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# DiBona v. Matthews: Clear and Present Danger for California Collegiate Administrators Exercising Curriculum Control

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# ***DiBona v. Matthews*: Clear and Present Danger for California Collegiate Administrators Exercising Curriculum Control?**

“First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.”<sup>1</sup> Since the Supreme Court of the United States advanced this proposition in 1969, federal and state courts alike have struggled to strike a balance between the right of administrators to control the school environment and the free speech rights of students and faculty.<sup>2</sup> This balance was the issue presented to a California Court of Appeal in *DiBona v. Matthews*.<sup>3</sup>

The dispute which led to the *DiBona* lawsuit began when Alan DiBona, a part-time drama teacher at a community college in Southeast San Diego, decided to produce a play called *Split Second*<sup>4</sup> as his summer drama workshop project.<sup>5</sup> *Split Second* depicts one of the ugliest aspects of racial discord: A black man

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1. *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969). *Tinker* involved three high school students who were suspended for wearing black armbands to school to protest the Vietnam War. *Id.* at 504. The Court held that the Constitution does not permit state officials to censor student speech that does not “materially or substantially interfere with the requirements of appropriate discipline in the operation of the school.” *Id.* at 509.

2. See *Board of Educ. v. Pico*, 457 U.S. 853 (1982) (plurality opinion) (holding that a school board may not remove books from high school library shelves simply because the board dislikes the ideas contained in the books); Steele, *Mandatory Student Fees At Public Universities: Bringing the First Amendment Within the Campus Gate*, 13 J.C.U.L. 353 (1987) (examination of how courts have balanced first amendment rights of students against rights of public universities to provide a forum for viewpoint exchange).

3. 220 Cal. App. 3d 1329, 269 Cal. Rptr. 882 (1990), *cert. denied*, 111 S. Ct. 557 (1990). It is likely the Supreme Court of the United States denied certiorari based upon the issues of standing and mootness raised by the *DiBona* opinion. See *DiBona* at 1338-40, 269 Cal. Rptr. at 887-88 (majority’s standing and mootness discussion); *id.* at 1349-51, 269 Cal. Rptr. at 894-96 (Huffman, J., dissenting) (dissent’s standing and mootness discussion).

4. Dennis McIntyre, *Split Second* (Samuel French, Inc., 1984).

5. *DiBona v. Matthews*, 220 Cal. App. 3d 1329, 1333, 269 Cal. Rptr. 882, 884 (1990).

who has suffered a lifetime of discrimination is driven beyond his breaking point and lashes out against a person who symbolizes the ignorance and ugliness of his oppressors.<sup>6</sup> DiBona tried to produce *Split Second* in a community racked by racial tension following the clash between a black youth and two white police officers that resulted in the death of one officer and the critical wounding of the other.<sup>7</sup>

Although originally expressing no concern over DiBona's choice to produce *Split Second*, the community college administrators decided not to allow DiBona to produce the play after community church leaders expressed their disapproval of the play's content.<sup>8</sup> DiBona and a student cast member filed an unsuccessful action to enjoin the administration's cancellation of the play.<sup>9</sup> They then brought a second action for declaratory and injunctive relief.<sup>10</sup>

The trial court hearing this second action granted the defendant college administrators' motion for summary judgment, finding that the administrators had acted properly in canceling *Split Second* under the circumstances.<sup>11</sup> On appeal, the California Court of Appeal for the Fourth District reversed the trial court's decision,<sup>12</sup> holding that college administrators could not censor the production of a play if there was no indication the play would create a clear and present danger of serious, substantive evil rising above public unrest or annoyance,<sup>13</sup> or that the play would materially and

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6. See *infra* notes 101 - 108 and accompanying text (discussing plot of *Split Second*).

7. See *infra* notes 100 - 127 and accompanying text (discussing facts surrounding *DiBona* opinion).

8. *DiBona*, 220 Cal. App. 3d at 1334, 269 Cal. Rptr. at 884.

9. *Id.* at 1350, 269 Cal. Rptr. at 895.

10. *Id.* at 1336, 269 Cal. Rptr. at 886.

11. *Id.*

12. *Id.* at 1348, 269 Cal. Rptr. at 894.

13. *Id.* at 1342, 269 Cal. Rptr. at 890 (citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)). *Terminiello* held that speech is protected against censorship unless "shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance, or unrest". *Terminiello*, 337 U.S. at 4. See also CAL. EDUC. CODE § 76120 (West 1989) (prohibiting speech that would incite students and create a clear and present danger of unlawful acts being committed on the community college premises).

substantially interfere with the operation of the school.<sup>14</sup> Additionally, the appellate court stated that no authority existed that would allow college administrators to censor *Split Second* simply because the play contained vulgar language.<sup>15</sup>

The purpose of this Note is to analyze the *DiBona* opinion and determine what impact, if any, *DiBona* may have on college and university administrators as they attempt to exercise curriculum control consistently with principles of free speech. Part I of this Note will examine general first amendment principles as they apply to determining the proper balance between the rights of students and teachers on the one hand, and the rights of administrators to control the “special” school environment on the other.<sup>16</sup> Part II will analyze the *DiBona* opinion.<sup>17</sup> Finally, Part III will explore the impact the *DiBona* opinion may have on the first amendment rights of administrators and students in California’s institutions of higher education.<sup>18</sup>

## I. LEGAL BACKGROUND

### A. *General First Amendment Principles*

#### 1. *Protected and Unprotected Speech*

The first amendment forbids Congress to make any law abridging the freedom of speech or the right of the people to

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14. *DiBona*, 220 Cal.App.3d at 1343, 269 Cal.Rptr. at 890-91 (citing *Tinker v. Des Moines School District*, 393 U.S. 503, 509 (1969)). *Tinker* held that high school officials can prohibit expression if the expression will “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” *Tinker*, 393 U.S. at 509.

15. *DiBona*, 220 Cal. App. 3d at 1346-47, 269 Cal. Rptr. at 893. Cf. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that, in the high school setting, administrators do not violate a student’s first amendment rights by exercising editorial control over the content of student speech in “school-sponsored expressive activities” such as school newspapers and drama productions, so long as their actions are “reasonably related to legitimate pedagogical concerns”). See *infra* notes 63 - 68 and accompanying text (discussing *Kuhlmeier*).

16. See *infra* notes 19 - 99 and accompanying text. See also *supra* note 1 (quoting the *Tinker* Court’s description of the school environment as “special”).

17. See *infra* notes 100 - 188 and accompanying text.

18. See *infra* notes 189 - 213 and accompanying text.

peaceably assemble.<sup>19</sup> One goal of the first amendment is to prevent the government from dictating what ideas are right or wrong.<sup>20</sup> Instead, the free trade of ideas must be encouraged so that the truthfulness of an idea is tested in the competition of the "market" of ideas.<sup>21</sup> To advance this goal, it is generally accepted that no government, federal or state,<sup>22</sup> may deny a citizen the fundamental right to speak, particularly regarding matters of public concern, unless the speech presents a clear and present danger of serious evil or harm to a substantial government interest.<sup>23</sup>

Not all speech, however, is provided unconditional first amendment protection.<sup>24</sup> Certain speech, such as obscenity,<sup>25</sup> is considered nonessential to an exchange of ideas with little social value as "a step to truth."<sup>26</sup> Because the Court has concluded that obscene materials are unprotected,<sup>27</sup> these materials may be censored by the government so long as the censoring regulation is carefully limited in its definition of obscenity.<sup>28</sup>

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19. U.S. CONST. amend. I. Cf. CAL. CONST. art. 1 § 2 (providing that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."). Although the California constitutional guarantee of free speech was interpreted to be broader than its first amendment counterpart in *Wilson v. Superior Court*, 13 Cal. 3d 652, 658, 532 P.2d 116, 120, 119 Cal. Rptr. 468, 472, (1975), the *DiBona* opinion does not address application of the California Constitution's free speech guarantee.

20. See *Virginia Bd. of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 770 (1976).

21. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

22. The first amendment applies to the states through incorporation into the fourteenth amendment. *Schneider v. State*, 308 U.S. 147, 160 (1939).

23. *Schenck v. United States*, 249 U.S. 47, 52 (1919). Additionally, the evil must be one that Congress or the state has a right to prevent. *Id.*

24. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (describing the well-defined and narrowly limited classes of speech which do not merit constitutional protection). Not all speech listed by *Chaplinsky* is still considered unprotected. See e.g., *New York Times v. Sullivan*, 376 U.S. 254, 283 (1964) (providing conditional constitutional protection to libelous speech directed at public officials).

25. See *Miller v. California*, 413 U.S. 15, 24 (1973) (defining obscenity as works which portray sexual conduct in a patently offensive manner, and which, taken as a whole, have no serious literary, artistic, political, or scientific value.)

26. *Chaplinsky*, 315 U.S. at 572.

27. *Miller*, 413 U.S. at 23.

28. *Id.* at 23-25.

2. *Governmental Regulation of Protected Speech--The Forum Distinction*

Over the last twenty years, Supreme Court decisions dealing with challenges to the constitutionality of government regulation of protected speech have engaged in an analysis to determine the type of forum in which the speech before the Court has taken place.<sup>29</sup> The Court utilizes the forum analysis to determine when the government can restrict speech on the government's property without violating the first amendment.<sup>30</sup> The extent to which the government can restrict public access to governmental property for expressive purposes depends upon the nature of the forum in question.<sup>31</sup> The public forum doctrine requires that speech restrictions be subjected to higher scrutiny when the speech occurs in areas historically associated with first amendment activities.<sup>32</sup>

In *Perry Education Assn. v. Perry Local Educators Assn.*<sup>33</sup> the Court identified three forums: (1) the traditional public forum, such as streets and parks; (2) public property opened for use as a place for expressive activity; and (3) public property that is not traditionally, or by designation, open as a forum for public expression (referred to as a nonpublic forum).<sup>34</sup> The government may regulate the time, place, and manner of protected speech taking place in a public forum<sup>35</sup> so long as the regulations are neutral as to the content of the speech and leave open ample alternative channels of communication.<sup>36</sup> However, if the

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29. See *United States v. Kokinda*, 110 S. Ct. 3115, 3119 (1990) (stating that since the Supreme Court's decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the Court has adopted a forum analysis).

30. *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 800 (1985).

31. *Id.*

32. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-24, at 987 (1988).

33. 460 U.S. 37 (1983).

34. *Id.* at 45-46.

35. *Schneider v. State*, 308 U.S. 147 (1939). For example, the *Schneider* court held that while a municipality could not forbid distribution of handbills, it could enact regulations against disseminating the handbills by throwing them into the street. *Id.* at 160-61.

36. *Perry*, 460 U.S. at 45. See *Carey v. Brown*, 447 U.S. 455, 470 (1980) (stating that the Supreme Court has often declared that a state may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content).

government desires to regulate protected speech in a public forum based upon the content of the speech, the government must show that the regulation is necessary to serve a compelling state interest and that the regulation is narrowly drawn to achieve that interest.<sup>37</sup> On the other hand, if the protected speech is presented in a nonpublic forum, the speech may be regulated by the government so long as the regulation is reasonable and is not based solely on opposition to the speaker's views.<sup>38</sup> Under this standard, access to a nonpublic forum can be restricted based on the subject matter of the speech or on the speaker's identity so long as the restrictions are viewpoint neutral and reasonable in light of the purpose of the forum.<sup>39</sup>

Because designation of the forum as public or nonpublic impacts the ability of the government to regulate speech occurring in the forum, it is often critical to the outcome of a first amendment challenge to determine what type of forum is involved. For example, in *Greer v. Spock*,<sup>40</sup> several political candidates were denied access to the sidewalks and streets within Fort Dix for the purpose of discussing election issues with military personnel and their families.<sup>41</sup> The plaintiffs argued that because the streets and sidewalks of Fort Dix were open to civilian traffic, and because civilian speakers had occasionally been invited to speak at the base, the base was a public forum and the plaintiffs should be allowed access for campaigning purposes.<sup>42</sup> However, the Supreme Court held that simply because members of the public were allowed to freely visit property owned and operated by the government did not mean a public forum for purposes of the first

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37. *Perry*, 460 U.S. at 45. The classic example of a compelling state interest arises when someone falsely shouts "fire" in a crowded theater. The state has every right to protect its citizens from this speech in this circumstance because of the likelihood of harm the speech creates. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

38. *Perry*, 460 U.S. at 46.

39. *Cornelius*, 473 U.S. 788, 806. See *infra* notes 46 - 54 and accompanying text (discussing prohibition of viewpoint-based discrimination).

40. 424 U.S. 828 (1976).

41. *Id.* at 832-33.

42. *Id.* at 830-32.

amendment had been created.<sup>43</sup> Fort Dix was devoted to military training, and the government was free to restrict access to the forum in keeping with that military mission.<sup>44</sup> Indeed, in later decisions the Supreme Court has held that the government does not create a public forum unless it intentionally opens a nontraditional forum for public expression.<sup>45</sup>

### 3. *Viewpoint-Based Discrimination*

Regardless of the forum, speech may not be suppressed by the government if the suppression is viewpoint-based.<sup>46</sup> Even if the expression occurs in a nonpublic forum, the fact that reasonable grounds exist for limiting access to that nonpublic forum will not save a regulation that is merely a disguise or pretense for viewpoint-based discrimination.<sup>47</sup>

An example of viewpoint-based discrimination can be seen in *Healy v. James*.<sup>48</sup> In *Healy*, the president of a state college in Connecticut denied official recognition to a chapter of the Students for a Democratic Society (SDS)<sup>49</sup> because the president believed the organization adhered to a philosophy of violence and disruption.<sup>50</sup> As a result, the SDS was unable to hold meetings in campus facilities, use campus bulletin boards to post

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43. *Id.* at 836.

44. *Id.* at 838 & n.10.

45. *Cornelius v. NAACP Def. and Educ. Fund*, 473 U.S. 788, 802 (1985). *See infra* notes 207-209 (discussing the possibility that school administrators could create a public forum through curriculum such as a school newspaper or drama productions if the administrators failed to retain control over the content of the curriculum).

46. *Id.* at 811. In *Perry*, the Court determined that the school was not discriminating on the basis of viewpoint by excluding one union from having access to school mail facilities after an opposing union won the right to exclusive representation of the teachers. *Perry*, 460 U.S. at 48-49. The Court believed it was more accurate to characterize the access policy as being based on the "status" of the unions rather than on their respective viewpoints. *Id.* *See infra* notes 210 - 213 and accompanying text (questioning whether the court's holding in *DiBona v. Matthews* can be understood as limited to prohibiting viewpoint-based discrimination).

47. *Cornelius*, 473 U.S. at 811.

48. 408 U.S. 169 (1972).

49. *Id.* at 174.

50. *Id.* at 187.

announcements, or place announcements in the school newspaper.<sup>51</sup> Conceding that a college has a legitimate interest in preventing campus disruption, and that this interest might justify banning student organizations that may prove to be disruptive, the Court held that a “heavy burden” rests on the college to demonstrate the appropriateness of banning the student organization.<sup>52</sup> The Court went on to hold that it was impermissible to deny recognition to the group based upon the administration’s disagreement with the group’s philosophy.<sup>53</sup> The Court stated that a college, as an instrumentality of the state, cannot restrict speech simply because it finds the views expressed by a group to be abhorrent.<sup>54</sup>

*B. Balancing First Amendment Rights and Control of the School Environment*

*1. School Administration’s Regulation of Noncurricular Speech*

Fundamental to the guarantee of free speech is the availability of opportunities for all types of expression.<sup>55</sup> This ensures that a desired message can be conveyed and received.<sup>56</sup> The right to receive ideas and information is recognized as particularly important for students because receiving information prepares them to effectively participate in our diverse society.<sup>57</sup> However, in *Tinker v. Des Moines School District*,<sup>58</sup> the Supreme Court of the United States held that the first amendment rights of students and teachers must be balanced with the comprehensive authority of states and school officials to control conduct in public schools.<sup>59</sup>

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51. *Id.* at 176.

52. *Id.* at 184.

53. *Id.* at 187.

54. *Id.* at 187-88.

55. *Young v. American Mini Theatres*, 427 U.S. 50, 76 (1976) (Powell, J., concurring).

56. *Id.* (Powell, J., concurring).

57. *Board of Educ. v. Pico*, 457 U.S. 853, 868 (1982).

58. 393 U.S. 503 (1969).

59. *Id.* at 506-07.

In *Tinker*, the Court held that it offended the Constitution to allow public high school officials to forbid students to wear black armbands to protest the Vietnam War when the officials did not foresee that wearing the armbands would cause substantial disruption or material interference with school activities, and no such disruption in fact occurred.<sup>60</sup> The *Tinker* Court stated that in order for school officials to justify prohibiting student speech, the officials must be able to show that they acted on something more than a “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>61</sup> Under the *Tinker* standard, unless the student’s speech materially disrupts class work, substantially disrupts the operation of the school, or invades the rights of others, school officials may not constitutionally restrict the student’s freedom of expression.<sup>62</sup>

## 2. School Administration’s Regulation of Curriculum

In contrast to the noncurricular student speech taking place in *Tinker*, the Supreme Court of the United States’ decision in *Hazelwood School District v. Kuhlmeier*<sup>63</sup> sets a different standard of review when the issue is curriculum control. In *Kuhlmeier*, the Court was asked to decide whether a principal’s editorial control over a high school newspaper invaded the first amendment rights of the student authors.<sup>64</sup> After determining the school newspaper, *Spectrum*, was part of the curriculum, and that the school did not create a public forum by publishing the newspaper as part of the student’s class work,<sup>65</sup> the Court held that the high school

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60. *Id.* at 514.

61. *Id.* at 509.

62. *Id.* at 513.

63. 484 U.S. 260 (1988).

64. *Id.* at 264.

65. *Id.* at 270. Because no public forum had been created, school officials were allowed to impose reasonable restrictions on the speech of students, teachers, and other members of the school community. *Id.* at 267. The Court decided *Spectrum* was not a public forum because school officials did not demonstrate a clear intent to create a public forum. *Id.* To support its position, the Court found that the school’s policy allowed school officials to retain ultimate control over the content of *Spectrum*. *Id.* at 269. Additional factors relied upon by the Court included: (1) The school policies stated that the journalism class responsible for producing

administrators did not violate the first amendment by exercising control over the content of this school-sponsored<sup>66</sup> expressive activity so long as the control was "reasonably related to legitimate pedagogical concerns."<sup>67</sup> The *Kuhlmeier* Court determined that the principal's censorship of articles dealing with divorce and pregnancy was reasonably related to his concern that "frank talk" contained in the articles was inappropriate in a publication distributed to fourteen-year-old high school freshmen.<sup>68</sup> In contrast, if the Court had followed the "material and substantial disruption" standard set forth in *Tinker*,<sup>69</sup> the principal would not have been able to censor the articles because there was no showing that the articles would have materially or substantially disrupted class work or the operation of the school, or invaded the rights of other students.<sup>70</sup>

*Kuhlmeier* has already been interpreted by other courts as granting wide latitude to elementary and secondary school administrators in controlling the school's curriculum.<sup>71</sup> For

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*Spectrum* was taught by a faculty member within regular school hours, and students received grades and academic credit for their work on the paper; (2) the journalism teacher had the authority to, and in fact did exercise control over *Spectrum*; and (3) the school's policy required that the principal review each issue of *Spectrum* prior to publication. *Id.* at 268-69. The Court did not accept that a public forum was created merely because an issue of *Spectrum* contained a Statement of Policy declaring that *Spectrum* "accepted all rights implied by the First Amendment." *Id.* at 269. See *supra* notes 29 - 45 and accompanying text (discussing the public forum doctrine).

66. See *infra* notes 152 - 155 and accompanying text (discussing the "school-sponsorship" rationale).

67. *Kuhlmeier*, 484 U.S. at 273.

68. *Id.* at 274-75.

69. See *supra* notes 58 - 62 and accompanying text (discussing the *Tinker* decision).

70. *Kuhlmeier*, 484 U.S. at 265-66.

71. See *Planned Parenthood v. Clark County School Dist.*, 887 F.2d 935, 946 (9th Cir. 1989) (relying on *Kuhlmeier* to find that a school could refuse to publish an advertisement from Planned Parenthood in the school's newspaper, yearbooks, and athletic event programs); *Crosby v. Holsinger*, 852 F.2d 801, 802-03 (4th Cir. 1988) (following *Kuhlmeier* to allow a school principal to eliminate the school mascot because the mascot offended black students and limited their participation in school activities); *Krizek v. Cicero-Stickney Township High School Dist.*, 713 F. Supp. 1131, 1139 (N.D. Ill. 1989) (holding that because under *Kuhlmeier* the school board could have legitimately banned the showing of a film to eleventh graders due to the film's content, the school board did not violate a nontenured teacher's first amendment rights by not renewing her contract because she showed the film); *McCarthy v. Fletcher*, 207 Cal. App. 3d 130, 145-46, 254 Cal. Rptr. 714, 723 (1989) (applying *Kuhlmeier*'s legitimate pedagogical concern standard to allow California high school administrators to censor extra-curricular reading

example, in *Virgil v. School Board*<sup>72</sup> a Florida district court granted a motion for summary judgment in favor of high school administrators who banned a humanities textbook from the high school's curriculum.<sup>73</sup> The textbook contained a play by Aristophanes and a poem by Chaucer that the school board deemed vulgar and unsuitable for eleventh and twelfth graders.<sup>74</sup> In rejecting the plaintiff's argument that the school board could not ban a book that was already part of the curriculum,<sup>75</sup> the district court reluctantly applied *Kuhlmeier* and held that the first amendment was not violated so long as the curriculum decision was reasonably related to legitimate pedagogical concerns,<sup>76</sup> even though in this case the "legitimate concern" was the exposure of

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recommendations by teachers). *But see* *Burch v. Barker*, 861 F.2d 1149, 1150 (9th Cir. 1988) (following *Kuhlmeier*, but distinguishing the speech involved—an unauthorized student-written newspaper—as speech that must be tolerated by the school, rather than speech that the school may censor because the speech could appear to be affirmatively promoted by the school); *Ramano v. Harrington*, 725 F. Supp. 687, 689 (E.D.N.Y. 1989) (refusing to apply *Kuhlmeier* where school paper was "school-sponsored" in terms of funding from the Board of Education, but was an ungraded, extra-curricular activity); *Leeb v. DeLong*, 198 Cal. App. 3d 47, 54, 243 Cal. Rptr. 494, 497-98 (1988) (holding that because the California Education Code clearly places editorial control of student publications on student editors, the broad power to censor these publications granted to administrators in *Kuhlmeier* is not available to educators in California). *See also* CAL. EDUC. CODE § 48907 (West Supp. 1990) (statute relied on in *Leeb*).

72. 677 F. Supp. 1547 (M.D. Fla. 1988), *aff'd*, 862 F.2d 1517 (11th Cir. 1989).

73. *Id.* at 1549.

74. *Id.*

75. *Cf.* *Board of Educ. v. Pico*, 457 U.S. 853, 871-72 (1982) (holding that a school board could not remove discretionary reading books from a junior/senior high school's library; however, if the books were never purchased, the school board was under no duty to add the books to the collection). The *Pico* plurality distinguished the removal of books from the addition of books to the library shelves. *Id.* The plurality found the removal of books inappropriate because removal signified a suppression of ideas and an attempt to prescribe the appropriate opinions regarding political, national, or religious matters. *Id.* However, the dissent in *Pico* stated that the decision to remove books is not any different than the decision to add books in terms of "official suppression." *Id.* at 892-93 & n.8 (Burger, C.J., dissenting). It is interesting to note that this argument was not raised by the *Virgil* plaintiffs on appeal to the Eleventh Circuit. Instead, plaintiffs argued that *Kuhlmeier* did not control because the offensive portions of the textbook were optional readings for an elective course. *Virgil v. School Board*, 862 F.2d 1517, 1522 (11th Cir. 1989).

76. *See* *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 264 (holding that control over the content of school-sponsored expressive activities does not violate the first amendment so long as the control is reasonably related to legitimate pedagogical concerns). *See also supra* notes 63 - 68 and accompanying text (discussing the *Kuhlmeier* opinion).

young minds to “vulgar and unsuitable materials” such as classic Greek literature and Renaissance poetry.<sup>77</sup>

The broad deference given to elementary and secondary school administrators to exercise curriculum control as advanced in *Kuhlmeier* and *Virgil* has not yet been specifically granted to college administrators by the Supreme Court of the United States.<sup>78</sup> Although the Court has not ruled on the specific balance to be struck between student and faculty first amendment rights and the right of administrators to control curriculum choices at the college level,<sup>79</sup> the Court has indicated that it is necessary to guard first amendment rights more rigorously on college campuses than on the campuses of elementary or high schools.<sup>80</sup> Additionally, in opinions dealing with issues pertinent to college and university campuses, although not specifically relating to curriculum control, the Court has indicated great respect for the first amendment rights of university and college students and faculty members.<sup>81</sup>

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77. *Virgil*, 677 F. Supp. at 1551.

78. See *Kuhlmeier*, 484 U.S. at 274 n.7 (Court specifically defers deciding whether the same degree of deference granted to elementary and high school administrators to control school-sponsored expressive activities should be granted to college and university administrators).

79. This is precisely the issue raised in *DiBona v. Matthews*, 220 Cal. App. 3d 1329, 269 Cal. Rptr. 882 (1990). See *infra* notes 100 - 188 and accompanying text (discussing the *DiBona* opinion).

80. See *Healy v. James*, 408 U.S. 169, 180 (1969) (holding that first amendment protections should apply with the same force on a college campus as they do in the community at large). See also *Board of Educ. v. Pico*, 457 U.S. 853, 920 (1982) (Rehnquist, J., dissenting) (stating that in its role as educator, the government is subject to fewer constitutional restraints when operating an elementary or secondary school than when operating a college or university). Justice Rehnquist's statement that the government is more restricted when it attempts to censor college or university speech appears to be an accurate reflection of several justices currently sitting on the Court. For example, in his concurrence Justice Blackmun stated that a school board could refuse to make a book available to a student because the book was inappropriate for that student's age group. *Id.* at 880 (Blackmun, J., concurring). Additionally, Justice O'Connor, in joining in Chief Justice Burger's dissenting opinion, joined in the Chief Justice's finding that “fundamental values” could not be inculcated except by having primary and secondary school boards make content-based decisions about the appropriateness of materials within the school library and curriculum. *Id.* at 889 (Burger, C.J., dissenting). See generally *supra* notes 48 - 54 and accompanying text (discussing the *Healy* opinion).

81. See *Papish v. Univ. of Missouri Curators*, 410 U.S. 667, 670 (1973) (finding that the dissemination of ideas on a state university campus may not be shut off merely because the ideas are in bad taste or offend conventions of decency).

An example of the Court's respect for first amendment rights on college campuses can first be seen in the 1957 decision in *Sweezy v. New Hampshire*.<sup>82</sup> Sweezy, a college lecturer, refused to answer questions put to him by the New Hampshire Attorney General<sup>83</sup> relating to a lecture Sweezy had given at the University of New Hampshire.<sup>84</sup> Finding this line of questioning in violation of Sweezy's liberty interest in academic freedom and political expression, the *Sweezy* Court stated that academic freedom in American universities is essential because of the vital role played by those who guide and train our youth.<sup>85</sup> To impose a straitjacket on intellectual leaders of colleges and universities would be to imperil the nation's future because scholarly thinking cannot flourish when surrounded by an atmosphere of suspicion and distrust.<sup>86</sup> College teachers and students must always remain free to inquire, study, and evaluate so that they may gain new understandings and save our society from stagnation.<sup>87</sup>

Ten years later, the Court in *Keyishian v. Board of Regents*<sup>88</sup> reiterated the reasoning in *Sweezy* and invalidated a New York statute barring university professors from employment because of their affiliation with the Communist Party of America.<sup>89</sup> Although conceding the legitimacy of New York's interest in protecting its educational system from subversion,<sup>90</sup> the Court held that the first amendment would not tolerate "laws that cast a pall of orthodoxy over the classroom."<sup>91</sup> The Court found that the classroom is "peculiarly the 'marketplace of ideas,'"<sup>92</sup> and that vigilant

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82. 354 U.S. 234 (1957).

83. *Id.* at 236-38. Sweezy was being questioned pursuant to New Hampshire's Subversive Activities Act of 1951, which was enacted to protect against the perceived threat of communism. *Id.*

84. *Id.* at 243-44.

85. *Id.* at 250.

86. *Id.*

87. *Id.*

88. 385 U.S. 589 (1967).

89. *Id.* at 609-10.

90. *Id.* at 602.

91. *Id.* at 603.

92. *Id.*

protection of constitutional freedoms is vital in American universities.<sup>93</sup>

If extended to curriculum control in the university setting, it is possible to view the *Kuhlmeier* "legitimate pedagogical concern" standard as a departure by the Court from the broad, almost idealistic respect accorded American university students and faculty in *Sweezy* and *Keyishian* because in essence, the *Kuhlmeier* standard could be applied so as to allow censorship in curriculum matters, such as textbooks and course offerings, so long as the administration can articulate a reasonable explanation for forbidding certain expression. However, one federal court of appeals adopted the *Kuhlmeier* standard for curriculum control in a university setting because the court believed it was essential to academic freedom that university administrators who reasonably regulated speech and campus activities be given great deference by federal courts in matters of curriculum choice.<sup>94</sup> In *Alabama Student Party v. Student Government Association of the University of Alabama*,<sup>95</sup> the Court of Appeals for the Eleventh Circuit noted that while academic freedom thrives on the independent and uninhibited exchange of ideas among teachers and students, it also thrives on autonomous decision-making by administrators.<sup>96</sup> The court believed the *Kuhlmeier* "legitimate pedagogical concern" standard achieved this goal.<sup>97</sup>

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93. *Id.*

94. *Alabama Student Party v. Student Gov't. Assn. of the Univ. of Alabama* 867 F.2d 1344, 1347 (11th Cir. 1989) (holding that because the university viewed its student government association as a "learning laboratory," the university had created a nonpublic forum reserved as a supervised learning experience for the students). Because this learning laboratory took on characteristics of speech promoted by the university, the university was entitled to place reasonable restrictions on the learning experience consistent with the university's legitimate pedagogical concern in minimizing the disruptive effect of campus electioneering. *Id.* Therefore, the court upheld regulations restricting distribution of campaign literature and limiting open forums or debates to the week of the election. *Id.* at 1345. *But see* *Student Gov't. Assn. v. Bd. of Trustees of the Univ. of Massachusetts*, 868 F.2d 473, 480 n.6 (1st Cir., 1989) (interpreting *Kuhlmeier* as inapplicable to college newspapers because the *Kuhlmeier* Court specifically refused to decide whether the holding should apply to universities or colleges).

95. 867 F.2d 1344 (11th Cir. 1989).

96. *Id.* at 1347 (quoting *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 (1985)).

97. *Id.*

In contrast, the California Court of Appeal in *DiBona v. Matthews* rejected the *Kuhlmeier* standard.<sup>98</sup> Faced with whether censorship of a play by a college administration can be justified when the administration gave the teacher freedom to choose the play, but stepped in to forbid production after the play had been cast because the administrators objected to the language in the play and there were indications that portions of the surrounding community objected to the play's content, the *DiBona* majority takes a more restrictive stand on a college administrator's ability to censor curriculum.<sup>99</sup>

## II. THE CASE

### A. *The Facts*

In the summer of 1986, Alan DiBona was hired by the San Diego Community College District (District) to teach a drama class at the Educational Cultural Complex (ECC), a community college located in southeast San Diego.<sup>100</sup> DiBona decided his class would produce *Split Second*, a play that tells the story of a black police officer (Val) who chases down and apprehends a white suspect in a deserted back alley of a big city on the fourth of July.<sup>101</sup> While waiting for a patrol car to transport them to the police station, the suspect verbally attacks Val with racially offensive, degrading epithets that represent to Val the lifetime of prejudice he has had to endure.<sup>102</sup> Although the suspect presents no physical threat, Val becomes enraged beyond reason, draws his

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98. *DiBona v. Matthews*, 220 Cal. App. 3d 1329, 1346-47, 269 Cal. Rptr. 882, 892-93 (1990).

99. See *infra* notes 131-132 and accompanying text (setting forth the holding in the *DiBona* opinion).

100. *DiBona*, 220 Cal. App. 3d at 1333, 269 Cal. Rptr. at 884.

101. *Id.* at 1333, 269 Cal. Rptr. 884. See *Split Second*, *supra* note 4, Act I, Scene I.

102. See *Split Second*, *supra* note 4, Act I, Scene 1 (depicting the the encounter between Val and the suspect where the suspect hurls abusive statements such as "spearchucker" and "fucking nigger cop" at Val, that all black policemen should be shipped to Africa to direct traffic in the jungle).

service revolver and shoots the suspect through the heart.<sup>103</sup> Val then plants a knife in the dead man's hand and fabricates a self-defense story to explain the shooting.<sup>104</sup>

The remainder of the play deals with Val's struggle between telling the truth or living with the lie he has created.<sup>105</sup> If he tells the truth, he will lose his wife and his job,<sup>106</sup> and his fellow black officers will suffer the stigma of the "black cop gone bad" attitude from a predominantly white police force.<sup>107</sup> Alternatively, by living with the lie, Val will always know he did not take responsibility for his actions.<sup>108</sup>

DiBona's decision to produce *Split Second* coincided with, and was probably inspired by, the murder trial of Sagon Penn.<sup>109</sup> Penn, a young black man living in southeast San Diego, was accused of fatally shooting one white police officer and seriously wounding a second officer and a female observer.<sup>110</sup> Penn pled self-defense, claiming the officers verbally abused and physically assaulted him.<sup>111</sup> During the time DiBona attempted to produce *Split Second*, Penn was acquitted of murder<sup>112</sup> and the prosecution decided to retry him for voluntary manslaughter.<sup>113</sup>

Although the ECC did not require teachers to obtain approval from the administration for the play to be performed in a drama class, DiBona discussed the content of *Split Second* with Robert Matthews, the president of ECC and a defendant in the *DiBona*

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103. *Id.*

104. *Id.*

105. *Split Second*, *supra* note 4, Act I, Scenes 2-4; *id.* Act II, Scenes 1-5.

106. *Id.*, Act II, Scene 2.

107. *Id.*, Act II, Scene 3.

108. *Id.*, Act II, Scene 4.

109. *DiBona v. Matthews*, 220 Cal. App. 3d 1329, 1335, 269 Cal. Rptr. 882, 885 (1990).

110. *Id.* The black community of San Diego viewed Penn's trial as an opportunity to bring to the public's attention the perceived practice of the San Diego police force to verbally and physically harass minorities. Bunting, *Police Actions Also on Trial in San Diego Officer's Death*, Los Angeles Times, February 18, 1986, § 2, at 1, col. 1.

111. Bunting, *supra*, note 110 at 1.

112. *See Sagon Penn Innocent of Murder*, Los Angeles Times, June 27, 1986, § 1, at 3, col. 1.

113. *See Schachter, Retrial of Suspect in Slaying of San Diego Officer Planned*, Los Angeles Times, July 11, 1986, § 1, at 29, col. 1.

case, in late May 1986.<sup>114</sup> Apparently Matthews voiced no objections to *Split Second* at that time.<sup>115</sup> DiBona cast the play by June 13, prior to the commencement of summer school classes on June 16.<sup>116</sup>

On June 16, defendant Matthews received a phone call from the past president of the ECC informing him that certain community church leaders did not approve of the production of *Split Second*.<sup>117</sup> Matthews relayed this concern to DiBona, who in turn informed his class at their first meeting that the play was being put "on hold" by the administration.<sup>118</sup> Matthews also obtained and skimmed through a script of *Split Second*, and at that point concluded that the play was not appropriate for production at the ECC.<sup>119</sup> Urged by DiBona and two student cast members to reconsider his decision, Matthews read the entire script and requested defendant James Hardison, the ECC dean, do the same.<sup>120</sup> After reading the script, Hardison informed DiBona that *Split Second* could not be produced at the ECC.<sup>121</sup> Hardison also

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114. DiBona v. Matthews, 220 Cal. App. 3d 1329, 1334, 269 Cal. Rptr. 882, 884 (1990).

115. *Id.* See *infra* notes 161 - 167 and accompanying text (discussing the constitutional significance of the timing of censorship).

116. DiBona, 220 Cal. App. 3d at 1334, 269 Cal. Rptr. at 884.

117. *Id.* The opinion never specified who the "church leaders" were or exactly why they objected to the production of *Split Second*. It is possible that the language contained in *Split Second* was enough to cause objection. However, it is more likely that the objections stemmed from the parallels between the Sagon Penn murder trial and the subject matter of *Split Second*. See *infra* note 127 and accompanying text (discussing the Sagon Penn murder trial and the trial court's determination that this alone justified the cancellation of *Split Second*).

118. DiBona, 220 Cal. App. 3d at 1335, 269 Cal. Rptr. at 885. For this reason, DiBona did not submit the enrollment cards for the students cast in his play to the ECC registrar's office. *Id.* at 1335, 269 Cal. Rptr. at 885-86. Since it was the custom for students to wait until they were cast in a show before adding the Drama 250 course to their curriculum and paying the requisite fee, there were only three students officially enrolled in the course at the time the class was canceled. *Id.* at 1334, 1336, 269 Cal. Rptr. 884-85. Because the ECC's general policy was to cancel classes with enrollment of less than ten students, DiBona's Drama 250 class was canceled on June 17, 1986, the same day defendants made their final decision not to allow *Split Second* to be produced. *Id.* at 1335-36, 269 Cal. Rptr. at 885-86. However, DiBona was never informed the class was canceled due to low enrollment. *Id.* at 1336, 269 Cal. Rptr. at 886. According to DiBona, defendant James Hardison, the ECC dean, told DiBona the class was canceled because of the "sensitivity of the community to the subject matter." *Id.* at 1335, 269 Cal. Rptr. at 885.

119. *Id.* at 1334, 269 Cal. Rptr. at 884.

120. *Id.* at 1335, 269 Cal. Rptr. at 885.

121. *Id.*

rejected DiBona's request to allow the students to receive credit for a private performance of the play.<sup>122</sup>

DiBona and one of the students, plaintiff Scott Gundlach, filed an action for injunctive relief in 1986, petitioning for a writ of supersedeas from the California Court of Appeal for the Fourth District.<sup>123</sup> After the court of appeal denied their request for a preliminary injunction, DiBona and Gundlach filed an action for declaratory and injunctive relief, alleging violation of their constitutional rights under the first amendment.<sup>124</sup> Defendants Matthews and Hardison moved for summary judgment, arguing mootness and lack of standing,<sup>125</sup> and lack of any first amendment violations.<sup>126</sup> The trial court granted the defendants' motion for summary judgment,<sup>127</sup> and the plaintiffs appealed.

### *B. The Majority Opinion*

Although the case was before the court of appeal for resolution of a motion for summary judgment, the majority characterized the record before the court as similar to the record following a full trial.<sup>128</sup> After disposing of the procedural issues,<sup>129</sup> the court

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122. *Id.* at 1336, 269 Cal. Rptr. at 885. Although DiBona and the student cast members ultimately performed the play off-campus, none of the students received course credit and DiBona was not compensated for teaching the course. *Id.* at 1336, 269 Cal. Rptr. at 886.

123. *Id.* at 1350, 269 Cal. Rptr. at 895.

124. *Id.* at 1336, 269 Cal. Rptr. at 886.

125. Both the majority and dissenting opinions discuss the justiciability of this controversy before reaching their respective first amendment opinions. *Id.* at 1338-40, 269 Cal. Rptr. at 887-88 (majority's standing and mootness discussion); *id.* at 1349-51, 269 Cal. Rptr. at 894-96 (Huffman, J., dissenting) (dissent's standing and mootness discussion).

126. *Id.* at 1336, 269 Cal. Rptr. at 886.

127. *Id.* The trial court took judicial notice of the "political atmosphere" in southeast San Diego at the time Hardison canceled DiBona's class. *Id.* at 1337, 269 Cal. Rptr. at 886. The trial court found that the administration properly considered the potential harm that could result from producing *Split Second*. *Id.* The court compared producing this play in southeast San Diego with yelling "fire" in a crowded theater. *Id.* Considering the nature of the college as a public institution, utilizing public money, and operating within a strife-ridden community, the trial court held that the administrators had the discretion to cancel the production of *Split Second* to prevent controversy within the campus or the community. *Id.* at 1337-38, 269 Cal. Rptr. at 886-87.

128. *Id.* at 1341 n.10, 269 Cal. Rptr. at 889 n.10. Since the plaintiffs filed no cross-motion for summary judgment, the court's task was to determine if there were still triable issues of fact. *Id.* The court answered this question affirmatively, commenting on the factual record before it to provide the lower court with guidance on remand. *Id.*

then addressed the central issue of this case: The scope of a college administrator's ability to encroach upon the first amendment rights of instructors and students when regulating curriculum.<sup>130</sup> The appellate court held that defendants Matthews and Hardison acted in violation of plaintiffs DiBona and Gundlach's first amendment rights if the defendants canceled production of *Split Second* in order to avoid the controversy the play may have engendered,<sup>131</sup> or if they canceled *Split Second* because of the allegedly offensive language contained in the play.<sup>132</sup> Thus, the court of appeal analyzed and invalidated two arguments offered by the college administrators in defense of their decision to cancel *Split Second*.

### 1. Content-Based Discrimination--The Avoidance of Controversy

In determining that the defendant administrators may have violated the plaintiffs' first amendment rights by canceling *Split Second*, the *DiBona* majority first turned to case law forbidding content-based discrimination.<sup>133</sup> However, by failing to engage in any forum analysis in the majority opinion, the majority departed from the approach used by the Supreme Court of the United States over the last twenty years when analyzing constitutional challenges to regulation of protected speech.<sup>134</sup> Rather, the *DiBona* majority simply stated in a footnote that although the plaintiffs argued that

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129. The majority also briefly discussed the defendants' argument that the class was canceled due to low enrollment. *Id.* at 1340, 269 Cal. Rptr. at 888-89. This claim was dismissed by the majority as having misconstrued the real issue; namely, that the cancellation of the class was directly related to the content of *Split Second*. *Id.* at 1340-41, 269 Cal. Rptr. at 889.

130. *Id.* at 1341 n.9, 269 Cal. Rptr. at 889 n.9. (stating that the court read the record as containing objections by the defendant to production of *Split Second* as part of the curriculum of an ECC drama class).

131. *Id.* at 1344, 269 Cal. Rptr. at 891.

132. *Id.* at 1346-47, 269 Cal. Rptr. at 893.

133. *Id.* at 1340-44, 269 Cal. Rptr. at 888-91 (citing to *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969), *Terminiello v. Chicago*, 337 U.S. 1 (1949), *Braxton v. Municipal Court*, 10 Cal. 3d 138, 514 P.2d 697, 109 Cal. Rptr. 897 (1973), *Brown v. Bd. of Regents of Univ. of Nebraska*, 640 F. Supp. 674 (D. Neb. 1986)).

134. See *supra* notes 29 - 39 and accompanying text (discussing the Supreme Court's adoption of a forum analysis in first amendment decisions).

the defendants had created a public forum, this classification was not helpful because the majority believed the defendants were simply exercising control over curriculum that had not created a public forum.<sup>135</sup> The majority then went on to apply standards utilized by the Supreme Court of the United States only when the Court has determined a public forums exists.<sup>136</sup>

For example, the *DiBona* majority determined that college administrators may not censor speech unless the censorship is necessary to serve the compelling state interest of preventing disturbances on campus.<sup>137</sup> As authority, the court cited *Tinker v. Des Moines*,<sup>138</sup> a decision which dealt with noncurricular "symbolic" speech by students.<sup>139</sup> Although *Tinker* was decided prior to the Court's adoption of forum analysis as a method of determining when the government can restrict speech on the government's property,<sup>140</sup> later decisions have recognized that university campuses, at least as to university students, possess many of the characteristics of a public forum.<sup>141</sup>

The *DiBona* court also stated that a college or university administrator's interest in avoiding disturbances on campus cannot support the suppression of speech unless the speech is "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."<sup>142</sup>

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135. *DiBona*, 220 Cal. App. 3d at 1341 n.9, 269 Cal. Rptr. at 839 n.9. See *infra* notes 193 - 196 and accompanying text (discussing ramifications of the court's failure to examine the forum issue).

136. *DiBona*, 220 Cal. App. 3d at 1342-43, 269 Cal. Rptr. at 890-91. See *infra* note 178 and accompanying text (discussing the *DiBona* dissent and Justice Huffman's belief that when activities may be fairly characterized as part of the school curriculum, the administration has not created a public forum and therefore the constitutional mandates governing regulation of speech in a public forum are not applicable). See also *supra* notes 35 - 39 and accompanying text (discussing standards applied by the Court in public and nonpublic forums).

137. *DiBona*, 220 Cal. App. 3d at 1342-44, 269 Cal. Rptr. at 890-91.

138. *Id.* at 1342-44, 269 Cal. Rptr. at 890-91 (citing *Tinker v. Des Moines*, 393 U.S. 503 (1969)). See *supra* notes 58 - 62 and accompanying text (discussing *Tinker*).

139. *Tinker*, 393 U.S. at 505.

140. See *U.S. v. Kokinda*, 110 S.Ct. 3115, 3119 (1990) (stating that since its decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the Court has adopted a forum analysis).

141. See *Widmar v. Vincent*, 454 U.S. 263, 267 n. 5 (1981) (collecting cases and discussing to what extent universities can and have been classified as public forums).

142. *DiBona*, 220 Cal. App. 3d at 1342, 269 Cal. Rptr. at 890 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

As support, the majority cited *Terminiello v. Chicago*.<sup>143</sup> *Terminiello*, like *Tinker*, was a case decided before the Supreme Court adopted a forum analysis approach to first amendment decisions. However, *Terminiello* was also a case that dealt with public forum speech; namely, the rights of a speaker at a public meeting.<sup>144</sup>

The *DiBona* majority found that neither the clear and present danger or the substantial interference requirements had been satisfied simply because the religious community opposed production of *Split Second*, or because the southeast San Diego community was agitated over racial issues in the wake of the Sagon Penn murder trial.<sup>145</sup> Rather, these concerns presented a classic illustration of a constitutionally insufficient “undifferentiated fear” of disturbance.<sup>146</sup> Because defendants Matthews and Hardison were unable to show a clear and present danger to the school or the public (the *Terminiello* standard), or even that the play would materially and substantially interfere with

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143. 337 U.S. 1 (1949).

144. *Terminiello*, 337 U.S. at 2-3. The *DiBona* court also relied on *Brown v. Board of Regents of University of Nebraska*, 640 F. Supp. 674 (D. Neb. 1986). In *Brown*, the court found that university students were unconstitutionally denied the right to receive controversial ideas when a university-owned, but non-classroom related, film theater canceled a presentation of *Hail Mary*, a controversial film depicting the birth of Christ. *Brown*, 640 F. Supp. at 681. The theater canceled the film because of opposition from the community and the state legislature. *Id.* at 676-77. The *DiBona* majority drew factual and decisional parallels between the *DiBona* and *Brown* opinions, citing with approval *Brown*'s finding that “action taken by an arm of the state merely to avoid controversy from the expression of ideas is an insufficient basis for interfering with the right to receive information.” *DiBona*, 220 Cal. App. 3d at 1344, 269 Cal. Rptr. at 891 (quoting *Brown*, 640 F. Supp. at 679). Additionally, the *DiBona* majority cited *Braxton v. Municipal Court*, 10 Cal. 3d 138, 514 P.2d 697, 109 Cal. Rptr. 897 (1973). In *Braxton*, the California Supreme Court was called on to determine the constitutionality of a California statute that allowed state colleges or universities to bar persons from the campus if the college or university administrator reasonably believed that person had willfully disrupted the orderly operation of the campus. *Braxton*, 10 Cal. 3d at 142-43, 514 P.2d at 699-700, 109 Cal. Rptr. at 899-90. The *Braxton* court determined that the statute in question would be unconstitutionally overbroad unless the statute was given a narrow construction, so that the content of speech was not restricted simply because the speech disrupted the tranquility of the campus or offended the tastes of the public or the school administrators. *Id.* at 146-47, 514 P.2d at 701-02, 109 Cal. Rptr. at 901-02.

145. *DiBona*, 220 Cal. App. 3d at 1343, 269 Cal. Rptr. at 890-91.

146. *Id.* at 1342-43, 269 Cal. Rptr. at 890-91 (citing *Tinker v. Des Moines School District*, 393 U.S. 503, 508). An undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. *Tinker*, 393 U.S. at 508.

the appropriate discipline in the operation of the school (the *Tinker* standard), the defendants' censorship of *Split Second* was constitutionally inappropriate.<sup>147</sup>

## 2. Regulation of Offensive Language

The *DiBona* majority also rejected the defendants' contention that college administrators should be afforded the same broad discretion to control their curriculum as has been granted administrators at elementary and secondary schools in *Kuhlmeier*.<sup>148</sup> *Kuhlmeier*, which provided that administrators could regulate "school-sponsored"<sup>149</sup> expressive activities so long as the regulation is reasonably related to legitimate pedagogical concerns, and the other cases granting broad latitude to high school administrators to regulate expressive activities,<sup>150</sup>

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147. *DiBona*, 220 Cal. App. 3d. at 1343, 269 Cal. Rptr. at 890-91.

148. *Id.* at 1346-47, 269 Cal. Rptr. at 892-93. See *supra* notes 63 - 70 and accompanying text (discussing *Kuhlmeier*). The court of appeal found it clear that the trial court had not relied on the defendants' assertion that they had the right to cancel the play due to its allegedly offensive language. *DiBona*, 220 Cal. App. 3d at 1344, 269 Cal. Rptr. at 891. Despite this, the court of appeal felt obliged to decide this issue, since resolution of the issue in the defendants' favor could provide an adequate independent basis for defendants to prevail on their motion for summary judgment. *Id.* See *supra* note 102 (giving examples of the offensive language in *Split Second*).

149. See *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 270-71 (1988) (stating that the question of "school sponsorship" centers upon whether the first amendment requires a school to affirmatively promote particular student speech). The *Kuhlmeier* Court found that the question of school sponsorship concerned the administration's authority over school-sponsored publications, theatrical productions, and other expressive conduct that might reasonably be perceived by students, parents or the public to bear the imprimatur of the school. *Id.* The Court included expressive conduct that could be considered as part of the school curriculum, whether or not the conduct occurs in a traditional classroom setting, so long as the conduct is supervised by faculty members and designed to impart specific knowledge or particular skills to students and audiences. *Id.* According to *Kuhlmeier*, educators may exercise greater control over school-sponsored expression, to assure that readers or listeners are not exposed to material that could be inappropriate for their age, as well as to ensure that the views of the individual speaker are not erroneously attributed to the school. *Id.* at 271.

150. See *Seyfried v. Walton*, 668 F. 2d 214, 215-17 (3rd Cir., 1981) (holding that high school administrators could stop an already-rehearsed production of *Pippin* because of the play's sexual content); *Bell v. U-32 Bd. of Educ.*, 630 F. Supp. 939, 945 (D. Vermont, 1986) (finding that the board did not abridge the student's first amendment rights when the board canceled the production of a play entitled *Runaways*, which focused on the problems, exploitation, and abuse of child runaways).

were distinguished by the majority as having dealt with minors rather than adults.<sup>151</sup>

The *DiBona* majority found unpersuasive the defendants' argument that by recognizing a strong governmental interest in regulating school-sponsored expressive activities, *Kuhlmeier* had created a standard that does not differentiate between the education of minors and the education of adults.<sup>152</sup> The majority held that the rationale underlying the *Kuhlmeier* school sponsorship rule cannot be extended to adult education.<sup>153</sup> The court reasoned that the general public is more likely to view elementary and secondary school-sponsored student speech as bearing the "imprimatur of the school" and therefore as being actively promoted by the school, then it is to view college-sponsored speech as bearing the imprimatur of, and being actively promoted by, the college.<sup>154</sup> By rejecting the school-sponsorship rationale, the *DiBona* majority indicated its belief that, at the college level, there is less danger that readers or listeners will be exposed to material that may be

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151. *DiBona*, 220 Cal. App. 3d at 1345-46, 269 Cal. Rptr. at 892. See *infra* notes 63 - 70 and accompanying text (discussing the *Kuhlmeier* decision).

152. *DiBona*, 220 Cal. App. 3d at 1346, 269 Cal. Rptr. at 893. There is support for the majority's differentiation between adult and minor students. In *Bethel v. Fraser*, 478 U.S. 675 (1986), the Court devoted a significant portion of its opinion to this distinction, characterizing elementary and secondary school authorities as acting in the place of parents. *Bethel*, 478 U.S. at 684. In *Brown v. Board of Regents of the University of Nebraska*, 640 F. Supp. 674, (D. Nebraska, 1986), the district court noted that "[j]ustification for guarding junior high and high school students from material thought to be offensive is more easily found than for guarding college students and the general public from it." *Brown*, 640 F. Supp. at 680. Additionally, in *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court pointed out that university students are young adults who are less impressionable than younger students. *Widmar*, 454 U.S. at 274 n.14. See *supra* note 80 and accompanying text (discussing portions of *Board of Education v. Pico* in which some justices expressed the view that the age difference between college and high school students might dictate a different result when determining the discretion of the school administration to control the school environment). See generally *Healy v. James*, 408 U.S. 169, 197 (1972) (Douglas, J., concurring) ("Students—who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age—are adults who are members of the college or university community").

153. *DiBona*, 220 Cal. App. 3d at 1346, 269 Cal. Rptr. at 893.

154. *Id.*

inappropriate for their maturity level, or that the views of an individual speaker will erroneously be attributed to the school.<sup>155</sup>

Additionally, the majority found it unreasonable to say that by producing a play a college thereby advocates the social or sexual mores or the indecent language contained in that play.<sup>156</sup> Although in *Kuhlmeier* the Supreme Court of the United States held that school plays such as *Split Second* are school-sponsored speech, the *DiBona* majority found that the use of vulgarity in *Split Second* could not be perceived as condoned by college administrators in the same manner that profanity by student writers contained in a high school newspaper could be perceived as condoned by elementary or high school administrators, because college administrators cannot reasonably be perceived to exercise as much control over their students as do elementary and high school administrators.<sup>157</sup> Even if the language could be perceived as condoned by the college, the majority believed that *Split Second* did not advocate the use of abusive, vulgar speech and racial slurs because the use of this language in the play results in irrational, tragic consequences.<sup>158</sup>

The *DiBona* majority conceded that school administrators at any grade level have considerable discretion when deciding the content of the school's curriculum, and that the language content of a play may legitimately be considered in making curriculum choices.<sup>159</sup> Indeed, there can be no question that, as a general rule, school administrators do have broad discretion over the

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155. *Id. See Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (discussing the reasons the *Kuhlmeier* Court found for allowing greater control by administrators over school-sponsored speech).

156. *DiBona*, 220 Cal. App. 3d at 1347, 269 Cal. Rptr. at 893.

157. *Id.* at 1346-47, 269 Cal. Rptr. at 893.

158. *Id. See supra*, notes 101 - 108 and accompanying text (discussing the plot of *Split Second*).

159. *DiBona*, 220 Cal. App. 3d at 1344, 269 Cal. Rptr. at 891. "Under the guise of free speech, the First Amendment does not transfer control of a public school's curriculum from school administrators to individual teachers and students." *Id.* at 1341, 269 Cal. Rptr. at 889. *See, e.g., Board of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (holding that the plaintiffs implicitly conceded that the school board's motivation would not have been unconstitutional had the board decided to remove the books at issue from the school's library because the books were pervasively vulgar).

curriculum they present.<sup>160</sup> However, the *DiBona* majority insisted that limitations on curriculum be made before a class has commenced.<sup>161</sup>

The majority offered no support for its proposition that control must be exercised before the commencement of a class. One possible source of support may be found in *Board of Education v. Pico*,<sup>162</sup> a decision by the Supreme Court of the United States dealing with censorship of extra-curricular reading books in a high school library.<sup>163</sup> In *Pico*, the plurality drew a distinction between adding books to and removing books from a school library.<sup>164</sup> The plurality felt that removing books from the shelves constituted suppression of ideas.<sup>165</sup> Likewise, in *DiBona*, since the defendant administrators initially exercised no control over *DiBona*'s choice of plays,<sup>166</sup> the majority opinion could be read as declining to allow the administration to censor the play after the play had been cast because this would constitute a suppression of ideas.<sup>167</sup>

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160. See, e.g., *Clark v. Holmes*, 474 F.2d 928, 930-31 (7th Cir. 1972) (upholding a university's decision not to rehire a nontenured teacher because the teacher refused to comply with the university's request that he stop overemphasizing sex in his health survey course) *cert. denied* 411 U.S. 972 (1973); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (stating that public education is committed to the control of state and local authorities, and federal courts should not ordinarily interfere in the resolution of conflicts arising in the daily operation of school systems); *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507 (1969) (stating that the Supreme Court has repeatedly emphasized the comprehensive authority of the states and of school officials to prescribe and control conduct in the schools); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (finding that boards of education have important, delicate, and highly discretionary functions, but none that they cannot perform within the limits of the Bill of Rights).

161. *DiBona*, 220 Cal. App. 3d at 1347-48, 269 Cal. Rptr. at 894.

162. 457 U.S. 853 (1982).

163. *Id.* at 856-57.

164. *Id.* at 871-72.

165. *Id.*

166. *DiBona*, 220 Cal. App. 3d at 1334, 1341-42 n.11, 269 Cal. Rptr. at 884, 889 n.11.

167. But see *Pico*, 457 U.S. at 892-93 & n.8 (Burger, C.J., dissenting) (stating that "it does not follow that the decision to *remove* a book is less 'official suppression' than the decision not to acquire a book desired by someone") (emphasis in original); *Piarowski v. Illinois Community College*, 759 F.2d 625, 631 (7th Cir. 1985) (stating that it was unimaginable what first amendment policy would be served by allowing a college to prevent the exhibition of offensive art, but not allowing the college to order the art removed after it was put on exhibition), *cert. denied* 474 U.S. 1007 (1985). The *DiBona* dissent found that the majority's creation of a "post-commencement" limitation on curriculum control was not authorized by law and was an unwarranted judicial intrusion upon the school's authority to regulate curriculum content. *DiBona*, 220 Cal. App. 3d at 1356, 269 Cal. Rptr. at 900 (Huffman, J., dissenting).

It is also possible that the majority's pre-class commencement limitation was premised solely on the practice by the ECC administration, and by college and university administrators in general, of delegating to faculty members the authority to evaluate and select curriculum.<sup>168</sup> Although the majority never expressly cited this as controlling, the ECC's failure to review DiBona's choice of plays was mentioned more than once in the majority opinion.<sup>169</sup> Arguably, failure by an administration to exercise control over initial curriculum decisions could be interpreted to create a public forum.<sup>170</sup> But even without finding that a public forum has been created, this hands-off approach to curriculum control was clearly significant to the *DiBona* majority, and the majority's pre-class commencement limitation may simply be a statement by the court that if administrators fail to participate in initial curriculum decisions, they may not be allowed to censor the curriculum once it has been chosen by the faculty member.

### *C. The Dissenting Opinion*

Criticizing the majority for writing an "advisory" opinion, Justice Huffman took the position that the standing and mootness issues resolved the case without reaching the first amendment issues.<sup>171</sup> However, realizing that the majority had declared first amendment policy, Justice Huffman turned to an analysis of the first amendment issues raised in the case.<sup>172</sup>

Justice Huffman disagreed with the standards chosen by the majority for determining the constitutionality of a college

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168. See *DiBona*, 220 Cal. App. 3d at 1341-42 n.11, 269 Cal. Rptr. at 889 n.11 (discussing the fact that college administrators often exercise no initial control over an instructor's choice of classroom materials).

169. *Id.* at 1334, 1341-42 n.11, 269 Cal. Rptr. at 884, 889 n.11.

170. See *infra* notes 205 - 209 and accompanying text (discussing the possibility that the ECC administrators created a public forum by failing to exercise curriculum control).

171. *DiBona*, 220 Cal. App. 3d at 1351, 269 Cal. Rptr. at 896 (Huffman, J., dissenting).

172. *Id.* at 1352, 269 Cal. Rptr. 896 (Huffman, J., dissenting).

administration's regulation of curriculum content.<sup>173</sup> To Justice Huffman, requiring college officials to articulate facts "indicating a 'clear and present danger'" to the school or the public that could have resulted from the production of *Split Second* was a "cavalier dismissal" of the defendants' legitimate concerns regarding the prevention of campus disruption.<sup>174</sup> Justice Huffman also found the majority's holding that college administrators cannot regulate curriculum based upon the impact the curriculum may have on the college or the surrounding community unless there is a clear and present danger to the college or the community to be in conflict with the Supreme Court of the United States's decision in *Hazelwood School District v. Kuhlmeier*.<sup>175</sup> Although conceding that the *Kuhlmeier* opinion specifically reserved the question of its application to college settings,<sup>176</sup> Justice Huffman found the *Kuhlmeier* decision to be controlling because *Kuhlmeier* returned discretion to school administrators with respect to curriculum decisions.<sup>177</sup> To Justice Huffman, *Kuhlmeier* stands for the proposition that when activities may be fairly characterized as part of the school curriculum, the administration has not created a public forum and therefore the constitutional mandates governing regulation of speech in a public forum are not applicable.<sup>178</sup> Rather, school administrators are entitled to exercise greater control to ensure that students learn the lessons an activity is designed to teach, that participants are not exposed to material that may be

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173. *Id.* at 1352-53, 269 Cal. Rptr. at 897 (Huffman, J., dissenting). *See supra* notes 137 - 144 and accompanying text (discussing the *Tinker* and *Terminiello* standards applied by the majority).

174. *DiBona* at 1352-53, 269 Cal. Rptr. at 897 (Huffman, J., dissenting). Justice Huffman's dissent read the court's decision as implying that curriculum content regulation motivated by the impact on the school and the community must meet the clear and present danger standard. *Id.* at 1353, 269 Cal. Rptr. at 897 (Huffman, J., dissenting).

175. *Id.* at 1353, 269 Cal. Rptr. at 897 (Huffman, J., dissenting). *See supra* notes 63 - 70 and accompanying text (discussing the *Kuhlmeier* decision).

176. *DiBona*, 220 Cal. App. 3d at 1354 n.4, 269 Cal. Rptr. at 898 n.4 (Huffman, J., dissenting).

177. *Id.* at 1354, 269 Cal. Rptr. at 898 (Huffman, J., dissenting).

178. *Id.* at 1353, 269 Cal. Rptr. at 897 (Huffman, J., dissenting). *See infra* notes 205 - 209 and accompanying text (discussing the possibility that the ECC created a public forum with regard to the drama department curriculum).

inappropriate for their maturity level, and that the viewpoint of the speakers are not inappropriately attributed to the school.<sup>179</sup>

Justice Huffman did not specifically state that he felt the content of *Split Second* was inappropriate for college students; instead, the emphasis of his argument was that college administrators, not courts, should decide what is or is not appropriate.<sup>180</sup> It was imperative to Justice Huffman that an administrator's discretion in controlling the school's curriculum not be second-guessed years later by judges who, removed from the conflicts facing the school and the surrounding community, may dismiss as trivial the administration's legitimate effort to act in the best interest of the school.<sup>181</sup> Justice Huffman found that the majority had taken away from administrators the authority to control the school's curriculum that had clearly been given to them by the Supreme Court of the United States, thus giving free rein to teachers to choose curriculum without regard to the impact the content of the curriculum might have upon the school.<sup>182</sup> Justice Huffman disagreed that the holding of the *Kuhlmeier* decision was dependent upon the age of the student.<sup>183</sup> In Justice Huffman's view, the holding was designed to return discretion to administrators when exercising control over curriculum bearing the "imprimatur of the school."<sup>184</sup>

To buttress this position, Justice Huffman cited *Seyfried v. Walton*,<sup>185</sup> a pre-*Kuhlmeier* case upholding cancellation of a high

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179. *DiBona*, 220 Cal. App. 3d at 1353, 269 Cal. Rptr. at 897 (Huffman, J., dissenting).

180. *Id.* at 1354, 269 Cal. Rptr. at 898 (Huffman, J., dissenting). See *supra* notes 94 - 97 and accompanying text (discussing *Alabama Student Party v. Student Government Association of the University of Alabama*, 867 F.2d 1344 (11th Cir. 1989), a United States Court of Appeals decision applying the *Kuhlmeier* standard because this standard protects autonomous decision-making by administrators, which in turn protects academic freedom).

181. *DiBona*, 220 Cal. App. 3d at 1354, 269 Cal. Rptr. at 898 (Huffman, J., dissenting).

182. *Id.* at 1356-57, 269 Cal. Rptr. at 900 (Huffman, J., dissenting).

183. *Id.* at 1354, 269 Cal. Rptr. at 898 (Huffman, J., dissenting). Justice Huffman also disagreed with the majority's conclusion that the general public is less likely to view school-sponsored speech at the college level as reflecting the policies of the college. *Id.* at 1354 n.5, 269 Cal. Rptr. at 898 n.5. (Huffman, J., dissenting). See *supra* notes 153 - 155 and accompanying text (discussing the majority's view regarding public perceptions of school-sponsored speech at the college level).

184. *DiBona* at 1354, 269 Cal. Rptr. at 898 (Huffman, J., dissenting).

185. 668 F.2d 214 (3d Cir. 1981).

school production of the play *Pippin* because of the administration's concerns regarding the play's sexual content.<sup>186</sup> According to Justice Huffman, *Seyfried* stands for the proposition that school administrators should have wide latitude to limit the performance of a play which the administrators feel is vulgar and inappropriate, because the administration is more capable than a court to decide how the school's limited resources should be used to educate students and integrate them into society.<sup>187</sup>

Finally, Justice Huffman concluded that the majority created a "post-commencement" limitation on exercising control over curriculum that is "an unwarranted judicial intrusion upon the legitimate authority of a school to deal with the content of its curriculum."<sup>188</sup>

### III. LEGAL RAMIFICATIONS

#### A. Curriculum Choices Based on Pedagogical Concerns

The *DiBona* opinion is important to California administrators because the opinion specifically rejected application of the school-sponsorship rationale of *Kuhlmeier* in a college or university environment. This means a court will be less deferential to college administrators than it would be under the *Kuhlmeier* standard regarding decisions to censor based on the administration's belief that the subject matter of the curriculum is unsuitable for students.<sup>189</sup>

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186. *DiBona*, 220 Cal. App. 3d at 1355, 269 Cal. Rptr. at 899 (Huffman, J., dissenting) (citing *Seyfried*, 668 F.2d at 215).

187. *Id.* at 1355, 269 Cal. Rptr. at 899 (Huffman, J., dissenting).

188. *Id.* at 1356, 269 Cal. Rptr. at 900 (Huffman, J., dissenting). *See supra*, notes 161 - 170 (discussing majority's pre-class commencement limitation).

189. *See infra* notes 180 - 181 and accompanying text (discussing Justice Huffman's opinion that by failing to follow *Kuhlmeier*, the majority had shifted control of curriculum from college administrators to the courts). *See also* *Virgil v. School Bd.*, 677 F. Supp. 1547, 1553-54 (M.D. Fla. 1988) (stating that under *Kuhlmeier* a court's review of an administrator's censorship based on legitimate pedagogical concern is limited and the administrator's discretion is broad), *aff'd.*, 862 F.2d 1517 (11th Cir. 1989).

While rejecting the *Kuhlmeier* standard, the appellate court imposed a pre-class commencement limitation to this aspect of its decision,<sup>190</sup> stating that college administrators are entitled to broad deference in exercising curriculum control having to do with the literary quality of the curriculum so long as the administrators make their determination in advance of the first class meeting.<sup>191</sup> The *DiBona* court noted that the ECC administrators, like most college administrators, delegate to faculty members the authority to evaluate and determine curriculum content.<sup>192</sup> Through this observation and the general tenor of their decision, the *DiBona* majority implies that to avoid facing greatly diminished control over the curriculum, administrators should institute curriculum review and control measures that are designed to require initial approval of curriculum choices.

*B. Curriculum Control Based on the Impact of the Curriculum on the College or Surrounding Community*

Perhaps more important to administrators is the aspect of the majority's decision dealing with curriculum control based on concerns over the impact the curriculum may have on the college or the surrounding community. The fact that the *DiBona* majority did not engage in a forum analysis when it discussed this type of curriculum control,<sup>193</sup> but simply applied public forum standards to these curriculum decisions, is significant. By applying public forum standards to this type of curriculum control, the court told administrators that they cannot make this type of curriculum decision unless the administration can show that the curriculum would create a clear and present danger of serious, substantive evil

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190. *DiBona*, 220 Cal. App. 3d at 1348, 269 Cal. Rptr. at 894.

191. *Id.* See *supra* notes 161 - 170 and accompanying text (discussing the appellate court's requirement that curriculum limitations based on literary quality be made in advance of the first class meeting).

192. *DiBona*, 220 Cal. App. 3d at 1334 & 1341-42 n.11, 269 Cal. Rptr. at 884 & 889 n.11.

193. *Id.* at 1341 n.9, 269 Cal. Rptr. at 889 n.9. See *supra* note 135 and accompanying text (discussing the *DiBona* majority's statement that public forum analysis was not helpful in this case); *supra* notes 29 - 45 and accompanying text (describing the forum doctrine).

(the *Terminiello* standard),<sup>194</sup> or that the curriculum would materially and substantially interfere with the operation of the school (the *Tinker* standard).<sup>195</sup> In addition, it does not appear that the *DiBona* majority applied the pre-class commencement limitation to this aspect of its decision.<sup>196</sup> Thus, it is possible to read *DiBona* as imposing the *Terminiello* and *Tinker* standards on curriculum control based on concerns over the impact the curriculum may have on the college or the surrounding community, regardless of whether regulation of the curriculum takes place before or after commencement of the class.

The fact that the *DiBona* court did not engage in a forum analysis means that the court mixed apples and oranges, applying public forum standards to curriculum control without giving adequate consideration to the impact these standards could have on traditional curriculum decisions. The appellate court states that administrative decisions regarding curriculum choices would not survive first amendment challenge unless the administration's decision is supported by evidence that the curriculum posed a clear and present danger of evil to the college or the surrounding community, or that the curriculum would materially and substantially interfere with the operation of the school. Taken to its logical conclusion, the court of appeal seems to assert that at no time may the ECC administration cancel a class if the administration's decision to cancel is based on community or student feedback regarding the class, unless the administration can prove that the class posed such a clear and present danger or materially and substantially interfered with the operation of the school.

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194. See *supra* notes 142 - 144 and accompanying text (discussing the *DiBona* majority's application of this standard from *Terminiello v. Chicago*, 337 U.S. 1 (1949)).

195. See *supra* notes 137 - 141 and accompanying text (discussing the *DiBona* majority's application of this standard from *Tinker v. Des Moines School District*, 393 U.S. 503 (1969)).

196. The pre-commencement limitation appears in the second half of the court's decision, when the court discussed *Kuhlmeier*. A clear break is made between this portion of the decision and the portion discussing *Terminiello* and *Tinker*.

*1. Impact of Finding a Public Forum Existed in DiBona*

On the other hand, if it is possible to interpret *DiBona* as a situation in which the ECC administrators created a public forum by failing to exercise control over the drama department curriculum, the ultimate holding reached by the *DiBona* majority would not change: If the administrators canceled *Split Second* in order to avoid the controversy the play might have engendered, the administrators acted in violation the first amendment rights of DiBona and his students. However, under this interpretation the use of the *Tinker* and *Terminiello* standards would be consistent with recent case law because these standards originated in cases in which public forums existed.<sup>197</sup> More importantly, the appellate court would not be applying the high public forum standards to the exercise of control over curriculum that does not create a public forum. This is important not only from a consistency standpoint--so that future decisions build on consistently applied precedents--but also from a practical standpoint. As a practical matter, it will be very difficult for college administrators exercising curriculum control to meet the public forum tests applied to them by *DiBona*. As a result, college administrators are effectively denied the right to exercise curriculum control based on concerns the administration has over the impact the particular curriculum may have on the college or the surrounding community.

*2. Creation of a Public Forum on School Campuses*

School facilities are deemed to be public forums only if school authorities have by policy or practice opened the facilities "for indiscriminate use by the general public."<sup>198</sup> For example, in *Widmar v. Vincent*,<sup>199</sup> the University of Missouri at Kansas City made it a practice to provide university facilities for meetings of

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197. See *supra* notes 141 & 144 and accompanying text (discussing *Tinker* and *Terminiello* as cases in which a public forum could be found to exist).

198. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (relying on *Perry Educ. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 47 (1983)).

199. 454 U.S. 263, 266 (1981).

registered student groups.<sup>200</sup> In 1977, the university adopted a regulation prohibiting the use of university facilities for religious worship or teaching.<sup>201</sup> Although finding that a university differs significantly from public forums such as streets or parks or municipal theaters,<sup>202</sup> the *Widmar* court held that, through its policy of providing facilities for group meetings, the university had created a public forum.<sup>203</sup> Thus, the university had to justify its exclusion under the constitutional requirements applicable to public forums.<sup>204</sup>

It is true that the administrators of the ECC did not accommodate meetings of drama groups that wished to produce plays. Rather, the administrators offered a course as part of their curriculum whereby students could learn about the production of a play.<sup>205</sup> However, in determining whether or not a public forum has been created in a school setting, the Supreme Court of the United States has placed great emphasis on the control exercised by the administration over the curriculum.<sup>206</sup> For example, in *Kuhlmeier*, since the high school administration exercised control over all aspects of the school newspaper, the administration had not created a public forum by publishing the newspaper.<sup>207</sup> Relying on *Kuhlmeier*, courts have found a public forum to exist where the administrative policy appears to place the control of a curricular

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200. *Id.*

201. *Id.*

202. *Id.* at 268 n.5.

203. *Id.* at 267.

204. *Id.* See *supra* notes 35 - 37 and accompanying text (discussing constitutional requirements applicable to public forums).

205. See *DiBona v. Matthews*, 220 Cal. App. 3d 1329, 1333, 269 Cal. Rptr. 882, 884 (1990) (discussing the Drama 250 curriculum). See also *Seyfried v. Walton*, 668 F.2d 214, 215-16 (3rd Cir., 1981) (upholding the cancellation of a school play based on the administration's determination that the play was too sexually explicit for the students). "[T]he selection of the artistic work to be given as the spring production does not differ in principle from the selection of course curriculum, a process which courts have traditionally left to the expertise of educators." *Id.* at 216 (quoting *Seyfried v. Walton*, 512 F.Supp. 235, 238-39 (D. Del. 1981)).

206. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 268-70 (1988).

207. *Id.* at 270.

activity in the hands of the students or faculty.<sup>208</sup> Since the policy of the ECC administration appears to be to place control of the drama curriculum in the hands of whatever teacher happens to be under contract for that year to teach the drama class,<sup>209</sup> the administration can be said to have created a public forum as to the production of their drama department plays.

### *3. Viewpoint-Based Discrimination*

Alternatively, regardless of whether a public forum has been created, it may be possible to construe the *DiBona* opinion as simply prohibiting viewpoint-based discrimination.<sup>210</sup> Under this interpretation, forum classification is irrelevant and the *Terminiello* and *Tinker* standards lose their significance as benchmarks that must be met by administrators exercising curriculum control. The reason for this is that the government may not regulate the content of speech in any forum if the government is discriminating against the speech based upon the speaker's viewpoint.<sup>211</sup>

The administrators in *DiBona* could be viewed as refusing to allow production of a play simply because the play depicted a white man who was so foul-mouthed and insensitive that he could provoke an otherwise likeable, honest, proud black police officer to murder him. The message expressed in *Split Second* that violence by blacks against whites can be explained, if not justified, is a viewpoint that is highly derogatory of whites as a race. It is also a viewpoint that is in keeping with the defense made by Sagon Penn, the black youth whose trial for shooting two white officers was going on at the time *DiBona* chose to produce *Split*

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208. See, e.g., *Lueth v. St. Clair County Community College*, 732 F. Supp. 1410, 1415 (E.D. Mich. 1990) (finding a public forum created by school newspaper when administrators, through their written policy, appeared to place control of the newspaper in the hands of students).

209. See *DiBona*, 220 Cal. App. 3d at 1334 & 1341-42 n.11, 269 Cal. Rptr. at 884 & 889 n.11 (discussing the fact that no initial approval of the instructor's choice of plays was required).

210. See *supra* notes 46 - 54 and accompanying text (discussing viewpoint-based discrimination).

211. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

*Second*.<sup>212</sup> For these reasons, *Split Second* depicted a viewpoint that, by all indications, was opposed by, or perhaps feared by, the ECC administration.

The *DiBona* court stated that the facts of the case reflected school officials who were simply concerned with avoiding any unpleasantness which accompanies unpopular or unorthodox points of view.<sup>213</sup> Therefore, it is possible to interpret the *DiBona* decision as simply prohibiting viewpoint-based discrimination by an administration engaging in censorship based on the content of curriculum because of their concern over the impact the curriculum might have on the college or the surrounding community.

### CONCLUSION

In *DiBona v. Matthews*<sup>214</sup> the California Court of Appeal held that a community college could not censor the production of a play chosen as curriculum for a drama class unless the administrators could show the play either created a clear and present danger of serious, substantive evil rising above public unrest or annoyance or materially and substantially interfered with the operation of the school.<sup>215</sup> Additionally, the *DiBona* court held that vulgar language alone in a play would not provide adequate justification for cancellation of the play because there is little legitimate pedagogical concern on the part of collegiate administrators to protect college students from vulgar language.<sup>216</sup>

The *DiBona* opinion is important to California administrators because the opinion expressly declined to apply the school-sponsorship rationale of *Kuhlmeier* to college or university administrators. Beyond this, it is unclear how *DiBona* will impact administrators making curriculum decisions. It is possible that

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212. See *supra* notes 109 - 113 and accompanying text (discussing Sagon Penn and the ongoing murder trial).

213. *DiBona v. Matthews*, 269 Cal. App. 3d 1329, 1343, 269 Cal. Rptr. 882, 890-91 (1990).

214. 220 Cal. App. 3d 1329, 269 Cal. Rptr. 882 (1990), *cert. denied*, 111 S. Ct. 557 (1990).

215. *Id.* at 1343-44, 269 Cal. Rptr. at 890-91.

216. *Id.* at 1346-47, 269 Cal. Rptr. at 893.

*DiBona* may be construed to require California college and university administrators to meet prohibitively high standards when exercising curriculum control based on concerns over the impact the curriculum may have on the college or the surrounding community. On the other hand, the majority's opinion can be read as imposing these high standards only when administrators fail to exercise control over the initial curriculum decision process. Finally, the court's decision may be viewed as simply prohibiting viewpoint-based discrimination. Whatever impact the *DiBona* decision may have on the curriculum review processes of California colleges and universities, it is clear that the stringent protection of free expression at the collegiate level is at the core of the appellate court's decision in *DiBona*.

By rejecting the *Kuhlmeier* "reasonably related to legitimate pedagogical concern" standard for content-based censorship due to the administration's concern that the subject matter of the curriculum is unsuitable for adult students, the court has not acted in an extraordinary manner. Many writers have predicted that this standard, originating in a case dealing with high school curriculum, would not be extended to the college setting.<sup>217</sup> Even the *DiBona* majority's pre-class commencement requirement for censorship based on concern that the curriculum is unsuitable can be supported by existing case law.<sup>218</sup> However, application by the appellate court of the "clear and present danger" and "material and substantial interference" standards to administrators exercising curriculum control based on concern by the administration over the impact the curriculum could have on the campus or surrounding community can be viewed as extraordinary. Here the appellate court departed from accepted first amendment analysis, applying

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217. See, e.g., Note, *Hazelwood School District v. Kuhlmeier: Increased Regulation of the University Press*, 40 ALA. L. REV. 267, 279-81 (1988) (positing that *Kuhlmeier* should not apply to public college and university campuses because students are no longer children and do not need enculturation by the state). See also *Student Gov't. Assn. v. Bd. of Trustees of the Univ. of Massachusetts*, 868 F.2d 473, 480 n.6 (1st Cir., 1989) (stating that *Kuhlmeier* is not applicable to college newspapers).

218. See *supra* notes 162 - 167 (discussing the pre-class commencement requirement and the *Pico* decision).

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public forum standards to nonpublic forum curriculum decisions. Unless the court was interpreting the ECC administration's actions as viewpoint-based discrimination, or the ECC administration's failure to exercise control over the faculty's curriculum choices is viewed as creating a public forum despite the court's assertion to the contrary, application of public forum standards to curriculum control leaves unclear exactly how far this court would go when striking a balance between free speech rights of students and faculty and the ability of college administrators to exercise control over the college's curriculum.

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