No. 86-836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HAZELWOOD SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

CATHY KUHLMEIER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PEOPLE FOR THE AMERICAN WAY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

1. Pursuant to Rule 36.3 and Rule 42 of the Rules of this Court, People For the American Way respectfully moves this Court for leave to file a brief *amicus curiae* in the above-captioned case.

2. People For the American Way is a non-partisan membership organization established in 1980 by religious, civic, and education leaders. Its purposes include, *inter alia,* educating the public about the vitality of our democratic tradition, as well as improving the educational climate by encouraging intellectual curiosity and personal responsibility. People For the American Way also sponsors a legal defense fund which has provided assistance to parents and school officials seeking to promote the establishment of legal precedents that could protect basic constitutional guarantees in the public schools.

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3. The question presented in this case is a matter of great and continuing national importance. Based on the experience it has acquired in confronting this and similar issues throughout the country on behalf of its 250,000 members, People For the American Way believes that the accompanying brief presents arguments that will assist this Court in its review. To the best of Movant's knowledge, the positions advanced therein have not been presented previously by other parties or *amici curiae* in this proceeding.

4. For the reasons stated above, and those set out in the accompanying brief *amicus curiae*, People For the American Way respectfully requests this Court grant its motion for leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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May 1987

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CONSENT OF THE PARTIES

Respondents have consented to the filing of this brief, but petitioners have not. A motion for leave to submit the within brief has been filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

People For the American Way is a member-based, nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. People For the American Way was founded in 1980 by a group of religious, civic and education leaders devoted to our heritage of tolerance and pluralism; it now has 250,000 members nationwide. The organization's primary mission is to educate the public on the vital importance of our democratic tradition and defend against attacks from those who would impose narrow sectarian constraints on our free society.

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The members of People For the American Way are committed to public education and believe that children must fully comprehend and appreciate their legacy of freedom in order to preserve it for the generations to come. In particular, the organization believes that public schools can meet their goal of preparing students to enter the real world by fostering students' intellectual curiosity and personal responsibility regarding issues that affect their lives. The organization has played a leading role in the debates over excellence and values in public education.

People For the American Way works to achieve these goals in a variety of ways, including the national distribution of publications, maintaining a speakers bureau of experts on a variety of education issues, and organizing a national network of local groups that work to prevent censorship in the schools. The organization recently initiated a legal defense fund which has provided assistance to parents and school officials in promoting the establishment of legal precedents that would protect basic constitutional guarantees.

Because this case will have great impact on the free exchange of ideas and independent thinking in the public schools, People For the American Way respectfully submits this *amicus* brief to the Court.

SUMMARY OF ARGUMENT

The court of appeals properly concluded that the Hazelwood East *Spectrum* was held out by the school to be and actually functioned as a forum for the expression of student opinion, and that the public forum doctrine therefore limited the authority of school officials to censor the newspaper under the First Amendment. This conclusion is not inconsistent with the finding of the district court that *Spectrum* was also a part of the school's curriculum.

Whether or not the public forum doctrine is applicable to student newspapers, censorship of student articles cannot be justified merely by reference to the newspaper's curricular role. Instead, a court should examine the nature and setting of speech in a particular case to determine if censorship was truly necessitated by curricular concerns, or rather by a desire to shield other students from discussion of certain topics. This Court's precedents require school officials to

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justify any suppression of non-obscene and non-libelous student speech by demonstrating a reasonable basis for predicting material and substantial disruption of the educational process or invasion of the rights of third parties. Since no such showing was made in this case, the court of appeals properly reversed the district court's decision sustaining the actions of the school officials.

The decision of the court of appeals accords with the longstanding commitment of this Court to preserving the "marketplace of ideas" in the public schools. Censorship of *Spectrum* violated the right of all Hazelwood East students to be exposed to a broad range of viewpoints and information on issues of crucial importance to their lives. The duty of school administrators to inculcate community values does not justify interference with speech between and among students. Rather, it imparts an obligation to respect the freedom of expression protected by the First Amendment.

ARGUMENT

POINT I

THE DECISION OF THE COURT OF APPEALS STRIKES THE CORRECT BALANCE BETWEEN THE FIRST AMENDMENT RIGHTS OF STUDENTS AND THE DISCIPLINARY AND CURRICULAR AUTHORITY OF SCHOOL OFFICIALS

Petitioners suggest that the decision of the court of appeals in this case stakes out a radical new position in the area of First Amendment rights of high school students. In truth, the decision is fully consistent with the prior holdings of this Court and with the mainstream of federal court jurisprudence interpreting the holding of *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969), that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

Petitioners rely primarily on cases dealing with more difficult issues regarding assertions of student First Amendment rights in connection with the selection by school officials of textbooks, library books, and school plays, the regulation of obscene, libelous, or intrusive speech, and the control of speech—such as the lewd and

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vulgar public comments by a student in *Bethel School Dist. No. 403 v. Fraser,* 106 S. Ct. 3159 (1986)—that threatens to undermine order and discipline in the school.

In contrast, this case concerns the most traditional and responsible mode of speech by students in schools: thoughtful discussion of important social issues in articles in the school newspaper. The clear majority rule in the federal courts is to apply the strictures of *Tinker* to official censorship of student-written newspapers, even when the publication is to some degree tied into the curriculum. In compliance with *Tinker,* the courts have accorded broad discretion to school officials in determining the scope and content of curriculum and in maintaining order and discipline in the school environment, intervening only in cases where, as here, administrators overstep their bounds and interfere unnecessarily with the free speech and free press rights of students.

A. The Court of Appeals Correctly Held That the Authority of School Officials to Censor the Hazelwood East *Spectrum* is Limited by the First Amendment

The court of appeals determined that the Hazelwood East *Spectrum* was held out by the school to be, and actually functioned as, a forum for student speech. This conclusion is correct and accords with the majority view in the federal courts, notwithstanding the finding by the district court that *Spectrum* also served a curricular role.

Petitioners seem to advocate a rigid and simplistic distinction between "curricular" newspapers, over which school officials are apparently to have unbridled discretion to impose content-based restrictions, and "noncurricular" publications, which alone would have the protection of *Tinker*. Their argument ignores the reality that in many high schools, the primary forum for the expression of student opinion is the "official" school newspaper, which will in most cases be funded and supervised to some degree by the school. To hold that such a publication is automatically outside the scope of the First Amendment, even if it is put forth by the school as a forum for the expression of student opinion and actually serves as such, would permit school officials to stifle expression even when their decisions are not grounded in their proper roles of determining

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curriculum and maintaining discipline in the school. The mere invocation of "curriculum" should not preclude a more particularized analysis of how a publication actually functions.

The court of appeals was correct in holding that the practical function served by *Spectrum* as a conduit for student expression makes it a "public forum" subject to constitutional protection. Even if this Court were to conclude, however, that public forum analysis is inappropriate in the context of a school-sponsored newspaper, it should reject the radical rule suggested by petitioners providing "all or nothing" First Amendment protection based on the formalistic determination of whether a student newspaper is a "public forum" or part of the curriculum. Even in the absence of a public forum finding, the discretion of school officials to make content-based decisions to suppress student speech is subject to constitutional limitations.

1. *The Court of Appeals Correctly Determined That School Officials Established* Spectrum *as a Forum For Student Speech*

The power of government to control speech in a place that by long tradition or government invitation has become a public forum is sharply limited by the First Amendment. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The State through its actions may create a public forum even in a place where it would not otherwise be required to permit speech, and may create a "limited public forum" dedicated to use by certain groups, such as students. *Id.*; *Widmar v. Vincent*, 454 U.S. 263, 267 (1981).

Most courts that have addressed the question have held that a high school student newspaper, even one that is in some measure part of the curriculum, is a public forum where it is intended to and in fact does operate as a medium for the expression of student opinion. *See, e.g.*, *Gambino v. Fairfax County School Bd.*, 564 F.2d 157, 158 (4th Cir. 1977); *Trujillo v. Love*, 322 F. Supp. 1266, 1270 (D. Colo. 1971); *Zucker v. Panitz*, 299 F. Supp. 102, 103-05 (S.D.N.Y. 1969). *Cf. Bazaar v. Fortune*, 476 F.2d 570, 575 (5th Cir.) (college magazine), *aff'd as modified on other grounds*, 489 F.2d 225 (5th Cir. 1973) (en banc), *cert. denied*, 416 U.S. 995

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(1974). *Stanton v. Brunswick School Dep't,* 577 F. Supp. 1560, 1571 (D. Maine 1984)(high school yearbook quotation page).

At Hazelwood East, *Spectrum* was avowedly created as a forum for student speech. As the court of appeals observed, the newspaper's official statement of policy, approved by school officials, expressly provides that "*Spectrum,* as a student-press publication, accepts all rights implied by the First Amendment," and specifically recognizes that *Tinker* guarantees these rights to high school students. *See* 795 F.2d 1368, 1372 n.3. The statement also stresses that material appearing in *Spectrum* reflects the views of the student writers and editors rather than the administration or faculty of Hazelwood East. *Id.* In addition, as the court of appeals noted, official written policies of the school board prohibited school sponsored publications from restricting free expression of diverse viewpoints on important issues. *Id.* at 1373. It teaches an awful paradox to have these official pronouncements coupled with an asserted power of censorship.

The students of Hazelwood East accepted the school's offer and actually used *Spectrum* as a forum for free expression on a wide range of issues. The court concluded:

> *Spectrum* was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a public forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution and their state constitution.

Id. The court's conclusion is not inconsistent with the factual findings made by the district court with regard to *Spectrum*'s role in the Hazelwood East curriculum. A newspaper may be a forum for student speech and still serve a valuable educational function. A school newspaper that was simply compiled in class and then buried in the files without being disseminated would be a sterile exercise; it is a newspaper's role as a functioning forum for student opinion on controversial topics that makes it a powerful educational device. *See Zucker,* 299 F. Supp. at 103 & n.1. The court of appeals correctly reversed the holding of the district court that simply because *Spec-*

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trum was also tied into the journalism curriculum, the newspaper had no role as a forum for student speech. 795 F.2d at 1373-74.

2. *Even Without Regard to "Public Forum" Analysis,* Tinker *Limits the Discretion of School Officials to Censor High School Student Newspapers*

An exclusive focus on public forum analysis, as urged by petitioners, may obscure more important inquiries in this case. Insisting that *Spectrum* must be rigidly characterized as either a public forum or a part of the curriculum, petitioners make the extraordinary argument that if it is *not* a public forum, student speech is entitled to virtually no First Amendment protection. This conclusion is supported by neither precedent nor logic.

The public forum doctrine has been most helpful in determining who may claim equal access to a particular place or medium, as when a student group seeks to use a meeting room made available for other groups, *see Widmar,* 454 U.S. at 265, or when an advertiser seeks to place a political advertisement in a school newspaper that has generally made such space available to others. *See San Diego Comm. Against Registration and the Draft v. Governing Board of Grossmont Union High School Dist.,* 790 F.2d 1471, 1476-77 (9th Cir. 1986). Analogous questions that might arise in connection with the operation of the Hazelwood East *Spectrum* would be whether the newspaper's Letters to the Editor column or advertising pages are public forums for all students. Forum analysis is also relevant in determining whether speech activity is compatible with the purposes to which a particular place is devoted. *See Perry,* 460 U.S. at 46-49 & n.9.

The present case does not concern access to the forum in the classic sense. The question before the Court is not which group of students is to have access to the forum, nor indeed whether the forum itself is compatible with speech activity. The nature of a newspaper answers both of these questions: the speakers are to be the newspaper's student writers and editors,[1] and a newspaper, by

[1] The questions of who has authority to select or remove staff members and what constitutional limits are placed on these decisions are not before the Court.

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definition, is a proper vehicle for expression. The students in this case do not demand the right to be admitted to the *Spectrum* staff; they already have been. Having been granted access to the forum, they seek merely to avoid content-based suppression of their speech.

The Court may conclude, therefore, that public forum analysis is not helpful in defining the issues in this case. That by no means leads to the conclusion that respondents are without constitutional protection. The *Tinker* standard—which permits suppression of speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others," 393 U.S. at 513—applies *whenever* school officials seek to censor student speech. *Tinker* itself made no reference to the public forum concept, and the case has apparently been applied in every student press case, regardless of whether a public forum has been found. *See, e.g., Nicholson v. Board of Educ., Torrance Unified School Dist.*, 682 F.2d 858, 863 n.3 (9th Cir. 1982) (*Tinker* protects official school newspaper; no public forum analysis); *Reineke v. Cobb County School Dist.*, 484 F. Supp. 1252, 1256-57 (N.D. Ga. 1980)(same); *Frasca v. Andrews*, 463 F. Supp. 1043, 1049-51 (E.D.N.Y. 1979) (same). *See also Bayer v. Kinzler*, 383 F. Supp. 1164, 1166 (E.D.N.Y. 1974) (*Tinker* would apply even if student newspaper were not public forum), *aff'd*, 515 F.2d 504 (2d Cir. 1975).

This Court's most recent decision touching on the First Amendment rights of students, *Bethel School Dist. No. 403 v. Fraser*, 106 S. Ct. 3159 (1986), also contains no public forum analysis. Instead, the Court focused on the lewd, vulgar, and disruptive nature of the speech delivered by a high school student at an official school assembly, concluding that punishment of the student was justified under *Tinker*'s exception for speech that " 'intrudes upon the work of the schools or the rights of other students.' " 106 S. Ct. at 3163 (quoting *Tinker*, 393 U.S. at 508). No Justice suggested that if the assembly were deemed a "public forum" no restrictions on expression would be permitted or that a finding of no public forum would make the protections of *Tinker* unavailable to high school students.

Instead of pigeon-holing *Spectrum* as "forum" or "curriculum"—when it undeniably embodies elements of both—a more flexible and realistic inquiry is called for. A court should focus upon the

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nature, setting, and mode of speech in a particular case to determine whether, under the standards of *Tinker*, school officials acted properly to restrain or punish student speech. Under this approach, it would be relevant but not dispositive that student speech occurred in a setting implicating curricular and not just disciplinary concerns. The question would remain whether the decision to curtail student speech in a given situation was soundly rooted in the school's curricular function or otherwise justified under *Tinker*.

When the duty of school officials to determine and implement curriculum is directly implicated, student speech rights may be sharply curtailed. "Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to state that 'a time, place, and manner restriction may not be based upon either the content or subject matter of speech.'" *Consolidated Edison Co. v. Public Serv. Comm'n,* 447 U.S. 530, 544-45 (1980) (Stevens, J., concurring in the judgment)(citation omitted).

Similarly, a journalism teacher at Hazelwood East would have broad discretion to control disruptive conduct in the classroom, and to make truly pedagogic decisions regarding student work. For example, if the teacher had decided, during the preparation of the articles in question, that certain quotations should be verified, or that both sides of a particular issue should be acknowledged, such decisions would at least arguably have been "curricular" and immune from judicial second-guessing. These decisions would relate directly to *teaching* journalism, to the normal give and take between student and teacher, and would have little impact on the free speech rights of the students involved.

The last-minute deletion of two full pages of *Spectrum*, by contrast, bears none of the earmarks of a curricular decision. The articles in question had been written, edited, and set in type as part of the normal editorial process, with consultation and guidance from the journalism teacher, Mr. Stergos; Mr. Reynolds, the principal, then summarily suppressed them all, largely on the basis that the subject matter was "inappropriate." In doing so, he was not engaged in the process of teaching journalism; he was deciding what sort of material should be available to the larger body of students in the

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school. He was engaging in non-curricular censorship. In declaring broadly that Hazelwood East students should not read articles about teenage pregnancy and divorce in the school newspaper, Mr. Reynolds himself defined his decision as being oriented toward concerns other than the training of student journalists.

The decision to suppress articles on the eve of publication may or may not be justifiable on the basis of a principal's power to maintain discipline, prevent libel or obscenity, or protect the rights of other students—the standards of *Tinker*. But it surely is not, and was not in this case, a *pedagogic* decision to which a court must automatically defer. The limited inquiry required by *Tinker* under the First Amendment cannot be foreclosed by talismanic reference to "curriculum," particularly when it is not at all clear that curricular concerns really governed the decision. The court of appeals properly rejected the legal conclusion of the district court that virtually no constitutional protection can exist for a school newspaper that serves a curricular function.

B. The Court of Appeals' Application of *Tinker* Is Consistent With the Mainstream of Federal Cases and Poses No Threat to the Autonomy of School Officials

In applying *Tinker* to the facts of the present case, the court of appeals reversed the district court's holding that *Spectrum* could be censored because school officials (1) believed that divorce and teenage pregnancy were "inappropriate" for treatment in the school newspaper, and (2) sought to protect nebulous non-legal rights of other students and their parents. 795 F.2d at 1374-77. This holding is consistent with the application of *Tinker* by other federal courts, and in no way interferes with the discretion of school officials to make important decisions relating to curriculum or discipline.

Tinker reflects a reasonable compromise between the First Amendment rights of high school students and the responsibility of educators to maintain discipline and manage curriculum. The Court there reaffirmed "the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." 393 U.S. at 507. *Tinker* does not require that school officials justify the

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curtailment of student expression by demonstrating that a compelling state interest could not otherwise be served—the traditional test for content-based state regulation of speech. Instead, school officials need only show that they had a reasonable basis upon which to forecast that student speech would "substantially interfere with the work of the school or impinge upon the rights of other students." *Id.* at 509.

Tinker has been carefully applied in federal cases involving the student press to preserve the important discretionary functions of educators. For example, it has been held that school officials need not wait until actual disruption has occurred before acting to curtail disruptive speech. *Quarterman v. Byrd,* 453 F.2d 54, 59 (4th Cir. 1971). Prior restraint, virtually never acceptable in the adult press, has been approved for the student press by many courts, at least on the condition that schools provide constitutionally adequate procedural safeguards. *See, e.g., Shanley v. Northeast Indep. School Dist., Bexar County, Tex.,* 462 F.2d 960, 969 (5th Cir. 1972); *Quarterman,* 453 F.2d at 59; *Eisner v. Stamford Board of Educ.,* 440 F.2d 803, 808 (2d Cir. 1971). *But see Fujishima v. Board of Educ.,* 460 F.2d 1355, 1358 (7th Cir. 1972). In addition to barring obscene or libelous speech, administrators may censor speech that is reasonably viewed as posing a substantial risk of physical violence in the school. *Frasca v. Andrews,* 463 F. Supp. 1043, 1051 (E.D.N.Y. 1979).

Courts applying *Tinker* have nevertheless heeded the Court's admonition that "undifferentiated fear or apprehension of disturbance" or the desire to avoid the "discomfort and unpleasantness" that may accompany unpopular speech cannot justify the suppression of student speakers. 393 U.S. at 508-09. Where a reasonable basis does not exist for the prediction of material and substantial disturbance, or where the procedures set up for prior review of student expression are impermissibly vague or overbroad, courts have properly overturned official censorship of student publications. *See, e.g., Shanley,* 462 F.2d at 974; *Eisner,* 440 F.2d at 810; *Riseman v. School Comm.,* 439 F.2d 148, 149 (lst Cir. 1971); *Bayer v. Kinzler,* 383 F. Supp. 1164, 1165-66 (E.D.N.Y. 1974), *aff'd,* 515 F.2d 504 (2d Cir. 1975). In addition, "the school board's burden

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of demonstrating reasonableness becomes geometrically heavier as its decision begins to focus upon the content of materials that are not obscene, libelous, or inflammatory." *Shanley*, 462 F.2d at 971. Speech may not be suppressed merely because it is viewed by school officials as "controversial" or "inappropriate." *See, e.g., id.* at 971-72; *Stanton v. Brunswick School Dep't*, 577 F. Supp. 1560, 1574 (D. Maine 1984).

The decision of the court of appeals in this case is fully consistent with this body of case law. Petitioners have never asserted that the publication of the censored articles would have resulted in substantial and material disruption of the school, and the record is devoid of any basis, other than administrative convenience, for completely suppressing two entire pages of *Spectrum* rather than delaying publication in order to deal precisely with the perceived problem by making supposedly necessary changes.[2] The court below held, further, that suppression of the articles could not be justified on the basis of "protecting the rights of others," since (1) the teenage subjects of the pregnancy article were quoted anonymously and voluntarily, (2) the identities of the parents discussed in the divorce article could not be discerned by persons previously unfamiliar with the revealed facts, and (3) no party could possibly assert tort liability against the school on the basis of anything contained in the articles. 795 F.2d at 1375-76.[3]

[2] The court of appeals also properly rejected the assertion that student speech may be suppressed in order to avoid the implication that the school somehow "endorses" the student's views. The censored articles presented a realistic picture of teenage pregnancy and divorce and could hardly be construed by a reasonable reader as an endorsement of teenage sexual promiscuity. In any event, the newspaper publishes a disclaimer expressly disavowing any endorsement by school officials of views expressed therein. *See* 795 F.2d at 1372 n.3.

[3] In arguing for a more expansive definition of "invasion of the rights of others," petitioners rely mainly on *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978), which held that school officials could prevent a high school magazine from conducting a written student survey on teenage sexuality. *Trachtman* is factually distinguishable from the present case since the Second Circuit's decision rested on the psychological harm that could be visited upon students "importuned" to answer a series of highly personal questions about their own sex lives. *Id.*

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Finally, the court of appeals accurately perceived that underlying other rationalizations for the censorship of *Spectrum* was the conviction of Mr. Reynolds that divorce and teenage pregnancy are "per se" inappropriate for treatment in the school newspaper. The court correctly rejected this ground for control of student speech, noting that students are both aware of and concerned about these issues and that responsible coverage in the school newspaper would be unlikely to shock or offend anyone. 795 F.2d at 1374-75.

The case before this Court does not concern speech by students that is lewd, sensationalistic, or unruly; it does not involve a challenge to the authority of school officials to select textbooks or library books, to shape the curriculum, or to regulate conduct that provides reasonable grounds for forecasting disruption of the educational process. It relates instead to a most traditional, respectable, and non-disruptive form of communication by students: careful, factual discussion of important social issues in a newspaper article.

POINT II

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S DECISIONS ASSURING FREE ACCESS TO A DIVERSITY OF VIEWPOINTS AND INFORMATION IN THE COMMUNITY OF AMERICAN SCHOOLS

In addition to violating the First Amendment rights of respondents, the actions of the school officials in this case interfered with

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at 519-20. Here, by contrast, school officials suppressed publication of completed articles that contained anonymous, voluntary quotations that offered no basis for predicting psychological harm to any student.

Even as limited, the decision in *Trachtman* has been severely criticized for "grossly distort[ing] the meaning of the invasion-of-rights test" by extending it beyond tortious conduct governed by clear standards. Note, *Administrative Regulation of the High School Press*, 83 Mich. L. Rev. 625, 640-41 (1984). *Trachtman* was decided over a vigorous dissent by Judge Mansfield, who objected to the court's "vague and nebulous" extension of *Tinker*'s language. 563 F.2d at 521 (dissenting opinion). Judge Mansfield also questioned the need to shield modern teenagers from discussions of sex, observing that the court had an outdated image of high school students as "fragile, budding egos flushed with the delicate rose of sexual naivety." *Id.* at 526.

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access by other Hazelwood East students to the information and ideas contained in the censored articles.[4] The decision of the court of appeals follows in the footsteps of this Court in refusing to allow the preferences and preconceptions of local officials to determine the range of knowledge and opinions available in the public school environment.

The assertion of petitioners that the decision below will interfere with the ability of school officials to inculcate basic values is totally without foundation. The important role of the secondary school in preparing students for participation in American society requires that they be taught not just skills and self-discipline, but a respect for our constitutional tradition. Central to that tradition is a tolerance for pluralism in outlooks and beliefs that can only be developed by exposure to a broad spectrum of information.

A. The Right to Receive Information Has Been Recognized as Necessary to Guarantee Access to the "Marketplace of Ideas"

The theory of the First Amendment is that democracy is strengthened and the cause of truth best served by permitting the full range of viewpoints, including the unpopular and the provocative, to vie for acceptance in the public arena. As Justice Holmes wrote nearly seventy years ago:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe ... that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.

Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion). *See also New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964).

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[4] It is irrelevant that school officials did not punish the students who subsequently distributed photocopies of the suppressed articles. The actions of petitioners had the intent and effect of limiting the number of students who would see the material by keeping the articles, and indeed the entire subjects of divorce and teenage pregnancy, out of the school newspaper. The perseverance of the *Spectrum* writers does not make this any less a case of censorship.

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This Court has repeatedly stated that free trade in ideas is especially to be cherished in our public schools.

> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (citations omitted). Those principles of *Keyishian* were applied to the public high school setting in *Tinker v. Des Moines Indep. Community School Dist.,* 393 U.S. 503, 512 (1969).

Because the marketplace of ideas is important not just for the speaker but for all who would hear what the speaker has to say, this Court has repeatedly recognized, in a wide range of settings, a First Amendment right to *receive* information. *See, e.g., Procunier v. Martinez,* 416 U.S. 396, 408-09 (1974) (right to receive mail from prison); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 386-90 (1969) (right of public to have access to wide range of ideas and experiences through broadcasting); *Lamont v. Postmaster General,* 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (right to receive publications through the mail); *Martin v. City of Struthers,* 319 U.S. 141, 143 (1943) (right to receive distributed literature).

In sum, this Court has held that

> the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach . . . .

Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (citations omitted).

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The right to receive information has also been recognized as a necessary incident of the marketplace of ideas in the public schools. As the Court said in *Tinker,* "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." 393 U.S. at 511. The right to receive information was expressly recognized by the plurality opinion in *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico,* 457 U.S. 853 (1982), which held that recognition of the right was necessary both to protect the rights of *senders,* and as "a necessary predicate to the *recipient's* meaningful exercise of his own rights to speech, press, and political freedom." *Id.* at 867 (emphasis in original).

> [J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.

Id. at 868. Some members of the Court in *Pico* were unwilling to hold that the removal of books from a high school library constituted a violation of the right of students to receive information in the absence of censorship of a particular speaker. A majority nevertheless recognized that where there is a willing speaker and recipient, the state may not unreasonably suppress communication in the schools. *See id.* at 878-79 (Blackmun, J., concurring in part and concurring in the judgment); *id.* at 887 (Burger, C.J., dissenting).

In contrast to *Pico,* this case *does* involve interference between a willing speaker and a willing listener. Although only the putative speakers are before the Court, broader interests are at stake. In silencing respondents—student journalists who sought to address important social issues in the pages of *Spectrum*—petitioners placed an obstacle in the road to knowledge for members of the larger high school community, impermissibly "contracting the spectrum of available knowledge."

It is beside the point to argue, as petitioners have, that similar information may be available through the orthodox channels of classroom instruction. The invitation to go speak somewhere else is rarely an inspired response to First Amendment claims. When offered with regard to one of the most basic media, a newspaper, such

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a response is unacceptable. Unless some valid barrier is shown, the students of Hazelwood East are entitled to be exposed in that newspaper to a wide range of views, including expression by fellow students, that will challenge them, provoke them, stimulate them—and help them to develop the judgment and independence to participate fully in our free and pluralistic society.

B. Recognition of the Right of High School Students to Be Exposed to Diverse Viewpoints Is Not Precluded By the "Inculcation" Role of School Officials

America's public schools play a crucial role in inculcating fundamental skills, knowledge, and values, and educators are accorded broad discretion in achieving that purpose. *Ambach v. Norwick,* 441 U.S. 68, 76-77 (1979). Petitioners suggest that this principle—undeniable and honored by the court of appeals in this case—precludes recognition of the public high school as a setting for diverse expression. They suggest that their duty in this regard authorizes them to silence student speech on important issues that they view as "appropriate" only to be addressed through formal classroom instruction.

However, among the most important values that public educators are charged with instilling are respect for the rights of others and tolerance for diversity in public discourse—in short, the principles underlying the First Amendment. To teach these principles in the abstract but fail to honor them in the concrete renders them meaningless in the eyes of students; it certainly does not prepare students to participate vigorously in a democratic society. Censorship by a school board "hardly teaches children to respect the diversity of ideas that is fundamental to the American system." *Pico,* 457 U.S. at 880 (Blackmun, J., concurring in part and concurring in the judgment). "It is most important that our young become convinced that our Constitution is a living reality, not parchment preserved under glass." *Shanley v. Northeast Indep. School Dist., Bexar County, Tex.,* 462 F.2d 960, 972 (5th Cir. 1972).

As Justice Jackson wrote in *West Virginia Board of Educ. v. Barnette,* 319 U.S. 624, 637 (1943):

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young

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> for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

To be sure, the constitutional rights of students must be applied "in light of the special characteristics of the school environment." *Tinker,* 393 U.S. at 506. Courts must strike a balance that permits limitations on student speech necessitated by the school's "inculcation" role without destroying the free trade in ideas that this Court has repeatedly recognized as sacred in the community of American schools. As Justice Blackmun noted in his concurrence in *Pico:*

> Concededly, a tension exists between the properly inculcative purposes of public education and any limitation on the school board's absolute discretion to choose academic materials. But that tension demonstrates only that the problem here is a difficult one, not that the problem should be resolved by choosing one principle over another.

457 U.S. at 881-82 (opinion concurring in part and concurring in the judgment). This Court should reject again the suggestion that the role of high schools in instilling basic values is inconsistent with the rights of high school students to be exposed to a broad range of viewpoints and information; the Court should reject a bright-line rule that allocates to high schools only the task of inculcation while reserving the marketplace of ideas for the college campus. That a different balance between "free trade in ideas" and "inculcation" may in some cases have to be struck depending on the level of the students involved does not mean that free speech and free press rights attach only upon college enrollment.

To the contrary, that high school students are being prepared for the adult world calls for the fullest recognition of their First Amendment rights consistent with the necessities of order and discipline in the school. High school students are or soon will be eligible to vote, serve on juries, enter into contracts, and register for the draft: They face increasingly difficult choices relating to college attendance, careers, exposure to drugs, and interpersonal relationships. They are

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either children in the process of becoming adults, or already young adults. In either case, they must be given the tools to participate in this free society. These tools include the ability not just to memorize historical events, but to reflect upon their significance; not just to learn vocabulary words, but to express ideas; not just to pass tests, but to participate in the world.

The issues addressed by the *Spectrum* articles censored by petitioners—teenage pregnancy and divorce—touch millions of students and their families. More to the point, they are issues about which many high school students must make informed personal decisions. The asserted necessity for the school to inculcate community values in classroom coverage of these and other subjects does not address the need of students for access to additional information and other viewpoints, including those of fellow students.

To suggest that some topics are so "important" that they can only be addressed in one forum with one officially sanctioned viewpoint stands the First Amendment on its head. And to suggest that topics like those in question here are too "sensitive" for students to read about in a school newspaper when many students must confront these issues in their daily lives is to deny reality.

In short, the responsibility of school officials to inculcate community values through curricular choices does not necessitate or permit regimentation of speech between and among students. Student-written articles appearing in a high school newspaper—even those produced in a journalism class—are not themselves "curriculum." In censoring these articles respondents did nothing to further their "inculcation" duty; they merely shut off access for many students to the views of their classmates—reducing the spectrum of available knowledge. As the Fifth Circuit has said: "[T]he purpose of education is to spread, not to stifle, ideas and views." *Shanley*, 462 F.2d at 972.

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CONCLUSION

In this year of bicentennial celebration, the former Chief Justice has urged that the meaning of the Constitution be discussed in every classroom in America. If the Constitution is to remain a living document, rather than "parchment under glass," our young must understand that its guarantees apply in the real world. The decision of the court of appeals in this case stands for the proposition that the First Amendment is not a history lesson, but a rule to live by. It is no threat to the authority of petitioners to hold that they must live by it too.

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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May 1987

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