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TO PUBLISH OR NOT TO PUBLISH: THAT IS THE QUESTION

*Hazelwood School District v. Kuhlmeier*¹

A high school principal in Lynchburg, Virginia, sits in her office proof-reading the soon-to-be-released student newspaper. She comes across an article documenting the homosexual activity of several of the school's students. She fears not only for the students profiled in the story but also the community reaction to a school-sponsored paper publishing an article which could be construed as advocating a homosexual lifestyle.

On the opposite coast, in Berkeley, California, the high school paper chronicles mercenary activity in Central America by a group of its students over spring break. The students are committed to the overthrow of any Marxist government on the North American continent. The principal, knowing many of the local PTA members yearn for the establishment of Marxist governments on the North American continent, is concerned not only about the propriety of the story, but local reaction as well. Attempts to censor the stories are likely to be met by cries of foul, citing violations of freedom of press and speech. What's a principal to do?

The United States Supreme Court declared in its 1969 case, *Tinker v. Des Moines School District*,² that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."³ Courts dealing with the rights of students look to *Tinker* for guidance. Indeed, the trial court in *Hazelwood School Dist. v. Kuhlmeier* specifically cited *Tinker* as the starting point for its analysis of the first amendment rights issue presented.⁴ Before examining the *Hazelwood* case's treatment of these issues, an explanation of the underlying facts is necessary.

THE CONTROVERSY

The final issue of Hazelwood East's Spectrum for the 1982-83 school term was scheduled for publication on May 13.⁵ On May 10, acting faculty

1. 479 U.S. 1053 (1987).

2. 393 U.S. 503 (1969).

3. *Id.* at 506.

4. *Kuhlmeier v. Hazelwood School Dist.*, 607 F. Supp. 1450, 1462 (E.D. Mo. 1985), *agreeing with* 596 F. Supp. 1422 (E.D. Mo. 1984), *modifying* 578 F. Supp. 1286 (E.D. Mo. 1984), *rev'd*, 795 F.2d 1368 (8th Cir. 1986), *rev'd*, 108 S. Ct. 562 (1988), *remanded*, 840 F.2d 596 (8th Cir. 1988), *aff'g* 607 F. Supp. 1450 (E.D. Mo. 1984), *and vacating* 795 F.2d 1368 (8th Cir. 1988).

5. 607 F. Supp. at 1458. The Spectrum was the officially recognized school newspaper at Hazelwood East High School. It was normally published six times a semester and covered a wide range of topics in the news, sports and entertainment fields. *Id.* at 1458. Published by University of Missouri School of Law Scholarship Repository, 1988

advisor Harold Emerson submitted proofs of the final edition to the principal of Hazelwood East, Robert Reynolds.⁶

Several articles in the issue dealt with teenage pregnancy and divorce.⁷ Principal Reynolds found two of the articles objectionable.⁸ One dealt with three Hazelwood students' pregnancies.⁹ Although the article mentioned that the names of the girls had been changed, Mr. Reynolds feared the students would be easily identified.¹⁰

The other story Mr. Reynolds found objectionable focused on the impact of divorce on children.¹¹ The article included quotes from a Hazelwood student which were critical of her father.¹² In the proof Mr. Reynolds read, the

1452.

6. *Id.* at 1458. Mr. Emerson became acting adviser when the previous adviser, Mr. Robert Stergos, left the employ of the Hazelwood School District on April 29, 1983. Mr. Emerson's other responsibilities at Hazelwood High were yearbook sponsor and coordinator of school information. Much of the trial court's finding of facts evolve around his predecessor's, Mr. Stergos', control over the Spectrum.

7. *Id.* at 1457. There were six articles in all, three spread across the top half of pages four and five and the other three spread across the bottom half. The stories in the first group all dealt with teen pregnancies, indeed the headline across pages four and five read:

*Pressure Describes It All For Today's Teenagers
Pregnancy Affects Many Teens Each Year*

The first of the stories relied heavily on information from a READER'S DIGEST article, and dealt with teen pregnancy, sexuality, and abortion.

The second article also relied on previously published materials, this time from THE NEW REPUBLIC. The article focused on "squeal laws," which would require federally funded clinics to notify parents if a teenager requested birth control assistance. The last of the first group of articles dealt with the personal experiences of three pregnant Hazelwood students. The article began by announcing that the names of the three girls had been changed. The substance of the report ranged from their own and families' reaction to the pregnancies to their own sexual experiences, including the use, or lack of, birth control devices.

The articles spread across the bottom half of the two pages delved heavily into divorce. One of the stories dealt with the divorce rate among teenage marriages and carried a local flavor because a source for the article was a faculty member of the school. Another article concerned itself with the problem of teenage runaways, its causes and cures. The third story dealt with the causes and effects of divorce. It also had a local flavor as Hazelwood High students spoke of their parents' divorces. Each of the articles was written by a different student.

8. *Id.* at 1460.

9. *Id.*

10. *Id.* Mr. Reynolds felt the number of pregnant students at Hazelwood was so few (8-10) that the students could not maintain their anonymity. *Id.*

11. *Id.*

12. *Id.* at 1457-58. Several quotes were attributed to Hazelwood students. One in particular actually identified the student, Diana Herbert. The following quote was attributed to her:

My dad wasn't spending enough time with my mom, my sister and I. He was always out of town on business or late playing cards with the guys. My parents always argued about everything. In the beginning I thought I caused the problem, but now I realized (sic) it wasn't me.

student was identified (unknown to Mr. Reynolds the name had been deleted in the proofs being sent to the printer).¹³ Mr. Reynolds thought it unfair to publish the article without the father's knowledge and opportunity to respond.¹⁴

Principal Reynolds actually read the articles while on the phone with Mr. Emerson on May 11.¹⁵ Voicing his concern to Mr. Emerson, Principal Reynolds asked what could be done to delete the stories.¹⁶ Mr. Emerson responded that the pages on which the two articles appeared could be totally deleted, thus turning the planned six page paper into a four page edition.¹⁷ The two pages included other articles dealing with the same subject matter, but which Mr. Reynolds had found acceptable.¹⁸

Concluding that the two articles were not suitable for publication and realizing that with the school year nearing its end, any delay would result in the entire edition not being published, Principal Reynolds directed Mr. Emerson to delete the two pages.¹⁹ Mr. Reynolds informed his immediate supervisor, assistant superintendent Francis Huss, of his decision.²⁰ Mr. Huss concurred with the principal's action.²¹

The Spectrum staff did not learn of the deletions until May 13, when the final edition of the paper was delivered to the school.²² Staff members of the Spectrum met with Mr. Reynolds that afternoon. He told them that he felt the articles were "too sensitive" for "our immature audience of readers."²³

Although the Spectrum staff published the "edited" edition of the paper, several students copied the deleted (objectionable) articles and handed them out on the school premises.²⁴ Those participating in the "underground" distribution were not punished.²⁵ On May 19, three of the paper's staff members filed an action in federal district court. The students sought both declaratory relief and damages arising out of the school administration's decision not to publish the articles.²⁶

13. *Id.* at 1458.

14. *Id.* at 1460.

15. *Id.* at 1459. Mr. Emerson called the principal after not hearing from him. They spent about 20 minutes on the phone, at which time Mr. Reynolds read the proofs for the first time. Mr. Reynolds was under the mistaken impression that Mr. Emerson was at the printers, leading to his sense of urgency.

16. *Id.*

17. *Id.*

18. *Id.* at 1457; *see supra* note 7.

19. *Id.* at 1459.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 1459-61.

25. *Id.* at 1461.

26. *Id.* at 1450-51. According to the trial court, the issues central to the case, the constitutional rights of the plaintiffs, were "inextricably intertwined" with the facts to be determined, thus both the questions of declaratory relief and liability would be de-

THE SEARCH FOR APPLICABLE LAW

The district court in *Hazelwood* recognized that *Tinker* provides that public school students do not forfeit their constitutional rights while on the school premises.²⁷ But, the court felt *Tinker* and other case law establishes that such rights are not always "coextensive with those of adults."²⁸

The Supreme Court in *Tinker* set out the standard under which student speech could not be punished unless it resulted in "substantial disruption of or material interference with school activities. . . ." ²⁹ Thus, *Tinker* resulted in that ever-present phenomenon of constitutional law, the balancing test. A claim of student first amendment rights would have to take into account the unique qualities of the school environment which "accorded wide latitude over decisions affecting the manner in which [school officials and teachers] educate students."³⁰ Would the student speech materially disrupt class work and involve substantial disorder?³¹

The district court separated the cases dealing with student expression into two areas. The first of those involved expression which occurred on school property but was "outside of official school programs."³² *Tinker* is in this line of cases.

In *Tinker* students wore black arm bands to protest the Vietnam War.³³ This was ruled symbolic speech which did not interfere with school activities.³⁴ The expression, while taking place on school property, was not part of an official school program; thus the Court took a dimmer view of the administration's attempt to silence the speech.

The second group of cases deals with expression that takes place "within the context of school-sponsored programs."³⁵ Falling into this category was

terminated by the trial judge. The trial court focused solely on the issue of liability.

27. *Id.* at 1462.

28. *Id.* (quoting *Williams v. Spencer*, 622 F.2d 1200, 1205 (4th Cir. 1980)). The *Williams* court cited the *Tinker* case for the proposition that the constitutional rights of public school students are not coextensive with adults. Actually it was Justice Stewart's concurring opinion which stated the proposition, and that came as a criticism of the majority for not making that distinction. See *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J., concurring). In cases following *Tinker*, the Supreme Court did in fact affirm that the rights of public school students do not coexist with that of adults in other settings. In a case decided the term prior to *Hazelwood*, the Court reaffirmed that distinction. *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986).

29. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 514 (1969).

30. *Kuhlmeier*, 607 F. Supp. at 1462 (quoting *Nicholson v. Board of Educ.*, 682 F.2d 858, 863 (9th Cir. 1982)).

31. *Tinker*, 393 U.S. at 514.

32. *Kuhlmeier*, 607 F. Supp. at 1462.

33. *Tinker*, 393 U.S. at 514.

34. *Id.*

35. *Kuhlmeier*, 607 F. Supp. at 1462.

Seyfreid v. Walton,³⁶ a 1981 case in which the Third Circuit upheld the right of a high school administration to cancel a school sponsored play based upon its sexual content.³⁷

A further distinction to which the *Hazelwood* court alluded was the type of forum the administrators were trying to regulate. Even if the expression was tied to the school's curriculum, it should receive a greater degree of constitutional protection if it originated from a "public forum."³⁸ The district court found this concept a "critical factor" in the *Seyfreid* case.³⁹

The distinction between non-school sponsored expression as exemplified in *Tinker* and school-sponsored speech as illustrated in *Seyfreid*, is rather straightforward. The latter distinction, whether or not the school program has become a "public forum" is a more difficult question. It calls for intensive inquiry and its resolution may determine whether the expression will be constitutionally protected. Thus, an examination of the framework through which the courts analyze public forums is necessary.

EXPRESSION ON PUBLIC PROPERTY

In 1939 the United States Supreme Court noted that areas such as streets and parks "have immemorially been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."⁴⁰ These areas are labelled "traditional" public forums. Any attempt by government to regulate the expression coming from such areas "must serve a compelling state interest and . . . [be] narrowly drawn to achieve that end."⁴¹

At the other end of the spectrum is public property which by "tradition or

36. 668 F.2d. 214 (3d Cir. 1981).

37. In *Seyfreid*, the superintendent of Caesar Rodney High, a public school, decided to cancel the school's production of the play "Pippin." The decision was based on his belief that the sexual content of the production was inappropriate for a public high school. The school board upheld the superintendent's decision.

38. *Kuhlmeier*, 607 F. Supp. at 1464.

39. *Id.* at 1463. Actually the *Seyfreid* court never used the term "public forum," or for that matter ran through the public forum analysis per se. It used the language "integral part of school's educational program," which became popular with the trial court in *Hazelwood*. The key question for the Third Circuit became: was the play intended for an educational experience? *Seyfreid*, 668 F. Supp. at 216.

40. *Hague v. CIO*, 307 U.S. 496, 515 (1939).

41. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). In *Perry*, a teacher's union opposing the one in power attempted to use the school's mail system to communicate with the teachers at the school. The union in power had successfully negotiated with the school board for the exclusive access to the system for such matters. When the school board disallowed the rival union the use of the system the union countered that the system was a public forum due to the communicative access other groups had to it. The Supreme Court ruled, based on its reading of the facts, the mail system had not taken on the characteristics of a public forum and denied the rival union access.

designation" is not a forum for public expression. The Supreme Court has held that the Constitution does not guarantee access to property just because it is "owned or controlled by the government."⁴² The standards by which courts view governmental attempts to regulate expression in these areas are less stringent than in "public forums." A regulation which is reasonable and not based on governmental opposition to the view expressed will pass judicial scrutiny.⁴³ Jails and military bases are examples of property which fall into this classification.⁴⁴

Between traditional and non-public forums lies a third category which by its nature is not a traditional public forum but which a governmental body has designated as available for expressive activity.⁴⁵ While by definition the government was under no obligation to create the forum, judicial review of subsequent attempts to regulate expression arising from it must pass the same standards as in a traditional forum.⁴⁶

Courts have ruled public schools are not traditional public forums.⁴⁷ Thus, the question in *Hazelwood* became whether the Spectrum itself had become a conduit for public expression, thus deserving traditional public forum status. If so, prior case law would require Principal Reynolds' actions to have "serve[d] a compelling state interest and . . . [been] narrowly drawn to achieve that interest."⁴⁸ If not, Mr. Reynolds's action need to have only been reasonable.

APPLICATION OF THE LAW

The district court ruled that Spectrum was an integral part of the school curriculum at Hazelwood East, a laboratory for the students enrolled in Journalism II.⁴⁹ In making this determination the court considered a number of factors, including the faculty advisor's control over the paper. The court characterized the power wielded by the advisor as "final authority."⁵⁰

42. *Id.* at 46 (quoting *United States Postal Serv. v. Council of Greenburgh Civics Ass'n*, 453 U.S. 114, 129 (1981)).

43. *Id.*

44. *See Greer v. Spock*, 424 U.S. 828 (1976).

45. *Perry*, 460 U.S. at 46.

46. *Widmar v. Vincent*, 454 U.S. 263, 267-68 n.5 (1981).

47. *Perry*, 460 U.S. at 45.

48. *Widmar*, 454 U.S. at 270.

49. *Kuhlmeier*, 607 F. Supp. at 1452-53. For the year in question, 1982-83, Hazelwood East offered two journalism classes in their curriculum. In the fall "Journalism I" was offered and it dealt with the basics of the print journalist's trade such as "reporting, writing, editing, layout, publishing and journalistic ethics." In the spring the curriculum offered "Journalism II," for which "Journalism I" was a prerequisite. While students enrolled in "Journalism II" continued to receive instruction in the "basics," the primary function of the class was the publication of the Spectrum. Both courses were taught by the Spectrum's advisor, Robert Stergos.

50. *Id.* at 1453. The trial court found that Mr. Stergos:

selected the editor, assistant editor, layout editor and layout staff . . . , sched-

The court as well gave weight to testimony that the principal previously had deleted stories, a factor which decreased the likelihood the paper was intended to be a public forum.⁵¹ Further, the court considered it specially significant that Hazelwood East's curriculum guide and the stated school board policy on student publications described the newspaper as a curricular activity.⁵² The court felt both statements demonstrated that Spectrum had not been opened up for student expression.⁵³ Thus, neither policy nor practice supported the contention that the Spectrum had become a public forum.

Despite finding that the paper was an integral part of the curriculum, the court acknowledged that "school officials were [not] completely free of constraints imposed by the first amendment."⁵⁴ The court then turned its inquiry to the appropriate standard for weighing the school administration's actions.

The court determined that if the expression occurred outside the school curriculum, *Tinker* applied, and the standard would be whether the speech materially disrupts the legitimate mission of the school.⁵⁵ On the other hand, if the expression originated within the school curriculum, the standard would be "a substantial and reasonable basis for the action taken."⁵⁶

Considering the potential consequences arising from the publication of the articles and the limited options available to Principal Reynolds, the court found there was a "reasonable basis for the action taken."⁵⁷ Where the

uled publication dates, decided the number of pages for each issue, assigned story ideas to class members, counseled students on the development of the stories, reviewed the use of quotations, edited stories, adjusted layouts, selected the letters to the editor, edited the letters to the editor, called in corrections to the printer, and sold papers from the Journalism II classroom.

While the court conceded some of these decisions were "made in consultation" with the students, it found many which were not. The court found the plaintiffs were well aware of the adviser's control over the newspaper.

51. *Id.* at 1453-54.

52. *Id.* at 1452, 1454-56. Journalism II was described in the Hazelwood East Curriculum Guide as "provid[ing] a laboratory situation in which the students publish the school newspaper applying the skills they have learned in Journalism I."

Of particular import to the trial court was Board Policy 348.51, entitled "School Sponsored Publications":

School sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism. School sponsored publications are developed within the adopted curriculum and its educational implications and regular classroom activities.

53. *Id. passim.*

54. *Id.* at 1466.

55. *Id.* at 1463.

56. *Id.*

57. *Id.* at 1466-67. The court concluded the potential "loss of anonymity" to the three Hazelwood girls would even satisfy the "invasion of the rights of others" aspect in the *Tinker* standard. The court put great stock in the expert witness of the school, Mr. Martin Duggan, a former editor for the St. Louis Globe Democrat. Mr. Duggan testified that the article about the three pregnant students was inappropriate, as it constituted an invasion of privacy. Mr. Duggan also characterized the divorce story as not

school's curriculum is involved "something less than substantial disruption . . . may justify prior restraints. . . ." ⁵⁸

As the district court below, the Eighth Circuit used a public forum analysis to analyze the case. Unlike the district court, the Eighth Circuit held the *Spectrum* to be a public forum.⁵⁹ Central to the appellate court's ruling was their determination that the *Spectrum* "was a 'student publication' in every sense."⁶⁰ They felt the students were in charge. They make the editorial decisions outside the purview of the school administration.⁶¹

The court felt policy statements published annually in the *Spectrum* made it clear it was a student newspaper. The statements announced that publication decisions would be based on first amendment considerations and that the content of the paper did not reflect the school administration's or faculty's views.⁶² These and other factors led the court to conclude the paper "was not

comporting to the "fairness and balance" standard that is expected in the field of journalism. *Id.* at 1461.

58. *Id.* at 1463.

59. *Kuhlmeier*, 795 F.2d at 1373.

60. *Id.* at 1372.

61. *Id.* According to the appellate court, the students made the key editorial decisions, from choosing the staff of the paper to selecting and determining the content of the articles to be published. The court quoted adviser Stergos' testimony concerning control of the *Spectrum*, "It's a student paper, so that the students, first of all, decided the stories, and, you know, wrote the stories, so they obviously were deciding the content. They were writing them. I would help if there were any matters that they had question of, legalwise or ethicalwise, but-." That was the extent of Stergos' testimony to which the appellate court referred. Obviously their finding of fact was directly counter to the lower court's as to whom had control of the *Spectrum*.

62. *Id.* at 1372 n.3. The statement of policy read as follows:

Spectrum is a school funded newspaper; written, edited, and designed by members of the Journalism II class with assistance of adviser Mr. Robert Stergos.

Spectrum follows journalism guidelines that are set out by Scholastic Journalism textbook. . . . The newspaper will not attack any individual. However, any group, organization or club may be subject to examination and/or criticism.

All non-by-lined editorials appearing in this newspaper reflect the opinions of the *Spectrum* staff, which are not necessarily shared by the administrators or faculty of Hazelwood East. All by-lined editorials reflect only the opinions of the writer.

Spectrum welcomes all student, faculty and community input, including suggestions, story ideas, news tips, and letters-to-the-editors. . . . *Spectrum* staff will not edit any letters, but all letters may be subject to condensing if there is a space limitation. A letter will not be printed if it is libelous, obscene, or against the general policy of the newspaper.

Spectrum will be published approximately every three weeks. It will be sold during the school day for the price of 25 cents.

Spectrum, as a student-press publication, accepts all rights implied by the First Amendment of the United States Constitution which states that: "Congress shall make no law restricting . . . or abridging the freedom of speech or the press. . . ."

just a class exercise [but] 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”⁶³

The court of appeals’ next question was the “extent” of constitutional protection the *Spectrum* deserved, noting that prior case law required content based regulation to be “narrowly drawn to effectuate a compelling state interest.”⁶⁴ The court conceded that the high school environment invited a “somewhat lower” standard.⁶⁵ That standard, according to the Eighth Circuit, was articulated in *Tinker*. To pass constitutional muster the regulation of the *Spectrum* must have been “necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others.”⁶⁶

The appellate court found no evidence that would have allowed Principal Reynolds to believe that disruption would have taken place in the school publication of the articles would disrupt the school in any material way.⁶⁷ The court dismissed as “administrative convenience” the total deletion of the pages containing the two objectionable articles.⁶⁸

Nor did the court give credence to Mr. Reynold’s fear that publication would create the impression that the school endorsed the “sexual norms” of the students interviewed in the articles.⁶⁹ The court ruled that opinions voiced in the extra-curricular paper were “akin to [books found in] the school

That this right extends to high school students was clarified in the *Tinker* vs. Des Moines Community School District case in 1969.

Among other indications the Eighth Circuit felt established *Spectrum* as a public forum open for the purpose of student expression was a non-by-lined editorial printed in the January 14, 1980 issue. Entitled “The Right to Write,” it read as follows:

Because *Spectrum* is a member of the press and especially because *Spectrum* is the sole press of the student body, *Spectrum* has a responsibility to that student body to be fair and unbiased in reporting, to point out injustice and, thereby, guard student freedoms, and to uphold a high level of journalistic excellence. This may, at times cause *Spectrum* to be unpopular with some. *Spectrum* is not printed to be popular. *Spectrum* is printed to inform, entertain, guide and serve the student body — no more, and hopefully, no less.

Id. at 1373.

63. *Id.*

64. *Id.* at 1374 (citing *Widmar v. Vincent*, 454 U.S. 263, 270 (1981)).

65. *Id.*

66. *Id.* The Eighth Circuit cited *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 511 (1969) for that standard. Actually the standard appearing on page 511 in *Tinker* is “prohibition of expression . . . without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline is not constitutionally permissible.” Two pages later the *Tinker* Court wrote, “conduct by the student [that] materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.” *Tinker*, 393 U.S. at 513.

67. *Kuhlmeier*, 795 F.2d at 1375.

68. *Id.*

69. *Id.*

library.”⁷⁰

As to the “rights of others” aspect of the *Tinker* standard, the court ruled that school officials’ application of any “yardstick less exacting than potential tort liability” could result in curtailing speech at the slightest fear of disturbance.”⁷¹ Finding that no justifiable cause of action would have resulted from the publication of the articles, the court concluded that censoring the articles violated the students’ first amendment rights.⁷²

In a 5-3 decision, the United States Supreme Court overruled the Eighth Circuit and upheld the district court’s original ruling. Like the two courts below, the majority used the public forum framework while giving greater deference to the district court in its finding that the Spectrum was an integral part of the curriculum.⁷³

Both the decision of the majority and the reasoning of the dissent are instructive in divining the current standard of first amendment protection of expression in public school systems. Is public forum analysis the focal point? If so, does it differ from the public forum analysis courts apply in non-academic areas? And, perhaps most importantly, has *Tinker* been compromised in such a way that students now abandon their constitutional rights when they enter the public schools?

The majority first considered whether the Spectrum was a public forum. The Supreme Court took a deeper look into the case law dealing with public forums than did the trial or appellate courts. Noting that public schools do not possess the characteristics of a traditional public forum, the Court quoted one of its recent rulings stating that, unless by “policy or by practice” the entity had been opened up “for indiscriminate use by the general public,” a public forum had not been created.⁷⁴

Even though a facility is used for “communications” it is not necessarily a public forum.⁷⁵ The creation of a public forum must be intentional and may not develop through inaction or the allowance of limited discourse. The Court was careful to point out that the tolerance, or even encouragement, of speech need not create a public forum.⁷⁶

Looking at the record in *Hazelwood*, the majority agreed with the trial court in that a clear intent to create a public forum was not present.⁷⁷ The Court stressed that the use of a school activity, such as the Spectrum, to “teach leadership skills . . . hardly implies a decision to relinquish school

70. *Id.*

71. *Id.* at 1376.

72. *Id.*

73. *Kuhlmeier*, 508 S. Ct. at 568-69.

74. *Id.*

75. *Id.* (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

76. *Id.*

77. *Id.*

control over that activity.”⁷⁸ Allowing students editorial responsibilities is not equivalent to the school foregoing a right of control.

In the Court’s opinion, the school authorities could regulate “in any reasonable manner.”⁷⁹ “Reasonableness” is the same standard of review the trial court applied and the accepted standard when dealing with content control in any non-public forum.⁸⁰ The Supreme Court agreed with the trial court that the actions of the principal were reasonable under the circumstances.⁸¹ But the decision’s importance is less the Supreme Court’s treatment of *Hazelwood’s* particular facts, than its determination of the applicable law.

Before leaving the public forum aspect of the case it should be noted the Supreme Court indicated it would have applied the *Tinker* standard had it found Spectrum to be a “public forum.”⁸² As discussed, the Supreme Court previously had ruled that any “content based prohibition [in a public forum] must be narrowly drawn to effectuate a compelling state interest.”⁸³

The Supreme Court never discussed its reasons for finding that *Tinker*, rather than the more rigorous public forum standard, would be the proper standard if Spectrum were a public forum. The Eighth Circuit, addressing the same point, abandoned “the narrowly drawn . . . compelling state interest” standard for the “somewhat lower” *Tinker* review.⁸⁴ It reasoned the high school setting invited a somewhat lesser standard of review.⁸⁵

Justice Brennan, in his dissent, made the only reference to the more “rigorous” standard, but he did not argue to abandon *Tinker* for it.⁸⁶ It is interesting to note that *Tinker*, a case where the question of a public forum was not in issue, provided the standard of review when courts find a public forum has been created.

Having concluded Spectrum was not a public forum and Principal Reynold’s actions reasonable under the circumstances, the Supreme Court went on to explore the relationship between student expression and a school administrator’s “legitimate pedagogical concerns.” The Court posed the question whether the first amendment’s “requir[ing] a school to tolerate particular student speech” is any different from the Constitution “requir[ing] a school affirmatively to promote particular student speech.”⁸⁷

The Court couched the issue as an “educator’s ability to silence a

78. *Id.*

79. *Id.*

80. *Kuhlmeier*, 607 F. Supp. at 1463; see also *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

81. *Kuhlmeier*, 508 S. Ct. at 571.

82. *Id.* at 569. After finding the Spectrum a non-public forum, the Court announced a reasonableness standard, rather than deciding that *Tinker* should govern.

83. *Perry*, 460 U.S. at 45.

84. *Kuhlmeier*, 795 F.2d at 1374.

85. *Id.*

86. *Kuhlmeier*, 108 S. Ct. at 573.

87. *Id.* at 569.

student's personal expression on the school premises" versus "authority over school sponsored . . . expressive activities that . . . the public might reasonably perceive to be the imprimatur of the school."⁸⁸ The first situation describes *Tinker* and the latter *Hazelwood*.

In *Tinker*-type situations, as already discussed, administrators may regulate student expression to avoid material disruption of classwork, substantial disorder or invasion of the rights of others. But what about "school sponsored . . . expressive activity?"

A legitimate question here might be what difference does it make? If the entity has become a public forum the *Tinker* standard applies; if not, a "reasonableness" standard is the test. Given that the district court, Eighth Circuit, and a majority of the Supreme Court followed this analysis in ruling on *Hazelwood*, one must wonder if there is any relevance in the Court's new inquiry?

The Court quickly acknowledged that educators were "entitled to exercise greater control" over school sponsored expression.⁸⁹ The Court articulated three justifications for this conclusion.⁹⁰ First is the school's desire to "assure that participants" get out of the activity what it is "designed to teach."⁹¹ This parallels the now common "integral part of the curriculum" analysis that was crucial in the public forum inquiry. Put quite simply, an educator has more control over an activity which is designed to educate than he/she has over personal student expression that happens to take place on school premises.

Secondly, the Court acknowledged the school's need to protect its audiences from "material that may be inappropriate for their level of maturity."⁹² In *Hazelwood*, one of Principal Reynolds' concerns was the articles' effect on a certain segment of the student audience.⁹³

Finally, the Court granted the school has an interest in making sure the message is not "erroneously attributed to the school."⁹⁴ The Court's initial example of such "disassociation" was from expression that could be characterized as "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane"⁹⁵ It is here the Court seems to be going further than mere content control, into the area of viewpoint control. What is "bias or prejudice" but viewpoint?

Later, the majority left no doubt that the school may regulate based on the particular view expressed. The Court stated, "a school must . . . retain the authority to refuse to sponsor student speech that might reasonably be

88. *Id.*

89. *Id.* at 570.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 571.

94. *Id.* at 570.

95. *Id.*

perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order', or to associate the school with any position other than neutrality on matters of public controversy."⁹⁶ To publish an article which documents the many drawbacks of drug use, yet not print one because it trumpets such use, is viewpoint discrimination.

The Court gave some indication that it views the school regulator as more akin to a publisher than a governmental entity.⁹⁷ Nevertheless, it did not ignore the latter status. The Court articulated a standard which any regulation of school sponsored student expression must satisfy. That standard is that any regulation of student expression in a school sponsored activity must be "reasonably related to legitimate pedagogical concerns."⁹⁸ Elsewhere the Court wrote the first amendment is implicated only if the censorship of the student expression "has no valid educational purpose."⁹⁹

This brings the analysis back to square one. If governmental property is not a public forum the standard by which the courts review any regulation is "reasonable." If expression is school sponsored, the regulation must be "reasonably related to legitimate pedagogical concern." Does the result of the Court's second inquiry differ in any significant way from the result a court would reach under public forum analysis?

In *Perry Education Association v. Perry Local Educator's Association*¹⁰⁰ the Supreme Court held regulation in a non-public forum is constitutional as long as it "is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."¹⁰¹ Taking the statement in *Perry* as the Court's interpretation of what would be impermissible regulation under public forum analysis, the newly articulated concept seems to grant constitutional authority to suppress expression for what was a previously prohibited reason—official opposition to the "speakers view." In that new authority is found the relevance of the Court's "new inquiry" noted above.

Certainly the dissent felt the majority had moved too far in that direction. Like the Eighth Circuit, the dissent saw *Spectrum* as a forum for student expression and *Tinker* as the proper standard.¹⁰² But the majority's distinction between personal student speech on the school premises and school sponsored speech was the point on which the dissent turned its guns.

96. *Id.*

97. *Id.*

98. *Id.* at 571.

99. *Id.*

100. 460 U.S. 37 (1982).

101. *Id.* at 46 (citing *United States Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114, 131 n.7 (1981)).

102. *Kuhlmeier*, 108 S. Ct. at 573 (Brennan, J., dissenting). The dissent, like the Eighth Circuit, found statements of policy by the school board and *Spectrum* itself showed "policy and practice" to create a forum for student expression. *Id.* See *supra* notes 62-63.

It argued the majority's new analysis allowed "unabashed and unconstitutional viewpoint discrimination."¹⁰³ The dissent felt if "mere incompatibility with the school's pedagogical message" were sufficient to constitutionally censor student expression, public schools would be converted into "enclaves of totalitarianism."¹⁰⁴

The dissent was faithful to *Tinker* throughout its analysis. It asserted that *Tinker* addressed the control over curriculum concern of the majority. Unless the expression would "materially disrupt[] classwork or involve[] substantial disorder" the regulation would be unconstitutional.¹⁰⁵

The dissent's only deviation from the *Tinker* standard would have strengthened the test rather than weakened it. Under this caveat, if a school feels the need to dissociate itself from student expression, the dissent focuses on the "less oppressive alternatives" which administrators could use.¹⁰⁶ Such a focus is the same as that of the "narrowly tailored" requirement the Court employs in other areas of freedom of expression.¹⁰⁷

The dissent deemed the educator's need to protect the audience as "illegitimate."¹⁰⁸ By so allowing schools to justify restraints on expression, the dissent feared administrators would be able to censor expression based on the view expressed.¹⁰⁹

On this point, the majority did sanction censoring of at least one Spectrum article due to the message conveyed. As the dissent noted, Principal Reynolds found other articles dealing with much the same subject matter as one of the deleted articles acceptable.¹¹⁰ The particular message conveyed in one of the deleted articles and its potential effect on its immature audience prompted the principal to censor it.¹¹¹

Thus, the crux of the case comes down to the distinction the majority makes between school sponsored expression and personal speech taking place on school premises. Finding the school's role more akin to a publisher in the former role, the court now allows regulation where neither *Tinker* nor public forum analysis would.

It is possible a student newspaper could be school sponsored yet by

103. *Id.* at 578.

104. *Id.* at 574 (quoting *Tinker*, 393 U.S. at 511).

105. *Id.* at 575 (quoting *Tinker*, 393 U.S. at 513).

106. *Id.* at 579. The dissent felt the administration could have achieved their goal by requiring the students to publish a disclaimer or "even issue our response clarifying the official position." The dissent characterized the actions in Hazelwood as "brutal censorship." *Id.*

107. See *supra* notes 41 and 83 and accompanying text.

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

109. *Id.* at 577-79. The dissent argued Hazelwood itself showed how officials could use the protection argument to "camouflage viewpoint discrimination." *Id.* at 578.

110. *Id.* at 579.

111. *Kuhlmeier*, 607 F. Supp. at 1459.

"policy and practice" become a vehicle for student expression. The Third Circuit so held several years ago in a similar situation.¹¹² But if such a situation arises after *Hazelwood*, what standard applies? Public forum, where viewpoint discrimination seems to be prohibited, or school sponsored, where viewpoint discrimination is constitutional? Does the mere fact the paper is school sponsored and used for an educational purpose automatically allow an educator's regulation to be reviewed by the more differential standard?

A rather ironic situation exists regardless of the analysis or standard used. Say, for instance, the Spectrum had been found a public forum by the Supreme Court, the *Tinker* standard had been applied and the students had won the case. Following the Court's holding the school could have closed the Spectrum (forum) down.

A public forum which is not "traditional" attains its status by "designation." The government designated through "policy and practice" the entity to be a forum for public expression. While a court may rule the government violated a particular plaintiff's constitutional rights because the entity is a public forum, it is well established the government is under no obligation to keep the "forum" open.¹¹³ The dissent conceded this very point.¹¹⁴ What an official once giveth, he can taketh away.

In crafting the powers a school administrator should have over school sponsored expression, should the administrator have more discretion than the ultimate power, that of shutting the forum down completely? Would student expression actually be fostered by such a result? The majority felt if the only available option for the school was the complete shut down of the forum, students would be the ones to suffer.

Looked at another way, would a school administrator, knowing his/her only alternative to control school sponsored student expression was to meet the *Tinker* standard, just avoid such a situation by never offering students an opportunity to express themselves? Could the dissent's position actually having a "chilling effect" on the school providing students any type of vehicle for expression?

The majority has not actually abdicated constitutional standards in their holding. A high school administrator is still not the equivalent of a private publisher. The actions of the administrator must still be "reasonable."¹¹⁵ While this may not be reassuring, "reasonableness" standards are the staple of the American legal system, including constitutional analysis.¹¹⁶

112. See *supra* note 39.

113. *Perry*, 460 U.S. at 46.

114. *Kuhlmeier*, 108 S. Ct. at 579.

115. *Id.* at 578.

116. As this paper has previously pointed out, non-public forums are regulated by a reasonableness standard. See *Perry*, 460 U.S. at 46. Much of the foundation of negligence law is based on the reasonable person standard, as are other areas of tort law. See generally W. PROSSER & P. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 173-75 (5th ed. 1984).

It could be "reasonable" to "disassociate" the school from school-sponsored student expression which advocates drug usage, or homosexuality. On the other hand, would it be "reasonable" to censor an article because it could be understood as advocating an increase in funding to the homeless or decreasing the national commitment to NATO?

Regardless of how they label it, the majority has sanctioned viewpoint discrimination. This seems to contrast with past rulings. In a 1982 case the Supreme Court held school officials could not remove books from the public library due to official disapproval of the ideas they convey.¹¹⁷ The *Hazelwood* Court does not extend to school sponsored newspapers the status bestowed upon school libraries. Can a principled distinction be made between books found in the school library and articles found in a school sponsored newspaper?

Has the *Hazelwood* court abandoned *Tinker*? The better argument is no. The Court merely has failed to extend it. In the previous term, the Court also refused to extend the *Tinker* standard to a student's making "lewd remarks" at a high school assembly.¹¹⁸

The basis for the Court's analysis is the distinction between personal student speech taking place on the school premises and student speech articulated in a school sponsored activity. The Court has determined the latter deserves a more deferential review when the school administrator deems it necessary to protect the audience, to preserve the integrity of the curriculum, or to disassociate the school from the message expressed. The decision's propriety, or lack thereof, lies not in whether the distinction is principled but rather in whether it is constitutional.

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117. Board of Educ. v. Pico, 457 U.S. 853 (1982).

118. Bethel School Dist. v. Fraser, 478 U.S. 675 (1986).