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ASSURING FREEDOM FOR THE COLLEGE STUDENT PRESS AFTER *HAZELWOOD*

NANCY J. MEYER*

I. INTRODUCTION

The January 1988 United States Supreme Court decision in *Hazelwood School District v. Kuhlmeier*,¹ that public high school administrators could censor student publications for pedagogical purposes, opened a Pandora's box of fears about the future of student press freedom. Although the decision narrowed the scope of first amendment speech protection for public high school students, it had no direct effect on their private school counterparts, for whom first amendment protection from administrative control has never been available.² And, while the Court refrained from including the college press in its *Hazelwood* holding,³ there is no guarantee that the Court would not extend the same federal rationale to the college campus. Indeed, before *Hazelwood*, high school and college newspapers had been treated equally under the first amendment within the framework of the 1969 decision in *Tinker v. Des Moines Independent Community School District*,⁴ in which the Court held that public school students do not shed their constitutional freedoms at the schoolhouse gate. That broad holding was narrowed by the *Hazelwood* distinction that the first amendment protects private expression by students on school premises, but not school-sponsored speech.⁵

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1. 484 U.S. 260 (1988).

2. U.S. CONST. amend. I. (The first amendment, on its face, constrains only the conduct of the federal government, not that of private individuals or entities, and to the extent of its incorporation in the fourteenth amendment due process clause, it also limits state governments.). See U.S. CONST. amend. XIV, § 1.

3. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988).

4. 393 U.S. 503 (1969).

5. 484 U.S. at 271. (The distinction was necessary, the Court said, "to assure that participants [in school-sponsored expression] 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.").

The *Hazelwood* decision should be viewed both as a threat to first amendment speech protection for students and as an incentive to find other means to protect student speech rights. One appeal of those "other means" is the potential to eliminate the distinctions in speech protection between public and private school students. Federal doctrine limits judicially enforceable guarantees to shielding individuals from government, but not from private, action. Thus, to invoke first amendment protection, a litigant must show that infringement of his speech rights is the result of "state action."⁶ For example, a student editor at a state university would be protected against censorship by his school administration because that censorship would constitute "state action," but his counterpart at a privately owned institution would have no first amendment claim.⁷ The rationale behind this distinction lies in a determination that public universities are instrumentalities of the state, but private schools are not. Only with a showing of some interdependent or symbiotic relationship between the private school and the state, could the acts of its administrator be construed as state action.⁸ Thus, speakers on a state university campus have first amendment protection not available to speakers at a private school. This distinction seems odd to those who perceive any university, public or private, to be the quintessential location for exchange of ideas. As the late Melville Nimmer wrote: "It is intuitively unacceptable to conclude that the courts should differentiate as between freedom of speech on the campus of Harvard University and on a University of California campus."⁹

The state action doctrine and the *Hazelwood* decision constitute formidable limitations on first amendment protection of the student press. This article seeks to avoid those limitations by grounding protection in state, rather than federal, constitutional law. Although some states have enacted statutes to protect the rights of the student press,¹⁰ and others are consider-

6. See, e.g., *Watkins v. United States*, 354 U.S. 178, 197 (1957) (Explaining that first amendment protection is implicated whenever a "law" abridges free speech, the Supreme Court said, "The first amendment may be invoked against infringement of the protected freedoms by law or law-making."). See also Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. REV. 455, 501 (1983) (explaining that the first amendment text refers to "Congress" simply because the power of the federal government resides primarily in Congress). Virtually all the powers exercised by the federal executive and judiciary are derived from Congressional enactments. See also Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 111 n.11 (1982).

7. *State v. Schmid*, 84 N.J. 535, 423 A.2d 615, 619 (1980) ("A private college or university does not . . . operate under or exercise the authority of state government. Hence, the state nexus requirement that triggers the application of the first amendment is not . . . met. . . .").

8. See *infra* note 73.

9. M. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT* § 4.09[D] (1984).

10. See CAL. EDUC. CODE ANN. § 48907 (Deering 1987); MASS. GEN. LAWS ANN. ch. 71, § 86 (1982 & Supp. 1989); Act of May 11, 1989, S.F. 224, 1989 IOWA ACTS (to be

ing similar legislation,¹¹ the majority of states already have constitutional guarantees of speech protection more expansive than that ensured by the federal Constitution.¹² As yet, no student journalists have sought the protection of their state constitutional guarantees, but other plaintiffs have successfully argued that private ownership of property does not preclude free speech activities where the premises are open to the public, so long as the activity meets reasonable time, place, and manner restrictions.¹³

Several state court decisions have relied on a finding that speakers on private property are protected so long as their expressive activities do not substantially interfere with the owner's intended use of the premises.¹⁴ Grounded in state constitutional provisions held to provide broader protection than their federal counterparts, these decisions have determined that privately owned shopping centers and universities serve a public function by providing forums in which people reasonably expect to exchange ideas.¹⁵

In view of the Supreme Court's finding that the student newspaper in *Hazelwood* was not a forum for first amendment purposes and that a school administrator's deletion of student-written articles was not unconstitutional state action, reliance on state protection of speech seems a natural alternative. Furthermore, the decentralized nature of education in the United States,¹⁶ in which school systems are organized and administered by the individual states, suggests that school speech policy should be established on the state level. This article will examine the desirability of bringing student censorship actions under state grounds to provide broader protection than the first amendment, to avoid Supreme Court review of decisions that affect student speech in the educational institutions in the individual states, and to eliminate unreasonable distinctions between private and public university students where free speech is at issue.

codified at IOWA CODE § 280.21).

11. *Iowa Becomes Latest State to Enact Bill Proclaiming Students' Free-Speech Rights*, PRESSTIME 72 (June 1989) (Bills providing protection for student press freedom have been introduced in the legislatures of Illinois, Kansas, Nevada, Oregon, and Rhode Island.). See also *Press Freedom Gains Momentum in the Midwest*, 10 STUDENT PRESS LAW CENTER REPORT 9 (Spring 1989).

12. See, e.g., MICH. CONST. art. I, § 5 ("Every person may freely speak, write, express, and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press."); ILL. CONST. art. I, § 4 ("All persons may speak, write, and publish freely, being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.").

13. See, e.g., *infra* notes 51, 68, 71, and 90.

14. See *infra* notes 68, 71, and 90.

15. See, e.g., *infra* notes 65, 68, 71, and 85.

16. See Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505, 515 (1989) ("Education is a state, not a national function.").

II. FEDERALISM

Precedent supports the protection of individual liberties, including free speech, through the state constitutions. Until the 1960s, when judicial nationalization began to dilute the federal system,¹⁷ primary protection of civil liberties came from state constitutions.¹⁸ During the 60s and 70s, as the Supreme Court incorporated into the fourteenth amendment a variety of legal issues, particularly those involving individual rights, few cases were grounded in state constitutional law.¹⁹ Lawyers almost exclusively trained on federal cases failed to raise state law in the courts. One commentator has noted that "[s]tate judges started to parrot federal cases and law clerks researched them to the exclusion of the state charters. The state constitutions atrophied in the process."²⁰ The 1980s have seen the pendulum swing back to state constitutional decisionmaking by state courts. Judith S. Kaye, an associate judge in the New York Court of Appeals, has suggested several possible explanations for the change.²¹ Kaye notes the United States Supreme Court's apparent "retreat from earlier federal Bill of Rights decisions,"²² the Court's explicit encouragement that a state jurisprudence be developed,²³ and the replacement of "vertical federalism"²⁴ with "horizontal

17. Douglas, *Federalism and State Constitutions*, 13 VT. L. REV. 127 (1988).

18. *Id.* at 127-28. (State constitutional protection of civil rights predated the federal Constitution and provided the pattern for its creation. Because the state charters were thought to provide adequate protections for civil liberties, the Constitutional Convention that met in Philadelphia in 1787 did not draft a bill of rights. Those first ten amendments were added in 1791 in response to a growing fear of a too powerful central government.).

19. Utter, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 636 n.8 (1987).

20. Douglas, *supra* note 17, at 133.

21. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 49 (1988).

22. *Id.* at 50.

23. *Id.* at 50 (citing *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1979), "[t]he State [has the authority] to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."). See also Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977):

The essential point I am making, of course, is not that the United States Supreme Court is necessarily wrong in its interpretation of the federal Constitution, or that ultimate constitutional truths invariably come prepackaged in the dissents, including my own, from decisions of the Court. It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.

Id.

24. See Kaye, *supra* note 21, at 55 (In reading the federal constitution, the Supreme Court must establish minimal rules that will bind all the states in a diverse nation.). See also Douglas, *supra* note 17, at 134-35. ("[T]he Supreme Court is there to set the lowest common denominator for the fifty states . . . to determine the judicial floor under which no state may pass.").

federalism”²⁵ as lawyers and judges look to other states, instead of to the federal courts for legal guidance.²⁶

A. *Insulation of State Court Decisions*

One advantage in establishing student speech rights at the state level is the state’s ability to insulate effectively its constitutional decisions from review. In *Herb v. Pitcairn*, the Supreme Court declared that it would not review a state court decision based on “independent and adequate state grounds.”²⁷ The Court gave three reasons for its holdings: 1) recognition of the partitioning power between state and federal judicial systems; 2) limitation of Supreme Court jurisdiction to those portions of state court decisions that incorrectly adjudge federal rights; and 3) lack of jurisdiction to render advisory opinions. Whenever the state court decision was not expressly grounded in state constitutional law, it was Supreme Court practice to continue the case on its docket until the state court had time to clarify.²⁸ However, in a 1983 decision, *Michigan v. Long*, the Court qualified that policy by stating that, unless the state court had “explicitly” grounded its decision in its state law, the Supreme Court would feel free to entertain the case.²⁹ The message is clear: if independent state grounds exist, a claimant may be fully vindicated at the state level without further consideration by the Supreme Court.³⁰

Consequently, speech left unprotected by the federal Constitution may still find security in the state constitution. Although the Supreme Court held in *Hazelwood* that a school administrator’s prepublication censorship of student newspaper articles did not violate the first amendment, the *Long* rationale, applied in a series of “shopping center cases,” supplies a basis at the state level for protection against that kind of action. Following the Su-

25. Pollack, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 992 (1985) (“Horizontal federalism, a federalism in which states look to each other for guidance, may be the hallmark of the rest of the century.”).

26. See also Douglas, *supra* note 17, at 134.

27. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

28. *Id.* at 128 (“[W]e will not proceed with a review while our jurisdiction is conjectural. . . . We think the simplest procedure . . . where the record is deficient, is to hold the case pending application to the state court for clarification or amendment.”).

29. *Michigan v. Long*, 463 U.S. 1032 (1983).

30. See *The New York Times*, Oct. 6, 1989, at 1, col. 1. (On October 5, 1989, the Florida Supreme Court relied on its own state constitution to strike down a law requiring teenage girls to get a parent’s consent for an abortion. The court held that the law violated the Florida constitutional provision that guarantees a citizen “the right to be let alone and be free from governmental intrusion into his private life.” An official of the National Abortion Rights Action League noted increasing reliance on state constitutional language to avoid taking abortion issues before the United States Supreme Court.).

preme Court's holding that censorship in privately owned shopping centers is not unconstitutional "state action,"³¹ the courts of several other states acknowledged the first amendment as a limitation on government and revived the theory that individual protection of free speech is to be found in the free speech clause of the state constitution.³²

The free speech rights of student journalists are to be found there, too. The *Hazelwood* decision is not a death knell for student press rights, but a signpost pointing a more direct route to personal liberty, influenced, but not restrained, by federal precedent. Although the first amendment may not forbid a public school administrator's censorship, the state constitution might prevent that kind of pedagogy where student publications are at issue, whether the school is public or private. A speaker at the 1988 Vermont Law Review Symposium on the Revolution in State Constitutional Law observed that "federal cases act as a judicial 'safety net' of last resort If the state constitution protects a citizen, there is no reason for the federal Constitution to be involved."³³ The remaining portion of this article will illustrate the inequities in student press rights that result from reliance on the first amendment, and using *Hazelwood* as an example, show how a revival of state constitutional jurisprudence could establish equality of free speech rights for all student journalists.

III. THE FEDERAL CASE

Free speech decisions based on the first amendment are constrained by the dual federal requirements of "state action" and "forum," factors not necessarily binding on state courts interpreting their own constitutions. Those dual factors have led to unrealistic distinctions between public and private educational institutions on the issue of free speech. A brief review of these two concepts will clarify the limitations of first amendment protection and shed light on the pathway to be taken by the state courts.

A. State Action

Literally interpreted, the first amendment's proviso against government abridgment of free speech prohibits any representative or agent of state or federal government from imposing unreasonable restrictions on expression.³⁴ In other words, the first amendment, incorporated by the due process clause of the fourteenth amendment, prohibits "state action" that inhibits free speech. But application of the rule is not so simple as it sounds because

31. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

32. See *infra* notes 68, 71, and 85.

33. Douglas, *supra* note 17, at 143.

34. See *supra* note 6.

no clear criteria have been developed for determining what constitutes "state action."³⁵ State action is obvious where the matter in question is a federal or state statute that mandates or prohibits certain behavior.³⁶ But where the acts of private parties are at issue, governmental support, approval, or acquiescence in those private activities may or may not constitute state action.³⁷ The state agent need not be employed, appointed, or elected to a government position, but may be merely a citizen seeking enforcement of a law or right or regulation.³⁸ "State action"³⁹ may include city ordinances that prohibit speeches in the park or distribution of leaflets on public sidewalks,⁴⁰ or the act of a private property owner who invokes the power of the state to enforce a trespass law to eject an intruder.⁴¹ When that ejection is intended to eliminate unwanted expressive activity, the property owner is said to be engaged in anti-speech "state action."⁴² Professor Lawrence

35. *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967):

[T]he Supreme Court has not succeeded in developing a body of state action "doctrine," a set of rules for determining whether governmental or private actors are to be deemed responsible for an asserted constitutional violation. The Court itself has acknowledged the stubborn individuality of the state action cases. "Formulating an infallible test" of state action is "an impossible task".

Id. See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 1690 (2d ed. 1988).

36. See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954) (law mandating racial segregation of public schools is state action).

37. L. TRIBE, *supra* note 35, at 1689.

38. M. NIMMER, *supra* note 9, at § 4.09(D)(2)(a) (When police eject an unwanted speaker from a private home at the homeowner's request, "the homeowner has had conferred upon him the power of the state under the law of trespass. . . . By reason of the trespass laws, the state has appointed the homeowner a censor of all speech occurring in his home. . . . Insofar as he elects to eject someone because of the content of his speech, the homeowner is enforcing an anti-speech restriction"). See also *Shelley v. Kraemer*, 334 U.S. 1 (1948) (state supreme court decision to uphold racially discriminatory property covenants was state action that deprived some citizens of their constitutional rights); *Marsh v. Alabama*, 326 U.S. 501 (1946) (enforcement of the Alabama trespass law against a leafleter was held to constitute state action).

39. *American Broadcasting Company v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) ("[A]rrests for criminal trespass result from a combination of activity on the part of the [police] and of the complaining owners of the premises . . . this amounts to a conspiracy based upon state action. . . ."). See also *Breard v. Alexandria*, 341 U.S. 622 (1951) (enforcement of an ordinance prohibiting door-to-door solicitation of private residences unless "requested or invited so to do by the . . . occupants of said private residences" was held to be state action constituting a first amendment issue).

40. *Marsh v. Alabama*, 326 U.S. 501 (1946); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Lovell v. Griffin*, 303 U.S. 444 (1938).

41. *Cuomo*, 570 F.2d at 1080.

42. M. NIMMER, *supra* note 9, at § 2.04. ("An anti-speech restriction attempts to protect a given interest through suppression or limitation of speech content. . . ."). See also *id.* § 4.09[D][2][a]. ("Insofar as he elects to eject someone because of the content of his speech, the homeowner is enforcing an anti-speech restriction. If the homeowner attempts to enforce his objection by calling the police and having them eject the unwanted speaker, it can hardly be

Tribe wrote that "only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance,"⁴³ and Professor Charles Black concluded that the state action cases are "a conceptual disaster area."⁴⁴ Although the first amendment may limit the property owner's action, it does not give the speaker an affirmative right to make a speech on the owner's property.⁴⁵

For a time, the Supreme Court developed a "public function doctrine"⁴⁶ to extend constitutional protection to individual behavior on privately owned property that has many of the attributes of a public institution.⁴⁷ The constitutional protection against state action was not considered absolute. The property owner was held to have a constitutional right to the use and enjoyment of his property as against a "taking" of that property by a government-authorized activity. Such activity might include an unwanted speaker whose constitutionally protected expressive activity constituted a "taking" or deprived the owner of an intended use of his property. The owner's intended use of the property determined the speaker's right.⁴⁸ The owner whose property was opened to some form of public use was held to assume limited constitutional obligations to those who wished to use that property for expressive purposes.

The limits of speech protection were determined by weighing the property owner's right to use of his property against the speaker's right to protection against government intrusion.⁴⁹ An unwanted speaker in a private residence that is clearly intended for the owner's peace and privacy was found to have few first amendment rights, even though abridgment of his speech constituted state action.⁵⁰ But where the owner has opened the prop-

argued that state action was not applied in abridging the speech.").

43. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1690 (2d. ed. 1988).

44. Black, *The Supreme Court, 1966 Term—Foreword: 'State Action,' Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 95 (1967).

45. *Garner v. Louisiana*, 368 U.S. 157, 202 (1961) (Harlan, J., concurring); *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 324 (1968).

46. *Evans v. Newton*, 382 U.S. 296, 299 (1966) ("powers or functions governmental in nature. . ."); See also *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974) ("powers traditionally exclusively reserved to the State.").

47. *Marsh v. Alabama*, 326 U.S. 501 (1946); *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968).

48. *Marsh*, 326 U.S. at 506 (stating that "the more an owner . . . opens up his property for use by the public," the more attenuated becomes the privacy interest); See also M. NIMMER, *supra* note 9, at § 4.09[D][b][ii].

49. *Marsh*, 326 U.S. at 506 (The Supreme Court held that "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.").

50. No Supreme Court case expressly deals with this issue, but dicta in several cases assumes that no such right exists. See *Garner v. Louisiana*, 368 U.S. 157, 202 (1961) (Harlan, J., concurring) (The right to freedom of speech "would surely not encompass verbal expression in a private home if the owner has not consented."); *Amalgamated Food Employees Union*,

erty for public use, the speaker had a greater degree of protection.⁵¹

An owner was said to hold a "bundle of rights" in his property. Activity that deprives an owner of only one element within that bundle does not amount to a taking.⁵² Consequently, where an owner opened his property to the public, he was not deprived of his property rights by expressive activity that did not prevent him from using the property for its intended purpose.⁵³ However, the Supreme Court has abandoned the public function doctrine as a means to extend constitutional protection to speakers on private property, and litigants have turned to the state constitutions for help.⁵⁴

The following section will examine a series of cases in which free speech rights were asserted on private property (shopping centers). These decisions illustrate the narrowed scope of first amendment protection and the developing body of state law following a Supreme Court holding that the states could provide speech protection broader than that found in the federal Constitution.

B. From Federal to State Law in the Shopping Centers

Relying on a balancing of rights, decisions in the shopping center cases established principles later applied to free speech challenges on college campuses.⁵⁵ A review of those cases clarifies the rationale and reveals the need for speech protection beyond that provided by the first amendment. *Marsh v. Alabama* was a 1946 trespassing case in which the Supreme Court found that the owner of a "company town" could not prohibit indi-

Local 590 v. Logan Valley Plaza, 391 U.S. 308, 324 (1968), *overruled on other grounds*, *Hudgens v. NLRB*, 424 U.S. 507 (1976) (The right to freedom of speech contrary to the wishes of the property owner may not be asserted in "a situation involving a person's home."); *See also* *Carey v. Brown*, 447 U.S. 455 (1980) (The need for privacy justifies limitation of speech at a private home.) and *Frisby v. Schultz*, ____ U.S. ____, 108 S.Ct. 2495 (1988) (The Court upheld a ban on picketing of a private home because the homeowner was an unwilling listener, figuratively trapped and unable to avoid the unwanted speech.); *But see* *City of Watseka v. Illinois Pub. Action Council*, 796 F.2d 1547 (7th Cir. 1986), *aff'd*, 479 U.S. 1048 (1987) (city ordinance limiting hours of door-to-door soliciting of private residences was unconstitutional, because of availability of less restrictive alternatives for preventing crime and protecting privacy).

51. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

52. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (enactment of a federal statute prohibiting the sale of golden eagle feathers did not deprive the owner of the right to possess the feathers, but only of the ability to sell them, one of a "bundle of property rights").

53. *Pruneyard*, 447 U.S. at 82 (1980) (Justice Rehnquist acknowledged that "one of the essential sticks in the bundle of property rights, is the right to exclude others." However, "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense."). *See* *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

54. *Richards, Raising the Banner of States' Rights to Prevent Private Abridgment of Speech*, 23 AM. BUS. LAW J. 155, 156 (1985).

55. *See, e.g.*, notes 71 and 85.

viduals from distributing religious literature on the town's sidewalks.⁵⁶ The entire town of Chickasaw, Alabama, was owned by the Gulf Shipbuilding Corporation, which provided its inhabitants, who were G.S.C. employees, with residential and commercial buildings, a post office, a sewage system, and sewage disposal plant, streets, and sidewalks. Except for its private ownership, Chickasaw was indistinguishable from many other American towns. A member of the Jehovah's Witnesses was arrested by a company-employed deputy sheriff and convicted for violation of an Alabama trespass statute after she distributed literature without a license on a Chickasaw sidewalk. In reversing that conviction, the Court held that, to the extent that an owner opens his property for general use by the public, his own rights are "circumscribed by the statutory and constitutional rights of those who use it."⁵⁷ In finding first amendment protection, the Court said that the appellant's right to express her religious beliefs outweighed the company's property interests.

The *Marsh* decision provided precedent twenty-two years later when the owners of a shopping center sought to exclude labor pickets. In *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza*, the Supreme Court applied the *Marsh* rationale and held that peaceful labor picketing of a business within the shopping center could not be enjoined as an invasion of the shopping center owner's property rights.⁵⁸ In 1972, however, the Court began a first amendment retreat by placing limitations on the *Marsh/Logan Valley* reasoning. The expressive activity in question, the Court said, had to bear directly on shopping center business. In *Lloyd Corporation v. Tanner*, a shopping center owner ejected from mall hallways people who were distributing leaflets protecting American involvement in the war in Vietnam.⁵⁹ The federal district court granted the protesters an injunction against the shopping center prohibition and a declaratory judgment that their first amendment rights had been violated.⁶⁰ The Supreme Court, however, reversed because the labor picketing in *Logan Valley* had been directly related to the use of shopping center property, while the war protest message in *Lloyd* was not. Although declining to overrule, the Court summarily dismissed the *Marsh* "company town" concept as "an economic anomaly of the past."⁶¹

But even limited federal protection of expressive activity in privately owned shopping centers was not to endure. In *Hudgens v. NLRB*, which

56. 326 U.S. 501 (1946).

57. *Id.* at 506.

58. 391 U.S. 308 (1968).

59. 407 U.S. 551 (1972).

60. *Lloyd Corp. v. Tanner*, 308 F. Supp. 128 (D. Or. 1970), *aff'd*, 446 F.2d 545 (1971), *aff'd*, 407 U.S. 551 (1976).

61. *Lloyd Corp. v. Tanner*, 407 U.S. at 561.

once again involved labor picketing of a business in the shopping center, the Court held that *Lloyd* applied to all speech at privately owned shopping centers, regardless of the subject matter.⁶² *Hudgens* implicitly acknowledged that the *Logan/Lloyd* distinction violated the content neutrality requirement of the first amendment.⁶³ *Hudgens*, however, did not close the shopping center issue.

Three years after *Hudgens*, the California Supreme Court held that its own state constitutional guarantee of free expression exceeded federal constitutional protection and granted an affirmative right to individuals to use privately owned shopping centers for non-disruptive speech activities.⁶⁴ The United States Supreme Court upheld the decision.⁶⁵ The speakers were high school students who had set up a card table in the corner of Pruneyard's central courtyard on a Saturday afternoon. From that position they had distributed pamphlets and asked mall customers to sign petitions opposing a United Nations resolution against "Zionism." The Court said: 1) "[the students'] orderly, peaceful activity did not impair the value or use of the shopping center property, and as such, did not amount to unconstitutional infringement of the owner's property rights in the shopping center,"⁶⁶ and 2) "a state has the sovereign right and the police power to adopt by statute or constitution individual liberties more expansive than those found in the federal constitution."⁶⁷

Although the *Hudgens* and *Lloyd* decisions left *Marsh* intact, it was the state law rather than the "company town" concept that sustained post-*Pruneyard* free speech claims. In 1981, the Supreme Court of Washington held that its state constitution guaranteed the right of members of an environmental protection group to seek signatures on a political petition at a privately owned shopping center so long as the activity did not unreasonably interfere with shopping center business.⁶⁸ Recognizing the state's authority to be more protective than the federal Constitution, the Washington court said that "when a state court neglects its duty to evaluate and apply its state constitution, it deprives the people [of the] 'double security' to which the federal system entitles them."⁶⁹ The court explained:

Where controlling federal principles have not changed with the

62. 424 U.S. 507 (1976).

63. *Id.* at 518. (The Supreme Court held that "the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case.").

64. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980).

65. 447 U.S. 74.

66. *Id.* at 83.

67. *Id.* at 81.

68. *Alderwood Assoc. v. Washington Envtl Council*, 635 P.2d 108 (1981).

69. *Id.*

evolution of our society or where they have been recently overruled by the United States Supreme Court, our constitution has been applied. . . . Old principles are continually re-examined and where our earlier cases have relied in part on overturned federal precedent, we will determine whether the considerations underlying that precedent continue to have vitality and hence require its perpetuation as a matter of state law.⁷⁰

Within five months of the *Pruneyard* decision, its principles reached the college campus. In *State v. Schmid*,⁷¹ the New Jersey Supreme Court found protection in its state constitution for a political activist who had distributed materials, without permission, on the campus of Princeton University, a privately owned institution. Because it found "compelling alternative grounds for relief" in the New Jersey Constitution, the court declined to decide the first amendment question.⁷² The court rejected the "company town" concept and acknowledged previously unsuccessful attempts to establish state action that would have invoked first amendment obligations on private universities.⁷³ Commenting on the unique role of a university in speech activities and noting the public use of its property, the court held that the university had assumed a constitutional obligation not to abridge free speech.⁷⁴ When private property is committed to public use, the court said, a counterbalancing is actuated between expressional and property rights. The court applied a three-pronged test to determine the appropriate

70. *Id.* at 113.

71. 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed per curiam sub. nom.* Princeton Univ. v. Schmid, 455 U.S. 867 (1982).

72. *Schmid*, 84 N.J. at 553, 423 A.2d at 624. (The court decided to "stay [its] hand in attempting to decide the question of whether the first amendment applies to Princeton University in the context of the present appeal. Defendant, moreover, has presented compelling alternative grounds for relief founded upon the state constitution, which we now reach.") See N.J. CONST., art. I, § 6.

73. 84 N.J. at 545, 423 A.2d at 620. (Such as receipt of government funds; institution performing governmental function by providing education; state accredited or state chartered or otherwise regulated by the state; derived economic benefit from tax exemptions; indirectly enforced governmental laws; built on formerly public lands.) See also *The Private School Press: Ways to Win Free Speech*, Student Press Law Center Report, Vol. VII, No. 3, Fall 1986. See also *Flagg Brothers v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Braden v. University of Pittsburgh*, 552 F.2d 948 (3rd Cir. 1977); *Isaacs v. Temple University*, 385 F. Supp. 473 (E.D. Pa. 1974).

74. *Schmid*, 84 N.J. at 560, 564, 423 A.2d at 628, 630. (The State Constitution "furnishes to individuals . . . freedoms of speech and assembly, . . . guarantees . . . also available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property." The court cited Princeton's own statement of its goals: "free speech and peaceable assembly are basic requirements of the University as a center for free inquiry and the search for knowledge and insight. . . .").

balance:

1) the nature, purposes, and primary use of such private property, generally, its 'normal' use; 2) the extent and nature of the public's invitation to use that property; and 3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of that property.⁷⁵

Despite finding "public use," the court refused to apply the *Marsh* "public function" concept, which would have subjected Princeton to first amendment obligations.⁷⁶ Instead, the court distinguished between a "company town" and a university campus. Although common sidewalks and parking areas and an invitation to the public to use the property were found to invoke first amendment obligations on a shopping center owner,⁷⁷ those same characteristics do not obligate the private university.

The nature of college community life . . . would not seem to invest the University with the fundamental attributes of a government substitute or surrogate in the manner deemed critical for positing state action in *Marsh v. Alabama*. A private educational institution . . . involves essentially voluntary relationships between and among the institution and its students, faculty, employees, and other affiliated personnel. . . . The public's invitation to use college facilities is incident to the educational life of the institution and must comport and be integrated with its educational endeavors. It is dubious therefore whether Princeton can or should be regarded as a quasi-governmental enclave or the functional equivalent of a 'company town.'⁷⁸

Applying its own three-pronged test, the court held that 1) free inquiry and expression are essential to the university's central purpose, the pursuit of truth and new knowledge;⁷⁹ 2) the educational mission of the university necessarily involves substantial public involvement and participation in the academic life;⁸⁰ and 3) political leafleting is not disruptive of any regular and essential university operations.⁸¹ The court found that Princeton policy at the time Schmid appeared on the campus was unconstitutional because it

75. *Schmid*, 84 N.J. at 563, 423 A.2d at 630.

76. *Marsh v. Alabama*, 326 U.S. at 506. (The public function doctrine holds that, even without state action, sufficient devotion of private property to public uses can circumscribe owner's rights to statutory and constitutional rights of those who use it.).

77. *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza*, 391 U.S. at 322-23.

78. *Schmid*, 84 N.J. at 552, 423 A.2d at 623-24.

79. *Id.* at 564, 423 A.2d at 630.

80. *Id.* at 564-65, 423 A.2d at 631.

81. *Id.*

established no specific standards by which the university could regulate expressive activities on the campus. Balancing the democratic essentiality of the individual rights of speech and assembly against the private property rights of Princeton University, the court held that a private property owner is entitled to "fashion reasonable rules to control the mode, opportunity, and site for the individual exercise of expressional rights upon his property."⁸² The reasonableness of these rules, the court said, depends heavily on the existence of "convenient and feasible alternative" avenues for the desired speech.⁸³ Although finding that Princeton had violated Schmid's constitutional rights, the court praised the university for its subsequent enactment of regulations that recognized and controlled expressional activities on the campus: "These current amended regulations exemplify the approaches open to private educational entities seeking to protect their institutional integrity while at the same time recognizing individual rights of speech and assembly and accommodating the public whose presence nurtures academic inquiry and growth."⁸⁴

A year after *Schmid*, the Supreme Court of Pennsylvania applied similar principles to the role of a private university when it overturned the trespassing convictions of five defendants who had entered the campus of privately owned Muhlenberg College to distribute leaflets critical of the Federal Bureau of Investigation.⁸⁵ The distribution had taken place on an open sidewalk in front of a building where former FBI director Clarence Kelley was giving a public speech. The Pennsylvania court said that the convictions would have been upheld if Muhlenberg had been a private home.⁸⁶ However, the court found that the defendants' free speech rights outweighed the college's interest in restricting access to its property. The court noted: "Muhlenberg College serves in many respects as a community center . . . maintaining upon its campus a United States Post Office station, a public cafeteria, an information and sales booth for tickets to public events. . . ."⁸⁷ Furthermore, Muhlenberg had imposed no restrictions on the presence of other persons in the same area. Thus, the court concluded that the leafleters were "peacefully presenting their point of view to this indisputably relevant audience in an area of the college normally open to the public."⁸⁸

The New Jersey and Pennsylvania decisions set a constitutionally reasonable free speech standard for a private university campus. *Schmid* clari-

82. *Id.* at 563, 423 A.2d at 630.

83. *State v. Schmid*, 84 N.J. 535, 563, 423 A.2d 615, 630 (1980).

84. *Id.* at 568, 423 A.2d at 633.

85. *Commonwealth v. Tate*, 495 Pa. 158, 432 A.2d 1382 (1981).

86. *Id.* at 167, 432 A.2d at 1386.

87. *Id.*

88. *Id.* at 175, 432 A.2d at 1391.

fied the unique role of a university as a place for expressional activities,⁸⁹ but recognized the right of a private institution to place reasonable limits on those activities. *Tate* emphasized that those "reasonable limits" could not be based on message content or speaker identity.⁹⁰ In today's urban/suburban society in which many traditionally public gathering places are now privately owned,⁹¹ the university's role as a forum for exchange of ideas becomes increasingly important. These principles give university administrators the latitude to choose whether to establish forums for expressional activities, including student newspapers, and to create policy as to their functions and purposes. However, once those forums are established as outlets for public or student expression, content and viewpoint-based censorship by the school's administration would unreasonably infringe the rights of speakers or writers choosing to use those forums. Because reliance on the state action doctrine would continue to force the unreasonable distinction between public and private university student journalists, litigants in student censorship cases must seek the shelter of their broader state constitutional guarantees. In upholding those guarantees, state courts must require their educational institutions to establish and uphold clearly stated speech policies.

C. Forum

The second factor required to establish federal protection of free speech is the existence of a "forum." In that context, the constitutionality of speech abridgment turns on the location of the expressive activity: no forum/no protection.⁹² If the place in question is a public forum or a place "held in trust for the public,"⁹³ and is traditionally used for speech purposes,⁹⁴ the first amendment protects the speech against governmental intervention subject only to reasonable time, place, and manner restrictions.⁹⁵

89. *State v. Schmid*, 84 N.J. 535, 564, 423 A.2d 615, 630-31 (1980).

90. *Commonwealth v. Tate*, 495 Pa. 158, 174-75, 432 A.2d 1382, 1390-91 (1981).

91. See *Richards*, *supra* note 54, at 155. ("The displacement of traditional public forums by private institutions exacerbates the erosion of natural persons' ability to be heard. Today's listeners are moving from downtown streets to suburban shopping centers and from single-family dwellings to apartments, condominiums and nursing homes. Many of these new, private forums absolutely forbid the person-to-person handbilling, picketing, or solicitation activities that might be within the financial means of many individuals and groups seeking an audience.").

92. *M. NIMMER*, *supra* note 9, at § 4.09[D][1][a]. ("The underlying premise is that freedom of speech under the first amendment extends to, but only to, those sites which constitute 'public forums.'").

93. See *supra* note 85 and accompanying text.

94. *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966). (Justice Black wrote that those who would exercise the first amendment right to speak may not do it "whenever, and however, and wherever they please.").

95. *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939).

Generally, governmental limits of a non-speech nature, so long as they are narrowly drawn, are presumed to outweigh the speech interests they incidentally restrict.⁹⁶ But a governmental restriction on speech in a public forum will pass constitutional muster only if: 1) it is content neutral, 2) there are ample alternative channels of communication, and 3) the regulation advances a significant governmental interest.⁹⁷

The difficulty in this deceptively simple approach to speech protection lies in the definition of public forum. The term first appeared in 1939 in the often quoted plurality opinion written by Justice Roberts in *Hague v. C.I.O.*:⁹⁸

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communications of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.⁹⁹

Decisions relying on the Roberts quote have classified "public forum" as a place set aside or expected to be used for speech purposes.¹⁰⁰ However, ownership does not determine demarcation. Not all publically owned properties constitute forums,¹⁰¹ nor do all private properties. In that context

96. United States v. O'Brien, 391 U.S. 367, 377 (1968):

[We] think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.

See also M. NIMMER, *supra* note 9, at § 2.04. (defines a non-speech restriction as one directed at communicative conduct, but not at speech content, as in a parade ordinance designed to preserve traffic flow and avoid obstruction of passageways).

97. United States Postal Service v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 132, 135 (1981).

98. 307 U.S. 496 (1939).

99. *Id.* at 515-16.

100. See *Adderley v. Florida*, 385 U.S. 39 (1966) ("The State . . . has power to preserve the property under its control for the use to which it is lawfully dedicated."); *Greer v. Spock*, 424 U.S. 828 (1976); *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).

101. *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 280 (1984) (meetings of Minnesota college administrators are not public forums because they are not open

lies the falsity of distinction between public and private universities as sites for free speech.¹⁰²

The definition of forum has been further complicated by a judicial distinction between "traditional" and "dedicated." If the property in question is a traditional forum (the public park, the courthouse square), nearly all categories of speech are acceptable, but if the place is a dedicated forum (schools, libraries),¹⁰³ recognition must be given to its primary function and to whether the speech in question is compatible with or disruptive of that function. If one reads Justice Roberts' opinion literally, speech in a public forum is protected by the first amendment only if it does not disrupt or inconvenience the primary activities on the premises at the time. Limiting a forum by reserving its use for certain purposes opens the door to distinctions based on subject matter and speaker identity,¹⁰⁴ an arguable interpretation of the *Hazelwood* decision.¹⁰⁵

Because the public university is considered a dedicated forum, its educational mission may justify certain limitations on speech.¹⁰⁶ In a traditional public forum, content-based speech exclusions are permissible only to serve a "compelling" state interest, under restrictions narrowly drawn to

for public participation); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984) (city-owned utility poles and lampposts are not public forums for the purpose of posting political signs); *United States v. Albertini*, 472 U.S. 675, 687 (1985) (a military base open house is not a public forum unless the military so abandons control that the base becomes indistinguishable from a public street).

102. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (A state university campus has characteristics of a 'public forum,' however, a public university need not make all facilities equally available to students and non-students alike, or grant free access to all of its grounds or buildings.).

103. *L. TRIBE*, *supra* note 35, at 1690.

104. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48-49 (1983) (The Court found a limited forum had been established by school policy that limited access to teachers' mailboxes to the teachers' designated exclusive bargaining union. No access was granted to the rival union on the rationale that its messages did not constitute "school-related business."); *See also Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788 (1985) (On the grounds that they were controversial, several legal defense funds and political advocacy groups were excluded from soliciting federal employees in an annual fundraising drive.); *Grayned v. Rockford*, 408 U.S. 104 (1972) ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.").

105. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). (School board policy stated that "school sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism." Published in the first issue of each year was *Spectrum* (the newspaper) policy which declared it a "student-press publication, [which] accepts all rights implied by the first amendment." Nonetheless, the Supreme Court held that the newspaper was not a forum because it was a classroom activity. Therefore, the school principal's deletion of articles about divorce and student pregnancy did not violate the content-neutrality requirement of first amendment protection.).

106. *See Widmar*, 454 U.S. at 267 n.5.

achieve that end. A dedicated forum, on the other hand, is created by affirmative action of a governmental entity, and its status can be limited or later withdrawn.¹⁰⁷ Thus, speech on a university campus may be limited to categories compatible with the school's educational purpose. A university may limit a particular forum within its authority for use by student groups or for discussion of a particular subject. A law journal published by a state-owned university may be limited to articles that pertain to law without infringing the constitutional rights of the citizen who wishes to publish discourse on another subject.¹⁰⁸ The school newspaper may be a designated forum for student expression (opened for general use by members of the student body) and given the same constitutional protection accorded to the commercial, privately owned press, or it may be set aside as a classroom activity, a part of the curriculum controlled by the school's faculty and administration.

In *Hazelwood*, the classroom activity designation was found to circumvent first amendment protection for the student writers and editors. So long as a "valid educational purpose" was being served by the classroom-produced newspaper, the first amendment was not implicated.¹⁰⁹ The decision contradicts *Tinker* and its progeny, which had established that, although no high school or university is required to establish or permit distribution of a student newspaper or other forum, once it does so, it cannot arbitrarily control the content of the expression therein.¹¹⁰ Where student expressive activity has been disruptive or abusive, the *Tinker* doctrine neither abolishes discipline subsequent to publication and distribution,¹¹¹ nor precludes reasonable pre-publication editorial review to avoid liability for libel, invasion of privacy, or obscenity. But the forum theory places responsibility for giving students freedom of speech on the school administration instead of in the Bill of Rights where it belongs. As a result, protection of free speech may differ from one public institution to another and be nonexistent at pri-

107. M. NIMMER, *supra* note 9, at § 4.09[D][1][a] n. 168(2).

108. *Id.* at §§ 2.04 and 4.09[D][1][b]; see also *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (City's rejection of political and public issue advertising in car card space on rapid transit system must not be "arbitrary, capricious, or invidious.").

109. *Hazelwood*, 484 U.S. at 273.

110. *Widmar v. Vincent*, 454 U.S. 263 (1981); *Papish v. University of Missouri*, 410 U.S. 667 (1973); *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983); *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir. 1973); *Joyner v. Whiting*, 447 F.2d 456 (4th Cir. 1973); *Students Against Apartheid Coalition v. O'Neil*, 660 F. Supp. 333 (W.D. Va. 1987); *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200 (D. Utah 1986).

111. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Sullivan v. Houston Independent School District*, 475 F.2d 1071 (5th Cir. 1973); *Norton v. Discipline Committee of Eastern Tennessee State University*, 419 F.2d 195 (6th Cir. 1969); *Speake v. Grantham*, 317 F. Supp. 1253 (S.D. Miss. 1970); *Graham v. Houston Independent School District*, 335 F. Supp. 1164 (S.D. Tex. 1970); *Schwartz v. Schuker*, 298 F. Supp. 238 (E.D.N.Y. 1969).

vate schools, which are under no obligation to create forums and whose censorship does not constitute state action.

IV. HORIZONTAL FEDERALISM

A. *An Alternative to Hazelwood*

The student plaintiffs in *Hazelwood* placed all their reliance on the first amendment and did not invoke the potentially broader protection of the Missouri Constitution. If they had, the result might have been different. First, the case might not have set a uniform national standard affecting speech policies in the educational institutions of other states. If the Missouri court had explicitly based its decision on adequate and independent state grounds, there would have been no Supreme Court review.¹¹² Second, if the plaintiffs had prevailed by pleading the broader protection of the Missouri Constitution, the free speech rights of student journalists in Missouri would have been ensured. Finally, although not binding, the precedent would have been persuasive in the forty-four states that have linguistically similar constitutional guarantees providing affirmative rights rather than mere restraints on state action.¹¹³ Minimum standards for constitutional protection are established by the United States Supreme Court, but the states can expand that protection through application of their own constitutions. Justice Brandeis once observed that the dual nature of the federal system allows the states to act as constitutional laboratories conducting "novel social and economic experiments" without risk to the entire country.¹¹⁴ Yet, the protection of free speech is hardly a "novel" concept.

Scholars refer to the paucity of cases grounded in state constitutional

112. See *Michigan v. Long*, 463 U.S. 1032 (1983).

113. See ALA. CONST. art. I, § 4; ALASKA CONST. art. I, § 5; ARIZ. CONST. art. II, § 6; ARK. CONST. art. II, § 6; COLO. CONST. art. II, § 10; CONN. CONST. art. I, § 4; FLA. CONST. art. I, § 4; GA. CONST. art. I, § 1, para. 4; IDAHO CONST. art. I, § 9; ILL. CONST. art. I, § 4; IOWA CONST. art. I, § 7; KAN. BILL OF RIGHTS § 11; KY. BILL OF RIGHTS § 8; LA. CONST. art. I, § 7; ME. CONST. art. I, § 4; MD. DECL. OF RIGHTS art. 40; MASS. CONST. art. 77; MICH. CONST. art. I, § 5; MINN. CONST. art. I, § 3; MISS. CONST. art. III, § 13; MO. CONST. art. I, § 8; MONT. CONST. art. II, § 7; NEB. CONST. art. I, § 5; NEV. CONST. art. I, § 9; N.H. CONST. Part I, art. 22d; N.J. CONST. art. I, § 6; N.M. CONST. art. II, § 17; N.Y. CONST. art. I, § 8; N.C. CONST. art. I, § 14; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 11; OKLA. CONST. art. II, § 22; PA. CONST. art. I, § 7; R.I. CONST. art. I, § 20; S.D. CONST. art. VI, § 5; TENN. CONST. art. I, § 19; TEX. CONST. art. I, § 8; VA. CONST. art. I, § 12; VT. CONST. art. I, § 20; WASH. CONST. art. I, § 5; WIS. CONST. art. I, § 3; WYO. CONST. art. I, § 20; cf. DEL. CONST. art. I, § 5; (although the text of the Delaware provision protects only press freedom, the Delaware courts have construed it to protect speech as well.) See *State v. Ceci*, 255 A.2d 700 (Del. Super. Ct. 1969).

114. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting).

law,¹¹⁵ particularly in the area of free speech. Missouri is no different. Despite the clarity of its generous provisions, few litigants in recent years have invoked Article I, Section 8, of the Missouri Constitution.¹¹⁶ First included in Missouri's Constitution of 1820, Section 8 has undergone only minor changes through the constitutional revisions of 1865, 1875, and 1945. Those changes, indicated in the following quotation by italics, only expand the original protection.

[N]o law shall be passed impairing the freedom of speech, *no matter by what means communicated*; that every person shall be free to say, write, or publish, *or otherwise communicate* whatever he will on any subject, being responsible for all abuses of that liberty. . . .

In 1902, the Supreme Court of Missouri found a prohibition on prior restraint of expression in the broad guarantees of what was then Article 2, Section 14, of the 1875 constitution. Not until twenty-nine years later did the United States Supreme Court find similar protection in the first amendment.¹¹⁷ In *Marx and Haas Jeans Clothing Company v. Watson*, the Court denied the plaintiff clothing manufacturer's plea for an injunction to stop circulation of a leaflet in which dissident employees urged Marx and Haas customers to boycott the business.¹¹⁸ Citing the principle that a constitution "is always to be understood in its plain, untechnical sense,"¹¹⁹ the Court said that the Missouri provision:

gives a general and perpetual guaranty against any interference from any quarter whatever with the freedom of every person 'to say, write, or publish whatever he will on any subject'. . . . Wherever, within our borders, speech is uttered, writing done, or publications made, there stands the constitutional guaranty giving stanch assurance that each and every one of them shall be free.¹²⁰

115. See, e.g., Utter, *supra* note 19; Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 Vt. L.R. 13 (1988); Halbert, *The First Amendment in the Workplace: An Analysis and Call for Reform*, 17 SETON HALL L. REV. 42 (1987); Richards, *supra* note 54.

116. V.A.M.S. CONST. Art. I, § 8. (The 1989 cumulative annotations reveal only nine appellate cases have sought interpretation of the free speech provision of the Missouri Constitution since 1979. Four additional cases, only one of which involved a newspaper, were actions in libel.).

117. *Near v. Minnesota*, 283 U.S. 697 (1931).

118. 168 Mo. 133, 67 S.W. 391 (1902); see also *Crow v. Sheperd*, 177 Mo. 205, 76 S.W. 79 (1903); *Ex. Parte Harrison*, 212 Mo. 88, 110 S.W. 709 (1908); *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W. 2d 291 (1942).

119. *Marx and Haas Jeans Clothing Co. v. Watson*, 168 Mo. 133, 67 S.W. 391, 394 (1902).

120. *Id.* at 144, 67 S.W. at 393.

And finally, in language that might have been written in a *Hazelwood* decision grounded in Missouri law, the Court said:

If these defendants are not permitted to tell the story of their wrongs, or, if you please, their supposed wrongs, by word of mouth, or with pen or print, and to endeavor to persuade others to aid them by all peaceable means in securing redress of such wrongs, what becomes of free speech, and what of personal liberty? The fact that in exercising that freedom they thereby do plaintiff an actionable injury does not go a hair toward a diminution of their right of free speech, etc., for the exercise of which, if resulting in such injury, the constitution makes them expressly responsible.¹²¹

A series of Missouri and California cases illustrate the "horizontal federalism" described by Justice Kaye.¹²² In *Marx and Haas*, the Missouri court cited a persuasive California precedent based on language of the California Constitution linguistically similar to that of Missouri. In *Magill Brothers v. Building Service Employees International Union*,¹²³ the California Supreme Court had lifted an injunction issued by the trial court that had prohibited performance of a play allegedly based on facts of a murder case about to be tried in the same community. Acknowledging that the theater production was potentially prejudicial to the defendant's right to a fair trial, the court nonetheless held that the words of the California Constitution clearly protected a citizen's unlimited right to speak freely, while at the same time holding him responsible for abuse of that right. Reliance on that same persuasive precedent continued forty years later when the California Supreme Court cited the "well expressed" Missouri opinion in *Marx and Haas*. In a case with similar facts, the California court ruled that abatement by injunction is an unconstitutional restriction on speech during a labor dispute. Even if that speech contains false statements, the court said, redress for harm is to be sought after publication.¹²⁴

Comparable interpretations of similarly worded constitutional free speech provisions have been made in New Jersey, Washington, and Pennsylvania.¹²⁵ All support the concept of horizontal federalism, which would have justified a different *Hazelwood* outcome. In finding broader speech

121. *Id.* at 150, 67 S.W. at 395.

122. *See supra* note 17.

123. *Dailey v. Superior Court*, 112 Cal. 94, 44 P. 458 (1896), and CAL. CONST. art. I, sec. 9 ("Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or press.").

124. *Magill Bros. v. Building Service Employees Int'l Union*, 20 Cal. 2d 506, 127 P.2d 542, 549 (1942).

125. *See* notes 68, 71, and 85.

protection in their state constitutions than that afforded by the first amendment, those courts extended speech protection from the purely public domain to privately owned forums opened to public use.¹²⁶ Balancing property rights against free speech privileges, the courts found protection for speech when it did not substantially disrupt a property owner's use of his property. When the property in question was a privately owned educational institution, the courts balanced the speech rights of students and visitors on campus against the right of the school to establish reasonable speech-regulating policies. The courts held that speech privileges granted by the school were subject to state constitutional protection against unreasonable censorship.

Furthermore, even in states that have free speech clauses linguistically similar to the first amendment,¹²⁷ the courts may read those provisions more expansively than the federal interpretation.¹²⁸ Randall T. Shepard, Chief Justice of the Indiana Supreme Court, wrote that, although the speech provision of the Indiana Constitution is constructed similarly to the first amendment, its language also "affirms the rights of expression in language much more comprehensive than the first amendment."¹²⁹ To lock the citizens of those states into identical readings of both state and federal speech clauses would nullify the dual nature of the federal system. Shepard wrote:

The rights of Americans cannot be secure if they are protected only by courts or only by one court. Civil liberties protected by a U.S. Supreme Court are only as secure as the Warren Court or the Rehnquist Court wishes to make them. The protection of Americans against tyranny requires that state supreme courts and state constitutions be strong centers of authority on the

126. *State v. Schmid*, 84 N.J. at 559, 423 A.2d at 628 (1980). ("The rights of speech and assembly guaranteed by the state constitution are protectable not only against governmental or public bodies, but under some circumstances, against private persons as well."); *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wash.2d 230, 236 n.4, 635 P.2d 108, 112 n.4 (1981). ("Individuals . . . are entitled to speak or petition in privately owned centers if law confers such a right . . ."); *Commonwealth v. Tate*, 495 Pa. 158, 172, 432 A.2d 1382, 1389 (1981) ("Government may, when necessary, protect personal liberties even when that protection, to a limited extent, subordinates the constitutional interests of others.").

127. *District of Columbia, Hawaii, Indiana, Oregon, South Carolina, Utah, West Virginia*. Also, Delaware, see *supra* note 104.

128. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989) (citing historically the Indiana Supreme Court's interpretation of the Indiana Constitution to provide rights broader than those protected by the Federal Constitution in the areas of freedom for slaves, jury trials, representation by counsel, double jeopardy, and search and seizure).

129. *Id.* at 581. (The Indiana Constitution provides "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." IND. CONST. art. I, § 9.).

rights of the people.¹³⁰

Indeed, Indiana law has expanded federal standards in the press-related area of libel, requiring that all libel plaintiffs, not just those who are public officials or public figures, must show actual malice.¹³¹ The Indiana court found its authority in the state constitution.¹³² In fact, the Indiana Constitution of 1851 was the model for the constitutions of Oregon and Washington, two states whose courts have interpreted free speech provisions to provide broader protection than the first amendment.¹³³ Under the doctrine of horizontal federalism, the free speech decisions of the Oregon and Washington courts could be persuasive precedent for an Indiana litigant.

V. CONCLUSION

The essential nature of free speech in democracy,¹³⁴ requires this search for the protection of the expressive rights of its younger citizens. Professor Harry Kalven wrote that understanding the theory and practice of free speech is necessary to understanding the basic concept of democracy. "Free speech is so close to the heart of the democratic organization," Kalven wrote, "that if we do not have an appropriate theory for our law here, we feel we really do not understand the society in which we live."¹³⁵ And Justice Holmes, in his often quoted dissent in *Abrams v. United States*, said that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself

130. Shepard, *supra* note 130, at 586.

131. *Aafco Heating and Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (The United States Supreme Court suggested, but did not require, that states permit private figure plaintiffs to prevail in libel actions on a mere showing of negligence.).

132. *Aafco*, 162 Ind. App. at 678-79, 321 N.E.2d at 585-86. "Indiana's constitutional protection of freedom of expression requires that the interchange of ideas upon all matters of 'general or public interest' be unimpaired." *Id.* at 679, 321 N.E.2d at 586.

133. See, e.g., *State v. Jackson*, 356 P.2d 495 (Or. 1960) (The Oregon Supreme Court cited the Missouri Supreme Court holding in *Marx* and *Haas* that the state constitution provided greater prior restraint protection than the first amendment); See *supra* note 68. See also WASH. CONST. art. I, § 5 (Washington's Declaration of Rights, adopted in 1859, borrowed heavily from the Indiana Constitution. For free speech reference, see B. ROSENOW, *THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION* 1889, at 496 n.12) (1962) [hereinafter *WASHINGTON JOURNAL*]; OR. CONST. art. I, § 8 (In adopting its 1859 Bill of Rights, Oregon copied its provisions almost verbatim from the Indiana Constitution. See *THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATE OF THE CONSTITUTIONAL CONVENTION OF 1857*, 302, 478-79 (1926) [hereinafter *OREGON PROCEEDINGS*]).

134. *Schaefer v. United States*, 251 U.S. 466, 474 (1920) ("That freedom of speech and of the press are elements of liberty, we all acclaim. Indeed, they are so intimate to liberty in everyone's convictions . . . we may say feelings . . . that there is an instinctive and instant revolt from any limitation of them either by law or a change under the law . . .").

135. H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 4 (1965).

accepted in the competition of the market."¹³⁶

American schools, whether public or private, bear primary responsibility for preparing future generations of citizens. One approach to this citizenship training is through the student press. Despite its imperfections, arrogance, naivete, and contentiousness, the campus newspaper is one of the most practical means by which student journalists and readers can think, analyze, test, and express the reality of ideas and events introduced inside and outside the classroom. As Professor Louis Ingelhart wrote, constitutionally protected freedoms and rights parallel the purposes and goals of education.¹³⁷

The rationale advanced in this article is that colleges and universities have a duty to clarify the means by which they intend to teach the rights and responsibilities of free speech. The school that opens a campus newspaper for student expression has constitutional obligations to both the writers and the readers who choose to avail themselves of that forum.

Hazelwood diminishes the press freedom and responsibility of high school journalists, and constitutes a potential threat to their college counterparts. Lacking the admittedly more effective protection of a uniform federal standard, the student press must look to state constitutions for help. Not only is help there, but the "good news" is that it comes without the baggage of the public/private distinction necessitated by the federal state action doctrine. Furthermore, although state constitutional law would not require a private educational institution to establish a newspaper for student expression, once that forum was created, those using it would have the same constitutional protection granted to their counterparts in the public schools.

136. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

137. Ingelhart, 1979: *The Campus Student Press in America*, 18 C. PRESS REV. 49, 59 (1979).