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The Supreme Court Further Restricts Student First Amendment Rights in Public Schools: The Future of "Free Trade in Ideas" after *Hazelwood School District v. Kuhlmeier*

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I. INTRODUCTION

Seventy years ago, Justice Holmes wrote:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .[1]

Holmes' marketplace-of-ideas concept was based on the view that an individual needs an uninhibited flow of information and opinion in order to learn how to make life-affecting decisions.[2] In his work *On Liberty*,[3] John Stuart Mill advanced the classic argument for the freedom to communicate and the need for diversity of opinion. Because the general or prevailing opinion on any subject is rarely or never the whole truth, the only chance truth has of emerging is through the collision of adverse opinions.[4]

Traditionally, the free market exchange of ideas has been most vigorous in American public schools.[5] The public school system in

1. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The marketplace of ideas concept was derived from John Stuart Mill. *See infra* note 3 and accompanying text.

2. M. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 45-48 (1984). *Cf.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (individuals should have increased access to the information stream through the communications media).

3. J. MILL, ON LIBERTY, 35-45 (1947) (1st ed. London 1859). Mill proposed that the value of free speech is the ultimate attainment of truth. *Id.* He believed that false ideas deserved protection because their expression made truth stronger in contrast. *Id.*

4. *Id.* at 35. In judicial terms, freedom of expression generally means freedom from prior censorship of speech or written communication. F. KEMERER & K. DEUTSCH, CONSTITUTIONAL RIGHTS AND STUDENT LIFE: VALUE CONFLICT IN LAW AND EDUCATION 93 (1979).

5. *See* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (academic freedom is a special concern of the first amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom); Shelton v. Tucker, 364 U.S. 479, 487 (1960) ("[t]he vigi-

the United States is based upon the idea that the process of education in a democracy must be free and open to all,[6] and that permitting a full range of viewpoints strengthens democracy.[7] In addition, the United States Supreme Court has stated that the classroom is peculiarly the marketplace of ideas because the future of the nation depends upon leaders trained through exposure to many viewpoints rather than through any kind of narrow indoctrination.[8]

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lant protection of constitutional freedoms is nowhere more vital than in the community of American schools"). There has been a commitment to freedom of expression throughout the history of the American public school system. In approximately 1635, the New England colonies first recognized the need for some type of public education. *See generally* J. Rapp, *Overview of American Education*, SCHOOL SAFETY ANTHOLOGY 11 (1985). A number of Boston citizens founded the Boston Latin School which remained the largest school of its kind in the colonies. *Id.* The school was patterned after the early European classical schools and included study in reading, writing, ancient languages, and literature. *Id.* Benjamin Franklin, Samuel Adams, John Hancock, Ralph Waldo Emerson, Henry Ward Beecher, and George Santayana attended the Boston Latin School. *Id.* In the 1640's, Massachusetts passed the first laws requiring compulsory instruction in reading and writing, and by 1671, all the colonies had compulsory education with the exception of Rhode Island. *Id.* at 12-13. The period following the Revolutionary War was characterized by a recognition of the need for an educated populace in a democracy. *Id.* at 17-18. By the end of the 19th century, over 30 states had compulsory attendance laws. *Id.* The public school concept grew rapidly as a result of the rapid changes in business and industry following the industrial revolution. *Id.* at 21-22.

6. Rapp, *supra* note 5, at 18; *cf.* Note, *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 159 (1969). In the landmark school desegregation case, Brown v. Board of Education, 347 U.S. 483 (1953), the United States Supreme Court stated that compulsory school attendance laws and public expenditures on education demonstrate our recognition of the importance of education to our democratic society:

> It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Id. at 493. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972), *infra*, notes 14-16 and accompanying text. *See also* Letter from Thomas Jefferson to Joseph Cabell, September 9, 1817, in 17 WRITINGS OF THOMAS JEFFERSON 417, 423-24 (Mem. ed. 1904). Jefferson stated that education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. *Id.*

7. In Board of Education v. Pico, 457 U.S. 853, 867 (1982), the Court stated that:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

Id. (quoting 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910)). The United States Supreme Court has expressly recognized the vital role played by public schools in inculcating fundamental values necessary to the maintenance of a democratic political system. Ambach v. Norwick, 441 U.S. 68, 76-77 (1979).

8. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); *see supra* note 5. *See also* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and under-

On January 13, 1988, the Supreme Court decided *Hazelwood School District v. Kuhlmeier*.[9] The Court's decision represents a departure from its longstanding commitment to preserving freedom of expression in the public schools.[10] The Court held that educators do not offend the first amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are "reasonably related to legitimate pedagogical concerns."[11]

This Note will provide an analysis of the Court's decision in *Hazelwood*. First, the Note discusses background information, including the standards at issue in *Hazelwood* as developed through pertinent case law. Next, the Note provides a detailed description of the lower court and Supreme Court decisions in *Hazelwood*. Finally, the Note criticizes the decision as an unwarranted restriction upon student first amendment rights and discusses recommendations for implementing the *Hazelwood* standard.

II. BACKGROUND

A. The Inevitable Conflict between Value Inculcation and Personal Autonomy

As a matter of course, early education occurs in the family unit.[12] The United States Supreme Court has recognized the right of parents to control the educational upbringing of their children.[13]

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standing; otherwise our civilization will stagnate and die"); Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 807-08 (2d Cir. 1971) (a school is a market place of ideas and a forum to learn intelligent involvement).

9. 108 S. Ct. 562 (1988) [hereinafter *Hazelwood*].

10. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969). *See infra* notes 30-41 and accompanying text.

11. *Hazelwood*, 108 S. Ct. at 571.

12. *See generally* Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 487 n.56 (1981) (discussion of the theoretical underpinnings of the parental right of censorship). In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the United States Supreme Court rejected the State of Oregon's attempt to require compulsory public school education, and affirmed the right of parents to control directly the education of their children in a democratic society. *Id.* at 534-35. The Court viewed the state requirement that a teacher be of good moral character and of "patriotic disposition" as constitutional because teachers educate children for the larger benefit of society. *Id.* at 534.

13. Meyer v. Nebraska, 262 U.S. 390 (1923). The *Meyer* case involved a Nebraska law which prohibited the teaching of foreign languages to children in public schools. *Id.* at 401. The Court reversed a teacher's conviction for teaching German because the law interfered with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own children. *Id.* at 401-02.

In *Wisconsin v. Yoder*,[14] the Court stated that the primary role of parents in the upbringing of their children is well-established as an enduring American tradition.[15] Accordingly, it held unconstitutional a Wisconsin law compelling Amish children to attend school beyond the eighth grade.[16] In contrast, the allocation of responsibility for later education falls upon the public school system *in loco parentis*, in place of the family with regard to control over the child's physical and moral well-being.[17]

Political and social thinkers from Thomas Jefferson[18] to John Dewey,[19] conceived a uniform public school system as a great leveler of society — a perfect vehicle by which to inculcate important social and cultural values while nurturing personal autonomy.[20] The American public education system, however, has never adopted a single philosophy. Instead, the American system has shifted among several models.[21] For example, a traditional perspective views the school's role as parental and authoritarian, and mainly concerned with indoctrination or transmission of community mores and established thought.[22] A more contemporary view

14. 406 U.S. 205 (1972).

15. *Id.* at 232.

16. *Id.* at 234.

17. *See, e.g.*, John B. Stetson Univ. v. Hunt, 88 Fla. 510, 516, 102 So. 637, 640 (1924) (the educational institution may act in the place of a parent with regard to a student, with all a parent's rights, duties, and responsibilities). The United States Supreme Court recently stated that its past cases recognize the obvious concern of parents and of school authorities acting *in loco parentis* to protect children from exposure to sexually explicit, indecent, or lewd speech. Bethel School Dist. v. Fraser, 106 S. Ct. 3159, 3165 (1986). *See infra* notes 60-71 and accompanying text.

18. *See supra* note 6 and accompanying text.

19. Dewey wrote that an "education which should . . . unify the disposition of the members of society would do much to unify society itself." J. DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION 305 (1920).

20. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools As Mediating Structures*, 48 OHIO ST. L.J. 666, 667 (1987). In Ambach v. Norwick, 441 U.S. 68, 69 (1979), the United States Supreme Court decided, on equal protection grounds, whether a state could deny teaching licenses to resident aliens who refused to become American citizens. Emphasizing the importance of the value-laden role of the teacher, the Court noted that teachers are role models who must exercise discretion in inculcating the student with fundamental principles of democratic government. *Id.* at 78-80. *See also* Board of Educ. v. Pico, 457 U.S. 853, 864 (1982) (public schools are vitally important as vehicles for inculcating fundamental values). For further discussion of *Pico*, see *infra* notes 27-29 and accompanying text.

21. Comment, *What Will We Tell the Children? A Discussion of Current Judicial Opinion on the Scope of Ideas Acceptable for Presentation in Primary and Secondary Education*, 56 TUL. L. REV. 960, 962-64 (1982).

22. Diamond, *supra* note 12, at 493-94 n.86. Diamond suggests that the public school system is not merely a means by which to instill the will of the parent into the child. *Id.* It is also a mechanism that instills in the child the collective societal values of the community. *Id.* One court has stated that a principal function of all elementary and

supports broad intellectual inquiry and the development of students' critical faculties rather than indoctrination.[23] This latter approach, with its emphasis on exposure to diverse points of view, has been referred to as an intellectual marketplace in which students invariably are exposed to ideas in direct opposition to parental and acceptable societal values.[24]

If a shift toward freedom brings the system perilously out of control or away from established community values, school authorities must intervene.[25] On the other hand, if school adminis-

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secondary education is to indoctrinate youth with a solid foundation of basic moral values, and that school curriculum is an effective instrument of socialization to the norms of the community. Seyfried v. Walton, 668 F.2d 214, 219 (3d Cir. 1981) (Rosenn, J., concurring). *See infra* notes 45, 57, 155 and accompanying text.

23. J. BRYSON & E. DETTY, THE LEGAL ASPECTS OF CENSORSHIP OF PUBLIC SCHOOL LIBRARY AND INSTRUCTIONAL MATERIALS 74 (1982).

24. J. DEWEY, *The School and Society*, in DEWEY ON EDUCATION 46-47 (M. Dworkin ed. 1961). Dewey believed that the students' learning process should not be a passive one, but rather should involve real-life situations which build on their tendencies "to make, to do, to create, to produce, whether in the form of utility or art." *Id.* This philosophy provided the underpinnings for the open classroom concept in which students are exposed to divergent viewpoints and theories and, with proper guidance, given the opportunity to determine the validity of various positions. *See* Comment, *What Will We Tell the Children?*, *supra* note 21, at 963-64. In Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), Justice Fortas observed that in our public school system, "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Id.* at 511. Thirteen years after *Tinker*, the Court relied in part on this language and held that a school board could not remove books from elementary and secondary school libraries. Board of Educ. v. Pico, 457 U.S. 853, 868 (1982). The Court reasoned that access to information was a critical component of full participation in a pluralistic society. *Id.*

25. In his concurring opinion in Seyfried v. Walton, 668 F.2d 214, 219 (3d Cir. 1981), Judge Rosenn stated that an inherent tension existed between the two essential functions of the educational process: exposing students to a marketplace of ideas while providing them with a solid foundation of basic moral values. *See* notes 22, 45, 57 and accompanying text; *see also* Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (student may be disciplined for use of indecent speech at school assembly where substantially disruptive of the educational process), *see infra* notes 60-71 and accompanying text; Glover v. Cole, 762 F.2d 1197, 1201-03 (4th Cir. 1985) (prohibition against selling certain products on school property); Hatch v. Goerke, 502 F.2d 1189, 1192 (10th Cir. 1974) (school rule establishing hair length and grooming standards valid); Karr v. Schmidt, 460 F.2d 609, 613-18 (5th Cir.), *cert. denied*, 409 U.S. 909 (1972); Norton v. Discipline Comm., 419 F.2d 195, 198-99 (6th Cir. 1969), *cert. denied*, 399 U.S. 906 (1970) (distribution of leaflets containing false and inflammatory information impermissible); Ferrell v. Dallas Indep. School Dist., 392 F.2d 697, 704 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968) (upheld school regulation banning Beatle-type haircuts); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966) (students engaging in disruptive behavior while wearing "freedom buttons" may be suspended); Fricke v. Lynch, 491 F. Supp. 381, 388-89 (D.R.I. 1980) (prohibition against a male homosexual from attending a senior prom with a male escort); Smith v. St. Tammany Parish School Bd., 316 F. Supp. 1174, 1176-77 (E.D. La.), *aff'd*, 448 F.2d 414 (5th Cir. 1971) (students and faculty ordered to

trators restrict the flow of information in the interest of maintaining order, discipline, or decorum, they run the risk of undermining a child's autonomy and sense of political freedom.[26]

In *Board of Education v. Pico*,[27] the Supreme Court, in a plurality opinion, acknowledged that the community has a legitimate and substantial interest in promoting respect for authority and traditional social, moral, or political values, and that local school boards must be permitted to establish and apply their curriculum in such a way as to transmit community values.[28] In reconciling school board authority with first amendment limitations on that authority, however, Justice Brennan stated that if school officials intend to deny students access to ideas with which the school administration disagrees, and if this intent is a decisive factor in its decision, then the school officials are acting in violation of the Constitution.[29]

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remove confederate flags and all indicia of racism from school); Baker v. Downey City Bd. of Educ., 307 F. Supp. 517, 526-28 (C.D. Cal. 1969) (restraint on obscene student publication); Hughes v. Caddo Parish School Bd., 57 F. Supp. 508 (W.D. La. 1944), *aff'd*, 323 U.S. 685 (1945) (prohibition of membership in secret society that fosters snobbish, anti-egalitarian, or divisive attitudes in students).

26. In his concurring opinion in Board of Education v. Pico, 457 U.S. 853 (1982), Justice Blackmun noted that censorship by a school board "hardly teaches children to respect the diversity of ideas that is fundamental to the American system." *Id.* at 880 (Blackmun, J., concurring). For further discussion of *Pico*, *see* notes 27-29, 164-66, 174 and accompanying text. *See also* Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1649 (1986) ("[t]he way in which school administrators operate schools may have a more powerful influence on students than the lessons in their civic textbooks").

27. 457 U.S. 853 (1982).

28. *Id.* at 864 (quoting Brief for Petitioners, at 10). In *Pico*, public school students brought suit against their local school board for ordering the removal of nine books from the school library shelves. *Id.* The school board members characterized the books as "anti-Semitic, anti-American, anti-Christian." *Id.* at 857. Included among the books were *Slaughterhouse Five*, by Kurt Vonnegut, Jr.; *The Naked Ape*, by Desmond Morris; *Best Short Stories of Negro Writers*, edited by Langston Hughes; *Black Boy*, by Richard Wright; and *Soul on Ice*, by Eldridge Cleaver. *Id.* at 856-57 n.3.

29. *Id.* at 871. *See generally* Freeman, *The Supreme Court and First Amendment Rights of Students in the Public School Classroom: A Proposed Model of Analysis*, 12 HASTINGS CONST. L.Q. 62 (1984). Freeman suggests that a two-step motivational inquiry model is the preferred analysis to be applied to school officials' actions. He suggests that two factors be examined: the substantive criteria devised by school officials used in making decisions, and the regularity of the procedures used to arrive at the particular decision being challenged. *Id.* at 62. *See also* Goyer, *Student First Amendment Rights in the Public School Setting: A Topic of Increased Litigation*, 6 AM. J. TRIAL ADVOC. 163, 176-87 (1982). Goyer similarly suggests that a court should concentrate on the school board's motives for enacting the challenged rule or regulation "if the evidence shows that the school board enacted the regulation against certain expression solely from a desire to suppress a particular point of view or to prevent controversy, the challenged regulation should be struck down." *Id.* at 181.

B. Historical Development

The first significant case in which the United States Supreme Court considered the first amendment rights of public high school students was *Tinker v. Des Moines Independent Community School District.*[30] In December, 1965, a group of adults and students met and determined that they would publicize their objection to the

30. 393 U.S. 503 (1969). *See generally* Note, *Beyond the Schoolhouse Gate: Protecting the Off-Campus First Amendment Freedoms of Students*, 59 NEB. L. REV. 790 (1980). The *Tinker* decision began an influx of students' first amendment rights cases. *See* San Diego Comm. v. Governing Bd., 790 F.2d 1471, 1478 (9th Cir. 1986) (high school newspaper was a public forum and the school could not prohibit publication of an advertisement opposing draft registration); Pratt v. Independent School Dist. No. 831, 670 F.2d 771, 776 (8th Cir. 1982) (school board violated first amendment by removing film from curriculum based on the board's disagreement with the film's ideological and religious themes); Nicholson v. Board of Educ., 682 F.2d 858, 864 (9th Cir. 1982) (school authorities had right to pre-publication review of a school newspaper produced in journalism class); Williams v. Spencer, 622 F.2d 1200, 1206 (4th Cir. 1980) (prohibition of student publication containing an advertisement for drug paraphernalia); Thomas v. Board of Educ., 607 F.2d 1043, 1050-51 (2d Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980) (students could not be disciplined for publishing off-campus sex satire); Trachtman v. Anker, 563 F.2d 512, 519-20 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978) (suppression of distribution, collection, and analysis of a questionnaire seeking information about students' sex habits); Gambino v. Fairfax County School Bd., 564 F.2d 157, 158 (4th Cir. 1977) (student newspaper which contained article about birth control was a public forum entitled to first amendment protection); Nitzberg v. Parks, 525 F.2d 378, 383-84 (4th Cir. 1975) (school regulations which permitted prior restraint of distribution of student literature were void for vagueness); Fujishima v. Board of Educ., 460 F.2d 1355, 1359 (7th Cir. 1972) (students could not be suspended for distributing on campus an underground newspaper that they had published without first obtaining approval from the general superintendent of schools); Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 811 (2d Cir. 1971) (requirement that contents of student literature be submitted for approval prior to distribution is void for vagueness); Katz v. McAulay, 438 F.2d 1058 (2d Cir. 1971), *cert. denied*, 405 U.S. 933 (1972) (prohibition of leaflets soliciting funds from fellow students); Guzick v. Drebus, 431 F.2d 594, 600 (6th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971) (prohibition against the wearing of political buttons or insignias); Scoville v. Board of Educ., 425 F.2d 10, 13-14 (7th Cir. 1970), *cert. denied*, 400 U.S. 826 (1970) (school could not expel students for distributing newspaper critical of school disciplinary procedures); Norton v. Discipline Comm., 419 F.2d 195, 198 (6th Cir. 1969), *cert. denied*, 399 U.S. 906 (1970) (distribution of leaflets containing false and inflammatory information impermissible); Searcey v. Crim, 681 F. Supp. 821, 831 (N.D. Ga. 1988) (regulations prohibiting peace activists from presenting information to students at "Career Day" programs violated first amendment); Stanton v. Brunswick School Dep't, 577 F. Supp. 1560, 1574 (D. Me. 1984) (school officials could not prohibit use in yearbook of student quote which the officials thought "inappropriate" and "in poor taste"); Seyfried v. Walton, 512 F. Supp. 235, 239 (D. Del.), *aff'd*, 668 F.2d 214 (3d Cir. 1981) (prohibition of presenting a play because of its sexual content); Zucker v. Panitz, 299 F. Supp. 102, 105 (S.D.N.Y. 1969) (school could not prohibit publication of an advertisement against the war in Vietnam in a school newspaper because the newspaper was a public forum). *See also* Churton-Hale, *Tinker Goes to the Theater: Student First Amendment Rights and High School Theatrical Productions in Seyfried v. Walton*, 11 HASTINGS CONST. L.Q. 247 (1984). Churton-Hale notes that post-*Tinker* student publications cases reflect judicial efforts to recognize and uphold student freedoms but continue to support school adminis-

war in Vietnam by wearing black armbands during the holiday season.[31] The principals of the schools learned of the plan and adopted a policy that any student who wore an armband to school would be disciplined.[32] Despite the warning, students wore the armbands and subsequently were suspended.[33]

The *Tinker* Court loosely defined the first amendment rights of students as somewhat less than those of adults, although still deserving of respect and protection.[34] The Court reaffirmed the comprehensive authority of state as well as school officials to prescribe and control conduct in public schools,[35] but stated that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years."[36] The Court also stated that given the nature of American society:

> [U]ndifferentiated fear or apprehension is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says that we must take the risk.[37]

In *Tinker*, the Court did not apply the traditional test for state regulation of free speech; namely, that school officials justify the curtailment of student free speech by demonstrating that a compelling state interest could not otherwise be served.[38] Rather, under the so-called "*Tinker* test,"[39] school officials need to show only that

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trators' comprehensive authority to prescribe and control conduct in the schools. *Id.* at 260.

31. *Tinker*, 393 U.S. at 504.

32. *Id.*

33. *Id.*

34. J. Huffman and D. Trauth, *High School Students' Publication Rights and Prior Restraint*, 10 J. L. & EDUC. 485, 486 (1981). *See generally* Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 350-79 (1979) (because of their lack of experience and maturity, children possess different free speech rights than those of adults).

35. *Tinker*, 393 U.S. at 507. For a related discussion of *Tinker*, *see* notes 151-59 and accompanying text.

36. *Tinker*, 393 U.S. at 506.

37. *Id.* (citation omitted).

38. *See infra* note 40 and accompanying text.

39. The Supreme Court has developed several tests to interpret the first amendment. In Kovacks v. Cooper, 336 U.S. 77, 89 (1949), the Court sustained a city ordinance prohibiting the use of loudspeakers on city streets. The Court stated that, although the content of expression may not be regulated, the time, place, and manner surrounding expression may be regulated. *Id.* at 86-89. The balancing approach weighs the rights of

they have a reasonable basis upon which to forecast that conduct by the student, whether in or out of class, will interfere substantially with the work of the school or impinge upon the rights of other students.[40] The implicit meaning of the *Tinker* test is that school officials cannot arbitrarily curtail students' rights of free expression, or restrain expression merely to avoid the discomfort and unpleasantness that accompany an unpopular viewpoint.[41]

In the years following the *Tinker* decision, the lower courts attempted to divine its meaning.[42] Other cases presented to the courts involved private student newspapers or non-school sponsored literature,[43] sex questionnaires or sex information,[44] and

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others or of the state against the exercise of expression. *See* Lehman v. Shaker Heights, 418 U.S. 298, 304 (1974) (city could prohibit political advertising on city buses because commuters have a right to be free from forced intrusions); United States v. O'Brien, 391 U.S. 367, 382 (1968) (the interest of the state in assuring that each draft registrant has a draft card justifies whatever infringement on speech might be involved in the prohibition of draft card burning). In Schenck v. United States, 249 U.S. 47, 51 (1919), the Court developed a "clear and present danger" test, which emphasized the context in which the speech is uttered. The test considers whether, under the circumstances, the words used are of such a nature to bring about the danger or evil Congress intended to prohibit. *Id.* at 52. Under the "bad tendency approach" set forth in Gitlow v. New York, 268 U.S. 652, 667, 669 (1925), all that is required to justify regulation of free expression is a tendency to cause harm. In most contemporary cases, the Court prefers the balancing of the time, place, manner approaches. In the school context, however, courts have resurrected the clear and present danger and the bad tendency tests. F. KEMERER & K. DEUTSCH, CONSTITUTIONAL RIGHTS AND STUDENT LIFE: VALUE CONFLICT IN EDUCATION 101 (1979).

40. *Tinker*, 393 U.S. at 509. *Cf.* Weisenfeld, *Paraphernalia Advertising at the Schoolhouse Gate: Williams v. Spencer and Restriction of Student Speech*, 62 B.U.L. REV. 1029, 1050-51 (1982) (*Tinker*'s substantial disruption test balances school authorities' institutional concerns and students' first amendment rights). Weisenfeld notes that student speech which does not threaten substantial disruption may be regulated for other reasons; for example, if it is obscene or defamatory. *Id.* at 1055.

41. *See* Letwin, *Regulation of Underground Newspapers on Public School Campuses in California*, 22 UCLA L. REV. 141, 144 (1974). The scope of *Tinker*, however, was unclear since the case involved symbolic political expression as opposed to educators' authority over expressive activities or school-sponsored newspapers. Schimmel, *Censorship of School-Sponsored Publications: An Analysis of Hazelwood v. Kuhlmeier*, 45 EDUC. L. REP. 941, 946 (1988).

42. *See generally* Diamond, *supra* note 12, at 478, and Churton-Hale, *supra* note 30, at 250 and 260-62 for a discussion of how post-*Tinker* courts have either distinguished or ignored the decision.

43. *See* Nicholson v. Board of Educ., 682 F.2d 858 (9th Cir. 1982); Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975); Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973); Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972); Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971); Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971); Reineke v. Cobb County School Dist., 484 F. Supp. 1252 (N.D. Ga. 1980).

44. *See* Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978); Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd without op.*, 515 F.2d 504 (2d Cir. 1975).

school-sponsored theatrical productions.[45] Dramatically different interpretations of the *Tinker* standard emerged as courts struggled to determine what degree of administrative regulation of student speech is constitutional.[46] Nevertheless, courts heeded the warning of the Supreme Court in *Tinker* that undifferentiated fear of disturbance or the desire to avoid the unpleasantness that may accompany unpopular speech could not justify the suppression of student communication.[47] If a reasonable basis did not exist for predicting material and substantial disturbance, or if established procedure for prior review of student expressions was impermissibly vague or overly broad, then courts overturned the censorship of student publications.[48]

For example, in *Trachtman v. Anker*,[49] staff members of a school newspaper sought administrative approval to distribute an in-school questionnaire surveying the sexual attitudes of students.[50] The court held that the denial of permission to distribute the questionnaire was constitutional because there was a reasonable basis for the school officials' belief that the questionnaire could cause significant psychological harm to some students.[51] In *Frasca v. Andrews*,[52] the court permitted the seizure of a school newspaper under an "invasion-of-rights" standard.[53] The student editors had planned to print an anonymous letter to the editor which was critical of a student government official.[54] The school principal investigated the matter, determined that the article was substantially

45. *See* Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981), *infra* notes 57-59 and accompanying text.

46. Some courts relied upon the *Tinker* decision to justify a heavy presumption against prior restraint of student expression. *See, e.g.*, Nitzberg v. Parks, 525 F.2d 378, 383-84 (4th Cir. 1975) (school's regulation permitting prior restraint was void for vagueness since it did not define what constituted a substantial disruption of or material interference with school activities). In Eisner v. Stamford Board of Education, 440 F.2d 803, 810 (2d Cir. 1971), the court read *Tinker* as requiring that school officials demonstrate only a reasonable basis for interference with student free speech. The Seventh Circuit rejected *Eisner* as unsound constitutional law, however, and interpreted *Tinker* as authorizing only post-publication discipline. Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972).

47. *See* Shanley v. Northeast Indep. School Dist., 462 F.2d 960 (5th Cir. 1972); Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971); Riseman v. School Comm., 439 F.2d 148 (1st Cir. 1971).

48. *See supra* note 46.

49. 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978); *see infra* notes 62, 183 and accompanying text.

50. *Trachtman*, 563 F.2d at 514.

51. *Id.* at 517.

52. 463 F. Supp. 1043 (E.D.N.Y. 1979).

53. *Id.* at 1051.

54. *Id.* at 1046.

untrue, and denied permission to print the letter.[55] The court determined that publishing the letter could potentially harm personal relationships and individual reputations.[56] Finally, in *Seyfried v. Walton*,[57] the Third Circuit upheld the cancellation of a high school dramatic production because of its sexual theme.[58] The court identified the relationship of the play to the school curriculum as a critical factor in its decision.[59]

In *Bethel School District No. 403 v. Fraser*,[60] the United States Supreme Court departed from the *Tinker* standard and held that school officials have the right to regulate certain types of student speech. In that case, Matthew Fraser was a high school student who delivered the nominating speech for a fellow student at a school assembly.[61] Although not sexually explicit, the speech contained sexual innuendo.[62] Some of the students present at the assembly reacted to the speech by hooting, yelling, and acting out some of Fraser's graphic references.[63] Many appeared bewildered and embarrassed.[64] One teacher reported that on the day after the assembly, she had to forego the planned lesson in order to discuss the speech with her pupils.[65] The school suspended Fraser pursuant to a disciplinary rule prohibiting the use of obscene language.[66]

Fraser brought suit in federal court, alleging a violation of his first amendment rights.[67] The district court held that the school's sanction violated Fraser's first amendment rights, and the Court of Appeals for the Ninth Circuit affirmed the judgment.[68] The Supreme Court reversed, holding that the sexual content of Fraser's speech should not be afforded the same protective right as the

55. *Id.* at 1047.
56. *Id.* at 1052.
57. 668 F.2d 214 (3d Cir. 1981).
58. *Id.* at 215.
59. *Id.* at 216.
60. 478 U.S. 675 (1986).
61. *Id.* at 677.
62. *Id.* at 678. Approximately 600 students, many of whom were as young as 14, attended the assembly. *Id.* at 677. The Court found the age factor significant because the speech, although not obscene, could be seriously damaging to a less mature audience. *Id.* at 684-85. Indeed, in *Trachtman v. Anker*, the Second Circuit held that the right of a first amendment claimant to impose thoughts on a captive audience of schoolchildren turns on a number of variables, one of which is the age and maturity of the children affected. *See supra* note 49 and accompanying text.
63. *Fraser*, 478 U.S. at 678.
64. *Id.*
65. *Id.*
66. *Id.* at 678-79.
67. *Id.* at 679.
68. Fraser v. Bethel School Dist. No. 403, 755 F.2d 1356, 1365 (9th Cir. 1985).

non-disruptive, political expression in *Tinker*.[69]

Noting that the test in *Tinker* concerned the impact of speech upon others, the *Fraser* Court reasoned that the freedom to advocate unpopular and controversial views in schools must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior.[70] The Court found it perfectly appropriate for the school to disassociate from conduct wholly inconsistent with the fundamental values of public school education.[71]

III. DISCUSSION

One year after it decided *Fraser*, the Supreme Court considered another case involving student first amendment rights. In *Hazelwood School District v. Kuhlmeier*,[72] the Court ruled that school officials can censor a school-sponsored student newspaper without violating students' constitutional rights.[73] As a result of the decision, school principals may now censor written or oral speech that is not officially approved.[74]

A. The Facts of Hazelwood

Hazelwood School District operates public and secondary schools within the State of Missouri, including Hazelwood East High School in St. Louis County ("Hazelwood East").[75] During the 1982-83 academic year, the Hazelwood East curriculum included two journalism classes, "Journalism I" and "Journalism II."[76] Enrollment in Journalism II required successful completion of Journalism I.[77]

The Journalism I curriculum included the principles of report-

69. *Fraser*, 478 U.S. at 685.

70. *Id.* at 681. Of particular concern to the Court was the effect of Fraser's socially inappropriate behavior upon the sensibilities of the other students, as well as the parents' and schools' interest to protect children from indecent speech. *Id.* at 683. In two previous cases, Ginsburg v. New York, 390 U.S. 629 (1968), and FCC v. Pacifica Found., 438 U.S. 726 (1978), the Court recognized that certain material which might be constitutionally protected for adult purposes would not be protected with regard to children. In recognizing children as a class, the Court departed from its observation in Cohen v. California, 403 U.S. 15, 25 (1971), that what is offensive is relative to the individual.

71. *Fraser*, 478 U.S. at 685.

72. 108 S. Ct. 562 (1988).

73. *Id.* at 572.

74. Wash. Post, Jan. 23, 1988, at A27, col. 1.

75. Kuhlmeier v. Hazelwood School Dist., 607 F. Supp. 1450, 1451 (D.C. Mo. 1985).

76. *Id.* at 1452.

77. *Id.*

ing, writing, editing, layout, publishing, and journalistic ethics.[78] This curriculum was continued in Journalism II, which involved the primary activity of producing a school-sponsored newspaper that was entitled *Spectrum*.[79] Students enrolled in Journalism II were to apply what they had learned in Journalism I to the production of *Spectrum*.[80] The Hazelwood School District financed the paper, although some expenses were defrayed by student sales.[81] *Spectrum* was not considered an extra-curricular activity.[82] The Journalism II teacher was also *Spectrum*'s faculty advisor.[83]

The production of *Spectrum* began with the collection of story ideas from staff members and from letters to the editor.[84] The editorial board, in consultation with the advisor, selected story ideas that were to be developed into publishable articles.[85] Initially, the writer assigned to the topic had discretion as to the content of the article.[86] Once a draft was completed, the advisor reviewed the article, made comments, and then returned it to the writer for further revision.[87] The advisor often edited the final drafts himself, and sent the proofs to the principal for final approval before sending *Spectrum* to the printer.[88]

The plaintiffs brought suit after the principal had directed the faculty advisor to delete two full pages of *Spectrum* which contained five articles — even though the principal found only two of the articles to be objectionable.[89] The principal specifically objected to a story which chronicled three students' experiences with pregnancy, and which briefly covered various topics including teenage sexuality, birth control, relations with parents, abortion, and the consequences of teenage pregnancy.[90] The principal was concerned that the story on pregnancy described the subjects of the story to the point that their peers could identify the students involved.[91] Additionally, he believed that the article's references to sexual activity and birth control were inappropriate for a school

78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 1453.
83. *Id.*
84. *Id.* at 1454.
85. *Id.*
86. *Id.*
87. *Id.*
88. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, 568 (1988).
89. *Hazelwood School Dist.*, 607 F. Supp. at 1460.
90. *Id.* at 1457.
91. *Id.* at 1460.

newspaper.[92]

The principal further objected to a second article which discussed the impact of divorce upon children.[93] He objected to portions of the story that related students' perceptions of the reasons for their parents' divorces because the editors had not afforded the parents an opportunity to respond to these characterizations.[94]

The principal did not find objectionable the other three articles that were deleted. These articles discussed runaways, teen pregnancy, and a proposed rule that would require federally-funded clinics to notify parents when teenagers sought birth control assistance.[95] He removed these articles solely because they were on the same pages as the allegedly objectionable ones.[96]

The principal concluded that changes in the allegedly objectionable articles could not be made before press time.[97] Moreover, no paper would be produced if the issue were delayed for any amount of time.[98] Consequently, the principal directed the faculty advisor to delete the two pages of *Spectrum* on which all of the articles appeared.[99] The students did not learn that the articles had been deleted until the final copies of *Spectrum* arrived at the school for sale.[100]

B. The Lower Courts' Decisions

Following the school's deletion of the articles, three *Spectrum* staff members filed an action seeking injunctive relief and money damages under the first amendment, and also a declaration that the school had violated the students' first amendment rights.[101] The district court denied injunctive relief, holding that no violation of the students' first amendment rights had occurred.[102]

In analyzing the first amendment issues, the district court distin-

92. *Id.* at 1459.
93. *Id.* at 1457.
94. *Id.* at 1461.
95. *Id.* at 1457. Parent notification rules are sometimes referred to as "squeal laws." Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, 579 (1988) (Brennan, J., dissenting).
96. *Hazelwood School Dist.*, 607 F. Supp. at 1459.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* For a related discussion of the timing of administrative review of student publications, see Note, *Administrative Regulation of the High School Press*, 83 MICH. L. REV. 625, 634 (1984).
101. Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368, 1371 (8th Cir. 1986).
102. *Hazelwood School Dist.*, 607 F. Supp. at 1467.

guished between student speech which is privately initiated and carried out independently of any school-sponsored program or activity, and student speech or conduct which is in the context of school-sponsored publications, activities, or curricular matters.[103] After finding that *Spectrum* was a non-public forum for free expression,[104] the district court held that the school could properly impose restraints on activities that constituted an integral part of the school's educational function,[105] and that the principal's decision had a substantial and reasonable basis.[106]

The Court of Appeals for the Eighth Circuit reversed,[107] finding that *Spectrum* was a public forum[108] for purposes of the first amendment because it functioned as a conduit for student opinion.[109] Applying the Supreme Court's prior decision in *Tinker*, the court concluded that the school district could not have reasonably forecast that the censored articles or any materials in the censored articles would have materially disrupted classwork, given rise to substantial disorder, or invaded the rights of others.[110] The court further stated that no evidence in the record supported fears that publication of the article on teen pregnancy would create the impression that the school condoned the sexual mores of the pregnant students.[111] The court also dismissed the school district's assertion that the age and immaturity of the high school reader justified the censorship.[112] It observed that even the youngest students in the school were aware of the teenage pregnancy problem, and that it was unlikely that anything in the articles would offend their

103. *Id.* at 1462-67.
104. *Id.* at 1465.
105. *Id.*
106. *Id.* at 1466 (citing Frasca v. Andrews, 463 F. Supp. 1043, 1052 (E.D.N.Y. 1979)).
107. Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368 (8th Cir. 1986).
108. *See* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (the government may impose reasonable time, place, and manner regulations on expression so long as the imposed regulations are content neutral, serve an important governmental interest, and leave open alternative channels of communication); Widmar v. Vincent, 454 U.S. 263 (1981) (concept of a public forum is essential to the first amendment since the right to free speech by definition includes the right to express one's views in public places); Hague v. CIO, 307 U.S. 496 (1939) (traditional public forum is found in areas open to the public for public use and used for purposes of assembly, communicating thoughts, and discussing public questions). The Court also has recognized that first amendment rights must be analyzed in light of the special characteristics of the school environment. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969), *supra* notes 30-41 and accompanying text.
109. *Hazelwood School Dist.*, 795 F.2d at 1372.
110. *Id.* at 1375.
111. *Id.*
112. *Id.*

sensibilities.[113]

Finally, the court turned to what it considered the heart of the case — the invasion of privacy concerns.[114] The court interpreted *Tinker* as limiting invasion of rights to tortious acts.[115] For example, school administrators would be justified in limiting student speech only when publication of that speech could result in tort liability.[116] The court concluded that the subjects of the two articles or their families could not maintain a tort action for libel or invasion of privacy against the school.[117]

C. *The Opinion of the Court*

The United States Supreme Court reversed the court of appeals and held that "educators do not offend the [f]irst [a]mendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[118] The Court began its analysis by noting that in *Bethel School District No. 403 v. Fraser*,[119] it previously had held that children and adults do not share the same constitutional rights,[120] and that students' first amendment rights must be applied in light of the special nature of the school environment.[121] The Court further noted that in a school setting, a determination of inappropriate speech properly rests with school officials.[122]

1. School Newspapers Not Forums for Public Expression

The Court then analyzed whether *Spectrum* could be character-

113. *Id.*

114. *Id.*

115. *Id.* at 1376. *See* Note, *Administrative Regulation of the High School Press*, *supra* note 100, at 641. The author argued that tort standards are sufficiently defined so as to permit recovery for damages, stating that:

> Limiting school action under the invasion-of-rights justification to torts or potential torts means that a school can refer to previously defined legal standards to decide if it may constitutionally restrain student expression. Moreover, limiting "invasion of rights" to tortious behavior fulfills the primary function of this justification for restraint — allowing the school to protect itself from tort liability for its students' actions.

Id.

116. *Hazelwood School Dist.*, 795 F.2d at 1376.

117. *Id.*

118. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, 571 (1988).

119. 478 U.S. 675 (1986). *See supra* notes 60-71 and accompanying text.

120. *Hazelwood*, 108 S. Ct. at 567.

121. *Id.* (citing Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969)).

122. *Id.* (citing *Fraser*, 478 U.S. at 683, 685-86).

ized as a forum for public expression.[123] First, it looked to its previous decisions which held that public schools do not possess all of the attributes of public places which have been used for purposes of public discussion,[124] and that school facilities may be deemed public only if school authorities have permitted their use by the general public.[125] Second, the Court examined the same evidence upon which the Eighth Circuit relied in determining that *Spectrum* was a forum for public expression.[126] The Court reasoned that, because the school district policy clearly treated *Spectrum* as part of the educational curriculum, and because the faculty advisor was the final authority with respect to almost every aspect of the production and publication of *Spectrum*, the newspaper was intended as a supervised learning experience for journalism students and not as a public forum.[127] The Court concluded that the school district was entitled to exercise control over the content of *Spectrum* in any reasonable manner.[128]

2. *Tinker* Does Not Apply

The Court distinguished the question addressed in *Tinker* from the question involved in *Hazelwood*.[129] In *Tinker*, the Court considered whether educators could silence personal expression occurring on school premises.[130] In *Hazelwood*, however, the question concerned school-sponsored activities that the public reasonably might perceive to have official school approval.[131]

The Court emphasized that educators are entitled to exert

123. *Id.* In public forums, the first amendment narrowly circumscribes the government's power to exclude or regulate speech. *See generally* Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1985). For further discussion of the public forum doctrine, see notes 108, 124-25 and accompanying text.

124. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981); Hague v. C.I.O., 307 U.S. 496 (1939). *But see* San Diego Comm. v. Governing Bd., 790 F.2d 1471 (9th Cir. 1986) (high school newspaper was a public forum, thus school could not prohibit publication of an advertisement from an organization opposing draft registration).

125. *See* Perry Educ. Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). In *Perry*, the Court identified three types of forums to which the public's right of access varies, as does the type of limitations the state may impose upon the right. These forums included places which by long tradition or by government fiat have been devoted to public assembly, public property which the government has opened for use by the public as a place for expressive activity, and public property which is not by tradition or designation a forum for public communication. *Id.* at 45-46.

126. *Hazelwood*, 108 S. Ct. at 568.

127. *Id.* at 568-69.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

greater control over activities that occur as part of school curriculum, even if the activities occur outside a traditional classroom setting.[132] A school may disassociate itself from speech that would interfere substantially with its educational mission or with the rights of other students.[133] The school also may disassociate itself from speech that is "ungrammatical, poorly written, inadequately research, biased or prejudiced, vulgar, or profane, or unsuitable for immature audiences."[134] The Court reasoned that a school should be able to set higher standards than those demanded by publishers in the real world, particularly in light of the social and emotional immaturity of the intended audience.[135]

In holding that school authorities do not offend the first amendment if their actions are reasonably related to legitimate pedagogical concerns, the Court concluded that the Hazelwood East principal did not violate the first amendment in deleting the articles from *Spectrum*.[136] The Court pronounced as reasonable the principal's concerns over privacy and decorum, and his conclusion that neither the teen pregnancy article nor the divorce article was suitable for publication.[137]

3. The Dissent

In a dissenting opinion, Justice Brennan, joined by Justices Marshall and Blackmun, argued that "[i]f mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for censorship of student speech . . . [schools would be converted] into 'enclaves of totalitarianism.' "[138] The dissent viewed the school administration's action as defeating the whole purpose of *Spectrum* and Journalism II which was to foster an appreciation of the rights associated with a free press.[139] The dissent rejected the majority's conclusion that high schools may shield students from potentially sensitive topics.[140] The dissent also deemed "potentially sensitive topics" a standard so vague as to invite manipulation and viewpoint discrimination.[141]

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132. *Id.* at 570.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 571-72.
137. *Id.* at 572.
138. *Id.* at 574 (Brennan, J., dissenting) (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969)).
139. *Id.* at 573 (Brennan, J., dissenting).
140. *Id.* at 577 (Brennan, J., dissenting).
141. *Id.* at 578 (Brennan, J., dissenting).

Justice Brennan, who had concurred in the judgment in *Fraser*,[142] took the majority to task for erecting a taxonomy of school censorship. Specifically, he rejected the majority's distinction between censorship in the context of school-sponsored expressive events which the public might perceive as school-approved, which the majority found acceptable, and censorship to silence personal expression which happens to occur on school premises, which the majority found unacceptable.[143] Rejecting the majority's approval of censorship in the area of school-sponsored expression, Brennan suggested reliance on disassociative means short of censorship, such as a disclaimer, which are available to the school.[144]

The dissent further asserted that the censorship served no legitimate pedagogical purpose. A student newspaper is intended to teach students to report a variety of opinions, even those opinions in disagreement with the views or values the school wishes to inculcate.[145] The dissent viewed the majority as deviating from precedent,[146] noting that, under *Tinker*, the mere role of sponsorship does not provide the school authorities with "a general warrant to act as 'thought police' stifling discussion of all but [officially-sanctioned subjects]."[147]

IV. ANALYSIS

The most significant question raised by the holding in *Hazelwood* is the practical effect the decision will have on students' first amendment rights. By classifying the students' expression as curricular,[148] the Court cleared a path for school administrators to silence student expression that neither disrupts classwork nor invades the rights of others if the activity is school-sponsored.[149] The Court, however, made an erroneous distinction between school-sponsored expression within an official curriculum and personal expression on school premises.

Applying the Court's reasoning, journalism students at East Ha-

142. Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 687 (1986).

143. *Hazelwood*, 108 S. Ct. at 575 (Brennan, J., dissenting).

144. *Id.* at 579 (Brennan, J., dissenting).

145. *Id.* at 576-77 (Brennan, J., dissenting). In the dissent's view, not sponsoring a school newspaper that is ungrammatical or of poor quality is fully consistent with both the first amendment and *Tinker* since the poor quality would materially disrupt the newspaper's curricular purpose. *Id.* at 576 (Brennan, J., dissenting).

146. *Id.* (Brennan, J., dissenting).

147. *Id.* at 577 (Brennan, J., dissenting).

148. Curriculum is defined as "a regular course of study or training, as at a school or university." 2 OXFORD ENGLISH DICTIONARY 1271 (1961).

149. *Hazelwood*, 108 S. Ct. at 568.

zelwood have the right to wear armbands in journalism class to protest the censorship of *Spectrum*, so long as the expression does not substantially and materially interfere with school discipline or with the rights of other students.[150] The students do not have the right, however, to thoughtfully and responsibly discuss important social issues in articles in the school newspaper.

By invoking the word "curriculum," the Court has placed some student publications automatically outside the scope of the first amendment, even though the publication may serve as the primary vehicle for expression in the school. The Court has made an artificial distinction between curricular newspapers over which school officials have unbridled discretion, and extra-curricular publications which are protected under *Tinker*.[151] The Constitution logically could not protect one form of personal expression and not the other,[152] because in many cases school publications produced as classroom assignments provide a forum for all student speech within the school.[153]

A school board has within its broad discretion the authority to determine the most suitable curriculum for students.[154] The inquiry required under *Tinker*, however, cannot be foreclosed merely by classifying a decision as curricular.[155] An educator's right to

150. Morris, Commentary, *Censoring the School Newspaper*, 45 EDUC. L. REP. 1, 14-15 (1988).

151. *Hazelwood*, 108 S. Ct. at 575-76 (Brennan, J., dissenting).

152. *Id.* (Brennan, J., dissenting).

153. Hazelwood School Dist. v. Kuhlmeier, 795 F.2d 1368 (8th Cir. 1986). The court stated that:

> Spectrum was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a public forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution and their state constitution.

Id. at 1373.

154. Board of Educ. v. Pico, 457 U.S. 853, 863-64 (1982). For a discussion of *Pico*, *see supra* notes 27-29 and accompanying text.

155. *Pico*, 457 U.S. at 869. In *Pico*, the Court stated that school boards "might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values." *Id.* at 869 (emphasis in original). Judicial deference to the discretion of school boards would be less compelling, however, in the case of an extra-curricular activity. *See* Churton-Hale, *supra* note 30, at 255 n.54. In determining school administrators' authority over extra-curricular activities, courts could use an analysis similar to the *Tinker* test to balance the students' first amendment right against the school board's interest. *Id.* Churton-Hale argued that by categorizing a high school production as part of a school's curriculum, the Third Circuit in Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981), declined to use either the *Tinker* freedom of expression test or a pre-*Pico* balancing test. The court instead confined itself to using a judicial deference approach which inquired only whether the school administration's decision implicated

make and implement curricular decisions necessarily may curtail student speech, but only speech that disrupts the classroom[156] or the educational atmosphere.[157] Therefore, instead of emphasizing that the speech occurred in a school-sponsored activity, the *Hazelwood* Court should have focused on the nature, setting, and manner of the speech itself in order to determine whether, under *Tinker*, the principal acted properly in censoring *Spectrum*.[158]

When examined in the context of *Tinker*, the school district's censorship in *Hazelwood* was not reasonable. The school officials never asserted that publication of the censored articles would have resulted in substantial and material disruption of the school. The suppression of the articles could not be justified on the basis of protecting the rights of others because the subjects of the pregnancy article were quoted anonymously and voluntarily, and the identities of the parents in the divorce article could not be discerned.[159]

The other justification for the censorship cited by the Court is also dubious.[160] Potential topic sensitivity is a vague concept to apply and may prompt school authorities to act solely out of undifferentiated fear or apprehension of disturbance.[161] The *Hazelwood* decision will require school officials, in addition to discharging

basic constitutional values. *Id.* at 250. For further discussion of *Seyfried*, see *supra* notes 57-59 and accompanying text.

156. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

157. Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

158. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 544-45 (1980) (Stevens, J., concurring) ("Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to state that 'a time, place and manner restriction may not be based upon either the content or subject matter of speech.' ").

159. Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368, 1377 (8th Cir. 1986). The school district's reasons for censoring *Spectrum* appear pretextual. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, 578 (1988) (Brennan, J., dissenting). If topic sensitivity were the true reason for the censorship, the principal would not have approved the "squeal law" article in the same issue, which dealt forthrightly with teenage sexuality, the use of contraceptives by teenagers, and teenage pregnancy. *Id.* at 579 (Brennan, J., dissenting). With regard to the story of the impact of divorce upon teenagers, the district court pointed out that no identification was possible since a particular quotation was attributed to an unnamed student in the junior class. Kuhlmeier v. Hazelwood School Dist., 607 F. Supp. 1422, 1457 (D.C. Mo. 1985).

160. *Hazelwood*, 108 S. Ct. at 579 (Brennan, J., dissenting).

161. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508 (1969). Morris, *supra* note 150, at 11, notes that it is not realistic in the modern world to shield children from exposure to topics such as AIDS, birth control, and teenage pregnancy, particularly because students discuss these subjects among themselves on school grounds. The author states that these concerns are of such importance to our society that a school newspaper should responsibly address precisely these issues. *Id.* For a related discussion, *see infra* note 183 and accompanying text.

their traditional planning and budgetary functions, to assess student vulnerability, maturity, and sensitivity to determine the type of information that students may send or receive. If schools exercise this authority impulsively, courts will be forced to take a more active role in instituting guidelines for such determinations.

The Court in *Hazelwood* also ignored its previous decisions that held the first amendment protects the right to receive information.[162] Not only do the rights of free speech and press include the rights to speak and to print, but also the rights to distribute, to receive, to read, to inquire, to think, and to teach.[163] In *Board of Education v. Pico*,[164] the Court stated that the right to receive information was necessary both to protect the rights of senders, and as a necessary predicate to meaningful exercise of the recipient's rights to speech, press, and political freedom.[165] The Court in *Pico* recognized that the state may not unreasonably suppress communication in the schools between a willing speaker and a willing recipient.[166]

The *Hazelwood* Court's emphasis on curricular activities creates a danger that lower courts will misread the opinion in order to sanction official censorship.[167] Just sixteen days after the Court's decision, a federal district court concluded that a local school

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162. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (right to sue when state action violates individual's right to receive information); Procunier v. Martinez, 416 U.S. 396 (1974) (right to receive letters written by prison inmates); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("[R]ight of the public to receive suitable access to social, political, ethical, moral, and other ideas and experiences . . . may not be constitutionally abridged by Congress or by the FCC."); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("right to receive information and ideas regardless of their social worth is fundamental to our free society").

163. Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

164. 457 U.S. 853 (1982).

165. *Id.* at 868. The Court recognized that just as access to ideas makes it possible for citizens to exercise their first amendment rights in a meaningful manner, such access prepares students "for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." *Id.* For a related discussion, *see* notes 19-29 and accompanying text.

166. *Id.* at 878-79 (Blackmun, J., concurring in part and concurring in the judgment); *Id.* at 887 (Burger, C.J., dissenting).

167. The *Hazelwood* decision illustrates how school officials may mask censorship under the guise of protecting student sensibilities. *See supra* note 159. If topic sensitivity was truly the basis for the publication restriction, the principal would have found the articles dealing with abortion and teenage sexual activity as objectionable as the articles on pregnancy and divorce. *Hazelwood*, 108 S. Ct. at 578-79 (Brennan, J., dissenting). The dissent in *Hazelwood* suggests that the Court's decision invites manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination, and chills student speech to which school officials might not object. *Id.* at 578 (Brennan, J., dissenting).

board in Florida acted reasonably and within its authority in discontinuing the use of a humanities text containing Chaucer's *The Miller's Tale* and Aristophanes' play *Lysistrata*.[168] The court acknowledged that the works were of undisputed literary value,[169] and agreed with the plaintiffs that the school board's decision reflected its fundamentalist Christian beliefs as to which values the students should be exposed.[170] Notwithstanding these findings, the court held that because the school authorities wished to keep sexually suggestive material out of the curriculum, their action was reasonably related to a legitimate pedagogical concern.[171] One must question whether other courts will rely similarly on *Hazelwood* to approve situations in which school administrators apparently overstep their bounds in order to inculcate their own value system.

Despite the power and discretion accorded them, school boards do not have an absolute right to remove materials from the curriculum.[172] If school officials intend their decisions to deny the students access to ideas with which the officials merely disagree, the restriction would be unconstitutional.[173] A better formulation of the *Hazelwood* standard would emphasize the object of the student activity, not merely the fact that the activity is school-sponsored. If the Hazelwood East principal had decided that certain quotations in *Spectrum* should have been verified or that both sides of a particular issue should have been represented, then those decisions would have been directly related to the teaching of journalism and, therefore, would not have curtailed student free speech in a constitutional sense.

If viewed as a realistic exercise designed to teach students actual newspaper skills, the legitimate pedagogical concern of a school newspaper is to teach "respect [for] the diversity of ideas that is

168. Virgil v. School Bd. of Columbia County, 677 F. Supp. 1547, 1554 (M.D. Fla. 1988) (citing *Hazelwood*, 108 S. Ct. at 570).

169. *Id.* at 1552.

170. *Id.*

171. *Id.* at 1553-54.

172. Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968) (a school board could not exclude from the curriculum on religious grounds the teaching of evolution); Board of Educ. v. Pico, 457 U.S. at 853, 878-79 (1982) (a school board may not purge its state-funded library of books that offend its social, political, and moral taste).

173. *Pico*, 457 U.S. at 870. *See also* Pratt v. Independent School Dist. No. 831, 670 F.2d 771 (8th Cir. 1982). In *Pratt*, a school board removed two films used to teach the allegorical short story "The Lottery" from the school curriculum. *Id.* at 774. The objections to the films centered around their impact upon the religious and family values of students. *Id.* The court held that because the school board eliminated the films to express an official policy with respect to moral and religious values, the censorship impermissibly interfered with the students' right to receive information. *Id.* at 778-79.

fundamental to the American system."[174] From that point of view, the censorship in *Hazelwood* unreasonably restricted speech because even if the speech was offensive, it was the product of a curricular exercise intended to teach discourse and exchange of ideas. In his dissent, Justice Brennan stated that no first amendment concern arises when a school maintains control over writing, research, and potentially libelous material because these criteria reflect the skills that the curricular newspaper is designed to teach.[175] The last-minute deletion of two full pages of *Spectrum* on the basis that the subject matter was inappropriate, however, was unrelated to the teaching of journalism or to the principal's powers to maintain discipline, to prevent exposure to obscene material, and to protect the rights of other students.[176]

The Court's approval of the principal's censorship cannot be justified given the availability of less oppressive means by which the school could have disassociated itself from the students' point of view.[177] Justice Brennan stated that the school could have required *Spectrum* to carry a disclaimer,[178] or could have clarified its position on the objectionable topics and pointed out why the students were wrong.[179] Censorship for the purpose of disassociating the school's sponsorship from the students' point of view has a chilling effect upon expression because it fosters bland publications that are mere public relations organs.[180] The *Hazelwood* decision allows for an Orwellian use of broad censorship power, indicating to students that neither a school newspaper nor the press in general should report bad news or express views that might upset the newspaper's sponsor.[181]

V. CONCLUSION

The decision in *Hazelwood* has produced an unfortunate stan-

174. *Pico*, 457 U.S. at 880 (Blackmun, J., concurring in part and concurring in the judgment); *see also* Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 972 (5th Cir. 1972) ("It is important that our young become convinced that our Constitution is a living reality, not parchment preserved under glass.")

175. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, 576 (1988) (Brennan, J., dissenting).

176. *Id.* at 570.

177. *Id.* at 579 (Brennan, J., dissenting).

178. *Id.* (Brennan, J., dissenting).

179. *Id.* (Brennan, J., dissenting).

180. Morris, *supra* note 150, at 11. This type of censorship causes concern because it may be used to censor student expression solely for non-educational, public relations purposes, and not for legitimate pedagogical concerns.

181. *Hazelwood*, 108 S. Ct. at 576 (Brennan, J., dissenting).

dard for both school administrators and lower courts. The decision marks the Supreme Court's departure from a protective first amendment to one which expands a school law exception, thereby restricting students' constitutional rights within the public school setting. Together with *Fraser*, the *Hazelwood* decision represents a shift in emphasis concerning the governance of schools and of constitutional rights within the schools.[182]

Despite this shift, future applications of the decision remain uncertain. Because students are exposed to such a diversity of information both inside and outside of the classroom, school administrators may determine that limiting discussions of certain ideas beyond the schoolhouse gate is a futile exercise.[183] Moreover, the decision probably will not have an effect upon student publications produced and distributed outside school-sponsored curricula,[184] and it should not effect first amendment rights of college or university students.[185]

There is a need to develop a policy which stabilizes and encourages the long range benefit of students and which affords protection against authoritarian paternalism or arbitrary suppression of ideas.

182. The Court recently has restricted student fourth amendment rights as well. In New Jersey v. T.L.O., 469 U.S. 325, 328 (1985), a school administrator searched a student's purse for cigarettes. When the administrator noticed a package of rolling papers, he continued the search expecting to find marijuana. *Id.* In holding that the search was reasonable, the Court accepted the concept that the fourth amendment applies to searches in schools, and reaffirmed the comprehensive authority of appropriate officials to prescribe and control student conduct. *Id.* at 337, 341.

183. *See generally* Churton-Hale, *supra* note 30, at 277-78. In Trachtman v. Anker, 563 F.2d 512, 526 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978), the dissenting opinion questioned the need to shield modern teenagers from discussions of sex, observing that the majority had an outdated image of high school students as "fragile, budding egos flushed with the delicate rose of sexual naivety." For a discussion of *Trachtman*, see *supra* note 49 and accompanying text.

184. *See* Thomas v. Board of Educ., 607 F.2d 1043, 1044-45 (2d Cir. 1979), *cert. denied*, 44 U.S. 1081 (1980). In *Thomas*, high school students were suspended for publishing a vulgar sexual satire off campus. *Id.* at 1046. The court held that the disciplinary actions of a public school administrator should be evaluated according to standards which allow some deference to the administrator's expertise only if the disciplinary actions do not reach beyond the schoolhouse gate. *Id.* at 1051-52.

185. Courts have generally upheld the first amendment rights of university students. *See generally* Papish v. Board of Curators, 410 U.S. 667 (1973) (dissemination of ideas on a state university campus cannot be proscribed in the name of "conventions of decency"); Stanley v. Magrath, 719 F.2d 279 (8th Cir. 1983) (public university may not cut funding of student newspaper because the university disapproves of the newspaper's content); Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973) (university's withdrawal of financial support from student newspaper which had segregationist editorial policy abridged freedom of press in violation of the first amendment); Trujillo v. Love, 322 F. Supp. 1266 (D. Colo. 1971) (public university may not constitutionally take adverse action against a school newspaper because the university disapproves of the newspaper's content).

The decision to edit a high school newspaper impacts upon the teaching of editorial judgment and the value of ideas in a free society. *Spectrum* was not just an in-class writing exercise, but rather a "laboratory" which afforded students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the first amendment. The *Hazelwood* decision created a paradox by restraining the liberty of expression in the context of teaching editorial judgment and the value of ideas in a democracy. The decision, therefore, diminishes one of the primary goals of public education — to prepare students for participation in a pluralistic society by teaching them respect for the full range of viewpoints, including the unpopular and provocative.

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