

CASENOTE

Protecting A School's Interest in Value Inculcation to the Detriment of Students' Free Expression Rights: *Bethel School District v. Fraser*¹ — An inherent tension exists between the free expression rights of students and the public school authorities' need to maintain the effective disciplinary procedures necessary to promote the educational process.² This tension is a result of the need to encourage students to participate in engaging, provocative discourse at school, but to discipline that discourse when it crosses the line of acceptability. The United States Supreme Court's decisions in this area reflect the difficulty in determining the parameters of acceptability within the public school environment.³

The United States Supreme Court stated in 1969, in *Tinker v. Des Moines School District*, that students do not shed their constitutional rights at the schoolhouse gates.⁴ The Court judged the legitimacy of student expression by inquiring as to whether it invaded other students' rights or substantially disrupted the educational process.⁵ Not surprisingly, the *Tinker* Court's recognition that students retain constitutional rights while at school led to a marked increase in students' rights litigation.⁶ Though the outcomes were mixed, many commentators felt that the fears that Justice Black expressed in dissent in *Tinker*⁷ had come true: the public schools were surrendering control to the students.⁸

¹ 106 S. Ct. 3159 (1986).

² See *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 507 (1969) (examining the "area where students in the exercise of First Amendment rights collide with the rules of the school authorities").

³ See, e.g., *id.* at 503 (suspension of students for wearing black armbands unconstitutional); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (suspension of students for refusal to salute the flag unconstitutional).

⁴ 393 U.S. at 506.

⁵ *Id.* at 509.

⁶ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (fourth amendment prohibition against unreasonable searches and seizures applicable to school officials); *Board of Educ. v. Pico*, 457 U.S. 853 (1982) (first amendment limits school official's discretion in removing library books); *Ingraham v. Wright*, 430 U.S. 651 (1977) (eighth amendment's cruel and unusual punishment clause not applicable to school official's corporal punishment of student); *Goss v. Lopez*, 419 U.S. 565 (1975) (fourteenth amendment entitles students facing suspensions to some procedural due process requirements).

⁷ *Tinker*, 393 U.S. at 525-26 (Black, J., dissenting). Justice Black's dissent is quoted in part *infra* note 115.

⁸ See, e.g., Wilkinson, *Goss v. Lopez: The Supreme Court as School Superintendent*, 1975 SUP. CT. REV. 25, 72 (stating that "[r]espect for democratic institutions will equally dissipate if they are thought too ineffectual to provide their students an environment of order in which the educational process may go forward"). Wilkinson expressly noted the growing disciplinary problems in public schools. *Id.* at 64-65 (citing Nemy, *Violence in Schools Now Seen as Norm Across the Nation*, N.Y. Times, June 14, 1975, at 1, col. 4; Barnes, *Violence Soars in U.S. Schools*, Washington Post, Apr. 10, 1975, at 1, col. 2; U.S. SENATE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE TO INVESTIGATE JUVENILE DELINQUENCY, 94TH CONG., 1ST SESS., OUR NATION'S SCHOOLS—A REPORT CARD: "A" IN SCHOOL VIOLENCE AND VANDALISM (Comm. Print 1975)). See also Haskell, *Student Expression in the Public Schools: Tinker Distinguished*, 59 GEO. L.J. 37, 51-53 (1970) (questioning the soundness of *Tinker* and stating that application of "constitutional principles applicable to the community at large to the advocacy of rule violation, ridicule of teachers and administrators, and obscenity and profanity in this unique and special-purpose environment is misplaced liberalism").

The Court's recent decision in *Bethel School District v. Fraser*, however, may halt this perceived trend by emphasizing school officials' discretion to pursue school objectives.⁹ In *Fraser*, the plaintiff, a seventeen year old senior at Bethel High School in Tacoma, Washington, delivered a speech, during school hours at a student-run assembly, nominating a classmate for student elective office.¹⁰ Students could choose either to attend the assembly or report to the study hall. Approximately 600 students attended the assembly.¹¹ At the assembly, Fraser delivered a brief metaphorical speech:

I know a man who is firm — he's firm in his pants, he's firm in his shirt, his character is firm — but most . . . of all his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts — he drives hard, pushing and pushing until finally — he succeeds.

Jeff is a man who will go to the very end — even the climax, for each and every one of you.

So vote for Jeff for A.S.B. vice-president — he'll never come between you and the best our high school can be.¹²

The students' reactions were mixed; some hooted and hollered, others appeared bewildered, and a few simulated the sexual activity alluded to in the speech.¹³ Fraser's speech did not delay the assembly program, however, and the students were dismissed on time.¹⁴

The next morning, after receiving letters commenting on the speech from four¹⁵ teachers, the assistant principal called Fraser into her office and charged him with violating the school's disruptive conduct rule.¹⁶ The assistant principal gave Fraser an opportunity to defend his speech, then suspended him for three days and removed his name from the list of possible graduation speakers.¹⁷ Fraser then filed a disciplinary action grievance with Bethel School District's superintendent.¹⁸ A hearing officer denied Fraser's grievance and allowed the punishment to stand.¹⁹

⁹ 106 S. Ct. 3159 (1986).

¹⁰ *Id.* at 3162.

¹¹ *Id.*

¹² *Id.* at 3167 (Brennan, J., concurring in the judgment).

¹³ *Id.* at 3162. While the Ninth Circuit described the reaction as "boisterous," the court noted that it was hardly disruptive. *Id.* at 3170 (Stevens, J., dissenting) (quoting *Fraser v. Bethel School Dist.*, 755 F.2d 1356, 1360 (9th 1985), *rev'd*, 106 S. Ct. 3159 (1986)).

¹⁴ Although the Supreme Court did not mention this fact, the Ninth Circuit made it clear that the speech did not delay the program. *Fraser*, 755 F.2d at 1360.

¹⁵ Although the Supreme Court stated that the assistant principal received five letters, *Fraser*, 106 S. Ct. at 3162, the Ninth Circuit stated that the assistant principal had received only four letters. *Fraser*, 755 F.2d at 1360 (citing Finding of Fact No. 8).

¹⁶ *Fraser*, 106 S. Ct. at 3162. The rule stated, "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.* Before delivering the speech, Fraser had three teachers review it. *Id.* at 3171 (Stevens, J., dissenting). Although at least three of the teachers told Fraser that the speech was inappropriate, none suggested that it violated the school's disciplinary code. *Id.* (Stevens, J., dissenting). Moreover, although the letters sent to the principal suggested that Fraser's speech was inappropriate, the Ninth Circuit noted that none stated that it disrupted the assembly. *Fraser*, 755 F.2d at 1360-61 (citing Finding of Fact No. 8).

¹⁷ *Fraser*, 106 S. Ct. at 3162.

¹⁸ *Id.*

¹⁹ *Id.* at 3162-63.

Alleging that Bethel School District had violated his first amendment right of free speech, Fraser brought a civil rights action in the United States District Court for the Western District of Washington.²⁰ He sought injunctive relief and monetary damages for the violation of his constitutional rights under Title 42 of the United States Code, Section 1983.²¹ The district court found for Fraser, holding that the school district violated Fraser's free speech rights.²² The court awarded Fraser nominal damages and attorneys' fees and enjoined the school district from precluding Fraser from giving a graduation address.²³

Affirming the district court's judgment, the Ninth Circuit Court of Appeals applied the standard the United States Supreme Court enunciated in *Tinker*, which protects non-disruptive speech that does not violate the rights of others.²⁴ The Ninth Circuit affirmed the district court's finding that the school district had failed to show that Fraser's speech materially disrupted the educational process.²⁵ Furthermore, the Ninth Circuit concluded that because the students voluntarily chose to attend the assembly, the speech did not intrude upon their privacy.²⁶ While acknowledging that school officials have the right to control school curriculum content, the Ninth Circuit found that Fraser's nominating speech was not part of the school curriculum.²⁷ Thus, the Ninth Circuit concluded, the school could not control the speech.²⁸ The school district petitioned for a writ of certiorari, which the United States Supreme Court granted.²⁹

The Supreme Court held 7-2 that the first amendment does not prevent school districts from disciplining students for their use of offensive speech in a high school assembly.³⁰ Factually disdistinguishing *Tinker*, the Court found that the speech disrupted the educational purpose of the school, which includes prohibiting the use of offensive speech, and impinged upon the rights of other students.³¹ The Court also rested its decision on the state's interest in protecting minors from exposure to vulgar language.³²

²⁰ *Id.* at 3163. He was joined by his father as guardian ad litem. *Id.*

²¹ *Id.* Fraser alleged that the school district's punishment violated his first amendment right of free speech and his fourteenth amendment due process right of fair notice of prohibited conduct. *Id.* The first amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I. This prohibition applies to the states through the due process clause of the fourteenth amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). The fourteenth amendment provides, in pertinent part, that no "State [shall] deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

Under 42 U.S.C. § 1983, individuals may bring suit against

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws

⁴² U.S.C. § 1983 (1982).

²² *Fraser*, 106 S. Ct. at 3163.

²³ *Id.*

²⁴ *Fraser*, 755 F.2d at 1359-63.

²⁵ *Id.* at 1359-61.

²⁶ *Id.* at 1361-63.

²⁷ *Id.* at 1363-65.

²⁸ *Id.* at 1365.

²⁹ The Supreme Court granted certiorari at 106 S. Ct. 56 (1985).

³⁰ *Fraser*, 106 S. Ct. at 3166.

³¹ *Id.* at 3163.

³² *Id.* at 3165.

Justice Blackmun concurred in the result without opinion.³³ Justice Brennan concurred in the judgment, stating that the school district's interest in teaching and maintaining civil public discourse outweighed the student's first amendment rights in this case.³⁴ Justice Marshall dissented, however, believing that the court of appeals had applied correctly the *Tinker* standard.³⁵ Justice Stevens also dissented, concluding that Bethel School District violated Fraser's fourteenth amendment right to due process because Fraser did not receive fair notice that this type of speech was prohibited.³⁶

Under traditional interpretations of the *Tinker* test, the first amendment protected Fraser's speech because it neither substantially disrupted school proceedings nor interfered with other students' rights.³⁷ Furthermore, Fraser's speech does not fit into other categories of expression which the Court has excepted from first amendment protection.³⁸ Yet the Court concluded that the school board could punish Fraser's expression because it interfered with the school's role as an inculcator of civic values.³⁹ *Fraser* thus expands the *Tinker* concept of substantial disruption of the educational process to include speech which disrupts the school's value inculcation purpose. School officials now have the authority to regulate any speech they consider to be offensive, thus depriving students of fair notice of what speech is forbidden.⁴⁰ This unpredictability will result in a "chilling effect" on student speech.⁴¹ While critics of *Tinker* might hail *Fraser* for returning classroom control to the teachers, for students, *Fraser* reduces the first amendment to a mere platitude.⁴² The Supreme Court's upcoming decision in *Kuhlmeier v. Hazelwood School District*, however, may limit *Fraser*'s impact.⁴³

Section one of this casenote will review the background of students' constitutional rights. After first exploring a judicial view of the role of public schools,⁴⁴ this casenote will examine school officials' authority to pursue educational goals and the effect of this authority on students' constitutional rights.⁴⁵ The casenote will then review the history

³³ *Id.* at 3167.

³⁴ *Id.* at 3167-68 (Brennan, J., concurring in the judgment).

³⁵ *Id.* at 3168-69 (Marshall, J., dissenting).

³⁶ *Id.* at 3169-72 (Stevens, J., dissenting). For the relevant text of the fourteenth amendment, see *supra* note 21.

³⁷ See *infra* notes 260-91 and accompanying text.

³⁸ See *infra* notes 292-308 and accompanying text.

³⁹ *Fraser*, 106 S. Ct. at 3165.

⁴⁰ See *Fraser*, 106 S. Ct. at 3169-72 (Stevens, J., dissenting); see *infra* notes 309-20 and accompanying text.

The Court stated that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Fraser*, 106 S. Ct. at 3165.

⁴¹ A law or regulation creates a "chilling effect" by seriously inhibiting the exercise of constitutionally protected conduct. See generally Schauer, *Fear, Risk and the First Amendment: Unravelling the "Chilling Effect"*, 58 B.U.L. REV. 685 (1978). By not providing fair warning and allowing arbitrary enforcement, a vague regulation that touches upon first amendment freedoms can "operate to inhibit the exercise" of free speech. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (quoting *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961)). See *infra* notes 309-20 and accompanying text.

⁴² See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (stating that the Court must protect students' individual freedoms so as not to "teach youth to discount important principles of our government as mere platitudes"); see *infra* note 103.

⁴³ 795 F.2d 1368 (8th Cir. 1986), cert. granted, 107 S. Ct. 926 (1987).

⁴⁴ See *infra* notes 55-64 and accompanying text.

⁴⁵ See *infra* notes 65-89 and accompanying text.

of students' free expression rights, focusing primarily on the *Tinker* concepts of substantial disruption and invasion of rights.⁴⁶ Section one will end with an examination of categorical proscriptions on student speech.⁴⁷ Section two will review the majority's reasoning,⁴⁸ along with Justice Brennan's concurrence⁴⁹ and Justices Marshall's⁵⁰ and Stevens' dissents.⁵¹

After analyzing Fraser's speech in light of the various justifications upon which school officials rely to regulate student expression,⁵² section three will criticize the *Fraser* Court's dramatic extension of *Tinker*.⁵³ Finally, this casenote will predict the likely chilling effect that *Fraser* will create and suggest that the Court narrow the *Fraser* precedent by returning to a traditional interpretation of students' rights in the upcoming case of *Kuhlmeier v. Hazelwood School District*.⁵⁴

I. BACKGROUND

A. *The Judicial View of the Role of Public Schools*

The Supreme Court has long recognized that public school education represents one of the government's most important functions.⁵⁵ In addition, the Court has noted that society supports the primacy of education by allocating substantial funds for public school budgets and enacting compulsory attendance laws to insure a minor's maximum participation in the educational system.⁵⁶

Education, the Court has stated, is an essential element in a person's life if he or she is to be successful.⁵⁷ The Court has observed that public schooling aids youth by developing skills necessary for future employment and helps promote the community's common values.⁵⁸ The Court has also recognized that public schools, through their curriculum and their teachers' examples, play a major role in preparing youth for citizenship.⁵⁹ The Court, therefore, has reasoned that public schools are crucial for the maintenance of a stable democratic government.⁶⁰

⁴⁶ See *infra* notes 90-156 and accompanying text.

⁴⁷ See *infra* notes 157-200 and accompanying text.

⁴⁸ See *infra* notes 201-29 and accompanying text.

⁴⁹ See *infra* notes 230-41 and accompanying text.

⁵⁰ See *infra* notes 242-44 and accompanying text.

⁵¹ See *infra* notes 245-54 and accompanying text.

⁵² See *infra* notes 260-308 and accompanying text.

⁵³ See *infra* notes 309-32 and accompanying text.

⁵⁴ See *infra* notes 333-40 and accompanying text.

⁵⁵ See *Ambach v. Norwick*, 441 U.S. 68, 76 (1969) ("[E]ducation is perhaps the most important function of our state and local governments.") (quoting *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954)); see also *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 29-30 (1973) (Education "is the very foundation of good citizenship.") (quoting *Brown*, 347 U.S. at 493); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a state.").

⁵⁶ See *Ambach*, 441 U.S. at 76-77 (quoting *Brown*, 347 U.S. at 493).

⁵⁷ *Brown*, 347 U.S. at 493 (segregation of students on basis of race violates the fourteenth amendment).

⁵⁸ *Ambach*, 441 U.S. at 77.

⁵⁹ *Id.* at 78-79.

⁶⁰ *Id.* at 77. At least one commentator, however, concludes that value inculcation in public schools is so ineffective at achieving its objectives that the state has no compelling interest in

Furthermore, the Court has noted that state and local officials are largely responsible for achieving these goals.⁶¹ In light of the important functions of public schools, the Court has affirmed these officials' power to prescribe student conduct.⁶² The Court, therefore, is reluctant to entangle itself in the public schools' daily operations.⁶³ It does intervene, however, to insure that school officials' actions do not infringe upon students' constitutional rights.⁶⁴

B. *The Effect of School Officials' Authority on Students' Constitutional Rights*

Public school students' constitutional rights are not coextensive with their rights outside of the public school context⁶⁵ because the Supreme Court has recognized that public school officials have a substantial interest in maintaining school discipline and order.⁶⁶ Because a disruption of the educational process will interfere with the school's objectives, courts generally give school officials greater control over students' actions than other governmental authorities have over minors outside of the public school context.⁶⁷ Although the students retain some constitutional rights within school confines, the scope of these rights is narrow.⁶⁸

The Supreme Court has protected and enlarged school officials' discretion by limiting the conflicting rights of students. Three cases, *Goss v. Lopez*,⁶⁹ *T.L.O. v. New Jersey*,⁷⁰ and *Board of Education v. Pico*⁷¹ illustrate these limitations. In *Goss*, a 1975 decision, the Court held that schools could not deprive students of their property and liberty interests under the fourteenth amendment without a measure of due process of law.⁷² *Goss* involved nine public high school students whom the school suspended without the benefit of a hearing for alleged misconduct.⁷³ Although the Court concluded that the fourteenth

protecting value inculcation. van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 262-89 (1983).

⁶¹ See *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

⁶² See *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 507 (1969).

⁶³ See *Epperson*, 393 U.S. at 104.

⁶⁴ *Id.*

⁶⁵ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (under the fourth amendment, school officials need only show that search of student was based on reasonable suspicion rather than probable cause, as fourth amendment would require outside of school). Even outside the school context, minors generally do not enjoy the same constitutional rights as adults. See, e.g., *Schall v. Martin*, 467 U.S. 253 (1984) (pretrial preventive detention of an accused juvenile not unconstitutional under the fourteenth amendment); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (no due process right under the fourteenth amendment to jury trial in juvenile delinquency proceedings). But see *Breed v. Jones*, 421 U.S. 519 (1975) (double jeopardy clause of fifth amendment applicable to juveniles); *In re Winship*, 397 U.S. 358 (1970) (fourteenth amendment's due process clause requires that a juvenile's guilt must be established beyond a reasonable doubt); *In re Gault*, 387 U.S. 1 (1967) (fifth amendment privilege against self-incrimination applicable to juvenile proceedings).

⁶⁶ *Tinker*, 393 U.S. at 507 (citations omitted).

⁶⁷ See, e.g., *T.L.O.*, 469 U.S. at 341-42.

⁶⁸ *Id.*

⁶⁹ 419 U.S. 565 (1975).

⁷⁰ 469 U.S. 325 (1985).

⁷¹ 457 U.S. 853 (1982).

⁷² 419 U.S. at 572-76.

⁷³ *Id.* at 568. The disruptive conduct included a student demonstration held in an auditorium while a class was in session in the auditorium, vandalism to school property, and an assault on a policeman. *Id.* at 569-70.

amendment entitled students facing suspensions to the procedural due process requirements of a hearing and adequate notice of that hearing,⁷⁴ the Court also stated that that amendment does not necessarily entitle students to representation of counsel, the right to cross-examine witnesses, or the right to call their own witnesses.⁷⁵ An overly formal disciplinary process, the Court reasoned, would not be an effective deterrent to disruptive student behavior.⁷⁶

Just as in *Goss*, in *T.L.O.*, a 1985 decision, the Supreme Court limited student rights, this time by holding that public school students' legitimate expectations of privacy under the fourth amendment must be balanced against school officials' need to maintain discipline.⁷⁷ In *T.L.O.*, an assistant principal searched a student's purse and discovered marijuana and drug paraphernalia which the state introduced into evidence against the student in Juvenile Court.⁷⁸ After stating that the fourth amendment's prohibition on unreasonable searches and seizures applies to school officials' actions, the Court nevertheless concluded that school officials need only base their searches on reasonable grounds rather than probable cause, which the fourth amendment requires before the government can initiate a search.⁷⁹ Students retain a privacy interest, the Court stated, but school officials must be accorded flexibility to maintain order.⁸⁰

The Supreme Court has also recognized that a student's constitutional right to receive information and ideas under the first amendment is subject to the authority of school officials.⁸¹ Affirming the almost unlimited discretion that school officials have in curriculum matters, the Court stated that it rarely has placed constitutional limits on school curriculum decisions.⁸² The plurality in *Pico*, however, held that the first amendment limited the discretion that school officials have in removing books from school libraries.⁸³ The plurality contrasted compulsory classroom readings with voluntary library readings⁸⁴ and concluded that a school board cannot exercise caprice in removing library books.⁸⁵ Although most members of the Court stated that school officials had the authority to remove library books that are "pervasively vulgar,"⁸⁶ the plurality held that

⁷⁴ *Id.* at 579.

⁷⁵ *Id.* at 583.

⁷⁶ *Id.*

⁷⁷ *T.L.O.*, 469 U.S. at 339.

⁷⁸ *Id.* at 328-29.

⁷⁹ *Id.* at 341-42.

⁸⁰ *Id.* at 342-43.

⁸¹ *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982). The Court had endorsed previously the proposition that an inherent corollary to the first amendment includes the right to receive information and ideas. *Martin v. Struthers*, 319 U.S. 141, 143 (1943) (ordinance prohibiting door-to-door distributions of handbills or circulars violates first amendment). See also *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (statute requiring Postmaster General to detain "Communist political propaganda" and to deliver it only upon addressee's request violates first amendment).

⁸² *Pico*, 457 U.S. at 861. Some constitutional limitations on a school's discretion in curriculum decisions, however, do exist. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968) (state law prohibiting teaching of Darwinian evolution violates the establishment clause of the first amendment); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state law prohibiting teaching of modern foreign language violates the fourteenth amendment).

⁸³ *Pico*, 457 U.S. at 872.

⁸⁴ *Id.* at 869.

⁸⁵ *Id.* at 869-72.

⁸⁶ *Id.* at 871; *id.* at 879-80 (Blackmun, J., concurring); *id.* at 919 (Rehnquist, J., dissenting).

schools may not remove books in a narrowly partisan manner.⁸⁷ For example, a Republican school board could not order the removal of all books written by Democrats.⁸⁸ The plurality noted, however, that its narrow holding applied only to the removal of library books.⁸⁹

Thus, the Supreme Court repeatedly has held that students have reduced constitutional rights within the confines of a public school. While the Court has stated that the Constitution entitles students to procedural due process guarantees, legitimate expectations of privacy, and the right to receive information and ideas, the Court has balanced these rights against the school's educational mission.

C. Students' Free Expression Rights

1. Students' Rights: Pre-*Tinker*

Before *West Virginia State Board of Education v. Barnette*, the Supreme Court presumed that school officials' authority circumscribed a student's first amendment rights of free expression and free speech as it limited students' other constitutional rights.⁹⁰ In *Barnette*, however, the Supreme Court established for the first time that students have first amendment rights in the public school context.⁹¹ The case involved a school regulation which required students to salute the American flag each morning.⁹² Failure to do so constituted insubordination for which the school could expel students.⁹³ Because of their religious beliefs, students of the Jehovah Witnesses' faith refused to salute the flag and subsequently were suspended.⁹⁴

The *Barnette* Court held that compelling public school students to salute the flag violated the students' first amendment rights.⁹⁵ The Court stated that the Bill of Rights, made applicable to the states through the fourteenth amendment, protects citizens from all state-created entities, including Boards of Education.⁹⁶ The Court also noted, however, that a student's right to express himself or herself freely must be balanced against certain legitimate state interests.⁹⁷

In support of its protecting the students' rights, the Court found that the students' behavior was orderly, did not cause any classroom disturbance,⁹⁸ did not interfere with

⁸⁷ *Id.* at 870.

⁸⁸ *Id.* at 870-71.

⁸⁹ *Id.* at 871-72.

⁹⁰ See *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 597-98 (1940) (stating that compulsory flag saluting by public school students is an appropriate means for fostering a sentiment of national unity and does not violate students' first amendment rights).

⁹¹ 319 U.S. at 624, 639 (1943). *Barnette*, however, did not discuss extensively the scope of students' free expression rights; it stands more for the limited proposition that the state may not compel students to declare beliefs which they do not hold. *Id.* at 642. *Barnette* expressly overruled *Gobitis*. *Id.*

⁹² *Id.* at 626.

⁹³ *Id.* at 629.

⁹⁴ *Id.* at 629-30.

⁹⁵ *Id.* at 639.

⁹⁶ *Id.* at 637.

⁹⁷ *Id.* at 630-31.

⁹⁸ *Id.* at 630. For a discussion of the substantial disruption standard as applied in *Tinker* and by later courts, see *infra* notes 116-39 and accompanying text.

other individuals' rights,⁹⁹ and, therefore, did not infringe upon any legitimate state interest.¹⁰⁰ Furthermore, the Court found that lack of student unanimity in saluting the flag did not present a grave and immediate danger to the state's interest in fostering patriotism.¹⁰¹ Intellectual and spiritual diversity, the Court reasoned, does not disrupt society; rather, it can be a source of strength.¹⁰² Finally, the Court concluded that depriving students of their constitutional rights would undermine the school's role of educating youths to be responsible citizens.¹⁰³ Thus, in *Barnette*, the Court put public school officials on notice that as inculcators of civic values, they should be wary of restricting students' first amendment rights.

2. The *Tinker* Test For Protecting Students' Rights

The Court did not reexamine students' free expression rights until 1969 in *Tinker v. Des Moines Independent Community School District*, where the Court reaffirmed the notion that students do not relinquish their constitutional rights to freedom of speech or expression in the school environment.¹⁰⁴ Recognizing the conflict between students' first amendment rights and schools' legitimate disciplinary rules, the Court set out to define more clearly the scope of students' rights in light of the public schools' important functions.¹⁰⁵

In *Tinker*, several students wore black armbands to protest the United States' involvement in Viet Nam.¹⁰⁶ The schools suspended the students for violating a school rule which prohibited armbands.¹⁰⁷ The Court equated this silent, passive expression of opinion, however, with pure speech and thus accorded it full first amendment protec-

⁹⁹ *Barnette*, 319 U.S. at 630. For a discussion of the invasion of rights standard, see *infra* notes 140-56 and accompanying text.

¹⁰⁰ *Barnette*, 319 U.S. at 639.

¹⁰¹ *Id.*

¹⁰² *Id.* at 641-42.

¹⁰³ *Id.* at 637. The Court noted the irony of attempting to teach citizenship to youth while withholding their constitutional rights: "That they [the Board of Education] are educating the young for citizenship is the reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.*

¹⁰⁴ 393 U.S. 503, 506 (1969). The Court also noted that teachers retain their constitutional rights in the public school context. *Id.*

Although during the years between *Barnette* and *Tinker* the Court did not expressly decide any other student free speech case, it did address other school related issues. See, e.g., *McCullum v. Board of Educ.*, 333 U.S. 203 (1948) (special arrangements for religious instruction inside public schools violates first amendment's establishment clause); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (segregation of public school students on basis of race violates fourteenth amendment); *Engel v. Vitale*, 370 U.S. 421 (1962) (prayer in public schools violates first amendment's establishment clause); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (state law barring employment of teachers who belong to certain organizations violates first amendment); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (state law prohibiting teaching Darwinian theory of evolution violates the establishment clause of first amendment).

¹⁰⁵ See *Tinker*, 393 U.S. at 507-15.

¹⁰⁶ *Id.* at 504.

¹⁰⁷ *Id.* Two students attended a Des Moines high school, while one attended a junior high school. *Id.*

tion.¹⁰⁸ The Court then articulated a standard, implied in *Barnette*,¹⁰⁹ to be applied in student speech and expression cases: a school may sanction a student's expression when it substantially disrupts the work of the school or invades other students' rights.¹¹⁰

Applying this standard, the *Tinker* Court observed that the district court made no finding that the armbands disrupted schoolwork or invaded the rights of other students.¹¹¹ Therefore, school officials could not punish the students for exercising their first amendment rights.¹¹² The Court stated that mere fear or inarticulate apprehension of a disturbance is not enough to justify school officials curtailing students' expression.¹¹³ The Court stated that the Constitution requires school officials to show that more than a mere desire to avoid the discomfort that a minority viewpoint causes the majority motivated their infringement upon students' expression.¹¹⁴ As in *Barnette*, the *Tinker* Court emphasized that intellectual diversity is a major source of our national strength.¹¹⁵

Although the *Tinker* Court did not explicitly define "substantial disruption" or "invasion of rights," the lower court cases upon which the Court relied help to illuminate these concepts. The Court borrowed this language from two Fifth Circuit Court of Appeals' decisions, *Burnside v. Byars*¹¹⁶ and *Blackwell v. Issaquena County Board of Education*.¹¹⁷ These cases described disruptions as physical events: the interruption of the

¹⁰⁸ *Id.* at 505–06. The Court, since 1931, has recognized that protected expression may be nonverbal. See *Stromberg v. California*, 283 U.S. 359, 369–70 (1931) (statute that prohibits the displaying of a red flag violates the first amendment).

¹⁰⁹ See *supra* notes 90–103 and accompanying text.

¹¹⁰ *Id.* at 509. The Court explicitly noted that a violation would occur if the student speech either substantially disrupted the work of the school or invaded the rights of others. *Id.* Thus, both factors need not be present for school officials to curb student speech.

¹¹¹ *Id.* Furthermore, the Court's independent examination of the record found that the armbands did not disrupt schoolwork or invade the rights of others. *Id.*

¹¹² *Id.* at 514.

¹¹³ *Id.* at 508.

¹¹⁴ *Id.* at 508–09.

¹¹⁵ *Id.* The Court also relied on the fact that school officials did not attempt to prohibit the wearing of all political insignia; instead, they singled out expression critical of the United States actions in Viet Nam. *Id.* at 510–11. School officials permitted students to wear national political buttons including the Iron Cross, a Nazi symbol. *Id.* at 510. The Court stated, however, that school officials may not prohibit one particular viewpoint without showing that the restrictions are necessary to avoid material and substantial disruption of the educational process. *Id.* at 511.

Justice Black dissented in *Tinker* and stated that he wished "to disclaim any purpose on [his] part 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." *Id.* at 526 (Black, J., dissenting).

¹¹⁶ 363 F.2d 744 (5th Cir. 1966) (cited with approval in *Tinker*, 503 U.S. at 505).

¹¹⁷ 363 F.2d 749 (5th Cir. 1966) (cited with approval in *Tinker*, 503 U.S. at 505 n.1). The *Tinker* Court provided two additional examples, *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967), and *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967), of cases where student speech was not disruptive and was, therefore, accorded first amendment protection. *Tinker*, 319 U.S. at 513–14. In *Hammond*, students held a protest meeting on a state college campus. 272 F. Supp. at 948. The college suspended the participating students for violating a rule which required prior approval by school officials for parades, demonstrations and celebrations. *Id.* at 948. The district court found the school rule to be an unconstitutional prior restraint on free speech. *Id.* at 950.

In *Dickey*, a school suspended a student for attempting to publish in a school newspaper an editorial critical of Alabama legislators. 273 F. Supp. at 615–16. The district court found that the school could not punish the student for exercising his constitutional rights when his conduct did not interfere with school operations or discipline. *Id.* at 618.

regular schedule of school activities, the distraction of students, and the breakdown of classroom order.¹¹⁸ The Fifth Circuit in *Burnside* recognized that under the first amendment, delivering a speech, carrying a banner, or distributing leaflets are constitutionally protected activities when conducted outside of school grounds; yet, when this conduct actually disturbs the classroom, the first amendment no longer protects the action and the school may discipline the perpetrator.¹¹⁹ The *Burnside* court found that the students' wearing of freedom buttons created no actual disturbance; consequently, school officials could not suspend students for this form of expression.¹²⁰

In *Blackwell*, however, the second case on which *Tinker* relied, the Fifth Circuit found that the activities associated with the wearing of freedom buttons directly contributed to the school's atmosphere of disorder.¹²¹ The *Blackwell* court found that a student, for example, interrupted classes to distribute the buttons and to convince other students to leave class.¹²² Furthermore, the court found that the students' forced distribution of the buttons invaded other students' rights.¹²³ Accosting their classmates in the hallways, the student distributors pinned the buttons on their classmates whether or not these students requested the buttons.¹²⁴ Thus, in *Blackwell*, the Fifth Circuit concluded that under the first amendment, school officials could permissibly prevent students from wearing freedom buttons because the activities surrounding the distribution of the buttons disrupted classes and invaded the rights of others.¹²⁵ The *Burnside* and *Blackwell* decisions illustrate that the same type of student expression may or may not be subject to school officials' constraints depending upon whether the student speech in question substantially disrupts the educational process or invades other students' rights. Because the *Tinker* Court relied on *Burnside* and *Blackwell*, these decisions help to explain *Tinker's* substantial disruption and invasion of rights concepts.

3. Post-*Tinker* Developments in Students' Rights

The lower court cases which followed *Tinker* also helped to clarify the vague concepts of substantial disruption and invasion of rights in the context of first amendment claims. Courts applying the substantial disruption standard have defined it as a physical disturbance which constitutes a material threat to the orderly administration of a school or the discipline of its students.¹²⁶ These post-*Tinker* cases involved conduct clearly disruptive in a physical manner: sitdown strikes which interfered with classes,¹²⁷ leaflets which

¹¹⁸ See *Burnside*, 363 F.2d at 748; *Blackwell*, 363 F.2d at 754.

¹¹⁹ *Burnside*, 363 F.2d at 748.

¹²⁰ *Id.* at 748-49. Freedom buttons were approximately one and a half inches in diameter and had the words "One Man, One Vote" printed on the perimeter, while "SNCC" was printed in the center. *Id.* at 746.

¹²¹ *Blackwell*, 363 F.2d at 754.

¹²² *Id.* at 751-52.

¹²³ *Id.* at 754.

¹²⁴ *Id.* at 751. One student tried to pin a button on a younger student who began crying. *Id.*

¹²⁵ *Id.* at 754.

¹²⁶ See, e.g., *Pliscou v. Holtville Unified School Dist.*, 411 F. Supp. 842, 850 (S.D. Cal. 1976) (school officials may not interfere with first amendment rights of students publishing unofficial student newspaper absent a foreseeable material disruption of the classroom).

¹²⁷ *Farrel v. Joel*, 437 F.2d 160, 164 n.5 (2d Cir. 1971) (high school student sitdown strike which substantially disrupted the operation of the school not protected by the first amendment); *Adibi-Sadeh v. Bee County College*, 454 F. Supp. 552, 557 (S.D. Tex. 1978) (student sitdown strike in

advocated a student walk out,¹²⁸ leaflets which stated falsely that classes were cancelled,¹²⁹ and speech which advocated or incited violence or rioting.¹³⁰ A common factor in these situations was that the students disrupted the learning process in the classroom.¹³¹

The lower courts generally have followed *Tinker's* statement that the first amendment requires more than unsubstantiated fears of disturbance to justify the regulation of student expression.¹³² The school official must ground his or her assertion that student expression represents a danger to school discipline in fact.¹³³ For example, in *Vail v. Board of Education*, the district court rejected as unconstitutionally overbroad under the first amendment a school regulation prohibiting the distribution of all written materials that the school had not sponsored.¹³⁴ The court stated that substantial facts must be present which make a disruption reasonably foreseeable.¹³⁵

Another district court, in *Dodd v. Rambis*, upheld the school officials' suspension and expulsion of high school students who passed out leaflets advocating a schoolwide walk out.¹³⁶ Because of a previous walkout of fifty-four students, school officials reasonably could anticipate that the leaflets would provoke an even larger walkout, thereby substantially disrupting school activities.¹³⁷ Thus, while the threat of substantial disruption necessarily turns on the precise facts of each case, the lower courts agree that the student's

gymnasium which forced cancellation of several classes and closing of gymnasium not protected by the first amendment); *Gebert v. Hoffman*, 336 F. Supp. 694, 697 (E.D. Pa. 1972) (high school student sitdown strike which caused students involved to miss class and forced teachers to relocate their classes not protected by the first amendment). See also *Furumoto v. Lyman*, 362 F. Supp. 1267, 1281-82 (N.D. Cal. 1973) (action to disrupt class of university professor, who the students alleged was advocating racist views, not protected by the first amendment).

¹²⁸ *Dodd v. Rambis*, 535 F. Supp. 23 (S.D. Ind. 1981) (student distribution of leaflets advocating walkout by high school students not protected by the first amendment where prior walkouts had occurred).

¹²⁹ *Speake v. Grantham*, 317 F. Supp. 1253, 1278 (S.D. Miss. 1970) (leaflets falsely stating that university classes are cancelled not protected by the first amendment).

¹³⁰ *Jenkins v. Louisiana State Bd. of Educ.*, 506 F.2d 992, 1003 (5th Cir. 1975) (student organized boycott which lead to property damage and disruption of classes not protected by the first amendment); *Channing Club v. Board of Regents of Texas Tech Univ.*, 317 F. Supp. 688, 691 (N.D. Tex. 1970) (university officials may not interfere with first amendment rights of students publishing newspaper which, though lewd, contained no hostile remarks or threats); *Hughes v. Board of Trustees*, 480 S.W.2d 289, 292 (Tex. Civ. App. 1972) (student threats to administrators which resulted in riots not protected by the first amendment).

¹³¹ When the student conduct occurs off school grounds, however, there is little justification for punishing the student. See, e.g., *Thomas v. Board of Educ., Granville Cent. School Dist.*, 607 F.2d 1043, 1051 (2d Cir. 1979) (alleged indecent newspaper published by high school students off school grounds protected by the first amendment); *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960, 974 (5th Cir. 1972) (underground newspaper published by high school students protected by the first amendment); *Klein v. Smith*, 635 F. Supp. 1440, 1441-1442 (D. Me. 1986) (high school student's vulgar gesture toward teacher off school grounds protected by first amendment).

¹³² See, e.g., *Dodd*, 535 F. Supp. at 29 (stating that school officials' fear of a second walkout "can hardly be characterized as merely the 'undifferentiated fear or apprehension of disturbance' referred to in *Tinker*."). See also *Frain v. Baron*, 307 F. Supp. 27 (E.D.N.Y. 1969) (school officials' conclusory assertions that students' refusal to salute the flag represents a danger to school discipline is insufficient to overcome students' first amendment rights).

¹³³ See *id.*

¹³⁴ 354 F. Supp. 592, 598 (D.N.H. 1973), *vacated and remanded*, 502 F.2d 1159 (1st Cir.).

¹³⁵ *Id.* at 600.

¹³⁶ 535 F. Supp. 23, 31 (S.D. Ind. 1981).

¹³⁷ *Id.* at 29.

expression must interfere with the school's activities or discipline before school officials can punish the speech.¹³⁸ These courts have required school officials to show reasonable bases for interfering with student speech.¹³⁹

While a number of courts have addressed the issue of "substantial disruption," very few courts have attempted to define the parameters of *Tinker's* "invasion of rights" exception to student first amendment protection.¹⁴⁰ Under one standard, student expression invades the rights of other students only when it reaches the level of tortious conduct.¹⁴¹ Tortious conduct includes not only riotous activity, incitement to violence, and the conduct in *Blackwell* — the forcible distribution of buttons¹⁴² — but also speech which libels, invades another's privacy, or inflicts severe emotional harm as well.¹⁴³ The Eighth Circuit expressly adopted the tortious activity standard to define the invasion of other students' rights in *Kuhlmeier v. Hazelwood School District*.¹⁴⁴ Because the Eighth Circuit decided *Kuhlmeier* on the same day the Supreme Court decided *Fraser*,¹⁴⁵ however, *Kuhlmeier* did not influence the *Fraser* Court's decision. Even so, the reasoning behind the tortious activity standard in *Kuhlmeier* remains important, especially in light of the Supreme Court's grant of certiorari in that case.¹⁴⁶

In *Kuhlmeier*, a principal censored two high school newspaper articles on divorce and teenage pregnancy because the stories allegedly invaded the privacy of their subjects.¹⁴⁷ The Eighth Circuit, however, noting that the articles' subjects remained anonymous and consented to the interviews, concluded that no grounds for a tort action existed.¹⁴⁸ Accordingly, the court stated that the principal did not have sufficient justification to censor the articles.¹⁴⁹

The competing standard for finding an invasion of rights, which the Second Circuit adopted in 1977 in *Trachtman v. Anker*, suggests that student speech does not have to be tortious to impinge upon the rights of others.¹⁵⁰ Instead, the Second Circuit held that school officials only need to demonstrate a reasonable basis for their belief that certain

¹³⁸ See generally, Annotation, *What Oral Statement of Student is Sufficiently Disruptive So as to Fall Beyond Protection of First Amendment*, 76 A.L.R. FED. 599 (1986).

¹³⁹ See, e.g., *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 810 (2d Cir. 1971) (school officials must show reasonable basis for interfering with student speech; bare allegations and speculations are not sufficient).

¹⁴⁰ *Kuhlmeier v. Hazelwood School Dist.*, 795 F.2d 1368, 1375 (8th Cir. 1986), cert. granted, 107 S. Ct. 926 (1987).

¹⁴¹ *Id.* at 1375-76.

¹⁴² See *supra* notes 123-24 and accompanying text.

¹⁴³ Note, *Administrative Regulation of the High School Press*, 83 MICH. L. REV. 625, 639-44 (1984) [hereinafter Note, *High School Press*].

¹⁴⁴ 795 F.2d at 1375-76.

¹⁴⁵ Both were decided on July 7, 1986. See *Fraser*, 106 S. Ct. at 5054; *Kuhlmeier*, 795 F.2d at 1368.

¹⁴⁶ See *Kuhlmeier*, 107 S. Ct. 926 (1987) (granting certiorari).

¹⁴⁷ *Kuhlmeier*, 795 F.2d at 1374. The principal stated additional reasons for his censorship of the articles: he believed that publication would give the appearance that the school endorsed the students' sexual activities, that the material was inappropriate for some students because of their age and maturity, and that a parent, whom the divorce article mentioned by name, was not given a chance to respond. *Id.* at 1374-75. In rejecting these arguments, the Eighth Circuit reversed the district court. *Id.* at 1375-76.

¹⁴⁸ *Id.* at 1376.

¹⁴⁹ *Id.*

¹⁵⁰ See *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977), cert. denied, 435 U.S. 925 (1978).

student speech possibly may harm students significantly.¹⁵¹ Thus, in *Trachtman*, the Second Circuit was able to conclude that a high school newspaper's distribution of a voluntary, anonymous sex questionnaire to students invaded their rights because of the possibility of subjecting them to emotional discomfort.¹⁵² The court found the solicitation of sexual information as more intrusive of fellow students' rights than the dissemination of sexual information.¹⁵³ Under this approach, the student speech need not cause extreme emotional harm; rather, the speech need only result in harm that is "significant."¹⁵⁴ This "significant harm" standard requires that school officials have no more than a generalized fear that student speech might cause psychological anxiety in an undetermined number of students.¹⁵⁵ The court, in applying this standard, gave great weight to a school official's judgment that student speech in the form of sexual information solicitation would cause some sort of emotional harm to students.¹⁵⁶ Thus, the significant harm standard, in contrast to the tortious activity standard, is more deferential to school officials' assertions and does not require that the emotional harm be extreme.

In sum, although few courts have defined *Tinker's* concept of invasion of rights, at least two theories have developed. One standard, the tortious activity standard, requires that student speech reach the level of tortious conduct before school officials may punish it. The other, the significant harm standard, does not require student speech to be tortious and gives greater deference to school officials' judgments.

4. Other Restraints on Student Speech

In addition to the restraints laid down in *Tinker*, student speech is subject to the same limitations placed on adult speech.¹⁵⁷ Speech or expression that is considered legally obscene constitutes a major category of speech which the Court has deemed unworthy of first amendment protection.¹⁵⁸ The Supreme Court declared standards for identifying speech which is legally obscene in *Miller v. California*.¹⁵⁹ The *Miller* Court stated that

¹⁵¹ *Id.* at 517.

¹⁵² *Id.* at 520.

¹⁵³ *Id.* at 516 n.2. For cases which upheld the rights of students to disseminate sexually related material, see *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960 (5th Cir. 1972) (birth control article in high school newspaper disseminated in school constitutionally protected); *Bayer v. Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd* 575 F.2d 504 (2d Cir. 1975) (sex information supplement in high school newspaper constitutionally protected).

¹⁵⁴ See *Trachtman*, 563 F.2d at 520.

¹⁵⁵ See *id.* The *Trachtman* dissent argued, however, that this "general undifferentiated fear of emotional disturbance on the part of some student readers [was] too nebulous and . . . too dangerous a potential for unjustifiable destruction of constitutionally protected free speech rights to support a prior restraint." *Id.* at 521 (Mansfield, J., dissenting).

¹⁵⁶ *Id.* at 520. See also Note, *High School Press*, *supra* note 143, at 640.

¹⁵⁷ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1941) (first amendment does not protect "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"). But see *Cohen v. California*, 403 U.S. 15, 26 (1971) (first amendment protects jacket displaying the words "Fuck the Draft"); *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (first amendment protects libelous newspaper article about public official, unless that official can show that the article was published with "actual malice" — knowledge of its falsity or reckless disregard of whether it was false or not).

¹⁵⁸ *Roth v. United States*, 354 U.S. 476, 485 (1957) (statute prohibiting mailing of obscene circulars held constitutional).

¹⁵⁹ 413 U.S. 15 (1973).

expression need not be utterly without socially redeeming value to qualify as obscenity.¹⁶⁰ Rather, the Court developed a three-tiered test to determine whether a particular form of expression is obscene.¹⁶¹ First, the expression must, as a whole, appeal to the prurient interest in sex.¹⁶² Second, the expression must describe sexual activities in a patently offensive manner.¹⁶³ Third, the expression, as a whole, must lack serious literary, artistic, political, or scientific value.¹⁶⁴ The speech must satisfy all three parts of the *Miller* test to be legally obscene.¹⁶⁵

Expression which is not obscene under the *Miller* test may nevertheless be banned, consistent with the first amendment, if minors are exposed to it. In *Ginsberg v. New York*, for example, the United States Supreme Court upheld a New York statute banning the sale of pornographic magazines to minors although adult access was accorded first amendment protection.¹⁶⁶ The Court found two state interests which justified the statute. First, because parents have the primary responsibility for the well-being of their children, the legislature reasonably could conclude that parents are entitled to laws which support their child rearing duties.¹⁶⁷ Second, the state has an independent interest in its minors' moral fitness.¹⁶⁸ Based on these interests, the Court held that it was reasonable for a legislature to prohibit minors' access to pornographic material if the legislature rationally concluded that such exposure is harmful to minors.¹⁶⁹

In addition, expression which is not obscene under *Miller* or *Ginsberg* may nevertheless be offensive, lewd, profane or vulgar. While governmental authorities have sought to regulate such expression, the Court has held that the first amendment protects indecent speech.¹⁷⁰ In *Cohen v. California*, for example, the appellant entered a municipal

¹⁶⁰ *Id.* at 24-25. The plurality opinion in *Memoirs v. Massachusetts* formulated the "utterly without socially redeeming value" standard. 383 U.S. 413, 418 (1965).

¹⁶¹ *Miller*, 413 U.S. at 24.

¹⁶² *Id.* The Court defined the issue as whether "the average person, applying contemporary community standards" would find the expression appealing to the prurient interest in sex. *Id.* (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972) (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957))).

¹⁶³ *Id.* The sexual conduct depicted or described must be "specifically defined by the applicable state law." *Id.* The Court provided two sufficient definitions: "(a) Patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at 25.

¹⁶⁴ *Id.* at 24.

¹⁶⁵ *Id.*

¹⁶⁶ 390 U.S. 629, 637-38 (1968).

¹⁶⁷ *Id.* at 639.

¹⁶⁸ *Id.* at 640-41.

¹⁶⁹ *Id.* at 639. The *Ginsberg* Court stated that the legislature's finding that exposure to pornography is detrimental to the moral development of minors may be rational even though the finding may not be "an accurate scientific fact." *Id.* at 641-43.

In a later obscenity case, however, the Court implied that expression involving the printed word or pure speech is entitled to greater protection than expression of a pictorial nature. *Kaplan v. California*, 413 U.S. 115, 119 (1973) (book lacking pictorial obscenity may nonetheless be obscene). One commentator has suggested that this distinction should limit *Ginsberg* to indecent pictures. Note, *High School Press*, *supra* note 143, at 646 n.121.

¹⁷⁰ *Cohen v. California*, 403 U.S. 15, 22-26 (1971). See also *Papish v. Board of Curators of the Univ. of Missouri*, 410 U.S. 667, 671 (1973) (holding that the expulsion of a university student for distributing on campus an "indecent" newspaper which contained an article entitled "M— f— Acquitted" violated the first amendment).

court wearing a jacket plainly bearing a profanity which described his sentiment toward the selective service process.¹⁷¹ He was arrested subsequently for disturbing the peace through offensive conduct.¹⁷² The Court reversed his conviction, stating that Cohen was convicted solely because of the words on his jacket rather than any other conduct on his part.¹⁷³ The first amendment protected these words, the Court explained. Noting that "one man's vulgarity is another's lyric,"¹⁷⁴ the Court recognized the emotive force behind the words.¹⁷⁵ While recognizing that Cohen's jacket could offend many people, the Court stated that strict enforcement of the first amendment requires permitting certain offensive expression.¹⁷⁶ In protecting listeners or viewers, the Court pointed out, the government can suppress expression only when the speaker intolerably violates the listeners' substantial privacy interests.¹⁷⁷ The Court noted that a person has a diminished privacy interest outside the home.¹⁷⁸ Therefore, the Court suggested that those offended by Cohen's jacket simply avert their eyes.¹⁷⁹

When the offensive language enters the home, however, the first amendment does not fully protect the speech.¹⁸⁰ For example, the Court upheld an ordinance prohibiting the use of sound trucks, in part because of the sound's intrusion into the home.¹⁸¹ Similarly, in the plurality decision of *F.C.C. v. Pacifica Foundation*, the Court upheld the constitutionality of an F.C.C. regulation which banned obscene, indecent, or profane broadcasting.¹⁸² In *Pacifica*, the F.C.C. had investigated a complaint concerning a New York radio station's broadcast of George Carlin's "Filthy Words" monologue.¹⁸³ The plurality found two grounds which justified the F.C.C.'s power to censor. First, because of the pervasive nature of broadcasting, it receives the least first amendment protection afforded to all modes of communication.¹⁸⁴ Broadcasting, the Court noted, can easily invade the privacy of one's home.¹⁸⁵ Second, broadcasting is readily available to children, including those who are very young.¹⁸⁶ In reaching its decision, however, the plurality noted the narrowness of its holding.¹⁸⁷

¹⁷¹ *Cohen*, 403 U.S. at 16. The jacket displayed the words "Fuck the Draft." *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 18.

¹⁷⁴ *Id.* at 25.

¹⁷⁵ *Id.* at 26.

¹⁷⁶ *Id.* at 21.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 21-22.

¹⁷⁹ *Id.* at 21.

¹⁸⁰ See, e.g., *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970) (upholding addressee's statutory right to stop future mailings of erotic material to his home); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding ordinance prohibiting use of sound trucks, in part because of the intrusion into individuals' homes).

¹⁸¹ *Kovacs*, 336 U.S. at 86-87.

¹⁸² 438 U.S. 726, 750-51 (1978).

¹⁸³ *Id.* at 729-30. While the F.C.C. did not impose formal sanctions, it kept the complaint on file and could have used the complaint against the station if additional complaints were registered. *Id.* at 730. For the complete text of Carlin's monologue, see appendix to case, 438 U.S. at 751-55.

¹⁸⁴ *Id.* at 748. See also *Red Lion Broadcasting, Co. v. F.C.C.*, 395 U.S. 367 (1969) (requiring station to give free radio time to victims of broadcasting criticism).

¹⁸⁵ *Pacifica*, 438 U.S. at 748-49.

¹⁸⁶ *Id.* at 749.

¹⁸⁷ *Id.* at 750-51. The Court noted that the F.C.C.'s decision was based on a "nuisance rationale under which context is all important." *Id.* at 750.

As a general rule, however, categorical proscriptions of speech, as well as other speech regulations, should be clearly defined.¹⁸⁸ Otherwise, if a regulation aimed at unprotected speech or conduct is vague or capable of being applied to protected speech, a "chilling effect" on that protected speech may result.¹⁸⁹ A vague regulation, the Supreme Court has stated, offends the Constitution by failing to provide people with fair warning of what conduct is prohibited and by allowing "arbitrary and discriminatory enforcement."¹⁹⁰ The Court has noted that ill-defined regulations abutting "upon sensitive areas of basic First Amendment freedoms" can operate to deter or chill the exercise of free expression rights.¹⁹¹ Accordingly, the Court has invalidated statutes that create an impermissible chilling effect.¹⁹²

In sum, student expression is subject to a number of constraints. Under *Tinker*, the expression may neither substantially disrupt the educational process nor invade the rights of other students.¹⁹³ Courts have defined disruption to mean a physical disturbance which interferes with school activities.¹⁹⁴ Courts which have examined the concept of invasion of rights have developed two approaches.¹⁹⁵ The tortious activity approach requires that student speech reach the level of tortious conduct before school officials can proscribe it.¹⁹⁶ Under the significant harm approach, the student speech need only cause "significant" harm and the court gives school officials' judgments more deference.¹⁹⁷ In addition to the *Tinker* restraints, student speech also is subject to the same limitations placed on adult speech.¹⁹⁸ Two such limitations are that governmental authorities may regulate obscene expression¹⁹⁹ and, in some circumstances, offensive expression.²⁰⁰

II. THE FRASER MAJORITY OPINION

The Supreme Court, in *Bethel School District v. Fraser*, held that the first amendment does not prohibit public school officials from disciplining a student for the use of

¹⁸⁸ See Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 288-89 (1981).

¹⁸⁹ See Schauer, *supra* note 41, at 692-93. Schauer describes the chilling effect as occurring "when individuals seeking to engage in activity protected by the first amendment are deterred from doing so by governmental regulation not specifically directed at that protected activity." *Id.* at 693 (italics deleted). A chilling effect thus may occur in the school when, for example, a school regulation prohibiting the publication of obscene material deters a student from publishing in the school newspaper an article which addresses maturely the problems of teenage pregnancy or sexually transmitted diseases. *Cf. Kuhlmeier v. Hazelwood School Dist.*, 795 F.2d 1368 (8th Cir. 1986), *cert. granted*, 107 S. Ct. 926 (1987) (principal censored articles on teenage pregnancy and divorce from high school newspaper). See *infra* notes 333-40 and accompanying text.

¹⁹⁰ Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

¹⁹¹ *Id.* at 109 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

¹⁹² See, e.g., *Coates v. City of Cincinnati*, 402 U.S. 611, 614-15 (1971) (ordinance prohibiting three or more persons from assembling on a sidewalk in a manner annoying to passers-by unconstitutional because it is vague and violates the first amendment).

¹⁹³ See *supra* notes 104-25 and accompanying text.

¹⁹⁴ See *supra* notes 126-39 and accompanying text.

¹⁹⁵ See *supra* notes 140-56 and accompanying text.

¹⁹⁶ See *supra* notes 140-49 and accompanying text.

¹⁹⁷ See *supra* notes 150-56 and accompanying text.

¹⁹⁸ See *supra* notes 157-87 and accompanying text.

¹⁹⁹ See *supra* notes 157-69 and accompanying text.

²⁰⁰ See *supra* notes 170-87 and accompanying text.

offensively lewd and indecent speech at a high school assembly.²⁰¹ The Court distinguished the holding in *Tinker* because that case involved expression which neither disrupted the educational process nor invaded the rights of others. The Court explored the role of the public school system in America and noted that its role included discouraging the use of offensive speech in public discourse.²⁰² Stating that *Ginsberg v. New York, Board of Education v. Pico*, and *F.C.C. v. Pacifica Foundation* recognized a state's interest in protecting minors from vulgar and offensive speech, the Court found that school officials acted within their authority in punishing Fraser.²⁰³ Finally, the Court rejected the argument that Fraser did not have fair notice that his speech was prohibited.²⁰⁴

In distinguishing *Tinker*, the *Fraser* Court stated that the Ninth Circuit incorrectly read *Tinker* to preclude any discipline of Fraser for his offensive speech.²⁰⁵ The Court concluded that the use of sexually explicit language in a nominating speech greatly differs from the passive political expression of black armbands.²⁰⁶ After noting that the Ninth Circuit failed to give this distinction sufficient weight, the Court pointed out that the expression in *Tinker* did not disrupt the school's educational objectives or invade the rights of other students.²⁰⁷

After factually distinguishing *Tinker*, the Court reviewed the role of public schools to determine whether offensive speech might disrupt the educational process. The objective of public education, the Court stated, is to inculcate young people with fundamental values which will enable them to participate effectively in a democratic form of government.²⁰⁸ The Court observed that although these fundamental values include society's toleration of differing, and even unpopular, viewpoints, these values also must take into account the sensibilities of other students.²⁰⁹ Thus, a student's right of free speech, the Court stated, must be balanced against the school's interest in teaching students the limits of socially acceptable conduct.²¹⁰

The Court supported its determination that public schools should regulate offensive speech by analogizing this regulation to congressional debate procedures.²¹¹ The Court noted that Congress's parliamentary rules provide for punishment of offensive language.²¹² The Court reasoned that if Congress could regulate offensive speech in its own debates, surely school officials should be able to proscribe such speech in public schools.²¹³

²⁰¹ See *Fraser*, 106 S. Ct. at 3166.

²⁰² *Id.* at 3164-65.

²⁰³ *Id.* at 3165.

²⁰⁴ *Id.* at 3166-67.

²⁰⁵ *Id.* at 3163.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 3164.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* (citing Jefferson's Manual of Parliamentary Practice, §§ 359, 360, reprinted in Manual and Rules of House of Representatives, H.R. Doc. No. 97-271, 97th Cong., 2d Sess. 111 n.a., 158-59 (1982)).

²¹² *Id.* (citing Senate Procedure, S. Doc. No. 97-2, 97th Cong., 1st Sess. Rule XIX 568-69, 588-91 (1981); Senate Election, Expulsion and Censure Cases from 1793 to 1972, S. Doc. No. 92-7, 92d Cong., 1st Sess. 95-98 (1972)).

²¹³ *Id.*

Moreover, while the first amendment protects the use of offensive speech in adult public discourse, the Court noted that the Constitution does not require extension of this protection to public school students.²¹⁴ Quoting Judge Newman's concurrence in *Thomas v. Board of Education, Granville*,²¹⁵ a Second Circuit opinion, the Court agreed that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket."²¹⁶ The Court, therefore, concluded that prohibiting the use of offensive speech in the school environment is an appropriate function of public school officials.²¹⁷

The Court also rested its decision on the state's interest in protecting minors from exposure to sexually explicit, indecent, or vulgar speech.²¹⁸ Relying on *Ginsberg*, which upheld a statute banning the sale of pornographic magazines to minors,²¹⁹ *Pico*, which acknowledged in dicta that school officials could remove vulgar library books,²²⁰ and *Pacifica*, which recognized a state interest in shielding children from offensive expression,²²¹ the Court recognized school officials' authority to assume the role of parents in protecting children from offensive speech.²²² The Court stated the school's interest in protecting students from offensive speeches outweighed Fraser's first amendment right to make his speech in school.²²³

Implying that certain types of speech, such as sexually graphic expression, deserve less protection than other types, such as political statements, the Court found Bethel School District's position more compelling than the school district's position in *Tinker*, where students wore armbands in protest of Viet Nam.²²⁴ The Court concluded that the school district's action was entirely appropriate, repeating that a high school assembly is an inappropriate forum for a lewd address toward an audience of impressionable minors.²²⁵ Quoting Justice Black's dissent in *Tinker*, the Court stated that the Constitution does not require school authorities to surrender control of the public schools to the students.²²⁶

Finally, the Court rejected Fraser's assertion that his suspension violated due process because he did not have fair notice of the punishment.²²⁷ Finding the argument without merit, the Court noted that the school conduct code needed to be flexible to deal with an array of unforeseen actions which disrupt the school's educational objectives; thus, the school's conduct code need not be as specific as a criminal code.²²⁸ In addition, the

²¹⁴ *Id.*

²¹⁵ 607 F.2d 1043 (2d Cir. 1979).

²¹⁶ *Fraser*, 106 S. Ct. at 3164-65 (quoting *Thomas*, 607 F.2d at 1057 (Newman, J., concurring in the result)).

²¹⁷ *Id.* at 3165.

²¹⁸ *Id.* at 3165-66.

²¹⁹ 390 U.S. at 637-38.

²²⁰ 457 U.S. at 871; *id.* at 879-80 (Blackmun, J., concurring); *id.* at 919 (Rehnquist, J., dissenting).

²²¹ 438 U.S. at 749.

²²² *Fraser*, 106 S. Ct. at 3165.

²²³ *See id.* at 3166.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* (quoting *Tinker*, 393 U.S. at 522 (Black, J., dissenting)).

²²⁷ *Id.* at 3166-67.

²²⁸ *Id.* at 3166.

Court found that Fraser's two-day suspension did not reach a level of punishment that required the full due process protections accorded to a criminal defendant.²²⁹

III. CONCURRING AND DISSENTING OPINIONS

A. Justice Brennan's Concurrence

Justice Brennan concurred in the judgment but wrote separately to express his understanding of the majority's holding.²³⁰ He agreed with the majority that school officials acted within constitutionally permissible limits because of the school's interests in teaching students how to conduct civil discourse and in preventing disruption of the educational process.²³¹

Justice Brennan did take issue, however, with other portions of the majority's opinion and sought to limit the holding's breadth. First, Justice Brennan quoted the text of Fraser's speech and expressed his surprise at the majority's characterization of it as obscene, vulgar, lewd, and offensive.²³² Justice Brennan noted that the speech was no more obscene, lewd, or sexually explicit than most prime time television programs.²³³ He also questioned the Court's speculation that the speech was insulting to female students and seriously damaging to fourteen year olds because there was no evidence of such in the record.²³⁴ Justice Brennan also disagreed with the Court's reliance on *Ginsberg*, *Pico*, and *Pacific*, which suggested that school officials could punish Fraser out of a need to protect younger children.²³⁵

Justice Brennan also sought to narrow the majority's statement that "[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions."²³⁶ Given the Court's prior decisions, Justice Brennan reasoned, the majority's language could only apply to vulgar expression in the school environment; the statement could not imply that the government has the general power to control the type of language used in public debate.²³⁷

In addition, Justice Brennan sought to limit the Court's holding to the specific facts of the case. Citing *Cohen v. California*²³⁸ for the proposition that the Court has accorded offensive speech first amendment protection, he noted that the school could not have punished Fraser for the same speech outside of the school environment.²³⁹ Justice Brennan suggested that the first amendment might have protected Fraser's speech had he given it in the school, but under circumstances where the school's interest in encouraging effective civil discourse had not been so weighty.²⁴⁰ Therefore, Justice Brennan asserted that the majority's decision only recognized a school official's authority to punish

²²⁹ *Id.*

²³⁰ *Id.* at 3167 (Brennan, J., concurring in the judgment).

²³¹ *Id.* (Brennan, J., concurring in the judgment).

²³² *Id.* (Brennan, J., concurring in the judgment).

²³³ *Id.* at 3168 n.2 (Brennan, J., concurring in the judgment).

²³⁴ *Id.* (Brennan, J., concurring in the judgment).

²³⁵ *Id.* (Brennan, J., concurring in the judgment).

²³⁶ *Id.* at 3165.

²³⁷ *Id.* at 3167 n.1 (Brennan, J., concurring in the judgment).

²³⁸ 403 U.S. 15 (1973).

²³⁹ *Fraser*, 106 S. Ct. at 3167 (Brennan, J., concurring in the judgment) (citing *Cohen v. California*, 403 U.S. 15 (1971)).

²⁴⁰ *Id.* at 3168 (Brennan, J., concurring in the judgment).

a high school student for using disruptive language during an address to a high school assembly.²⁴¹

B. *Justices Marshall's and Stevens' Dissents*

Justice Marshall stated that the Ninth Circuit had applied the *Tinker* standard correctly and conscientiously.²⁴² Because the school district failed to show that Fraser's speech was disruptive, Justice Marshall reasoned, the Court should not have reversed the Ninth Circuit's judgment.²⁴³ While Justice Marshall recognized that courts must allow school officials flexibility in deciding what actions interfere with the educational process, he stated that when the right of free speech is involved, the Court should not accept conclusory allegations that certain speech disrupted the educational mission.²⁴⁴

Although Justice Stevens stated his belief that schools, in carrying out their educational objectives, may regulate both the content and style of student speech, he expressed concern that under the majority's holding, students will not receive fair notice of what constitutes prohibited speech and what punishments will attach.²⁴⁵ Justice Stevens concluded that Fraser's failure to receive fair notice that the school would punish his speech violated his right to fair procedure protected by the due process clause of the fourteenth amendment. The Justice found that this constitutional violation, in combination with Fraser's first amendment interests, required affirmation of the Ninth Circuit's decision.²⁴⁶

Justice Stevens stated that the school could have notified Fraser fairly by any of three means: the school disciplinary rule, the teacher's specific warnings, or the obvious impropriety of the speech.²⁴⁷ As to each of the three opportunities, however, Justice Stevens revealed inadequacies. First, Justice Stevens found the school disciplinary code ambiguous at best.²⁴⁸ The rule was meant to punish conduct that materially and substantially interfered with the educational process.²⁴⁹ Justice Stevens noted, however, that both the District Court and the Ninth Circuit concluded that the evidence did not demonstrate a material disruption.²⁵⁰ Second, Justice Stevens pointed out, although Fraser had three teachers read his speech before he delivered it, not one suggested that it might violate a school rule.²⁵¹ Finally, Justice Stevens discussed whether Fraser should have known that such a speech was wholly unacceptable in the high school assembly context.²⁵² While noting that the speech may have been improper in the classroom or formal social situations, Justice Stevens stated that the speech could have been a routine comment in the locker room or school halls.²⁵³ Therefore, Justice Stevens reasoned that the Court should have deferred to the district and circuit court judges, who were better equipped to determine whether the speech was appropriate at an assembly.²⁵⁴

²⁴¹ *Id.* (Brennan, J., concurring in the judgment).

²⁴² *Id.* at 3168-69 (Marshall, J., dissenting).

²⁴³ *Id.* (Marshall, J., dissenting).

²⁴⁴ *Id.* at 3169 (Marshall, J., dissenting).

²⁴⁵ *Id.* (Stevens, J., dissenting).

²⁴⁶ *Id.* (Stevens, J., dissenting).

²⁴⁷ *Id.* at 3170 (Stevens, J., dissenting).

²⁴⁸ *Id.* at 3171 (Stevens, J., dissenting). See *supra* note 16 for the text of the school rule.

²⁴⁹ *Fraser*, 106 S. Ct. at 3170 (Stevens, J., dissenting).

²⁵⁰ *Id.* at 3170-71 n.4 (Stevens, J., dissenting).

²⁵¹ *Id.* at 3171 (Stevens, J., dissenting).

²⁵² *Id.* at 3171-72 (Stevens, J., dissenting).

²⁵³ *Id.* at 5059 (Stevens, J., dissenting).

²⁵⁴ *Id.* at 5060 (Stevens, J., dissenting).

IV. FRASER: ANALYSIS AND EFFECT

By affording school officials unfettered discretion to determine what constitutes disruptive speech, the Supreme Court in *Fraser* has given school officials the opportunity to apply subjective standards in deciding whether students may exercise their free expression rights. In *Fraser*, the school district did not demonstrate that Fraser's speech substantially disrupted school proceedings as precedent has defined that term.²⁵⁵ The school district also did not show that his speech interfered with the rights of other students.²⁵⁶ Furthermore, Fraser's address does not fit into any proscribed speech category.²⁵⁷ Yet, the Supreme Court nevertheless concluded that the school board could punish Fraser's expression because it interfered with the school's role as an inculcator of civic values.²⁵⁸ The Court's extension of the *Tinker* concept of substantial disruption of the educational process to include speech which disrupts the school's value inculcation purpose unduly expands a school board's discretion in penalizing students for their speech. Moreover, the vagueness of a value inculcation standard permits arbitrary enforcement by school officials which will create student uncertainty and fear as to what modes of expression are punishable. The Court's decision in *Fraser*, therefore, will chill student speech.²⁵⁹

The Supreme Court, since its 1943 decision in *West Virginia State Board of Education v. Barnette*,²⁶⁰ which established that students are entitled to first amendment guarantees, has stated that the first amendment does not immunize students from punishment for speech which substantially disrupts the educational process.²⁶¹ *Tinker* and its progeny have defined substantially disruptive speech as expression creating a physical disturbance which constitutes a material threat to the orderly administration of a school or the discipline of its students.²⁶² Under this definition, Fraser's speech was not substantially disruptive, and, therefore, merited first amendment protection.²⁶³

Fraser's speech cannot properly be labeled disruptive because, first, it caused no physical disturbance in the high school assembly.²⁶⁴ While the address did evoke some applause and some hooting and yelling, a school guidance counselor testified that this behavior was not atypical for students at an assembly.²⁶⁵ The district court also found that three students were observed simulating sexual activity, but, as the Ninth Circuit noted, such a small reaction from an audience of 600 students hardly rises to the level of substantial disruption.²⁶⁶ In addition, school officials testified that they had no problems in maintaining order during the assembly²⁶⁷ and that the speech did not interrupt

²⁵⁵ See *infra* notes 260-79 and accompanying text.

²⁵⁶ See *infra* notes 280-91 and accompanying text.

²⁵⁷ See *infra* notes 292-308 and accompanying text.

²⁵⁸ *Fraser*, 106 S. Ct. at 3165.

²⁵⁹ See *infra* notes 309-20 and accompanying text.

²⁶⁰ 319 U.S. 624 (1943). See *supra* notes 90-103 and accompanying text for a discussion of *Barnette*.

²⁶¹ See *Barnette*, 319 U.S. at 630.

²⁶² See *supra* notes 109-31 and accompanying text.

²⁶³ See *Fraser*, 106 S. Ct. at 3170-71 n.4 (Stevens, J., dissenting).

²⁶⁴ Fraser's speech caused no delay in the program and students were dismissed on time. *Fraser*, 755 F.2d at 1359-60.

²⁶⁵ See *id.* The Court did not question the factual findings of the district court.

²⁶⁶ *Id.* at 1360.

²⁶⁷ *Id.*

the regular school activity schedule.²⁶⁸ Moreover, although three of the four teachers who wrote to the assistant principal to comment on Fraser's speech suggested that his behavior was inappropriate, none suggested that his speech was disruptive.²⁶⁹

The letters clearly show that the teachers felt that Fraser's speech was inappropriate for a high school assembly. The resolution of student expression cases, however, does not end with an examination of school officials' reactions. *Barnette* and *Tinker* established that, despite school officials' disagreement with the propriety of a student's expression, the first amendment may protect that expression.²⁷⁰ *Tinker* explicitly required that a substantial disruption standard, not an appropriateness standard, be applied in student free expression cases.²⁷¹

In addition, although interference with the learning process in the classroom is a common factor in post-*Tinker* cases finding disruptive student speech,²⁷² the student expression in these cases was the direct cause of the interruption of classes.²⁷³ Courts have found disruption, for example, where a student demonstration forced teachers to relocate their classes due to the demonstration's noise²⁷⁴ and where students, responding to a student leaflet, skipped class, thereby hindering teaching efforts.²⁷⁵ Disruption also includes violence or threats of violence.²⁷⁶ Fraser's speech, however, is not the same as or analogous to any of these situations. The only other evidence of disruption the school district introduced, beyond the incidence of applause, yelling, and simulations, was the fact that a home economics teacher spent ten minutes of her class discussing the speech with her students.²⁷⁷ The district court, however, found that the teacher initiated the class discussion after she found the class more interested in the speech than their classwork.²⁷⁸ By analogy, then, Fraser's speech was no more disruptive, as the Ninth Circuit suggested, than a topical current event that momentarily captured the attention of students.²⁷⁹ While the teacher's decision deprived the class of ten minutes of home economics, the class may have profited from a discussion on the meaning of the first amendment and the propriety of Fraser's speech. In sum, although constitutional protections do not attach to speech that substantially disrupts the educational process, Fraser's speech did not substantially disrupt the assembly or the classroom. In addition, although first amendment guarantees do not protect student speech that invades the rights of other students, Fraser's speech failed to satisfy either the tortious activity or

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 1360-61 & n.3.

²⁷⁰ See *Tinker*, 393 U.S. at 508-09; *Barnette*, 319 U.S. at 642.

²⁷¹ *Tinker*, 393 U.S. at 509.

²⁷² See *supra* text accompanying notes 126-31.

²⁷³ See *supra* text accompanying notes 126-31.

²⁷⁴ See, e.g., *Gebert v. Hoffman*, 336 F. Supp. 694, 697 (E.D. Pa. 1972) (high school student sitdown strike which caused students involved to miss class and forced teachers to relocate their classes not protected by the first amendment).

²⁷⁵ See, e.g., *Dodd v. Rambis*, 535 F. Supp. 23 (S.D. Ind. 1981) (student distribution of leaflets advocating walkout by high school students not protected by the first amendment where prior walkouts had occurred).

²⁷⁶ See, e.g., *Hughes v. Board of Trustees*, 480 S.W.2d 289 (Tex. Civ. App. 1972) (student threats to administrators which resulted in riots not protected by the first amendment).

²⁷⁷ See *Fraser*, 106 S. Ct. at 3162. See also 755 F.2d at 1360 for the lower court's discussion.

²⁷⁸ See *Fraser*, 755 F.2d at 1360 (citing Finding of Fact No. 5).

²⁷⁹ *Id.* at 1361.

the significant harm standards which the courts developed in the wake of *Tinker*.²⁸⁰ The tortious activity standard, adopted by the Eighth Circuit in *Kuhlmeier v. Hazelwood School District*, allows school officials to suppress student speech only when that speech is or will be tortious.²⁸¹ The significant harm standard, adopted by the Second Circuit in *Trachtman v. Anker*, allows school officials to act on a lower threshold of harm and gives more deference to school officials' judgments.²⁸²

Under the tortious activity standard, school officials could not punish Fraser for violating other students' rights because Fraser's conduct did not constitute infliction of emotional distress or any other recognized tort. His speech was not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."²⁸³ Indeed, Justice Brennan noted that Fraser's speech was similar in content to most of the programs shown on prime time television or in local movie houses.²⁸⁴ Moreover, the tort of intentional infliction of emotional distress requires that the victim actually suffer severe emotional anguish.²⁸⁵ Yet the school presented no such evidence to the district court. Thus, the school district failed to show that Fraser's speech reached the level of tortious conduct and, therefore, failed to establish an exception to protected speech under the tortious standard.

Furthermore, although a closer question, Fraser's speech also did not violate other students' rights under the significant harm standard. In *Trachtman*, the Second Circuit found that the solicitation of sexual information invaded the rights of students because of the possibility of some emotional harm.²⁸⁶ In reaching its decision, the court distinguished the solicitation of sexual information from the dissemination of sexually related material,²⁸⁷ noting that mere dissemination warranted constitutional protection.²⁸⁸ Although Fraser's speech could have been found to convey sexual information, it clearly did not solicit personal responses from the student audience. Moreover, the significant harm standard requires the showing that some "significant" emotional harm occurred or might have occurred as a result of Fraser's speech.²⁸⁹ In *Trachtman*, the school board had psychological experts testify as to the possible harmful effect of sex questionnaires that students distributed.²⁹⁰ In *Fraser*, in contrast, the school board had no psychological experts testify and presented no evidence, other than the fact that some students appeared confused, to support its assertion that Fraser's speech somehow harmed the students emotionally.²⁹¹ Even under such a deferential standard, the school board did

²⁸⁰ The *Tinker* Court did not explicitly define the invasion of rights standard. See 393 U.S. at 513. For a discussion of why Fraser's speech does not invade others' rights, see *infra* notes 283-91 and accompanying text.

²⁸¹ 795 F.2d 1368, 1376 (8th Cir. 1986), *cert. granted*, 107 S. Ct. 926 (1987). See *supra* text accompanying notes 140-49.

²⁸² 563 F.2d 512, 520 (2d Cir. 1977). See *supra* text accompanying notes 150-56.

²⁸³ RESTATEMENT (SECOND) OF TORTS § 46(1) comment d (1965).

²⁸⁴ *Fraser*, 106 S. Ct. at 3168 n.2 (Brennan, J., concurring in the judgment).

²⁸⁵ RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

²⁸⁶ See *Trachtman*, 563 F.2d at 520.

²⁸⁷ *Id.* at 516 n.2. See also *id.* at 520 (Gurfein, J., concurring).

²⁸⁸ *Id.* at 516 n.2.

²⁸⁹ See *id.* at 520.

²⁹⁰ *Id.* at 517-18.

²⁹¹ See *Fraser*, 106 S. Ct. at 3168 n.2 (Brennan, J., concurring in the judgment). Justice Brennan

not meet its burden of showing a reasonable basis for concluding that Fraser's speech caused emotional harm. Fraser's speech, therefore, did not invade other students' rights under either standard.

In addition to not being substantially disruptive and not invading the rights of other students, Fraser's speech does not fall into a proscribed category of expression. The Court has denied first amendment protection to only limited categories of expression,²⁹² such as obscenity²⁹³ and, in certain circumstances, offensive speech.²⁹⁴ Although the Court referred to Fraser's speech as obscene,²⁹⁵ it failed to apply the obscenity test established in *Miller*.²⁹⁶ *Miller* defined obscenity as expression which depicted sexual activities in a patently offensive manner and lacked serious social value.²⁹⁷ Yet Fraser's speech did not describe sexual activities in a patently offensive manner and did not lack certain artistic and political value. His speech, though sophomoric, was imaginative and successful. His candidate won the election.²⁹⁸ Furthermore, the Court's decision in *Ginsberg*, which affirmed a state's power to apply a more expansive definition of pictorial obscenity which is exposed to minors, is not controlling here because *Ginsberg* only held that a legislature could restrict minors' access to sexual material that they could "read or see."²⁹⁹ The *Pacifica* Court addressed the issue of restricting minors' access to spoken language.³⁰⁰ Moreover, the Court has implied previously that expression involving pure speech is entitled to greater protection than expression of a pictorial nature.³⁰¹

Fraser's speech is also distinguishable from Carlin's profanity-riddled monologue, which the *Pacifica* Court refused full first amendment protection.³⁰² First, Fraser's speech

noted that no evidence in the record supported the majority's speculation that the speech insulted or seriously damaged students. *Id.* (Brennan, J., concurring in the judgment).

²⁹² See *supra* note 157.

²⁹³ *Roth v. United States*, 354 U.S. 476 (1957) (statute prohibiting mailing of obscene circulars constitutional).

²⁹⁴ *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978) (regulation banning obscene, indecent, or profane broadcasting does not violate the first amendment). But see *Cohen v. California*, 403 U.S. 15 (1971) (first amendment protects jacket displaying the words "Fuck the Draft").

²⁹⁵ *Fraser*, 106 S. Ct. at 3163.

²⁹⁶ See *supra* notes 157-65 and accompanying text. Indeed, the school district did not contend in the lower court that Fraser's speech was legally obscene. *Fraser*, 755 F.2d at 1361 n.5.

²⁹⁷ 413 U.S. 15, 24-25 (1973).

²⁹⁸ *Fraser*, 755 F.2d at 1363 n.9.

²⁹⁹ 390 U.S. at 637. The *Fraser* Court did not use *Ginsberg* to establish that Fraser's speech was obscene under a reduced standard for children; rather, the Court cites *Ginsberg* and *Pico* to support the proposition that school officials may act *in loco parentis* to protect children from exposure to offensive speech. *Fraser*, 106 S. Ct. at 3165. Yet a year earlier, in *New Jersey v. T.L.O.*, the Court expressly rejected the notion that school officials act *in loco parentis* when dealing with students. 469 U.S. 325, 336-37 (1985). The Court stated that "[t]oday's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies." *Id.* at 336. For a discussion of whether school officials in *Fraser* acted in furtherance of educational objectives, see *infra* note 309. For a discussion of whether they acted in furtherance of disciplinary objectives, see *supra* text accompanying notes 260-79.

³⁰⁰ See 438 U.S. at 749-50. See *infra* notes 302-08 and accompanying text for a discussion of why *Pacifica* is inapplicable to Fraser's speech.

³⁰¹ See *Kaplan v. California*, 413 U.S. 115, 119 (1973). See also Note, *High School Press*, *supra* note 143, at 646 n.121.

³⁰² See *Pacifica*, 438 U.S. at 750-51. For a discussion of *Pacifica*, see *supra* notes 180-87 and accompanying text. In *Fraser*, Justice Brennan observed that the speech did "not even approach

was much milder than Carlin's monologue.³⁰³ Second, one of the *Pacifica* Court's major concerns was the effect of offensive speech on very young children.³⁰⁴ Yet no very young children were present in the Bethel High School assembly. Third, the *Pacifica* Court was concerned also with a person's privacy interest in his or her home.³⁰⁵ A student's privacy interest, however, is not as great in the high school assembly context. Moreover, the students were not a captive audience. The students, knowing that they would be subject to various nominating and campaign speeches, voluntarily chose to attend.³⁰⁶ In fact, the Court noted twice in its second paragraph that students had a choice of either going to the assembly or reporting to the study hall.³⁰⁷ Fraser's speech, therefore, does not fall into one of the circumstances in which the school may punish offensive speech because the speech did not intolerably violate other students' privacy interests.³⁰⁸

Although under the analysis of *Tinker* and its progeny and decisions imposing restrictions on adult speech, Fraser's speech was not disruptive of the educational process, did not interfere with the rights of others, and was not obscene or offensive, the Court still concluded that school officials could punish Fraser for his expression. The *Fraser* Court reached this result by extending dramatically the *Tinker* concept of schoolwork disruption to include interference with the school's work of value inculcation. Accordingly, the Court held that the first amendment did not prevent school officials from punishing student speech which undermined somehow the school's role of preparing youth for citizenship.³⁰⁹ In contrast, prior to *Fraser*, courts had defined the *Tinker* concept of substantial disruption as conduct that physically interferes with school activities.

By departing from precedent and defining disruption of classwork to include disruption of value inculcation, the Court has afforded student speech uncertain protection at best. While the Court acknowledged that students retain their freedom of speech,³¹⁰ it retreated from the constitutional protection that *Tinker* guaranteed student speech. Student expression is free only to the extent that a school official agrees with its pro-

... the indecent speech banned in [*Pacifica*]." 106 S. Ct. at 3168 n.2 (Brennan, J., concurring in the judgment).

³⁰³ Compare the content and length of Fraser's speech, *supra* text accompanying note 12, with Carlin's monologue, *quoted in Pacifica*, 438 U.S. at 751-55 (appendix).

³⁰⁴ See *Pacifica*, 438 U.S. at 749.

³⁰⁵ See *id.* at 748-49.

³⁰⁶ See *Fraser*, 106 S. Ct. at 3162.

³⁰⁷ *Id.*

³⁰⁸ Furthermore, Fraser's speech did not reach the level of explicitness of the university student's expression in *Papish v. Board of Curators of the Univ. of Missouri* where the Court held that the expulsion of a university student for distributing on campus an "indecent" newspaper which contained an article entitled "M— f— Acquitted" violated the first amendment. 410 U.S. 667, 671 (1973). No member of the *Fraser* Court referred to *Papish*.

³⁰⁹ *Fraser*, 106 S. Ct. at 3165. At least one commentator concludes, however, that because value inculcation in public schools fails to achieve any of the four related goals recognized by the Supreme Court (maintaining a stable and democratic government, reducing politically inspired violence, producing a loyal and patriotic citizenry, and preparing students for citizenship), the state has no compelling interest in protecting value inculcation. van Geel, *supra* note 60, at 262-89. Although the *Ambach* Court asserted the importance of the school's role as value inculcator, 441 U.S. at 77, scant evidence supports this claim. van Geel, *supra* note 60, at 262-89. Indeed, some sociological findings reveal the contrary. *Id.* Accordingly, the *Ambach* Court's assertions are at best speculative, making the protection of value inculcation an inadequate justification for the suppression of student speech. See *id.* at 288-89.

³¹⁰ *Fraser*, 106 S. Ct. at 3163.

priety.³¹¹ School officials can now be secure in the knowledge that the courts will give great deference to their decisions to punish student speech. Students, on the other hand, will not have any security; the boundaries of their freedom of expression are uncertain and depend upon school officials' subjective judgments. By investing such unguided discretion in school officials, the Court's decision in *Fraser* will undoubtedly have a "chilling effect"³¹² on student speech.

As a result of *Fraser*, students who wish to express themselves have three alternatives. First, students simply may express themselves and hope that they have not run afoul of a school official's standard of propriety. Second, they may seek prior approval of their speech to lessen the chance of punishment. In effect, prior approval constitutes a prior restraint on speech.³¹³ Prior restraints are particularly offensive to the first amendment values of robust discussion and free flow of information because they do more than "chill" speech; prior restraints "freeze" speech.³¹⁴ Third, if students decline to seek official approval of their speech and do not want to run the risk of punishment, they may choose to remain silent. This third scenario illustrates *Fraser's* chilling effect.

The Court's reference to Congress's procedural rules further highlights *Fraser's* potential chilling effect. To buttress its argument that schools may punish student speech which officials feel transcends the boundaries of proper civil discourse, the Court noted that Congress, in both the House and Senate, has rules which prohibit the use of offensive expressions during debate.³¹⁵ Yet the analogy is inapt because the congressional rules are much more specific than the vague school disciplinary code.³¹⁶ For example, Rule XIX of Senate procedure prohibits abusive language directed at specific Senators or their states during debate in the legislative halls.³¹⁷ Because the school disciplinary rules typically prohibit conduct which interferes with the "educational process," the application of the school rules is more arbitrary and the rules' scope depends less upon the language of the provision and more upon a particular school official's subjective judgment. Students, then, unlike Senators, do not have fair notice of which improprieties school can punish. Accordingly, this uncertainty will contribute to a chilling effect on student speech.

Moreover, upon closer examination, the *Fraser* Court's reference to the Senate censures of congressional speech infractions does not support the Court's extension of the substantial disruption standard to include interference with value inculcation. For example, the censure of Senators McLaurin and Tillman, to which the *Fraser* Court refers, came about largely because of a fistfight.³¹⁸ This disruption is more analogous to the traditional concept of substantial disruption as a physical disturbance or the tortious activity standard of invasion of rights.

³¹¹ *Id.* at 3165.

³¹² See *supra* notes 188-92 and accompanying text.

³¹³ See, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552-58 (1975) (city's denial of use of municipal theatre for production of the musical "Hair" is an unconstitutional prior restraint); *Freedman v. Maryland*, 380 U.S. 51, 59-60 (1965) (scheme requiring submission of motion pictures to a state Board of Censors for prior approval, without adequate safeguards to protect against the inhibition of protected speech, is an unconstitutional prior restraint).

³¹⁴ See A. BICKEL, *THE MORALITY OF CONSENT* 61 (1975) ("A criminal statute chills, prior restraint freezes.").

³¹⁵ *Id.* at 3164.

³¹⁶ See *id.* at 3171 n.5 (Stevens, J., dissenting).

³¹⁷ Senate Procedure, S. Doc. No. 97-2, 97th Cong., 1st Sess. Rule XIX 568-69, 588-91 (1981).

³¹⁸ Senate Election, Expulsion and Censure Cases from 1793 to 1972, S. Doc. No. 92-7, 92d Cong., 1st Sess. 95-98 (1972).

Ironically, the decision in *Fraser* may undermine what it sought to protect: a school's interest in value inculcation. Affording school officials discretion to punish speech based on subjective notions of propriety hardly serves as a valuable civics lesson to students. Instead, it may breed intolerance and reduce the first amendment to a mere platitude in students' eyes.³¹⁹ Moreover, any chilling effect that *Fraser* produces will contribute to this intolerant atmosphere. Clearly, a "silence born of fear"³²⁰ does not foster respect for the constitutional guarantee of freedom of speech. In sum, the Court's extension of the substantial disruption standard to include speech that disrupts the school's value inculcation mission is detrimental to student free speech rights because value inculcation is a vague term that will give school officials wide discretion in curtailing student speech when the school official disagrees with the propriety of that speech. This increase in school officials' authority will naturally result in a chilling effect on student speech.

In addition, *Fraser* may signal a further retreat from student free speech protections guaranteed by *Tinker* by implicitly adopting a significant harm approach to *Tinker*'s invasion of rights exception. Although the Court did not specifically address the issue of whether *Fraser*'s speech invaded the rights of the student audience, it discussed the concept of invasion of rights. The *Fraser* Court distinguished *Fraser*'s speech, which it found to be extremely insulting to female students and potentially emotionally damaging to less mature members of the audience, many of whom were 14 years old,³²¹ from the student armbands in *Tinker*, which the Court found to be passive political expression that did not intrude upon the rights of others.³²² No evidence introduced at the district court, however, supported these speculations.³²³ Due to the absence of severe harm or tortious conduct, the Court implicitly relied on a standard more lenient than the tortious conduct standard when it suggested that *Fraser*'s speech had invaded the rights of other students. Instead of inflicting severe emotional harm, therefore, student speech apparently only needs to insult or offend students to lose first amendment protection. Moreover, the Court was extremely deferential to school officials' determinations of what constitutes appropriate modes of expression in the school environment.³²⁴ Thus, the Court implicitly endorsed the significant harm standard.

The tortious activity standard, however, is more consistent with precedent than the significant harm approach and more protective of first amendment values.³²⁵ The *Tinker* Court borrowed the "invasion of rights" language from the Fifth Circuit's 1966 decision in *Blackwell v. Issaquena County Board of Education*.³²⁶ The improper expression in *Blackwell*, where students forced other students to wear freedom buttons, involved tortious contact of other persons.³²⁷ Thus, *Blackwell*, the source of the invasion of rights exception to

³¹⁹ See *supra* note 103.

³²⁰ *Thomas v. Board of Educ.*, 607 F.2d 1043, 1048 (2d Cir. 1979).

³²¹ *Fraser*, 106 S. Ct. at 3165.

³²² *Id.* at 3166. When the message is more orthodox, however, the Court treats high school students more akin to college students. *Id.* at 3169-70 n.2 (Stevens, J., dissenting).

³²³ *Id.* at 3168 n.2 (Brennan, J., concurring in the judgment).

³²⁴ The Court stated that the "determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Id.* at 3165.

³²⁵ Compare *supra* text accompanying notes 140-49 (discussing the tortious activity standard) with text accompanying notes 150-56 (discussing the significant harm standard).

³²⁶ *Tinker*, 393 U.S. at 513 (citing *Blackwell*, 363 F.2d at 749).

³²⁷ See RESTATEMENT (SECOND) OF TORTS § 18 (1965).

students' first amendment protections, suggests that only tortious activity gives rise to an invasion of another's rights.³²⁸ Furthermore, this tortious activity approach allows school officials to refer to previously defined legal standards to decide if they may punish student speech.³²⁹ Under a more lenient standard, such as the significant harm approach, school officials could act on unsubstantiated fears to curtail student speech.³³⁰

Moreover, the *Tinker* Court stated that unsubstantiated fears of potential harm are not sufficient justifications to suppress student speech.³³¹ At least one commentator has noted that, under the significant harm standard, a school could punish both the armbands worn by students in *Tinker* and a controversial article about Viet Nam published in a student newspaper because of their likelihood to cause some emotional anguish to a student who had relatives or friends serve in Viet Nam.³³² In accepting such a subjective test, the Court overlooks the need for a defined legal standard which provides guidance to school officials; instead, *Fraser* allows school officials to regulate student speech at the slightest fear that the speech might cause some students emotional anxiety. Thus, the *Fraser* Court has ignored *Tinker's* admonition that a school official's undifferentiated fears do not justify infringement upon a student's freedom of expression.

The Supreme Court's upcoming decision in *Kuhlmeier v. Hazelwood School District*³³³ may alleviate the uncertainty that *Fraser* potentially produces for students. In *Kuhlmeier*, a principal censored two high school newspaper articles primarily because the stories allegedly invaded the rights of its subjects.³³⁴ Although *Kuhlmeier* is technically a prior restraint case, its significance lies in its application of *Tinker's* invasion of rights exception.³³⁵ The Eighth Circuit, applying the tortious activity standard, concluded that no grounds for a tort action existed and, therefore, held that the principal lacked sufficient justification for suppressing the articles.³³⁶ The school district petitioned for a writ of certiorari, which the Supreme Court granted.³³⁷

Kuhlmeier is crucial to student free expression rights in two respects. First, it represents an opportunity for the Court to limit *Fraser* to the proposition that the first amendment permits school officials to punish a student for delivering a sexually explicit speech at a high school assembly. The *Kuhlmeier* Court could look to Justice Brennan's concurrence³³⁸ to narrow *Fraser's* impact. Asserting that the majority's holding only recognizes a school official's authority to punish a student for delivering a disruptive speech during a high school assembly, Justice Brennan used the term disruption as it was defined by *Tinker* and its progeny.³³⁹ Although the evidence presented in the district court did not lend itself to a conclusion of disruption, Justice Brennan at least avoided

³²⁸ See *Kuhlmeier v. Hazelwood School Dist.*, 795 F.2d 1368, 1375-76 (8th Cir. 1986), *cert. granted*, 107 S. Ct. 926 (1987).

³²⁹ See *id.*; see also Note, *High School Press*, *supra* note 143, at 641.

³³⁰ See *Kuhlmeier*, 795 F.2d at 1376.

³³¹ *Tinker*, 393 U.S. at 508.

³³² See Note, *High School Press*, *supra* note 143, at 647 n.133.

³³³ 795 F.2d 1368 (8th Cir. 1986), *cert. granted*, 107 S. Ct. 926 (1987).

³³⁴ *Kuhlmeier*, 795 F.2d at 1374-75.

³³⁵ See *id.* at 1375-76.

³³⁶ *Id.* at 1376.

³³⁷ 107 S. Ct. 926 (1987).

³³⁸ *Fraser*, 106 S. Ct. at 3167-68 (Brennan, J., concurring in the judgment).

³³⁹ See *Fraser*, 106 S. Ct. at 3167-68 (Brennan, J., concurring in the judgment).

equating disruption of the educational process with disruption of the school's role as an inculcator of civic values and thereby avoided the chilling effect on student speech produced by that extension of *Tinker*.³⁴⁰

Kuhlmeier is also critical to student free expression rights because it provides the Court an opportunity to define *Tinker*'s invasion of rights concept. If the Court rejects the tortious conduct approach and adopts the significant harm standard, student free speech rights will be dealt another severe blow as this approach will give school officials even greater discretion in their decisions to restrict student speech. If the Supreme Court does reverse the Eighth Circuit, *Fraser* and *Kuhlmeier* will represent the evisceration of *Tinker*'s protections of student speech.

CONCLUSION

In *Bethel School District v. Fraser*, the Supreme Court reexamined the guidelines laid down in *Tinker v. Des Moines Independent Community School District* to decide whether school officials could discipline a student for delivering a speech in the form of a sexual metaphor at a high school assembly. Although under traditional analysis the speech neither disrupted school proceedings nor impinged upon the rights of other students as required under *Tinker*, the Court nevertheless concluded that school officials may prohibit offensive speech to encourage effective civil discourse. In doing so, however, the Court greatly expanded the *Tinker* exceptions to first amendment protection, substantial disruption and invasion of rights, to include a disruption of value inculcation exception. Furthermore, because the decision was extremely deferential to school officials' decisions, the officials may now exercise their own subjective judgment in determining whether speech is offensive or proper. By investing such unguided discretion in school officials, the Court's decision in *Fraser* likely will have a chilling effect on student speech. Much of the uncertainty that *Fraser* will produce can be avoided if the Supreme Court narrows *Fraser*'s scope in its upcoming decision of *Kuhlmeier v. Hazelwood School District*.

ROYAL C. GARDNER III

³⁴⁰ See *supra* notes 309-20 and accompanying text.