Florida State University Law Review

Volume 16 | Issue 1 Article 4

Spring 1988

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

Walter E. Forehand

Constitutional Law—TINKERING WITH *TINKER*: ACADEMIC FREEDOM IN THE PUBLIC SCHOOLS—*Hazelwood School District v. Kuhlmeier*, 108 S. Ct. 562 (1988)

> *"Our Nation is deeply committed to safeguarding academic freedom . . . ."*[1]
>
> *"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."*[2]
>
> *"[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."*[3]

THIS inquiry will examine the constitutional limits on the authority of local school officials to prescribe what students study and teachers teach, or, stated from a different perspective, the extent to which students and teachers can shape curriculum regardless of the wishes of school officials. In *Hazelwood School District v. Kuhlmeier*,[4] the United States Supreme Court has written a new chapter in a book whose outline has never been altogether clear. This study first will place that decision in context by a brief review of the previous case law.[5] Then it will analyze the *Kuhlmeier* case and discuss its implications for this area of constitutional jurisprudence.

I. BEFORE *KUHLMEIER*

Courts grappling with constitutional rights in the school setting often have quoted *Tinker v. Des Moines Independent Community School*

---

1. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).
2. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969).
3. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, 571 (1988) (footnote omitted).
4. *Id.*
5. There are several works which provide a much more detailed coverage of this area of law prior to *Kulhmeier*. *See, e.g.*, Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647 (1986); Freeman, *The Supreme Court and First Amendment Rights of Students in the Public School Classroom: A Proposed Model of Analysis*, 12 HASTINGS CONST. L.Q. 1 (1984); Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 79 TEX. L. REV. 477 (1981); Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293 (1976).

District[6] for the proposition that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[7] Whether holding in favor of plaintiff teachers and students or defendant school officials, courts regularly have paid homage to what has become the underlying principle of *Tinker*: the authority of school officials over students and teachers is limited by the Constitution.

At the same time, however, *Tinker* voiced customary deference to school officials. Justice Fortas stated for the majority that "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[8] *Tinker* thus enunciates two dissonant poles which courts working in this area must confront: deference to the broad authority of school officials versus the constitutional guarantees of teachers and students.

The facts of *Tinker* did not implicate the school curriculum directly. Fifteen-year-old John Tinker and two other students decided to wear black armbands to school in protest against the Vietnam War. School officials learned of the plan and adopted a policy prohibiting the wearing of these armbands. When the students refused to remove their armbands at school, they were suspended.[9]

In holding that the policy violated the students' first amendment rights, the Court was careful to emphasize that it would not protect expression which was disruptive or intrusive upon the rights of others. Justice Fortas observed that

> conduct by the student, in class or out of it, which for any reason— whether it stems from time, place, or type of behavior— materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.[10]

Despite the concerns of Justice Black that the Court was improperly limiting the decision-making power of school officials,[11] this "*Tinker*

---

6. 393 U.S. 503 (1969).

7. *Id.* at 506.

8. *Id.* at 507.

9. *Id.* at 504. The *Tinker* court, however, did not intimate that its reasoning was limited to the non-curricular context.

10. *Id.* at 513.

11. *Id.* at 517 (Black, J., dissenting) ("the Court arrogates to itself, rather than to the State's elected officials charged with running the schools, the decision as to which school disciplinary regulations are 'reasonable' ").

test'' has not been applied to strip school boards of their basic authority.[12]

In 1982, *Board of Education, Island Trees Union Free School District No. 26 v. Pico*[13] presented the Court with a challenge to a local school board's removal from the school library of certain books, characterized by the board as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."[14] The posture of the case was such that it could have been decided either on procedural or constitutional grounds.[15] The result was a plurality opinion with rich dicta relating to the constitutional issues, several concurrences, and several dissents.[16]

In fashioning the opinion of the plurality, Justice Brennan characterized the case as follows:

> In sum, the issue before us in this case is a narrow one, both substantively and procedurally. It may best be restated as two distinct questions. First, does the First Amendment impose *any* limitations upon the discretion of petitioners to remove library books from the [school]? Second, if so, do the affidavits and other evidentiary materials before the District Court, construed most favorably to respondents, raise a genuine issue of fact whether petitioners might have exceeded those limitations?[17]

---

12. For example, in one typical case, Solmitz v. Maine School Admin. Dist. No. 59, 495 A.2d 812 (Me. 1985), the Supreme Court of Maine cited a concern for safety as sufficient grounds under *Tinker* for a public high school to cancel a "Symposium on Tolerance Day," after news that a lesbian was to participate led to threats of damage and disruption to the school.

13. 457 U.S. 853 (1982).

14. *Id.* at 857 (quoting Pico v. Board of Educ., Island Trees Union Free School Dist., 474 F. Supp. 387 (E.D.N.Y. 1979), *rev'd*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982)). The books were K. VONNEGUT, JR., SLAUGHTERHOUSE-FIVE (1969); D. MORRIS, THE NAKED APE (1967); P. THOMAS, DOWN THESE MEAN STREETS (1967); BEST SHORT STORIES BY NEGRO WRITERS (L. Hughes ed. 1967); ANONYMOUS, GO ASK ALICE (1971); O. LA FARGE, LAUGHING BOY (1929); R. WRIGHT, BLACK BOY (1945); A. CHILDRESS, HERO AIN'T NOTHIN' BUT A SANDWICH (1973); E. CLEAVER, SOUL ON ICE (1968); A READER FOR WRITERS (J. Archer ed. 1971); and B. MALAMUD, THE FIXER (1966). *Pico*, 457 U.S. at 856-57 n.3.

15. The action was initiated by students seeking injunctive relief. The district court granted a summary judgment in favor of the board, but a three-judge panel of the Second Circuit reversed and remanded for trial. 457 U.S. at 858-60.

16. Justice Brennan announced the decision of the Court, which was joined by Justices Marshall, Stevens, and in all except Part II(A)(1), which contained an important segment of the first amendment analysis, by Justice Blackmun, who also filed a separate concurrence. Justice White concurred in the judgment and filed an opinion stressing the procedural question. The dissent of Chief Justice Burger was joined by Justices Powell, Rehnquist, and O'Connor. Justice Powell also filed a separate dissent. Justice Rehnquist filed a dissent which the Chief Justice and Justice Powell joined. Finally, Justice O'Connor filed a two-paragraph statement explaining her reasons for joining the Burger dissent.

17. *Pico*, 457 U.S. at 863.

In finding that the board's action, if determined to be as alleged, had violated the students' constitutional rights, the plurality limited its holding severely:

> [W]e hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." Such purposes stand inescapably condemned by our precedents.[18]

This narrow statement of the holding,[19] however, came amid passages of dicta which approach a more general analysis of the resolution of conflicts between school board authority and students' rights. Justice Brennan stressed the deference owed the actions of elected school boards.[20] Furthermore, he was careful to separate the library from the curriculum at large. "Petitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values."[21] Despite these pronounced bows in the direction of local board, the plurality was faced with facts involving books in a library, which seem much closer to the teaching mission than Tinker's armband, and found that here the board's authority was limited if exercised in pursuit of an impermissible motive. Finally, the plurality delineated a positive "right to receive information" to be reposed in students in the school environment.[22]

The dissenters objected to the analysis of the plurality and to the "right to receive."[23] They also voiced federalism-based concerns that the Court had delved too far into the local management of schools.[24]

---

18. *Id.* at 872 (citation omitted) (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

19. *See id.* at 861 ("We emphasize at the outset the limited nature of the substantive question presented by the case before us.").

20. *See id.* at 863 ("The Court has long recognized that local school boards have broad discretion in the management of school affairs."); *id.* at 869 ("In rejecting petitioners' claim of absolute discretion to remove books from their school libraries, we do not deny that local school boards have a substantial legitimate role to play in the determination of school library content."); *id.* at 866 ("[C]ourts should not 'intervene in the resolution of conflicts which arise in the daily operation of school systems' unless 'basic constitutional values' are 'directly and sharply implicate[d]' in those conflicts") (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

21. *Id.* at 869.

22. *Id.* at 866-68.

23. *Id.* at 887 (Burger, C.J., dissenting); *id.* at 895 (Powell, J., dissenting); *id.* at 911-12 (Rehnquist, J., dissenting).

24. *Id.* at 885 (Burger, C.J., dissenting); *id.* at 893 (Powell, J., dissenting); *id.* at 921 (O'Connor, J., dissenting).

Pico left many understandably perplexed.[25] Did the plurality define the outer limits of the right to academic freedom? Might the Court's entrance into the realm of educational materials herald other intrusions into areas touching upon the curriculum itself? What are the implications of a "right to receive"? The Court in *Pico* flirted with a constitutional analysis of rights related to the school's formal educative function more closely than in any other decision not controlled by the establishment clause,[26] and in so doing raised as many questions as answers.

Bethel School District No. 403 v. Fraser[27] came before the Court in 1986. The case involved the disciplining of a high school student following his delivery of a speech in support of a candidate for school office. Though advised by teachers not to make the speech because of its heavy reliance on sexual innuendo and double entendre, the student delivered it at an assembly, described as "part of a school-sponsored educational program in self-government."[28] Students could choose either to attend the program or go to study hall.[29]

The Ninth Circuit had affirmed the district court's declaratory judgment in favor of the plaintiff, finding that the school district had violated his first amendment rights when it suspended him and removed his name from the list of candidates for commencement speakers.[30] The board maintained that the speech had disrupted the assembly, that the board had an interest in maintaining civility in the schools, and that the board had authority to determine the speech inappropriate since it had been delivered as part of an educational program.[31] Both the two-judge

---

25. *See* Note, *Reshelving the First Amendment*: Board of Education, Island Trees Union Free School District No. 26 v. Pico, 17 LOY. L.A.L. REV. 1057 (1984); Comment, Board of Education, Island Trees Union Free School District No. 26 v. Pico, 12 HOFSTRA L. REV. 561 (1984); Comment, *Education or Indoctrination—Removal of Books from Public School Libraries:* Board of Education, Island Trees Union Free School District No. 26 v. Pico, 68 MINN. L. REV. 213 (1983).

Compare Bowman v. Bethel-Tate Bd. of Educ., 610 F. Supp. 577 (S.D. Ohio 1985), *vacated*, 798 F.2d 468 (8th Cir. 1986) (without opinion), which used *Pico* to grant injunctive relief to plaintiffs after a school board decision to forbid the production of an elementary school play, *Sorcerer and Friends*, with Bell v. U-32 Bd. of Educ., 630 F. Supp. 939 (D. Vt. 1986), which refused to allow similar relief after the school board determined not to allow the performance of *Runaways*. While *Bowman* found the play to be a voluntary activity not a part of the required curriculum, 610 F. Supp. at 581, *Bell* determined the reverse. 630 F. Supp. at 944.

26. *See, e.g.*, Edwards v. Aguillard, 107 S. Ct. 2573 (1987) (striking down a Louisiana statute requiring that instruction on the origin of the human species must include both "evolution-science" and "creation-science").

27. 106 S. Ct. 3159 (1986).

28. *Id.* at 3162.

29. *Id.*

30. Fraser v. Bethel School Dist. No. 403, 755 F.2d 1356, 1357-58 (9th Cir. 1985) *rev'd*, 106 S. Ct. 3159 (1986).

31. *Id.* at 1358-59.

majority opinion and the dissent relied on *Pico* and other case law concerning the first amendment in the schools. The split in the panel came over differing views as to the amount of disruption necessary to limit speech under the *Tinker* standard.[32]

The circuit majority in *Bethel* reasoned that the option to attend study hall rather than attend the assembly indicated that the assembly was not a required activity. *Pico* was read to operate *against* the board in such a situation, "beyond the compulsory environment of the classroom."[33] The court of appeals then determined not to give public school officials power to regulate the speech of high school students which school officials consider to be indecent under any possible *FCC v. Pacifica Foundation*[34] obscenity analysis.[35]

The Ninth Circuit majority also cited *Pico* for the proposition that school board discretion is limited by the first amendment.[36] The dissent, on the other hand, cited *Pico* to support "a presumption against judicial involvement in the schools"[37] and stressed that the board's duty to inculcate community values should be limited only from the pursuit of impermissible purposes.[38] This difference in approach well illustrates the malleable quality of *Pico*. That the circuit court majority was aware that *Pico* might cut the other way is clear from its reliance on a circuit precedent,[39] rather than *Pico* to indicate its awareness of the deference due local boards.[40] The circuit court majority was using *Pico* in its board-limiting mode. To cite it also as board-supportive would make the majority seem to go in both ways at once.

The Supreme Court reversed. The majority, in an opinion by Chief Justice Burger, said that the circuit panel had read the protections established in *Tinker* too broadly,[41] and it distinguished Fraser's situation from that of Tinker:

---

32. *Id.* at 1360 ("we fail to see how we can distinguish this case from *Tinker* on the issue of disruption").

33. *Id.* at 1364 (citing *Pico*, 457 U.S. 853, 869 (1982)).

34. 438 U.S. 726 (1978). In this case the Court allowed the FCC to regulate materials for broadcast which did not meet the level of being obscene, but which instead met a lesser standard of being indecent.

35. *Fraser*, 755 F.2d at 1363. The court indicated that it was not reaching the question of whether the board might control instructional materials that it considered offensive, and noted that Justice Blackmun's concurrence in *Pico* had raised a similar point. *Id.* at n.10 (citing *Pico*, 457 U.S. at 880 (Blackmun, J., concurring)).

36. *Id.* at 1358 ("The discretion of school authorities in managing school affairs is necessarily limited . . . by 'the imperatives of the First Amendment.' ") (quoting *Pico*, 457 U.S. 853, 864 (1982)).

37. *Id.* at 1366.

38. *Id.* at 1367-68.

39. Nicholson v. Board of Educ., 682 F.2d 858 (9th Cir. 1982).

40. *Fraser*, 755 F.2d at 1358, 1363-64.

41. Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3163 (1986).

> Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission.[42]

The Court stressed that the schools have an inculcative function[43] and that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[44] Moreover, the opinion included the following statement on extracurricular educational activities which may be quite influential as the effects of *Fraser* continue to be felt in the courts below:

> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.[45]

Such language indeed suggests that courts may limit *Tinker* a great deal in support of the school's perception of proper conduct.

In addition, the majority offered the following characterization of *Pico*: "And in addressing the question whether the First Amendment places any limit on the authority of public schools to remove books from a public school library, all Members of the Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar."[46] The least one may say about this statement is that it defines one of the permissible purposes that a school board may have in performing its duties. A much more limiting effect, however, may be seen. Chief Justice Burger focused on the school library context and book removal aspects of *Pico* and found, even there, a non-limiting feature of the holding. One might conclude that the

---

42. *Id.* at 3166.
43. *Id.* at 3164 (relying on Ambach v. Norwick, 441 U.S. 68 (1979)).
44. *Id.*
45. *Id.* at 3165.
46. *Id.*

Court is not reluctant to extend *Pico*, and that it has aligned itself with those who cite the case as supportive of deference to school boards.

Justice Brennan, concurring, was careful to protect *Tinker* and *Pico*: "[T]he Court's holding concerns only the authority that school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly."[47] In essence, Justice Brennan tried to limit the holding to its facts, being willing to find the speech disruptive and to acknowledge the board's authority to teach civil conduct,[48] yet opposing modification of any previous decisions. This may have reflected a concern that the Court was inclined to limit *Tinker* further. Such a limitation has now been expressly accomplished in *Hazelwood School District v. Kuhlmeier*.[49]

Tinker made clear that pure political speech which does not interfere with the rights of others must receive full constitutional protection. At the same time, the Court in *Tinker* acknowledged that the states have great discretion in controlling public schools. Accordingly, when courts have been called upon to decide constitutional questions arising from the discharge of a teacher or disciplining of a student, they have been forced to steer between the Scylla of young Tinker's right to free expression and the Charybdis of the school officials' right to maintain control over the schools.

In 1982, the *Pico* Court tried to clarify the borders of constitutional protection in the school setting. The result was a difficult plurality decision in which the Court seemed to provide a kind of negative protection against decisions to take materials away from students after the school had made them available. The nature of the *Pico* plurality, concurring, and dissenting opinions, however, makes the meaning of the case unclear. On one hand, Justice Brennan, writing for the plurality, established that the motives of school officials affect the constitutional analysis of their actions. A desire to promote doctrinaire views is suspect, and when officials seek to control the flow of ideas based on such motives, they offend the first amendment. On the other hand, Justice Brennan suggested that where the curriculum itself is involved, school officials have plenary control. The Court, however, also referred to a student's "right to receive," a concept surely akin to academic freedom.

In general, *Pico* seemed to extend the protections of *Tinker*. If the first amendment extended to the school library, were there other areas within the school that fell under its commands? Again, details are

47. 106 S. Ct. 3159, 3168 (Brennan, J., concurring).
48. *Id.* at 3167-68.
49. 108 S. Ct. 562 (1988).

wanting. The school cannot take books off the shelves for doctrinaire purposes, but it has control over which books to buy, perhaps without regard to its motives. There may be a right of access for students, but does it extend to teachers?

II. TINKERING WITH *TINKER*: *HAZELWOOD SCHOOL DISTRICT V. KUHLMEIER*

Speech clause cases generally have interpreted existing Supreme Court teachings to uphold official control of the core of the school program. With activities on the margin, such as plays[50] and school newspapers,[51] there have been variations because facts and views of governing precedents differ.

A fundamental tension remains: the curriculum cannot be at the mercy of competing demands of students and teachers, but students and teachers cannot function productively if the minority can be subjected to curricula designed by repressive motives of school board majorities. In view of this state of the law, schools will look carefully at *Hazelwood School District v. Kuhlmeier* to determine what they may teach about these issues.

A. Kuhlmeier v. Hazelwood School District: *The Cases Below*

This case has a full record of published opinions.[52] Two of the district court's published memoranda are of interest in that they provide full accounts of the reasoning of a court struggling with these school-related constitutional issues (a third is devoted to mootness). Examination of the decision of the Eighth Circuit also is instructive.

1. The Facts

In his memorandum decision, Chief District Judge Nangle, sitting without a jury, presented lengthy findings of fact.[53] Giving legal effect to these facts became an important, even dispositive feature of the subsequent appellate decisions. In short summary, the case arose from a decision by a high school principal to delete from the school newspaper

---

50. *See supra* note 25.

51. The variance in reasoning of the district, circuit, and Supreme Court in *Kuhlmeier* well illustrates this point.

52. Kuhlmeier v. Hazelwood School Dist., 578 F. Supp. 1286 (E.D. Mo. 1984) (pre-trial motions), *modified*, 596 F. Supp. 1422 (E.D. Mo. 1985) (mootness issues resolved), *modified*, 607 F. Supp. 1450 (E.D. Mo. 1985) (final order), *rev'd*, 795 F.2d 1368 (8th Cir. 1986), *rev'd*, 108 S. Ct. 562 (1988).

53. *Kuhlmeier*, 607 F. Supp. at 1451-61.

two articles, *Pressure Describes It All For Today's Teenagers* and *Pregnancy Affects Many Teens Each Year*.[54]

The district court determined that the high school newspaper, *Spectrum*, was closely connected to the school's Journalism II class,[55] though the paper accepted submissions from non-journalism students, and Journalism II students were not required to publish their work for a grade. The faculty advisor did, however, have pre-publication review of the paper.[56]

There were several policies which might have applied to the paper, including a publication policy, a school board policy on student expression, and a policy on the presentation of controversial issues in the classroom.[57] In fact, the publication policy of the paper made express reference to the rights "clarified in *Tinker v. Des Moines Independent Community School District*."[58]

The principal maintained that he decided to delete the articles because they were personal, highly sensitive, and inappropriate for use in a school newspaper.[59] There was additional concern that the article on pregnancy, which was based on interviews with girls in the school, might reveal the identity of individual students, and also that the story on divorce was written so as to be unfair to a parent of one of the students interviewed.[60]

The district court gave more weight to the testimony of defendants' expert on the proper use of journalistic technique in the preparation of the articles. It also found that the judgment of the professional educators involved in the decision "that portions of the articles in question were not appropriate for high school age readers or publication in a school sponsored newspaper" is "reasonable and entitled to great deference."[61]

2. *Motion to Dismiss for Lack of Subject Matter Jurisdiction*

Plaintiffs filed a complaint asking for actual and punitive damages, declaratory and injunctive relief, and attorney's fees and costs.[62] The first of the district court's published memoranda dealt with several pretrial motions. One of these, defendants' motion to dismiss for lack of

54. *Id.* at 1457, 1459.
55. *Id.* at 1452.
56. *Id.* at 1453.
57. *Id.* at 1454-57.
58. *Id.* at 1455.
59. *Id.* at 1459.
60. *Id.* at 1460-61.
61. *Id.* at 1461.
62. *Kuhlmeier*, 578 F. Supp. at 1290.

subject matter jurisdiction, raised an interesting issue with respect to the courts and the school curriculum.

Defendants' motion was founded on the theory that the newspaper was part of the curriculum, that decisions as to curricula were solely within the discretion of school officials and, hence, that no constitutional question was involved.[63] This line of argument put squarely to the court the extreme view of school board control over the curriculum. Judge Nangle addressed this contention directly:

> [D]efendants' argument proceeds from the mistaken premise that if *Spectrum* is a part of the Hazelwood East curriculum, as opposed to a public forum for student expression, first amendment values are not implicated. This Court agrees that school officials have a great deal of discretion in the realm of determining curriculum. However, that discretion is not without limits. Defendants are incorrect in stating that constitutional values are not implicated in curricular decisions. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Therefore, the mere fact that *Spectrum* may be a part of, or related to, Hazelwood East's curriculum does not deprive this Court of subject matter jurisdiction to determine whether the conduct complained of comports with the requirements of the first amendment.[64]

Judge Nangle's perspective clearly displays the belief that even with respect to the curriculum there is some *Tinker* protection. On the other hand, counsel for the defense found enough material in the case law to suggest the argument of absolute control without constitutional limit.

3. *The District Court Decision*

In its findings of fact, the court concluded that the paper was part of the school's Journalism II class and was not a public forum.[65] Thus, the analysis was curricular in nature. In organizing the problem, Judge Nangle succinctly stated the crux of these types of problems:

> Two lines of cases have developed for dealing with student free speech and press issues. One line of cases consists of those situations where student speech or conduct occurred outside of official school programs. In the other are cases where the speech or conduct in question occurred within the context of school-sponsored programs.[66]

---

63. *Id.* at 1291.
64. *Id.* (citations omitted).
65. 607 F. Supp. at 1461.
66. *Id.* at 1462.

The court correctly noted that "[s]tudents' first amendment rights generally prevail where the speech or conduct that is sought to be prohibited or regulated is private, non-school-sponsored and non-program related."[67] In other words, these cases are more or less on point with *Tinker*. "On the other hand, the results have been mixed in cases where educators have attempted to regulate, prohibit or punish student speech or conduct in the context of school-sponsored publications, activities or curricular matters."[68]

In the first line of cases, controlled by *Tinker*, disruption *vel non* of school activities is the operative question as to whether student rights must give way to school demands. In the second, "something less than substantial disruption" may justify prior restraint of student speech.[69] Still, officials must demonstrate a reasonable basis for their action.[70] Because the court held that "[t]he full panoply of precise substantive and procedural regulations is not required within the . . . curriculum," the exercise of discretion by the Hazelwood school officials did not offend the students' first amendment rights.[71] Judge Nangle's analysis tried to steer a course between the competing *Tinker* objectives, deciding, however, that *Tinker* did not require the same protection for school-sponsored and non-school-sponsored activities.

4. *The Eighth Circuit's Reversal*

A divided panel of the Eighth Circuit Court of Appeals reversed the district court. Crucial to the appellate court's decision was its view that on the facts before it the newspaper *Spectrum* was a public forum for the expression of student opinion.[72] The circuit court also noted the primary importance of *Tinker*, although the district court had decided that full *Tinker* protection was not available within the curriculum.[73] Because the court could find no basis for believing that the articles in question would cause disruption to the school, it turned to the second prong of the *Tinker* test, involving inquiry as to whether the rights of others were invaded by the articles.[74] The majority held that "[a]ny yardstick less exacting than potential tort liability could result in school

67. *Id.*
68. *Id.* at 1463.
69. *Id.*
70. *Id.* at 1466.
71. *Id.* at 1467.
72. Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368, 1370, 1372-74 (8th Cir. 1986), *rev'd*, 108 S. Ct. 562 (1988).
73. *Id.* at 1371.
74. *Id.* at 1375.

officials curtailing speech at the slightest fear of disturbance."[75] In handling other issues raised on appeal, the court advised that *Tinker* required school officials to give students an opportunity to alter questionable material and placed the burden on the school to justify actions taken under the *Tinker* standard.[76]

Judge Wollman dissented, relying on the reasoning of a Third Circuit case[77] which had upheld the authority of school officials to halt production of a school play with sexual content since the play was part of the curriculum, and on language in *Pico* expressing deference to school officials in matters of curriculum.[78] In the judge's opinion, *Tinker* should not be extended so as to grant school-sponsored newspapers the same rights as the commercial press.[79] "A contrary holding, as exemplified by the majority opinion, pits students against school officials in a battle for control over what is rightfully within the province of school officials."[80]

By reaching a conclusion contrary to that of the district court with respect to the classification of the student newspaper, the circuit majority avoided a direct confrontation with the district court's application of *Tinker* to the curriculum. The dissent followed the district court in determining that the paper was part of the curriculum and agreed that *Tinker* could not be expanded to provide the same protection for curricular matters as for instances of pure expression. The Supreme Court was next to review these differing perspectives in rendering a decision that promises to have considerable effect on how *Tinker* will be applied in the future.

B. The Supreme Court's Reversal

The Supreme Court reversed the Eighth Circuit with Chief Justice Rehnquist and Justices Stevens, O'Connor, and Scalia joining the opinion of Justice White. Justice Brennan wrote a dissent, which was joined by Justices Marshall and Blackmun.

1. The Opinion of the Court

Justice White began his analysis with *Tinker*'s famous quote: "Students in public schools do not 'shed their constitutional rights to free-

75. *Id.* at 1376.
76. *Id.* at 1377.
77. Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981).
78. *Kuhlmeier*, 795 F.2d at 1378 (Wollman, J., dissenting).
79. *Id.*
80. *Id.* (citing the *Pico* dissents of Chief Justice Burger, 457 U.S. 853, 885 (1982) and Justice Powell, *id.* at 894).

dom of speech or expression at the schoolhouse gate.' "[81] He continued, however, to cite *Bethel School District No. 403 v. Fraser* and *Tinker* for the proposition that students in the school setting do not necessarily have the same rights as adults in other settings, and that the school can "disassociate itself" from vulgar or inappropriate forms of expression.[82] "It is in this context that respondents' First Amendment claims must be considered."[83]

As will be made clear, the majority expressly limits the applicability of *Tinker* in a way that it has not been limited heretofore. Justice White's choice to begin the analysis with *Tinker*'s most quoted language, however, indicates that the Court is not prepared to abandon that 1969 decision as a fundamental precedent for schoolhouse rights.[84] Still, the immediate reliance on *Fraser* strongly suggests that that case is also meant to limit the area in which *Tinker* controls. One recalls that Justice Brennan's concurrence in *Fraser* argued that in disciplining the student the school officials had presented enough evidence of disruption to satisfy the *Tinker* standard.[85] His attempt to characterize the two holdings in the same manner in the *Kuhlmeier* dissent is expressly rejected by the majority.[86]

Having established this tone, Justice White proceeded to an analysis of the public forum question. He concluded that under the facts that had come up from the district court, the newspaper was clearly part of the school curriculum. *Perry Education Association v. Perry Local Educators' Association*[87] recognized that school officials could determine what speech was appropriate in the classroom or at school assemblies. "It is this standard, rather than our decision in *Tinker*, that governs this case," Justice White wrote.[88]

Justice White distinguished between "personal expression that happens to occur on the school premises" (governed by *Tinker*) and "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public

---

81. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, 567 (1988) (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969)).

82. *Id.*

83. *Id.*

84. In dissent, Justice Brennan refers to this "purport[ed]" "reaffirm[ation]" as an "ironic introduction to an opinion that denudes high school students of much of the First Amendment protection that *Tinker* itself prescribed." *Id.* at 580 (Brennan, J., dissenting).

85. Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3167-68 (Brennan, J., concurring).

86. *Kuhlmeier*, 108 S. Ct. at 570 n.4.

87. 460 U.S. 37 (1983).

88. *Kuhlmeier*, 108 S. Ct. at 569.

might reasonably perceive to bear the imprimatur of the school."[89] When the latter is the area of concern, the school may disassociate itself from material that it considers violative of the *Tinker* standard and "from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[90] For these cases, the Court rejected the notion that *Tinker* need apply and said, "[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[91]

Finally, Justice White underscored that the primary responsibility for educating children rests at the local level and not with the federal courts. Decisions to "censor a school-sponsored publication, theatrical production, or other vehicle of student expression" (identified earlier as "activities which may fairly be characterized as part of the school curriculum")[92] implicate constitutional rights only when there is "no valid educational purpose."[93]

In view of the Court's past reluctance to discuss the parameters of constitutional protection with respect to the curriculum, Justice White's classifications are significant indeed. These marginal activities are now deemed curricular in nature. Furthermore, *Tinker* does not control in these instances. Rather, the actions of school officials now seem not to implicate free speech concerns at all so long as they are taken with "valid educational purpose."

Justice White concluded his opinion for the Court with a short statement directed at the principal's actions in deleting the two pages of text containing the objectionable stories from the edition of *Spectrum*. In determining that the principal acted reasonably the Court seems to provide an example of one set of facts which pass the "valid educational purpose" test. There is no evidence in the record, however, of a doctrinaire intent of the sort found in the school board's actions held uncon-

89. *Id.*

90. *Id.* at 570 (footnote omitted).

91. *Id.* at 571 (footnote omitted).

92. *Id.* at 570.

93. *Id.* at 571. In its footnote 7 the Court implied approval of Nicholson v. Board of Educ. of Torrance Unified School Dist., 682 F.2d 858 (9th Cir. 1982); Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981); Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978); and Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979). These opinions similarly determined that educators' decisions regarding the content of school-sponsored expressive activities are entitled to substantial deference. The Court noted that it was not deciding these questions with respect to college and university activities.

stitutional by *Pico*.[94] The broadest way that one might read this example is that when an educator acts in good faith to evaluate a situation in terms which focus on quality of work or on the propriety of materials for dissemination to students in the school environment, the actions will be deemed to exhibit a "valid educational purpose." As Justice White phrased it, the principal's decision was "reasonable under the circumstances" and therefore "no violation of First Amendment rights occurred."[95]

2. *Justice Brennan's Dissent*

Justice Brennan's dissent contains a number of criticisms of the majority opinion. In general, however, it rests on the premise that *Tinker* should not be shunted away from cases of the sort addressed in *Kuhlmeier*, that the majority decision departed from precedent, and that the decision opens the door to a variety of potential abuses.

The dissent should be read against the background of *Pico* and *Fraser*. In *Pico*, Justice Brennan wrote the plurality opinion which delineated a constitutional protection against the removal of books from the library out of doctrinaire motives. It also suggested a "right to receive" for students. Indeed, Justice Brennan wrote that "[o]ur precedents have long recognized certain constitutional limits upon the power of the State to control even the curriculum and classroom."[96] However, inexplicably, he wrote that "[p]etitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values."[97] One might ask whether such language is indicative of a desire to create a decisional majority in support of a holding that might later be extended. In *Bethel School District No. 403 v. Fraser*, Justice Brennan concurred "to express [his] understanding of the breadth of the Court's holding."[98] The thrust of his concurrence was to claim that the majority was really applying the *Tinker* standard to conclude that the school officials had acted properly in disciplining the student conduct in question. In short, Justice Brennan may have been trying to broaden the general *Tinker* philosophy in *Pico*. He certainly tried in the *Kuhlmeier* dissent to protect it against narrowing by the classification of activities within the school in such a way as to take them out of *Tinker*'s ambit.

---

94. Board of Educ. Island Trees Union Free School Dist. v. Pico, 457 U.S. 853 (1982).
95. *Kuhlmeier*, 108 S. Ct. at 572.
96. *Pico*, 457 U.S. at 861.
97. *Id.* at 869 (emphasis in original).
98. 106 S. Ct. 3159, 3167 (1986) (Brennan, J., concurring).

The dissent makes clear its position that *Tinker* must broadly control in the school setting: "[T]he First Amendment[] [contains] prohibitions against censorship of any student expression that neither disrupts classwork nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose."[99] While acknowledging that there is a delicate balance between the rights of students and the legitimate exercise of school authority, the dissent maintained that "[i]n *Tinker*, this Court struck the balance."[100]

The majority expressly rejected Justice Brennan's claim that *Fraser* was decided under the *Tinker* standard.[101] The dissent was somewhat more oblique in challenging the majority on whether its opinion might be extended to school-sponsored activities at the university level. The majority had raised the question by noting that it "need not now decide whether the same degree of deference is appropriate" in the post-secondary setting.[102] In contrast, Justice Brennan recalled the reliance on *Tinker* in *Papish v. University of Missouri Board of Curators*[103] and *Healy v. James*,[104] both cases involving universities.[105]

The alternative Justice Brennan offers is to apply the "material disruption" language of *Tinker* in such a way as to consider poorly performed journalism as a disruption of "a legitimate curricular function."[106] He then counters the majority's limiting technique: "The Court today casts no doubt on *Tinker*'s vitality. Instead it erects a taxonomy of school censorship, concluding that *Tinker* applies to one category and not another."[107]

Implicit in Justice Brennan's dissent is the realization that the majority did not clearly articulate how to evaluate official action with respect to school-sponsored activities. The dissent analyzed the principal's actions as they related to educational objectives and found the relationship insufficient.[108] Furthermore, the Justice insisted that if the school wished to disassociate itself from the expression, it had means available short of censorship.[109] Finally, Brennan writes, if the censorship were permissible, the means used were not. The principal could have deleted

---

99. *Kuhlmeier*, 108 S. Ct. at 573 (Brennan, J., dissenting).
100. *Id.* at 575.
101. *Id.* at 570 n.4.
102. *Id.* at 571 n.7.
103. 410 U.S. 667 (1973) (*per curiam*) (newspaper sold on campus by permission).
104. 408 U.S. 169 (1972) (propriety of denying privileges to student political organization).
105. *See Kuhlmeier*, 108 S. Ct. at 575 (Brennan, J., dissenting).
106. *Id.* at 576.
107. *Id.* at 575.
108. *Id.* at 578-79.
109. *Id.* at 579.

specific material without completely destroying two pages containing more than the objectionable articles.[110]

By criticizing the majority decision in this way, the dissent is prepared to give teeth to any reasonableness evaluation of an educator's actions. It is also establishing a basis for finding some "time, place, and manner" restrictions unacceptable, recognizing that the majority had stated that such a "reasonable manner" standard was the appropriate test for this case.[111]

Justice Brennan's greatest concern over abandoning the *Tinker* standard, however, was that the majority's decision opened the way for "thought control" by "stifling discussion of all but state-approved topics" and by "school suppression of disfavored viewpoints."[112] "The case before us aptly illustrates how readily school officials (and courts) can camouflage viewpoint discrimination as the 'mere' protection of students from sensitive topics."[113]

III. ACADEMIC FREEDOM AFTER *HAZELWOOD SCHOOL DISTRICT V. KUHLMEIER*

The Court unmistakenly "tinkered" with *Tinker* in *Kuhlmeier*. Furthermore, it is clear that the majority now asserts that *Fraser* stands for something different from *Tinker*. In *Fraser*, the Court established that school officials can punish vulgar, lewd, and plainly offensive speech. In *Kuhlmeier*, it teaches that *Tinker* does not apply to expressive activities that are school-sponsored. The case clearly will stand for much more, but it is not so clear what that will be.

A. Kuhlmeier *Reviewed*

Kuhlmeier identifies school-sponsored publications, theatrical productions, and other expressive activities that might reasonably seem to be school-approved. These are fairly considered part of the curriculum even though they may take place outside the classroom. What, however, is the operative part of this classification? Is the Court limiting its decision here to *expressive* activities, that is, those in which students perform or present their ideas orally or in writing? Or, is the decision meant to cover the entire curriculum?

If "expression" is intended, then the case significantly modifies the applicability of *Tinker*, but it does not control academic freedom in the

110. *Id.* at 579-80.
111. *Id.* at 569.
112. *Id.* at 577-78.
113. *Id.* at 578.

broader sense. The majority opinion makes not a single reference to *Pico*.[114] Unlike *Tinker*, therefore, *Pico* is not expressly changed by the *Kuhlmeier* Court. Thus, *Pico*'s holding with respect to books in the library, and other non-curricular, voluntarily used materials, arguably is unaffected. Though the *Pico* "right to receive" has yet to be clarified, whatever effect it may have on the curriculum itself would seem to be undisturbed under the "expressive" reading of *Kuhlmeier*.

On the other hand, if the Court means its holding to apply to everything which may fairly be classified as part of the curriculum, then the effect is sweeping indeed. The high court has never expressly delineated constitutional rights with respect to the curriculum, despite dicta in *Pico*, outside of the establishment clause.[115] In fact, as the district court opinion in *Kuhlmeier* illustrates, courts often have struggled with whether some version of the *Tinker* standard must apply to the curriculum. Still, classification of an activity as curricular *vel non* has been important to judicial analysis, and it is certainly possible to read *Kuhlmeier* as affirming the correctness of a curricular/non-curricular distinction. Any such general statement on the curriculum has fundamental implications for academic freedom, that is, for any right students may have to study or refrain from studying certain materials and for teachers to control independently of the school officials what they teach.

Several features of the Court's decision weigh against the "curricular" and for the "expressive" interpretation of the holding. The Court speaks of "disassociating" from objectionable content in school-sponsored activities.[116] Disassociation from what students study (by something like censorship) makes little sense, although it may have more meaning with respect to a disagreement over what, or how, a teacher decides to teach. Secondly, the references to *Perry Education Association*,[117] a case which affirmed time, place, and manner restrictions in the school context, suggest that the Court has in mind such restrictions directed at the active expression of ideas. Again, such a distinction does not fit well with students studying curricular materials—though it may be applicable to teachers presenting those materials. Finally, the Court's consistent and recent pronouncements on the curriculum and the establishment clause[118] indicate that it is quite willing to find unconstitutional official action with respect to the curriculum.

---

114. Justice Brennan cites *Pico* five times. *Id.* at 573, 574, 578, 580.

115. *See, e.g.*, Edwards v. Aguillard, 107 S. Ct. 2573 (1987).

116. *Kuhlmeier*, 108 S. Ct. at 567.

117. Perry Educ. Ass'n. v. Perry Local Educator's Ass'n., 460 U.S. 37 (1983), *cited in Kuhlmeier*, 108 S. Ct. at 568, 569.

118. *Aguillard*, 107 S. Ct. 2573 (1987).

This question concerning the extent of the holding becomes all the more pressing when one asks what standard of review the Court has established in *Kuhlmeier*. The *Tinker* standard is expressly eschewed, over Justice Brennan's strenuous objection. In the school setting the actions must be merely "reasonably related to legitimate pedagogical concerns."[119]

The majority opinion's analysis of the principal's actions in *Kuhlmeier* gives some indication of what may be considered reasonable. In this case, however, despite Justice Brennan's efforts to suggest that it is not possible to see these actions as reasonably related to pedagogical concerns, the motivation does not appear to be against the *views* expressed by the students. It is very much an open question, then, whether the Court would move toward a fourteenth amendment rational relationship standard in which virtually everything school officials do, short of implicating the establishment clause, is acceptable, or whether it would continue to adhere to an examination such as the one suggested in *Pico*, under which doctrinaire motives trigger careful constitutional scrutiny.

The dissent makes clear that a highly permissive standard will allow school officials to engage in thought control.[120] The potential danger is real enough. If school officials are relieved of all concern for proper motive and claim a pedagogical purpose, then those children of a minority world view stand at the mercy of school officials who wish to control what they learn, out of personal or political motives.

It is also unclear whether university students and professors are affected by the decision. The majority noted that the distinction of school-sponsored from non-school-sponsored speech was consistent with *Papish v. University of Missouri Board of Curators*,[121] where the newspaper was not school-funded, but was allowed to be sold on campus.[122] Instead of announcing that there remained a different standard for the university environment, the Court in *Kuhlmeier* noted only that it was not called upon to decide the degree of deference appropriate to control of school-sponsored university expressive activities. Granted that the Court avoids gratuitous decisions, such a statement cannot be comforting to university-supported literary magazines, newspapers, and drama departments.

In *Fraser* and *Kuhlmeier* the Court reentered the realm of the schools and the speech clause. The Court has made clear that it will not extend

119. *Kuhlmeier*, 108 S. Ct. at 571.
120. *Id.* at 578-79 (Brennan, J., dissenting).
121. 410 U.S. 667 (1973) (*per curiam*).
122. *Kuhlmeier*, 108 S. Ct. at 570 n.3.

the reasoning of *Pico*. Furthermore, it is ready to back away from *Tinker* by limiting the areas to which it applies.

On analysis, *Kuhlmeier* must be considered an unsatisfactory decision. In view of the reluctance of the Court to involve itself in matters close to the operations of the schools, it seems likely that its decision should be read narrowly, as applying to "expressive" school-sponsored activities. It is intended to affirm that the schools can provide opportunities to students for expression without fearing that they will be helpless to control these activities if they threaten to get out of hand.[123] The fact that it does not expressly overrule *Tinker* and that the Court has quite recently shown that it will enforce the establishment clause argues strongly against reading *Kuhlmeier* to mean that the schools are as free to regulate students and teachers in the face of the first amendment as, for example, the states are to regulate commerce in the face of substantive due process. It would have been much more satisfactory had the majority opinion made this clear.

The dissent brings forth the principal argument against giving school officials the Court's blessing for virtually unfettered leave to control the entire curriculum. It is simply too easy to limit in the name of educational objectives the free inquiry which teaches the young to deal with competing ideas. As long as a principal function of our Constitution is to protect the few from forced march down the road chosen by the many, it cannot be constitutional for students or teachers in a public school to be without protection from public officials who seek to force the curriculum of the schools into a doctrinaire mold. Perhaps Justice Brennan's attempt to use the *Tinker* standard as a guide to curricular analysis is unacceptable. Nonetheless, the courts must have some protective standard by which to review suspect behavior. The "reasonableness" standard articulated by the majority in *Kuhlmeier* may be effective, but only if it is used in a way similar to that the Court utilized to examine official intent in *Pico*, that is, in a way that acknowledges the traditional locus of school control and at the same time affords real protection against abuses.

B. Kuhlmeier *Applied*: Virgil v. School Board[124]

Less than three weeks after the Supreme Court issued its *Kuhlmeier* decision, a federal district judge upheld the removal of a textbook from the curriculum by a school board, and interpreted *Kuhlmeier* to require

123. *See id.* at 572 n.9.

124. 677 F. Supp. 1547 (M.D. Fla. 1988).

this outcome despite personal reservations against the board's methods.[125]

The district court in *Virgil v. School Board*[126] was faced with cross motions for summary judgment on essentially undisputed facts. A parent voiced objection to the school board over the content of a school humanities text, specifically a translation of *Lysistrata* by the ancient Greek playwright Aristophanes and *The Miller's Tale* by Geoffrey Chaucer. The book was a state-approved text used in a course taken by eleventh and twelfth graders. It was the only state-approved humanities text. Neither of the works was assigned reading, but portions of *Lysistrata* were read aloud in one class. A committee report suggested that the two works not be used in required readings but that the textbook be retained in the curriculum. On recommendation of the school superintendent, who disagreed with that report, the school board decided to remove the book from the curriculum and place the school's copies in a store room. The text was kept in the library, however, as were other translations of the works.[127]

District Judge Black's opinion quotes the school board's reasons for its decision. Because these provide a clear statement of purpose against which the court judged the reasonableness of the board's actions, it is useful to list them here:

> 1. The sexuality in the two selections.
> 2. A belief that portions of the two selections were excessively vulgar in language and subject matter, regardless of the value of the works as literary classics.
> 3. A belief that the subject matter of the selections was immoral, insofar as the selections involved graphic, humorous treatment of sexual intercourse and dealt with sexual intercourse out of wedlock.
> 4. A belief that the sexuality of the selections was violative of the socially and philosophically conservative mores, principles and values of most of the Columbia County populace.
> 5. A belief that the subject matter and language of the selections would be offensive to a substantial portion of the Columbia County populace.
> 6. A belief that the two selections were not necessary for adequate instruction in the course; nor was this particular textbook, in its entirety, necessary for instruction in the course.
> 7. A belief that the two selections were inappropriate to the age, maturity, and development of the students in question.[128]

125. *Id.* at 1552-53.
126. *Id.* at 1551.
127. *Id.* at 1549.
128. *Id.*

Plaintiffs, having briefed the case prior to *Kuhlmeier*, argued that because the course was an elective and the readings optional, *Pico* should govern.[129] The court rejected the invitation to apply *Pico*. "In light of [*Kuhlmeier*], this Court need not decide whether the plurality decision in *Pico* may logically be extended to optional curriculum materials. *Kuhlmeier* resolves any doubts as to the appropriate standard to be applied whenever a curriculum decision is subject to first amendment review."[130] Judge Black noted that while *Kuhlmeier* did not specifically address textbooks it did appear to "address a wide realm of 'curriculum' decisions."[131] Although plaintiffs argued that the school board's action amounted to an attempt "to impose their fundamentalist Christian beliefs on the students," they did not argue a violation of the establishment clause.[132] The court agreed that the school board's action reflected its "own restrictive views," but held that *Kuhlmeier* allowed for broad regulation of sensitive topics, especially those dealing with sexuality.[133]

Of great interest to those who ask how *Kuhlmeier* will be applied is the court's analysis of the "reasonableness" standard. Judge Black concluded that despite her personal difficulty in seeing how exposure to these classics could harm older high school students and the perception that the board might have chosen a less restrictive approach, *Kuhlmeier* sanctioned pedagogical concern for sexually vulgar materials and did not mandate that the means be the least restrictive, only that they be reasonable.[134]

In light of the analysis of *Kuhlmeier* offered above, one must be disappointed by the *Virgil* decision. Apparently Judge Black felt compelled to render the decision based on *Kuhlmeier*. However, this compulsion is a result of a determination that *Kuhlmeier* is at last the Supreme Court's statement on the curriculum. As the previous analysis argues, such is not the reasonable reading of the Supreme Court's decision. Rather, the Court seems to be establishing a standard different from *Tinker* for curricular *expressive* activities. Hence, *Kuhlmeier* does not preclude the *Virgil* plaintiffs' appeal to *Pico*, which on the surface seems to have been proper, since *Virgil* did not involve expressive activity.

---

129. *Id.* at 1550 n.2.

130. *Id.* at 1551 (footnote omitted).

131. *Id.* at n.4.

132. *Id.* at 1550 n.1, 1552.

133. *Id.* at 1550. Judge Black apparently did believe that had the board tried to enforce a political belief it would have fallen afoul of West Virginia v. Barnette, 319 U.S. 624 (1943), which found that forcing students to pledge allegiance to the flag was unconstitutional. *Id.*

134. *Id.* at 1552.

Judge Black's effort to discern the proper standard suggested by *Kuhlmeier* illustrates the weakness of that decision. The district judge suggests that in her view the Court did not overrule all limits on the actions of the school board, so long as the actions may be deemed reasonable. *Virgil* does assert a belief, however, that inculcation allows the board to approve a rather restrictive range of literary experience and exposure to literary methods of effective political expression (*Lysistrata*) and social commentary (*The Miller's Tale*).

IV. CONCLUSION

In *Hazelwood School District v. Kuhlmeier*,[135] the Supreme Court delivered a decision which could have a profound effect on the place of the Constitution in the public schools. Except in cases decided under the establishment clause, the Court has not before ruled expressly in a case which measured the demands of students and teachers to some first amendment protection with respect to the public school curriculum.

Since 1969, *Tinker v. Des Moines Independent School District*[136] has been the Court's principal statement on first amendment rights in the school. In 1982, *Board of Education, Island Trees Union Free School District No. 26 v. Pico*[137] made an attempt to delineate more specific rights—limiting school officials in their right to remove books from a school library. This was a plurality opinion, however, which has been taken both as a "pro-student" and as a "pro-school" case. In 1986, the Court limited *Tinker*'s application in *Bethel School District No. 403 v. Fraser*,[138] which established that the school may discipline students for speech that is lewd or vulgar. *Kuhlmeier* limits *Tinker* further by teaching that there is a difference in protection of speech within the school environment which is not a part of a "curricular" activity and speech within "expressive" activities, such as school newspapers and dramatic performances which are "curricular" in nature.

Kuhlmeier is an unsatisfactory decision in that it does not make clear the limits of its application. Furthermore, it does not establish a sufficiently clear standard of evaluation for school board conduct in the areas to which the decision applies. It is possible to consider *Kuhlmeier* a general curriculum decision, as one district court has already done. This interpretation does not seem to fit the language of the decision, especially if read in historical context. But the danger of misinterpretation is

135. 108 S. Ct. 562 (1988).
136. 393 U.S. 503 (1969).
137. 457 U.S. 853 (1982).
138. 106 S. Ct. 3159 (1986).

great, as *Virgil v. School Board*[139] illustrates. Furthermore, in view of the recent history of establishment clause decisions and of the Court's approval of *Tinker* in proper context, it does not appear that the Court has meant that school officials have absolute control of students and teachers in "curricular" settings. Nonetheless, *Kuhlmeier* establishes a "reasonableness" test that will leave courts uncertain as to their duty.

In summary, the Supreme Court has spoken expressly concerning the speech clause and curriculum for the first time. The result may cause more confusion than clarification in this vexed area of constitutional protection. If academic freedom is to have any meaning in the public schools after *Kuhlmeier*, the Court must make clear whether or not that decision is generally applicable to the curriculum or only to "expressive" activities. Furthermore, and especially if this is to be a general "curricular" decision, it must make clear that its *Kuhlmeier* test can be failed by boards acting with doctrinaire motive. To hold otherwise is to risk pockets of thought control inimical to the Constitution and to the preservation of free thought.

Walter E. Forehand*

---

139. 677 F. Supp. 1547 (M.D. Fla. 1988).

* Former Professor and Chairman of the Classics Department, Florida State University, J.D. expected December 1988. The author wishes to acknowledge and express his appreciation for substantive improvements made by Stephen Senn and his editorial committee in preparation of this Note.