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### Student Press Exceptionalism

Sonja R. West

University of Georgia School of Law, [srwest@uga.edu](mailto:srwest@uga.edu)



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## Student Press Exceptionalism

Sonja R. West\*

*Imagine two students walking down the hall of their public high school. The first student enters his English class wearing a t-shirt depicting the President with images of alcohol and illegal drugs.<sup>1</sup> On his wrist, he sports a bracelet with a phrase that references female body parts.<sup>2</sup> And then, during a class discussion, he makes arguments against his gay and lesbian classmates.<sup>3</sup> The second student, meanwhile, turns into a different classroom. In her class, she engages in truthful and accurate speech about issues of great*

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\* Sonja West is an Associate Professor of Law at the University of Georgia School of Law, and was formerly a judicial clerk for U.S. Supreme Court Justice John Paul Stevens and Judge Dorothy W. Nelson of the U.S. Court of Appeals for the 9th Circuit. She was a Hugo Black Faculty Fellow at the University of Alabama, and a lawyer practicing First Amendment and Intellectual Property Law. Professor West wishes to thank Chelsey McDade for research assistance.

<sup>1</sup> See, e.g., *Guiles v. Marineau*, 461 F.3d 320 (2d. Cir. 2006) (upholding the right of a middle-schooler to wear a t-shirt depicting President George W. Bush with the words “Chicken-Hawk-In-Chief.” The shirt also showed “a large picture of the President’s face, wearing a helmet, superimposed on the body of a chicken. Surrounding the President are images of oil rigs and dollar symbols. To one side of the President, three lines of cocaine and a razor blade appear. In the “chicken wing” of the President nearest the cocaine, there is a straw. In the other “wing” the President is holding a martini glass with an olive in it. Directly below all these depictions is printed, “1st Chicken Hawk Wing,” and below that is text reading “World Domination Tour.” The back of the T-shirt has similar pictures and language, including the lines of cocaine and the martini glass. The representations on the back of the shirt are surrounded by smaller print accusing the President of being a “Crook,” “Cocaine Addict,” “AWOL, Draft Dodger,” and “Lying Drunk Driver.” The sleeves of the shirt each depict a military patch, one with a man drinking from a bottle, and the other with a chicken flanked by a bottle and three lines of cocaine with a razor”).

<sup>2</sup> *Hawk v. Eaton Area School District*, (3d Cir. 2013) (upholding the right of two middle-school students to wear bracelets that stated “I ♥ boobies! (KEEP A BREAST).”

<sup>3</sup> *Glowacki v. Howell Pub. Sch. Dist.*, No. 11-15481 (E.D. Mich. Jun. 10. 2013). See also, *Federal Court Rules Michigan Teacher’s Discipline of Student for Anti-Gay Remarks Violated the Student’s Free Speech Rights*, NATIONAL SCHOOL BOARD ASSOCIATION, (June 27, 2013), <http://legalclips.nsba.org/2013/06/27/do-not-post-still-working-on-draft-federal-district-court-in-michigan-rules-teacher-who-disciplined-student-for-anti-gay-remarks-during-classroom-discussion-violated-the-students-free-speech-rights/#sthash.z0eb9cWX.dpuf>.

*concern to her classmates like bullying,<sup>4</sup> violence,<sup>5</sup> and teen pregnancy.<sup>6</sup> She also challenges her school's policies on testing<sup>7</sup> and special treatment of student athletes.<sup>8</sup>*

*Remarkably, it is the second student's speech that is far more vulnerable to official censorship under the United States Supreme Court's rulings. Why? Because the room the second student entered was her high school journalism class, and her speech appeared in the student newspaper.*

Constitutional protection for student speakers is an issue that has been hotly contested for almost 50 years. Several commentators, moreover, have made powerful arguments that the Court has failed to sufficiently protect the First Amendment rights of all students.<sup>9</sup> But this debate has overlooked an even more troubling reality about the current state of expressive protection for students—the especially harmful effect of the

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<sup>4</sup> See Sara Gregory, *Virginia Student's Column on Bullying Shot Down by School's Principal*, STUDENT PRESS LAW CENTER (Nov. 21, 2013, 12:00 AM), <http://www.splc.org/article/2013/11/virginia-students-column-on-bullying-shot-down-by-schools-principal> (“A student's column criticizing sexuality-based bullying was deemed inappropriate for her high school's student newspaper by the principal, editors say”).

<sup>5</sup> William C. Nevin, *Neither Tinker, Nor Hazelwood, Nor Fraser, Nor Morse: Why Violent Student Assignments Represent a Unique First Amendment Challenge*, 23 WM. & MARY BILL RTS. J. 785, 785 (2015) (“In the first year after the . . . shooting at Columbine . . . scholars were quick to note the rush to censorship across the country, including discipline for a high school newspaper columnist who suggested satirically that assassinating the president would be a good stress reliever; the efforts in Colorado, Georgia, New Mexico, and Tennessee to ban the style of trench coats worn by the Columbine shooters; and—ironically enough—cases in Louisiana and Texas involving administrators who attempted to prevent students from wearing black armbands. It was simply, as Professor Clay Calvert wrote, “a story of censorship”).

<sup>6</sup> Dan Simmons, *Stevenson High School officials halt publication of student newspaper, the Statesman*, CHICAGO TRIBUNE (Nov. 20, 2009), [http://articles.chicagotribune.com/2009-11-20/news/0911190739\\_1\\_halt-publication-student-press-law-center-teen-pregnancy](http://articles.chicagotribune.com/2009-11-20/news/0911190739_1_halt-publication-student-press-law-center-teen-pregnancy).

<sup>7</sup> Amanda Granato, *New Policy Mandates Schedule for Assigning Homework*, THE RIDER ONLINE (Nov. 8, 2012), <http://www.therideronline.com/top-story/2012/11/08/new-policy-mandates-schedule-for-assigning-homework-tests-projects/>.

<sup>8</sup> Nicole Ocran, *Student Newspaper Containing Critical Article Confiscated at Iowa High School*, STUDENT PRESS LAW CENTER (Feb. 10, 2010, 12:00 AM), <http://www.splc.org/article/2010/02/student-newspaper-containing-critical-article-confiscated-at-iowa-high-school>.

<sup>9</sup> See, e.g., Christine Snyder, *Reversing the Tide: Restoring First Amendment Ideals in America's Schools Through Legislative Protection for Journalism for Journalism Students and Advisors*, 2014 B.Y.U. EDUC. & L.J. 71 (2014).

Court's precedents on student journalists. Under the Court's jurisprudence, schools may regulate with far greater breadth and ease the speech of student journalists than of their classmates. Schools are essentially free to censor the student press even when the speech at issue is truthful, legally obtained, non-disruptive, and about matters of public concern.

As a constitutional matter, the lack of protection for student journalists should be alarming. This is because the suppression of student journalists not only potentially violates the First Amendment's Free Speech Clause (as does the censorship of other student speech), but it also infringes on the constitutional guarantee of a free press. Unlike their non-press classmates, student journalists fulfill distinctive roles that the Supreme Court has repeatedly recognized as constitutionally valuable. And like reporters outside of the school setting, these young journalists face high risks of government oppression and manipulation if left unprotected. Official censorship of student journalists thus raises numerous First Amendment concerns that should demand heightened—not weakened—court scrutiny.

In Part I of this essay, I examine the Supreme Court's jurisprudence on student speech and explain how its rulings have created an incongruous framework in which student journalists receive less First Amendment protection than other student speakers. In Part II, I discuss the Court's recognition of the unique and important roles of the press, and I demonstrate how the student press furthers these vital constitutional goals. Finally, in Part III, I explore how the Court's under-protection of student journalists violates many of the recognized core principles of freedom of speech and of the press.

### **The Demise of Constitutional Protection for Student Journalists**

The United States Supreme Court has addressed the constitutional rights of student speakers in only a handful of cases. Most famously, in the 1969 case of *Tinker v. Des Moines*, the Court upheld the free speech rights of students whose school had punished them for protesting the Vietnam War. The Court in *Tinker* described student speech freedoms in broad and sweeping terms, declaring that students are “persons” under the First Amendment and do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>10</sup>

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<sup>10</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

In two later cases, the Court continued to endorse the basic premise of *Tinker* that student speakers have a constitutional right of expression.<sup>11</sup> Even while ruling in favor of the schools in these cases, which involved a student's "lewd and indecent" speech at a school assembly<sup>12</sup> and a message that was "viewed as promoting illegal drug use" at a "school-sanctioned event,"<sup>13</sup> the Court nonetheless upheld the core holding that schools may not punish or suppress student speech unless the speech would "materially and substantially interfere" with the work of the school or interfere with the rights of other students.<sup>14</sup>

When a case came before the Court involving a high school's censorship of a student newspaper, however, the Court did not apply the strong protections of *Tinker*. In this case, *Hazelwood School District v. Kuhlmeier*, the school principal forced the student newspaper editors to remove two pages from their newspaper, because he objected to two of the students' stories—one about the experiences of three students with teen pregnancy and another about the impact of divorce on students.<sup>15</sup>

This time the Court did not hold that the student journalists had constitutional rights to free expression that protected them from government censorship. Instead, it distinguished *Tinker* as addressing a different question.<sup>16</sup> *Tinker*, the Court stated, dealt with "educators' ability to silence a student's personal expression that happens to occur on the school premises."<sup>17</sup> This case, the Court explained, was different, because it involved "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."<sup>18</sup>

Once deemed to be a "school-sponsored publication" or a non-public forum, the Court held that the students' speech lost virtually all of its constitutional protection. The school's power to censor the students'

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<sup>11</sup> But see, Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gate: What's Left of Tinker*, 48 DRAKE L. REV. 527, 530 (2000) ("Simply put, in the three decades since *Tinker*, the courts have made clear that students leave more of their constitutional rights at the schoolhouse gate").

<sup>12</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

<sup>13</sup> *Morse v. Frederick*, 551 U.S. 393, 403 (2007). See generally Sonja R. West, *Sanctionable Conduct: How the Supreme Court Stealthily Opened the Schoolhouse Gate*, 12 LEWIS & CLARK L. REV. 27 (2008) (arguing that the *Morse v. Frederick* decision is unsupported by precedent and could encourage schools to sanction more events in the future).

<sup>14</sup> *Tinker*, 484 U.S. at 512-13.

<sup>15</sup> 484 U.S. 260 (1988).

<sup>16</sup> *Id.* at 270-71.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 271.

speech thus became nearly absolute. When dealing with student speech in a “school-sponsored” forum, the Court held, school officials are free to “exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>19</sup> These concerns can include, the Court explained, anything the school officials deem to be “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.”<sup>20</sup> School officials also may regulate student speech that takes “any position other than neutrality on matters of political controversy” or that could be reasonably perceived as “inconsistent with the shared values of a civilized social order.”<sup>21</sup>

The effect of *Hazelwood* on student journalists has been profound. From 1988 to 2003, the Student Press Law Center (“SPLC”), a non-profit advocacy organization for student journalists, saw a 350-percent increase in calls to its center—“a nearly constant rise that shows no sign of decline.”<sup>22</sup> These calls, according to the SPLC, generally involved reports of censorship of “articles, editorials and advertisements that are perceived as ‘controversial’ or that school officials feel might cast the school in a negative light.”<sup>23</sup> The SPLC also reported a rise of faculty journalism advisors reporting that their jobs had been threatened if they refused to cooperate with the schools’ censorship.<sup>24</sup>

As a technical matter, the *Hazelwood* decision does not apply just to student journalists. The line it draws, rather, is based on whether the student expressive activity occurs in an open public forum or as part of a school-sponsored, non-public forum. Thus courts in a few cases have applied its restrictive framework to non-media student curricular activities like art shows, debates and academic presentations.<sup>25</sup> At the same time, moreover, not all student journalism is necessarily subject to *Hazelwood*-

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<sup>19</sup> *Id.* at 273.

<sup>20</sup> *Id.* at 271.

<sup>21</sup> *Id.* at 272 (internal quotations omitted) (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

<sup>22</sup> *Hazelwood School District v. Kuhlmeier: A Complete Guide to the Supreme Court Decision*, The Student Press Law Center, 6, <http://s3.amazonaws.com/cdn.getsnworks.com/spl/pdf/HazelwoodGuide.pdf> (last visited June 26, 2015).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See e.g., *Hansen v. Ann Arbor Pub. Sch.*, 293 F. Supp. 2d 780, 795 (E.D. Mich. 2003) (finding that *Hazelwood* governed a high school assembly program); *Curry ex rel. Curry v. Sch. Dist. of the City of Saginaw*, 452 F. Supp. 2d 723, 735 (E.D. Mich. 2006) (applying *Hazelwood* standards to a school project).

level censorship. For example, when the student journalism is extracurricular, independent or otherwise deemed to be part of a public forum, it does not fall under *Hazelwood*.<sup>26</sup>

Yet particularly at the high school level,<sup>27</sup> the reality is that the *Hazelwood* decision impacts student journalists far more frequently than other types of student speakers. Much of this disparity is due to how the decision was crafted. In *Hazelwood*, the Court relied on certain factors and used specific language that more naturally applies to student journalists than it does to other student speakers.<sup>28</sup> For example, in trying to determine whether the student newspaper in *Hazelwood* was a non-public forum, the Court pointed to characteristics that tend to describe the student press such as newspapers, yearbooks, literary magazines, or television broadcasts. These factors include asking whether the speech was produced as part of the curriculum, supervised by a faculty member, or financed by the school. The Court also expressed concern with student speech bearing the name or “imprimatur of the school” such as the student newspaper, because the Court concluded that these forums raise the danger that “the views of the individual speaker [will be] erroneously attributed to the school.”<sup>29</sup> These factors all inevitably capture the speech of the student press.

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<sup>26</sup> Dean v. Utica Cmty. Sch., 345 F. Supp. 2d 799, 806 (E.D. Mich. 2001) (finding that because the school newspaper was a limited public forum the principal could not censor the student written article).

<sup>27</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 274 n.7 (majority opinion) (“[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”). See generally Frank D. LoMonte, “*The Key Word is Student*”: *Hazelwood* Censorship Crashes the Ivy-Covered Gates, 11 FIRST AMEND. L. REV. 305 (2013) (pointing out the confusion among the circuit courts over the applicability of *Hazelwood* to student speakers at the college and university level and arguing that *Hazelwood* is inapplicable to the college and university level).

<sup>28</sup> See Resolution One 2013: AEJMC Resolution: 25<sup>th</sup> Anniversary of *Hazelwood* v. *Kuhlmeier*, ASSOCIATION FOR EDUCATION IN JOURNALISM AND MASS COMMUNICATION (April 2, 2013), <http://www.aejmc.org/home/2013/04/resolution-one-2013>, (stating that *Hazelwood* is “significantly reducing the level of First Amendment protection afforded to students’ journalistic speech”); see also Kaitlin Tipsword, *After 25 Years, Impact of Hazelwood on student journalism is Mixed, Experts Say*, STUDENT PRESS LAW CENTER (Jan. 30, 2013, 12:00 AM), <http://www.splc.org/article/2013/01/after-25-years-impact-of-hazelwood-on-student-journalism-is-mixed-experts-say> (quoting Frank Susman, the attorney who represented the students in *Hazelwood*, “The difference that was cited here was that the student newspaper was a school exercise. Wearing the armband was just private speech out of the school context, as opposed to a class of Journalism I or Journalism II . . . Because of that distinction, *Tinker* didn’t really apply”).

<sup>29</sup> *Hazelwood*, 484 U.S. at 271 (1988).



In *Hazelwood*, therefore, the Court created a two-tiered regime for high school students in which “a student’s personal expression that happens to occur on the school premises” receives the expansive protections of *Tinker*, while student journalists, who are typically part of a “school-sponsored” expressive activity, are subject to the highly restrictive *Hazelwood* standard. In other words, high school student journalists, the Court has implicitly decided, have fewer constitutional protections than other types of student speakers.

On its face, this outcome seems paradoxical. And, indeed, an analysis of the text of the First Amendment, the Supreme Court’s declarations on the unique role of the press, and the Court’s free speech precedents points in the opposite direction. Student journalists deserve more, not less, constitutional protection.

### **Student Journalists Fulfill Constitutional Press Functions**

The First Amendment to the Constitution states that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>30</sup> Although freedoms of both speech and press are specifically mentioned in the text of the Constitution, modern First Amendment law places nearly all of its emphasis on speech. Our individual and collective speech rights are expansive and robust. Government regulations on speech based on its content are held to the Court’s most stringent test of strict scrutiny. And, in the same vein, subject-matter, viewpoint- or speaker-based restrictions are presumed unconstitutional.

The *Tinker* decision applies much of this constitutional free speech shield to student speakers. The Court in *Tinker* declared that schools “may not be enclaves of totalitarianism” and that students are not “closed-circuit recipients of only that which the State chooses to communicate.”<sup>31</sup> Instead, the Court held, students “are possessed of fundamental rights which the State must respect” including the “freedom of expression of their views” even when they involve “controversial subjects.”<sup>32</sup>

In contrast to its vigorous free speech jurisprudence, the Court has given far less attention to the Press Clause. It has never held, for example, that a particular right or protection emanates solely as a right of press freedom.<sup>33</sup> Yet while the Court has refused to interpret the Press Clause as

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<sup>30</sup> U.S. CONST. amend. I.

<sup>31</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

<sup>32</sup> *Id.*

<sup>33</sup> See David A. Anderson, *Freedom of the Press* 80 TEX. L. REV. 429, 430 (2002) (“[A]s a matter of positive law, the Press Clause actually plays a rather minor role in protecting

providing explicit protection to press speakers,<sup>34</sup> it has nonetheless repeatedly and consistently affirmed<sup>35</sup> that press speakers are different than non-press speakers. The Court has declared that the press fulfills an “historic, dual responsibility in our society.”<sup>36</sup> These unique constitutional roles include gathering and disseminating news to the public and checking the government and the powerful.<sup>37</sup>

Student journalists also further these vital First Amendment functions. Even accepting that the rights of student speakers in general “are not automatically coextensive with the rights of adults in other settings,”<sup>38</sup> and must be “applied in light of the special characteristics of the school environment,”<sup>39</sup> the Court in *Hazelwood* made a crucial error by failing to give any weight to student journalists’ constitutionally special role as part of the press.

### *Gathering and Disseminating News to the Public*

The Supreme Court has declared “an untrammelled press [to be] a vital source of public information.”<sup>40</sup> The information provided by the press enables the public to “vote intelligently or to register opinions on the administration of government generally”<sup>41</sup> and answers “the public need for information and education with respect to the significant issues of the times.”<sup>42</sup>

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the freedom of the press”); C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 956 (2007) (“The Court has never explicitly recognized that the Press Clause involves any significant content different from that provided to all individuals by the prohibition on abridging freedom of speech”).

<sup>34</sup> Sonja R. West, *The Stealth Press Clause*, 38 GA L. REV. 729, 732 (2014) (“The oft-told story that the Court has treated press and nonpress speakers alike does not hold up to close examination. Despite its protestations to the contrary, the Court has made clear that there is a special constitutional space for the press”).

<sup>35</sup> Although it has done so often only in dicta. See generally RonNell Andersen Jones, *The Dangers of Press Clause Dicta*, 48 GA. L. REV. 705 (2014) (discussing the dangers of Supreme Court dicta praising the press and the unique function it serves).

<sup>36</sup> *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 382 (1984) (describing the dual responsibilities as “reporting information and . . . bringing critical judgment to bear on public affairs”).

<sup>37</sup> *Id.* at 750; see also Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434 (2014) (arguing that press speakers should be protected when fulfilling these constitutional roles).

<sup>38</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

<sup>39</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>40</sup> *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936).

<sup>41</sup> *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975).

<sup>42</sup> *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940); see also *Estes v. Texas*, 381 U.S. 532,

When it ignored the censorship of student journalists in *Hazelwood*, however, the Supreme Court stifled the public's ability to receive information about matters of public concern. Student articles targeted since *Hazelwood* have addressed important topics such as the easy availability of drugs in public schools,<sup>43</sup> treatment of gay and bi-sexual teenagers,<sup>44</sup> gangs,<sup>45</sup> depression among teenagers,<sup>46</sup> English as a second language,<sup>47</sup> medical marijuana,<sup>48</sup> rape culture,<sup>49</sup> and bullying.<sup>50</sup>

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539 (1965) (praising the role of the free press in “generally informing the citizenry of public events and occurrences”); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (“Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society”).

<sup>43</sup> See Joanna Brenner, *High School Journalists Ordered to Print Administration-Approved Newspaper*, STUDENT PRESS LAW CENTER (Nov. 25, 2009, 12:00 AM), <http://www.splc.org/article/2009/11/high-school-journalists-ordered-to-print-administration-approved-newspaper?id=2003> (discussing the easy availability of drugs).

<sup>44</sup> See *Story on Gay Teen Life Sparks Controversy*, STUDENT PRESS LAW CENTER (Dec. 1, 1996, 12:00 AM), <http://www.splc.org/article/1996/12/story-on-gay-teen-life-sparks-controversy> (discussing a school's review of its policy after a student written article over student's experiences as gay was published in the school newspaper); see also Emily Summars, *Tenn. Yearbook's Profile of Gay Student Brings Calls for Investigation*, STUDENT PRESS LAW CENTER (May 3, 2012, 12:00 AM), <http://www.splc.org/article/2012/05/tenn-yearbooks-profile-of-gay-student-brings-calls-for-investigation> (“Some community members are asking for an investigation of the yearbook adviser at Lenoir City High School, after the 2012 book included an article about an openly gay student”); Catherine MacDonald & Christopher Carter, *LGBT Content a Target for Censorship*, STUDENT PRESS LAW CENTER (Sept. 1, 2009, 12:00 AM), <http://www.splc.org/article/2009/09/lgbt-content-a-target-for-censorship> (discussing a high school's new policy after a student written article that reported on student LGBT issues affecting students was published in the school newspaper).

<sup>45</sup> See *Censorship-Fighters From Wis., Pa., Recognized with 'Courage in Student Journalism' Award*, STUDENT PRESS LAW CENTER (Nov. 11, 2014, 10:38 AM), <http://www.splc.org/article/2014/11/censorship-fighters-from-wis-pa-recognized-with-courage-in-student-journalism-award> (discussing some high school newspaper school editors who won the Courage in Journalism Award for addressing gang issues).

<sup>46</sup> See *Students Struggle With Depression—And With Telling The Story*, NPR (May 24, 2014, 7:47 AM), <http://www.npr.org/2014/05/24/315445104/students-struggle-with-depression-and-with-telling-the-story> (discussing a high school that did not permit its students to write about depression in their high school newspaper).

<sup>47</sup> Freya Sonnichsen, *When English Comes Second*, CENTRAL TIMES (Dec. 22, 2014), <http://www.centraltimes.org/showcase/2014/12/22/when-english-comes-second/#sthash.0E9x9dLC.dpuf> (discussing the struggles high school students encounter when English is not their first language).

<sup>48</sup> See Greg Parlier, *Lakeland Student Fights to Write Story*, THE LEDGER (Apr. 27, 2014, 2:49 AM), <http://www.theledger.com/article/20140427/NEWS/140429269/1326?Title=Lakeland-Student-Fights-to-Write-Story> (discussing a high school teacher forbidding a student

Student journalists, moreover, do not focus solely on issues concerning teenagers and high schools. They also cover matters of local, state, and national importance such as elections,<sup>51</sup> low-income housing,<sup>52</sup> gun control,<sup>53</sup> the minimum wage,<sup>54</sup> religion,<sup>55</sup> and other current events.<sup>56</sup>

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from writing about the legalization of marijuana).

<sup>49</sup> See Scoot Kaufman, *WI School Officials Seize Control Over Student Paper After 'Rape Culture' Article Appears*, RAW STORY (Mar. 12, 2014, 10:48 AM), <http://www.rawstory.com/rs/2014/03/wi-school-officials-seize-control-over-student-paper-after-rape-culture-article-appears/> (“School district officials in Fond du Lac, Wisconsin have instituted new guidelines for student journalists after a high school newspaper published a story on the dangers of rape culture”).

<sup>50</sup> See Sara Gregory, *Virginia Student's Column on Bullying Shot Down by School's Principal*, STUDENT PRESS LAW CENTER (Nov. 21, 2013, 12:00 AM), <http://www.splc.org/article/2013/11/virginia-students-column-on-bullying-shot-down-by-schools-principal> (“A student's column criticizing sexuality-based bullying was deemed inappropriate for her high school's student newspaper by the principal, editors say”); see also Emily Chiles, *Sticks and Stones May Break Her Bones But Their Words No Longer Hurt Her*, THE KIRKWOOD CALL (Feb. 1, 2014), [http://www.thekirkwoodcall.com/\\_stories/\\_features/2014/02/01/sticks-and-stones-may-break-her-bones-but-their-words-no-longer-hurt-her/](http://www.thekirkwoodcall.com/_stories/_features/2014/02/01/sticks-and-stones-may-break-her-bones-but-their-words-no-longer-hurt-her/) (discussing a high school student who has been the victim of bullying).

<sup>51</sup> See Sara Gregory, *High School Journalists Cover the 2012 Elections*, STORIFY (2012), <https://storify.com/saragregory/high-school-journalists-cover-the-2012-elections> (highlighting student journalists who covered the 2012 elections); see also *The Call Votes Obama for a Second Term*, THE KIRKWOOD CALL (Oct. 31, 2012), [http://www.thekirkwoodcall.com/\\_stories/\\_opinion/staff-editorials/2012/10/31/the-call-votes-obama-for-a-second-term/](http://www.thekirkwoodcall.com/_stories/_opinion/staff-editorials/2012/10/31/the-call-votes-obama-for-a-second-term/) (discussing the high school newspaper's staff's support for Obama in the 2012 elections); Mark Z. Barabak, *Obama Wins Second Term After Defeating Romney*, THE EAGLE'S TALE (Nov. 7, 2012), <http://eaglestaleonline.com/news/2012/11/07/obama-wins-second-term-after-defeating-romney/> (discussing Obama's defeat over Romney in the 2012 elections); William Douglas, *New Congress is Most Diverse in History*, THE EAGLE'S TALE (Jan. 6, 2015), <http://eaglestaleonline.com/news/2015/01/06/new-congress-is-most-diverse-in-history/> (discussing the diversity of the 114<sup>th</sup> Congress).

<sup>52</sup> Mischa Nee, *The Closure of the Buena Vista Mobile Home Park is Inexcusable*, THE CAMPANILE (Oct. 13, 2014), <http://www.palycampanile.org/archives/4665#sthash.jQ31nUbM.dpuf> (criticizing the closure of a local mobile home park and blaming it on the negligence of persons of higher economic status).

<sup>53</sup> See Katie Alaks, *Editors' Roundtable: Illinois Concealed Carry*, CLARION (Apr. 3, 2012), <http://rbclarion.com/uncategorized/2014/04/03/editors-roundtable-illinois-concealed-carry/> (discussing the different views the editors of a high school newspaper have over their state's new concealed carry law).

<sup>54</sup> See Brian Crotty & Neal Hasan, *Why Minimum Wage Deserves Maximum Attention*, CENTRAL TIMES (Dec. 19, 2014), <http://www.centraltimes.org/showcase/2014/12/19/why-minimum-wage-deserves-maximum-attention/> (discussing why the minimum wage is an important issue for students to pay attention to).

The role of the press in informing the public does not include just the dissemination of news to the public but also the equally important work of collecting valuable information on the public's behalf. Thus the Supreme Court has observed that "news gathering is not without its First Amendment protections,"<sup>57</sup> because "without some protection for seeking out the news, freedom of press could be eviscerated."<sup>58</sup> This unique news-gathering function of the press reflects an understanding that journalists serve as "surrogates for"<sup>59</sup> or as "the 'eyes and ears' of the public."<sup>60</sup>

Once again, student journalists also fulfill this crucial task of gathering newsworthy information. In addition to utilizing the traditional tools of reporting such as interviewing sources and attending government meetings, student reporters commit time and resources to pursuing other sources of information. Two Ohio high school journalists, for example, used a public record request to uncover that an incident at their school, which their principal had publicly referred to as an "allegation of assault," actually involved a rape charge.<sup>61</sup> And a student in New Jersey relied on anonymous sources for an article investigating complaints that the school district's superintendent harassed teachers and staff members.<sup>62</sup>

Like the press outside the school setting, student journalists engage in a qualitatively different and uniquely valued type of speech than other types

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<sup>55</sup> See Arsheen Kour & Fatima Elfakahany, *Kennesaw City Council Denies Muslim Mosque, Stomps on 1<sup>st</sup> Amendment Rights*, THE CHANT (Dec. 5, 2014), <http://nchschant.com/2341/opinions/kennesaw-city-council-denies-muslims-mosque-stomps-on-1st-amendment-rights/> (discussing their local city council's decision regarding a permit to build a mosque).

<sup>56</sup> See Kristen Hare, *In St. Louis, High School Journalists Are Telling Their Own Stories About Ferguson*, POYNTER (Nov. 21, 2014, 1:33 PM), <http://www.poynter.org/news/mediawire/282183/in-st-louis-high-school-journalists-are-telling-their-own-stories-about-ferguson/> (discussing different high school students writing about Ferguson); see also Allie Biscupki, *Ferguson to Iowa City*, WESTSIDE STORY (2013), <http://wsspaper.com/longform/2014/11/Ferguson> (discussing the Ferguson protests).

<sup>57</sup> *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972).

<sup>58</sup> *Id.* at 681.

<sup>59</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (plurality opinion).

<sup>60</sup> *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978).

<sup>61</sup> Kristen Hare, *Ohio High School Journalists Push for Records, Break a Story*, POYNTER.ORG (Oct. 17, 2013 3:24 PM), <http://www.poynter.org/news/mediawire/226181/ohio-high-school-journalists-push-for-records-break-a-story/>.

<sup>62</sup> Dani Kass, *Protections Inconsistent For Student Journalists Who Withhold Names of Sources*, STUDENT PRESS LAW CENTER (Nov. 17, 2014, 4:58 PM), <http://www.splc.org/article/2014/11/protections-inconsistent-for-student-journalists-who-withhold-names-of-sources>.

of speakers. By allowing them to be silenced, the Court has robbed the public of information and education about pressing matters.

### *Checking the Government and the Powerful*

Simply conveying information to the public is not the only job of the press. It also, according to the Supreme Court, “plays a unique role as a check on government abuse”<sup>63</sup> and “serve[s] as an important restraint on government.”<sup>64</sup> According to the Court, “the Framers of our Constitution thoughtfully and deliberately” sought to protect “the right of the press to praise or criticize governmental agents.”<sup>65</sup> First Amendment scholar Vincent Blasi similarly concluded that “the generation of Americans which enacted the First Amendment built its whole philosophy of freedom of the press around the checking value.”<sup>66</sup>

Student journalists similarly serve this vital checking function, often by reporting on issues about their schools’ administration. In Texas, student journalists exposed criticisms of a new policy on testing, homework and projects.<sup>67</sup> Students in Michigan, meanwhile, covered a lawsuit pending against the school by residents of a nearby neighborhood who claimed diesel fumes from idling buses constituted a nuisance.”<sup>68</sup>

The role of the press as government watchdogs raises unique risks that journalists will be targeted by public officials. Due to the power imbalance inherent in the school setting, student reporters who seek to investigate their own administration face an even more severe danger of being censored by the very government officials they are seeking to investigate. Two Arizona high school students, for example, were not allowed to run a story about the school district’s teacher assessment testing.<sup>69</sup> A Florida high school principal forced student journalists to

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<sup>63</sup> *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

<sup>64</sup> *Minneapolis Star & Tribune Co. v. Minnesota Com’r of Revenue*, 460 U.S. 575, 585 (1983).

<sup>65</sup> *Mills v. Alabama*, 384 U.S. 214, 219 (1966); *see also id.* (“the Constitution specifically selected the press” for this protection because it “serve[s] as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve”).

<sup>66</sup> Vincent Blasi, *Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 538 (1977).

<sup>67</sup> Amanda Granato, *New Policy Mandates Schedule for Assigning Homework*, THE RIDER ONLINE (Nov. 8, 2012), <http://www.therideronline.com/top-story/2012/11/08/new-policy-mandates-schedule-for-assigning-homework-tests-projects/>.

<sup>68</sup> *Dean v. Utica Cmty. Sch.*, 345 F. Supp. 2d 799 (E.D. Mich. 2004).

<sup>69</sup> Brian Stewart, *Students Ask School Board to Decide if Principal Was Right in not*

remove a story about the “achievement gap” between white and minority students on state test scores.<sup>70</sup> High School administrators in Iowa confiscated copies of the student newspaper that contained an article probing into inconsistencies in penalties given to student athletes who had violated the school’s policies.<sup>71</sup> Students in Maryland were told by their vice-principal that they could not publish an article that raised questions about their principal’s side business and allegations against the principal of plagiarism.<sup>72</sup>

It is an insufficient response to suggest that other journalists, not associated with the school, could investigate and report on these types of issues. Student journalists cover issues that might not catch the attention of other reporters who are less familiar with and have more limited access to the workings of the school. They have an incentive to devote time and resources to matters that other reporters lack. And the students bring new insights and a different perspective to their coverage. One student journalist, for example, was criticized for reporting on a sensitive issue in her student newspaper rather than leaving the coverage to the “professional press.” She wrote in response that outside journalists did not have the ability to cover her high school “with the same scope and attention to detail that we strive to achieve.” She added that because the students “live here” they are “in a unique position to provide this important coverage.”<sup>73</sup> Allowing censorship of student journalists thus comes at a high cost—the cost of silencing unique voices from our public debate.

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*Allowing Story to Print*, STUDENT PRESS LAW CENTER (June 10, 2009, 12:00 AM), <http://www.splc.org/article/2009/06/students-ask-school-board-to-decide-if-principal-was-right-in-not-allowing-story-to-print>.

<sup>70</sup> April Hale, *Florida High School Newspapers Passed Out With a Hole*, STUDENT PRESS LAW CENTER (Oct. 27, 2006, 12:00 AM), <http://www.splc.org/article/2006/10/florida-high-school-newspapers-passed-out-with-a-hole-c763>.

<sup>71</sup> Nicole Ocran, *Student Newspaper Containing Critical Article Confiscated at Iowa High School*, STUDENT PRESS LAW CENTER (Feb. 10, 2010, 12:00 AM), <http://www.splc.org/article/2010/02/student-newspaper-containing-critical-article-confiscated-at-iowa-high-school>.

<sup>72</sup> Michael Beder, *Md. Student Paper Wins Fight Over Article on Allegations Against Principal*, STUDENT PRESS LAW CENTER (May 2, 2008, 12:00 AM), <http://www.splc.org/article/2008/05/md-student-paper-wins-fight-over-article-on-allegations-against-principal>.

<sup>73</sup> Shane McKeon, *An Open Letter to Students*, THE SHAKERITE (Sept. 17, 2013 12:00 AM), <http://shakerite.com/opinion/2013/09/17/an-open-letter-to-students/>.

### ***Hazelwood* Violates Established First Amendment Principles**

Much like their non-school counterparts, student journalists thus occupy a role that the Supreme Court has recognized repeatedly as constitutionally valuable. Not only does the *Hazelwood* decision fail to recognize these contributions, however, it also contradicts many established First Amendment principles. In several ways, allowing student press speakers to be censored violates the most basic cornerstones of our expressive rights.

#### *Publication of Lawfully Obtained, Truthful Information*

In a series of cases in the 1970s and 1980s, the Supreme Court addressed the question of whether the press can be punished for publishing truthful information that was lawfully obtained. This line of cases led to what is known as the *Daily Mail* principle, which states that “if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.”<sup>74</sup>

In all of these cases the Court found that restrictions on the ability of the press to publish truthful, lawfully obtained, newsworthy information were unconstitutional. The Court wrote its decisions in press-specific terms<sup>75</sup> and emphasized again the important role of the press to “inform citizens about public business.”<sup>76</sup>

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<sup>74</sup> Smith v. Daily Mail Pub. Co., 443 U.S. 97, 103 (1979); *see also* Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) (holding that “where a newspaper publishes truthful information . . . punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order”); Landmark Commc’ns, Inc. v. Virginia, 435 U.S. 829, 841 (1978) (stating that the state’s interest in maintaining the institutional integrity of its courts is insufficient to justify punishing the speech at issue); Oklahoma Pub. Co. v. Dist. Court In & For Oklahoma Cnty., 430 U.S. 308 (1977) (holding that a state court may not “prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public”); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491–92 (1975) (reasoning that the state may not punish the press for publishing information regarding events that are of legitimate concern to the public).

<sup>75</sup> West, *Stealth Press Clause*, *supra* note 5, at 738–740.

<sup>76</sup> Cox Broad. Corp., 420 U.S. at 496; *see also id.* at 491–92 (noting that great responsibilities are placed upon the news media to report on the government); *id.* at 491 (explaining how, “in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations”).



The *Hazelwood* decision, however, is in violation of the *Daily Mail* principle. Under *Hazelwood*, government actors may prohibit a newspaper from publishing information that meets exactly these criteria for no other reason than that it is deemed to be “ungrammatical,” “inconsistent with the shared values of a civilized social order,” or otherwise contrary to “pedagogical concerns.” This is in theory and in practice a far lower standard than requiring the government to establish a need “of the highest order.”

### *Protection of Editorial Process*

The Supreme Court also has held that the press has a constitutional right to maintain control of its editorial process, and that the First Amendment protects the press’s “journalistic judgment of priorities and newsworthiness.”<sup>77</sup> Justice Potter Stewart once declared that the First Amendment “is a clear command that government must never be allowed to lay its heavy editorial hand on any newspaper in this country.”<sup>78</sup> In the 1974 case of *Miami Herald Publishing Co. v. Tornillo*,<sup>79</sup> the Court endorsed this principle, holding that a Florida statute requiring newspapers to run replies from political candidates who had been criticized in the paper was unconstitutional. The problem with the law, the Court said, was that it intruded “into the function of editors” to decide what to include or not include on the pages of their newspaper.<sup>80</sup>

The Court has, on several occasions, noted that editorial freedom for the press is “a matter of particular First Amendment concern”<sup>81</sup> and a “crucial process” that cannot be regulated “consistent with First Amendment guarantees of a free press as they have evolved to this time.”<sup>82</sup> The press, the Court explained, “does not merely print observed facts the way a cow is photographed through a plateglass window”<sup>83</sup> but rather adds value to that information through editorial decision-making.<sup>84</sup>

While censorship is often the primary concern when it comes to regulation of the press, the Court in *Tornillo*, addressed a situation where a

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<sup>77</sup> *Columbia Broad. Sys., Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 118 (1973).

<sup>78</sup> *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 403-404 (1973) (Stewart, J., dissenting).

<sup>79</sup> 418 U.S. 241, 244 (1974).

<sup>80</sup> *Id.* at 258.

<sup>81</sup> *Herbert v. Lando*, 441 U.S. 153, 191 (1979) 191 (Brennan, J., dissenting in part).

<sup>82</sup> *Tornillo*, 418 U.S. at 258.

<sup>83</sup> *Id.* at 258 n.24 (quoting 2 ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS 633 (1947)).

<sup>84</sup> *Tornillo*, 418 U.S. at 258.

newspaper was being forced by the state to include material. This was also a constitutional violation, the Court held, because it interfered with the newspaper's editorial freedom. The Court noted that it has long "expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print."<sup>85</sup>

Yet the *Hazelwood* decision allows for direct government interference with the editorial decision-making process of student journalists. Every time a school official tells a student journalist what can or can not be included in his or her news publication or broadcast, it has struck at what Justice Byron White referred to as "the very nerve center of a newspaper" and "collides with the First Amendment."<sup>86</sup>

The right of editorial discretion is violated not only by straight-forward censorship but also by orders compelling the students to include messages that are not their own or use alternative wording.<sup>87</sup> Consider, for example, a high school student newspaper in Pennsylvania that refused to use the term "redskins" to describe the school's athletic teams. The student editorial board had voted against using the term, announcing that the board had "come to the consensus that the term 'Redskin' is offensive."<sup>88</sup> The principal, however, ordered them to use the word in a future edition of their newspaper. In response to the students' refusal to comply, the principal suspended the newspaper's faculty advisor and student editor as well as docking the newspaper \$1,200 in student funding.<sup>89</sup>

This type of government regulation of the press is in direct contrast to the Supreme Court's holding that forcing the editors of a newspaper "to publish that which 'reason' tells them should not be published is unconstitutional."<sup>90</sup>

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<sup>85</sup> *Id.* at 256; see also *Columbia Broad. Sys., Inc.*, 412 U.S. at 118 (holding that a regulation forcing broadcasters to air paid editorial advertising was unconstitutional).

<sup>86</sup> *Tornillo*, 418 U.S. at 261 (White, J., concurring).

<sup>87</sup> Emily Richmond, *Suspended For Not Using a Racial Slur*, THE ATLANTIC (Oct. 16, 2014, 1:49 PM), <http://www.theatlantic.com/education/archive/2014/10/students-suspended-for-not-using-a-racial-slur/381551/>.

<sup>88</sup> *Unsigned Editorial: Why We Won't Publish the R-Word*, THE PLAYWICKIAN (Oct. 23, 2013), <http://playwickian.com/unsigned-editorial-why-we-wont-publish-the-r-word/> (stating the term "is racist, and very much so").

<sup>89</sup> Richmond, *supra* note 87.

<sup>90</sup> *Tornillo*, 418 U.S. at 256 (quotations omitted).

*Prohibition on Prior Restraints*

If there is a single bedrock principle in the Court's First Amendment jurisprudence, it is the prohibition on prior restraints. The Supreme Court has declared that the "chief purpose"<sup>91</sup> of "the liberty of the press" is "to prevent previous restraints upon publication."<sup>92</sup> Prior restraints on speech, the Court has emphasized, "are the most serious and the least tolerable infringement on First Amendment rights"<sup>93</sup> and "an immediate and irreversible sanction."<sup>94</sup> If punishment after publication runs the risk of chilling speech, "prior restraint 'freezes' it at least for the time."<sup>95</sup>

The harm of a prior restraint, moreover, "can be particularly great when [it] falls upon the communication of news and commentary on current events."<sup>96</sup> For this reason, the Court places a "heavy burden"<sup>97</sup> on the government to justify a prior restraint and such regulations on speech come with a "'heavy presumption' against its constitutional validity."<sup>98</sup>

Once again, however, the Supreme Court, under the *Hazelwood* decision, allows exactly this type of censorship of student journalists. The facts of the *Hazelwood* case itself involved a prior restraint when the principal removed two pages of the student newspaper before publication. *Hazelwood* specifically declares that school officials "may refuse to disseminate" student speech that school officials conclude does not meet their "high standards."<sup>99</sup>

Many high school journalists in a post-*Hazelwood* world are subject not only to prior restraints but also to prior review.<sup>100</sup> In other words, they must submit their work to school officials for approval before it may be published. In *Near v. Minnesota*, Chief Justice Hughes writing for the Court specifically decried as the "essence of censorship"<sup>101</sup> a law that

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<sup>91</sup> *N.Y. Times Co. v. United States*, 403 U.S. 713, 726 (1971).

<sup>92</sup> *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

<sup>93</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Near*, 283 U.S. at 559–60.

<sup>97</sup> *New York Times Co.*, 403 U.S. at 714.

<sup>98</sup> *Nebraska Press*, 427 U.S. at 583.

<sup>99</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

<sup>100</sup> Neel Swamy, *Has Hazelwood Run Dry? Let's Talk About Censorship in High Schools*, THE UNDERGRADUATE TIMES (July 8, 2014), <http://ugtimes.com/2014/07/editorchoice/has-hazelwood-run-dry-lets-talk-about-censorship-in-high-schools/> (discussing censorship in high schools and high school students being subject to prior review).

<sup>101</sup> *Near*, 283 U.S. at 713.

forced a newspaper to go before the government prior to publication and prove that its articles “are true and are published with good motives.”

### *Subject- and Viewpoint-Based Discrimination*

The Court has further held that the government cannot regulate speech based on its subject-matter<sup>102</sup> or viewpoint.<sup>103</sup> Government regulations of speech based on its message, the Court has said, “pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.”<sup>104</sup> And when the target of government regulation is not just a particular subject matter but a specific viewpoint on that issue “the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination.”<sup>105</sup>

Such regulation, therefore, is presumed to be unconstitutional.<sup>106</sup> The Government should not receive “the benefit of the doubt” in such cases, the Court has held, or else “we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas.”<sup>107</sup>

*Hazelwood* directly violates this basic free speech concept. Rather than requiring a skeptical review of school officials’ restrictions on student

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<sup>102</sup> See *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995) (“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys”); see also *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) (“Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right”); *Consol. Edison Co. of New York v. Pub. Serv. Comm’n of New York*, 447 U.S. 530, 537-38 (1980) (“If the marketplace of ideas is to remain free and open, governments must not be allowed to choose which issues are worth discussing or debating” (internal quotations omitted)).

<sup>103</sup> See *Wood v. Moss*, 134 S. Ct. 2056, 2061 (2014) (“The First Amendment, our precedent makes plain, disfavors viewpoint-based discrimination”); see also *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (“The principle that has emerged from our cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others”).

<sup>104</sup> *Turner Broad. Sys.*, 512 U.S. at 641; see also *Consol. Edison Co.*, 447 U.S. at 536 (“But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited “merely because public officials disapprove the speaker’s views”) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result)).

<sup>105</sup> *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

<sup>106</sup> *Id.* at 828 (“Discrimination against speech because of its message is presumed to be unconstitutional”).

<sup>107</sup> *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818 (2000).

journalists, the Court has created a standard that is highly deferential to government regulators. Under *Hazelwood*, the Court specifically allows administrators to censor speech based on its subject-matter, noting that schools can regulate speech about “potentially sensitive topics.”<sup>108</sup>

Even the most “egregious form”<sup>109</sup> of regulation of speech—viewpoint discrimination—is likewise tolerated under *Hazelwood*. The Court in *Hazelwood* gave school officials the power to censor “student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order’”<sup>110</sup> as well as any speech that might “associate the school with any position other than neutrality on matters of political controversy.”<sup>111</sup>

### *Regulation through Chilling Effect*

Underlying all First Amendment concerns of government regulation of expression is the danger of a chilling effect. Because of the custodial and supervisory power of school officials over high school students, the risk of chilling the speech of student journalists is high.

The Court has stressed repeatedly that government regulation on speech may bring about a serious secondary harm—self-censorship. The Court has called this “a peculiar evil, the evil of creating chilling effects which deter the exercise of those freedoms.”<sup>112</sup> The concern that the mere threat of potential censorship or punishment for speech might deter speech is so great, the Court has said, that it “must be guarded against by sensitive tools.”<sup>113</sup>

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<sup>108</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

<sup>109</sup> *Rosenberger*, 515 U.S. at 829.

<sup>110</sup> *Hazelwood*, 484 U.S. at 272.

<sup>111</sup> *Id.* But see, Carol S. Lomicky, *Analysis of High School Newspaper Editorials Before and After Hazelwood School District v. Kuhlmeier: A Content Analysis Case Study*, 29 J.L. & EDUC. 464, 464-65 (2004) (stating that pre-*Hazelwood* “student journalists had the relative freedom to publish articles on a variety of controversial topics” and federal courts upheld the rights of students to report on “teen sexuality, birth control and abortion, drug abuse and criminal conduct by students, as well as commentaries critical of school policies and personnel”).

<sup>112</sup> *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 598 (1973); see also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (expressing concern that a regulation “would have an undoubted ‘chilling’ effect on speech relating to public figures that does have constitutional value”); *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (noting that a chilling effect “is incompatible with the atmosphere of free discussion contemplated by the First Amendment”).

<sup>113</sup> *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 604 (1967).

The evidence that *Hazelwood* has led to self-censorship by student journalists is strong.<sup>114</sup> One study, for example, found that “the types of editorials published *pre-Hazelwood* were significantly different than those published *post-Hazelwood*,” including a large drop-off in the number of critical editorials that were published, those that were published tended to be on “safer issues”<sup>115</sup> and students were less likely to “criticize school policies or tackle controversial subject matter.”<sup>116</sup> A high school student newspaper editor from New York explained to *The New York Times* that he and his co-editors chose not to publish articles “that could potentially cause backlash from the school administration” because there is “too much risk, not enough reward.”<sup>117</sup>

Unlike direct censorship or regulation of speech, chilling effects can be hard to detect because it is difficult to know when speech has not been expressed. The Court once explained that the danger of self-censorship is that it is “a harm that can be realized without an actual prosecution.”<sup>118</sup> The invisibility of the chilling effect on student journalists is especially concerning, because studies have found that even quite subtle forms of intimidation can lead to self-censorship by students.<sup>119</sup> Threats can include retaliation against their journalism advisers or budget cuts to the publication. These types of indirect pressure on student journalists can be “just as effective at silencing student-speech as taking scissors to a newspaper article.”<sup>120</sup>

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<sup>114</sup> Maggie Backwith, *Twenty Years of Hazelwood*, STUDENT PRESS LAW CENTER (Dec. 17, 2007, 12:00 AM), <http://www.splc.org/article/2007/12/twenty-years-of-hazelwood> (“There’s no doubt in my mind that newspapers after the *Hazelwood* case became more conservative and less willing to take on the more controversial, sensitive stories,” said Hall, the former adviser at Kirkwood High School in Missouri).

<sup>115</sup> Carol Lomicky, *supra* note 111, at 470-71.

<sup>116</sup> *Id.* at 472.

<sup>117</sup> See also Elizabeth Perle & Taylor Trudon, *Student Reading Contest Winner: Brave High School Journalists*, THE NEW YORK TIMES (July 15, 2013, 11:41 AM), <http://learning.blogs.nytimes.com/2013/07/15/student-reading-contest-winner-brave-high-school-journalists/>.

<sup>118</sup> *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 393 (1988).

<sup>119</sup> A 2014 survey found that approximately a third of students reported that they had decided not to publish something based on the belief that school officials would censor it. Frank D. LoMonte, *Survey: One-Third of Journalism Students, Teachers Nationwide Report Administrative Censorship*, STUDENT PRESS LAW CENTER (Feb. 18, 2014, 12:00 AM), <http://www.splc.org/article/2014/02/press-release-survey-one-third-of-journalism-students-teachers-nationwide-report-administrative-cens>.

<sup>120</sup> Tyler J. Buller, *The State Response to Hazelwood v. Kuhlmeier*, 66 MAINE L. REV. 90, 120 (2013); see also Tyler J. Buller, *Subtle Censorship: The Problem of Retaliation Against High School Journalism Advisers and Three Ways to Stop It*, 40 J. L. & EDUC. 609, 610 (giving examples where “student journalists write something that administrators

## Conclusion

With the *Hazelwood* decision, the Court created a counterintuitive legal framework that leaves most public high school journalists with less First Amendment protection than other student speakers. This contradicts what the Constitution and the Court's precedents declare about the importance of the press. Student journalists fulfill constitutionally unique and recognized roles that are deserving of heightened constitutional status.

The costs of the Supreme Court's failure to protect student journalists' constitutional rights are real. By allowing the government to censor these speakers, the Court is denying the public important information, eliminating needed scrutiny of government officials and silencing unique voices from our public debate. Student speakers provide valuable insights about important issues that are likely not found outside of the school setting.

Student journalists are, of course, not perfect. They make, and will continue to make, errors of all kinds. But the Court has said repeatedly that the Constitution does not demand perfection of our press and has accepted that "press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."<sup>121</sup>

Finally, the idea that these students can be "taught" good journalism through government censorship is especially troubling. As Justice Brennan observed in his dissent in *Hazelwood*, government-sponsored censorship teaches students a different kind of lesson—"that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors."<sup>122</sup>

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do not like and the journalism adviser is retaliated against to silence the students").

<sup>121</sup> *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974). *See also, id.* at 260 (White, J., dissenting) ("Of course, the press is not always accurate, or even responsible, and may not present full and fair debate on important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed").

<sup>122</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 299 (1988). *See also, Id.* at 291 (Brennan, J., dissenting) (noting that the students "expected a civics lesson, but not the one the Court teaches them today"); *see also New York Times v. Sullivan*, 385 U.S. at 388-389 (*quoting* James Madison: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press"(*quoting* 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876 ed.)).