CENSORSHIP 101: ANTI-*HAZELWOOD* LAWS AND THE PRESERVATION OF FREE SPEECH AT COLLEGES AND UNIVERSITIES

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

—Justice Louis Brandeis[1]

I. INTRODUCTION

The pierced nipple on the magazine cover started it all.[2] It seems safe to say that when Arizona State University (ASU) President Michael Crow saw an exposed breast on the front of the *State Press*' weekly magazine edition in the fall of 2004, he was less than ecstatic.[3] For one thing, a prominent ASU donor had called to complain to Crow about the image, never a comforting prospect for a university president.[4] For another, Crow had made it a priority to clean up his university's historical reputation as a party school, and a photograph like that in a student publication, even when it accompanied a story about "extreme body piercing," did nothing to help the cause.[5] Rather than simply complaining to the *State Press*' student editors or writing a letter to the editor, however, Crow responded to the picture with a threat to slash ASU's funding of the newspaper.[6] After months of wrangling between administrators and the paper, the dispute made it all the way to the upper echelons of Arizona government, where a largely symbolic budget provision calling for a ban on state funding of university newspapers was struck down when Governor Janet Napolitano vetoed the budget bill in March 2005 for stated reasons unrelated to the proposed ban.[7]

In the end, nothing came of ASU's threatened funding cut, but the showdown offered one of the latest examples of the growing number of instances in which university administrators have considered using the

1. Olmstead v. United States, 277 U.S. 438, 479 (1927) (Brandeis, J., dissenting).
2. Student Press Law Center, *University President Threatens to Cut Newspaper Funding Over Magazine Cover*, NEWS FLASH, Nov. 30, 2004, http://www.splc.org/newsflash_archives.asp?id=918&year=2004.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. Kate Campbell, *Ariz. Budget that Proposed Eliminating Funding for Student Publications Vetoed*, NEWS FLASH, Apr. 5, 2005, http://www.splc.org/newsflash_archives.asp?id=998&year=2005.

power of the purse strings to gain greater control of student publications at their institutions.[8] Furthermore, the prospect that such threats to college students' free speech rights could become widespread and commonplace is far from a theoretical one, which became apparent in early 2006 when the United States Supreme Court opted not to hear an appeal in *Hosty v. Carter*.[9] That denial of certiorari let stand the opinion of the United States Court of Appeals for the Seventh Circuit that the rule the Supreme Court announced in *Hazelwood School District v. Kuhlmeier*, which allowed high school officials to regulate "the style and content of student speech in school-sponsored expressive activities" to the extent necessary to advance "legitimate pedagogical concerns,"[10] also may apply at the college and university level.[11] That standard, though well-intentioned, opened the door to a new wave of censorship by secondary school administrators,[12] and the same specter easily could arise for college and university students nationwide if the Court one day applies the *Hazelwood* standard to those institutions.

This Comment argues that the possibility of postsecondary administrators abusing *Hazelwood* powers to place undue restrictions on college students' free expression is sufficiently worrisome that states should act to provide greater protection to their students' free speech rights, either via so-called anti-*Hazelwood* statutes—like the ones that a handful of states have approved[13]—or via public modification or judicial interpretation of state constitutions' free speech provisions. Part II of this Comment looks at the precedential foundations of *Hazelwood*, while Part III addresses the decision itself and its impact on high school press freedoms. Part IV then examines how the United States circuit courts have dealt, often contradictorily, with the unresolved question of whether *Hazelwood* applies at the postsecondary level and surveys some of the detrimental consequences for students, instructors, and society that could result from *Hazelwood*'s application at the postsecondary level. Next, Part V examines why anti-*Hazelwood* statutes are the most effective and sensible way to stave off those negative occurrences and suggests a model law for the college environment. Finally, Part VI concludes with a look at some other steps that students, media members, and other concerned citizens should take now in an effort to vouchsafe free speech rights on college and university campuses.

8. *See infra* Part IV.B.

9. 412 F.3d 731 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1330 (2006); *see also infra* text accompanying notes 87-104.

10. 484 U.S. 260, 273 (1988).

11. *Hosty*, 412 F.3d at 735.

12. *See infra* Part III.C.

13. *See, e.g.*, COLO. REV. STAT. § 22-1-120 (West, Westlaw through the end of the 2006 First Extraordinary Session of the Sixty-Fifth General Assembly); IOWA CODE § 280.22 (1996); KAN. STAT. ANN. § 72-1506 (2002).

II. THE ROAD TO *HAZELWOOD*

The precedential backing for *Hazelwood*'s grant of authority to high school officials to regulate the content of school-sponsored student expression rests primarily in two cases: *Tinker v. Des Moines Independent Community School District*[14] and *Bethel School District No. 403 v. Fraser*.[15] The free speech forum analysis so central to *Hazelwood*, meanwhile, received its best-known Court recognition in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.[16] Each of these cases is examined in turn.

A. School Regulation of Student Speech: Tinker *and* Fraser *Lay the Foundation*

Years before *Hazelwood*, the Supreme Court already had sought to clarify what kinds of student speech deserved protection and under what conditions speech that otherwise would be protected might, instead, be limited. In the 1969 case of *Tinker v. Des Moines Independent Community School District*, the Warren Court set the bar high for secondary school administrators who wished to regulate students' political speech.[17] The case arose after three Iowa teenagers were suspended from school after they intentionally violated school policy by wearing black armbands to protest the Vietnam War.[18] The students' parents then sued on their behalf, alleging a civil rights violation under 42 U.S.C. § 1983 (2000).[19] In a seven-to-two decision, the Court observed that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[20] and found in the students' favor.[21] After emphasizing that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate,"[22] the Court held that administrators may limit students' expressive conduct only if it "'materially and substantially interfer[es] with the requirements of appropriate discipline in the operation of the school.'"[23]

The *Tinker* test controlled in high school free speech cases for seventeen years, until the Burger Court's 1986 decision in *Fraser* shifted the balance of power back toward administrators. In *Fraser*, a high school student was suspended for delivering a student government nomination speech that "referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor" during a 600-student assembly attended by students as young

14. 393 U.S. 503 (1969).
15. 478 U.S. 675 (1986).
16. 460 U.S. 37 (1983).
17. *See Tinker*, 393 U.S. at 509.
18. *Id.* at 504.
19. *Id.*
20. *Id.* at 506.
21. *Id.* at 513-14.
22. *Id.* at 511.
23. *Id.* at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

as fourteen.[24] The student challenged his punishment and his father sued on his behalf, claiming, as the petitioners in *Tinker* had, a civil rights violation under 42 U.S.C. § 1983.[25] The district court ruled in the student's favor, and the circuit court of appeals found that the student's speech was "indistinguishable from the protest armband in *Tinker*" and that the student's suspension was thus impermissible.[26] The Supreme Court, however, reversed in a seven-to-two decision, finding a "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech in this case."[27] Working off the premise that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,"[28] the Court held that administrators have the right to reject "vulgar speech and lewd conduct [that] is wholly inconsistent with the 'fundamental values' of public school education."[29]

B. Perry *and the Elaboration of the Public Forum Doctrine*

In addition to the holdings of the student free speech rights cases, the public forum doctrine described in *Perry Education Ass'n v. Perry Local Educators' Ass'n*[30] was crucial to the framework that the Court would adopt later in *Hazelwood*.[31] Drawing on a long line of precedents, the *Perry* Court recognized three basic classes of speech forums on public property, each requiring varying degrees of governmental interest to justify speech restrictions: traditional public forums, limited public forums, and non-public forums.[32]

Speakers in traditional public forums, such as parks and streets, are afforded the most protection; to limit their speech content, the government must demonstrate "a compelling state interest" and draft a regulation "narrowly drawn to achieve that end."[33] Citizens receive similar protection in limited public forums like government meetings or theaters; though the government is not obligated to create such speaking opportunities or to keep them open indefinitely, "it is bound by the same standards as apply in a traditional public forum" once it does.[34] On the opposite end of the spectrum is the non-public forum, where the government is much freer to limit the expressive means for which the property can be used, subject only to the requirements that "the regulation on speech is reasonable and not an effort to

24. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677-78 (1986).
25. *Id.* at 678-79.
26. *Id.* at 679.
27. *Id.* at 676, 680.
28. *Id.* at 682 (citing New Jersey v. T.L.O., 469 U.S. 325, 340-42 (1985)).
29. *Id.* at 685-86.
30. 460 U.S. 37, 38-39, 45-47 (1983).
31. *See infra* Part III.B (discussing the framework adopted by the *Hazelwood* Court).
32. *Perry*, 460 U.S. at 45-47.
33. *Id.* at 45.
34. *Id.* at 45-46.

suppress expression merely because public officials oppose the speaker's view."[35]

Tinker, *Fraser*, and *Perry* left the Court poised to address the issue of how student journalism fit into the free speech framework it had established. What kind of forum was a student publication? What level of protection, if any, did student media's content merit? And how clear or murky of a test would result from the Court's efforts to resolve these issues? Just a couple of years after *Fraser*, the nation got its answers to these questions.

III. *HAZELWOOD* AND ITS AFTERMATH

A. A Four-Page Newspaper and a Five-Year Court Battle: The Roots of Hazelwood

A few months after the Court weighed in with its forum analysis in *Perry*, the journalism students at Hazelwood East High School in Missouri ran into a huge problem while on deadline for their class-produced newspaper, *Spectrum*.[36] Three days out from the paper's scheduled May 13 publication date, the school's principal objected to a pair of stories on pregnancy and divorce, respectively, voicing concerns that the girls quoted anonymously in the pregnancy article were still too readily identifiable and that the father of a girl quoted by name in the divorce article did not receive a chance to comment on her charges that he was rarely at home and frequently argued with her mother when he was.[37] The principal also said he worried that students in the lower grades were too young to read about sex and birth control.[38] Because both the publication deadline and the end of the school year were imminent, the principal ordered the newspaper adviser to remove the two pages that contained the stories in question—even though the pages contained several other stories that he found acceptable—and to send the remaining four pages to the printer.[39]

Upon learning of the decision, three *Spectrum* staff members sued in the United States District Court for the Eastern District of Missouri, claiming a violation of their First Amendment rights.[40] The judge, in rejecting their claim, ruled that school-sponsored newspapers like *Spectrum* were subject to "'substantial and reasonable'"[41] regulation because they were "an integral part of the school's educational function."[42] From a curricular standpoint,

35. *Id.* at 46.
36. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 263 (1988).
37. *Id.* As the Court noted, the principal did not know, at the time he exercised prior review on the paper, that the girl's name already had been removed from the divorce article. *Id.*
38. *Id.*
39. *Id.* at 263-64 & n.1.
40. *Id.* at 264.
41. Kuhlmeier v. Hazelwood Sch. Dist., 607 F. Supp. 1450, 1463 (E.D. Mo. 1985) (quoting Frasca v. Andrews, 463 F. Supp. 1043, 1052 (E.D.N.Y. 1979)), *rev'd*, 795 F.2d 1368 (8th Cir. 1986), *rev'd*, 484 U.S. 260 (1988).
42. *Id.*

the district court raised concerns about whether the school's publication of the divorce story would have encouraged students to violate journalistic standards by failing to contact a person singled out for criticism in the article.[43] Putting on its school administrator's hat, the court then found that the principal's concerns about the articles were "legitimate and reasonable" and that his decision to withhold one-third of the newspaper's pages was permissible given his "reasonable belief that he had to make an immediate decision and that there was no time to make modifications to the articles in question."[44]

The United States Court of Appeals for the Eighth Circuit, applying both the *Perry* forum analysis and the *Tinker* test, reversed.[45] As a threshold issue, the court reasoned that *Spectrum*'s status as a curricular newspaper did not preclude it from serving as a traditional public forum because the paper "was intended to be and operated as a conduit for student viewpoint."[46] Highly persuasive to the court was an annually published policy statement in which the newspaper asserted that the views expressed in its pages were those of students, not school officials, and in which it claimed for itself "all rights implied by the First Amendment" and secured by the Supreme Court's decision in *Tinker*.[47]

After making its forum determination, the court of appeals applied the *Tinker* test and held that school administrators could restrain publication of material in public forums only in two instances, neither of which it found in the *Spectrum* dispute.[48] First, school officials could censor content to the extent "'necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others.'"[49] Second, administrators could restrain publication of any content that could open their institution to tort liability.[50] The court rejected the first potential grounds for prior restraint, pointing to a dearth of evidence that "the principal could have reasonably forecast that the censored articles or any materials in the censored articles would have materially disrupted classwork or given rise to substantial disorder in the school."[51] The court then found that the objectionable stories would not have placed the school in tort danger because the only possible suit it could have faced was for invasion of privacy, and the suit would have failed because all potential plaintiffs either had consented to be interviewed or were not named in the stories.[52] The circuit court dismissed

43. *Id.* at 1466-67.
44. *Id.* at 1466.
45. Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1370 (8th Cir. 1986), *rev'd*, 484 U.S. 260 (1988).
46. *Id.* at 1372.
47. *Id.* at 1372 n.3.
48. *Id.* at 1374-76.
49. *Id.* at 1374 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511, 513 (1969)).
50. *Id.* at 1376.
51. *Id.* at 1375.
52. *Id.* at 1376.

the district court's conclusion that the principal was unable to push back the publication date, finding that his actions were for the sake of "administrative convenience,"[53] and rejected the contention that parental divorce and teenage pregnancy were "inappropriate" topics for a high school paper, noting that a growing number of students were encountering one or both.[54]

After three years, the *Hazelwood* litigation appeared to have left secondary students with even stronger guarantees that the First Amendment protected their expression at school.[55] But shortly thereafter, the Supreme Court granted certiorari and handed down a decision that placed further constraints on student speech and effectively slammed the door in the faces of student journalists eager to enter a world of greater press freedoms.[56]

B. 'A Civics Lesson': Hazelwood *and the New Rules for Regulating Student Speech*

In *Hazelwood*, the Court gave secondary school administrators "greater control" over certain forms of student speech than they had enjoyed under the *Tinker* standard.[57] The 1988 decision distinguished between "personal expression that happens to occur on the school premises," to which the *Tinker* test still applied, and student expression that occurs in "school-sponsored . . . expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school," such as publications or plays produced as part of a school's curriculum.[58] To place content limitations on the latter kind of speech, the Court held, administrators merely have to demonstrate that their actions "are reasonably related to legitimate pedagogical concerns."[59] The Court reasoned that the standard would leave school officials freer "to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics"[60] and that the new test would advance its belief that "[i]t is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d]' as to require judicial intervention to protect students' constitutional rights."[61]

The *Hazelwood* Court also applied the public forum analysis to the area of student speech and found that a school is presumed to have surrendered content-based control of a school-sponsored expressive outlet only if the

53. *Id.* at 1375-76.
54. *Id.*
55. *See id.* at 1374-76.
56. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).
57. *See id.* at 272-76.
58. *Id.* at 271.
59. *Id.* at 273.
60. *Id.* at 272.
61. *Id.* at 273 (citation omitted) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

evidence reveals "the 'clear intent to create a public forum.'"[62] The Court then examined six factors to determine whether Hazelwood officials expressed such an intent with regard to their student newspaper: (1) the fact that the paper's production was part of a classroom curriculum, (2) the evidence that the school did not open the paper to use by the student body or community at large, (3) the fact that students got a grade for their work, (4) the fact that the paper's adviser had final control over most steps in *Spectrum*'s publication process, (5) the school's history of allowing the principal to examine the paper before publication, and (6) the school district's written policy that "'[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism.'"[63] On balance, the Court decided that these factual findings indicated that Hazelwood officials had not established a policy or tradition of treating the newspaper as a public forum and that *Spectrum* therefore was a non-public forum subject to any reasonable regulation[64] to promote such ends as "assur[ing] that participants learn whatever lessons the activity is designed to teach" and preventing speech that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[65] The Court then reversed the circuit court's decision, finding that the principal's actions were reasonable due to the short amount of time before deadline, his worry that the pregnancy article was unsuitable for fourteen-year-olds, and his stated fear that the divorce article violated the tenets of fair reportage.[66]

In a blistering dissent, Justice Brennan cautioned that the *Hazelwood* standard could leave student press freedom open to inappropriate attacks.[67] The dissent, joined by Justices Blackmun and Marshall, blasted the majority decision for departing from the *Tinker* test in the context of school-sponsored student speech, asserting that the distinction between such expression and speech that incidentally occurs on campus had no precedential foundation.[68] The dissent also rejected each of the rationales that the Court used to justify the laxer *Hazelwood* standard—"the public educator's prerogative to control curriculum; the pedagogical interest in shielding the high school audience from objectionable viewpoints and sensitive topics; and the school's need to dissociate itself from student expression"—by arguing that "*Tinker* fully addresses the first concern; the second is illegitimate; and the third is readily achievable through less oppressive means."[69] As to the third point, the dissent argued that the school could have detached itself from

62. *Id.* at 270 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)).
63. *Id.* at 268-70 (quoting HAZELWOOD SCHOOL BOARD POLICY 348.51).
64. *Id.* at 270.
65. *Id.* at 271.
66. *Id.* at 274-76.
67. *See id.* at 278 (Brennan, J., dissenting).
68. *See id.* at 281-82.
69. *Id.* at 282-83.

controversial views via a public response or a regularly published disclaimer like the one *Spectrum* published each school year.[70] Justice Brennan warned that the majority opinion "invites manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination and chills student speech to which school officials might not object."[71] The dissent then concluded with a caustic condemnation of the decision's message to high school journalists: "The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today."[72]

C. Unintended Fallout: The Growth of Censorship After Hazelwood

Though much of the evidence is anecdotal, it appears that Justice Brennan's warning that the *Hazelwood* standard would increase the incidence of high school censorship was on the mark. The Student Press Law Center (SPLC), a nonprofit advisory group for members of the high school and college media, reported—through the end of 2003—a 331% increase in calls for legal help since the Court handed down *Hazelwood* in 1988.[73] That substantial growth is attributable in no small part to the *Hazelwood* standard's vagueness, which leaves plenty of loopholes for officials to censor student expression. Some principals have adopted an extremely broad view of their *Hazelwood* powers, leading them to censor speech that places some aspect of the school in a negative light.[74] As the SPLC has argued, "many administrators have apparently interpreted the decision as providing them with an unlimited license to censor anything they choose."[75]

Post-*Hazelwood* tales of high school officials engaging in censorship abound. An Indiana principal censored an accurate story about a girls' tennis coach who stole $1,000 that players had paid for court time.[76] A New York administrator banned a true report that his school of 3,600 students contained only two functional restrooms.[77] A Florida principal fired the high school's yearbook editor after she opposed his decision not to run a senior picture of a lesbian student who was wearing a tuxedo.[78] In Tennessee, an administrator confiscated every copy of a newspaper that contained stories about birth control and tattoos.[79] These instances of censorship are but a small sample of the hundreds that the SPLC has documented.[80]

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70. *Id.* at 289.
71. *Id.* at 287-88.
72. *Id.* at 291.
73. Brief of Student Press Law Center et al. as Amici Curiae Supporting Petitioners, Hosty v. Carter, 126 S. Ct. 1330 (2006) (No. 05-337), 2005 WL 2736314, at *14 [hereinafter SPLC Brief].
74. *Id.* at *14-*15.
75. *Id.* at *14.
76. *Id.*
77. *Id.*
78. Clay Gaynor, *Yearbook Portrait Policy Changed, Principal Still Has Final Say*, NEWS FLASH, Sept. 29, 2005, http://www.splc.org/newsflash_archives.asp?id=1082&year=2005.
79. Clay Gaynor, *Principal Censors Newspaper Over Articles on Birth Control, Tattoos*, NEWS

Growing concerns that *Hazelwood* left students' press freedoms too vulnerable led a handful of states—Arkansas, California, Colorado, Iowa, Kansas, and Massachusetts—to pass so-called anti-*Hazelwood* statutes, affording students greater free speech protections under their state laws than they received under *Hazelwood*.[81] These laws by no means have made student press freedom disputes a thing of the past in those states—last year, for example, an Arkansas principal pointed to a long-standing school district policy in an effort to introduce a system of pre-approval of the student newspaper[82]—but recent research nonetheless has found that "prior review is less likely to occur with a statute."[83] Despite these findings, few of the more than two dozen state legislatures that have considered anti-*Hazelwood* laws have adopted one,[84] and no state has enacted such a statute since 1995.[85] Seventeen years after its appearance on the legal landscape, *Hazelwood* appears to have fallen off many lawmakers' radar screens.

IV. NEW URGENCY: FALLOUT FROM *HAZELWOOD*'S POTENTIAL APPLICATION TO UNIVERSITIES

A. Going to College: How Does Hazelwood *Apply in the University Context?*

Hazelwood's fifteen minutes of fame at the high school level may have come and gone, but that does not mean it plans to leave the spotlight for good. A single sentence in a footnote in the 1988 decision left open the question of whether the case's standards for censorship of school-sponsored expressive activities applied at the college and university level,[86] and that

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FLASH, Nov. 29, 2005, http://www.splc.org/newsflash_archives.asp?id=1136&year=2005.

80. SPLC Brief, *supra* note 73, at *15 n.13.

81. *See* ARK. CODE ANN. §§ 6-18-1201 to -1204 (1999); CAL. EDUC. CODE §§ 48907, 48950 (West 2006); *id*. § 94367 (West 2002); Act of Aug. 28, 2006, ch. 158, 2006 Cal. Legis. Serv. (West, Westlaw through 2005-2006 session) (prohibiting administrators within the University of California system from disciplining students solely on the basis of their speech) (to be codified at CAL. EDUC. CODE § 66301); COLO. REV. STAT. § 22-1-120 (West, Westlaw through the end of the 2006 First Extraordinary Session of the Sixty-Fifth General Assembly); IOWA CODE § 280.22 (1996); KAN. STAT. ANN. §§ 72-1504 to -1506 (2002); MASS. GEN. LAWS ANN. ch. 71, § 82 (West 1996). These statutes will be examined in more detail in Part V.B.

82. Britt Hulit, *H.S. Student Editors Say Principal's Policy Violates Arkansas Anti*-Hazelwood *Law*, NEWS FLASH, Mar. 2, 2005, http://www.splc.org/newsflash_archives.asp?id=969&year=2005.

83. Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the "College* Hazelwood*" Case*, 68 TENN. L. REV. 481, 501 n.161 (2001) (citing Mark Paxton & Tom Dickson, *State Free Expression Laws and Scholastic Press Censorship*, JOURNALISM & MASS COMM. EDUCATOR, Summer 2000, at 50, 57-58).

84. *See id.* at 502.

85. *See* A.J. Bauer, *Rays of Hope Amid Dying Legislation*, REPORT, Fall 2006, http://www.splc.org/report_detail.asp?id=1285&edition=40.

86. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 n.7 (1988) ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.").

debate recently re-emerged thanks to the Supreme Court's denial of certiorari in *Hosty v. Carter*.[87]

Three years after *Hazelwood*, United States circuit courts already were split on the question of whether the test applied generally in the postsecondary environment.[88] Most circuit courts that have applied *Hazelwood* to college campuses, however, have been careful to do so on a limited basis, typically in the context of classroom or curricular speech.[89] Federal courts have been far more consistent in rejecting claims that administrators may dictate what college students can or cannot say in extracurricular publications; indeed, before mid-2005, no circuit court had held directly that the *Hazelwood* framework applied to student publications, regardless of whether they received school funding.[90] Until that time, the closest that a circuit court had come to such a holding was a Sixth Circuit panel decision that the en banc court later reversed.[91]

Then came the Seventh Circuit's 2005 decision in *Hosty v. Carter*.[92] The case arose from the temporary shutdown of the *Innovator* at Governors State University in Illinois, an extracurricular newspaper that relied on school-provided student activity fees for funding.[93] In fall 2000, the paper ran several articles critical of a university dean and refused to publish administrators' responses or to retract what school officials claimed to be false statements.[94] After much wrangling between the newspaper staff and administrators, the school's dean of students, Patricia Carter, told the paper's printer that no further issues were to be published without her prior review and approval.[95] The paper's staff refused to agree to prior restraint and sued, claiming a violation of their First Amendment rights.[96] After a federal district court and a Seventh Circuit panel declined to dismiss the students'

87. 126 S. Ct. 1330 (2006) (mem.). *See supra* text accompanying notes 9-12.

88. *Compare* Student Gov't Ass'n v. Bd. of Trs. of the Univ. of Mass., 868 F.2d 473, 480 n.6 (1st Cir. 1989) (no) *with* Bishop v. Aronov, 926 F.2d 1066, 1071 (11th Cir. 1991) (yes).

89. *See, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1289 (10th Cir. 2004) (relying in part on *Hazelwood* to allow curriculum that required theater student to say lines that she believed to be inconsistent with her religion); Brown v. Li, 308 F.3d 939, 949 (9th Cir. 2002) (applying *Hazelwood* to "university's assessment of a student's academic work"); *Bishop*, 926 F.2d at 1071 (applying *Hazelwood* to permit university to order professor to keep his personal religious beliefs out of his physiology instruction).

90. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834-35 (1995) (holding public university not allowed to withhold funding from Christian-themed student publication based on content); Sinn v. Daily Nebraskan, 829 F.2d 662, 665 (8th Cir. 1987) (finding editorially independent student newspaper not a "state actor" just because it is overseen by a university-created committee); Schiff v. Williams, 519 F.2d 257, 260-61 (5th Cir. 1975) (holding public university president not allowed to fire student editors due to concerns over non-disruptive content).

91. Kincaid v. Gibson, 191 F.3d 719 (6th Cir. 1999), *vacated*, 197 F.3d 828 (6th Cir. 1999), *rev'd en banc*, 236 F.3d 342 (6th Cir. 2001). In *Kincaid*, administrators at Kentucky State University (KSU) confiscated all copies of the student yearbook due to objections over its cover and content. Kincaid v. Gibson, 236 F.3d 342, 345 (6th Cir. 2001). Sitting en banc, the Sixth Circuit ruled that the yearbook was a limited public forum and that KSU officials' restrictions were unreasonably overbroad. *Id.* at 354.

92. 412 F.3d 731 (7th Cir. 2005).

93. *Id.* at 733.

94. *Id.* at 732-33.

95. *Id.* at 733.

96. *Id.*

claim against Carter,[97] an en banc Seventh Circuit reversed and found that she had qualified immunity against the suit.[98]

More significantly for the realm of American collegiate press freedom, the decision marked the first time that an en banc circuit court ever explicitly applied the *Hazelwood* framework to an extracurricular student publication.[99] The court rejected the idea that college students' status as adults frees them from *Hazelwood*'s grasp, noting that though age is a relevant factor as to students' maturity, it is irrelevant to other concerns expressed in *Hazelwood*, such as "the desire to ensure 'high standards for the student speech that is disseminated under [the school's] auspices'" and "the goal of dissociating the school from 'any position other than neutrality on matters of political controversy.'"[100] The court also refused to draw a bright-line distinction between curricular and extracurricular student speech, though it pointed to evidence that the *Innovator* reasonably could be considered a limited public forum under *Hazelwood*.[101] In a vigorous dissent, Circuit Judge Evans argued that the majority underestimated the significance that *Hazelwood* attached to students' age and that the secondary and postsecondary environments are not analogous.[102] The dissent also observed that no other post-*Hazelwood* case "would suggest to a reasonable person . . . that she could prohibit publication simply because she did not like the articles [the paper] was publishing"[103] and warned that *Hosty* "now gives the green light to school administrators to restrict student speech in a manner inconsistent with the First Amendment."[104]

B. The Big Chill: How the Hazelwood *Framework Could Hurt College Students' Free Speech*

Even though the Supreme Court opted not to hear an appeal in *Hosty*,[105] the Seventh Circuit's controversial decision has reinvigorated the old *Hazelwood* debate and has raised the prospect of college students' fighting the same sort of First Amendment battles they thought they had left behind upon their high school graduations. It thus is both timely and relevant to examine the hazardous and unintended consequences that could ensue if *Hazelwood* goes to college.

97. *Id.*
98. *Id.* at 738-39.
99. *Cf. id.* at 735 ("We hold, therefore, that *Hazelwood*'s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools.").
100. *Id.* at 734-35 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271-72 (1988)).
101. *See id.* at 736-38.
102. *See id.* at 740-42 (Evans, J., dissenting).
103. *Id.* at 743.
104. *Id.* at 742.
105. Hosty v. Carter, 126 S. Ct. 1330 (2006) (mem.).

1. Say No More: Hazelwood*'s Dangers for College Students' Free Expression*

Post-*Hazelwood* censorship disputes have not been limited to high schools; a number of colleges and universities have gotten in on the action as well. In 2003, the acting president of Hampton University in Virginia seized the entire press run of the student newspaper, *Hampton Script*, after it printed her letter responding to a story about a school cafeteria's health-code violations on page three, rather than on the front page as she requested.[106] An Indiana university last year briefly instituted a policy to require students to get approval from the school's marketing department before speaking with reporters.[107] In Alabama, an art student sued in late 2005 after university officials removed his artwork, which included nudity, from an on-campus exhibit that cautioned visitors before they entered that some of the works might contain nudity.[108] And a growing number of higher-education institutions have begun to test the First Amendment's boundaries by establishing "[f]ree [s]peech [z]ones" that limit the on-campus locations where citizens can express their grievances[109] and by instituting (frequently overbroad) "speech codes" in an attempt to combat racial and sexual harassment.[110]

In today's atmosphere of increasing collegiate regulation of student speech, the application of the *Hazelwood* test to universities could unintentionally cripple college journalism. Because most colleges' student publications receive some form of financial assistance from the university—either directly through student fee allocations or indirectly through the provision of free or low-cost office space or equipment—the *Hazelwood* framework established for school-sponsored student expression potentially could apply to the vast majority of college publications.[111] Such an outcome would leave student newspaper or yearbook editors in a difficult position: Do they play nice and allow administrators to exercise prior review, which could convert their publications into little more than propaganda-laden puff pieces, or do they stick to their ethical guns and risk funding cuts or worse? Under *Hazelwood*, college editors would be forced to conduct a cost-benefit analysis when faced with a column that expresses an unpopular opinion or a story

106. Student Press Law Center, *After Controversy, Hampton U. Adopts Policies Ensuring Free-Press Rights*, NEWS FLASH, Jan. 5, 2004, http://www.splc.org/newsflash_archives.asp?id=725&year=2004.

107. Kyle McCarthy, *University Retracts Policy Restricting Student Speech*, NEWS FLASH, Nov. 3, 2005, http://www.splc.org/newsflash_archives.asp?id=1117&year=2005.

108. Thomas Spencer, *Troy Art Student Sues after Nude Photos Banned*, BIRMINGHAM NEWS, Nov. 1, 2005, at 5B.

109. Petition for Writ of Certiorari, *Hosty*, 126 S. Ct. 1330 (No. 05-377), 2005 WL 2330125, at *28 n.12 (quoting Thomas J. Davis, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 IND. L.J. 267, 267-68 (2004)).

110. *Id.* at *28 n.11 ("In 2003, the Foundation for Individual Rights in Education reported that, of the 176 colleges it surveyed, 76 restricted speech that otherwise would be protected off campus.").

111. *See* SPLC Brief, *supra* note 73, at *4-*6.

that could make their school look bad. Inevitably, like many of their high school counterparts, some might decide to forego the hassle.[112]

The fallout from *Hazelwood*'s application to colleges would not be limited to newspapers and yearbooks.[113] Other forms of student expression, such as a student group's choice of speaker or performance artist, could be subject to administrative veto. Newly created publications would be especially vulnerable, as they would likely have a more difficult time demonstrating their status as a public forum than established publications. Even professors could wake up one day to discover that the academic freedom they have cherished for so long is now nothing more than "a professional courtesy that college administrators may lawfully disregard on pedagogical grounds."[114] If *Hazelwood* arrives on college campuses, it is difficult to see a stopping point for the wreckage it could leave in its wake.

2. "Too Much Freedom": How the Extension of Hazelwood *to Universities Could Endanger the Future of the First Amendment*

Because *Hazelwood*, intentionally or otherwise, greatly expanded secondary school officials' powers to censor student speech on a host of topics,[115] college effectively provides many young people with their first taste of largely unfettered free speech rights. If *Hazelwood* follows students to universities, however, their introduction to a fully functioning free press could be delayed for years longer. This result would be disastrous for the journalism profession, which soon would find its ranks filled with freshly minted journalism school graduates inadequately prepared to pursue controversial stories aggressively and to endure the backlash therefrom.

It also likely would exacerbate what appears to be a disturbing trend in American society: the existence of a sizable plurality of citizens who do not understand the importance of free speech rights. A 2004 University of Connecticut survey of more than 112,000 high school students found that 32% of them think the press has "too much freedom" and that 36% believe

112. *See* Peltz, *supra* note 83, at 496 ("'[N]early 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.'") (quoting Rosemary C. Salomone, *Free Speech and School Governance in the Wake of* Hazelwood, 26 GA. L. REV. 253, 271 (1992)).

113. Some college administrators already have been informed that *Hosty* could open the door to much greater control over student journalists' work. Ten days after the decision, legal counsel for the California State University system circulated a memorandum to tell administrators that "'[*Hosty*] appears to signal that CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers . . . .'" SPLC Brief, *supra* note 73, at *18 (quoting C. Helwick, Memorandum to CSU University Presidents (June 30, 2005)).

114. *Id.* at 535. *See generally* Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967) ("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.'") (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

115. *See supra* text accompanying notes 73-85.

newspapers should clear their reporting with the government before publication.[116] Meanwhile, the 2005 State of the First Amendment survey discovered that those beliefs often do not change much once citizens reach the age of maturity; 23% of the survey's adult respondents said the First Amendment "goes too far in the rights it guarantees," down from almost 50% in 2002 (shortly after the September 11, 2001, terrorist attacks).[117] The extension of *Hazelwood* to colleges could lead an even larger number of Americans, during some of their most formative years, to become more accepting of official limitations on the content of their speech.[118] That, in turn, could pave a dangerous path toward vastly expanded federal and state speech regulation and a society in which "free" speech is nothing more than a distant memory from an earlier time.

V. HIT THE BRAKES: STATE ANTI-*HAZELWOOD* LAWS AS A DEVICE TO ENSURE FREE SPEECH ON COLLEGE CAMPUSES AND BEYOND

Censorship horror stories are disturbing, surely, but could average Americans do anything to stop their genesis on college campuses if the Supreme Court extended *Hazelwood* to the postsecondary environment and Congress continued to opt against approving a national college press freedom law?[119] As it turns out, they could, and it would be as simple as calling to lobby their local legislator for the passage of an anti-*Hazelwood* law in their state.[120]

A. Why a Statute Is the Best Approach to Protect Students' Free Speech

Legislative adoption of anti-*Hazelwood* laws is not the only method to vouchsafe free expression at universities, but it is the one that offers the best balance of widespread efficacy, ease of enactment, and low probability of repeal. An alternative track that college free speech advocates could take would be to pursue a state supreme court ruling that the state constitution affords students free expression rights above and beyond those protected by the United States Constitution. In general, however, reliance on that approach would be impractical, uncertain, and costly because it cannot be pursued in the absence of an appropriate case, and even then it would entail

116. Greg Toppo, *U.S. Students Say Press Freedoms Go Too Far*, USA TODAY, Jan. 31, 2005, at 6D.

117. Mark Memmott, *First Amendment Gains Support as Fears Ease*, USA TODAY, June 28, 2005, at 4A.

118. *Cf.* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 836 (1995) ("For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.").

119. Such a law could raise federalism questions that are beyond the scope of this Comment, which deals with individual free speech rights. Accordingly, this Comment focuses on proposals for state laws.

120. At first blush, it may seem presumptuous to call for states to enact statutes that effectively sidestep a Supreme Court decision. However, as Richard J. Peltz notes, "*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." Peltz, *supra* note 83, at 501.

substantial litigation costs coupled with a strong probability that the court would decline to read the state constitution expansively.[121] Two other non-legislative possibilities would be to push for a university policy to protect students or to approve a ballot measure via initiative and referendum. However, university policies frequently change with each administration, and ballot initiatives, aside from the fact that they are unavailable in many states, require a substantial commitment of resources to collect citizens' signatures and raise voter awareness before the statewide vote.[122]

A state constitutional amendment to protect college students' free expression would offer more promise than the tactics mentioned above, and it would stand on less tenuous ground than a statute. However, the amendment option has its fair share of drawbacks. For one thing, most state constitutional amendments require approval not only from legislators but also from a statewide popular vote, which makes them a far more uncertain proposition than statutes.[123] Furthermore, many state constitutions already contain provisions that fairly could be interpreted to provide greater free speech protections than the United States Constitution, so an amendment along those lines would be superfluous in those states.[124] A better option is an anti-*Hazelwood* statute that would carry the force of state law, could be passed by a simple majority vote of a state legislature, and would be unlikely to be overturned judicially if drafted properly.[125]

*B. What Should an Anti-*Hazelwood *Statute Look Like?*

No two anti-*Hazelwood* laws are alike, but the few states with such provisions on the books almost universally have followed the model of the California student press freedom statute that preceded *Hazelwood* by a decade.[126] The California-style laws all include language assigning student editors the responsibility for their publications' content, assuring students the right to decide on what merits publication.[127] Massachusetts's law, which existed as an option for school districts in pre-*Hazelwood* days but became mandatory afterward, provides the other primary real-world model for a

121. *See* Alexander Wohl, *The* Hazelwood *Hazard: Litigating and Legislating in the State Domain When Federal Avenues Are Closed*, 5 ST. THOMAS L. REV. 1, 13-16 (1992).

122. *See generally* DAVID S. BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY (2000).

123. *See, e.g.*, ALA. CONST. art. XVIII, § 284.

124. Wohl, *supra* note 121, at 17-18; *cf id.* at 16-17 ("Perhaps the greatest liability in the process as a whole is the potential for what has been called 'amendomania,' the tendency to amend state constitutions so frequently as 'to constitutionalize provisions of the law that are essentially statutory in character . . . .'") (quoting Donald E. Wilkes, *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223, 233 (1984)).

125. *Cf. id.* at 19-20 (noting that procedural prohibitions on state legislatures are unlikely to impede anti-*Hazelwood* legislation).

126. *See* Heather K. Lloyd, Comment, *Injustice in Our Schools: Students' Free Speech Rights Are Not Being Vigilantly Protected*, 21 N. ILL. U. L. REV. 265, 310-11 (2001).

127. Wohl, *supra* note 121, at 21-23.

student free expression statute.[128] The third potential framework is the SPLC's model legislation, which bears many hallmarks of the California law.

The statutes modeled after the California law[129] focus primarily on student publications and generally give students responsibility for news and opinion material, but they differ as to the allocation of responsibility for advertising content[130] and the particulars of the exceptions that permit administrators to suppress content.[131] The much shorter Massachusetts statute, meanwhile, applies to a much broader range of speech and allows school officials to censor student speech only to prevent "any disruption or disorder within the school."[132] All six laws apply both to school-sponsored and non-school-sponsored speech, either explicitly or via judicial interpretation.[133]

To protect college students' free speech rights effectively and to minimize the grounds upon which an administrator could seek to justify censorship, a strong anti-*Hazelwood* statute should at minimum: (1) declare student publications to be a public forum[134] or otherwise preclude publications from being adjudged as non-public forums,[135] (2) order officials to draft written policies in accordance with the law,[136] and (3) immunize educational institutions from tort or criminal liability for any student speech protected by the law.[137] The three main models for anti-*Hazelwood* laws achieve varying degrees of success in satisfying these factors. The SPLC's model legislation, for example, covers all three of those bases, but the law is crafted to apply to secondary schools and would require numerous modifications to adapt to the university environment.[138] The Massachusetts law, meanwhile,

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128. Lloyd, *supra* note 126, at 310-11.

129. CAL. EDUC. CODE § 48907 (West 2006).

130. Wohl, *supra* note 121, at 23-24.

131. Exceptions commonly found in the laws include speech that is defamatory or encourages violations of federal or state laws or school regulations. *See, e.g.*, COLO. REV. STAT. § 22-1-120 (West 2005); IOWA CODE § 280.22 (West 2005).

132. MASS. GEN. LAWS ANN. ch. 71, § 82 (West 1996).

133. Scott Andrew Felder, *Stop the Presses: Censorship and the High School Journalist*, 29 J.L. & EDUC. 433, 459 (2000).

134. Colorado's law does this explicitly. COLO. REV. STAT. § 22-1-120(2).

135. One way to avoid the forum question would be to impose a blanket ban on prior restraint of student speech.

136. The laws in Arkansas, California, Colorado, and Iowa include such provisions. Felder, *supra* note 133, at 459.

137. *See* MASS. GEN. LAWS ANN. ch. 71, § 82 ("No expression made by students in the exercise of such rights shall be deemed to be an expression of school policy and no school officials shall be held responsible in any civil or criminal action for any expression made or published by the students.").

138. Below is the text of the model statute in its entirety:

> A. Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the publication of expression in school-sponsored publications and other news media, whether or not such media or other means of expression are supported financially by the school or by use of school 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

provides for written policies[139] and immunizes institutions from liability for student expression, but the law's exception permitting officials to censor speech that could "cause any disruption or disorder within the school" could provide censorship-minded administrators just the sort of loophole they would need to mount an improper attack on student speech.[140] In addition, as with the SPLC legislation, the wording of the Massachusetts law seems better suited for secondary schools.[141]

Of the three options, the best bet for protecting college students' free speech rights would be the adoption of a modified version of the California college free press statute.[142] The California law only explicitly satisfies one

> 4. so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the material and substantial disruption of the orderly operation of the school. School officials must base a forecast of material and substantial disruption on specific facts, including past experience in the school and current events influencing student behavior, and not on undifferentiated fear or apprehension.
>
> C. Student editors of school-sponsored media shall be responsible for determining the news, opinion and advertising content of their media subject to the limitations of this section. It shall be the responsibility of a journalism adviser or advisers of student media within each school to supervise the production of the school-sponsored media and maintain the provisions of this chapter. This section shall not be construed to prevent an advisor 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 media, whether school-sponsored or non-school-sponsored, will be subject to prior review by school 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 policy, and no school officials or school district shall be held responsible in any civil or criminal action for any expression made or published provided by students unless school officials have interfered with or altered the content of the student expression.
>
> F. Each governing board of a school district 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 student media adviser may institute proceedings for injunctive or declaratory relief in any court of competent jurisdiction to enforce the rights provided in this section.

STUDENT PRESS LAW CTR. MODEL LEGISLATION TO PROTECT STUDENT FREE EXPRESSION RIGHTS (Student Press Law Ctr. 2000), http://www.splc.org/legalresearch.asp?id=7. The statute focuses largely on student publications, and its references to the roles of parents and journalism advisers are two examples of the ways in which the law, which offers sound protection of high school students' free speech rights, is designed for an atmosphere vastly different from that found at many colleges and universities.

139. MASS. GEN. LAWS ANN. ch. 71 § 85.

140. *Id.* § 82.

141. *See id.*

142. Below is the text of the California law in its entirety:

> A. Neither the Regents of the University of California, the Trustees of the California State University, nor the governing board of any community college district shall make or enforce any rule subjecting any student to disciplinary sanction solely on the basis of conduct that is speech or other communication that, when engaged in outside a campus of those institutions, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.
>
> B. Any student enrolled in an institution, as specified in subdivision (a), that has made or enforced any rule in violation of subdivision (a) may commence a civil action to obtain appropriate injunctive and declaratory relief as determined by the court. Upon motion, a court may award attorney's fees to a prevailing plaintiff in a civil action pursuant to this section.

of the three requirements essential to an anti-*Hazelwood* law—it renders the forum question moot with a clear prohibition of prior review—but it offers the huge advantage of being designed specifically for public postsecondary institutions. Lawmakers easily could beef up the statute by attaching provisions requiring schools to establish written student expression policies and granting institutions tort and criminal immunity for student expression. Ideally, legislators also would apply the law to private, non-religious colleges, much as California did with its Leonard Law.[143] Even if legislators opted to exempt all private institutions from the provisions, however, widespread state passage of laws along the lines of the one proposed here would allow most American college students to breathe a sigh of relief, secure in the knowledge that their free speech rights are just as safe as those of other adults.

VI. CONCLUSION

In the end, regardless of whether or how the Supreme Court eventually applies *Hazelwood* at the university level, college students can ensure that their free speech rights remain vigorous by exercising those very rights in an effort to safeguard them. Students should band together to lobby their elected officials to push anti-*Hazelwood* bills or, alternatively, propose constitutional amendments through the halls of state legislatures. In the meantime, leaders of student newspapers and other media outlets would be well advised to request that administrators issue written promises that they will not try to interfere with or retaliate due to students' content decisions. Student journalists also should be prepared to thrust recalcitrant officials who refuse to offer such an assurance into the media limelight in an effort to bring public opinion to bear against those administrators.[144] Other student groups can seek similar promises regarding their selection of speakers or performance artists or any other area of expression in which they fear administrative intervention. If enough concerned citizens join together to demand an end to the encroachment of censorship on college campuses, Americans finally can begin to undo the inadvertent but significant damage

> C. Nothing in this section shall be construed to authorize any prior restraint of student speech.
> D. Nothing in this section prohibits the imposition of discipline for harassment, threats, or intimidation, unless constitutionally protected.
> Nothing in this section prohibits an institution from adopting rules and regulations that are designed to prevent hate violence, as defined in subdivision (a) of Section 4 of Chapter 1363 of the Statutes of 1992, from being directed at students in a manner that denies them their full participation in the educational process, so long as the rules and regulations conform to standards established by the First Amendment to the United States Constitution and Section 2 of Article 1 of the California Constitution for citizens generally.

CAL. EDUC. CODE § 66301 (West 2003).

143. *Id.* § 94367.

144. The SPLC recommends this approach. *See* Student Press Law Center, *Hosty v. Carter* Information Page, http://www.splc.org/legalresearch.asp?id=49 (last visited Oct. 15, 2006).

resulting from the *Hazelwood* "civics lesson" that Justice Brennan lamented almost two decades ago.[145]

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145. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 291 (1988) (Brennan, J., dissenting).