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In the landmark case of Tinker v. Des Moines Community School District,¹ the United States Supreme Court established that public school students retain first amendment rights while on the school grounds.² The Tinker decision caused a flood of litigation in the federal courts.³ The Student Press Law Center received over 500 reports of censorship battles among school newspaper editors and

¹. 393 U.S. 503 (1969).
². Neither Tinker nor Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562 (1988), considers the first amendment rights of students in private schools. Consequently, this note likewise addresses only public schools. See Tinker, 393 U.S. at 514 (concluding that “[i]n the circumstances, our Constitution does not permit officials of the State to deny [the plaintiff’s] form of expression)(emphasis added); Kuhlmeier, 108 S.Ct. at 567 (referring exclusively to “[s]tudents in the public schools. . .”). It should be noted, however, that some commentators contend that every school is a public institution. See generally Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027, 1035 (1969); Cohen, The Private-Public Legal Aspects of Institutions of Higher Education, 45 Denver L.J. 643 (1968). As a general rule, however, the United States Constitution applies only to the relationship between the government and individuals. Students enrolled in private schools, therefore, do not retain the same first amendment rights as do their public school counterparts. Okamoto, Prior Restraint and the Public High School Student Press: The Validity of Administrative Censorship of Student Newspapers Under the Federal & California Constitutions, 20 Loyola L.A. L. Rev. 1055, 1067 n.46. Indeed, courts have rejected the argument that private action becomes state action when an otherwise private school receives substantial public funding. See Rendell-Baker v. Kohn, 457 U.S. 830, 832 (1982) (holding that no state action existed despite the fact that 90-99% of the budget of a private high school was publicly funded); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 536, 546 (S.D.N.Y. 1968) (holding no state action existed although public funds constituted 40-45% of the income of a private university). The courts have also rejected the claim that private schools are state actors because they are performing a public function, such as education. Rendell-Baker, 457 U.S. at 842; Grossner, 287 F. Supp. at 549.
³. Tinker, 393 U.S. at 506.
⁴. See infra notes 73-85, 186-188 and accompanying text (discussing the judicial reaction to the Tinker decision).
school administrators in 1987. In order to resolve these disputes, the United States Supreme Court, in *Hazelwood School District v. Kuhlmeier*, granted school authorities broad discretion to edit school newspapers. In *Kuhlmeier*, the Court held that public school administrators may exercise editorial control over school-sponsored newspapers when official actions are reasonably related to legitimate pedagogical concerns.

Part I of this note will discuss the legal background of the First Amendment generally. Next, the development of first amendment law pertaining to students' first amendment rights will be explored. Part II will summarize the facts of the *Kuhlmeier* case and review the decision of the Supreme Court. Finally, Part III of this note will discuss the legal ramifications of the *Kuhlmeier* decision.

### I. LEGAL BACKGROUND

In order to comprehend fully the nature of the first amendment rights of high school students, one must explore the law governing speech outside the confines of the school campus.

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7. Seligmann & Namuth, *supra* note 5, at 60. See infra notes 121-125 and accompanying text (discussing the holding of *Kuhlmeier* and the degree of discretion granted to school authorities by the *Kuhlmeier* majority).
8. *Webster's Third New International Dictionary* 1663 (1976) (defining pedagogic or pedagogical to mean suiting, resembling, or pertaining to teachers or to education).
9. *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562, 571 (1988). It should be noted that *Kuhlmeier* may not apply in California because the state legislature has specifically delineated student journalists' free press rights in section 48907 of the California Education Code. See *Cal. Educ. Code* §48907 (West Supp. 1988). How *Kuhlmeier* will impact future student press litigation in California is unclear. One commentator has suggested two potential approaches to section 48907: applying a per se ban on prior restraint or applying a public forum analysis on a case-by-case basis. Okamoto, *supra* note 2, at 1104-47. The per se rule has been adopted by the Court of Appeal for the Fourth Appellate District in California. See *Leeb v. DeLong*, 198 Cal. App. 3d. 47, 243 Cal. Rptr. 494 (1988). In fact, *Leeb* suggests that the *Kuhlmeier* holding is not controlling in California. Id. at 54, 243 Cal. Rptr. at 497-98. However, *Leeb* may be distinguished from *Kuhlmeier* because *Leeb* involved potentially defamatory speech—not pedagogical concerns. Id. at 51, 58, 243 Cal. Rptr. at 495, 500-01. Therefore, the *Leeb* court's mention of *Kuhlmeier* may be dicta. More importantly, *Leeb* assumed that section 48907 of the Education Code mandates the conclusion that school newspapers are limited public forums, although the statute is apparently silent on the public forum question. See *Leeb* at 57, 243 Cal. Rptr. at 500. The public forum issue is the centerpiece of the *Kuhlmeier* opinion. See infra notes 112-119 and accompanying text (discussing the Supreme Court's analysis of the public forum issue). See also infra note 175 (discussing other relevant California law).
10. See infra notes 14-63 and accompanying text.
11. See infra notes 64-86 and accompanying text.
12. See infra notes 87-153 and accompanying text.
13. See infra notes 154-217 and accompanying text.
A. Constitutional Restrictions on Freedom of Speech

The First Amendment declares: "Congress shall make no law . . . abriding the freedom of speech, or the press. . . ."\(^{14}\) Despite the absolute nature of the language of the First Amendment, some limitations on free speech and press are permissible.\(^{15}\) For example, defamatory speech\(^{16}\) and incitement to illegal action\(^{17}\) are not protected by the First Amendment and may be punished subsequent to the utterance of the speech. A prior restraint on speech is the least tolerable infringement on First Amendment rights.\(^{18}\) While prior restraints have been rejected throughout the last three centuries,\(^{19}\) the United States Supreme Court has refused to ban prior restraints completely.\(^{20}\) The Court will permit a prior restraint only in extreme circumstances,\(^{21}\)

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14. U.S. CONST., amend. I. The Supreme Court declared that "freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states." Gitlow v. New York, 268 U.S. 652, 666 (1925).

15. See Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877 (1963) (discussing factors underlying a nonverbal interpretation of the free speech and free press provisions of the first amendment and formulating a basic theory and specific doctrines for first amendment law).


17. See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that advocacy inciting or promoting "imminent lawless action" is not protected by the first amendment and may be punished).


19. See Emerson, supra note 15, at 909-16 (discussing the history of prior restraint doctrine).

20. See Near v. Minnesota, 283 U.S. 697, 708, 716 (1931). If the command of the First Amendment was absolute then any and all restraints on the press would be prohibited. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 858, 865-67 (1986). The Supreme Court has refused to adopt this absolutist position. See Near, 283 U.S. at 708, 716. See also Nebraska Press Ass'n., 427 U.S. at 570 ("This court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed."); New York Times Co. v. United States, 403 U.S. 713, 726 (1971) (per curiam) (Brennan, J., concurring) (noting prior restraints are permissible in very limited circumstances); id. at 748 (Burger, C.J., dissenting) (indicating that the First Amendment is not absolute, but that clear constitutional limitations apply to prior restraint).

21. Near, 283 U.S. at 716. Chief Justice Hughes explained:

[T]he protection even as to prior restraint is not absolutely unlimited. But the
such as obscene speech\textsuperscript{22} or speech which threatens national security.\textsuperscript{23} However, even in an area where speech is not protected, such as obscene speech, the government must grant the speaker access to the courts to challenge the restraint.\textsuperscript{24} To ensure prompt judicial review of the censorship program the government must initiate judicial proceedings against those intending to express themselves.\textsuperscript{25} Any attempts by the government to invoke a prior restraint must overcome a heavy presumption of invalidity,\textsuperscript{26} and the government carries a heavy burden of justifying the imposition of such a restraint.\textsuperscript{27} Furthermore, any restraints imposed by the government before judicial review may last only for a specified brief period.\textsuperscript{28} Strict limitation has been recognized only in exceptional cases: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." . . . On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of community life may be protected against acts of violence and the overthrow by force of orderly government.\textit{Id.} (quoting Schenck v. United States, 249 U.S. 47, 52 (1919) (citations and footnotes omitted)).

22. See Roth v. United States, 354 U.S. 476, 483, 485 (1957) (holding that obscenity is not constitutionally protected speech). See also Miller v. California, 413 U.S. 15, 36-37 (1973) (holding that the first amendment does not protect "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and . . . do not have serious literary, artistic, political or scientific value").

23. See New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (Pentagon Papers case). In the Pentagon Papers case, the government sought to enjoin the New York Times from publishing a top secret military policy statement involving the Vietnam War. \textit{Id.} at 714. The government maintained that release of the papers would jeopardize national security, but the court found this argument unpersuasive. \textit{Id.} at 717-18. Most of the justices agreed that publication might be damaging to national interests, but argued that a prior restraint cannot be imposed on publications that might prejudice the national interest. \textit{Id.} at 725-26 (Brennan, J., concurring); see also \textit{id.} at 731 (White, J., concurring).

24. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975) (overturning the refusal of a municipality to rent an auditorium for production of the play \textit{Hair} as an unlawful prior restraint); Blount v. Rizzo, 400 U.S. 410, 417 (1971) (holding that postal regulations designed to deny the use of the mails to commercial distributors of obscene literature lacked adequate procedural safeguards against prior restraint); Freedman v. Maryland, 380 U.S. 51, 55-56 (1965) (permitting limited prior restraint pending judicial evaluation of allegedly obscene material).


26. \textit{New York Times Co.}, 403 U.S. at 714 (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)). As the Court has noted, the presumption of unconstitutionality of prior restraint exists primarily because while the "threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) (footnote omitted). For further analysis of the evils of prior restraint, see Emerson, supra note 8, at 659; see also T. EMERSON, The System of Freedom of Expression 506 (1970).


28. \textit{Southeastern Promotions, Ltd.}, 420 U.S. at 560 ("any restraint prior to judicial review can be imposed only for a brief period"). \textit{See also New York Times Co.}, 403 U.S. 713; \textit{Freedman}, 380 U.S. at 58-59 ("the exhibitor must be assured by statute or authoritative judicial construction, that the censor will, within a brief specified period, either issue a license or go to court to restrain showing the film"); Bantam Books Inc. v. Sullivan, 372 U.S. 53,
compliance with the above procedures is vital to guarantee that constitutionally protected speech is not restricted.29

The United States Supreme Court on two occasions has deviated from the established policy pertaining to content regulation by carving out exceptions to first amendment law cases involving minors. Expression by adults directed toward minors may be regulated even though the same expression would be protected if aimed at adults.30

In *Ginsberg v. New York*,31 the Court upheld a state statute banning the sale of soft-core pornographic magazines to minors.32 The Court held that the magazines by contemporary community standards were not obscene for adults.33 The Court found, however, that the interest of the state in protecting the welfare of minors and in supporting parental prerogatives to keep pornography from their children justified barring the sale of the magazines to minors.34 Similarly, in *F.C.C. v. Pacifica Foundation*,35 the Court upheld an administrative decision of the Federal Communications Commission circumscribing the broadcasting of an indecent comic monologue.36 The Court justified the regulation, in part, because broadcasting is uniquely accessible to children.37 Although the Court conceded that the mon-

70 (1963) (stating that a prior restraint system is tolerable only where it “assure[s] an almost immediate judicial determination of the validity of the restraint.”).

29. *Bantam Books*, 372 U.S. at 70. In *Bantam Books*, the actions of the review board, whose purpose was to “educate the public concerning ... [literature] manifestly tending to the corruption of the youth” induced distributors to recall copies of the best selling novel *Peyton Place*, preventing both children and adults from acquiring the award-winning novel. *Id.* at 59.


31. 390 U.S. 629 (1968). The statute at issue in *Ginsberg* followed the contemporary definition of obscenity, but the statute evaluated speech in terms of suitability of the speech for minors. *Id.* at 646. See *Miller v. California*, 413 U.S. 15, 24, 26 (1973) (defining obscenity); *Krislov, From Ginzburg to Ginsberg: The Unhurried Children’s Hour Obenity Litigation, 1968 Sup. Ct. Rev. 153.*


33. *Id.* at 634.

34. *Id.* at 639-41. The state has an independent interest in the well-being of its youth. *Id.* at 640. Parents also have an independent right to raise their children as they see fit. *Id.* at 639.


36. *Pacifica*, 438 U.S. at 750-51. The 12-minute monologue at issue was by comedian George Carlin, entitled “Filthy Words,” which had been recorded before a live audience in a California theatre. *Id.* at 729.

37. *Id.* at 749-50. The court noted that each distinct medium of expression presents unique First Amendment problems, *id.* at 748, and that broadcasting receives the most limited First Amendment protection. The court pointed out that broadcasting is particularly pervasive because it may invade the privacy of the home, “where the individual’s right to be let alone plainly outweighs the First Amendment rights of the intruder.” *Id.* The court further pointed out that some children may not have understood the broadcast if it were in print form, but that by hearing the monologue over the airwaves, children could easily enlarge their vocabulary. *Id.* at 750.

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logue's language was not obscene, the Court found that language in the monologue was indecent.\textsuperscript{38} The Court relied on \textit{Ginsberg} for the proposition that forms of offensive expression may be withheld from minors without restricting the expression completely.\textsuperscript{39} Thus, \textit{Ginsberg} and \textit{Pacifica} indirectly establish that the first amendment rights of minors are not coextensive with the rights of adults.\textsuperscript{40}

Although prior restraints on speech are strictly proscribed with limited exceptions, the government may establish reasonable time, place and manner regulations on speech uttered on public property.\textsuperscript{41} These regulations, such as parade permit requirements, cannot be overbroad\textsuperscript{42} or so vague\textsuperscript{43} that individuals lack clear guidance as to what action is prohibited.\textsuperscript{44} Rather, the regulation must be drawn with narrow specificity.\textsuperscript{45} The degree of specificity required in the regulation depends on the nature of the forum in which the expression takes place.\textsuperscript{46}

Historically, regulations of expression on public property are permissible in varying degrees depending on the nature of the forum where the speech is offered.\textsuperscript{47} In \textit{Hague v. CIO},\textsuperscript{48} the Supreme Court recognized that city streets and parks had long been used for purposes of assembling, exchanging thoughts among citizens, and discussing public issues.\textsuperscript{49} The Supreme Court established that speech made on public property is constitutionally protected.\textsuperscript{50}

\begin{itemize}
\item \textsuperscript{38} Id. at 727, 729, 735. See id. at 751-55 (appendix to the opinion of the court containing a verbatim transcript of the monologue).
\item \textsuperscript{39} Id. at 749.
\item \textsuperscript{41} See generally T. Emerson, \textit{supra} note 26, at 298-310 (discussing time, place and manner restrictions on speech).
\item \textsuperscript{42} See, e.g., Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969) (holding that an ordinance which conferred upon the city commissioner broad discretion to prohibit any parade, procession, or demonstration, was void because the prior restraint of a license must be narrow, objective, and provide definite standards to guide the licensing authority); Thornhill v. Alabama, 310 U.S. 88, 105 (1940) (holding a statute prohibiting all picketing facially void since the statute banned peaceful picketing protected by the first amendment).
\item \textsuperscript{43} See, e.g., Herndon v. Lowry, 301 U.S. 242 (1937).
\item \textsuperscript{44} See Smith v. Goguen, 415 U.S. 566 (1974) (overturning the conviction of an individual for violating a state flag-misuse statute because the statute was vague).
\item \textsuperscript{45} NAACP v. Button, 371 U.S. 415, 433 (1963) (citing Cantwell v. Connecticut, 310 U.S. 296, 311 (1940)).
\item \textsuperscript{46} Okamoto, \textit{supra} note 2, at 1066 n.41 (discussing the forum theory and the concomitant degree of specificity required for statutes applying to the different types of forums).
\item \textsuperscript{47} Cornelius v. NAACP Legal Defense & Ed. Fund, 473 U.S. 788 (1985).
\item \textsuperscript{48} 307 U.S. 496 (1939).
\item \textsuperscript{49} \textit{Hague}, 307 U.S. at 515.
\item \textsuperscript{50} See generally Gorlick, \textit{Right to a Forum}, 71 Dick. L. Rev. 273 (1967) (analyzing the
\end{itemize}
In *Perry Education Association v. Perry Local Educators’ Association*, the Supreme Court established three classes of forums: the traditional public forum, the limited or nontraditional public forum, and the nonpublic forum. Examples of the traditional public forum are streets, parks and other similarly situated public properties. In public forums the government may not prohibit all speech. Any content-based regulation on speech must serve a compelling state interest and must be narrowly drawn to achieve that interest in order to be enforced. The state may also enforce content-neutral regulations restricting the time, place and manner of speech in these public forums so long as the regulations are narrowly tailored to serve a significant state interest and leave open sufficient alternative channels of communication.
Nontraditional or limited public forums exist where the state has designated a public place for expressive activity. The existence of a limited public forum is a factual question resolved on a case-by-case basis. For example, a school auditorium is designated a public forum when individuals use the auditorium for public meetings. A state is not required to retain property as a limited public forum indefinitely. But, as long as the forum remains open to the public, the forum must be governed by the same standards applicable to the traditional public forum.

On the other hand, public expression is judged by different criteria when speech is delivered on public property that is not by tradition or designation a public forum. Nonpublic forums are reserved for their intended purposes, communicative or otherwise. For example, jails and military bases are not public forums, but rather public properties that are reserved for a specific purpose. Restrictions on expression in nonpublic forums must only be reasonable and not amount to viewpoint discrimination in order to be enforced.


58. See Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 546, 171 P.2d 885, 891-92 (1946) (holding that denying the San Diego Civil Liberty Committee, an affiliate of the American Civil Liberties Union, access to a school auditorium, which was deemed a public forum, because the S.D.C.L.C. would not sign an affidavit stating that the organization did not advocate overthrow of the government, denied the S.D.C.L.C. the right of free speech and assembly). See also Widmar v. Vincent, 454 U.S. 263, 268 (1981) (holding that the site used for university meeting facilities was public forum); City of Madison Joint School Dist. v. Wisconsin Emp. Rel. Comm'n, 429 U.S. 167, 175 (holding that the site used for school board meeting was a public forum).


60. Id. Designation of public property as a public forum does not preclude adoption of regulations aimed at safeguarding the primary function of the property from interference by the speech on the premises. United States Postal Ser. v. Council of Greenburgh Civic Ass’ns., 453 U.S. 114, 129-30 (1981); Greer v. Spock, 424 U.S. 828, 836 (1976) (upholding the decision of a military commander disallowing certain presidential candidates the right to speak on a military base); Adderley v. Florida, 385 U.S. 39, 47 (1966) (upholding the trespass conviction of demonstrators who were protesting upon the premises of a county jail).

61. Perry, 460 U.S. at 46.

62. Id.


64. Perry, 460 U.S. at 46. Regulations may not suppress speech simply because public authorities oppose the views of the speaker. Id.
B. Students' First Amendment Rights

In *Tinker v. Des Moines Independent Community School District*, the Supreme Court held that the school violated the first amendment rights of three students when they suspended the students for wearing black armbands at school in protest of the Vietnam War. In the Court's opinion, the armbands neither disrupted school functions nor invaded the rights of others. The Court ruled that the speech must actually disrupt the orderly atmosphere of the educational process, or invade the rights of other individuals, to punish student expression.

The majority declared that students on campus possess first amendment rights. The majority feared that state-operated schools would resemble totalitarian states where students would receive only information that the school opted to communicate if students were stripped of their first amendment rights.

Nevertheless, the first amendment rights of students must be evaluated in light of the special characteristics of the school environment. *Tinker* loosely defined students' first amendment rights as less than adults, but nonetheless worthy of respect and significant protection.

The *Tinker* decision triggered a flood of litigation in the federal courts by unequivocally stating that students possess first amendment rights. Much of the litigation addressed the first amendment rights

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66. *Tinker*, 393 U.S. at 504. The students wore armbands to school to protest the Vietnam War despite having knowledge of a school policy forbidding such action. *Id.*
67. *Id.* See *infra* notes 81-85 and accompanying text (discussing the "invasion of rights" prong of the *Tinker* test).
68. *Tinker*, 393 U.S. at 504. The test adopted by the *Tinker* court was articulated in *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966). In *Burnside*, the Fifth Circuit held that the wearing of "freedom buttons" inscribed with the wording "One Man One Vote," could not be prohibited absent a showing that school activities were disrupted or that students' rights were invaded by wearing the buttons. *Id.* See also *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966) (companion case of *Burnside*).
70. *Id.* at 511.
71. *Id.* at 511.
73. Most of these cases involve underground newspapers and symbolic speech. See *infra* notes 186-205 (discussing content restrictions on non-school-sponsored student expression after *Kuhlmeier*).
of students who published high school newspapers. Because the Supreme Court repeatedly denied certiorari in these cases, substantial differences of opinion developed both within and among the federal courts of appeal regarding when school officials could permissibly censor school newspapers and other student expression.

A number of cases involving school-sponsored newspapers disallowed censorship by high school administrators as a violation of the first amendment rights of the students. In three cases, the federal courts found that the school newspaper was not part of the school curriculum, concluding that the paper was not subject to curriculum control in the same manner as an English class. Treating the curriculum determination as an issue of fact, these courts analyzed the newspaper to determine whether the newspaper was a forum for student expression or an extension of the regular school curriculum. Courts that found a newspaper to be a public forum for student expression have applied the Tinker disruption test to determine

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76. See Huffman & Trauth, supra note 71 at 486-504 (discussing the split of authority within the federal courts regarding school newspapers); Comment, Tinker's Legacy: Freedom of the Press in Public High Schools, 28 DEPAUL L. REV. 387, 405-418 (1979) (analyzing the major legal trends in the federal circuit courts regarding school newspapers).
77. See infra notes 186-205 and accompanying text (discussing the ramifications of Kuhlmeier on the various positions articulated by the federal circuit courts on the issue of non-school-sponsored student expression).
79. Gambino, 429 F. Supp. at 734; Bayer 383 F. Supp. at 1166; Zucker 299 F. Supp. at 102. See also San Diego Comm. v. Governing Bd., 790 F.2d 1471, 1476 (9th Cir. 1986) (holding that an off-campus non-profit organization was denied first amendment rights when school officials precluded them from advertising in a high school newspaper which the court classified as a limited public forum); Lee v. Board of Regents, 306 F. Supp. 1097, 1100-01 (W.D. Wis. 1969) (state college newspaper deemed a public forum for student expression), aff'd, 441 F.2d 1257 (7th Cir. 1971).
80. See Gambino, 429 F. Supp. at 735 (holding that the student newspaper is not a part of the school curriculum despite the fact that the school offered a journalism course and paid most of the expenses of the newspaper); Zucker, 299 F. Supp. at 103-04 (holding that the student newspaper is a forum for student expression despite a school policy limiting articles to school-related topics). See also Nahmod, Beyond Tinker: The High School as an Education Public Forum, 5 HARV. C.R.-C.L. L. REV. 278 (1970) (discussing the implications of Tinker on the content and vehicle of student protests, and the high school as an educational public forum); Note, Religious Expression in the Public School Forum, 72 GEO. L.J. 135, 140-49 (1983) (discussing when a public school has created a public forum for student expression, and the implications of creating such a forum).
whether editorial control by school officials was constitutional.\(^8\)

Not all courts have found that high school newspaper censorship violates the First Amendment. In two cases courts\(^8\) have invoked the second prong of \textit{Tinker} and found the censoring of school newspapers by school officials reasonable to prevent the invasion of other students' rights.\(^8\) In \textit{Trachtman v. Anker}, school authorities feared that a school newspaper survey regarding the sexual attitudes and practices of students would invade students' rights by subjecting the students to psychological pressure that might cause emotional harm.\(^8\) Based on conflicting psychological testimony, the Second Circuit Court of Appeal found that the concern of school officials had a reasonable basis and upheld the decision of school administrators not to distribute the survey.\(^8\) Similarly, in \textit{Frasca v. Andrews}, the District Court for the Eastern District of New York upheld the refusal of a principal to distribute an issue of the school newspaper because the issue contained potentially libelous statements.\(^8\)

The conflicting results and general confusion surrounding litigation involving school officials and high school newspaper staff members set the stage for a decision by the Supreme Court.\(^8\) In \textit{Hazelwood School District v. Kuhlmeier}...\(^8\)
School District v. Kuhlmeier, the U.S. Supreme Court resolved the conflict between the federal courts.

II. THE CASE

A. The Facts

In Hazelwood School District v. Kuhlmeier, three former staff members of the Hazelwood East High school newspaper contended that school officials violated their first amendment rights by deleting two pages from an issue of the school newspaper. The adviser of the newspaper submitted the page proofs of the upcoming issue to the principal for review pursuant to school practice. The principal objected to two articles. One article described the pregnancy experiences of three high school students and contained references to sexual activity and birth control. The second article discussed the impact of divorce on students at the high school. The principal found the subject matter to be inappropriate for some of the younger students and feared that the unnamed subjects of the pregnancy article would be identified from the texts. In addition, the principal felt that the parents of a named student in the divorce article should have been given the right to respond in the newspaper. The principal ordered the adviser to delete the two pages on which the articles

school students and the right of the state to control education, using Bd. of Educ. v. Pico, 457 U.S. 853 (1982) as a guide. Compare Diamond, The First Amendment and Public Schools: The Case Against Judicial Intervention, 59 Tex. L. Rev. 477 (1981)(arguing for substantial judicial deference to local educators in cases involving students' first amendment rights) with Note-The High School Press, 83 Mich. L. Rev. 625 (1984) (concluding that prior restraints on the high school press should be strictly proscribed and that procedural safeguards should be implemented by school officials to protect students' first amendment rights); Comment, supra note 61 (arguing generally for greater first amendment freedoms for the high school press) and Note, Prior Restraints in Public High Schools, 82 Yale L.J. 1325 (1973) (concluding that the Seventh Circuit position that prior restraints on student expression are per se invalid is the superior view).

90. Id.
91. Id.
92. Id.
93. Id.
94. Id. at 565-66.
95. Id. at 566. At the time the principal reviewed the article, the name of the student was used in the divorce article. The name of the student was later deleted by the adviser, unbeknown to the principal. Id.
The Board of Education supported the principal’s decision.97 The students brought suit in the United States District Court for the Eastern District of Missouri, seeking a declaration that the principal violated their first amendment rights, injunctive relief, and monetary damages.98 The district court held that no violation of the students’ first amendment rights occurred, and denied all relief.99 The Court of Appeal for the Eighth Circuit reversed.100 The Supreme Court ultimately reversed the judgment of the Court of Appeal.101

B. The Majority Opinion

In an opinion written by Justice White,102 the Supreme Court held that educators do not infringe students’ first amendment rights when exercising editorial control over student speech in school-sponsored expressive activities if the actions of educators are reasonably related to legitimate pedagogical concerns.103 In so holding, the Court concluded that the two prong Tinker test104 was inappropriate for determining when a school may censor school-sponsored student expression.105 The Court noted that while students in public schools retain first amendment rights while on campus,106 the first amendment rights of students in the public schools are not equivalent to the rights of adults.107 The first amendment rights of students, therefore, must be examined in the context of the unique characteristics of the

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96. Id. See also id. at 566 n.1 (noting the content of the other articles that were on the two pages that the principal deleted from the issue of the newspaper).
97. Id. at 565.
98. Id. at 566.
100. See Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368 (8th Cir. 1986).
102. The opinion was joined by Chief Justice Rehnquist, and Justices Stevens, O’Connor, and Scalia. Justice Brennan filed a dissenting opinion, in which Justices Marshall and Blackmun joined. Id. at 565.
103. Id. at 566.
104. See supra note 67 and accompanying text.
105. Kuhlmeier, 108 S. Ct. at 570. The Court mentioned only school newspapers and drama productions as examples of school-sponsored student expressive activities. Id. at 569.
106. Id. at 567 (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969)).
107. Id. (quoting Bethel School Dist. No. 403 v. Fraser, 478 U.S. 106 S.Ct. 3159, 3164 (1986)).
school environment. With these principles in mind, the Court analyzed two main issues. First, the Court determined whether the school newspaper was a public forum. Second, the Court determined the appropriate standard of review for school-sponsored student expression.

1. No Public Forum

The Kuhlmeier Court concluded that the school newspaper at issue was not a public forum for purposes of first amendment protection. The Court distinguished public schools from streets, parks, and other traditional public forums. The Court held that school facilities, such as school newspapers, are public forums only if authorities by policy or practice indiscriminately open those facilities to the general public or some segment of the public, such as student organizations.

In deciding whether the school newspaper was a public forum, the Kuhlmeier Court carefully scrutinized the Hazelwood School Board Policy regarding school newspapers. The Court found the following

108. Id. (quoting Tinker, 393 U.S. at 506). The majority also cited New Jersey v. T.L.O., 469 U.S. 325, 341-43 (1985). T.L.O. involved the rights of students who had been subjected to search and seizure on public school grounds by a school administrator. Id. at 328. The Court held that the warrant requirement of the Fourth Amendment did not apply to students who were searched by school officials, and that the reasonableness of the search is dependent on the surrounding circumstances. Id. at 340-41.


111. Kuhlmeier, 108 S.Ct. at 569.

112. Id. at 567-68. The Supreme Court, in Hague v. CIO, 307 U.S. 496 (1939), declared that streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Id. at 515. The Supreme Court, in Kuhlmeier, found that "schools do not possess all of the attributes of streets, parks, and other traditional public forums." Kuhlmeier v. Hazelwood School Dist., 108 S.Ct. 562, 567 (1988).

113. Id. at 568. See Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 47 (1983) (discussing whether the internal mail system of a school had been opened-up to the general public).

114. Id. at 568-69. The policy, entitled "School Sponsored Publications," provided as follows:

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

a. All material must be signed.

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

c. A faculty-student review board composed of the principal, publications teacher, two other classroom teachers and two publications students will evaluate the recom-
facts significant: (1) the adopted curriculum of the school included the school newspaper; (2) a faculty adviser taught an advanced journalism class that was required for all newspaper staff members; (3) the curriculum guide described the advanced journalism class as a laboratory environment for students to apply their knowledge and skills acquired in the basic journalism class; and (4) students received grades and credit for their performance. The Court also found that the practice of school officials demonstrated a lack of intent to create a public forum.

The Supreme Court relied on the district court's findings that the adviser to the newspaper exercised substantial control over the paper, and that the principal regularly reviewed the page proofs before publication. The Court, therefore, found no clear intent by the school to create a public forum.

2. **Standard of Review**

The majority next articulated the appropriate standard of review to be applied in determining when educators may permissibly censor school-sponsored student expression. The *Kuhlmeier* Court created a
critical distinction between speech that occurs incidently on the school grounds, and school-sponsored student expression. The court distinguished \textit{Tinker} from the present case because \textit{Tinker} involved happenstance political expression, whereas \textit{Kuhlmeier} involved school-sponsored student expression. The Court held that school officials need not demonstrate that school-sponsored student expression materially interferes with, or substantially disrupts, everyday school functions as was previously required by \textit{Tinker}. Rather, school officials need show only that their actions are reasonably related to legitimate pedagogical concerns. The Court provided educators with a lengthy list of potential justifications for censoring school-sponsored student expression. For example, school officials may act in order to guarantee class lessons are learned and to prevent exposure of immature students to materials inappropriate to their maturity level. Furthermore, the school has a right to disassociate itself from any speech that is disruptive of school activities, grammatically unsound, poorly written, or inadequately researched, biassed or prejudiced, vulgar or profane, unsuitable for immature audiences, perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the values of a civilized society, or politically non-neutral articles. The Court concluded that educators may not censor school-sponsored speech only when the decision of school authorities has no valid educational purpose.

Consequently, the majority concluded that the principal’s actions were reasonable under the circumstances. The majority pointed out that identification of the unnamed girls in the pregnancy article was

\begin{itemize}
  \item \textit{Id.} at 569. The majority cited no precedent for this distinction. See \textit{id.} The distinction created by the Court undoubtedly derived from the District Court’s division of prior case law into two categories, speech outside of official school programs and school sponsored expression. Kuhlmeier v. Hazelwood School Dist., 607 F. Supp 1450, 1462-65 (D.C. Mo. 1985).
  \item \textit{Kuhlmeier}, 108 S.Ct. at 569. The Court characterized the student speech involved in \textit{Tinker} as “personal expression that happens to occur on the school premises.” \textit{Id.}
  \item \textit{Id.} at 570. See \textit{supra} notes 67 and accompanying text (discussing the two prong test of \textit{Tinker}).
  \item \textit{Kuhlmeier}, 108 S.Ct. at 571. The Court thus rejected the “substantial and reasonable basis” test employed by various lower courts., See, e.g., Frasca v. Andrews, 463 F. Supp. 1043, 1052 (E.D.N.Y. 1978). This “reasonably related” test, or as it is sometimes phrased, the “rational basis” test, is the common test employed by the court in analyzing economic and social legislation under the due process clause and equal protection clause of the Fourteenth Amendment.
  \item \textit{Kuhlmeier}, 108 S.Ct. at 570.
  \item \textit{Id.}
  \item \textit{Id.} at 570.
  \item \textit{Id.} at 571.
\end{itemize}
a legitimate concern and that the frank discussion of the girls' sex lives and birth control experiences was arguably inappropriate for fourteen-year-old freshman. The majority also reasoned that the principal's decision to give the parent criticized in the divorce article an opportunity to respond was not unreasonable. Finally, the Court concluded that the decision to edit the full pages containing the two articles at issue, rather than just the two articles, was reasonable in light of the particular circumstances of the case.

C. Dissenting Opinion

The dissenting opinion, written by Justice Brennan, forcefully disagreed with the majority opinion. First, the dissent argued that the school newspaper was a public forum for student expression. The dissent emphasized that the school board policy prohibited school officials from restricting free expression or diverse viewpoints within the rules of responsible journalism. The dissent also noted that a statement of policy, published in the newspaper at the beginning of the school year, indicated that the student press retained all rights implied by the First Amendment. The dissent therefore concluded that censorship by school officials clearly violated the first amendment rights of the students.

Second, Justice Brennan was concerned with the failure of the majority to apply the test articulated in Tinker to the facts of the case. Justice Brennan argued that Tinker properly struck the bal-
ance between students’ first amendment rights and the efficient functioning of public schools.\textsuperscript{138} While recognizing the need to defer to local school authorities, the dissent noted that historically judicial intervention has been necessary to protect students’ rights.\textsuperscript{139} In the dissent’s view, deference to school officials, to the degree afforded by the majority opinion, would seriously impair first amendment rights.\textsuperscript{140} The dissent further contended that the dichotomy between happenstance speech and school-sponsored expression, articulated by the majority, was not only without precedential support,\textsuperscript{141} but also actually contrary to precedent.\textsuperscript{142}

The dissent next criticized the majority’s justifications for abandoning the \textit{Tinker} test.\textsuperscript{143} The dissent subdivided the court’s reasons for affording school officials greater control over school-sponsored speech into three areas; (1) the power of public educators to set curriculum; (2) the interest of authorities in protecting immature audiences from sensitive viewpoints; and (3) the right of the school to disassociate itself from school-sponsored expression to which the school objected.\textsuperscript{144} According to the dissent, the \textit{Tinker} safeguards

\begin{itemize}
\item \textsuperscript{138} \textit{Id.} at 575.
\item \textsuperscript{139} \textit{Id.} at 574 (citing Edwards v. Aguillard, 482 U.S. (1987) (striking down a state statute banning the teaching of evolution absent instruction on “creation science”); Board of Educ. v. Pico, 457 U.S. 516, 542 (1982) (invalidating school board removal of books from the school library when motivated by mere disapproval with the views the books express); Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (striking down state statute which prohibited teaching Darwinian theory of evolution); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 652 (1943) (state may not compel students to salute the flag); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (state law banning the teaching of foreign language in public and private schools unconstitutional)).
\item \textsuperscript{140} Kuhlmeier, 108 S. Ct. at 574. Justice Brennan stated:
\begin{quote}
If mere incompatibility with the school’s pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the foregoing hypotheticals [e.g. the student who responds to a history teacher’s question by stating “socialism is good”], converting our public schools into “enclaves of totalitarianism” that “strangle free mind at its source.”
\end{quote}
\textit{Id.} (citations omitted).
\item \textsuperscript{141} \textit{Id.} at 571. On this point the dissent argued that the \textit{Tinker} decision did not articulate any discernable distinction between personal expression and school-sponsored speech. \textit{Id.}
\item \textsuperscript{142} \textit{Id.} The dissent pointed out that Bethel School Dist. No. 403 v. Fraser, 478 U.S. \textit{---} 106 S. Ct. 3159 (1986), involved school-sponsored speech, but faithfully applied \textit{Tinker} to the facts of that case. The dissent also noted that two university speech cases similarly failed to draw a line between happenstance and school-sponsored speech. \textit{Id. But see Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, 570 nn.3 & 4 (distinguishing both university speech cases and Fraser). See also Kuhlmeier v. Hazelwood School Dist., 607 F. Supp. 1450, 1464 (D.C. Mo. 1985) (discussing Fraser after it was decided by the Ninth Circuit Court of Appeals, but before the case was heard by the Supreme Court)).
\item \textsuperscript{143} Kuhlmeier, 108 S.Ct. at 576-79 (Brennan, J., dissenting).
\item \textsuperscript{144} \textit{Id.} at 576. None of the excuses offered by the majority supported the distinction between happenstance and school-sponsored expression. \textit{Id.}
\end{itemize}
adequately addressed any concern over curriculum and the learning process as a whole, including poor grammar, writing, or research.\footnote{145} Moreover, the dissent asserted that censorship designed to shield audiences or disassociate the sponsor serves no legitimate curricular purpose.\footnote{146} The dissent found the efforts of the majority to justify shielding audiences and disassociating the sponsor from objectionable material, on the grounds that these were legitimate curricular concerns,\footnote{147} unpersuasive at best.\footnote{148} Most of all, the dissent opposed any deviation from \textit{Tinker} in order to shield impressionable students from potentially sensitive topics or unacceptable social viewpoints.\footnote{149} Although educators have a mandate to inculcate values, the dissent reasoned that officials may not exercise value-oriented mind control or act as "thought police."\footnote{150} The dissent found potential topic sensitivity to be a "vaporous non-standard" that would enable school authorities to disguise viewpoint discrimination.\footnote{151} The dissent conceded that the right of a school to disassociate itself from certain objectionable student speech may justify distinguishing happenstance expression from school-sponsored speech.\footnote{152} Nevertheless, the dissent argued that given the imposition on fundamental first amendment rights that prior restraint entails, a less restrictive alternative to censorship was required.\footnote{153} The dissent offered two alternatives, such as disclaimers in newspapers or official rebuttals by the administration.\footnote{154} The dissent concluded that the
majority approves of censorship by sanctioning the conduct of the principal and labelling the conduct reasonable under the circumstances.\textsuperscript{155}

III. RAMIFICATIONS

The mandate for substantial deference to the authority of local educators involving school-sponsored newspapers by the court in \textit{Kuhlmeier}\textsuperscript{156} compels an analysis of the first amendment rights of students after \textit{Kuhlmeier}. Read most narrowly, \textit{Kuhlmeier} represents merely a conclusion that the Hazelwood East High School newspaper is not a public forum. Hence, the newspaper is subject to prior restraint by school officials.\textsuperscript{157} Read more broadly, \textit{Kuhlmeier} signifies a trend toward blanket deference by the Supreme Court to the decisions of local school authorities.\textsuperscript{158} Not only will the \textit{Kuhlmeier} decision affect high school newspapers, but also may have ramification that affect other school-sponsored student expressive activities, student expression that is not school-sanctioned, and the public college and university press.

A. The High School Press

The \textit{Kuhlmeier} decision may stand for the basic proposition that public school officials have the same right to exercise editorial control over high school newspapers as newspaper publishers have over

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\textsuperscript{155} Id. Brennan complained that the courts “approves of brutal censorship.” \textit{Id}.

\textsuperscript{156} In dictum, Justice White made numerous remarks that local autonomy is vital to the efficient functioning of the nation’s public schools. For example, he stated: “The \textit{Fraser} court cited as “especially relevant” a portion of Justice Black's dissenting opinion in \textit{Tinker} disclaiming any purpose... to hold that the Federal Constitution compels teachers, parents and elected school officials to surrender control of the American public school system to public school students.” Of course, Justice Black’s observations are equally relevant to the instant case. \textit{Kuhlmeier}, 108 S. Ct. 562, 570 n.4 (ellipses in original) (citations omitted).

\textsuperscript{157} See supra notes 109-117 and accompanying text (discussing whether the school newspaper at issue in \textit{Kuhlmeier} is a public forum for student expression).

\textsuperscript{158} See supra notes 124-127 (discussing the degree of deference afforded to local educators by the court in \textit{Kuhlmeier}). See also \textit{Bethel School Dist. No. 403 v. Fraser}, 478 U.S. 106 S. Ct. 3159 (1986) (student who gave speech with sexual overtones at school assembly rightly punished by school officials); \textit{New Jersey v. T.L.O.}, 469 U.S. 325, 340-41 (1985) (holding that a warrantless search of a student by a school official was an unreasonable search and seizure under the Fourth Amendment); \textit{Ambach v. Norwich}, 441 U.S. 68, 80-81 (1979) (holding that the non-hiring of a resident alien by a public school does not violate the equal protection clause of the Fourteenth Amendment).
\end{flushleft}
private newspapers. However, the Kuhlmeier Court did not hold that all school-sponsored newspapers are not public forums as a matter of law. Rather, Kuhlmeier establishes a two-prong test to determine whether censorship of school newspapers violates the first amendment rights of students. First, students must demonstrate that the school newspaper is a public forum. Second, if the paper is not a public forum, students must show the official's decision to censor was unreasonable.

Given the broad dicta of the Court as to the permissible range of reasonable justifications for officials to censor school-sponsored student expression, and the minimal scrutiny that the rational basis or reasonable relation test entails, the second prong of the Kuhlmeier test may be difficult for future plaintiffs to satisfy. Whether a school newspaper is a public forum, however, is a factual issue to be decided on a case-by-case basis. Students must demonstrate that the school, by policy or practice, intended to create a public forum. In Kuhlmeier, the Court found that the school officials did not clearly intend to create a public forum. The Court emphasized that the school newspaper was part of a class taught by an adviser who had substantial control over the newspaper. The Court also concluded that in practice the newspaper was part of the school curriculum and not a public forum, since students received grades and credits for their work on the newspaper. In addition, the Court found that the policies of the school board demonstrated that the

159. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and the treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment.").

160. See supra notes 109-117 and accompanying text (discussing the public forum analysis in Kuhlmeier).

161. See supra notes 46-63 and accompanying text (discussing the concept of the public forum). See also supra notes 109-117 (discussing the analysis of the public forum issue in Kuhlmeier).

162. See supra notes 118-129 and accompanying text (discussing the standard of review analysis in Kuhlmeier).

163. See supra notes 124-127 and accompanying text (discussing the degree of discretion granted to school authorities by the court in Kuhlmeier).

164. See supra note 123.

165. Note, supra note 40, at 633 (discussing the public forum question).


167. Id.

168. See supra notes 114-116 and accompanying text (discussing the findings of fact regarding the school practice pertaining to the newspaper as a public forum).

169. See supra note 113 and accompanying text (discussing the findings of fact of the Kuhlmeier court).
school did not intend to create a public forum.\textsuperscript{170} Significantly, the Court chose to emphasize the school board policy provisions that indicated that the school newspaper was part of the academic curriculum and that school officials maintained substantial control over the newspaper.\textsuperscript{171} The Court de-emphasized the more libertarian first amendment clauses contained in the school board policy\textsuperscript{172} by reading them in light of the provisions which emphasized administrative oversight and control. By analyzing the school board policies collectively, rather than individually,\textsuperscript{173} future courts can more readily find that school officials do not intend to create a student newspaper that is a forum for student expression.

In light of the burdens Kuhlmeier imposes on students, state court may provide a more hospitable forum for the high school press if the applicable state constitution is more accommodating to the claims of students than the federal constitution.\textsuperscript{174} California courts, for example, may be more receptive to the claims of students given the more expansive free speech provisions in the California Constitution.\textsuperscript{175} Indeed, the trend toward filing claims in state courts has already begun.\textsuperscript{176}

### B. Other School-Sponsored Student Expression

The Kuhlmeier Court did not limit its holding exclusively to school newspapers, but extended its holding to editorial control over all student speech in school-sponsored expressive activities.\textsuperscript{177} In partic-

\begin{itemize}
\item \textsuperscript{170} See supra note 114 (discussing the school board policy regarding school-sponsored newspapers).
\item \textsuperscript{172} See, e.g., supra note 114 (reiterating the school board policy).
\item \textsuperscript{173} Kuhlmeier, 108 S. Ct. at 569.
\item \textsuperscript{174} See, e.g., Okamoto, supra note 2 (discussing at length the relative rights of the high school press under the Federal and California Constitutions).
\item \textsuperscript{175} See generally, Id. at 1068-70. The California Constitution provides: "[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." CAL. CONST. art. I, § 2(a). The California courts have concluded that the California Constitution affords greater protection of free speech and press than does the First Amendment. See, e.g., Pines v. Tomson, 160 Cal. App. 3d 370, 394, 206 Cal. Rptr. 866, 881 (1984); Daily v. Superior Court, 112 Cal. 94, 97, 44 P. 458, 459 (1896).
\item \textsuperscript{176} Court to Student Editors: Teacher Knows Best, U.S. NEWS \& WORLD REP., Jan. 25, 1988, at 10 (noting that students in Oregon already have decided to bypass the federal courts and file a suit in state court challenging censorship by a school principal).
\item \textsuperscript{177} See supra note 105 (discussing the list of school-sponsored activities given by the Kuhlmeier court).
\end{itemize}
ular, the Court, relying in part on *Seyfried v. Walton*, a Third Circuit opinion, referred to theatrical productions as one of the activities school officials could censor. The reasoning of *Seyfried* comports with the logic of *Kuhlmeier* in that schools may disassociate themselves from speech that is unsuitable for immature audiences.

The plight of students participating in censored or cancelled school-sponsored theatre productions remains an open question. Arguably, since the *Kuhlmeier* court was not bound to discuss school theatrical productions, the mention of theatre productions in the opinion is dicta. Nevertheless, the repeated reference to theatre productions by the *Kuhlmeier* Court indicates that students may have to pass the two-prong test of *Kuhlmeier* in future theatrical production cancellation cases. Because the public forum question is the first prong of *Kuhlmeier*, students may successfully sue school officials by showing that school policy or practice demonstrates an intention to make the school theatre a forum for student expression. The application of the two-prong test of *Kuhlmeier* to theatre production cases would significantly reduce the precedential value of the *Seyfried* decision because it is devoid of any discussion of the public forum issue.

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178. 668 F.2d 214 (3rd Cir. 1981). *Seyfried* represents the only reported case on high school theatre production censorship. The *Kuhlmeier* Court cited *Seyfried* for the proposition that the decision of school authorities to censor school drama productions should be given substantial deference. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, 571 n.7 (1988). In *Seyfried*, the Third Circuit Court of Appeals held that the decision of a school superintendent to cancel a play production because the play was inappropriate for school sponsorship did not violate students' first amendment rights. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, 571 n.7 (1988).

179. *Kuhlmeier*, 108 S. Ct. at 569. The court stated that a school may disassociate itself from student speech as part of its "capacity as... producer of a school play." *Id* at 571.

180. See supra notes 125-26, 149-51 and accompanying text (discussing the right of school officials to censor material that involves potentially sensitive topics).


182. *Kuhlmeier*, 108 S. Ct. at 569 (noting that drama productions are school-sponsored student expressive activities just as high school newspapers are school-sponsored student expression). Although dicta, the Supreme Court mentioned school drama production four times in *Kuhlmeier*. *Id*. at 569, 570, 571.

183. See supra notes 46-63, 109-117 and accompanying text (discussing the public forum issue). Notably, the Supreme Court has declared that theatres are public forums designed for and dedicated to expressive activities for adults. See Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 555 (1975) (overturning the refusal of a municipality to rent an auditorium for the production of the play *Hair*, as an unlawful prior restraint).

184. Faaborg, supra note 181 at 588.
C. Prior Restraint of Student Happenstance Speech

Almost all of the litigation in the federal courts following the Tinker decision has not involved school-sponsored activities. Rather, the activities involved in federal litigation include underground newspapers, leaflets, and various forms of symbolic speech. The language of the Kuhlmeier majority suggests that the rule in Tinker will continue to govern non-school-sponsored student expression. First, the Kuhlmeier Court recognizes a distinction between school-sponsored speech and the happenstance speech exemplified by Tinker. Second, the Court indicates that personal views expressed on school campuses cannot be punished absent a showing of substantial disruption. Third, the Court noted that the distinction between speech that happens to be made on campus and school-sponsored speech is consistent with precedent. In sum, a substantial amount of language in Kuhlmeier suggests that application of the Tinker test to happenstance speech cases will continue.

Nevertheless, Kuhlmeier may affect the conflict that exists in the federal courts over the proper rule regarding prior restraint of underground newspapers. The majority rule, developed by the Fourth Circuit, treats prior restraint in the public school setting much the

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190. Id. at 570 n.3. citing Papish v. Board of Curators, 410 U.S. 667 (1973) (per curiam) (holding that a state university student who distributed an underground newspaper containing indecent material was punished in violation of her first amendment rights).

191. See Note, Constitutional Rights of High School Students, 23 Drake L. Rev. 403, 406-09 (1974) (discussing students' First and Fourteenth Amendment rights as interpreted by the federal courts after Tinker); Comment, supra note 76 at 405-418 (reviewing the various positions articulated by the federal circuit courts regarding students' first amendment rights).
same way courts address prior restraint on the adult level. The majority rule applies strict scrutiny to school board regulations. School officials must establish stringent procedural safeguards before prior restraints can overcome the presumption of invalidity. The Seventh Circuit holds that prior restraints on student speech, including underground newspapers, are per se invalid. In contrast, the Second Circuit requires very minimal procedural safeguards on prior restraint programs employing a minimal scrutiny approach.

The Kuhlmeier Court expressly declined to decide what procedural safeguards are required in cases involving non-school-sponsored student expression. The Court did, however, employ minimum scrutiny to prior restraint in the context of school-sponsored publications. Given the language of the majority emphasizing the necessity of deferring to local school authorities, the majority rule of the Fourth Circuit regarding prior restraint of happenstance expression would appear to be disfavored. More important, Kuhlmeier suggests that

192. Comment, supra note 76 at 405-411 (discussing the Fourth Circuit rule on prior restraint of student expression).
193. Id. at 409. See, e.g., Nitzberg v. Parks, 525 F.2d 378, 383 (4th Cir. 1975) (invalidating a regulation defining “libel,” “obscenity” and “distribution”; providing for a two-pupil-day review period with written reasons for denying approval; and establishing a three-day appeal procedure; because the regulation failed to detail the elements of libel and obscenity; did not provide guidelines for determining what would constitute a substantial disruption of school activities; and did not establish the appropriate criteria that an administrator might use in predicting whether a disruption had occurred).
194. See Baughmann v. Freienmuth, 478 F.2d 1345, 1351 (4th Cir. 1973). In Baughmann, the Fourth Circuit detailed four requirements for any prior restraint program involving student publications. These criteria required: (1) A clear definition of “distribution”; (2) a provision for prompt approval/disapproval; (3) a statement informing students of the effect of a failure to take prompt administrative action; and (4) a provision for an adequate and prompt appeal. Id.
195. Id. at 1348. See supra notes 26-27 and accompanying text (discussing prior restraint law in the adult world).
196. See, e.g., Fujishima v. Board of Educ., 460 F.2d 1355, 1358-59 (7th Cir. 1972) (invalidating a school board rule that prohibited the distribution of any book or publication on the school premises without the prior approval of the school superintendent); Jacobs v. Board of School Comm’rs, 490 F.2d 601, 605 (7th Cir. 1973) (invalidating a school board rule that required prior approval by the school superintendent before students could distribute underground newspapers because the school regulation was vague and overbroad).
197. See, e.g., Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 810-11 (2d Cir. 1971). In Eisner, the Court only mandated: (1) A provision for an expedited review procedure; and (2) a precise definition of the word “distribute.” Id.
198. Id. at 807.
200. Id. at 571.
201. See supra notes 124-127 and accompanying text.
202. To the extent that Kuhlmeier expressly authorizes prior restraint in the student speech context, Kuhlmeier apparently rejects, at least in part, the Seventh Circuit approach sub silenco. Kuhlmeier, 108 S. Ct. at 571 (holding of the court). To contrast Kuhlmeier with the Seventh
a school may not tolerate student expression inconsistent with the basic educational mission of the school. This notion forms the basis of the right of a school to disassociate itself from certain student expression. Therefore, if a school can suppress any student expression inconsistent with the basic educational mission of the school, regardless of whether the speech is school-sponsored, affirmation of prior restraint in the non-school-sponsored speech realm could result.

D. The College and University Student Press

The Kuhlmeier Court noted that the decision did not extend to the first amendment rights of public college and university students. Kuhlmeier, however, may reasonably be interpreted to apply to the state college and university press. Much of the language in Kuhlmeier refers to students in public schools generally, without limiting the language to high schools, junior high schools, and elementary schools. In addition, it could be suggested that public colleges and universities also have a right to disassociate themselves from speech that is inconsistent with their basic educational mission. Finally, the factual settings of a high school and state college newspaper may be similar if students attend a class supervised by an adviser, and students receive both grades and credit for their work.

Despite these few arguments, almost all of the language in Kuhlmeier is supported by cases involving high school students. Moreover, the broad discretion granted to school officials in Kuhlmeier was based in part on the need to protect immature students from
sensitive topics. This concern does not exist in a state college or university setting given the differences in emotional and intellectual maturity between high school and college students. Finally, courts have emphasized that the first amendment rights of mature students are of great social value. Imposition of controls upon college and university student expression would be a very dangerous proposition and contrary to prior holdings of the Supreme Court. Consequently, Kuhlmeier is not expected to alter public college and university students' first amendment rights.

**CONCLUSION**

In *Hazelwood School District v. Kuhlmeier*, the U.S. Supreme court held that public school officials may exercise editorial control over school-sponsored newspapers when official actions are reasonably related to legitimate pedagogical concerns. School newspapers

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210. See Nicholson v. Board of Educ., Etc., 682 F.2d 858, 863 n.4. (9th Cir. 1982) ("Different considerations govern application of the first amendment on the college campus and at lower level educational institutions. The activities of high school students, for example, may be stringently reviewed than the conduct of college students, as the former are 'in a much more adolescent and immature stage of life and less able to screen fact from propaganda.'"); Haskell, *Student Expression in the Public Schools: Tinker Distinguished*, 59 Geo. L. J. 37, 43-44 (1970) ("Constitutional protection of expression is, of course, always relative to circumstances, and it makes sense that greater freedom of provocative expression should be allowed on a college campus than in a high school."); Trager, *Freedom of the Press in College & High School*, 35 Alb. L. Rev. 161, 166-81 (1971) (analyzing the differences between state college and university students and public secondary school students).


213. See, e.g., Papish v. Board of Curators, 410 U.S. 667 (1973)(per curiam) (holding that a state university student who published an underground newspaper was punished in violation of her first amendment rights); Healy v. James, 408 U.S. 169 (1972) (holding that a state university decision to deny students the right to establish a local chapter of Students for a Democratic Society as a campus organization violated the students' first amendment right of association). In *Healy*, the Court made it clear:

> the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."
>
> *Id.* at 180 (citation omitted). The court further noted in *Papish* that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish*, 410 U.S. at 670.

214. Seligmann & Namuth, *supra* note 5 at 60 (concluding that *Kuhlmeier* will not affect college and university students, and noting that "at the college level, where most of the students are not minors, the courts have almost always extended full First Amendment protections.")
may still be deemed public forums after Kuhlmeier, therefore falling outside the scope of the holding of Kuhlmeier, although this result is unlikely.\textsuperscript{215} Early indications are that official efforts to regulate school newspaper content will increase in the future.\textsuperscript{216}

The Kuhlmeier Court left several issues regarding students' first amendment rights undecided. The decision may have ramifications on both school-sponsored student expression, such as theatre productions and nonschool-sanctioned student expression involving underground newspapers. The two-prong test in Tinker should continue to govern cases involving nonschool-sponsored student expression. The broad discretion given to local public school administrators by the Supreme Court in Kuhlmeier, however, could result in further expansion of the school officials' power to limit student speech uttered on the school grounds.

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\textsuperscript{215} See infra notes 113-19, 133-36, 171-73 and accompanying text (discussing the analysis of the public forum issue in Kuhlmeier).

\textsuperscript{216} Court to Students Editors: Teachers Knows Best, supra note 174 at 10.