CENSORSHIP TSUNAMI SPARES COLLEGE MEDIA:
TO PROTECT FREE EXPRESSION ON PUBLIC
CAMPUSSES, LESSONS FROM THE
"COLLEGE HAZELWOOD" CASE

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I. INTRODUCTION

Since the advent of journalism schools in the college academy,1 student
publications have taken their place as a vital component of campus life.2 As
counterparts to the Fourth Estate in the society at large, college3 journalists act
as watchdogs on student government, ensuring that student money is wisely
spent and student justice equitably administered. As an outpost of the Fourth
Estate, college journalism serves all the public by monitoring the
administration of higher education.4 College students have a greater stake
than anyone in the conduct of government on campus, and they have
unparalleled access to campus officials and information. Even beyond the
news and editorial pages of the campus newspaper, the student

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at Little Rock. The author thanks Theresa M. Beiner, Mike Hiestand, Bruce L. Plopper, Rodney
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their selfless and steadfast dedication to the student voice.

2. Though his vision was not swiftly realized, General Robert E. Lee "drew up plans for
the first 'working' [vocationally oriented] school of journalism in America" in 1869 at then-
Washington College, today's Washington & Lee University. MARSHALL W. FISCHWICK, LEE
AFTER THE WAR 138 (1963). The University of Missouri at Columbia claims to have "the
world's first journalism school," founded in 1908. Missouri School of Journalism, Home Page

3. The Miami Student at Miami University in Oxford, Ohio claims to have "the oldest
college newspaper in the United States, established 1826." See The Miami Student Online,
html>.

4. In this Article, the terms "college" and "university" are used interchangeably to refer
to public institutions of post-secondary education. "School" may refer to a secondary or post-
secondary institution.

5. This Article concerns only the affairs of public schools. Private schools are quite
another matter, as the state action doctrine precludes First Amendment application to
nongovernmental actors. But see, e.g., Brian J. Steffen, Freedom of the Private-University
Student Press: A Constitutional Proposal, Address Before the Association for Education in
Journalism and Mass Communication (AEJMC), Phoenix, Ariz. (Aug. 9-12, 2000) (transcript
on file with author).
publications—including newspapers, magazines, yearbooks, literary magazines, and broadcast programs—serve college communities by commenting on and documenting campus politics and campus life, by provoking thought and discussion, and by simply entertaining. Insofar as college journalists remain student journalists, as opposed to professional journalists deriving a livelihood on the job, the student publication offers the single best avenue for training—superior even to the journalism school, though the two together make for the best overall experience—for a career in professional journalism.3

In September 1999, a decision from the U.S. Court of Appeals for the Sixth Circuit4 threatened to radically distort the face of college journalism by rendering student writers, editors, and producers impotent and bound by the will of government. The court applied to adult, college journalists the same lenient standard for government censorship that applies to minors in secondary schools. In a shocking conclusion that armed higher education administrators nationwide with a weapon to silence their most vocal critics, the Sixth Circuit sent the Supreme Court’s eleven-year-old high school speech doctrine to college.

College media across the country, along with academics, alumni, professional journalists, and others sympathetic to student publications, breathed a sigh of relief on January 5, 2001 when the Sixth Circuit ruled en banc that, in 1999, the divided, three-judge panel had erred.7 Seven agonizing months after oral arguments on rehearing, a majority of the en banc panel concluded that both the federal District Court and the Sixth Circuit panel were mistaken when they applied permissive high school censorship standards to a university yearbook.8 The Sixth Circuit en banc announced clearly and strongly its commitment to free speech on campus, echoing the ACLU amicus brief’s reference to the public university as the “quintessential marketplace of ideas.”9

A public high school journalism student in the United States may be prohibited from reporting in the school newspaper that the superintendent was


6. Kincaid v. Gibson, 191 F.3d 719, 723 (6th Cir. 1999) [hereinafter Kincaid II], vacated, 197 F.3d 828 (6th Cir. 1999), and rev’d en banc, Kincaid v. Gibson, 236 F.3d 342 (6th Cir. 2001) [hereinafter Kincaid III].

7. Kincaid III, 236 F.3d at 344.

8. Id. at 346.

9. Id. at 352 (quoting Healy v. James, 408 U.S. 169, 180 (1972)).
arrested for driving drunk,\textsuperscript{10} that a teacher embezzled student money,\textsuperscript{11} or that a fellow student required emergency treatment for alcohol poisoning.\textsuperscript{12} School administrators can censor all of those stories if they find the subject matter "inconsistent with 'the shared values of a civilized social order'"\textsuperscript{13} or simply because they find the stories "poorly written."\textsuperscript{14} In 1988, the Supreme Court in \textit{Hazelwood School District v. Kuhlmeier} ruled that the high school journalist is, after all, a schoolchild whose First Amendment rights may be abridged to serve the state's interest as educator\textsuperscript{15} or merely to preserve a belief in Santa Claus.\textsuperscript{16} \textit{Hazelwood}\textsuperscript{17} represented an about face in First Amendment doctrine in the schools, which formerly stated that students do not "shed their constitutional rights . . . at the schoolhouse gates."\textsuperscript{18} The announcement of \textit{Hazelwood} was so significant a shift in Court jurisprudence that student media advocates J. Marc Abrams and S. Mark Goodman wrote that the decision could be perceived as "a tsunami that has wiped out all that existed before."\textsuperscript{19}

However well intended, in countless jurisdictions \textit{Hazelwood} resulted in a tyranny by school administrators that has devastated high school journalism. Formerly bold and enterprising student publications have been subverted to principals' use as vehicles for public relations. Journalism education in the secondary schools has been crippled, unable to teach students the democratic balance of freedom and responsibility due to the lack of both. And worst, \textit{Hazelwood} has served as a springboard for lower courts to allow executive inroads not only into other student constitutional freedoms, but also into the sacrosanct realm of teachers' academic freedom.

In extending \textit{Hazelwood}, the District Court and the original Sixth Circuit panel paid no heed to the differences between high school and college,
particularly that college students are adults with fully vested constitutional rights. Without wincing, the judges applied Hazelwood and approved the confiscation of a student yearbook for the reason that school officials disapproved of the theme, the photograph selections, and the color of the cover: purple, rather than school colors, green and gold.20

Had the en banc majority not stepped in to reverse the prior decisions, the Sixth Circuit could have become ground zero for a censorship tsunami. Had college deans followed the lead of high school principals, many would have seized the opportunity to squash vital journalistic enterprises at the college level and transform them into cheerleaders, helplessly purveying school spirit. Deans who did not succumb willingly would have had little choice but to follow suit, as defamation plaintiffs sought to raid deep college pockets, complaining that the schools failed to exercise discretion. Meanwhile, journalism education, already shouldering blame for a professional media perceived as shallow and sensationalist, would have been stripped of its ability to educate journalists and inculcate professionalism through “real-life” experience in the campus community. Academic freedom would have been jeopardized, as an academic adviser could have been punished for failing to keep students in line with the administration’s views. Students who followed the rules would have learned mistakenly that journalists are servants of the state. Students who dared defy suppression of their expression—if they survived as journalists—would have been forced underground to practice on a shoestring with limited campus access, no advice, and no accountability. So what would have happened when the college chancellor was arrested for drunk driving, a professor embezzled student funds, or a fraternity pledge was hospitalized for alcohol poisoning? Those stories might never have seen newsprint.

Parts II and III of this Article review the history of high school and college journalism before Kincaid v. Gibson. Part IV presents the background and holdings of Kincaid itself. Part V sketches, by analogy to the effect of Hazelwood in secondary schools, the detrimental impact Kincaid could have had on college journalism had the ultimate decision by the Court of Appeals not been favorable to the students. Part V then turns, still by analogy to Hazelwood, to consider how, in light of the ultimate decision in Kincaid, college journalism advocates can avert future threats to free expression on campus.

II. HIGH SCHOOL JOURNALISM FREEDOM

Despite students’ victory in the Sixth Circuit in Kincaid, the threat of Hazelwood application to colleges merits discussion. The possibility remains that the Supreme Court might itself one day extend the Hazelwood doctrine in another case. Understanding the impact of Hazelwood as it would apply at

20. Kincaid II, 191 F.3d at 723.
the college level requires first an understanding of the doctrine itself, how it changed the law, and the devastating impact it had on high school journalism.

A. An All-Ages First Amendment

Student free expression rights underwent the same sea change that occurred throughout First Amendment jurisprudence in the twentieth century. In the 1943 decision West Virginia State Board of Education v. Barnette,21 the Supreme Court reversed its own three-year-old ruling in Minersville School District v. Gobitis,22 which had required students to recite the Pledge of Allegiance.23 The Court’s about-face foreshadowed a later, broad invigoration of expressive freedom for people of all ages. But of then-immediate importance to young people, Barnette established that minors in schools, even elementary school students, have First Amendment rights so strong that they can outweigh the administrative and curricular needs of schools. In fact, Barnette inverted historical thinking about teaching democratic principles, suggesting that young people entrusted with freedom might learn its exercise better than students told about freedom in an environment without it.24

In 1964, the Supreme Court decision in New York Times Co. v. Sullivan marked the start of a dramatic expansion of First Amendment rights in the United States. At first the Court made it harder for public officials to prevail in defamation suits.26 In time the Court revolutionized First Amendment doctrine by erecting barriers to protect speakers against all manner of tort liability27 and government censorship28 and even by creating a modest right of affirmative access to government.29

Five years after New York Times Co. v. Sullivan, the Supreme Court announced where student rights would sit in this new order of First

22. 310 U.S. 586 (1940).
23. Id. at 587.
24. See Barnette, 319 U.S. at 637 (“That [localities] are educating the young for citizenship is reason for [the Court’s] scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”).
26. Id. at 279-80 (adopting “actual malice” standard); e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
Amendment thinking.

B. The Tinker Doctrine: "Material and Substantial Disruption"

In 1969, Justice Abe Fortas wrote the now renowned statement, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The case that gave rise to that declaration was the constitutional law staple, Tinker v. Des Moines Independent School District, perhaps more widely known as "the black-armband case." Tinker acknowledged student First Amendment rights to the extent that student expression does not "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others."

On December 16 and 17, 1965, three Des Moines young people—fifteen-year-olds John Tinker and Christopher Eckhardt, and John's thirteen-year-old sister, Mary Beth Tinker—wore black armbands to their schools in defiance of an express school district ban. The students wore the armbands for the dual purpose of mourning the dead in the Vietnam War and protesting continued U.S. involvement. All three students had the support of their parents and had been raised in politically conscious, if not activist, families. For their expression, Eckhardt and Mary Beth Tinker were suspended; John was sent home without formal suspension.

Reversing an Eighth Circuit Court of Appeals decision, the United States Supreme Court ruled in favor of the students. A minority of the Court initially would have affirmed student free expression rights broadly. But notes of the Court conference reflect strong sentiments by Justice Black about the need for "discipline" in schools, particularly in light of the anti-war student demonstrations of the 1960s. Ultimately, a majority of the Court accepted only a modest limitation on students' First Amendment rights: "[A student] may express [her] opinions, even on controversial subjects like the conflict in Vietnam, if [she] does so without 'materially and substantially

31. See, e.g., JOHN W. JOHNSON, THE STRUGGLE FOR STUDENT RIGHTS: TINKER V. DES MOINES AND THE 1960S 169 (1997); see also id. at ix (discussing "the armband case" in Iowa).
32. Tinker, 393 U.S. at 513.
33. Johnson, supra note 31, at 16-25. Though only Eckhardt and the Tinkers sued the school system, many students, perhaps 24 or more, including the Tinkers' younger siblings, Hope and Paul, also wore armbands to school. Id. at 8-9.
34. Tinker, 393 U.S. at 514; Johnson, supra note 31, at 5.
36. Id. at 18, 20, 25.
37. Tinker, 393 U.S. at 514.
38. See Johnson, supra note 31, at 165-67.
39. Id. at 166. According to his colleagues' notes, Justice Black believed that "the country is going to ruin" with "children being allowed to run riot." Id. (quoting notes of Justices Douglas and Marshall, respectively).
interfer[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others."  

*Tinker* fell into place in the Court's then-developing public forum analysis. In this analysis there are three types of forums: the traditional public forum, such as the park; the limited, or designated, public forum, such as the public library; and the nonpublic forum, such as the government office building. A student publication under *Tinker* appears to be a designated public forum. The state governments, through school administrations, open the student newspaper to student-written and student-edited expression.

In a traditional public forum, government regulation of expression must survive strict scrutiny; that is, the regulation must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." This strict scrutiny applies likewise in a designated public forum, as long as the government "retain[s] the open character of the facility." Thus, one may understand the "material and substantial disruption" test to work by detecting whether there exists a "compelling state interest"—order in the school or protection of the rights of others—before censorship may occur.

The facts of *Tinker* demanded a result in favor of the students. There had been no disruption in Eckhardt's school or the Tinkers' schools as a result of

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40. *Tinker*, 393 U.S. at 513 (fourth alteration in original) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).


43. *Id.* at 45 (describing a public forum as "public property [that] the State has opened for use by the public as a place for expressive activity"); see also *SPLC Law, supra* note 10, at 35-36 (discussing *Gambino v. Fairfax County Sch. Bd.*, 564 F.2d 157, 158 (4th Cir. 1977) (finding a high school student newspaper a designated public forum)).

44. *Perry*, 460 U.S. at 45.

45. *Id.* at 46. However, Professor Nancy Meyer points out that in a designated public forum, the government may limit expression to that which is consistent with the purpose for which the forum was established. Nancy J. Meyer, *Assuring Freedom for the College Student Press After Hazelwood*, 24 VAL. U. L. REV. 53, 69-70 (1989). Such limiting power might be abused to restrict speech improperly. See *id.* at 70. For example, a school official might argue that a school newspaper is a forum designated to rally school spirit, so an editorial critical of the school is outside the proper scope of the forum. Fortunately, no such poor disguise for content discrimination is likely to go unmasked.

46. See *SPLC Law, supra* note 10, at 36. The *Tinker* Court expressly discounted reasonableness as too low a threshold. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508-09 (1969). Further applying the public forum analysis of *Perry*, one can argue that under *Tinker*, even in a case of material and substantial disruption or invasion of others' rights, an administrator must employ measures narrowly drawn to avert or abate the disruption or invasion.
the armbands.\textsuperscript{47} Eckhardt was taunted in the halls, but he turned himself in and was suspended before morning class.\textsuperscript{48} John Tinker had received verbal insults and at least one expression of support before his afternoon suspension, but school officials knew of no confrontations.\textsuperscript{49} In fact John Tinker's armband sparked lunchtime student discussion, not of the Vietnam War, but of the propriety of the school district's armband ban.\textsuperscript{50} Some of Mary Beth Tinker's peers asked the meaning of the armband, which she explained.\textsuperscript{51} Some boys teased her at lunch, and some students warned that she might be suspended, but none took issue with her politics.\textsuperscript{52} To the contrary, Mary Beth Tinker found few of her peers interested in the political issues.\textsuperscript{53} A Quaker school administrator even sympathized with Mary Beth's peaceful protest, but the administrator said that school rules left her with no choice but suspension.\textsuperscript{54}

Interestingly, while \textit{Tinker} involved student expression apart from journalistic practice, the case, in fact, grew from an instance of student newspaper censorship. Three days before Eckhardt and the Tinkers wore their armbands to school and before the school district banned armbands, a school district administrator censored an article submitted to Eckhardt's school newspaper.\textsuperscript{55} Student Ross Peterson had submitted to the school newspaper a notice explaining the purpose of a planned armband demonstration for December 16 and urging support for a holiday truce.\textsuperscript{56} After ordering that the notice not be printed, Des Moines school officials "hastily" met and banned armbands from the schools, prompting the \textit{Tinker} three's defiance.\textsuperscript{57}

The \textit{Tinker} standard was promptly expanded beyond the realm of student symbolic speech and into the realm of student publications in order to prohibit the sort of censorship employed against Ross Peterson. A federal court in New York applied \textit{Tinker} to a high school newspaper in 1969, three months after \textit{Tinker}'s announcement, in \textit{Zucker v. Panitz}.\textsuperscript{58} Learning from \textit{Tinker} that "students have the same rights inside the schoolyard that they have as citizens," the court reversed a principal's order not to publish an

\textsuperscript{47} \textit{Tinker}, 393 U.S. at 514; see also \textit{Johnson}, supra note 31, at 166 (describing a clerk's memorandum to the Chief Justice in which the clerk observed in the record a paucity of violent incidents linked to armbands).
\textsuperscript{48} \textit{Johnson}, supra note 31, at 19.
\textsuperscript{49} \textit{Id.} at 23-24.
\textsuperscript{50} \textit{Id.} at 23.
\textsuperscript{51} \textit{Id.} at 19.
\textsuperscript{52} \textit{Id.} at 19-20.
\textsuperscript{53} \textit{Id.} at 19.
\textsuperscript{54} \textit{Id.} at 20.
\textsuperscript{55} \textit{Id.} at 6.
\textsuperscript{56} \textit{Id.} at 5.
\textsuperscript{57} \textit{Id.} at 6.
\textsuperscript{58} 299 F. Supp. 102, 104-05 (S.D.N.Y. 1969), cited in \textit{SPCLAW}, supra note 10, at 34.
advertisement opposing the Vietnam War.59

Through the 1970s and 1980s, the courts consistently applied Tinker to student expression in public schools and fleshed out the material and substantial disruption test.60 This development clearly favored student expression.61 For example, students reading a newspaper during class may warrant punishment, but it is not necessarily a disruption authorizing censorship.62 Distribution of printed matter that students or faculty might find offensive does not authorize censorship to avert personal discomfort or the mere possibility of a physical confrontation.63 Notably, a federal court in Georgia also rejected grammar and spelling as rationales for censorship.64 However, censorship or punishment for publication has been permitted under Tinker when the content resulted in or threatened a walk-out demonstration.65

Thus, while Tinker might leave some ambiguity about when the threat of disruption becomes sufficiently concrete to permit preemptive censorship or punishment by school officials, it is clear, as constitutional standards go, that disruption can be measured on a continuum, and government intervention is warranted at some point. Students, faculty, and school officials must sometimes endure distractions, insults, and hurt feelings. However, school officials need not stomach walk-outs, sit-ins, or physical confrontations. The continuum is reminiscent of the Brandenburg test for "imminent lawless

60. SPLC LAW, supra note 10, at 35 (describing "19 years of agreement among the courts on student press rights"). Some courts also developed the "invasion of the rights of others" language. Id. at 30 (citing Trachtman v. Anker, 563 F.2d 512, 519 (2d Cir. 1977) (upholding, for fear of emotional injury to students, prohibition on high school newspaper's survey of students' attitudes toward sex)).
61. SPLC LAW, supra note 10, at 32.
64. Id. at 32 (citing Reinke v. Cobb County Sch. Dist., 484 F. Supp. 1252 (N.D. Ga. 1980)).
65. Id. at 33 (citing Karp v. Becken, 477 F.2d 171 (9th Cir. 1973); Dodd v. Rambis, 535 F. Supp. 23 (S.D. Ind. 1981)).
action," but with the standard of lawlessness watered down to give school officials some breathing room.

C. Fraser: A Fissure in the Tinker Dam

Even as Tinker thrived in the lower courts, the tenor of the Supreme Court as to minors changed in the 1980s in sync with the Court's increasingly conservative bent. Some scholars contend that the Burger Court (1969-1987) confirmed more than countered the liberalism of the Earl Warren Court, which issued the Tinker decision among its last. Whether or not that contention holds true for the mainstream media, it does not describe the experience of minors exercising their free expression rights.

A 1985 decision limiting the Fourth Amendment rights of minors in schools signaled the Court's changing philosophy. The next year, the Court extended this change in philosophy into the First Amendment sphere with Bethel School District No. 403 v. Fraser. The case arose from the suspension of Matthew Fraser, a student who, at a school assembly, made a sexually suggestive speech in support of a peer's candidacy for student government. In upholding the suspension, the Court clearly limited Tinker.

67. See, e.g., JOHNSON, supra note 31, at 206-07.
69. New Jersey Administrative Law Judge Bruce R. Campbell recently observed: Fraser and Hazelwood have moved the United States Supreme Court considerably away from the path indicated by Tinker. Whether one chooses to explain this in terms of appointments of more conservative justices or a disenchantment with student activity and social upheavals of the 1960s, the fact remains that it exists.
70. The shift in United States Supreme Court holdings may simply reflect the tension that exists in reconciling the mission of the schools to inculcate social values in young persons with the need to avoid the strictures of orthodoxy and the suppression of legitimate debate in the classroom.
72. Id. at 677-78. Fraser said:

I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most... of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

Jeff is a man who will go to the very end—even the climax, for each and every one of you.
but how is unclear. Fraser cannot be read as an application of Tinker. True, some audience members "hooted and yelled," some made "gestures graphically simulating the sexual activities ... alluded to," and one teacher "found it necessary" to use class time "to discuss the speech" with "bewildered" students.73 But the Court did not ground its decision on "material and substantial disruption."74 Rather, the Court pointed variously to the "insulting" sexual content75 and the "official" nature of the "high school assembly attended by 600 students,"76 in contrast to the Tinker "passive expression of a political viewpoint."77 Professor John W. Johnson rationalizes this distinction in terms of public forum analysis: while Tinker described the whole school as a designated public forum, Fraser78 identified specifically an official school assembly as a nonpublic forum, akin to a school classroom.79 Johnson's distinction forecasts a divergence to come, but poorly explains Fraser itself; the Court conducted no public forum analysis.80 Instead, the Court's references to sexual content, particularly in relation to the doctrines of indecency and obscenity as to minors,81 combined with a bold quotation of Justice Black's Tinker dissent,82 signaled the Court's willingness to leave Tinker behind and set new limitations on student First Amendment freedoms. The Court did just that less than two years later.

D. The Hazelwood Doctrine: "Legitimate Pedagogical Concerns"

While Matthew Fraser was making his speech at Bethel High School in April 1983,83 students at the Spectrum, the student newspaper at Hazelwood

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So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

Id. at 687 (Brennan, J., concurring) (alteration in original) (quotation marks omitted) (quoting party brief).

73. Id. at 678.
74. See id. at 680-86 (noting the Court's decision despite its contrast of the Tinker armband expression as "nondisruptive"). Id. at 680.
75. Id. at 683.
76. Id. at 681.
77. Id. at 680, 685.
78. See id. at 684-85.
79. JOHNSON, supra note 31, at 208.
80. See Fraser, 478 U.S. at 680-86.
81. Id. at 684 (citing FCC v. Pacifica Found., 438 U.S. 726 (1978); Ginsberg v. New York, 390 U.S. 629 (1968)).
82. Id. at 686 (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 526 (1969) (Black, J., dissenting) ("I wish, therefore, ... to disclaim any purpose ... to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students." (alteration in Fraser))).
83. Id. at 677.
East High School in St. Louis County, Missouri, were planning a hard-hitting, two-page spread on teen pregnancy, marriage, runaways, and teens dealing with parents' divorce.\textsuperscript{84} *Spectrum* reporters interviewed and quoted students, including one pregnant teen and two teen mothers, all identified by pseudonym.\textsuperscript{85} The divorce story identified by name a student who criticized his father for staying out late and neglecting his family.\textsuperscript{86} Prior review was the norm at Hazelwood, and Principal Reynolds disapproved of the pregnancy and divorce stories.\textsuperscript{87} Short on time, he removed the two-page spread from the newspaper paste-ups and submitted the remaining four pages to the printer.\textsuperscript{88} He later explained his action, claiming (1) that student and parental privacy were at risk, (2) that the stories were unfair or unbalanced, and (3) that content referring to sexual activity was inappropriate for some students.\textsuperscript{89} Students discovered the censorship only after the paper came back from the printer.\textsuperscript{90} They sued in federal district court, alleging violation of their First Amendment rights.\textsuperscript{91}

The students lost before the district court, which was satisfied that the principal's decision was "legitimate and reasonable."\textsuperscript{92} But relying on *Tinker*, the Eighth Circuit reversed.\textsuperscript{93} The Court of Appeals ruled the *Spectrum* a public forum, and with no evidence of threatened "material and substantial disruption," the principal's act violated the students' First Amendment rights.\textsuperscript{94}

In a five-to-three decision,\textsuperscript{95} the Supreme Court reversed and ruled in favor of the school. The Court grounded its decision in public forum analysis.\textsuperscript{96} Where the *Tinker* Court's reasoning seemed to analyze student expression in the schools as a designated public forum problem, the *Hazelwood* Court drew a then-as-yet-unrecognized distinction between "personal" speech, which the school might have "to tolerate," and "school-
sponsored” speech, which the school need not “promote.” The *Tinker*
armbands were “personal speech.” But the *Spectrum*, because it was “part of
the educational curriculum” and “members of the public might reasonably
perceive [it] to bear the imprimatur of the school,” was “school-sponsored”
speech.98

In the case of “school-sponsored” speech, a court must determine whether
the forum has been designated as a public forum or reserved to the
government as a nonpublic forum.99 The *Hazelwood* Court determined that
school officials had reserved the *Spectrum* as a nonpublic forum for
journalism education.100 The Court looked foremost to school board policy,
which stated that “[s]chool sponsored publications are developed within the
adopted curriculum and its educational implications in regular classroom
activities.”101 The Court looked as well to other indicia of government
control: (1) that the faculty adviser exercised control over the editorial
process and decisions, (2) that the paper was regularly submitted to the
principal for prior review, and (3) that “[s]tudents received grades and
academic credit for their performance in the [Journalism II] course.”102

The Court declined to give weight to a “Statement of Policy” printed in
the *Spectrum* itself, in which the *Spectrum* “accept[ed] all rights implied by
the First Amendment.”103 The *Spectrum* statement went on to incorporate the
*Tinker* standard, which, the Court noted, was not stated “accurately.”104

As a nonpublic forum, the *Spectrum* became subject to administrative
control much as a Bunsen burner experiment in chemistry class or a game of

97. *Id.* at 270-71; *id.* at 282 (Brennan, J., dissenting).
98. *Id.* at 267-71. *Hazelwood* might not have been the decision student rights advocates
wanted, but they could have been worse off. The Supreme Court chose to apply public forum
analysis rather than the government-as-speaker doctrine, exemplified by *Rust v. Sullivan*, 500
U.S. 173, 192-99 (1991). In *Rust* the Court allowed Congress to impose even viewpoint-
discriminatory restrictions on the speech of doctors working in federally funded clinics. *Id.* at
177-78. By extension, a court could hold that a school may impose viewpoint-discriminatory
restrictions on student speech that the school funds, as a condition of the funding. *Cf.* Board
of Regents v. Southworth, 529 U.S. 217, 229 (2000) (“If the challenged speech here were
financed by tuition dollars and the University and its officials were responsible for its content,
the case might be evaluated on the premise that the government itself is the speaker.”) It
remains difficult today to distinguish a nonpublic forum speaker under public forum doctrine
from a nonforum, or government-contractor, speaker under the government-as-speaker doctrine.
100. *Id.* at 267-70.
101. *Id.* at 268 (alteration in original) (quotations marks omitted) (quoting Hazelwood
School Board Policy).
102. *Id.* at 268-69.
103. *Id.* at 269 (alteration in original) (quotations marks omitted) (quoting “Statement of
Policy” of Sept. 14, 1982).
104. *Id.* at 269 & n.2. The dissent disagreed. See *id.* at 277 & n.1 (Brennan, J.,
dissenting).
dodge ball in gym class. Never mind the school system’s avowed goal of teaching students “leadership responsibilities” and “responsibility and acceptance of criticism for articles of opinion.” The Court repeated Fraser’s invocation of the Black dissent to Tinker, “disclaim[ing] any purpose . . . to surrender control of the American public school system to public school students.” Censorship in a nonpublic forum such as a curricular newspaper is appropriate, the Court ruled, in a case of writing that is “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.” The Hazelwood principal was empowered to censor “student speech that might reasonably be perceived to advocate . . . irresponsible sex, . . . conduct otherwise inconsistent with the shared values of a civilized social order,” or a particular political position. Over the dissent’s strenuous objection, the Court found its new standard broad enough to encompass the Hazelwood principal’s grounds for censorship: “articles . . . too sensitive for our immature audience of readers and . . . simply inappropriate, personal, sensitive and unsuitable for the newspaper.”

In theory, despite Hazelwood’s broad pronouncement, the power of government to censor in a nonpublic forum is not without limitation. The Court still required that the censor’s motivations be “reasonably related to the legitimate pedagogical concerns.” However, in the strained application of that standard to the Hazelwood principal’s blunt distaste for “inappropriate” content, it is hard to imagine any act of censorship that would go too far. Legal scholars wondered if there might be any limit to “pedagogical concerns.” Could pedagogy justify changing the typeface of headlines? Spiking a story on administrative malfeasance? Meanwhile, on the front lines, in the schools, administrators and student journalists were learning to live with a radically altered balance of power.

105. Id. at 268, 270 (quotation marks omitted) (quoting Hazelwood East High School Curriculum Guide).
107. Id. at 271 (footnote omitted).
108. Id. at 272 (quoting Fraser, 478 U.S. at 683). Brennan described the majority’s standard for such “presumed abominations” as permitting “thought control” or “Orwellian ‘guardianship of the public mind.’” Id. at 286 (Brennan, J., dissenting).
109. Id. at 272.
110. Id. at 285 (Brennan, J., dissenting) (quotation marks omitted) (quoting Kuhlmeier v. Hazelwood Sch. Dist., 607 F. Supp. 1450, 1459 (E.D. Mo. 1985)).
112. Hazelwood, 484 U.S. at 273.
113. See parenthetical information following sources cited infra note 115.
E. Hazelwood Aftermath I: Birth of a Tsunami

The Supreme Court spoke, and principals heard—something. Education Professor David Schimmel wrote, "Few students rights decisions have been more widely reported and distorted than the Supreme Court's opinion in Hazelwood."114 The vast majority of notes, comments, and reviews following Hazelwood criticized the decision for its reasoning or its breadth.115 In the


But see Bruce C. Hafen, Comment, Hazelwood School District and the Role of First Amendment Institutions, 1988 DUKES.L.J. 685, 685 ("Hazelwood seeks to strengthen students'... right to develop their own educated capacity for self-expression."). In a 1995 article, Professor Hafen conceded, "Given the expansion of Hazelwood's applicability, some may wonder what is left of Tinker." Bruce C. Hafen & Jonathan O. Hafen, The Hazelwood Progeny:
minority, Professor Schimmel concluded that "the impact of Hazelwood should be more modest than its critics fear or its supporters hope."116 Hazelwood's impact was profound and immediate.

Within one hour after the Supreme Court's decision was announced on the radio, a high school principal censored an article on AIDS. That same day, at another high school, all student staff members quit their positions at the school sponsored newspaper, in protest of the Hazelwood decision, and began working on an underground newspaper.117

"In the first three weeks after Hazelwood, the Student Press Law Center" (SPLC)—a Washington, D.C.-based non-profit organization dedicated to protecting student media rights—"answered more than 500 calls from students, teachers, and professional journalists about the implications of the opinion."118 The SPLC tracked an increase in censorship after Hazelwood, reporting a weak correlation between principals' grounds to censor and "arguably 'pedagogical' reasons."119 Surveys after Hazelwood did not consistently point to a dramatic increase in high school censorship; however, results suggested that in surveyed school districts, prior review and censorship were already the norm.120 Moreover, the surveys revealed a more alarming Hazelwood effect: students and their advisers steering clear of controversial subject matter, so-called "self-censorship" or "a chilling effect."121 After a 1989 national survey, Professor Rosemary Salomone found that "nearly 23% of [350 high school journalism] advisers reported that their students were less likely to report on controversial matters post-Hazelwood than they had been prior to the decision," and "more than 41% of the advisers perceived an increasing acceptance of Hazelwood's standards by students as time wore on."122 Also,
according to Professor Salomone, a June 1990 survey showed that principals were well aware of Hazelwood: 86.3% of 256 respondents. 123

Almost without exception, courts upheld school officials' decisions to censor, 124 and not only in the student publication context. 125 The Ninth Circuit disallowed publication of Planned Parenthood advertisements in school district newspapers and yearbooks because the ads "were inconsistent with [the] educational mission or might interfere with the 'proper function of education." 126 The Sixth Circuit allowed disqualification of a student council candidate because his candidacy speech was "discourteous" and "rude." 127 The Fourth Circuit allowed a ban on student display of rebel symbols offensive to African-American students. 128 An Arkansas federal court also disqualified a student council candidate because three of his teachers reported a "lack of maturity" or "[l]ack of [r]esponsibility." 129 Quoting the Sixth Circuit, the court in Arkansas wrote that "respect for authority" is one of those "shared values" that can justify Hazelwood censorship. 130

More numerous are those cases of censorship that never reach the courtroom. SPLC case files offer these reports:

In Illinois, school officials refused to print an accurate story on the arrest of the school superintendent for drunk driving. "The focus of a school newspaper is to be positive, to build pride in a school," the principal told a local newspaper. "I would not want to see [the student newspaper] used as a forum that would be critical of students or staff." 131

9-12, 2000) (unpublished manuscript on file with author).
123. Salomone, supra note 118, at 312.
124. In the fall of 1999, I gave my first-year students in Reasoning, Writing, and Advocacy an assignment based on Hazelwood. Students were confounded with the task of developing a meaningful rule of law to define "reasonableness" or "legitimate pedagogical concerns" under Hazelwood. More than one student concluded in frustration that "anything" is reason to censor in a Hazelwood nonpublic forum.
125. See, e.g., Hafen & Hafen, supra note 115, at 396 & n.80.
126. Martha M. McCarthy, Post-Hazelwood Developments: A Threat to Free Inquiry in Public Schools, 81 EDUC. L. REP. 685, 689 (1993) (citing Planned Parenthood, Inc. v. Clark County Sch. Dist., 887 F.2d 935, 942 (9th Cir. 1989), aff'd en banc, 941 F.2d 817 (9th Cir. 1991)).
128. McCarthy, supra note 126, at 690 (citing Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988)).
130. Id. at 1460 (quoting Poling, 872 F.2d at 762).
In Indiana, a principal censored a story that painstakingly detailed how the girls’ tennis coach had improperly pocketed more than $1,000 that team members had paid for court time. ... [S]chool administrators ... used th[e] story as a bargaining chip, threatening the coach to resign or ... the school would publish the story.\textsuperscript{132}

In Alaska, a principal censored a junior high school student newspaper editorial that complained about unnamed teachers who regularly smoked in a room next door to an occupied classroom, which the student wrote, made students “sick from the smoke coming into our room.” At the time, smoking was prohibited in the school. The principal told the editor the story could not run because it would be an embarrassment.\textsuperscript{133}

In Ohio, a superintendent censored an advertisement submitted to the student newspaper by a local school board candidate. After the ad was censored, the student wrote an editorial criticizing the superintendent’s act of censorship. ... School officials censored the editorial.\textsuperscript{134}

In Michigan, a principal censored a story ... about an unnamed student arrested for shoplifting during a school field trip. ... [The school superintendent] justified the censorship on grounds that the story] reflected poorly on the district.\textsuperscript{135}

Censorship under \textit{Hazelwood} has not diminished.\textsuperscript{136} Ten years after \textit{Hazelwood}, SPLC Executive Director Mark Goodman said, “\textit{Hazelwood} has essentially gutted the First Amendment in many of America’s high schools.”\textsuperscript{137} For 1999, the SPLC reported an all-time high number of calls from high school students and advisers seeking help in matters of censorship: 367 calls, or an average of one per day, every day.\textsuperscript{138} That high continued a
five-year rise, which Goodman in 1997 attributed to Hazelwood. "In an ever-growing number of high schools, censorship of the student media has simply become standard operating procedure," he said.

Worse news for student advocates than any case of censorship, courts have extended Hazelwood beyond the realm of student expression rights. The Supreme Court itself mentioned Hazelwood in upholding the random drug testing of student athletes against a Fourth Amendment challenge. The Eleventh Circuit further extended the Hazelwood analysis into the realm of students’ right to receive information; the court applied the analysis to regulations governing "Career Day" and "Youth Motivation Day" speakers. A Minnesota federal court extended Hazelwood to restrict students’ free association rights in allowing disciplinary action against students who attended parties where alcohol was served. Extension of Hazelwood to restrict after-hours use of school buildings has been impeded only by the federal Equal Access Act, which forbids secondary schools that open their facilities for public use from discriminating between users on “religious, political, philosophical, or other content” grounds. Hazelwood further appears frequently in dicta to support the discretion of school officials in limiting student rights.

Because Hazelwood addressed the curricular context specifically, the decision, not surprisingly, was extended to bolster curricular discretion. For example, the Eleventh Circuit allowed removal of a textbook from the

139. Id.
140. High School Censorship Calls Soar in '97, supra note 137, at 3.
141. Id. (quotation marks omitted).
142. See, e.g., Salomone, supra note 118, at 274-99, cited in Hafen & Hafen, supra note 115, at 396 n.81.
143. Hafen & Hafen, supra note 115, at 395 (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995)). Though Vernonia School District 47J v. Acton merely cites Hazelwood for the now unsurprising proposition that Tinker was not the last word on student rights, Acton, 515 U.S. at 656, Hazelwood certainly marked the start of a climate in education law that makes decisions such as Vernonia possible. See, e.g., Professor Anne Profitt Dupre, University of Georgia School of Law, Remarks at the Program of the Education Law Section of the Association of American Law Schools Annual Meeting, San Francisco, Cal. (Jan. 6, 2001) (audio recording available from Recorded Resources Corp., Millersville, Md.) (asserting that Hazelwood had a "big impact" on Vernonia).
144. Salomone, supra note 118, at 294 (citing Sarchey v. Harris, 888 F.2d 1314, 1315-17 (11th Cir. 1989)).
147. Id. § 4071(a); see Hafen & Hafen, supra note 115, at 409 (discussing Board of Educ. v. Mergens ex rel. Mergens, 496 U.S. 226 (1990) and Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1393 (3d Cir. 1990) (Stapleton, J., dissenting)).
curriculum under *Hazelwood*. But *Hazelwood* has reached beyond curriculum-setting decisions traditionally made by the school board and into the very presentation of materials in the classroom.\(^{150}\)

Thus, *Hazelwood* has subjugated secondary-school teachers' academic freedom to the whims of administrators. The First Circuit upheld as "reasonably related to legitimate pedagogical concerns" the non-reappointment of a biology teacher who "discussed abortion of Down's Syndrome fetuses."\(^{151}\) Under the *Hazelwood* standard, the Tenth Circuit upheld the reprimand of a teacher who commented about particular students "making out."\(^{152}\) The Fifth Circuit relied on *Hazelwood* to uphold the nonrenewal of a teacher's contract who used an unapproved reading list in class.\(^{153}\) The Seventh Circuit cited *Hazelwood* in upholding a superintendent's refusal to let a teacher present "a nonevolutionary theory of creation in his junior high school social studies class."\(^{154}\) The Sixth Circuit under *Fraser*, before *Hazelwood*, allowed the termination of a teacher who showed his high school class a film with violence and nudity.\(^{155}\) Students' challenges to curricular restrictions were rebuffed in at least two cases.\(^{156}\)


\(^{151}\) Hafen & Hafen, supra note 115, at 401-02 (quoting Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993)).

\(^{152}\) Miles v. Denver Pub. Sch., 544 F.2d 773, 774 (10th Cir. 1976), cited in Dagley, supra note 150, at 29 and Hafen & Hafen, supra note 115, at 402 and McCarthy, supra note 126, at 697-98.


\(^{154}\) McCarthy, supra note 126, at 698 (citing Webster v. New Lenoir Sch. Dist. No. 122, 917 F.2d 1004 (7th Cir. 1990)).


F. Hazelwood Aftermath II: Fighting Back

One critic called the Hazelwood decision "a bitter pill for high school students to swallow." Despite the majority trend toward censorship, some school officials and lower courts also found Hazelwood a bitter pill. They chose not to take it.

Hazelwood might allow censorship of the student media, but censorship is not required. The Hazelwood Court intended only to put decision-making authority in local hands. Though the exception rather than the rule, local officials are free to decide that students will learn journalistic values better in a censorship-free environment. From 1988 to the present day, state legislators have been fighting to make just that decision.

Though they vary in their particulars, statutes in six states operate essentially to turn the clock back from Hazelwood to Tinker. These high school free expression laws limit the circumstances in which censorship is permissible, typically requiring school boards to adopt policies allowing censorship only in cases of defamation, obscenity, threatening material and substantial disruption, or invasion of the rights of others. California courts extended an existing law to protect students' rights against Hazelwood. California later reinforced its law with a provision more protective of students than even Tinker. Massachusetts was the first state to enact an anti-

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159. See id.
162. See supra note 161 and accompanying text.
164. SPLC LAW, supra note 10, at 48 n.55 (citing CAL. EDUC. CODE § 48950 (West 1993)).
Hazelwood law after the decision.\textsuperscript{165} Iowa, Colorado, Kansas, and Arkansas followed.\textsuperscript{166} At least twenty-seven state legislatures have considered anti-Hazelwood bills.\textsuperscript{167} Student rights advocates in Kansas recently repelled efforts to weaken the statute there after school officials in one county became incensed over a student’s editorial criticism of the administration.\textsuperscript{168}

Even where state legislatures have failed to act, some state school officials have taken it upon themselves to protect students’ rights.\textsuperscript{169} The superintendent in Baltimore County, Maryland, circulated a memorandum within weeks of Hazelwood.\textsuperscript{170} The memorandum promised that the county would not “take advantage of the expanded authority the Supreme Court has granted us . . . We do not want to chill criticism of school personnel, school board policies, school administration or the superintendent of schools.”\textsuperscript{171} The Dade County, Florida school board in 1994 reaffirmed its commitment to a pre-Hazelwood policy protecting student expression and, further, prohibited prior review.\textsuperscript{172} The SPLC has published model school system guidelines to protect student expression, as well as model student free expression legislation.\textsuperscript{173}

The judiciary also has worked around Hazelwood, even without the help of legislation. In one class of cases, the courts have found that the Hazelwood standard for nonpublic forum expression does not apply because the student expression is not school sponsored. In a second class of cases, courts have applied Hazelwood and found a nonpublic forum, but determined the censorship improper even under Hazelwood’s permissive terms.

The Hazelwood standard only applies when “members of the public might reasonably perceive [the student expression] to bear the imprimatur of the school.”\textsuperscript{174} In this sense Hazelwood did not overrule Tinker; rather, Hazelwood carved out of Tinker a class of cases. The Tinker black armbands would not be subject to the Hazelwood test because the armbands were the students’ personal expression, not a school-sponsored expression.\textsuperscript{175} To state the distinction in terms of public forum analysis, the black armbands are expression occurring in the limited public forum of the school building as a

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{165} \textit{Id.} at 49 (citing \textit{Mass. Gen. Laws Ann. ch.} 71, § 82).
\item \textsuperscript{169} SPLC \textit{Law}, supra note 10, at 47.
\item \textsuperscript{170} \textit{Id.}
\item \textsuperscript{171} \textit{Id.} (alteration in original) (quoting \textit{Baltimore County School System Says It Won’t Censor}, YNS, Feb. 1988, at 5).
\item \textsuperscript{172} \textit{Id.} at 48 (citing SPLC, \textit{New Dade County Policy Adopted}, \textit{REPORT}, Fall 1994, at 5).
\item \textsuperscript{173} See \textit{id.} at 229-32, 237-38.
\item \textsuperscript{174} Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).
\item \textsuperscript{175} See Hafen & Hafen, supra note 115, at 399-400.
\end{enumerate}
\end{footnotesize}
whole. The *Spectrum* feature stories are student expression occurring in the narrow nonpublic forum of the student newspaper, akin to teachers’ mailboxes, a space reserved as nonpublic within the school building.\textsuperscript{176} Under this distinction, student dress codes, for example, are analyzed under *Tinker*, not *Hazelwood*.\textsuperscript{177}

Student publications that do not bear the imprimatur of the school have therefore escaped *Hazelwood*. These publications have come to be called “undergrounds” and, in accord with teachers’ predictions,\textsuperscript{178} have increased in number in the wake of *Hazelwood*.\textsuperscript{179} Unlike school-sponsored publications, undergrounds cannot lawfully be banned outright,\textsuperscript{180} and their distribution must be permitted on school grounds subject only to reasonable time, place, and manner restrictions.\textsuperscript{181} Courts in fifteen states and Guam have found prior review of undergrounds unconstitutional “in most situations.”\textsuperscript{182}

The underground offers an ironic\textsuperscript{183} solution to the *Hazelwood* problem. The Court in *Hazelwood* was motivated, presumably, by a desire to allow school officials broad latitude in the inculcation of journalistic values and norms. But unlike the Journalism II class at Hazelwood East High School, school officials have little control over the underground newsroom. “Without the training offered by a professional adviser and the financial support of school sponsorship,” underground editors must brave the perils of publication, such as legal liability, on their own.\textsuperscript{184} Whereas the Hazelwood East principal had the option, albeit unexercised, of taking his concerns to the students and hashing out a solution in an academic setting, the school official who drives


\textsuperscript{177} E.g., McCarthy, supra note 126, at 692-94. Some courts have, however, modified *Tinker* in accord with *Fraser*, allowing restrictions on “attire considered vulgar or plainly offensive . . . without being linked to a disruption.” Id. at 692-93 (citing Chandler v. McMinnville Sch. Dist., 978 F.2d 524 (9th Cir. 1992); Broussard v. School Bd., 801 F. Supp. 1526 (E.D. Va. 1992)).

\textsuperscript{178} Salomone, supra note 118, at 310 (reporting more than 42% of journalism advisers surveyed anticipating an increase in underground publishing).

\textsuperscript{179} E.g., SPLIC LAW, supra note 10, at 75-76; see also SPLIC, *Doing It Underground*, REPORT, Spring 1998, at 28, 28.

\textsuperscript{180} *Doing It Underground*, supra note 179, at 30 (citing, as example, Vail v. Board of Educ., 354 F. Supp. 592 (D.N.H. 1973), vacated without reported opinion, 502 F.2d 1159 (1st Cir. 1973)).

\textsuperscript{181} Id. (citing Sword v. Fox, 446 F.2d 1091, 1097 (4th Cir. 1971)). However, administrators are trying to get a grip on undergrounds, as well. Id. at 28 (citing, as an example, Thomas v. Board of Educ., 607 F.2d 1043, 1050-51 (2d Cir. 1979) (denying administrators control over student publication when “all but an insignificant amount of relevant activity . . . was deliberately designed to take place beyond the schoolhouse gate”)).

\textsuperscript{182} Id. at 29.


\textsuperscript{184} SPLIC LAW, supra note 10, at 76.
students underground will have to grin and bear whatever students choose to print and distribute, short of defamation, obscenity, disruption, or invasion of others' rights. Meanwhile, underground student editors are denied the benefits of journalism education under the tutelage of professional teachers.

_Hazelwood_ might leave room for a student publication somewhere between the school-sponsored and the underground, though courts have been reluctant to recognize this gray zone. In _Hazelwood_ the Court determined school sponsorship with reference to written school policy, the role of the faculty adviser, the practice of prior review, and the compensation to the student staff. In _Romano v. Harrington_, a federal court in New York applied this analysis to find that an extracurricular student newspaper was not school sponsored because the New York student newspaper received school funding, and an English teacher served as faculty adviser. However, the newspaper was not part of a class, so the students received no course credit. Moreover, the court found conflicting evidence as to whether the paper had been subject routinely to prior review.

A court might also find that a student publication is so distant from school sponsorship that the publication is not any sort of government forum, and thus, it is out of reach of _Hazelwood_. One court reached this conclusion specifically with regard to student publications' advertising content. When a Massachusetts man sued over a student newspaper and yearbook's refusals to publish his pro-abstinence advertisement, the First Circuit in _Yeo v. Town of Lexington_ found no state action, thus no impermissible censorship. The _Yeo_ court used the state action doctrine to determine the rights of a private party vis-à-vis the students and school administrators. But _Yeo_ is important as to the relationship of students vis-à-vis administrators because to reach its decision, the court determined that the imprimatur of the school, the influence of a faculty adviser, and school financial support all were insufficient to make the newspaper advertising content a nonpublic, government-controlled forum. Nevertheless, the court could have found state action if there existed an adequate "nexus" between the newspaper and school. Thus under the

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188. _Id_. at 689.
189. _Id_. at 691.
191. _Id_. at 253-55. The court noted the Massachusetts student free speech law, but declined to decide whether school officials could have overridden student editorial control. _Id_. at 249 & n.5 (citing MASS. GEN. LAWS ch. 71, § 82 (1996)). Moreover, the court was vague as to what weight the student speech law carried in the state action analysis: "[T]he state's student speech law may be a factor in the state action inquiry, but the issue for us is ultimately one of federal constitutional law." _Id_. at 249 n.5.
192. _See id_. at 253-54; _see also_ Benjamin Wattenmaker, Note, _Yeo v. Lexington_:
reasoning of Yeo, a student publication with "editorial autonomy" from a school administration might sufficiently distance itself from government control as to escape Hazelwood's forum analysis altogether. The Yeo decision is strange, though, because the students' autonomy as nonstate actors can only persist at the will of the school. Once the school chooses to break its silence and exercise some degree of control, a court must apply Hazelwood's forum analysis to determine what kind of government forum has been created. At least the students could attempt to rely on a Yeo history of intellectual autonomy to argue that the school merely designated a public forum.

In the second class of cases in which the courts have worked around Hazelwood, the courts applied Hazelwood's public forum analysis to find a nonpublic forum, but ruled the censorship nonetheless improper. These outcomes are rare.

A court has found Hazelwood fully applicable in only one reported decision involving student expression, that is, found the student expression at issue to have occurred in a nonpublic forum, but ruled that the officials' conduct was not consistent with legitimate pedagogical concerns. A New Jersey court found no legitimate pedagogical reason supporting a principal's censorship of movie reviews in a junior high school newspaper. In Desilets v. Clearview Regional Board of Education, the student writer, whose mother sued on his behalf, wrote reviews of R-rated movies such as Mississippi Burning and Rain Man. Interestingly, a lower New Jersey appellate court ruled for the student on state constitutional grounds, finding New Jersey free speech protections for secondary students broader than First Amendment guarantees under Hazelwood. Reliance on state constitutional grounds is a strategy suggested by Professor Nancy Meyer in 1989 to protect the college media from Hazelwood; she lamented that the Spectrum staff had not relied on the broader-than-federal protection of the Missouri Constitution. But the New Jersey Supreme Court declined to decide the state constitutional question, instead resting its conclusion squarely within the Hazelwood framework. The court easily found the student newspaper a nonpublic forum, looking to the newspaper's role in the curriculum, the involvement of the faculty adviser, and the academic credit awarded to the student staff. But the court seemed frustrated with the Hazelwood standard of "legitimate

Abridging Rights of Publication in the Student Press, 40 B.C. L. REV. 573, 590-92 (1999). The state action nexus test is sufficiently analogous to the Hazelwood school sponsorship inquiry to find Yeo useful as a precedent for nonschool sponsorship.

193. Wattenmaker, supra note 192, at 592.
195. Id. at 153.
198. Desilets, 647 A.2d at 154.
199. Id. at 152.
educational policy”—“[t]he difficulty in resolving the basic question . . . is fully illustrated in this case”—and with the conflicting opinions of the lower courts.200 The court stated that an expert administrative agency would have been better suited to make an initial determination on the central issue, despite the constitutional implications.201 Ultimately, the court grounded its decision on the school board’s inability to produce any explicit, nonvague policy that would preclude students’ exposure to reviews of R-rated movies.202 The Desilets opinion was ground-breaking for its pro-student conclusion under a purely Hazelwood analysis. At the same time, it is not clear that the court would have favored the students had the school principal consistently applied an explicit policy of censorship.

Hazelwood on its own terms offers only one other ground to avoid the censor’s spike: the notion that censorship, even in a Hazelwood nonpublic forum, might be improper if viewpoint discriminatory. General nonpublic forum case law points to a curious omission in the Hazelwood doctrine. Under ordinary censorship analysis in nonpublic forums, censorship is prohibited if the government acts unreasonably or acts to suppress a particular viewpoint—so the Court held in the prototypical forum cases of Perry Education Association v. Perry Local Educators’ Association203 and International Society for Krishna Consciousness, Inc. v. Lee (“ISKCON”).204 Hazelwood’s “legitimate pedagogical concerns” test for nonpublic forum censorship correlates to the “reasonableness” of the ordinary Perry test. But Hazelwood described no prohibition on viewpoint suppression by school officials. Arguably, viewpoint suppression was not at issue in Hazelwood, as the principal probably would have allowed no speech at all concerning teen sex and pregnancy, regardless of pro or con viewpoint. So did the viewpoint-suppression prohibition survive Hazelwood? Or was the Supreme Court’s omission of that latter prong meant to say that it does not apply at school?

In cases involving student media, any analysis under the viewpoint-discrimination prong is hard to find in cases following Hazelwood. For example, after finding a nonpublic forum in Poling v. Murphy, the Sixth Circuit wrote, “The only real question, under Hazelwood, is whether the actions of the school officials were reasonably related to ‘legitimate pedagogical concerns.’”205 And sometimes the line between content and viewpoint discrimination is blurry. The dissent in Hazelwood itself complained, “The case before us aptly illustrates how readily school officials (and courts) can camouflage viewpoint discrimination as the ‘mere’ protection

200.   Id. at 154.
201.   Id. at 154-55.
202.   Id. at 154 (“[A] policy, if it exists, is vaguely defined and loosely applied[,] and . . . its underlying educational concerns remain[,] essentially undefined and speculative.”).
204.   505 U.S. 672 (1992) [hereinafter “ISKCON”].
205.   872 F.2d 757, 762 (6th Cir. 1989).
of students from sensitive topics. Justice Brennan suggested that Hazelwood East administrators might not have objected to newspaper content that clearly advocated personal responsibility in sexual conduct. Justice Brennan’s complaint can be read to conclude that a viewpoint-discrimination prong remains part of the Hazelwood nonpublic forum test, at least formally, even if oft overlooked by the lower courts subsequently. The SPLC and Professor Martha M. McCarthy assert that viewpoint discrimination is still prohibited in a Hazelwood nonpublic forum.

But both point only to Ninth Circuit authorities, and of those, only the Ninth Circuit’s decision in Planned Parenthood came after Hazelwood. Viewpoint-discrimination inquiry still appears in nonpublic forum analyses since Hazelwood, but only outside the context of student publications. For example, the schools may not employ viewpoint discrimination when outside parties seek access to school facilities, such as bulletin boards. In disallowing viewpoint discrimination between peace activists and the military at a school career day, the Eleventh Circuit held that a viewpoint-discrimination prohibition “is firmly embedded in first amendment analysis” and thus survived Hazelwood.

Viewpoint-discrimination prohibitions appear as absent from Hazelwood’s extension to restrict faculty academic freedom as they are from student media decisions. A California court referred to Justice Brennan’s fear of impermissible viewpoint discrimination camouflaged as permissible content


207. See id.

208. See SPLC LAW, supra note 10, at 45-46; McCarthy, supra note 126, at 690-91.

209. See SPLC LAW, supra note 10, at 46 & n.39 (citing Planned Parenthood v. Clark County Sch. Dist., 941 F.2d 817, 829 (9th Cir. 1991) (citing Hazelwood, 484 U.S. at 280, for reasonableness and nonstudent cases for viewpoint neutrality)); McCarthy, supra note 126, at 690-91 & n.29 (citing San Diego Comm. Against Registration & Draft v. Governing Bd., 790 F.2d 1471 (9th Cir. 1986) (finding impermissible viewpoint discrimination between the exclusion of an anti-draft advertisement and allowance of military recruitment ads)); see also Golub, supra note 115, at 510 (“Principal Reynolds’[s] actions must . . . not [be] merely a facade for a judicially abhorred viewpoint or content discrimination.” (citing only pre-Hazelwood, or nonstudent, nonpublic forum cases (footnotes omitted))).

210. Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989) (finding impermissible exclusion of peace activists and their literature from bulletin boards and guidance offices while military recruiters were allowed), cited in McCarthy, supra note 126, at 691.

211. Searcey, 888 F.2d at 1325 (citing Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting)).

212. See, e.g., Miles v. Denver Pub. Schs., 944 F.2d 773, 775, 777 (10th Cir. 1991) (inquiring only whether discipline against teacher was “reasonably related to legitimate pedagogical interests” in response to teacher’s “commenting . . . negatively on individual members of [the] student body” (quoting reprimand letter)), cited in McCarthy, supra note 126, at 697-98.
discrimination in a ruling against a library book removal decision.\textsuperscript{213} The court feared the promotion of a religious viewpoint inherent in the book removal decision as a religious establishment problem.\textsuperscript{214} A Seventh Circuit decision reached a similar conclusion in keeping creationism out of the social studies classroom, also looking to \textit{Hazelwood} and the Establishment Clause, but without noting any prohibition of viewpoint discrimination arising from the former.\textsuperscript{215}

Despite the claims of student media advocates, courts since \textit{Hazelwood} have disregarded the viewpoint-discrimination prong of nonpublic forum analysis. Though the prong might still appear when third parties complain about access to the school, the traditional First Amendment prohibition on viewpoint discrimination in nonpublic forums does not appear to be available to students and high school faculty complaining of First Amendment violations.

In sum, the anti-\textit{Hazelwood} movement has met with limited success. Statutory and regulatory solutions are effective once in place, but they require much work and favorable conditions to implement and vigilance to maintain. State constitutional solutions have either not been tried or not born fruit. Underground and extracurricular publications have undermined \textit{Hazelwood}, but at the substantial and ironic cost of formal classroom training in journalism for student practitioners. Finally, \textit{Hazelwood} by its own terms offers possible escapes from censorship through the legitimate pedagogical concerns standard and through a possibly under-emphasized second prong of the analysis prohibiting viewpoint discrimination. But courts have embraced neither of these avenues of escape. Despite scholarly disapproval, the \textit{Hazelwood} doctrine in the courts has proven overpowering, and censorship of the student media runs rampant regardless of whether school officials can demonstrate educational objectives.

\section*{III. College Journalism Freedom: Still \textit{Tinker} "Material and Substantial Disruption"}

The rights of college journalists at public schools do not share the embattled history of high school students' rights since \textit{Hazelwood}. While the \textit{Hazelwood} Court observed that minors' constitutional rights are not co-extensive with those of adults, public college students, of course, are adults. Thus, any limitation on their exercise of First Amendment rights, at least in noncurricular contexts, must implicate the ordinary constitutional tests that

\begin{footnotesize}
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\item \textsuperscript{214} \textit{McCarthy}, 254 Cal. Rptr. at 724.
\item \textsuperscript{215} Webster v. New Lenox Sch. Dist. No. 122, 917 F.2d 1004, 1008 (7th Cir. 1990), \textit{cited in} McCarthy, \textit{supra} note 126, at 698.
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come into play when government tries to censor in a public place. The Tinker standard, material and substantial disruption and invasion of the rights of others, was an adaptation of First Amendment strict scrutiny to the academic environment, the age of the speaker notwithstanding; thus, it is not surprising that public colleges and high schools do share a common history in the application of Tinker to campus. In fact, Tinker-like language first appeared in a college press case before the Tinker decision. In 1967, a federal court in Alabama reversed the suspension of a state university student journalist who printed the word "censored" in white space rather than replace his politically controversial editorial with a fluff feature. The court found no "material[] and substantial[] interference with . . . appropriate discipline." The Tinker standard continued to appear in principal college press cases after 1969. In a 1972 case involving selective recognition of student organizations, the Supreme Court expressed an extreme reluctance to allow government control of the college campus, even vis-à-vis "the community at large."[220] "[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

When the Court decided Hazelwood in 1988, the majority specifically reserved judgment on application of the new standard to the college campus. In Hazelwood's footnote 7, the Court wrote, "We need not now decide whether the same degree of deference [to school officials] is appropriate with respect to school-sponsored expressive activities at the college and university level." Scholars recognized the possibility that Hazelwood might one day be extended to the college campus, but regarded any such extension as so unwise as to be unlikely. Former and present SPLC Executive Directors J. Marc Abrams and S. Mark Goodman distinguished college media from secondary school media by recognizing:

the older age of college newspaper reporters, the concomitantly higher age

221. Healy, 408 U.S. at 180 (quotation marks omitted) (quoting Shelton v. Tucker, 364 U.S. 447, 487 (1960)).
223. See, e.g., Abrams & Goodman, supra note 19, at 728; see also Rothauge, supra note 115, at 218 (describing Hazelwood's extension to college as "an aberration of first amendment jurisprudence because surely university students are "persons under the constitution".")).
of these newspapers' readers, the increased independence generally granted to students in higher education, and the acknowledgement that such students are, in fact, young adults with full legal rights in our system (save, in most states, the right to drink).\footnote{224}

Stuart Walters Belt warned that college officials might see Hazelwood as an opportunity to expand their power,\footnote{225} and Professor Nancy J. Meyer recommended that college media advocates take both preemptive and proactive steps to seek protection from Hazelwood under state statutory and constitutional law.\footnote{226}

Any concerns about the impact of Hazelwood on the college campus were not immediately warranted. Before Hazelwood the Supreme Court had held unequivocally that “the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.”\footnote{227} The lower courts signaled that they would not likely depart from this established doctrine based on the ambivalent language of Hazelwood's footnote 7,\footnote{228} prompting the SPLC to conclude “that college officials are prohibited from censoring in all but the most exceptional situations.”\footnote{229}

Foreshadowing the Hazelwood analysis, courts in the 1970s and 1980s applied variations of public forum analysis to the college campus.\footnote{230} But even those courts uniformly placed campus speech comfortably out of reach of

\footnote{224. Abrams & Goodman, \textit{supra} note 19, at 728. A footnote to a 2000 concurrence by Justice Souter suggests that the Abrams-Goodman view might one day prevail in the Supreme Court. Justice Souter wrote: “Our university cases have dealt with restrictions imposed from outside the academy on individual teachers' speech or associations, and cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, [Hazelwood, 484 U.S. at 262; Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1986); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 504 (1969)] whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education. Board of Regents v. Southworth, 529 U.S. 217, 238 n.4 (2000) (Souter, J., joined by Stevens & Breyer, JJ., concurring) (other citations omitted).”}

\footnote{225. Belt, \textit{supra} note 115, at 203.}

\footnote{226. Meyer, \textit{supra} note 45, at 54.}


\footnote{228. SPLC LAW, \textit{supra} note 10, at 54-55 & n.27 (citing, inter alia, \textit{DiBona}, 269 Cal. Rptr. at 892-93 & n.13 (“[W]here children are concerned the legitimate role of the government in regulating speech is substantially broader.”); see also Student Gov't Ass'n v. Board of Trustees, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (“Haz... is not applicable to college newspapers.”), quoted in SPLC LAW, \textit{supra} note 10, at 55.}

\footnote{229. SPLC LAW, \textit{supra} note 10, at 51.}

\footnote{230. Id. at 52-53 & n.10 (citations omitted).}
lower-tier scrutiny, concluding, as the Fifth Circuit in *Bazaar v. Fortune*, “that once a [university recognizes a student activity [that] has elements of free expression, it can act to censor that expression only if it acts consistent[ly] with First Amendment constitutional guarantees.”

After 1988, at least two cases referred to *Hazelwood* in connection with public forum analysis at the college level. In one of those cases, on a negligent supervision action by an administrator against her employer, a public college that publishes the student newspaper, a New Jersey court ruled for the defendants on state tort law grounds and expressly declined to decide the applicability of *Hazelwood*. A federal court in Michigan did apply *Hazelwood* and found a student newspaper’s advertising space a designated public forum in *Lueth v. St. Clair County Community College*. *Lueth* arose in a community college setting, perhaps a place more vulnerable to analogy to secondary education than a four-year public university. Importantly, the court did not adopt *Hazelwood*’s legitimate pedagogical concerns standard for nonpublic forums. Rather, the court utilized the usual *Perry* test of reasonable restriction and viewpoint neutrality. However, the court did use *Hazelwood* to determine whether the community college newspaper was a public or nonpublic forum. Without distinguishing the secondary educational environment from the community college, the court distilled six criteria from *Hazelwood* to detect public forum designation “by policy or by practice”: (1) the newspaper’s relationship to the curriculum per school policy; (2) description of the newspaper in the school’s curriculum guide; (3) faculty involvement in teaching newspaper for credit “during regular class hours;” (4) faculty involvement in selecting editors and managing production; (5) prior review policy; and (6) school officials’ adherence to their own policies. Applying these criteria, the court found *The Erie Square Gazette* in *Lueth* unlike the *Spectrum* in *Hazelwood* in “significant” and “material”

231. *Id.* at 52.
232. 476 F.2d 570, 574 (5th Cir. 1973), *aff’d en banc with modification, 489 F.2d 225* (5th Cir. 1973) (per curiam), *quoted in SPLC LAW, supra note 10, at 53.*
236. Sorenson & LaManque, supra note 233, at 978.
238. *Id.* (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988)).
239. *Id.* (quoting *Hazelwood*, 484 U.S. at 267 (quoting *Perry*, 460 U.S. at 47)).
240. *Id.* (citing *Hazelwood*, 484 U.S. at 268).
ways: The *Gazette* had (1) no tie to a particular curricular program; (2) no faculty involvement in production or content; and (3) "free[] distribut[ion] throughout the local community" with some funding from "outside advertisers." Looking also to the *Gazette*’s own declarations of policy concerning autonomy and free expression, the court found the *Gazette* a public forum and disallowed censorship of a controversial advertisement.

Lueth raised the possibility that a college newspaper might one day fall under the *Hazelwood* analysis and, in ignorance of the differences between secondary and collegiate academics, be declared a nonpublic forum subject to school control. But that specter remained faint. After all, college publications typically function with the autonomy of *The Erie Square Gazette* and without the curricular ties of the *Spectrum*. And in stating the test applicable to a nonpublic forum, the Lueth court drew language from Perry, suggesting that even if a college newspaper were ruled a nonpublic forum, college journalists might enjoy some insulation from the rampant abuse of *Hazelwood*’s vague legitimacy standard. Thus, even in the wake of *Hazelwood*, public college students had little fear of their schools seizing control of student journalistic enterprises. College students could count on their student media to perform as watchdog, informer, and chronicler with a student perspective free of administrative influence. College journalists could ply their training on the job and practice free and responsible journalism. High school journalists victimized by school officials more concerned with public relations and disciplinary strictures than with education could look forward to adult freedom in the adult world of college. Yet all the while, the *Hazelwood* specter, however faint, has persisted.

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241. *Id.* at 1414-15. No *Hazelwood* criterion seems to have triggered the Leuth court’s third observation. Though the *Hazelwood* Court did not mention advertising in the *Spectrum*, the newspaper was sold in the local community, generating limited revenue. *Hazelwood*, 484 U.S. at 262. Both papers were dependent on their schools for financial support. *Id.* at 263-64; *Lueth*, 732 F. Supp. at 1412 (describing funding from a student activity fee). There are no grounds to distinguish advertising revenue from sales revenue when neither primarily supports a publication. Perhaps the *Lueth* court perceived a distinction between Hazelwood East’s outright grant to support the *Spectrum* and the mandatory student activity fee arrangement that supported the *Gazette*.


243. *Id.* at 1415-16. The college objected to an ad for a Canadian nude dancing club "because it "was degrading to women, promoted drinking to [underage] students . . . and was otherwise inimical to the educational mission of the College and the values the College [sought] to promote in its publications." *Id.* at 1415 (quoting dean’s affidavit).

244. "Practice" in the sense of practicing a profession, compare *supra* note 5, not simulating an experience.
IV. Kincaid v. Gibson

A. Early Conflicts

Conflicts over control of the Kentucky State University (KSU) student newspaper and yearbook exploded during the week of Thanksgiving in 1994. On November 24, Student Publications Adviser Laura Cullen was transferred indefinitely to clerical duties in another office—"demoted," in her view—and KSU administrators seized 2000 copies of the student yearbook, forbidding distribution.

Tensions between Cullen and Vice President for Student Affairs Betty Gibson had escalated over 1993-1994 as school officials came under fire on the pages of the student newspaper, The Thorobred News. Editorial

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245. It is important to understand that the modern yearbook is as much a "vigorous, creative and intelligent" forum for student expression as the newspaper. SPLC Brief, supra note 131, Part II.C. The amicus brief of the SPLC, et al., described the modern yearbook:

- College student yearbooks of the [1990s] are not just the picture books many remember from an earlier generation. They routinely cover all aspects of student life, including current events, and offer criticism of school policies and officials. Beginning in the [1970s], many student yearbook staffs began to "scoff at the idea that yearbook was somehow the 'ugly step-sister' to the more prestigious high school newspaper... and began to incorporate an expanded use of copy and, occasionally, more hard-hitting coverage in their yearbooks."

Id. (alteration in original) (quoting Jostens, Inc., HISTORY WORTH REPEATING: A CHRONOLOGY OF SCHOOL YEARBOOKS 48 (1996)).

- No longer merely a hard-bound puff book, or sugar-coated public relations tool, or extra-curricular trip down a rose-petal covered memory lane (which probably never existed anyway), the yearbook is recognized finally as a news medium, and yearbook advisers and staffs have an even greater obligation as a result to see that the content of a yearbook is consistent with the journalistic standards of newsworthiness[] and the journalistic principle governing reporting.

Id. (quoting Thomas A. Prentice, Yearbook Content Criticized: Drinking, Drug Use Story Sparks Parent, Staff Controversy, SCHOLASTIC EDITOR, April-May 1980, at 12, 13); cf. SPLC, Endangered Species: Censorship Threats Leave Yearbook Staffs Wondering Which Way to Turn, REPORT, Fall 2000, at 12 <http://www.splc.org/report/f00report/f00p12a.html> (reporting that increased emphasis on accuracy threatens yearbook survival by disappointing parents' and administrators' desires for whitewashed memories) [hereinafter SPLC, Endangered Species]. First Circuit Judge Sandra Lynch was sorely misinformed on this issue when she announced her dissent in Yeo v. Town of Lexington, No. 96-1623, 1997 WL 292173, at *19, *29 (1st Cir. June 6, 1997). See infra note 318.

246. SPLC, Background on Kincaid v. Gibson (visited Nov. 27, 1997) <http://www.splc.org/newsflashes/background.html> [hereinafter SPLC Background].

cartoons unflatteringly caricatured KSU President Mary Smith, Gibson herself, and others.\textsuperscript{248} Gibson claimed not to mind,\textsuperscript{249} but other victims of the satirist’s pen were less understanding and more vocal in their opposition.\textsuperscript{250}

Cullen advised the newspaper staff and arranged and gave seminars on newspapering,\textsuperscript{251} but she was adamant in her refusal to take editorial control of \textit{The Thoroughbred News}. Repeatedly she told colleagues and Gibson, her superior, that students’ First Amendment rights precluded her interference in editorial decision-making.\textsuperscript{252}

The week of Thanksgiving 1994, \textit{Thoroughbred News} student editor Calvin Wilson faced a particularly tough call: whether to print a letter to the editor that was cruelly disparaging of President Smith.\textsuperscript{253} For the first time, Gibson did not ask; she ordered Cullen to keep the letter out of the newspaper.\textsuperscript{254} Cullen refused; she told Wilson about Gibson’s order, but, asserting student autonomy, left the decision in his hands.\textsuperscript{255} In a decision Cullen later described as personally agreeable but professionally unsound, Wilson decided on November 28 not to run the letter.\textsuperscript{256}

Despite Wilson’s decision, that afternoon Gibson handed Cullen a memorandum in which Gibson unilaterally transferred Cullen to the Office of Housing.\textsuperscript{257} Gibson described the transfer as “temporary,” though she would not say how long “temporary” would last.\textsuperscript{258} Gibson later claimed her decision was purely a matter of resource allocation to help out the shorthanded Housing Office at the busy end of the semester.\textsuperscript{259} But Gibson did not follow the usual university procedures for transfer,\textsuperscript{260} and she planned to change the locks on Cullen’s office door at student publications.\textsuperscript{261}

Meanwhile, also on November 28, 1994, the student yearbook arrived at the Office of Student Publications.\textsuperscript{262} The yearbook was a double issue, its
coverage running from fall 1992 to spring 1994.263 University administrators, particularly Betty Gibson, were not pleased with the book.264 In a memo to Cullen, Gibson complained of photographs without captions and "confusing layout."265 In her deposition she further complained of the yearbook cover color, purple, rather than school colors, green and gold; an "inappropriate" theme, "Destinations Unknown"; and the use of "current events" photographs of famous personalities who had not visited KSU.266 The university confiscated the yearbooks and refused to distribute them.267

Cullen filed a formal grievance within the university system, objecting to her transfer to the Housing Office.268 On December 20, 1994, Cullen was reinstated as publications adviser.269 The reinstatement came with strings attached. Gibson sent Cullen a memo outlining specific expectations for the job, with regard to The Thorobred News, adding that her performance would be reassessed in sixty days.270 Among the expectations: Cullen was to reduce the "newspaper error rate," to ensure that "more positive news . . . be published," to ensure that the newspaper cover "all campus events," to improve the quality of newspaper photographs, and to submit the newspaper to the Student Publications Board for prior review.271

Cullen replied, questioning the memo of expectations.272 She reiterated her position that administrative control of content decisions in student publications would violate students' First Amendment rights.273 Also, on First Amendment grounds, she refused to submit The Thorobred News for prior review.274 Cullen was later "written up" for failing to submit the first January issue for review.275 In June 1995, Cullen resigned from KSU.276

B. Cullen: The Adviser's Case

The facts of the Kincaid case gave rise to two related lawsuits. On March 14, 1995, Cullen filed the first.277 She sued Gibson, Smith, and members of the KSU Board of Regents, alleging violation of her First and Fourteenth

263. Id. at 161; Gibson Dep., supra note 247, at 42.
266. Gibson Dep., supra note 247, at 43-44.
267. Id. at 49-51.
268. Cullen Dep., supra note 247, at Ex. 7.
269. See id. at Ex. 6.
270. Id.
271. Id.
272. Id. at Ex. 10.
273. Id.
274. Id.
275. Id. at 56-57 & Ex. 13.
276. Id. at Ex. 1.
277. SPLC Background, supra note 246.
Amendment rights. Cullen complained of the student yearbook confiscation, of administration efforts to control the student newspaper, and of her transfer to the Housing Office. She asserted that the transfer resulted from administrators’ disappointment with her reluctance to act as censor and from administrators’ displeasure with her pro-union activities. The students who later brought suit in Kincaid v. Gibson tried to intervene in the Cullen suit, but U.S. District Judge Joseph M. Hood denied their motion.

In April 1996, Judge Hood granted partial summary judgment for KSU, ruling that Cullen lacked standing to assert violation of students’ rights. Cullen then dismissed her remaining claim for retaliatory transfer and appealed the partial summary judgment order to the U.S. Court of Appeals for the Sixth Circuit. The Sixth Circuit never reached the constitutional arguments; instead, the court dismissed the appeal on grounds of mootness, observing that Cullen had voluntarily resigned from her position.

C. Kincaid I: The Students’ Case in the District Court

1. From Complaint to Summary Judgment

While Cullen’s case crumbled as it advanced through the courts, students Charles Kincaid and Capri Coffer, denied intervention, brought suit on their own against Gibson, Smith, and the Regents. Kincaid was a KSU student. Coffer was a KSU student and editor of The Thorobred yearbook. The students alleged violation of their First and Fourteenth Amendment rights for action taken against the newspaper, against the yearbook, and against adviser Cullen. The students also sued for breach of contract, alleging that they were entitled to receive the yearbook as a benefit for having paid the mandatory eighty-dollar student activity fee.

The court granted KSU officials’ motion to dismiss in part, as to
allegations of Fourteenth Amendment due process and First Amendment free association rights.291 The court also rejected the students’ effort to certify KSU students as a class.292 But Judge Hood let stand four claims: (1) violation of free speech rights as to threatened newspaper censorship; (2) breach of contract as to the student activity fee and yearbook confiscation; (3) violation of free speech rights as to the yearbook; and (4) arbitrary and capricious administrative action as to the yearbook.293 The students had cause for optimism: their central free speech claims survived dismissal.

After amended pleadings and motions for summary judgment from both sides,294 Judge Hood quashed students’ hopes by granting summary judgment for the defendants.295 As to the students’ claims of abridged First Amendment expression in the student newspaper, the court ruled that the students lacked standing for failure of “injury in fact.”296 The court observed that the students’ complaint failed to point to any specific newspaper content that was not published as a result of KSU’s threats to censor.297 “The threat of injury . . . must be real and immediate, not conjectural or hypothetical,” Judge Hood wrote.298

The students had tried to evade this outcome on the newspaper speech claim by asserting that a cry of “no harm, no foul” would not eliminate a continuing threat of prior review and future restraint of the newspaper.299 But according to the court, the students failed to allege that the administration required prepublication review for the newspaper;300 thus, the court distinguished a case in which the U.S. District Court for the District of Massachusetts ruled prepublication review unconstitutional.301

As to the breach of contract claim, the court relieved the university of liability under sovereign immunity doctrine pursuant to the Eleventh Amendment.302 The court relieved the individual officials of liability because

292. Id.
293. Id.; SPLC Background, supra note 246.
296. Id. at Part I.
297. Id.
298. Id. (quotation marks omitted) (quoting Greater Cincinnati Coalition for the Homeless v. City of Cincinnati, 56 F.3d 710, 716 (6th Cir. 1995) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983))).
299. Id.
300. Id.
302. Id. at Part III.
they had not contracted as individuals with the plaintiffs.303

The decisions, which gave rise to appeal, came in the court’s two rulings expressly approving of the yearbook confiscation. Essentially, the court determined that KSU was the publisher of the yearbook, a nonpublic forum, thus having authority to order any reasonable restraint.304 According to the court, the confiscation order was a reasonable restraint, thus not arbitrary and capricious.305

To determine the extent to which KSU might be permitted to control the content of the student yearbook, the court applied the familiar tripartite rubric of public forum analysis: the traditional public forum and limited, or designated, public forum, both subject to strict scrutiny; and the nonpublic forum, subject to lower-tier scrutiny.306 Judge Hood looked to four authorities to arrive at the conclusion that The Thorobred yearbook is a nonpublic forum.307

First, he considered the decision of the Fifth Circuit in Bazaar v. Fortune.308 Bazaar was a decision in which the court determined that student publications at the university level are public forums.309 The Bazaar court borrowed language from Tinker—Hazelwood would not be decided for another fifteen years—to explain that as a public forum, a student literary magazine could not be restricted for indecency when the content is “not being forced on an unwilling audience through public display” and when “[t]here is no chance of violent disruption.”310 A restriction of free expression narrowly tailored to avert such disruption would survive heightened scrutiny.

Second, Judge Hood considered the Supreme Court decision in Hazelwood. “[B]ecause [the] school had not intended to ‘open up’ the pages of the newspaper, and instead had reserved the paper for its intended purpose, an educational tool,” the newspaper was a nonpublic forum subject to reasonable government control.311

Third and fourth, Judge Hood looked to the since-withdrawn First Circuit decision in Yeo v. Town of Lexington (“Yeo I”),312 and the Ninth Circuit decision in Planned Parenthood v. Clark County School District.313 Recall that Yeo and Planned Parenthood contrarily found college student newspaper

303. Id.
304. Id. at Part II.
305. Id. at Parts II.B, IV.
306. See id. at Part II.A.
307. See id.
308. See id. (citing Bazaar v. Fortune, 476 F.2d 570, 575-76 (5th Cir. 1973)).
309. See Bazaar, 476 F.2d 570.
310. Id. at 580; see also id. at 573 (citing Healy v. James, 408 U.S. 169 (1972) and Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969)).
313. 941 F.2d 817 (9th Cir. 1991).
and yearbook advertising pages a limited public forum and a nonpublic forum, respectively.\textsuperscript{314} Neither of the main opinions dealt with the \textit{editorial} content of school publications.\textsuperscript{315} Both \textit{Yeo I} and \textit{Planned Parenthood} relied on the forum analysis of \textit{Hazelwood},\textsuperscript{316} and there Judge Hood placed his reliance.\textsuperscript{317} Agreeing with the \textit{Yeo I} dissent\textsuperscript{318} and the \textit{Planned Parenthood} majority, Judge Hood found the editorial pages of \textit{The Thorobred} yearbook a nonpublic forum.\textsuperscript{319} Judge Hood found no intent on the part of KSU to make \textit{The Thorobred} anything other than state property.\textsuperscript{320} In support of this conclusion, he emphasized that yearbook distribution was aimed at the KSU student community, not the public at large.\textsuperscript{321} Ultimately, he drew a distinction between “a journal of expression and communication in a public forum sense” and “a journal of the ‘goings on’ in [a] particular year at KSU.”\textsuperscript{322}

Upon establishing that \textit{The Thorobred} was a nonpublic forum, it was a simple matter for Judge Hood to conclude that the confiscation resulted from reasonable objections to the yearbook content.\textsuperscript{323} The broad discretion afforded the government in cases of nonpublic forums allowed the KSU administration to act on its position that the yearbook was of unacceptable quality. The court found Gibson’s objection to the cover color, the theme, and the content choices legitimate to establish that the yearbook staff had failed in its mission to portray the “goings on” of the year at KSU.\textsuperscript{324} The court called on \textit{Hazelwood} for reference, noting that censorship is a reasonable response to content that is “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for

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\item \textsuperscript{314} \textit{Yeo I}, 1997 WL 292173, at *16; \textit{Planned Parenthood}, 941 F.2d at 828-29.
\item \textsuperscript{315} \textit{Yeo I}, 1997 WL 292173, at *1; \textit{Planned Parenthood}, 941 F.2d at 817. In her dissent to \textit{Yeo}, Circuit Judge Sandra Lynch asserted the intriguing theory that forum analysis should not apply to newspapers, including student newspapers, at all; rather, they should enjoy First Amendment protection wholly outside public forum analysis. 1997 WL 292173, at *34-*35. "It is passingly strange to even think of a student newspaper as a public forum," Judge Lynch wrote, explaining that public forum analysis makes sense only as applied to physical places, not media. \textit{Id.} at *34.
\item \textsuperscript{316} \textit{See Yeo I}, 1997 WL 292173, at *6; \textit{Planned Parenthood}, 941 F.2d at 823.
\item \textsuperscript{317} Order of 11/14/97, \textit{supra} note 295, Part II.A.
\item \textsuperscript{318} \textit{See Yeo I}, 1997 WL 292173, at *29 (Lynch, Cir. J., dissenting) (“High school yearbooks are not usually vehicles for the expression of views[ ] or for robust debate about societal issues, and they never have been. There can be no serious argument that this yearbook is a public forum.”).
\item \textsuperscript{319} Order of 11/14/97, \textit{supra} note 295, Part II.A.
\item \textit{Id.}
\item \textsuperscript{320} \textit{Id.}
\item \textsuperscript{321} \textit{Id.} Whether range of distribution should carry any weight is not clear under \textit{Hazelwood}. \textit{See supra} note 241 and accompanying text.
\item \textsuperscript{322} Order of 11/14/97, \textit{supra} note 295, Part II.A. Judge Hood suffers, and so the defendants suffered, from an antiquated concept of yearbook journalism. \textit{See supra} note 245.
\item \textsuperscript{323} Order of 11/14/97, \textit{supra} note 295, at Part II.B.
\item \textit{Id.}
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immature audiences." Judge Hood concluded that the KSU administration was permitted "to set high standards for the student speech that is disseminated under [university] auspices," even higher than the standards that might apply to a "real world" publication.

2. Post-Judgment

In a motion to alter, amend, or vacate filed ten days after Judge Hood's memorandum opinion and order, the students focused their efforts on the single issue that brought Hazelwood to bear: violation of free speech rights in the yearbook confiscation. The students urged the court to reconsider its determination that the yearbook was a nonpublic forum on four grounds: (1) that Yeo is bad law, having been withdrawn and superseded by the First Circuit decision on rehearing en banc; (2) that Hazelwood applies to high schools, not colleges and universities; (3) that the yearbook is a public forum even under Hazelwood; and (4) that defendants should have borne the burden of proof to show that the yearbook was a nonpublic forum, not plaintiffs to show that it was a public forum.

In March 1998, the court rejected all four bases of the students' motion. First, the court pointed to its reliance on the Yeo dissent, rather than the main opinion. Judge Hood wrote that the First Circuit en banc decision did not assign error in the panel's forum analysis; rather, the court resolved the Yeo case on other grounds. Second, the court reasserted its reliance on Hazelwood, observing that the Supreme Court's forum analysis stood apart from the fact that a high school newspaper was involved and that the Court had "declined to decide whether the same degree of deference was due to a college publication."

Third, the court found no merit in the students' contention that the court erred in application of the Hazelwood analysis and restated the court's reliance on Bazaar, the Yeo dissent, and Planned Parenthood. The court never addressed the students' fourth contention regarding the burden of

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325. Id. (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988)).
326. Id. (quoting Hazelwood, 484 U.S. at 271-72).
327. Plaintiffs' Motion to Alter, Amend, or Vacate, Kincaid I, Civil No. 95-98.
329. Id.
330. Id.
331. Id. "The First Circuit vacated the panel decision, determining that no First Amendment violation existed because the student editors, exercising independent judgment, could not be considered state actors." Id. n.1.
332. Id.
333. Id.
Ultimately, the court reiterated its position from the summary judgment order concerning the public/nonpublic forum distinction in the mission of The Thorobred: "[T]he KSU yearbook was not meant to be open to the public, but instead was meant to be a journal of the happenings at KSU during a particular year."

D. Kincaid II: The Students' Case in the Court of Appeals

1. From Notice of Appeal to Oral Argument

The decision to appeal followed Judge Hood's ruling on the motion to alter by a scant few days. The SPLC announced, "The fight for college student press freedom is officially on." Both sides filed briefs with the Sixth Circuit in the spring and summer of 1998.

Appellants raised five points on appeal, essentially covering all the issues on which they lost in district court. First, they challenged the classification of the yearbook as a nonpublic forum and the finding of reasonable administrative censorship. Second, they disputed the district court's "no injury" ruling. Third, they quarreled with the district court's rulings as to no breach of contract and no arbitrary and capricious conduct by school officials. Fourth, they appealed the district court's dismissal of their due process and freedom of association claims. And fifth, they appealed the district court's denial of class action certification. The Sixth Circuit would take up only the first issue in any detail.

Aside from the parties' briefs, the appellate court received three briefs from amici, all favoring the students. The students drew support from journalism scholars, "real world" practicing journalists, and defenders of civil liberties. The scholars' brief came from a coalition that included the SPLC
and representatives from every accredited, public college journalism program in the Sixth Circuit—Kentucky, Michigan, Ohio, and Tennessee—as well as several organizations, including the Association for Education in Journalism and Mass Communication (AEJMC), the Association of Schools of Journalism and Mass Communication (ASJMC), and College Media Advisers, Inc. ("the SPLC coalition").348 The practitioners’ brief came from the Society of Professional Journalists, the American Society of Newspaper Editors, the National Federation of Press Women, and the Reporters Committee for Freedom of the Press.349 The civil liberties brief was filed by the American Civil Liberties Union, the American Association of University Professors, and the Thomas Jefferson Center for Freedom of Expression.350

The SPLC coalition brief asserted three points: (1) that the Hazelwood standard is not appropriate for college students, and if applied to the college media, "would have disastrous consequences"; (2) that "[t]o the extent that public forum analysis applies to the college media they are clearly public fora for student expression;" and (3) that KSU’s censorship of The Thorobred defied justification.351 The practitioners’ brief "warned of the impact that the lower court’s decision could have on the ability of professional, commercial news organizations to recruit well-trained and educated young journalists."352 And the ACLU-led brief warned of trespass against "that quintessential marketplace of ideas, the public university."353

Four years and four days after Cullen first took KSU to court in Cullen v. Gibson, a three-judge panel of the Sixth Circuit Court of Appeals in Cincinnati heard oral arguments on behalf of Cullen’s students in Kincaid v. Gibson. The panel did not seem receptive. Judge James Ryan told students’ attorney Bruce Orwin up front, "Your constitutional arguments are not persuasive."354

Orwin’s argument turned on the proposition that the KSU student handbook’s grant of editorial discretion to the student editor of the yearbook constituted the designation of a public forum.355 Judge Ryan responded, "I can’t believe that [the student handbook] says the university was going to hand over the yearbook to a student editor . . . saying, ‘This is your baby, do with it whatever you want.’"356 Responsive to his sense of the panel, KSU attorney J. Guthrie True gave the students’ First Amendment argument no

348. SPLC Brief, supra note 131 ("Interest of Amici Curiae").
349. SPLC News Flash: Coalition Brief, supra note 346.
350. Id.
351. SPLC Brief, supra note 131 ("Table of Contents").
352. SPLC News Flash: Coalition Brief, supra note 346.
353. Id. (quotation marks omitted) (quoting party brief).
355. Id.
356. Id. (second alteration in original).
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credence, relying instead on the nonpublic forum conclusion of the lower court: "This is a government sponsored publication by a government sponsored university."357 On rebuttal, Orwin warned that an adverse decision would "destroy the student press."358

2. Decision

The amici's pages and Orwin's breath came to no avail. On September 8, 1999, the Sixth Circuit, per Circuit Judge Alan E. Norris, announced its decision upholding the lower court ruling on point.359 The Thorobred yearbook was a nonpublic forum, just as the Spectrum newspaper in Hazelwood, thus subject to KSU's reasonable restraint.360 As to the Thorobred News, the Sixth Circuit agreed with Judge Hood's no injury finding and never reached the Hazelwood question.361

Like the Supreme Court in Hazelwood, the Sixth Circuit began its analysis with a beguiling nod to the Tinker doctrine, conceding that college newspapers successfully challenged administrative censorship in "virtually all" such cases in the 1970s and 1980s.362 But the court quickly turned its attention to Hazelwood and, without any apparent hesitation, found the high school doctrine applicable "in the instant action."363 In a footnote, the court dismissed students' contentions that public forum analysis is inappropriate to a forum controlled by private rather than state actors.364 But the court did not say a single word about any difference between minors in secondary schools and adults in colleges.365 With the Hazelwood analysis invoked, the court set about determining the nature of the yearbook forum.366

In forum analysis the court looked first to the Hazelwood factors, which it distilled to four criteria characterizing nonpublic forums: (1) curricular sponsorship of publications; (2) faculty editorial control; (3) credit and grades for students; and (4) prior administrative review.367 The court conceded that the de facto autonomy of The Thorobred yearbook student staff weighed in favor of finding a public forum.368 But quoting Hazelwood, the court stated

357. Id.
358. Id.
359. Kincaid II, 191 F.3d at 719.
360. Id. at 728.
361. Id. at 730. The court rejected students' appeal as to freedom of association, class certification, and other due process claims for failure to assert those issues in the notice of appeal. Id.
362. Id. at 726.
363. Id.
364. Id. at 726 n.2.
365. See id. passim.
366. See id. at 727.
367. Id. at 727 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 268-69 (1988)).
368. Id.
that "inaction" by school administrators did not make a forum public de jure. 369

Instead, the court looked to the KSU student handbook, which was surprising because the handbook more than once suggested student editorial autonomy. "Though both [the newspaper and yearbook] publications are subsidized by the University," the handbook read, "it is the intent that both shall be as free of censorship as prevailing law dictates." 370 Though the handbook provided for a publications adviser, the adviser's changes to student-created material "must deal only with the form or the time and manner of expressions rather than alteration of its content." 371 But the court looked elsewhere in the handbook for guidance. 372 The handbook dedicated student publications to the oversight of the Student Publications Board—a joint student-administrative body—"and emphasized that the Board expects student editors and faculty advisors to adhere to high standards of journalistic ethics and the highest level of good taste and maturity in the integrity, tone and content of student publications." 373 The handbook also empowered the Board to control distribution and to appoint and remove editors. 374 "[M]ost telling," the court wrote, the handbook required The Thorobred News to print a disclaimer that the newspaper content did not necessarily represent the view of the KSU administration, but the handbook made no such demand of the yearbook. 375 That omission, the court concluded, demonstrated a lack of intent to designate a public forum in the yearbook. 376 And even in the handbook's declaration that the publications "be as free of censorship as prevailing law dictates," the court found "certainly... nothing" to specify a public rather than nonpublic forum. 377

Having identified a nonpublic forum, the court made short work of the reasonableness inquiry. "It is no doubt reasonable that KSU should seek to maintain its image to potential students, alumni, and the general public," the court held. 378 In fact, the court adopted a two-prong version of the nonpublic forum analysis, citing both Hazelwood and ISKCON for the proposition that "school officials may impose any reasonable, non-viewpoint-based restriction on student speech." 379 In a footnote, though, the court discounted students'

369. Id. (quoting Hazelwood, 484 U.S. at 267).
370. Id. at 722 (quoting student handbook).
371. Id. at 723 (quoting student handbook).
372. See id. at 728.
373. Id. (quoting student handbook).
374. Id.
375. Id.
376. Id.
377. Id. (stating that "such language merely begs the question").
378. Id. at 729.
379. Id. at 727 (emphasis added) (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988)).
allegations of viewpoint discrimination. Gibson had criticized the yearbook because she found its theme, photographs, and cover color inappropriate, not because she objected to any ideology; the court decided this was permissible content discrimination, not impermissible viewpoint discrimination.

The court's rationale on the viewpoint prong seems at odds with its conclusion as to reasonableness: "[I]t is also reasonable that KSU might cut its losses by refusing to distribute a publication that might tarnish, rather than enhance, [KSU's] image." Failure to enhance KSU's image represented "the yearbook's failure to accomplish its intended purpose," but the court refused to recognize that purpose as the proffering of a particular viewpoint. At least the court recognized a viewpoint-neutrality requirement under Hazelwood, an improvement over the absence of that inquiry in the same court's decision in Poling v. Murphy.

As to the newspaper claims, the court agreed with District Judge Hood that plaintiffs failed to show injury. Gibson's demands on adviser Cullen notwithstanding, the court found no evidence that Cullen ever acceded to those demands or that students even knew about them. Given the students' attempt to intervene in Cullen's suit against the administration, not to mention the close working relationship of any newspaper adviser and student editors, it seems more plausible that the court wished to duck the issue, rather than that the students were ignorant of Gibson's machinations.

If Kincaid II had any silver lining, it was that based on the court's reasoning, the censorship with which Gibson threatened The Thorobred News probably would have been unconstitutional had she carried through. If the court reasoned that an omission of disclaimer from the yearbook manifested a lack of affirmative intent to designate the yearbook as a public forum, then the requirement for a disclaimer in the newspaper must represent that affirmative intent. Gibson's content discrimination would not have survived strict scrutiny were the newspaper a designated public forum. But even if the newspaper were not a public forum, Gibson's demands as to content were clearly viewpoint discriminatory in nature: "More positive news is to be published."

3. Dissent

Concurring as to The Thorobred News, Circuit Judge R. Guy Cole, Jr.

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380. See id. at 729 n.4.
381. Id.
382. Id. at 729.
383. Id.
384. 872 F.2d 757 (6th Cir. 1989).
385. Kincaid II, 191 F.3d at 730.
386. Id.
387. Id. at 724 (quoting Gibson memorandum).
dissented from the court's ruling as to *The Thorobred* yearbook. Citing *Hazelwood*’s footnote 7, Judge Cole did challenge the extension of *Hazelwood* to the college level. Judge Cole observed that no other circuit court had seen fit to extend to the college level diminished deference to student First Amendment rights. Furthermore, even applying *Hazelwood*, Judge Cole concluded that the yearbook was a designated public forum. "It does not make sense," he chastised the majority, "to infer the university's intent in one section of the [student] handbook when a different section of the [university] handbook actually states the university's intent." Judge Cole agreed that Gibson's confiscation of the yearbook constituted content discrimination and that discrimination, lacking "any compelling governmental interest," ran afoul of the strict scrutiny that should have applied to the yearbook as a designated public forum.

E. Kincaid III: *The Students’ Case on Rehearing in the Court of Appeals*

1. From Petition for Rehearing to Oral Argument

Granting a petition from the students, the Sixth Circuit on November 29, 1999 vacated *Kincaid II* and voted by majority to rehear the case with a thirteen-judge panel. The SPLC was optimistic; Mark Goodman told *The Chronicle of Higher Education*, "This is definitely a positive step." Kentucky State University pledged to "continue to present its well-founded arguments." As is ordinary practice, the court announced no reason for the grant of rehearing. Oral argument occurred in Cincinnati on May 30, 2000 and went well for the students. Thirteen judges presided, including one by

388. *Id.* at 730 (Cole, Cir. J., concurring in part and dissenting in part).
389. *Id.* (Cole, Cir. J., concurring in part and dissenting in part).
390. *Id.* (Cole, Cir. J., concurring in part and dissenting in part).
391. *Id.* at 731 (Cole, Cir. J., concurring in part and dissenting in part).
392. *Id.* (Cole, Cir. J., concurring in part and dissenting in part).
393. *Id.* (Cole, Cir. J., concurring in part and dissenting in part).
394. Telephone Interview with Beverly Harris, Case Manager for the U.S. Court of Appeals for the Sixth Circuit (Dec. 7, 1999) [hereinafter Harris]; see *Kincaid v. Gibson*, 197 F.3d 828 (6th Cir. 1999), vacating *Kincaid II*, 191 F.3d at 719.
396. Reisberg, supra note 395 (quoting KSU counsel Harold Greene) (quotation marks omitted).
conference call. For some forty minutes, the court questioned the attorneys: for KSU, J. Guthrie True, and for the students, volunteer Winter Huff.

The arguments were familiar and centered on application of the public forum doctrine. True said that the university never intended to open The Thorobred to free student expression; rather, KSU meant to retain editorial control, much like a university controls promotional publications. He said that because students are appointed to work on The Thorobred, the student body generally cannot participate. And he reminded the court of the disclaimer disparity: that the Thorobred News has to print a disclaimer that its views were not necessarily those of the university, while the yearbook does not. Those factors evidence KSU's intent, True said, to make The Thorobred like the curricular high school newspaper in Hazelwood, a "nonpublic forum."

Huff argued that KSU intended to open The Thorobred as a "designated public forum," that is, a forum for free expression that the government deliberately creates. She said the student editor, though appointed, exercised sole editorial control until the confiscation. KSU policy provided a process to remove the editor if she were incapable, Huff said, but the university never followed that policy, instead censoring unilaterally. And even if the yearbook was a nonpublic forum, Huff argued, the university still went too far because it censored a viewpoint it disliked—the theme, "Destinations Unknown." The First Amendment prohibits viewpoint discrimination even in a nonpublic forum.

The court evinced skepticism of True's argument. Judges questioned him about KSU policy language that echoed the legal definition of a public forum, and they pressed him to admit that the administration never exercised editorial control over the yearbook before it was printed. True nevertheless insisted that the government must be unequivocal in its designation of a public forum, or else none exists.

But the court pressed Huff as well. One judge wanted to know whether

399. Id.
400. Id.
401. Id.
402. Id.
403. Id.
404. Id.
405. Id.
406. Id.
407. Id.
408. Id.
409. Id.
the university could freely censor a "student" publication as long as the university clearly disclosed its broad censorship policy in advance. 410 Huff was forced to defend the uncomfortable position that a student publication might be a public forum regardless of plain university policy to the contrary. 411

After the dust settled in Cincinnati, the parties and their allies began their anxious vigil in anticipation of the court's decision. They waited out the remainder of the year 2000.

2. Decision En Banc

Judge Cole, the dissenter from the three-judge panel, had the last word after all. On January 5, 2001, the SPLC gleefully reported the decision of a nine-judge majority, authored by Judge Cole and announced that morning: reversal. 412 The Thorobred was a limited public forum, and KSU officials violated students' rights by confiscating the yearbooks. 413 The SPLC's delight was warranted; the decision resounded with support for the student press.

Kincaid III is methodical in its reasoning: divided in three parts, the discussion section 414—following background 415 and standard of review (de novo) 416—establishes applicability of the public forum doctrine, applies the public forum doctrine to the yearbook, and analyzes the constitutionality of KSU officials' actions in light of the public forum application. In the first part of the discussion, the court immediately set a tone favoring the student appellants, quoting Supreme Court precedent regarding applicability of the

410. Id.
411. Id. This dialog occurred:

Court: If a university says, "We're paying for this yearbook. Students are going to work on it, but we can decide whether it's a good product or not." Does that violate the Constitution?

Huff: [Pause.] Your Honor, I think it possibly could... Again, freedom of the press is just that—

Court: Even if the university owns the press?

Huff: If the university wants to say, "We're going to have a university publication," then I think they can do that. If the university says, "We're going to have a student publication," then I don't think they should [have editorial control].

Court: So it depends in your view on whether they call it a "student publication" or not?

Huff: That would certainly be one thing I would look at.

Id.

413. Kincaid III, 236 F.3d at 342.
414. Id. at 347-56.
415. Id. at 344-46.
416. Id. at 346-47.
First Amendment on the college campus.\footnote{417} Interestingly, the court refuted the students’ alternative argument that ordinary public forum doctrine should not pertain to students’ right to receive the yearbooks.\footnote{418} The students probably worried that public forum doctrine had formerly condemned them to disastrous results under 
Hazelwood, but those worries were not warranted this time. 
Hazelwood was among the cases the court cited to demonstrate applicability of the public forum doctrine in a public educational setting.\footnote{419} The court also pointed to 
Rosenberger v. Rector & Visitors of the University of Virginia, a publication funding case in which the Supreme Court admittedly adapted public forum analysis for lack of any other analytical tool.\footnote{420}

Having established applicability of the public forum doctrine, the court next set about determining the type of forum involved. The court defined the tripartite forum rubric according to four cases, including the recent 
Arkansas Educational Television Commission v. Forbes and 
Rosenberger authorities and the classic public forum authorities 
Perry and 
Cornelius v. NAACP Legal Defense and Education Fund, Inc.\footnote{421} Additionally, Forbes is cited as in “accord” with the proposition that government intent is “the touchstone of [public forum] analysis.”\footnote{422} but Hazelwood in no way drives the discussion. Ultimately the court identified and separately analyzed four factors at play in the public forum analysis: (1) government policy; (2) government practice; (3) “the nature of [The Thorobred] and its ‘compatibility with expressive activity’,” and (4) “the context within which the [yearbook] is found.”\footnote{423} No one factor is identified as dispositive.\footnote{424}

As to KSU policy, the court emphasized precisely that language from the student handbook that the prior court decisions had glossed over: provisions limiting the role of the publications adviser to matters of “form,” “time,” and “manner of expressions rather than . . . content”; interposing the Student Publications Board between the KSU administration and student publication editors; and broadly declaring “the integrity of student publications and the press . . . in an atmosphere of free and responsible discussion and of

\footnotesize{\begin{align*}
417. & \textit{Id. at 347 (citing Widmar v. Vincent, 454 U.S. 263, 268-69 (1981)).} \\
418. & \textit{Id.} \\
420. & \textit{Id. at 347 (citing Rosenberger, 515 U.S. 819 (analogizing to public forum law to hold viewpoint neutrality principle applicable to university funding of student publications)).} \\
422. & \textit{Id. at 348-49 (citing Hazelwood, 484 U.S. at 267).} \\
423. & \textit{Id. at 349 (quoting Cornelius, 473 U.S. at 802).} \\
424. & \textit{See id.}\end{align*}}
The court rejected KSU's reliance on the disclaimer between the newspaper and yearbook, describing the "negative inference" as "hardly persuasive" "inferential gymnastics." KSU policy pointed to a limited public forum, the court decided.

Practice also pointed to a limited public forum, the court determined, observing that the student publications policy was followed prior to the confiscation: neither university administrators, nor the Student Publications Board, nor the student publications adviser had ever exerted control over the content of the yearbook. The court likewise found the third and fourth factors weighing in favor of a limited public forum. As to the forum's compatibility with expressive activity, the court found the yearbook "expressive activity," "by its very nature," "a creative publication" containing "pictures, captions, and other written material" that "constitute expression." The court might as well have been describing a literary magazine; the opinion reflects not a hint of Judge Hood's earlier distinction between "a journal of expression and communication in a public forum sense" and "a journal of the 'goings on' in a particular year at KSU." As to "the context within which this case arises," the court went out of its way to elaborate on its initial declaration as to the pertinence of the First Amendment on the college campus. The university environment is the quintessential 'marketplace of ideas'" the court wrote, true to the ACLU-led amicus brief. In both points three and four of the public forum analysis, the court distinguished Hazelwood: first, contrasting The Thorobred with a "closely-monitored classroom activity in which an instructor assigns student editors a grade, or in which a university official edits content;" and second, using the signal "Compare . . . with" to emphasize that college students are adults, not "immature audiences."

The court addressed in a separate part of the discussion the KSU argument that a limited public forum must be open to "indiscriminate use by the general

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425. Id. at 349-50 (emphasis omitted) (quoting KSU student publications policy, which the court attached to its opinion as Appendix I).
426. Id. at 350-51.
427. Id. at 351.
428. Id.
429. See Order of 11/14/97, supra note 295; see also supra note 322 and accompanying text.
430. Kincaid III, 236 F.3d at 352.
431. Id. (quoting Healy v. James, 408 U.S. 169, 180 (1972)).
432. See supra note 353.
434. Id. at 352 (comparing Hazelwood, 484 U.S. at 271 with Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981)). The reader learns for the first time in the opinion that student Charles Kincaid was thirty-seven years old when he was deposed in March 1997. Id.
public." That contention "badly distorts a basic tenet of public forum law," the court stated. Even Hazelwood described public forums as open "for indiscriminate use by the general public, or by some segment of the public, such as student organizations." Truly "[s]elective access occurs when the government 'does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, "obtain permission" to use it,'" the court explained. Having determined that The Thorobred was a limited public forum, the court had little difficulty deciding that "wholesale confiscation of printed materials that the state feels reflect poorly on its institutions" went too far. Restrictions in a limited public forum must be reasonable time, place, and manner restrictions or, if content-based restrictions, must satisfy strict scrutiny. The court stated that confiscation could not possibly be a reasonable time, place, and manner solution as it leaves open no alternative channels to communicate the same information. As to KSU's formerly successful contention that it was regulating mere quality, not content, the court wrote: "This argument is simply not credible." Gibson's objections to cover color, captions, photo selection, and theme all concerned content in the court's opinion and in any event, the confiscation is "amongst the purest forms of content alteration," akin to compelled speech. With the Sixth Circuit full panel, Gibson found none of the indulgence expended by the previous tribunals.

Those conclusions left KSU without a leg to stand on, and the court could have stopped there. It went further. "Even were we to assume, as the KSU officials argue, that the yearbook was a nonpublic forum, confiscation of the yearbook would still violate Kincaid's and Coffer's free speech rights." Even under permissive nonpublic forum analysis, Gibson's confiscation was both unreasonable and "smack[ed] of viewpoint discrimination." The confiscation was "rash" and "arbitrary" in that it violated the university's own student publications policy, and occurred pursuant to no discussion among university administrators or consultation with adviser Cullen. And still cutting Gibson no breaks, the court stated that Coffer's selection of the

435. Id.
436. Id.
437. Id. at 353 (quoting Hazelwood, 484 U.S. at 267) (citations omitted in original) (quotation marks omitted) (emphasis added).
439. Id. at 354.
440. Id.
441. Id.
442. Id.
443. Id. at 354-55.
444. Id. at 355.
445. Id. at 356.
446. Id. at 355.
yearbook theme and photographs, as well as her written segments, all were expressions of viewpoint; thus, Gibson’s objections to these elements were impermissibly viewpoint-based.447

The court reversed and remanded, instructing the District Court to enter summary judgment for Kincaid and Coffer, “and to determine the relief to which they are entitled.”448 KSU decided to settle the case in February 2001.449

3. Separate Opinions

Seven judges, including Chief Judge Martin, joined Judge Cole in his opinion.450 Kincaid III drew three separate opinions: a concurrence, a concurrence and dissent, and a dissent. Judge Ryan, who made up half of the 2-1 majority on the first appellate panel, wrote separately only to clarify that he had been “in error” in his first decision and decided instead to join “Judge Cole’s excellent opinion for the court.”451 Circuit Judge Boggs determined that “there is substantial, but not conclusive, evidence” of content discrimination, but he regarded that issue as one of material fact that should have been subject to determination on remand.452 Judge Boggs further found significant “evidence that the administration’s claims [were] pretextual” even as to viewpoint discrimination and would have remanded that question also.453 Finally, Judge Norris, who wrote the 2-1 opinion, wrote briefly in dissent, quoting the vacated opinion in Kincaid II, to reaffirm his original conclusions; Judges Suhrheinrich and Batchelder joined him.454

447. Id. at 356. The court quoted with approval Charles Kincaid’s testimony: “[A] picture that may be relevant to me may be something that would be garbage to you.” Id. “[S]tate officials may not expunge even ‘garbage’ if it represents a speaker’s viewpoint.” Id.
448. Id. at 357.
449. SPLC, Kentucky State University Yearbooks Agrees to Release Yearbooks Confiscated by School Officials in 1994 in Settlement with Students (visited Apr. 17, 2001) <http://www.splc.org/newsflashes/2001/030101kentucky.html>. The university will release the yearbooks, pay the plaintiff students $5,000 each, and pay plaintiffs $60,000 for attorneys fees and costs. Id. KSU pledged to attempt delivery of the 717 books to 90% of students eligible to receive them, turning the remainder over to plaintiffs’ attorneys. Id.
450. Kincaid III, 236 F.3d at 342.
451. Id. at 358 (Ryan, Cir. J., concurring).
452. Id. (Boggs, Cir. J., concurring in part and dissenting in part).
453. Id. (Boggs, Cir. J., concurring in part and dissenting in part). On balance, Judge Boggs favored reversal, and the opinion comes off as sympathetic to the majority view; thus the SPLC in its press release, supra note 412, described the case as a 10-3 victory.
454. Kincaid III, 236 F.3d at 359 (Norris, Cir. J., dissenting, joined by Suhrheinrich and Batchelder, Cir. JJ.).
V. COLLEGE JOURNALISM FREEDOM AFTER KINCAID

A. Even in the Wake of Kincaid, No Rest for the Weary

Had the Sixth Circuit not reversed in *Kincaid III*, the case could have had a profound impact on expressive freedom on college campuses. And the risk remains, with Supreme Court involvement unlikely, that a court in another jurisdiction will find persuasive the reasoning of *Kincaid II*—reversed but irretrievably published. Anywhere *Kincaid II* reasoning gains a foothold, however limited the geographic scope, there is no reason to expect college administrators in that jurisdiction to respond differently from how high school administrators responded to *Hazelwood*. To the extent that high school administrators took advantage of their expansive powers to convert the student publications to student public relations on “pedagogical” grounds, one should expect no less, or no more, from college administrators, who are embroiled in the intensely competitive business of higher education.455

College students may rightly fear a *Kincaid II*-style decision. The *Hazelwood* doctrine in the high schools gave principals nearly unbridled discretion to say what is and what is not appropriate content for student media. Such power proved too tempting for many to refrain from using it,456 resulting in a “standard operating procedure” of censorship. Certainly some college administrators would be likewise unable to resist. Many a dean would be unable to stay his or her hand from, say, spiking a story about alcohol abuse from the front page of the student newspaper on parents’ weekend. The SPLC coalition brief listed a sample of real college journalism stories that would have been fair game for censorship in a *Kincaid II* world:

An opinion piece opposing an upcoming referendum that would have provided the college with revenue collected from property taxes.457

An editorial criticizing the school for conducting roof repair work during the school year, which, because of the coal tar used, was causing noxious odor and fumes to drift into active classrooms and dormitories. The fumes reportedly caused migraines, asthma attacks and other ailments. The editorial pointed to studies that indicated the carcinogenic and toxic nature


456. “Power is so apt to be insolent and Liberty to be saucy, that they are very seldom upon good Terms.” George Saville, Marquis of Halifax, *quoted in The Concise Oxford Dictionary of Quotations* 114 (2d ed. 1986).

of the coal tar fumes. 458

An article detailing the incoming university president’s expenditure of state funds, including over $100,000 spent to remodel the president’s home and pay for his inauguration. 459

A yearbook story reporting that members of the school’s volleyball team were removed for bringing alcohol on a team trip and a feature spread on sex and relationships. 460

A story reporting the resignation of the school’s provost after pornographic images were allegedly found on his office computer. 461

An editorial cartoon, featuring Beavis and Butthead figures as university officials, commenting on a U.S. Department of Education report that found the school had misused public funds when it paid for a trip to Disney World by students and school officials. 462

Worse than censorship, survey data after Hazelwood predicts a severe “chilling effect,” or so-called “self-censorship” by the student media. 463 High school advisers detected an increasing acceptance of Hazelwood, with time, by student journalists. 464 So with time college journalists in a Kincaid II world could become increasingly complacent, unwilling to go after controversial stories in the student newspaper and unwilling to tackle controversial subjects and events in the student yearbook.

A chilling effect at the college level would of course be disastrous for cutting off vital forums for information and debate on college campus. But the consequences could be even more tragic outside the ivy-covered walls.

458. Id. (citing Toxins Invade Mountainside Hall, Campus, SKYLINE (Su Ross St. U., Tex.), May 1, 1997, at 2).
459. Id. (citing NORTHERN STAR (N. III. U.), June 1985, reported in SPLC, REPORT, Fall 1987, at 24). “Following publication, the president transferred the newspaper’s adviser to another position at the school . . . . The president later resigned after being questioned by state legislators regarding the spending . . . . The adviser was reinstated.” Id.
460. Id. (citing L’ACADEMIE (Sw. U. La.), 1991, at 12, 219, reported in SPLC, REPORT, Fall 1994, at 29). “Following publication, the yearbook editor lost his job. After the editor sued, the school agreed to a settlement in which it paid the editor $10,000 and agreed to a publications policy that prohibited administrative interference with the content of student publications.” Id.
461. Id. (citing VIEWPOINTS (Riverside Community C.), Cal., Aug. 18, 1997, at 1).
462. Id. (citing THE YELLOW JACKET (W. Va. St. U.), Jan. 27, 1994, reported in SPLC, REPORT, Spring 1994, at 25). “One of those portrayed, the vice president of student affairs, temporarily halted printing of the issue. He also later appointed himself the newspaper’s adviser.” Id.
463. Salomone, supra note 118, at 307-08.
464. Id. at 310.
Imagine a generation of college-trained journalists with no practical experience handling controversial subject matter, nor with any more than an academic understanding of the role of the Fourth Estate in American society. Professional journalism already suffers in quality because it is the lowest paid job to require college training.\textsuperscript{465} If even those college graduates sufficiently altruistic to pursue a career in journalism despite the meager compensation were further trained in an environment that reinforced the role of government as Justice Brennan's "thought police,"\textsuperscript{466} the quality of professional journalism would suffer immeasurably. A college editor in a \textit{Kincaid II} régime might decline to pursue a story on a university president's use of public funds to remodel his home because the story would reflect negatively on the university's public image. It is difficult to imagine that the same college editor as a professional journalist would aggressively pursue a story about a state governor spending public money on personal expenses.\textsuperscript{467}

Students are not the only members of the college community who ought to be concerned. A \textit{Kincaid II}-style decision would jeopardize college academic freedom. With nary a glance at any distinction between minors' rights and adult teachers' rights, courts extended Hazelwood to strip secondary-school teachers of discretion in the conduct of their classrooms. If Hazelwood were to apply with full force to the college classroom, there would be little reason to think that the tradition of academic freedom in American higher education—despite the approval of case law\textsuperscript{468}—is any more than a professional courtesy that college administrators may lawfully disregard on pedagogical grounds. The Supreme Court, per Justice Brennan, recognized the university as "peculiarly the 'marketplace of ideas.'"\textsuperscript{469} Under a \textit{Kincaid II} régime, the inventory in that marketplace would be subject to

\begin{footnotesize}
\textsuperscript{465} See James Ledbetter, \textit{The Slow, Sad Sellout of Journalism School}, ROLLING STONE, Oct. 16, 1997, at 73, 78 ("Supply and demand works its painful logic: Those who do get jobs start at an average salary of about $16,000 . . . .").


\textsuperscript{468} E.g., Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); see also Board of Regents v. Southworth, 529 U.S. 217, 237 n.3 (2000) (Souter, J., concurring). The Supreme Court held, not long before 	extit{Tinker}:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."


\textsuperscript{469} Keyishian, 385 U.S. at 603.
\end{footnotesize}
severe curtailment by the government owner, hardly what Justice Brennan had in mind. The SPLC coalition brief argued, "The arbitrary censorship of university publications was never intended to be the legacy of Hazelwood." Indeed, the arbitrary censorship of academic speech in public colleges and universities could not have been the intended legacy of Hazelwood. Consequently, this parade of horribles, however rightly feared, will not come to pass any time soon in the Sixth Circuit. From the perspectives of Capri Coffer and Charles Kincaid, *Kincaid III* could not have gone better. Practically, the decision was the best that college media advocates could have hoped for from the Sixth Circuit. *Kincaid III* treated The Thorobred yearbook with classic public forum doctrine, based substantially on *Perry*. The court noted that "Hazelwood has little application to this case," suggesting that *Hazelwood* pertains only insofar as it demonstrates public forum analysis and rejecting KSU's analogy to *Hazelwood* as specially a student publication case. The court declined to decide whether and to what extent the public forum doctrine would apply to a college student newspaper, and the court even noted that a college yearbook with features more akin to a university student newspaper might be analyzed under a framework other than the forum framework. Then, after having determined that *The Thorobred* was a limited public forum, the court distinguished itself from the two predecessor tribunals by refusing to engage in deferential winking at public officials' content- and viewpoint-neutral pretexts for confiscation.

But while *Kincaid III* was the best decision one practically might have expected from the Court of Appeals, the case leaves in its wake a college media with its few vulnerabilities exposed. On the one hand, *Kincaid III* sends a strong message about the importance of expressive freedom on campus and the impropriety of relaxing forum analysis as to student publications at the collegiate level. On the other hand, carefully interpreted, *Kincaid III* provides a roadmap for university administrators to seize control of their student media. With so much at stake, college media and their advocates would be errant to rest on their laurels. *Kincaid III* presents two grave concerns.

First, the right conditions in another venue might invite censorship under the potentially devastating rationales of *Kincaid I* and *II*, that is, *Hazelwood*, or even under the reasoning of *Kincaid III*. College media must act now to avert fact scenarios that would beg for an unfavorable outcome should another

470. SPLC Brief, supra note 131, at Part I.B.iii.
471. *Kincaid III*, 236 F.3d at 346 n.5 (citing with "cf." Student Gov't Ass'n v. Board of Trustees, 868 F.2d 473, 480 n.6 (1st Cir. 1989) and describing that case parenthetically as "stating that *Hazelwood* is not applicable to college newspapers").
472. Id. at 348 n.6 (citing as an example Stanley v. Magrath, 719 F.2d 279 (8th Cir. 1983) (holding students' rights were violated by at least partially content-based decision to cut newspaper funding)).
473. Id.
court foolishly follow Hazelwood in a public forum analysis or should a court follow Kincaid III, but find it factually distinguishable.

The second concern for college media arises from the one still unresolved issue that backed students' attorney Winter Huff into a corner during the en banc oral argument: essentially, what happens when a college explicitly states its desire to control student media as nonpublic forums?474 One can argue that a college's express publications policy should not be the last word in determining whether a forum is public or nonpublic. But the very question suggests that public forum analysis might not be an appropriate analytical framework.

B. Preserving the College Media against a Hazelwood Assault

In 1989, Professor Nancy Meyer described the threat Hazelwood posed to the college student press and recommended that advocates seek shelter for students under state law, lest colleges and secondary schools be subsumed under Hazelwood as they were under Tinker.475 Because in the ten years after Professor Meyer wrote courts seemed content with the Hazelwood-Tinker secondary-school-college dichotomy, her warnings were understandably relegated to the history of curious observations about the Hazelwood decision. Kincaid II breathed new life into Professor Meyer's fears.

College students have at their disposal the full range of routes that high school students pioneered and engineered to escape the reach of Hazelwood, including pursuing statutory solutions, "going underground," and facing down public forum analysis under its own tests for forum determination or reasonableness.

1. Beating Hazelwood in the Legislature

In fact, it would probably be unwise for college media advocates to pursue statutory solutions absent a clear and present threat to free expression. An effort to pursue a statutory solution similar to that which protects high school press freedom in six states, unless higher education is wholly on board, would probably serve only to educate administrators as to a previously unrealized vulnerability of the college media. Having failed to obey the maxim, "if it

474. See supra note 411 and accompanying text.
475. See Meyer, supra note 45, at 54. Professor Meyer was not the only scholar who worried about Hazelwood reaching college campuses. See, e.g., Golub, supra note 115, at 513. [I]t is more than likely that university newspapers will eventually be subject to the same fate. Although the majority's justification that school officials have the duty to shield immature students from certain topics will not be applicable, the majority's reference to the 'principal as publisher' analogy could allow courts to reason that university funding[] and concerns about university endorsement of student viewpoints[] justify censorship. Id. (footnotes omitted).
ain't broke, don't fix it," college journalists might find themselves much worse off at home after an unsuccessful bout with the state legislature.

Nevertheless, from an academic perspective, it is worthwhile to observe that the SPLC has developed two versions of "Model Legislation to Protect Student Free Expression Rights" and that the latter version is at least readily adaptable to the college context. In fact, the SPLC's shorter, second version already makes no distinction on its face between public secondary schools and colleges or universities; only legislative intent and placement in the code create that distinction. The proposed statute merely relieves the courts of the burden of forum analysis, stating explicitly that student publications are public forums. The statute would supersede any contrary indication in a student handbook. A modified SPLC's version 2 bill might appear thus:

All school-sponsored publications and news media produced primarily by students at a public school college or university, except for those intended for distribution or transmission only in the classroom in which they are produced, shall be public forums for the expression by student reporters and editors at such school college or university.477

The longer, first version of SPLC model legislation may also be adapted to the college context,478 but adaptation would be appropriate only after a

476. SPLC Law, supra note 10, at 237-38.
477. Id. at 238 (emphasized words added) (strikeout modifies original text).
478. Again for academic purposes, a modified bill might appear thus:

(A) Students of public schools colleges and universities (hereinafter "colleges" or "college") shall have the right to exercise freedom of speech and of the press including, but not limited to, the publication of expression in school college-sponsored publications media, whether or not such publications or other means of expression media are supported financially by the school college or by use of school college facilities or are produced in conjunction with a class, except as provided in subsection (B).

(B) Nothing in this section shall be interpreted to authorize expression by students that

(1) is obscene as to minors as defined by state law,
(2) is libelous or slanderous as defined by state law,
(3) constitutes an unwarranted invasion of privacy as defined by state law, or
(4) so incites students as to create a clear and present danger of the commission of unlawful acts on school premises the college campus or the violation of lawful school college regulations, or the material and substantial disruption of the orderly operation of the school college. School College officials must base a forecast of material and substantial disruption on specific facts, including past experience in at the school college and current events influencing student behavior, and not on undifferentiated fear or apprehension.

(C) Student editors and producers of school college-sponsored publications media shall be responsible for determining the news, opinion and advertising content of their publications and productions subject to the limitations of this section. It shall be the responsibility of a journalism advisor or advisor of student publications within each school to supervise the production of the school-sponsored publications and maintain the
Kincaid II-style disaster; that is, after a court applied Hazelwood to allow censorship of a college publication. Absent that circumstance, version 1 might result in an unduly inflexible mode of analysis that works to students’ detriment. The problem that arises is that version 1 contemplates a situation when Hazelwood already applies to school-sponsored media, as is the default rule for secondary schools in forty-four states. The effect of the SPLC statute is to turn back the clock from Hazelwood to Tinker, mandating use of Tinker’s disruption or invasion standard in place of Hazelwood’s reasonableness standard. But one must remember that Tinker arose in a pre-collegiate education case. Insofar as Tinker, because of its connection to minors, might evolve to be any more restrictive of students’ rights than the generic Perry test for adult speech in a public forum, the classic Perry approach would be more desirable for adult college students. Thus, for example, Sixth Circuit college students should be reluctant to tie themselves to minors through a Tinker standard because Kincaid III employed the classic approach through Perry and its progeny.

If the necessity arises, legislative solutions for the college media might meet with a warmer reception in state legislatures than have high school free speech bills.⁴⁷⁹ One can rationally debate the maturity of a secondary-school

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provisions of this chapter. This section shall not be construed to prevent an journalism adviser from teaching professional standards of English and journalism to the student staff. No journalism adviser will be fired, transferred, or removed from his or her position for refusing to suppress the protected free expression rights of student journalists.

(D) No student publication or production, whether school college-sponsored or non-school college-sponsored, will be subject to prior review by school college administrators.

(E) No expression made by students in the exercise of free speech or free press rights shall be deemed to be an expression of school college policy, and no school college officials or school district governing boards shall be held responsible in any civil or criminal action for any expression made or published by students unless school college officials have interfered with or altered the content of the student expression.

(F) Each governing board of a school district college or college system shall adopt rules and regulations in the form of a written student freedom of expression policy in accordance with this section, which shall include reasonable provisions for the time, place, and manner of student expression and which shall be distributed to all students at the beginning of each school year.

(G) Any student, individually or through parent or guardian, or publications journalism adviser may institute proceedings for injunctive or declaratory relief in any court of competent jurisdiction to enforce the rights provided in this section.

Id. (emphasized words added) (strikeout modifies original text). Section C requires modification to avoid creating a requirement that colleges employ a publications adviser. Language describing the “schools” and “school districts” must be adapted to the college context, and references that restrict the meaning of “students” to minors may be modified or deleted as superfluous. Throughout, the model bill may be modified to accommodate the electronic media, which are more common on the college campus than in secondary schools.

⁴⁷⁹ In those states that have adopted high school free speech legislation, there is one striking argument to be made in favor of a college bill: If Hazelwood applies to college media
student and to what extent the state acts as loco parentis in the schools. Such a debate can hardly be had in seriousness at the college level. College students are adults, and as adults, they are part of the voting public to which the legislature is beholden. As explained, the college campus is more readily recognized as a proper "marketplace of ideas" than is the secondary school, where maintaining order and discipline—particularly in light of recent years' school shootings—is regarded in public opinion as a problem and priority. Moreover, states have a tremendous amount of money invested in public higher education, and college administrators have more autonomy in spending than secondary school administrators have. With more money comes greater potential for abuse, and college media have a long track record of breaking the news of such abuse. Legislators who would let the college media fall prey to the control of college officials would strip themselves of a powerful budget oversight tool.

By the same token, there is a lot of money at stake in higher education. The same competitive environment and thirst for control that would compel many college administrators to employ a Hazelwood prerogative could also compel them to lobby against legislative measures that would prohibit censorship. The higher education lobby, because of its stake and its extensive resources, can make a formidable foe for student media advocates backing anti-Hazelwood legislation. The college media would be wise to study the experience of high school press advocates. 480

2. Going Underground

Only a school's "official" media outlets can be subject to Hazelwood analysis, because only the official outlets consist of any sort of government property. Underground publications, therefore, may be restricted only as to time, place, and manner of distribution, or in the case of compelling state
interests.\footnote{481} On a college campus, unlike in a secondary school, students spend considerable time on campus outside the strictly regimented classroom environment. Thus, an underground publication on the college campus need not be deeply underground, but instead may circulate openly to attract a broad audience and stimulate discussion.

However, the college underground suffers from the same ironic problems as the high school underground. College administrators pleased with the control they can exercise over school-sponsored publications would find themselves under assault from an underground front that defies control and that may as well defy journalistic norms. At the same time, underground editors will face the perils of publication, such as legal liability and uncertain financial viability, without the network for education and support that a student publications board and a journalism school can provide.\footnote{482} While an underground is a vital alternative for student journalists facing intolerable administrative interference, and the underground will always be a vital outlet for student voices, the underground as the primary conduit for student journalism at the college level is a lose-lose situation for students and college administrators, as well as for journalism education.

\footnote{481. As explained in supra note 177, public forum analysis where it still pertains in secondary schools is sometimes tempered by \textit{Fraser}. If \textit{Hazelwood} is viewed as a culmination of evolving doctrine since \textit{Tinker} and through \textit{Fraser}, see generally Mary Muehlen Maring, "\textit{Children Should Be Seen and Not Heard}": Do Children Shed Their Right to Free Speech at the Schoolhouse Gate?, 74 N.D. L. Rev. 679 (1998), then that view highlights the flaw in \textit{Kincade II} by suggesting that \textit{Hazelwood}, like \textit{Fraser}, depended on the special case of minors' speech and sensibilities. One might expect that even university officials who would employ \textit{Hazelwood} to silence criticism would hardly flinch at mild sexual innuendo on campus.}

\footnote{482. \textit{See}, e.g., \textit{infra} note 504. Unlike in secondary school, it is unusual for a collegiate journalism educator to have a hand in newspaper production. SPLC Brief, supra note 131, at Part II.A. However, journalism students who work after school hours on an “official” publication can form trusting relationships with their professors who refrain from improper influence because they are trained and knowledgeable as to the importance of journalistic independence. With an underground, there is diminished probability that the publication’s mission is strictly journalistic in nature because undergraduates depend on extra-university funding. For example, the Intercollegiate Studies Institute is a conservative organization that supports alternative, conservative publications on college campuses. See Intercollegiate Studies Institute, \textit{The Collegiate Network} (last modified Oct. 19, 1999) <http://www.isi.org/cn-about.html>. Because of the ideological mission of such a publication, it is more likely than the “official” student newspaper to be staffed with students from academic backgrounds other than journalism, such as political science. These student staffers are less likely than journalism students to form relationships with journalism educators or to have journalistic norms such as objectivity and balance among their methods and objectives. Viewpoint-driven publications can make important contributions to the campus marketplace of ideas, but they are no substitute for publications that strive to apply viewpoint-neutral criteria in news judgment and to adhere to professional journalistic standards for editorializing.}
3. Preserving the College Media as Public Forums

When public forum analysis is brought to bear on a college student publication, the forum determination might follow a path similar to the four-factor inquiry in Kincaid III, or, as in Lueth, might follow the Hazelwood factors, which the Supreme Court designed for the high school setting. Application of either set of factors results in either one of two determinations: that the publication is an administrator-friendly nonpublic forum, where restrictions are subject to some form of a legitimacy or reasonableness analysis, or that the publication is a student-friendly limited public forum, where restrictions are limited to time, place, and manner, or constrained by a form of strict scrutiny. Certainly the college media should do everything within their power to rig the game in advance, that is, to ensure that under either analysis, they walk, talk, and quack like public forums.

Kincaid III looked to four factors to determine that The Thorobred yearbook was not a limited public forum: policy, practice, nature of the property and its compatibility with free expression, and context. No one factor was identified as dispositive, but college media should be prepared to make a convincing case on all four points. Review of the Hazelwood factors distilled in Lueth reveals that a student publication favored as a public forum under the Kincaid III factors should likewise be favored under Hazelwood factors.

a. Policy

Absent superseding state legislation, student media advocates may pursue protective policies at individual colleges and universities. Indeed, some governing boards of institutions of higher education might themselves recognize the ill wisdom of Kincaid III. Like the Baltimore County Board of Education after Hazelwood, college administrators might eschew the power to censor. That outcome might be more likely to occur in colleges than in secondary schools if journalism educators stand up for students’ rights.

Kincaid I and II demonstrate how important it is that college media not be caught unaware. Student publications at public colleges should work to obtain their explicit guarantee of public forum status before conflicts erupt with administrators, that is, during peace time. Turnover, usually a liability of student publications, can also be a virtue; upon appointment, new editors should carefully examine policies and negotiate for desired changes. Administrators will be euphoric to be “out with the old,” and new editors will not have had time to burn any bridges in the name of watchdog journalism.

The SPLC “Model Guidelines for Student Publications,” intended for high

483. See Kincaid III, 236 F.3d at 349.
484. Id.
schools, offers an excellent starting point to draft protective policies.\textsuperscript{485} Even the KSU policies disputed in Kincaid have usable language—for example, "the integrity of student publications and the press[] and the rights to exist in an atmosphere of free and responsible discussion and of intellectual exploration"—but ambiguities that fueled KSU’s defense in the litigation must be eliminated—for example, "as free of censorship as prevailing law dictates."\textsuperscript{486}

Journalism faculty can be expected to support journalism students in pressing college administrations to adopt policies that explicitly preserve the public forum status of student publications. All of the accredited journalism schools in the Sixth Circuit joined in the SPLC amicus brief in Kincaid, and within a week of Kincaid II, the national AEJMC condemned the decision.\textsuperscript{487} In secondary schools, the journalism adviser is typically an English teacher performing secondary duties as a journalism teacher. A media-hostile principal can quiet the voice of this lone faculty member, who might not have any formal training in journalism and free expression rights, and whose job security—or at least job satisfaction—is very much in the hands of the principal. In contrast, a college journalism school typically includes multiple faculty members who have post-graduate training or experience specifically in journalism and who possess greater personal control over their teaching responsibilities. Moreover, under the vague standards that sometimes pertain to dismissal of a tenured high school teacher, the college journalism professor likely enjoys better job security,\textsuperscript{488} thus a more secure position from which to

\textsuperscript{485} See SPLC LAW, supra note 10, at 229-32. The model guidelines for high schools are too lengthy to reprint here, but are available online at SPLC, Model Guidelines (visited Jan. 24, 2001) <http://www.splc.org/resources/high.school/guidelines.html>.

\textsuperscript{486} Kincaid III, 236 F.3d at 357 (emphasis added). A good policy should avoid a disclaimer disparity, too, like that which allowed the Kincaid I and II courts to draw a "negative inference" disfavoring the expressive value of the yearbook. Id. at 350; see supra Part IV.E.2.

\textsuperscript{487} AEJMC & ASJMC, NEWS RELEASE, Sept. 15, 1999, reprinted in E-mail from Joel Campbell, Staff Writer, DESERTER NEWS (Salt Lake City, Utah), to State and Local Freedom of Information Issues, Listserv, Syracuse University (Sept. 15, 1999) (on file with author) (forwarding E-mail from Edward C. Pease, Professor & Department Head, Department of Communication, Utah State University).

\textsuperscript{488} Primary- and secondary-school teachers can achieve statutory, regulatory, or contractual tenure positions in most jurisdictions. LOUIS FISCHER & DAVID SCHIMMEL, THE RIGHTS OF STUDENTS AND TEACHERS: RESOLVING CONFLICTS IN THE SCHOOL COMMUNITY 303-04 (1982). See generally MARTHA M. MCCARTHY & NELDA H. CAMBRON, PUBLIC SCHOOL LAW: TEACHERS’ AND STUDENTS’ RIGHTS 253-55 (4th ed. 1998). However, "[t]he typical state law provides that incompetence or immorality are grounds for dismissing a tenured teacher." FISCHER & SCHIMMEL, supra, at 303. "[C]ommunity standards" and "professional judgment" are factors in finding "incompetence or immorality." Id. Because the university is a community of adults and represents "the quintessential marketplace of ideas," see Kincaid III, 236 F.3d at 352 (quoting Healy v. James, 408 U.S. 169, 180 (1972) (quotation marks omitted)), and while Hazelwood views the secondary-school classroom as a protective environment for children, see Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988), community standards and
defend students’ freedom to criticize school policy.

If college administrators cannot be persuaded to the wisdom of student journalistic independence on altruistic and pedagogical grounds, an appeal to the purse might work. As Yeo v. Town of Lexington demonstrated, a public administration cannot be held responsible for torts committed in publications if the government lacks control over the content. Kincaid I and II warn how easily an equivocal policy governing the propriety of government intervention can be read to enable government control. Therefore, only by clearly designating student publications as public forums can college officials avoid tort liability by claiming an inability to countermand student editorial decisions. Students, of course, must be careful what they wish for; they will bear sole responsibility for the content they publish, defamation and all. But with freedom comes responsibility, and that is the very lesson that journalism students deserve to learn, the lesson that Kincaid II would have denied them.

b. Practice

Notwithstanding the extent to which policy allows administrative intervention in the affairs of student publications, a court will inquire into the de facto situation on campus. For this reason college journalists should combat every instance in which a college administrator, publications board, or publications adviser attempts to manipulate the content of a publication. At most, students may tolerate a board or adviser who, according to a clear and strict public forum policy, intervenes only with such measures as can be regarded as time, place, and manner restrictions.

The Kincaid III court asserted that “practice speaks louder than words” to determine government intent. The court looked to prior occasions when university administrators or the publications board had intervened in yearbook affairs. Neither had intervened with respect to yearbook content; rather, they had acted in accordance with the adjudicated-public forum policy: the administration working with Coffer only to set a release date and the publications board handling advertising rates and editor selection. Thus, to protect public forum status, student publication editors must strive to keep nonstudents out of content decisions.

In this vein and of critical importance, prior review is absolutely
unacceptable. Even the temptation to have a student-friendly publications adviser engage in prior review should be resisted as a publications adviser is nonetheless a school administrator. A publications adviser may educate in the abstract, give post-publication feedback, and make many contributions of a time-place-manner nature to enhance the smooth operation of student publications. But neither the adviser nor any administrator should conduct a prior review of content.

c. Nature of the Property and Compatibility with Expressive Activity

Student publications should have little difficulty satisfying this inquiry. As the Kincaid III court concluded, a yearbook, "[a]s a creative publication," "by its very nature[] exists for the purpose of expressive activity." 494

Certainly a student newspaper—newsprint being a traditional vehicle for free expression—should raise no dispute under this inquiry. A yearbook engaging in journalistic activity should also be recognized as a forum compatible with free expression. Journalistic content, though, is hardly required, as the First Amendment applies with equal vigor to protect artistic expression, which can include features from poetic verse to color and design. The modern yearbook, typically being a hybrid of artistic and journalistic expression, 495 should appear nonetheless as a forum compatible with free expression.

The Kincaid I and II courts were not enlightened as to the modern appearance of yearbook journalism, and they failed to recognize the expressive value in a yearbook’s artistic features. Thus, yearbooks have not yet carved a firm foothold in the company of newspapers as forums readily identified with free expression. The best way for yearbooks to maintain and enhance their currency as forums compatible with free expression is, simply, to be very good at what they do. Yearbook writers and editors should observe journalistic norms, such as accuracy, when acting as journalists, such as by chronicling past events. Yearbook art, whether poetry, photograph, or layout, should communicate themes to readers, be it themes of flag-waving school spirit or of frightened indecision. Journalism scholars and free expression advocates can do their part by studying and documenting the expressive value and journalistic achievements of yearbooks. 496 In time, yearbook journalism will come into its own in the popular consciousness as an important avenue for free expression.

The farther from core First Amendment speech a publication ranges, the harder the row to hoe when trying to demonstrate compatibility with free expression. But it should never get too hard. A student political magazine, political speech being at the veritable center of First Amendment protection,

494. Id.
495. See supra note 245.
496. See, e.g., SPLC, Endangered Species, supra note 245.
is indisputably compatible. A student literary magazine should fit comfortably in the First Amendment-protected ring of purely artistic expression. A sufficient body of case law exists to bring parody within the realm of valued free expression, though that determination will require a judge with a sense of humor. Whether student publications move onto the Internet should make no difference in determining their compatibility with free expression; web-based publications have similar textual content and analogous artistic features to their partners in print.

The Kincaid III court distinguished the expression-compatible forum of *The Thoroughbred* from nonpublic forums such as a federal workplace, a prison, and a military installation. Citing *Hazelwood*, the court indicated that the college corollary to those nonpublic forums would be "a closely-monitored classroom activity in which an instructor assigns student editors a grade, or in which a university official edits content." Such entanglement with university educators or administrators would probably run a student publication afloat of the practice inquiry as well as the nature inquiry. Nevertheless, students should decline academic credit for their work on student publications. Also, student editors should be wary of running college administrators' unpaid, prepared content, such as press releases or even "current events" calendars, without putting that content through a routine editorial process for outside submissions.

d. Context

The Kincaid III court derived the context inquiry from Supreme Court case law, in particular, *Forbes*: "[T]he public forum doctrine should not be extended in a mechanical way to the very different context of public television broadcasting." The special context present in Kincaid was the university


499. Id. at 352 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 250, 268-69 (1988)).

500. Id. at 349 (quoting Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 672-73 (1998)). In *Forbes* the Court applied the public forum doctrine to political debates carried by public broadcasters, but that application deviated from the norm that "public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine." *Forbes*, 523 U.S. at 675.
setting: "the quintessential 'marketplace of ideas.'"\textsuperscript{501} The court distinguished the scholastic setting of \textit{Hazelwood} in which students are not adults.\textsuperscript{502} Thus, the context inquiry should always weigh in students' favor at public colleges.

e. \textit{Hazelwood} Factors

Review of the \textit{Hazelwood} factors distilled in \textit{Lueth} reveals no additional concerns for college media other than those presented by the four \textit{Kincaid III} factors. To determine that a college newspaper was a public forum, the court in \textit{Lueth} relied on \textit{Hazelwood}, rather than on a traditional \textit{Perry} model, and gleaned six pertinent factors: (1) the newspaper's relationship to the curriculum per school policy; (2) description of the newspaper in the school's curriculum guide; (3) faculty involvement teaching newspaper for credit "during regular class hours;" (4) faculty involvement selecting editors and managing production; (5) prior review policy; and (6) school officials' adherence to their own policies.\textsuperscript{503}

The first two \textit{Lueth} factors are subsumed under the "policy," and partly under the "practice," inquiries of \textit{Kincaid III}. The sixth \textit{Lueth} factor concerns "practice" exclusively. The remaining factors under \textit{Lueth} highlight other "practice" concerns that also pertain under \textit{Kincaid III}. Classroom instruction should not become entangled with student publications; specifically, college students should not accept academic credit for work on student publications, and a student publication should not be the objective of classroom instruction.\textsuperscript{504} Faculty or administration involvement in the selection of

\textsuperscript{501} \textit{Kincaid III}, 236 F.3d at 352 (quoting Healy v. James, 408 U.S. 169, 180 (1972)).

\textsuperscript{502} \textit{Id.} (comparing \textit{Hazelwood}, 484 U.S. at 271 with Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981)).

\textsuperscript{503} \textit{Lueth} v. St. Clair County Community College, 732 F. Supp. 1410, 1415-16 (E.D. Mich. 1990); \textit{see also supra} Part III.

\textsuperscript{504} A mock-up publication or even a student publication of limited circulation may serve as the end product of a class, be it in journalism or, say, creative writing. Such an exercise can have worthwhile pedagogical objectives, but should only be employed when those objectives—such as exposing students to deadline pressure or the satisfaction of a published product—can be identified. Only when potential injury outweighs the pedagogical objectives should administrators intervene as censors. In any event, supervising faculty should be sensitive to the public forum implications of such an exercise, namely, that the publication is probably not a public forum. Student contributors deserve to be informed of the limitations on their rights when they participate in such a forum, to avoid painful disillusionment. Even more importantly, the audience deserves to be informed that the work is a product of classroom instruction, thus, essentially, a joint product of joint authorship, both student and school. A class publication should never be regarded as a substitute for public forum student publications.

While it seems simple to maintain a distinction between truly student publications and publications that result from classroom exercises, the distinction frequently dissolves when the classroom "publication" is a radio or television broadcast program. Whereas students can
4. Fighting Censorship Even in a Nonpublic Forum

As at the high school level, there remains the possibility that a court could rule a college publication a nonpublic forum; students may then still seek a determination that the censorship was constitutionally impermissible. Such a determination might rely on expanded state constitutional grounds, as did the intermediate appellate decision in Desiles v. Clearview Regional Board of Education. But such a ruling might just as well point to an utter lack of "legitimate pedagogical" justification, as the New Jersey Supreme Court did

publish a newspaper with a single computer and sell ads to pay a printer or a literary magazine with a typewriter and access to a photocopier, broadcasting requires unusual technological expertise and a hefty investment to lease, or buy and maintain equipment. Consequently, faculty and administrators might be reluctant to give students the extent of unsupervised access to equipment that would be necessary to demonstrate a public forum in practice. A public forum is certainly possible in broadcast programming, if supervising faculty or administrators can refrain from becoming involved in content determinations. But if broadcast programming is entangled with the broadcast curriculum, then the same disclaimers to student contributors and audience members—regarding dual authorship, or the potential for censorship—should be included.

505. Student publications boards typically act as publishers of student publications; as publishers, they may be charged with the responsibility for hiring and if necessary firing editors. There is no doubt that these boards can be dangerous vehicles for administrative control or student government control. However, it is possible to fashion a student-constitutional structure that strikes the delicate balance between journalistic independence and accountability, attaining the virtues of a board-publisher system without the dangers. For example, a board can consist of designated student representatives only, including publications editors themselves, but permit a faculty adviser and school administrators to sit as nonvoting observers. The board can be charged with annually appointing publications editors, but be restricted in its constitutional structure—which can be legally binding, see SPLC Law, supra note 10, at 67-69—as to what circumstances justify removing editors. In a well balanced system, the board can then serve as a pool of expertise, wisdom, and institutional memory on which students can rely for advice, or even moral support, and can also serve as a mediator allowing readers and even school officials to air gripes and constructively discuss editorial decisions.

506. See supra note 482. Like Thorobred yearbook adviser Cullen, The Erie Square Gazette in Lueth had a faculty adviser who did not impose her will in content decisions. See Lueth, 732 F. Supp. at 1414.

507. Besides the outright possibility of a Kincaid I or Kincaid II-style ruling in another jurisdiction, see the circumstances of student broadcasters as described supra, in note 504.

in its *Desiletts* decision.509

A "no legitimate pedagogical concerns" argument might succeed at the college level for the very reason that *Hazelwood* was an unwise decision to begin with: practical experience with editorial freedom and responsibility is an essential component of an education in journalism. Of course, the same argument pertains at the high-school level and failed to stop *Hazelwood*. But the argument might be stronger at the college level. Employers in journalism specifically look for experienced candidates, and the collegiate journalism academy emphasizes the importance of on-the-job training.510

Students might also beat censorship in a nonpublic forum on viewpoint-suppression grounds. Importantly, in extending *Hazelwood* to college before *Kincaid, Lueth* retained *Perry*’s viewpoint-suppression prohibition as the second prong of the nonpublic forum analysis, despite *Hazelwood*’s ambiguity on that point.511 Even *Kincaid II* drew a viewpoint-suppression prohibition from ISKCON, despite that decision’s heavy reliance on *Hazelwood*.512

If viewpoint suppression is to be prohibited even in nonpublic forum student expression, there is every reason to believe that the prohibition, unlike the reasonableness prong under *Hazelwood*, will have teeth. *Kincaid III* presented a toothy version of the prohibition, though the court arrived there via *Perry* and progeny, not *Hazelwood*, and addressed nonpublic forum analysis only in dicta. If the college campus is the quintessential marketplace of ideas, the viewpoint-suppression prohibition should apply with full force, in the name of academic freedom, even if content discrimination must be tolerated. But as the *Hazelwood* dissent recognized more than a decade ago, viewpoint discrimination disguised as content discrimination might trouble free-expression advocates.513

Betty Gibson smartly testified that she did not understand the theme of *The Thorobred* yearbook, "Destinations Unknown." Had she instead testified that she disliked the theme, essentially that she would have preferred a theme more reflective of idealistic predetermination than of ambivalent

509. Desiletts v. Clearview Reg’l Bd. of Educ., 647 A.2d 150 (N.J. 1994); see also supra Part II.F.


511. See supra Part II.F.

512. *Kincaid II*, 191 F.3d at 727 (6th Cir. 1999) (citations omitted); see also supra Part IV.D.2.


514. *Kincaid II*, 191 F.3d at 729 n.4.
existentialism,\textsuperscript{515} then her aim would have been facially viewpoint discriminatory and impermissible even in a nonpublic forum. Whether the KSU yearbook would have “tarnish[ed] rather than enhance[d]”\textsuperscript{516} KSU’s reputation, to use the \textit{Kincaid II} court’s words, because of objectively poor quality or because of a distasteful message is debatable, and Gibson’s testimony points as much to the latter as to the former.\textsuperscript{517} Fortunately, \textit{Kincaid III} provides a basis for college media advocates to refute administrators’ justifications for censorship when those justifications are masquerading in the Emperor’s new robes of viewpoint-neutral, qualitative assessment.

\textbf{C. Preserving College Media Freedom Despite Contrary Government Intent}

The four factors \textit{Kincaid III} employed to determine the forum status of \textit{The Thorobred}, or alternatively, the \textit{Hazelwood} factors the \textit{Euth} court employed to determine the forum status of \textit{The Erie Square Gazette} are not themselves determinative; rather, the factors are a proxy, or a tool, to help courts determine the government’s intent, which is controlling. Thus college media are left to face a troublesome question: What if the government clearly states its intent not to create a public forum?

Policy is only one factor in the \textit{Kincaid III} intent analysis. But while \textit{Kincaid III} looked to all of four factors—policy, practice, nature, and context—identifying no one as dispositive, Supreme Court language paints a more complicated picture. The Court has been careful to say that the government cannot create a public forum through inaction,\textsuperscript{518} that is, inadvertently. And the Court wrote in \textit{Cornelius}, “We will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity.”\textsuperscript{519}

\textsuperscript{515} The Gibson-Coffman theme dispute exemplifies intergenerational misunderstanding. The “Destinations Unknown” theme fits neatly with the character of so-called “Generation X.” Compare \textit{Neil Howe \& Bill Strauss, 13th Gen: Abort, Retry, Ignore, Fail?} 14-24 (1993) with \textit{Kincaid II}, 719 F.3d at 723 (quoting Coffman: “[The theme] was about... saying [‘]where are we going in our lives[?’]” (second alteration in original)). Ms. Gibson’s disapproval likewise fits neatly in the Strauss and Howe model under which the “misdirection” of “Xers” is both feared and loathed by older generations. See \textit{Howe \& Strauss, supra}, at 17-24. See generally \textit{William Strauss \& Neil Howe, Generations: The History of America’s Future} 1584-2069 (1991).

\textsuperscript{516} \textit{Kincaid II}, 191 F.3d at 729.

\textsuperscript{517} It is unfortunate that the District Court never reached Gibson’s more offensive and facially viewpoint-discriminatory admonition to \textit{The Thorobred News}: “More positive news is to be published.” Id. at 724 (quoting Gibson memorandum).


\textsuperscript{519} \textit{Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.}, 473 U.S. 788, 803 (1985)
That statement suggests that policy and nature can each be dispositive if the factor weighs unambiguously in favor of a nonpublic forum. While nature will always favor college media, policy might not. An explicit nonpublic forum policy would be unfavorably dispositive even when all other factors point the opposite way.

By that conclusion, whether a publication is a public forum or a nonpublic forum—in the parlance of the Kincaid III oral argument, a "student publication" or a "university publication"—can turn exclusively on which term the government uses. But that conclusion contravenes First Amendment principles; it invites the government to create the appearance of a public forum in all practical respects but reserve to itself, via written policy alone, the discretion to shatter that appearance and intervene as censor whenever convenience dictates. The First Amendment does not vest government with such discretion.

Imagine that KSU, in response to its loss in Kincaid III, were to redraft its student publication policy to make The Thorobred "a nonpublic forum, subject to editorial control by the KSU administration for any reason and at any time." Of course, students would not be defenseless. They would have at their disposal the same strategies as if they had lost a forum determination question, that is, that administrative intervention still must be reasonable or at least must be justified on pedagogical grounds, and it must be viewpoint neutral.

Imagine further that twenty years slip by with business as usual at The Thorobred. Administrators, including the publications adviser, never use their power to intervene in content matters. A conscientious and pro-student publications adviser even suggests on more than one occasion that intervention would be improper and exceed her authority, and a new vice-president for student affairs agrees. But then, twenty years later, a new university president moves to spike an editorial that criticizes her. Is The Thorobred not a public forum simply because of a disused, decades-old, and all but forgotten policy? The students should be able to argue that after twenty years "action speaks louder than words." 521

Under those circumstances, or at least circumstances where administrators had never exercised their discretionary editorial control, students would prevail on three out of four of the Kincaid III criteria. Practice, nature, and context would all dictate in favor of finding a public forum, even though policy would read expressly to the contrary. A court would then have to decide whether a public forum determination can indeed turn exclusively on the term the government chooses.

This situation—a college deliberately reserving to itself, and saving for a rainy day, editorial control over a student publication—is not at all far-fetched. There are probably student publications operating today that are

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520. See supra note 411 and accompanying text.
521. See Kincaid III, 236 F.3d at 351.
unaware of latent editorial privileges in their colleges’ policies. To preserve student free expression and the integrity of the university as the quintessential marketplace of ideas, the answer to the legal quandary should be that three Kincaid factors can outweigh even an express declaration of policy.

That a court might not so hold poses sufficient risk to suggest that the limited public forum/nonpublic forum dichotomy does not offer the best analytical framework for college media and certainly does not offer a framework conducive to post-secondary educational objectives. One way around the dichotomy is to reach for the third forum classification: the traditional public forum. Another way around the dichotomy is to set it aside entirely and adopt a different framework.

At least student newspapers might find relief if they strive for classification as traditional public forums. In *Perry* the Court described "streets and parks" as traditional public forums, because they “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” 522 But *Perry* placed streets and parks “[a]t one end of the spectrum.” 523 Maybe they are an extreme example, and “time out of mind” is not a strict requirement. 524 *Perry* also described traditional public forums as “places which by long tradition or by government fiat have been devoted to assembly and debate,” 525 and *Cornelius* quoted that definition. 526 *ISKCON* described the traditional public forum as “property that has as 'a principal purpose ... the free exchange of ideas.'” 527 In *ISKCON* the Court rejected airports as traditional public forums in part because of their recent “appearance,” and in part because their historical purpose has not been (and is not) “speech activity.” 528 Granted, college student newspapers also post-date “time out of mind.” 529 However, *newspapers generally* pre-date the United States Constitution. And *newspapers generally*, as well as student newspapers specifically, have always had the free exchange of ideas as their principal purpose. The *ISKCON* Court

523. *Id.*
528. *Id.* at 680.
529. *See supra* note 2.
rejected the Krishnas’ attempt to broaden the level of abstraction in that case from airports to “transportation nodes” generally.\textsuperscript{530} But if the question is one of abstraction, the Court might rule differently on different facts. Unlike bus and rail terminals, expression is at the heart of what a newspaper is; traditional public forum attributes are inherent in newspapers. The government’s creation of a newspaper might be analogous to creation of a new public park or the construction of a new public street.

Notwithstanding possible classification of student newspapers as traditional public forums, student publications on the whole likely will continue to struggle with the limited public forum/nonpublic forum dichotomy. Public forum analysis is arguably a bad fit to student expression, and a different approach might be needed. College media advocates should explore constitutional law to develop viable frameworks, entirely besides public forum analysis, to solve problems of student expression on public campuses. The Kincaid III court “note[d] that a college yearbook with features akin to a university student newspaper might be analyzed under a framework other than the forum framework.”\textsuperscript{531} The Supreme Court might one day be receptive to a different approach, indicating as it did in Forbes that “the public forum doctrine should not be extended in a mechanical way to [a] very different context.”\textsuperscript{532}

VI. CONCLUSION

In early November 1999—after Kincaid II and before Kincaid III—Kentucky State University suspended thirteen students from its sixteen-member women’s basketball team.\textsuperscript{533} The athletics director took the action in

\textsuperscript{530} ISKCON, 505 U.S. at 681-82. The Court pointed to historically private ownership to distinguish airports from streets and parks and to special security needs to distinguish airports from other transportation nodes. Id. The former concern would distinguish newspapers generally from streets and parks, but no distinction besides ownership readily distinguishes the college newspaper from newspapers generally. Unlike newspapers, transportation is not necessarily, the Court observed, “compatible with various kinds of expressive activity.” Id. at 681. That observation as to the nature of the forum smacks of the nature inquiry to distinguish limited public from nonpublic forums, hinting at the fragility of public forum analysis as a viable framework.

\textsuperscript{531} Kincaid III, 236 F.3d at 348 n.6.

\textsuperscript{532} Arkansas Educ. Television Comm’n v. Forbes, 523 U.S. 666, 672-73 (1998); see supra note 500 and accompanying text. Of course, college media advocates must be on guard against an alternative framework, such as the government-as-speaker doctrine, that would work against free expression. See supra note 98 and accompanying text.

response to accusations linking the players to "the theft of thousands of dollars of merchandise from a local sporting-goods store."\textsuperscript{534} Officials were investigating the possibility that a KSU student who worked at the store and was not a member of the team allowed players to steal from the store.\textsuperscript{535}

These suspensions, and the accusations if they prove true, tarnish the reputation of KSU. Surely, KSU officials did not want to see this story widely reported. Its dissemination to some degree could not be helped, as sports fans were bound to notice when the basketball squad failed to take the court. But KSU had a tremendous incentive to keep as much control of the story as possible. Parents of prospective KSU students, particularly prospective KSU athletes, might be turned off by the basketball players' reportedly poor judgment. Contributing alumni might be disgusted by a perceived lapse in student conduct standards. To mitigate the damage, the university would be wise to orchestrate who says what to whom and when; it is not a question of control so much as intelligent public relations.

The \textit{Lexington Herald-Leader} and The \textit{State Journal} (Frankfort, Ky.) reported the story.\textsuperscript{536} Probably \textit{The Thoroughbred News} picked it up too. But what if \textit{The Thoroughbred News} had been first? What if basketball season were over and no one off campus knew what was going on? What if a capital campaign were underway and the university needed only one more weekend to secure a major donation for a new sports complex? What would the university have done when it found journalism education and student free expression pitted against an urgent public relations plea for just a few more days?

Were \textit{Kincaid I} and \textit{II} the law of the Sixth Circuit, Betty Gibson would have been within her legal rights to order the publications adviser to censor the story. The adviser, fearful of reprisal—constitutionally permissible under \textit{Hazelwood} and \textit{Kincaid II}—would have acceded. The university would have gotten its alumni contribution. But students, perhaps including one student with exculpatory information that would have aided in the investigation, would not have gotten the story for another week. Later, eager to forget the whole affair, university officials could have ordered the yearbook editors not to mention it. And of course that literary magazine piece, "Ode to Injustice," by the English-major basketball captain? That would have to have been spiked. A small price for a greater good.

Suppose one day a graduate of that hypothetical KSU journalism program finds herself with exclusive access to a law enforcement operation, say a federal government siege of a geographically remote militia enclave. Purportedly to further law enforcement interests, but with dubious

\textsuperscript{534} Id.
\textsuperscript{535} Id.
\textsuperscript{536} See id.
explanation, officials offer her continued exclusive access in exchange for her sitting on the story for just one night. She balances the government's offer and her career-making exclusive against the public's right to know. She weighs her experience as a student journalist at KSU against what she learned in the classroom about journalistic responsibility. A small price for a greater good. She takes the deal.

In reality, Kincaid III is the law of the land, the basketball story cannot be lawfully suppressed, and our heroine might take the deal anyway. No one can say for certain that extension of Hazelwood to college journalism would diminish students' appetite for the truth, depress the vigor of campus media, or least of all, worsen the quality of professional journalism. But looking to Hazelwood and its effects in secondary schools, it is certain that extending the decision would stack the deck against college journalism. Hazelwood has been used, perhaps misused, to permit widespread censorship of the high school media, erosion of minors' constitutional freedoms, and intrusion into traditionally sacrosanct academic freedoms—all with little regard for truly pedagogical concerns. If a court were to extend Hazelwood, disregarding the distinctions between secondary schools and public colleges, there would be every reason to expect the Hazelwood high school horribles to replicate themselves in college.

Despite the favorable outcome in Kincaid III, its predecessor decisions remind us that college media freedom is only one Supreme Court footnote away from demotion to high school. The temptation of power and competitive advantage make it unlikely that college administrators will always exercise wisdom and self-restraint. College students and college media advocates can and should act now, before a conflict arises, to avoid any extension of the Hazelwood doctrine. The best bet for students and their allies is to ensure (1) that college policies specifically designate publications as "public forums" and prohibit adviser or administrator intervention in content decisions and (2) that practice reflects those policies. Statutory solutions and underground publishing offer alternative solutions to protect college expression, but they are not as promising and beneficial, respectively, as a concerted effort to preserve college media as public forums.

In sum, the best defense of the college press is a good offense. Government officials in public colleges and universities invariably will try to stretch their power to restrain student expression: to water down the news or to whitewash memories of real life ups and downs. Only preparation and vigilance can ensure that truth always sees light and that "Destinations Unknown" are never forgotten.