.splc.org/report_detail.asp?id=1258&edition=38>.
[91] *College Censorship InBrief,* p. 28.
[92] Andrew D. M. Miller, "Balancing School Authority and Student Expression," *Baylor Law Review* 54 (Fall 2002), 650.
[93] 393 U.S. 503 at 509 (1969).
[94] Miller, 653.
[95] 460 U.S. 37 at 46 (1983).