Kuhlmeier v. Hazelwood School District: Application of the Prior Restraint and Public Forum Doctrines to the Free Expression Rights of High School Students

Introduction

Public school students do not forfeit the right to free expression under the First Amendment merely by being in school.[1] The extent of a student's free expression rights, however, is unclear. In *Kuhlmeier v. Hazelwood School District*,[2] the Eighth Circuit Court of Appeals considered a difficult and unsettled issue: whether a school administration may censor articles on sensitive subjects in a student-produced, school-sponsored newspaper.

Since the Supreme Court's landmark decision in *Tinker v. Des Moines Independent Community School District*,[3] the federal courts have heard a stream of cases concerning high school students' free expression rights under the First Amendment.[4] The cases have arisen primarily as the result of school board censorship of student newspapers[5] and punishment of student speech.[6] However, high school first amendment issues also arise in such school supported activities as theatrical productions,[7]

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1. *See* Tinker v. Des Moines Indep. Comm. School Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."). The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

2. 795 F.2d 1368 (8th Cir. 1986), *reh'g denied*, 795 F.2d 1368, *cert. granted*, 107 S. Ct. 926 (1987).

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

4. *See, e.g.*, Bethel School Dist. v. Fraser, 106 S. Ct. 3159 (1986); Board of Educ. v. Pico, 457 U.S. 853 (1982); Nicholson v. Board of Educ., 682 F.2d 858 (9th Cir. 1982); Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981); Gambino v. Fairfax County School Bd., 564 F.2d 157 (4th Cir. 1977); Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977); Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975); Stanton v. Brunswick School Dept., 577 F. Supp. 1560 (D. Mass. 1984); Reineke v. Cobb County School Dist., 484 F. Supp. 1252 (N.D. Ga. 1980); Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979); Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd*, 515 F.2d 504 (2d Cir. 1975).

5. *See, e.g.*, Gambino v. Fairfax County School Bd., 564 F.2d 157 (4th Cir. 1977).

6. *See, e.g.*, Bethel School Dist. v. Fraser, 106 S. Ct. 3159 (1986).

7. *See, e.g.*, Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981).

and extend into the school library and the classroom.[8] These cases have in common a struggle between two potent interests: the student's interest in free expression, squarely recognized in *Tinker*,[9] and the school's state-mandated interest in educating students, maintaining order, protecting students from personal harm, and inculcating fundamental community values.[10]

In *Kuhlmeier*, the Court of Appeals came to grips with three unsettled issues involving student speech: (1) the application of the *Tinker* test, (2) the constitutionality of prior restraint of school newspapers, and (3) the dividing line between the school's power over curriculum and the student's free expression right. This Comment examines the *Kuhlmeier* decision and its implications. Part I presents the facts, holdings and reasoning of *Kuhlmeier*, as well as the dissent by Judge Wollman.[11] Part II reviews the first amendment principles underlying the court's decision.[12] Part III then examines the *Kuhlmeier* court's analysis, focusing on the court's prior restraint position, its interpretation of *Tinker*, and its designation of the school-supported newspaper as a public forum.[13] This Comment concludes that the *Kuhlmeier* court ultimately reached the correct result, but erred in applying the public forum doctrine to achieve that end.

I. *Kuhlmeier v. Hazelwood School District*

A. The Facts

Spectrum was the student-produced, school-sponsored newspaper of Hazelwood East High School in St. Louis County, Missouri.[14] Its operation was governed by school board regulations, a board-approved textbook, and its own policy statement.[15] Members of the school's Journalism II class staffed the newspaper. Under the direction of a faculty advisor, the staff selected topics and wrote articles of general interest to the student body and the community. The faculty advisor exercised minimal control,[16] but did submit each edition to Hazelwood's

8. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853 (1982) (school libraries); Meyer v. Nebraska, 262 U.S. 390 (1923) (classrooms).

9. *See supra* note 1.

10. *See* Bethel School Dist. v. Fraser, 106 S.Ct. 3159, 3165 (1986); Board of Educ. v. Pico, 457 U.S. 853, 869 (1982); Ambach v. Norwich, 441 U.S. 68, 76-77 (1979); Bender v. Williamsport Area School Dist., 741 F.2d 538, 548 (3d Cir. 1984).

11. *See infra* notes 14-51 and accompanying text.

12. *See infra* notes 52-148 and accompanying text.

13. *See infra* notes 149-182 and accompanying text.

14. Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368, 1370 (8th Cir. 1986), *reh'g denied*, 795 F.2d 1368, *cert. granted*, 107 S.Ct. 926 (1987).

15. *Id.* at 1372-73.

16. *Id.* at 1370.

principal for prepublication review.[17]

The final stages of the May 13, 1983, edition of *Spectrum* included articles on teen pregnancy, juvenile delinquency, runaways, abortion and divorce.[18] The pregnancy article featured personal accounts of three Hazelwood East students who had become pregnant: it discussed each student's reaction to the pregnancy, her relationship to the fetus' father, her parents' reactions, and details about her sex life and birth control practices.[19] Fictitious names were used. The divorce article included quotations from students, three of whom were named. The students described their parents' behavior and its effect on the marital relationship and on the students themselves.[20] The authors obtained consent from the students who were quoted, but not from the parents of the named students in the divorce article.[21]

After reviewing the final proofs, the principal ordered the deletion of two full pages, including the pregnancy and divorce articles as well as three non-offending articles.[22] The *Spectrum* staff learned of the deletions when the printed newspapers were delivered for distribution. They met with the principal, who told them the articles were "inappropriate, personal, sensitive, and unsuitable."[23] The students then reproduced the removed articles and circulated them on school grounds, acts for which they received no discipline.[24]

On August 19, 1983, three *Spectrum* staff members brought an action in federal court against Hazelwood School District, the principal, the school superintendent and his assistant. Plaintiffs sought injunctive relief, damages, and a declaration that their first amendment rights had been violated.[25] The district court tried the case without a jury because "the factual disputes in [the] case [were] inextricably intertwined with the central legal [first amendment] issue."[26] In two separate opinions, Chief Judge Nangle denied injunctive relief[27] and held that the deletion of the articles did not violate the plaintiffs' first amendment rights.[28]

17. *Id.*
18. Kuhlmeier v. Hazelwood School Dist., 607 F. Supp. 1450, 1457-58 (E.D. Mo. 1985).
19. *Id.* at 1457.
20. *Id.*
21. *Id.* at 1458.
22. *Id.* at 1459.
23. *Kuhlmeier*, 795 F.2d at 1371.
24. *Id.*
25. *Id.*
26. 607 F. Supp. at 1450.
27. 596 F. Supp. 1422 (E.D. Mo. 1984).
28. 607 F. Supp. 1450, 1467 (E.D. Mo. 1985).

B. The Eighth Circuit Decision

The students then appealed to the Eighth Circuit Court of Appeals, arguing the district court erred in determining that *Spectrum* was not a public forum,[29] and that the school district had not violated their first amendment rights.[30] The Court of Appeals found for the students on both claims, and reversed the trial court's decision.

The court noted that any analysis of the first amendment rights of students in the high school setting must begin with *Tinker v. Des Moines Independent Community School District*:[31] unless student expression "materially disrupts classwork or involves substantial disorder or invasion of the rights of others," school officials must afford student speech the same first amendment protection afforded adult speech.[32] The *Kuhlmeier* court, however, accepted the lower court's conclusion that the *Tinker* test was not sufficient to evaluate the constitutionality of a school administration's regulation of student speech.[33] The *Tinker* test would apply, said the court, only if *Spectrum* were a public forum.[34] If *Spectrum* were found to be an integral part of the school curriculum, a test more accommodating to the school officials would apply.[35] The court found *Spectrum* to be a public forum protected by the *Tinker* standard.[36]

The court then applied the *Tinker* test to determine the constitutionality of the principal's censorship.[37] Finding no material disruption of classwork nor any substantial disorder as the reasonably foreseeable result of distribution of the articles,[38] the court next considered whether

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29. *Kuhlmeier*, 795 F.2d at 1371.

30. *Id.*

31. *Id.* (citing Tinker v. Des Moines Indep. Comm. School Dist., 393 U.S. 503, 513 (1969)).

32. *Id.*

33. *Id.*

34. *Id.* For a discussion of the public forum doctrine, see *infra* notes 86-96 and accompanying text.

35. The District Court stated:

> Where the particular program or activity is an integral part of the school's educational function, something less than substantial disruption may justify prior restraints on students' speech and press activities. The following is an acceptable articulation of the applicable standard: "[T]he rule has been wisely established that decisions of school officials will be sustained, even in a First Amendment context, when, on the facts before them at the time of the conduct which is challenged, there was a substantial and reasonable basis for the action taken."

607 F. Supp. at 1463 (citing Frasca v. Andrews, 463 F. Supp. 1043, 1052 (E.D.N.Y. 1979)).

36. The court's finding that *Spectrum* was a public forum was based on evidence that the school board intended *Spectrum* to operate as a conduit for expressing student viewpoints, and on evidence that *Spectrum* did so operate. 795 F.2d at 1372-73.

37. *Id.* at 1374-76.

38. *Id.* at 1375.

the rights of others had been invaded.[39] Citing a law review Note,[40] the court decided that a school official may regulate student speech under the "rights of others" segment of the *Tinker* test only if the unregulated expression would bring tort liability on the school.[41] The court found that in each article, permission had been given by the subjects, pseudonyms had been used, or the material simply did not invade the privacy of the person referred to in the text.[42] Thus, the principal's actions could not be justified under the "rights of others" test.[43] The court concluded that the first amendment rights of the students had therefore been violated.

The court remanded the case to the district court to determine the amount of damages.[44] The court did not declare unconstitutional either the principal's rule of prepublication review or selected Hazelwood School Board policies, trusting that the school administration would in the future apply these rules to comport with the court's opinion.[45]

Judge Wollman's dissent stressed that *Spectrum* was indeed an integral part of Hazelwood High School's curriculum,[46] and that only activity "*totally* removed from the aegis of the school" could receive the first amendment protection provided by *Tinker*.[47] Thus, Hazelwood's principal, though possibly overly cautious, deserved deference in this curriculum-related decision.[48] Judge Wollman concluded that deleting the articles did not violate the students' first amendment rights.[49]

The school district appealed to the Supreme Court. The Court granted certiorari,[50] and will hear arguments in the case of *Hazelwood School District v. Kuhlmeier* in the fall of 1987.[51]

II. First Amendment Free Speech Protection

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech . . . ."[52] Although this language is sus-

39. *Id.* For discussion of the *Tinker* "rights of others" test, see *infra* notes 118-132 and accompanying text.

40. Note, *Administrative Regulation of the High School Press*, 83 MICH. L. REV. 625, 640 (1984).

41. *Kuhlmeier*, 795 F.2d at 1375-76.

42. *Id.*

43. *Id.*

44. 795 F.2d at 1377 (the court was convinced that the facts would only give rise to nominal damages).

45. *Id.* The plaintiffs' demand for a jury trial was not considered in view of the court's favorable holdings for the plaintiffs on the first amendment issues. *Id.* at 1377-78.

46. *Id.* at 1378 (Wollman, J., dissenting).

47. *Id.* (emphasis added).

48. *Id.* at 1379.

49. *Id.*

50. Hazelwood School Dist. v. Kuhlmeier, 107 S. Ct. 926 (1987).

51. San Francisco Chronicle, Jan. 21, 1987, at 8, col. 4.

52. U.S. CONST. amend. I.

ceptible to an "absolutist", literal interpretation,[53] the Supreme Court has indicated that speech may be restricted by the government.[54] There is no simple test, however, for determining what speech *is* protected by the First Amendment.[55] The cases represent struggles between myriad competing values, struggles whose resolution must depend on the facts of each situation: the who,[56] what,[57] when, where, how,[58] and why[59] of the expression itself, and of the challenged restriction.[60] In attempting to resolve these struggles the Court has developed various analyses for resolving the free speech issues which faced the *Kuhlmeier* court.

A. Speech Outside the High School Setting

A speaker's identity, or that of her audience, may determine the extent of the protection her expressive act will receive. For example, the Court has defined particular levels of first amendment protection for children[61] and prisoners.[62] Most cases, however, concern the constitutionality of restricting speech aimed at, or delivered by, the average adult.

1. Content Based Regulation

The degree to which speech is subject to content-based regulation depends on whether the speech falls within certain limited categories of unprotected speech. In *Chaplinsky v. New Hampshire*,[63] the Supreme Court recognized "well defined and narrowly limited" types of expression whose content is of "such slight social value" as to merit *no* first

53. Justice Black stated: "[I] believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech . . . shows that the men who drafted our Bill of Rights did all the balancing that was to be done in this field . . . . [T]he Court's absolute statement that there are no "absolutes" under the First Amendment must be an exaggeration of its own views." Konigsberg v. State Bar of Cal., 366 U.S. 36, 60-61 (1961) (Black, J., dissenting).

54. *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

55. For example, the "clear and present danger" test of the *Schenck* line of cases proved inappropriate for application in many first amendment disputes, giving rise to other methods of analysis, like categorical proscription analysis (discussed *infra* at notes 63-73 and accompanying text) and time, place, and manner analysis (discussed *infra* at notes 80-85 and accompanying text).

56. *See infra* text accompanying notes 61-62.

57. *See infra* notes 63-79 and accompanying text.

58. See *infra* notes 80-96 and accompanying text for discussion of "when, where and how" (time, place and manner) speech restraints.

59. *See* Debs v. United States, 249 U.S. 211, 215 (1919) (intent of speaker relevant to issue of whether speech would be protected).

60. *See infra* notes 97-111 and accompanying text.

61. *See* New York v. Ferber, 458 U.S. 747 (1982); FCC v. Pacifica Found., 438 U.S. 726 (1978).

62. *See* Pell v. Procunier, 417 U.S. 817, 822 (1974).

63. 315 U.S. 568 (1942).

amendment protection.[64] The *Chaplinsky* Court's division of speech into protected and non-protected classes survives today.[65] The government may engage in absolute censorship, or "categorical proscription,"[66] of certain precise categories of speech, including: (1) speech that creates a clear and present danger of illegal behavior;[67] (2) obscenity;[68] (3) defamation;[69] (4) false or misleading commercial speech;[70] and (5) child pornography.[71] Categorical proscription analysis, however, is not always exclusively content based. For example, determination of whether speech creates a clear and present danger of illegal behavior requires consideration of the physical context of the delivery[72] and the nature of the audience.[73]

Even when the content of speech places it outside the proscribed categories, that content may still affect the degree of first amendment protection. Political speech,[74] for example, lies "within the core protection of the First Amendment."[75] Governmental restrictions on political

64. *Id.* at 571-72.

65. *See, e.g.*, Central Hudson Gas and Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 563 (1980) (misleading commercial speech is unprotected by the First Amendment); Miller v. California, 413 U.S. 15, 23 (1973) (obscene material is unprotected by the First Amendment).

66. Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1226-30 (1984).

67. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

68. *See* Paris Adult Theatre v. Slaton, 413 U.S. 49, 54 (1973); Miller v. California, 413 U.S. 15, 23 (1973).

69. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

70. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-66 (1980).

71. *See* New York v. Ferber, 458 U.S. 747 (1982).

72. *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

73. *See* Edwards v. South Carolina, 372 U.S. 229, 236 (1963).

74. "Political speech" has no set definition. Professor Meiklejohn defines political speech broadly to encompass education, philosophy, science, literature and the arts. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256-57. Professor Bork (currently Circuit Judge for the D.C. Circuit Court of Appeals and a recent nominee to the Supreme Court) offers a more focused definition: "The category of protected [political] speech should consist of speech concerned with governmental behavior, policy or personnel . . . not . . . scientific, educational . . . or literary expressions . . . ." Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27-28 (1971).

75. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 587 (D.D.C. 1971) (Wright, J., dissenting), *aff'd sub nom.* Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972). *See also* Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

speech must therefore demonstrate the highest justification.[76] Commercial speech is also protected,[77] though to a lesser degree than political speech.[78] Governmental regulation of commercial speech triggers an intermediate level of judicial scrutiny.[79]

2. Non-Content Based Regulation

There are essentially two methods of regulating free expression without looking to the content of the speech. First, there are time, place and manner restrictions which regulate the means of expression. Second, there is the public forum doctrine which is used to determine how much regulation speech can be subjected to, based on the nature of the forum used.

a. Time, Place and Manner Analysis

Time, place and manner restrictions focus on the time,[80] location,[81] or physical manner[82] of the expressive activity, rather than on the content of the speech. Such restrictions are constitutional if they "are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[83] Time, place and manner restrictions must not be overbroad or vague.[84]

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76. Restraints on political speech are constitutional only if they serve a compelling governmental interest, and use the least drastic means to achieve that interest. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 540 (1980); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978); Buckley v. Valeo, 424 U.S. 1, 25 (1976).

77. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 773 (1976). "Commercial speech . . . may be understood as speech of any form that advertises a product or service for profit or for a business purpose." J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 904 (3d ed. 1986). *See generally* Comment, *In re* R. J. Reynolds Tobacco Co., Inc.: *The "Common Sense" Distinction Between Commercial and Noncommercial Speech*, 14 HASTINGS CONST. L.Q. 869 (1987).

78. *See* Breard v. Alexandria, 341 U.S. 622, 642 (1951); Murdock v. Pennsylvania, 319 U.S. 105, 110-11 (1943).

79. A restriction on commercial speech must directly advance a substantial governmental interest, and must not be more extensive than is neccessary to serve that interest. The First Amendment does not protect commercial speech that is misleading or concerns unlawful activity. Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980).

80. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding an ordinance restricting expressive activity on property adjacent to a school during school hours).

81. *See, e.g.*, Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) (state law requiring that solicitation of funds by religious groups be conducted from booths found to be a reasonable time, place and manner regulation).

82. *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (National Park Service regulation prohibiting sleeping in park in connection with a demonstration upheld as a reasonable restriction on the manner in which a demonstration could be carried out).

83. United States v. Grace, 461 U.S. 171, 177 (1983).

84. *See, e.g., Grayned*, 408 U.S. at 108-21.

In assessing the constitutional validity of these regulations, the Court balances the governmental interests served by the regulation against any incidental restriction of free expression. This balancing ensures that the regulation is not an "unnecessary or gratuitous suppression of communication."[85]

b. Public Forum Analysis

The public forum doctrine[86] relates to time, place, and manner restrictions at particular public places[87] or from governmentally controlled channels of communication.[88] Under this doctrine, courts initially classified types of property and communications media as open to the public, and protected only speech that occurred on "public forums."[89] The Supreme Court has refined this rigid approach by suggesting three types of public property, in descending order of protectiveness: the "traditional public forum," the "designated public forum," and the "nonpublic forum."[90] When categorizing a site or speech medium as one of the three public forum types, the Court looks to the government's intent in creat-

85. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 970-71 (3d ed. 1986).

86. The term "public forum" was first employed in International Ass'n of Machinists v. Street, 367 U.S. 740 (1961). The public forum concept, however, dates back to the famous dictum of Justice Roberts in *Hague v. C.I.O.*: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." 307 U.S. 496, 515-16 (1939).

87. *See, e.g.*, City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) (ordinance prohibiting posting of signs on public property upheld as applied to lightposts, which did not constitute a public forum).

88. *See, e.g.*, Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1985) (executive order upheld which limited access of nonprofit organizations to federally controlled charitable contribution program).

89. *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S 298, 301-04 (1974) (no constitutional right to advertise political candidacy in city-owned transit vehicles which were not public forums); Greer v. Spock, 424 U.S. 828, 836 (1976) (public area of Army base not a public forum, therefore base commander's refusal to allow plaintiff to make a political speech on the base did not violate the First Amendment).

90. These three public forum categories were created in Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45-46 (1983), and were further defined in Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 799-811 (1985). "Traditional public fora are those places which 'by long tradition or by government fiat have been devoted to assembly and debate.' . . . Public streets and parks fall into this category." *Id.* at 802 (citing *Perry*, 460 U.S. at 45). "[S]peakers can be excluded from a [traditional] public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Id.* at 800. "[A designated public forum] may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Id.* at 802 (citing *Perry*, 460 U.S. at 45, 46 n.7). "[W]hen the Government has intentionally designated a

ing the forum.[91] The Court may examine the nature of the property or medium and its compatibility with expressive activity to discern the government's intent.[92]

Public forum analysis has drawn sharp dissent,[93] as well as criticism from academic commentators, for stressing the features of a site or communication channel instead of the speaker's and the government's conflicting interests.[94] Two professors advocate replacement of public forum analysis with a "focused balancing" approach[95] in decisions involving

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place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest." *Id.* at 800.

"[P]roperty which is not by tradition or designation a forum for public communication [i.e., a nonpublic forum] is governed by different standards .... In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and [viewpoint neutral]." *Perry*, 460 U.S. at 46.

91. *Cornelius*, 473 U.S. at 802.

92. *Id. See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) (In finding that a university had a policy of making meeting facilities open to student groups, the Court considered relevant the fact that a university campus possessed many characteristics of a traditional public forum. The policy evidenced an intent to create a public forum.).

93. *See, e.g., Cornelius*, 473 U.S. at 820 (Blackmun, J., dissenting) (the examination of relevant interests is more important than public forum analysis, which is but analytical shorthand for underlying principles); *id.* at 833 (Stevens, J., dissenting) (public forum analysis is of questionable value in the actual decisional process); *Perry*, 460 U.S. at 65 (Brennan, J., dissenting) (public forum analysis "irrelevant"); Greer v. Spock, 424 U.S. 828, 860 (1976) (Brennan, J., dissenting) ("[T]he Court's forum approach to public speech blind[s] it to proper regard for First Amendment interests").

94. *See, e.g.*, Farber & Nowak, *supra* note 66, at 1224:

> Our objection to public forum analysis is not that it invariably yields wrong results (although it sometimes does), but that it distracts attention from the first amendment values at stake in a given case. It almost certainly will hinder lower court judges from focusing on those values or from making sense of Supreme Court precedent.

Id. See also M. NIMMER, NIMMER ON FREEDOM OF SPEECH 4-74, 4-76 (1984):

> It may be argued that whether or not given premises are labeled "public forum" is irrelevant since the First Amendment standards applied by the Court do not meaningfully turn on this label. . . . [T]he three elements—content neutrality, significant governmental interest and alternative means of communication—are necessary in order to validate a speech restriction regardless of whether or not the premises thus restricted are regarded as a public forum.

Id.

95. Professors Farber and Nowak write:

> Classification of public places as various types of forums has only confused judicial opinions by diverting attention from the real first amendment issues involved in the cases. Like the fourth amendment, the first amendment "protects people, not places." Constitutional protection should depend not on labeling the speaker's physical location but on the first amendment values and governmental interests involved in the case. Of course, governmental interests are often tied to the nature of the place. Public sidewalks, for example, are generally places where the governnment's interests are rather weak, given the diverse uses of sidewalks. At the same time, because sidewalks and streets have often served as forums of last resort for those who cannot afford other media of expression, the first amendment interests at stake may

"situational restraints"—speech restraints which mix content and locational concerns.[96] The public forum doctrine nonetheless remains a central, if confusing, analytical tool for the lower courts in some first amendment cases.

3. *Prior Restraint*

"Prior restraint" is a first amendment term of art referring to a particular means of preventing speech. Prior restraints are distinguished from legal measures which inhibit speech through a threat of subsequent punishment.[97] Prior restraint refers instead to a category of methods of restricting speech which are commonly held to be, by their nature, more inimical to first amendment values than subsequent punishment.[98] The Supreme Court has consistently disfavored prior restraint devices.[99]

Historically, prior restraint meant censorship laws which required that the speaker obtain a license from the government in order to publish.[100] Today, the term encompasses more than governmental licensing requirements. In *Near v. Minnesota*,[101] the Court struck down as an improper restraint a statute authorizing judicial abatement of "malicious, scandalous, and defamatory" newspaper publications.[102] Forty years later, in *New York Times Co. v. United States* ("The Pentagon Papers Case"),[103] the Court announced two basic rules concerning prior restraints: (1) any system of prior restraint bears a heavy presumption of

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> be especially high. Consequently, the balance may well tilt in favor of free speech more often when a sidewalk is involved than when some other place is involved. To this extent, the public forum doctrine is a useful heuristic device—a shorthand method of invoking this balance of interest. But when the heuristic device becomes the exclusive method of analysis, only confusion and mistakes can result.

Farber & Nowak, *supra* note 66, at 1234-35.

96. Professors Farber and Nowak's focused balancing test requires as a threshold that a situational restraint have clearly articulated goals which are themselves consistent with first amendment values (i.e. content neutrality). A balancing test follows the threshold requirements: the regulation must "be shown to serve a governmental interest that outweighs [the regulation's] impact on speech." *Id.* at 1243.

97. For example, though a statute forbidding theater owners from showing obscene films might "restrain" speech which comes after the statute is passed, it would not constitute a prior restraint in the technical sense. Such a statute would fall under the heading of "subsequent punishment."

98. For a discussion of the dangers of prior restraint, see *infra* notes 106-111 and accompanying text.

99. *See* Organization for a Better Austin v. Keefe, 402 U.S. 415, 418-19 (1971); New York Times Co. v. United States (The Pentagon Papers Case), 403 U.S. 713, 714 (1971) (per curiam); Near v. Minnesota, 283 U.S. 697, 713-14 (1931).

100. *See Near*, 283 U.S. at 713; Lovell v. Griffin, 303 U.S. 444, 451-52 (1938); *see also* L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 216-17 (1960).

101. 283 U.S. 697 (1931).

102. *Id.* at 701-03.

103. 403 U.S. 713 (1971) (per curiam).

unconstitutionality, and (2) the government carries a heavy burden to justify any system of prior restraint.[104] Again, the method of regulation in question was a court injunction.[105]

The Court is concerned primarily with the potential for abuse associated with prior restraints as opposed to subsequent punishment.[106] For example, administrative restraint of speech, as exemplified by the functioning of licensing boards, is prone to abuse due to the administrator's loyalty to the specific governmental program she serves.[107] This loyalty tends to override broader concerns, such as a speaker's constitutional rights.[108] Court ordered injunctions also offer opportunities for abuse. Potentially easier to obtain and procedurally swifter than criminal prosecutions,[109] civil injunctions invite indiscriminate application. Even if a temporary restraining order is eventually overturned, the government may already have achieved its illicit goal by halting expression at a crucial time.[110] "If subsequent punishment chills, prior restraint freezes."[111]

B. Student Speech

The justifications for restricting adult speech also may limit the free expression rights of high school students. In addition, special characteristics of the high school setting justify additional control over speech. The Supreme Court first attempted to delimit the extent of students' free expression rights in *Tinker v. Des Moines Independent School District.*[112]

1. Tinker*: Free Expression in the High School Setting*

In *Tinker*, the Supreme Court recognized that first amendment protections extend to students in public schools.[113] Holding that a school ban against wearing black armbands in protest of the Viet Nam War

104. *Id.* at 714.

105. *Id.*

106. *See, e.g.*, Southeastern Productions, Ltd. v. Conrad, 420 U.S. 546, 553, 559 (1975).

107. As Chief Justice Warren observed in his dissent, Times Film Corp. v. City of Chicago, 365 U.S. 43, 67 (1961): "The censor is beholden to those who sponsored the creation of his office . . . ."

108. *See* Mayton, *Toward a theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV 245, 250 (1982).

109. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 867 (3d ed. 1986).

110. As Justice Douglas observed in his dissent in Walker v. City of Birmingham, 388 U.S. 307, 336 (1967): "[I]f a person must pursue his judicial remedy [of appealing on injunction] before he may speak, . . . the occasion when protest is desired or needed will have become history and any later speech . . . will be futile or pointless."

111. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 867 (3d ed. 1986).

112. 393 U.S. 503 (1969).

113. *See supra* note 1.

violated students' right to free expression, the Court created a now familiar standard for reviewing the constitutionality of high school regulations affecting speech: student expression may be curtailed only when it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others . . . ."[114]

Tinker involved regulation of speech on public property, and thus presented a public forum issue.[115] However, the *Tinker* court declined to employ the nascent public forum doctrine.[116] Instead, the Court struck a balance between competing interests in the high school environment: the students' free expression interest and the state's interest in fulfilling its educational mission and in protecting the personal rights of its students. The *Tinker* test embodies this balance by preventing school officials from restricting student speech which neither disrupts education nor invades the rights of others. Thus the *Tinker* decision, because it avoided the misdirected emphasis used in public forum analysis,[117] provides a useful starting point for lower courts in deciding high school first amendment disputes.

2. *Beyond* Tinker*: Unsolved Questions*

a. Applying the "Rights of Others" Justification

While courts have found the "material disruption" and "substantial disorder" segments of the *Tinker* standard relatively noncontroversial,[118] the "rights of others" test has proven less handy.[119] This test allows school officials to forbid student expression which invades others' rights.[120] The two cases decided before *Kuhlmeier* interpreted the test in markedly different ways.

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

115. *See infra* notes 86-92 and accompanying text.

116. Justice Brennan made this observation in Greer v. Spock, 424 U.S. 828, 858 (1976) (Brennan, J., dissenting). Justice Brennan sought to demonstrate that the notion of a "public forum" was not the "touchstone of public expression." *Id.* at 859.

117. Public forum analysis encourages scrutiny of the nature of the location to the exclusion of the parties' interests. *See infra* notes 93-96 and accompanying text.

118. *See, e.g.*, Trachtman v. Anker, 563 F.2d 512, 521 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978) (Mansfield, J., dissenting):

> The *Tinker* test makes sense as a standard designed to insure that school officials will be permitted, even at the expense of some freedom of expression, to maintain order on the school premises, particularly in the classroom, and it has been construed by ourselves and other circuits as permitting an abridgement of free speech toward that end.

Id.

119. "The phrase 'invasion of the rights of others' is not a model of clarity or preciseness." Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 808 (2d Cir. 1971).

120. "[I]nvasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker*, 393 U.S. at 513. The Court in *Tinker* recognized in particular "the rights of . . . students to be secure and to be let alone." *Id.* at 508.

In *Trachtman v. Anker*,[121] the Second Circuit held that distribution of a student questionnaire on sexual attitudes and experiences, and publication of the results, would invade the rights of students by "subjecting them to psychological pressures."[122] The court permitted censorship by school officials even though the questionnaires were completed anonymously and voluntarily.[123] This broad interpretation of the "rights of others" invaded by student speech clearly allowed the school officials great latitude in censoring student speech.[124]

In *Frasca v. Andrews*,[125] a district court interpreted the "rights of others" test more narrowly. In *Frasca*, a school administrator seized all copies of a newspaper containing a substantially untrue and potentially libelous letter to the editor criticising a student government officer.[126] The court asserted that the principal was justified in believing, based on facts known at the time of the seizure, that the article was libelous, and would have a devastating impact on the libelled student.[127] The court held, therefore, that the pricipal's seizure was not in violation of the First Amendment.[128]

In a law review Note[129] analyzing the "rights of others" test, the student author praised the *Frasca* approach and went further. The *only* circumstance properly triggering prior restraint under the "rights of others" test, the Note argued, is potential tort liability for the school as a result of the student expression.[130] The Note maintained that a less exacting standard would allow school officials to abuse the test.[131] The Court of Appeals in *Kuhlmeier* cited the Note's approach with approval.[132]

b. Prior Restraint in the High School Setting

Tinker held unconstitutional the punishment of students who had

121. 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 453 U.S. 925 (1978).

122. *Id.* at 516, 519-20.

123. *Id.* at 515.

124. "We believe that the school authorities are sufficiently experienced and knowledgeable in these matters, which have been entrusted to them by the community . . . ." *Id.* at 519.

125. 463 F. Supp. 1043 (E.D.N.Y. 1979).

126. *Id.* at 1046. The newspaper also contained a letter to the editor and its response, which provided additional justification for the seizure. *Id.* The letter's inflammatory content presaged a "substantial risk of disruption of school activities." *Id.* at 1051.

127. *Id.* at 1052.

128. *Id.*

129. *See* Note, *supra* note 40, at 641.

130. *Id.* at 640-44.

131. *Id.*

132. *See supra* text accompanying notes 40-43.

worn protest armbands.[133] It was not, therefore, a prior restraint case, but concerned subsequent punishment.[134] However, many lower courts have used the *Tinker* standard to test prior restraint of student speech.[135] Lower court decisions vary widely in deciding the types of student speech which may be restricted, and in determining the criteria for testing the constitutionality of such prior restraint regulations.

The Second Circuit Court of Appeals has developed an approach paralleled by most courts of appeals.[136] The Second Circuit permits prior restraints by school officials when the regulatory standards and clearance procedures are defined in advance, and review of submitted student publications is expeditious.[137] The Second Circuit is the most permissive toward school officials, allowing them wide power and discretion to determine what student speech may be suppressed, and what constitutes a disruption.[138]

The Seventh Circuit provides greater protection of student speech, applying the *Tinker* formula only to punishment of students, not to prior restraint.[139] Schools may restrict the distribution of printed materials by means of time, place, and manner rules, however, and may punish students whose speech falls into proscribable categories, such as obscene or libelous literature.[140] In sum, the circuits are split on the permissibility of prior restraint of student speech, and on the level of discretion to be allowed school officials in regulating student speech.

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

134. *Id. Tinker*, it has been argued, approves censorship of student expression by school authorities *before* the disruption or invasion of others' rights occurs. The relevant language in the *Tinker* decision refers to "any facts *which might reasonably have led school authorities to forecast* substantial disruption of or material interference with school activities." *Id.* at 514 (emphasis added). *See* Note, *supra* note 40, at 635. It is just as likely, however, that the Court in *Tinker* was referring to facts appearing *after* commencement of an expressive act which presaged substantial disruption. The facts of *Tinker* presented such a scenario. *Tinker*, 393 U.S. at 509 (halting of protest occurred only after students had worn armbands on school grounds). *Accord* Fujishima v. Board of Educ., 460 F.2d 1355, 1358 (7th Cir. 1972).

135. *See, e.g.*, Karp v. Becken, 477 F.2d 171, 175 (9th Cir. 1973); Quarterman v. Byrd, 453 F.2d 54, 58 (4th Cir. 1971); Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 808 (2d Cir. 1971). *Cf.* Nicholson v. Board of Educ., 682 F.2d 858, 863, n.3 (9th Cir. 1982); Riseman v. School Comm., 439 F.2d 148, 149 (1st Cir. 1971); Burch v. Barker, 651 F. Supp. 1149, 1154 (W.D. Wash. 1987).

136. *See* Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971).

137. *Id.* at 809-11.

138. Fujishima v. Board of Educ., 460 F.2d 1355, 1358-59 (7th Cir. 1977).

139. *Id.* at 1359.

140. School authorities need only demonstrate a reasonable basis for "prior restraint" of student speech. *Eisner*, 440 F.2d at 810.

c. The Relevance of the School's Control Over Curriculum

Several lower courts have attempted to avoid *Tinker*'s protection for student speech. These courts assert that a certain school speech medium must be adjudged a public forum before it may come within *Tinker's* reach.[141] Relying on Supreme Court decisions which would bestow near complete discretion on school officials in matters of curriculum choice,[142] some courts have reasoned that areas of the school's operation which are an integral part of the curriculum must not be considered public forums.[143] Since, in *Tinker*, the Court declined to employ the public forum doctrine,[144] and since that case concerned student expression carried on outside the school's curriculum,[145] that decision offers no guidance to the lower courts in school curriculum cases.

The lower courts lack Supreme Court guidance for decisions relating curriculum to free speech rights in public forums. The Court has never employed curriculum-noncurriculum distinctions in conjunction with the public forum doctrine.[146] Thus, a court choosing to apply public forum analysis must resort to forced analogies to the facts of other lower court decisions decided on public forum or curriculum grounds.[147] The danger in this approach is that the real interests at stake—the stu-

141. *See, e.g.*, Gambino v. Fairfax County School Bd., 429 F. Supp. 731, 734, *aff'd*, 564 F.2d 157 (4th Cir. 1977); Zucker v. Panitz, 299 F. Supp. 102, 104-05 (S.D.N.Y. 1969). *Cf.* San Diego Comm. Against Registration and the Draft (Card) v. Governing Bd. of Grossmont Union High School Dist., 790 F.2d 1471, 1476 (9th Cir. 1986) (student newspaper was a public forum, therefore school board's exclusion of political advertisement without a compelling governmental interest violated the First Amendment).

142. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 107 (1968) (the state has an "undoubted right to prescribe the curriculum for its public schools," though this right may not be exercised in derogation of the First Amendment).

143. *See, e.g.*, Seyfried v. Walton, 668 F.2d 214, 216 (3d Cir. 1981); Kuhlmeier v. Hazelwood School Dist., 607 F. Supp. 1450, 1465 (E.D. Mo. 1985).

144. *See supra* note 116 and accompanying text.

145. The wearing of armbands in *Tinker* was planned and carried out by the students and their parents, independent of any school program. *Tinker*, 393 U.S. at 504.

146. In Bethel School Dist. v. Fraser, 106 S. Ct. 3159 (1986), the Court implicitly recognized the importance of ties between the punished speech and the school's curriculum in deciding public school free speech issues. The Court held that the "determination of what manner of speech in the classroom or in school assembly is inapproriate properly rests with the school board." *Id.* at 3165. The Court also noted that "a high school assembly or classroom is no place for a sexually explicit monologue" and that "it was perfectly appropriate for the school to disassociate itself . . ." to avoid leaving the impression on students that lewd speech was a part of the school's curricular mission. *Id.* at 3166-67. Significantly, the *Fraser* decision contained no public forum analysis. Accordingly, the *Fraser* decision represents a recent signal from the Court that curriculum ties can be relevant to high school free speech issues without inclusion of public forum concepts.

147. *See Kuhlmeier*, 607 F. Supp. at 1462-67.

dent's free speech right and the state's interest in education[148]—are neglected in the effort to fit the case's facts into either the curriculum or the public forum classification.

III. *Kuhlmeier* Reconsidered

A. The "Rights of Others" Justification Defined

The *Kuhlmeier* court, in interpreting the *Tinker* "rights of others" test, required that tort liability on the part of the school be a foreseeable result of the targeted speech.[149] This was a novel step,[150] but probably a sound choice. The *Tinker* Court had taken the "rights of others" test from *Blackwell v. Issaquena County Board of Education*.[151] In *Blackwell*, school authorities had disciplined students who spread their message by physically accosting their peers to pin protest buttons on them—conduct tantamount to battery.[152] Thus the Eighth Circuit's use of the tort liability test in *Kuhlmeier* was consistent with the test's tort-based origin.

Trachtman v. Anker[153] shows how a loose interpretation of the rights of others test may lead to overregulation of student speech by school officials. In *Trachtman*, school officials used the "rights of others" test to justify censorship of material which invaded no one's rights, but merely offended the sensibilities of the school administration.[154] *Trachtman* suggests that the *Kuhlmeier* court's concerns about

148. *See supra* notes 93-111 and accompanying text.

149. *Kuhlmeier*, 795 F.2d at 1375-76.

150. Though the court in Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979), recognized libelling another student as a violation of the "rights of others" test, it did not adopt a tort based interpretation of the test as a rule.

151. 363 F.2d 749 (5th Cir. 1966).

152. W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 39 (1984) ("A harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact . . . is a battery").

153. 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978). *See supra* notes 121-124 and accompanying text.

154. The trial court in *Trachtman* had found that the speech at issue might conceivably have embarrassed or even have caused anxiety and emotional difficulties in some of the more sensitive Hazelwood High students. *Trachtman*, 563 F.2d at 517-19. *Tinker*, however, requires more: "[School officials] must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. at 509. *See also* Note, *supra* note 3, at 640. In addition, the view of high school students as any more sensitive than the average adult to the sexual content of the questionnaire in *Trachtman* is arguably outdated and unnecessarily paternalistic. *See* Note, Tinker *Goes to the Theater: Student First Amendment Rights and High School Theatrical Productions in* Seyfried v. Walton, 11 HASTINGS CONST. L.Q. 247, 277-78 (1984). "Some courts have recognized as futile educators' attempts to limit the discussion of certain ideas deemed inappropriate for secondary students when those same values are much in evidence beyond the schoolhouse gate." *Id.* at 277 (citing Keefe v. Geanakos, 418 F.2d 359, 361-62 (1st Cir. 1969).

overregulation by school officials were justified.[155] Furthermore, *Kuhlmeier's* potential tort liability standard would not strip school officials of discretion over all student speech; the remaining segments of the *Tinker* test—substantial disorder and material disruption of classwork—permit properly limited regulation by school officials. Therefore, the *Kuhlmeier* court significantly advanced first amendment law in the school setting by adopting its tort based interpretation of the *Tinker* "rights of others" test.

B. Prior Restraint Approved

The *Kuhlmeier* court chose to reject the Seventh Circuit's reasoning protecting student free expression rights,[156] and adopted the Second Circuit's position that prior restraints of student expression are permissible under certain circumstances.[157] The test approved by the *Kuhlmeier* court provides that a school official may restrain student speech only if she reasonably believes it will violate the *Tinker* standards.[158] If censorship prior to publication is justified, "the least restrictive means are to be followed."[159] Thus the principal's censorship of two full pages to eliminate two offending articles,[160] at the same time deleting three non-offending articles, would probably constitute an unlawful restraint even if the two offensive articles were properly censored under *Tinker*. The court also directed that students be given an early opportunity to alter their articles to conform to appropriate standards.[161] Since the court found the student articles acceptable, as written, under the *Tinker* standard, the students presumably would not have been required to make any such alterations. Finally, once a student challenges an administrator's decision, the school carries the burden of justifying its action under the *Tinker* guidelines.[162]

These standards and procedures offer a balanced, middle ground solution to a difficult problem. On one hand, the court avoided the Seventh Circuit's per se proscription of content related prior restraint. The Seventh Circuit approach triggers the *Tinker* concerns regarding potential

155. The *Kuhlmeier* court's tort-based interpretation, however, arguably might encourage school officials to be overly sensitive to potential lawsuits, and might thus backfire by producing a speech restrictive side effect. To prevent this effect, school boards can issue legally sophisticated guidelines to enable administrators to make safe yet nonrestrictive decisions. In addition, administrators should be encouraged to consult the school district's legal counsel in tough cases.

156. Fujishima v. Board of Educ., 460 F.2d 1355, 1358 (7th Cir. 1972). *See supra* notes 138-139 and accompanying text.

157. *See supra* notes 136-137 and accompanying text.

158. *Kuhlmeier*, 795 F.2d at 1374 n.5.

159. *Id.*

160. *Id.* at 1370-71.

161. *Id.* at 1377.

162. *Id.*

school disruption and invasion of individual rights.[163] Nor are students necessarily protected against arbitrary restrictions when prior restraints are forbidden, since the school administration can still impose arbitrary post-publication punishments.[164] The court also discouraged abuse of prior restraint by setting forth the requirements and procedures outlined above. While the Supreme Court clearly indulges in a presumption against prior restraints,[165] and this presumption exists, to some extent, with respect to children as well as adults,[166] it is also well established that the constitutional rights of students are not automatically coextensive with those of adults.[167] Therefore, the special need in the school environment to protect against disruption and to protect the rights of students may justify administrative review which would be impermissible in the adult context.

C. A "Public Forum" Recognized

Though the *Kuhlmeier* court viewed its interpretation of the "rights of others" test as the "heart of the case,"[168] perhaps a more fundamental issue was presented by the court's problematic treatment of the public forum question.[169] If *Spectrum* was found to be a public forum, said the court, the censored articles would be entitled to the first amendment protections provided by the *Tinker* test.[170] In determining that *Spectrum* was such a forum, the court gave short shrift to the state's interest in regulating the student speech,[171] instead concentrating on explaining why *Spectrum* qualified as a public forum. The court's search for qualifying factors replaced the constitutionally urgent need to identify and balance the conflicting and legitimate interests of both parties, students and school officials.[172] This talismanic use of the public forum category was unnecessary, under existing authority, to reach a result respectful of the student's first amendment rights.

There is Supreme Court authority to assist lower courts in identifying the state's interest in regulating the content of a student newspaper

163. *See* Note, *supra* note 40, at 635-36.

164. *Id.*

165. *See supra* note 104 and accompanying text.

166. Burch v. Barker, 651 F.Supp. 1149, 1153 (W.D. Wash. 1987).

167. Bethel School Dist. v. Fraser, 106 S. Ct. 3159, 3164 (1986); New Jersey v. T.L.O., 469 U.S. 325, 339-343 (1985) (school officials may subject students to searches which would be impermissible in the adult context).

168. 795 F.2d at 1375.

169. *See supra* notes 86-96 and accompanying text.

170. *See supra* text accompanying notes 112-133 (discussion of Tinker free speech protections); *see also supra* note 35 (lesser speech protection for non-public forums).

171. In fact consideration of state interests appears nowhere in the Court's public forum determination. Only by applying the *Tinker* test later in the opinion did the court implicitly recognize state interests. 795 F.2d at 1374-76.

172. *See* Farber & Nowak, *supra* note 66, at 1234-35.

like *Spectrum*. The Supreme Court has acknowledged that public schools are vitally important as vehicles for "inculcating fundamental values."[173] In *Board of Education v. Pico*,[174] the Court recognized a student's first amendment interest in preventing the removal of controversial books from a public school library. The *Pico* Court also recognized, however, that "[school officials] might well defend their claim of absolute discretion in matters of *curriculum* by reliance on their duty to inculcate community values."[175] Thus, the *Kuhlmeier* court could have gone beyond the nature of the forum to examine more carefully the state's interest in the case.[176]

Having found that *Spectrum* was a public forum, the *Kuhlmeier* court effectively rejected as irrelevant the school's claimed interest in regulating the newspaper's content. The court could have reached the same result, in a more reasoned fashion, by relying on Justice Brennan's reasoning in *Pico*. Writing for a plurality, Justice Brennan noted that the school had the utmost discretion in matters of curriculum,[177] and had a duty to inculcate values.[178] This duty, however, is misplaced where the school administrators "attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway."[179] Since the reading of *Spectrum* was purely voluntary,[180] Justice Brennan's delimitation of the range of administrative discretion applies just as readily to it, if not more so. As Chief Justice Burger indicated in his dissent in *Pico*, he might well have joined in Justice Brennan's approach if the school's action had actively "prohibit[ed] a student from expressing views,"[181] as was the case in *Kuhlmeier*.[182]

Relying on *Pico* to limit the reach of the school administrtation's curricular discretion, the *Kuhlmeier* court would have found that *Spectrum* was outside the compass of administrative control. The state and

173. Ambach v. Norwich, 441 U.S. 68, 76-77 (1979).

174. 457 U.S. 853 (1982).

175. *Id.* at 869.

176. Recent Supreme Court decisions indicate that consideration of the interests of the parties is not foreclosed by the existence of the public forum doctrine. For example, in City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984), Justice Stevens briefly noted that streetlamp posts were not a traditional public forum, *id.* at 813-14, but based his decision upholding an anti-posting ordinance on the relative importance of the parties' interests. *Id.* at 817.

177. Board of Educ. v. Pico, 457 U.S. 853, 869 (1982).

178. *Id.*

179. *Id.*

180. Though arguably the students participating in Journalism II would be less able to avoid reading the articles, there is no evidence that the reading of their classmates' work would be required in the same fashion as a textbook. In addition, Journalism II was an elective course, and thus registration for the course was voluntary.

181. *Pico*, 457 U.S. at 886 (Burger, C.J., dissenting).

182. *See supra* text accompanying note 22.

student interests, properly identified, could then be balanced. The student's right to freedom of expression would prevail over the state interest. Such attention to the parties' interests results in a logically sound decision which protects state interests without unnecessarily restricting student expression.

Conclusion

To strike the proper balance between student free speech rights and the state's interest in regulating student speech, courts must carefully examine the interests at stake. In *Tinker*, the Supreme Court provided rare guidance in balancing these interests in the high school setting. The court in *Kuhlmeier* rightly looked to *Tinker* for guidance in evaluating school censorship of student speech. *Tinker*, however, has left several issues unresolved concerning the importance of ties between student speech and the curriculum, the constitutionality of prior restraint, and the ambiguous language of the *Tinker* test itself. While the *Kuhlmeier* court reached a result consistent with Supreme Court precedent, its reasoning was doctrinally confused, and largely unsupported.

The Supreme Court will hear the *Kuhlmeier* case during the fall Term of 1987. The Court faces an opportunity to continue its examination, begun in *Tinker*, of competing first amendment interests in the high school environment. The fruits of such an examination could be the much needed answers to the three *Kuhlmeier* issues that *Tinker* left in its choppy wake. In reaching a decision on the extent of a school administration's curricular control, the Court can send a strong signal by avoiding use of the distracting public forum doctrine. The Court may provide better guidance for lower courts by expanding the interest based analysis it initiated in *Tinker*, and resumed in *Pico*, to arrive at a standard which comes closest to accomodating the interests of both the individual student and the state.

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