BETHEL SCHOOL DISTRICT NO. 403
v.
FRASER

SUPREME COURT OF THE UNITED STATES
478 U.S. 675
July 7, 1986
[7 – 2]

OPINION: Chief Justice BURGER…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…[as] part of a school-sponsored educational program in self-government…During the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.

Two of Fraser's teachers, with whom he discussed the contents of his speech in advance, informed him that the speech was "inappropriate and that he probably should not deliver it" and that his delivery of the speech might have "severe consequences."

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 forgo a portion of the scheduled class lesson in order to discuss the speech with the class.

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 <u>obscene, profane language or gestures</u>."**

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…[He admitted 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…then brought this action…[and] alleged a violation of his First Amendment right to freedom of speech and sought both injunctive relief and monetary damages…**The District Court held that the school's sanctions violated respondent's right to freedom of speech under the First Amendment…, 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 attorney's 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…affirmed…, holding that respondent's speech was indistinguishable from the protest armband in *Tinker*[1]**…**We granted certiorari [and we **REVERSE**.]

Give an admittedly lewd speech, receive punishment, sue, win $$$ and, more importantly, thumb your nose at elected adult school board members and teachers. Surely this will not hold up in the Supreme Court.

…**The Court of Appeals…**appears to have proceeded on the theory that the use of lewd and obscene speech in order to make…[a point] was essentially the same as the wearing of an armband in *Tinker* as a form of protest or the expression of a political position…In upholding the students' right to engage in a nondisruptive, 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."…

The role and purpose of the American public school system were well described by two historians, who stated: "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 (1968)…

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 behavior. **Even the most heated**

[1] Case 1A-S-18 on this website.

political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

In our Nation's legislative halls…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."…Senators have been censured for abusive language directed at other Senators. **Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?**

> Personally, I feel the ghost of John Marshall saying, "Keep it simple. Stay away from metaphysical thinking and the Country will be just fine." This truly is simple. Could it be possible that we would interpret the Constitution to protect a minor's desire to give a lewd speech in a school designed to teach him social graces and good citizenship, while censuring elected adults for doing the same thing on the floor of Congress? Simply put, lewd behavior by children in the wrong place at the wrong time (public school) was never intended to fall under the rubric of "protected speech."

The First Amendment guarantees wide freedom in matters of adult public discourse. A sharply divided Court upheld the right to express an antidraft viewpoint in a public place, albeit in terms highly offensive to most citizens. *Cohen v. California*[2]. **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, the same latitude must be permitted to children in a public school.** In *New Jersey v. T.L.O.* (1985)[3], we reaffirmed that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings…"[T]he 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, Granville Central School Dist.* (CA2 1979).

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse…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 schools." *Tinker*. 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…**The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.**

[2] Case 1A-S-20 on this website.
[3] Case 4A-5 on this website.

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. 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*[4] 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.*[5] 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 *FCC v. Pacifica Foundation* (1978)[6], we dealt with the power of the FCC 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." 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. 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 reasons 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 be

[4] Case 1A-S-14 on this website.
[5] Case 1A-S-31 on this website.
[6] Case 1A-S-30 on this website.

> derived from them is clearly outweighed by the social interest in order and morality.' *Chaplinsky v. New Hampshire*.[7]

We hold that petitioner School District 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*, 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 public school system to public school students."**

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.* 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. **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.** 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. The judgment of the Court of Appeals for the Ninth Circuit is reversed.

CONCURRENCE: Justice BLACKMUN/BRENNAN…Respondent gave the following speech at a high school assembly in support of a candidate for student government office:

> "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 A.S.B. vice-president—he'll never come between you and the best our high school can be."

[**The rest of this concurrence is omitted as it does not add much.**]

[7] Case 1A-S-8 on this website.

DISSENT: Justice MARSHALL…I dissent from the Court's decision…because in my view the School District failed to demonstrate that respondent's remarks were indeed **disruptive**…

I know there are some who disagree, but in my opinion, this type of jurisprudence serves to destroy the true spirit of freedom as envisioned by the Framers. I have absolutely no doubt that they would have railed at Justice Thurgood Marshall's dissent. I guess he approves of "nondisruptive vulgarity" in the schools.

DISSENT: Justice STEVENS…"Frankly, my dear, I don't give a damn." When I was a high school student, the use of those words in a public forum shocked the Nation. Today Clark Gable's four-letter expletive is **less offensive than it was then**. Nevertheless, I assume that high school administrators may prohibit the use of that word in classroom discussion and even in extracurricular activities that are sponsored by the school and held on school premises. For I believe a school faculty must regulate the content as well as the style of student speech in carrying out its educational mission. It does seem to me, however, that if a student is to be punished for using offensive speech, **he is entitled to fair notice of the scope of the prohibition and the consequences of its violation…** This respondent was an outstanding young man with a fine academic record. **The fact that he was chosen by the student body to speak at the school's commencement exercises demonstrates that he was respected by his peers.**

Oh, my. It would appear that Justice Stevens is not in touch with the real world. By all indications, Fraser was chosen to speak at his commencement exercise by a write-in vote (he was not on the ballot as part of his punishment for giving the lewd speech) (1) **after** he had defied his school officials and gave the lewd speech, (2) **after** he filed a rather ridiculous lawsuit, and (3) **after** the District Court made him a hero by granting him a judgment against his school. Please, Justice Stevens. Respected by his peers? Respected for taking a stand in support of lewd behavior! Respected for snubbing authority. Anyway, it is just hard for me to believe a Supreme Court Justice is persuaded by a write-in vote under these circumstances. Discuss!

This fact…indicates that he was probably in a better position to determine whether an audience composed of 600 of his contemporaries would be offended by the use of a four-letter word—or a sexual metaphor—than is a group of judges who are at least two generations and 3,000 miles away from the scene of the crime.

What? Is Justice Stevens actually judging the constitutionality of Fraser's lewd presentation by whether "Fraser's contemporaries" would likely be offended? Measured by Fraser's pre-speech predictions? He surely must realize that no one would suspect that most high school students would "be offended" in 1986 by these words. But, that is not the issue and, if it were, at a minimum, the school district staff would surely be in a far better position on the scene of the crime at the time of the crime than a group of judges **anywhere**, much less 3,000 miles away! Justice Stevens seems to have forgotten about the **elected folks** --- the ones charged by the voters with the responsibility of molding young people into responsible adults. This is irresponsible jurisprudence in my estimation.

The fact that the speech may not have been offensive to his audience—or that he honestly believed that it would be inoffensive does not mean that he had a constitutional right to deliver it. For the school—not the student—must prescribe the rules of conduct in an educational institution. But it does mean that he should not be disciplined for speaking frankly in a school assembly if he had no reason to anticipate punitive consequences.

You may not agree, but it would appear that Justice Stevens would not convict a killer unless it were proven that at some time in the killer's life he was told it was wrong to kill. No reason to anticipate punitive consequences? To me, this kind of "attitude at the top" **is** a major cause of the ills of our society. Justice Stevens would rather see this "fine young man" win a money judgment against his authority figures than learn a valuable lesson.

One might conclude that respondent should have known that he would be punished for giving this speech on three quite different theories: (1) It violated the "Disruptive Conduct" rule published in the student handbook; (2) he was specifically warned by his teachers; or (3) the impropriety is so obvious that no specific notice was required. I discuss each theory in turn.

The Disciplinary Rule

At the time the discipline was imposed, as well as in its defense of this lawsuit, the school took the position that respondent violated the following published rule:

> "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."

Based on the findings of fact made by the District Court, the Court of Appeals concluded that the evidence did not show "that the speech had a materially disruptive effect on the educational process"…: "The record now before us yields no evidence that Fraser's use of a sexual innuendo in his speech materially interfered with activities at Bethel High School. While the students' reaction to Fraser's speech may fairly be characterized as **boisterous**, it was **hardly disruptive of the educational process**. In the words of Mr. McCutcheon, the school counselor whose testimony the District relies upon, the reaction of the student body 'was not atypical to a high school auditorium assembly.' In our view, a noisy response to the speech and sexually suggestive movements by three students in a crowd of 600 fail to rise to the level of a material interference with the educational process that justifies impinging upon Fraser's First Amendment right to express himself freely…

"*boisterous*": rowdy, stormy, tumultuous. Webster's New Collegiate Dictionary.

"*disruptive*": to cause to break down, to throw into disorder. Webster, again.

Now we have a Supreme Court Justice trying to tell a local school board that this speech was not disruptive --- from 3,000 miles away no less! Sorry – that is just an abuse of power!

Please, Justice Stevens. You just don't get it. We are not talking about the atypical response of three in a crowd of 600 as the benchmark of "disruption." The disruptive nature of this event has far greater ramifications than the immediate consequences of an afternoon assembly. It has to do with common respect. The kind of thing you seem so willing to see break down in our society. And, what you fail to recognize is that literally no one "has the right to express himself **freely anywhere anytime**." If that were so, we would not need **any lawsuit** for folks like you to determine the limits of that freedom.

[T]he evidence in the record, as interpreted by the District Court and the Court of Appeals, makes it perfectly clear that respondent's speech was not "conduct" prohibited by the disciplinary rule. Indeed, even if the language of the rule could be stretched to encompass the nondisruptive use of obscene or profane language, there is no such language in respondent's speech. What the speech does contain is a sexual metaphor that may unquestionably be offensive to some listeners in some settings. But if an impartial judge puts his or her own views about the metaphor to one side, I simply cannot understand how he or she could conclude that it is embraced by the above-quoted rule. At best, the rule is sufficiently ambiguous that without a further explanation or construction it could not advise the reader of the student handbook that the speech would be forbidden.

Respondent read his speech to three different teachers before he gave it. Mrs. Irene Hicks told him that she thought the speech "was inappropriate and that he probably should not deliver it." Steven DeHart told respondent "that this would indeed cause problems in that it would raise eyebrows." The third teacher, Shawn Madden, did not testify. None of the three suggested that the speech might violate a school rule.

The fact that respondent reviewed the text of his speech with three different teachers before he gave it does indicate that he must have been aware of the possibility that it would provoke an adverse reaction, but the teachers' responses certainly did not give him any better notice of the likelihood of discipline than did the student handbook itself. In my opinion, therefore, the most difficult question is whether the speech was so obviously offensive that an intelligent high school student must be presumed to have realized that he would be punished for giving it.

Obvious Impropriety

…It seems fairly obvious that respondent's speech would be inappropriate in certain classroom and formal social settings. On the other hand, in a locker room or perhaps in a school corridor the metaphor in the speech might be regarded as rather routine comment. If this be true, and if respondent's audience consisted almost entirely of young people with whom he conversed on a daily basis, can we—at this distance—confidently assert that he must have known that the school administration would punish him for delivering it?

Justice Stevens, distance is so totally irrelevant. And, so is his knowledge, right? No one could ever determine what he "must have known." The issue is what he "should have known." And, I simply cannot believe you would suggest that an assembly of the entire school (teachers and administration included) would be the "appropriate time" to use "locker room lingo." Flag on the field! That is a Real World Violation, for sure!

For three reasons, I think not. First, it seems highly unlikely that he would have decided to deliver the speech if he had known that it would result in his suspension and disqualification from delivering the school commencement address. Second, I believe a strong presumption in favor of free expression should apply whenever an issue of this kind is arguable. Third, **because the Court has adopted the policy of applying contemporary community standards in evaluating expression with sexual connotations, this Court should defer to the views of the district and circuit judges who are in a much better position to evaluate this speech than we are.** I would affirm the judgment of the Court of Appeals.

Outrageous! The local elected school board is far, far better at "applying contemporary community standards" than any judge. In fact, you should defer to the views of the elected school officials. They know far better how to handle such situations than you, Justice Stevens --- 3,000 miles away --- trained in law, not in education!