

NOTES

STUDENTS' FREE SPEECH RIGHTS IN PUBLIC SCHOOLS: CONTENT-BASED VERSUS PUBLIC FORUM RESTRICTIONS

INTRODUCTION

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.¹

These are among the first words that are spoken throughout classrooms of America every school day morning. In 1943, however, the United States Supreme Court held that a school board may not compel public school students to recite these words and involuntarily affirm allegiance to the United States of America.² The Court based its holding upon the belief that such a requirement would violate the students' constitutionally protected first amendment right of freedom of speech.³ Thus, in 1943, the Court ushered the first amendment's free speech protections into America's classrooms.

Since that time, the Supreme Court has decided three major student speech cases⁴ that have defined the extent and limitations of the free speech protections in the schoolhouse. A common thread that runs throughout these cases is the Court's effort to bal-

1. 36 U.S.C. § 172 (1982). The pledge of allegiance was first enacted in 1942. The words "under God" were included in 1954. *Id.*

2. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

3. *Id.* For a discussion of *Barnette*, see *infra* notes 79-86 and accompanying text.

4. *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988); *Bethel School Dist. v. Fraser*, 106 S. Ct. 3159 (1986); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969). In addition to these three cases, the Supreme Court has also decided one other student speech case. *Board of Educ. v. Pico*, 457 U.S. 853 (1982). In *Pico*, the issue was whether the school board violated students' free speech rights when it removed several books from the school's library. This case, therefore, involved the students' right to receive information, rather than their right to speak. Further, the precedential value of *Pico* is questionable because, while a plurality of the Court based its decision on the constitutional issue, the majority ultimately decided the case on procedural grounds. *Id.* at 883 (White, J., concurring). See also *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1045 n.30 (5th Cir. 1982); Comment, *Board of Education v. Pico: The Supreme Court's Answer to School Library Censorship*, 44 OHIO ST. L.J. 1103, 1113 (1983). Therefore, this note focuses on the *Hazelwood*, *Bethel*, and *Tinker* decisions.

ance the school official's need to maintain order and discipline within the school against the countervailing constitutional free speech rights of the students. Unfortunately, because the Court used a different mode of analysis to resolve these three cases, it is very difficult to understand the effects of the cases upon each other. This note presents a way of looking at these cases that makes it possible to define clearly their boundaries when compared to one another.

In recent years, the Supreme Court has divided its review of first amendment free speech cases into two broad categories: the public forum doctrine,⁵ and content-based speech regulations.⁶ Under the public forum doctrine, a speaker's location determines whether governmental authorities may be permitted to regulate the speech. Under the content-based analysis, governmental authorities may be permitted to proscribe particular kinds of speech. Because the Court has begun to place a great deal of emphasis on the public forum/content-based distinction, it is becoming necessary to categorize all free speech cases in this manner.

Although the Supreme Court specifically utilized the public forum doctrine in its most recent student speech case, *Hazelwood School District v. Kuhlmeier*,⁷ it failed to articulate which of these two standards were used in its two earlier cases, *Bethel School District v. Fraser*⁸ and *Tinker v. Des Moines Independent Community School District*.⁹ The purpose of this note is twofold. The note first analyzes the Court's decisions in these cases to determine whether they were decided using the public forum or the content-based analysis. Once each of these cases are categorized, the note shows how each case relates to the others.

Section I of this note begins with an overview of the first amendment's free speech doctrine. It then reviews the Supreme Court's treatment of the public forum doctrine and content-based regulations as applied generally under the first amendment. Section II discusses the extent of adolescents' first amendment free speech rights outside the school. Next, section III closely examines

5. See *infra* notes 21-42 and accompanying text for a discussion of the public forum doctrine.

6. See *infra* notes 43-62 and accompanying text for a discussion of content-based speech regulations.

7. 108 S. Ct. 562 (1988).

8. 106 S. Ct. 3159 (1986).

9. 393 U.S. 503 (1969).

the free speech rights of public school students while in the school. This section first reviews the historical context of student speech and then analyzes each of the three major Supreme Court student speech cases. After presenting the facts, holding, and rationale of each case, the analysis in section III focuses on whether the Court's review followed the public forum doctrine or a content-based analysis. Section III first concludes that in *Tinker*, the Court used a limited public forum analysis. Second, it is shown that in *Bethel*, the Court based its decision on a permissible content-based regulation analysis. Third, it is shown that the Court explicitly used the public forum doctrine to decide *Hazelwood*.

Finally, section IV discusses the current state of student free speech rights in public schools based upon the Supreme Court's decisions in *Tinker*, *Bethel*, and *Hazelwood* when they are placed within the public forum/content-based restriction context. This note concludes that a public school is not a public forum for student expression within either a school sponsored or nonschool sponsored context unless school officials intentionally open the school as a public forum. This note further concludes that even when the school is opened as a forum for student expression, the sphere of constitutional protection granted to the student is narrower than it is for either the student outside the school, or an adult in any context.

I. THE FREEDOM OF SPEECH LANDSCAPE

Student speech in public schools comprises a small portion of the first amendment's broad free speech doctrine. An understanding of the broader application of the free speech clause is therefore necessary to develop the framework with which to analyze the student speech cases. This section contains a brief summary of the freedom of speech doctrine,¹⁰ and then discusses the public forum

10. Freedom of speech is fundamental in American society. This freedom serves as the indispensable link between personal liberties and self-governance. Justice Brandeis described the concept of free speech as follows:

Those who won our independence believed that . . . freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). A number of com-

doctrine and the hierarchy of content-based restrictions.

The first amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press."¹¹ While some have read the first amendment under a very strict, literal interpretation,¹² few would object to the state prohibiting a person from "falsely shouting fire in a theater and causing a panic."¹³ It is clear that the freedom of speech guaranteed by the first amendment is not absolute.¹⁴ Some limited government restrictions of speech are permitted "in order to protect the State from destruction or serious injury, political, economic or moral."¹⁵

The Supreme Court has spent the last three quarters of a century defining the permissible levels of government restriction on

mentators have discussed why protection of free speech rights is so fundamental to the American way of life. For example, Professor Emerson stated:

The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society.

Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-79 (1963). See also Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 785-89 (1988).

11. U.S. CONST. amend. I. The first amendment is made applicable to the states through the fourteenth amendment. See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925). The fourteenth amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

12. Justice Black was a firm supporter of the doctrine that "no law" means just that, no law. See, e.g., *Konigsberg v. State Bar*, 366 U.S. 36, 60 (1961) (Black, J., dissenting). Justice Black stated: "I believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech . . . shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." *Id.* at 61.

13. *Schenck v. United States*, 249 U.S. 47, 52 (1919). Justice Holmes wrote:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

Id.

14. "[T]hat a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question." *Whitney v. California*, 274 U.S. 357, 371 (1927) (citation omitted).

15. *Id.* at 373 (Brandeis, J., concurring).

the exercise of free speech.¹⁶ During this time, the Court developed two separate modes of free speech analysis depending on whether the government restrictions are content-based or content-neutral.¹⁷ Content-based restrictions regulate the speech because of the message conveyed,¹⁸ while content-neutral restrictions limit speech without regard to the message conveyed.¹⁹ The Court's content-neutral analysis has evolved into the public forum doctrine.²⁰ Likewise, the Court has developed a hierarchy of content-based restrictions.

A. *The Public Forum*

The public forum doctrine dictates the level of protection that is given to speech, without regard to its content, when it is conducted on public land.²¹ The doctrine is based on the recognition that the right to exercise one's first amendment freedoms on public land is not absolute.²² Rather, the public forum doctrine seeks to balance the individual's right to speak while on public property against the state's interest in restricting the land for particular uses.

Although the term "public forum" is relatively new,²³ the concept can be traced to Justice Holmes while he was serving as a Justice on the Supreme Judicial Court of Massachusetts. In *Com-*

16. One commentator has stated that the "start of the law of the first amendment" began with *Schenck v. United States*, 249 U.S. 47 (1919) and *Debs v. United States*, 249 U.S. 211 (1919) read together. Kalven, *Ernst Freund and the First Amendment Tradition*, 40 U. CHI. L. REV. 235, 236 (1973).

17. See, e.g., Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

18. Stone, *supra* note 17, at 190.

19. *Id.* at 189.

20. See, e.g., Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1. See also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

21. See, e.g., Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984). "Public forum analysis might well be called the 'geographical' approach to first amendment law, because results often hinge almost entirely on the speaker's location." *Id.* at 1220. See also Note, *Public Forum Analysis After Perry Education Association v. Perry Local Educators' Association—A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property*, 54 FORDHAM L. REV. 545 (1986).

22. "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of government property" *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 799-800 (1985).

23. See Kalven, *supra* note 20.

monwealth v. Davis,²⁴ the court denounced the concept that public areas are available for indiscriminate public use. Speaking through Justice Holmes, the court observed: "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."²⁵ The United States Supreme Court affirmed *Davis*²⁶ and adhered to this view until 1939 when the Court rejected the notion in *Hague v. C.I.O.*²⁷ In much quoted dictum, Justice Roberts stated:

Wherever the title of streets and parks may rest, they 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. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.²⁸

In the years since *Hague*, the Court has refined the public forum concept and three distinct types of public forums have evolved.²⁹ The three types of forums, enunciated in *Perry Education Association v. Perry Local Educators' Association*,³⁰ are the traditional "quintessential public forum," the designated or limited public forum, and the nonpublic forum.³¹

The traditional public forums are the streets and parks spoken of in *Hague*. The state may impose reasonable time, place, and manner restrictions on speech in these public forums.³² Government uses time, place, and manner restrictions to regulate the physical impact that the speech may have, regardless of its con-

24. 162 Mass. 510, 39 N.E. 113 (1895), *aff'd*, 167 U.S. 43 (1897).

25. *Id.* at 511, 39 N.E. at 113.

26. *Davis v. Massachusetts*, 167 U.S. 43 (1897). The Supreme Court unanimously affirmed *Davis*, holding that "[t]he right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser." *Id.* at 48.

27. 307 U.S. 496 (1939).

28. *Id.* at 515.

29. *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

30. *Id.*

31. *Id.* at 45-46.

32. "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

tent.³³ A time, place, and manner regulation must: 1) be content neutral, 2) be "narrowly tailored to serve a significant government interest," and 3) "leave open ample alternative channels of communication."³⁴ However, if the state seeks to enforce content-based speech regulations in the traditional public forum, the state may do so only if it can "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."³⁵

The second category of public forum which the Court recognizes consists of public property that the state has specifically designated for first amendment activity by the public.³⁶ Thus, the designated or limited public forum is created by the state. Although the state may not have been required to open the specific public property as a forum in the first instance, once it does, the property becomes a limited public forum and is subject to the same restrictions as the traditional forum.³⁷ A limited public forum differs from the traditional public forum in two ways. First, the state may limit it for specific purposes.³⁸ Second, the state is not required to retain the open character of the limited public forum indefinitely.³⁹

The third, and final, type of forum is the nonpublic forum. Nonpublic forums comprise all public property that is neither a

33. Farber & Nowak, *supra* note 21, at 1237. The Supreme Court has stated:

For example, two parades cannot march on the same street simultaneously, and government may allow only one. A demonstration or parade on a large street during rush hour might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. [Finally, if] overamplified loudspeakers assault the citizenry, government may turn them down.

Grayned, 408 U.S. at 115-16 (citations omitted).

34. *Perry*, 460 U.S. at 45.

35. *Id.* This is the strict scrutiny test. See also *Carey v. Brown*, 447 U.S. 455, 461 (1980).

36. *Perry*, 460 U.S. at 45.

37. *Id.* at 46. An example of this limited forum is described in *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that once a public university opens the school facilities to some student groups, it must open the facilities to all student groups). In *Police Department of Chicago v. Mosely*, the Court stated that

government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.

Police Dep't of Chicago v. Mosely, 408 U.S. 92, 96 (1972).

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

39. *Id.*

traditional forum nor a designated forum.⁴⁰ The nonpublic forum doctrine recognizes that the first amendment “does not guarantee access to property simply because it is owned or controlled by the government.”⁴¹ Like the first two categories of public forums, the state can impose reasonable time, place, and manner regulations on speech in the nonpublic forum. In addition, the state may also regulate the speech “as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”⁴²

B. Content-Based Speech Regulations

The starting point for any content-based regulation analysis of the free speech clause is the presumption that “above 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 Under traditional first amendment analysis, speech either fell within the protected sphere of the free speech clause and was fully protected,⁴⁴ or it fell outside the scope of protection, and the government was free to impose any reasonable regulations upon it.⁴⁵ Any speech that was not included within *Chaplinsky v. New Hampshire*’s “well-defined and narrowly limited” area of unprotected speech was granted the full protection of the first amendment. In recent years, however, the Supreme Court’s two-tiered approach to first amendment analysis has given rise to a third level of speech, partially protected speech, which falls be-

40. *Id.*

41. *Id.* (quoting *United States Postal Service v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129 (1981)).

42. *Id.* This is the “rational basis” test.

43. *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

44. The general rule is that all speech is protected. *See, e.g., Dennis v. United States*, 341 U.S. 494 (1951) (Douglas, J., dissenting).

45. *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-72 (footnote omitted).

tween the fully protected speech and the unprotected speech.⁴⁶ Thus, the Supreme Court has developed a hierarchy of speech that comprises three general categories: unprotected speech, partially protected speech, and fully protected speech.⁴⁷

The first amendment permits the government to proscribe only certain precise categories⁴⁸ of speech. Those categories of speech which are not protected by the first amendment include obscene speech,⁴⁹ speech which advocates illegal action,⁵⁰ libel or defamation,⁵¹ false or misleading commercial speech,⁵² and child pornography.⁵³ Once a determination is made that the speech fits into

46. For example, the Court has "afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation [of commercial speech] that might be impermissible in the realm of noncommercial expression." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). See generally Goldman, *A Doctrine of Worthier Speech: Young v. American Mini Theaters, Inc.*, 21 St. Louis U.L.J. 281 (1977). See also *infra* notes 55-61 and accompanying text.

47. Speech within the sphere of first amendment protection is still subject to regulation under the public forum doctrine. See *supra* notes 21-42 and accompanying text.

48. See Farber & Nowak, *supra* note 21, at 1228 (stating that the Court utilizes the "categorical" approach to content-based regulation problems).

49. See *Miller v. California*, 413 U.S. 15 (1973). "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment." *Id.* at 23 (citations omitted). The Court failed on several attempts prior to *Miller* to arrive at a workable definition of what constituted technical obscenity. See, e.g., *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Roth v. United States*, 354 U.S. 476 (1957). To determine whether speech constitutes technical obscenity, the *Miller* test asks:

(a) whether the 'average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest;

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(c) whether the work taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24 (citations omitted).

50. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969). A state may forbid or proscribe speech that advocates the use of force or lawlessness when "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447 (footnote omitted). The *Brandenburg* test was derived from the *Schenck* "clear and present danger" test for permitting government regulation of speech. See *supra* note 13.

51. See *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

52. See *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). Although commercial speech is entitled to some constitutional protection, see *infra* text accompanying notes 57-58, this entitlement only arises if the commercial speech concerns a lawful activity or is not "more likely to deceive the public than to inform it." *Id.* at 563-64.

53. See *New York v. Ferber*, 458 U.S. 747 (1982). Although pornography may not fall within the category of technical obscenity, see *supra* note 49 and accompanying text, the

one of these enumerated categories, the government is free to impose upon it any reasonable restrictions, as well as to punish the speaker.⁵⁴

The middle tier of speech is a newly defined level of protected speech that is granted only partial protection under the first amendment. Speech in this category includes speech that is near obscene even though it is not deemed to be technically obscene.⁵⁵ Although near obscene speech is protected under the first amendment, the Supreme Court has recently held that it may be regulated when the regulation "serve[s] a substantial governmental interest and allows for reasonable alternative avenues of communication" for the speaker.⁵⁶ Commercial speech has also recently been added to the middle tier of protected speech.⁵⁷ As with near obscene speech, the state may regulate commercial speech if it has a substantial interest in regulating the speech, the regulation advances this governmental interest, and the regulation is not more extensive than necessary to serve that interest.⁵⁸

A third type of speech recently added to the list of partially protected speech is private speech.⁵⁹ In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court found that "speech on 'matters of public concern'" is "at the heart of the First Amendment's protection" whereas speech concerning purely private matters deserves less protection.⁶⁰ The Court stated that "[w]hile such speech is not totally unprotected by the First Amendment, its protections are less stringent."⁶¹ Although near obscene speech, commercial speech, and private speech have been granted some level of constitutional protection, the protection is limited and the state may im-

Court determined that child pornography need not be technically obscene before the state may prohibit or restrict it. *Id.*

54. See, e.g., *Central Hudson Gas & Elec. Corp.*, 447 U.S. 557; *Miller*, 413 U.S. 15; *Brandenburg*, 395 U.S. 444; *New York Times Co.*, 376 U.S. 254.

55. See, e.g., *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986).

56. *Id.* at 50.

57. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), was the first case in which the Court recognized commercial speech as a protected form of speech. However, the level of protection granted to commercial speech was not enunciated until *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Commercial speech is only protected if it concerns a lawful activity and is not false or misleading.

58. *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

59. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

60. *Id.* at 758-59 (citations omitted).

61. *Id.* at 760 (citation omitted).

pose greater regulations on these types of speech than on the fully protected speech.

Any speech that does not fall into any of the unprotected or into the partially protected categories of speech enjoys the fullest protection of the first amendment. It is subject, however, to regulation or restriction under the public forum doctrine when the speech occurs on public land.⁶²

II. FREE SPEECH RIGHTS OF ADOLESCENTS OUTSIDE THE SCHOOLHOUSE

Before turning to the free speech rights of students in public schools, it is important to examine the extent to which adolescents enjoy the first amendment's free speech protection outside the classroom. The Supreme Court has generally held that children do not possess the same degree of constitutional protection as adults.⁶³ In the arena of free speech, however, the Supreme Court has offered little guidance.⁶⁴

The leading case involving children's free speech rights outside the classroom is *Ginsberg v. New York*.⁶⁵ In *Ginsberg* the Court

62. See *supra* notes 21-42 and accompanying text.

63. See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979) (holding that a state may require a pregnant minor to obtain permission to have an abortion); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (holding that children are not entitled to a jury trial in delinquency adjudications under the Constitution); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults"). But see *In Re Gault*, 387 U.S. 1 (1966) (holding that fourteenth amendment's due process clause protects children in juvenile delinquent proceedings).

64. The three major Supreme Court speech cases involving children outside the school focus primarily on obscenity or near obscene speech. See *New York v. Ferber*, 458 U.S. 747 (1982) (using children in pornographic, but not obscene, movies may be prohibited); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (FCC may prohibit "patently offensive" speech from the airwaves at certain times of the day when children are likely to be in the listening audience); *Ginsberg v. New York*, 390 U.S. 629 (1968) (statute that prohibits selling magazines that are sexually oriented, but not obscene, to minors is constitutional).

Adolescent free speech rights is an area of constitutional jurisprudence where commentators have engaged in lively debate. See, e.g., Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 488-89 (1981) ("The ability of the child to influence the actions of the state through the political process . . . through the first amendment is severely limited."). See also Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321 (1981); Stern, *The Burger Court and the Diminishing Constitutional Rights of Minors: A Brief Overview*, 1985 ARIZ. ST. L.J. 865; Wright, *Free Speech Values, Public Schools, and the Role of Judicial Deference*, 22 NEW ENG. L. REV. 59 (1987).

65. 390 U.S. 629 (1968). *Ginsberg* involved the free speech rights of children to receive information rather than the rights of children to speak.

upheld a statute that forbade selling "girlie" magazines to minors even though the magazines were not technically obscene.⁶⁶ The Court found that the statute did not invade minors' constitutionally protected freedom of speech. Rather, the statute "simply adjust[ed] the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . . of minors.'"⁶⁷ Thus, the Court brought near obscene speech which involves minors into the sphere of unprotected adult obscenity. *Ginsberg* recognized that children's free speech rights can be analyzed under a lower standard than adults' rights with regard to speech which is on the fringes of first amendment protection.⁶⁸ *Ginsberg* did not stand for the proposition that minors lack first amendment rights; rather, the Supreme Court merely lowered the level of protection granted to near obscene speech when children are involved.⁶⁹

A second case involving adolescent free speech rights outside the classroom is *FCC v. Pacifica Foundation*.⁷⁰ The issue in *Pacifica* was whether the government could regulate a radio broadcast containing "patently offensive words" because of its content.⁷¹ The Court found that while the broadcast was not technically obscene, it was "vulgar, offensive, and shocking," and therefore not entitled to absolute constitutional protection.⁷² When the Court considered the level of protection constitutionally required, it noted that the radio was a medium "uniquely accessible to children, even those too young to read."⁷³ Because the radio broadcast was aired during a time when children may have had access to it,

66. *Id.* at 638. See *supra* note 49 and accompanying text.

67. *Ginsberg*, 390 U.S. at 638 (quoting *Mishkin v. New York*, 383 U.S. 502, 509 (1966)).

68. See *id.*

69. The *Ginsberg* Court based its limitation of the adolescent's exercise of first amendment rights on the adolescent's inability to make informed, mature decisions. *Diamond*, *supra* note 64, at 492.

70. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

71. *Id.* at 745. The radio station was playing a George Carlin comedy monologue entitled "Filthy Words." The monologue contained "seven dirty words," which were continually repeated during the broadcast. *Id.* at 729.

72. *Id.* at 747. See *supra* notes accompanying text 55-56.

73. *Pacifica*, 438 U.S. at 749. The Court distinguished *Pacifica* from *Cohen v. California*. *Id.* In *Cohen*, the defendant wore a jacket into a Los Angeles courthouse with the words "F___k the Draft" written on its back. *Cohen v. California*, 403 U.S. 15 (1971). The *Cohen* Court reasoned that because the message was written, anyone who might be offended by it could just avert their eyes. *Id.* at 21. Conversely, in *Pacifica*, because the message played over the radio, the Court reasoned that one could not simply turn away from the offensive broadcast. *Pacifica*, 438 U.S. at 749.

the Court reasoned that the *Ginsberg* analysis should apply.⁷⁴ Consequently, the Court found that the FCC could regulate indecent speech when broadcast on the radio.⁷⁵

Although the Court has provided only limited guidance with respect to children's free speech rights, the Court has addressed other adolescent rights cases. The general theme of the Court when confronted with issues regarding a minor's rights is that states may limit the freedom of children in some instances because "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."⁷⁶ Nearly all restrictions on minors' freedom permitted by the Court are based on the presumption that children lack "intellectual, physical, or emotional maturity."⁷⁷ The result of these cases is that although adolescents' constitutional rights, including the right to free speech, may be weaker than adults, adolescents nevertheless retain a limited degree of constitutionally protected fundamental rights.⁷⁸

III. FIRST AMENDMENT FREEDOM OF SPEECH AND THE PUBLIC SCHOOLS

The first amendment's free speech clause first entered the public schools in 1943 through the landmark case of *West Virginia State Board of Education v. Barnette*.⁷⁹ In *Barnette*, the school board adopted a resolution making the flag salute mandatory in the West Virginia public schools.⁸⁰ This resolution was challenged

74. *Pacifica*, 438 U.S. at 750.

75. *Id.* at 750-51. The Court stressed that its holding was limited to the facts of the case; the context of the broadcast, and not merely the broadcast's content, was the deciding factor. *Id.* The Court reasoned that when the FCC "finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene." *Id.*

76. *Bellotti v. Baird*, 443 U.S. 622, 635 (1979). The issue in *Bellotti* was whether a state can require a pregnant minor to obtain parental consent to have an abortion. Because of the minor's general lack of maturity, the Court concluded that a state may require parental consent as long as it also provided an "alternative procedure whereby authorization for the abortion can be obtained." *Id.* at 643.

77. Stern, *supra* note 64, at 881.

78. See generally Stern, *supra* note 64.

79. 319 U.S. 624 (1943).

80. The resolution required all teachers and students "to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly." *Barnette*, 319 U.S. at 626. The language of the resolution was adopted from a similar resolution that the Supreme Court had found constitutional just three years earlier in *Minersville School Dist. v. Goniatis*, 310 U.S. 586 (1940).

by Jehovah's Witnesses who claimed that the mandatory flag salute violated their freedom of speech and their religious freedoms under the first amendment.⁸¹ The Supreme Court decided the case on the free speech issue and held that the Jehovah's Witnesses' freedom of speech rights were unconstitutionally violated.⁸²

The Court found that the first amendment limitation on the government's ability to regulate or restrict speech applied to public school boards of education through the fourteenth amendment.⁸³ The Court then concluded that while a state may restrict speech when the speech presents a clear and present danger,⁸⁴ "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."⁸⁵ Thus, the Court held that students have the first amendment constitutional right "to be free from ideological indoctrination."⁸⁶

The Court did not address students' free speech rights after *Barnette* until 1969 when it reaffirmed them in *Tinker v. Des Moines School District*.⁸⁷ After *Tinker*, student free speech rights were next examined by the Court in 1986 in *Bethel School District v. Fraser*,⁸⁸ and again most recently in *Hazelwood School District v. Kuhlmeier*.⁸⁹ The remainder of this section examines in detail

81. *Barnette*, 319 U.S. at 630. The religious clauses of the first amendment provide: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

82. *Barnette*, 319 U.S. at 642.

83. *Id.* at 637.

84. *Id.* at 633.

85. *Id.* Much of the Court's opinion was spent warning against the dangers of state enforced patriotism.

86. 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, 10 (1984). Justice Jackson's closing words in the Court's opinion have become a cornerstone in first amendment jurisprudence. Justice Jackson wrote:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

Barnette, 319 U.S. at 642.

87. 393 U.S. 503 (1969).

88. 106 S. Ct. 3159 (1986).

89. 108 S. Ct. 562 (1988).

the Court's decisions in each of these three cases. This section shows how these three cases can be categorized within either the public forum doctrine or the content-based restriction mode of analysis. Only by categorizing the student speech cases in this manner is it possible to understand how the Supreme Court has defined the limits of students' free speech rights in public schools. Section IV then discusses the manner in which these three student speech cases interact with each other to establish the current state of student free speech rights in public schools.

A. *Tinker v. Des Moines School District*

The United States Supreme Court affirmed public school students' first amendment constitutional right to freedom of speech in its 1969 landmark decision, *Tinker v. Des Moines School District*.⁹⁰ The Court held that public school officials could not punish students for speaking out against the Vietnam War.⁹¹

In December, 1965, fifteen-year-old John Tinker and two other students wore black armbands to school in a silent and passive protest of the Vietnam War.⁹² The school's principal felt that the presence of the armbands would disturb the regular activities in the school,⁹³ even though the school had allowed students to wear other kinds of symbolic messages.⁹⁴ The school authorities responded to the student protest by banning students from wearing the armbands inside the school.⁹⁵ When the students refused to remove the black armbands, they were suspended from school.⁹⁶ The students remained on suspension until they returned to school without the armbands.⁹⁷

90. 393 U.S. 503 (1969).

91. *Id.* at 514.

92. *Id.* at 504. A total of seven students wore the black armbands to school. Four of these students were members of the Tinker family, whose father was a Methodist minister. *Id.* at 516. The Tinker family had taken part in similar activities in the past and decided to participate in this holiday season protest. *Id.*

93. *Id.* at 504.

94. *Id.* at 510. The school authorities did not prohibit all symbols of political or controversial significance. Students were permitted to wear buttons concerning political campaigns. In addition, some students wore Iron Crosses to school, the traditional symbol of Nazism. *Id.*

95. *Id.* at 504.

96. *Id.*

97. *Id.* The students returned to school after the planned period for their protest had expired.

1. *The Court's Decision*

The Court, in the majority opinion written by Justice Fortas, recognized that a clash existed between the constitutionally protected rights of the students and the need for school officials to maintain order and discipline within the school. On the student side of the conflict, the Court reaffirmed its "unmistakable holding . . . for almost fifty years"⁹⁸ that students do not "shed their constitutional rights to freedom of speech or expression at the school-house gate."⁹⁹ In addition, the Court also reaffirmed the "comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."¹⁰⁰ This clash between student speech and school authority was amplified when the Court determined that wearing the black armbands in protest of the Vietnam War was a form of "pure speech"¹⁰¹ which fell directly within the bounds of first amendment protection.¹⁰²

The Court then sought to resolve the conflict between the students and the school officials. Justice Fortas stated two major premises laying the foundation which enabled the Court to hold that student speech is protected within the school. The first major premise was the recognition that a student is a person under the Constitution, both in and out of the school.¹⁰³ The underlying importance of this finding is that if students were found not to be persons under the Constitution, then school officials could exercise absolute authority over the students. However, because the Court

98. *Id.* at 506. The Court based this conclusion on a series of school cases including, in part, *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *West Virginia v. Barnette*, 319 U.S. 624 (1943), and *Engel v. Vitale*, 370 U.S. 421 (1962).

99. *Tinker*, 393 U.S. at 502.

100. *Id.* at 507.

101. Symbolic speech is "[a]ctions which have as their primary purpose the expression of ideas Such conduct is generally protected under the First Amendment as 'pure speech' because very little conduct is involved." BLACK'S LAW DICTIONARY 1299 (5th ed. 1983) (citing *Tinker*, 393 U.S. at 503 (1969)). One year before *Tinker*, the Court had held that burning a draft card in protest of the Vietnam War combined both symbolic speech and conduct (nonspeech). *United States v. O'Brien*, 391 U.S. 367 (1968). While the speech element of the protest was protected by the first amendment, the nonspeech or conduct element was not protected. Thus, it was permissible to punish the protestor for his conduct, but not for his speech. *Id.* By finding that *Tinker's* armband was a form of pure speech, the Court rejected the idea that *Tinker* could be punished for his conduct.

102. *Tinker*, 393 U.S. at 508.

103. *Id.* at 511.

found that students are protected as persons by the Constitution, the school's power to regulate student actions must necessarily be limited. The Court's second major premise defined the scope of constitutional protection for adolescents as extending to the fundamental rights in the Constitution.¹⁰⁴ Based upon these two major premises, the Court reached the conclusion that school officials can only abridge a student's free speech rights by invoking a "constitutionally valid" reason.¹⁰⁵

Once the Court concluded that students enjoy the constitutional protection of free speech, it shifted its focus to determine whether there existed a constitutionally valid reason to permit school officials to abridge these student rights. Justice Fortas began by finding that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."¹⁰⁶ Justice Fortas reasoned that school officials must be able to show that their action to prohibit speech was based on more than just a "desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."¹⁰⁷ To determine what level of protection was required, Justice Fortas first reviewed the importance of the interaction between the Constitution and the schools. He found that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the market place of ideas."¹⁰⁸

The Court recognized that a permissible reason for abridging students' rights arises from the school's need to maintain order and discipline within the school, and to provide a quality education to all the students.¹⁰⁹ This regulation, however, must be consistent with the constitutionally protected rights of the students. The *Tinker* Court concluded that a constitutionally sufficient reason for school officials to regulate student speech arises when the speech "materially disrupts classwork or involves substantial disor-

104. *Id.*

105. *Id.*

106. *Id.* at 508. Justice Fortas concluded that any time a person presents views that differ from the majority opinion, there is a likelihood of argument or disturbance. Justice Fortas continued, however, by stating that "our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength." *Id.* (citation omitted).

107. *Id.* at 509.

108. *Id.* at 512. (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1965)).

109. *Id.* at 507.

der or [involves] invasion of the rights of others."¹¹⁰ The school could not show that Tinker's armband caused any disruption in the school.¹¹¹ In addition, the Court noted that the school had not prohibited other students from wearing other "symbols of political or controversial significance."¹¹² The Court therefore held that the school violated Tinker's freedom of speech rights.¹¹³

Justice Black filed a strong dissenting opinion. He concluded that the Court's opinion would compel "the teachers, parents, and elected school officials to surrender control of the American public school system to public school students."¹¹⁴ Justice Black reasoned that the Constitution does not grant an individual the right to "say what he pleases, where he pleases, and when he pleases."¹¹⁵ Justice Black found that schools are places where children go to learn, not to teach, and therefore, students do not have free speech rights in the public schools.¹¹⁶

2. *The Schoolhouse as a Limited Public Forum*

In the nearly twenty years since *Tinker* was decided, its holding has been debated by commentators¹¹⁷ and its results have left the lower courts in a state of confusion.¹¹⁸ Much of the debate and

110. *Id.* at 513.

111. *Id.* at 514.

112. *Id.* at 510. See *supra* note 94 and accompanying text.

113. *Id.* at 514.

114. *Id.* at 526 (Black, J., dissenting). Justice Harlan also filed a separate dissenting opinion.

115. *Id.* at 522 (Black, J., dissenting).

116. *Id.* Justice Black limited his conclusion only to rights in the school. He made no reference to adolescent rights outside the schoolhouse.

117. See, e.g., Diamond, *supra* note 64, at 528 ("Courts should review first amendment claims arising in a public school setting with only a limited standard: the minimum rationality standard currently used to review government action that does not implicate fundamental rights."); Haskell, *Student Expression in the Public Schools: Tinker Distinguished*, 59 *Geo. L.J.* 37, 52 (1970) (stating that "freedom afforded high school students by the *Tinker* decision" should not apply to "advocacy of disregard of school rules and procedures and student ridicule of school administrators and teachers"); Wright, *supra* note 64, at 61 (stating that there should not be a "judicially enforceable right of the minor student to speak out on most or each of the particular occasions on which the student might seek to assert such a right"); Note, *Tinker's Legacy: Freedom of the Press in Public High Schools*, 28 *DE PAUL L. Rev.* 387, 401 (1979) ("The Court should not be reluctant to apply strict scrutiny on behalf of children—it would not mean that the states would be deprived of the power to protect children, only that they would have to exercise that power within the bounds of the Constitution."). See also Freeman, *supra* note 86; Garvey, *supra* note 64.

118. Compare *Trachtman v. Anker*, 563 F.2d 512, 520 (2d Cir. 1977) (holding that where "school authorities have reason to believe that harmful consequences might result to

confusion revolves around the many questions left unanswered in *Tinker*.¹¹⁹ One of the major unresolved questions is whether the *Tinker* standard represents a content-based test or a public forum's reasonable time, place, and manner test. This subsection discusses this issue and argues that the *Tinker* standard is primarily a public forum test. This subsection shows further that, under *Tinker*, a school becomes a limited public forum for student speech when school officials permit some students to speak.

The *Tinker* standard has been categorized by one commentator as a strict scrutiny test¹²⁰ "equivalent to the clear and present danger test,¹²¹ tempered by time, manner, and place restrictions."¹²² Under this interpretation, the school setting becomes the "backdrop against which the [student's free speech rights] must be measured."¹²³ Thus, in the school, there is a clear and present danger when the student's speech substantially disrupts regular school activities. Because the "clear and present danger" test functions as a content-based regulation,¹²⁴ the commentator's analysis presumes that the *Tinker* standard itself is primarily a content-based regulation.

students" by responding to a student's sex questionnaire, then prohibiting the questionnaire does not violate the student's constitutional rights) *with* *Fraser v. Bethel School Dist.*, 755 F.2d 1356 (9th Cir. 1985), *rev'd*, 106 S. Ct. 3159 (1986) (holding that school cannot punish student for using sexual innuendos during nominating speech because the school officials failed to show that the speech caused a substantial disruption in the educational process).

119. There are several unresolved questions after *Tinker*. 1) Is prior restraint of student speech permissible under *Tinker*? *Compare* *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971) (prior restraint is allowed) *with* *Fujishima v. Board of Educ.*, 460 F.2d 1355 (7th Cir. 1972) (prior restraint is not allowed). *See generally* Hoffman & Trauth, *High School Students' Publication Rights and Prior Restraint*, 10 J.L. Educ. 485 (1981). 2) Who must cause the disruption in the school in order to restrict the speaker; the speaker or those reacting to the speaker? *See, e.g.*, *Diamond, supra* note 64, at 483; *Garvey, supra* note 64, at 361. 3) How is *Tinker's* "invasion of the rights of others" to be interpreted? *Compare* Note, *Administrative Regulation of the High School Press*, 83 MICH. L. REV. 625, 639 (1984) ("Invasion of the rights of others' must refer only to a tortious act . . . [or] to libel or personal abuse.") *with* *Wright, supra* note 64, at 81 (nontortious act that may cause psychological harm to students should not be protected). 4) What constitutes *Tinker's* material disruption or substantial disorder in the school? *See, e.g.*, *Diamond, supra* note 64, at 482 (stating that disruption or disorder can be confined to only physical disruption, or can be broadened to include nonphysical disruption as well).

120. *See supra* note 35 and accompanying text.

121. *See supra* note 50 and accompanying text.

122. Note, *supra* note 117, at 395.

123. *Id.* at 396.

124. If speech is found to create a "clear and present danger," it is not protected under the first amendment. The state can then impose any reasonable content-based regulations to prohibit that speech or to punish the speaker. *See supra* note 50 and accompanying text.

Although *Tinker* may contain some elements of permissible content-based regulations, the Court's analysis in *Tinker* parallels the Court's reasonable time, place, and manner analysis in a limited public forum situation.¹²⁵ The first requirement of any public forum restriction is that the restriction must be content-neutral. The *Tinker* standard requires that any school regulation restricting or punishing speech must be content-neutral. "School officials cannot suppress 'expressions of feeling with which they do not wish to contend.'" ¹²⁶ The *Tinker* Court specifically noted that the school had permitted students to wear iron crosses as well as other controversial political symbols. However, black armbands, a particular symbol worn to protest the Vietnam War, were singled out for prohibition.¹²⁷ This is exactly the type of content-based regulation that the Court forbids under a time, place, and manner restriction in a public forum.¹²⁸ Therefore, the *Tinker* standard can be read as a content-neutral restriction.

The second part of the public forum's time, place, and manner test requires that the governmental regulation be "narrowly tailored to serve a significant government interest."¹²⁹ In the school setting, prohibiting student speech that "materially disrupts class-work or involves substantial disorder or [invades] the rights of others"¹³⁰ is certainly a significant state interest. A school cannot carry out its fundamental mission—to educate the children—if school authorities are powerless to control or regulate disruptive speech in the schools.¹³¹ Therefore, *Tinker*'s standard of review advances the state's significant interest in maintaining control of the classroom.¹³²

125. See *supra* notes 36-39 and accompanying text. The Supreme Court has never held that a public school is a traditional public forum. Therefore, if a public school is considered to be a public forum at all, it must be a limited public forum.

126. *Tinker*, 393 U.S. at 511 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

127. *Id.* at 510-11.

128. See, e.g., *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972). A city cannot prohibit a person from peacefully picketing in protest of school discrimination in front of a city school when peaceful labor picketing is permitted. "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone . . ." *Id.* at 96.

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

130. *Tinker*, 393 U.S. at 513.

131. See generally *Diamond*, *supra* note 64.

132. *Tinker* prohibits student speech that is "basically incompatible with the normal activity" of the school during school hours. *Grayned v. City of Rockford*, 408 U.S. 104, 116

Also, the *Tinker* standard is narrowly tailored to permit only regulation of disruptive speech. For example, wearing an armband to school is unlikely to disrupt the classroom and, therefore, cannot be prohibited.¹³³ However, if a student makes a speech protesting the Vietnam War during math class when the rest of the class is trying to learn algebra, this would be disruptive and the school would be justified in taking disciplinary actions against the student.¹³⁴

The final element of a time, place, and manner restriction to be satisfied is that the governmental regulation must "leave open ample alternative channels of communication" for the speaker.¹³⁵ The *Tinker* standard dealt only with regulation of student speech in the schoolhouse.¹³⁶ Student speakers may speak outside of the school free from school officials' regulation.¹³⁷ Therefore, this final element will always be fulfilled unless the student's speech will have meaning only if presented within the confines of the school. Thus, *Tinker* provides for "ample alternative channels of communication" for student speech.

Hence, the *Tinker* standard meets the Supreme Court's three-prong public forum test. As a result, it appears that the Court is willing to permit school officials to create a limited public forum within the schoolhouse. Once the school becomes a limited public forum for student speech, the speech may only be subject to reasonable time, place, and manner restrictions, protecting the school against possible physical disruptions.

While the Court never formally stated that a limited public forum had been created in *Tinker*, the Court must have found that a public forum existed when it held, under a public forum mode of

(1971).

133. See *Tinker*, 393 U.S. at 514.

134. Professor Haskell sees little difference between wearing an armband in math class and making a protest speech in the same class. He wrote: "[A]n oral assertion of an anti-Vietnam position in a mathematics class would undoubtedly be constitutionally proscribable, though it seems that, under *Tinker*, the nonprotesting student in the mathematics class cannot complain of the symbolic expression which is in his line of vision. This seems a curious result." Haskell, *supra* note 117, at 51.

135. See *supra* notes 32-34 and accompanying text.

136. It is permissible to restrict the area immediately outside the school where activity can disturb the classroom. *Grayned*, 408 U.S. at 118.

137. The Court has held that it is permissible to prohibit certain speech on state fair grounds because the speakers can go off the fairgrounds to speak. *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981).

analysis, that Tinker's free speech rights had been violated. It is possible then, by looking at the specific facts in *Tinker*, to determine what is required of school officials before the Court is willing to recognize that a public forum has been created.

The only facts in *Tinker* which could have created a public forum are those that indicate that the "school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance."¹³⁸ Rather, some students were permitted to wear "buttons relating to national political campaigns, and some even wore the Iron Cross," the traditional symbol of Nazism.¹³⁹ It appears that once school officials permitted some students to wear these symbols, a limited public forum, at least for the wearing of symbols, was created. The Court stated: "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."¹⁴⁰ Therefore, under *Tinker*, a limited public forum can be created when school officials merely permit some students to speak.

B. *Bethel School District v. Fraser*

Bethel School District v. Fraser,¹⁴¹ decided in 1986, was the Supreme Court's next major student speech case. The *Bethel* Court held that school officials can punish a student for "offensively lewd and indecent" speech in the schoolhouse.¹⁴²

Matthew Fraser, a student at Bethel High School in Bethel, Washington, delivered a nominating speech for a fellow student during a school sponsored assembly before approximately 600 high school students.¹⁴³ Fraser filled his speech with sexual metaphors to describe the candidate for vice-president.¹⁴⁴ During Fraser's

138. *Tinker*, 393 U.S. at 510.

139. *Id.*

140. *Id.* at 511.

141. 106 S. Ct. 3159 (1986).

142. *Id.* at 3166.

143. *Id.* at 3162.

144. The speech given by Fraser is as follows:

"I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he suc-

speech, a school counselor observed that some students reacted to the speech by hooting and yelling, other students reacted by making gestures that simulated the activities alluded to in the speech, and some students appeared bewildered and embarrassed by the speech.¹⁴⁵ The school's assistant principal determined that Fraser violated the school's disciplinary rule which prohibited obscene language in the school.¹⁴⁶ After a disciplinary hearing, the hearing officer found that Fraser's speech was "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly."¹⁴⁷ School officials suspended Fraser for three days and disqualified him from consideration for student graduation speaker.¹⁴⁸ Fraser brought suit against the school for violation of his first amendment right to free speech.¹⁴⁹

1. *The Court's Decision*

The Supreme Court began its review of *Bethel* by reaffirming the *Tinker* standard that students in public schools "do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"¹⁵⁰ However, Chief Justice Burger, speaking for the majority, distinguished the political message of *Tinker's* armband from Fraser's lewd speech and found that Fraser's speech did not warrant *Tinker's* degree of first amendment protection.¹⁵¹ The Court then considered the appropriate level of first amendment protection for this type of speech.¹⁵²

After balancing Fraser's first amendment rights against "soci-

ceeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be."

Id. at 3167.

145. *Id.* at 3162.

146. *Id.* The disciplinary rule under which Fraser was charged provided: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.*

147. *Id.*

148. *Id.* Fraser served two days of the suspension and was elected to be graduation speaker by a write-in vote. The school permitted him to speak at graduation. *Id.* at 3168.

149. *Id.* at 3163. Fraser also challenged the school officials' actions under the due process clause of the fourteenth amendment. *Id.* at 3166.

150. *Id.* at 3163 (quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969)).

151. *Id.*

152. *Id.*

ety's countervailing interest in teaching students the boundaries of socially appropriate behaviour,"¹⁵³ the Chief Justice found that students in public schools do not have the same latitude to use offensive language as do adults.¹⁵⁴ The Court reiterated that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."¹⁵⁵ The Court then analogized Fraser's speech with *Ginsberg v. New York*¹⁵⁶ and *FCC v. Pacifica*¹⁵⁷ in which the Court had held that a state may restrict near obscene speech¹⁵⁸ which might be directed towards adolescents.¹⁵⁹ The Court, focusing on the fact that Fraser's speech was lewd, vulgar, and offensive, held that the "School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech."¹⁶⁰ Finally, Chief Justice Burger concluded that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as [Fraser's] would undermine the school's basic educational mission."¹⁶¹

Justice Brennan concurred in the Court's judgment, but he did not agree with the majority's analysis.¹⁶² Justice Brennan found it "difficult to believe" that Fraser's speech was obscene, vulgar, or offensively lewd, and therefore concluded that Fraser could not be punished for using obscene language.¹⁶³ However, Jus-

153. *Id.* at 3164.

154. *Id.* The Court compared Fraser's speech with Cohen's jacket, *see supra* note 73 and accompanying text, and concluded that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Id.* at 3164-65 (quoting *Thomas v. Board of Ed.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring)).

155. *Id.* at 3164 (citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)). The issue in *New Jersey v. T.L.O.* was whether a student's fourth amendment right prohibiting unreasonable searches and seizures had been violated when the principal searched the student's purse and found a small amount of marijuana. *T.L.O.*, 469 U.S. at 328. The Court found that while students are protected under the fourth amendment, the level of protection is not as great as for adults and therefore it held that the student's rights were not violated. *Id.* at 340.

156. 390 U.S. 629 (1968). For a discussion of *Ginsberg*, *see supra* text accompanying notes 65-69.

157. 438 U.S. 726 (1978). For a discussion of *Pacifica*, *see supra* notes 70-75 and accompanying text.

158. Near obscene speech is generally protected under the first amendment. *See supra* note 55 and accompanying text.

159. *Bethel*, 106 S. Ct. at 3165.

160. *Id.* at 3166.

161. *Id.* After finding that Fraser's first amendment rights had not been violated, the Court dismissed his due process challenge as well. *Id.*

162. *Id.* at 3167 (Brennan, J., concurring).

163. *Id.* "The language [Fraser] used is far removed from the very narrow class of 'ob-

tice Brennan concurred with the majority's judgment because he found that the school officials did not abuse their discretion under the first amendment when they determined that Fraser's speech disrupted the high school assembly.¹⁶⁴

Justice Marshall dissented in *Bethel* for two reasons.¹⁶⁵ First, he agreed with Justice Brennan that Fraser's speech was not obscene and, therefore, Fraser could not be punished for that reason.¹⁶⁶ Second, he concluded that under *Tinker* the school officials "failed to demonstrate that [Fraser's] remarks were indeed disruptive."¹⁶⁷ On that basis, Justice Marshall concluded that Fraser's first amendment rights had been violated.

2. *Bethel's Standard of Review: A New Definition of Near Obscene Speech*

The *Bethel* Court did not decide the case under a *Tinker* analysis. Indeed, the standard of review that the Court used to decide the case is not very clear. One commentator has argued that the Court applied a time, place, and manner restriction analysis.¹⁶⁸ A second commentator has argued that the Court "expand[ed] the *Tinker* concept of substantial disruption of the educational process to include speech which disrupts the school's value inculcation purpose."¹⁶⁹ Each of these arguments, however, contains inherent weaknesses. This subsection first analyzes these two arguments and then proposes that the Court merely equated Fraser's speech with near obscene speech, which is not protected under the first amendment when directed toward adolescents.¹⁷⁰

It is suggested that the Court incorporated a limited public forum's time, place, and manner analysis in *Bethel* even though it

scene' speech which the Court has held is not protected by the First Amendment." *Id.*

164. *Id.* at 3168.

165. *Id.* (Marshall, J., dissenting). Justice Stevens also filed a dissenting opinion, but his dissent was based upon Fraser's due process claim and not the free speech challenge. *Id.* at 3169 (Stevens, J., dissenting).

166. *Id.* at 3168 (Marshall, J., dissenting).

167. *Id.*

168. Note, *Bethel School District v. Fraser: A Legitimate Time, Place, and Manner Restriction on Speech in the Public Schools*, 32 S.D.L. REV. 156 (1987).

169. Note, *Protecting a School's Interest in Value Inculcation to the Detriment of Students' Free Expression Rights: Bethel School District v. Fraser*, 28 B.C.L. REV. 595, 598 (1987).

170. See *supra* notes 65-75 and accompanying text.

was "unwittingly articulated in a somewhat confusing manner."¹⁷¹ Although this argument is based on several factors, its crucial claim is that the School Board's sanctions against Fraser were content-neutral.¹⁷² It is firmly established that reasonable time, place, and manner restrictions must be content-neutral.¹⁷³ However, it was precisely because of the content of Fraser's speech that the Court found his punishment to be constitutional. The Court stated: "We hold that [the] School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his *offensively lewd and indecent speech*."¹⁷⁴ Therefore, the Court could not have used a limited public forum's time, place, and manner analysis in *Bethel* because Fraser's punishment would have been rendered unconstitutional under a forum regulation's requirement of content-neutrality.

Another commentator has suggested that the Court reached its holding in *Bethel* by extending its interpretation of *Tinker* to include Fraser's speech.¹⁷⁵ This argument was apparently formulated by a process of elimination. First, the author decided that Fraser's speech did not reach *Tinker's* required level of material disruption to school activities before permitting punishment.¹⁷⁶ Second, the author reasoned that Fraser's speech did not invade the rights of the other students in the school,¹⁷⁷ and therefore Fraser could not have been punished under *Tinker's* invasion of rights prong. Finally, the author determined that Fraser's speech did not fall into any of the "proscribed categor[ies] of expression."¹⁷⁸ By eliminating the possible ways that the Court could have upheld Fraser's punishment under the existing common law, the author concluded that the Court reached its result "by extending dramatically the *Tinker* concept of schoolwork disruption to include interference with the school's work of value inculcation."¹⁷⁹ The prob-

171. Note, *supra* note 168, at 163.

172. *Id.*

173. See *supra* notes 32-34 and accompanying text.

174. *Bethel*, 106 S. Ct. at 3166 (emphasis added).

175. Note, *supra* note 169, at 620.

176. *Id.* at 616-17.

177. The author found that Fraser's speech was neither tortious nor substantially harmful to the students. Either of these activities would constitute invasion of rights under *Tinker*. *Id.* at 617-18.

178. *Id.* at 619. See *supra* notes 48-53 and accompanying text for a discussion of proscribed speech under the first amendment.

179. Note, *supra* note 169, at 620. The author concluded that schoolwork disruption under the *Tinker* standard refers to a "physical disturbance which constitutes a material

lem with this analysis is that it fails to recognize the Court's willingness to expand the boundaries of obscenity when children are involved.

The Court did not apply the *Tinker* analysis in *Bethel*, but neither did it set out an alternative standard for reviewing student speech. Instead, the Court simply took Fraser's speech outside the boundaries of first amendment protection by equating it to obscene and near obscene speech.¹⁸⁰ This type of speech is not protected, particularly when there are, or might be, children in the audience.¹⁸¹

The Court's opinion focused on the content of Fraser's speech, the age of his audience, and the fact that the speech was taking place in a public school where the state has a substantial interest in protecting its students against vulgar speech. By finding his speech to be offensively lewd and indecent to school children's ears, the Court took Fraser's speech outside the first amendment's sphere of protection and treated it much like unprotected obscene speech. In *Ginsberg v. New York*¹⁸² and in *FCC v. Pacifica Foundation*,¹⁸³ the Court concluded that certain speech, which is normally not considered to be obscene in an adult setting,¹⁸⁴ may be obscene and therefore not protected when it is directed towards children. By holding that the "School District acted entirely within its permissible authority in imposing sanctions upon Fraser,"¹⁸⁵ the *Bethel* Court concluded that Fraser's speech was unprotected.

The Court appeared to give the Bethel school authorities a great deal of deference in determining that Fraser's speech was obscene, given that his speech was relatively mild compared to either *Ginsberg's* pornography or *Pacificas'* "seven dirty words." While the Court has defined obscenity in the adult context,¹⁸⁶ the *Bethel* Court was willing to allow the school officials to define obscenity

threat to the orderly administration of a school or the discipline of its students." *Id.* at 616.

180. See *supra* notes 49, 55-56 and accompanying text.

181. See *supra* notes 65-75 and accompanying text.

182. 390 U.S. 629 (1968) (holding that even though a sexually explicit speech may be entitled to first amendment protection with respect to adults, that same speech is not protected when it is directed towards children). See *supra* text accompanying notes 65-69.

183. 438 U.S. 726 (1978) (holding that the FCC could sanction a radio station for transmitting a broadcast containing "seven dirty words" when there might be children in the audience). See *supra* notes 70-75 and accompanying text.

184. See *supra* note 49 and accompanying text.

185. *Bethel*, 106 S. Ct. at 3166.

186. See *supra* note 49.

for themselves. The standard of review that evolves from *Bethel* is, then, a content-based restriction on free speech in which near obscenity is not protected in the public schools, and it is left to the school officials to define the meaning of near obscenity within the school setting.

C. *Hazelwood School District v. Kuhlmeier*

The most recent student speech case is *Hazelwood School District v. Kuhlmeier*,¹⁸⁷ which the Supreme Court decided in 1988. The *Hazelwood* Court, finding that a school sponsored student newspaper is not a public forum for indiscriminate student use, held that school officials may restrict the contents of the student newspaper.

In *Hazelwood*, the high school's journalism class published the school newspaper, the *Spectrum*, every three weeks and distributed copies to students, school personnel, and members of the community.¹⁸⁸ The journalism teacher submitted the newspaper page proofs to the principal who reviewed them prior to publication.¹⁸⁹ When the page proofs for the last issue of the school year were submitted to the principal for approval, the principal objected to two articles that were to appear in the newspaper.¹⁹⁰ One of the objectionable articles described three students' personal experiences with pregnancy.¹⁹¹ The principal was concerned that although the three pregnant girls' identities were not disclosed in the article, the article was specific enough that their identities would be discovered by the other students in the school.¹⁹² Also, the principal felt that references in the article to sexual activity and birth control were not appropriate for the younger students in the school.¹⁹³

The second *Spectrum* article to which the principal objected described how students in the school were affected by their par-

187. 108 S. Ct. 562 (1988).

188. *Id.* at 565. The Board of Education provided the primary funding for the newspaper. The school funding was supplemented by proceeds from sales of the newspaper, totaling \$1,166.84. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 566.

ents' divorce.¹⁹⁴ In the article, a student, who was identified by name, complained about her divorced father's activities.¹⁹⁵ The principal's concern with respect to the article centered on the fact that the *Spectrum* never gave her father an opportunity to respond to her complaints.¹⁹⁶ The principal felt that the student's parents should have been given an opportunity to respond or consent to the story.¹⁹⁷

The principal believed that there would not be enough time to change the controversial stories and still have the newspaper come out before the end of the school year.¹⁹⁸ He therefore directed the *Spectrum's* faculty advisor to withhold the two pages containing the divorce and pregnancy stories from publication.¹⁹⁹ Three students who worked on the newspaper brought suit in federal court claiming that the principal violated their first amendment free speech rights.

1. *The Court's Opinion*

The Court began its analysis by reaffirming once again the *Tinker* standard that "[s]tudents in the public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"²⁰⁰ The *Bethel* caveat that the "First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings'" was also reaffirmed.²⁰¹ The Court then set out to distinguish *Hazelwood* from *Tinker*.

Justice White, speaking for the majority, first examined whether the *Spectrum* should be considered a forum for student expression.²⁰² Justice White began this analysis by stating the gen-

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 567 (quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969)).

201. *Id.* at 567 (quoting *Bethel School Dist. v. Fraser*, 106 S. Ct. 3159, 3164 (1986)).

202. *Id.* If the *Spectrum* was a public forum, then it would have enjoyed the maximum protection available under the first amendment. If, on the other hand, the *Spectrum* was a nonpublic forum, then the principal would have had nearly unlimited discretion in its regulation. See *supra* notes 21-42 and accompanying text.

eral rule that school facilities are not traditional public forums.²⁰³ He continued by finding that a public forum is only created within a public school if the school officials have " 'by policy or by practice' " opened the school to either the general public or "some segment of the public, such as student organizations" for first amendment free speech activity.²⁰⁴

Once the Court described the steps required to create a limited public forum in the school, it focused its attention on the *Spectrum's* role in the school to determine whether the school officials had created a limited public forum by permitting publication of the student newspaper.²⁰⁵ The *Hazelwood* Court found that the *Spectrum* was part of the school's journalism course and that the journalism teacher exercised a great deal of control over the class.²⁰⁶ Based on this, the Court held that the school officials had " 'reserve[d] the forum for its intended purpos[e] as a supervised learning experience for journalism students," and, therefore, the *Spectrum* was not a public forum.²⁰⁷

The primary distinction that the Court drew between *Tinker* and *Hazelwood* was the difference between a school sponsored activity and a nonschool sponsored activity. The Court found that although *Tinker's* armband was part of a nonschool sponsored activity, publication of the newspaper was part of the classroom curriculum, and therefore it was an officially sanctioned school activity.²⁰⁸ As such, the Court concluded that the newspaper was not

203. *Hazelwood*, 108 S. Ct. at 568. Streets and parks are examples of traditional public forums. See *supra* notes 29-32 and accompanying text.

204. *Hazelwood*, 108 S. Ct. at 568 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983)). The Court also cited to *Widmar v. Vincent*, 454 U.S. 263 (1981). In *Widmar*, a state university opened some school facilities to all student groups on the campus except for groups with religious affiliations. The university argued that providing religious student groups with the use of the school facilities would violate the first amendment's establishment clause. However, the Supreme Court held that once the school opened the facilities to some students groups, they must make the facilities available to all student groups. *Widmar*, 454 U.S. at 267-68. The *Hazelwood* Court limited the application of *Widmar* by concluding that a public forum is not created when the school permits the facilities to be used for a specific communicative purpose or by inaction on the part of the school officials. *Hazelwood*, 108 S. Ct. at 568.

205. *Hazelwood*, 108 S. Ct. at 568. For a discussion on limited forums, see *supra* notes 36-39 and accompanying text.

206. *Hazelwood*, 108 S. Ct. at 568. The journalism teacher selected the editors for the newspaper, assigned story ideas to class members, and graded the students' performance. *Id.*

207. *Id.* at 569 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n* 460 U.S. 37, 46 (1983)).

208. *Id.*

amenable to the same level of constitutional protection as *Tinker's* armband.²⁰⁹

Once the Court made this distinction between *Tinker* and *Hazelwood*, it turned to the question of what level of protection, if any, was appropriate for school sponsored speech in the nonpublic forum context. The Court concluded that a "school must be able to set high standards for the student speech that is disseminated under its auspices . . . and may refuse to disseminate student speech that does not meet those standards."²¹⁰ Thus, the Court held that school officials may exercise control over the "content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."²¹¹ The Court concluded that the principal had acted reasonably when he ordered the pregnancy and divorce articles deleted from the newspaper, and therefore the students' first amendment rights had not been violated.²¹²

Justice Brennan filed a strong dissenting opinion in which he found that the free speech rights of the students had been violated.²¹³ Justice Brennan's primary objection to the majority's opinion was the Court's disregard of the *Tinker* analysis.²¹⁴ He stated that "mere incompatibility with the school's pedagogical message [is not] constitutionally sufficient justification for the suppression of student speech."²¹⁵

Justice Brennan found that the majority's school sponsored/nonschool sponsored distinction for granting different levels of constitutional protection to student speech was not justified. He determined that the *Tinker* test sufficiently encompasses all student speech within the school. Under the *Tinker* standard, Justice Brennan reasoned, the school would still have the control, sought

209. *Id.*

210. *Id.* at 570.

211. *Id.* at 571. This is equivalent to the rational basis test. See *supra* note 42 and accompanying text.

212. *Id.*

213. *Id.* at 573 (Brennan, J., dissenting). Justices Marshall and Blackmun joined Justice Brennan's dissent.

214. *Id.* at 574-76.

215. *Id.* at 574. Justice Brennan determined that if mere incompatibility was sufficient to suppress student speech, then the schools would become "enclaves of totalitarianism that strangle the free mind at its source." *Id.* (citations omitted). Under the Constitution, "public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate." *Id.* at 575.

by the majority, over student speech in school sponsored activities, because student speech in that context is more likely "to disrupt materially any legitimate pedagogical purpose."²¹⁶ Justice Brennan concluded that "instead of 'teach[ing] children to respect the diversity of ideas that is fundamental to the American system,' . . . the Court today 'teach[es] youth to discount important principles of our government as mere platitudes.'"²¹⁷

2. *Hazelwood Criticized: The Public Forum Doctrine Vanishes in the Schoolhouse*

The *Hazelwood* Court put to rest the question of whether a student newspaper is a public forum.²¹⁸ The Court's holding that a school sponsored student newspaper is a nonpublic forum unless the school officials designate the newspaper to be a limited public forum is fully consistent with its previous case law.²¹⁹ Nevertheless, the Court seemed to misapply its own standard when it found that the *Spectrum* had not been designated by the school to be a limited public forum. A limited public forum is created when the government "intentionally open[s] a nontraditional forum for public discourse."²²⁰ This is exactly what the Hazelwood School Board did. In *Hazelwood*, the School Board specifically permitted the student newspaper to operate as a "real" newspaper, as long as the students exercised "responsible journalism."²²¹ In addition, the School Board accepted the students' proposition that the newspaper should be protected by the first amendment.²²² Thus, the School Board appears to have created a public forum as a result of the Board Policies they established to regulate the contents of the

216. *Id.* at 576. "[U]nder *Tinker*, the school may constitutionally punish the budding political orator if he disrupts calculus class but not if he holds his tongue for the cafeteria" because in the cafeteria he is less likely to materially disrupt regular classroom activities. *Id.*

217. *Id.* at 580 (citations omitted).

218. *Compare Gambino v. Fairfax County School Bd.*, 564 F.2d 157 (4th Cir. 1977) (holding that student newspaper is a forum for student speech) and *Kuhlmeier v. Hazelwood School Dist.*, 795 F.2d 1368 (8th Cir. 1986) (holding that student newspaper is a forum for student speech) with *Nicholson v. Board of Educ.*, 682 F.2d 858 (9th Cir. 1982) (holding that student newspaper is not a forum for student speech).

219. Generally, only streets and parks are considered to be traditional public forums. Other government property can become a limited public forum if the government designates it as such. See *supra* notes 29-42 and accompanying text. Because a school is not a traditional public forum, see, e.g., *Police Dep't of Chicago v. Mosely*, 408 U.S. 92 (1971), it does not become one unless the school officials designate it as one.

220. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

221. *Hazelwood*, 108 S. Ct. at 568.

222. *Id.*

newspaper.²²³

Since the School Board permitted the newspaper to be treated as a public forum within the school setting, the principal, under the public forum doctrine, should have been limited in his exercise of power over the contents of the newspaper. However, the Supreme Court determined that the school had never intended that the newspaper be a public forum. When placed in the school context, the Court's decision in *Hazelwood* is contrary to the general application of the limited public forum doctrine. It merely demonstrates the Court's continued willingness to modify the scope of the free speech clause within the school, as the Court did in *Bethel* on the issue of near obscenity. Thus, after *Hazelwood*, policies promulgated by school officials that may appear to create a limited public forum may not do so, according to the Court, at least in school sponsored activities.

IV. THE CURRENT STATE OF STUDENTS' FREE SPEECH RIGHTS: A COMBINATION OF CONTENT-BASED AND PUBLIC FORUM RESTRICTIONS

The three student speech cases analyzed in section III demonstrate the dichotomy between the public forum doctrine and content-based regulations in the schoolhouse. *Tinker* and *Hazelwood* both relied on the public forum analysis,²²⁴ while *Bethel* was decided under a content-based regulation analysis.²²⁵ This section discusses the current state of student speech in public schools based upon the Supreme Court's decisions in *Tinker*, *Bethel*, and *Hazelwood* after having been characterized in section III as either a public forum or a content-based analysis.

Tinker represented a significant step in the first amendment free speech arena. For the first time, the Court recognized that stu-

223. One of the Board's policies stated that "[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism." *Id.* at 568-69. In addition, the students published a Statement of Policy in the newspaper, which was approved by school authorities stating that the newspaper, "as a student-press publication accepts all rights implied by the First Amendment." *Id.* at 569. Further, "[o]nly speech that "materially and substantially interferes with the requirements of appropriate discipline" can be found unacceptable and therefore be prohibited." *Id.* at 569 n.2 (citations omitted).

224. *See supra* notes 125-37, 200-12 and accompanying text.

225. *See supra* notes 180-86 and accompanying text.

dents in public schools are "persons" under the Constitution.²²⁶ This placed student speech squarely within the constitutional protection of the first amendment's free speech clause. The *Tinker* Court found that a public school can be a limited public forum available for student expression, permitting the school to invoke only reasonable time, place, and manner restrictions on the speech without regard to content. Additionally, under *Tinker*, once school officials allow some students to speak, the limited public forum is created and the officials must allow all students to speak, at least in a similar manner.²²⁷

The standard presented by *Tinker* represents the best compromise between student rights and school interests.²²⁸ If students were found to have rights even greater than those recognized in *Tinker*, they could, in essence, control the school, and school officials would be powerless to ensure that all students receive the best education possible.²²⁹ A school cannot operate if students are permitted to disrupt classwork. On the other hand, there would have been a chilling effect had the Court found that student speech can be regulated to a greater degree. Under this standard, the school can, and should, regulate or prohibit speech that would create a physical disruption in the educational process.

Bethel did little to change *Tinker's* limited public forum analysis. Rather, the *Bethel* Court redefined the meaning of near obscenity for the public school setting.²³⁰ Near obscene speech in the school, like obscene speech in the adult context, is not constitutionally protected.²³¹ Thus, *Bethel* carved out a permissible content-based restriction from *Tinker's* content-neutral forum thereby shrinking the sphere of protected speech within the school.

Hazelwood refined and limited the openness of the school as a public forum. Justice White, speaking for the majority, reaffirmed that the

public schools do not possess all of the attributes of streets, parks, and other traditional public forums Hence, school

226. See *supra* notes 103-05 and accompanying text.

227. See *supra* notes 125-37 and accompanying text.

228. The debate continues whether minors should even be granted free speech rights at all. See *supra* note 64.

229. This was one of Justice Black's major concerns with *Tinker*. See *supra* notes 114-16 and accompanying text.

230. See *supra* notes 180-86 and accompanying text.

231. See *supra* note 49 and accompanying text.

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,' or by some segment of the public, such as student organizations.²³²

In *Hazelwood*, the Court found that the school officials never intended the newspaper to be an open public forum,²³³ even though specific school policy appeared to create, through strong language, a limited public forum. Rather, the Court held that the newspaper was simply part of the school's curriculum, and, as a nonpublic forum, was under the school's full control.²³⁴ Hence, one manner in which *Hazelwood* limits *Tinker* is in the requirements necessary to create a limited public forum in the school. *Tinker* requires only a minimal showing that school officials, by their action or inaction, have created a limited public forum. *Hazelwood*, on the other hand, seems to assume that a public forum is not created until school officials not only say that it is a public forum, but also indicate that they intend to create a limited public forum for student speech. The *Hazelwood* Court's reluctance to find that the *Spectrum* was a limited public forum even when there was strong evidence to the contrary suggests that in the future students will carry a heavy burden proving that a limited public forum has been created in the school. The general rule concerning student speech in public schools is that the school is a nonpublic forum unless and until it is intentionally opened by school officials.

The standard of review that emerges from *Hazelwood* is that school officials may regulate school sponsored speech "so long as their actions are reasonably related to legitimate pedagogical concerns."²³⁵ This type of "reasonable" content-based speech regulation is exactly the type of regulation that the Supreme Court has permitted in the nonpublic forums.²³⁶ Thus, *Hazelwood* created a double standard of protected student speech by differentiating between nonschool sponsored and school sponsored speech. While it appears that *Tinker*'s higher level of scrutiny still governs non-school sponsored speech once a limited public forum is created, educators now have far greater discretion in controlling school re-

232. *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. at 562, 567 (1988) (citations omitted).

233. *Id.* at 569.

234. *Id.*

235. *Id.* at 571.

236. See *supra* text accompanying notes 40-42.

lated speech—to the extent that they can enforce reasonable content-based regulations.

This double standard is likely to create confusion in the future. While some speech, such as classroom discussion, is clearly school related, and some speech, such as locker room discussion, is clearly not school related, the line between the two is not very sharp. Although the *Hazelwood* holding is limited to school sponsored activities, the Court's dicta suggests that *Hazelwood* may have a greater impact and extend into the areas of nonschool sponsored activity as well. For example, in *Tinker*, had the school decided to have a "Vietnam Day," *Tinker's* armband would have become school sponsored speech. Once *Tinker's* armband became part of a school sponsored activity, *Tinker* would have been subject to *Hazelwood's* control. In essence, endorsing students' activities gives school officials the power to control the students' speech because it would bring speech from a *Tinker* situation into the *Hazelwood* context. Therefore, the impact of *Hazelwood* is likely to be far greater than just affecting school sponsored student speech.

CONCLUSION

The United States Supreme Court recognizes that students' free speech rights are protected in America's public schools under the first amendment. This freedom, however, is not unlimited. Just as all speech may be restricted by government officials in certain circumstances, the freedoms enjoyed by students may be curtailed by school officials. These government imposed restrictions, both in and out of the school, may be either content-based or public forum restrictions. This note has analyzed the level of protection accorded to students by reviewing the Court's three recent student speech decisions.

Beginning with *Tinker*, the Court held that school officials may only regulate student speech that materially disrupts regular classroom activity. The standard enunciated by *Tinker* fits neatly within the Court's public forum doctrine and, therefore, although not specifically designated as such by the Court, is most likely a permissible public forum restriction. Further, the *Tinker* Court seemed to indicate that a public school can become a limited public forum once school officials allow some students the opportunity to speak.

This note's broad reading of *Tinker* shows that the Court was

willing to find that schools are limited public forums. The Court, however, did not state the extent to which school officials may regulate student speech based upon the content of the speech. The Court examined the issue of content-based regulations in *Bethel*.

In *Bethel*, the Court allowed a student to be punished because of the contents of a speech he delivered during a school assembly, thereby permitting the school to impose content-based regulations on student speech. The Court classified the student's speech as vulgar and offensive, but not obscene. Because vulgar and offensive speech is generally protected under the Constitution, whereas obscene or near obscene speech when directed toward children is not, it appears that the *Bethel* Court was willing to bring vulgar and offensive speech into the sphere of unprotected obscene speech.

By broadening the spectrum of nonprotected speech, the *Bethel* Court effectively narrowed the protections of *Tinker's* limited public forum because the public forum doctrine only applies to protected speech. Additionally, because the Court was so willing to extend the definition of obscenity within the school, it is likely that the Court will similarly enlarge other areas of unprotected or partially protected speech such as commercial speech or inciteful speech while in the classroom. This would limit *Tinker's* holding to an even greater extent.

The *Hazelwood* Court further limited *Tinker* even in two ways. First, while a limited public was created under the *Tinker* Court's analysis when school officials simply allowed some students to speak, the *Hazelwood* Court required school officials to intentionally create a limited public forum for student speech. This additional requirement effectively increases the burden on students who claim that the school is a limited public forum. Second, although the *Hazelwood* Court appeared to limit its holding to school sponsored speech, the nonpublic forum analysis used by the Court will probably affect nonschool sponsored student speech as well. By endorsing any student activity within the school, school officials can turn these activities into school sponsored events—which the school officials may regulate under *Hazelwood's* nonpublic forum.

The Supreme Court initially brought the first amendment's free speech protections into the classroom in 1943. The Court defined the extent and limitations of this protection in *Tinker*, *Bethel*, and *Hazelwood*. Although *Tinker* appeared to broaden stu-

dents' free speech rights, *Bethel* and *Hazelwood* left few of these rights intact. School officials may constitutionally impose either public forum or expanded content-based restrictions to regulate and control student speech in public schools.

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