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HAZELWOOD SCHOOL DISTRICT v. KUHLMEIER:*
HOW USEFUL IS PUBLIC FORUM ANALYSIS IN EVALUATING RESTRICTIONS ON STUDENT EXPRESSION IN THE PUBLIC SCHOOLS?

Although the first amendment¹ rights of high school students are not automatically coextensive with the rights of adults,² the United States Supreme Court has recognized that student expression does enjoy some first amendment protection.³ Traditionally,

1. “Congress shall make no law . . . abridging freedom of speech . . . or freedom of the press . . . .” U.S. Const. amend. I.
2. Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (“the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings”). In Fraser, a public high school student delivered a speech to an assembly of 600 of his fellow students, nominating a friend for student elective office. Id. at 677. Fraser repeatedly referred to his candidate in terms of an explicit sexual metaphor. Id. at 678. The following morning the assistant principal notified Fraser that the school considered his speech to have violated the school’s “disruptive-conduct rule.” Id. Fraser was suspended for three days and informed that his name would be removed from a list of candidates for graduation speaker. Id.
Fraser, by his father as guardian ad litem, filed suit in federal district court, alleging a violation of his first amendment right to freedom of speech, and sought both injunctive relief and money damages. Id. at 679. The district court held that Fraser’s first amendment right to freedom of speech was violated, awarded him monetary relief, and enjoined the school district from banning Fraser as a possible graduation speaker. Id. The United States Court of Appeals for the Ninth Circuit affirmed and held that Fraser’s speech was indistinguishable from the armband protest in Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). Id. The Supreme Court reversed, holding that the first amendment did not prevent the school district from disciplining Fraser. Id. at 685. The Fraser Court found that the penalties imposed in this case were unrelated to any political viewpoint, unlike the sanctions imposed on the students wearing armbands in Tinker. Id. See infra note 5 for a discussion of the Tinker decision.
Before examining public forum analysis, see infra note 9 for a discussion of the public forum, it is important to first understand how the Supreme Court has viewed constraints on expression within public schools in light of traditional first amendment analysis. Government regulation of speech falls into three categories: content based restrictions; time, place and manner restrictions; or a combination of these two categories. Farber & Nowak, The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication, 70 Va. L. Rev. 1219 (1984).
Content regulation cases involve the proscription of certain categories of speech. Id. at 1224. One such category of proscribed speech has traditionally been that which involves a clear and present danger of illegal behavior. See Schenck v. United States, 249 U.S. 47, 52 (1919) (Justice Holmes’ “clear and present danger” test). For a modern application of the clear and present danger doctrine, see NAACP v. Claiborne
however, the Court has limited the free speech rights of students

Hardware Co., 458 U.S. 886, 933-34 (1982) (statement by NAACP leader did not constitute incitement, and was therefore protected by the first amendment); Hess v. Indiana, 414 U.S. 105, 108 (1974) (anti-war demonstrator's speech protected because it was "nothing more than advocacy of illegal action at some indefinite future time"); Cohen v. California, 403 U.S. 15, 20 (1971) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942)) (words "inherently likely to provoke violent reaction"); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (words that provoke "imminent lawless action"). Defamation is a second category of historically unprotected speech. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974) (in defamation actions brought by private figures, states are free to establish negligence, recklessness or knowing falsity as standard of liability); New York Times Co. v. Sullivan, 376 U.S. 254, 279-83 (1964) (defamed public officials must prove defamatory statement was made with "actual malice," i.e., "with knowledge that it was false or with reckless disregard of whether it was false or not"). A third category of traditionally regulated communication is false or misleading commercial speech. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564-66 (1980) (four-part test for determining whether regulation of commercial speech violates first amendment). Child pornography is a fourth category of expression that is almost universally proscribed. See New York v. Ferber, 458 U.S. 747, 773 (1982) (distribution of non-obscene materials showing children engaged in sexual conduct could be barred in view of the minimal first amendment value of the speech). Finally, obscenity is another category of speech that has traditionally been the subject of content-based restrictions. See Miller v. California, 413 U.S. 15, 24 (1973) (three-part test for identifying material that may be banned by communities as "obscene"); Roth v. United States, 354 U.S. 476, 485 (1957) ("obscenity is not within the area of constitutionally protected speech or press").

Time, place, and manner regulations involve restrictions on the context rather than content of the speech. See Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980) (state's Public Service Commission regulation prohibiting Consolidated Edison from using bill inserts to discuss the desirability of nuclear power not a valid time, place, and manner regulation); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 90-91, 93 (1977) (racially-integrated town's prohibition on real estate "For Sale" and "Sold" signs not a valid time, place, and manner regulation); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (state statute making it "unprofessional conduct" for a pharmacist to advertise prescription drug prices not a valid time, place, and manner regulation); Grayned v. City of Rockford, 408 U.S. 104, 115, 118-21 (1972) (ordinance prohibiting noise-making outside a school while classes in session was valid time, place, and manner regulation); Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941) (state statute prohibiting parades on public streets without license was valid time, place, and manner regulation).


A third category of regulation combines both content-based restrictions and time, place, and manner regulation. These government regulations restrict the content of speech in a certain context. Farber & Nowak, supra, at 1219 (Supreme Court has had little trouble deciding traditional content regulation cases, and little trouble deciding time, place, and manner cases, but "[t]he Court has had a great deal of difficulty . . . with hybrid regulations involving governmental limitations on speech in a specific context"). First amendment challenges to government control in public
where the “special characteristics of the school environment” require it. Tinker v. Des Moines Independent School District established that the personal expression of students in the public schools may not be proscribed without a showing that the expressive activity is substantially and materially disruptive. In Hazelwood School District v. Kuhlmeier, the Court addressed the extent to which educators may exercise editorial control over the contents of a public high school newspaper produced as part of a school's journalism curriculum. In rejecting a student challenge to the school's pre-publication review of the newspaper, the Court relied on a finding that the newspaper was a non-public forum in which school officials.

4. Tinker, 393 U.S. at 506.
5. Id. at 503. In Tinker, three public school students were suspended from school for wearing black armbands to protest the VietNam War. Id. at 504. The students sought nominal damages and an injunction against the regulation banning the armbands. Id. The district court dismissed the students' complaint on the ground that the school authorities' action was reasonable and justified as an effort to prevent disruption of school discipline. Id. at 505. The United States Court of Appeals for the Eighth Circuit affirmed without opinion. Id. The Supreme Court held that the students' suspensions violated the first amendment because the students' passive expression did not materially and substantially interfere with school work and discipline. Id. at 513-14. In reaching this conclusion, the Supreme Court balanced the students' right to freedom of expression against the school's concern with disruption of school work and discipline. Id. at 506-08.

6. Id. at 505 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
8. Id. at 565.
9. Id. at 569. The concept of public forum is well-founded in legal history. In 1897, Justice Oliver Wendell Holmes suggested that streets and parks were not guaranteed first amendment protection. Commonwealth v. Davis, 162 Mass. 510, 511, 39 N.E. 113 (1895). Justice Holmes' property analysis was not questioned until 1939. In that year, Justice Roberts asserted that certain publicly owned property would be open to citizens for free expression. Hague v. C.I.O., 307 U.S. 496, 515-16 (1939). Throughout the next two decades, Justice Robert's dictum became doctrine.

were free to regulate student expression in any reasonable manner.\textsuperscript{10} While the result in \textit{Kuhlmeier} was correct, the Court's approach offends the rule in \textit{Tinker}, fails to address the individual first amendment interests of the students,\textsuperscript{11} and does not provide lower courts with any guidance as to when a student publication constitutes a public forum.\textsuperscript{12}

In May of 1983, the principal of Hazelwood East High School deleted two pages from an issue of the school newspaper.\textsuperscript{13} The deleted pages contained two articles which the principal found objectionable.\textsuperscript{14} One discussed the impact of divorce on students and the

\begin{itemize}
\item[10.] \textit{Kuhlmeier}, 108 S. Ct. at 569.
\item[11.] See infra notes 68-74 and accompanying text for a discussion of the problems with public forum analysis.
\item[13.] \textit{Kuhlmeier}, 108 S. Ct at 565.
\item[14.] \textit{Id.} Pages four and five were deleted from the May 13, 1983 issue of the \textit{Spectrum}, the Hazelwood East High School newspaper \textit{Kuhlmeier}, 607 F. Supp. 1450, 1459 (D. Mo. 1986). Three articles covered the top half of pages four and five.
\end{itemize}
other described the pregnancy experiences of three students. The deleted pages also contained four otherwise unobjectionable articles.

Hazelwood East High students, with the assistance of their teacher, wrote and edited the newspaper as part of a second-level journalism class. In accordance with established school policy, the teacher was required to submit page proofs to the school principal prior to publication. After reviewing the pregnancy article, the principal became concerned that the facts of the story made the students identifiable. In addition, he found the article's references to sexual activity and birth control inappropriate for younger students.

The principal also objected to the divorce article, which iden-
tified a student by name and reported statements she made that were critical of her father.28 The principal felt that the student's parents should have been given an opportunity to respond before publication.24 Believing there was no time to make the necessary changes in either article, the principal simply withheld from publication the pages on which the offending articles appeared.28

Three months later, three former staff members26 of the newspaper brought an action in federal district court27 against the Hazelwood School District and various school officials.28 The students sought a declaration that the school had violated their first amend-

-dent who was identified only as a "Junior." "My dad didn't make any money, so my mother divorced him." "My father was an alcoholic and he always came home drunk and my mom really couldn't stand it any longer." Brief For Petitioner at 6, Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct 562 (1988) (No. 86-836). A freshman identified by name as "Diana Herbert" gave the following quote:

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

Id. at 6-7. Students Susan Kiefer and Jill Viola also made statements of a similar nature in the same article. Id.

23. Kuhlmeier, 108 S. Ct. at 566. Upon receiving the page proofs for the May 13th issue, Mr. Emerson personally deleted Diana Herbert's name in connection with her statements in the divorce article. Kuhlmeier, 607 F. Supp. at 1458. However, Mr. Emerson gave a set of uncorrected proofs to Mr. Reynolds, the principal. Id.

24. Kuhlmeier, 108 S. Ct. at 566.

25. Id. On May 11, 1983, Mr. Emerson telephoned the principal at approximately 3:15 p.m. Kuhlmeier, 607 F. Supp. at 1458-59. The principal read through the issue while Mr. Emerson was on the phone. Id. The principal testified that, at the time, he thought Mr. Emerson was at the printer and that he had to make an immediate decision on publication of the articles. Id. The principal did not believe that there was time to make any changes in the content of the stories, and that no paper could be produced if the issue were delayed. Id. When the principal asked Mr. Emerson what would have to be done to delete the two stories in question, Mr. Emerson responded that pages four and five could be deleted and page six could be changed to page four. Id. The principal directed that this be done. Id.

26. Kuhlmeier, 108 S. Ct. at 569. Plaintiffs Kathy Kuhlmeier, Lee Ann Tippitt-West and Leslie Smart were students in the Journalism II class at Hazelwood East High School in St. Louis County, Missouri. Kuhlmeier, 607 F. Supp. at 1451. Ms. Kuhlmeier served as lay-out editor for Spectrum, the school newspaper. Id. Specifically, she did page lay-outs for the deleted articles from the May 13th issue. Id. Ms. Smart served as newswriter and movie reviewer for Spectrum. Id. Ms. Tippett served as news feature writer, cartoonist and part-time photographer. Id. In addition, Ms. Tippett prepared a graph used in connection with one of the articles in controversy. Id. The above-mentioned students did not, however, write any of the deleted stories. Id.


28. Kuhlmeier, 108 S. Ct. at 565. Defendant Hazelwood School District is a Missouri public school district organized pursuant to, and operated in accordance with, the statutes of the State of Missouri. Kuhlmeier, 607 F. Supp. at 1451. Other defendants were Dr. Thomas S. Lawson, superintendent of the Hazelwood School District, Dr. Francis Huss, assistant superintendent, Robert Eugene Reynolds, principal of the Hazelwood East High School, and Howard Emerson, a teacher in the Hazelwood School District. Id.
ment rights. They also sought injunctive relief and money damages. The district court denied both the request for injunctive relief and damages, and held that the school's conduct did not violate the students' first amendment rights. The Court of Appeals for the Eighth Circuit reversed and held that the school's action violated the students' first amendment rights because the newspaper was a conduit for protected student expression. The United States Supreme Court granted certiorari to consider the extent to which educators may exercise editorial control over the contents of a high school newspaper that is produced as part of a public high school's journalism curriculum. The Court concluded that the principal's decision to delete the two pages was reasonably related to pedagogical concerns and, accordingly, did not violate the students' first amendment rights.

The Court began its analysis by discussing the public forum doctrine, which divides the areas in which a state might regulate communications into three categories. A traditional public forum is any place, such as a park or public street, that has historically been used as a place for expressive activity. In order to restrict communicative activity in a traditional public forum, the state must generally show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. A designated, or limited, public forum is public property, like a university classroom, gymnasium, or auditorium, that is made available to the public for expressive activity. A limited public forum is public property, like a high school, that is not available to the public for expressive activity. In order to restrict communicative activity in a limited public forum, the state must generally show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. A nonpublic forum is private property, like a private residence, that is made available to the public for expressive activity. In order to restrict communicative activity in a nonpublic forum, the state must generally show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

30. Id.
35. Id. at 569.
36. Id. at 567-69. See supra note 9 for a history of the public forum doctrine.
38. Id. Public facilities created for the purpose of public communication are treated as public forums. Id. See, e.g., City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) (school board meeting held open to public could not exclude teachers); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (city theater could not exclude production of "Hair," even though some other, privately-owned theater in the same city was available); Searcey v. Crim, 681 F. Supp 821 (N.D. Ga. 1988) (school could not deny "peace activists" access to school's bulletin boards or to dissemination of literature through school guidance counselors).
39. Perry Educ. Ass'n, 460 U.S. at 45. Specifically, the Court in Perry said: In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicatory thoughts between citizens, and discussing public questions."
sity campus" or a state fairground, that the state has opened for use by the public as a place for expressive activity. The state does not have to keep such a facility open indefinitely, but as long as it does, it is bound by the same standards that apply in a traditional public forum. Nonpublic forums are areas that the state has specifically reserved for other governmental purposes. Examples of non-public forums include military bases, courthouses, and jails. The state may regulate speech in nonpublic forums as long as the regulation is reasonable and not an effort to suppress expression because public officials oppose the speaker's viewpoint.

The Kuhlmeier Court determined that the school newspaper was a nonpublic forum because the high school officials did not in...

43. Perry Educ. Ass'n, 460 U.S. at 45; see also Grayned v. Rockford, 408 U.S. 104, 121 (1972) (school grounds deemed limited public forum but the state could regulate noise while classes were in session); Brown v. Louisiana, 383 U.S. 131, 143 (1966) (use of a library was not disturbed by a silent sit-in).
44. Perry Educ. Ass'n, 460 U.S. at 46. Even if the government is not required to permit expressive activity in the first place, once it does, "[t]he Constitution forbids a State to enforce certain exclusions from a forum generally open to the public." Id. at 45.
45. See infra notes 47-48 and accompanying text for examples of nonpublic forums.
46. Id. at 46. The Perry Court distinguished nonpublic forums as follows: "Public property which is not by tradition or designation a forum for public communication is governed by different [from traditional or limited public forums] standards." Id. at 46.
50. Perry Educ. Ass'n, 460 U.S. at 46. The requirement that a restriction on speech must be viewpoint-neutral means that the government may not prohibit speech based on a particular speaker's opinion. Id. at 59. Content-based restrictions, on the other hand, prohibit entire classes of speech or an entire area of subject matter. Id. In a non-public forum, the government may exclude speech or speakers based on the content of their message, Farber & Nowak, supra note 3, at 1222, but may not exclude speech based upon a particular speaker's viewpoint. Perry Educ. Ass'n, 460 U.S. at 59. That is, content-based restriction, in order to be valid, must be viewpoint neutral. Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. Chi. L. Rev. 81, 83 (1978).

In his Kuhlmeier dissent, Justice Brennan warned that school officials "can camouflage viewpoint discrimination as 'mere' protection of students from sensitive topics." Kuhlmeier, 108 S. Ct. at 578 (Brennan, J., dissenting). The majority in Kuhlmeier found the potential sensitivity of "teenage sexual activity" supported the principal's censorship, but Brennan notes that the principal "did not, as a matter of principle, oppose discussion" of sexual topics. The inference, of course, is that the school was trying to suppress a particular viewpoint rather than non-discriminatorily suppress a whole category of speech. See also Searcey v. Crim, 681 F. Supp. 821 (N.D. Ga. 1988) (although high school's career days activity was non-public forum, school could not prohibit participation of peace activists even under reasonable regulations that were a "facade" "formulated specifically to suppress" particular point of view).
tend the school newspaper to be a public forum for student expression. The school officials did not by policy or practice open the school newspaper to indiscriminate student use. Rather, the school created the newspaper as a part of the educational curriculum, specifically the second-level journalism class. Because the paper was a nonpublic forum, the Court held that the school could regulate its contents in any reasonable manner.

The Court was apparently concerned that the result in Kuhlmeier might be construed as inconsistent with Tinker v. Des Moines Independent Community School District. In Tinker, the Court had held that a public school could not prohibit the expression of personal anti-war beliefs by students wearing armbands unless school officials could show that such activity would be materially and substantially disruptive of a school's learning environment. The Court therefore distinguished the two cases. The Kuhlmeier Court noted that its decision applies to cases involving student activity that bears the imprimatur of the school, while Tinker applies to the purely personal expressions of students that happen to occur on school grounds. The Court further explained that student expression may bear the imprimatur of the school whether or not it occurs in a traditional classroom setting, so long as it is supervised by faculty members. Rejecting the Tinker rule in favor of public forum analysis, the Court concluded that school officials could proscribe certain student speech as long as their actions were reasonably related to legitimate pedagogical concerns.

Although the Kuhlmeier Court correctly concluded that educa-

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52. Id. (quoting Perry Educ. Ass'n, 460 U.S. at 47).
54. Id.
56. Id. at 513.
57. Kuhlmeier, 108 S. Ct. at 569-70. Specifically, the Court said:
The question whether the First Amendment requires a school to tolerate particular 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 . . . Accordingly, we conclude that the standard articulated in Tinker for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.
Id.
58. Id. at 569.
59. Id.
60. Id. at 570.
61. Id. at 569.
62. Id. at 571; see also Perry Educ. Ass'n, 460 U.S. at 46 (“the state may reserve the forum for its intended purposes . . . as long as the regulation on speech is reasonable. . .”).
tors may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum, the Court's analytical approach is unsound. First, the Kuhlmeier Court failed to adequately define the types of student expression that school officials may regulate. Second, in limiting its analysis to public forum, the Court focused more on the location of the proscribed conduct than on the interests of the parties. Third, by simply adding school-sponsored newspapers to the list of non-public forums, the Court failed to provide lower courts with a precise method of analysis that applies in all factual settings. Finally, if the Kuhlmeier Court had instead balanced the interests of the parties, it could have reached the same result without either diminishing or distinguishing the Tinker decision.

One reason the Kuhlmeier opinion is deficient is that it fails to adequately define the types of student expression protected by the first amendment. The test announced by the Kuhlmeier Court is that public school officials may regulate student speech in “school-sponsored” activities as long as the school’s action is “reasonably related to legitimate pedagogical concerns.” Further, the Court indicated that school officials may regulate expressive activity that bears the “imprimatur of the school.” The Court defined “expressive activities that bear the imprimatur of the school” as activity that is part of the school curriculum, supervised by faculty members and designed to educate the students. Unfortunately, however, the Kuhlmeier Court failed to define, or provide lower courts with guidelines on how to define, either “school-sponsored” activities or “legitimate pedagogical concerns.”

Specifically, the Court did not address the degree of faculty involvement necessary before the student expression became subject to reasonable regulation. The Kuhlmeier Court also did not indi-
cate the role that school district funding plays in deciding whether a newspaper bears the imprimatur of the school. The Court failed to articulate the types of student expression entitled to broad first amendment protection. Therefore, until these thorny definitional questions are litigated, school officials will likely continue to have great latitude in determining the types of student expression that may be proscribed.

A second problem with the Kuhlmeier opinion is that in emphasizing public forum analysis, the Court fails to fully address the legitimate interests of the parties; the student's first amendment speech, however, in states with alternative statutory or constitutional provisions. See, e.g., Leeb v. DeLong, 193 Cal. App. 3d 57, 244 Cal. Rptr. 494 (1988) (school board's decision to censor possibly defamatory student publication governed by California statute and decisional law which expressly provide students with greater free speech rights than Kuhlmeier).

67. While it is clear that completely independent, "underground" newspapers are governed by Tinker rather than Kuhlmeier, see Papish v. Bd. of Curators, 410 U.S. 667 (1973) (per curiam) (state university could not prohibit on-campus distribution of off-campus "underground" newspaper); Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988) (school's attempt to reprimand students for distribution of independent newspaper at a Senior Class barbeque without prior approval governed by Tinker), it is unclear whether the Kuhlmeier Court intended all school-funded newspapers to be per se "school-sponsored."

68. While public forum analysis may be useful, it should not be the exclusive method of analysis. Two leading constitutional scholars suggest that the public forum doctrine is a useful heuristic device—a shorthand method of invoking this balance of interest. Farber & Nowak, supra note 3, at 1234-35. "But when the heuristic device becomes the exclusive method of analysis, only confusion and mistakes can result." Id. at 1235. "Our objection to public forum analysis is not that it invariably yields wrong results, although sometimes it does, but that it distracts attention away from the first amendment values at stake in a given case. Id. at 1224; see also L. Tribe, American Constitutional Law 987 (2d ed. 1988) ("the Court described and reformulated public forum doctrine in ways that have proven to be quite manipulable and problematic"); M. Nimmer, Nimmer on Freedom of Speech §§ 4-74, 4-76 (1984) ("the three elements—content neutrality, significant governmental interest and alternative means of communication—are necessary in order to validate a speech restriction regardless of whether or not the premeises thus restricted are regulated as a public forum").

Public forum analysis has also drawn sharp dissent from Supreme Court justices. See, e.g., Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 820 (Blackmun, J., dissenting): Thus, the public forum, limited public forum, and nonpublic forum categories are but analytical shorthand for the principles that have guided the Court's decisions regarding claims to access to public property for expressive activity. The interests served by the expressive activity must be balanced against the interests served by the uses for which the property was intended and the interests of all citizens to enjoy the property. Id. See also id. at 833 (Stevens, J., dissenting) ("concerning the categories of public and quasi-public fora . . . I am somewhat skeptical about the value of this analytical approach in the actual decisional process"). The major objection to public forum analysis is that it distracts attention away from the legal interests of the litigants. Farber & Nowak, supra note 3, at 1224; see also Perry Educ. Ass'n, 460 U.S. at 65 (Brennan, J., dissenting) (public forum analysis is not relevant); Greer v. Spock, 444 U.S. 528, 560 (1976) ("the Court's forum approach to public speech blinds it to proper regard for First Amendment interests"). It also hinders lower court judges
rights and the school's interests in regulating student speech. The Court thus seems more concerned with the location of the speech than with the substantive rights of the parties. Such an approach does not square with the well-established notion that the first amendment protects people, not places.

A third problem with the Kuhlmeier opinion is that the Supreme Court has merely provided the lower courts with an addition to the list of places that are nonpublic forums. While certain school-sponsored newspapers will now be considered public forums, the Supreme Court has offered no analytical framework for lower courts to apply in deciding whether other student expression might be reasonably regulated by school officials. A more flexible analysis that balances the interests of the parties would have provided lower courts with a method of analysis of practical value for future cases with disparate facts.

from making sense of Supreme Court precedent. For examples of inconsistent results among lower courts in the area of public school regulation of student speech, see infra note 73.

69. Kuhlmeier, 108 S. Ct. at 567-68. See infra notes 80-100 and accompanying text for a discussion of a test that more adequately addresses the interests of the parties.

70. Kuhlmeier, 108 S. Ct. at 567-68.

71. Farber & Nowak, supra note 3, at 1234.


73. The following cases indicate the confusion that reigns in the lower courts under public forum analysis when the facts of a given case are not on all fours with any Supreme Court precedent: See, e.g., Kuhlmeier v. Hazelwood School Dist. 795 F.2d 1368 (8th Cir. 1986) (journalism class-produced school newspaper deemed public forum so educators not entitled to control content), rev'd, 108 S. Ct. 562 (1988); Fraser v. Bether School Dist., 755 F.2d 1356 (9th Cir. 1985) (student who gave an indecent speech during a school assembly could not be disciplined), rev'd, 478 U.S. 675 (1986); Nicholson v. Board of Educ., 682 F.2d 858 (9th Cir. 1982) (educators could review journalism class-produced school newspaper prior to publication); Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981) (school could prevent performance of school sponsored theatrical production); Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977), cert. denied, 435 U.S. 925 (1978) (school could prevent distribution of sex questionnaire in school newspaper based on possible harm to students); Gambino v. Fairfax County School Bd., 564 F.2d 157 (4th Cir. 1977) (educators could not prohibit publication of article in school newspaper); Stanton v. Brunswick School Dep't., 577 F. Supp. 1560 (D. Ma. 1984) (school officials could not prevent publication of a student quote in yearbook); Reineke v. Cobb County School Dist., 484 F. Supp. 1252 (N.D. Ga. 1980) (school district could not censor or control journalism class student newspaper); Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979) (school officials could prevent publication of letter in school newspaper); Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974), aff'd, 515 F.2d 504 (2d Cir. 1975) (school officials could not prevent distribution of sex information in school newspaper); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969) (school officials could not prohibit publication in school newspaper of advertisement protesting Viet Nam War).

74. See Farber & Nowak, supra note 3, at 1224 (public forum analysis will hin-
Finally, if the Kuhlmeier Court had employed an analysis balancing the interests of the parties, the Court would not have had to distinguish Tinker.\(^7\) The Tinker Court balanced the interests of the parties and found that the student's interest in purely personal expression that was not materially disruptive outweighed the school's interest in maintaining an orderly learning environment.\(^7\) The Tinker Court did not use public forum analysis, but instead concentrated on the first amendment rights of the students and the school's possible justification for regulating student speech.\(^7\) Balancing the parties' interests under the facts in Kuhlmeier would still have produced the same result because the school's interest in teaching responsible journalism, by means of a school sponsored and regulated student newspaper, clearly outweighs the student's interest in exercising first amendment rights.\(^7\) Such an approach would also have been consistent with Tinker and, as a result, there would have been no need for the Court to either distinguish or diminish Tinker.\(^7\)

One approach to balancing the parties' interests is a three-part test proposed by Professors Farber\(^8\) and Nowak\(^9\) that would help courts determine if a given government regulation of speech is permissible. The first requirement is that the government clearly articulate what speech is permissible, what goals the regulation of speech seeks to achieve, and how these goals are related to the context of the speech.\(^8\) Under the second prong of the test, the government's
specified goals must be consistent with first amendment values and not favor one viewpoint over another.\textsuperscript{83} Third, the government must show that its regulation serves a government interest sufficiently important to outweigh its impact on the speech.\textsuperscript{84} When applied in the context of speech in the public schools, this method of analysis has the virtue of addressing the student's first amendment interests, but still weighing them against the school's justifications for regulating student speech.\textsuperscript{85} An examination of how this balancing test might have been applied in \textit{Kuhlmeier} demonstrates that such an approach would also set clear guidelines for lower courts to follow in future cases.

The first part of the test requires the government to articulate in advance which classes of speech it intends to regulate, and the goal it seeks to achieve.\textsuperscript{86} In \textit{Kuhlmeier}, both the curriculum guide\textsuperscript{87} and well-established school board policies\textsuperscript{88} demonstrated that the school district had reserved the newspaper for use as a class exercise in which Journalism II students could apply what they had learned.\textsuperscript{89} In order to achieve this goal, the school needed the power to regulate the contents of the newspaper.\textsuperscript{90} The school also had an

\begin{itemize}
  \item [3.] \textit{The Balancing Requirement}. Having passed the threshold tests, the regulation must still be shown to serve a government interest that outweighs its impact on speech. This requires a scrutiny of the relationship between the regulation and the government's goals to determine whether the regulation is reasonably likely to attain the goal. It also requires a determination of whether the goal is important enough to justify the means.
\end{itemize}

\textit{Id.}

\begin{enumerate}
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id. at 1262-63.}
  \item \textit{Id. at 1243.}
  \item \textit{Kuhlmeier}, 108 S. Ct. at 568. The Hazelwood East Curriculum Guide described Journalism II as a course that provides a "laboratory situation in which the students publish the school newspaper applying the skills they have learned in Journalism I." Brief for Petitioner at 4 n.2, Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562 (1988) (No. 86-836).
  \item \textit{Kuhlmeier}, 108 S. Ct. at 568. School Board Policy 348.51, which was entitled "School Sponsored Publications," provided 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." Kuhlmeier v. Hazelwood School Dist., 607 F. Supp. 1450, 1455 (D. Mo. 1986).
  \item See supra notes 87-88 for the textual content of the Hazelwood School District's curriculum guide and school board policy.
  \item See \textit{Kuhlmeier}, 108 S. Ct. at 576 (Brennan, J., dissenting). Justice Brennan said:
    
    I fully agree with the Court 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 ... of student speech that is disseminated under the school's auspices.

\textit{Id.} Justices Marshall and Blackmun joined Brennan's dissent. Justice Brennan said that a school newspaper was not merely a class exercise in which students learned to
express policy allowing the principal to edit and review each issue of the student newspaper; thus, the classes of speech that the school intended to regulate were articulated in advance and the school's regulation of student speech in the Hazelwood school newspaper meets the first part of the test.

The second part of the test requires that any regulation of speech be consistent with first amendment values. In Kuhlmeier, the reason the administration retained editorial control over the newspaper was not to regulate ideas, per se, but to teach responsible journalism. Further, the educational purpose behind the regulation of the paper was viewpoint neutral and therefore consistent with first amendment values. The school's editorial control over the paper therefore also meets the second part of the test.

Under the third prong of the test, the challenged regulation must serve a goal that outweighs its impact on speech. Specifically, the Hazelwood school officials would have had to show that the regulation of student expression confers a societal benefit that clearly outweighs any resultant burden on the students' right of expression. In Kuhlmeier, the school's goal in regulating the contents of the newspaper was to teach the students responsible journalism. Teachers have a legitimate need to correct, edit, review, or even suppress the journalistic work of students if the educational purpose of the newspaper is to be served. In fact, the presence of such an educational function is an important factor in the Supreme Court's recognition of the first amendment rights of students.
While it is true that exercising the right of free speech does, in itself, contribute to the goal of education, this right must be "applied in light of the special characteristics of the school environment." Therefore, while the indiscriminate suppression of students' rights to express their ideas is wrong, regulation of student speech in a school-sponsored newspaper confers a significant societal benefit: young adults participate in a meaningful learning process that teaches them responsible journalism. On balance, this benefit outweighs the burden on student speech that may result from any editorial review by the administration or faculty. Thus, the school's exercise of editorial control over the paper survives all three parts of the test. The key point, however, is that, unlike the public forum doctrine, the Farber & Nowak analysis used to reach this result adequately addresses the interest of the parties involved and sets clear standards for lower courts to follow under any particular set of facts.

Although the Kuhlmeier Court correctly decided the case, the majority opinion creates many problems. In limiting its analysis to the public forum doctrine, the Court did not adequately analyze the competing interests of the parties involved. By simply adding school-sponsored high school newspapers to the growing list of non-public forums, the Kuhlmeier Court has given school districts a "how-to guide" on suppression of student expression and has left lower courts without a framework to consistently analyze first amendment challenges in a scholastic setting.

More disturbing, however, is the danger this approach poses for the first amendment rights of public school students. In the narrow context of student newspapers, administrators seeking to maintain some first amendment rights for students in public schools. In addition, the United States Supreme Court has long recognized that public education is essential in preparing the nation's youth for life in our increasingly complex society. Brown v. Board of Educ., 347 U.S. 483, 493 (1954); Kuhlmeier, 108 S. Ct. at 573 (Brennan, J., dissenting) (addressing the importance of public education, Justice Brennan stated that "[t]he public school conveys to our young the information and tools required not merely to survive in, but to contribute to civilized society"); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (school need not tolerate student speech that would undermine the school's basic educational mission); Ambach v. Norwick, 441 U.S. 68, 76 (1979) (public schools prepare individuals for participation as citizens and preserve societal values).

100. Kuhlmeier, 108 S. Ct. at 570 (school entitled to exercise greater control over curriculum activities "to assure that participants learn whatever lessons the activity is designed to teach").
101. See supra notes 68-71 and accompanying text for explanation of how the Kuhlmeier rule fails to adequately analyze the competing interests of the parties.
102. See supra notes 72-74 and accompanying text for the argument that the Kuhlmeier Court provides no comprehensive approach for lower courts to follow in ruling on future challenges to school restrictions on student expression.
tight control over student expression need only establish that the paper is "school-sponsored." This will permit the school to regulate the operation and content of the student newspaper for any purpose "reasonably related" to educational concerns. In a larger context, school officials may also be encouraged to tightly regulate any forum in which students might express themselves. Paradoxically, such hostility to student expression presumably makes it more likely that a school intended the particular setting to be a non-public forum and thus more likely that a court would permit the school to regulate the student expression as it sees fit.

Regrettably, the public forum analysis relied on by the Kuhlmeier majority permits school officials to mold into a non-public forum the environment in which public school students engage in expressive activity. This makes the free speech rights of students dependent on the beneficence of school officials. Unfortunately, after Kuhlmeier, it is likely that many school districts will again be asking their high school students to check their first amendment rights at the schoolhouse door.

Mark N. Bonaguro

103. See supra notes 63-66 and accompanying text for the argument that the rule in Kuhlmeier does not adequately define "school-sponsored activities."

104. See Kuhlmeier, 108 S. Ct. at 571 ("we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns") (emphasis added).

105. For example, under Kuhlmeier, school districts could provide numerous alternative forums of student expression—newspaper, yearbook, student council, theatrical productions, current affairs forums, etc. On the surface this would appear to be positive and progressive; revealing the school district to be in favor of free speech principles. Clever administrators, however, may adopt such an approach to ensure that most student expression will occur within a nonpublic forum subject to any and all "reasonable regulation" school officials may deem appropriate to further "legitimate pedagogical concerns," such as order, discipline, and "learning" as narrowly defined by the school officials. Kuhlmeier itself is a good example of this danger. Students in the Hazelwood school may well have "learned" just as much about responsible journalism by publishing irresponsible stories and exposing themselves to discipline as by having their journalistic work censored prior to publication.

106. See supra note 3 for the Supreme Court's statement in Tinker regarding the first amendment rights of students. The language of the Kuhlmeier rule is actually quite broad—extending beyond school newspapers to "any student speech in school-sponsored expressive activities." See, e.g., Virgil v. School Bd. of Columbia County, 677 F. Supp. 1547 (M.D. Fla. 1988) (Kuhlmeier rule applies to school board's decision to discontinue "sexual" and "vulgar" humanities textbook).