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Constitutional Law: Closing the Schoolhouse Gate on the First Amendment - Hazelwood School District v. Kuhlmeier

Amy Fischer

CASE COMMENTS

CONSTITUTIONAL LAW: CLOSING THE SCHOOLHOUSE GATE ON THE FIRST AMENDMENT

Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562 (1988)

Respondents, former staff members of a high school newspaper published in a journalism class, alleged a violation of their first amendment rights when the school principal deleted two pages of the paper.[1] The pages contained articles describing students' experiences with pregnancy and the impact of divorce on students at the school.[2] Although the pages contained other, unobjectionable material, the principal withheld both pages from publication.[3] Respondents filed suit in federal district court against the school district and school officials.[4] The district court found that editing the school paper was within the school officials' discretion and did not violate the students' first amendment rights.[5] The Eighth Circuit Court of Appeals reversed,[6] noting that the school paper was a public forum, "intended to be and operated as a conduit for the student viewpoint."[7] On certiorari,[8] the Supreme Court reversed the Eighth Circuit, and HELD, since the school paper is not a public forum,[9] school authorities may exercise editorial control over the style and content of student speech so long as their actions are reasonably related to legitimate pedagogical concerns.[10]

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1. 108 S. Ct. 562, 566 (1988).
2. *Id.* at 565-66. The principal objected to the pregnancy story because the pregnant students, though not named, could be identified and because the article's references to sexual activity and birth control were inappropriate for some students. The principal objected to the divorce article because the proofs had identified by name (though the name was deleted in the final version) a student who complained of her father's conduct, and the parents had not been given an opportunity to respond. *Id.*
3. *Id.* at 566 n.1. Believing there was not enough time to make the changes in the paper and have it ready for publication, the principal directed that the pages on which the articles appeared be withheld. *Id.* at 566.
4. 607 F. Supp. 1450 (D.C. Mo. 1985), *rev'd*, 795 F.2d 1368 (8th Cir. 1986), *rev'd*, 108 S. Ct. 562 (1988).
5. 607 F. Supp. at 1467.
6. 795 F.2d 1368 (8th Cir. 1986), *rev'd*, 108 S. Ct. 562 (1988).
7. 795 F.2d at 1372.
8. 108 S. Ct. 562, 567 (1988).
9. *Id.* at 568.
10. *Id.* at 571.

The Supreme Court has denied states the power to abridge the fundamental rights explicitly and implicitly stated in the Bill of Rights absent a compelling state interest.[11] The government, however, bears no affirmative duty to guarantee the meaningful exercise of those rights.[12] While the government may not impede or restrain an individual's right to free expression,[13] government property is not automatically a forum for the exposition of one's ideas.[14] The government, like a private land owner, exercises absolute discretion over the use of property held in public trust.[15]

The Supreme Court, however, has abridged the government's absolute proprietary right[16] by protecting access to public property that is a "quintessentially public forum."[17] In streets and public squares, which have historically served as fora for the exchange of ideas, the right of free expression is subject only to compelling government interests.[18] The Court extended the public forum concept to encompass public buildings.[19] As long as the expression is consistent with the government's use of the facilities, an individual's first amendment rights will prevail over the government's proprietary interest.[20]

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11. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (first amendment is a fundamental right protected from state action by the due process clause of the fourteenth amendment).

12. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 317-18 (1980) (while the fourteenth amendment prohibits states from restricting the exercise of fundamental rights, neither the states nor Congress has a duty to fund or subsidize the exercise of fundamental rights).

13. *See generally* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) (government must do more than refrain from censorship and must act affirmatively to facilitate expression).

14. *See, e.g.*, City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 814 (1984) ("the mere fact that government property can be used as a vehicle of communication does not mean that the Constitution requires such uses to be permitted").

15. Davis v. Massachusetts, 167 U.S. 43, 47-8 (1897).

16. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 512 n.6 (1969) (dedication of a public place to specific uses does not imply that the constitutional rights of the persons entitled to be there are gauged as if the premises were purely private property).

17. *See* Hague v. CIO, 307 U.S. 496, 515 (1939) (city could not lawfully forbid union from communicating its ideas by holding meetings and assemblies in the open air and at public places). The Supreme Court subsequently deemed streets and parks "quintessentially public forums." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

18. In *Hague*, the Court said freedom of expression in streets and parks is subject only to regulations concerning the general "comfort and convenience" which do not abridge or deny freedom of speech and assembly. 307 U.S. at 515. *Perry* later referred to the standard originally enumerated in *Hague* as a "compelling government interest" requirement. 460 U.S. at 45.

19. *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555-57 (1975) (auditorium and city-leased theatre were public forums designed for and dedicated to expressive activities). *See also* Widmar v. Vincent, 454 U.S. 263, 267-8 (1981) (school meeting facilities used for student meetings are public fora).

20. *Compare* Brown v. Louisiana, 383 U.S. 131, 136-9 (1966) (silent protest of segregation allowed in reading room of public library) *with* Adderley v. Florida, 385 U.S. 39, 41-3 (1966)

In the schools, the government not only has a valid interest in controlling the use of public property but also has the duty to educate its citizenry.[21] Although the government may not impose orthodoxy in the name of education,[22] it has a compelling interest to maintain an atmosphere conducive to learning.[23] These valid pedagogical and proprietary state interests must be weighed against the student's first amendment rights.

In *Tinker v. Des Moines Independent Community School District*,[24] the Court attempted to define high school students' first amendment rights. In *Tinker*, school authorities suspended high school students for wearing black armbands to protest the Vietnam War. The Court found that punishing the students for their unobtrusive protest violated their first amendment rights.[25] The Court stated that students in school as well as out of school are "persons" under the Constitution and possess certain fundamental rights which the state must respect.[26] While school officials have extensive authority to run the school,[27] they must exercise their discretion consistent with fundamental constitutional safeguards.[28] The Court reasoned that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[29] Only upon a showing that the forbidden expression would "materially and substantially interfere with the requirements of appropriate discipline[30] or with the rights of others"[31] would the

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(demonstrators at a jail not protected by first amendment because their expression was inconsistent with government use of the facility as a prison).

21. *See, e.g.*, Brown v. Board of Educ. of Topeka, 347 U.S. 483, 493 (1954) ("Today education is perhaps the most important function of state and local government.").

22. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism or religion, or other matters of opinion.").

23. *See* Grayned v. Rockford, 408 U.S. 104, 119 (1972) (anti-noise statute narrowly tailored to further state's compelling interest in having an undisrupted school session conducive to student learning).

24. 393 U.S. 503 (1969).

25. *Id.* at 508.

26. *Id.* at 511.

27. *Id.* at 507.

28. *Id.* at 511.

29. *Id.* at 506.

30. The standard of material and substantial interference is derived from Burnside v. Byars, 363 F.2d 744, 748-49 (5th Cir. 1966) (permitting students to wear "freedom buttons" where there was no disturbance to the functioning of the school) and Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966) (upholding school officials' right to deny students the right to wear "freedom buttons" where students wearing buttons harassed those who did not and created a disturbance).

31. Where demonstrable harm to others, including emotional harm, can be shown, school officials may repress disturbing conduct. Katz v. McAulay, 438 F.2d 1058, 1061 (2d Cir. 1971),

Court sustain prohibition on expression.[32] An "undifferentiated fear or apprehension of disturbance" is not enough to overcome the right of freedom of expression.[33] The authority to decide these constitutional issues remains with the Court.[34]

Tinker suggests that even in places which are not traditionally public fora, the only permissible restrictions on expression are those that require the expressive activity to conform to the place's use. In *Perry Educational Association v. Perry Local Educators' Association*,[35] the Court replaced this functional, balancing approach with a tiered public forum analysis.[36] *Perry* involved a rival teachers' union's right to have equal access to school mailboxes which were open to the teachers' representative union. The Court denied the rival union's first amendment and equal protection claims, stating that different treatment of the two unions was not based on the content of the expression but on the unions' different capacities.[37] The *Perry* Court stated that the right of access depends on the character of the property at issue.[38] Although access to a quintessentially public forum is subject only to compelling government interests and reasonable time, place, and manner restrictions,[39] the Court described the mailbox as only a "limited public forum."[40] While the state may allow the public to use

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cert. denied, 405 U.S. 933 (1972) (prohibiting distribution of leaflets soliciting funds is permissible upon showing demonstrable harm to students who did not contribute because they had different beliefs or were too poor). Most lower courts accept a tort standard towards invasion of rights. *See, e.g.*, Kuhlmeier v. Hazelwood, 795 F.2d 1368, 1376 (1986) (any standard not allowing potential tort liability could result in school officials "crushing speech at the slightest fear of disturbance").

32. 393 U.S. at 509 (1969).

33. *Id.* at 508.

34. *Id.* at 507.

35. 460 U.S. 37 (1983).

36. "Public forum," referring to property well suited to public speech and the exchange of ideas is discussed in Kalven, *The Concept of the Public Forum*: Cox v. Louisiana, 1965 SUP. CT. REV. 1. In a "tiered public forum analysis," the Court applies varying degrees of scrutiny according to the nature of the forum. Regulation of public fora is subject to a strict scrutiny standard, and regulation of limited-public fora is subject to a reasonableness standard. 460 U.S. at 45-46. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 808 (1985) (government's decision to restrict access to a nonpublic forum need only be reasonable; "[i]n contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the forum need not be made").

37. 460 U.S. at 50. Representative union's use of school mailboxes was necessary to perform its duties as exclusive representative. The rival union, lacking such obligations, had no need of access. *Id.* at 51.

38. *Id.* at 44.

39. *Id.* at 45.

40. *Id.* at 46-47.

government property as a forum for expressive activity, the state retains the right to reserve the forum for its intended purpose.[41] The Court suggested that the state may control access to a nonpublic forum based on the subject matter and the identity of the speaker, so long as the distinctions are reasonably related to the purpose of the forum.[42] Important to the Court's holding was the availability of alternate fora; the rival union was not foreclosed from effectively communicating with the teachers through other media.[43]

The *Perry* forum analysis, with its seemingly objective standard for balancing the state's interests against the individual's first amendment rights, supplanted the "material and substantial interference" standard of *Tinker*, which had proved difficult to define and impossible to consistently apply.[44] In *Bethel School District No. 403 v. Fraser*,[45] the Court looked to the nature of the forum to define the appropriate level of scrutiny, thus resolving the first amendment claim without regard to whether the expression disturbs the educational environment or the rights of others. In *Fraser*, a student used sexual innuendo to praise a candidate for school office in a speech addressed to a school assembly.[46] The Court held that such speech is unprotected in a school assembly.[47] The nature of the expression distinguished the case from *Tinker*.[48] While the speech fell short of being legally obscene,[49] school

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41. *Id.* at 46.

42. *Id.* at 49. *See* Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.").

43. 460 U.S. at 53 (reasonableness of limitations on access to school mail is supported by the substantial alternative channels that remain open for teacher-union communication).

44. *See generally* Hamilton, *Free Expression in the Public Schools: Regulation of School Newspapers*, 18 CUMB. L. REV. 181 (1988) (ambiguities of the *Tinker* "material and substantial interference" standard have given rise to disparate standards in the lower courts). *See also* Diamond, *The First Amendment and the Court: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 487 (1981) ("The extraordinary lack of consistency in lower court cases attempting to follow *Tinker* demonstrates the lack of real guidance provided by the Court's decision.").

45. 478 U.S. 675 (1986).

46. *Id.* at 678 ("Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor."); *cf.* 478 U.S. at 687-88 (Brennan, J., concurring) (citing the text of Fraser's speech, and concluding that the remarks "exceeded permissible limits.").

47. *Id.* at 685.

48. *Id.* at 680. Note, Tinker *Revisited*: Fraser v. Bethel School District *and the Regulation of Speech in the Public Schools*, 1985 DUKE L.J. 1164, 1165. *Tinker* is distinguishable as a public forum case; *Fraser* is a legitimate time, manner, place restriction. *Id.*

49. 478 U.S. at 688 (Brennan, J., concurring) (the language used is far removed from the narrow class of obscene speech which is not protected by the first amendment) (citing Ginsberg v. New York, 390 U.S. 629 (1968); Roth v. United States, 354 U.S. 476 (1957)). The *Fraser*

authorities are not bound to give the same deference to sexual innuendo at a school assembly as they must afford the unobtrusive political expression in *Tinker*.[50] Although sexual innuendo could not be prohibited outside the school setting, students' first amendment rights in school are not coextensive with those generally held by adults.[51] Inside school, officials have the authority to censure forms of speech inappropriate to the forum.[52]

In the instant case, the Court extended the *Fraser* rationale to sanction the censure of ideas and the subject matter itself.[53] The Court decided that school officials may use their discretion to reasonably restrict content as well as the manner of expression.[54] To come within the protection of *Tinker*, the medium for the speech must first be a public forum.[55] The instant Court defined the school newspaper as a nonpublic forum;[56] school facilities are public fora only if school authorities "have by policy or practice opened those facilities to indiscriminate use by the general public."[57] Because the school board did not definitively state that the paper was open to public discourse, the paper remained a nonpublic forum.[58] The Court reasoned that since the paper was not a public forum, school officials could regulate the content of the paper in any reasonable manner.

The Court found the *Tinker* material and substantial interference standard inapplicable[59] because the instant case did not involve the

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Court referred to the speech as "lewd and obscene." *Id.* at 680. In the instant case, however, the Court appears to side with Brennan's concurring opinion in *Fraser*, saying that Fraser's speech was not "legally obscene." 108 S. Ct. 562, 567 (1988).

50. 478 U.S. at 698. *Contra id.* at 690 (Marshall, J., dissenting) (*Tinker* was appropriately applied by the lower courts to find no disruption of the educational process as a result of the speech). *See* Fraser v. Bethel School Dist. No. 43, 755 F.2d 1356, 1358-65 (1985).

51. 478 U.S. at 682. ("[T]he first amendment gives a high school student the right to wear Tinker's armband, but not Cohen's jacket.") (quoting Thomas v. Board of Educ., Granville Cent. School Dist., 607 F.2d 1043, 1057 (2d Cir. 1979)).

52. *Id.* at 683.

53. 108 S. Ct. 562, 571 (1988).

54. *Id.*

55. *Id.* at 567-68.

56. *Id.* at 568.

57. *Id.*

58. *Id. Compare* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.") *with* Flowers v. United States, 407 U.S. 197, 198-99 (1972) (by allowing public access, commander of a military base abandoned any claim of special interest in who walks, talks or distributes leaflets on the avenue of the base).

59. 108 S. Ct. at 569.

suppression of the students' personal expression. Educators may exercise greater control over school-sponsored publications which are part of the curriculum and "might reasonably be perceived to bear the imprimatur of the school."[60] The Court stated that a school must be allowed to set high standards for student speech disseminated under its auspices and may refuse to lend its name and resources to the dissemination of student expression.[61] According to the Court, responsibility for education is better left to school officials than the courts.[62]

Justice Brennan's dissent questioned both the instant Court's designation of the newspaper as a nonpublic forum and the validity of the public forum doctrine itself.[63] While acknowledging that the rights of school students are not coextensive with the rights of adults, Justice Brennan asserted that *Tinker* limits officials' discretion to curtail students' rights.[64] He criticized the Court for creating a "false taxonomy" that departs from the material and substantial interference standard of *Tinker* if the expression is school-sponsored or might bear the school's imprimatur.[65] Justice Brennan distinguished *Fraser* as a valid time, place, manner restriction; the school could censor the student's endorsement for the lewd manner in which it was delivered, not for its content.[66] Because the *Fraser* Court applied the *Tinker* test in the case of a school-sponsored assembly, Justice Brennan reasoned that the distinction between school-sponsored and casual expression on school grounds was irrelevant.[67] Justice Brennan feared that characterizing expression as school-sponsored would allow school officials to impose a content restriction without any showing of a compelling government interest or balancing of countervailing considerations.[68]

Tinker suggests that students may use school facilities as a public forum for any expression that does not "materially and substantially interfere with the educational process or the rights of others."[69] In the instant case, this right of free speech becomes a privilege conditioned upon the state's beneficence. The Court refuses to protect

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60. *Id.*
61. *Id.* at 570.
62. *Id.* at 571.
63. *Id.* at 573.
64. *Id.* at 574.
65. *Id.* at 575.
66. *Id.*
67. *Id.* at 577.
68. *Id.* at 580. Even if the school officials were justified in deleting the articles, Justice Brennan asserted that the means used, deleting the whole page, was overly broad and not sufficiently tailored to the ends. *Id.*
69. *See supra* notes 29-33 and accompanying text.

speech in a government-sponsored forum unless the plaintiff establishes that the medium is a traditional[70] or designated public forum.[71] The instant Court offers no rational basis for distinguishing the personal expression protected in *Tinker* from the expression in the instant case.[72] Instead, the Court differentiates the medium of expression in each case. According to the instant Court, the school in *Tinker* inhibited lawful, expressive conduct, whereas the school in the instant case merely refused access to government property. The Court draws a spurious distinction. By denying access to the one available forum for expressing student ideas, the school has silenced expression.[73] School authorities should not interfere with any student expression that conforms to the *Tinker* standard.

By categorizing the school paper as a nonpublic forum, the instant Court defines the school officials' censorship as an extension of the state's power to regulate the use of its property.[74] This forum analysis shifts the focus from the individual's right of expression to the school's editorial discretion.[75] In *Perry*, the Court balanced the rival union's first amendment rights against the government's interest in controlling the use of its property. In categorizing the mailboxes as nonpublic fora, the Court considered the historically restricted access to the fora[76] and the availability of sufficient, alternate fora.[77]

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70. *See* Hague v. CIO, 307 U.S. 496, 515 (1939) (public forum refers to parks, streets and property that 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").

71. 108 S. Ct. at 569 (Court refuses to apply the *Tinker* standard until the plaintiff establishes that the school facility is a public forum).

72. *Id. Tinker* addressed educators' power to prohibit student expression to maintain the learning environment. The issue in the instant case is the educators' control over school-sponsored publications that might be perceived as bearing the school's imprimatur. *Id.* The *Tinker* analysis focuses on the disruption to the school and not the medium of expression.

73. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 513 (1969):

> [F]ree speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.

Id.

74. 108 S. Ct. at 571.

75. *Id.* at 570. The court examines the extent to which educators may edit the contents of a high school newspaper produced as part of the school's journalism curriculum. The exercise of editorial discretion is an extension of the state's proprietary right to control the use of the newspaper. *Id.*

76. *See* United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 (1981) (government may restrict access to mailboxes to material for which postage is paid).

77. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

In the instant case, the Court looked to government's intent to determine the nature of the forum. Since school officials intended to control expression in the newspaper, the Court decided that the paper was a nonpublic forum.[78] The restriction was permissible because the forum was nonpublic. Through this circular reasoning the Court evades the central issue: the constitutionality of the restriction.[79] Since the state opened its property as a medium of expression for some individuals, it should not be allowed to deny access to similarly situated groups[80] or prohibit ideas it finds objectionable.[81] The deferential treatment accorded the one union in *Perry* could be justified by considering its status as the teachers' representative.[82] However, the school paper, while designated as part of the curriculum,[83] is a de facto public forum to which schools should not deny students equal access.

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78. 108 S. Ct. at 568 (school funded the newspaper, principal had reserved editorial discretion, and "[s]chool officials did not deviate in practice from their policy"). The Court's logic leads to the conclusion that as long as the state intends to censure and indeed does censure, its actions are not open to challenge.

79. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 813 (1985) (Blackmun, J., dissenting) (giving a clear, concise critique of the circular reasoning inherent in the Court's application of the public forum doctrine).

80. *See supra* notes 14, 15 and accompanying text. Property is not rendered a "public forum" simply because it is owned by the government, nor is the government required to surrender its property for use as forum; however, by allowing use of the property as a forum, it loses its non-forum status. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 277 (1981) (having opened school facilities to student groups, authorities could not deny access to a student religious group).

81. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place."). *See also* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 512 (a school is a "public place" and dedication to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if premises were purely private property). Even private property owners who use their property for public purposes surrender absolute control of their land to first amendment claims of protected speech. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 506 (1946) (company could not prohibit Jehovah's Witnesses from distributing literature in company-owned town because "[o]wnership does not mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.").

82. The *Perry* public forum doctrine was further refined in Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) ("Control over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in the light of the purpose served by the forum and are viewpoint neutral.").

83. 108 S. Ct. 562, 568 (1988) (citing board policy). *See* Goeking, Kuhlmeier v. Hazelwood School District: *Application of the Prior Restraint and the Public Forum Doctrine to the Free Expression Rights of High School Students*, 14 HASTINGS CONST. L.Q. 889, 904 (1977) ("The Court has never explicitly used curriculum and non-curriculum distinctions in the public forum context . . . "). *See* 478 U.S. 675, 683 (Court implicitly recognized that curriculum ties can be relevant to resolving first amendment conflicts).

The Court affirms the school's content-based prior restraint as a valid exercise of "editorial discretion."[84] The *Fraser* Court affirmed a content neutral, time, place, and manner restriction consistent with the *Tinker* standard.[85] The student's endorsement was constitutionally protected; only the lewd manner of the address was not protected since it was inappropriate for the school assembly forum. In the instant case, school authorities denied access to students because the content — the ideas themselves — were objectionable.[86] The government may restrict the manner of expression and the class of speakers allowed access to the school forum.[87] The school, however, may not censor ideas.[88] Censoring expression that is consistent with the forum's nature[89] and purpose[90] violates both the first amendment and the equal protection clause.[91] Even if the paper is no more than an extension of

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84. *See supra* notes 53-62 and accompanying text.

85. 478 U.S. at 689-90 (Brennan, J., concurring) (conduct sufficiently disturbed the educational atmosphere so as to be unprotected under the more exacting standard of *Tinker*). *Cf. id.* at 690 (Marshall, J., dissenting) (school failed to establish that the remarks were disruptive under the *Tinker* standard). Both the majority and the dissent agree that the *Tinker* standard is applicable. *Id.* at 683, 690.

86. 108 S. Ct. at 565. The principal objected to the articles because he believed the articles' references to sexual activity and birth control were inappropriate for some students.

87. *See supra* notes 37-42 and accompanying text (discriminating on the basis of the different status of the two unions is permissible as long as the state does not differentiate on the basis of their ideas).

88. *See, e.g.*, Board of Educ., Island Trees Free Union School No. 26 v. Pico, 457 U.S. 853, 867 (1982) (right to receive information and ideas is inherent corollary of the rights of free speech and press).

89. Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368 (8th Cir. 1986). The nature of the forum is defined by its inherent qualities. *Id.* at 1372. The newspaper lends itself to the exploration of controversial topics of interest to the student body. *Id.* The school censored the articles only because of their subject matter — not because the form of expression was inappropriate for the medium. *Id.* at 1374-75.

90. *See id.* at 1372 (The Court of Appeals stated that the newspaper was "intended to be and operated as a conduit for student viewpoint"); *cf.* Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. at 568 (Court held that the censured articles were not within the designated purpose of the forum, citing Hazelwood Board Policy 348.51 which provides that "[s]chool-sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities"). The instant Court ignored the rest of the policy statement guaranteeing that "[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism." *Id.* at 573 (Brennan, J., dissenting).

91. The criterion for granting access to a government forum must at least be rationally related to the nature and purpose of the forum. The use of any other criterion would be facially invalid because the first amendment right of expression would be unduly curtailed without a compelling government interest. Only when the forum is unable to accommodate both expression and the government function must the right of expression yield. *See generally* Comment, *Forum Over Substance:* Cornelius v. NAACP Legal Defense and Educ. Fund, 35 CATH. U.L. REV.

the curriculum, the school violated the students' constitutionally protected right of access to information.[92] The government is not obligated to provide information, but it may not censor information.[93]

The Court has transformed the public forum idea from a rationale for extending free expression on public property to a mechanism for restricting the first amendment right at the government's discretion. What originated as a descriptive formula for balancing the government's and individual's countervailing interests[94] has evolved into a prescriptive doctrine, allowing the state to circumvent the first amendment.[95] Rather than balance the state's property interest against the individual's free speech rights, the Court categorizes the forum according to the government's intended use.[96] Limited public fora are, for

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307, 331 (1985) (Court analysis traditionally has focused on the way in which the manner of expression affects the forum; restrictions on speech or distinctions between speakers were allowed when the nature of the forum so dictated). *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (An ordinance that required distribution of literature to be conducted from preassigned booths at a fair was valid even though it inhibited a religious practice and the right of expression. The peculiar characteristics of the fairgrounds and the government's interest in controlling large numbers of people dictated this result.); Greer v. Spock, 424 U.S. 828 (1976) (commander could restrict expression on a military base to preserve loyalty, discipline, and morale). *But see* Cornelius v. NAACP, 105 S. Ct. 3439 (1985) (government's intent determines the nature of the forum and thus the right to access).

92. *See* Board of Educ., Island Trees Free Union School No. 26 v. Pico, 457 U.S. 853, 867. The school could not remove books from the school library because doing so violated students' first amendment rights — the right to receive information and ideas is an inherent corollary of the rights of free speech.

93. *Id.* at 872. The Court refers to access to books, but the principle is equally valid in the context of the school paper. *See also* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969) (educators may not transform students into closed circuit recipients of only that which the state chooses to communicate).

94. *See* Comment, *supra* note 91, at 308 (forum analysis is a "device used to evaluate the constitutionality of regulating expressive activity on government property by balancing the mandates of the first amendment against the government's power to restrict the use of its property to its intended purpose"). *Tinker* used ambiguous terms to define the extent of students' first amendment rights to allow a flexible balancing of individual rights and countervailing government interests. 393 U.S. 503 (1969).

95. *See* Comment, *supra* note 91, at 332. Deference to the government's intent is inconsistent with the history of the first amendment because it gives the government almost limitless discretion to restrict speech in facilities not generally open to the public. *Id.*

96. Farber & Novak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984):

> Constitutional protection should not depend on labeling the speaker's physical location but on the first amendment values and government interests involved in the case. The public forum doctrine is a useful shorthand method of invoking this balance of interest. But when the heuristic device becomes the exclusive method of analysis, only confusion and mistakes can result.

Id. at 1226-30.

all practical purposes, non-fora unless the government expressly permits unrestricted access.[97] In a nonpublic forum, the right to free expression will fail if the government can offer any plausible reason for the restriction. In any other setting, courts would subject a content-based prior restraint imposed by an administrative agency to the most exacting scrutiny.[98]

Access to limited public fora is determined not by the government's intent but by the degree that access impedes the government's functioning.[99] Courts should presume that government facilities are open fora and then shift the burden to the state to establish that the expression at issue unduly inhibits a vital governmental function.[100] This approach is more consistent with the forum doctrine's historical appli-

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97. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, 568 (1988) ("school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public.'"). *See also supra* note 58.

98. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 276 (1981) (even in a university, the most exacting scrutiny is required in cases where the state undertakes to regulate speech on the basis of its content). *See also* Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 225 (1983) (because evaluations of content-based restrictions are likely to involve ideological predispositions of evaluators, the safest and most sensible course may be to test all content-based restrictions by the same stringent standards of review); New York Times Co. v. United States, 403 U.S. 713, 723 (1971) (The Court announced two rules concerning prior restraints: (1) any system of prior restraint bears a heavy presumption of unconstitutionality, and (2) the government carries the burden to justify any system of prior restraint). The Supreme Court has not explicitly stated the appropriate level of review for prior restraints in the school setting. Some lower courts apply the *Tinker* standard to test prior restraints. *See* Eisner v. Samford Bd. of Educ., 440 F.2d 803, 807-08 (2d Cir. 1981) (prior restraint of student speech is permissible if the official reasonably believes the speech will violate the *Tinker* standard). *But see* Fujishima v. Board of Educ., 460 F.2d 1355, 1358 (7th Cir. 1972) (the *Tinker* formula is applied to punishment of students; prior restraints are impermissible). The Court of Appeals in the instant case applied the *Tinker* standard with the proviso that if censorship is justified, "the least restrictive means are to be followed." Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368, 1374 n.5 (8th Cir. 1986).

99. *E.g.*, Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981). "Consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Id.* at 650-51. *See also* Comment, *supra* note 91, at 310 (the Court has evaluated restrictions on expressive use of government property by looking at the particular expressive activity, by examining the way the particular property is normally used, and by evaluating the effect of that expression on that use).

100. Free expression is such a fundamental right and so essential to political freedom that the government and its agents must be forced to provide more than a mere rational justification for curtailing that liberty. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (The first amendment guarantee of free speech is a "fundamental principle of the American government."). The highly deferential rationality review used by the instant Court offers no protection against government overreaching.

cation, which defined the forum in functional terms rather than according to the government's intent. A presumption of access focuses on the real issue, not the extent of the government's property interest but the protection of expression.[101] Schools are inherently fora for the exchange of ideas,[102] and a school newspaper is a medium for exploring controversial subjects. The state's intent in creating the paper should be irrelevant.

Students' first amendment rights in school may not be coextensive with those of adults.[103] However, the rights at issue are no less fundamental. What varies is the countervailing state interest. While the state's interest is more compelling in the school setting, it is still subject to constitutional restraints.[104] The school could have protected its valid interests in this case by far less intrusive means.[105] School officials should be held to a high standard of care when they impinge upon constitutionally protected rights.[106] Allowing overbroad restraints fosters careless disregard for first amendment rights[107] without promoting any legitimate state interest. While running schools is best

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101. Dissenters have criticized the Court's interpretation of the public forum doctrine for focusing too much on government property interests and ignoring the relevant free speech rights. *See, e.g.*, Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 820 (Blackmun, J., dissenting) (examination of the relevant interests [first amendment rights] is more important than the public forum analysis which is just an analytical device); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 65 (1983) (Brennan, J., dissenting) (Court's forum approach to public speech blinds it to the first amendment considerations). *See also* Farber & Novak, *supra* note 96, at 1224 ("Our objection to the public forum analysis is . . . that it distracts attention from the the first amendment values at stake in a given case.").

102. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'market place of ideas'").

103. Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) ("constitutional rights of students in public school are not automatically coextensive with those of adults in other settings").

104. *See* Epperson v. Arkansas, 393 U.S. 97 (1968) (state has a right to prescribe the curriculum for its public schools, though this right is subject to the constraints of the first amendment); *see also* Meyer v. Nebraska, 262 U.S. 390 (1923).

105. *See* 108 S. Ct. 562, 580 (1988) (Brennan, J., dissenting) (even if one were to concede that the school authorities were empowered to delete the two articles, the principal acted unreasonably in deleting two whole pages containing other unobjectionable articles).

106. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

107. *See* 108 S. Ct. 562, 580 (Brennan, J., dissenting) ("Such unthinking contempt for individual rights is intolerable from any state official."); *see also* H. REDISH, FREEDOM OF EXPRESSION 148 (1984). The author states that "nonjudicial administrative regulators often exist for the sole purpose of regulating; this is their raison d'etre. They simultaneously perform the function of prosecutor and adjudicator and, if only subconsciously, will likely feel obliged to justify their existence by finding some expression constitutionally subject to regulation." *Id.*

left to the school officials, as the Court suggests, the scope of the first amendment is a legal issue which remains the province of the courts.[108]

The instant case represents the culmination of a disturbing trend in first amendment law. The Court restricts access to state-sponsored media, while the state assumes an ever more prominent role in the "marketplace of ideas."[109] The right to free speech is meaningless if the government can withhold the only effective medium of communication.[110] The public forum doctrine, which extended first amendment protection to government property, has been transformed into a mechanism for frustrating free expression.[111] In deferring to school authorities, the Court abrogates its duty to protect constitutionally guaranteed rights.[112] First amendment rights may still exist beyond the schoolhouse gate, but the school "need not tolerate particular student speech."[113]

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108. *See* Note, *Constitutional Law: Freedom of Speech in the Public Schools* — Fraser v. Bethel School District *Revisited*, 39 OKLA. L. REV. 472, 480 (1986) (refuting arguments that judiciary's isolation and incompetence in education makes it unsuited to resolve conflicts in the school since the issues are legal and constitutional and thus within the court's designated purpose).

109. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (first amendment protects the "market place of ideas").

110. In *Perry*, availability of alternate fora weighed heavily in the Court's decision. Restricting access to the mailboxes posed no grave threat to the union's ability to communicate because there were "substantial alternate channels" open. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 41 (1983). In the instant case, the students, who have no alternate media with which to communicate with the student body, are effectively denied the right of expression.

111. *See* 460 U.S. at 46. Individuals may assert a right of free speech only in public fora. *Id.* A public forum is created by historical usage or by government acquiescence. *Id.* The historical usage category of the public forum and the government acquiescence exception as defined in *Perry* and applied in the instant case fail to encompass the broad range of state facilities that should legitimately be fora for the exchange of ideas. The Court's public forum analysis violates the equal protection principle by deferring to government intent without adequately scrutinizing the ends, the means or the fit of means to ends.

112. Since the school's actions abridge a fundamental right, the Court should apply a strict scrutiny standard of review.

113. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, 567 (1988) ("a school need not tolerate student speech that is inconsistent with its 'basic educational mission'"). The "basic education mission" cited from Bethel School Dist. v. Fraser, 105 S. Ct. 3159, 3166 (1986), is never explicitly defined. As schools have near absolute discretion in dictating appropriate curriculum, they wield the power to define the "basic educational mission." Educators may not "cast a pall of orthodoxy over the classroom," Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). However, part of the educational mission is to "inculcate communal values," 108 S. Ct. at 570. The Court has deferred to the school officials to draw the fine line between impermissible indoctrination and permissible inculcation.