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Congress . . . shall make no law . . . abridging the freedom . . . of the press . . . .

U.S. Constitution, First Amendment

I.  INTRODUCTION

The United States Constitution, when first ratified 200 years ago, was written without any guarantee of freedom of the press.¹ This omission is partially explained by the fact that the drafters, who believed primarily in a strong central government, nevertheless wrote the Constitution to give only designated powers to the federal government.² They and other supporters of the document believed that

1. W. HACHTEN, THE SUPREME COURT ON FREEDOM OF THE PRESS 4 (1968). “[N]ine of the original thirteen colonies had previously amended their charters to include such guarantees.” Id.

2. The Federalists were primarily responsible for the drafting of the Constitution. Disorder under the Articles of Confederation had convinced many Federalist leaders, such as James Madison, that the “vices coming out of the state governments’ were an even greater threat to American society.
certain natural or inherent rights exist which lie beyond the scope of any Constitution. Therefore, the newly-drafted document could not give the federal government authority to violate basic rights such as freedom of speech or press. Additionally, the drafters believed that language which specifically guaranteed these basic freedoms was unnecessary because freedom of speech and freedom of the press, just as other natural rights, were so fundamental as to be incapable of definition. For example, Alexander Hamilton stated in one of The Federalist papers that freedom of speech and press "must altogether depend on public opinion and on the general spirit of the people and of the government." Thus, if the general populace felt the need for a particular freedom, it would exist.

However, citizens of the ratifying states were not satisfied that the "spirit of the people" alone could secure their fundamental rights. After all, they had observed a severe "intolerance of criticism among the people's representatives in colonial assemblies," as hundreds of

than the weakness of the Confederation's government, and that a strong national government was the necessary remedy." Powell, The Compleat Jeffersonian: Justice Rehnquist and Federalism, 91 YALE L.J. 1317, 1367 (1982). "The experience of democratic excesses had led the Federalists to believe that, although popular government prevented some kinds of governmental tyranny, democracy had its own inherent danger—oppression by the majority." Nedelsky, Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution, (Book Review), 96 HARV. L. R. 340, 347 (1982). Thus, the Federalists believed that a real threat potentially existed in the "faithful execution of the majority's unjust dictates by the people's representatives." Id. at 347. The Constitution as envisioned by the Federalists would "make it extremely difficult for anyone to tyrannize over anyone else." Id. at 348, n.28.

The Anti-Federalists agreed that the alliance under the Articles was not working. On the other hand, the Anti-Federalists were stalwart supporters of state sovereignty, who viewed the Constitution's power as a means to destroy the state governments and to destroy the liberties of the people. Powell, supra, at 1365-67. A favored platform of the Anti-Federalists was the lack of specifically designated individual rights in the Constitution. Thus, the necessity of political compromise at the Constitutional Convention and the ratification assemblies led to a moderation of the Federalist view. Id. It also ultimately led to a Bill of Rights.

3. Hentoff, The First Freedom 73 (1980). Hentoff states that:
Noah Webster observed that if it really was necessary to write into the Constitution such obvious inherent rights as freedom of speech, one might as well also include a provision "that everybody shall, in good weather, hunt on his own land, and catch fish in rivers that are public property... and that Congress shall never restrain any inhabitant of America from eating and drinking, at seasonable times, or prevent his lying on his left side in a long winter's night, or even on his back, when he is fatigued by lying on his right."

Id.

4. Id. at 71.
5. Id. at 70-71.
6. Id. at 69.
persons were tracked down and criminally prosecuted by the legislative assembly for seditious libel—the crime of criticizing the government in such a way as to stir the people to rebellion. In fact, a colonist took a chance when an opinion was expressed which was contrary to that of the general public. As one constitutional historian noted, ‘[E]ach community, especially outside the few ‘cities,’ tended to be a tight little island clutching its own orthodoxy and willing to banish unwelcome dissidence or punish it extralegally.’ Although there was safety in “majority speech,” a dissenting opinion was not necessarily tolerated.

While individual minority opinion was suspect, the press in colonial America was particularly subject to suppression of ideas and was at the mercy of the legislative power to punish. In 1722, James Franklin was jailed after printing a criticism of the government’s method of dealing with coastal pirates. When released, Franklin was forbidden to print without permission, a directive which he promptly ignored. When the government again attempted to prosecute him for violating this censorial order, the grand jury refused to issue an indictment. This episode established the principle in American press history that there can be no censorship prior to

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7. *Id.* at 65.

The popularly elected assemblies, rather than the courts, were the most suppressive bodies—any critical words spoken or printed might invoke punishment.

‘Literally scores of persons . . . throughout the colonies were tracked down by the various messengers and sergeants and brought into the house to make in glorious submission for words spoken in the heat of anger or for writing which intentionally or otherwise had given offense.’ L. LEVY, *JUDGMENTS, ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 124 n.50 (1972) (quoting M. P. CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 117 (1943)).

8. L. LEVY, *supra* note 7, at 121.

9. Levy, believes that:

[t]he persistent image of colonial America as a society that cherished freedom of expression is a sentimental hallucination that ignores history. . . . The American people and their representatives simply did not understand that freedom of thought and expression means equal freedom for the other fellow, particularly the fellow with the hated ideas.

*Id.*

10. However, James Franklin’s paper, the *New England Courant*, was still published through the efforts of James’ younger brother Ben. While James was jailed, Ben published British essays, under the name Cato (the joint pseudonym of the Whig journalists John Trenchard and Thomas Gordon) which discussed intellectual and political liberty and attacked the punishment of freedom of discussion. See N. HENTOFF, *supra* note 3, at 62, and L. LEVY, *supra* note 7, at 117.
publication (no prior restraint), a concept already firmly established in British common law and summarized by Blackstone:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press, but if he published what is improper, mischievous, or illegal, he must take the consequences of his own temerity.

Blackstone's comments were representative of early eighteenth century colonial thought concerning press freedom: that total freedom embraced only the notion of prior restraint. While one could freely publish, there could be swift criminal sanction for any expression critical of government or political leaders, even though the publication merely reflected facts that were true. Only gradually did the notion of truth as a defense begin to emerge, and it wasn't until after the American Revolution that truth as a defense to libel became embodied in the law, thereby more fully guaranteeing true freedom of the press.

Although the Constitution did not expressly guarantee speech and press freedoms, such provisions had been part of some American

11. N. Hentoff, supra note 3, at 63.
12. W. Hachten, supra note 1, at 41.

As early as 1644 John Milton had criticized the English government's licensing of printing presses as a vehicle for thought repression. However, freedom from such prior restraint was not won until 1695 when the English House of Commons failed to extend the Licensing Act. Then the notion gradually became embodied in the common law. Id.

13. John Peter Zenger was prosecuted in 1735 for seditious libel. His attorney, Andrew Hamilton of Philadelphia, astounded the courtroom by admitting that his client had in fact printed the infamous news articles. Hamilton went on to state that criticism is "the right of every free born subject to make." N. Hentoff, supra note 3, at 65. But Hamilton explained that the mere act of publishing does not make a crime. "The words themselves must libellous—that is, false, scandalous, and seditious, or else we are not guilty." Id. Although the judge instructed the jury that they were present only to decide the factual issue of whether Zenger had published the "seditious libels," the jury followed Hamilton's assertion that they were free to decide the legal issue of guilt and found Zenger not guilty.

Although this was a resounding victory for those who espoused truth as a defense in the courtroom, the press continued to be only as free as the elected assemblies permitted. The right of the assembly to suppress negative opinion was still superior to rights of freedom of speech and press. See L. Levy, supra note 7, at 115-49.

After the Revolution, legislators in Pennsylvania put the principles of "truth as defense and the jury's right to decide both the law and the fact" in the state constitution in 1790. Fifteen years later New York's legislature did the same. N. Hentoff, supra note 3, at 67.
colonial charters. The colonists, recognizing that unguarded rights had been "abused for centuries," had insisted that speech and press freedoms should be included among the personal freedoms expressly embodied by charter. Later, citizens and leaders of the newly formed states, armed with firsthand knowledge of the ramifications of verbal and printed dissent in America, also objected to the national Constitution because it did not expressly guarantee personal freedoms. "Protests of varying degrees were heard in all thirteen [states] about the absence of a bill of rights." Thus, the first Congress was compelled to adopt the Bill of Rights.

The resultant first amendment press clause has been the subject of varied interpretations by jurists and constitutional analysts, because little legislative history exists to explain its true meaning when adopted. Did the drafters envision only the common law freedom from prior restraint, or the emerging libertarian notions that truth is a defense to libel, or even the more radical concept of total prohibition of government action? While the argument about how

14. N. Hentoff, supra note 3, at 73. Hentoff was referring to England and the lack of such protection under British law.
15. See supra note 1.
16. The Anti-Federalists greatly feared concentration of power in a national government. They did not fully trust the wisdom of elected leadership nor did they believe that government was prone to stay within its bounds. They therefore led the attack upon ratification of the Constitution, while insisting upon the inclusion of the Bill of Rights.

Each state was to ratify the Constitution, and although "no state's ratification was explicitly conditioned upon the adoption of a bill of rights, Virginia, New Hampshire, Massachusetts, New York and South Carolina relied upon various understandings." Denbeaux, The First Word of the First Amendment, 80 NW. U.L. REV. 1156, 1163 (1986). Additionally, Virginia, New York, North Carolina, and Rhode Island adopted proposed federal press protection at their ratifying conventions. Id. at 1165; see also Anderson, The Origins of the Press Clause, 30 UCLA L. REV. 455, 471 (1983).
17. N. Hentoff, supra note 3, at 72.
18. The notion of total prohibition of government action is endorsed by Jeffrey Smith in Prior Restraint and Original Intentions, 28 WM. & MARY L. REV. 445, 457 (1987). Justices Douglas and Black were absolutists in their belief that rights of expression are not subject to balancing, and thus, there can be control over conduct, but not over expression of ideas. Id. at 448.

Another author believes that "[f]reedom of the press—not freedom of speech—was the primary concern of the generation that wrote . . . the Bill of Rights," and that Blackstone's view of press freedom as being freedom from prior restraint alone can't have been the basis for the press clause. Anderson, supra note 16, at 533. The press was envisioned as a "necessary restraint on what the patriots viewed as government's natural tendency toward tyranny and despotism." Id. Justice Potter Stewart and others who have seen the press as the Fourth Estate, an institution functioning as another check on government, would agree. "The primary purpose of the constitutional guarantee was . . . to create a fourth institution outside the Government as an additional check on the three official branches." Stewart, "Or of the Press," 26 HASTINGS L. J. 631, 634 (1974-75).
broadly the drafters actually defined press freedom still rages among scholars, there is consensus that at a minimum the first Congress generally agreed there could be no prior restraint. James Madison, who had urged the adoption of a bill of rights, stated it this way: "[I]f we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 19

Most United States Supreme Court decisions interpreting the press clause have occurred over the last sixty years. Although the Justices have varied in their beliefs as to the scope of the press clause, 20 the Court has generally upheld the notion of no prior restraint. 21 This doctrine, however, was recently held inapplicable to a certain class of United states citizens: high school students writing for an official school newspaper. 22

This article will briefly explore the doctrine of no prior restraint and will then turn to an examination of pertinent constitutional standards that have evolved from case law dealing with student expression. The article will attempt to show that the Supreme Court, which has declared that student rights are not as broad as those of adults, has turned to forum analysis as a convenient means to avoid the constitutional analysis which would otherwise be necessary in those cases dealing with free speech and press issues in the context of a school-sponsored setting.

II. STATEMENT OF THE CASE

The dispute underlying the case of Hazelwood School District v. Kuhlmeier arose at Hazelwood East High School (Hazelwood East), one of three public secondary schools in Missouri's Hazelwood School District (District). A six-member Board of Education (Board) operated with ultimate responsibility for the schools in the

19. Smith, supra note 18, at 450 (citing 4 Annals of Congress 934 (1793-1795)). Madison explained that censorial power rests with the people because the people retain all rights not delegated by the Constitution; thus, Congress has no authority to act in this area. " 'Opinions,' he stated, 'are not the objects of legislation.' " L. Levy, supra note 7, at 141.
20. See supra note 18 and infra notes 61, 63, 66 and accompanying text.
21. See infra notes 55-63 and accompanying text.
District, while the school superintendent performed as the chief executive officer to enforce Board policies. Defendants Robert Reynolds and Howard Emerson were the Hazelwood East principal and newspaper advisor, respectively. Mr. Emerson was a temporary replacement for Robert Stergos, the regular journalism teacher and newspaper advisor, who left in April 1983.

Two journalism classes were taught at Hazelwood East. Journalism I, a first semester course, encompassed "the principles of reporting, writing, editing, layout, publishing, and journalistic ethics." Journalism II was taught the next semester, was open to students who completed Journalism I, and was primarily organized to produce the school newspaper, *Spectrum*. Both classes were taught according to the Curriculum Guide approved by the Board.

*Spectrum* was published six times per semester and was funded by Board allocations supplemented by sales receipts. The paper was "written and designed by journalism students," although other students could contribute articles which met policy guidelines. Newspaper articles were pertinent to the community as well as to the school and covered topics such as teenage runaways, drug and alcohol use, and the death penalty. Mr. Stergos, the regular teacher, selected the top editors and exercised a great deal of control over the paper, including story assignment and final editing. In fact, "Mr. Stergos was the final authority with respect to almost every aspect of the production and publication of *Spectrum*, including its content."

There was also a certain degree of Board control exercised over District school newspapers. The superintendent testified that "prior review of controversial or sensitive materials by a high [school] principal was a standard procedure," and that the District had pre-
viously prevented publication of objectionable material. In fact, early in 1983, Mr. Stergos had been told to submit newspaper copy to the principal before publication for prior approval. Stergos complied with this order until he left, and then he made his replacement aware of the directive.

The May 13th issue of Spectrum was essentially ready for printing when Mr. Stergos left on April 29th. The replacement teacher, Mr. Emerson, took uncorrected galley proofs of the paper to the principal's office on May 10th and spoke to the principal by phone the next day. At this time the principal, Mr. Reynolds, objected to articles on pages four and five. Mr. Reynolds was aware that the paper was to be distributed two days later, and because he believed there was no time for changes in the objectionable articles, he ordered deletion of the entire two pages.30

The articles in question were written by Spectrum staff members and approved by Mr. Stergos. Kathy Kuhlmeier, Lee Ann Tippett-West, and Leslie Smart, plaintiffs in the later-filed court action, were students in the journalism class and staff members of Spectrum. However, they did not write the articles, which concerned teenage pregnancy and the effect of divorce on teenagers. The pregnancy article was an anonymous discussion of three students' reactions to becoming pregnant, their relationships with parents and boyfriends, their birth control practices, and their sexual activity.31 The divorce story quoted a student who spoke of her parents' divorce and who said, "My dad wasn't spending enough time with my mom, my sister, and I. He was always out late playing cards with the guys. My parents always argued about everything."32

Mr. Reynolds later testified that he would not have deleted the other material on pages four and five if these two stories had not appeared there. He believed that the pregnant girls were still identifiable in the story and that the story was "'too sensitive' for ['an] immature audience of readers.'"33 He also felt that the parents in

30. Id. at 1459.
31. Id. at 1457.
32. Id.
33. Id. at 1459.
the divorce story should have been given an opportunity to respond and that the quoted student’s name should have been omitted.\textsuperscript{34} (Actually, it had already been deleted by Mr. Emerson.)

The students were not aware of the newspaper page deletions until the paper arrived at the school from the printer. No student’s grade “was affected by reason of the incident involved,” and no journalism student was deprived of a class credit.\textsuperscript{35}

\textbf{A. The District Court Opinion}

The student journalists initiated an action in federal district court, \textit{Kuhlmeier v. Hazelwood School District}.\textsuperscript{36} The defendant school district presented an expert witness, a former editor and college journalism instructor, who testified that the stories were not appropriate for publication because they constituted an invasion of privacy. Further, he defined the difference between censorship and editing by stating that censorship is from “an outside source” while editing is “the prerogative of an authority within the publishing entity.”\textsuperscript{37}

The district court agreed in principle with the defendants’ expert and concluded that the principal’s actions did not violate the students’ rights because \textit{Spectrum} was not a public forum. The public forum doctrine would have afforded the students free expression subject only to time, manner and place regulations. The court explained that two lines of cases could be examined when student speech and press rights are involved. The first line of cases, evolving from \textit{Tinker v. Des Moines Independent Community School District},\textsuperscript{38} dealt with conduct arising outside official school programs, while the other line of cases concerned conduct or speech within a school-sponsored program.\textsuperscript{39} Based on the cases evolving from \textit{Tinker}, school officials can rarely justify questionable official actions by meeting the \textit{Tinker} standard. \textit{Tinker} requires a showing that “non-

\begin{itemize}
\item \textsuperscript{34} \textit{Id.} at 1460.
\item \textsuperscript{35} \textit{Id.} at 1459, 1461.
\item \textsuperscript{36} \textit{Id.} at 1450.
\item \textsuperscript{37} \textit{Id.} at 1461.
\item \textsuperscript{38} See, e.g., \textit{Tinker v. Des Moines Independent Community School Dist.}, 393 U.S. 503 (1969).
\item \textsuperscript{39} Hazelwood, 607 F. Supp. at 1462.
\end{itemize}
program-related student speech or conduct will materially disrupt the educational process.  

However, in the second line of cases, where the focus is on the “nature of the school-sponsored program or activity in question,” the school administration need only show that the conduct occurred in a school-sponsored program and that there was a reasonable basis for administrative action. The district court cited Nicholson v. Board of Education, which upheld the right of school officials to exercise pre-publication review of a classroom-generated newspaper, and said Spectrum was a school-sponsored program—not a public forum. The court said that the principal had acted reasonably in response to his belief that the articles should not be published and that there was no time for modification. The court denied the students’ plea for injunctive relief.

B. The Circuit Court Reversal

Upon appeal to the Eighth Circuit Court of Appeals, the students contended that Spectrum was a public forum. The Court of Appeals agreed because Spectrum “was intended to be and [was] operated as a conduit for student viewpoint . . . . [I]t was a ‘student publication’ in every sense.” The appeals court noted that each year the newspaper published a policy statement saying that its material reflected the viewpoint of staff members and not of the school, that it followed standards expressed in the textbook used by the journalism class and that it was established to give students an opportunity to express their views.

The circuit court found no justification for censoring two entire pages of the newspaper under the Tinker standard because the ev-


40. Id. at 1463.
41. Id.
43. Nicholson v. Board of Education, 682 F.2d 858 (9th Cir. 1982).
44. Hazelwood, 607 F. Supp. at 1466.
46. Id. at 1372.
47. Id. at 1373, n.4. The textbook recognized (1) that school discipline requires punishment for disruptive speech (e.g., standard), (2) that such speech may be punished only after publication of questionable material, and (3) that fear of disruption cannot result in prior restraint or censorship. Id.
idence did not show that the principal could reasonably have forecast any material disruption. The court then turned to the invasion of privacy issue surrounding the identity of students discussed in the articles. The opinion of the court was that school action could be taken only to correct situations which might result in tort liability for the school and that no such action could be maintained on these facts. Thus, there should have been no censorship.

C. The Supreme Court Reversal Of The Circuit Court

The United States Supreme Court, on a writ of certiorari, found that the Hazelwood East student journalists’ rights of freedom of expression had not been violated and reversed the circuit court of appeals. As will be explained in the subsequent case analysis, the Court abandoned the Tinker standard and said that forum analysis was appropriate in this case.

III. PRIOR CASE LAW

As cases encompassing student press issues occurred with increasing frequency in the 1970's and 1980's, federal courts across the country inconsistently turned to varying areas of case law in a search for which standards to apply. Some courts used the Tinker guidelines, as did the court of appeals in Kuhlmeier. Others agreed with the Kuhlmeier district court and relied on forum analysis. Still oth-

48. Id. at 1375, 1376.
49. Id. at 1375-76. The court was persuaded to adopt this position by Note, Administrative Regulation of the High School Press, 83 Mich. L. Rev. 625, 640 (1984).
50. Tinker, 393 U.S. 503 (conduct by a student that is disruptive or invades rights of others is not protected by the first amendment).
51. See, e.g., Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972) (Tinker is a formula for deciding when a student should be punished for exercising first amendment rights); Reineke v. Cobb County School Dist., 484 F. Supp. 1252 (N.D. Ga. 1980) (facts must be shown to demonstrate fear of disruption).
52. See, e.g., Nicholson, 682 F.2d 858 (where there’s a journalism class that produces a school newspaper, administrative review of sensitive articles for accuracy rather than censorship is permissible); Gambino v. Fairfax, 429 F. Supp. 731 (E.D. Va. 1977), aff’d, 564 F.2d 157 (4th Cir. 1977) (a newspaper established as a public forum can not be regulated by the School board); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969) (the school newspaper is a forum for “dissemination of ideas,” therefore, students have a right of access and may publish a political advertisement).
ers used court-initiated standards tailored to a particular case.\textsuperscript{53} Few relied upon the doctrine of no prior restraint,\textsuperscript{54} the doctrine underlying the constitutional guarantee.

A. The No Prior Restraint Doctrine

Justice Holmes in 1907 reiterated English common law in \textit{Patterson v. Colorado} when he stated that the Constitution prohibited all "previous restraints upon publications . . . [but not] the subsequent punishment of such as may be deemed contrary to the public welfare."\textsuperscript{55} Since that time the Supreme Court has "steadfastly held there is a special presumption under the first amendment against the use of prior restraints."\textsuperscript{56}

In \textit{Near v. Minnesota}\textsuperscript{57} the Court examined a statute designed to suppress, by injunction, those publications classified as a public nuisance. The Court found the object of the statute to be suppression rather than punishment and stated that the "chief purpose of the [press clause is] to prevent [such] previous restraints upon publication."\textsuperscript{58} The opinion stressed that the freedom "extends as well to the false as to the true, [and] the subsequent punishment may extend as well to the true as to the false."\textsuperscript{59} The punishment will be provided by the state's libel laws.

Although the Court in \textit{Near} emphatically endorsed the no prior restraint doctrine, it recognized that the press clause does not afford an unlimited protection. Specifically mentioned were exceptions to be found in times of war, in the decency requirements necessitated by obscenity, in the security interests surrounding "incitements to

\textsuperscript{54} See, e.g., Fujishima, 460 F.2d 1355 (finding that a Board of Education rule requiring prior approval of any written material distributed to students constitutes offensive prior restraint). This circuit court alone has found prior restraint unconstitutional \textit{per se}. See AVERY \& SIMPSON, supra note 53, at 16.
\textsuperscript{55} Patterson v. Colorado, 205 U.S. 454, 462 (1907).
\textsuperscript{57} Near v. Minnesota, 283 U.S. 697 (1930).
\textsuperscript{58} \textit{Id.} at 713.
\textsuperscript{59} \textit{Id.} at 714.
acts of violence," and in the privacy rights of citizens. Thus, the Near decision undercut the absolutist position of the common law that there can never be prior restraint of expression.

Subsequent cases further elaborated on the doctrine of no prior restraint and somewhat modified it with the expansion of the exceptions, but Justices Black and Douglas and other constitutional scholars remained steadfast in their absolutist position that the rights of expression are not subject to balancing and that there can never be prior governmental control of expression of ideas.

With the exception of the Seventh Circuit, the federal circuit courts have not found prior restraints per se unconstitutional in a school setting. Instead, these courts have tended to permit prior review of school newspapers where there are procedural safeguards and students are made aware of standards.

Thus, the doctrine of no prior restraint embodied in the press clause, a doctrine that was deemed of ultimate importance to the Congress which drafted the Bill of Rights, has been diluted over the years and has not been of primary importance in lower court analysis of student press rights.

B. The Tinker Standard

In December of 1965 John Tinker wore a black armband to school to protest the Viet Nam War. He and other students were

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60. Id. at 716.

If the first amendment was designed to prohibit government actions, then at least one author sees these exceptions as an attempt to rewrite the Constitution. See Smith, supra note 18, at 462.

61. Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 559 (1976) (prior restraint is the most serious infringement on first amendment rights); Lowe v. Securities and Exchange Commission, 105 S.Ct. 2557 (1983) (White, J. concurring; to prevent an unregistered investment advisor from publishing a newsletter would constitute a prior restraint).


63. Smith, supra note 18, at 448.

64. Fujishina, 460 F.2d 1355 (distinguishing school authorities’ power to prevent speech and power to punish).

65. See Avery & Simpson, supra note 53, at 12-17. This article summarizes district and circuit court opinions and says that courts of appeals seem to approve any scheme of prior submission as long as students are made aware of what may or may not be written for print. Safeguards to assure student awareness include a system for prompt approval or disapproval, a procedure for use when there is failure to promptly approve or disapprove student material, and an adequate appeals process. Id.
suspended until they would return without wearing the armbands. The Supreme Court granted certiorari to address the issue of whether students’ expression of views through symbolic acts falls within first amendment protection when those acts collide with school rules.66

While the Tinker Court recognized the authority of the state and school officials to control the conduct of students, it also emphasized that neither students or teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”67

Justice Fortas, writing for the court, pointed out that schools cannot exercise absolute authority over students. Students in school as well as out of school are

“persons” under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.68

According to the Tinker Court, in order for a school official to suppress student opinion, the school must be able to show that the action was prompted by “something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”69 There must be a showing that the student’s conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school”70 or that the conduct would collide with the rights of others.71 The Court found Tinker’s expulsion unconstitutional because the wearing of the armband did not interrupt school activity or interfere with the others students’ rights.

66. Tinker, 393 U.S. at 505.
67. Id. at 506.
68. Id. at 511. It is interesting to note Justice Black’s dissent in this case. He says, “While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases.” Id. at 517 (Black, J., dissenting).
69. Id. at 509.
70. Id., (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
71. Id. at 513.
The *Tinker* Court set forth a standard by which student expression of ideas through conduct becomes punishable. The limitation of the *Tinker* standard, however, is that the Court did not delineate what constitutes a material disruption or invasion of privacy. Although the *Tinker* standard became predominant in lower court analysis of students' rights cases, there continued to be confusion when attempting to define the limits of the first amendment freedom in the school setting.\(^72\)

Then, in *Bethel School District No. 403 v. Fraser*\(^73\) the Supreme Court once again used the *Tinker* guidelines, but this time to justify punishment for offensive student speech. In *Fraser* a high school male student gave a nominating speech at a school-sponsored assembly. The speech contained a lewd "sexual metaphor"\(^74\) which prompted two teachers who saw the speech to recommend that Fraser not deliver it. The school suspended Fraser for three days for violating a disciplinary rule prohibiting obscenity.\(^75\) Both the district court and the court of Appeals for the Ninth Circuit found Fraser's conduct similar to Tinker's protest armband and found a violation of Fraser's constitutional right of free speech.

The Supreme Court, however, distinguished the two cases, saying that *Tinker* had emphasized that neither speech nor action were protected when they intruded "'upon the work of the schools or the rights of other students.'"\(^76\) Additionally, the Court cited a recent

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\(^72\) See AVERY & SIMPSON, supra note 53.
\(^73\) Bethel School Dist. No. 403 v. Fraser, 106 S.Ct. 3159 (1986).
\(^74\) Id. at 3162. The speech included the following excerpt:

I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

Jeff is a man who will go to the very end—even the climax, for each and every one of you.

So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

Id. at 3167.

\(^75\) The rule provided that "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.* at 3162.

\(^76\) *Id.* at 3163 (quoting *Tinker*, 89 S. Ct. at 737).
case, *New Jersey v. T.L.O.*, 77 in which the Court had said rules could be enforced to preserve “order and a proper educational environment,” 78 even though the student conduct “would be perfectly permissible if undertaken by an adult.” 79 Thus, student rights within the school setting “are not automatically coextensive with the rights of adults in other settings.” 80

A school must tolerate “unpopular and controversial views,” 81 said the Court, but a school is permitted to protect its interest in teaching appropriate behavior. “The determination of what manner of speech in the classroom or in school assembly is inappropriate rests with the school board.” 82 The Court gave examples of when school officials may punish disruptive speech: to ensure order and discipline, 83 to protect minors from offensive language, 84 and to instruct students how to conduct civil public discourse. 85

With *Fraser* the Supreme Court made it clear that control of student speech within the context of a school function is the prerogative of the local school boards. The boards will determine the appropriateness of conduct in light of school interests.

77. *New Jersey v. T.L.O.*, 469 U.S. 325 (1984). The school argued in this case that because a school acts as a surrogate parent (*in loco parentis*), the school is immune to constitutional guidelines. This argument was struck down when the Court said: “Today’s public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies.” *Id.* at 336. Thus, school officials are deemed to act as “representatives of the State,” *Id.*, and must abide by constitutional directives.

78. *Id.* at 339.

79. *Id.* The Court made the adult/minor distinction in first amendment rights in *Ginsburg v. New York*, 390 U.S. 629 (1968), when it upheld a state statute that banned the sale of sexual material to minors. Thus, the speaker’s right to address minors was not found to be coextensive with his right to address adults.

80. *Fraser*, 106 S. Ct. at 3164.

81. *Id.* at 3164.

82. *Id.* at 3165.

83. Students had responded in various ways to Fraser’s speech. Some had “hooted and yelled,” others “simulated sexual activity,” and others appeared embarrassed. *Id.* at 3162. One teacher reported she had to stop her regular class the next day in order to discuss Fraser’s speech with students. *Id.* at 3162.

84. *Id.* at 3165. The Court cited FCC v. *Pacific Foundation*, 438 U.S. 726 (1978) for this proposition. In that case the Court upheld a citation given to a radio station for broadcasting vulgarity. The Court explained that the right to use vulgar words is easily outweighed by social interests in morality. Obscene or vulgar language, unlike political expression, has little social value or first amendment protection.

85. *Fraser*, 106 S. Ct. at 3165.
The Fraser and Tinker cases have been cited repeatedly in the lower courts in cases concerning press rights of students, even though Fraser and Tinker were punishment cases and did not deal with the issue of prior restraint of expression. This confusion is understandable because both subsequent punishment and prior restraint can effectively silence the voice of dissent or the unpopular view.

Ultimately, the importance of these cases on the issue of the deletion of student material from a newspaper prior to publication lies in the Court’s assumption that although students are protected by the Constitution, their rights in the schoolhouse are not the same as those they will exercise as adults. Local school officials will be permitted to define unacceptable behavior in the context of preservation of important school interests. Therefore, when a student view comes into conflict with school interests, the importance of each will be balanced, and as long as the official position is justified, the student’s interests must give way.

C. The Public Forum Cases

Forum analysis is used by the Supreme Court when the government interest in preserving its property for an intended purpose conflicts with the interests of those who would like to use it for other purposes.\textsuperscript{86} Forum analysis recognizes that the government, just as a private owner of property, may preserve property under its control for the property’s designated use.\textsuperscript{87} “The extent to which the government can control access depends on the nature of the relevant forum.”\textsuperscript{88} Thus, under forum analysis the Court examines and iden-


\textsuperscript{87} Cornelius, 105 S. Ct. at 3448.

\textsuperscript{88} \textit{Id.} at 3448.
tifies the government property while also looking at the access sought by the speaker.  

Streets and parks are representative of the traditional public forum and "have immemorially been held in trust . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Because the purpose of the public forum is to provide a place for the free exchange of ideas, a speaker in the traditional public forum can be excluded only for a compelling government interest. Additionally, the State is permitted to enforce time, place, and manner regulations that are content-neutral and that are narrowly drawn to serve significant government interests, but only while leaving open other channels of communication.

However, not all public property falls within this traditional public forum category, and in Perry Ed. Ass'n. v. Perry Local Educator's Ass'n., the Supreme Court made it clear that "the access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." In Perry a rival teacher's union challenged a local school ruling that denied the union access to intra-school mailboxes while permitting the elected bargaining representative to use the mailboxes. The Court said that the first and fourteenth amendments' guarantees of free speech do apply to teachers' mailboxes, but that the nature of the mailboxes as government property was critical.

The Court said that in addition to the traditional public forum, two other categories of government property exist. The first additional category is that which is opened by the government for expressive activity. This designated public forum is created by government as a place for communication for the public at large.

89. Id. at 3449.
91. Id. at 3448.
93. Id.
94. Id. at 44.
95. Id.
for certain speakers, or for discussion of particular topics.96 The designated public forum is governed by the same standard that applies to a traditional public forum, even though a State is not required to create the forum or hold it open indefinitely.97 For example, the Court has said that a university campus, municipal auditorium, or city theatre may fall into this category98 because the property was intentionally opened for public discourse.99

The second additional category, as defined by Perry, falls outside the traditional or designated public fora and can be called a non-public forum. Here, a State may preserve the forum for its intended purpose and deny access to the non-public forum. Denial can be based on speaker identity and subject matter as long as the restrictions are "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."100 The Perry Court found that school mailboxes for teachers fell within the nonpublic forum category and that the school had the right to "make distinctions in access [to the mailboxes] on the basis of subject matter and speaker identity,101 so long as the distinctions were reasonable, were compatible with forum purpose, and were viewpoint neutral.

Three years later in Cornelius v. NAACP Legal Defense and Education Fund,102 the Court reiterated the principles of Perry and further clarified the meaning of a non-public forum by saying that it may exist even though expressive activity regularly occurs within the context of the forum103 and that there is no "requirement that [any] restriction be narrowly tailored or that the Government's interest be compelling."104 Although the Cornelius Court said that "the existence of reasonable grounds for limiting access to a nonpublic

96. Cornelius, 105 S. Ct. at 3449.
97. See supra note 92 and accompanying text.
98. Perry, 460 U.S. at 46.
100. Perry 460 U.S. at 46.
101. Id. at 49.
103. Id. at 3451.
104. Id. at 3453.
forum [will not] save a regulation that is in reality a facade for viewpoint-based discrimination," the government retains wide latitude to restrict speech in the nonpublic forum.

It is the Perry standard that the Supreme Court in Hazelwood applied to the issue of student expression in an official high school newspaper.

IV. Case Analysis

The United States Supreme Court granted certiorari in Hazelwood to address the issue of "the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum." The Court found that the Hazelwood East students' first amendment rights were not violated and reversed the court of appeals' decision. The majority opinion reiterated Tinker's guarantee that students do not lose their constitutional rights at the schoolhouse gate but abandoned the Tinker personal expression guidelines in favor of public forum analysis.

Justice White, writing for the majority, predictably begins the opinion by explaining Tinker's standards, which he states are applicable only in punishment cases. He then addresses the Fraser decision and explains why the Court in 1986 used the Tinker standards to uphold a school's decision to discipline a student for a sexually suggestive speech made at an official school assembly. Presumably, the Court chose to analyze Fraser by Tinker's standards because both were punishment cases where the speech at issue had already occurred.

The Hazelwood opinion distinguishes between two kinds of student speech. The first, as illustrated by Tinker, occurs incidentally

105. Id. at 3454.
107. Id. at 567-72.
108. Justice White's opinion in Hazelwood brings to mind one writer's opinion that justices too often must sift through stacks of prior case law in order to explain the law in light of a new case, while only incidentally trying to interpret the Constitution. D. CURIE, THE CONSTITUTION AND THE SUPREME COURT xi (1985).
110. Id. at 569-71.
on school grounds at places such as the cafeteria, stadium, or hallways. The second kind of student speech, as found in Fraser, is speech that might be perceived by the public as being condoned by the school because it occurs within the context of an official school function, such as an assembly, play or newspaper article.

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. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.\(^{111}\)

Justice White underscores the Fraser Court's recognition of a school's right to punish a student and to thereby disassociate itself from student speech by demonstrating that the speech is "inconsistent with the fundamental values of public school education."\(^{112}\)

Thus, a school may set a higher standard than that set forth in Tinker when student speech appears to be "disseminated under [the] auspices" of the school.\(^{113}\) Moreover, school authorities, rather than the courts, will determine what manner of speech is inappropriate in a particular case.\(^{114}\)

In retrospect, Fraser was an early indication of the Court's willingness to recognize a school's interest in appearances, while continuing to apply the Tinker standards in a punishment context. However, the Hazelwood case centers around prior restraint rather than subsequent punishment. This factor led the Hazelwood majority to agree with the lower federal courts which had concluded that Tinker would not be applicable to cases of prior restraint of student speech. Instead, the Hazelwood Court finds forum analysis

\(^{111}\) Id. at 569.
\(^{112}\) Id. at 567.
\(^{113}\) Id. at 570.
\(^{114}\) Id. at 567.
to be better suited to the issue of whether a school may censor unheard student viewpoints. The question of censorship under these circumstances turns upon the forum analysis inquiry as to whether the speech will occur in a public or nonpublic forum.

Justice White's opinion states that the Hazelwood East school officials did not by policy, practice, or intent open the newspaper to general student use. Instead, the school reserved the paper for its intended purpose as a vehicle for students to apply journalism skills and thereby retained the newspaper as a nonpublic forum. Accordingly, the Hazelwood school officials were entitled to regulate the contents of Spectrum in any reasonable manner, as long as the school's action was "reasonably related to a legitimate pedagogical concerns." 117

The majority opinion gives three reasons why a school has a valid interest in controlling speech: 1) to assure that students learn what a lesson was designed to teach, 2) to assure that students are not exposed to inappropriate material, and 3) to assure that student views are not wrongly attributed to the school. Moreover, only when the school has no "valid educational purpose" may a court intervene in order "to protect students' constitutional rights." 119 The concerns expressed by Principal Reynolds when he deleted the newspaper pages were deemed legitimate and, furthermore, the opinion states that Principal Reynolds acted reasonably in deleting two entire pages of the newspaper under the circumstances as he understood them. 121

The dissenting opinion, written by Justice Brennan and joined by Justices Marshall and Blackmun, stringently disagreed with the analysis set forth in Hazelwood majority opinion because the ma-

115. Id. at 568-69.
116. Id. at 569.
117. Id. at 571.
118. Id. at 570.
119. Id. at 571.
120. Principal Reynolds believed that students' anonymity was not preserved in the pregnancy article, that the parent in the divorce story should have had an opportunity to respond, and that there was not enough time to make article corrections prior to publication. Id. at 565-66.
121. Id. at 572.
majority abandoned *Tinker*. The dissent said that of the three reasons given by the majority as to why educators should have more control over school-sponsored speech than *Tinker* would allow, only the third was valid: the risk that views of the speaker could incorrectly be attributed to the school. Yet, said Brennan, this valid purpose cannot “be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” Other means short of censorship can be used, particularly in this instance where the principal deleted two entire pages because two articles were objectionable. Ultimately, the dissenters believe that the constitutional rights of the students were violated when the principal censored expression that did not disrupt classwork or invade the rights of others, particularly where the censorship was not narrowly tailored to serve its purpose.

The basic underlying difference in the majority and minority opinions is found in the majority’s willingness to recognize a high school publication as a media organ of the school and, perhaps, ultimately of the state. The dissenters, on the other hand, express great concern over the ramifications of this concept: “The mere fact of school sponsorship does not, as the [majority] suggests, license such thought control in the high school, whether through school suppression of disfavored viewpoints or through official assessment of topic sensitivity.”

122. See supra note 118 and accompanying text, for the three reasons.

123. *Hazelwood*, 108 S. Ct. at 576. The first reason cited by the majority was the school’s right to control the curriculum in order to assure that the students learn whatever lessons the activity was designed to teach. *Id.* Justice Brennan questions the notion that blatant censorship teaches students anything, *Id.*, and also states that the *Tinker* test is perfectly designed to assure that learning occurs while still taking into account the student’s right to free expression. Under *Tinker* the school officials may censor speech that would “materially disrupt a legitimate curricular function.” *Id.* Thus, student speech in a noncurricular context would usually be protected because it would be less likely to disrupt any true pedagogical purpose. *Id.*

The second purpose cited by the majority, the school’s interest in shielding an impressionable school audience, is illegitimate according to Justice Brennan. Once again he uses *Tinker’s* standards to assert that the school cannot act as “thought police” and stifle “discussion of all but state-approved topics and advocacy of all but the official position.” *Id.* at 577. Such suppression would constitute viewpoint discrimination and would infringe upon the other students’ right to information and ideas. *Id.* at 578.

124. *Id.* at 579.


126. *Id.* at 577.
While Justice Brennan does not expand upon the notion of thought control, one can speculate how far the censorship right extends. The majority opinion, which sees the student newspaper as the product of a classroom exercise applying journalism skills, recognizes that the school principal has editorial authority in determining the content of the student newspaper. This authority derives from the fact that the newspaper is produced during school hours by students who are taking a journalism class, who use the school facility, and who depend upon school financing to produce the paper.  

Yet, the majority analysis fails to delineate how far this editorial authority might legitimately extend upward through the state educational bureaucracy. The Hazelwood superintendent obviously felt that the District could exercise censorial control either through the Board or the superintendent himself. The newspaper funding actually came from the District, which is also ultimately responsible for school facilities and curriculum. If the District can demonstrate a legitimate concern reasonably related to a censorial order then, presumably, under the Hazelwood decision, a high school newspaper staff must comply.

A similar argument can be made about prior restraint by a state board of education which appropriates funds to districts and establishes curriculum guidelines for state-wide use. Theoretically, any state board of education directive issued to official high school newspapers to prohibit opinion on designated subjects could be upheld as long as the state board could show that the directive reflected legitimate state board concerns that were reasonably related to the ban. Not only does this possibility raise the spectre of thought control mentioned by Justice Brennan, but it should also prompt recollection of the prior restraint concerns voiced first by the Federalist drafters of the Constitution, who feared the suppression of minority opinion by the will of the majority, and secondly, by the Anti-Federalists, who insisted upon the free speech and press amendment to the Constitution in an attempt to avoid loss of personal autonomy.  

127. Id. at 577-78.
128. See supra notes 2, 16 and accompanying text.
Thus, the *Hazelwood* decision not only goes far beyond *Tinker* in giving local educational administrators control over school-sponsored speech, but it also creates the potential for governmental abuse. Although the public has long recognized and presumed that a state agency's publications are intended to reflect the viewpoint of that particular agency,\(^\text{129}\) it seems there is something basically wrong with a student newspaper which can only espouse the viewpoint of the local or state educational system. The Supreme Court in *Cornelius v. NAACP Legal Defense and Education Fund* also recognized the dangers inherent in the non-public forum label when the Court said that view point discrimination cannot exist under the guise of a non-public forum restriction.\(^\text{130}\)

Another problem with the *Hazelwood* majority's opinion is found in the designation of the Hazelwood newspaper as a non-public forum for the purposes of first amendment analysis. It has long been settled that a school's actions to restrict student speech constitute state action;\(^\text{131}\) therefore, first amendment principles should be the focus of the student speech and press cases. However, under forum analysis the classification of the forum becomes the focus of a court's deliberations, while the first amendment values at issue are only secondary. As authors Farbak and Novak\(^\text{132}\) have commented, "[T]he judicial focus on the public forum concept confuses the development of first amendment principles."\(^\text{133}\) They are concerned that the public forum focus "distracts attention from the first amendment values at stake in a given case,"\(^\text{134}\) while hindering "lower court judges from focusing on those values or from making sense of Supreme Court precedent."\(^\text{135}\)

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129. For example, when one receives a mailing from the state agricultural department, one presumes the mailing's content will reflect any biases of that particular arm of the state. Similarly, when one receives Internal Revenue Service literature espousing the wonders and ease of the new 1986 tax rules, such literature is presumed to embody IRS viewpoint and not that of the general public.

130. See *supra* note 105 and accompanying text.

131. See *supra* note 77. See also West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943).


133. *Id.* at 1223.

134. *Id.* at 1224.

135. *Id.*
Supreme Court precedent has, in fact, included dicta dramatically emphasizing that students must “remain free to inquire, to study and to evaluate, to gain new maturity and understanding.” 136 The Court has said that “‘vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’” 137 Yet under forum analysis, student speech that relates to a newspaper labeled as a non-public forum will only receive cursory review.

Commentators often note that a number of avoidance mechanisms exist which permit the disposition of cases based on how the court views the merits of the underlying claims. 138 Those mechanisms include standing, the political question doctrine, ripeness and mootness and are designed to keep the case out of court entirely. The public forum analysis can also act as an avoidance mechanism for the constitutional questions implicated in a case which is actually being heard. Thus, public forum analysis offers the lower courts an issue avoidance device. A court which finds that speech occurs in a non-public forum need not perform the careful balancing of interests normally required in first amendment analysis of prior restraint and suppression of view. 139 Perhaps what is most disconcerting about the majority opinion in Hazelwood is that past experience has shown that high school students in an authoritarian setting demonstrate an “unquestioning attitude . . . [of] acquiescence in pronouncements of school authorities no matter how unfair or oppressive. . . .” 140 In fact, a survey cited by Nat Hentoff in his book The First Freedom 141 indicated that of 90,000 Americans under the age of 35 in the early 1970’s, 94 percent of the 13 year-olds, 78 percent of the 17 year-olds, and 68 percent of the 26 to 35 year

139. Thus, there is issue avoidance. See supra note 132.
141. Hentoff, supra note 3.
olds were in favor of censorship of ideas with which they disagreed. This kind of publicly endorsed censorship was exactly what many colonial leaders so greatly feared and what led to the first amendment guarantees of freedom of speech and press.

The *Hazelwood* court was, of course, well aware of the history of the Constitution and earlier case precedent which endorsed the notion of no prior restraint. However, case precedent also recognized that the no prior restraint doctrine was not absolute and that it must sometimes be balanced against other important interests. Other precedent also indicated that student rights are not coextensive with the rights of adults and that when student speech is at issue a balancing must occur to determine the strength of the students’ interest in freedom of expression. Thus, in order to fairly confront the first amendment issues involved in the prior restraint of the Hazelwood East student newspaper, the Court should have found 1) that the students’ free expression rights would be balanced under the *Tinker* standards, or 2) that the newspaper was a designated public forum, which finding also requires a balancing exercise. This would have permitted more than cursory review of constitutional issues, thus guaranteeing a more fair treatment of the interests of the students in this case, as well as the interests of students in press freedom cases yet to occur. It would also be more in keeping with the truly historical mandate of the first amendment—that there shall be no prior restraint.

V. CONCLUSION

Specifically left as unanswered by the *Hazelwood* opinion is the question of whether censorial control can be imposed on a high school publication that is not produced as a classroom exercise or that is not funded by the school system. Many newspapers are produced in a high school facility by students outside a classroom setting and by money generated by advertising and sales receipts. In fact, it is probably rare to find a high school paper that is totally

142. *Id.* at 17-18.
143. *See supra* note 2 and accompanying text.
funded by the school and produced within the classroom curriculum.

The Court also did not address the degree of control that may be exercised over school-sponsored speech at the college and university levels,145 where presumably the degree of deference to the school interest in disassociation from student speech would not be so weighty.

What the Hazelwood decision does is instruct the lower courts to use public forum analysis for cases of prior restraint of student expression. It also provides guidelines for the educational community to follow in designating a school newspaper as an official publication subject to school control.146 Additionally, the decision sends a message to high school student journalists who have in the past believed that they were learning the principles of free speech as they relate to the publication of informational material. They must now realize that when they participate in the production of an official high school newspaper they may be restricted in the expression of opinions that do not reflect the position of the school. Theoretically, those students who wish to express an alternative position will turn to an existing “underground” newspaper being published unofficially by students. Yet, how many students have this option? And how many high school students will actually realize the importance of the alternative viewpoint?147

Obviously, our nation’s schools owe it to our students to provide more than a lesson in subservience to the state’s viewpoint. Schools must meet the mandates of the Constitution by encouraging the free exchange of ideas so necessary to the vitality of democracy and by continuing to be viewpoint neutral when assessing student expression. Finally, the courts, when using forum analysis in prior restraint cases, must be alert to the potential harm of permitting schools to strictly enforce the viewpoint of the state. While no reasonable person would argue with Justice Black’s opinion in the Tinker dissent

145. Id. at n.7.
146. The high school should make the newspaper the product of a class, should write the course description to include a description of the purpose of the newspaper and to limit the scope of access to the newspaper, and should fund the newspaper.
147. See supra notes 140, 142.
that we do not need to turn our high schools over to the students,\textsuperscript{148} neither should the school fail to teach students that our nation is founded on basic Constitutional principles which recognize the right of the individual to dissent from the majority and to publicly announce his dissent.

\textit{Grace Wigal}

\textsuperscript{148} \textit{Tinker}, 393 U.S. 503, 526.
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