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Constitutional Law - First Amendment - School Officials Entitled to Regulate Contents of School Sponsored Newspaper in Reasonable Manner Recent Development.

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RECENT DEVELOPMENTS

CONSTITUTIONAL LAW—FIRST AMENDMENT—SCHOOL OFFICIALS ENTITLED TO REGULATE CONTENTS OF SCHOOL SPONSORED NEWSPAPER IN REASONABLE MANNER. *Hazelwood School District v. Kuhlmeier*, ___ U.S. ___, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988).

Kathy Kuhlmeier, Lee Ann Tippett-West, and Leslie Smart were students at Hazelwood East High School in St. Louis County Missouri enrolled in Journalism II class. As part of the journalism curriculum, they also served as staff members on the school newspaper, the *Spectrum*. The May 13th edition of *Spectrum*, which was prepared and edited by the journalism students, included an article on the experiences of three pregnant Hazelwood students, discussing birth control and sexual activity, and a second story addressing the effects of divorce on students at the school. The Journalism instructor, Howard Emerson, pursuant to the usual school procedure submitted proofs of the six page *Spectrum* to the school principal, Robert Reynolds, for approval. Reynolds received the proofs on May 10, three days prior to the paper's scheduled date of publication. Reynolds found both of the articles to be objectionable. He believed that despite the use of fictional names, it was possible that readers could discover the identity of the three students whose experiences with pregnancy were discussed in that article. In addition, he felt that some of the references to birth control and sexual activity were inappropriate for some of Hazelwood's younger students. Further, he was concerned about publishing the divorce story because it included statements made by a named student about her parents' conduct, without obtaining the parents' consent or giving them an opportunity to respond. Based on these concerns and the short amount of time left prior to the planned date of publication and the end of the school year, Reynolds instructed Emerson to delete the entire two pages containing those objectionable articles from the *Spectrum*. Reynolds was unaware, however, that Emerson himself had already deleted the name of the student who had criticized her parents in the divorce article. The deleted pages also contained other articles which Reynolds did not find objectionable.

The students then filed suit in a Missouri district court, claiming their first amendment rights had been violated by the deletion of the two pages from the *Spectrum*. The district court disagreed, holding that if the activity involved is an "integral part of the school's educational function," reasonable restraints on student speech may be imposed by school officials. The court characterized Reynolds' concerns as legitimate and reasonable, and thus upheld his actions. The Eighth Circuit Court of Appeals reversed, stating that because the *Spectrum* constituted a public forum, the school's decision to censor the articles violated the first amendment. The appellate court held that restraint of student speech would be permissible only if it was reasonably necessary to prevent a material and substantial disruption of school activities or discipline, or if the speech impinged on the rights of other persons. The court determined that no such problems would occur because Emerson had already deleted the student's name in the divorce article, and because it believed that no one could successfully bring a tort action against the school based on the pregnancy article. The United States Supreme Court reversed the court of appeals, and held that when addressing school sponsored activities, the proper standard for deciding this type of free speech case is whether the regulatory action is reasonably related to legitimate educational concerns. Applying this test, the court concluded that Reynold's decision to delete those pages was reasonable under the circumstances.

The first amendment to the United States Constitution, which provides that "Congress shall make no law . . . abridging the freedom of speech . . . ," was enacted as a part of the Bill of Rights in 1791. U.S. Const. amend. I. According to Justice Brennan, the underlying purpose of free speech is to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *See Roth v. United States*, 354 U.S. 476, 484 (1957). When interpreting the concept of free speech the Supreme Court has held that it does not encompass an unbridled right to say anything, at any time, in any place one chooses. *See Cox v. Louisiana*, 379 U.S. 536, 554 (1965). The Supreme Court has noted that speech which is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action" is not within the ambit of the first amendment. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)(statute proscribing advocacy of lawless action violated first amendment); *see also Gitlow v. New York*, 268 U.S. 652, 667 (1925)(speech threatening unlawful overthrow of organized government not protected by first amendment); *Schenck v. United States*, 249 U.S. 47, 52 (1919)(defendants who mailed out circular to draftees saying draft unconstitutional not protected by First Amendment). Furthermore, the Supreme Court has recognized that speech may be regulated depending upon the type of forum involved. *See Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 44 (1983). In *Perry*, the Supreme Court held that to constitutionally regulate speech in traditional public forums, such as streets and parks, the regulations must serve a compelling

governmental interest and consist of narrowly tailored time, place, and manner restrictions. *See id.* at 45. The same public forum standard is applied to public property "which the State has opened for use by the public as a place for expressive activity." *See id.; see also Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981)(university policy created public forum by permitting student groups to meet in university buildings). It should be noted, however, that free speech rights in this area are limited to those topics or groups to which the forum was opened originally. *See Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 48 (1983). *Compare Flower v. United States*, 407 U.S. 197, 198 (1972)(broad public forum opened inside military base by acquiescence of commander) *with Greer v. Spock*, 424 U.S. 828, 836-38 (1975)(public forum opened on military base limited to activities previously permitted). Finally, as to property which is not a public forum by tradition or designation, a slightly altered standard is applied. *See Perry*, 460 U.S. at 46. In addition to any restriction which would comply with the "compelling interest" test mentioned above, the *State* may "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *See id.*; *see also Greer v. Spock*, 424 U.S. 828, 838 (1976)(federal military reservations do not constitute public forum); *Adderley v. Florida*, 385 U.S. 39, 46-48 (1966)(punishment for attempted speech on jail premises not opened for public use did not violate free speech rights).

Because the school environment involves the competing interests of the students' right to speak and the school's right to prescribe and control student conduct, first amendment questions in this area must be considered in light of those interests. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506-07 (1969). Indeed, it has long been observed that the topic of education is to be considered as a matter "of supreme importance which should diligently be promoted." *See Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). Until *Hazelwood*, the leading cases dealing with school regulation of student free speech in a secondary school setting were *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) and *Bethel School Dist. v. Fraser*, __ U.S. __, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986).

The school in *Tinker* had passed a regulation proscribing the wearing of black armbands on school property. *See Tinker*, 393 U.S. at 504. Pursuant to that regulation, three students who wore such armbands to school in order to protest against the Vietnam War were suspended. *Id.* After noting that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the Court was faced with the question of what the proper test should be in cases involving student free speech. *Id.* at 506. Ultimately, the majority adopted the Fifth Circuit's approach, holding that the correct inquiry for cases involving

speech at school is whether the expression will cause a material and substantial disruption of classwork or invade the rights of others. *See id.* at 513 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). In *Tinker*, the Court found that no potential disruption or invasion of other student's rights was apparent; hence the Court held that the school's ban on the armbands violated the students' free speech rights. *See Tinker*, 393 U.S. at 514.

Bethel involved a challenge to a school's punishment of a student who had made a lewd and offensive speech during a school assembly. *See Bethel*, __ U.S. at __, 106 S. Ct. at 3166, 92 L. Ed. 2d at 560. The Court stated that despite the students' recognized first amendment rights, school officials do possess the authority to punish students for lewd and vulgar speech at school when that speech undermines the school's basic educational mission. *See id.* at __, 106 S. Ct. at 3166, 92 L. Ed. 2d at 560. The *Bethel* opinion emphasized that students' constitutional rights at school are not necessarily coextensive with those of adults. *Id.* at __, 106 S. Ct. at 3164, 92 L. Ed. 2d at 558. Further, the opinion distinguished *Tinker* on the basis that *Tinker* dealt with the expression of a political viewpoint, rather than a "sexually explicit monologue directed towards an unsuspecting audience of teenage students." *Id.* at __, 106 S. Ct. at 3166, 92 L. Ed. 2d at 560. Therefore, the Court found that the school's officials did have the authority to punish the student for his speech. *See id.* Neither *Tinker* nor *Bethel* noted any significant distinction between student speech on school premises and "school sponsored" speech.

In *Hazelwood*, the Supreme Court was faced with three central issues. First, there was the question of whether the *Spectrum* constituted a public forum for expression. The answer to this question would have a profound effect on the second issue, which was to decide which free speech standard was to be applied in the case. Having chosen the correct test, the Court would then have to determine whether, in light of the evidence, the school's restriction on speech was justifiable under the applicable free speech standard.

Initially, the court observed that a student's free speech rights in his classroom are not necessarily as broad as an adult might have in another setting. *See Hazelwood School Dist. v. Kuhlmeier*, __ U.S. __, __, 108 S. Ct. 562, 567, 98 L. Ed. 2d 592, 602 (1988); *cf. New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1986)(fourth amendment protection against searches and seizures greater for adults than for students while attending school). Thus, for example, a school can, in some instances, legally regulate speech by its students on school premises even though the same speech could not be censored by the government if the speech took place in public. *See Hazelwood*, __ U.S. at __, 108 S. Ct. at 567, 98 L. Ed. 2d at 602 (citing *Bethel School Dist. v. Fraser*, __ U.S. __, __, 106 S. Ct. 3159, 3164-65, 92 L. Ed. 2d 549, 558 (1986)(student could be punished for lewd, offensive speech which took place at school as-

sembly)). The opinion then turned to the issue of whether the school newspaper constituted a public forum. *See Hazelwood*, __ U.S. at __, 108 S. Ct. at 567-68, 98 L. Ed. 2d at 602. The Court held that in order for school facilities to be considered "public forums," they must be made available by school officials for "indiscriminate use" by the general public or certain groups such as student organizations. *See id.* at __, 108 S. Ct. at 568, 98 L. Ed. 2d at 603 (citing *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45-46 (1983)); *see also Widmar v. Vincent*, 454 U.S. 263, 267 (1981)(school policy allowing use of school property for student group meetings created public forum). Despite the presence of a clear statement of policy in the *Spectrum* that the paper "accepts all rights implied by the [f]irst [a]mendment," the majority in *Hazelwood* declined to hold that the *Spectrum* was a public forum. *See Hazelwood*, __ U.S. at __, 108 S. Ct. at 568-69, 98 L. Ed. 2d at 604. Instead, emphasis was placed on the great degree of control which the Journalism II teachers and the principal continually asserted over matters involving the *Spectrum*. *See id.* at __, 108 S. Ct. at 568-69, 98 L. Ed. 2d at 603-04. Based on this, the Court concluded that there was no clear intent on the school's behalf to open the *Spectrum* as a public forum for use by the paper's staff. *See id.* at __, 108 S. Ct. at 569, 98 L. Ed. 2d. at 604-05. As a result, the *Spectrum* was classified as a mere "supervised learning experience for journalism students," the contents of which could be controlled by the school in any reasonable fashion. *Id.*

The majority then addressed the question of what standard would be used to determine the constitutionality of Reynolds' decision to censor the newspaper. *See id* at __, 108 S. Ct. at 569, 98 L. Ed. 2d. at 605. The Eighth Circuit had used *Tinker*'s "material and substantial interference" test to reach its conclusion. *See Hazelwood School Dist. v. Kuhlmeier*, 795 F.2d 1368, 1374 (8th Cir. 1986), *rev'd*, __ U.S. __, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988). The Supreme Court disagreed, however, holding that *Tinker* was inapplicable to the case at hand. *See Hazelwood*, __ U.S. at __, 108 S. Ct. at 569, 98 L. Ed. 2d at 605. The *Tinker* decision was distinguished on the basis that it applied only to cases involving a school official's "ability to silence a student's personal expression that happens to occur on school premises," whereas the instant case dealt with a school's authority to regulate a school-sponsored publication. *See id.* at __, 108 S. Ct. at 569-70, 98 L. Ed. 2d at 609. The latter category of speech would also include theatrical productions, as well as any other media of expression which the public might think of as being approved by the school. *See id.* at __, 108 S. Ct. at 569, 98 L. Ed. 2d at 605. The Court observed that this type of speech, as part of the school curriculum, is therefore justifiably subject to a higher degree of censorship than the type of speech in the *Tinker* case. *See id.* at __, 108 S. Ct. at 570, 98 L. Ed. 2d at 605-06. The appropriate test, then, is whether the school's action is "reasonably related to legitimate pedagogical concerns." *See id.* at __, 108 S. Ct. at 570-71, 98 L. Ed. 2d at 606. The *Hazelwood*

Court stated that content regulation of a school paper could be constitutionally based on concerns such as the overall quality of the paper, or the fact that an article is inappropriate for its intended audience. *See id.* at __, 108 S. Ct. at 570, 98 L. Ed. 2d at 605.

After denoting the proper test, the Court proceeded to apply the facts in *Hazelwood*. As to the pregnancy article, several factors led the majority to conclude that Reynolds acted reasonably in deleting it. *See id.* at __, 108 S. Ct. at 571, 98 L. Ed. 2d at 607. These factors included the possibility that the readers could discern the identity of the students who had been pregnant, the potential invasion of the privacy of the pregnant student's parents and boyfriends, and the inappropriateness of the article's content in light of the young age of some of the *Spectrum*'s readers. *See id.* at __, 108 S. Ct. at 571-72, 98 L. Ed. 2d at 607. The Court also upheld the principal's deletion of the page containing the story on divorce. *See id.* at __, 108 S. Ct. at 572, 98 L. Ed. 2d at 607-08. Although he was unaware that the student's name had already been deleted by the Journalism II instructor, Principal Reynolds' concern over publishing remarks which were "sharply critical" of that student's divorced father was held to be a legitimate one. *See id.* Because Reynolds believed there was insufficient time to correct these specific articles, his decision to delete the entire pages upon which the two articles appeared was upheld as "reasonable under the circumstances as he understood them." *Id.*

In a vigorous dissent, Justices Brennan, Marshall, and Blackmun contended that this case should have been resolved under the *Tinker* standard. *See id.* at __, 108 S. Ct. at 573, 98 L. Ed. 2d at 609 (1988)(Brennan, J. dissenting). Justice Brennan distinguished between speech which interferes with a school's educational mission and speech which "express[es] a message that conflicts with the school's [message], without directly interfering with the school's expression of its message." *See id.* at __, 108 S. Ct. at 574, 98 L. Ed. 2d at 610-11 (1988)(Brennan, J., dissenting). The Justices then pointed out that the mere fact that a student's message conflicts with the school's does not provide any basis for content-based regulation of student speech. *See id.* Thus, it was argued by the dissent that the Court must apply the *Tinker* test, because that test was carefully designed to balance the valid interests of the school and its students in such situations. *See id.* at __, 108 S. Ct. at 575, 98 L. Ed. 2d at 611. Under *Tinker*, Principal Reynolds' censorship clearly violated the first amendment rights of the *Spectrum*'s staff. *See id.* at __, 108 S. Ct. at 579, 98 L. Ed. 2d at 617.

The dissenting opinion went on to criticize the majority's distinction between *Tinker* and the case before the Court. *See id.* at __, 108 S. Ct. at 575-76, 98 L. Ed. 2d at 611-12. By examining previous student speech cases, the dissent found no indications of any kind that first amendment cases involving student speech on school premises and "school-sponsored" speech were