Rights and Regulations: Academic Freedom and a University's Right to Regulate the Student Press[*]

Among the multitude of roles the First Amendment serves, the creation of a marketplace of ideas is arguably its most basic and vital function. By protecting freedom of speech, press, assembly, and expression, the First Amendment acts as a true guardian of democracy, facilitating the thought, discourse, and debate necessary to reinvigorate and energize a democratic society.

Colleges and universities play a similarly crucial role in American society. They exist as the archetypal marketplace of ideas that the First Amendment aims to create. Yet, the university marketplace is different than the marketplace existing in society at large. It serves a broader purpose—to educate both present and future generations—and unlike the state, its educational mission is in line with First Amendment goals. While the state may attempt to restrict expression, a university has every incentive to encourage and facilitate expression in the search for truth and enlightenment.

Student publications are an integral part of the university's educational marketplace, facilitating communication and fostering values required in an educational setting. These publications act as the university marketplace in print and aid the university in fulfilling its educational mission. In order for student publications to continue to serve this essential function in the academic community, it is imperative that they be protected and preserved. The First Amendment provides the necessary protection—safeguarding basic freedoms of expression and, in the university context, incorporating the additional liberty of academic freedom, a freedom supplied to students, faculty, and even the university itself.

Yet a recent decision by the Seventh Circuit has created criticism and concern that the freedoms of student publications are at greater risk than ever.[1] In *Hosty v. Carter*,[2] the court applied traditional forum analysis to determine whether a university could permissibly regulate a student newspaper.[3] Forum analysis is a method courts use to determine the

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1. Virginia J. Nimick, Note, *Schoolhouse Rocked:* Hosty v. Carter *and the Case Against* Hazelwood, 14 J.L. & POL'Y 941, 942–43, 980–81 (2006) (stating that the Seventh Circuit's decision resulted in "alarm and outrage among free speech advocates across the country"). *see generally* Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1169 (2006).

2. 412 F.3d 731 (7th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1169 (2006).

3. *Id.* at 736–38.

permissibility of state regulation of expressive activity on public property.[4] This standard categorizes public property as one of three forums: public, limited public, or nonpublic forums.[5] Each forum is accompanied by a specific standard of review; a form of strict scrutiny is applied to public and limited public forums, and a deferential standard similar to rational basis review is applied to nonpublic forums.[6]

While applying forum analysis in *Hosty*, the court strongly considered categorizing a student paper as a nonpublic forum and implementing a highly deferential standard of review, first formulated in the high-school context, to legitimate a university's prior restraint on a campus paper.[7] Such consideration was significant because prior to *Hosty*, a university publication had never before been categorized as a nonpublic forum. While in the end the court did not actually implement deferential review, it reserved the right to do so in the future[8] and sparked great fear that university administrators may have the power to regulate campus publications to a much higher degree than previously believed.[9]

Critics of the *Hosty* decision have attacked the Seventh Circuit for its suggestion that a college-student newspaper could constitute a nonpublic forum and thus be subject to deferential review;[10] however, this criticism is misplaced. The *Hosty* decision should not have been criticized for its threat to categorize a university publication as a nonpublic forum and apply deferential review; it should have been criticized for its application of forum analysis altogether. Though forum analysis has been the traditional mode of analysis applied to student publications, its application is fundamentally inapposite to the university setting and detrimental to the university's educational function.

When reviewing university regulations of student publications, courts have traditionally applied forum analysis to protect student publications. Yet

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4. *See* WILLIAM W. VAN ALSTYNE, THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY: CASES AND MATERIALS 426 (Robert C. Clark et al. eds., Foundation Press 3d ed. 2002) (introducing forum analysis as a contemporary standard for scrutinizing the government's management of public property in regard to regulation of expression).

5. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

6. *Id.*

7. *Hosty*, 412 F.3d at 734–38.

8. *Id.*

9. *See* Nimick, *supra* note 1, at 996–97 ("[A]ny court wishing to extend *Hazelwood* would have to consider the inevitable chilling effect . . . on all speech on the nation's university campuses. Allowing *Hazelwood*'s restrictive framework inside the college gates is to substantially disrupt the well-established ideal of the university as the 'quintessential marketplace of ideas.'"); Chris Sanders, Comment, *Censorship 101: Anti-*Hazelwood *Laws and the Preservation of Free Speech at Colleges and Universities*, 58 ALA. L. REV. 159, 160 (2006) ("[T]he 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.").

10. Jessica B. Lyons, Note, *Defining Freedom of the College Press After* Hosty v. Carter, 59 VAND. L. REV. 1771, 1792–98 (2006); Nimick, *supra* note 1, at 984–97.

forum analysis treats university regulations like any other state action that restricts expression. Its application hampers a university's ability to regulate its student publications and thus its ability to pursue its educational mission. Due to forum analysis's inappropriateness within the educational context, I will argue that courts should implement a new framework for reviewing university regulation of student publications.

Of course, my criticism and attempt at a solution is not the first. Current scholarship, responding to *Hosty* and similar cases involving regulation of student publications, seems to accept at face value the application of forum analysis to student publications, but scholars argue that such an analysis should not result in deferential review within the university context.[11] As a solution, much of the current scholarship has argued for a protective statute or a limited-public-forum presumption in order to insulate students' press rights from deferential review.[12] Yet this scholarship, and the suggested alternatives, suffers from the same failings of forum analysis: it simply ignores the importance of institutional academic freedom and purpose, which distinguishes a university from the state and justifies the university's attempts to shape and cultivate a unique marketplace of ideas to stimulate learning. I am not the first to observe this failing. In fact, one scholar, Richard J. Peltz, also recognizes the faults of forum analysis and the shortcomings of proffered solutions, though for different reasons, and he has challenged media advocates to develop a new, more viable framework;[13] my argument presents one such attempt.

I argue that forum analysis is inappropriate to the higher educational context, and I focus on its particular application to student publications, which play a fundamental role in furthering the university's educational interests. As an alternative, I propose a framework that focuses on a university's educational need and academic freedom to cultivate and shape a unique marketplace of ideas. Unlike other proposed solutions, the framework centers upon an underlying principle of First Amendment law—to create, foster, and enhance a marketplace of ideas—as applied to the

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11. *See* Nimick, *supra* note 1, at 988–95 (arguing against the use of forum analysis in the university context but stating that university newspapers should be presumed to be traditional public forums); Sanders, *supra* note 9, at 168–77 (discussing the use of forum analysis in *Hosty* and determining that a protective statute would be the best means of preserving the freedom of the student press).

12. *See, e.g.*, Richard J. Peltz, *Censorship Tsunami Spares College Media*, 68 TENN. L. REV. 481, 555 (2001) ("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."); Nimick, *supra* note 1, at 982–86 (arguing that *Hazelwood* deference should be inapplicable to the university environment); Sanders, *supra* note 9, at 173–74 (arguing that legislative adoption of anti-*Hazelwood* laws is the best course of action for protecting free expression in universities).

13. Peltz, *supra* note 12, at 553. Peltz expresses concern that universities could circumvent constitutional limitations on regulation by creating and recognizing student publications only as nonpublic forums. *Id.* at 551–53.

university setting's educational purpose and need. It recognizes that a university's educational function requires protection of students' expressive rights but also recognizes a university's regulatory rights to stimulate particular forms of student expression in an effort to enhance its educational ends. In short, the framework acknowledges that a university's academic freedom and mission enable the university to cultivate and shape a marketplace of ideas in a way that the state cannot.

My proposed framework requires a court to determine the permissibility of university regulations on student publications by asking the following two questions:

1. Does the regulation have the purpose of enhancing the marketplace of ideas?

2. Does the regulation effectuate this purpose?

By "enhancing the marketplace" I mean regulations that attempt to shape the university marketplace in an effort to serve an educational function, such as stimulating a multiplicity of voices, increasing informational accuracy in the market, or sparking critical discussion and debate. To determine whether a regulation has this purpose, a court must inquire into the university's subjective purpose in regulating a student publication. The second question requires the court to objectively determine if the regulation effectuates the required purpose—to enhance the marketplace. If the court can answer both questions affirmatively, then the regulation is permissible; if either question is answered in the negative, then the regulation cannot stand. To better illustrate how such a framework would function, I have applied the test to five hypothetical regulations of student publications[14]: regulation of (1) poor writing, (2) criticism of the administration, (3) criticism of the administration bordering on libel, (4) hate speech, and (5) regulation to ensure access. I believe these five hypothetical regulations illustrate the regulatory capability of the framework as well as its ability to protect institutional and individual rights.

Part I of this Note will provide a historical background of the Court's treatment of student rights and expressive activity on university campuses. In that Part, I will argue that university regulation of student expression has traditionally been reviewed using forum analysis. Part II of this Note will argue that forum analysis is an inappropriate framework within the institutional context. Finally, Part III of this Note will argue that a proper framework should focus on First Amendment aims as they apply in the educational context and protect the university's regulations that cultivate a

14. I have focused on the framework's application to student publications due to the important role student newspapers play in the campus community. However, my criticism of forum analysis applies to its use in the university context as a whole, not simply its application to student publications. Further, my framework is based upon broad First Amendment values and the underlying purpose and freedom of a university; therefore, it is applicable to other university contexts, but such contexts are beyond the scope of this Note.

marketplace better suited to fulfilling an educational function. In that Part, I will articulate the framework I have devised and illustrate the framework by applying it to the five hypothetical regulations discussed above.

I. Historical Recognition of Student Rights and the Traditional Use of Forum Analysis

Courts have long recognized that students retain their First Amendment rights on college campuses;[15] however, many cases have arisen over time that question how strongly these rights should be protected in the university context.[16] I argue that courts have always engaged in a variation of forum analysis, either explicitly or implicitly, when determining the degree of First Amendment protection afforded to students' expressive activity.

A. Background: What Is Forum Analysis?

Before explaining the courts' progression towards explicit application of forum analysis, it is important to offer a general background of the framework within the educational setting. In 1983, the Supreme Court expressly applied forum analysis to the educational context for the first time in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.[17] Forum analysis characterizes public property as one of three possible forums: a public forum, a limited public forum, or a nonpublic forum.[18] A public forum is defined as a place traditionally—or created by the state for the purpose of being—"devoted to assembly and debate," such as streets, parks, and other areas historically used by the public to assemble and discuss public matters.[19] Limited public forums are places that have been designated as property specifically opened to the public for the purpose of facilitating expressive

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15. *See, e.g.*, Healy v. James, 408 U.S. 169, 180 (1972) (discussing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."); *see also, e.g.*, Gay Alliance of Students v. Matthews, 544 F.2d 162, 166 (4th Cir. 1976) ("[A] state college or university 'may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.'" (quoting *Healy*, 408 U.S. at 187–88)); Bazaar v. Fortune, 476 F.2d 570, 579 (5th Cir. 1973) (holding that with respect to censorship of a student literary magazine by the University of Mississippi, "speech cannot be stifled by the state merely because it would perhaps draw an adverse reaction"), *modified per curiam on reh'g en banc*, 489 F.2d 225 (5th Cir. 1973); Lyons, *supra* note 10, at 1800 ("College newspapers seem much more similar to professional newspapers than to high school newspapers, and courts have routinely held that college campuses enjoy strong First Amendment protection.").

16. *See infra* subparts I(B)–(D).

17. 460 U.S. 37 (1983). For example, a school-board meeting would constitute a limited public forum because these meetings are open to public discussion limited to educational issues. *See id.* at 48 (explaining that if the school district had created a limited public forum by granting access to the school's mail system to outside groups like the Cub Scouts and the YMCA, the constitutional right of access would extend only to similar groups).

18. *Id.* at 45–46.

19. *Id.* at 45.

activity for a limited purpose.[20] Lastly, nonpublic forums are described as public property that has not been designated as a forum for public communication or traditionally thought of as serving such a purpose.[21]

The characterization of a forum determines the applicable standard of review. Public and limited public forums are held to a strict standard of review that sharply curtails the state's regulatory power.[22] In order to impose permissible regulations on the content of expressive activity, the government must show that the regulations are narrowly drawn and serve a compelling interest.[23] Further, content-neutral regulations must be based on the time, place, and manner of the expressive activity.[24] Also, these regulations must be narrowly tailored to serve a significant state interest, and they must leave open alternative channels for expression.[25] On the other hand, nonpublic forums may be restricted to their intended purpose,[26] which often is unrelated to expressive purposes. Additionally, any reasonable regulation of expressive activity is permissible in nonpublic forums unless it suppresses expression merely out of disagreement with the message or viewpoint it carries.[27]

The above analysis that the Court followed in *Perry* constitutes a basic forum-analysis framework. Essentially, the analysis requires regulation of public and limited public forums to surpass a form of strict scrutiny, while regulation of nonpublic forums need only withstand a form of rational basis review. I argue that it is this standard that courts have implicitly applied to determine the permissibility of restrictions on students' expressive activity, most importantly the regulation of student publications.

B. General Treatment of Student Rights in the Public-School Context

In addition to forum analysis, it is important to offer a basic explanation of student rights in the public-school context. The seminal case recognizing student rights, both at the secondary and postsecondary level, is *Tinker v. Des Moines Independent Community School District*.[28] *Tinker* arose from a dispute between high-school students and school administrators regarding a student's right to wear a black arm band to school in protest of the Vietnam War.[29] The Supreme Court found that the school's prohibition of the arm band and suspension of the student acted as an infringement upon the

20. *Id.*
21. *Id.* at 46.
22. *Id.* at 45.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 46.
27. *Id.*
28. 393 U.S. 503 (1969).
29. *Id.* at 504.

student's First Amendment rights.[30] Providing a highly protective standard for student rights, the Supreme Court strongly pronounced that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[31] Further, the Court ruled that school officials could not regulate student expression unless the expressive activity "substantially interfere[d] with the work of the school or impinge[d] upon the rights of other students."[32] This precedent is now used in both high-school and college cases concerning school regulation of student publications, student organizations, or individual student speech.[33]

While *Tinker* may be used interchangeably in all public-school contexts, post-*Tinker* courts have consistently distinguished between the treatment of student rights in secondary and postsecondary settings.[34] Cases seem to draw this distinction based upon differing institutional purposes, finding that secondary schools serve an inculcating function, while institutions of higher education have the paramount goal of fostering a marketplace of ideas.[35] In *Bethel School District No. 403 v. Fraser*,[36] the Court stated that high-school students' rights "are not automatically coextensive with the rights of adults in other settings"[37] and that a school was not obligated to tolerate speech inconsistent with its "basic educational mission."[38] This mission is the secondary institution's inculcating function to instill within its students proper social values.[39] From *Bethel*, it would seem that the inculcating function warrants more expansive regulatory power in secondary education than in higher education. In contrast, regulatory power is reduced in higher education because it will defeat the institutional purpose of fostering the marketplace of ideas.

If *Bethel* stood as the first major restriction of student rights after *Tinker*, *Hazelwood School District v. Kuhlmeier*[40] constitutes the second. In *Hazelwood*, a high-school principal censored the school newspaper when

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30. *Id.* at 514.

31. *Id.* at 506.

32. *Id.* at 509.

33. *See, e.g.*, Healy v. James, 408 U.S. 169, 180 (1972) (applying *Tinker* in the context of a group of college students attempting to form a student organization).

34. *See* David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 254 (1990) ("[R]estrictions on speech that may be appropriate for younger students would violate the [F]irst [A]mendment in the university context. . . . [T]he Court has cited differences in the 'emotional maturity' of students, and Chief Justice Rehnquist [in dissent] . . . conceded that there are fewer inculcative or pedagogical reasons to limit access to ideas in universities." (footnote omitted) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988))).

35. *See id.*

36. 478 U.S. 675 (1986).

37. *Id.* at 682.

38. *Id.* at 685.

39. *Id.* at 683.

40. 484 U.S. 260 (1988).

journalism students attempted to publish a story on divorce and teenage pregnancy.[41] *Hazelwood*, following the *Perry* precedent, applied forum analysis to the school-sponsored student paper.[42] The Court then found that the school newspaper constituted a nonpublic forum,[43] and the Court also created a highly deferential standard of review for regulation of nonpublic forums in the educational context.[44] Under this standard, school regulations need only be related to "legitimate pedagogical concerns."[45] In other words, regulations will be upheld at the school's assertion of virtually any valid educational interest.

While *Bethel* had little effect on college campuses due to its emphasis on the need to inculcate societal values in young students, *Hazelwood* loomed large in the college context due to the Court's inclusion of a highly questioned footnote. In footnote seven of the *Hazelwood* decision, the Court punted on the question of whether the *Hazelwood* framework was directly applicable to school-sponsored activities in a university setting.[46] This question raised many fears that college-student publications might be subjected to censorship based on *Hazelwood*'s highly deferential standard.[47]

Their concern, while merited, was somewhat alarmist. In reality, the *Hazelwood* standard was not a significant departure from the traditional framework applied in college cases because courts had already been applying forum analysis, either implicitly or explicitly, to college-student-press cases. The significant difference causing fear was the finding of a nonpublic forum and the application of a new form of rational basis review—the legitimate-pedagogical-concerns test. However, there was little cause for concern in the university setting given *Hazelwood*'s high-school context and the historical tradition of recognizing college-student expression to exist within a public or limited public forum, subject to *Tinker* strict scrutiny.

*C. The Pre-*Hazelwood *Cases*

Initial cases involving college expressive activities rarely mention forum analysis or portray expressive activity as existing within any particular forum at all. Cases do, however, apply the *Tinker* standard consistently to regulation of students' expressive activities.[48] As mentioned previously, the *Tinker* standard affords school administrators regulatory authority over expressive activity only if a compelling interest exists to uphold order and

41. *Id.* at 263–65.
42. *Id.* at 267–73.
43. *Id.* at 267–68.
44. *Id.* at 272–73.
45. *Id.* at 273.
46. *Id.* at 273 n.7.
47. *See* Peltz, *supra* note 12, at 509–12 (discussing the views of multiple scholars who had expressed concern over *Hazelwood* being extended to the college-student press).
48. *See infra* notes 53, 56 and accompanying text.

discipline within the academic community.[49] The *Tinker* standard greatly parallels strict scrutiny,[50] which requires that a regulation is purposed to effectuate a compelling government interest.[51] Additionally, *Tinker* implies that a school may constitute a public forum due to the significant weight the Court places on the historical importance of expressive activity within American schools.[52] The emphasis the Court places on the traditional treatment of schools as the bastions of expressive activity sounds markedly similar to the characteristics of a public or limited public forum, thus meriting a high degree of First Amendment protection.

Post-*Tinker*, several federal district courts followed the Supreme Court's lead and applied the *Tinker* standard in order to strike down university regulation of students' expressive activity.[53] While few cases even posed a question of forum, courts repeatedly acknowledged the special role of a university and its student publications in facilitating communication and thoughtful discussion.[54] In fact, one of these cases, *Trujillo v. Love*,[55] comes very close to explicitly advocating public-forum analysis, holding that once a university had established a particular forum for expression, limitations could not be placed upon the forum to interfere with protected speech unless justified by an overriding state interest.[56] The repeated mentioning of the special role of academic institutions in American society, and the importance of protecting First Amendment rights therein, offers strong evidence that university publications fell within the definition of a public or limited public

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49. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509, 513 (1969).

50. Peltz, *supra* note 12, at 509, 508–09 (2001) ("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 . . . ." (footnote omitted)).

51. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPALS AND POLICIES 519 (2d ed. 2002).

52. *See Tinker*, 393 U.S. at 509, 512 ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.'" (internal quotation marks and citation omitted) (quoting Keyishian v. Bd. of Regents of the Univ. of N.Y., 385 U.S. 589, 603 (1967))).

53. *See, e.g.*, Trujillo v. Love, 322 F. Supp. 1266, 1270–71 (D. Colo. 1971) (finding that the suspension of a student-newspaper editor was unconstitutional because the publication had not substantially interfered with order or the school's learning process); Channing Club v. Bd. of Regents of Tex. Tech Univ., 317 F. Supp. 688, 691 (N.D. Tex. 1970) (finding a university's attempt to regulate a student publication containing "inappropriate" language unconstitutional because the publication did not pose a substantial threat to campus order or the educational process); Korn v. Elkins, 317 F. Supp. 138, 142 (D. Md. 1970) (holding that a university's prior restraint upon a publication for picturing the burning of an American flag was not constitutional because the publication did not substantially threaten campus order or discipline); Antonelli v. Hammond, 308 F. Supp. 1329, 1336 (D. Mass. 1970) (determining that a university could not place a prior restraint upon a campus newspaper because the expressive activity was not incompatible with the university's obligation to maintain discipline and order essential to its educational process).

54. *See, e.g.*, *Trujillo*, 322 F. Supp. at 1270 ("[T]he *Arrow* did serve as a forum for student expression . . . ."); *Antonelli*, 308 F. Supp. at 1337 (recognizing the "potentially great social value of a free student voice in an age of student awareness and unrest").

55. 322 F. Supp. 1266 (D. Colo. 1971).

56. *Id.* at 1270.

forum. In fact, one scholar has briefly pointed to this similarity before, acknowledging that the constitutional standards applied to university regulation of college publications and the standards applied to governmental regulations of expressive activity within public places were strikingly analogous.[57]

As the lower courts moved closer to administering explicit forum analysis, the Supreme Court, along with two circuit courts, continued to apply the *Tinker* standard as a variation of strict scrutiny in the college context.[58] These cases directly applied the *Tinker* standard to determine if regulation of student expressive activity was permissible, and in all of these cases, the universities and colleges were unable to meet *Tinker*'s heavy burden.[59] Case law reasoned that a high burden was necessary due to the unique characteristics of the educational setting.[60] These characteristics, such as the university's traditional role as a marketplace of ideas, closely parallel the characteristics necessary for finding the existence of a limited public forum. And a Fifth Circuit case recognized the similarity of college-case precedent to the necessary justifications for finding an "open forum."[61] In light of these similarities, there is sound evidence that courts were presuming student expressive activities to take place within either a public or limited public forum.

In *Widmar v. Vincent*,[62] the Supreme Court took additional steps toward the express application of forum analysis in the university context. The Court explicitly recognized that a university campus portrays many

57. Peltz, *supra* note 12, at 508–09.

58. *See, e.g.*, Healy v. James, 408 U.S. 169, 187 (1972) (finding that a university unconstitutionally infringed on student First Amendment rights when it denied recognition to a student group due to its mere affiliation with a national organization known for disruptive and violent conduct, and not due to an actual material interference with campus order and discipline); Schiff v. Williams, 519 F.2d 257, 261 (5th Cir. 1975) (denying a university the ability to regulate a student paper due to its poor quality of writing because the paper's quality had not resulted in a disruption of the school's educational processes); Joyner v. Whiting, 477 F.2d 456, 459–60 (4th Cir. 1973) (holding that a student paper's segregationist editorial policy could not be regulated because the newspaper did not create a material or substantial interference with the school's discipline or operation).

59. *See Healy*, 408 U.S. at 189 (finding no evidence in the record in support of the assertion that a student organization that was denied official campus recognition would have "posed a substantial threat of material disruption"); *Schiff*, 519 F.2d at 261 (holding that though "poor grammar, spelling and language expression—could embarrass, and perhaps bring some element of disrepute to the school . . . these faults are clearly not the sort which could lead to significant disruption on the university campus or within its educational processes"); *Joyner*, 477 F.2d at 461 ("Censorship of the paper cannot be sustained. . . . The record contains no proof that the editorial policy of the paper incited harassment, violence, or interference with white students and faculty.").

60. *See, e.g.*, *Healy*, 408 U.S. at 180–81 (recognizing the particular importance of safeguarding First Amendment rights in the college classroom and surrounding environment).

61. *See* Bazaar v. Fortune, 476 F.2d 570, 575 (5th Cir. 1973) ("The cases involving student publications are quite similar to, and owe much of their rationale to, those cases which have been characterized as 'open forum' cases."), *modified per curiam on reh'g en banc*, 489 F.2d 225 (5th Cir. 1973).

62. 454 U.S. 263 (1981).

characteristics of a public forum.[63] Due to this "open forum" context, the Court found that First Amendment rights of speech are to be strongly protected within the university,[64] and their regulation must be subject to strict scrutiny as adapted to the special characteristics of the educational setting.[65] The Court based its assumption of a public forum on the importance of the college environment as a marketplace of ideas.[66] Ultimately, the Court held that while a university may impose reasonable regulations compatible with its educational mission,[67] it may only regulate expressive activity when such activity threatens to substantially interfere with the educational mission and campus order.[68]

Thus, prior to *Hazelwood*'s explicit application of forum analysis, federal courts were applying variations of forum analysis to the university context.[69] But no court had subjected student publications to lower tier scrutiny.[70] *Hazelwood* changed very little when it explicitly applied forum analysis in order to determine the applicable standard for reviewing school regulation of students' expressive activity. The decision is highly distinguishable, however, because it proposed, as a real possibility, the application of a rational basis standard of review specially adapted to the educational context: the "legitimate pedagogical concerns" test.[71] Essentially, it was not *Hazelwood*'s application of forum analysis that constituted a huge change; it was the creation of a new, highly deferential standard of review.

*D. The Post-*Hazelwood *Cases*

The aforementioned case law presents strong evidence that courts had implicitly engaged in forum analysis long before *Hazelwood* was decided; however, post-*Hazelwood* cases have gone one step further by explicitly adopting forum analysis to determine the permissibility of regulating student expressive activities on college campuses. In fact, three cases have directly adhered to the *Hazelwood* forum-analysis framework, and two of these cases implemented the *Hazelwood* deferential standard of review in the curricular context.

The Sixth Circuit was the first circuit to directly address the application of *Hazelwood* within the university context. In *Kincaid v. Gibson*,[72] a

63. *Id.* at 267 n.5.
64. *Id.* at 268, 270.
65. *Id.* at 268–70.
66. *Id.* at 267 n.5.
67. *Id.*
68. *See id.* at 277 (stating that a university may prohibit activities that violate reasonable campus rules or substantially interfere with education).
69. Peltz, *supra* note 12, at 510.
70. *Id.* at 510–11.
71. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).
72. 236 F.3d 342 (6th Cir. 2001) (en banc).

university confiscated all of the school yearbooks due to their poor quality, "inappropriate" theme and cover color, and inclusion of irrelevant current events.[73] After conducting a forum analysis,[74] the court categorized the yearbooks as a limited public forum.[75] The court then concluded that confiscation by the university was impermissible because it was not "narrowly drawn to effectuate a compelling state interest."[76] The Sixth Circuit also specifically denied the applicability of *Hazelwood* deference, expressing doubt that such a standard could be applicable under any circumstances within the university context.[77]

Though the Sixth Circuit declined to apply the *Hazelwood* standard in *Kincaid*, the Ninth Circuit applied *Hazelwood* deference only a year later in a curricular context. In *Brown v. Li*,[78] a graduate student submitted his thesis to the library with an additional "disacknowledgement" section, which berated university administration, officials, and faculty.[79] The library alerted the administration to the added section, and the university subsequently withdrew its approval of the thesis and refused to confer a degree upon the graduate student.[80] The court found that the curricular context of the graduate thesis made *Hazelwood* deference an appropriate standard of review[81] and that the university's actions were permissible because they were reasonably related to pedagogical concerns—to teach the proper format of an academic work.[82] The application of *Hazelwood* deference implies that the court may have presumed that curricular contexts fall within the nonpublic forum category.

Two years later, the Tenth Circuit confirmed *Hazelwood*'s applicability in the college-curricular context. In *Axson-Flynn v. Johnson*,[83] the plaintiff was a member of a university's "Actor Training Program."[84] However, the student, when acting, refused to use language offensive to her religious convictions.[85] School administrators threatened to dismiss her from the program for her refusal to use language necessitated by a script.[86] Applying forum analysis,[87] the court determined that the acting program constituted a

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73. *Id.* at 345.
74. *Id.* at 347–49.
75. *Id.* at 349.
76. *Id.* at 354.
77. *See id.* at 352 ("[T]he university context mitigates in favor of finding that the yearbook is a limited public forum.").
78. 308 F.3d 939 (9th Cir. 2002).
79. *Id.* at 943.
80. *Id.* at 943–45.
81. *Id.* at 951–52.
82. *Id.* at 952.
83. 356 F.3d 1277 (10th Cir. 2004).
84. *Id.* at 1281.
85. *Id.* at 1281–82.
86. *Id.* at 1282.
87. *Id.* at 1284–85.

nonpublic forum;[88] accordingly, the university could regulate such speech when doing so was "reasonably related to legitimate pedagogical concerns."[89] Using this rationale, the court found that compelling the student's speech was reasonably related to legitimate pedagogical concerns because the acting exercises were for the purpose of preparing students to be professional actors.[90]

Therefore, within the curricular context, both the Ninth and Tenth Circuits have applied forum analysis and the *Hazelwood* deferential standard, while the Sixth Circuit has expressly denounced *Hazelwood*'s application in the extracurricular context. It may appear as though these decisions reflect a circuit split regarding *Hazelwood*'s applicability within the educational context, yet no such split exists. The courts are not disagreeing about *Hazelwood*'s application to the higher educational context; the decisions simply result in findings of different forums, which require the application of different standards of review. Essentially, *Brown* and *Axson-Flynn* resulted in the application of *Hazelwood* deference because the university was regulating a nonpublic forum. Alternatively in *Kincaid*, the Sixth Circuit adamantly opposed the application of *Hazelwood* deference because the yearbooks constituted a limited public forum in which the *Hazelwood* standard truly was inapplicable.

These cases illustrate the determinative role that curricular context plays in forum categorization, rather than explain the applicability of *Hazelwood* in the university context at large. Overall, pre- and post-*Hazelwood* courts have consistently presumed that university publications, partly due to their extracurricular nature, constitute limited public forums. This means that university regulation of these forums is subject to greater scrutiny than the *Hazelwood* deferential standard provides. However, *Hosty* implemented forum analysis in full and threatened the possibility of applying *Hazelwood* deferential review to the extracurricular setting of a student newspaper.[91]

E. Hosty*: Just Another Case*

In *Hosty*, a student newspaper was subjected to prior restraints after criticizing the university administration.[92] The Seventh Circuit, following the Supreme Court's ruling in *Hazelwood*, applied forum analysis to determine if the student paper constituted a nonpublic forum.[93] When applying forum analysis, the court directly responded to *Hazelwood*'s controversial

88. *Id.* at 1285.
89. *Id.* (quoting Fleming v. Jefferson County Sch. Dist., 298 F.3d 918, 923 (10th Cir. 2002)).
90. *Id.* at 1291.
91. Hosty v. Carter, 412 F.3d 731, 734 (7th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1169 (2006).
92. *Id.* at 732–33.
93. *Id.* at 734.

footnote,[94] in which the Supreme Court declined to answer whether *Hazelwood* was the applicable standard in higher education.[95] The court interpreted the footnote to address degrees of deference rather than the applicability of the *Hazelwood* standard of review.[96] The court then concluded that the *Hazelwood* framework should apply to cases in which a public school regulates students' expressive activity, regardless of secondary or postsecondary, curricular or extracurricular context.[97]

The decision in *Hosty* sparked a great deal of criticism because it was seen as an aberration from traditional college-case precedents. Critics felt the court departed from previous case law when it determined that *Hazelwood* deference could be applied even in the extracurricular, university context.[98] But the court's analysis did not depart from the traditional forum analysis as applied to students' expressive activity, and it was not the first decision to threaten the imposition of a highly deferential form of review.[99] It was simply the first decision in a university setting to refuse to draw bright lines between the curricular and extracurricular context when categorizing a forum.[100] In fact, *Hosty* did not even determine that the student publication constituted a nonpublic forum.[101] The case was decided on qualified immunity grounds,[102] and even though the Seventh Circuit threatened the possibility of a nonpublic forum categorization, the court found, in dicta, that the student paper most likely constituted a limited public forum subject to the same strict standard of review as applied in previous cases.[103] Which begs the question, what are *Hosty* critics so upset about?

Critics of the *Hosty* decision do not directly object to the use of forum analysis; instead, they are alarmed by the *possibility* that forum analysis will result in the application of deferential review. Yet the presumption of a limited public forum and the application of strict scrutiny are equally worrisome to colleges and universities because the standard results in complete disregard for institutional freedoms, purposes, and interests. Neither side directly objects to *Hosty*'s application of the traditional analytical framework, but both sides have generated a great deal of opposition to the standards of

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94. *Id.*

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

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

97. *Id.* at 735–36.

98. *See* Lyons, *supra* note 10, at 1784–85 (discussing criticism of *Hosty* as the first application of the *Hazelwood* framework to university student activity outside of the classroom); Nimick, *supra* note 1, at 981 ("[T]he majority of the commentary on the *Hosty* decision has been negative . . . .").

99. *See, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1285 (10th Cir. 2004) (finding that the classroom associated with an acting program constituted a nonpublic forum and that officials could therefore regulate the speech within that classroom in any reasonable manner).

100. *See Hosty*, 412 F.3d at 736 ("[A]lthough, as in *Hazelwood*, being part of the curriculum may be a *sufficient* condition of a non-public forum, it is not a *necessary* condition.").

101. *Id.* at 737.

102. *Id.* at 739.

103. *See id.* at 737.

review that forum analysis threatens to impose. And this opposition illustrates that forum analysis's application to the higher educational context poses a serious threat of ignoring the freedoms and interests of participating actors in a college community.

II. Forum Analysis Is Inapposite in the Higher Educational Context

As the previous discussion has shown, courts have traditionally relied on forum analysis to determine the permissibility of university regulation of student publications, but this framework is not an appropriate mode of analysis within the educational context. Forum analysis is used to determine the permissibility of state actions regulating expression on public premises and prohibits state actors from interfering with expression,[104] even if such interference is meant to facilitate expression.[105] Yet a university's institutional purpose—to educate—distinguishes it from the state and compels marketplace intervention.

Additionally, in those rare instances when forum analysis does acknowledge a university's regulatory power, it is still problematic because application of *Hazelwood* deference to nonpublic forums disregards student expressive rights, which similarly handicaps the educational function of a university. Overall, the inability of forum analysis to protect the university's regulatory authority or students' expressive rights makes its application entirely unacceptable in the university context because it undermines the university's educational mission.

A. Forum Analysis Ignores Significant Distinctions Between the State and a University and Prevents the University from Cultivating a Unique Marketplace of Ideas

Forum analysis is inappropriate in the university context because it does not recognize important differences between the university and the state in their respective abilities to regulate expressive activity on public property. Again, forum analysis is a standard used when analyzing the government's role as a manager of public property.[106] Yet, a university's institutional purpose and freedom distinguish it from the state and compel marketplace intervention in order to serve the very purpose for which universities were established: to educate.

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104. *See* VAN ALSTYNE, *supra* note 4, at 426–27 (discussing the development of forum analysis and the greater discretion it allows for public regulation of First Amendment use of government-managed facilities).

105. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995) (noting that once a forum is made public by the state's consent or conduct, state actors must respect the boundaries of the public forum whether those boundaries are spatial, geographic, or metaphysical).

106. VAN ALSTYNE, *supra* note 4, at 426–27.

University regulation of expressive activity, while technically constituting state action, is not equivalent to governmental attempts to interfere with freedom of expression. Instead, a university and the state are significantly distinct in their capacities as managers of public property. First, the facilities of a university are not "public" in the same sense as streets and parks because they are for the benefit of the academic community, as opposed to the public at large.[107] Second, a university, unlike the state, is expected to foster an atmosphere "conducive to speculation, experiment and creation,"[108] and this atmosphere extends to all vital aspects of campus life, including extracurricular activities.[109] Last, a university is dissimilar from traditional state actors because it has both an educational and expressive function and enjoys a certain degree of academic freedom to fulfill these functions.[110] Thus, a university has a greater interest in regulating expressive activity than the state[111] and is empowered by academic freedom and institutional purpose to regulate the marketplace of ideas in situations where the state could not.

Universities play a unique role within our democratic society, and courts have long recognized that the First Amendment's purpose of fostering "energetic debate and the free interchange of views" is specially served in the university setting.[112] Due to the uniqueness of the educational context, courts have incorporated academic freedom into their reading of the First Amendment. This freedom, while not a well-defined First Amendment liberty, has traditionally been recognized in various forms, one of which is institutional.[113] Institutional academic freedom acknowledges that a university, as an entity, enjoys its own form of academic freedom.[114] This freedom gives the university power to set its own course,[115] manage its

107. Widmar v. Vincent, 454 U.S. 263, 278 (1981) (Stevens, J., concurring).

108. *Id.* at 279 n.2 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

109. *Id.* at 278.

110. *Id.* at 278–79.

111. *See id.* at 280 ("Thus, I do not subscribe to the view that a public university has no greater interest in the content of student activities than the police chief has in the content of a soapbox oration on Capitol Hill. A university legitimately may regard some subjects as more relevant to its educational mission than others.").

112. Smith v. Regents of the Univ. of Cal., 56 Cal. App. 4th 979, 986 (Cal. Ct. App. 1997) (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995)); *see also* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives . . . on the independent and uninhibited exchange of ideas among teachers and students . . . ."); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312, 312–13 (1978) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."); Keyishian v. Bd. of Regents of the Univ. of N.Y., 385 U.S. 589, 603 (1967) (highlighting the role that free academic exchange plays in the creation of future leaders).

113. Rabban, *supra* note 34, at 229–31.

114. *Id.*

115. *Id.*

academic community,[116] and determine "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[117] Further, academic freedom embodies the university's autonomous decision-making power, and it is important that such freedom be recognized to protect the "university's discretion to shape its educational mission."[118]

One means of fulfilling this educational mission is through the creation and cultivation of a marketplace of ideas. The mission of a university is strongly related to this First Amendment "marketplace" rationale. A university is meant to cultivate thought and understanding through open communication, respect, cooperation, and critical inquiry.[119] In fact, the university setting's very tradition is to promote thought and experiment.[120] As an institution, a university is expected to create, foster, and enhance a marketplace of ideas in the pursuit of learning.[121] However, a university's educational function enables it not only to create a marketplace of ideas but also to shape the marketplace to suit its educational needs. Basically, not just any marketplace will do. Instead, a university requires a marketplace teeming with participation and informational accuracy, a marketplace that instills values fundamental to learning—values such as introspection, critical thinking, and debate, among others. It is not enough that the marketplace exists; the marketplace must be shaped to encourage values that serve the university's educational function.[122]

Forum analysis, however, treats university regulations as it would any other state actor, and it fails to recognize the special powers and purposes of a university that merit regulation of expressive activity. More often than not, student publications are categorized as limited public forums,[123] which

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116. Hosty v. Carter, 412 F.3d 731, 736 (7th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1169 (2006).

117. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting a statement made by scholars from the University of Cape Town and the University of the Witwatersrand).

118. Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 239 (2000) (Souter, J., concurring).

119. *See* Nimick, *supra* note 1, at 987–88 (quoting a typical university mission statement that reads: "To cultivate and enlarge a diverse and intellectually stimulating community of learners guided by a culture that embodies: Openness of communication; diversity of backgrounds, experiences, and perspectives; mutual respect and cooperation; critical inquiry, constant questioning, and continuing assessment").

120. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 835 (1995).

121. Lyons, *supra* note 10, at 1772.

122. The following are examples of values important in an educational setting: multiplicity of voices, respect and collegiality to encourage participation, and truthful dialogue and informational accuracy to promote discovery.

123. *See* Nimick, *supra* note 1, at 990–91 (arguing that most university publications are limited public forums due to their financial, curricular, and editorial independence from the schools with which they are affiliated); *see also Rosenberger*, 515 U.S. at 829 (holding that a university publication was a limited public forum because the university gave up, to a degree, its editorial and financial control over the publication); Kincaid v. Gibson, 236 F.3d 342, 348–49 (6th Cir. 2001) (en banc) (using the *Rosenberger* standard to make a similar finding).

imposes a strict standard of review that places an excessive burden on the university's ability to regulate its marketplace. Such a high standard of review strikes down regulations implemented to shape and cultivate a marketplace of ideas to promote education, without considering the special role a university plays and the privileges it enjoys. Unfortunately, this failure is detrimental to the entire university community.

B. Forum Analysis Ignores Students' Expressive Rights and the Value of Student Participation in the University Marketplace

Forum analysis can be equally destructive to the university when it results in *Hazelwood* deference to nonpublic, university forums. This deferential standard is unacceptable because it disregards students' rights and the importance of student publications in the university marketplace. Courts have long recognized that students do not shed their First Amendment rights at the schoolhouse gate,[124] and university officials should not be able to infringe upon these rights without a compelling reason.[125] Several courts have also protected students by extending some form of academic freedom as well.[126] For example, students are capable of influencing their curriculum, individualizing their learning experiences, and freely participating in the marketplace of ideas.[127]

Further, students play a fundamental role in creating and enlarging the university's marketplace of ideas. Students are active participants in the university community. They participate in classes, debates, and demonstrations. They join extracurricular organizations, participate in student government, and act as liaisons to university faculty and administration. In short, students engage in a variety of participatory

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

125. *See* Dickey v. Ala. State Bd. of Educ., 273 F. Supp. 613, 618 (M.D. Ala. 1967) (stating that school officials cannot abridge students' First Amendment rights if their exercise does not "materially and substantially" interfere with school operations (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966))), *vacated as moot sub nom.* Troy State Univ. v. Dickey, 402 F.2d 515 (5th Cir. 1968).

126. Rabban, *supra* note 34, at 236–37 ("Courts have used academic freedom and free speech interchangeably or ambiguously, have attached academic freedom to professors as well as to universities, and have extended it to teachers in public schools and to students generally without considering how its meaning might differ in these various contexts."); *see* Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEXAS L. REV. 1265, 1304, 1304–05 (1988) (noting that while student academic freedom has a kind of symbiosis with the rights of academic freedoms recognized for professors, when courts have addressed the academic freedom of students, they treat it "less as a right than as an atmosphere, which the school's attitude toward student newspapers, organizations, or demonstrations could freshen or pollute").

127. *See* William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, LAW & CONTEMP. PROBS., Summer 1990, at 79, 125 ("[The cases] do assure students of some right to fashion what is in some loose sense a constitutionally protected cocurriculum on campus—the teaching agendas and learning experiences of their own actions—carried on in a manner that may well influence the official curriculum as well.").

activities that preclude students from standing idly by as passive observers of the campus marketplace. And their participation plays a significant role in the university's educational mission. Participation teaches critical-thinking skills, encourages students to inquire and debate about the information they receive, and empowers students with educational values that can then be carried into the classroom.

Yet deferential review threatens student expression and academic freedom because it ignores students' First Amendment rights. It restricts the university marketplace, reduces student participation, and impedes the university's ability to instill values in students necessary to effectively educate them. Simply the possibility of finding a nonpublic forum and applying deferential review, therefore, endangers the educational function of the university and evidences the inappropriateness of forum analysis in the university context.

C. Student Publications: The Marketplace in Print

While forum analysis is inappropriate in the higher educational context as a whole, my focus is on its inapplicability to student publications. Application to student publications is particularly inappropriate because campus publications serve as the university marketplace in print and provide a highly educational function by consistently fostering values important to the educational context. The principal purpose of newspapers has always been to promote the free exchange of ideas, and student newspapers are no different.[128] These publications facilitate dialogue between actors in the college community and play an informative role by educating these actors on current debates and discussions.[129] Publications stimulate critical thinking, offer a mode for critical inquiry and response, and provide an arena where these skills can be practiced, cultivated, and transferred into the classroom. All of these effects enhance the university's ability to effectively teach and educate the community. Unfortunately, forum analysis has a prohibitive effect on a student newspaper's ability to regulate and facilitate this unique marketplace and therefore impedes the university's ability to educate its academic community.

III. A Proper Framework Should Focus on First Amendment Aims, Rather than Individual Rights

To replace forum analysis, I have proposed a new framework that recognizes the unique characteristics of a university, which holds a special

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128. Peltz, *supra* note 12, at 552.

129. *See* Healy v. James, 408 U.S. 169, 181–82 (1972) ("Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students.").

place within First Amendment jurisprudence.[130] The esteem institutions enjoy under First Amendment law has provided colleges and universities with a great deal of institutional academic freedom to promote a unique marketplace of ideas that better serves a university's educational goals. In light of these special characteristics, I have devised a framework that is centered upon an underlying First Amendment rationale—the creation of a marketplace of ideas—as adapted to the higher educational context. The framework enables a university to cultivate a marketplace of ideas better suited to its educational needs via regulation of student publications.[131]

The framework acknowledges a university's educational need for a unique marketplace of ideas that fosters diversity of thought, critical inquiry, and debate, and ultimately aims at improving understanding and realizing truth. The framework will enable a university to cultivate a marketplace of ideas in which these skills can be learned, practiced, and refined to stimulate discovery. It recognizes that a university's regulatory authority is derived from its institutional purpose and academic freedom, and it also appreciates students' expressive rights and the educational value of student participation. Essentially, the framework acknowledges the uniqueness of the university marketplace, which is purposed not simply to allow expression free of governmental interference but to enable, cultivate, encourage, and enhance expression.

Again, the underlying focus of my proposed framework is the educational need to cultivate a unique marketplace of ideas. It consists of a simple two-prong test, which requires a court to ask the two following questions:

1. Does the university's regulation of student publications have the purpose of enhancing the university marketplace of ideas?

2. Does the regulation effectuate that purpose?

In order to answer the first question, a court must engage in a factual inquiry to determine if the university has the subjective purpose of enhancing the university marketplace of ideas via the proposed regulation of a student publication. By "enhancing the university marketplace," I mean that the regulation must be intended to stimulate the marketplace's ability to further education. For example, regulations that promote informational accuracy, multiplicity of voices, critical debate, or access within the university marketplace would likely meet the first prong. However, a court must not defer to the university's proffered purpose when making this determination; it should take into consideration all of the countervailing factors in order to objectively determine the university's true purpose in enacting the regulation. Second, the court must determine if the regulation effectuates the required purpose—

130. Kincaid v. Gibson, 236 F.3d 342, 352 (6th Cir. 2001) (en banc).

131. It is not necessary that the framework be restricted to student publications; however, this Note focuses on its application to campus publications due to their significant role in facilitating the educational goals of the university, as discussed in subpart II(C).

to enhance the marketplace. Both questions must be answered affirmatively in order to hold that the university regulation is permissible; otherwise, the regulation cannot stand.

To better illustrate how this framework will function, I have provided five hypothetical university regulations of student publications[132]: regulation of (1) poor writing, (2) criticism of the administration, (3) criticism of the administration bordering on libel, (4) hate speech, and (5) regulation to ensure access.

A. *Regulation of Poor Writing Is Impermissible*

To determine if regulation of poor writing style in student publications is permissible, a court must ask: Does regulation of poor writing have the purpose of enhancing the university marketplace of ideas and does the regulation effectuate that purpose? A court is likely to answer both questions in the negative. The regulation of poor grammar and writing style would not likely be purposed to enhance the university marketplace of ideas, and more importantly, such regulation would have the effect of restricting the marketplace. Therefore, this regulation would be impermissible under the framework I have proposed.

First, a court must inquire into the university's subjective purpose for implementing these regulations. It is likely that a court will find that a university has two possible interests in regulating poorly written student speech: a reputational interest or an educational interest. A university has an inherent interest in maintaining its reputation as a credible institution, and campus publications ridden with grammatical mistakes and crude writing threaten this reputation. Additionally, the university has a strong educational interest in teaching its students proper writing and journalism skills, and regulation of poor writing in campus publications could aid the university in reinforcing these skills. Yet, neither of these interests support an argument that the regulation is designed to cultivate a marketplace that furthers the educational purpose of a university. At first this explanation may seem contradictory to the framework because the school has an educational interest in promoting good grammar; however, this educational interest is outweighed by more pressing educational interests.

While a university's educational function and academic freedom occasionally necessitate regulation of student publications, the university's interest in teaching grammar is not a circumstance giving rise to regulation. Regulatory intervention based on educational concerns is permissible in limited situations in which regulation will enhance the marketplace of ideas by promoting values such as critical thought or multiplicity of voices, which are critical to effective teaching and research, and ultimately to truth and

132. Again, I have chosen to focus on university regulation of student publications, though it is possible that the framework could be applied in other university contexts.

discovery. Grammar skills are an important educational interest as well, but restricting expression in the interest of enforcing good grammar reduces accessibility and robustness of the marketplace. It also creates a danger that the university will use grammar and writing skills as a pretext for limiting other forms of content in student publications.

From this discussion, it is clear that this regulation also fails to meet the second prong of the test because it restricts the university marketplace of ideas. Regulating poorly written arguments does nothing to enhance discussion and debate within campus papers. Instead, it favors certain speakers and denies access to those who are less articulate, thereby reducing the multiplicity of voices in the marketplace. This regulation is in opposition to the university's educational function of fostering a free interchange of ideas and stimulating critical thought and discussion. Though derived from an educational interest that seemingly places only a minor burden on the marketplace, such a restriction will disenfranchise the student body and could be used as a pretext for regulating student expression with which the university simply disagrees.

Lastly, a university could further its educational and reputational interests by alternative means, such as appointing a faculty adviser to aid student editors or requiring student journalists to take a writing or journalism class before being appointed to a campus paper. While it is possible that appropriate writing conventions will still be ignored, it is more important that campus discussion and dialogue continue. Student publications play a fundamental role in facilitating communication among students, faculty, administration, and the entire campus community. This communication sparks debate and thought in the community and advances the university's educational function by promoting critical inquiry that continues in the classroom. Therefore, grammatical regulation of student newspapers or other campus publications would be impermissible because it lacks the subjective purpose and objective effect of enhancing the university marketplace of ideas.

B. Regulation of Criticism of the Administration Is Generally Impermissible

Many cases that have invoked forum analysis have dealt with situations in which the university administration placed prior restraints upon student publications after a campus newspaper publicly criticized school policy, faculty, or the administration itself.[133] Under the framework I have proposed, such regulation would generally be impermissible. Again, in order to be found permissible, regulation of criticism of the administration must have the purpose of enhancing the university marketplace of ideas, and the regulation must effectuate this purpose.

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133. *See e.g.*, Hosty v. Carter, 412 F.3d 731, 734 (7th Cir. 2005) (en banc) (noting that the disputed actions occurred following publication of an article attacking a dean), *cert. denied*, 546 U.S. 1169 (2006).

A court conducting an objective inquiry is likely to find that the university's purpose of regulating a student publication's criticism of the university is to protect the university's reputational interests, rather than advance the educational role of the university marketplace. In addition, a court will find that such regulations, rather than broaden critical thought and debate, constrict the marketplace by removing any critical discussion of the university from campus publications.

Furthermore, self-serving regulations such as these would restrict the speech in need of greatest protection. Student publications perform a "watchdog" function by criticizing school policy, faculty, or administration. Criticism holds the university accountable to the student body and provides an impetus for change. While a university would clearly prefer not to be discredited by campus publications, allowing a university to restrict the marketplace of ideas on campus in the name of academic freedom would not serve the interests animating the principle; academic freedom gives the university authority to enhance and enlarge the marketplace's ability to serve an educational function, not to restrict it.

A court will determine that this kind of self-serving regulation that restricts student publications from criticizing the university is impermissible and contrary to the university's educational purpose for regulating and cultivating expression in campus publications. The regulation fails to instill values necessary to effectively educate the community and impedes the acquisition of such values by denying community members the opportunity to critically debate the university administration. These regulations have neither the subjective purpose nor the effect of enhancing the university marketplace of ideas and thus cannot be upheld under my proposed framework. Up to this point, the framework has led to relatively uncontroversial results; however, its regulatory capabilities will be better demonstrated by the three forthcoming hypothetical regulations.

C. Regulation of "Something Less than Libel" Is Permissible

While the framework may generally restrict regulation of criticism of the administration, the framework could permit regulation of criticism that met a "less than libel" standard. For example, one scholarly work has suggested a "demonstrable fact" standard, which would allow the university to regulate criticism of school faculty, officials, or administrators that was "not based on demonstrable fact."[134] Under the framework, regulation, like the demonstrable fact standard, could be permissible if a court determines that the regulation has the subjective purpose of enhancing the university marketplace of ideas and the court objectively determines the regulation effectuates this purpose.

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134. *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1130 (1968).

To understand how a less than libel standard can promote the marketplace of ideas, it is necessary to understand the current libel standard for public officials. In *New York Times Co. v. Sullivan*,[135] a very high burden was placed upon public officials attempting to prove defamation.[136] The Court adopted an "actual malice" standard, which required public officials to show a published statement was knowingly false or made with reckless disregard for the truth.[137] Such a standard is very hard to meet, and often public officials are forced to endure erroneous criticism and a marketplace flooded with false information.[138] The standard follows the rationale that it is better to protect speech and prevent self-censorship in publications than to chill speech by punishing accidental misreporting.[139]

However, this current libel standard can be detrimental to the marketplace of ideas within the university setting, and a court could determine that a university's subjective purpose in implementing a less than libel standard is to enhance, rather than harm, the university marketplace. The purpose of the university marketplace is to promote discussion and debate in order to discover truth; it differs from society's more general marketplace because its purpose is educational, not simply democratic or political. A university must shape and cultivate this marketplace in order to promote more critical thought and discussion, which will be transferred to the classroom and enable more effective teaching and research. With these educational aims, it is important that accurate information be communicated to enhance the discussion and discern truth in the unique institutional context.

Therefore, the effects of the actual malice standard could damage the university marketplace by flooding it with false information. Invoking a less than libel standard such as demonstrable fact could also encourage responsible journalism,[140] and responsible reporting within publications will promote productive discourse because it will be based upon accurate information. Thus, regulations requiring some form of accuracy in reporting could help maintain the social value of student criticism and promote responsible discussion of campus issues. Promoting responsible discussion, unlike promoting higher writing quality, justifies regulation because it will enhance informational accuracy and stimulate more effective thought, criticism, and debate. Similar to regulation of grammar, there will be a danger of regulations based on pretextual arguments; however, this danger is outweighed by the importance of maintaining truthful information in an

135. 376 U.S. 254 (1964).

136. *Id.* at 279–80.

137. *Id.*

138. *See id.* at 271–72 ("[E]rroneous statement[s] [are] inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" (omission in original) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963))).

139. *Id.*

140. *Developments in the Law—Academic Freedom*, *supra* note 134, at 1130.

environment where discussion and debate are expected to aid understanding and learning. As a result, a court could find not only that a university had the subjective purpose of enhancing the marketplace[141] but also that the university's implementation of a less than libel standard effectuates that purpose.

Lastly, encouraging a less than libel standard accommodates student rights while simultaneously protecting university reputational and educational interests. Criticism of university administration can be productive, but false criticism can undermine public and student-body confidence. Lost confidence can threaten both educational quality and campus order,[142] so it is important that student publications be responsible in critical reporting. Also, the standard educates students in professional journalism without overly curtailing their ability to express criticism of the administration. Therefore, the framework would permit the application of a less than libel standard when regulating student criticism of public officials if such standards serve the purpose of maintaining a healthy university marketplace of ideas and enhance, rather than restrict, that marketplace.

D. Regulation of Hate Speech Is Permissible

Under this framework, it would also be permissible for universities to regulate hate speech in campus newspapers and publications. Initially, permitting hate-speech regulation seems counterintuitive to the framework, but the regulation of hate speech can easily meet the test I have devised.

Hate-speech regulation can have both the purpose and effect of enhancing the marketplace of ideas within the university context.[143] While the immediate effect of hate-speech regulations will restrict a specific form of speech within the university marketplace, in the aggregate, regulation of hate speech in student publications will foster the university marketplace and

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141. When inquiring into the university's subjective purpose, the court must consider whether the true purpose of the regulations was to protect the university from student criticism by restricting it. If a court finds that the subjective purpose was ultimately to protect the university's reputation and not to encourage more informed discussion and debate, then the regulation would be impermissible. For example, a general regulation of criticism of the administration would be impermissible. To make this determination, a court would need to closely scrutinize the regulation itself, the process surrounding its creation and implementation, and any other evidence helpful in determining the regulation's subjective purpose.

142. *Developments in the Law—Academic Freedom*, *supra* note 134, at 1130.

143. Please note that hate-speech regulation can have the purpose of enhancing the university marketplace's educational function, but it may not always have this purpose. A court must engage in an objective inquiry as to the subjective purpose of hate-speech regulation. If the court finds evidence to suggest a university's regulation of hate speech was based solely on the university's disagreement with the viewpoint being expressed, the regulation would be impermissible. Under the proposed framework, the university cannot use the purpose of enhancing the university marketplace as a pretext for viewpoint discrimination.

encourage greater participation by minority voices.[144] Greater participation will broaden campus debate, promote more diverse critical thought, and provide more individuals with an avenue for learning, refining, and transferring such skills to the classroom. Therefore, the regulation of hate speech in campus publications will promote a more equitable form of free speech in the university marketplace and greatly benefit the university community.[145] One such benefit is the broadening of campus debate through greater inclusion of speakers.

Hate speech should be regulated in campus publications because it is counterproductive to the university's educational mission, reduces multiplicity of voices, and suppresses discussion and debate about minority issues. Hate speech is not spoken in the spirit of the marketplace or to promote the discovery of truth; instead, it has the purpose of abusing, demeaning, and subordinating its victims.[146] Arguably, hate speech is aimed at driving its victims out of the marketplace. Such speech cannot exist within a campus publication aimed at forging respectful dialogue between university actors. Within the institutional context, respect and collegiality must be fostered in order to preserve the multiplicity of voices and ideas, which stimulate learning by diversifying the debate and generating critical thought and inquiry about less frequently discussed issues. Hate speech discourages these values. It disrespects and degrades specific voices, and it restricts the university marketplace by quieting minority voices that are already underrepresented and often unheard.

Due to its purpose, hate speech should be awarded less value within the institutional context of a university publication and thus restricted. In order to fulfill its educational role, a university must be capable of enforcing a certain level of dignity and respect among participating actors. Dignity and respect will encourage discussion and debate, but hate speech will threaten every actor within the system. It will chill minority voices[147] and expression within the community at large. Eliminating such speech from the printed marketplace would promote the educational purpose of the university and its publications without being detrimental to the expression of hate speech as a whole.[148] For these reasons, a court could determine that regulation of hate speech has the subjective purpose of enhancing the university marketplace of ideas and is capable of effectuating that purpose.

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144. *See* Fletcher N. Baldwin, Jr., *The Academies, "Hate Speech" and the Concept of Academic Intellectual Freedom*, 7 U. FLA. J.L. & PUB. POL'Y 41, 76 (1994–1995) (stating that targets of hate speech are silenced and not able to fully participate in campus life).

145. *Id.*

146. *Id.* at 73.

147. *Id.* at 78.

148. My framework only provides that these viewpoints should not be protected within higher education; alternative avenues for the expression of this speech will be available to such speakers.

E. Regulation to Ensure Access Is Permissible

Lastly, the framework I have devised will allow universities to implement regulations to ensure that community actors are given access to campus publications. Regulations ensuring access are likely to have the purpose of promoting the university marketplace, and these regulations will effectuate this purpose.

Regulations such as the "fairness doctrine" or "right of reply" statutes offer good examples of access regulations that would be permissible under the new framework. Two Supreme Court cases have previously discussed the constitutionality of these access regulations outside of the educational context: *Red Lion Broadcasting Co. v. FCC*[149] and *Miami Herald Publishing Co. v. Tornillo*.[150] The *Red Lion* case questioned the constitutionality of the fairness doctrine as applied in radio broadcasting.[151] The fairness doctrine required broadcasting stations to furnish individuals attacked in previous radio broadcasts with an opportunity to respond.[152] The Court supported the fairness doctrine with the rationale that it enhanced rather than infringed First Amendment rights.[153] Broadcasting presents a scarcity problem because there are substantially more individuals wishing to communicate than can be accommodated by the medium.[154] Due to this scarcity, it is important that the government be able to ensure that the medium's function is consistent with the First Amendment's purpose of preserving an "uninhibited marketplace of ideas."[155] The fairness doctrine effectively preserves this purpose in radio broadcasting by promoting access to the marketplace and therefore enhancing rather than infringing First Amendment rights.

In the case of school-sponsored speech, *Red Lion* is highly applicable. Campus newspapers, like the broadcasting medium but unlike private newspapers,[156] suffer a scarcity problem. Universities have limited funds for sponsoring student publications; therefore, absent regulations, not all participating actors can be assured access to a campus newspaper. Yet, the purpose of university publications is to foster educational values and facilitate discussion and debate within the community; accordingly, all participating actors should have some form of access to campus discourse. Increased access to the columns of student papers furthers the university's educational purpose

149. 395 U.S. 367 (1969).
150. 418 U.S. 241 (1974).
151. *Red Lion*, 395 U.S. at 370.
152. *Id.* at 373–75.
153. *Id.* at 375.
154. *Id.* at 388–89.
155. *Id.* at 390.
156. In *Tornillo*, the Court was not persuaded by the scarcity argument used in *Red Lion*. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 251, 258 (1974) (holding that although "economic factors . . . have made entry into the marketplace of ideas served by the print media almost impossible," government regulation of editorial control and judgment cannot be exercised consistent with the First Amendment).

because it promotes greater involvement in a marketplace that fosters critical-thinking skills, offers an avenue for refining such skills, and encourages the consistent use of critical thought and inquiry so that these skills carry over into the classroom.

Alternatively in *Tornillo*, the Court found that a right of reply statute, which required private newspapers to provide candidates access to respond to criticism during an electoral campaign, was unconstitutional.[157] The Court reasoned that the editorial discretion of private newspapers was only bound by two things: (1) the need to maintain a sufficient number of readers and advertisers to ensure financial success and (2) "journalistic integrity of its editors and publishers."[158] Further, the Court determined that publication decisions of private papers are reserved for the paper's editorial judgment and control; therefore, it is inconsistent with the First Amendment to require private newspapers to publish "that which [they] would not otherwise print."[159]

In the case of school-sponsored speech, *Tornillo* is easily distinguished. Unlike the private newspaper in *Tornillo*, university publications rely on public funds and student activity fees to finance publication; therefore, they belong to the university community at large, not to student editors. More importantly, campus newspapers are forums provided by the university to advance its educational interests. Therefore, there are strong arguments that its columns should be open to the entire academic community to enhance, rather than inhibit, discussion and debate in the university context.[160] Rather than leaving the content of campus newspapers solely to student editorial discretion, access regulations would promote the university marketplace by ensuring that student publications are accessible to a variety of speakers. As discussed in regard to regulation of hate speech, increased access and participation in the university marketplace advances the educational interests of universities.[161]

In short, a university could regulate a student newspaper by implementing a fairness doctrine or right of reply regulation because it is likely that the purpose of such regulation is to enhance the university marketplace of ideas. The regulation would effectuate this purpose by ensuring access to the publications and advancing the university's educational function.

157. *Id.* at 258.

158. *Id.* at 255 (quoting Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973) (Burger, C.J., plurality opinion)).

159. *Id.* at 256.

160. Joyner v. Whiting, 477 F.2d 456, 462 (4th Cir. 1973) (admitting that the case "provides no occasion for formulating a principle akin to the fairness doctrine for the college press" because there is no evidence to suggest that contrary views were rejected).

161. For additional detail on how increased access to university publications facilitates education, see *supra* subpart III(D).

IV. Conclusion

A university plays a unique role within American society. Its educational purpose distinguishes it from the state, and academic freedom provides it with the regulatory authority necessary to fulfill its educational role. In order to effectively educate the academic community, it is imperative that universities be able to cultivate and shape a marketplace of ideas suited to their educational purpose. Regulation of student publications is an effective way of cultivating this unique marketplace and advancing education because student newspapers facilitate communication, debate, critical thought, and inquiry, as well as other important values necessary to expand learning, understanding, and overall education.

Yet university regulation of campus publications, like regulation of other expressive activities on public property, has traditionally been judged by applying forum analysis. As a standard, forum analysis is a blunt instrument that is fundamentally inapposite to the university setting. It ignores the distinct institutional purpose and academic freedom of a university, treats a university like any other state actor, and substantially restricts a university's ability to regulate expression in order to cultivate a marketplace of ideas uniquely capable of advancing the university's educational purpose. Forum analysis, when applying *Hazelwood* deference, presents the additional danger of disregarding students' expressive rights and the value of student participation in the university marketplace.

Though other scholars have offered alternatives to forum analysis, their suggestions are not viable. Proffered solutions, such as protective statutes and presumptions of a limited public forum, address the danger of ignoring student rights, but they fail to consider the important educational function of a university and its academic freedom to regulate student publications in order to advance the educational function. The consistent failure of forum analysis and these alternatives to recognize the unique qualities of a university and its marketplace impede the university's educational function, and that is an unacceptable consequence of judicial action.

Due to the faults of forum analysis and previously suggested alternatives, I have proposed a replacement centered upon a university's educational need to cultivate a marketplace of ideas that advances learning, understanding, and overall education of the academic community. My proposed framework consists of a two-part test that will allow universities to regulate student publications only if the regulations have the subjective purpose of enhancing the university marketplace of ideas and the regulations actually effectuate this purpose. Thus, this framework, unlike other proposed solutions, recognizes that a university may be justified in regulating expression to enhance the educational function of the university marketplace. It also ensures the protection and stimulation of students' expressive rights, which further facilitate education. In short, a university's academic freedom and educational mission enable it to cultivate and shape a marketplace of

ideas in a way that the state cannot. By recognizing this distinction, my framework, unlike forum analysis, facilitates the educational purpose of a university, rather than impeding it.

—Lauren E. Tanner