

NOTES

YEO V. LEXINGTON: ABRIDGING RIGHTS OF PUBLICATION IN THE STUDENT PRESS

INTRODUCTION

Like many parents of high school-aged students enrolled in the public schools of Lexington, Massachusetts, Douglas E. Yeo objected when the town voted to adopt a condom distribution policy in Lexington High School ("LHS").¹ He responded by forming a political action group to oppose the policy and submitting pro-abstinence advertisements for publication in the official LHS yearbook ("the yearbook") and newspaper ("the *Musket*").² When student editors of both publications declined to run Yeo's advertisements, citing unwritten policies prohibiting the acceptance of political advertisements, Yeo claimed that his First and Fourteenth Amendment rights had been violated and threatened to sue.³ Upon the editors' issuance of their final refusal to publish, Yeo brought an action against his town and his son's high school principal in federal district court.⁴

Both the local press and the district court decision that granted the defendants' motion for summary judgment portrayed plaintiff Yeo as overly litigious and moralistic.⁵ As Federal District Court Judge Richard Stearns noted in his opinion, "[a]t the end of the day, one wonders whether this litigation was necessary."⁶ Several editorials pub-

¹ See *Yeo v. Town of Lexington*, 131 F.3d 241, 244 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 2060 (1998).

² See *id.* at 244, 245.

³ See *id.* at 245, 246, 248.

⁴ See *id.* at 248.

⁵ See Rachelle C. Cohen, *Students Fight on for Press Freedoms*, BOSTON HERALD, Dec. 17, 1997, at 35. The editorial stated in part, "Memo to Douglas Yeo: Next time you want to get your abstinence message over to teenagers, rent a billboard . . . But for heaven's sake don't make a federal case out of it . . . This was a piddling little squabble that escalated into a federal court case because that's how things are these days." *Id.*

⁶ *Yeo v. Town of Lexington*, No. 94-10811-RGS, at 18 (D. Mass. Apr. 22, 1996).

lished in the *Herald* characterized this litigation as "a piddling little squabble" and plaintiff Yeo himself as "spoiling for a fight."⁷ In fact, good reasons existed for wondering whether this litigation was necessary. Yeo did not have to bring a legal action to communicate his pro-abstinence message to the LHS community. LHS student editors offered to publish his message if he would either amend the content of his advertisement or write a letter to the editor of the newspaper, where editors felt his political message would be more appropriate.⁸

This litigation seems unnecessary for another reason as well—the media in question are the high school newspaper and yearbook. It seems inherently wrong for an outsider to dictate the content of such periodicals over the objections of the school administration, faculty and student editors. But in the four opinions spawned by this litigation, only First Circuit Justice Sandra Lynch (in dissent) addressed this issue head-on: "It is passingly strange to even think of a student newspaper as a public forum."⁹ Further, she alone observed that the educational process may be least disrupted by permitting the student editors' decision to stand.¹⁰ In its *en banc* decision, the First Circuit almost completely failed to address the special considerations attendant to litigation arising in the context of public high schools.¹¹

Yeo's suit alleged that the publications' refusal to print his advertisements constituted a violation of his rights to free speech and equal protection under the Constitution.¹² This litigation therefore broached two important issues and complex constitutional doctrines. The court first addressed whether the decisions of the student editors constituted an action of the state, because the court cannot impose obligations under the First and Fourteenth Amendments to the Constitution on private actors without a finding of state action.¹³ Second, the court grappled over whether student publications constitute public fora—that is, government-owned areas such as streets or public parks in

⁷ Cohen, *supra* note 5, at 35.

⁸ See Yeo, 131 F.3d at 246.

⁹ Yeo v. Town of Lexington, No. 96-1623, 1997 WL 292173, at *34 (1st Cir. 1997) (Lynch, J., dissenting).

¹⁰ See *id.* at *35. "There is a legitimate interest in preventing disruption of the educational process. The school and its students have an interest in maintaining some form of harmony in its student publications; avoiding use of its advertising pages to convey political or advocacy messages may serve this end. The school and its students also have an interest in fostering independent thought in student editors and may choose to do so by respecting those students' independent conclusions." *Id.*

¹¹ See generally Yeo, 131 F.3d at 241, 250.

¹² See *id.* at 248.

¹³ See *infra* text accompanying notes 124-86.

which members of the public traditionally have a right to express their opinions without government restrictions.¹⁴

This Note argues that although the First Circuit's *en banc* decision was correctly decided, its reasoning is flawed because it failed to address the special considerations of controversies arising in the context of a public high school.¹⁵ The analyses of whether the student editors' refusal to publish Yeo's advertisement constitutes state action, and whether student publications qualify as public forums, cannot be meaningfully discussed without considering the role of educators in controlling the content of student speech in classroom or school activities. Part I of this Note examines important precedent on the state action and public forum doctrines.¹⁶ Part II analyzes the *Yeo* case, including the recent *en banc* decision of the Court of Appeals for the First Circuit applying the state action doctrine to the editorial decisions of student editors.¹⁷ Part III situates the doctrines of state action and public forum in the context of current pedagogical theory, as developed by legal scholars and applied in Supreme Court opinions.¹⁸

Part IV of this Note examines the First Circuit's *en banc* decision in light of the pedagogical theory currently favored by the United States Supreme Court. In this Part, the Note argues first that the decisions made by student editors of school-sponsored publications can always be attributed to the state, because the role of educators in formulating content is substantial whether or not they actively participate in the decision giving rise to litigation.¹⁹ Second, this Note argues in this Part that the LHS yearbook and *Musket* do not qualify as traditional public fora.²⁰ Rather, they are limited public fora that are appropriately used to communicate only specific kinds of information—specifically, the information which is consistent with the pedagogical philosophy of the school.²¹ Therefore, LHS student editors may constitutionally refuse to publish Yeo's advertisement if they reasonably believe that it does not represent values consistent with the school's educational mission.²²

¹⁴ See *id.*

¹⁵ See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

¹⁶ See *infra* text accompanying notes 23–123.

¹⁷ See *infra* text accompanying notes 124–86.

¹⁸ See *infra* text accompanying notes 187–241.

¹⁹ See *infra* text accompanying notes 242–90.

²⁰ See *infra* text accompanying notes 291–307.

²¹ See *infra* text accompanying notes 291–307.

²² See *infra* text accompanying notes 291–307.

I. BACKGROUND

The First Amendment provides that Congress may not restrict an individual's freedom of expression.²³ This protection has been extended to preclude all branches and agencies of the state from infringing upon the First Amendment rights of a private citizen.²⁴ The First Amendment only protects freedom of speech against actions of the government; therefore, a citizen must first demonstrate that the alleged violation occurred at the hands of the state.²⁵ If a plaintiff can establish this notion of "state action" regarding a First Amendment cause of action, the judiciary applies a public forum analysis to determine whether the state actor violated the citizen's right to freedom of expression.²⁶ The public forum doctrine requires the court to determine (1) the nature of the forum at issue and (2) whether the state's regulation of a citizen's access to the forum represents a violation of that citizen's First Amendment rights.²⁷

A. State Action Doctrine

Almost all of the individual rights afforded by the United States Constitution, including the entire Bill of Rights, are judicially enforceable only against state or federal government action.²⁸ The United States Supreme Court has recognized that purely private action is not subject to the requirements of the First and Fourteenth Amendments.²⁹ To state a claim alleging an abridgment of one's freedom of expression, therefore, a plaintiff must show that an arm of the federal or state

²³ See U.S. CONST. amend. I. The First Amendment states, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press." *Id.*

²⁴ See *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) ("It is, of course a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.").

²⁵ See *infra* notes 33-60.

²⁶ See generally *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

²⁷ See generally *Cornelius*, 473 U.S. at 788; *Perry*, 460 U.S. at 37.

²⁸ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-1 (2nd ed. 1988). The purpose of the state action doctrine is to limit the government's realm of action, thus protecting the freedom of association of private individuals.

²⁹ See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) ("Private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have been involved in it.") The principle of state action was first articulated in the Civil Rights Cases. See 109 U.S. 3 (1883).

government was responsible for the violation.³⁰ The state's participation in an act that leads to a potential Constitutional violation is sometimes immediately obvious, as with a state or federal statute that restricts speech rights. The judiciary has also been asked to decide, however, whether state action exists where a plaintiff alleges that a government actor has supported or tacitly approved of the actions of a private party through inaction, acquiescence or tolerance that constitutes ratification of that private choice.³¹ When called upon to determine the existence of state action, the judiciary considers factors such as state funding, state regulation, whether the actor performed a "state function," whether the action was taken "under color of state law" and whether a "symbiotic relationship" existed between the actor and the state.³²

1. Supreme Court Decisions Establishing the "State Action" Doctrine

In 1961, in *Burton v. Wilmington Parking Authority*, the United States Supreme Court established the proposition that a government can be implicated in the actions of a private citizen if there exists a "symbiotic" relationship—one that is mutually beneficial—between the state and the private actor.³³ In *Burton*, the Wilmington Parking Authority ("Authority"), a Delaware State agency, erected a parking facility in downtown Wilmington.³⁴ The facility included several commercial units that it leased to private businesses including a restaurant.³⁵ The plaintiff in *Burton* alleged that the restaurant violated his rights under the Equal Protection Clause after it refused to serve him on account of his race.³⁶

In assessing whether the government's participation in the restaurant's refusal of service rose to the level of state action, the Court described the relationship between the garage and the restaurant as "symbiotic" because each conferred a variety of mutual benefits upon the other.³⁷ The Court observed that guests of the restaurant have access to a convenient parking place subsidized by the state government, while the presence of the restaurant would likely attract addi-

³⁰ See *Burton*, 365 U.S. at 722.

³¹ See *infra* notes 33–60.

³² See *infra* notes 33–60.

³³ See 365 U.S. at 725.

³⁴ See *id.* at 718.

³⁵ See *id.* at 719.

³⁶ See *id.* at 720.

³⁷ See *id.* at 724.

tional revenue for the parking garage.³⁸ Indeed, the Authority would have been unable to finance the garage but for the revenue from leases of commercial establishments such as the restaurant.³⁹ Because the state and the private enterprise conferred mutual benefits upon one another, the Court found that the state was implicated in the discriminatory actions of the private party.⁴⁰

In 1982, in *Rendell-Baker v. Kohn*, the Court articulated four different tests to determine whether the actions of a private actor constitute state action.⁴¹ The main issue in *Rendell-Baker* was whether a private, publicly-funded school acted under color of state law when it discharged petitioner employees who publicly opposed management decisions, allegedly in violation of their rights under the First, Fifth and Fourteenth Amendments.⁴² The school, a private institution, received the majority of its students through referrals from state agencies, and thereby received public funds comprising at least ninety percent of its annual operating budget.⁴³ To receive tuition funding from the state, the school was required to comply with extensive state regulations.⁴⁴

The Court evaluated four factors which the petitioners alleged made the school's discharge decisions fairly attributable to the state.⁴⁵ First, although the school received virtually all of its funds from the state, the Court reasoned that financial support alone does not elevate a private institution's personnel decisions to state action.⁴⁶ Second, the Court evaluated whether the state could be implicated in the school's employment decisions because it required the school to conform to certain regulations.⁴⁷ Although these regulations were "extensive," the Court reasoned that they neither compelled nor influenced the school's personnel decisions in any way.⁴⁸ Therefore, the state regulations lacked a sufficiently close nexus to the school's action to justify attributing the school's action to the state.⁴⁹ Third, the Court considered whether the school's performance of a traditional "public

³⁸ See *Burton*, 365 U.S. at 724.

³⁹ See *id.* at 719.

⁴⁰ See *id.* at 724.

⁴¹ See 457 U.S. 830, 840-42 (1982).

⁴² See *id.* at 833.

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.* at 840-43.

⁴⁶ See *Rendell-Baker*, 457 U.S. at 840.

⁴⁷ See *id.* at 841.

⁴⁸ See *id.*

⁴⁹ See *id.* at 841-42.

function" rendered it a state actor.⁵⁰ The Court found that, although the statute commanded the state to pay for special education for troubled youths, the state had only recently adopted this function. Therefore, it could not be construed as a "traditional" state function.⁵¹ Fourth, the Court evaluated whether the state and the school had a "symbiotic" relationship that would elevate the level of state participation so that the school's actions constituted state action.⁵² The Court reasoned that because the state would not benefit from the school's allegedly discriminatory actions, as did the state of Delaware in *Burton*, no such symbiosis existed.⁵³

2. "State Action" Doctrine as Applied to Student Organizations and Press

In 1987, in *Sinn v. The Daily Nebraskan*, the United States Court of Appeals for the Eighth Circuit followed the majority of circuit court decisions in finding that a university newspaper's editorial decisions did not constitute state action for purposes of a suit brought under 42 U.S.C. § 1983.⁵⁴ Petitioners attempted to place "roommate needed" advertisements which described the sexual orientation of the advertiser in the campus newspaper of the University of Nebraska-Lincoln.⁵⁵ When the newspaper refused all such advertisements pursuant to its advertising policy, petitioners brought a § 1983 claim against the newspaper, individual members of the University Board of Regents and individual members of the University Publications Committee.⁵⁶

Although the newspaper derived its existence, legal status, power, authority and the majority of its budget from its association with the state, the court did not find state action.⁵⁷ In reaching its conclusion, the court, following *Rendell-Baker*, held that government regulation and subsidizing of an entity, without more, do not result in a finding of state action.⁵⁸ Further, the court determined that the students' exercise of editorial discretion did not constitute state action because

⁵⁰ See *id.* at 842.

⁵¹ See *Rendell-Baker*, 457 U.S. at 842.

⁵² See *id.* at 842-43.

⁵³ See *id.*

⁵⁴ See 829 F.2d 662, 663 (8th Cir. 1987); see also *Leeds v. Meltz*, 85 F.3d 51, 54 (2d Cir. 1996); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1074 (5th Cir. 1976). But see *Lee v. Board of Regents*, 441 F.2d 1257, 1258 (7th Cir. 1971).

⁵⁵ See *Sinn*, 829 F.2d at 663.

⁵⁶ See *id.*

⁵⁷ See *id.* at 666.

⁵⁸ See *id.* at 665.

the *Daily Nebraskan* functioned like a private newspaper.⁵⁹ Where a court finds, as in this case, that "there is not the slightest whisper that the [state] authorities had anything to do with the [editorial decision]," it cannot find state action under the *Sinn* holding.⁶⁰

B. Public Forum Analysis

Access to public property for the purpose of speech has been recognized as a right guaranteed by the First Amendment since the late nineteenth century. Traditionally, the public forum doctrine has ensured that publicly-owned properties, such as parks and streets, are available to citizens for expressive activity, such as assemblies and demonstrations.⁶¹ The doctrine has recently been expanded to cover municipal theaters, university buildings and student newspapers.⁶² The public forum doctrine holds that restrictions on speech should be subject to higher scrutiny when that speech occurs in a place historically associated with expressive activity.⁶³

In the early 1980s, the Supreme Court brought uniformity to the public forum doctrine by stating that public property may fall into one of three categories.⁶⁴ The three categories are traditional public fora, limited public fora and non-public fora.⁶⁵ Each category provides varying degrees of protection for expressive activities. First Amendment expression which occurs in traditional public fora receives maximum protection from government interference under the public forum doctrine, while non-public fora offer no protection for expressive activity.

1. Supreme Court Development and Treatment of the Public Forum Doctrine

Under the public forum doctrine, the Supreme Court has identified three types of fora. The first type, traditional public fora, include 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 dis-

⁵⁹ See *id.*

⁶⁰ See *Sinn*, 829 F.2d at 666.

⁶¹ See Daniel J. Coyle, Comment, *The First Amendment in Conflict: Advertising Access to State University Student Newspapers*, 24 SANTA CLARA L. REV. 763, 767-68 (1984).

⁶² See *id.*

⁶³ See *TRIBE*, *supra* note 28, at 987.

⁶⁴ See *Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 45.

⁶⁵ See *Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 45.

cussing public questions."⁶⁶ Government entities may not prohibit expressive activity in traditional public fora unless (a) the regulation serves a compelling government interest, and (b) it is narrowly drawn to achieve that end.⁶⁷ The state may also issue regulations upon public fora speech that restrict the time, place and manner of expression, so long as the regulations do not discriminate against the content of the speech, are narrowly tailored to serve a compelling government interest and leave open alternative channels of communication.⁶⁸

The second category, limited public fora, consists of public property which the state has purposefully opened for use by the public as a place for expressive speech by certain groups or for discussion of specific topics.⁶⁹ Once opened, the limited public forum is governed by the same restrictions upon speech regulations as the traditional public forum.⁷⁰ Accordingly, content-based regulations must be narrowly tailored to serve a compelling state interest, while reasonable time, place and manner regulations are permitted.⁷¹

The third and final category is non-public fora.⁷² In these fora, the state may issue reasonable regulations on speech that do not discriminate on the basis of the speaker's viewpoint.⁷³ Non-public fora include government property that is reserved for specific governmental purposes on the principle that "the state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."⁷⁴

In 1983, the Supreme Court attempted a synthesis of the public forum doctrine in *Perry Education Association v. Perry Local Educators' Association*.⁷⁵ In *Perry*, Perry Education Association (PEA) was a teachers' union that lost the certification election and later was denied access to the school district's internal mail system, although the certified union was granted this access.⁷⁶ Although Perry Local Educators' Association (PLEA) received permission to use other school facilities to communicate with teachers, it filed suit under § 1983 against PEA and the town school board, alleging that the school-imposed preferen-

⁶⁶ *Perry*, 460 U.S. at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ *See id.*

⁷⁰ *See id.* at 46.

⁷¹ *See Perry*, 460 U.S. at 46.

⁷² *See id.*

⁷³ *See id.*

⁷⁴ *Id.*

⁷⁵ *See* *TRIBE*, *supra* note 28, at 987.

⁷⁶ *See Perry*, 460 U.S. at 39.

tial access system violated their First and Fourteenth Amendment rights.⁷⁷

The Court reasoned that the internal mail system constituted a non-public forum because the district had not, by policy or practice, intentionally opened the system for indiscriminate use by the general public.⁷⁸ Furthermore, as a non-public forum, the district was permitted to restrict access with regulations that were reasonable and not based upon the speaker's viewpoint.⁷⁹ The Court first ruled that the regulations did not constitute viewpoint discrimination, but rather legitimately distinguished between the *status* of the unions, one of which functioned as the teachers' sole representative.⁸⁰ Second, the Court held that the distinction was reasonable because it was wholly consistent with the district's legitimate interest in reserving the property for its dedicated use—official communication.⁸¹ Thus, under the holding of *Perry*, the Supreme Court established that the state does not open a government forum unless it affirmatively intends to do so.⁸²

2. Supreme Court Analysis of First Amendment Rights in the Public Schools

The central cases defining the limits of public school students' rights to freedom of expression under the First Amendment are *Tinker v. Des Moines Independent Community School District*, *Bethel School District No. 403 v. Fraser* and *Hazelwood School District v. Kuhlmeier*.⁸³ In both *Tinker* and *Fraser*, the Court did not have to address the public forum analysis.⁸⁴ These cases, however, identified the limits of students' First Amendment rights in the public school setting and therefore affected the public forum analysis as applied within the public schools.⁸⁵ *Hazelwood* applied a public forum analysis to determine the rights of educators to censor the content of a student newspaper over the objections of its editors.⁸⁶

In 1969, in *Tinker*, the Supreme Court issued perhaps its strongest defense of students' First Amendment rights to freedom of expression

⁷⁷ See *id.* at 41.

⁷⁸ See *id.* at 46, 47.

⁷⁹ See *id.* at 47.

⁸⁰ See *id.* at 50-51, 52.

⁸¹ See *Perry*, 460 U.S. at 50.

⁸² See *id.*

⁸³ See *infra* notes 87-115.

⁸⁴ See *infra* notes 87-100.

⁸⁵ See *infra* notes 87-100.

⁸⁶ See *infra* notes 101-15.

within public schools.⁸⁷ In *Tinker*, five students were suspended for wearing black armbands at school to protest the Vietnam War.⁸⁸ The students brought an action under 42 U.S.C. § 1983 seeking nominal damages and an injunction to restrain school officials from disciplining the students.⁸⁹ The *Tinker* Court famously observed that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁹⁰ On this basis, the Court held that a school may not restrict a student's right to free speech unless school officials could reasonably forecast that the speech might substantially interfere with the work of the school or impinge upon the rights of other students.⁹¹ It noted further that "the discomfort and unpleasantness" that may accompany the voicing of an unpopular viewpoint is insufficient to justify a prohibition on a particular expression of opinion.⁹² Using this standard, the Court found that the school officials' fear of a disturbance resulting from the students' wearing of armbands was unreasonable.⁹³ It held, therefore, that the school's restriction on the wearing of armbands by students was unconstitutional.⁹⁴

In 1986, in *Fraser*, the Supreme Court afforded greater latitude to school administrators in regulating the content of student speech and narrowed students' freedom of expression in the public schools.⁹⁵ In *Fraser*, the Court held that the school could constitutionally prohibit obscene speech at a school-sponsored assembly.⁹⁶ The Court acknowledged the holding of *Tinker*, that students have the right under the First Amendment to advocate unpopular and controversial views in the public schools, yet reasoned that these rights are not coextensive with those of adults in other settings.⁹⁷ The Court observed that educators in public schools have greater latitude to regulate the content of student speech in schools to teach their pupils "the boundaries of socially appropriate behavior."⁹⁸ The Court also recognized that school authorities, acting *in loco parentis*, have a responsibility to protect chil-

⁸⁷ 393 U.S. 503, 512-13 (1969).

⁸⁸ See *id.* at 504.

⁸⁹ See *id.*

⁹⁰ *Id.* at 506.

⁹¹ See *id.* at 511.

⁹² See *Tinker*, 393 U.S. at 508.

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ 478 U.S. 675, 685 (1986).

⁹⁶ See *id.*

⁹⁷ See *id.* at 682.

⁹⁸ *Id.* at 683.

dren from exposure to lewd or indecent speech.⁹⁹ Therefore, the Court reasoned, public schools may enforce regulations that prohibit student speech that is lewd and obscene even though it does not threaten to disrupt the operation of the school, as required by the *Tinker* Court.¹⁰⁰

In 1988, in *Hazelwood*, the Supreme Court further enhanced school officials' power to curtail student speech.¹⁰¹ In *Hazelwood*, the Court considered whether a school principal could censor the content of a student newspaper without the consent of student editors or the journalism advisor.¹⁰² To answer this question, the Court utilized the public forum analysis.¹⁰³ The Court determined that a high school newspaper designed and published in the context of a curricular activity, with close supervision by an advisor, was not a public forum because the administration did not open up the paper for indiscriminate use by the general public.¹⁰⁴ Rather, the school reserved the paper for the specific purpose of teaching journalism students about newspaper publication under the guidance of a faculty advisor.¹⁰⁵ Therefore, the school could constitutionally exercise control over the style and content of student speech in school-sponsored fora, assuming such regulation reasonably related to legitimate pedagogical concerns.¹⁰⁶

The *Hazelwood* Court specifically distinguished the holding of *Tinker*, which relates only to "student speech that happens to occur on school premises."¹⁰⁷ The facts of *Hazelwood*, on the other hand, involved student speech that was affirmatively promoted by school-sponsored or curricular activities such as theatrical presentations or school newspapers.¹⁰⁸ Because these school-sponsored activities may reasonably be deemed to bear the imprimatur of the school, the Court reasoned that school officials should have greater latitude to regulate the speech contained therein.¹⁰⁹

⁹⁹ See *id.* at 684.

¹⁰⁰ See *Fraser*, 478 U.S. at 683.

¹⁰¹ 484 U.S. 260, 265-66 (1988).

¹⁰² See *id.* at 268. The principal of Hazelwood East High School objected to two of the articles scheduled to appear in the contested edition of the *Spectrum*. See *id.* at 262. One of the stories described three students' experiences with pregnancy and the other discussed the impact of divorce on students at the school. See *id.*

¹⁰³ See *id.* at 267-70.

¹⁰⁴ See *id.* at 268.

¹⁰⁵ See *id.*

¹⁰⁶ See *Hazelwood*, 484 U.S. at 273.

¹⁰⁷ *Id.* at 270-71.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

The *Hazelwood* Court accordingly issued a new standard by which school officials could constitutionally regulate the content of student speech in school-sponsored activities.¹¹⁰ Under this standard, educators may regulate school-sponsored student speech in a manner that has a reasonable relationship to legitimate pedagogical purposes.¹¹¹ The Court opined further that educators may exercise this level of control over school-sponsored speech in order to accomplish three objectives: (1) the activity imparts whatever lesson the educators intend to teach; (2) readers or listeners do not become exposed to age-inappropriate material and (3) the views of students do not become erroneously imputed to the school.¹¹²

In the wake of *Hazelwood*, therefore, educators maintain significant authority to regulate the content of student speech.¹¹³ Within the confines of school-sponsored activities, educators have wide discretion to impose such regulations.¹¹⁴ *Tinker's* "disruption" standard, however, still governs speech that merely happens to occur on campus, rather than speech that is affirmatively promoted by school-sponsored activities.¹¹⁵

Planned Parenthood of Southern Nevada v. Clark County School District, decided in 1991, represents the most recent circuit court opinion relating to First Amendment issues and the student press.¹¹⁶ In *Planned Parenthood*, the Ninth Circuit held that a public school system could reasonably refuse to publish an advertisement promoting family planning in a student publication that is designated as non-public fora.¹¹⁷ The court found that the publications were not public fora because the schools did not reserve them for indiscriminate use by the general public.¹¹⁸ Rather, the school district maintained a detailed policy outlining standards for accepting advertisements, thus evidencing an intention to retain control over the publications and their advertisements.¹¹⁹ The court applied the *Hazelwood* rationale, noting that where school publications have not been opened to the public for indiscriminate expressive use, school officials may refuse to publish advertise-

¹¹⁰ See *id.*

¹¹¹ See *Hazelwood*, 484 U.S. at 271.

¹¹² See *id.*

¹¹³ See generally Martha M. McCarthy, *Post-Hazelwood Developments: A Threat to Free Inquiry in Public Schools*, 81 EDUC. L. REP. 685, 686 (1993).

¹¹⁴ See *id.*

¹¹⁵ See *id.* at 694.

¹¹⁶ 941 F.2d 817 (9th Cir. 1991).

¹¹⁷ See *id.* at 830.

¹¹⁸ See *id.* at 824.

¹¹⁹ See *id.* at 823-24.

ments in school-sponsored publications bearing its imprimatur for legitimate pedagogical reasons.¹²⁰ Applying this standard, the court reasoned that the school officials' policy of rejecting advertisements on both sides of the abortion debate was reasonable to maintain the school's neutrality on a divisive issue.¹²¹

Planned Parenthood represents important precedent in the context of *Yeo* for at least two reasons. First, the case affirms the principle, rightly followed by the First Circuit *en banc* in *Yeo*, that outside entities do not have the right to publish their advertisements in publicly-funded, school-sponsored publications.¹²² Second, it adheres to the teaching of *Hazelwood* that school publications are generally not public fora, whether or not they publish advertisements submitted by those outside the academic community.¹²³

II. *YEO V. TOWN OF LEXINGTON*

Like many public schools, Lexington High School provides ample support to its various publications. For instance, LHS permitted its newspaper, the *Musket*, to publish on LHS's property and the school subsidized the *Musket*'s publication expenses as well as the \$1373 yearly stipend to a faculty advisor.¹²⁴ Notwithstanding the financial support from the school, students made all editorial and business decisions regarding news articles, editorials and advertisements to be run in the *Musket*.¹²⁵ Save for school administration policy prohibiting the publication of obscenity or other material that violated state or federal law, students otherwise controlled the content of the *Musket*.¹²⁶ Student editors adopted a policy of refusing advertisements from political candidates, organizations, advocacy groups and cigarette manufacturers during the 1993-1994 academic year and adopted the policy in writing the following year.¹²⁷ Pursuant to this policy, the *Musket* never accepted a political or advocacy advertisement.¹²⁸

Another LHS publication, the yearbook, was published annually and managed by a student editor-in-chief.¹²⁹ As with the *Musket*, the

¹²⁰ See *id.* at 828.

¹²¹ See *Planned Parenthood*, 941 F.2d at 829.

¹²² See *id.* at 830.

¹²³ See *id.*

¹²⁴ See *Yeo v. Town of Lexington*, No. 94-10811-RGS, at 2-3 (D. Mass. Apr. 22, 1996).

¹²⁵ See *id.*

¹²⁶ See *id.* at 3 n.5.

¹²⁷ See *id.* at 3.

¹²⁸ See *id.*

¹²⁹ See *Yeo*, No. 94-10811-RGS, at 3.

high school permitted the yearbook staff to use school facilities for publication and subsidized the annual stipend for a faculty advisor.¹³⁰ The yearbook was otherwise financially self-sufficient.¹³¹ The yearbook printed advertisements placed by local businesses and congratulatory messages submitted by students and parents, but never published an advocacy advertisement.¹³² In the 1994–1995 academic year, the student editors adopted a written policy limiting paid advertisements to messages of congratulations submitted by graduating seniors and their parents.¹³³

The dispute giving rise to litigation stemmed from the Lexington School Committee's decision to distribute, without parental consent, condoms and information about sexually transmitted diseases to students.¹³⁴ Yeo, a father of an LHS student, opposed the policy and galvanized an advocacy group that placed the issue on the 1993 town ballot.¹³⁵ Despite Yeo's efforts, the condom distribution policy received the support of a majority of Lexington voters.¹³⁶

After the referendum, Yeo co-founded the Lexington Parents Information Network ("LEXNET"), an organization intended to educate parents about public school issues.¹³⁷ On behalf of LEXNET, Yeo sent an advertisement promoting sexual abstinence to the yearbook with the advertising fee on November 1, 1993; he attempted to place the same advertisement with the newspaper on February 1, 1994.¹³⁸ Both editorial boards rejected the advertisement.¹³⁹

The student co-editors of the *Musket* decided to reject the advertisement because it violated their policy of refusing to publish advocacy or political advertisements.¹⁴⁰ Yeo declined the students' offer to write the advertisement in a more appropriate tone and subsequently wrote to the faculty advisor demanding that the newspaper reconsider its decision.¹⁴¹ In April 1994, Yeo brought this action in federal district court, claiming that the LHS yearbook and *Musket* deprived him of his right to freedom of expression and equal protection under the First

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² See *id.* at 3–4.

¹³³ See *id.* at 4.

¹³⁴ See Yeo, No. 94–10811-RGS, at 4.

¹³⁵ See *id.*

¹³⁶ See *id.*

¹³⁷ See *id.* at 6.

¹³⁸ See *id.*

¹³⁹ See Yeo, No. 94–10811-RGS, at 6.

¹⁴⁰ See *id.* at 6–7.

¹⁴¹ See *id.* at 7.

and Fourteenth Amendments, § 1983 and Article 16 of the Massachusetts Declaration of Rights.¹⁴² Yeo asked the court to issue a temporary restraining order preventing both school publications from publishing future issues without LEXNET's advertisement.¹⁴³ The district court ruled against Yeo.¹⁴⁴

On appeal, the First Circuit Court of Appeals affirmed the district court's ruling on the preliminary injunction.¹⁴⁵ The court further remanded the matter to the district court.¹⁴⁶ On remand, the defendants sought a motion for summary judgment.¹⁴⁷

A. *The District Court Grants the Town of Lexington's Motion for Summary Judgment*

In 1996, in *Yeo v. Town of Lexington*, the United States District Court for the District of Massachusetts granted the defendants' motion for summary judgment, holding that a high school publication's refusal to publish a submitted advertisement did not constitute state action.¹⁴⁸ In granting summary judgment for the defendants, the court rejected Yeo's argument that the student editors' actions could be characterized as state action.¹⁴⁹ The court first observed that state regulations did not compel the students' decision to reject LEXNET's advertisement, as the only policy governing the students pertained to the publication of obscene or illegal material.¹⁵⁰ Second, the court concluded that state funding of a private body alone does not establish state action.¹⁵¹ Third, the court determined that Yeo had not proven the existence of a symbiotic relationship.¹⁵² Because nothing in the record indicated that the administration influenced the student editors' decision, the court ruled that the school had not meaningfully participated in the refusal to publish Yeo's advertisement.¹⁵³ Thus, the district court granted the defendants' motion for summary judgment,

¹⁴² See *id.* at 10.

¹⁴³ See *id.*

¹⁴⁴ See *Yeo v. Town of Lexington*, No. 96-1623, 1997 WL 292173, at *3 (1st Cir. 1997).

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

¹⁴⁷ See *id.*

¹⁴⁸ See *Yeo*, No. 94-10811-RGS, at 17, 19.

¹⁴⁹ See *id.* at 13.

¹⁵⁰ See *id.*

¹⁵¹ See *id.*

¹⁵² See *id.* at 16.

¹⁵³ See *Yeo*, No. 94-10811-RGS, at 16.

holding that the student editors' decision to reject the advertisements did not constitute state action.¹⁵⁴

B. *The First Circuit Panel Overrules the District Court's Findings*

In June 1997, a three-judge panel of the United States Court of Appeals for the First Circuit reversed the district court, holding that the student editors' refusal to publish Yeo's advertisements constituted state action.¹⁵⁵ The panel also found that advertising pages were public fora which could not be subject to content-based restrictions.¹⁵⁶

The panel began its analysis by rejecting the lower court's reliance upon *Rendell-Baker* and *Sinn* in its assessment of whether the student editors' decisions constituted state action.¹⁵⁷ The panel reasoned that the district court incorrectly relied upon these cases because neither addressed the unique set of constitutional concerns that public high school publications raise.¹⁵⁸ The panel cited *Hazelwood* for the proposition that state action exists in the production of all high school publications, theatrical and other expressive activities where students and parents might reasonably perceive the production to bear the imprimatur of the school.¹⁵⁹ Using the state action analysis thus identified in *Hazelwood*, the panel determined that editorial decisions for both school publications constitute state action because neither publication escaped the reasonable perception that they bore the imprimatur of the school.¹⁶⁰

The panel then turned to the question of whether the advertising pages of the LHS publications constituted public fora.¹⁶¹ The panel first noted that it must confine its public forum analysis to the LHS publications' advertising sections because the access sought by the speaker defines the relevant forum.¹⁶² The panel determined that the advertising sections of both periodicals qualified as limited public fora because student editors opened advertising space to a segment of the

¹⁵⁴ See *id.* at 10, 19.

¹⁵⁵ See *Yeo*, 1997 WL 292173, at *18.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.* at *5.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

¹⁶⁰ See *Yeo*, 1997 WL 292173, at *6. The panel court was mistaken in their assumption that *Hazelwood* created a new test for state action. As correctly pointed out by the *en banc* court, state action was not at issue in the *Hazelwood* decision because the disputed editorial judgment was admittedly undertaken by a state actor. See *Yeo v. Town of Lexington*, 131 F.2d 241, 250 n.8 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 2060 (1998).

¹⁶¹ See *Yeo*, 1997 WL 292173, at *8.

¹⁶² See *id.*

public that included commercial businesses, non-profit organizations and members of the school community.¹⁶³ The panel reasoned that the publications violated Yeo's First Amendment rights by opening their advertising pages to this broad segment of the public but refusing to publish Yeo's advertisement, a decision which constituted discrimination against a controversial or objectionable viewpoint.¹⁶⁴ Thus, a panel of the United States Court of Appeals for the First Circuit held that the student editors' refusal constituted a state action and the advertising pages of the school publications constituted limited public fora.¹⁶⁵

C. *First Circuit Grants Rehearing En Banc and Affirms Decision of the District Court*

In December 1997, on rehearing *en banc*, the Court of Appeals for the First Circuit withdrew the panel opinion and affirmed the district court's decision on the ground that the students' refusal to publish Yeo's advertisements did not constitute state action.¹⁶⁶ First, the court observed that cases considering whether student decisions on school-sponsored publications in public high schools constitute state action provide little guidance because their facts remain distinguishable.¹⁶⁷ The court observed, however, that most circuits have addressed the state action question in the context of state-sponsored publications in public universities and found that student editors' decisions did not constitute state action.¹⁶⁸

The court analyzed whether the LHS students' editorial decision constituted state action by using three of the four tests articulated in *Rendell-Baker*.¹⁶⁹ The first test addressed whether school officials actually made or controlled the decision not to publish.¹⁷⁰ The court determined that the record did not support this conclusion.¹⁷¹ The sec-

¹⁶³ See *id.* at *10.

¹⁶⁴ See *id.* at *14. Indeed, in its March 1, 1994 letter to Yeo, the *Musket* explained that it recently had rejected Yeo's advertisement; however, "since that rejection we have been informed that LEXNET is . . . not a political organization. Therefore, it is entirely possible that there is nothing in our advertising policy that would preclude us from running your ad. However . . . it has come to our attention that a number of citizens both within and outside the high school find both your organization and the message you wish to place objectionable." *Id.* at *15.

¹⁶⁵ See *id.* at *18.

¹⁶⁶ See *Yeo*, 131 F.3d at 243.

¹⁶⁷ See *id.* at 250. The court observed, for instance, that in *Hazelwood*, state action was not at issue because the disputed actions were admittedly undertaken by public school officials, *i.e.*, the high school principal. See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See *id.* at 251.

¹⁷⁰ See *id.*

¹⁷¹ See *Yeo*, 131 F.3d at 251-52.

ond test addressed whether the state had a duty to intervene in the student actors' decisions, giving rise to a finding of state action in the absence of any affirmative action by agents of the state.¹⁷² Citing the Massachusetts statute regarding the editorial autonomy of high school publication editors, the court observed that the statute imposes no such duty.¹⁷³ Further, the court indicated that the First Amendment does not impose a duty on government to intervene in the affairs of the press where no state action otherwise exists.¹⁷⁴ The court, therefore, concluded that the school administrators had no duty to control the editorial judgments of student editors.¹⁷⁵

The third category of analysis addressed whether the student editors' conduct could be fairly attributable to the state by virtue of the nexus between state regulation and financial support of the publications and the decisions themselves.¹⁷⁶ The court relied on the reasoning in *Rendell-Baker* that establishes the principle that the receipt of public funds does not, by itself, transform the institution's actions into those of the state.¹⁷⁷ Instead, the Supreme Court in *Rendell-Baker* focused on the interplay between the provision of funds and the decision at issue.¹⁷⁸ The court, therefore, concluded that the student editors made their decision independent of their receipt of state funds.¹⁷⁹

The court observed, however, that the issue of state action turns on context and that it must consider all factors which could contribute to the nexus between state support and the student editors' decision.¹⁸⁰ The court noted that the publications bore the name of the school, served as a means of communication for the LHS community and provided educational value.¹⁸¹ The court also conceded that the faculty

¹⁷² See *id.* at 251.

¹⁷³ See *id.* at 252-53; see also MASS. GEN. LAWS ch. 71, § 82 (1974). The statute reads, in pertinent part, "The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder in the school. Freedom of expression shall include without limitation, the rights and responsibilities of students, collectively and individually, (a) to express their views through speech and symbols, (b) to write, publish and disseminate their views, (c) to assemble peaceably on school property for the purpose of expressing their opinions." MASS. GEN. LAWS ch. 71, § 82.

¹⁷⁴ See *Yeo*, 131 F.3d at 253. To support this argument, the court cited *Columbia Broadcasting System v. Democratic National Committee*, in which the Supreme Court held that the decisions of broadcasters not to accept any editorial advertising were not government action for the purposes of the First Amendment, although the government licensed and regulated the broadcasters. See 412 U.S. 94, 119 (1973).

¹⁷⁵ See *Yeo*, 131 F.3d at 253.

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ See *id.* at 254.

¹⁷⁹ See *id.*

¹⁸⁰ See *Yeo*, 131 F.3d at 254.

¹⁸¹ See *id.*

advisors may have subtly influenced student editors.¹⁸² The court acknowledged that all of these factors supported Yeo's argument that the student editors' decision constituted state action.¹⁸³ The court observed, however, that student editors maintained a history of editorial autonomy from school officials and even had an adversarial relationship with them.¹⁸⁴ The court reasoned that the student editors relied on the state for resources but maintained intellectual autonomy.¹⁸⁵ Thus, the court held that the students' refusal to publish the LEXNET advertisements did not violate Yeo's First Amendment rights because the student editors' refusal did not constitute state action.¹⁸⁶

III. EDUCATIONAL IDEOLOGY AND ITS RELATION TO THE ISSUES RAISED IN *YEO V. TOWN OF LEXINGTON*

During the past seventy-five years, the judiciary has defined the rights of various members of the public school community. As demonstrated by the cases in the preceding section, and by the *Yeo* case itself, there is considerable controversy regarding the contours of the rights of students, parents and administrators in the school environment. In no other instance are these issues more complex than in disputes over students' freedom of expression in the public schools. Students' interests in freedom of expression must be balanced against educators' rights to ensure that the teachers' messages are not lost in the din of competing voices in the classroom.¹⁸⁷ This balance is artfully dramatized by the *Hazelwood* opinion: while public school students do not "shed their rights at the schoolhouse gate," these rights "are not automatically coextensive with the rights of adults in other settings" and must be "applied in light of the special characteristics of the school environment."¹⁸⁸

¹⁸² See *id.*

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See *Yeo*, 131 F.3d at 254.

¹⁸⁶ See *id.* at 255.

¹⁸⁷ The First Amendment interests of the students in this analysis are complex. See Bruce C. Hafen, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 686. The students' rights include, of course, a freedom of self-expression. The students' rights, however, also include a right to have their capacity for communication developed in their public school. See *id.* Professor Hafen argues that schools are "first amendment institutions" that can "advance and protect the values of the first amendment" only if the teachers have the authority to silence students whose expression conflicts with the educational purpose of the school. See *id.* According to Hafen, "until children have developed this freedom for expression, their freedom from restraints on expression has only limited value." *Id.* at 700.

¹⁸⁸ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

As the Court determines where students' speech rights end and the educators' right to regulate the speech of their students begins, it articulates a vision of what the American public school ought to be. Beginning in the 1920s and perhaps culminating with its *Tinker* decision, the Court articulated a "progressive" educational model that emphasized student participation in the educational process and was intended to develop students' independent thought processes.¹⁸⁹ In the last twenty years, however, the Court has shifted from the progressive model and issued decisions that emphasize the role of schools as transmitters of cultural values.¹⁹⁰ The latter theory of education, now dominant in Supreme Court jurisprudence, permits teachers and administrators to assert substantial control over the content of student speech in classroom and school-sponsored activities.¹⁹¹

The Supreme Court's adoption of the "values inculcation" pedagogical model has significant consequences for determining the permissible parameters of conduct for students and teachers in classrooms across the United States. Today's students have less freedom to express themselves in school-sponsored events and fora than their counterparts did thirty years ago. Faculty and administrators have ample liberty to regulate student expression that is channeled through school-sponsored activities such as plays, newspapers and other publications. Moreover, the Court's adoption of the values inculcation theory has consequences for the application of the state action and public forum doctrines in the case of *Yeo*. First, the question of whether the LHS students' editorial decisions constituted state action may be affected by a legal regime that anticipates significant control by educators over the content of student expression in school-sponsored publications.¹⁹² Second, the issue of whether the *Musket* and yearbook constituted public fora is similarly affected by the values inculcation ideology.¹⁹³ Because

¹⁸⁹ See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (holding that students cannot be compelled to salute flag) ("That [schools are] educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."); *Pierce v. Society of the Sisters*, 268 U.S. 510, 535 (1925) (declining to uphold statute requiring attendance at public schools) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public school teachers only. The child is not the mere creature of the state."); see also *infra* notes 194-202. But see *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) ("Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment.").

¹⁹⁰ See *infra* text accompanying notes 203-13.

¹⁹¹ See *infra* text accompanying notes 203-13.

¹⁹² See *infra* text accompanying notes 252-90.

¹⁹³ See *infra* text accompanying notes 291-307.

educators are presumed to wield considerable discretion in regulating the speech content of school publications under *Hazelwood*, it is difficult to conceive of student newspapers as public fora in which the public would have a virtually unlimited right to access.

A. *Two Educational Models Which Influence Supreme Court Holdings in Free Speech Cases Involving Public School Students*

1. Progressivism

The progressive educational model builds upon the works of John Dewey and asserts that the primary goal of education is to develop students' thought processes.¹⁹⁴ Advocates of this theory opine that the educational environment should emphasize students' active roles in learning and thinking, processes that are ideally stimulated by intellectual conflict.¹⁹⁵ Because this school of thought views education as a participatory process with a maximum level of interaction designed to develop students' thought processes, it values independent student expression and thought.¹⁹⁶ Conversely, the role of the teacher is limited to that of facilitator rather than disciplinarian; the undue exercise of authority by any school official is met with distrust in this framework.¹⁹⁷

Although it is reflected in Supreme Court decisions dating back to the 1920s,¹⁹⁸ the *Tinker* decision likely represents the high-water mark of the progressivist educational ideology in the Supreme Court's jurisprudence.¹⁹⁹ In support of students' rights to free expression, the Court prohibits any regulation of student speech that does not materially or substantially interfere with the activities, operations or requirements of appropriate discipline of the school.²⁰⁰ "In our system," writes Justice Fortas, "state-operated schools may not be enclaves of totalitarianism . . . students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."²⁰¹ The Court here

¹⁹⁴ See, e.g., Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Incultation in the Public Schools*, 70 NOTRE DAME L. REV. 769, 771-72 (1995).

¹⁹⁵ See William B. Senhauser, Note, *Education and the Court: The Supreme Court's Educational Ideology*, 40 VAND. L. REV. 939, 947 (1987).

¹⁹⁶ See *id.* at 948.

¹⁹⁷ See Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 680 (1987).

¹⁹⁸ See *Pierce*, 268 U.S. at 535.

¹⁹⁹ See *Tinker v. Des Moines Community Sch. Dist.*, 393 U.S. 503, 511 (1969).

²⁰⁰ See *id.* at 512-13.

²⁰¹ *Id.* at 511.

affirms a pedagogical ideology that favors student expression as a means of developing students' intellectual capacities.²⁰² In limiting teachers' ability to control student speech, this ideology also gives voice to progressivism's anti-authoritarian doctrine.

2. Values Inculcation

The second and more conservative pedagogical method strives to instill students with specific knowledge, skills, morals and social rules.²⁰³ Values inculcationists view education as the process of encouraging the internalization of societal norms—with particular emphasis on the child's need to learn societal discipline—rather than encouraging individual growth.²⁰⁴ This theory of public school education has its roots in the origin of the common school movement more than 100 years ago.²⁰⁵ The father of the common school movement in Massachusetts, Horace Mann, believed that universal education would preserve our nation's democratic institutions and political community by training students in morality, discipline, patriotism and cultural assimilation.²⁰⁶ One commentator has remarked that the public schools originally received their authority to inculcate virtues in their students because schools were seen as an extension of the family.²⁰⁷ As recipients of delegated parental authority, schools developed students' personal autonomy through their public citizenship.²⁰⁸

Although the values inculcation school found a voice in the Court's decisions as early as *Brown v. Board of Education*, it did not gain preeminence among theories of the public school until the Supreme Court's ruling in *Fraser*, handed down almost twenty years after *Tinker*.²⁰⁹ In *Fraser*, Chief Justice Burger observed that the purpose of the public school system is to "inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."²¹⁰ Moreover, the Court reintroduced the notion of *in loco parentis*, a doctrine that was largely absent from Supreme Court jurisprudence in the post-*Tinker* era.²¹¹ Thus, the Supreme Court conceived

²⁰² See *id.*

²⁰³ See, e.g., Senhauser, *supra* note 195, at 943.

²⁰⁴ See *id.* at 944.

²⁰⁵ See Hafen, *supra* note 197, at 675.

²⁰⁶ See *id.*

²⁰⁷ See *id.* at 671.

²⁰⁸ See *id.*

²⁰⁹ See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986).

²¹⁰ *Id.*

²¹¹ See *id.* at 684; see also Hafen, *supra* note 197, at 721–22.

the role of the public school as one which draws its authority from parental delegation and thereby retains the responsibility for educating its students in the shared values of the social community both inside and outside the classroom.²¹² Accordingly, Chief Justice Burger wrote, "schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers . . . demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, *like parents*, they are role models."²¹³

B. *Values Inculcation as the Dominant Paradigm in Evaluating Student Speech Interests*

1. Social Science Research Justifies Application of Values Inculcation to Public Schools

Even though there can be no clear resolution to the debate over which of the two dominant pedagogical methods is superior, many commentators have recently written in support of the values inculcation method.²¹⁴ Social scientific research supports this theory by demonstrating that children, even those of high school age, require guidance in order to function in school because they lack adequately developed cognitive processes for fully rational thought.²¹⁵ Therefore, sound moral instruction must be provided in the school and in the home.²¹⁶ Jean Piaget, a leading authority on the intellectual development of children, has demonstrated that children experience significant mental barriers that inhibit fully rational thought.²¹⁷ Preteen children, for instance, have a limited attention span and experience difficulty in comprehending more than one thing at a time.²¹⁸ Although the majority of Piaget's research is devoted to the study of children younger than twelve years, Piaget noted that pre-adult intellectual characteristics often begin to diminish around the age of twelve.²¹⁹ Piaget also suggested that individuals of average intellect do not reach fully mature thought processes until they are between fifteen

²¹² See Hafen, *supra* note 197, at 721-22.

²¹³ *Fraser*, 478 U.S. at 683 (*italics added*).

²¹⁴ See, e.g., Bitensky, *supra* note 194, at 771; Hafen, *supra* note 197, at 670.

²¹⁵ See Bitensky, *supra* note 194, at 781, 782.

²¹⁶ See *id.* at 790.

²¹⁷ See, e.g., JEAN PIAGET, JUDGMENT AND REASONING IN THE CHILD (Marjorie Warden trans., Littlefield, Adams & Co. 1976); JEAN PIAGET, THE CHILD'S CONCEPTION OF THE WORLD (Joan Tomlinson & Andrew Tomlinson trans., Littlefield, Adams & Co. 1979).

²¹⁸ See Bitensky, *supra* note 194, at 783.

²¹⁹ See *id.* at 784.

and twenty years old.²²⁰ Further, adolescents may be subject to mental processes such as a propensity to become consumed with philosophical ideas and a unique vulnerability to sexual anxieties and urges.²²¹ It is unlikely that a younger person, hindered by such intellectual and emotional baggage, would learn to make sound behavioral and moral choices without firm instruction at home and in the schools.

During the 1970s and 1980s, American public schools were required to permit a wide range of student speech that was inconsistent with the values and lessons that the schools were attempting to teach.²²² One scholar has argued that American public schools have suffered in quality at least in part due to the progressive educational reforms ushered in by the Warren Court in *Tinker*.²²³ Indeed, studies document a strong correlation between the introduction of progressivist educational reforms in public schools and a steep decline in the academic performance of public school students.²²⁴ One study conducted by the National Commission on Excellence in Education correlated the progressivist innovations in education with a steady decline in SAT scores between 1963 and 1980.²²⁵ Another study demonstrated that students in private schools—which remain exempt from the restrictions on school regulations governing student speech under *Tinker*—perform better on standardized tests by approximately two grade levels than their counterparts in public schools.²²⁶ The authors of this 1982 study determined that half of the variance between test scores was attributable to the effects of rigorous discipline and academic policies in private schools.²²⁷ The other half of the variance between test scores could be attributed to students' demographic and socioeconomic background characteristics.²²⁸ To summarize these findings, it appears that schools which are not hindered by the court-ordered legal "tinkering" of progressivism accomplish their educational mission more successfully.

²²⁰ See *id.* at 785.

²²¹ See *id.* at 786.

²²² See Hafetz, *supra* note 197, at 684.

²²³ See *id.*

²²⁴ See *id.*

²²⁵ See *id.* (quoting THE NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 5 (1983)).

²²⁶ See *id.* at 686 (quoting J. COLEMAN, T. HOFFER, S. KILGORE, HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED 188 (1982)).

²²⁷ See Hafetz, *supra* note 197, at 686.

²²⁸ See *id.*

2. *Hazelwood* Provides Rationale for Application of Values Inculcation Model to Public High Schools

The Supreme Court's decision in *Hazelwood* is probably the most significant free speech case in the public schools since *Tinker*. In fact, *Hazelwood* limited the reach of *Tinker* by creating a realm of student endeavor to which the latter decision no longer applies. In the course of the opinion, the *Hazelwood* Court identified two fundamental educational interests that justify the limitation on student speech within school-sponsored activities.²²⁹

First, *Hazelwood* reasoned that the school should retain authority over the content of school-sponsored activities to teach students whatever lessons they were designed to teach.²³⁰ In the case of student publications like the newspaper or yearbook, the activities would be designed to teach journalistic skills, editorial responsibility and production management.²³¹ Further, the Supreme Court has written elsewhere that protection of editorial freedom is central to our concept of First Amendment guarantees of a free press.²³² Thus, the "skills" being taught in this particular school-sponsored activity are fundamental to the full exercise of the right of freedom of the press and to the successful functioning of our democratic process.²³³

Second, the Court gave school officials the authority to restrict student speech in school-sponsored publications to regulate the values-content of the publications.²³⁴ Specifically, schools are now permitted to monitor the content of student publications (1) to ensure that readers are not exposed to material that is inappropriate to their age level and (2) to distance the educational institutions from writers' views that may otherwise be erroneously attributed to the school.²³⁵ The

²²⁹ See *Hazelwood*, 484 U.S. at 271.

²³⁰ See *id.*

²³¹ A student newspaper could also be conceived of as a vehicle with which a school could teach grammar and proper writing style to its students. See William Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505, 519 (1989). Buss analogizes the newspaper's role as pedagogical tool to that of a science textbook used to teach students facts or techniques or a writing manual used to teach students writing style. See *id.*

²³² See *The Miami Herald Publ'g Co. v. Tornillo*, 481 U.S. 241, 258 (1974) ("A newspaper is more than a passive receptacle for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on size and content of the paper, and treatment of public issues and public officials . . . constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.").

²³³ See *id.*

²³⁴ See *Hazelwood*, 484 U.S. at 271.

²³⁵ See *id.*

Court thus gives schools wide latitude to dissociate themselves from material that does not meet their standards, either because of poor grammar or writing style or because it promotes irresponsible values which are inconsistent with those of a civilized society.²³⁶ By granting this latitude, the Court permits schools to act as role models to school communities as a means of instruction in values and decorum.²³⁷

The Court in *Hazelwood* held that schools can promote core First Amendment values by actively directing educational processes and managing the content of student speech within curricular activities.²³⁸ This returns more control to teachers and administrators. Of course, *Hazelwood* does not direct schools to run their curricular activities—including student newspapers—in any particular way or in accordance with any given educational methodology.²³⁹ Indeed, schools ought to provide some curricular activities with diminished supervision, thereby encouraging student leadership and promoting independent thought.²⁴⁰ Student publications, along with student government, might provide appropriate fora in which leadership skills may be taught. Decisions to grant students this freedom, however, should be the *affirmative choice* of individual schools based upon pedagogical theory, instead of legislative or court-ordered mandates to stay out of students' way.²⁴¹ *Hazelwood* confers upon schools this option along with the responsibility for overseeing and implementing their pedagogical decisions.

IV. YEO V. TOWN OF LEXINGTON RECONSIDERED IN LIGHT OF PEDAGOGICAL THEORY

In holding that an outside advertiser does not have constitutionally-mandated access to the pages of a student newspaper, the First

²³⁶ See *id.* at 271, 272.

²³⁷ See *Fraser*, 478 U.S. at 683.

²³⁸ See Bruce C. Hafen, *Schools as Intellectual and Moral Associations*, 1993 BYU L. Rev. 605, 615.

²³⁹ See *id.* at 615–16.

²⁴⁰ See *id.*

²⁴¹ Legislatures in four states have adopted anti-*Hazelwood* statutes that codify the *Tinker* standard prohibiting schools from enforcing regulations that restrict student speech except where it threatens a "material or substantial disruption of school activity." These states are California, Massachusetts, Iowa and Kansas. Thirteen additional states have considered, but rejected, similar statutes. See Bruce Hafen & Jonathan Hafen, *The Hazelwood Progeny: Autonomy and Student Expression in the 1990s*, 69 ST JOHN'S L. REV. 379, 406 n.149–51 (1995). The Massachusetts statute, MASS. GEN. LAWS ch. 71, §82, was adopted in 1974, and originally applied only to those cities and towns which chose to accept it. In 1988, the statute became mandatory throughout the state as amended, MASS. GEN. LAWS ch. 7, § 86 (1988). See *Pyle v. South Hadley School Committee*, 55 F.3d 20, 21 (1st Cir. 1995).

Circuit undoubtedly reached the correct result.²⁴² In its *en banc* decision, however, the First Circuit's reasoning in *Yeo* remains incomplete.²⁴³ The court should have found that the decision of LHS student editors to refuse publication of petitioner Yeo's advertisement constituted state action.²⁴⁴ Further, the panel should have found that the LHS *Musket* and yearbook were not traditional public fora, but instead constituted non-public fora to which the editors were not required to grant outsider access.²⁴⁵ On this basis, the court could find that the students' decision did not qualify as a violation of Yeo's constitutional rights. Moreover, as this Note will argue below, this reasoning would place the panel's decision in harmony with the educational theory currently favored in Supreme Court jurisprudence.

The *Yeo en banc* decision did not take into account the special characteristics of the public high school environment.²⁴⁶ This is evident from an examination of the precedent upon which the court relied.²⁴⁷ Indeed, the court specifically distinguished the leading cases arising in a high school environment as unrelated to its analysis of state action.²⁴⁸ Rather, the court relied on cases involving editors at university and commercial presses and thus equated the actions of high school student editors with those of university and commercial newspaper editors.²⁴⁹ The court's reasoning, therefore, ignores the age of these student "actors" and their relatively limited capacities as adolescents for reasoned moral judgment.²⁵⁰ Further, the court's reasoning overlooks the role of faculty advisors' suggestions and advice in light of values inculcation pedagogy.²⁵¹ In sum, this decision ignores the simple reality of the student editors' educational setting.

²⁴² See, e.g., Coyle, *supra* note 61, at 783-84; Janet E. Stone & Cynthia L. Zedalis, Comment, *Student Editorial Discretion, the First Amendment, and Public Access to the Campus Press*, 16 U.C. DAVIS L. REV. 1089, 1116 (1983).

²⁴³ See *Yeo v. Town of Lexington*, 131 F.3d 241, 243 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2060 (1998).

²⁴⁴ See *id.* at 255.

²⁴⁵ See *id.*

²⁴⁶ See *id.* at 250.

²⁴⁷ See *id.*

²⁴⁸ See *Yeo*, 131 F.3d at 250.

²⁴⁹ See *supra* text accompanying notes 166-86.

²⁵⁰ See *supra* text accompanying notes 166-86.

²⁵¹ See *supra* text accompanying notes 166-86.

A. Yeo's *State Action Analysis Reconsidered in Light of Values Inculcation Pedagogy*

On a common sense level, one can immediately perceive differences between the student and commercial presses that complicate the *en banc* court's analysis of state action in *Yeo*.²⁵² Evidence that the *en banc* court's analysis ignores these differences may be derived from the analogies it employs to analyze the relationship between the *Musket* editors' decision and LHS faculty.²⁵³ To support the claim that the school had no duty to control the content of student editors' judgments, for instance, the court compared the regulatory relationship between the LHS administration and editors of the *Musket* to the relationship of regulation that exists between the Federal Communications Commission and the Columbia Broadcasting Network.²⁵⁴ Further, the court compared the "adversarial" relationship that supposedly existed between the LHS administration and editors of the *Musket* to the adversarial relationship that exists between public defenders and the state.²⁵⁵ Both decisions represent good law in the area of state action but cannot withstand comparison to the litigants in *Yeo*, primarily because the "actors" in this analysis are high school juniors and seniors, not adults.

²⁵² See *supra* text accompanying notes 166–86.

²⁵³ See *Yeo*, 131 F.3d at 253, 254.

²⁵⁴ See *id.* at 253 (citing *Columbia Broad. Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 119 (1973)). In *CBS*, a plurality of the Supreme Court held that the actions of CBS in refusing the editorial advertisements of the DNC could not be attributed to the government, despite heavy regulation by the Federal Communications Commission. See *CBS*, 412 U.S. at 119. Although the legal principle applies to the analysis of state action in *Yeo*, few similarities exist between the relationship of the FCC to the Columbia Broadcasting Network and the relationship of the LHS faculty and administration to the student editors of the *Musket*. See *id.* The nature of the "regulation" in the latter instance is, of course, *educational*: intended to instruct journalism students in the nuances of journalistic style and ethics.

²⁵⁵ See *Yeo*, 131 F.3d at 254 (citing *Polk County v. Dodson*, 454 U.S. 312, 324–25 (1981)). In *Dodson*, the actions of a public defender representing a defendant in a criminal proceeding were not attributable to the state—even though the office was staffed by public employees—because the office's relationship to the state is necessarily independent and adversarial. See *Dodson*, 454 U.S. at 324–25. The court compared this relationship between actors and the state to that which existed in *Yeo*. See *Yeo*, 131 F.3d at 254. The court reasoned that the students exercised similarly independent judgment and that it maintained a similarly adversarial relationship to the school administration in making editorial decisions with which the latter party disagreed. See *id.*

The comparison cannot withstand serious scrutiny. With respect to the independence of the public defender from the influence of the state, both the canons of professional responsibility and the constitutional obligation of the state to respect the professional independence of the public defenders whom it employs mandate the independent judgment of these state employees. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B) (1976) ("A lawyer shall not permit a person who employs him to render legal services to direct his professional judgment in

Social scientists have demonstrated in empirical research that persons under the age of eighteen do not have fully developed emotional and intellectual capabilities equivalent to those of adults.²⁵⁶ For several decades, state legislatures have recognized this fact by enacting laws that withhold certain rights and privileges from citizens who are younger than eighteen.²⁵⁷ With its decision in *Hazelwood*, the United States Supreme Court applied this learning to the controlled environment of the high school journalism curriculum, recognizing that high school teachers should be given the authority to teach their students about grammar, journalism, values and civility in a reasonable manner.²⁵⁸ Despite this data to the contrary, the First Circuit treated the LHS student journalists like adult journalists. In failing to recognize how the arm of the state is implicated in decisions made by student journalists, the court's finding avoids the reality of the student journalists' age and educational setting.

rendering such services."); see also *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (establishing that state criminal defendants have right to counsel at proceedings against them and that counsel will be free from state control). As to their adversarial function, there exists a strong public interest in the quest for truth and fairness that our system assumes can only be achieved by opposing the state.

The student editors of the *Musket* certainly exercised independent judgment in making the decision giving rise to litigation, but such independence is not intrinsic to their role—let alone a duty incumbent upon student editors—as it may be for editors of the commercial press. Furthermore, the "adversarial" relationship which supposedly characterized the occasional differences of opinion between LHS faculty and student editors cannot be seriously analogized to the duty of public defenders to zealously represent their clients against the state.

²⁵⁶ See *supra* text accompanying notes 214–28.

²⁵⁷ See, e.g., *Mazart v. State*, 441 N.Y.S.2d 600, 607 (N.Y. Ct. Cl. 1981). In *Mazart*, the court held that a university was not negligent for failing to provide libel guidelines to student editors because, as adults, it was not foreseeable that they would not comprehend the normal procedures for information gathering and dissemination. See *id.* Because college students are at least eighteen years old, the editors' failure to adhere to standards followed by reasonable persons was not reasonably foreseeable. See *id.*

This holding suggests that—in the state court system of New York—high school officials who do not provide guidance on common-sense journalistic efforts, such as information gathering and dissemination, to its student editors, may be held liable for instances of libel. According to the *Mazart* court, high school officials have a duty to guide the decisions made by student editors because the officials could reasonably foresee that pre-adult students may not adhere to standards of journalistic ethics which are common knowledge and followed by reasonable persons. See *id.* Thus, *Mazart* indicates that New York high school journalism teachers have a legal duty to guide their pupils in the basic standards of their craft. See *id.*

²⁵⁸ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

1. Receipt of Government Funding and Significant State Encouragement

The rise of values inculcation pedagogy in public education jurisprudence affects the analysis of whether a decision made by student editors of a school-sponsored publication constitutes state action. Within the values inculcation framework, as interpreted by *Fraser* and *Hazelwood*, school authorities receive considerable autonomy to regulate the content of student speech in school-sponsored curricular events.²⁵⁹ This heightened level of permissible supervision by instructors suggests that student editors are not—nor should they be—completely autonomous actors in the context of curricular activities.²⁶⁰ Where educators' involvement with the editorial process of school publications increases, so too does the responsibility of these state actors for the actions of their pupils. A sufficient nexus is thus created to attribute the students' actions to the state as a result of faculty influence upon student editors' decisions, in combination with other factors such as public financing, the use of school facilities for production and the bearing of the school's imprimatur.²⁶¹

It becomes important to remember, however, that *Hazelwood* authorizes educators to exercise additional supervisory control only in the context of school-sponsored, curricular activities.²⁶² By contrast, student expression that merely happens to occur on campus, but not within a curricular activity, remains protected from interference of school authorities by the *Tinker* standard and should be considered autonomous student expression.²⁶³ Similarly, decisions of student editors that occur in a privately-subsidized, underground newspaper that does not bear the school's imprimatur could not be attributable to the state.²⁶⁴

As indicated by the Supreme Court in *Rendell-Baker*, the receipt of government funding alone cannot give rise to a finding of state action.²⁶⁵ When the funding, however, is combined with coercive power or significant encouragement, state action may be implied.²⁶⁶ A survey

²⁵⁹ See *supra* text accompanying notes 203–13.

²⁶⁰ See *supra* text accompanying notes 203–13.

²⁶¹ See Plaintiff's/Appellant's *En Banc* Appeals Court Brief at 8, *Yeo* (No. 96-1623) [hereinafter "*En Banc* Brief of Plaintiff"].

²⁶² See *supra* text accompanying notes 101–15.

²⁶³ See J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L.J. 706, 726.

²⁶⁴ See *id.*

²⁶⁵ See 457 U.S. 830, 840 (1982).

²⁶⁶ See *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

of the relevant factors in the *Yeo* case leads ineluctably to the conclusion that a sufficient nexus existed between student editors and state agents to attribute the students' decision to the state.²⁶⁷ For instance, students performed their duties for the periodical on school grounds and during school hours.²⁶⁸ Further, the publication identifies itself as the newspaper of the public high school in its interactions and communications with the students and community.²⁶⁹

As stated by the *en banc* court, the factors listed above present "a close question" whether the students' actions could be fairly attributed to the state.²⁷⁰ The decisive factor for the *en banc* court was the "context" of the students' relationship with faculty and administration in which these factors were situated.²⁷¹ That decision characterized the students' relations with school officials as "close to adversarial," and the court concluded on this basis that it could only characterize the students' decision as independent of, and therefore not fairly attributable to, the state.²⁷² As discussed above, the finding of an adversarial relationship is specious and thus immaterial to the nexus analysis.²⁷³ Indeed, it can hardly be said that students in a school-sponsored activity maintain the same adversarial relationship with their teachers as do public defenders with the state government.²⁷⁴ Moreover, if a school publication was truly independent and maintained an adversarial relation to school officials, then it could not serve the pedagogical interests of the school vis-à-vis the students and community.²⁷⁵

Instead, these factors ought to be considered within the context of the values inculcation pedagogy and its enhanced view of teachers' roles in school-sponsored activities.²⁷⁶ Under the values inculcation regime ushered in by *Hazelwood*, the influence of faculty advisors in producing student periodicals assumes a very different posture than the one described by the *en banc* court.²⁷⁷ In this framework, school officials wield the authority to alter school-sponsored publications that do not meet its standards because these publications are "ungrammatical, poorly written, inadequately researched, biased or prejudiced,

²⁶⁷ See *En Banc* Brief of Plaintiff at 8.

²⁶⁸ See *Yeo*, 131 F.3d at 254.

²⁶⁹ See *id.*

²⁷⁰ See *id.*

²⁷¹ See *id.*

²⁷² See *id.*

²⁷³ See *supra* notes 254, 255 and accompanying text.

²⁷⁴ See *En Banc* Brief of Plaintiff at 11.

²⁷⁵ See *id.*

²⁷⁶ See *supra* text accompanying notes 205-13.

²⁷⁷ See 484 U.S. at 272.

vulgar or profane, or unsuitable for immature audiences."²⁷⁸ After this decision, therefore, faculty advising always contains the *potential* for ultimate censorship. In this context, the suggestive language of faculty advisors assumes significant influence over the final decisions of student editors. Even where school agents could have acted to alter the final product but did not, their complicity in the final product cannot be ignored: faculty members almost always maintain the power to alter the final product. In other words, school officials' *power* to control the content of school publications carries with it the *responsibility* for the end product.

2. Symbiotic Relationship Between the School and the Publication

Under *Burton*, a symbiotic relationship between LHS and its official publications—the yearbook and *Musket*—gives rise to a finding of state action if the school and its publications mutually benefit one another.²⁷⁹ That these publications prosper from their affiliation with LHS is clear; indeed, they would cease to exist but for the resources and support provided by LHS officials. LHS, moreover, receives tangible benefits from its association with the yearbook and *Musket*. LHS, which has its name on the masthead of the *Musket*, benefits generally from the positive publicity generated by a school newspaper that has won awards for journalistic excellence.²⁸⁰ The *Musket* also serves as a channel of communication for the faculty and administration with members of the LHS community regarding events, activities and academic pursuits of the student body.²⁸¹ In addition, it informs readers about the diverse pursuits of faculty and administrators.²⁸²

Moreover, LHS officials benefit from its association with both publications because they serve as vehicles which further the school's educational mission. By allowing students to write and produce school publications, LHS imparts lessons to journalism students regarding journalistic standards, ethics and management.²⁸³ In addition, the publications may provide a means for the school to teach its student readers about grammar and writing style.²⁸⁴ *Hazelwood* explicitly gives school officials the authority to police school-sponsored publications

²⁷⁸ See *id.* at 271.

²⁷⁹ See *supra* text accompanying notes 33–40.

²⁸⁰ See *En Banc* Brief of Plaintiff at 11.

²⁸¹ See *id.*

²⁸² See *id.*

²⁸³ See Buss, *supra* note 231, at 519.

²⁸⁴ See *id.*

for speech that is ungrammatical, poorly written, inadequately researched, vulgar and prejudiced, and to refuse to publish such material under its auspices.²⁸⁵ Schools that take advantage of this authority use its publications like a grammar textbook, teaching student readers by example about the elements of writing, editing and journalistic style.²⁸⁶

Finally, *Fraser* permits schools to refuse to sponsor student speech which promotes values or conduct that is inconsistent with the shared values of a civilized social order.²⁸⁷ Thus, schools may also use student-edited publications to introduce its student readers to cultural values and to help them contribute to their environment.²⁸⁸ In other words, under the values inculcation pedagogy endorsed by the Supreme Court, LHS retains authority over the content of school-sponsored student speech to impart significant educational lessons regarding values, just as it uses a traditional classroom exercise or textbook to teach lessons in science and history. Moreover, the relationship between LHS and its student publications confers upon each a variety of incidental benefits.²⁸⁹ Under *Burton*, therefore, the student editors' decision cannot be construed as purely private because LHS has so far insinuated itself into a position of interdependence with the *Musket* and yearbook that the state must be recognized as a joint participant in the challenged activity.²⁹⁰

B. Public Forum Analysis

Because the *Yeo* court sitting *en banc* did not find state action, it settled the dispute before reaching the question of whether the LHS student publications qualified as public fora.²⁹¹ Where the court finds state action, by contrast, it must determine whether the student publications constitute public fora to ascertain whether plaintiff *Yeo* has a constitutional right to advertise in the *Musket* and yearbook. The panel decision determined that both LHS publications were limited public fora and therefore decided that the exclusion of LEXNET's advertisements violated *Yeo*'s freedom of expression.²⁹² This decision was incorrect. The court should have found that the advertising spaces of the

²⁸⁵ See *Hazelwood*, 484 U.S. at 271.

²⁸⁶ See Buss, *supra* note 231, at 519.

²⁸⁷ See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986).

²⁸⁸ See *Hazelwood*, 484 U.S. at 272.

²⁸⁹ See *En Banc* Brief of Plaintiff at 11.

²⁹⁰ See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961).

²⁹¹ See *Yeo v. Town of Lexington*, No. 96-1623, 1997 WL 292173, at *16, *30 (1st Cir. 1997).

²⁹² See *Yeo*, 1997 WL 292173, at *16.

LHS publications were non-public fora, based upon the policy and practice of the editorial board regarding the acceptance and publication of advertisements. As non-public fora, LHS educators and student editors could lawfully refuse to open its pages to advertisers.

The Supreme Court's public forum analysis requires that the LHS publications be classified as one of the three categories identified in *Perry*: non-public fora, limited public fora or traditional public fora.²⁹³ Under *Perry*, government bodies create designated public fora when they open its property for indiscriminate use by the public; the government engenders limited public fora by limiting its property's use to certain classes of speakers.²⁹⁴ A public forum is not created unless the state actor evinces, by policy or by practice, a specific intention to open its pages to use by the public for the purposes of speech.²⁹⁵ Thus, the central issue under the public forum analysis in determining whether, and which, forum has been created is the intention of the student editors, as stated in advertisement policies or as manifested in their practice of accepting advertisements.²⁹⁶

In this case, the LHS *Musket* and yearbook did not maintain advertising policies which demonstrated the requisite intent to open their advertising pages to the general public to qualify as limited or designated public fora.²⁹⁷ Both periodicals maintained unwritten policies against the acceptance of political advertisements.²⁹⁸ Moreover, after the litigation began in 1994, both publications reduced their policies to writing.²⁹⁹

The record is also clear that the school did not evince, through its advertising practices, an intention to provide a general advertising space to the public.³⁰⁰ Although it is true that some advertising was accepted, no evidence exists that either of the publications ever accepted the type of political or advocacy advertisements submitted by Yeo.³⁰¹ Student editors only published advertisements that catered to

²⁹³ See *supra* notes 61-82 and accompanying text.

²⁹⁴ See *supra* notes 61-82 and accompanying text.

²⁹⁵ See *supra* notes 61-82 and accompanying text.

²⁹⁶ See *supra* notes 61-82 and accompanying text.

²⁹⁷ See *Hazelwood*, 484 U.S. at 267.

²⁹⁸ See *Yeo*, 131 F.3d at 243-44. Although the policies against accepting political and advocacy advertising were unwritten, the maintenance of even an unwritten policy is sufficient to demonstrate an intention not to turn their publications' advertising pages into a public forum. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 n.7 (1983).

²⁹⁹ See *Yeo*, 131 F.3d at 248.

³⁰⁰ See *Amicus Curiae* Brief on Rehearing *En Banc* in Support of Defendants/Appellees at 13, *Yeo* (No. 96-1623) [hereinafter "*Amicus Brief*"].

³⁰¹ See *id.* at 13; see also *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (public transit system

student tastes, including video, book and record stores, as well as test preparation services and a deli.³⁰² Moreover, the publications uniformly enforced their policies against acceptance of political advertisements on all viewpoints, including an advertisement promoting the opposite viewpoint from Yeo's.³⁰³

Policy considerations also support a finding that the advertising pages of student publications do not constitute public fora. Indeed, such a finding is also consistent with the values inculcation pedagogical model now predominant in the Supreme Court. If a court requires school-sponsored student publications that publish advertisements to publish all submitted political advertisements, school officials will be left with only two options. One option would be to terminate the advertising sections, forego the money raised through this section and prevent some journalism students from learning the role of business manager, which is a key part of any commercial publication.

School officials' second option would be to broadcast the opinions of outsiders in school-sponsored publications, regardless of the advertisements' age-appropriateness or particular message. One wonders whether advertisements extolling the virtues of Naziism or chemical warfare would be afforded similar protection and win the right of access in high school publications over the objections of editors and school officials.³⁰⁴ Although newspaper editors and school officials may not agree with the opinions published in its advertising pages, this fact may not appear clear to readers. Publication of a disclaimer may remedy this confusion, but it may not be sufficient to overcome the presumption that opinions published in publications bearing the imprimatur of the school represent the opinions of its editors or publisher.³⁰⁵ This confusion certainly poses the potential for embarrassing those responsible for publication of political views with which they do not agree. More significantly, however, school officials and older students (such as newspaper editors) act as role models, demonstrating the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.³⁰⁶ These role models, acting *in loco parentis*, could not fulfill their roles if required to sponsor

displayed advertising but could constitutionally refuse to display all political and public issue advertising).

³⁰² See Yeo, 1997 WL 292173, at *31.

³⁰³ See *Amicus* Brief at 13.

³⁰⁴ See Coyle, *supra* note 61, at 784.

³⁰⁵ See *id.*

³⁰⁶ See *Fraser*, 478 U.S. at 683.

speech they would deem inappropriate for their charges or younger colleagues.³⁰⁷

CONCLUSION

The First Circuit sitting *en banc* correctly decided the *Yeo* case by finding that student editors who refused to publish a political or advocacy advertisement did not violate petitioner Yeo's First Amendment rights.³⁰⁸ However, the court's finding that the student's refusal to publish did not constitute state action is flawed.³⁰⁹ The court reasoned that the state did not play any meaningful role in the students' refusal to publish the advertisement.³¹⁰ However, the court did not address the values inculcation pedagogical theory currently prevailing in Supreme Court jurisprudence that endows school officials with significant control over the speech content of school-sponsored activities.³¹¹

This heightened level of control, which school officials may use to associate the school only with values that the school finds appropriate to teach, leads to two conclusions that implicate the state in decisions made by student editors.³¹² First, if school officials have permitted speech to be published under its auspices, it may be presumed that they have scrutinized its content and approved its publication for (1) age appropriateness, or (2) its advocacy of activity such as drug use, irresponsible sex and conduct otherwise inconsistent with its educational mission.³¹³ Second, the school and its student-edited publications maintain a mutually beneficial relationship that resembles a joint venture and therefore precludes a finding that the student actions are purely private.³¹⁴

Upon finding state action in the students' decision, the court should have found that the student newspaper does not qualify as a public forum.³¹⁵ Applying the *Hazelwood* standard, which holds that a limited public forum is created only when the government specifically intends to do so, is consistent with the values inculcation pedagogy,

³⁰⁷ See *id.* at 684.

³⁰⁸ See *Yeo v. Town of Lexington*, 131 F.3d 241, 255 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 2060 (1998).

³⁰⁹ See *id.*

³¹⁰ See *id.*

³¹¹ See *supra* text accompanying notes 203-13.

³¹² See *supra* text accompanying notes 252-90.

³¹³ See *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

³¹⁴ See *supra* text accompanying notes 279-90.

³¹⁵ See *supra* text accompanying notes 291-307.

which gives educators strict control over the content of school-sponsored publications.³¹⁶ A contrary result, which would permit an outsider to publish a political advertisement in a student newspaper over the objections of its editors, is certainly not consistent with a theory that encourages educators' heightened control over school activities.³¹⁷

BENJAMIN WATTENMAKER

³¹⁶ See *supra* text accompanying notes 291-307.

³¹⁷ See *supra* text accompanying notes 291-307.