

United States Court of Appeals,
Fourteenth Circuit.

Martin PRINCE, et al., Appellants,
v.
KERRYWOOD UNIVERSITY, Appellee

No. 04-0103

July 10, 2004

Appeal from the United States District Court for
the Middle District of Davis.

Before MATHIS, BROWN, EPHRAIM, Circuit
Judges.

MATHIS, Circuit Judge:

We are asked to decide whether refusal by the Kerrywood University administration to publish a student editorial that strongly condemned the Bush administration for its handling of the Iraq war in the school newspaper violated the Free Speech Clause of the First Amendment. For the reasons that follow, we hold that the school's restriction was unconstitutional. Accordingly, we reverse the District Court and remand for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

The District Court made the following findings of fact:

Kerrywood University is a state-run university with a majority of its students coming from outside the local area. Although KU is a relatively calm institution of higher learning, controversial issues can spark public and impassioned debate. The recent events in Iraq have sparked such passion and have led to protests, flyers, and coffeehouse arguments. At times, expression has departed from the ideal of sober debate and the objective search for truth, and has degenerated into vituperative sloganeering and vicious name-calling. In recent months, screaming and two minor shoving

matches have erupted at some of the protests, but no major confrontations have occurred. That said, no professors have complained that these protests and altercations have disrupted their classes.

Debate on the Iraq war also has spilled onto the pages of several student-run publications. Some of these publications are entirely student-run, with no financing or oversight by the administration. Others, usually published by student groups, are financed by the administration but have no real university oversight. University policies require these student group publications to contain a prominently placed disclaimer which states that the views contained therein do not necessarily represent the views of the KU administration.

Finally, there is the Kerrywood Gazette, the focus of this lawsuit. The Kerrywood Gazette is published quarterly, is funded almost entirely by the administration, and is run by student editors as part of a class called "Journalism VI." The paper itself is of a very high quality, but is mostly devoted to university specific issues and has rarely entered into the fray on any controversial topic.

The students working on the newspaper receive a grade for their work, which is supervised by Professor Elia Broozer. Professor Broozer allows the students a fair amount of latitude in running the paper to give them useful, real-world experience, but he often gives advice, which the staff usually follows. Professor Broozer is also adamant that professional journalism standards must be followed. For this reason, Professor Broozer has, at times, required members of the staff to modify their work. All issues of the Kerrywood Gazette are submitted to Dean George Boomhauer of the College of Arts and Sciences for a final review. This final review is

usually nothing more than a rubber stamp, but Dean Boomhauer has blocked the publication of two news articles (not opinion pieces) in the past three years. In each case, the staff has made conforming changes to meet the Dean's concerns.

It is in this setting that the events giving rise to this lawsuit occurred. In January 2004, one of the staff's editorial columnists, Chip Muir, wrote an opinion column analyzing the benefits of a local redistricting plan that the state legislature was considering, and concluding that the plan should be adopted. Mr. Muir took the position that the redistricting would make it easier for Representative Richard Cunningham to be reelected to the U.S. House of Representatives. Mr. Muir believed that Representative Cunningham should win because of his support for clearing Kerrywood Forest, directly adjacent to Kerrywood University, to make room for expensive high rise apartments and a shopping center. In his support of Representative Cunningham, Mr. Muir opined that the representative's plans would ultimately revitalize a then economically depressed urban neighborhood near the University, and also improve the quality of life for Kerrywood students.

Mr. Muir's column led to several dozen, one paragraph comments being submitted for inclusion in the "Rants & Raves" section of the Gazette. This number is much higher than that generated by most pieces published in the Kerrywood Gazette. About a third of the comments were on the local issues that were the subject of Mr. Muir's article, with equal numbers representing each side. The other two-thirds of the comments, however, dealt with Representative Cunningham's support for President Bush's Iraq policies. These comments mostly expressed the view that, regardless of

Representative Cunningham's views on issues of local concern, he deserved to be soundly defeated because of his support of the President. To the minds of these commenters, Mr. Muir's editorial "missed the boat entirely." Pursuant to Kerrywood Gazette policies, all of these comments were to be published in the next issue.

In response, the editorial staff of the newspaper met to discuss the issue. The vast majority of the editorial staff hold views on the Iraq war opposed to those of Representative Cunningham, and the staff felt that their views should be published as well. By a nearly unanimous vote, the editorial staff decided to run an editorial on the front page of the April issue expressing their opposition to the redistricting plan because of their disapproval of Representative Cunningham's support of the President. This editorial was not to have been signed by an individual. Rather, the editorial would simply have had the headline "Staff Editorial."

The bulk of the staff editorial focused directly on the President and used very heated rhetoric. The editorial said that the President was "at best a moron and at worst a pathological liar" and that his Iraq policies "totally sucked." The editorial further said that the President "led us to war to get sweetheart oil deals for his fat cat contributors" and that he was "directly and morally responsible for every Iraqi and American who has died as a result of the violence from this god-forsaken war."

The allegations in the above paragraph relied in part upon the documentary *Celsius 488* by the filmmaker/political activist Michelle Berry.¹ Specifically, the editorial said, "Although we previously might have been a little

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hesitant to draw these conclusions, the revelations in the recently released *Celsius 488* have made our indictment compelling.”

Celsius 488 has been very controversial, receiving accolades from the President’s foes but drawing venom from his supporters. One of the main focuses of attention on Ms. Berry’s documentary has been on its accuracy. The documentary was attacked from the beginning by the President’s Press Secretary as being “just a pack of lies,” and investigations of the documentary’s accuracy have been performed by respected news organizations such as the Washington Post, Newsweek, and ABCNews. These investigations have concluded that the presentation of some facts in the movie is highly misleading. The articles have also questioned several of the conspiratorial inferences made in Ms. Berry’s movie. However, the investigations have concluded that some of her points have validity.

Ms. Berry responded to the criticism by saying:

a lot of the attacks have been on the conclusions I’ve drawn from the facts. I’ll admit that maybe not everything in *Celsius 488* is watertight, but these issues are way too important to let a few mistakes by me obscure the important fact that Bush is a lying, murderous scumbag and an incompetent poo-poo head.

The events related above regarding the controversy surrounding Berry’s movie are well known and all happened at least a month before the editorial was submitted to Professor Brooker.

Soon after the editorial was submitted to Professor Brooker, the professor took it to Dean Boomhauer for comment. Dean Boomhauer strongly disapproved of the article. He said that the editorial’s

reliance upon Ms. Berry, “a notorious purveyor of lies,” was unprofessional, that the tone of the article and the use of name-calling was unprofessional, and that he did not want the University to be seen as taking sides in such a controversial issue. According to the undisputed testimony of Professor Brooker, Dean Boomhauer became more and more angry as he spoke and finished by saying, “We can’t print garbage like this. This editorial is outrageous and I’m not going to let this kind of garbage come out while I’m Dean.” Both Dean Boomhauer and Professor Brooker are well-known fundraisers for Republican political causes.

Professor Brooker agreed with the Dean and scheduled a meeting with the student editors. At the meeting, the editors stood by the tone and content of their editorial and refused to make the many changes Professor Brooker demanded. They questioned the motivations of Professor Brooker and Dean Boomhauer and felt that they had to stand up for their beliefs. The editors did admit that *Celsius 488* formed part of the factual basis for their opinions and that they were aware of the controversy surrounding the movie, but they thought that they were free to rely on the movie in an opinion piece. The editor-in-chief, Milhouse Van Houten, elaborated on the point: “We were writing an editorial, not doing an investigative report. I think that in writing an editorial, it is proper for us to generally and partially rely on the movie without independently verifying every detail.”

After this meeting, Dean Boomhauer and Professor Brooker consulted with each other but with no one else. After these consultations, Professor Brooker told the student editors that the editorial would not run. The editor-in-chief went to Dean Boomhauer to try to change his mind, but to no avail.

The editorial board then sought relief through the internal administrative process but failed there as well. On April 24, 2003, ten days after their administrative remedies were exhausted, three members of the editorial board, all juniors, filed this lawsuit. After a bench trial, the District Court entered judgment for the University. The students now appeal.

III. STANDARD OF REVIEW

The Supreme Court has held that in First Amendment cases, an appellate court must “make an independent examination of the whole record.” *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (internal quotations omitted). This is to ensure that “the judgment does not constitute a forbidden intrusion on the field of free expression.” *Id.* Based on the foregoing, we review the District Court’s findings of constitutional fact and conclusions of law in this case *de novo*.

IV. DISCUSSION

The second Clause in the First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” This is applied to the states, and in this case, to public universities, by the Fourteenth Amendment. See U.S. CONST. amend XIV; *Near v. Minnesota*, 283 U.S. 697 (1931).

The Supreme Court has provided a framework for Free Speech analysis that asks first whether the speech is protected by the First Amendment. *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 797 (1985). Assuming that the speech is protected, the next task is to identify the nature of the forum, because the extent of permissible Government restriction of speech depends on the type of forum in which the speech occurs. *Id.* Finally, after identifying the appropriate forum, the Court must then determine whether the justifications for the Government restriction of the speech satisfy the applicable standard. *Id.* Applying this analysis, we conclude first that the District Court used the wrong standard to analyze the Government action in this case.

Secondly, while we agree with the District Court that the Appellants’ editorial is protected speech occurring in the context of a nonpublic forum, we find that the university’s reasons for refusing to publish the editorial failed even the least demanding reasonableness standard.

A.

It is well-settled that the protections of the First Amendment encompass newspaper articles. The Supreme Court’s First Amendment school cases make clear that public school students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969). All parties in this case concede that Appellants’ editorial in the Kerrywood Gazette is protected by the First Amendment. That conclusion, however, does not end our inquiry. Even where protected speech is concerned, the Government still retains the right to “preserve the property under its control for the use to which it is lawfully dedicated.” *Greer v. Spock*, 424 U.S. 828, 836 (1976).

To determine when the Government’s interest in limiting its property to its intended use outweighs the right to free speech, the Supreme Court has employed a forum analysis. Under that analysis, the extent of what the Government can do to restrict protected speech varies based on whether the forum is public or non-public. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983).

The District Court held, and Appellants do not dispute, that the Kerrywood Gazette is a non-public forum. We therefore regard the issue as waived.

B.

It is now necessary to determine the requisite standard by which to assess the University’s justifications for refusing to publish the Appellants’ editorial in the Gazette, a non-public forum. The District Court held that the standard announced in *Hazelwood School District v. Kulmeier*, 484 U.S. 260 (1988) is the appropriate standard to use in this case. *Hazelwood*

involved administrative censorship of Spectrum, a school-sponsored and funded high school student newspaper. The Court held that schools may exercise editorial control over “student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Hazelwood*, 484 U.S. at 273.

The District Court used *Hazelwood* to find that the refusal by the Kerrywood administration to publish the Appellants’ editorial was constitutional. In the District Court’s view, the similarities between the Kerrywood Gazette and Spectrum warrant the conclusion that *Hazelwood* applies to this case. Appellants contend, however, that application of the *Hazelwood* standard was error because *Hazelwood* was meant to apply only on the pre-college level, not to colleges and universities. We agree with Appellants that *Hazelwood* is not the appropriate standard, and therefore reverse the holding of the District Court.

1. *Hazelwood* does not apply to colleges.

We hold that *Hazelwood* is inapplicable to colleges for several reasons. First, as even the District Court noted, the *Hazelwood* Court refused to even answer the question of whether to apply the same deferential standard that it used for high schools to colleges and universities. *Hazelwood School District v. Kulmeier*, 484 U.S. 260, 273, n. 7 (1988) (“We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”). We, therefore, decline to assume that the Supreme Court would apply as highly a deferential standard to colleges as it has to high schools.

Second, the rationale underlying the deferential *Hazelwood* standard is wholly inapplicable on the university level. *Hazelwood* was meant to address the special circumstances of emotionally immature high school students. As the Court emphasized when it crafted the *Hazelwood* reasonableness standard, “a school must be able to take into account the emotional maturity of the intended audience.” *Hazelwood*, 484 U.S. at

272. Clearly, university students are presumed to be mature and independent adults. The Supreme Court recognized this concept before it decided *Hazelwood* in *Widmar v. Vincent*, 454 U.S. 263, 274 n. 14 (1981). Because of the level of maturity and independence that characterizes college students, they have historically received more legal rights, including First Amendment rights, than high school students. It is no wonder why the Court thought that the same deferential standard it adopted in *Hazelwood* for high school students might not be appropriate for college students.

Furthermore, applying *Hazelwood* to colleges and universities would fly in the face of long-standing expectations of academic freedom and vigorous debate that so characterize the arena of higher education. For example, under *Hazelwood*, schools may restrain student speech in areas of political controversy. *Hazelwood*, 484 U.S. at 272. The Court reasoned that, without the ability to engage in such restraint, schools would be “unduly constrained from fulfilling their role as a principal instrument in awakening the *child* to cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment.” *Id* (emphasis added) (internal quotations omitted). Certainly, the Court did not intend its holding to reach college students, who in most cases are adults, some of them with children of their own. College students should not be treated the same as their high school, or even elementary school counterparts.

The District Court’s approval of Judge Graber’s opinion in *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002) has no influence on this court. Not even in the Ninth Circuit, where the case was decided, is her opinion binding. Instead of Judge Graber’s analysis, we find the concurring and dissenting opinion of Judge Reinhardt in the same case particularly persuasive, and choose to follow the example of the Sixth and First Circuits in their refusal to apply *Hazelwood* to colleges. See *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (en banc) (declining to apply *Hazelwood* to colleges); *Student Govt. Ass’n v. Board of Trustees of the Univ. of Mass.*, 868 F.2d 473, 480, n.6 (1st Cir. 1989) (recognizing

that *Hazelwood* does not apply to college newspapers).

We conclude that the proper standard can be derived from *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969). *Tinker* held that unless the school can demonstrate that certain student speech might reasonably have led school authorities to forecast substantial disruption of, or material interference with, school activities, then prohibiting the speech is an unconstitutional denial of students' rights of expression of opinion. *Id.*

Nothing in the facts of this case indicates that Appellants' editorial would have resulted in substantial disruption to the school environment. At best, Dean Boomhauer might have feared such disruption; however, more than just an unsupported fear or apprehension that student expression might cause a disturbance is required. *Tinker*, 393 U.S. at 508. Thus, the University's refusal to publish Appellants' editorial fails constitutional muster under the *Tinker* standard.

2. Alternatively, *Hazelwood* would apply differently to colleges.

Assuming *arguendo* that the District Court was correct to apply *Hazelwood* to colleges, it nevertheless erred in its failure to require viewpoint neutrality, and to take a harder look at the University's purported reasons for refusing to publish the student editorial. Even courts that have held *Hazelwood* applicable to colleges have also recognized that the standard would apply differently in that context. See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (2004). We find that a version of *Hazelwood* that not only requires viewpoint neutrality, but that also is less deferential to the school's rationale for speech restriction would be necessary to adequately protect the free speech rights of university students.

a. Viewpoint Neutrality

The District Court, in using *Hazelwood* to sanction viewpoint discrimination essentially rewrote First Amendment law. The viewpoint

neutrality requirement is a staple of our country's Free Speech jurisprudence. Indeed, it is necessary to a society wherein the free expression and exchange of ideas lies at the core of democracy. Even under the most permissive First Amendment scrutiny, any restriction on speech must be viewpoint neutral. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (holding that the government cannot engage in viewpoint discrimination, even when prohibiting unprotected speech). It is true that the Government in some cases can proscribe entire categories of speech, such as "fighting words;" however, even then, the Government may not proscribe speech within that category based on viewpoint. *Id.*

Although *Hazelwood* itself is silent on the issue of viewpoint neutrality within the context of schools, the Court did not explicitly abandon the long-standing requirement. Where universities are concerned, a viewpoint neutrality requirement is especially critical. See Susannah B. Tobin, *Divining Hazelwood: The Need For A Viewpoint Neutrality Requirement In School Speech Cases*, 39 Harv. C.R.-C.L. L. Rev. 217 (2004) (arguing for a viewpoint neutrality requirement under *Hazelwood*).

The District Court makes too much of the fact that *Hazelwood* did not explicitly require viewpoint neutrality. If anything, the Court's silence on the subject is insufficient to constitute a drastic change in First Amendment law that would allow the Government to discriminate based on viewpoint. We refuse to assign such an intention to the Supreme Court absent a clear statement. We therefore reverse the District Court's holding regarding viewpoint neutrality under *Hazelwood* and hold that even if *Hazelwood* applies to colleges, it requires viewpoint neutrality.

The facts of this case indicate that KU's decision was based on viewpoint discrimination. At the center of this controversy is a student editorial, by its very nature an opinion piece, wherein the students expressed a view that was disapproving of a Republican politician. We cannot overlook the fact that Dean Boomhauer, a prominent fundraiser for Republican Party causes, was very

instrumental in the decision to disallow the students' editorial. Ultimately, it was Professor Brooker, also a prominent fundraiser for the Republican Party, who informed Appellants that their editorial would not run. We also find it telling that Dean Boomhauer became increasingly angry while considering the students' editorial, calling it "crap," before deciding that he would not allow it to be published. Moreover, Dean Boomhauer decided to block publication of this editorial, even though he had never blocked publication of opinion pieces in the past. These and other facts lead us to conclude that the University restricted Appellants solely because of their disparaging views on the war in Iraq and the policies of a Republican presidential administration.

b. Reasonableness

Given the expectations of maturity and free ideological exchange so characteristic of the university context, we expect that the Supreme Court would apply *Hazelwood* in a less deferential manner to universities than it would to high schools. The result in this case is that even if the District Court were correct to apply *Hazelwood*, it nevertheless erred in the amount of deference it showed to KU's purported reasons for refusing to publish the student editorial.

It is true that *Hazelwood* showed a substantial amount of deference to the school's explanation of how its restriction was reasonably related to a legitimate pedagogical purpose. We emphasize, however, that the rationale for such deference was the need to allow schools to consider the emotional maturity of their pre-college aged students. Such reasoning has no place in the context of university level education.

In a high school, it is understandable that action similar to that of Dean Boomhauer and Professor Brooker would be reasonable considering the maturity level of the students involved and the specific disciplinary and socialization needs of the pre-college environment. It is quite a different story, however, in a college setting. What might be reasonable in a high school is not necessarily reasonable in a university. Thus,

even if we were inclined to approve *Hazelwood* as the appropriate standard in this case, we would still disapprove of the District Court's application of the standard because it showed too much deference to KU on the question of reasonable relationship to a legitimate pedagogical purpose.

Assuming *arguendo* that *Hazelwood* applies, the refusal of the University to publish Appellants' editorial was not reasonably related to a legitimate pedagogical purpose. While we agree with the District Court that the University has a legitimate pedagogical interest in teaching professionalism to its journalism students, we disagree that the University's restriction was reasonably related to that purpose. Appellees contend that Dean Boomhauer refused to publish Appellants' editorial because of its allegedly inappropriate tone, its name-calling, and its reliance on a so-called questionable news source. This is mere pretext. While it is true that a University may require its students to adhere to the highest standards of professional journalism, refusing to run an opinion piece because of its tone, use of vivid adjectives, and mentioning of a source that is praised as much as it is questioned does not accomplish that pedagogical purpose. Rather than a legitimate pedagogical objective, it is most obvious that KU's restriction was reasonably related to a political objective. The students themselves questioned the motives of Dean Boomhauer and Professor Brooker in disapproving their editorial. When the students confronted them about their true motivations, the Professor and the Dean still refused to publish it. Even absent a viewpoint neutrality requirement under *Hazelwood*, political viewpoint discrimination at the university level would be unreasonable.

Factoring in the academic and expressive freedoms that tend to characterize the university context, KU's restriction of the students' speech becomes obviously unreasonable. Appellants used their editorial to draw conclusions about certain topics, and their conclusions were reasonably based upon available facts. Public sentiment confirms that Appellants are not alone in their perceptions or in the sources they used to support their views. The opinions Appellants

expressed in their editorial are neither far-fetched nor completely unsupported by the facts available to them. Their editorial seems to us directly in line with the academic demands of professional editorial writing, especially given the academic freedoms so characteristic of the university arena.

In finding that the University's decision was reasonably related to a legitimate pedagogical purpose, the District Court referenced *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002). In that case, Judge Graber thought it reasonable for a university to disapprove a student's master's thesis—thereby forcing him to temporarily forego his degree—because of a professionally inappropriate “disacknowledgments” section. The parallel the District Court attempts to make between Judge Graber's opinion in *Brown* and this case, however, is fallacious. First, the acknowledgments section of a thesis is not generally used to express controversial views. Newspaper editorials, on the other hand, have traditionally been used precisely for that purpose. Likewise, acknowledgements sections are traditionally positive, courteous expressions of thanks. Editorials, however, are often negative, biting expressions of criticism, as is expected and accepted in the real world of journalism and public sentiment. Thus, what is an appropriate academic restriction with regard to an acknowledgements section of a master's thesis is not necessarily an appropriate restriction with regard to a newspaper editorial.

Finally, we cannot accept, as did the District Court, Appellees' contention that the decision not to publish Appellants' editorial was reasonable because of the University's desire to disassociate itself from its students' positions on matters of political controversy. Such reasoning is belied by the facts of the case. Nothing on the record indicates that any student editorial appearing in the *Kerrywood Gazette*, a university level newspaper, run by student editors, would be attributed to the school. Appellants' editorial in particular was clearly entitled “Staff Editorial.” Everyone knows that the Editorial Staff consists entirely of University students.

Furthermore, Mr. Muir's editorial, which Dean Boomhauer had previously approved for publication, concerned a controversial issue, just as the Appellants' response editorial did. In fact, both editorials concerned the same controversial political issue—whether a new redistricting plan, which would assure the reelection of a local Representative, should be adopted. Even though Mr. Muir's editorial appeared to focus on a matter of local concern, it was ultimately about a Congressional candidate whose views on a globally controversial issue—America's war in Iraq—were well-known. It stands to reason then that if the controversial nature of the topic were of concern to the University, it would have disallowed Mr. Muir's editorial, just as it later did Appellants' editorial.

For these reasons, the decision by the University not to publish Appellants' editorial fails constitutional muster under even the highly deferential First Amendment standard of *Hazelwood*.

C.

We hold that *Hazelwood* is an inappropriate standard to apply in the university context. A more appropriate standard is *Healy v. James*, *supra*. Alternatively, if *Hazelwood* does apply to universities, it requires viewpoint neutrality, and commands a harder look at the Government's purported reasoning for restricting protected speech. We therefore REVERSE and REMAND to the District Court for proceedings not inconsistent with this opinion.

81 D. Supp.

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No. 04-3404

May 21, 2004.

Spencer, District Judge:

SUMMARY

Three members of the editorial board of a college newspaper brought suit alleging a violation of their First Amendment right to free expression after the school's administration decided not to publish an editorial that strongly condemned the Bush administration for its handling of the Iraq war.

After conducting a bench trial, Spencer, J., held (1) that the *Hazelwood* standard for the censorship of curricular speech applied, (2) that the *Hazelwood* standard does not prohibit viewpoint discrimination, and (3) that Kerrywood's speech restriction was constitutional because it was reasonably related to legitimate pedagogical objectives. Spencer, J., further held that even if *Hazelwood* prohibits viewpoint discrimination, the censorship in question was viewpoint neutral.

BACKGROUND

Kerrywood University (KU) is a state university that has, like many other schools around the country, become a forum for spirited debate over the recent war in Iraq. The editorial board of the Kerrywood Gazette decided to publish an editorial strongly criticizing President Bush for his handling of the war, but the KU administration did not allow the article to be published. After exhausting their administrative appeals, three members of the editorial board filed this 42 U.S.C. §1983 civil rights lawsuit claiming that their constitutional right of free expression was violated and seeking damages and declarative relief. After holding a three day bench trial, I now find for the defendants.

FINDINGS OF FACT

Kerrywood University is a state-run university with a majority of its students coming from outside the local area. Although KU is a relatively calm institution of higher learning, controversial issues can spark public and impassioned debate. The recent events in Iraq have sparked such passion and

have led to protests, flyers, and coffeehouse arguments.

At times, expression has departed from the ideal of sober debate and the objective search for truth, and has degenerated into vituperative sloganeering and vicious name-calling. In recent months, screaming and two minor shoving matches have erupted at some of the protests, but no major confrontations have occurred. That said, no professors have complained that these protests and altercations have disrupted their classes.

Debate on the Iraq war also has spilled onto the pages of several student-run publications. Some of these publications are entirely student-run, with no financing or oversight by the administration. Others, usually published by student groups, are financed by the administration but have no real university oversight. University policies require these student group publications to contain a prominently placed disclaimer which states that the views contained therein do not necessarily represent the views of the KU administration.

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It is in this setting that the events giving rise to this lawsuit occurred. In January 2004, one of the staff's editorial columnists, Chip Muir, wrote an opinion column analyzing the benefits of a local redistricting plan that the state legislature was considering, and concluding that the plan should be adopted. Mr. Muir took the position that the redistricting would make it easier for Representative Richard Cunningham to be reelected to the U.S. House of Representatives. Mr. Muir believed that Representative Cunningham should win because of his support for clearing Kerrywood Forest, directly adjacent to Kerrywood University, to make room for expensive high rise apartments and a shopping center. In his support of Representative Cunningham, Mr. Muir opined that the representative's plans would ultimately revitalize a then economically depressed urban neighborhood near the University, and also improve the quality of life for Kerrywood students.

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In response, the editorial staff of the newspaper met to discuss the issue. The vast majority of the editorial staff hold views on the Iraq war opposed to those of Representative Cunningham, and the staff felt that their views should be published as well. By a nearly unanimous vote, the editorial staff decided to run an editorial on the front page of the April issue expressing their opposition to the redistricting plan because of their disapproval of Representative Cunningham's support of the President. This editorial was not to have been signed by an individual. Rather, the editorial would simply have had the headline "Staff Editorial."

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A lot of the attacks have been on the conclusions I've drawn from the facts. I'll admit that

¹ Although the titles are similar, *Celsius 488* is not the documentary by Michael Moore.

maybe not everything in *Celsius 488* is watertight, but these issues are way too important to let a few mistakes by me obscure the important fact that Bush is a lying, murderous scumbag and an incompetent poo-poo head.

The events related above regarding the controversy surrounding Ms. Berry's movie are well known and all happened at least a month before the staff editorial was submitted to Professor Broozer .

Soon after the editorial was submitted to Professor Broozer, the professor took it to Dean Boomhauer for comment. Dean Boomhauer strongly disapproved of the article. He said that the editorial's reliance upon Ms. Berry, "a notorious purveyor of lies," was unprofessional, that the tone of the article and the use of name-calling was unprofessional, and that he did not want the University to be seen as taking sides in such a controversial issue. According to the undisputed testimony of Professor Broozer, Dean Boomhauer became more and more angry as he spoke and finished by saying, "We can't print garbage like this. This editorial is outrageous and I'm not going to let this kind of garbage come out while I'm Dean." Both Dean Boomhauer and Professor Broozer are well-known fundraisers for Republican political causes.

Professor Broozer agreed with the Dean and scheduled a meeting with the student editors. At the meeting, the editors stood by the tone and content of their editorial and refused to make the many changes Professor Broozer demanded. They questioned the motivations of Professor Broozer and Dean Boomhauer and felt that they had to stand up for their beliefs. The editors did admit that *Celsius 488* formed part of the factual basis for their opinions and that they were aware of the controversy surrounding the movie, but they thought that they were free to rely on the movie in an opinion piece. The editor-in-chief, Milhouse Van Houten, elaborated on the point: "We were writing an editorial, not doing an investigative report. I think that in writing an editorial, it is proper for us to generally and partially rely on the movie without independently verifying every detail."

After this meeting, Dean Boomhauer and Professor Broozer consulted with each other but with no one else. After these consultations, Professor Broozer told the student editors that the editorial would not run. The editor-in-chief went to Dean Boomhauer to try to change his mind, but to no avail. The editorial board then sought relief through the internal administrative process but failed there as well. On April 24, 2003, ten days after their administrative remedies were exhausted, three members of the editorial board, all Juniors, filed this lawsuit.

DISCUSSION

I. FREE SPEECH AND THE SCHOOLS

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend I. From this simple text, a large and complicated body of legal doctrine has arisen to give practical effect to this most important of guarantees. Through the Fourteenth Amendment, the right of free expression has been extended to protection from interference by state governments. See U.S. CONST. amend XIV; *Near v. Minnesota*, 283 U.S. 697 (1931). Because this case involves a government restriction of speech in a government-owned or -sponsored forum, the restriction must be analyzed under forum analysis principles that have been

developed by the United States Supreme Court. *See Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983).

A. Speech Restrictions in Forums

The constitutionality of government speech restrictions in government forums depends upon the type of forum at issue. Different forums call for the application of different standards. At one end of the spectrum is the traditional public forum. The traditional public forum includes property such as “streets and parks which ‘have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.’” *Perry*, 460 U.S. at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

An exacting standard of review applies to speech restrictions in the traditional public forum. Content-based restrictions (which can be thought of as subject matter restrictions) must pass strict scrutiny: they must be necessary to achieve a compelling government interest and must be narrowly tailored to achieve this end. *Id.* As a practical matter, very few restrictions survive strict scrutiny review. Content-neutral restrictions on the time, place, and manner of speech must pass an intermediate level of scrutiny: they must be narrowly tailored to achieve a significant government interest and must “leave open ample alternative channels of communication.” *Id.*

Designated public forums are forums that the government has opened for “indiscriminate use” by the general public, *id.* at 47, or that have been made generally open to a class of speakers. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998). Speech restrictions in such forums are subject to the same standards that apply to the traditional public forum.

The next type of forum is the limited public forum. There appears to be a great deal of confusion in the Circuits over both the definition of the limited public forum and the standard to apply to it, but a recent Court decision should clear up many of the difficulties. In *Good News Club v. Central Milford School*, 533 U.S. 98, 106 (2001), the Supreme Court defined the limited public forum as a forum which the government reserves for specific groups or for expression on certain topics. Speech restrictions in the limited public forum must merely “be ‘reasonable in light of the purpose served by the forum’” and viewpoint neutral. *Id.* at 106-07 (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

At the most permissive end of the spectrum is the nonpublic forum, which encompasses all forums that are not one of the other three. Restrictions in nonpublic forums must merely be reasonable and viewpoint neutral. *See Perry*, 460 U.S. at 46.

B. Speech Restrictions in School Settings Prior to Hazelwood

In the school setting, there are three primary cases dealing with restrictions on student speech. The first case is *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which covers student speech that just happens to occur on school grounds. *Tinker* made clear that

students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.* at 506. The Court held that a school could not punish student expression on school grounds unless the evidence available to the school allowed it to reasonably believe that the speech in question “would substantially interfere with the work of the school or impinge upon the rights of other students.” *Id.* at 509. For this reason, the *Tinker* Court held that punishing students for their “silent, passive” expression of opposition to the Vietnam War through the wearing of black armbands was unconstitutional. *Id.* at 508.

The *Tinker* Court, however, recognized that the school setting was a special case in which more stringent speech regulations might be allowed. *See id.* at 506. In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, (1986), the second primary case, the Court upheld the school administration’s punishment of a student for giving a speech littered with sexual innuendo at a school assembly. The punishment was constitutional because, although students have free speech rights, schools do not have to allow speech that “would undermine the school’s basic educational mission.” *Id.* at 685. *Fraser* made it clear that courts should show deference to school administrators: “The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.” *Id.* at 683.

The *Fraser* Court discussed the parameters of the educational mission of schools at great length. The educational mandate of schools is not limited to “books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.” *Id.* Furthermore, it is up to the schools to determine what speech is consistent with teaching “the essential lessons of civil, mature conduct.” *Id.*

C. Hazelwood’s Analysis of Student Speech That is Government Sponsored

In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court applied the principles of *Fraser* to censorship of a secondary school newspaper. The newspaper in question was published as part of a journalism class at Hazelwood East High School, with most of the funding coming from the school board. *Id.* at 262-63. A teacher supervised the student editors, and the newspaper was submitted to the principal of the school for review prior to publication. *Id.* Prior to publication of one of the issues, the principal removed two of the six pages of the school newspaper because these pages contained two articles that the principal found objectionable. *Id.*

The first censored article focused on the impact that teenage pregnancy had on three Hazelwood East students. *Id.* The principal objected to this article because the subject matter was inappropriate for some of the younger students at the school. *Id.* The principal was also concerned about the privacy of the three pregnant girls. *Id.* Although they were given aliases for the article, the principal believed that there was enough other information in the article to allow readers to identify the pregnant students. *Id.* The second censored article focused on the impact that divorce had on Hazelwood East students. *Id.* The principal objected to this article because one student (who was identified by name in the draft viewed by the principal) complained about her father, and the student’s parents were not given a chance to respond or to consent to publication of the comments. *Id.*

1. Hazelwood's forum analysis.

The *Hazelwood* Court began its discussion with forum analysis. After noting that schools have not traditionally been available for public expression, the Court delved into the issue of whether the newspaper in question was a designated public forum or a nonpublic forum. *Id.* at 267. The Court cited *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985), for the proposition that simply permitting limited discourse does not create a designated public forum. Instead, only a forum opened for “indiscriminate use” would qualify as a designated public forum. *Hazelwood*, 484 U.S. at 267 (quoting *Perry*, 460 U.S. at 47).

The Court concluded that the newspaper was a nonpublic forum because of the control that the Journalism teacher and the administration exercised over the newspaper. The staff members of the paper were intended to learn several lessons: developing “journalistic skills under deadline pressure”; learning the legal, ethical, and moral principles of journalism; and learning to exercise responsibility in writing opinion articles and accepting criticism of same. *Id.* at 268. Furthermore, the students received grades for the work they did for the paper. *Id.* Finally, the Journalism teacher exercised a great deal of control over the paper by such regular activities as deciding on publishing dates, assigning stories, editing certain parts of the newspaper, and dealing with the printing company. *Id.*

2. The *Hazelwood* Standard

The Court, in deciding on which standard to apply, distinguished *Hazelwood* from *Tinker* on the grounds that the former involved activities that were part of the school curriculum. *Id.* at 271. The Court defined curriculum broadly to include “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.” *Id.* Such activities are to be included, even though they do not take place in a classroom, “so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.” *Id.* The Court went on to hold that schools could exercise more control over such curricular speech, “to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.” *Id.*

With these principles in mind, the Court created the following standard: Schools can exercise editorial control over “student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 273. This standard is similar to the standard that is generally used for nonpublic forums, but there is no mention of a viewpoint neutrality requirement.

Applying this standard, the Court held that the administration’s actions were constitutional. Regarding the teen pregnancy article, the Court found that the principal could reasonably have

concluded that the article did not adequately protect the anonymity of the pregnant girls or the privacy interests of the boyfriends and parents who were mentioned in the article. *Id.* at 274. Furthermore, it was reasonable for the principal to conclude that the frank talk on the use of birth control and the sexual histories of the girls could have been inappropriate for some of the younger students at the school. *Id.* As for the article on the effects of divorce on Hazelwood East students, the principal could have reasonably concluded, from the draft he was given, that “an individual publicly identified as an inattentive parent . . . was entitled to an opportunity to defend himself as a matter of journalistic fairness. *Id.* at 275.

II. HAZELWOOD IS THE STANDARD TO APPLY

This Circuit has never applied *Hazelwood* or faced the issue of whether *Hazelwood* applies to colleges, but I have found the case law in other Circuits a useful guide. Because of the close similarities between the Kerrywood Gazette and the school newspaper at issue in *Hazelwood*, I conclude that the *Hazelwood* standard applies to this case. I further conclude that, unlike the general standard for nonpublic forums, *Hazelwood* does not require restrictions on speech to be viewpoint neutral.

A. The Kerrywood Gazette is a Nonpublic Forum.

I first address forum analysis and conclude that the Kerrywood Gazette is clearly a nonpublic forum. The reasoning that the *Hazelwood* Court employed applies almost perfectly to the facts of this case. Both newspapers were published as part of a journalism class, both were funded by the school, both resulted in grades for the students running the newspaper, and both were controlled to a substantial degree by the administration. The Kerrywood Gazette certainly was not opened for “indiscriminate use” by the general public, *see Perry*, 460 U.S. at 47, and was not generally open for a selected class, such as the class of students, *see Forbes*, 523 U.S. at 679. Rather, the Kerrywood Gazette was open only for “limited discourse,” *see Cornelius*, 473 U.S. at 802.

The Plaintiffs argue that forum analysis for colleges and universities should differ from forum analysis for secondary schools because of the many differences between the two settings. To this end, they cite *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (en banc), which held that the University yearbook at issue was a limited public forum and that the standard used for designated public forums should apply. The Plaintiff’s argument is without merit for two reasons.

First, *Kincaid* is easily distinguished from the facts in this case. In *Kincaid*, editorial control was in the hands of students, not the faculty advisor. *Id.* at 349. Indeed, the faculty advisor’s control over the yearbook was limited: the yearbook’s policy guide forbade the faculty advisor from altering the content of the staff’s work. *Id.* at 349-50. The *Kincaid* court concluded that the university had chosen to oversee only “general and administrative matters and to cede authority over the yearbook’s content to the students who published it.” *Id.* at 350. Finally, in concluding that the yearbook was a limited public forum, the *Kincaid* court distinguished the yearbook from the newspaper in *Hazelwood* by pointing out that the yearbook was not “a closely-monitored classroom activity in which an instructor assign[ed] student editors a grade, or in which a university official edit[ed]

content.” *Id.* at 352.

Second, the *Kincaid* court’s use of a heightened standard for the limited public forum is questionable given the Court’s holding in *Good News*. Of course, the forum analysis issue is in some sense academic because the *Kincaid* court was merely attempting to apply a higher standard to the university setting. Whether such an effort is made before or after a forum is decided upon may make little practical difference.

B. Hazelwood Applies to Colleges.

Now that I have concluded that the Kerrywood Gazette is a nonpublic forum, I must now decide what standard should be applied. The factual similarities between the Kerrywood Gazette and the newspaper in *Hazelwood* would appear to strongly argue for application of the same standard, but matters are not so clear. First, the *Hazelwood* Court, in a footnote, explicitly reserved the issue of whether the same degree of deference applies to colleges and universities. *Hazelwood*, 484 U.S. at 273, n.7. Second, the Circuit Courts have split on the issue, with some applying a strict standard and others applying the deferential standard of *Hazelwood*. For the reasons that follow, I conclude that the *Hazelwood* standard applies to colleges.

First, although the university environment differs from the secondary school environment in many respects, the primary duty of both is to educate. In *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002), Judge Graber applied *Hazelwood* to the acknowledgments section of a master’s degree thesis.² Judge Graber recognized that universities should have a great amount of control over core curricular speech. *See id.* at 950.

Furthermore, although academic freedom is a much greater concern at the university level, academic freedom depends as much on “autonomous decisionmaking by the academy” as it does on the “independent and uninhibited exchange of ideas.” *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 237 (2000) (Souter, J., concurring). Judge Graber followed Justice Souter’s approach and concluded that *Hazelwood* analysis was appropriate because it was workable and balanced.³ *Brown*, 308 at 952.

In *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), the Tenth Circuit agreed with Judge Graber’s analysis in *Brown* and also applied *Hazelwood* to the university setting. In doing so, the *Axson-Flynn* court emphasized that “[f]ew activities bear a school’s ‘imprimatur’ and ‘involve pedagogical interests,’ more significantly than speech that occurs within a classroom setting as part

²In *Brown*, there was a three way split of opinion. J. Graber applied the *Hazelwood* standard, J. Reinhardt disagreed with J. Graber in an opinion concurring in part and dissenting in part, and J. Ferguson concurred in the result but avoided the *Hazelwood* issues.

³It is important to note, however, that Judge Graber did not conclude that *Hazelwood* applies to extracurricular speech at colleges. *See Brown*, 308 at 951.

of a school's curriculum." *Id.* at 1289 (quoting *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 924 (2002)). In *Axson-Flynn*, a play produced as part of a university's acting program qualified as such a classroom setting. As in *Brown*, the *Axson-Flynn* court sidestepped the issue of university control over extracurricular issues. *See id.* at 1288-89.

The analyses in *Brown* and *Axson-Flynn* are very persuasive. At the very least, when core curricular speech is involved, the *Hazelwood* standard should apply to universities. The Kerrywood Gazette clearly involves such core curricular speech. Therefore, I will apply the *Hazelwood* standard in this case.

The Plaintiffs point to decisions in other Circuits that conclude that *Hazelwood* does not apply at the university level, but some of these only deal with the issue at a conclusory level, *see e.g. Student Gov't Ass'n v. Bd. of Trs. of Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir.1989), or deal with a forum that is not closely analogous to the Kerrywood Gazette, as in *Kincaid*. As for Judge Reinhardt's opinion in *Brown*, I find his analysis unpersuasive because it does not appreciate the many similarities between the secondary school and university environments.

C. *Hazelwood* Does Not Require Viewpoint Neutrality.

Having decided to apply the *Hazelwood* standard, I must now deal with another issue which has split the Circuits: whether *Hazelwood* requires viewpoint neutrality. The *Hazelwood* opinion does not mention a viewpoint neutrality requirement, but viewpoint neutrality is a key component in most other free speech tests. For the reasons that follow, I conclude that *Hazelwood* does not require viewpoint neutrality.

First, the fact that *Hazelwood* does not mention a viewpoint neutrality requirement is of primary importance. Second, some of the examples of censorship that the *Hazelwood* Court considered justified are not viewpoint neutral. Censoring speech because it advocates alcohol use or irresponsible sex appears to me to discriminate against viewpoints, yet *Hazelwood* says that schools must retain the right to censor school-sponsored speech for just these reasons. *Hazelwood*, 484 U.S. at 272.

Third, the Court has hinted that viewpoint neutrality requirements do not apply to speech that bears the imprimatur of the state. In *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Supreme Court invalidated a University of Virginia policy which denied funding to student groups that promoted belief in a deity. The policy was unconstitutional because it discriminated based on viewpoint. In invalidating the policy, however, the Court cited to *Hazelwood* to distinguish between speech by the government and private speech that the government merely facilitates. *See id.* at 834. Although the point is arguable, I believe that the fairest inference to draw is that the *Rosenberger* Court recognized that *Hazelwood* does not require viewpoint neutrality.

Courts in other Circuits have also concluded that *Hazelwood* does not require viewpoint neutrality. In *Fleming v. Jefferson County School District R-1*, 298 F.3d 918 (2002), the Tenth Circuit put forth a simple but compelling argument that *Hazelwood* does not forbid viewpoint discrimination: With a

viewpoint neutrality requirement, the *Hazelwood* standard would essentially be the same as the general nonpublic forum standard, but such a pedestrian result makes no sense given the *Hazelwood* Court's emphasis on the "special characteristics of the school environment" and the deference afforded to educators. *Id.* at 926 (quoting *Hazelwood*, 484 U.S. at 266).

In *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993), the First Circuit also concluded that *Hazelwood* does not prohibit viewpoint discrimination. The *Hickey* Court distinguished the viewpoint neutrality requirements found in cases such as *Perry*, by pointing to the special nature of the school setting. *Id.* at 454. According to *Hickey*, the standards enunciated in *Perry* simply do not apply to schools. *Id.*

Other courts have held the opposite view. One of the first major decisions to follow the opinion in *Hazelwood* was *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*, 941 F.2d 817 (9th Cir. 1991) (en banc). The *Planned Parenthood* court appears to have simply assumed that viewpoint neutrality was required. *See id.* at 829. In *Searcy v. Harris*, 888 F.2d 1314 (1989), the Eleventh Circuit held that *Hazelwood* forbids viewpoint discrimination. While conceding that *Hazelwood* does not mention a viewpoint discrimination requirement, the *Searcy* court countered by saying that it saw "no indication that the Court intended to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views." *Id.* at 1319, n.7. I cannot at all agree with *Searcy's* characterization of *Hazelwood* because *Hazelwood* emphasized the special nature of the school setting.

D. The University's Censorship of the Kerrywood Gazette Was Reasonably Related to Legitimate Pedagogical Purposes.

The reasons Dean Boomhauer gave for refusing to publish the editorial are reasonably related to legitimate pedagogical objectives. Dean Boomhauer's first two reasons, that the editorial's tone, use of name-calling, and reliance on Ms. Berry's movie were unprofessional, are reasonably related to the legitimate pedagogical objective of teaching professional skills to journalism students.

That the pedagogical objective is legitimate is undeniable, and the relationship between the Dean's reasons and this objective is also reasonable. *Brown* is again instructive on this point. In *Brown*, a master's degree candidate decided to include a "Disacknowledgments" section in place of the usual acknowledgment's section. The first version used profanity but even the non-profane version called several leading University administrators degenerates. *Brown*, 308 F.3d at 943. Judge Graber concluded that the thesis committee's decision to reject the thesis as long as it included the disacknowledgments section was reasonable. *See id.* at 949. The decision was reasonable because "the First Amendment does not require an educator to . . . approve the work of a student that, in his or her judgment, fails to meet a legitimate academic standard." *Id.* In this case, Dean Boomhauer could have reasonably concluded that the tone of the editorial and the presence of name-calling did not meet the professional journalistic standards that Kerrywood University is trying to teach. Furthermore, the editorial's reliance on a questionable news source could reasonably be seen as violating journalistic norms. Although an editorial is an opinion piece, it must still meet "the same standards of accuracy with respect to facts as news reports." *American Soc. of Newspaper Editors Statement of Principles*, Article IV (2002), at

<http://www.asne.org/kiosk/archive/principl.htm>).

The last reason Dean Boomhauer gave for not publishing the editorial was that he did not want the University to be involved in such a controversial issue. *Hazelwood* concluded that “[a] school must also retain the authority to refuse to . . . associate the school with any position other than neutrality on matters of political controversy.” *Hazelwood*, 484 U.S. at 272. Because the Iraq war is such a controversial political issue, the decision not to publish a vehement attack on the President’s conduct of the war must be seen as reasonable.

The plaintiffs point to the earlier opinion piece written by Mr. Muir that was published by the Kerrywood Gazette. They argue that the Kerrywood Gazette’s neutrality on matters of controversy had already been breached by this earlier article. Mr. Muir’s piece, however, was on the less controversial topic of clearing Kerrywood Forest. The university could have reasonably concluded that the character of Mr. Muir’s opinion piece was less likely to mire the school in a hot political topic. Furthermore, Mr. Muir’s piece was written by one person and was, therefore, less likely to be seen as speech by the university.

I do concede that Dean Boomhauer’s third reason presents a closer question than the others, but a reasonableness standard means that the censorship “need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.” *Cornelius*, 473 U.S. at 808. Therefore, Kerrywood University’s decision not to publish the staff editorial was constitutional because it was reasonably related to legitimate pedagogical objectives.

E. The Censorship Was Constitutional Even if Hazelwood Requires Viewpoint Neutrality.

Even if *Hazelwood* requires viewpoint neutrality, Kerrywood University’s decision not to publish the staff editorial was constitutional. Each of the three reasons given by Dean Boomhauer are viewpoint neutral. First, disapproval of the editorial’s tone and use of name-calling is not targeted at the views being expressed but the manner in which they are expressed. Second, Dean Boomhauer’s objection to the editorial’s reliance on Ms. Berry is directed at upholding professional journalism standards on the use of facts in an editorial. The third reason given by Dean Boomhauer is a closer call, but I see the desire to avoid controversial political issues to be a content-based motivation rather than a viewpoint-based motivation.

The plaintiffs argue that even if these reasons are viewpoint neutral, they are mere pretext for Dean Boomhauer’s disagreement with the staff editorial’s views. Although both the Dean and the Professor are Republicans and the Dean’s response was more angry than one might expect from concern over pedagogical objectives, I am not persuaded that his given reasons should be taken at anything other than face value.

CONCLUSION

For all of the reasons given above, I conclude that Kerrywood University’s decision not to publish the editorial staff’s attack on the President was constitutional.

IN THE
SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 2004

KERRYWOOD UNIVERSITY,

Petitioner,

v.

MARTIN PRINCE, BARTHOLOMEW SIMPSON,
AND MILHOUSE VAN HOUTEN,

Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit,
Prince v. Kerrywood University, 4 D. 419 (14th Cir. 2004).

ORDER

The petition for writ of certiorari is hereby GRANTED limited to the following question:

1. Whether Kerrywood University's censorship of a Kerrywood Gazette editorial violated First Amendment Free Speech guarantees.

Probable jurisdiction is noted, and a total of one half hour allotted for oral argument. The briefs of both parties are to be filed with the Clerk of the Court on or before 5:00 p.m. on **Friday, September 17, 2004**. The case is set for oral argument in the October 2004 term of this Court.

FINALS

THE TWENTY-FIFTH ANNUAL JOHN W. DAVIS

MOOT COURT COMPETITION



MOOT COURT ROOM
SYDNEY LEWIS HALL
OCTOBER 22, 2004
4:30 P.M.

**THE TWENTY-FIFTH ANNUAL JOHN W. DAVIS
MOOT COURT COMPETITION**

"I may be crank on the subject of Moot Court; I have no doubt that Mr. Graves thinks I put too much emphasis on them...I concede that the thing may be overdone; and that after all the real school for practice must be the courtroom; but so much embarrassment can be saved the young practitioner, and so much added to his capacity for serving those who are unfortunate to be among his early clients, that I hardly think too much care can be taken in training him, so far as possible, in the tools of the trade."

-John W. Davis, April 30, 1898
In a letter written to Professor H. St. Tucker

The Washington and Lee University School of Law hosts the John W. Davis Moot Court Competition every fall. Law students and faculty developed the competition to provide participating students the opportunity to practice their oral advocacy and brief writing skills. In recent years, Washington and Lee University School of Law alumni and brothers Philip and Benjamin Gardner of Martinsville, Virginia have enabled the program to continue through their kind contributions. At the banquet for participants, professors and judges following the final round, the Gardner brothers will present the Gardner Moot Court Awards to those students who excel in the competition.

All second and third-year students, except members of the Moot Court Executive Board, are invited to participate. Each participant competes as Petitioner or Respondent's counsel in a mock case before the United States Supreme Court. Before participants present their first oral argument to the Court, they first submit a written brief. Participants advance in the competition based on the combined score for their brief and oral argument. As the competition progresses, emphasis shifts to participants' oral argument skills. In this final round, competitors will be judged on their oral arguments alone.

This year, L'Shauntee Robertson and Michael Spencer, the 2004-05 Davis Moot Court Administrators, created and wrote the problem and supervised the competition. In addition, both served as judges during the preliminary and quarterfinal rounds. Moot Court Executive Board members—along with 2003 Davis Quarterfinalists Kevin Brotzman and Seth Johnston, and 2003 Davis Finalists Helena Joly and Susan Richter—also served as judges in these preliminary rounds. Three faculty members—Professor Samuel W. Calhoun, Professor Ann MacLean Massie, and Professor Blake D. Morant—judged oral arguments in the semifinals.

Members of the Moot Court Executive Board judged all briefs submitted by the participants for content, grammar and blue booking. The Board selected those briefs with the five highest scores as Best Brief nominees. Professor Margaret Howard, Professor Ronald J. Krotoszynski, Jr., and Professor Brian C. Murchison selected the Best Brief winner from among the Best Brief nominees.

Those students who excel in the competition may be selected to represent Washington and Lee at different extramural competitions across the country this coming spring.

The Moot Court Executive Board would like to thank Professor Ronald J. Krotoszynski, Jr. and Jonathan Albano of Bingham McCutchen LLP in Boston, Massachusetts for their help in crafting this year's problem. The Board will also like to extend its thanks to all of the aforementioned professors and students who served as judges in the competition.

The 2004 John W. Davis Moot Court Competition culminates today with the announcement of the Best Oral Advocate and winner of the Best Brief Award following the presentation of oral arguments.

THE PARTICIPANTS

Counsel for the Petitioner

Brian Berkley

Katherine Tritschler

Counsel for the Respondent

James Coleman

Cavelle Johnston

THE COURT

THE HONORABLE MARTHA C. DAUGHTREY
(Judge of the United States Court of Appeals, Sixth Circuit)

THE HONORABLE WALTER D. KELLEY, JR.; '77, 81L
(Judge of the United States District Court in the Eastern District of Virginia)

THE HONORABLE EVERETT A. MARTIN, JR.; '74, 77L
(Judge of the Circuit Court in the Fourth Judicial Circuit of Virginia)

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IN THE SUPREME COURT OF THE UNITED STATES

KERRYWOOD UNIVERSITY,
Petitioner

v.

Martin PRINCE,
Bartholomew Simpson, and
Milhouse Van Houten
Respondents

Competitors in the 2004 John W. Davis Moot Court Competition argue based on the following fact pattern:

Kerrywood University is a state-run university with a majority of its students coming from outside the local area. The Kerrywood Gazette is a quarterly newspaper funded almost entirely by the administration, and is run by student editors as part of a class called "Journalism VI." The students working on the newspaper receive a grade for their work, which is supervised by Professor Elia Broozar. Professor Broozar allows the students a fair amount of latitude in running the paper to give them useful, real-world experience, but he often gives advice, which the staff usually follows. All issues of the Kerrywood Gazette are submitted to Dean George Boomhauer of the College of Arts and Sciences for a final review. This final review is usually nothing more than a rubber stamp, but Dean Boomhauer has blocked the publication of two news articles (not opinion pieces) in the past three years. In each case, the staff has made conforming changes to meet the Dean's concerns.

In January 2004, one of the staff's editorial columnists, Chip Muir, wrote an opinion column analyzing the benefits of a local redistricting plan that the state legislature was considering, and concluding that the plan should be adopted. Mr. Muir took the position that the redistricting would make it easier for Representative Richard Cunningham to be reelected to the U.S. House of Representatives.

Mr. Muir's column led to several dozen, one paragraph comments being submitted for inclusion in the "Rants & Raves" section of the Gazette. Although some comments dealt with the local issues raised in Mr. Muir's article, about two-thirds of the comments dealt with Representative Cunningham's support for President Bush's Iraq policies. These comments mostly expressed the view that, regardless of Representative Cunningham's views on issues of local concern, he deserved to be soundly defeated because of his support of the President.

The vast majority of the editorial staff holds views on the Iraq war opposed to those of Representative Cunningham, and felt that their views should be published as well. The editorial staff decided to run an editorial expressing their opposition to the redistricting plan because of their disapproval of Representative Cunningham's support of the President. This editorial was not to have been signed by an individual. Rather, the editorial would simply have had the headline "Staff Editorial."

The bulk of the staff editorial focused directly on the President and used very heated rhetoric, calling the President "at best a moron and at worst a pathological liar," and saying his Iraq policies "totally sucked." The editorial further said that the President "led us to war to get sweetheart oil deals for his fat cat contributors," and that he was "directly and morally responsible for every Iraqi and American who has died as a result of the violence from this god-forsaken war."

The allegations in the above paragraph relied in part upon the documentary *Celsius 488* by the filmmaker/political activist Michelle Berry. *Celsius 488* has been very controversial, receiving accolades from the President's foes but drawing venom from his supporters.

Investigations into the documentary's accuracy have questioned some of the conspirational inferences in the film and have found the presentation of some facts to be highly misleading. However, the investigations have also concluded that some of Ms. Berry's points have validity.

Soon after the editorial was submitted to Professor Brooker, he took it to Dean Boomhauer for comment. Dean Boomhauer strongly disapproved of the article. He said that the editorial's reliance upon Ms. Berry, "a notorious purveyor of lies," was unprofessional, that the tone of the article and the use of name-calling was unprofessional, and that he did not want the University to be seen as taking sides in such a controversial issue. Both Dean Boomhauer and Professor Brooker are well-known fundraisers for Republican political causes.

Professor Brooker agreed with the Dean and scheduled a meeting with the student editors. At the meeting, the editors stood by the tone and content of their editorial and refused to make the many changes Professor Brooker demanded. They questioned the motivations of Professor Brooker and Dean Boomhauer and felt that they had to stand up for their beliefs. The editors did admit that *Celsius 488* formed part of the factual basis for their opinions and that they were aware of the controversy surrounding the movie, but they thought that they were free to rely on the movie in an opinion piece.

After this meeting, Dean Boomhauer and Professor Brooker consulted with each other and decided to block the editorial from publication. The editor-in-chief went to Dean Boomhauer to try to change his mind, but to no avail.

The editorial board then sought relief through the internal administrative process but failed there as well. On April 24, 2003, ten days after their administrative remedies were exhausted, three members of the editorial board, all juniors, filed this lawsuit in the Northern District of Kerrywood.

The District Court entered judgment for the University. The District Court found that the *Kerrywood Gazette* was a non-public forum and that the proper standard to apply was the one announced in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). *Hazelwood* is highly deferential to educators, allowing them to control "student speech in school sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." The court further ruled that *Hazelwood* does not require viewpoint neutrality, but that Kerrywood University's actions were constitutional even in the event that *Hazelwood* does require viewpoint neutrality.

On appeal to the Court of Appeals for the Fourteenth Circuit, the designation of the *Kerrywood Gazette* as a non-public forum remained undisturbed. Nevertheless, the Court noted that the facts of *Hazelwood* involved a secondary school, and concluded that the *Hazelwood* rule does not apply to colleges. Instead, the Court applied the standard of *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), which states that school censorship of speech is unconstitutional "unless the school can demonstrate that certain student speech might reasonably have led school authorities to forecast substantial disruption of, or material interference with, school activities." The Court went on to say that even if *Hazelwood* does apply to the instant case, it requires viewpoint neutrality. Furthermore, the Court felt that Kerrywood's actions were not reasonably related to a legitimate pedagogical concern.

Kerrywood University appealed to the Supreme Court, which granted certiorari on the following question:

- (1) Whether Kerrywood University's censorship of a Kerrywood Gazette editorial violated First Amendment Free Speech guarantees.

**RESULTS OF THE
2003 JOHN W. DAVIS
MOOT COURT COMPETITION**

FINALISTS

Brian Berkley

James Coleman

Cavelle Johnston

Katherine Tritschler

SEMIFINALISTS

Adam Nunziato

Lindsay Rubel

Meghan Smith

Soha Turfler

QUARTERFINALISTS

Michael Bauer

Ryan Corle

Stephen Mealor

Jason Rogers

BEST BRIEF NOMINEES

Brian Berkley

Adam Nunziato

Jason Rogers

Lindsay Rubel

Katherine Tritschler

The members of the Moot Court Executive Board would like to extend their appreciation to all student participants and faculty members who participated in this year's program. Without these individuals, the John W. Davis Moot Court Competition would not succeed as well as it has.

BIOGRAPHIES OF JUDGES

THE HONORABLE MARTHA C. DAUGHTREY United States Court of Appeals for the Sixth Circuit

Judge Martha “Cissy” Daughtrey was nominated to the United States Court of Appeals by President William Jefferson Clinton in August, 1993. She was confirmed by the Senate in November of the same year.

Judge Daughtrey received both her B.A. (*cum laude*, '64) and J.D. ('68) from Vanderbilt University, where her academic honors included induction into Phi Beta Kappa and the Order of the Coif. From 1968-69, she served as an Assistant U.S. Attorney for the Middle District of Tennessee. From 1969-72, she served as an Assistant District Attorney for the Tenth Judicial Circuit of Tennessee. In the same time period (1971-72), she taught as a Lecturer at Vanderbilt University School of Law. In 1972, she became an assistant professor there, becoming the first woman appointed to the Vanderbilt Law faculty. In 1975, she became the first woman appointed to the Tennessee Court of Criminal Appeals. Judge Daughtrey sat on the Court of Criminal Appeals until 1990, during which time she returned to Vanderbilt as a Lecturer (1976-88) and Adjunct Professor (1988-90). In 1990 Judge Daughtrey once again set a record, becoming the first woman appointed to the Tennessee Supreme Court. She sat on the Supreme Court until her appointment to the Sixth Circuit.

THE HONORABLE WALTER D. KELLEY, JR.
United States District Court in the Eastern District of Virginia

Judge Kelley was nominated to the District Court of the United States in the Eastern District of Virginia by President George W. Bush in October, 2003. He was confirmed by the Senate in June, 2004.

Judge Kelley was a “seven-year man” at Washington and Lee University, having received his B.A. *cum laude* in 1977 and his J.D. *magna cum laude* in 1981. In the year between graduating from college and starting law school, Judge Kelley served as the Press Secretary for Congressman James R. Collins (R-TX). After graduating from law school, Judge Kelley clerked for The Honorable Ellsworth A. Van Graafeiland in the United States Court of Appeals for the Second Circuit. In 1982, Judge Kelley joined the Virginia firm Wilcox & Savage, PC, as an associate. He became a partner there in 1987. In 2001, Judge Kelley left Wilcox & Savage for another Virginia firm, Troutman Sanders LLP. During his time in private practice, Judge Kelley specialized in business litigation, with an emphasis on intellectual property and antitrust cases. He appeared in “The Best Lawyers in America” for the category of Business Litigation and was consistently voted as being among the “Legal Elite” for civil litigation in *Virginia Business* magazine’s annual survey.

Judge Kelley is currently an Adjunct Professor of Antitrust Law at Regent University School of Law in Virginia Beach, Virginia.

THE HONORABLE EVERETT A. MARTIN, JR.
Virginia Circuit Court for the Fourth Judicial Circuit

Judge Martin was elected to the Circuit Court bench by the Virginia General Assembly in 1995.

Like Judge Kelley, Judge Martin was a “seven-year man” at Washington and Lee, having received his B.A. in 1974 and his J.D. in 1977. After graduating from law school, Judge Martin clerked for The Honorable Richard B. Kellam in the United States District Court in the Eastern District of Virginia. He went on to earn a Master of Law in Taxation from New York University in 1980. From 1980-88, Judge Martin practiced privately, mostly with the former firm of Seawell, Dalton, Hughes and Timms. From 1988-90, Judge Martin served as an Assistant Commonwealth’s Attorney in Norfolk, Virginia. In 1990, he became a judge in the Juvenile and Domestic Relations District Court.

JOHN W. DAVIS (1892, 1895L)

The annual Moot Court Competition at Washington and Lee is named in honor of John W. Davis. Renowned for both his advocacy skills and his public service, Davis was considered the finest Supreme Court attorney of his day. Davis argued before the Court 139 times before his death in 1955, at the time a 20th century record.

Davis was born in 1873 in West Virginia, and attended Washington and Lee for both undergraduate and law degrees. Davis taught at Washington and Lee for three years after his graduation, but chose private practice over a permanent position at W&L. Davis practiced law in Clarksburg, West Virginia from 1897-1913, serving as a U.S. Congressman during 1911-13. From 1913-1918, he served as Solicitor General of the United States, after which he served as ambassador to the Court of St. James until 1921. Upon returning from London, Davis became the head of the prominent New York law firm of Davis, Polk and Wardwell. He rejected an appointment to the Supreme Court in 1922, choosing instead to continue practicing before it. He unsuccessfully ran for President as the Democratic nominee in 1924, losing to Calvin Coolidge. Davis then left the political arena, and spent the remainder of his life devoted to private practice.

Davis' advocacy record presents a complex and seemingly self contradictory history. He is best known for successfully defending the steel industry against seizure during the Korean War in *Youngstown Sheet and Tube Co. v. Sawyer* and for unsuccessfully defending segregation of public schools in *Brown v. Board of Education*. Davis also spoke in defense of religious liberty when Al Smith was attacked during the 1928 presidential campaign because of his Catholicism, and defended, *pro bono* a Yale divinity professor in the landmark case for conscientious objection, *United States v. McIntosh*.

Students of appellate advocacy know well *The Argument of an Appeal*, an address given by Davis to the Association of the Bar of the City of New York in 1940. Davis sets forth his "ten commandments" of oral argument, which, if followed, lead to success for the attorney and client. His admonitions, from "know your record from cover to cover" to "read sparingly and only from necessity" guide the participants today in the competition named in his honor.