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# The School as Publisher: Hazelwood School District v. Kuhlmeier

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## NOTE

### The School As Publisher: *Hazelwood School District v. Kuhlmeier*

For four decades, the United States Supreme Court has grappled with the proper balance between students' first amendment<sup>1</sup> rights and public school officials' authority to regulate their campuses and curricula.<sup>2</sup> In the 1969 landmark decision *Tinker v. Des Moines Independent Community School District*<sup>3</sup> the Court announced that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"<sup>4</sup> and determined that the first amendment offered substantial protection for student speech.<sup>5</sup> In the two decades since *Tinker*, courts have scrutinized any speech regulation by school officials to ensure that they adequately observed these constitutional safeguards.<sup>6</sup>

Over time, this accommodation of student rights proved to be uncomfortable, sometimes leaving school officials with insufficient tools to perform their function of inculcating community values and decent behavior.<sup>7</sup> In *Hazelwood School District v. Kuhlmeier*<sup>8</sup> the Court permitted greater official control over speech whenever a school sponsors the mode of expression.<sup>9</sup> When the school organizes the communicative activity and provides for its production as part of

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1. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."). The first amendment is made binding on the states by the fourteenth amendment. *E.g.*, *Healy v. James*, 408 U.S. 169, 171 (1972).

2. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (compelling school children to salute the flag violates first amendment); *see also Epperson v. Arkansas*, 393 U.S. 97, 107 (1968) (state's right to prescribe curriculum does not include right to prohibit teaching of evolution).

3. 393 U.S. 503 (1969).

4. *Id.* at 506.

5. *Id.* at 511. "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Id.* Regulation of student speech is constitutionally permissible only when conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 513.

6. *E.g.*, *Reineke v. Cobb County School Dist.*, 484 F. Supp. 1252, 1256 (N.D. Ga. 1980) (enjoining school censorship of student newspaper); *Frasca v. Andrews*, 463 F. Supp. 1043, 1048-49 (E.D.N.Y. 1979) (allowing censorship of student newspaper because of likelihood of disruption and invasion of rights); *Bayer v. Kinzler*, 383 F. Supp. 1164, 1165 (E.D.N.Y. 1974) (enjoining restraint on distribution of student newspaper), *aff'd without opinion*, 515 F.2d 504 (2d Cir. 1975); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970) (declaring unconstitutional a college president's refusal to release student fees to finance campus newspaper); *Zucker v. Panitz*, 299 F. Supp. 102, 105 (S.D.N.Y. 1969) (barring school officials from prohibiting publication of anti-Vietnam War advertisement in school paper). *See generally*, Note, *Administrative Regulation of the High School Press*, 83 MICH. L. REV. 625, 652-56 (1984) (proposes regulatory scheme for high school publications based on *Tinker* standards).

7. *See Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681-86 (1986). For a discussion of *Fraser*, *see infra* text accompanying notes 52-59.

Justice Black predicted that the protections the Court had placed on student speech would lead to unhappy results. *Tinker*, 393 U.S. at 525 (Black, J., dissenting). "This case . . . subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students." *Id.* (Black, J., dissenting).

8. 108 S. Ct. 562 (1988).

9. *Id.* at 570-71.

the school's general educational mission, the school will be treated as publisher,<sup>10</sup> with much the same control over content as private publishers enjoy.<sup>11</sup>

This Note traces the Court's articulation of students' freedom of expression over the past twenty years. It examines the standards by which courts must judge a school's control over student speech, and how these standards vary depending on the school's relation to the expressive activity. The Note concludes with a forecast that as a result of *Kuhlmeier* fewer views and voices will be heard on campus as school publishers invoke their broad powers to stifle student expression.

Robert Reynolds, the principal of Hazelwood East High School, objected to two student-written articles scheduled for publication in the May 13, 1983, edition of the school-sponsored newspaper, *Spectrum*.<sup>12</sup> One story described three students' experiences with pregnancy.<sup>13</sup> Reynolds believed that the students could be readily identified, even though the story gave them fictitious names,<sup>14</sup> and that the article's references to sexual activity and birth control practices were inappropriate for younger readers.<sup>15</sup> The second story contained a named student's critical remarks about his parents' marriage, parenting, and subsequent divorce, and Reynolds was concerned that the student's parents had no opportunity to respond or consent to the comments.<sup>16</sup> Reynolds deleted two pages containing the stories from the edition, thereby eliminating several other stories to which he had no objection.<sup>17</sup>

Three student staff members filed suit against the school district, seeking a declaration that their first amendment rights had been violated, injunctive relief, and monetary damages.<sup>18</sup> The district court denied relief, finding no first amendment violation.<sup>19</sup> The United States Court of Appeals for the Eighth Circuit reversed, concluding that the censorship was unjustified because the principal could not have reasonably forecast a disruption in classwork, substantial disorder, or the invasion of the rights of others.<sup>20</sup> The Supreme Court reversed, hold-

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10. *Id.* at 570.

11. Private publishers have complete control over what they publish. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 255-56 (1974) ("right of reply" statute granting political candidates the right to equal space to answer criticisms by a newspaper held unconstitutional). A school publisher can control speech only for legitimate reasons. See *infra* text accompanying notes 93-98.

12. *Kuhlmeier*, 108 S. Ct. at 565.

13. *Id.*

14. *Id.*

15. *Id.* at 565-66.

16. *Id.* at 566. Reynolds was unaware that the student's name already had been deleted by the faculty advisor. *Id.*

17. *Id.* at 566 & n.1. Reynolds believed the printing deadline would not permit revision of the articles in time to publish the newspaper before the school year ended. *Id.* at 566. He concluded that his only options were to delete the two pages or publish no newspaper at all. *Id.* The other articles on the pages dealt with teenage marriage, runaways, and juvenile delinquents, and one covered teenage pregnancy in a more general way. *Id.* at 566 n.1.

18. *Id.*

19. *Kuhlmeier v. Hazelwood School Dist.*, 607 F. Supp. 1450, 1467 (E.D. Mo. 1985), *rev'd*, 795 F.2d 1368 (8th Cir. 1986), *rev'd*, 108 S. Ct. 562 (1988).

20. *Kuhlmeier v. Hazelwood School Dist.*, 795 F.2d 1368, 1375-76 (8th Cir. 1986), *rev'd*, 108 S. Ct. 562 (1988).

ing that school officials, in the creation and subsequent handling of *Spectrum*, had not created a public forum; therefore, the Court applied a less exacting first amendment review standard.<sup>21</sup> Writing for the majority, Justice White concluded that school-sponsored publications and other expressive activities can be regulated in any way "reasonably related to legitimate pedagogical concerns."<sup>22</sup> The Court concluded that Reynolds' concerns with privacy and topic sensitivity were legitimate and that his decision to delete two pages from the May 13 issue of *Spectrum* was "reasonable under the circumstances as he understood them."<sup>23</sup>

Justice Brennan, joined by Justices Marshall and Blackmun, dissented, urging scrutiny of all restrictions on student speech under the standards announced in *Tinker v. Des Moines Independent Community School District*<sup>24</sup> nineteen years earlier.<sup>25</sup> Justice Brennan contended that under *Tinker* the school constitutionally could refuse to publish inadequately researched, poorly written, or otherwise below-standard student articles because such journalism would materially disrupt the newspaper's curricular purpose.<sup>26</sup> A less exacting standard, in his view, would invite school officials to seize upon any pretext to exercise blatant viewpoint discrimination.<sup>27</sup> Justice Brennan chose to base his dissent on broad philosophical grounds and did not address the majority's forum analysis.

Consideration of the significance of school sponsorship in *Kuhlmeier* must begin with earlier cases recognizing students' broad first amendment rights. In *Tinker* the Supreme Court held that students have first amendment rights, limited only by the "special characteristics of the school environment."<sup>28</sup> Three students had received suspensions for wearing black armbands to school in protest of the Vietnam War.<sup>29</sup> Concluding that this expression was constitutionally protected,<sup>30</sup> the Court noted that "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" was not enough to justify punishment or prohibition of student expression.<sup>31</sup> Speech that would fall within the ambit of the first amendment outside the school environment

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21. *Kuhlmeier*, 108 S. Ct. at 569. For a discussion of the Court's forum analysis, see *infra* notes 82-85 and accompanying text.

22. *Kuhlmeier*, 108 S. Ct. at 571.

23. *Id.* at 572.

24. 393 U.S. 503 (1969).

25. *Kuhlmeier*, 108 S. Ct. at 576 (Brennan, J., dissenting). For a discussion of *Tinker*, see *infra* notes 28-33 and accompanying text.

26. *Kuhlmeier*, 108 S. Ct. at 576-77 (Brennan, J., dissenting). The dissenters apparently would have permitted Principal Reynolds to exercise prepublication review and to insist that the articles meet responsible journalistic standards. *Id.* at 576 (Brennan, J., dissenting).

27. *Id.* at 577-79 (Brennan, J., dissenting). Justice Brennan found possible viewpoint discrimination in the principal's objection to the teen pregnancy story because it was an inappropriate topic. *Id.* at 578-79 (Brennan, J., dissenting). Noting that the principal testified to his approval of another article on the same page also concerning teenage pregnancy, Justice Brennan hypothesized that the objectionable article may have been censored not because of its topic, but because the principal read it as advocating irresponsible sex. *Id.* at 579 (Brennan, J., dissenting).

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

29. *Id.* at 504.

30. *Id.* at 514.

31. *Id.* at 509. The Court, in prohibiting schools from compelling a flag salute, has spoken eloquently about the importance of tolerating all viewpoints, unpopular and otherwise, in the public

cannot be punished unless it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."<sup>32</sup> Similarly, schools cannot prohibit speech unless they reasonably can "forecast substantial disruption of or material interference with school activities."<sup>33</sup>

In subsequent decisions, the Court strictly interpreted the *Tinker* standards and applied them to any official attempt to punish or prohibit student expression. In *Healy v. James*<sup>34</sup> a state-supported college denied official recognition to students seeking to establish a local chapter of the Students for a Democratic Society (SDS).<sup>35</sup> The Court held that denying recognition was a prior restraint violating the freedom of association implicit in the first amendment.<sup>36</sup> Such a restraint was impermissible if based solely on the school's disagreement with the policies and practices of the national organization.<sup>37</sup> The Court inferred such viewpoint discrimination because the college had not produced substantial evidence that a local chapter of SDS would be a disruptive force on campus.<sup>38</sup> Quoting *Tinker*, the Court stated that nonrecognition based on the college's fear that SDS would be a disruptive influence "constituted little more than the sort of 'undifferentiated fear or apprehension of disturbance which is not enough to overcome the right to freedom of expression.'"<sup>39</sup>

Relying on *Healy* and *Tinker*, the Court determined in *Papish v. Board of Curators*<sup>40</sup> that a student could not be expelled for distributing an indecent but not legally obscene publication on a college campus.<sup>41</sup> The university did not attempt to justify the punishment of expulsion under the *Tinker* standards of

schools. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637-42 (1943). Writing the Court's opinion in *Barnette*, Justice Jackson stated:

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. . . .

....

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . . If there are any circumstances which permit an exception, they do not now occur to us.

*Id.* at 637, 642.

32. *Tinker*, 393 U.S. at 513.

33. *Id.* at 514. "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508.

34. 408 U.S. 169 (1972).

35. *Id.* at 170.

36. *Id.* at 181. For a discussion of the prior restraint doctrine, see *infra* notes 71-74 and accompanying text.

37. *Healy*, 408 U.S. at 187. Much of the dispute between the litigants centered on the affiliation of the local group with the national SDS, some chapters of which were perceived as engaging in violence. *Id.* at 185. The Court stated that such affiliation was irrelevant unless the college could show that the local chapter had a "specific intent to further . . . illegal aims." *Id.* at 186.

38. *Id.* at 190-91. The only evidence the college offered on the issue of disruptiveness other than the group's affiliation with the national SDS was the ambiguous statements of group representatives regarding their potential response to issues of violence. *Id.*

39. *Id.* at 191 (quoting *Tinker*, 393 U.S. at 508).

40. 410 U.S. 667 (1973) (per curiam).

41. *Id.* at 670. The student had a permit to sell the newspaper, the Free Press Underground, on campus. *Id.* at 667. The issue asserted to be indecent contained a cartoon depicting policemen raping the Statue of Liberty and the Goddess of Justice and an article entitled "M——f—— Acquitted." *Id.*

substantial disruption or invasion of the rights of others.<sup>42</sup> In the absence of such justification, the Court held that any punishment based on the content of the newspaper was impermissible, because the "First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech . . ."<sup>43</sup> Federal courts also have applied the *Tinker* standards to distribution of underground publications by high school students.<sup>44</sup>

Nine years after *Papish*, in *Board of Education v. Pico*,<sup>45</sup> the Court gave the first indication that school-imposed restrictions on expression might escape constitutional scrutiny under *Tinker* standards when the school itself is the conduit of that expression. At issue was the school board's removal from library shelves of nine books that it characterized as "anti-American, anti-Christian, anti-Semitic, and just plain filthy."<sup>46</sup> Five justices voted to reverse the summary judgment because a factual issue—the reasons for the removal of books—remained undetermined.<sup>47</sup> Seven justices wrote opinions, however, producing no binding holding on constitutionally permissible reasons for removal of books.<sup>48</sup> In a portion of his plurality opinion joined by only two justices, Justice Brennan attempted to establish constitutional safeguards even broader than *Tinker* by vesting students with a right to receive ideas.<sup>49</sup> Chief Justice Burger strongly rejected any such right in a dissent that foreshadowed the Court's stance in *Kuhlmeier*.<sup>50</sup> Distinguishing the suppression in *Pico* from the restraint on stu-

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42. *Id.* at 670 n.6. The university contended only that the newspaper contained speech that was improper for the university campus. *Id.*

43. *Id.* at 671.

44. *See, e.g., Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960 (5th Cir. 1972). In *Shanley* five students were suspended for distributing, off school property and outside of school hours, an underground newspaper characterized as "probably one of the most vanilla-flavored ever to reach a federal court." *Id.* at 964. The students ran afoul of a school board policy requiring the principal's approval before students could distribute any kind of documents. *Id.* at 964-65. Concluding that regulations requiring prior approval of printed materials were not unconstitutional per se, the court stated such prescreening could not be used to "stifle the content" of any publication other than those that met the *Tinker* test of substantial disruption. *Id.* at 969-70. The activity for which the five students were punished did not approach that threshold. *Id.* at 970; *see also Fujishima v. Board of Educ.*, 460 F.2d 1355, 1357-58 (7th Cir. 1972) (school policy interpreted as requiring principal approval of content of distributed materials constitutionally invalid); *Quarterman v. Byrd*, 453 F.2d 54, 59-60 (4th Cir. 1971) (school regulation prohibiting distribution of unapproved written material facially invalid for failure to specify criteria for disapproval); *Leibner v. Sharbaugh*, 429 F. Supp. 744, 748 (E.D. Va. 1977) (regulation allowing principal to prohibit distribution of material not conforming to "journalistic standards of accuracy, taste, and decency" unconstitutionally vague).

45. 457 U.S. 853 (1982) (plurality opinion).

46. *Id.* at 857.

47. *Id.* at 875 (plurality opinion by Brennan, J.); *id.* at 882 (Blackmun, J., concurring in part and concurring in judgment); *id.* at 883 (White, J., concurring in judgment).

48. *See id.* at 886 n.2 (Burger, C.J., dissenting). Chief Justice Burger noted, however, that all nine justices agreed that the school board could remove books that were "pervasively vulgar" or "educationally unsuitable." *Id.* at 890 (Burger, C.J., dissenting).

49. *Id.* at 867.

50. *Id.* at 888 (Burger, C.J., dissenting). Justices Powell, Rehnquist, and O'Connor joined in the Chief Justice's dissenting opinion. Justice Blackmun also rejected, although in milder terms, any absolute right to receive ideas. *Id.* at 880-81 (Blackmun, J., concurring in part and concurring in the judgment). Under Justice Blackmun's formulation, a school may not purposefully suppress ideas, but it may pursue positive educational action that has an incidental suppressive effect. *Id.* at 881-82 (Blackmun, J., concurring in part and concurring in the judgment).

dent-initiated expression addressed in *Tinker*, the Chief Justice concluded that "[i]t does not follow . . . that a school board must affirmatively aid the speaker in his communication."<sup>51</sup>

The Court raised further questions about the general applicability of *Tinker* standards in *Bethel School District No. 403 v. Fraser*.<sup>52</sup> Writing for the majority, Chief Justice Burger made clear that a school can punish a student for lewd and indecent forms of expression in the classroom or school assembly.<sup>53</sup> The student in *Fraser* delivered a speech nominating a fellow student for elective office during a school-sponsored assembly.<sup>54</sup> The speech consisted of an elaborate sexual metaphor delivered to an audience of 600 students, many of them fourteen-year-olds, who were required either to attend the assembly or to report to study hall.<sup>55</sup> The Court distinguished the protest armbands in *Tinker* as a "passive expression of a political viewpoint" that did not intrude upon the work of the school.<sup>56</sup> The student's speech at the assembly, however, interfered with the school's function as an inculcator of fundamental values, such as decency and consideration for the sensibilities of others.<sup>57</sup> Chief Justice Burger wrote:

Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.<sup>58</sup>

Clearly *Tinker's* standards of substantial disruption and invasion of the rights of others were not the only constitutionally valid reasons for a school to punish student expression when that expression interfered with "the school's basic educational mission."<sup>59</sup>

*Tinker* and its progeny analyzed students' first amendment rights in terms of the form and content of the speech. In justifying its departure from *Tinker*, the *Kuhlmeier* Court relied on another line of cases that based first amendment protections on the context of the speech. The leading case in this line is *Perry Education Association v. Perry Local Educators' Association*,<sup>60</sup> in which a collective bargaining agreement between the school board and its teachers' bargaining representative reserved for that union exclusive access to the interschool mail system.<sup>61</sup> A rival union claimed that this restriction on access infringed on its free speech and equal protection rights.<sup>62</sup> The Court first identified three categories of forums that determine which first amendment standard applies: the

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51. *Id.* at 887 (Burger, C.J., dissenting).

52. 478 U.S. 675 (1986).

53. *Id.* at 685.

54. *Id.* at 677.

55. *Id.*

56. *Id.* at 680.

57. *Id.* at 681.

58. *Id.* at 683 (quoting *Tinker*, 393 U.S. at 508).

59. *Id.* at 685.

60. 460 U.S. 37 (1983).

61. *Id.* at 38-39.

62. *Id.*

traditional public forum,<sup>63</sup> such as streets and parks; the limited public forum,<sup>64</sup> which the government has opened for indiscriminate use by the public or some segment of the public; and the nonpublic forum,<sup>65</sup> which may contain expression but which has been reserved for government purposes.<sup>66</sup> The government can restrict speech only within narrow limits in the traditional and limited public forums but can control its nonpublic forum in any reasonable manner.<sup>67</sup> Despite the rival union's previous free access to the mail system and community groups' periodic access to teacher mailfiles at individual schools, the Court held that the school had not created a public forum because it had reserved the mail system for school-related business.<sup>68</sup>

*Perry* addressed the access of outsiders to a school forum, but did not consider how courts should categorize a school-created forum for student expression. *Fraser* did not announce a range of constitutionally permissible reasons for a school to punish or prohibit student expression not reachable under *Tinker*, and failed to delimit the context within which the broader censorship powers could be exercised.<sup>69</sup> *Kuhlmeier* addressed all of these issues. According to the Court, when the student expression occurs in a school-sponsored activity, schools can exercise control over content for any valid educational purpose.<sup>70</sup>

*Kuhlmeier's* significance lies in its grant to school officials of a license to exercise prior restraint on student speech. The Court long ago determined that the free speech and free press guarantees primarily prevented prior restraints.<sup>71</sup>

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63. *E.g.*, *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939) (streets and other public places).

64. *E.g.*, *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (university meeting rooms as public forum limited to student groups).

65. *E.g.*, *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 806 (1985) (charity drive aimed at federal employees).

66. *Perry*, 460 U.S. at 45-46. In *Cornelius* the Court refined the test for whether the government has created a limited public forum, holding that the government must show a clear intent to create a public forum, and courts should look to the policy and practice of access to the forum to determine this intent. *Cornelius*, 473 U.S. at 802. If the governmental purpose of the forum conflicts with unlimited speech, or if the government makes a practice of selective access, it shows its intent to reserve the forum as its own. *Id.*

67. *Perry*, 460 U.S. at 45-46. "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter or speaker identity," so long as the distinctions are reasonable in light of the purpose the forum serves. *Id.* at 49.

68. *Id.* at 47-48. Because the rival union had no first amendment right to use the mail system, the incidental effect of the access policy, discouraging the viewpoint of the rival union while advancing that of the recognized union, presented no equal protection infirmities. *Id.* at 55.

69. The *Fraser* Court did not cite *Perry* and did not categorize the school assembly as a particular type of forum. The court of appeals, however, identified the assembly as a limited public forum. *Fraser v. Bethel School Dist. No. 403*, 755 F.2d 1356, 1365 (9th Cir. 1985), *rev'd*, 478 U.S. 675 (1986). Justice Brennan points out this anomaly in his dissent in *Kuhlmeier*, stating that the *Fraser* Court faithfully applied the *Tinker* standard. *Kuhlmeier*, 108 S. Ct. at 575-76 (Brennan, J., dissenting). The *Kuhlmeier* majority disputes this conclusion, implying that the school's power to punish the speaker in *Fraser* derived from the assembly's character as a nonpublic forum. *Id.* at 570 n.4.

70. *Kuhlmeier*, 108 S. Ct. at 571.

71. *Near v. Minnesota ex rel. Olson County Attorney*, 283 U.S. 697, 713 (1931); *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). A more recent explanation of the prohibition against prior restraints appears in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). Writing for the majority, Justice Blackmun stated:

[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in ad-



At the heart of this doctrine is the view that the truth of any idea can be determined only in the marketplace of competing ideas.<sup>72</sup> The government can impose prior restraints only in exceptional circumstances,<sup>73</sup> and it bears the heavy burden, both substantively and procedurally, of justifying any such restrictions.<sup>74</sup> The *Kuhlmeier* Court did not abandon the prior restraint doctrine. Instead, the Court clearly regards restrictions on student speech in school-sponsored activities as self-restraint.

*Kuhlmeier* provides school officials with a three-step analysis by which they can discern the limits on their authority to exercise this self-restraint over student speech. First, school officials must characterize the school's role in connection with the forum: Is the school the sponsor of the expressive activity?<sup>75</sup> Second, school officials must consider whether they intentionally have opened the forum for indiscriminate use by the students or the public.<sup>76</sup> Finally, if the forum remains nonpublic, school officials must determine whether the regulation is "reasonably related to legitimate pedagogical concerns."<sup>77</sup>

School officials should have no difficulty determining whether they are the sponsors of the speech they desire to suppress. The *Kuhlmeier* Court emphasized *Spectrum*'s role as an integral part of Hazelwood East's journalism curriculum.<sup>78</sup> A few lower courts had distinguished curricular publications and activities from extracurricular endeavors, giving school officials broad latitude to control content in the former but applying *Tinker* standards to the latter.<sup>79</sup> The *Kuhlmeier* Court does not limit its holding to purely curricular activities, however; the authority to regulate student speech applies to "school-sponsored pub-

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vance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

*Id.*

72. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

73. *Near*, 283 U.S. at 716 (statute allowing prior restraint on publication that lodges charges of official misconduct unconstitutional; defamed officials' only remedy is a tort action).

74. *Southeastern Promotions*, 420 U.S. at 560 (denial of use of city auditorium to promoters of rock musical "Hair" without prompt judicial review lacked requisite procedural safeguards); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*) (government failed to carry burden of proving compelling national security interest justifying prior restraint on publication of the Pentagon Papers).

75. *Kuhlmeier*, 108 S. Ct. at 569-70.

76. *Id.* at 567.

77. *Id.* at 571.

78. *Id.* at 568. The Court noted that *Spectrum* was the product of Hazelwood East's Journalism II class, which was taught by a faculty member during regular class hours. *Id.* Students received grades and academic credit for participation in the course. *Id.* The teacher selected editors, assigned story ideas, edited stories, and dealt with the printer on all details of publication. *Id.*

79. See *Seyfried v. Walton*, 668 F.2d 214, 216 (3rd Cir. 1981); *Gambino v. Fairfax County School Bd.*, 429 F. Supp. 731, 736 (E.D. Va.), *aff'd per curiam*, 564 F.2d 157 (4th Cir. 1977); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970). But see *Nicholson v. Board of Educ. Torrance Unified School Dist.*, 682 F.2d 858, 863 n.3 (9th Cir. 1982); *Reineke v. Cobb County School Dist.*, 484 F. Supp. 1252, 1257 (N.D. Ga. 1980); *Bayer v. Kinzler*, 383 F. Supp. 1164, 1166 (E.D.N.Y. 1974), *aff'd without opinion*, 515 F.2d 504 (2d Cir. 1975); *Zucker v. Panitz*, 299 F. Supp. 102, 104-05 (S.D.N.Y. 1969). See generally Comment, *Freedom of Expression in Public Schools: Regulation of Student Newspapers and Other Publications*, 18 CUMB. L. REV. 181, 194 (1987) (noting difficulty of distinguishing curricular from extracurricular activities and offering factors to consider); Note, *supra* note 6, at 633 (*Tinker* applies to both curricular and extracurricular activities).

lications, theatrical productions and other expressive activities that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school."<sup>80</sup> Whenever the school lends its name and resources to an activity, it needs the authority to ensure that students learn the intended lessons and that the public does not mistakenly attribute student views to the school.<sup>81</sup>

If the school sponsors an expressive activity, the activity's status as a non-public forum is nearly a foregone conclusion. The *Kuhlmeier* Court emphasized that schools create public forums only if they intentionally open the activity for indiscriminate use by the public, students, or student groups.<sup>82</sup> A statement published at the beginning of the school year, that *Spectrum* accepts all first amendment rights, was deemed insufficient evidence of an intent to designate the newspaper a public forum.<sup>83</sup> The Court also rejected the argument that because the students exercised some editorial control over *Spectrum's* contents, the school had intentionally opened *Spectrum* as a public forum.<sup>84</sup> Instead, the Court viewed the faculty advisor's supervisory duties and the principal's prepublication review as conclusive indications of the school's intent to reserve *Spectrum* for educational purposes.<sup>85</sup> Under the *Kuhlmeier* forum analysis, nothing short of a school-sponsored rap session, inviting students to speak openly about their concerns, would constitute a limited public forum for student speech.

The weakness in the Court's analysis is its view that the concepts of reserving an activity for educational purposes and creating a forum for students to share their ideas and opinions are mutually exclusive.<sup>86</sup> The Court in *Tinker*

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80. *Kuhlmeier*, 108 S. Ct. at 569. The Court did not acknowledge the curricular-extracurricular distinction. Irrespective of whether activities occur outside the traditional classroom, if they "are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences" the activities fall within the Court's definition of curriculum. *Id.* at 570. The Court, then, would characterize as curricular such traditionally extracurricular groups as the cheerleading squad and the school's chapter of Future Farmers of America.

81. *Id.* at 570.

82. *Id.* at 568. In previous forum analyses, the Court has examined intent by inquiring, in part, whether the speaker seeking access to a forum has adequate alternative channels of expression. See *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 809 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 53-54 (1983). In *Perry*, the Court held that the school's reservation of its mail system as a nonpublic forum was reasonable because there were ample alternative means of communication. *Id.* For a discussion of the Court's decision in *Perry*, see *supra* text accompanying notes 60-68.

The *Kuhlmeier* Court did not raise the alternative channels issue. One commentator concluded, however, that because students have no equivalent means of communicating with each other, schools presumably intend that student newspapers be public forums. Note, *Public Forum Analysis and State Owned Publications: Beyond Kuhlmeier v. Hazelwood School District*, 55 *FORDHAM L. REV.* 241, 258 (1986).

83. *Kuhlmeier*, 108 S. Ct. at 569.

84. *Id.*

85. *Id.* at 568-69.

86. Lower courts evaluating educational activities that also provided venues for student expression have determined that students' first amendment rights take precedence over the school's interest in controlling content. To reach these results, the courts usually have denominated the activity an open forum. See *Bazaar v. Fortune*, 476 F.2d 570, 575 (5th Cir.) (university literary magazine), *aff'd per curiam as modified on rehearing en banc*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *Stanton v. Brunswick School Dep't*, 577 F. Supp. 1560, 1570 (D. Me. 1984) (high-school yearbook); see also Buckley, *Student Publications, the First Amendment, and State Speech*, 34 *CLEV. ST. L. REV.* 267, 270-86 (1985) (forum analysis unworkable when state is publisher; student publications, as government speech, should be protected from intergovernmental censorship).

had observed:

The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process.<sup>87</sup>

The court of appeals concluded that *Spectrum* "was a public forum in which the school encouraged students to express their views to the entire student body freely, and [that] students commonly did so."<sup>88</sup> *Spectrum* published stories of interest to students, including school news, current affairs, and letters to the editor.<sup>89</sup> Students not enrolled in the Journalism II class could also submit stories for publication.<sup>90</sup> The school clearly intended *Spectrum* to serve two purposes: to provide a forum for student expression, and to provide an educational opportunity for Journalism II students. In the *Kuhlmeier* Court's view, however, because the school intended *Spectrum* to serve the latter purpose, the former purpose was irrelevant, and the newspaper remained a nonpublic forum with few first amendment protections. To maintain substantial control over content, therefore, schools need only refrain from unequivocally throwing open their forums for the school community's unchecked use.

The *Tinker* standards for regulating student speech remain applicable, however, to those few public forums a school may create.<sup>91</sup> Student-initiated expression that the school does not sponsor, such as underground newspapers or protest symbols, also remains within *Tinker's* protection. Educators' ability to silence a student's personal expression occurring on the school premises continues to depend on whether that expression would constitute a substantial disruption or invade the rights of others.<sup>92</sup>

The school publisher's powers are not unlimited, however, even in a school-sponsored, nonpublic forum; the regulation must have a valid educational purpose.<sup>93</sup> The *Kuhlmeier* Court outlined a broad range of justifications for regulating student speech in school-sponsored activities that would be reasonably related to legitimate pedagogical concerns.<sup>94</sup> The school can refuse to promote

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87. *Tinker*, 393 U.S. at 512.

88. *Kuhlmeier v. Hazelwood School Dist.*, 795 F.2d 1368, 1373 (8th Cir. 1986), *rev'd*, 108 S. Ct. 562 (1988).

89. *Kuhlmeier v. Hazelwood School Dist.*, 607 F. Supp. 1450, 1452-53 (E.D. Mo. 1985), *rev'd*, 795 F.2d 1368 (8th Cir. 1986), *rev'd*, 108 S. Ct. 562 (1988).

90. *Id.* at 1453.

91. See *Kuhlmeier*, 108 S. Ct. at 569. For an example of one such forum, see *supra* text following note 85.

92. *Id.* at 569 n.2.

93. *Id.* at 571.

94. *Id.* The "legitimate pedagogical concerns" test is equivalent to the rational-basis test that the Court has applied in certain due-process contexts. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943). In that case, however, the Court stated that "freedoms of speech and of press . . . may not be infringed on such slender grounds." *Id.* at 639. But see *Diamond, The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 528 (1981) (courts should use minimum rationality standard to review all first amendment claims arising in public schools).

speech that is grammatically incorrect, inadequately researched, biased, or vulgar.<sup>95</sup> Additionally, the school can restrain student speech that it judges inappropriate for the emotional maturity of the intended audience,<sup>96</sup> or that tends to advocate drug or alcohol use, teenage sexual activity, or other improper conduct.<sup>97</sup> Finally, a school can refuse to promote speech that might associate it "with any position other than neutrality on matters of political controversy."<sup>98</sup> Indeed, the permissible reasons for a school to refuse to promote student speech give principals power virtually equivalent to that of a private publisher.<sup>99</sup>

When considering whether the school's reason for censorship is a legitimate pedagogical concern, courts must pay great deference to the decisions of educators.<sup>100</sup> "[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."<sup>101</sup> Nevertheless, under *Tinker*, school officials bore the burden of proving that their decision to punish or prohibit student speech was justified because of the possibility of substantial disruption or the invasion of the rights of others.<sup>102</sup> *Kuhlmeier* shifts to students the burden of proving that the restraint on speech served no valid pedagogical purpose.<sup>103</sup> This burden promises to prove virtually insurmountable;<sup>104</sup> if school officials were ever bold enough to admit they censored speech solely because they disagreed with its viewpoint, the Court would refuse to allow the restraint.<sup>105</sup> If the viewpoint discrimination can

95. *Kuhlmeier*, 108 S. Ct. at 570.

96. *Id.* Such sensitive topics "might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting." *Id.* Justice Brennan was particularly critical of this justification, calling it a "vaporous nonstandard . . . that invites manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination." *Id.* at 578 (Brennan, J., dissenting).

97. *Id.* at 570; see also *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions.")

98. *Kuhlmeier*, 108 S. Ct. at 570. Since the views in a student newspaper may be "erroneously attributed to the school," *id.*, it is arguable that this justification may give schools a blanket editorial license to prohibit any student expression on controversial political issues.

99. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (publisher's powers include determining what goes into the paper and how public officials and issues will be treated).

100. *Kuhlmeier*, 108 S. Ct. at 571. The Court frequently has referred to the deference courts must pay to curricular decisions of states and their schools. See, e.g., *Board of Educ. v. Rowley*, 458 U.S. 176, 208 (1982) (determination of appropriate methodology for educating the handicapped rests with state); *Wood v. Strickland*, 420 U.S. 308, 326 (1975) (evidence to be considered in student disciplinary proceedings lies within discretion of school administrators). The Court has interfered, however, with determinations of educational policy that conflict with fundamental first amendment values. See, e.g., *Edwards v. Aguillard*, 107 S. Ct. 2573, 2577 (1987) (invalidating Louisiana statute requiring teaching of creation science whenever evolution theory is taught); *Meyer v. Nebraska*, 262 U.S. 390, 402-03 (1923) (invalidating Nebraska ban on teaching of foreign languages).

101. *Kuhlmeier*, 108 S. Ct. at 571.

102. *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960, 969 (5th Cir. 1972).

103. *Kuhlmeier*, 108 S. Ct. at 571.

104. Courts require that the state's articulated purpose be sincere and not a sham. *Edwards v. Aguillard*, 107 S. Ct. 2573, 2579 (1987). Given the broad outlines of legitimate pedagogical concerns sketched by the Court, however, it is hard to imagine any speech about which a school could not state a facially legitimate justification for censorship.

105. See *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 806 (1985) (control over subject matter in a nonpublic forum must be viewpoint neutral). In its brief, the school conceded that it must exercise censorship in a manner that is viewpoint neutral. Brief for Petitioners at 32, *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988) (No. 86-836).

be considered incidental to a proper purpose, however, *Kuhlmeier* counsels federal judges not to interfere.<sup>106</sup> Given this judicial deference, virtually any justification the school offers for restricting student speech will fall within constitutional bounds.

Once the school establishes this minimal justification for regulating student speech, its authority is unlimited; the Court imposes no constitutional requirement that schools restrain speech in the least restrictive manner possible. Courts have recognized this requirement when school officials justifiably prohibit student-initiated speech based on *Tinker* standards.<sup>107</sup> More generally, the Supreme Court has insisted that states employ the least drastic means of restraint any time a legitimate government regulation also stifles fundamental personal liberties.<sup>108</sup> The Court's characterization of Principal Reynolds' decision to delete two pages as "reasonable under the circumstances as he understood them"<sup>109</sup> illustrates that school officials are not obligated to find the least restrictive means to censor speech in school-sponsored activities. Reynolds' belief that there was no time to make necessary changes in the articles was reasonable, in the Court's view, even though he did not inquire whether printing could be delayed until the problems in the stories were corrected.<sup>110</sup>

In a footnote, the *Kuhlmeier* majority hypothesized that many schools might discontinue student publications rather than control them within *Tinker*'s limits, which it viewed as requiring publication "regardless of how sexually explicit, racially intemperate, or personally insulting that expression otherwise might be."<sup>111</sup> Accepting this as a realistic possibility<sup>112</sup> and conceding, *argu-*

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106. In view of the Court's analysis in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), students would have no better success challenging such incidental viewpoint discrimination on equal protection grounds. See *supra* note 68. "[O]n government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used." *Perry*, 460 U.S. at 55.

107. *Kuhlmeier v. Hazelwood School Dist.*, 795 F.2d 1368, 1374 n.5 (8th Cir. 1986) ("Of course, if student writings are to be censored prior to publication, the least restrictive means are to be followed."), *rev'd*, 108 S. Ct. 562 (1988).

108. See *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980) (order prohibiting inclusion of inserts discussing controversial issues in monthly utility bills unconstitutional because it is not narrowly drawn to serve compelling state interest); *Shelton v. Tucker*, 364 U.S. 479, 488-89 (1960) (statute requiring teachers to disclose all associational ties unconstitutional because of overbreadth).

109. *Kuhlmeier*, 108 S. Ct. at 572.

110. *Id.* The Court noted that the faculty member responsible for *Spectrum* had recently been replaced and may not have been entirely familiar with production procedures. *Id.* Reynolds felt "pressure . . . to make an immediate decision so that students would not be deprived of the newspaper altogether." *Id.* The court of appeals took a markedly different view of the reasonableness of the decision to delete two pages, characterizing it as mere administrative convenience. "It is clear from the record that there was no specific timetable for publication . . . , thus the principal could have delayed publication long enough to seek student concurrence to the changes he proposed." *Kuhlmeier v. Hazelwood School Dist.*, 795 F.2d 1368, 1375 (8th Cir. 1986), *rev'd*, 108 S. Ct. 562 (1988). Justice Brennan was more blunt: "Where '[t]he separation of legitimate from illegitimate speech calls for more sensitive tools,' the principal used a paper shredder." *Kuhlmeier*, 108 S. Ct. at 580 (Brennan, J., dissenting) (citations omitted) (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)).

111. *Kuhlmeier*, 108 S. Ct. at 572 n.9.

112. The Court did not provide any statistics about the number of schools that had dissolved student publications during the 19 years *Tinker* was presumed to be the standard for school regulation of all student speech. Noteworthy in this regard is Justice Black's dissent in *Tinker*, which

*endo*, that *Tinker* gave school officials insufficient control of their educational endeavors, the Court nevertheless overreacts. Principals now have the equivalent of "a general warrant to act as 'thought police' stifling discussion of all but state-approved topics and advocacy of all but the official position."<sup>113</sup>

A forum analysis that takes a more realistic view of the school's purposes in sponsoring expressive activities holds promise for case-by-case results that would better safeguard students' needs and rights to express their views. If a publication is truly a journalistic laboratory,<sup>114</sup> then perhaps school officials should have a free hand to control content. By contrast, an extracurricular newspaper published under the school's auspices but produced with students' voluntary creative efforts deserves more sensitive first amendment protections. A newspaper like *Spectrum*, as a hybrid of the two, would pose more difficulties. Nonetheless, under this test, the *Kuhlmeier* case probably would have come out the same based on the Court's interpretation of the facts.<sup>115</sup> Such an approach would provide students involved in purely extracurricular activities with a "civics lesson" in first amendment values<sup>116</sup> and give substance to the Court's assertion that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."<sup>117</sup>

Instead, the Court has placed the censor's scissors squarely in the hands of school officials any time they act as publishers of student expression, and federal courts will intervene only when the silenced student can show the restraint was without a valid educational purpose.<sup>118</sup> This ruling creates a great risk that school officials will take up the scissors too often, motivated by their natural desire to maintain a bright image for their schools. Principals and other school authorities have an "urgent wish to avoid . . . controversy"<sup>119</sup> that could in any way earn the disfavor of parents, upon whom the schools depend for support, in terms of tax dollars, volunteerism, and general good will. Under the Court's lax standard of legitimate pedagogical concerns, officials can invoke almost any pretext to censor student expression. A likely target for censorship will be criticism of the school itself.<sup>120</sup> If controversy and criticism are eliminated from the school-sponsored modes of expression, then students will have lost their most effective means of sharing ideas and attitudes.

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predicted such dire consequences as students' defying their teachers and thinking that among their first amendment rights was the right to control the schools. *Tinker*, 393 U.S. at 525 (Black, J., dissenting). After analyzing empirical data, one commentator concluded those predictions had not materialized. Comment, *Tinker's Legacy: Freedom of the Press in Public High Schools*, 28 DE PAUL L. REV. 387, 419 (1979).

113. *Kuhlmeier*, 108 S. Ct. at 577 (Brennan, J., dissenting).

114. Justice White quoted the Hazelwood East Curriculum Guide, which called the Journalism II class that produced *Spectrum* a laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I. *Id.* at 568.

115. See *supra* note 78.

116. *Kuhlmeier*, 108 S. Ct. at 573 (Brennan, J., dissenting).

117. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

118. *Kuhlmeier*, 108 S. Ct. at 571.

119. *Tinker*, 393 U.S. at 510.

120. Note, *supra* note 6, at 651 ("[T]he officials who will be reviewing student expression are likely also to be the targets of that expression, making objective evaluation difficult.").

Schools certainly have a right and a duty to control curriculum and student conduct for educational value and propriety. However, "the purpose of education is to spread, not to stifle, ideas and views."<sup>121</sup> The *Kuhlmeier* Court has created a risk that school officials will don the broad mantle of publisher to "eliminate all diversity of thought, . . . 'strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.'"<sup>122</sup>

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121. *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960, 972 (5th Cir. 1972) ("Ideas in their pure and pristine form, touching only the minds and hearts of school children, must be freed from despotic dispensation by all men, be they robed as academicians or judges or citizen members of a board of education.").

122. *Board of Educ. v. Pico*, 457 U.S. 853, 879 (1982) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).