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The Expanded Role of School Administrators and Governing Boards in First Amendment Student Speech Disputes: Bethel School District No. 403 v. Fraser

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NOTES

THE EXPANDED ROLE OF SCHOOL ADMINISTRATORS AND GOVERNING BOARDS IN FIRST AMENDMENT STUDENT SPEECH DISPUTES: *BETHEL SCHOOL DISTRICT NO. 403 v. FRASER*

I. INTRODUCTION

At the close of the 1986 Term the United States Supreme Court issued an opinion which expanded the authority of school administrators and governing boards in the area of first amendment student speech disputes. In *Bethel School District No. 403 v. Fraser*,[1] the Court held that school authorities could discipline a student for giving a speech during a high school assembly which contained a sexual innuendo. *Bethel School District* represents a new direction by the Supreme Court in analyzing student speech conflicts. The Court's opinion is a departure from a protective first amendment analysis[2] to one which permits local governing boards to set the standard in their own school district.[3]

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1. 106 S.Ct. 3159 (1986).

2. *See e.g.*, Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) (citing Burnside v. Byars, 363 F.2d 744 (1966)). *Tinker* concerned the right of three high school students to wear black armbands to school as a sign of their opposition to the war in Vietnam. The Court's definition of speech included the symbolic statement of the three students. *Id.* at 505. The Court said that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. The Supreme Court held that the authorities may regulate the school environment but the regulations must meet constitutional standards. The *Tinker* standard is usually stated as a concern for whether the speech materially interfered with the educational process. *Id.* at 509.

3. 106 S.Ct. at 3165. The Court said, "The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."

In *Bethel School District* the Supreme Court majority held that limits could be placed upon the content of student speech considered to be indecent by school officials, even though the school district had conceded that the statement did not meet the legal test for obscenity.[4] Prior to *Bethel School District* the Supreme Court's first amendment jurisprudence protected the content of speech, but allowed government to regulate conduct through procedural time, place and manner regulations.[5] Although the Supreme Court has considered other aspects of first amendment disputes within the schools in the past few years,[6] *Bethel School District* is the first United States Supreme Court opinion to evaluate the content of student speech and to place a limit on first amendment rights since *Tinker* v. *Des Moines Independent School District*[7] was decided in 1969.

In *Bethel School District* the Court employed a balancing test to evaluate content. The nature of the institution and government's objectives in regulating that institution were balanced against the first amendment rights of the individual.[8] The Supreme Court concluded that it was within the school board's powers to determine "what manner of speech in the classroom or in school assembly is inappropriate."[9]

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4. *See* Fraser v. Bethel School District No. 403, 755 F.2d 1356, 1361, n.5 (9th Cir. 1985). *See also* Miller v. California, 413 U.S. 15, 24 (1975) for the Court's legal definition of obscenity. The Court's definition is whether an average person, applying contemporary community standards, would find that the description of sexual conduct (i) appeals to the prurient interest in sex; (ii) portrays sex in a patently offensive way; and (iii) does not have serious literary, artistic, political, or scientific value.

5. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536 (1965) and Police Dept. v. Mosley, 408 U.S. 92 (1972); in both of those cases the Court invalidated breach of the peace statutes. The Supreme Court held that the disputed ordinances were content based and impermissible under the first amendment. The right of government to enact procedural regulations was upheld. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969). The Supreme Court held that speech advocating an unpopular point of view was protected by the first amendment unless the speaker's words incited "imminent lawless action." *Id.* at 449.

6. *See, e.g.*, Board of Education v. Pico, 757 U.S. 853 (1982) (removal of library books from a school library); Widmar v. Vincent, 454 U.S. 263 (1981) (public forums and equal access to religious groups at a state university); Bender v. Williamsport School Dist., 106 U.S. 1326 (1986), meeting of high school students' religious club on campus.

7. 393 U.S. 503 (1969).

8. 106 S.Ct. at 3164. The Court said, "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behaviour."

9. 106 S.Ct. at 3165.

The Court's opinion represents an expansion of a "school law exception" restricting students' constitutional rights within the public school setting.[10] The Court has given school officials more restrictive authority based upon the particular nature of the institution and the need for discipline in the schools.[11] By employing a balancing test the Court has avoided stating a legal definition to measure future first amendment disputes between students and administrators. The facts of each particular dispute will have to be evaluated and weighed. The emphasis on the special setting and the Supreme Court's utilization of a balancing test represents a shift in emphasis concerning the governance of the schools and of constitutional rights within the schools.

II. BACKGROUND

The dispute in *Bethel School District* concerned a nominating speech Fraser made on behalf of a classmate during a high school assembly convened to hear candidates for student office. Fraser's speech contained a metaphor about male sexuality.[12] After the assembly, the school district charged him with violat-

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10. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985). The Court upheld a school law exception in the fourth amendment area. The Court held that evidence of drugs and money was admissible when school authorities had "reasonable cause" to conduct a search. The holding was a departure from the probable cause standard. In arriving at its holding, the Court balanced ". . . the school-child's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place." *Id.* at 340. The Court based its exception on the school setting. The Court rejected the *in loco parentis* doctrine that school officials act in place of parents during school hours, and therefore have parental powers which are not subject to constitutional restraints. The Court affirmed that school authorities were subject to constitutional considerations and cited *Tinker* for that proposition. However, the Court gave to school authorities expanded control as state officials in the fourth amendment area.

11. 106 S.Ct. at 3166 (citing New Jersey v. T.L.O., 469 U.S. 325 (1985)).

12. Fraser v. Bethel School Dist., 755 F.2d at 1357. The following was Fraser's nominating 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.

ing its disruptive conduct rule and suspended him for three days.[13]

Fraser was an honor student and a member of the debate team. He had received the "top speaker" award in statewide debate championships for the past two years. At the time the speech was made he was a graduating senior. As part of the disciplinary action imposed on him, the school district removed his name from a list of candidates who were to be on the ballot for graduation speaker.

Fraser filed suit in federal district court with his father as guardian *ad litem* and charged a violation of his civil rights under 42 U.S.C. section 1983,[14] claiming that the Bethel School had abridged his freedom of speech as protected by the first and fourteenth amendments.[15] The United States District Court ruled in his favor, issued a declaratory judgment, and awarded him $12,750 in costs and attorneys fees.[16] The court also issued an injunction enjoining the school district from preventing Fraser from participating as a commencement speaker in the graduation exercises.[17]

The United States Court of Appeals for the Ninth Circuit affirmed the district court, and went on to hold that Fraser's speech was not materially disruptive to the educational process as required by *Tinker* v. *Board of Education*.[18] Under *Tinker* the school district was required to offer evidentiary proof that there was a material disruption in order to justify its disciplinary action. The Court of Appeals also held that the school district could not discipline him for speech which the authorities considered to be indecent. The court noted that the school dis-

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13. *Id.* at 1357 n.1. The rule, which was published in the school's student handbook, stated:

In addition to the criminal acts defined above, the commission of, or participation in certain noncriminal activities or acts may lead to disciplinary action. Generally, these are acts which disrupt and interfere with the educational process.

Disruptive Conduct. Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.

14. *Id.* at 1358.

15. *Id.*

16. *Id.*

17. *Id.*

18. 393 U.S. 503.

trict had conceded that the speech was not legally obscene,[19] in which case it would have been outside of first amendment protection. The court reasoned that the first amendment standard under *Tinker* required a test of material disruption and not "inappropriateness."[20]

The Ninth Circuit discussed the district court's evidentiary findings and noted that the only evidence presented by the school district to support its contention that the speech materially disrupted the assembly was the testimony of one counselor. He said that only three students, sitting on different sides of the auditorium, indicated any overt response to the speech. The majority for the Ninth Circuit determined, based upon the testimony of the school counselor, that "the reaction of the student body 'was not atypical to a high school auditorium assembly' "[21] and thus was not disruptive.

The only other evidence presented by the school district was the testimony of a home economics teacher, who said that during class the next day her students expressed so much interest in Fraser's speech that she devoted approximately ten minutes to a discussion of it.[22] The majority for the Ninth Circuit concluded that the school district had failed to prove that Fraser's speech materially interfered with the educational process as required by *Tinker*.[23]

The Ninth Circuit rejected the school district's argument that it could discipline Fraser because the speech was made at a school-sponsored function. The school district had argued that the student audience was a "captive" audience, and therefore the authorities had an obligation to protect the students from indecent speech.[24] The Ninth Circuit did not accept the argument. The court distinguished between unwanted intrusions into the privacy of the home, and the public nature of a high school assembly.[25]

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19. 755 F.2d at 1361 n.5.

20. *Id.* at 1361.

21. *Id.* at 1359-1360.

22. *Id.* at 1360.

23. *Id.* at 1359.

24. For its captive audience argument the school district relied upon Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726 (1978). *See* note 31.

25. 755 F.2d at 1362-1363.

III. THE SUPREME COURT'S ANALYSIS OF *BETHEL SCHOOL DISTRICT NO. 403* v. *FRASER*

The United States Supreme Court came to a different conclusion than the Court of Appeals based upon the evidentiary record.[26] The Supreme Court reversed on the grounds that the school district had the authority to regulate student speech it considered to be indecent.[27]

The majority opinion was delivered by Chief Justice Burger. He found the facts of this case to be distinguishable from the symbolic speech dispute in *Tinker*.[28] *Tinker* concerned the right of three high school students to wear black armbands to school as a sign of their opposition to the war in Vietnam. The majority asserted that the first amendment protection afforded to the students in *Tinker* did not apply to the facts of the *Bethel School District* dispute. In evaluating the content of both statements the Court differentiated between the political statement in *Tinker* and Fraser's campaign speech. The Court determined that greater first amendment protection should be afforded to the symbolic political speech in *Tinker* than to Fraser's speech.[29]

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26. There is a disagreement as to how disruptive and disturbing Fraser's speech was. The Supreme Court and the Court of Appeals came to different conclusions based upon the evidence.

The Court of Appeals for the Ninth Circuit concluded that the testimony of the high school counselor and home economics teacher was not enough evidence.

The Supreme Court majority concluded that "the speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. Some students were reported as bewildered by the speech and the reaction of mimicry it provoked." 106 S.Ct. at 3165.

Justice Brennan in his concurring opinion stated that there was no evidence in the record to indicate that any student either male or female found the speech "insulting." *Id.* at 3168 n.2.

Justice Marshall, dissenting, also found that the school district had failed to present sufficient evidence that the speech was disruptive. *Id.* at 3168-3169.

Fraser, in an interview given shortly after the Supreme Court opinion was issued said, "In a lower court, a nurse from another school district testified that if she had been in the audience, which she wasn't, and if she had been 14 years old, she would have been upset by my speech. Distorting this testimony, Chief Justice Burger stated that 14 year old girls were extremely upset by the speech." L.A. Daily J., July 18, 1986, § 1, at 4, col. 3.

27. 106 S.Ct. at 3163.

28. *See supra* note 2 for the *Tinker* standard.

29. Justice Burger said, "The marked distinction between the political 'message' of armbands in Tinker and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals." 106 S.Ct. at 3163.

Chief Justice Burger's opinion was supported by two earlier United States Supreme Court opinions which had permitted government intervention to protect minors from indecent speech and indecent publications. In *FCC* v. *Pacifica Foundation*[30] a plurality held that indecent speech which was not legally obscene could be regulated when broadcast over the radio.[31] In *Ginsberg* v. *State of New York*[32] the Court affirmed the government's power to enact legislation which protected minors from "harmful" publications.[33]

The Court's opinion in *Bethel School District* was based upon the idea that the function of public education is to prepare

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30. 438 U.S. 726 (1978).

31. Justice Stevens delivered the plurality opinion in *Pacifica*. The Court held that indecent speech (a twelve-minute monologue titled "Filthy Words") could be regulated because it was broadcast over the airwaves. A man who was driving in his car with his son heard the broadcast which was aired in the afternoon. He filed a complaint with the F.C.C. The F.C.C. ruled that the broadcast was indecent. The Supreme Court plurality reasoned that the broadcast reached listeners in the privacy of their homes, where some might be unwilling, and thus a "captive" audience. The Court also reasoned that the broadcast could reach children who were too young to read, were not in school, and who had no control over what they might be hearing. The plurality opinion concluded that it was within the F.C.C.'s power to regulate speech which was not legally obscene. The plurality put forth a theory that there could be a hierarchy placed upon the value of speech with varying degrees of constitutional protection. *Id.* at 746.

32. 390 U.S. 629 (1968).

33. Ginsberg was convicted under a statute of selling a pin-up magazine, which was "harmful to a minor," to someone under the age of 17 years old. The question of whether the magazine was legally obscene was not before the Court. However, the Court noted that "obscenity is not within the area of protected speech or press." *Id.* at 634 (citing Roth v. United States, 354 U.S. 476). The Court held that the statute could be drafted so that it was more restrictive in allowing minors access to the publication than it would be to adults. They held that this did not abridge a minor's constitutional right to freedom of expression.

The Court's justification for finding a violation, even though it was not a crime to sell the publication to adults, was that "the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined." *Id.* at 636.

The Court reasoned that it was within the State's power to enact health and safety legislation for the well-being of its children. They affirmed the New York statute on rational basis grounds, finding obscenity to not be protected speech requiring a heightened level of scrutiny.

In *Ginsberg*, the Court affirmed government's role to enact legislation which protected minors from "harmful" publications. The court indicated that there could be limits which would not invade "the area of freedom of expression constitutionally secured to minors." *Id.* at 637. In *Pacifica* and *Ginsberg* the Court permitted limits on first amendment expression where speech was of a lesser value than "core political speech," and when it was within the legislative powers of government to enact rules for the well being of its children.

students "for citizenship in the Republic. . . ."[34] The majority asserted that the schools must teach the social values of a democracy which include "habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[35] The Supreme Court majority gave great deference to the local school board and to the societal values which members of it hold as political representatives.[36]

The Court's opinion is that the school's function to teach social values encompasses regulation of speech which school administrators find offensive. The majority noted that the Manual of Parliamentary Procedure drafted by Thomas Jefferson prohibited the use of impertinent or indecent speech in the House of Representatives.[37] Thus, even if Fraser's speech was a political speech, Fraser's choice of words would not have received first amendment protection under Jefferson's guidelines because of its content.

The Court noted that support for the authority of the Governing Board to regulate student speech disputes could be found in *Ambach* v. *Norwick*.[38] In *Ambach* the Supreme Court held that a New York state statute prohibiting any person who was not a citizen of the United States from teaching in the public school system did not violate the equal protection clause of the United States Constitution. The Court found no constitutional violation and affirmed the state statute on rational basis grounds.[39] *Ambach* was one of a line of cases in which the Supreme Court established a "public employee" exception[40] to judicial review at the strict scrutiny level when alienage was a characteristic of the disputed classification.

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34. 106 S.Ct. at 3164 (quoting C. Beard & M. Beard, *New Basic History of the United States* 228 (1968)).

35. *Id.* at 3164.

36. *Id.* at 3165.

37. *Id.* at 3164.

38. 441 U.S. 68 (1979).

39. *Id.* at 76-77, citing Foley v. Connelie, 435 U.S. 291 (1978). The Supreme Court reasoned that there could be a "public employee" exception because teachers participate in a governmental function which includes teaching students about citizenship and the administration of government.

40. *Id.* at 76-77 (citing Brown v. Board of Education, 347 U.S. 483 (1954)).

The majority cited *Ambach* for the proposition that education may be government's most important function, in part, because it teaches the cultural values of a democracy. The Supreme Court held in *Ambach* that since teachers play a critical role in this process, United States citizenship could be required of them.

The Court found additional support for the expanded school board authority in a first amendment dispute in *Board of Education* v. *Pico*, a United States Supreme Court opinion decided during the 1982 Term.[41] A school board had evaluated the content of library books and ordered some removed because they were considered indecent. In *Pico*, a plurality of the Supreme Court held that "local school boards have broad discretion in the management of school affairs."[42] In *Bethel School District* the Court observed that, although the *Pico* decision was a plurality opinion, all of the Supreme Court justices agreed that a local governing board had the authority to remove books from a school library which the board members considered to be vulgar.[43]

In *Pico* the emphasis was on the local board's authority to censor the content of books which its members considered indecent. In *Bethel School District* the Supreme Court permitted the governing board to censor speech which its members considered indecent. The Supreme Court's legal standard in these opinions is not protective of content, but rather gives deference to community standards which may vary from one locale to another.

The Court rejected Fraser's argument that the school's disciplinary action violated his right to procedural due process of notice and a right to a hearing.[44] The Court reasoned that the school's disciplinary conduct rule and the advance warning from

41. 457 U.S. 853 (1982).

42. *Id.* at 863 (citing Meyer v. Nebraska, 262 U.S. 390, 402 (1925)).

43. 106 S.Ct. at 3165 (citing Board of Education v. Pico, 457 U.S. 853, 871-872 (1982) (plurality opinion)); *Id.* at 879-881 (Blackmun, J., concurring); *Id.* at 918-920 (Rehnquist, J., dissenting). The books which were the subject of the dispute were: *Slaughter House Five, The Naked Ape, Down These Mean Streets, Best Short Stories of Negro Writers, Go Ask Alice, Laughing Boy, Black Boy, A Hero Ain't Nothing But a Sandwich, Soul on Ice, The Fixer. Id.* at 856 n.3.

44. 106 S.Ct. at 3166.

two of his teachers that he might be subject to sanctions was adequate notice. In *Bethel School District* the Court affirmed the school law exception it had articulated in its last term in *New Jersey* v. *T.L.O.*,[45] and said that the constitutional rights of students in the school setting was not "automatically coextensive with the rights of adults in other settings."[46]

In *Bethel School District* the Supreme Court reasoned that deference should be accorded to the local governing board so that it had enough authority to run the schools. The Court emphasized the distinction between political speech which was protected and speech which was not protected. The Court distinguished the symbolic speech dispute in *Tinker* from indecent speech which would not receive first amendment protection in the schools. Chief Justice Burger said, "[a]s cogently expressed by Judge Newman, 'the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket.' "[47] Cohen was convicted of disturbing the peace in the Los Angeles County courthouse. He wore a jacket which had an epithet on it expressing opposition to the draft. The United States Supreme Court reversed his conviction. The Court found Cohen's speech to be protected by the first amendment. The Court held that it expressed his own opinion and there was no intent to disrupt.[48] In *Bethel School District* the Supreme Court concluded that Fraser's sexual metaphor was not a politi-

45. 469 U.S. 325 (1985). *See supra* note 10.

46. 106 S.Ct. at 3164.

47. *Id.* at 3164-3165 (citing Thomas v. Board of Education, Granville Central School District, 607 F.2d 1043, 1057 (CA 2 1979) (opinion concurring in result). *Thomas* concerned a dispute over a student produced off-campus newspaper which was alleged to be indecent. The court held that administrators could not punish students for off-campus activities. The court never reached the issue as to whether the publication was indecent. The concurring opinion discussed whether or not the publication was protected by the first amendment. The concurring opinion concluded that the authorities could regulate indecent speech which was not obscene. He said, "School authorities can regulate indecent language because its circulation on school grounds undermines their responsibility to try to promote standards of decency and civility among school children." *Id.* at 1057.

48. *See* Cohen v. California, 403 U.S. 15 (1971). In *Cohen* the Court held that the statute under which Cohen was tried was too vague, and it didn't identify the interests which the state wished to limit. The Court asserted a high standard for government to meet. They said, "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Id.* at 21. In *Cohen* the Supreme Court concluded that anyone who was offended could look away or continue

cal statement and therefore it was not constitutionally protected.[49]

Justice Brennan wrote a separate concurring opinion in *Bethel School District*. He reasoned that under the facts of this case the school district's disciplinary action was permissible because of its authority to govern the schools.[50] He distinguished between the level of first amendment protection which the Court gave to a statement which authorities considered to be indecent within the schools and outside of them. Brennan concurred with the majority's emphasis on the special setting of the school environment. He noted that Fraser's speech did not meet the legal test for obscenity. He reaffirmed the Supreme Court's holding in *Cohen*, and said that government could not prohibit Fraser's statement as inappropriate in a non-school setting.[51]

Justice Stevens, in his dissenting opinion, maintained that the school faculty could regulate the content of some speech, as long as the student involved received fair notice. He did not believe Fraser had received fair notice, however.[52] Justice Stevens favored a strong presumption in favor of protected first amendment expression,[53] and went on to argue that, based upon the evidence in the record, Fraser's speech was not prohibited by the school's own disciplinary rules which required that it must have caused a material disruption.[54] Justice Stevens acknowledged that Fraser was a good student who was respected by his peers.[55] He noted that there was no evidence in the Court of Appeals' record to indicate that any of the students found the speech offensive.[56] He said that the dispute might, in part, be generational and that the students might be a better judge of contemporary standards "than is a group of judges who are at least two generations and 3,000 miles away from the scene of the crime."[57]

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walking, and that the courthouse was a public place which did not guarantee freedom from unwanted intrusion.

49. 106 S.Ct. at 3164.
50. *Id.* at 3167-3168 (Brennan, J., concurring).
51. *Id.* at 3167.
52. *Id.* at 3169 (Stevens, J., dissenting).
53. *Id.* at 3172.
54. *Id.* at 3170.
55. *Id.* at 3169.
56. *Id.* at 3169 n.2.
57. *Id.* at 3169.

Stevens concluded that if the Supreme Court was going to defer to local community standards then the Court should defer to the federal district court and Court of Appeals which had found the speech to be protected.[58]

Justice Marshall also dissented. He alone would have affirmed the lower court's finding that there was no material disruption of the educational process as required by *Tinker*.[59]

IV. CRITIQUE

In *Tinker* the Supreme Court held that the United States Constitution applied to students attending public schools. The first amendment right to freedom of speech was held applicable to the schools through the due process clause of the fourteenth amendment.[60] Since the Supreme Court issued the *Tinker* decision in 1969, it has measured student speech disputes by that standard. The rule has been that speech is protected by the first amendment unless the authorities can prove that it "materially and substantially interferes with the requirements of appropriate discipline in the operation of the schools."[61]

The *Tinker* court affirmed the authority of school officials to govern the schools.[62] However, the Court said, "[o]ur problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities."[63] The *Tinker* court cited *Epperson* v. *Arkansas*[64] for the following rule concerning the level of judicial review to be accorded a dispute within the public school system: "By and large, public education in our nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic

58. *Id.* at 3172.

59. *Id.* at 3168-3169 (Marshall, J., dissenting).

60. 393 U.S. at 507 (citing West Virginia v. Barnette, 319 U.S. 624, 637 (1943), in which the Court said, "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").

61. 393 U.S. at 509.

62. 393 U.S. at 507.

63. *Id.* at 507.

64. 393 U.S. 97 (1968).

constitutional values."[65] In *Tinker* the Supreme Court held that the authorities may regulate the school environment; however, the regulations must meet constitutional standards.[66] This rule was very protective of content. It regulated conduct but did not censor ideas. In *Tinker* the Supreme Court concluded that the students' symbolic expression did not interfere with the work of the schools or interfere with the rights of other students.[67] The Supreme Court held, "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[68]

In the years since Tinker was decided, the federal courts have had occasion to rule on student speech disputes. If a court found that the dispute involved protected rights, a first amendment analysis utilizing the *Tinker* standard was applied.[69] If a court found that constitutional rights were not involved deference was given to the local governing body.[70] In some instances the courts have held that school authorities violated first amendment rights. In other instances, the courts have found that the authorities acted within their governmental powers and no constitutional violation was found.

Although the circuits have not always been consistent, it is possible to extract some principles from their holdings. In conflicts which concerned student newspapers, most of the courts have followed *Tinker* and held that student speech was protected unless the school district could present a compelling justification for its restriction. An opinion by the United States Court of Appeals for the Ninth Circuit distinguished between student speech made within the context of a school-sponsored public forum to which the *Tinker* standard applied, and a stu-

65. 393 U.S. at 104. The Supreme Court struck down a state statute prohibiting the teaching of the theory of evolution in the public schools. The Court held that the statute violated the first and fourteenth amendments. Although this opinion affirms judicial intervention when constitutional values are at stake, it is often cited for the proposition that the Court will not interfere with government's legitimate authority to administer the schools.

66. 393 U.S. at 513.

67. 393 U.S. at 508.

68. 393 U.S. at 511.

69. *See* note 72.

70. *See* notes 71, 73, and 74.

dent newspaper which was produced in a journalism class which authorities could regulate.[71]

The courts have ruled that once school authorities allow a public forum to develop, it must be accessible to all students.[72] When there are health and safety considerations deference has been given to the school's regulations.[73] Similarly, when there is a concern for the age of the students, and in order to avoid psychological harm because of their relative immaturity, school regulations will be upheld.[74] A federal district court held that privacy concerns for students and their families was within the school district's domain.[75] That decision was reversed by the United States Court of Appeals for the Eighth Circuit, and is presently pending before the United States Supreme Court.[76]

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71. *See* Nicholson v. Board of Educ., 682 F.2d 858 (9th Cir. 1982). Pre-publication review of a journalism class produced school newspaper was upheld. The Ninth Circuit affirmed the right of school authorities to exert their control over matters which involved the school curriculum. The court reasoned that since the publication was an integral part of the curriculum the school district could exert more control over it. *Id.* at 863-864.

72. *See* Gambino v. Fairfax County School Bd., 564 F.2d 157 (4th Cir. 1977). The court held that a student newspaper was established as a public forum and entitled to first amendment protection. The school board appealed a district court order enjoining it from prohibiting publication of a student article about birth control. The Court of Appeals affirmed.

See Zuker v. Panitz, 299 F.Supp. 102 (S.D.N.Y. 1969). A federal district court held that the school district could not prohibit publication of an advertisement in a school newspaper opposing the war in Vietnam because it was a public forum and there had been other articles about the war and the draft in it.

See San Diego Comm. v. Governing Bd., 790 F.2d 1471 (9th Cir. 1986). High school newspaper was a public forum and the school could not prohibit publication of an advertisement from plaintiff organization opposing draft registration.

73. *See* Williams v. Spencer, 622 F.2d 1200 (4th Cir. 1980). School district could prohibit distribution of a student produced off-campus newspaper which contained advertisement for the sale of drug paraphernalia.

74. *See* Trachtman v. Anker, 563 F.2d 512 (2nd Cir.), cert. denied, 435 U.S. 925 (March 20, 1978). School district could prohibit distribution of a questionnaire about sex to ninth and tenth graders because of their age. However, it could be distributed to eleventh and twelfth graders. The results were to be published in the student publication.

75. *See* Kuhlmeier v. Hazelwood School Dist., 607 F.Supp. 1450 (D.C. Mo. 1985). The federal district court held that two pages could be deleted from a student newspaper. The articles concerned teen pregnancy and divorce. The district court reasoned that privacy concerns for the students and their families was a compelling justification for not publishing the articles.

76. *See* Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368 (8th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3493 (U.S. Jan. 20, 1987) (no. 86-836). The Court of Appeals held that the student newspaper was a public forum and "a conduit for student viewpoint." The court held that the deletion of the articles violated the students' first amendment rights.

Allegations concerning indecent speech have been decided both ways.[77]

In *Bethel School District* the Supreme Court announced a legal standard to measure student speech disputes which differed sharply from the *Tinker* approach. The court employed a balancing test that weighed and evaluated the content of the speaker's words against the government interest in prohibiting the speech.[78]

The majority in *Bethel School District* did not utilize the *Tinker* analysis to measure whether the speech had a material disruption on the educational process. The majority disregarded the findings of both the federal district court and the United States Court of Appeals that the speech was not disruptive. The Supreme Court also declined to consider the public forum issues of the dispute which were discussed by the lower court,[79] and which have traditionally been part of a first amendment analysis.[80]

Instead, the majority evaluated the content of Fraser's speech and distinguished between the political message of the *Tinker* armbands and the sexual content of Fraser's statement.[81] The Court did not define political speech except by analogy to

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77. *See* Thomas v. Board of Educ., 607 F.2d 1043 (2d Cir. 1979), *cert. denied* 444 U.S. 1081 (1980). Student newspaper published off-campus which contained articles of sexual satire was considered indecent by the school board. The students who published it were suspended for five days and sought injunctive relief. The Court of Appeals held that the students could not be disciplined because the activity took place outside of school. The court did not reach the issue of indecent speech. *See supra* note 47.

See Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981). The court held that the school district did not violate the first amendment when it cancelled a play, "Pippin," because of its sexual theme. The court reasoned that although participation in the play was voluntary, it was considered a part of the theater arts curriculum and was within the school board's authority.

78. 106 S.Ct. at 3164.

79. 755 F.2d at 1365.

80. *See* Widmar v. Vincent, 454 U.S. 263, 270 (1981), where the Supreme Court said that in order to justify exclusion of a student religious club from a state university the authorities must "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." The Court held that the university had created a forum open to student groups and that the religious club should also be allowed to meet on campus.

See Grayned v. City of Rockford, 408 U.S. 104 (1972). Sidewalks outside of school were limited public forum and may be closed if they disrupt school while it's in session.

81. 106 S.Ct. at 3163.

Tinker. Without a legal definition from the Court, distinguishing the political from the indecent presents a problem for analyzing future disputes. Sometimes a statement may be both — as the Supreme Court held in *Cohen*.[82] The standard becomes subjective and a matter of local community values without a definition from the Court.[83] In *Bethel School District* the Court has created an intermediate category of speech which neither meets its legal definition of obscenity,[84] nor receives the protection of the first amendment.

In *Bethel School District* the Supreme Court concluded that the authorities could discipline Fraser and prohibit his speech not because it caused a material disruption as required by *Tinker*, but because of the "school's basic educational mission."[85] The Supreme Court majority balanced the speaker's first amendment rights against the school district's justification for regulating the speech. The majority of the Court evaluated the content of the statement and held that it was not appropriate for that setting.[86] The Court considered the content of Fraser's speech and expressed a judgment about its political value, rather than considering the effect the speech had on the conduct of the audience.

Bethel School District's Effect on Student Speech Statutes

In California there is an Education Code provision on the student exercise of free expression.[87] The statute provides that

82. *See supra* note 48.

83. Shortly after this opinion was issued, Fraser discussed the Court's evaluation of the content of his speech, and commented on the implication that the Court's opinion could be used to censor ideas. He said, "The year after I graduated, for instance, the school administration prevented students from performing 'Working', a play by Studs Terkel, because it included a segment on prostitutes. But the play, based on live interviews, did not glorify prostitution; instead, prostitutes described how unfulfilling their lives are."

"During my senior year, parents and some school board members tried to put a stop to a performance of 'Jesus Christ Superstar.' The play was allowed to go on, but only after acrimonious debate and a 3-2 vote on the school board." L.A. Daily J., July 18, 1986, § 1, at 4, col. 3.

84. *See supra* note 4.

85. 106 S.Ct. at 3166.

86. *Id.* at 3166.

87. *See* Cal. Educ. Code § 48907 (West Supp. 1987). Student exercise of free expression. (Former § 48916, enacted by Stats. 1976, c. 1010, and formerly § 10611.)

students in the public schools have the right to exercise freedom of speech. Expression which is "obscene, libelous, or slanderous" is prohibited. As is speech which disrupts "the orderly operation of the school."

In 1975, the Legislative Counsel of California was presented with a question concerning indecent student speech. Legislation had been introduced to amend the Education Code provision on student speech.[88] The question presented was whether it would be constitutional to require that the right to student exercise of free expression specifically exclude profane or vulgar expression.

The Legislative Counsel's opinion concluded that school districts could not prohibit indecent speech unless it also met the legal definition for obscenity, was libelous or caused a material disruption.[89] The Legislative Counsel's opinion was based upon the constitutional standard articulated by the Supreme Court in *Tinker* and *Cohen*. Under the guidelines issued by the Supreme Court in *Bethel School District* a different conclusion might be reached if the same question was presented to the Legislative Counsel today, because the Court has created an indecent speech category for students which is based on a different legal standard.

The disruptive conduct regulation adopted by the school district in the State of Washington[90] and the California student speech statute are both based upon the *Tinker* standard. If an indecent student speech dispute was to occur in California, the California Education Code provision would offer no greater first amendment protection to California students then the Bethel School District's disruptive conduct regulation offered to Fraser.

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88. Assembly Bill 207, 1974-1975 Cal. Regular Session. (The legislation was not enacted.)

89. *See* Advisory Opinion of the Legislative Counsel of California, June 25, 1975. The Legislative Counsel cited two federal circuit court opinions which concerned disputes about high school newspapers (Scoville v. Board of Educ., 425 F.2d 10 (7th Cir. 1970), and Sullivan v. Houston Independent School Dist., 333 F.Supp. 1149 (1971), *vacated* 475 F.2d 1071 (1973), *reh'g denied*, 475 F.2d 1404 (1973)). A United States Supreme Court opinion was also cited which held that a student could not be disciplined for speech which a university considered to be indecent because of "conventions of decency." *See* Papish v. University of Missouri, 410 U.S. 667 (1973).

90. *See supra* note 13.

The Balancing Test as Applied to Public Employment First Amendment Cases

In *Bethel School District* the Supreme Court balanced the student's first amendment right to express himself against the school district's justification for prohibiting the speech. The Court has utilized a balancing test to determine whether or not speech was protected in first amendment cases concerning public employees. This was first articulated in *Pickering* v. *Board of Education.*[91]

In public employment cases the Supreme Court said that a balancing test was needed to protect the employee's first amendment rights as a citizen balanced against the government employer's need to regulate the work environment.[92] The issue in *Pickering* was whether a teacher's letter to the editor of a local newspaper, which was critical of the school board, was protected by the first amendment. The Supreme Court held that the school district could not dismiss the teacher because he had a first amendment right to speak on a matter of public concern.[93] In *Pickering* the Supreme Court balanced the interests of the individual as a citizen commenting upon a public issue against the interests of the state as employer.[94]

In *Pickering* the Supreme Court concluded that the balance weighed in favor of the employee's first amendment right of self-expression. The Court gave some guidelines for evaluating future conflicts. They reasoned that the employee's speech was protected by the first amendment because it did not interfere with confidentiality or the need to maintain discipline in the work environment. The statement was not libelous and it reflected a difference of opinion about a matter of public concern.[95]

In *Connick* v. *Myers*,[96] a more recent dispute between a public employee and the government employer, the Supreme Court held that the balance favored government. Myers was

91. 391 U.S. 563 (1968).
92. *Id.* at 568.
93. *Id.* at 570.
94. *Id.* at 568.
95. *Id.* at 570.
96. 461 U.S. 138 (1983).

employed as an Assistant District Attorney. She circulated an in-house questionnaire concerning employment conditions. She was ordered transferred to a different division and when she refused the transfer she was terminated. Myers charged that she was terminated for exercise of protected speech. The Supreme Court affirmed her discharge and held that the speech was not protected because it was not about a matter of public concern.[97]

In *Connick* the Supreme Court distinguished between speech that concerned private matters (internal office complaints) and matters of public concern.[98] The Court said that when an employee's statement was not about a matter of political or social concern ". . . government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[99]

In *Connick*, as in *Pickering*, the Court afforded more protection to speech about public issues. The Court referred to "the hierarchy of first amendment values."[100] Consequently, some speech by public employees about their employer was found to be more protected than other speech. The Court gave as its reason for emphasizing public issues a concern for first amendment rights of political association and a fear of chilling those rights.[101] The Supreme Court concluded that Myers' speech was not on a public matter and deferred to the employer's authority to regulate the office environment.[102]

In each of the public employee first amendment disputes the Court evaluated the content of the speech, and, as a matter of law, it determined whether government met its evidentiary burden of proof for justifying its action.[103] As part of this individualized evaluation the Court gave consideration to the government employer's authority to regulate the work environment. The Court said, "[w]hether an employee's speech addresses a matter of public concern must be determined by the content,

97. *Id.* at 148.
98. *Id.* at 147-148.
99. *Id.* at 146.
100. *Id.* at 145.
101. *Id.* at 145 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)).
102. *Id.* at 154.
103. *Id.* at 148 n.7. "The inquiry into the protected status of speech is one of law, not fact."

form, and context of a given statement, as revealed by the whole record."[104]

In *Bethel School District* the Supreme Court used a balancing test to resolve a first amendment dispute between a student and the school board. The majority evaluated "the content, form and context" of Fraser's statement. The Supreme Court accorded greater deference to the school district's authority to regulate the school environment than to Fraser's first amendment rights. The expanded governmental authority to regulate speech was based upon the institution, the school setting.[105] Whether or not *Bethel School District* is limited to its particular facts remains to be seen. The Supreme Court has issued a new and different standard by which to measure first amendment disputes in the schools which requires an individualized evaluation, similar to the balancing test used by the Court in the first amendment public employee cases.

V. CONCLUSION

Bethel School District, the Supreme Court's most recent opinion on a first amendment dispute in the schools, and *Tinker*, which was decided in 1969, represent a tension in the Supreme Court's first amendment jurisprudence. In *Tinker* there was a debate between the majority and Justice Black, who dissented, as to the level of constitutional protection to be given to student speech. Justice Black did not believe that students had full constitutional rights and he affirmed the authority of school officials to exert their control.[106] In many respects the Supreme Court's opinion in *Bethel School District* appears to support Justice Black's dissent in *Tinker*, limiting students' constitutional rights within the schools.

Bethel School District is the first Supreme Court opinion to employ a balancing test to measure a student speech dispute. It represents a departure from the *Tinker* standard. Instead, it follows a line of public employee first amendment cases, in which the Court employed a balancing test to evaluate content. In the

104. *Id.* at 147-148.
105. 106 S.Ct. at 3166.
106. 393 U.S. at 526..

public employee cases the Court has given greater first amendment protection to public speech concerning political issues. The first amendment rights of the individual are balanced against the governmental interest in prohibiting the speech. In *Bethel School District* the Supreme Court majority concluded that Fraser's speech was indecent and not political, therefore it was not protected by the first amendment.

Dicta in the opinion give more weight to local control of the governing boards and to local community values. The Supreme Court has expressed greater deference to the authority of administrators to manage the schools. This opinion does not represent a bright line rule for practitioners. The facts of each particular dispute will have to be evaluated and weighed. The rules will develop out of subsequent interpretation of case law.

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