CASE NOTES

CONSTITUTIONAL LAW—The First Amendment Permits Speech in a School-Sponsored Newspaper to Be Restrained or Prohibited by the School if There Is a Substantial and Reasonable Basis for the Action Taken—*Hazelwood School Dist. v. Kuhlmeier* 108 S. Ct. 562 (1988).

Hazelwood East High School produced a school newspaper called *Spectrum* as part of its Journalism II class.[1] It was written and edited by students, under the supervision of a journalism teacher, with the school principal reviewing each issue prior to publication.[2] On May 10, 1983, the principal objected to the contents of two articles which were scheduled for the next edition.[3] One article described the experiences of pregnant students and the other article assessed the impact of divorce on students.[4] Both articles, along with the other articles on the two pages on which the offending article appeared, were deleted by the principal from the final version of the newspaper.[5]

Three former student staff members of *Spectrum* initiated this suit. They claimed that the deletion violated the students' first amendment right of freedom of speech.[6] The United States District Court for the Eastern District of Missouri disagreed and the request for an injunction was denied.[7] The Court of Appeals for the Eighth Circuit reversed, stating that the newspaper was a public forum and that school officials could only censor articles when " 'necessary to avoid material and substantial interference

1. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, 565 (1988). *Spectrum* was published approximately every three weeks and distributed to students, school personnel, and members of the community. *Id.*

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 566. The principal deleted articles about teenage marriage, runaways, and juvenile delinquents, as well as a general article on teenage pregnancy. *Id.* at n.1.

6. *Id.* at 566. The first amendment states, in part, that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

7. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. at 566. *See also* Hazelwood School Dist. v. Kuhlmeier, 607 F. Supp. 1450 (E.D. Mo. 1985).

with school work or discipline . . . or the rights of others.' "[8] The United States Supreme Court granted certiorari and *held*, reversed.[9] The first amendment permits speech in a school-sponsored newspaper to be restrained or prohibited by the school if there is a substantial and reasonable basis for the action taken. *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988).

The majority, in an opinion written by Justice White, began by noting that although students do not " 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,' "[10] their rights " 'are not automatically coextensive with the rights of adults in other settings.' "[11] A school does not have to "tolerate speech that is inconsistent with its 'basic educational mission' " and the school board may determine what speech is inappropriate.[12]

The first issue before the Court was whether the school newspaper was a public forum.[13] The majority stated that the newspaper was not a public forum since school facilities traditionally have not been public forums like parks, streets, or other places which are used for public assembly and the discussion of public issues.[14] Thus, the Court believed that a school facility could be construed to be a public forum only if the school had opened it up to indiscriminate public use.[15] Here, it was concluded, the school did not designate its newspaper for such purposes.[16] School Board Policy No. 348.51 stated that the newspaper was a part of the school curriculum and a " 'regular classroom activit[y].' "[17] The paper was constantly overseen by a journalism teacher who was the final authority in all phases of production and publication, including contents.[18] Additionally, the students received credit for the course and were graded upon their performance in it.[19] Therefore, the district court's finding that the newspaper was not a public forum was amply supported by the evidence and was not clearly erroneous.[20]

The majority believed that the court of appeals mistakenly based its

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8. Hazelwood School Dist. v. Kuhlmeier, 795 F.2d 1368, 1374 (8th Cir. 1986) (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969)).

9. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. at 567 (1988).

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

11. *Id.* (quoting Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3165 (1986)).

12. *Id.* (quoting Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3165 (1986)).

13. *Id.*

14. *Id.* at 567-68 (citing Hague v. CIO, 307 U.S. 496, 515 (1939)).

15. *Id.* (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983)).

16. *Id.*

17. *Id.* (quoting Hazelwood School Dist. v. Kuhlmeier, 607 F.Supp. 1450, (E.D. Mo. 1453 1985)).

18. *Id.* (citing Hazelwood School Dist. v. Kuhlmeier, 607 F. Supp. 1450, 1453 (E.D. Mo. 1985)).

19. *Id.*

20. *Id.*

reversal upon equivocal evidence.[21] Although the School Board Policy No. 348.51 stated that it would " 'not restrict free expression or diverse viewpoints within the rules of responsible journalism,' "[22] Justice White concluded that it could be inferred that the school still retained control over what was "responsible journalism."[23] It was also noted that the " '*Spectrum*, as a student-press publication, accepts all rights implied by the First Amendment.' "[24] This language merely suggested that the school had granted only those rights to which a *school-sponsored* newspaper is entitled; it certainly did not imply that the newspaper was to be a public forum.[25] Likewise, the fact that the students had some input as to the contents of the newspaper was not dispositive, as this merely furthered the school's objective of teaching the students editing and leadership responsibilities.[26] The school did not completely turn the newspaper over to student authority.[27] Thus, the Court did not find the Statement of Policy and the student input evidence persuasive.[28]

The majority distinguished the case at bar from *Tinker v. Des Moines Independent Community School District*,[29] by reasoning that this case dealt with a *school-sponsored* publication rather than with student expression which simply occurred on school grounds.[30] The Court found three reasons why the school must be able to exercise greater discretion in supervising school-sponsored activities. First, the school may choose to protect people from speech which is not consistent with their level of maturity.[31] Second, the school may be concerned that the public might perceive the speech as attributable to the school.[32] Third, since these activities are part of the school's curriculum and they are designed to teach students particular knowledge or skills, teachers must have greater control to ensure that

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21. *Id.* The court of appeals held that the newspaper was a public forum since it was intended to express student viewpoints. *Id.* at 569.

22. *Id.* (quoting Brief for Appellant at 22).

23. *Id.*

24. *Id.* (quoting Statement of Policy published in the Sept. 14, 1982 issue of *Spectrum*).

25. *Id.* (emphasis added).

26. *Id.*

27. *Id.* The Court stated that "[a] decision to teach leadership skills in the context of a classroom activity hardly implies a decision to relinquish school control over that activity." *Id.*

28. *Id.*

29. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). In *Tinker* the students wore black arm bands to school to protest United States involvement in the Vietnam War. *Id.* at 504. Such symbolic speech can only be prohibited if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 513.

30. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, 569 (1988) (emphasis added). The Court felt that "here the question is whether the first amendment requires a school to affirmatively promote particular student speech." *Id.*

31. *Id.* at 570. The Court believed that a discussion of the existence of Santa Claus in an elementary setting would be an example of speech inappropriate for some students' level of maturity. *Id.*

32. *Id.*

students actually acquire the skills which the lesson is designed to teach.[33] Thus, a school may set higher standards than those required in the "real" world[34] and may refuse to sponsor speech which does not live up to those standards.[35] This speech, the Court held, can be restrained or prohibited as long as the school has a substantial and reasonable basis for doing so.[36]

The second issue before the Court was whether the principal had acted reasonably in deleting the two offending articles.[37] With respect to the teenage pregnancy article, there was evidence that at least one teacher could identify one of the pregnant students and possibly all three.[38] The Court felt that the principal could reasonably have concluded that the article violated any pledge of anonymity which might have been given to the students.[39] In addition, the Court found that, since the students' boyfriends and parents were discussed in the article, and they were given no opportunity to respond or consent to the publication, there could be an invasion of privacy.[40] The Court also reasoned that the students talked openly about their use or non-use of birth control, and this could be inappropriate subject matter for the students' younger brothers and sisters who might read the newspaper at home.[41] Thus, the Court could not say that the principal acted unreasonably in deleting this article.[42]

In the divorce article, a student was very critical of her father, stating that he often chose to be out with his friends rather than with his family.[43] He was not given a chance to respond to these statements and this, the Court held, violated principles of journalistic fairness.[44] Accordingly, the Court believed that the principal had acted reasonably in deleting this article.[45]

The third issue before the Court was whether the principal had acted

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33. *Id.*

34. *Id.*

35. *Id.* The Court believed that biased, ungrammatical, profane, or poorly written speech would be an example of speech which does not live up to the standards required by the school. *Id.*

36. *Id.* at 571.

37. *Id.*

38. *Id.* This was due to the small number of pregnant girls at the school. *Id.*

39. *Id.* The first paragraph of the article stated that "[a]ll names have been changed to keep the identity of these girls a secret." *Id.*

40. *Id.* Martin Duggan, a former editorial page editor of the *St. Louis Globe-Democrat* and a former college journalism instructor, testified that the story was inappropriate since it intruded upon the privacy of the girls, their parents, and their boyfriends. *Id.* at 572 n.8.

41. *Id.* at 572. The Court also deemed it inappropriate for the fourteen-year-old freshman. *Id.*

42. *Id.*

43. *Id.* She stated that he "chose playing cards with the guys over home and family." *Id.*

44. *Id.* Martin Duggan testifies that it did not comport with standards of journalistic fairness because the father was not given a chance to respond. *Id.* at n.8.

45. *Id.* at 572.

reasonably in deleting the other articles which appeared on the same pages as the offending articles.[46] The principal testified that at the time he read the articles he did not believe that there was time to make any changes.[47] Thus, in his opinion, he was faced with the choice of printing the newspaper without the two pages or printing no newspaper at all.[48] The majority noted that, although he did not verify that it was too late to make any changes, the supervising journalism teacher did not correct the principal's misconception.[49] Perhaps, the Court reasoned, the teacher was not familiar with the production procedures or was not aware of the pressure on the principal to make a decision so that the newspaper could be published.[50] Under these circumstances the principal's deletion of the other articles was found reasonable.[51]

The majority was satisfied that the principal reasonably could have concluded that the students had not learned how to protect the privacy of others, how to preserve journalistic fairness, or how to handle adult and controversial subjects with sensitivity.[52] Since the students had not learned the required lessons, their speech could reasonably be prohibited.[53] Accordingly, the Court found no violation of the students' first amendment rights.[54]

Justice Brennan wrote a vehement dissent in which Justice Marshall and Justice Blackmun joined.[55] Justice Brennan noted that at the beginning of each year a Statement of Policy, written by the students and approved by the school authorities, was published.[56] The Statement of Policy expressly noted that the *Spectrum* adopted all first amendment rights and only speech which " 'materially and substantially interferes with the requirements of appropriate discipline' " could be prohibited.[57] The dissent argued that the students' first amendment rights had been violated by the principal, who had prohibited speech which did not disrupt classes or violate the rights of others.[58]

Justice Brennan conceded that educators have a difficult job and must pick from diverse and conflicting classes, moral values, and political

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46. *Id.*
47. *Id.* In reality, the printing could have been delayed to make the necessary changes. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* The journalism teacher had only recently been brought in to replace a former teacher. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 573 (Brennan, J., dissenting).
56. *Id.* (Brennan, J., dissenting).
57. *Id.* (Brennan, J., dissenting) (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 513 (1969)).
58. *Id.* (Brennan, J., dissenting).

theories.[59] Thus, the Court had left "'the daily operation of school systems'" to the states; but if school policies or decisions violated the Constitution, the Court would step in and strike them down.[60] The dissent noted that student speech often disrupts the school's functions by directly interfering with the school's ability to teach[61] or by disruption of the operation of the school.[62] These types of student speech can be constitutionally prohibited.[63] Other student speech merely conflicts with a message that the school is trying to send.[64] Justice Brennan believed that such was the case here, where the *Spectrum* was attempting to convey a position which the school disagreed with and found uncomfortable.[65] This type of speech, Justice Brennan argued, cannot be prohibited without violating the students' first amendment rights.[66]

According to Justice Brennan, the majority erroneously distinguished this case from the prior controlling precedent of *Tinker*.[67] He noted that *Tinker* "did not even hint" that the mere nature of the speech was dispositive.[68] He pointed to *Bethel School District No. 403 v. Fraser*,[69] in which the United States Supreme Court used the *Tinker* test in upholding the school's ability to prohibit speech in a *school-sponsored* assembly.[70] The distinction drawn between school-sponsored and incidental speech was not then, nor ever had been, dispositive in the Court's prior decisions.[71]

Justice Brennan reiterated the three reasons given by the majority for believing that school officials require greater control over student speech in school-sponsored activities.[72] First, the school has a duty to control the curriculum.[73] Second, the school should protect students from objectionable viewpoints.[74] Third, the school has a need to keep the public from

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59. *Id.* at 574 (Brennan, J., dissenting).

60. *Id.* (Brennan, J., dissenting) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

61. *Id.* (Brennan, J., dissenting). The dissent suggested that interference might be exemplified by a student who speaks while a teacher is talking in class. *Id.*

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

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

64. *Id.* (Brennan, J., dissenting). The dissent suggested that such a conflicting message might be exemplified by a student who sits in class wearing a symbol of protest. *Id.*

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

66. *Id.* at 575. (Brennan, J., dissenting).

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

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

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

70. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, 575 (1988) (Brennan, J., dissenting) (emphasis added). In *Fraser* a student delivered a lewd nominating speech at a school assembly which students were required to attend. *Id.*

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

72. *Id.* at 576 (Brennan, J., dissenting).

73. *Id.* (Brennan, J., dissenting). The dissent believed that *Tinker* addressed the first reason. *Id.*

74. *Id.* (Brennan, J., dissenting). The dissent believed that the second reason was illegitimate. *Id.*

attributing such viewpoints to the school.[75] Justice Brennan addressed each of these propositions separately in his dissent.

Justice Brennan agreed with the majority's first proposition—that the school had a legitimate interest in ensuring that the students learned the lessons which the school was trying to teach—but he felt that this was the very essence of the *Tinker* test.[76] Under *Tinker* the school can prohibit any speech which would " 'materially disrupt' " a curricular function.[77] "Thus . . . the school may constitutionally punish the budding orator if he disrupts calculus class but not if he holds his tongue for the cafeteria."[78] That is so because student speech is more likely to disrupt when it occurs in class than when it merely occurs on school grounds.[79]

Justice Brennan characterized the majority's second proposition—that the school has a duty to protect its students from material which is not appropriate to their level of maturity—as simply not believable.[80] He accepted the idea that schools have a legitimate interest in teaching moral and political values, but this "is not a general warrant to act as 'thought police' stifling discussion of all but state-approved topics and advocacy of all but the official position."[81] He felt that students have a " 'right to receive information and ideas' " and schools may not chill student speech under the guise of protecting them from sensitive and controversial topics.[82]

Finally, Justice Brennan conceded the majority's third proposition—that the public may attribute the newspaper's viewpoints to the school and the school has a right to disassociate itself from those viewpoints.[83] But " '[e]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' "[84] In this case he felt that the school had less restrictive means available to disassociate itself from the viewpoints expressed in the newspaper.[85] It could have published a disclaimer or issued its own official statement on the controversial or sensitive subjects.[86] To choose otherwise is

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75. *Id.* (Brennan, J., dissenting). The dissent believed that this need could be met through less restrictive means. *Id.*

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

77. *Id.* (Brennan, J., dissenting) (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 513 (1969)).

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

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

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

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

82. Id. at 578 (Brennan, J., dissenting) (quoting Board of Educ. v. Pico, 457 U.S. 853, 867 (1982)).

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

84. *Id.* (Brennan, J., dissenting) (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

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

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

to promote brutal and indiscriminate censorship.[87]

The dissent argued that since the censorship had no legitimate basis, it could not have been tailored to prevent a " 'materia[l] disrup[tion of] classwork.' "[88] Additionally, as the court of appeals noted, even if the article contained journalistic improprieties, they could not be considered tortious or criminal, and a mere " 'undifferentiated fear or apprehension of disturbance is not enough (even in the public-school context) to overcome the right to freedom of expression.' "[89]

Alternatively, Justice Brennan argued, even if the principal had a legitimate constitutional basis for objecting to the articles, the brutality of the censorship was inexcusable.[90] Although only two articles were objectionable, the principal deleted six.[91] He did not even inquire as to less restrictive alternatives.[92] In supporting the principal's actions in this case, the Court " 'teach[es] youth to discount important principles of our government as mere platitudes.' "[93]

Conclusion

The effect of this decision will be widespread and dangerous. The paternalistic attitude of the Court forces students to realize that although they can study the first amendment, they must understand that it does not apply to them. If the school can think of an appropriate reason for barring specific articles from student publications, students will not be allowed to express themselves on issues which the school believes are objectionable.

Additionally, courts following this decision will give greater deference to school officials' censorship of school-sponsored publications and productions. Student speech which conflicts with the school's viewpoints or deals with a controversial subject which the school deems "inappropriate for the student" could be prohibited. Thus, schools will be able to achieve indirectly what is constitutionally impermissible to do directly.

In the future, each court considering a similar case will first have to decide whether the censored speech occurred in conjunction with a school-sponsored activity. Is a football game a school-sponsored activity? Are part-time jobs obtained through a work-study program school-sponsored activities? Must the speech be an inherent part of the activity or merely

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

88. *Id.* (Brennan, J., dissenting) (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508 (1969)).

89. *Id.* (Brennan, J., dissenting) (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508 (1969)).

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

91. *Id.* at 580 (Brennan, J., dissenting).

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

93. *Id.* (Brennan, J., dissenting) (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1923)).

incidental to it? This decision has created more problems than it has solved. Instead of clarifying the constitutional limits on student speech, it has only muddied already murky water.

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