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NOTES

Constitutional Law: First Amendment Rights: Goodbye to Free Student Press?

The Supreme Court began 1988 with a bang rather than a whimper. On January 13, 1988, in Hazelwood School District v. Kuhlmeier, the Court protected a Missouri high school principal's action to censor the school's student newspaper. The Court held that the school newspaper in this particular case could not be characterized as a public forum and, hence, the school officials could regulate the paper's contents in any reasonable manner. Here, deletion of two full pages from the newspaper, because an article on teenage pregnancy and an article on divorce were considered inappropriate and sensitive, was deemed reasonable.

There are three keys to understanding the Court's decision in Hazelwood. First, the Court emphasized the pedagogical interest in shielding the high school audience from sensitive topics. Second, the Court characterized the school newspaper as an integral part of the educational curriculum rather than a public forum for student expression. Finally, the Court distinguished between personal and school-sponsored speech, granting greater editorial control over school-sponsored expressive activities. Each of these three "excuses" justified the Court's application of the rational basis test, allowing the Court to abandon the heightened scrutiny test outlined in Tinker v. Des Moines Independent Community School District.

Although it may be reasonable to assume that the Court simply executed upon the pervasive national desire to "crack down" on student discipline, the Court appears to have chosen a factually weak case to implement this policy. First, even if school officials have a legitimate interest in shielding high school students from potentially sensitive topics, the subject matter of the two censored articles was simply not objectionable. Further, as this note will illustrate, the legal determination as to what is or is not a public forum is arbitrary and highly subjective, and yet that very determination identifies the extent of students' first amendment rights. As the history of Hazelwood itself shows, either determination can be adequately justified by different courts, leaving the nation with an amorphous line of demarcation between free student speech and censorship. Finally, the Court's distinction between personal and school-sponsored speech is both unnecessary and unprecedented. Rather, it is an additional pretext for avoiding the application of Tinker and for applying the rubber stamp rational basis test.

2. Id. at 572.
3. Id.
4. 393 U.S. 503 (1969) (prohibition against students' wearing black armbands to protest U.S. government policy in Vietnam violated first amendment because of no evidence the conduct substantially or materially interfered with school classwork or discipline, or invaded rights of others).

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The Bumpy Road to Censorship

On May 13, 1983, the principal of Hazelwood East High School in St. Louis County, Missouri, deleted two pages of *Spectrum*, the school newspaper. He contended the stories involving pregnant students and divorce were inappropriate, sensitive, and would invade the privacy rights of others. Three former Hazelwood students who were staff members of *Spectrum* filed a first amendment action seeking injunctive relief, money damages, and a declaration that their first amendment rights were violated by the censorship of the articles.

The district court denied injunctive relief and held that the newspaper was an integral part of the school's curriculum, rather than a public forum for free expression by students. The court further held that the students' first amendment rights were not violated because "school officials have a great deal of discretion in the realm of curriculum." As an integral part of the school's curriculum, school officials have significant discretion in regulating the newspaper as long as their actions are legitimate and reasonable. The court held that the deletion, under a belief that the stories involving pregnant students and divorce would result in an invasion of privacy, was legitimate and reasonable. In other words, simply a "belief" that someone's privacy may be invaded is adequate justification for censorship as long as a public forum is not involved.

The district court correctly acknowledged that this public forum/curriculum distinction is the crucial factor for ultimately determining students' first amendment rights. On appeal, the Eighth Circuit reversed the district court and held that the newspaper was a public forum for student expression because it was "intended to be and operated as a conduit for student viewpoint." The Eighth Circuit emphasized that *Spectrum* was not just a class exercise in which students learned to prepare papers and hone writing skills. The newspaper was recognized as a public forum, established to give students an opportunity to express their views to the entire student body freely, and to the public. Finally,

6. Id. at 1467.
7. In the context of school-sponsored programs, school officials still must demonstrate that there was a reasonable basis for the action taken, based on the facts before them at the time of the conduct in question. See, e.g., Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979) (school officials properly prevented publication of letter in official school newspaper that would result in substantial disruption of school).
10. Id. at 1373. See also Gambino v. Fairfax County School Bd., 564 F.2d 157 (4th Cir. 1977) (high school newspaper, produced by students in a journalism class, deemed a free speech forum because it was conceived, established and operated as a conduit for student expression on a wide variety of topics); Note, *Constitutional Law: Freedom of Speech in the Public Schools—Fraser v. Bethel School District Revisited*, 39 OKLA. L. REV. 473 (1986) (secondary public school students have free expression rights coequal to those of adults in public forums).
as a public forum, school officials were precluded from censoring its contents except upon demonstrating that the prohibition was "necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others."\textsuperscript{11} Hence, the Eighth Circuit triggered Tinker's heightened scrutiny test by finding Spectrum to be a public forum.

Applying Tinker, the Eighth Circuit observed there was "no evidence in the record that the principal could have reasonably forecast that the censored articles or any materials in the censored articles would have materially disrupted classwork or given rise to substantial disorder in the school."\textsuperscript{12} Moreover, the court recognized that no such claim was made on appeal.\textsuperscript{13}

However, the court admitted the school officials were entitled to censor the articles on the ground they invaded the rights of others, but it argued that "[v]ery few courts have defined the parameters of 'invasion of the rights of others'."\textsuperscript{14} The court, persuaded by a law review student note's analysis,\textsuperscript{15} concluded that "invasion of the rights of others" must refer only to a tortious act.\textsuperscript{16} Hence, "school officials are justified in limiting student speech under this standard only when publication of that speech could result in tort liability for the school."\textsuperscript{17} The court emphasized that "[a]ny yardstick less exacting than potential tort liability could result in school officials curtailling speech at the slightest fear of disturbance."\textsuperscript{18}

The Eighth Circuit concluded that no tort action for libel or invasion of privacy could have been maintained against the school by the subjects of the two articles or by their families.\textsuperscript{19} First, all names used in both the divorce and pregnancy articles were fictitious, and each of the students was informed

\begin{itemize}
\item 12. \textit{Kuhlmeier}, 795 F.2d at 1375.
\item 13. \textit{Id.}
\item 14. \textit{Id.} See Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977) (distribution to students of sex questionnaire invaded rights of others).
\item 15. However, at least one law review note suggests that "invasion of the rights of others" must refer only to a tortious act. Note, \textit{Administrative Regulation of the High School Press}, 83 Mich. L. REV. 625, 640 (1984). The Eighth Circuit in Kuhlmeier was persuaded by the note's argument that: "Limiting school action under the invasion-of-rights justification to torts or potential torts means that a school can refer to previously defined legal standards to decide if it may constitutionally restrain student expression." \textit{Id.} at 641. The Eighth Circuit agreed that school officials are justified in limiting student speech, under this standard, only when publication of that speech could result in tort liability for the school.
\item 16. \textit{Kuhlmeier}, 795 F.2d at 1375.
\item 17. \textit{Id.} at 1376.
\item 18. \textit{Id.}
\item 19. \textit{Id.}
\end{itemize}
that their names would not be revealed.20 Second, the authors of both articles obtained the consent of the students quoted but did not obtain the consent of the boyfriends and parents who were merely mentioned, not quoted, in the pregnancy article.21 Accordingly, the only tort action that conceivably could have been brought against the school would have been one for invasion of privacy by the parents or boyfriends of the girls in the pregnancy article.22 Because the pregnancy article did not expose any details of the parents’ lives, and because the fathers could only be identified by persons who previously had knowledge of the revealed facts, no tort action could have been maintained.23 Therefore, according to the Eighth Circuit, the school officials violated the students’ first amendment rights by censoring two pages of the newspaper.

Circuit Judge Wollman, dissenting, agreed with the district court that *Spectrum* was not primarily a public forum.24 Judge Wollman acknowledged that *Spectrum* “may have constituted a vehicle for the expression of student viewpoints,” but such role was “incidental to its primary purpose of giving students a hands-on opportunity to put their theory into practice.”25 Judge Wollman’s admission is evidence that the so-called line between public forum and curriculum is anything but bright. In fact, his use of the seemingly innocuous word “primary” illustrates that the process of defining this line is far from absolute. Rather, it is a subjective balancing of a laundry list of factors with the longest list winning.

Finally, Judge Wollman pitted students’ first amendment rights against deference to school administrators. He candidly acknowledged that the Hazelwood East school officials may have acted “out of a too abundant sense of caution,” but remarked that such “caution” is well within the school officials’ purview.26 As such, he argued the court should grant the school officials “the deference due them.”27

Such deference, particularly in the face of admitted fallibility, is not only shocking but unnecessary. Although a certain amount of discretion is necessari-

20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* This tort includes “publicity, of a highly objectionable kind, given to private information about the plaintiff even though it is true and no action would lie for defamation.” W. Prosser & W. Keaton, Torts 809 (4th ed. 1971). The American Bar Association’s Juvenile Justice Standards Project Relating to Schools and Education would permit restriction of student expression that “is violative of another person’s right of privacy by publicly exposing details of such person’s life, the exposure of which would be offensive and objectionable to a reasonable person of ordinary sensibilities.” Standards Relating to Schools and Education 84 (1982).
25. *Id.* (emphasis added). Judge Wollman relied on Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981), in holding that school officials may constitutionally decline to publish certain articles for fear of the consequences those articles may engender. In *Seyfried*, the production of a school play having graphic sexual content was halted by school officials. The court held the play was an integral part of the school’s educational program and that participation in the play “was considered a part of the curriculum in the theater arts.” *Id.* at 216. As such, deference is granted the school officials. *Id.*
27. *Id.*
ly afforded school officials, courts must be both willing and able to intervene when that discretion is abused. As the dissent in Hazelwood acknowledged, the Court has traditionally reserved the daily operation of school systems to the states and their local school boards. However, the dissent stressed that the Court has not hesitated to intervene where the school’s decisions run afoul of the Constitution.

The Three Keys to Hazelwood

The United States Supreme Court reversed the Eighth Circuit in a five-to-three decision. The Court concluded that the students’ first amendment rights had not been violated by the deletion of two pages from the school newspaper. The Supreme Court held that the school officials exercised reasonable editorial control over the newspaper produced as part of the school’s journalism curriculum. Both the majority and the dissent in Hazelwood marshalled a methodical process of analysis. This case can be best understood by following that process of analysis because the same process—the same analysis—led to entirely contrary results.

First Amendment Rights of Adults Versus Students

Powerfully, the majority underscored that “[s]tudents in the public schools do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’” However, in its next breath, the Court severely limited these constitutional rights. The constitutional rights of students in the public schools “are not automatically coextensive with the rights of adults in other settings,” and “must be applied in light of the special characteristics of the school environment.” The natural repercussions of the Hazelwood decision, however, are that the first amendment rights of students in the public schools are minimal at best. In fact, their first amendment rights are extremely fragile. They are precariously placed in the hands of school administrators,

31. Id. at 567, quoting Tinker, 393 U.S. at 506.
33. Tinker, 393 U.S. at 506.
teachers, and counselors who rarely have the legal ability to hold them, nurture them, or protect them when necessary.

Moreover, although a school need not tolerate student speech that is inconsistent with its "basic educational mission," the two full pages of articles excised from Spectrum were hardly inconsistent with Hazelwood East's educational mission. As the dissent noted, the school board itself affirmatively guaranteed the students of Journalism II an atmosphere conducive to fostering such an appreciation and exercising the full panoply of rights associated with a free student press." Hazelwood School Board Policy 348.51 vowed "[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism.

More important, as the dissent emphasized, free student expression undoubtedly sometimes interferes with the effectiveness of the school's pedagogical functions. In fact, some student expression may interfere directly, by preventing the school from pursuing its educational mission. However,

34. Fraser, 478 U.S. at 685.
36. Kuhlmeier, 607 F. Supp. at 1455-56. The Hazelwood School Board Policy 348.51 is entitled "School Sponsored Publications" and provides as follows:

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.

Students who are not in the publications classes may submit material for consideration according to the following conditions:

a. All material must be signed.

b. The material will be evaluated by an editorial review board of students from the publications classes.

c. A faculty-student review board composed of the principal, publications teacher, two other classroom teachers and two publications students will evaluate the recommendations of the student editorial board. Their decision will be final. No material shall be considered suitable for publication in student publications that is commercial, obscene, libelous, defaming to character, advocating racial or religious prejudice, or contributing to the interruption of the educational process.

37. Hazelwood, 108 S. Ct. at 574. For example, some brands of student expression directly prevent the school from pursuing its pedagogical mission:

The young polemic who stands on a soapbox during calculus class to deliver an eloquent political diatribe interferes with the legitimate teaching of calculus. And the student who delivers a lewd endorsement of a student-government candidate might so extremely distract an impressionable high school audience as to interfere with the orderly operation of the school.... Other student speech, however, frustrates the school's legitimate pedagogical purposes merely by expressing a message that conflicts with the school's, without directly interfering with the school's expression of its message: A student who responds to a political science teacher's question with the retort, "Socialism is good," subverts the school's inculcation of the message that capitalism is better. Even the maverick who sits in class passively sporting a symbol of protest against a government policy, [citations omitted] or the gossip who sits in the student commons swapping stories of sexual escapade could readily muddle a clear official message condoning the government policy or condemning teenage sex.

Id. (emphasis added).
other student speech merely frustrates the school's legitimate pedagogical purposes by expressing a message that conflicts with the school's message, without directly interfering with the school's expression of its message.\textsuperscript{39} Here, \textit{Spectrum} may have conveyed a moral position at odds with the school's official stance, but mere incompatibility with the school's pedagogical message cannot be a constitutionally sufficient justification for censorship of student speech. If such were justified, as the dissent recognized, our public schools may be converted into "'enclaves of totalitarianism'"\textsuperscript{39} that "'strangle the free mind at its source'".\textsuperscript{40} Instead, the first amendment permits no such blanket censorship authority, and public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate.\textsuperscript{41}

The majority in \textit{Hazelwood} cited \textit{Bethel School District v. Fraser} as authority for the proposition that a school need not tolerate student speech that is inconsistent with its basic educational mission.\textsuperscript{42} However, \textit{Hazelwood} is easily distinguished from \textit{Fraser}. In \textit{Fraser}, the Supreme Court held that a student could be disciplined for having delivered a speech at an official school assembly that was "sexually explicit" but not legally obscene. The school was entitled to disassociate itself from the speech in a manner that would demonstrate to others that such vulgarity was "'wholly inconsistent with the 'fundamental values' of public school education'"\textsuperscript{43}

It is easy to agree with the Court that a student's continual and vulgar sexual innuendo throughout a school assembly is inconsistent with a school's basic educational mission. The students in \textit{Fraser} were a captive audience as they were required to attend the assembly and obviously could not avoid hearing the vulgarity. However, it is particularly difficult to imagine how the two innocuous articles involved in \textit{Hazelwood} were "inconsistent," either directly or indirectly. In fact, the district court specifically found that the principal "did not, as a matter of principle, oppose discussion of said topic[s] in \textit{Spectrum}".\textsuperscript{44} Further, the principal approved the "'squeal law' article on the same page, dealing forthrightly with 'teenage sexuality', 'the use of contraceptives by teenagers', and 'teenage pregnancy'".\textsuperscript{45} The two articles should have been equally inconsistent with the school's mission and, hence, both censored.

\textsuperscript{38} See supra note 37 and accompanying text.
\textsuperscript{39} 108 S. Ct. at 574, quoting \textit{Tinker}, 393 U.S. at 511.
\textsuperscript{41} Id., 108 S. Ct. at 574-75.
\textsuperscript{42} Id. at 567.
\textsuperscript{43} Fraser, 478 U.S. at 685-86.
\textsuperscript{44} Kuhlmeier, 607 F. Supp. at 1467. The court stated that the principal's objections legitimately went to the manner in which two of the topics were handled.
\textsuperscript{45} Id., 108 S. Ct. at 579. The dissent noted that "[i]f topic sensitivity were the true basis of the principal's decision, the two articles should have been equally objectionable." Further, "[i]t is much more likely that the objectionable article was objectionable because of the viewpoint it expressed: It might have been read (as the majority apparently does) to advocate 'irresponsible sex'." Id.
Finally, the Court held that educators must be afforded the authority to shield immature high school students from exposure to "potentially sensitive topics" (like "the particulars of teenage sexual activity") or unacceptable social viewpoints (like the advocacy of "irresponsible sex or conduct otherwise inconsistent with the shared values of a civilized social order"). The majority held the principal had a legitimate pedagogical interest in shielding an impressionable high school audience from material whose substance was "unsuitable for immature audiences." Conversely, the dissent correctly attacked this proposition as illegitimate, stating:

_Tinker_ teaches us that the state educator's undeniably vital, mandate to inculcate moral and political values 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. . . . Even in its capacity as educator the State may not assume an "Orwellian guardianship of the public mind."

Furthermore, the dissent characterized "potential topic sensitivity" as a "vaporous nonstandard . . . that invites manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination and chills student speech to which school officials might not object." Because of these dangers, the dissent argued that the Court has consistently condemned schemes allowing state officials boundless discretion in licensing speech from a particular forum.

Consistent with the dissent's argument, the Court camouflaged viewpoint discrimination as protection of students from sensitive topics. The Court claimed it upheld the principal's censorship of one of the articles because of the potential sensitivity of "teenage sexual activity." Yet, the district court specifically found that the principal did not oppose discussion of such a topic in _Spectrum_. Furthermore, as stated above, the principal did not oppose a similar "squeal law" article also dealing with teenage sexuality. Therefore, potential topic sensitivity is both an illegitimate and unfounded rationale.

Public Forum Versus Integral Part of School Curriculum

The determination as to whether a particular student activity is an integral part of the school curriculum or a public forum for student expression is critical to the outcome of this first amendment case. That determination triggers the appropriate constitutional standard (either minimum rationality or some level

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46. Id. at 570.
47. Id.
49. 108 S. Ct. at 578.
51. _Hazelwood_, 108 S. Ct. at 570.
52. _Kuhlmeier_, 607 F. Supp. at 1467.
of heightened scrutiny) to be applied. Such determination, although critical, is often extremely arbitrary and highly subjective. Hazelwood is a prime example of this subjectivity because both sides are able to marshall facts sufficient to support their respective positions. In essence, then, this determination is artificial, resembling not much more than a legal game of ping-pong. For example, the district court found curriculum; the appellate court found public forum; and the Supreme Court found curriculum. We are left to speculate what might happen if there were another opportunity for appeal.

The majority in Hazelwood held that the student newspaper, Spectrum, could not appropriately be characterized as a forum for public expression. The Court noted that “public schools do not possess all the attributes of streets, parks, and other traditional public forums that . . . ‘have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions’.” Therefore, the Court emphasized that school facilities are public forums only if school authorities have “‘by policy or by practice’ opened those facilities ‘for indiscriminate use by the general public’, or by some segment of the public, such as student organizations.” The Court warned, however, that if the facilities have instead been reserved for other intended purposes, “communicative or otherwise,” then a public forum has not been created, “and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.”

The Court identified a laundry list of facts supporting its conclusion that Spectrum was not a public forum for student expression, namely: (1) Hazelwood School Board Policy 348.51 provided that “[s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities”; (2) the Hazelwood East Curriculum Guide described the Journalism II course as a “laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I”; (3) Journalism II was taught by a faculty member during regular class hours, and students received grades and academic credit for the course; (4) the district court found that the journalism teacher “‘both had the authority to exercise and in fact exercised a great deal of control over Spectrum’”; and, (5) a decision to teach leadership skills in the context of a classroom activity hardly implies a decision to relinquish school control over that activity.

54. Id. at 567-68.
55. Id. at 568, quoting Perry Educ. Ass’n v. Local Educators’ Ass’n, 460 U.S. 37, 46 (1983).
57. Id. The Court admitted that “the evidence relied upon by the Court of Appeals in finding Spectrum to be a public forum . . . is equivocal at best.” Id. (emphasis added). By this, the Court implied that some evidence existed supporting the conclusion that Spectrum was a public forum. However, the Court emphasized that “the evidence relied upon by the Court of Appeals fails to demonstrate the ‘clear intent to create a public forum’.” Id. at 569, quoting Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 802 (1985).
In sum, the Court concluded the school officials did not evince either by policy or by practice any intent to open Spectrum to "‘indiscriminate use’ by its student reporters and editors, or by the student body generally." Further, the Court noted that the evidence relied upon by the Eighth Circuit failed to demonstrate a "clear intent to create a public forum" as required by 
Cornelius v. NAACP Legal Defense & Educational Fund, Inc." Rather, the Court believed the school officials "‘reserve[d] the forum for its intended purpos[e]’ as a supervised learning experience for journalism students." Accordingly, the Court held that school officials were entitled to regulate the contents of Spectrum in any reasonable manner because the minimum rationality standard governs rather than the Tinker standard, which applies only to public forums.

The dissent in Hazelwood characterized Spectrum as a "forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution." The dissent (and the Eighth Circuit) marshaled their laundry list of facts supporting their contention that Spectrum was indeed a public forum, namely: (1) the Statement of Policy of Spectrum stated that "Spectrum, as a student-press publication, accepts all rights implied by the first amendment"; (2) Hazelwood School Board Policy 348.51 stated that "[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism;" (3) the students exercised great control over the production, management, and content of the newspaper; (4) Spectrum covered topics of general interest to the student body and was distributed to both the school and the public; and, (5) a non-bylined editorial printed in the January 14, 1980 issue, entitled "The Right to Write," explained that Spectrum was the sole press of the student body and as such, had a responsibility to be fair and unbiased in reporting, to point out injustice, to guard student freedoms, and to uphold a high level of journalistic excellence. Therefore, the dissent concluded that Spectrum was a public forum for student expression and, as such, the majority incorrectly abandoned the Tinker standard.

The ability of both sides to sift through the multitudinous facts, to selectively articulate those facts particularly advantageous to their position, to claim that position, and then to decide the case based upon that claimed position

is quite unsettling. Certainly Hazelwood illustrates that any line of demarcation between public forum and school curriculum is highly subjective if not entirely arbitrary, particularly in this case where the facts are anything but conclusive. Therefore, the Court chose a factually weak case in which to establish precedent and set policy. By doing so, it has left the door wide open to persuasive criticism.

School-Sponsored Versus Personal Speech

By categorizing the two newspaper articles as “school-sponsored” speech,66 the majority in Hazelwood again avoided application of the Tinker standard. The Court argued that the standard for determining when a school may punish student expression is not the same as the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.67 The Court distinguished between “tolerating” particular student speech (i.e., a student’s personal expression that happens to occur on the school premises) and a school affirmatively “promoting” particular student speech (i.e., an educator’s authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school).68

According to the majority, this latter “school-sponsored” speech may be characterized as part of the school curriculum, whether it occurs in a traditional classroom setting, so long as there is supervision by faculty members, and the activity is designed to impart particular knowledge or skills to student participants and audiences.69 As part of the school curriculum, educators are entitled to exercise greater control over this form of student expression. Educators can disassociate themselves from speech that not only substantially interferes with classwork or impinges upon the rights of others, but that also is ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.70

The dissent criticized the majority for creating this distinction between personal and school-sponsored speech, emphasizing it could not be discerned from

66. Id. at 569. The Court distinguished the issue in Hazelwood from the issue in Tinker. It stated:
The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in Tinker—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators’ ability to silence a student’s personal expression that happens to occur on the school premises. The latter question concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

67. Id. at 570.
68. Id. at 569.
69. Id. at 570.
70. Id. at 570.
precedent. The dissent argued that the Tinker test is appropriately applied to both kinds of speech, and in the past, the Court has so applied Tinker. For example, the dissent contended that the Court applied Tinker during the previous term in Fraser, upholding an official decision to discipline a student for delivering a lewd speech in support of a student-government candidate during a student assembly. As the dissent aptly pointed out, if ever a forum for student expression was "school-sponsored," Fraser's was: "Fraser...delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students...attended the assembly. Students were required to attend the assembly or to report to study hall. The assembly was part of a school-sponsored educational program in self-government." Likewise, the dissent argued that Tinker should be applied to Hazelwood, whether involving personal or school-sponsored speech. Such distinction, which the majority found dispositive, is, according to the dissent, merely one of "an obscure tangle of three excuses" offered by them to avoid Tinker. The dissent stressed that under Tinker, a school may "constitutionally punish a budding political orator if he disrupts calculus class but not if he holds his tongue for the cafeteria." This is not because a more stringent standard applies in the curricular context, but because student speech in the noncurricular context is less likely to disrupt materially any legitimate pedagogical purpose.

It is important to note, however, that the majority in Hazelwood claimed that the Court did not apply the Tinker standard in Fraser. In fact, the Court throughout Fraser was careful to distinguish Tinker from the facts and circumstances involved. Even though the Fraser Court apparently distinguished Tinker, purported not to apply it, and was careful not to use the magic "disruption" language contained in Tinker, the Court did hold Fraser's conduct violative of the first amendment essentially because it was "disruptive." Therefore, the dissent's attack on the majority's distinction between personal and school-sponsored speech in Hazelwood has more credibility than the majority admitted.

The dissent also emphasized that the Court need not abandon Tinker to constitutionally censor poor grammar, writing, or research because to reward

71. Id. at 575.
72. Id.
73. Id.
74. Id., quoting Fraser, 478 U.S. at 677 (emphasis added).
76. Id.
80. See generally Fraser, 478 U.S. at 683 ("The schools, as instrument of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct.").
such expression would materially disrupt the newspaper’s curricular purpose—to teach.\textsuperscript{81} However, censorship motivated by a desire to shield the audience or disassociate the sponsor from the expression cannot legitimately serve the curricular purpose of a student newspaper. The purpose of a school newspaper is not to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors. In essence, then, the dissent argued that the application of \textit{Tinker} would adequately and effectively deal with the concerns of the majority, and abandonment of \textit{Tinker} was not only unnecessary but unprecedented.

\textit{Application of the Respective Judicial Standards}

Because the majority in \textit{Hazelwood} justified abandonment of the \textit{Tinker} standard, it applied the constitutional rubber stamp known as “rational basis” or “minimum rationality.”\textsuperscript{82} Under this standard, as long as the school officials’ decision to delete two full pages of the newspaper was “reasonably related to legitimate pedagogical concerns,” the action was constitutional.\textsuperscript{83} Because the principal believed the students’ anonymity was not adequately protected in the pregnancy article, and because he believed the pregnancy article was not sufficiently sensitive to the privacy interests of the students’ boyfriends and parents, it was not \textit{unreasonable} for him to strike the pregnancy article. Also, because the principal believed that a particular father might have been identified in the divorce article, he did not unreasonably strike it from publication.

In addition, the principal did not unreasonably delete two entire pages from \textit{Spectrum} even though only two articles were objectionable. He believed there was no time to make changes in the articles, and he believed the newspaper had to be printed immediately or not at all. In essence, each of the principal’s reasons for striking the pages is reasonable, and as such, no violation of the students’ first amendment rights occurred.

However, under the \textit{Tinker} standard, the Court may not regulate student expression that neither disrupts classwork nor invades the rights of others. Any censorship that is not narrowly tailored to serve its purpose is a violation of the first amendment prohibitions against censorship.\textsuperscript{84} The dissent argued

\textsuperscript{81} \textit{Hazelwood}, 108 S. Ct. at 576. The dissent fully agreed with the majority that the “first amendment should afford an educator the prerogative not to sponsor the publication of a newspaper article that is ungrammatical, poorly written, inadequately researched, biased or prejudiced, or that falls short of the high standards for . . . student speech that is disseminated under [the school’s] auspices.”

\textsuperscript{82} The origin of the rational basis test can be traced to \textit{McCulloch} v. \textit{Maryland}, 17 U.S. 316 (1819). In \textit{McCulloch}, Chief Justice Marshall stated: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” \textit{Id.} at 421. \textit{See also} \textit{Katzenback} v. \textit{McClung}, 379 U.S. 294 (1964) (interstate commerce).

\textsuperscript{83} \textit{Hazelwood}, 108 S. Ct. at 571.

\textsuperscript{84} \textit{Id.} at 573.
that because the censorship served no legitimate pedagogical purpose, it could not “by any stretch of the imagination have been designed to prevent ‘material[] disruption of] classwork’.” Further, the dissent argued that the censorship was not necessary to prevent student expression from invading the rights of others because the articles “could not conceivably be tortious, much less criminal.”

Perhaps most important, the dissent emphasized that even if the majority were correct in holding that the principal could constitutionally censor the objectionable material, the majority did so in a “brutal manner.” The principal excised six entire articles simply because he considered two articles objectionable. The dissent noted that the principal did not even inquire into obvious alternatives, such as precise deletions or additions (one of which had already been made), rearranging the layout, or delaying publication. According to the dissent: “Such unthinking contempt for individual rights is intolerable from any state official. It is particularly insidious from one to whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees.”

Therefore, the principal’s conduct was not narrowly tailored to achievement of his purported legitimate pedagogical interest and, hence, was unconstitutional.

Finally, the dissent properly criticized the Court’s purported reaffirmation of Tinker’s time-tested proposition that public school students “do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” As the dissent highlighted, “[t]hat is an ironic introduction to an opinion that denudes high school students of much of the First Amendment protection that Tinker itself prescribed.” On May 13, 1983, the students at Hazelwood East did shed their constitutional rights to freedom of speech.

85. Id. at 579, quoting Tinker, 393 U.S. at 513.
87. Id. at 579-80. The dissent emphasized that “[t]he separation of legitimate from illegitimate speech calls for more sensitive tools,” and here, the principal used a paper shredder. See Keyishian v. Board of Regents, 385 U.S. 589, 602 (1967); Speiser v. Randall, 357 U.S. 513, 525 (1958).
89. Id.
90. Id. at 580, quoting Tinker, 393 U.S. at 506.
91. 108 S. Ct. at 580. The dissent stated:
   Instead of “teach[ing] children to respect the diversity of ideas that is fundamental to the American system,” Pico, 457 U.S. at 880, and “that our Constitution is a living reality, not parchment preserved under glass,” Shanley v. Northeast Independent School District, 462 F.2d 960, 972 (5th Cir. 1972), the Court today “teach[es] youth to discount important principles of our government as mere platitudes.” Barnette, 319 U.S. at 637. The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.

Id. See also Comment, The Supreme Court and the Decline of Students' Constitutional Rights: A Selective Analysis, 65 Neb. L. Rev. 161 (1986) (discussing the authoritarian trend of the Court in the most recent students’ rights cases).
at the high school gate. The question remains whether they must do the same at the university gate.\footnote{92}

\textit{Conclusion}

Student journalism literally may be fighting for its life, if “life” includes an opportunity for students to express themselves in a manner consistent with the educational process. Such is the present state of affairs because this nation seems satisfied with allowing students’ first amendment rights to rest on a subjective and nefarious public forum/curriculum determination. Once the Court makes a nonpublic forum determination, it effectively rubber stamps the school officials’ decision to censor. Inquiries into the extent of such censorship are rarely meaningful because as long as the decision is reasonable, the decision finds sanction with the Court.

Each and every school official has the ability to show a decision was reasoned. Therefore, the Court urgently needs to develop more conclusive public forum/curriculum guidelines, or to abandon such an approach altogether and adopt a more principled standard for determining students’ first amendment rights. The \textit{Tinker} standard is that more principled standard.

Furthermore, in \textit{Hazelwood}, the Court’s distinction between personal and school-sponsored speech was merely a smokescreen designed to throw skeptics off the \textit{Tinker} trail. It was not successful. As the dissent retaliated, such distinction was both unprecedented and unnecessary.

Finally, the Court’s concern with subjecting immature students to potentially sensitive topics was far from legitimate. Even if legitimate, such concern was misguided under the particular facts and circumstances of \textit{Hazelwood} because neither article could be considered objectionable. \textit{Hazelwood} obviously was a policy decision by the Supreme Court designed to lay the heavy hand of authority on schoolchildren. This policy of heightened student control and discipline may well be warranted and desired by the public. However, a principled approach to law is preferential to allowing our highest Court to establish precedent based solely on public desires.

Finally, as noted above, the majority in \textit{Hazelwood} left open the issue whether this precedent would apply at the college and university level. Left to be seen is whether mature students will tolerate the application and imposition of \textit{Hazelwood} upon themselves. If the Supreme Court is in the habit of deciding principles based upon public desire, it will follow the mature students’ free speech desire and the heightened standard articulated in \textit{Tinker} will prevail.

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\footnote{92. The majority claimed that it “need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.” 108 S. Ct. at 571 n.7.}