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# Constitutional Law - First Amendment - Freedom of Speech (Bethel School District No. 403 v. Fraser)

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CONSTITUTIONAL LAW—FIRST AMENDMENT—FREEDOM OF SPEECH—*Bethel School District No. 403 v. Fraser*—In *Bethel School District No. 403 v. Fraser*, the Supreme Court held that the first amendment does not prevent a school district from disciplining a student for giving an offensively lewd and indecent speech at a school assembly.<sup>1</sup> Chief Justice Burger delivered the opinion of the Court in which Justices White, Powell, Rehnquist and O'Connor joined.<sup>2</sup> Justice Blackmun concurred in the result, and Justice Brennan concurred in the judgment.<sup>3</sup> Justices Marshall and Stevens filed dissenting opinions.<sup>4</sup> This case is significant because previous Supreme Court opinions have not dealt specifically with the issue of first amendment protection of a speech made by a high school student at a school sponsored assembly.<sup>5</sup> Applicable precedent addresses the issues of the rights of nonverbal expression accorded older students or generally obscene communication to a vast audience.<sup>6</sup> In *Fraser*, the issue arises in the context of an optional school sponsored assembly before 600 fourteen-year-old students.<sup>7</sup>

In April of 1983, 17-year-old Mathew Fraser was a high school senior attending Bethel High School, a public school operated by the defendant Bethel School District No. 403, in Pierce County, Washington.<sup>8</sup> On April 26, 1983, Fraser spoke on behalf of a candidate for vice president of the Associated Student Body at a school assembly during school hours, attended by

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

2. *Id.*

3. *Id.* at 3167.

4. *Id.* at 3168-69.

5. See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (Court upholds fourth amendment search of student's purse by school official based upon reasonable suspicion that search would produce "evidence that the student has or is violating either the law or the rules of the school"); *Board of Educ. v. Pico*, 457 U.S. 853 (1982) (student's first amendment rights are violated in the event that the Board of Education removes books from school libraries based upon mere disapproval of the ideas contained in those books); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1968) (Court upholds right of public school students to wear black armbands to protest Government policy in Vietnam based upon first and fourteenth amendments).

6. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Tinker*, 393 U.S. 503.

7. *Fraser*, 106 S. Ct. at 3160.

8. *Fraser v. Bethel School Dist. No. 403*, 755 F.2d 1356, 1357 (1985).

approximately 600 students.<sup>9</sup> Students had the option to attend the assembly or go to a study hall.<sup>10</sup> Fraser gave the following nomination speech:

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 succeeds. 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 ASB vice-president — he'll never come between you and the best our high school can be.<sup>11</sup>

During the speech a school counselor observed one male student simulating masturbation while two students were observed simulating sexual intercourse with movement of their hips.<sup>12</sup> No students visibly indicated disapproval of the speech.<sup>13</sup> The speech created no disturbance at the time it was given, other than what a school counselor present deemed “not atypical” of any other Bethel school assembly.<sup>14</sup> The administration had no difficulty maintaining order during the program.<sup>15</sup> Fraser's speech did not delay the proceedings, and the assembly was dismissed on schedule.<sup>16</sup>

Before giving the speech, Fraser privately presented it to three different teachers seeking their comments.<sup>17</sup> One teacher stated that it might “raise eyebrows” but refrained from advising Fraser not to give the speech.<sup>18</sup> The other two teachers advised Fraser not to give the speech, suggesting it was “inappro-

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9. *Id.* at 1357.

10. *Id.* at 1364 (“Attendance, moreover, was not compulsory; students were free to attend a study hall instead.”).

11. *Id.* at 1357.

12. *Id.* at 1359.

13. *Id.* at 1360.

14. *Id.* at 1359.

15. *Id.* at 1360.

16. *Id.*

17. *Fraser*, 106 S. Ct. at 3171.

18. *Id.*

ropriate and should not be given," yet left the decision up to him.<sup>19</sup> None of the teachers either (a) suggested the speech might violate a school rule, or (b) notified the administration prior to the assembly of Fraser's speech.<sup>20</sup>

The day after he gave the speech, Fraser was given notice that he was being charged with violating the school's disruptive conduct rule.<sup>21</sup> He was given an opportunity to explain his speech and admitted to intentionally using sexual innuendo to capture attention and gain victory for his candidate.<sup>22</sup> He then was informed he would be suspended for three days, and his name would be removed from consideration as a graduation speaker.<sup>23</sup>

On the morning after the speech, four teachers gave written notice to the assistant principal complaining of Fraser's speech.<sup>24</sup> None of the letters suggested the speech disrupted the assembly or interfered with school activities, but three teachers disapproved of the speech as "inappropriate" for a high school assembly.<sup>25</sup> Additionally, a home economics teacher testified that during a class following the speech, students expressed enough interest to discuss the speech for approximately ten minutes.<sup>26</sup>

Fraser filed a complaint under the U.S. Constitution and the Civil Rights Act, 42 U.S.C. § 1983.<sup>27</sup> Judge Tanner presided over a hearing in the U.S. District Court for the Western District of Washington.<sup>28</sup> He ruled: (1) the suspension violated Fraser's right of free expression under the first amendment of the Federal Constitution; (2) the school's disruptive conduct rule was unconstitutionally vague and overbroad; (3) removal of Fra-

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19. *Id.* at 3162.

20. *Fraser*, 106 S. Ct. at 3171.

21. *Fraser*, 755 F.2d at 1357.

22. *Fraser*, 106 S. Ct. at 3161.

23. *Id.*

24. *Fraser*, 755 F.2d at 1360.

25. *Id.* at 1360-61 & n.3.

26. *Id.* at 1360 ("Judge Tanner [at trial] summarized her testimony as follows: 'On the day after the speech was delivered a teacher found that students in her class were more interested in discussing the speech than attending to classwork.'").

27. *Fraser*, 755 F.2d at 1357. The oral opinion, findings of fact, conclusions of law and judgment of the United States District Court for the Western District of Washington, the Honorable Jack Tanner presiding, are unreported.

28. *Fraser*, 106 S. Ct. at 3163.

ser's name from the list of candidates for graduation speaker violated due process due to the failure of the disciplinary rules to specify such sanctions; and (4) *sua sponte*, the suspension violated state law.<sup>29</sup> On September 1, 1983, the District Court awarded Fraser \$278.00 in damages and \$12,750.00 as costs and attorney's fees.<sup>30</sup>

On March 4, 1985, a three Judge panel of the Ninth Circuit affirmed the judgment of the District Court, with Justice Wright dissenting.<sup>31</sup> The central issue was whether school officials had the power to punish a high school student who used sexual innuendo, without obscenity or offensive words, in a speech concerning student politics.<sup>32</sup> The school district urged, based on an extension of *F.C.C. v. Pacifica*, that nonobscene sexual innuendo in a high school context should be excepted from first amendment protection.<sup>33</sup> The Ninth Circuit declined to recognize such an extension of *Pacifica*, holding:

We fear that if school officials had the unbridled discretion to apply a standard as subjective and elusive as 'indecentcy' in controlling the speech of high school students, it would increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in public schools.<sup>34</sup>

Indeed, the Ninth Circuit thought Kuhlman's overwhelming victory was persuasive evidence that fellow students believed Fraser's speech to be neither indecent nor offensive.<sup>35</sup>

The second issue was whether the speech caused a material disruption in Bethel's educational process. The Ninth Circuit held that "a noisy response to the speech and sexually suggestive movements by three students in a crowd of 600 fail to rise to the level of material interference with the educational process

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29. *Id.*

30. *Fraser*, 755 F.2d at 1358.

31. *Id.*

32. *Id.*

33. *See id.* at 1363.

34. *Id.* The Supreme Court seemed to take offense at this remark, or at least thought it indicative of the weakness of the Ninth Circuit's decision.

35. *Id.* "Whether [Fraser] succeeded or whether he went over the line of good taste and became offensive is for his fellow students to judge when they cast their ballots in the school elections." *Id.*

that justifies impinging on Fraser's First Amendment right to express himself freely."<sup>36</sup>

The third issue decided by the Ninth Circuit was whether the forum in which the speech was given was a school function which would allow the school to regulate the content of the speeches presented.<sup>37</sup> Although the Ninth Circuit acknowledged that Fraser's speech was delivered during a school sponsored assembly (indeed, the school district thought this fact was dispositive of the issue),<sup>38</sup> it maintained:

[H]is speech was clearly not part of the school curriculum. The assembly, which was run by students, was a voluntary activity in which students were invited to give their own speeches, not speeches prescribed by school authorities as part of the educational program. Attendance, moreover, was not compulsory; students were free to attend a study hall instead.<sup>39</sup>

Consequently, the Ninth Circuit held that in exercising his first amendment rights at the assembly, Fraser was as free to express himself as if he had been in the school cafeteria, or on the school steps.<sup>40</sup>

Judge Wright's dissent began with a presumption against judicial involvement in schools.<sup>41</sup> He then listed several factors to support this presumption, which give schools a unique position in first amendment law. First, students are essentially a "captive audience."<sup>42</sup> Second, the speech was made by a minor to other minors.<sup>43</sup> Third, the school's special responsibility to inculcate societal values puts it in the best position to determine whether the speech was harmful to other minors, and the courts should show great deference to those determinations.<sup>44</sup>

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36. *Id.* at 1360.

37. *See id.* at 1363.

38. The school district's contention was based on WASH. REV. CODE ANN. § 28A.58.115 (1982 & Supp. 1987) ("an 'associated student body' means the formal organization of the students of the school formed with the approval of and regulation by the board of directors of the school district").

39. *Fraser*, 755 F.2d at 1364.

40. *See id.*

41. *See id.* at 1366.

42. *See id.* at 1367.

43. *Id.*

44. *Id.*

The Supreme Court granted certiorari and the oral argument took place in March of 1986. The Court said, in an opinion handed down in July of 1986, that the first amendment did not prevent the school district from disciplining Fraser for giving the speech at a school assembly.<sup>45</sup> The Court, relying on the separate standards for children and adults articulated in *Tinker v. Des Moines Independant Community School District, F.C.C. v. Pacifica Foundation*, and, most recently, *New Jersey v. T.L.O.*, held that children in public school may be protected from exposure to offensive spoken language.<sup>46</sup>

Second, the Court held that the circumstances of Fraser's suspension did not violate due process because both the school disciplinary code and the prespeech admonitions of the teachers put him on notice that delivering the speech could subject him to sanctions.<sup>47</sup>

Justice Brennan, concurring in judgment, stated that under the circumstances it was permissible for the school district to deem Fraser's speech exceeded permissible limits.<sup>48</sup> He wrote separately to underscore his understanding of the narrowness of the Court's holding, and in so doing emphasized (1) that the same speech given outside the school environment could not be penalized by government officials who simply thought it inappropriate, and (2) that the language may be inappropriate in light of the circumstances, but it was not obscene.<sup>49</sup> Justice Marshall, in dissent, agreed with Justice Brennan that the speech was not obscene and thought the school district did not demonstrate that Fraser's remarks were in fact disruptive.<sup>50</sup> Dissenting, Justice Stevens disagreed on the adequacy of Fraser's notice of sanctions, and agreed with the Ninth Circuit that sexually suggestive movements by three students in a crowd of 600 failed to rise to the level of material disruption.<sup>51</sup>

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45. *Fraser*, 106 S. Ct. 3159.

46. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969).

47. The Supreme Court added, "Two days suspension from school does not rise to the level of a penal sanction calling for the full panoply of procedural due process protection." *Fraser*, 106 S.Ct. at 3166-67.

48. *Id.* at 3167.

49. *Id.* at 3167-68.

50. *Id.* at 3168-69.

51. *Id.* at 3169-72.

The precedential foundation supporting the first amendment's application to school behavior was, for over two decades, built solidly on *Tinker*, which involved three high school students who were suspended for wearing black armbands in symbolic protest of the war in Vietnam.<sup>52</sup> The Supreme Court announced the following test in *Tinker*: "[T]he regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school."<sup>53</sup> Typically,<sup>54</sup> courts begin a discussion of the first amendment's application to school issues by noting the *Tinker* court's statement that students do not "shed their constitutional rights of freedom of speech or expression at the school-house gate."<sup>55</sup> However, many subsequent qualifications of this laudable dicta have reduced it to quicksand, causing reliance on it to consistently fall into controversy.<sup>56</sup> Reasonable people can and do differ on what satisfies the *Tinker* "substantial disruption" test. However, it is apparent that once an event is deemed "disruptive," students still do not lose their rights at the school-house gate but instead shed them once they are firmly inside the confines of academia.

The Ninth Circuit began by analyzing *Tinker*,<sup>57</sup> and sought to justify the role of the judicial branch in resolving first amendment controversies between public school officials and students by citing the case of *West Virginia v. Barnette*:

The Fourteenth Amendment, as now applied to the states, protects citizens 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.<sup>58</sup>

The Ninth Circuit then proceeded to apply the *Tinker* "substan-

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52. *Tinker*, 393 U.S. 503 (1969).

53. *Id.* at 513.

54. Note the following occurrence in both the Ninth Circuit and the Supreme Court decisions.

55. *Tinker*, 393 U.S. at 506.

56. See cases cited *supra* note 5. See also *Goss v. Lopez*, 419 U.S. 565 (1975).

57. *Fraser*, 755 F.2d at 1358.

58. *West Virginia v. Barnette*, 319 U.S. 624, 637 (1943).



tial disruption" test: "As the Supreme Court said in *Tinker*, student speech or conduct is not 'immunized by the constitutional guarantee of freedom of speech' if it 'materially disrupts class-work or involves substantial disorder of the rights of others.'"<sup>59</sup> After a close and detailed analysis of the record at trial, the Ninth Circuit held that on the issue of disruption this case was indistinguishable from *Tinker*, because the record showed no evidence that Fraser's use of sexual innuendo materially interfered with any activities of the school.<sup>60</sup> What is most important for this analysis at this point, however, is that the Ninth Circuit did in fact conscientiously apply the "material disruption" standard in *Tinker*.

The Ninth Circuit readily acknowledged Fraser's speech may have been inappropriate.<sup>61</sup> Indeed, four teachers claimed as much in written statements.<sup>62</sup> Additionally, both the principal and the assistant principal testified the word "inappropriate" was synonymous with the word "disruptive" in a school context.<sup>63</sup> Yet the Ninth Circuit clearly thought there was an important difference between the two standards: "The mere fact that some members of the school community considered Fraser's speech to be inappropriate does not necessarily mean it was disruptive of the educational process."<sup>64</sup> In an attempt to be faithful to the language in *Tinker* the Ninth Circuit acknowledged the two competing tests and announced, "[T]he First Amendment standard *Tinker* requires us to apply is material disruption, not inappropriateness."<sup>65</sup> Although this has been called a "'hazardous freedom,'"<sup>66</sup> the Ninth Circuit thought such openness "'is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.'"<sup>67</sup>

Justice Wright, in dissent, charged that the majority misun-

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59. *Fraser*, 755 F.2d at 1359 (quoting *Tinker*, 393 U.S. at 513).

60. *See id.* at 1360.

61. *See id.* at 1361. The Court of Appeals "recognize[d] that the principal, assistant principals and some teachers thought that Fraser's speech was inappropriate." *Id.*

62. *Fraser*, 106 S. Ct. at 3167.

63. *Fraser*, 755 F.2d at 1361.

64. *Id.*

65. *Id.*

66. *Id.* (quoting *Tinker*, 393 U.S. at 508).

67. *Id.*

derstood and misapplied *Tinker*.<sup>68</sup> He supported this view by relying on a law review article which stressed the uniqueness of the public school environment:

In determining where school authorities may draw the line (regarding obscenity, vulgarity, and indecency) courts must consider not only the fact that teen-age children are involved, but also the fact that the school is a special purpose environment existing under peculiar sociological conditions . . . . It follows that a substantial degree of social propriety is called for in the operation of an effective educational system. It might even be said . . . that discouragement of the use of obscene or profane language is a function of the school.<sup>69</sup>

Justice Wright's dissenting opinion clarified the item of contention: What standard shall be applied to measure the permissible gap between protected adult discourse and unprotected adolescent discourse? Of course, this question presupposes that students invariably leave some of their rights at the schoolhouse gate. The inquiry, however, has shifted to precisely how much first amendment protection is lost at the entrance to academia.

Justice Black's dissent, combined with Harlan's brief dissent in *Tinker*, embodies the *de facto* standard for analyzing first amendment rights of students in public schools.<sup>70</sup> Black's and Harlan's prescient approach manifested itself in Justice Wright's dissent in the Ninth Circuit, and the majority of the Supreme court has now placed it firmly amongst accepted criteria in our Constitutional constellation.<sup>71</sup> Although the majority of the Supreme Court claims to use the disruption standard in *Fraser*, this analysis will show they are in fact applying the

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68. *Fraser*, 755 F.2d at 1366.

69. Haskel, *Student Expression in the Public Schools: Tinker Distinguished*, 59 GEO. L.J. 37, 57-58 (1970).

70. As argued throughout this paper, the Court claims to apply the *Tinker* "substantial disruption" test, yet is in fact applying the much lower standard suggested by Justice Black in his dissenting opinion in *Tinker*, a distraction/diversion standard. Justice Harlan's dissenting opinion in *Tinker* is analytically similar in that he believes "[s]chool officials should be accorded the widest authority in maintaining discipline and good order in their institutions," though he did not actually specify what standard he would employ. See *Tinker*, 393 U.S. at 526.

71. However, the majority did not acknowledge that it was in fact applying the rationale of Justice Black's dissent in *Tinker*. See *id.*

much lower diversion/distraction standard as advocated by Justice Black in *Tinker*.<sup>72</sup>

Although Justice Black did not explicitly define this standard,<sup>73</sup> we can be sure he meant it to be an easier standard to meet than actual disruption:

While the absence of obscene remarks or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually "disrupt" the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and *diverted* them to thoughts about the highly emotional Vietnam war.<sup>74</sup>

The record in *Tinker* indicated the armbands (worn by seven of 18,000 students)<sup>75</sup> "caused comments, warnings by other students, and poking fun."<sup>76</sup> Additionally, as in *Fraser*, one class in the school devoted some time to speaking about the issue. Justice Black argued that the armbands (to his credit he did not suggest they disrupted anything) "took the students' minds off their classwork and diverted them."<sup>77</sup>

Justice Black's diversion standard was conceived in the highly emotional times of the Vietnam war.<sup>78</sup> From the perspective of more than two decades later, it seems likely that symbolic reminders of the war would in fact easily divert student attention from their work. But Justice Black intended the standard to apply in a great many educational situations beyond these relatively rare emotional occurrences.<sup>79</sup> In *Waugh v. Mississippi*

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72. See *Tinker*, 393 U.S. at 518 (Black, J., dissenting).

73. See *id.*

74. *Id.* (emphasis added).

75. *Id.* at 508.

76. *Id.* at 517.

77. *Id.* at 517-18.

78. Justice Black, writing in 1969, recognized the country was in the middle of the conflict.

79. It is a reasonable inference to suggest that Justice Black wanted the distraction/diversion approach to apply to a wider scope of situations than just those involving the highly emotional war because he cited *Waugh v. Board of Trustees of the Univ. of Miss.*, 237 U.S. 589 (1915), which involved a fraternity situation, which is presumably much less emotional than a war.

*University*,<sup>80</sup> school authorities had passed a law barring students from peaceably assembling in fraternities and allowing the school to suspend anyone who joined fraternities. Justice Black, stating that "[t]he true principles on this entire subject were in my judgment spoken" by the Court in *Waugh*,<sup>81</sup> quoted the following language:

*"Membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions. It is not for us to entertain conjectures in opposition to the views of the State and annul its regulations upon disputable considerations of their wisdom or necessity."*<sup>82</sup>

Clearly, Justice Black intended to distinguish the distraction/diversion standard from the higher test of actual disruption in holding Tinker could be disciplined for his actions. To emphasize his point, he again quoted the above language from *Waugh* later in his opinion.<sup>83</sup>

The concomitant attribute of this relatively lower diversion/distraction standard is Justice Black's notion that "[u]ncontrolled and uncontrollable liberty is an enemy to domestic peace."<sup>84</sup> In response to the Ninth Circuit's suggestion that we must leave the decisions on these matters at least partially to the students,<sup>85</sup> and that our Constitution calls for "hazardous freedom"<sup>86</sup> in which we take reasonable risks to maintain our cherished liberties, Justice Black stated that if students "can defy and flout orders of school officials to keep their minds on their own schoolwork, it is a beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary."<sup>87</sup> Concern about uncontrollable liberty and revolutionary permissiveness brings one to a diversion/distraction approach to student behavior which maintains maximum order. Finding actual

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80. 237 U.S. 589 (1915).

81. *Tinker*, 393 U.S. at 522.

82. *Id.* at 523 (quoting *Waugh*, 237 U.S. at 597) (emphasis added by Justice Black).

83. *Id.* at 524.

84. *Id.*

85. See *supra* note 35.

86. See *Tinker*, 393 U.S. at 508.

87. *Id.* at 518.

disruption becomes unnecessary.<sup>88</sup> Acts may be diverting and distracting without actually disrupting the educational process. In *Fraser*, for example, the speech caused no reaction "atypical" of any other high school assembly and there was no evidence the speech disrupted the school's educational mission.<sup>89</sup>

In the opening paragraph of its opinion, the Supreme Court characterized Fraser's speech as "an elaborate, graphic, and explicit sexual metaphor."<sup>90</sup> Chief Justice Burger wrote, "some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech."<sup>91</sup> This description may seem less than faithful to the finding of facts by the lower courts;<sup>92</sup> yet this willingness to stretch the facts reflects the approach of a court intent on finding disruption in acts two previous courts found merely to rise to the level of distraction or diversion.<sup>93</sup>

The Supreme Court altered the standard announced in the decision in *Tinker* for dealing with cases precisely like *Fraser*, perhaps because Fraser's speech involved sexual innuendo.<sup>94</sup> To justify this modified approach the Court explained the essence of public education as "the 'inculcation of fundamental values necessary to the maintenance of a democratic political system.'"<sup>95</sup> The Court then explained its balancing test as follows: "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against

88. In that "to distract" is a lower standard than "to disrupt," one need not find actual disruption when searching for distraction.

89. See *Fraser*, 755 F.2d at 1359-60.

90. *Fraser*, 106 S. Ct. at 3160-61.

91. *Id.* at 3162.

92. *Fraser*, 755 F.2d at 1359. The "hooting and yelling" was, according to the person who heard it, "not too dissimilar to any auditorium sounds I have heard over the many assemblies I have been at Bethel High School." The Supreme Court omitted this fact. Additionally, another teacher present reported, "the kids were just saying, yahoo, wonderful, we are all for it." *Id.* at 1360.

93. It is important that the Supreme Court deem these acts disruptive if they are to fit them into the *Tinker* test and thereby hold the remarks exceeded permissible limits. To say they were merely distracting, as the two lower courts held, would be to protect Fraser's speech or to develop new precedent and impliedly overrule *Tinker*.

94. It is not unreasonable to suggest, as the school district did, that *Tinker* is analytically inappropriate to compare with *Fraser* because *Tinker* did not involve suggestive speech.

95. *Fraser*, 106 S. Ct. at 3164 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

the society's countervailing interest in teaching students the boundaries of socially appropriate behaviour."<sup>96</sup> Since "the schoolroom is the first opportunity most citizens have to experience the power of the government,"<sup>97</sup> the level of protection we afford controversial speech in the classroom is surely an accurate reflection of our commitment to cherished principles of democracy.

Chief Justice Burger stated that Fraser's speech included "pervasive sexual innuendo [that] . . . was plainly offensive to both teachers and students — indeed to any mature person."<sup>98</sup> This statement is puzzling, partly because neither a single teacher nor student claimed the speech was offensive.<sup>99</sup> The district court did not find the speech offensive.<sup>100</sup> Nor did the Ninth Circuit believe the speech to be offensive.<sup>101</sup> Moreover, the *Tinker* standard speaks to disruption as the touchstone for finding indecent speech, not offensiveness.<sup>102</sup> The Court, apparently on its own initiative, has incorporated offensiveness as a component of a diversion/distraction standard.<sup>103</sup>

Chief Justice Burger next stated, "By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students."<sup>104</sup> One may ask, if it was acutely insulting to teenage girls, would it not also be insulting to teenage boys and, for that matter, all females and males? Yet no student testified that the speech was insulting.<sup>105</sup> Nor does it seem likely that Kuhlman would proceed to an overwhelming victory if the speech deeply insulted so many. What in fact happened is that three students reacted in a sexual manner, some students

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96. *Id.* This reference is perplexing because it refers to the political views in *Tinker* and is applied in the context of Fraser's sexual innuendo. Fraser's speech was not an "unpopular view" as much as a controversial presentation.

97. *New Jersey v. T.L.O.*, 469 U.S. 325, 385 (1985).

98. *Fraser*, 106 S. Ct. at 3165.

99. There were allegations of inappropriateness by the teachers, but no one claimed the speech was offensive. See *supra* notes 19, 25 and accompanying text.

100. See *Fraser*, 755 F.2d at 1358.

101. *Id.* at 1363.

102. *Id.* at 1359.

103. Since the *Tinker* standard does not address offensiveness, but rather "material and substantial disruption," it is reasonable to suggest the Supreme Court took it upon itself to add "offensiveness" as a component of the *Tinker* test.

104. *Fraser*, 106 S. Ct. at 3165.

105. *Fraser*, 755 F.2d at 1361 n.4.

seemed bewildered, and all of this happened in a context described as typical of any other Bethel assembly.<sup>106</sup>

The court next turned to the decision in *Pacifica*.<sup>107</sup> In *Pacifica*, the Court determined prurient appeal is an element of obscenity, but it is not an element of indecency, which merely refers to nonconformance with contemporary standards of morality. The Court upheld the FCC's right to ban George Carlin's monologue from the air-waves, in part because there were likely to be children in the audience.<sup>108</sup> In *Fraser*, the Supreme Court stated: "Such utterances [Fraser's speech] are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>109</sup> Fraser's speech, however, was part of an "idea" intended to draw attention to a candidate and describe his character, all of which was, apparently, enormously successful.<sup>110</sup> It also appears from the facts that order and morality were not maligned, at least in that the assembly was not delayed, nor did anyone complain of a lack of morality in his speech.

One may confess to confusion regarding the Court's approach up to this point. However, in the next paragraph of the decision, the Court quoted Justice Black's dissenting opinion in *Tinker* as being "especially relevant in this case":<sup>111</sup> "I wish therefore . . . to disclaim any purpose . . . to hold that the federal Constitution compels the teachers, parents and elected school officials to surrender control of the American public school system to public school students."<sup>112</sup> This quote reveals the true relevance of *Tinker* and the spirit in which the Supreme Court approached the facts.<sup>113</sup> The district court, two judges of the Ninth Circuit, and four justices on the Supreme

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106. *Id.* at 1359-60.

107. *F.C.C. v. Pacifica*, 438 U.S. 726 (1978).

108. *Id.* at 740, 749.

109. *Fraser*, 106 S. Ct. at 3166 (quoting *Pacifica*, 438 U.S. at 746 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))).

110. His candidate, Kuhlman, won by a wide margin.

111. *Fraser*, 106 S. Ct. at 3166.

112. *Id.* (quoting *Tinker*, 393 U.S. at 522, 526).

113. By quoting Justice Black's dissenting opinion in *Tinker*, Chief Justice Burger's opinion in *Fraser* impliedly subscribes to the logic behind Black's dissent. *See id.*

Court agreed that Fraser's remarks could not be construed as disruptive.<sup>114</sup> What is clear, however, is that Fraser's speech was "inappropriate" because it distracted (three students in 600 at the assembly) and it diverted (the next day approximately ten minutes of a class were devoted to talking about it), no matter how briefly, the school's educational mission with regard to those students affected. This distraction/diversion standard, which Justice Black argued for in *Tinker*, and the Court tacitly approved in *Fraser*, seems perfectly reasonable.<sup>115</sup> Yet it is not clear why the Court stated approval of the majority approach in *Tinker*, yet applied Justice Black's test.

Justice Brennan's concurring opinion, joined by Justice Blackmun, began with skepticism: "I find it difficult to believe it is the same speech the court describes,"<sup>116</sup> and then offered a simple proposition:

[T]he most that can be said about respondent's speech — and all that need be said — is that in light of the discretion school officials have to teach high school students how to conduct civil and effective public discourse, and to prevent disruption of school educational activities, it was not unconstitutional for school officials to conclude, under the circumstances of this case, that respondent's remarks exceeded permissible limits.<sup>117</sup>

Justice Brennan then cited *Tinker* to support the proposition that "[i]f respondent had given the same speech outside of the school environment he could not have been penalized simply because government officials considered his language to be inappropriate."<sup>118</sup> This indicates that both Justices Brennan and Blackmun believe it was constitutional for the school district, given the facts of the case, to punish Fraser merely on a showing of inappropriateness. According to Justice Brennan's concurrence, "school officials sought only to ensure that the high school

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114. Chief Justice Burger and Justices Brennan, White, Powell, Blackmun, Marshall, and Stevens all agreed that the speech was not disruptive. *Id.* at 3162.

115. That is, reasonable people can differ on what the permissible standard of discourse should be by minors in public schools. What is distressing, however, is when the Supreme Court announces one standard and applies another.

116. *Fraser*, 106 S. Ct. at 3167.

117. *Id.*

118. *Id.*



assembly proceeded in an orderly manner."<sup>119</sup> Thus, Justice Brennan indicates that the most effective way of ensuring orderliness is to allow the school district to determine what is appropriate.<sup>120</sup> In light of the school officials' belief that disruptive is "synonymous with inappropriate,"<sup>121</sup> Justice Brennan's position is the equivalent of allowing the school board to be the ultimate arbiter of "appropriateness."<sup>122</sup>

Justice Brennan recognized that Fraser's language was not even close to being obscene, as the standard was announced in *Ginsberg v. New York*.<sup>123</sup> His concurring opinion emphasized the public school setting of *Fraser*, which is apparently the sole location in which he believes the majority's holding is applicable.<sup>124</sup> Justice Brennan maintained that the Court's holding "could not refer to the government's authority generally to regulate the language used in public debate outside the school environment."<sup>125</sup> Justice Brennan believed it was necessary to highlight this point because the majority stated, "[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions."<sup>126</sup> Although the context of the paragraph in which the majority held the above was a public school setting, the strong language could cause many to ponder the extent to which it is applicable outside the public school. Justice Brennan, who is in the better position to judge the majority's intent, obviously thought it necessary to clarify the point for the sake of his own conscience.

Justice Brennan then pointed out, contrary to the majority's

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119. *Id.* at 3168.

120. *See id.* Since Justice Brennan believed the district can punish merely on a showing of inappropriateness, and the school officials just sought to make the assembly proceed in an orderly manner, it follows that the district can ensure orderliness by determining what is appropriate.

121. *See Fraser*, 755 F.2d at 1361.

122. If the school board can ensure orderliness by determining what is disruptive, and disruptive is the same as inappropriate, the school board can ensure orderliness by determining what is appropriate. *See id.*

123. "Moreover, despite the Court's characterizations, the language respondent used is far removed from the very narrow class of 'obscene' speech which the Court has held is not protected by the First Amendment." *Fraser*, 106 S. Ct. at 3167 (citing *Ginsberg v. New York*, 390 U.S. 629, 635 (1968); *Roth v. United States*, 354 U.S. 476, 485 (1957)).

124. At least by implication Justice Brennan is intent on giving a very narrow reading to the majority position, which is why he wrote separately.

125. *Fraser*, 106 S. Ct. at 3167 n.1.

126. *Id.* (quoting 106 S. Ct. at 3165).

implication, that the record contained no evidence that any student found Fraser's speech insulting.<sup>127</sup> He noted that Fraser could not be penalized merely because school officials considered the text of his speech inappropriate.<sup>128</sup> Indeed, to his mind, Fraser's speech was "no more 'obscene,' 'lewd,' or 'sexually explicit' than the bulk of programs currently appearing on prime time television or in the local cinema."<sup>129</sup> This reflects a vastly different analytical approach than that of the Court, which deemed Fraser's speech an acutely insulting and plainly offensive product of a "confused boy."<sup>130</sup>

Justice Brennan "disagree[d] with the Court's suggestion that school officials could punish respondent's speech out of a need to protect younger students."<sup>131</sup> Having determined that Fraser's speech was insulting, indecent and a hazard to younger students, the Court approached realization of the Ninth Circuit's fear that complete school board discretion will cement white middle-class standards of acceptability in public discourse.<sup>132</sup> Justice Brennan himself echoed this sentiment in his dissenting opinion in *Pacifica*, when he said the Court's decision was another example of "the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking."<sup>133</sup> Yet, according to Justice Brennan, the distinguishing element in *Fraser* is the school official's right to ensure an orderly assembly.

Justice Brennan's approach is puzzling in that it analyzed the facts so closely on the one hand yet still concluded that the majority's holding "concerns only the authority that school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly."<sup>134</sup> He did not articulate what was disruptive, nor indicate a permissible standard of disruption, but only that the school district may de-

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127. *Id.* at 3168 n.2. The student's reaction ranged from bewilderment to excitement, but there was no evidence anyone was insulted. Indeed, that would be contrary to Fraser's goal of getting his candidate elected.

128. *Id.* at 3167.

129. *Id.* at 3168 n.2.

130. *Id.* at 3165.

131. *Id.* at 3168 n.2.

132. *Fraser*, 755 F.2d at 1363.

133. *F.C.C. v. Pacifica*, 438 U.S. 726, 777 (1978).

134. *Fraser*, 106 S. Ct. at 3168.

termine what is disruptive.

It is doubtful whether Justice Brennan intended to authorize school boards to be the arbiter of appropriate speech, especially since the facts indicate they will apply a distraction/diversion standard to determine what is appropriate. His dissent in *Pacifica* shows the same kinds of concern the Ninth Circuit had in *Fraser*.<sup>135</sup> Still, his concurring opinion in *Fraser* would authorize the school district to apply a distraction/diversion standard to speech which may merely be inappropriate.

Finally, Justice Brennan argued that the school board's discretion is not limitless—it has a responsibility to distinguish the vigorous from the vulgar.<sup>136</sup> Yet he assures us the circumstances of the case show enough disruption such that the discipline imposed on *Fraser* was constitutional. Consequently, *Fraser* sets the standard for a threshold of disruption by which future cases involving speech in public schools may be evaluated.

Justice Marshall, in his dissenting opinion, agreed with the principles announced by Justice Brennan, but found the threshold of disruption that was acceptable to Brennan and the majority inadequate.<sup>137</sup> Justice Marshall thought it important that both the district court and the Ninth Circuit “conscientiously applied *Tinker*, and concluded that the Board had not demonstrated any disruption of the educational process.”<sup>138</sup> This statement indicates that Justice Marshall, like Justice Stevens, probably thought no disruption occurred. Further, his use of the word “conscientiously” indicates that he is less than satisfied with the majority's attempt to apply the *Tinker* test.

Justice Marshall acknowledged that school officers must be shown great deference in their control over the educational process. Yet he assumed the position that the school district had to meet the standard announced in *Tinker*. Since the school district failed, in both of the lower courts, to show *Fraser*'s remarks disrupted the educational process, he saw no reason to disturb

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135. Justice Brennan, in *Pacifica*, and the Ninth Circuit majority, in *Fraser*, were concerned about a kind of “acute ethnocentric myopia,” *Pacifica*, 438 U.S. at 775, in which majoritarian conventions would dictate permissible behavior. See generally *Fraser*, 755 F.2d 1356.

136. *Fraser*, 106 S. Ct. at 3168.

137. *Id.*

138. *Id.* at 3169.

the Ninth Circuit's judgment.<sup>139</sup>

Justice Marshall was satisfied in applying the *Tinker* test forthrightly. He implicitly recognized the standard as workable and fair. Justice Stevens, however, assumed a broader approach to the facts. He began by asserting Fraser was entitled to fair notice of the consequences of his speech, thereby indicating his belief that Fraser was deprived of reasonable notice.<sup>140</sup>

Justice Stevens mentioned Fraser's outstanding credentials which

. . . indicate he was probably in a better position to determine whether an audience composed of 600 of his contemporaries would be offended by four letter words — or a sexual metaphor — than is a group of Judges who are at least two generations and 3000 miles away from the scene of the crime.<sup>141</sup>

Like the Ninth Circuit, Justice Stevens was willing, at least partially, to defer to the judgment of the individual delivering the speech. Unlike the majority, he considered the identity of the speaker an item to be weighed when determining whether the speech is constitutionally protected.<sup>142</sup>

Justice Stevens then returned to the issue of notice, explaining three theories by which we might conclude Fraser could have known he would be punished for delivering the speech. First, he quoted Bethel's disciplinary rule,<sup>143</sup> and examined the possibility that the speech was disruptive. After analyzing the facts, Justice Stevens proclaimed the evidence in the record "makes it perfectly clear that respondent's speech was not 'con-

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139. *Id.* at 3168-69.

140. *Id.* "It does seem to me, however, that if a student is to be punished for using offensive speech, he is entitled to fair notice of the scope of the prohibition and the consequences of its violation." *Id.*

141. *Id.*

142. That is, by saying Fraser was in a better position to judge the impact of the speech on the students, he implies that we should defer to the speaker and his own judgment, which makes additional sense here because Fraser was trying to rally support for his cause, not offend others.

143. Bethel's disciplinary rule reads in part: "'Disruptive Conduct: Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.'" *Fraser*, 106 S. Ct. at 3170 (quoting *Fraser*, 755 F.2d at 1357 n.1).

duct' prohibited by the disciplinary rule."<sup>144</sup> Turning from disruption to the language itself, Justice Stevens argued that even if the rule was stretched, one could not deem the speech obscene or profane.<sup>145</sup> This analysis illustrates a good faith effort to apply the *Tinker* standard. Justice Stevens "simply cannot understand" how an impartial judge could conclude that the speech was disruptive or indecent.<sup>146</sup>

He then examined the warnings given Fraser by the teachers. Like the Ninth Circuit, Justice Stevens concluded that "none of the three [teachers Fraser presented the speech to] suggested that the speech might violate a school rule."<sup>147</sup> However, the process of previewing the speech indicates that Fraser "must have been aware of the possibility that it would provoke an adverse reaction."<sup>148</sup> Still, Justice Stevens concluded, "the teachers' responses certainly did not give him any better notice of the likelihood of discipline than the student handbook itself."<sup>149</sup> This conclusion is difficult to reconcile with that of the majority, which asserted that the teachers "advised him it was inappropriate and should not be given."<sup>150</sup>

Finally, Justice Stevens addressed the "most difficult question" of whether the speech was so obviously offensive that Fraser surely knew he would be punished for delivering it.<sup>151</sup> Justice Stevens' approach to this question reflects Justice Sutherland's nuisance standard: "[N]uisance may be merely a right thing in the wrong place."<sup>152</sup> There are places where it could be offensive (a formal setting), and places where it would be thoroughly appropriate (a school corridor or a locker room). The question for Justice Stevens was whether the court could confidently decide Fraser must have known he would be punished for delivering the speech.

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144. *Id.*

145. *Id.*

146. *See id.* at 3171.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 3162. In fact this appears to be another example of the majority stretching the facts to present Fraser in an unfavorable light and to make his conduct appear more disruptive.

151. *See id.* at 3171.

152. *Id.* (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).

Justice Stevens answered this question in the negative for three reasons. First, he believed it was "highly unlikely" that Fraser would have given the speech if he knew it would result in sanctions. This is supported by the fact that Fraser was apparently going to college and knew a suspension could be detrimental to his chances.<sup>153</sup>

Second, Justice Stevens argued for a strong presumption in favor of free expression "wherever an issue of this kind is arguable."<sup>154</sup> What does Justice Stevens mean by an "issue of this kind"? Is the issue the first amendment in general, or free speech in a high school setting? The meaning is not fully clear.

Finally, Justice Stevens argued that the Supreme Court should defer to the district court and the circuit court, which were both in a better position than the Supreme Court to evaluate this speech based on contemporary community standards.<sup>155</sup>

Justices Marshall and Stevens implicitly recognized the difficulties of legal analysis which calls for one standard — the *Tinker* "substantial disruption" test — yet in fact applies a different standard — Justice Black's "distraction/diversion" test. We are asked, by a Supreme Court majority intent on bending facts to fit a misnamed mold, to accept that the "not atypical behavior" of three students in a crowd of 600, and a ten minute classroom discussion, rises to the level of "substantial disruption" wherein first amendment freedoms are curtailed. As Justices Marshall and Stevens indicated, a conscientious application of the *Tinker* test can only lead one to the same conclusion reached by the two lower courts.

The Supreme Court had several options in analyzing *Fraser*, yet it chose the most legally pernicious approach by applying one standard while claiming to use another. Surely it would be more intellectually honest — with resulting clarity in precedent and approach — to announce that Justice Black's standard of distraction/diversion will now be the controlling test. In fact, one may argue that the Court did precisely that by citing with approval Justice Black's dissent in *Tinker*. Still, it is not unreasonable to ask our highest court for an explicit reversal, or at least

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153. *Id.*

154. *Id.* at 3172.

155. *Id.*

to acknowledge a modification, when that is in fact the result of a decision.

Another response to the majority's opinion is to distinguish *Fraser*<sup>156</sup> by claiming that sexual connotation in school related speech deserves less protection. Since these students are impressionable young people relying on academia to act *in loco parentis*, this approach may have its merits,<sup>157</sup> but it is certainly not served by a deceptive judiciary willing to distort facts to maintain precedential clarity. The Meese Commission on Pornography is just one example of the kind of respect warped enthusiasm in the name of our best interest engenders. The *Fraser* decision is destined to be met with the same derision.

The *Tinker* rationale was conceived in the turbulence of the Vietnam era, and as such it is a model of judicial restraint in a time when "uncontrollable liberties" threatened entrenched institutions like the judiciary. *Fraser* is, just as identifiably, a product of the Reagan eighties. In a time when so many are intent on going back to the future, it is troubling that the Supreme Court could find support for restraining freedom of speech in a judicial triumph supporting the first amendment (*Tinker*).

What is most troubling about the *Fraser* decision looms beyond the majority's transparent manipulation of the facts and the resultant muddling of precedent; these items, at least, are identifiable. The real harm lies in the shifting focus of the Court's approach to first amendment issues: the Court is moving closer to debating the merits of the speech, based on the majority's reaction, rather than upholding the rights of the speaker. With the *Fraser* standard, the central inquiry becomes, "How did the students react?" If the students found the speech diverting or distracting, the speech becomes an exception to first amendment protection. In such an inquiry, the rights of the speaker necessarily become subjugated to the majority's perception of the appropriateness, or the merits, of the speech. What is even worse, in this instance, is that only three students in an auditorium of 600 were distracted, and even their response was

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156. See *supra* note 94 and accompanying text.

157. This author fails to see these merits, however, especially in light of the vast social stimuli to which nonacademic settings expose high school students. See *supra* text accompanying note 129.

characterized as relatively normal. It seems that (far from needing to offend the majority before your speech will be declared unprotected) if virtually anyone objects, it will be an exception to first amendment freedoms. This precedent can only do harm to our cherished liberties.

The central inquiry in *Tinker* is fundamentally different from that implied by *Fraser*. Based on *Tinker* we must ask, "Did the school's educational mission continue relatively unharmed?" This standard is better suited to protecting the liberties afforded by the first amendment because we can agree that interrupting a school's educational mission is to the detriment of all the parties involved. The *Tinker* standard is also, in this sense, an easier standard to apply because "disruption" is more quantifiable than mere "diversion."

Of course, on the continuum of "disruption to diversion," there is considerable room for the Court to move toward an even more sensitive test. Did the speech shock the students? Were the students concerned by the speech? Free speech skeptics might say we are not even close to these standards. But, undoubtedly, *Fraser* represents considerable movement toward asking the above questions. Indeed, the Supreme Court has gone from asking whether education was disrupted to inquiring whether anyone found the speech distracting. Although this approach may make the Court's task easier, it can only have odious consequences for freedom of speech. When the typical reactions of three students in a crowd of 600 causes a speaker to lose his first amendment rights, one must question precisely where we are heading.

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