10-1985

Bethel School district No. 403 v. Fraser

Lewis F. Powell, Jr.

CFR with brew to Grant. Grant

5/14

Resp., a high school senior, in a speech to student body assembly made - according to J. Wright, dissenting - "crude & indecent remarks". (see p 2)

Resp. admitted he resorted to "sexual innuendo" to gain attention.

D C & CA 9 found Petr. had violated Resp's first amend rights when he was disciplined for the speech (denied right to speak at commencement)

But - as J Wright says - this was on school prop. during school hours at a compulsory assembly. Not a speech in public park.

Response is in. It adds nothing -- tracks the majority opinion and claims full exercise of First Am. rights in high schools. I recommend GRANT

PRELIMINARY MEMORANDUM

May 16, 1985 Conference
List 1, Sheet 4

No. 84-1667

BETHEL SCH. DIST. No. 403, et al. ($1983 deft)	Cert to CA9 (Norris, Goodwin; Wright [dis])	strong judge
v.	N.J. v. TLO in closer than Tinker ?	
FRASER, et al. ($1983 plntf)	Fed./Civ.	Timely

1. SUMMARY: Petr claims that the LCs erred in holding that it violated the First Amendment by disciplining resp for a speech given at a school assembly.

2. FACTS AND DECISION BELOW: On Apr. 26, 1983, resp Mathew Fraser, then a 17-year old senior at Bethel, Wash.,

CFR with an eye toward a grant. I agree with the memo-writer that the dissent has the better argument. Tinker is not controlling -

High School, a member of the Honor Society and the Debate Team and the recipient of the "Top Speaker Award" in statewide debate championships for two consecutive years, gave the following "nominating speech" for a friend running for school office. The speech was given during a student-run assembly conducted on school grounds during school hours:

> "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--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."

The record showed that the 600 odd students and teachers listening to the speech reacted, inter alia, by "whooping and hollering," and that one student was seen simulating masturbation and two others were seen simulating sexual intercourse by moving their hips. Three or four teachers wrote the school principal that they considered the speech "inappropriate," and others testified that they had to spend class time the following day discussing the speech. The following day resp was called into the Assistant Principal's office and notified that he was being charged with violating the school's "disruptive conduct rule," which states:

> "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."

After a hearing at which resp admitted to deliberately using sexual innuendo to shock and interest his audience, resp was suspended for three days and his name was removed from a previously approved list of candidates for graduation speaker. Resp was nevertheless elected one of the graduation speakers by a write-in vote, but the school denied him permission to speak. After exhausting administrative remedies, resp brought a §1983 action in FDC, seeking to have the school district required to allow him to speak at graduation. The DC agreed with resp. It found that the school district's actions in punishing resp violated the First Amendment, that the "disruptive conduct" rule was unconstitutionally vague and overbroad, and sua sponte, found that the imposition of the suspension violated a Washington State statute. The court entered an injunction requiring the school district to allow resp to speak at graduation, and resp so spoke. The DC also awarded $278 in damages and $12,700 in costs and attorney's fees.

On appeal the CA9 affirmed with one judge dissenting. Essentially, the court found that the school district had violated resp's First Amendment rights by disciplining him for the speech he gave. The court began its analysis with a

general discussion of First Amendment principles, noting that a high school student retains First Amendment rights inside the school, see Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969), but also noting that a student's First Amendment rights inside a school are not absolute. The speech, of course, was not obscene under this Court's standard. The court rejected three specific arguments raised by petr in favor of its ability to discipline resp for his speech.

(1) The CA9 rejected the district's argument that resp could be disciplined because his speech had a disruptive effect on the school's educational process. Although Tinker states that student speech is not protected if it "materially disrupts class work or involves substantial disorder" in a school, here the evidence submitted by the petr was insufficient to establish such disruption. The "hooting and yelling," was not an uncommon reaction from students, and the expressive conduct of 3 out of 600 students did not show substantial disruption. The CA9 also rejected as evidence of disruption the facts that certain teachers had written to the principal indicating that they considered the speech "inappropriate," and that other teachers had spent class time the following day discussing the speech. The CA9 reasoned that the disruption shown could not distinguish the case from Tinker. Finally, the CA9 rejected testimony by school officials that in their view the fact that the speech was "inappropriate" meant that it was "disruptive." "The mere

fact that some members of the school community considered [resp's] speech to be inappropriate does not necessarily mean that it was disruptive of the educational process."

(2) The CA9 then rejected the district's argument that it could discipline resp because his speech was "indecent." The fact that school officials consider certain speech offensive is not enough to allow them to censor it. The CA9 rejected the District's reliance on FCC v. Pacifica, 438 U.S. 726, in which this Court upheld an FCC rule banning a broadcast of George Carlin's "filthy words" monologue. Pacifica was distinguishable because of its reliance on a "captive audience" analysis and because it relied on the fact that the broadcasting would reach unsupervised children. Here, the CA9 reasoned, "a high school assembly is a very public place," especially when convened for the purpose of providing a forum for students to make campaign speeches. "Realistically, high school students are beyond the point of being sheltered from the potpourri of sights and sounds we encounter at every turn in our daily lives." School officials cannot be allowed "unbridled discretion" to determine whether a particular speech is "indecent," and thereby to control the speech of high school students; this "would increase the risk of cementing white, middle class standards for determining what is acceptable and proper speech and behavior in our public schools."

(3) The CA9 also rejected petr's argument that school officials generally may control language used to convey ideas

at school-sponsored events. Essentially, the CA9 found that this assembly was a student-run "voluntary activity," and therefore was "extra-curricular." The fact that attendance at the assembly was "voluntary" made this case like Board of Education v. Pico, 457 U.S. 853, which involved the censorship of books in a high school library. In Pico this Court noted that students were exposed to the books only through "voluntary inquiry," and were not a captive audience. "In exercising his First Amendment rights at the assembly, [resp] was as free to express himself as if the students had organized a campaign rally in the cafeteria or outside on the school steps." "Just as in the political world outside the school, the First Amendment requires that the principal restraint on the choice of words and ideas and political dialogue is the risk of disapproval by the audience the speaker hopes to influence."

Finally, the majority dropped a footnote in which it agreed with the DC's decision that the school's misconduct rule was constitutionally infirm, because "on its face it permits a student to be disciplined for using speech considered to be 'indecent' even when engaged in an extra-curricular activity."[1]

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[1]The CA9 did not address the DC's ruling that the suspension ordered violated Washington state law. Although the CA9's failure to address this non-constitutional ground might raise Ashwander problems such as those confronted at argument in United States v. Albertini, I do not believe that such problems would be a reason for denying cert. Even assuming the state law ground

Footnote continued on next page.

Judge Wright dissented. He noted that the majority opinion rendered school authorities powerless to discipline a student who makes crude and indecent remarks during a school assembly, and that the majority opinion further held that school authorities were required to allow such a student to give the address at school commencement exercises. The thrust of Judge Wright's disagreement was with the majority's failure to grant any deference or discretion to school authorities dealing with the speech of students inside the school; he noted that this Court has recognized that the school context cannot be treated the same for purposes of defining individual liberties as can events occurring outside the school. See New Jersey v. T.L.O., 105 S.Ct. 733. In addition, Judge Wright disagreed with the majority on the facts; the only finding showed that attendance at the assembly was mandatory, in the sense that a student must either attend the assembly or study hall; the audience therefore was a captive one. He also noted that student government campaigns clearly were part of the educational process, and that the speech occurred during school hours on school grounds and could not be described as "extra-curricular." Judge Wright questioned the applicability of Tinker, inasmuch as Tinker dealt with restraints on "pure

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was at all valid, it only went to one form of relief that was afforded; an injunction was also granted and the fees and costs which keep this case alive probably were awarded as much for prevailing on the injunction as for prevailing with respect to the suspension.

speech," and not restraints on the use of indecent language to present ideas. He thus found the decision in FCC v. Pacifica useful. School officials, in their capacity in loco parentis and also as inculcators of societal values, must be given great leeway to determine what speech would be disruptive and indecent for 14-to-18 year olds required to sit through a high school assembly. The federal courts should as a general matter refrain from second-guessing such decisions.

Finally, Judge Wright indicated his disagreement with the majority's holding that the "disruptive conduct" rule was unconstitutionally vague and overbroad. School district rules should not be held to the same standards as criminal statutes; here the regulation gave fair notice of what was prohibited.

3. CONTENTIONS: Petr for the most part echoes Judge Wright's dissent. The CA9's decision creates "a novel First Amendment 'right' for students to express themselves in a sexually offensive and indecent manner." This Court has repeatedly emphasized that local school boards and school officials should have broad discretion to regulate the conduct of students. See New Jersey v. T.L.O.; Board of Education v. Pico. The CA9's decision equates the regulatory authority of local school boards with the authority of state and local officials to suppress speech in a public forum. But this Court has indicated that in the school context school officials may regulate speech as long as their particular action does not indicate an intent to impose political orthodoxy upon students. See Board of Education v. Pico.

In addition, petr argues that by determining that school officials cannot define "indecent" speech the CA9 has rendered the officials powerless to regulate any such activity, because it would be impractical to draw up detailed regulations describing what speech is considered "indecent." Finally, petr urges this Court to grant cert to review the CA9's decision that the school's disciplinary rules are vague and overbroad; the CA9 has departed from decisions of this Court and other courts indicating that such rules are not subject to the same vagueness and overbreadth attacks as criminal statutes.

4. DISCUSSION: I think that Judge Wright and petrs have the better of this argument, and in addition I believe the case is probably certworthy. One can begin with the proposition that if resp had given his speech on a stump in a public park it would have been fully protected without reaching the conclusion that the CA9 reaches here. And it goes without saying that one does not have to agree that the speech was "offensive" or that the sanctions were warranted. Petr and Judge Wright seem quite correct that, although the majority makes passing references to broader regulatory authority in school officials, the majority nevertheless treats this speech--which was given during school hours on school grounds as part of a school-sponsored student government campaign--as if the school officials had no more power to regulate speech inside a school than do state officials outside it.

yes

CA9 failed to recognize that there is a dif. between authority of school outside - during school hrs - and outside schools

I think there is more to this case, however, than a mere failure to follow this Court's precedents. A review of the cases indicates that this case falls in a void between Tinker, Pacifica, T.L.O., and Pico; this Court has never really dealt with the authority of school officials to regulate speech that is neither purely political nor unprotected, but is merely offensive, and Judge Wright may be correct in suggesting that the Tinker "substantial disruption" test is inapt. It does not take much imagination to think of speech that students might engage in that would be protected on the street but that one would think could be regulated in the classroom, whether or not the speech "substantially disrupted" the educational process under the CA9's application of that test. Cf. Cohen v. California. This problem is highlighted by the CA9's rather summary conclusion that the school rule preventing use of "profane" language--which seems to be equated with "indecent" language--is void for vagueness. And the notion that a school must allow a student who has given such a speech also to give a graduation speech seems questionable indeed.

There is no square conflict, although petr points to cases indicating that school disciplinary rules should not be assessed under standard vagueness or overbreadth analysis. There is a factual dispute which detracts somewhat from the case's certworthiness, but the CA9 seems to have gone outside the record in determining that the assembly was "voluntary" and "extra-curricular." The case is not moot because resp has given his graduation speech; there still is a dispute over

damages, costs and attorneys' fees. In sum, I think the lower court opinion is probably wrong, and I also think that this case presents important issues on which this Court has not really spoken.

I recommend CFR with an eye toward grant.[2]

~~There is no~~ Response *waived*.

May 10, 1985 Englander opin in petn

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[2]I note that if cert is granted there certainly is no need to grant on question 4--"did the District Court err in raising and deciding issues of state law sua sponte ...."

September 30, 1985

Court .....
Argued ....., *19*...
Submitted ....., *19*...

Voted on....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 84-1667

BETHEL SCH. DIST.

vs.

FRASER

Granted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓	✓	Rev.									
Brennan, J.			✓										
White, J.			✓										
Marshall, J.			✓										
Blackmun, J.		✓	Join 3										
Powell, J.		✓											
Rehnquist, J.			✓										
Stevens, J.													
O'Connor, J.		✓											

rbs 03/01/86 Reviewed 3/2

Excellent memo.

Bob thinks that ~~[illegible]~~ Tinker's standard, if accept literally, would require affirmance. Tinker would require a showing ~~[illegible]~~ that the speech "materially & substantially interfered with discipline of ~~[illegible]~~ schools. Bob would re-examine Tinker, and adopt a more ~~[illegible]~~ deferential standard w/r to speech in school during school hours. He likes, as do I, the 5 6's standard.

BENCH MEMORANDUM

Bob would Reverse. I am inclined to agree - but doubt there will be four votes for this result.

To: Mr. Justice Powell March 1, 1986

From: Bob

No.84-1667 Bethel School District v. Fraser (father & son (CA 9)

To be argued, Monday, March 3, 1986

QUESTIONS PRESENTED

Whether the First Amendment prohibited school officials from punishing a student for a speech at an assembly replete with sexual innuendo.

Whether the high school disciplinary rule in question is unconstitutionally vague.

Whether the school's failure to define each specific form of disciplinary action that could be imposed on a student violated due process.

Whether the DC erred in raising and deciding issues of state law sua sponte.

I. BACKGROUND

In April of 1983 respondent Matthew Fraser was a 17 year-old high school senior attending Bethel High School, a public school operated by the petr. Fraser spoke on behalf of a candidate for vice president of the Associated Student Body at an all-school assembly that took place during school hours and was attended by approximately 600 students. Students were required to attend either the assembly or a study hall.[1] There was hooting and yelling during the speech, and three students were observed to be simulating sexual acts. The next day, several teachers complained, others reported disruption of their classes due to student reaction. The day after the speech petr was informed that he had violated the school's disruptive conduct code.[2] He was

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[1]The entire text of the speech was:
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 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.

[2]That code provides: Disruptive Conduct: Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.

given copies of the letters of complaint, and a chance to explain himself. He was informed that he would be suspended for three days and that his name would be removed from consideration as a candidate for graduation speaker at the upcoming graduation ceremony.

After appealing to the school board, resp, joined by his father as guardian ad litem, brought a §1983 action in DC. The DC ruled after a one-half day hearing that (1) the suspension violated Fraser's rights of free expression under the First Amendment of the Federal Constitution, (2) the school's disruptive conduct rule was unconstitutionally vague and overly broad, (3) the failure of the disciplinary rule to specify removal of names from the candidates' list for graduation violated due process, (4) sua sponte, the state court ruled that the suspension violated state law. The Court also announced an injunction requiring the school district to allow resp to speak at the Bethel school commencement exercises. A permanent injunction and damages, of $278, and $12,750 costs, followed in later orders. The CA9 affirmed in an opinion that relies heavily on this Court's opinion in Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (1969).

II. DISCUSSION

In Tinker, this Court noted that a student "may express his opinions ... if he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." Id., at 513 (quotation omitted). On one level this

case is distinguishable from Tinker in that Tinker dealt with pure political speech. Nonetheless, analysis of this case must begin with the proposition that a reversal here cannot be squared with the reasoning of Tinker. Indeed, it hardly appears that the petrs or SG think it can be, thus, their attempts to suggest other possible standards to be applied. To uphold the suppression of speech here under Tinker would require a view of "material, substantial interference" with discipline that renders the standard analytically useless. The SG's argument that this standard was not central to the holding of Tinker is unpersuasive. Thus, in order to reverse the CA9, the Tinker standard, with respect to the showing made by a school board, must be reexamined.

The Tinker standard is inappropriate because it is overbroad in that implicit it in is a view that a school's primary interest is order and discipline, and that once this is achieved, the school has little interest in whatever else a student may choose to do or say provided it does not interfere with the rights of others. Schools then, are akin to local police who have an interest only in domestic tranquillity. The primary function of a school, however, is to teach, and in carrying out that teaching function it may choose to discipline behavior for reasons wholly unconnected to its disruptive character. For better or for worse, schools do serve a critical socializing function. See Board of Education v. Pico, 457 U.S. 853, 864 (1982) (Opinion of BRENNAN, J.). When viewed from this perspective it may be entirely consistent with the function of the school and, indeed in the best interest of the student, to punish a student for a

speech containing sexual innuendo, or to deny a student run newspaper the right to publish, for example, an article that is a scathing satire of the physical attributes of the faculty. The SG points out that a speech including racial or religious slurs should be able to be suppressed without requiring a showing of disruption. Respondents address this point by assuming that such speech could be suppressed because it would inevitably lead to disruption. First, that is simply not clear; consider a school with a small or virtually nonexistent minority population; second, the example demonstrates the silliness of a standard that focuses solely on some "disruption" of the educational process.

Once the function of the school is recognized as something broader than, and more amorphous than, maintaining order, the competence of a federal judge to decide when students should be able to speak and what they should be able to say is called into question. Thus, surely one factor influencing the Court in a decision such as this is which societal institution is better equipped to safeguard First Amendment principles while carrying out the educational mission. Clearly the school board is such an entity. Nor is the school board unaccountable; unpopular acts that cannot easily be challenged in a court can be challenged at the ballot box. Indeed, even the plurality in Pico recognized that courts should not "intervene in the resolution of conflicts which arise in the daily operation of school systems unless basic constitutional values are directly and sharply implicated in those conflicts." Id., at 866 (quotation omitted).

Although the Tinker standard may be overbroad, it would be error to remove the supervisory power of the courts altogether from decisions made in schools with respect to fundamental rights. This is so because left totally to their own devices school officials may fall prone to the temptation, often succumbed to by those in power, to censor speech for reasons that have nothing to do with the educating function.

The approach of the SG provides a sort of middle ground. He proposes that:

> Regulation of student speech in the high school environment *should be permitted if officials have* a reasonable basis for the regulation grounded in the maintenance of an atmosphere of civility or the transmission of basic societal values, so long as the regulations do not, as in Tinker, suppress student expression of a particular viewpoint.

The advantage of a standard such as this is that it leaves the vast majority of day-to-day decisions to school authorities, but leaves room for litigation when a student suspects that a school has gone too far. Petr complains that the standard could be used to impose the narrow, arbitrary views of a particular community on student speech. Arguably, however, a rule based on those standards would not be one relating to "basic societal values." In addition, resps argue that the "particular viewpoint" portion of the test is meaningless. They argue that here, Fraser was in his manner of speaking taking a particular viewpoint about the school administration. I think there is room within this standard to say that the student could not be punished for being

critical of a school administration, but could be punished for the manner in which he chose to do it.[3] In addition, the resps parade of horribles such as the censorship of Melville, etc, can be handled under the "reasonableness" prong of the standard. The reasonableness standard would serve to require the board to make some showing, but would not place the same burdens on a school board in the unique school setting that are placed on the state when it enacts criminal ordinances. These are fine lines, but the SG's standard does, at least, foreclose litigation in the vast majority of day-to-day situations in which students need to be disciplined. Finally, the SG's standard at least moves closer to the core values of the First Amendment in protecting discussion of public concern, rather than the adolescent antics engaged in here.[4]

I think that such a deferential rule is justified in the context of supervised school activities with an educational component for several reasons. First, schools perform a unique

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[3]Respondents suggest that ~~petr~~ Fraser was indeed punished for his views about the administration. As evidence they suggest that others who had written or said similarly "indecent" things were not punished. On remand, the Court of Appeals would presumably be free to consider such a claim. I note, however, that the irony of respondents' position is that in order to control some speech, a school is required to control a lot more.

[4]A good argument can be made that the school in this case should be estopped from enforcing the rule here because three teachers saw the speech in advance and did not prohibit it. It is a curious mixed signal to send a student to let him deliver a speech and then punish him for it. It is not clear on the record, however, that these teachers had the authority--without more--to order that the speech not be delivered.

function, as noted above. Second, students are minors. Third, simply because an activity does not take place in a classroom does not mean that its attachment to learning is nil.[5] Finally, the resps proposition that the school should be allowed to censor all indecent language, is in reality a rule that precludes any and all judicial review, not a standard.

A second issue in this case involves a challenge based on overbreadth and vagueness to the school's disruptive conduct rule. I think the CA9's holding with respect to this rule should be reversed because schools deserve flexibility in writing and applying their rules, and the rule here is reasonably clear in detailing the kind of conduct prohibited. School rules need not be treated like criminal statutes. Indeed, under the standard set forth above, it is difficult to see how the rule covers the content of speech relating to a particular viewpoint. If there comes a time when the rule is so used, a challenge under the above standard can be brought.

Finally, I agree with the petitioner that the issue relative to whether the school could bar petr from the speech is moot. Respondent asserts that the damages awarded were based solely on

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[5] Suppose a school board decided that one purpose of student council was to promote public speaking habits, and then decided that all speeches given must be grammatically correct, or pre-approved by an advisor. I find it hard to believe that a school could not do this. Yet, excessive court interference into the day-to-day operations of schools would not lead to freer speech, but arguably to greater restrictions placed by schools to avoid the outside interference. Indeed, a school might decide that student run assemblies are not worth the candle.

the loss of two days' value of school, not on the lost right to speak. I also agree that the issue of whether the DC should have addressed the state law should not be decided because the CA9 did not decide it. It may also be moot, as the incident is over and it is not clear to me that this finding could support damages under §1983.

III. CONCLUSION

Under the standard set forth by the SG, I believe that the school had a reasonable basis for disciplining the conduct here. I recommend that you reverse the judgment of the CA9.

Prelim. Memo @ 3/1

84-1667 Bethel Sch Dist v. Fraser (CA9)
(Indecent speech in school assembly)

1. Question: Resp., 17 yr. old student leader in high school, made ~~a~~ indecent statements in a student political assembly ~~held~~ [held in accord with school rules] on school prop. & during school hours. A school rule ~~forbade~~ included "indecent speech" in its definition of "Disruptive Conduct".

Resp. was suspended for 3 days, & forbidden from making one of graduation speeches.

There was some "disruption"; "whoop & cheers"; speech had to be discussed in ~~classes~~ classes next day; several teachers objected. School Dist. Hearing Officer found "disruption" See Br - 3-5

also "obscene" language also included. Speech was not "obscene" under Miller standard but School used "obscene" in its popular context.

2. Courts below. DC & CA9 held Resp's first amend. rts. were violated. J. Wright dissented - emphasizing deference owed school authorities for decisions inside schools during school hours.

Also CA9's decision, ~~was~~ if approved here, would seriously undercut authority of schools to control speech within schools - however ~~a~~ indecent & when given.

3. Inclined to agree with J. Wright. Hard of our cases control. Case falls between Tinker, Pacifica, T.L.O. & Kuhlmeier

84-1667 Bethel School v. Fraser Argued 3/3/86

Coats (Petr)

Case comes up under disruptive rule of District.

Interest in maintaining an educational environment & interest.

CA9 invalidated Rule on ground of over broad & vague.

~~Few minutes~~ Before assembly two teachers advised Resp ~~that~~ her speech was inappropriate and "probably should not deliver it."

(Tinker: ~~t~~ arm bands: Ct. found students were "a silent, passive expression of opinion accompanied by no disorder or disturbance" - 393 U.S. at 508)

Resp. must have been in doubt or he went to two teachers for their advice

→ J PS is concerned by Q whether there was fair notice.

Haley (Resp)

Rule is too vague to give notice.

~~Rule so~~

Argues this was political speech.

Relies on Tinker that did involve political speech

Coats (Reply)

See Connecticut v. Mayers (BRW's OK) – distinguishing bet. political & other speech. The language at issue was not political – vulgar or obscene language in a political speech is not "political speech"

Students Rules are printed and are available in school office.

Rules of School do not have to meet criminal law standards.

Bethel School 84-1667

1. Purpose & responsibility of a High School are not limited to teaching the standard subjects.

2. Not in School authority over student conduct ~~(or speech~~ (including speech) limited to maintaining order – as Police do.

3. The broader resp. includes inculcating:
   (i) Moral values
   (ii) manners acceptable generally in civilized communities.
   (iii) decency of speech
   ~~(iv)~~ civility

Socializing functions.

4. The setting is relevant.
   In School / school hours

5. Deference owed Board

6. Not overbroad - not a criminal case.

84-1667 Bethel School Dist

(Musel notes)

1. Tinker standard: if applicable, would require affirmance.

If required a showing that the speech "materially & substantially" interfered with school discipline.

But the speech in Tinker was "political".

If necessary I could re-examine Tinker – or at least limit it to political speech.

The speech here could be viewed as "obscene" in the popular sense – & it produced simulated sexual acts by several students – as well as some disruption

Rev 6-3

No. 84-1667, Bethel School v. Fraser Conf. 3/5/86

The Chief Justice Reverse

Great deference owed School Dist.

First Amend does not, in setting of a school, limit the School Dist's authority to require civility.

Not like Tinker where there was political speech.

Rule is not vague or overbroad in context of a school.

~~Offenses~~ Offender acted reasonably.

Justice Brennan Affirm.

Students don't shed 1st amend rights at school house door.

Tinker is relevant. No ev. in record here that speech created disturbance.

CA9 correctly emphasized that officials had other means of ~~disciplining~~ imposing discipline.

Justice White Reverse

Can't believe 1st amend would prevent a Rule to effect that during an assembly speech should not include profanity or indecent language.

The notice Q is troublesome.

Not vague.

Justice Marshall

Aff'm

Language was stupid but no 1st amend violation.

Justice Blackmun

Rev.

~~Aff'd~~

Follow J. Wright's dissent.

Atmosphere & circuits are important in schools.

Justice Powell

Rev

See my notes.

Justice Rehnquist Reverse

Agree with what others have said

Justice Stevens Affirm - but not on 1st Amend, rather on no Free

There is tension between Widmar & Bender & this case.

On merits of 1st Amend issue, agree School may control the type of speech in school.

But is troubled by notice & vagueness issues. When speech that normally is protected, the students should be put on clear notice. Ninth Cir not CA9's rationale but don't buy its reasoning

Tinker most applicable

Justice O'Connor Rev.

Leave discretion to School authorities to regulate speech.

Even if school had no Rule, extreme speech could be subject of discipline

rbs 05/16/86

Helpful memo. I may do a concurring op.

I've written CJ. I'll await his response before I write a concur.

MEMORANDUM

To: Mr. Justice Powell May 16, 1986

From: Bob

No.84-1667 Bethel School Dist. v. Fraser

This opinion contains some unfortunately broad language that, I think, would not be in it if you had written it, and which, I think, detracts from the central point to be made by a case such as this.

1. I cannot see why it is necessary or proper to say things such as "Once the speech was given it became imperative for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education." See also p. 7: "The essential lessons of civil, mature conduct cannot be conveyed in the school that tolerates lewd, indecent or offensive

speech and conduct such as that engaged in by this misguided boy." The point the opinion misses by making such broad statements (suggesting a "duty" on the part of the school board to act) is that respondent should lose because school boards are better situated to make judgments about appropriate conduct than are federal courts. A school board may have decided to ignore Fraser's speech, and I do not think a court could have intervened in that event. The opinion, then, in seeming to support the school board, actually strikes a blow to decentralized decision-making by suggesting that the board had a "duty" to do what it did.

I think the case could have been resolved simply by saying that this is not nondisruptive political speech of the sort engaged in by Tinker, and that while in some cases the line between Tinker and Fraser might blur, this is a case where the school board is free to decide whether discipline is necessary and what that discipline should be. The school board has this authority because the public school does have the role of inculcating values, and in a case such as this, it is up to the school board, and not a federal court, to decide how that should be done.

2. The sentence: "Such speech has no claim to First Amendment protection," on p. 9 is far too broad and potentially dangerous unless confined to the setting of a high school assembly as here, and is a sentence that should be deleted, or qualified.

3.I note that no one has as yet joined the opinion, and you may want to wait to see whether anyone objects to any of the above before joining, or you may want to have me spell out and

circulate the above problems in greater detail in an attempt to have some changes made.

4. I still think the result reached by the chief is the correct one, and note that the opinion is good insofar as it leaves the Tinker protections in place for political speech.

May 19, 1986

PERSONAL

84-1667 Bethel School District v. Fraser

Dear Chief:

I agree, of course, with the result reached by your opinion for the Court. I also think the opinion correctly and satisfactorily distinguishes Tinker as protected political speech.

My concern relates to language in the opinion that can be read as imposing a "duty" on the part of a school board to take action in cases such as this. For example, the draft states that "it became imperative for the school to disassociate itself [from this speech] to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education." P. 9. In addition, the draft states:

> "The essential lessons of civil, mature conduct cannot be conveyed in the school that tolerates lewd, indecent or offensive speech and conduct such as that indulged in by this misguided boy." (p. 7).

While I agree with the sentiments you express, I do not think this Court should say that a school must impose discipline. Perhaps because I served for eleven years on the Richmond School Board, I would write the opinion in terms of the Board's authority to discipline respondent as distinguished from an obligation or duty to do so.

There will be close questions as to whether the language used by a student requires discipline, and the facts and circumstances can vary widely. In this case, for example, although I think the Board clearly acted correctly, I would not hold that the Board had a duty to impose discipline. All we really need to decide is that the speech was not political (as in Tinker), and therefore respondent's First Amendment rights were not violated when the School Board exercised its reasonable discretion.

I probably will write a brief concurring opinion to make the above distinction explicitly clear.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 19, 1986

84-1667 -

Bethel School District No. 403 v. Fraser

Dear Chief,

Please join me.

Sincerely yours,

Byron

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 20, 1986

PERSONAL

84-1667 Bethel School District v. Fraser

Dear Lewis:

I could probably accommodate most of your concerns if you do not write. However, if you intend to write there is reason for my trying to meet your point.

I agree that there is no issue on whether there is a duty on the school to act, but you can be damned sure that if I had a teenager in school and the authorities let this pass I'd castigate them as wholly incompetent to serve in their positions. But I'll "soften" the dictum if it will save writing.

Regards,

WEB

Justice Powell

Dear Chief, gladly
I'll await your second
draft.

Sincerely

May 20, 1986

PERSONAL

84-1667 Bethel School District v. Fraser

Dear Chief:

I'll gladly await your second draft.

Sincerely,

The Chief Justice

lfp/ss

2nd draft received & it still has language that doesn't belong in Nat doesn't belong in my opinion. I have talked to SOC who agrees with me. She will now write the CJ a personal letter 5/24

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: MAY 23 1986

Recirculated: _____

Pages 6, 7, 9

5 and/or
re writing
the CJ's
probably.
I'll await
what I
will be
a 3rd
draft
removing
some of
CJ's
dicta.
5/24

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–1667

BETHEL SCHOOL DISTRICT No. 403, ET AL., PETITIONERS *v.* MATTHEW N. FRASER, A MINOR AND E. L. FRASER, GUARDIAN AD LITEM

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

[May ——, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.

I

A

On April 26, 1983, respondent Matthew N. Fraser delivered a speech nominating a fellow student for student elective office at the Bethel High School in Bethel, Washington. Approximately 600 high school students, many of whom were 14 year olds attended the assembly. Although attendance was not mandatory, the assembly was held during school hours and on school property, as part of a school-sponsored educational program in self-government. Students who elected not to attend the assembly were required to report to study hall. During the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.

Prior to delivering his speech, Fraser discussed the contemplated remarks with several of his teachers. Two of them informed him that the speech was "inappropriate and that he probably should not deliver it," (J. A. at 30) and that

his delivery of the speech might have "severe consequences." J. A. at 61.

During Fraser's delivery of the speech, a school counselor observed the reaction of students to the speech. Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech. One teacher reported that on the day following the speech, she found it necessary to forego a portion of the scheduled class lesson in order to discuss the speech. Joint Appendix at 41–44.

A Bethel High School disciplinary rule prohibiting the use of obscene language in the school provides:

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

The morning after the assembly, the Assistant Principal called Fraser into her office and notified him that the school considered his speech to have been a violation of this rule. Fraser was presented with copies of five letters submitted by teachers, describing his conduct at the assembly; he was given a chance to explain his conduct, and he admitted to having given the speech described and that he deliberately used sexual innuendo in the speech. Fraser was then informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises.

Fraser sought review of this disciplinary action through the school district's grievance procedures. The hearing officer determined that the speech given by respondent was "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly." The examiner determined that the speech fell within the ordinary meaning of "obscene," as used in the disruptive conduct rule, and affirmed the discipline in its entirety.

Fraser served two days of his suspension, and was allowed to return to school on the third day.

B

Respondent, by his father as guardian *ad litem*, then brought this action in the United States District Court for the Western District of Washington. Respondent alleged a violation of his First Amendment right to freedom of speech and sought both injunctive relief and monetary damages under 42 U. S. C. § 1983. The District Court held that the school's sanctions violated respondent's right to freedom of speech under the First Amendment to the United States Constitution, that the school's disruptive conduct rule is unconstitutionally vague and overbroad, and that the removal of respondent's name from the graduation speaker's list violated the Due Process clause of the Fourteenth Amendment because the disciplinary rule makes no mention of such removal as a possible sanction. The District Court awarded respondent $278 in damages, $12,750 in litigation costs and attorneys fees, and enjoined the School District from preventing respondent from speaking at the commencement ceremonies. Respondent, who had been elected graduation speaker by a write-in vote of his classmates, delivered a speech at the commencement ceremonies on June 8, 1983.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, *Bethel School District No. 403* v. *Fraser*, 755 F. 2d 1356 (1985), holding that respondent's speech was indistinguishable from the protest armband in *Tinker* v. *Des Moines Independent School District*, 393 U. S. 503 (1969). The court explicitly rejected the School District's argument that the speech, unlike the passive conduct of wearing a black armband, had a disruptive effect on the educational process. The Court of Appeals also rejected the School District's argument that it had an interest in protecting an essentially captive audience of minors from lewd and indecent language in a setting sponsored by

the school, reasoning that the school board's "unbridled discretion" to determine what discourse is "decent" would "increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools." 755 F. 2d, at 1363. Finally, the Court of Appeals rejected the School District's argument that, incident to its responsibility for the school curriculum, it had the power to control the language used to express ideas during a school sponsored activity.

We granted certiorari, —— U. S. ——- (1985). We reverse.

II

This Court acknowledged in *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969) that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gates." The Court of Appeals read that case as precluding any discipline of Fraser for indecent speech and lewd conduct in the school assembly. That court appears to have proceeded on the theory that the use of lewd and obscene speech in order to make what the speaker considered to be a point in a nominating speech for a fellow student was essentially the same as the wearing of an armband in *Tinker* as a form of protest or the expression of a political position.

The marked distinction between the political "message" of the armbands in *Tinker* and the sexual content of respondents speech in this case seems to have been given little weight by the Court of Appeals. In upholding the students' right to engage in a non-disruptive, passive expression of a political viewpoint in *Tinker*, this Court was careful to note that the case did "not concern speech or action that intrudes upon the work of the schools or the rights of other students." 393 U. S., at 508.

It is against this background that we turn to consider the level of First Amendment protection accorded to Fraser's ut-

terances and actions before an official high school assembly attended by six hundred students.

III

The role and purpose of the American public school system was well described by two historians, saying "public education must prepare pupils for citizenship in the Republic. . . . It must inculcate the 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." C. Beard & M. Beard, *New Basic History of the United States* 228 (1968). In *Ambach* v. *Norwick*, 441 U. S. 68, 76–77 (1979), we echoed the essence of this statement of the objectives of public education as the "inculcat[ion] fundamental values necessary to the maintenance of a democratic political system."

These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms carries with it a responsibility to keep the plane of debate out of the gutter. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

In our nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate. The Manual of Parliamentary Practice, drafted by Thomas Jefferson and adopted by the House of Representatives to govern the proceedings in that body, prohibits the use of "impertinent" speech during debate and likewise provides that "[n]o person is to use inde-

cent language against the proceedings of the House." Jefferson's Manual of Parliamentary Practice, §§359, 360, *reprinted in* Manual and Rules of House of Representatives, House Doc. No. 271, 97th Cong. 2d Sess. 158–159 (1982); *see id.*, at 111 n. *a* (Jefferson's Manual governs the House in all cases to which it applies). The Rules of Debate applicable in the Senate likewise provide that a Senator may be called to order for imputing improper motives to another Senator or for referring offensively to any State. See Senate Procedure, S. Doc. No. 2, 97th Cong., 1st Sess. Rule XIX at 568–569, 588–591 (1981). Senators have been censured for abusive language directed at other senators. See Senate Election, Expulsion and Censure Cases from 1793 to 1972, S. Doc. 92–7, 92d Cong. 1st Sess. 95–98 (1972) (Senators McLaurin and Tillman); *id.*, at 152–153 (Senator McCarthy). Can it be that what is proscribed in the halls of Congress is acceptable in a school assembly of teenagers?

The First Amendment guarantees wide freedom in matters of adult public discourse. A sharply divided Court upheld the right to express an anti-draft viewpoint in a public place, albeit in terms highly offensive to most citizens. See *Cohen* v. *California*, 403 U. S. 15 (1971). It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, that the same latitude must be permitted to children in a public school. In *New Jersey* v. *T. L. O.*, —— U. S. ——, —— (1985), we reaffirmed that the constitutional rights of students in public school are not automatically co-extensive with the rights of adults in other settings. As 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." *Thomas* v. *Board of Education*, 607 F. 2d 1043, 1057 (CA2 1979) (Newman, J., concurring).

Surely it is a highly appropriate function of public school education to prohibit ~~that~~ the use of vulgar and offensive

terms in public discourse. Indeed, that the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the school." *Tinker*, 398 U. S., at 508; *see Ambach* v. *Norwick*, *supra*. The determination of what manner of speech is inappropriate properly rests with the school board.

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. Students who express their views without rudeness or lewdness and practice civility, however boisterous or vigorous their speech, demonstrate respect for the rights and privacy of others. The State may determine that the essential lessons of civil, mature conduct cannot be conveyed in the school that tolerates lewd, indecent or offensive speech and conduct such as that indulged in by this confused boy.

The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. See Joint Appendix at 77–81. 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.

This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children. In *Ginsberg* v. *New York*, 390 U. S. 629 (1968) this Court upheld a New York statute banning the sale of sexually oriented material to minors, even though the material in question was entitled to First Amendment protection with respect to adults. And in addressing the question whether the First Amendment places any limit on the authority of public schools to remove books from a public school library, all members of the Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar. *Board of Education* v. *Pico*, 457 U. S. 853, 871–72 (1982) (plurality opinion); *id.*, at 879–881 (JUSTICE BLACKMUN, concurring); *id.*, at 918–920 (JUSTICE REHNQUIST, dissenting). These cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis* to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.

We have also recognized an interest in protecting minors from exposure to vulgar and offensive spoken language. In *Federal Communications Commission* v. *Pacifica Foundation*, 438 U. S. 726 (1973), we dealt with the power of the Federal Communications Commission to regulate a radio broadcast described as "indecent but not obscene." There the Court reviewed an administrative condemnation of the radio broadcast of a self-styled "humorist" who described his own performance as being in "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say ever." *Id.*, at 729; see also *id.*, at 751—755 (appendix). The Commission concluded "that certain words depicted sexual and excretory activities in a patently offensive manner, and noted that they were broadcast at a time when children were 'undoubtedly in the audience.'" The Commission is-

sued an order declaring that the radio station was guilty of broadcasting indecent language in violation of 18 U. S. C. § 1464. *Id.*, at 732. The Court of Appeals set aside the Commission's determination, and we reversed, reinstating the Commission's citation of the station. We concluded that the broadcast was properly considered "obscene, indecent, or profane" within the meaning of the statute. The plurality opinion went on to reject the radio station's assertion of a First Amendment right to broadcast vulgarity:

> "These words offend for the same reason that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: '[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may derived from them is clearly outweighed by the social interest in order and morality.' *Chaplinsky* v. *New Hampshire*, 355 U. S., at 572." 438 U. S. at 746.

We hold that petitioner acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. By offering a vulgar and lewd speech under the transparent guise of a student political campaign, these utterances and the conduct they provoked undermined the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards a captive audience of teenage students. Such speech has no claim to First Amendment protection. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education. Justice Black, dissenting in *Tinker*, *supra*, made a point that is especially relevant in this case:

"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 pubic school system to public school students." 393 U. S., at 522, 526.

IV

Respondent contends that the circumstances of his suspension violated due process because he had no way of knowing that the delivery of the speech in question would subject him to disciplinary sanctions. This argument is wholly without merit. We have recognized that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." *New Jersey* v. *T. L. O.*, —— U. S. ——, —— (1985). Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions. Cf. *Arnett* v. *Kennedy*, 416 U. S. 134, 161 (1974) (JUSTICE REHNQUIST, concurring). Two days suspension from school does not rise to the level of a penal sanction calling for the full panoply of procedural due process protections applicable to a criminal prosecution. Cf. *Goss* v. *Lopez*, 419 U. S. 565 (1975). The school disciplinary rule proscribing "obscene" language and the pre-speech admonitions of teachers gave adequate warning to Fraser that his lewd speech could subject him to sanctions.*

---

*Petitioners also challenge the ruling of the District Court that the removal of Fraser's name from the ballot for graduation speaker violated his due process rights because that sanction was not indicated as a potential punishment in the school's disciplinary rules. We agree with the Court of Appeals that this issue has become moot, since the graduation ceremony has long since passed and Fraser was permitted to speak in accordance with the District Court's injunction. No part of the damage award was

The judgment of the Court of Appeals for the Ninth Circuit is

Reversed.

APPENDIX TO THE OPINION OF THE COURT

The following is a transcript of the speech delivered by respondent at the school assembly.

> "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." Joint Appendix at 47.

---

based upon the removal of Fraser's name from the list, since damages were based upon the loss of two days schooling.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 27, 1986

Re: No. 84-1667-Bethel School District No. 403 v. Matthew N. Fraser

Dear Chief:

I await the dissent.

Sincerely,

TM

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 28, 1986

Re: 84-1667 - Bethel School District No. 403 v. Fraser

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 28, 1986

No. 84-1667

Bethel School v. Fraser

Dear Chief,

Although I am not yet certain what disposition I'll reach, I will be writing separately in this case.

Sincerely,

WJB

The Chief Justice

Copies to the Conference

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

L 7 P.

From: **The Chief Justice**

5,6,7,9

Circulated: JUN 12 1986

Recirculated: _____

The C.J. finally makes - reluctantly it appears - my point that in the School Bd that ~~no~~ make decisions as to appropriateness of speech. pp 7 + 9

Join

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–1667

BETHEL SCHOOL DISTRICT NO. 403, ET AL., PETITIONERS *v.* MATTHEW N. FRASER, A MINOR AND E. L. FRASER, GUARDIAN AD LITEM

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

[June ——, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.

I

A

On April 26, 1983, respondent Matthew N. Fraser delivered a speech nominating a fellow student for student elective office at the Bethel High School in Bethel, Washington. Approximately 600 high school students, many of whom were 14 year olds attended the assembly. Although attendance was not mandatory, the assembly was held during school hours and on school property, as part of a school-sponsored educational program in self-government. Students who elected not to attend the assembly were required to report to study hall. During the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.

Prior to delivering his speech, Fraser discussed the contemplated remarks with several of his teachers. Two of them informed him that the speech was "inappropriate and that he probably should not deliver it," (J. A. at 30) and that

his delivery of the speech might have "severe consequences." J. A. at 61.

During Fraser's delivery of the speech, a school counselor observed the reaction of students to the speech. Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech. One teacher reported that on the day following the speech, she found it necessary to forego a portion of the scheduled class lesson in order to discuss the speech. Joint Appendix at 41–44.

A Bethel High School disciplinary rule prohibiting the use of obscene language in the school provides:

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

The morning after the assembly, the Assistant Principal called Fraser into her office and notified him that the school considered his speech to have been a violation of this rule. Fraser was presented with copies of five letters submitted by teachers, describing his conduct at the assembly; he was given a chance to explain his conduct, and he admitted to having given the speech described and that he deliberately used sexual innuendo in the speech. Fraser was then informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises.

Fraser sought review of this disciplinary action through the school district's grievance procedures. The hearing officer determined that the speech given by respondent was "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly." The examiner determined that the speech fell within the ordinary meaning of "obscene," as used in the disruptive conduct rule, and affirmed the discipline in its entirety.

Fraser served two days of his suspension, and was allowed to return to school on the third day.

B

Respondent, by his father as guardian *ad litem*, then brought this action in the United States District Court for the Western District of Washington. Respondent alleged a violation of his First Amendment right to freedom of speech and sought both injunctive relief and monetary damages under 42 U. S. C. § 1983. The District Court held that the school's sanctions violated respondent's right to freedom of speech under the First Amendment to the United States Constitution, that the school's disruptive conduct rule is unconstitutionally vague and overbroad, and that the removal of respondent's name from the graduation speaker's list violated the Due Process clause of the Fourteenth Amendment because the disciplinary rule makes no mention of such removal as a possible sanction. The District Court awarded respondent $278 in damages, $12,750 in litigation costs and attorneys fees, and enjoined the School District from preventing respondent from speaking at the commencement ceremonies. Respondent, who had been elected graduation speaker by a write-in vote of his classmates, delivered a speech at the commencement ceremonies on June 8, 1983.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, *Bethel School District No. 403* v. *Fraser*, 755 F. 2d 1356 (1985), holding that respondent's speech was indistinguishable from the protest armband in *Tinker* v. *Des Moines Independent School District*, 393 U. S. 503 (1969). The court explicitly rejected the School District's argument that the speech, unlike the passive conduct of wearing a black armband, had a disruptive effect on the educational process. The Court of Appeals also rejected the School District's argument that it had an interest in protecting an essentially captive audience of minors from lewd and indecent language in a setting sponsored by

the school, reasoning that the school board's "unbridled discretion" to determine what discourse is "decent" would "increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools." 755 F. 2d, at 1363. Finally, the Court of Appeals rejected the School District's argument that, incident to its responsibility for the school curriculum, it had the power to control the language used to express ideas during a school sponsored activity.

We granted certiorari, —— U. S. —— (1985). We reverse.

II

This Court acknowledged in *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969) that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gates." The Court of Appeals read that case as precluding any discipline of Fraser for indecent speech and lewd conduct in the school assembly. That court appears to have proceeded on the theory that the use of lewd and obscene speech in order to make what the speaker considered to be a point in a nominating speech for a fellow student was essentially the same as the wearing of an armband in *Tinker* as a form of protest or the expression of a political position.

The marked distinction between the political "message" of the armbands in *Tinker* and the sexual content of respondents speech in this case seems to have been given little weight by the Court of Appeals. In upholding the students' right to engage in a non-disruptive, passive expression of a political viewpoint in *Tinker*, this Court was careful to note that the case did "not concern speech or action that intrudes upon the work of the schools or the rights of other students." 393 U. S., at 508.

It is against this background that we turn to consider the level of First Amendment protection accorded to Fraser's ut-

terances and actions before an official high school assembly attended by six hundred students.

III

The role and purpose of the American public school system was well described by two historians, saying "public education must prepare pupils for citizenship in the Republic. . . . It must inculcate the 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." C. Beard & M. Beard, *New Basic History of the United States* 228 (1968). In *Ambach* v. *Norwick*, 441 U. S. 68, 76–77 (1979), we echoed the essence of this statement of the objectives of public education as the "inculcat[ion] fundamental values necessary to the maintenance of a democratic political system."

These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. 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. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

In our nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate. The Manual of Parliamentary Practice, drafted by Thomas Jefferson and adopted by the House of Representatives to govern the proceedings in that

body, prohibits the use of "impertinent" speech during debate and likewise provides that "[n]o person is to use indecent language against the proceedings of the House." Jefferson's Manual of Parliamentary Practice, §§ 359, 360, *reprinted in* Manual and Rules of House of Representatives, House Doc. No. 271, 97th Cong. 2d Sess. 158–159 (1982); *see id.*, at 111 n. *a* (Jefferson's Manual governs the House in all cases to which it applies). The Rules of Debate applicable in the Senate likewise provide that a Senator may be called to order for imputing improper motives to another Senator or for referring offensively to any State. See Senate Procedure, S. Doc. No. 2, 97th Cong., 1st Sess. Rule XIX at 568–569, 588–591 (1981). Senators have been censured for abusive language directed at other senators. See Senate Election, Expulsion and Censure Cases from 1793 to 1972, S. Doc. 92–7, 92d Cong. 1st Sess. 95–98 (1972) (Senators McLaurin and Tillman); *id.*, at 152–153 (Senator McCarthy). Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?

The First Amendment guarantees wide freedom in matters of adult public discourse. A sharply divided Court upheld the right to express an anti-draft viewpoint in a public place, albeit in terms highly offensive to most citizens. See *Cohen* v. *California*, 403 U. S. 15 (1971). It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, that the same latitude must be permitted to children in a public school. In *New Jersey* v. *T. L. O.*, —— U. S. ——, —— (1985), we reaffirmed that the constitutional rights of students in public school are not automatically co-extensive with the rights of adults in other settings. As 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." *Thomas* v. *Board of Education*, 607 F. 2d 1043, 1057 (CA2 1979) (Newman, J., concurring).

Surely it is a highly appropriate function of public school education to prohibit that the use of vulgar and offensive terms in public discourse. Indeed, that the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the school." *Tinker*, 398 U. S., at 508; *see Ambach* v. *Norwick*, *supra*. The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. Students who express their views without rudeness or lewdness and practice civility, however boisterous or vigorous their speech, demonstrate respect for the rights and privacy of others. The State may determine that the essential lessons of civil, mature conduct cannot be conveyed in the school that tolerates lewd, indecent or offensive speech and conduct such as that indulged in by this confused boy.

The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. See Joint Appendix at 77–81. 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 re-

ported as bewildered by the speech and the reaction of mimicry it provoked.

This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children. In *Ginsberg* v. *New York*, 390 U. S. 629 (1968) this Court upheld a New York statute banning the sale of sexually oriented material to minors, even though the material in question was entitled to First Amendment protection with respect to adults. And in addressing the question whether the First Amendment places any limit on the authority of public schools to remove books from a public school library, all members of the Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar. *Board of Education* v. *Pico*, 457 U. S. 853, 871–72 (1982) (plurality opinion); *id.*, at 879–881 (JUSTICE BLACKMUN, concurring); *id.*, at 918–920 (JUSTICE REHNQUIST, dissenting). These cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis* to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.

We have also recognized an interest in protecting minors from exposure to vulgar and offensive spoken language. In *Federal Communications Commission* v. *Pacifica Foundation*, 438 U. S. 726 (1973), we dealt with the power of the Federal Communications Commission to regulate a radio broadcast described as "indecent but not obscene." There the Court reviewed an administrative condemnation of the radio broadcast of a self-styled "humorist" who described his own performance as being in "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say ever." *Id.*, at 729; see also *id.*, at 751—755 (appendix). The Commission concluded "that certain words depicted sexual and excretory activities in a patently offensive manner,

and noted that they were broadcast at a time when children were 'undoubtedly in the audience.'" The Commission issued an order declaring that the radio station was guilty of broadcasting indecent language in violation of 18 U. S. C. § 1464. *Id.*, at 732. The Court of Appeals set aside the Commission's determination, and we reversed, reinstating the Commission's citation of the station. We concluded that the broadcast was properly considered "obscene, indecent, or profane" within the meaning of the statute. The plurality opinion went on to reject the radio station's assertion of a First Amendment right to broadcast vulgarity:

> "These words offend for the same reason that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: '[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may derived from them is clearly outweighed by the social interest in order and morality.' *Chaplinsky* v. *New Hampshire*, 355 U. S., at 572." 438 U. S. at 746.

We hold that petitioner acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.

Justice Black, dissenting in *Tinker*, *supra*, made a point that is especially relevant in this case:

> "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 pubic school system to public school students." 393 U. S., at 522, 526.

IV

Respondent contends that the circumstances of his suspension violated due process because he had no way of knowing that the delivery of the speech in question would subject him to disciplinary sanctions. This argument is wholly without merit. We have recognized that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." *New Jersey* v. *T. L. O.*, —— U. S. ——, —— (1985). Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions. Cf. *Arnett* v. *Kennedy*, 416 U. S. 134, 161 (1974) (JUSTICE REHNQUIST, concurring). Two days suspension from school does not rise to the level of a penal sanction calling for the full panoply of procedural due process protections applicable to a criminal prosecution. Cf. *Goss* v. *Lopez*, 419 U. S. 565 (1975). The school disciplinary rule proscribing "obscene" language and the pre-speech admonitions of teachers gave adequate warning to Fraser that his lewd speech could subject him to sanctions.*

*Petitioners also challenge the ruling of the District Court that the removal of Fraser's name from the ballot for graduation speaker violated his due process rights because that sanction was not indicated as a potential punishment in the school's disciplinary rules. We agree with the Court of Appeals that this issue has become moot, since the graduation ceremony

The judgment of the Court of Appeals for the Ninth Circuit is

Reversed.

APPENDIX TO THE OPINION OF THE COURT

The following is a transcript of the speech delivered by respondent at the school assembly.

> "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." Joint Appendix at 47.

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has long since passed and Fraser was permitted to speak in accordance with the District Court's injunction. No part of the damage award was based upon the removal of Fraser's name from the list, since damages were based upon the loss of two days schooling.

June 12, 1986

84-1667 Bethel School District v. Fraser

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 12, 1986

No. 84-1667 Bethel School District No. 403 v. Fraser

Dear Chief,

Please join me.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

July 1, 1986

Re: No. 84-1667, Bethel School v. Fraser

Dear Chief:

At the foot of your opinion, would you please add:

"JUSTICE BLACKMUN concurs in the result."

Sincerely,

HAB

The Chief Justice

cc: The Conference

84-1667 Bethel School v. Fraser (Mike)

CJ for the Court 3/10/86
1st draft 5/13/86
3rd draft 6/12/86
4th draft 6/12/86
5th draft 6/26/86
6th draft 7/2/86
Joined by BRW 5/19/86
WHR 5/28/86
SOC 6/12/86
LFP 6/12/86

JPS dissenting
1st draft 7/1/86
2nd draft 7/2/86

WJB concurring in the judgment
1st draft 7/1/86
2nd draft 7/2/86

HAB concurs in the result 7/1/86

TM dissenting
1st draft 7/2/86

TM awaiting dissent 5/27/86

WJB will write separately 5/28/86