Missouri Law Review

Volume 52
Issue 4 *Fall 1987*

Article 4

Fall 1987

Fraser Balancing Test: Leaving Cohen's Jacket at the Schoolhouse Gate, The

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NOTES

THE *FRASER* BALANCING TEST: LEAVING COHEN'S JACKET AT THE SCHOOLHOUSE GATE

Bethel School District v. Fraser[1]

In *Bethel School District v. Fraser*,[2] the United States Supreme Court was presented the challenge of determining proper limitations on students' constitutional rights at school. The specific question addressed by the Court was whether a student possessed the comprehensive freedom to employ offensive language in expressing his opinions on school premises.[3] The answer, clearly, was no.[4] The *Fraser* decision holds that a student does not necessarily enjoy first amendment protection when speaking in an indecent manner within the confines of the school building. At least under certain circumstances, offensive modes of expression by students may be justifiably regulated and punished by school officials.[5]

In reaching this determination, the Supreme Court looked to the underlying principles of *Tinker v. Des Moines Independent School District*[6] and *Cohen v. California*.[7] In those decisions, the Court utilized a balancing test to determine first amendment protection of controversial language. The Court weighed the speaker's interests in conveying the message against the State's interests in regulating that conveyance.[8] In both *Tinker* and *Cohen*, the balance tipped in favor of the speaker.[9]

In *Tinker*, the Supreme Court declared that students did not "shed their constitutional rights to freedom of speech or expression at the school-

1. 106 S. Ct. 3159 (1986).
2. *Id.*
3. *Id.* at 3164.
4. *Id.*
5. *Id.* at 3166.
6. 393 U.S. 503 (1969).
7. 403 U.S. 15, *reh'g denied*, 404 U.S. 876 (1971).
8. *Tinker*, 393 U.S. at 507; *Cohen*, 403 U.S. at 18, 22-23.
9. *See Tinker*, 393 U.S. at 514; *Cohen*, 403 U.S. at 27.

house gate."[10] Students could freely express controversial and political viewpoints without fear of punishment.[11] Only when the speech disrupted the educational objectives of the school could sanctions be imposed.[12]

Later, in *Cohen*, the Court upheld an individual's right to express political viewpoints through vulgar and offensive language. The use of lewd expressions in voicing dissident opinions was constitutionally protected.[13] Absent public disturbance, the language was permissible.[14]

In delivering the *Fraser* opinion, Chief Justice Burger clearly indicates that the rationale of *Cohen* is inappropriate in a high school setting.[15] As a result, a limitation is placed on the first amendment rights afforded students in *Tinker*. A student clearly retains the freedom to voice dissident opinions in school, but now he may be regulated in the choice of language used to convey that message.[16]

In reaching this conclusion, the *Fraser* Court utilized a balancing process similar to those used in *Tinker* and *Cohen*.[17] The distinctive outcome in *Fraser* came about through the Court's determination that, under the facts of the case, the State's interests superceded those of the orator.[18] However, the resulting boundary line between appropriate and inappropriate student language appears to be the consequence of more than just the distinguishable fact situations between *Fraser* and previous decisions. Rather, the distinction seems to lie in a shift of emphasis that the Court places on one scale of the balancing mechanism. That is, in cases involving indecent student language in schools, the Court appears to have redefined the scope of the State interests against which the speaker's interest must be weighed. In so doing, the focus of the disruptive test is now centered more closely on the teaching of societal values rather than the maintenance of classroom order.[19] The ultimate impact of this shift in the Court's attention is unclear; just as in *Tinker*[20] and *Cohen*,[21] the door has been left open to future refinements and courtroom battles.[22]

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10. *Tinker*, 393 U.S. at 506.
11. *Id.* at 511.
12. *Id.* at 513.
13. *Cohen*, 403 U.S. at 26.
14. *Id.*
15. 106 S. Ct. at 3164.
16. *Id.* at 3165.
17. *See id.* at 3164.
18. *Id.* at 3165-66.
19. *Id.* at 3164.
20. *See infra* notes 34-41, 60 and accompanying text.
21. *See infra* notes 56-60 and accompanying text.
22. *See infra* notes 96-101 and accompanying text.

In *Tinker*, three students wore black armbands to class to publicize their objections to the Vietnam War.[23] They chose to do so despite a newly adopted school regulation specifically prohibiting the activity.[24] All three were suspended until they agreed to comply with the regulation. The Supreme Court held that the disciplinary actions taken by the school officials violated the students' first amendment rights.[25]

The *Tinker* decision was based on a balancing test.[26] The Court examined the students' rights guaranteed under the first and fourteenth amendments. Weighed against those rights was the State's interest in maintaining control in the classroom.[27]

Justice Fortas, writing for the majority, stressed that "First Amendment rights, applied in light of the special characteristics of the school environment, [were] available to teachers and students."[28] A student was not limited to voicing only those opinions which were pre-approved by school officials. He could not be prohibited from expressing his feelings solely because they involved issues with which school officials did not wish to contend.[29]

Also compelling, however, was the State's need to regulate student conduct to insure an orderly academic environment. Great deference was afforded the authority of school officials "to prescribe and control conduct in the schools."[30]

The Court ultimately held that a student had the right to express his opinion so long as the speech did not "materially and substantially" in-

23. Tinker v. Des Moines Independent School District, 393 U.S. 503, 505 (1969). The Court held that wearing the armbands constituted a symbolic act illustrating a political viewpoint which was protected by the free speech clause of the first amendment. *Id.*

24. *Id.* After learning of the demonstration, school officials initiated a policy which mandated that a student donning an armband would first be asked to remove it. If the request was refused, the student would be suspended until he agreed to conform with the regulation. *Id.*

25. *Id.* at 514.

26. *Id.* at 507; *see* Note, *Tinker Revisited: Fraser v. Bethel School District and Regulation of Speech in the Public Schools*, 1985 DUKE L.J. 1164, 1166 & n.24, 1176 & n.92, 1188 & n.165.

27. *Tinker*, 393 U.S. at 507.

28. *Id.* at 506; *see also* Shelton v. Tucker, 364 U.S. 479, 486 (1960) (failure to renew teachers' contracts for refusing to file a listing of every organization to which they belonged or contributed held unconstitutional).

29. *Tinker*, 393 U.S. at 511. *See generally* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (expulsion of student who refused to salute the American flag for religious reasons held unconstitutional).

30. *Tinker*, 393 U.S. at 507; *see* Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 807 (2d Cir. 1971) (in spite of the desire to encourage students to become involved in social comment and debate, the state ultimately has the authority "to minimize or eliminate influences that would dilute or disrupt the effectiveness of the educational process").

terfere with the discipline and operation of the school or collide with the rights of others.[31] The regulation of student speech was to occur only if there were sufficient facts which would reasonably lead school officials to "forecast substantial disruption of or material interference with school activities."[32] The majority concluded that "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students [were] entitled to freedom of expression of their views."[33]

The *Tinker* decision left a number of questions unanswered,[34] one of which was addressed in Justice Stewart's concurring opinion. Stewart felt that the majority implied that a student's first amendment rights were synonymous with those enjoyed by adults.[35] Citing *Ginsberg v. New York*,[36] he stressed that "[a] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[37] The obvious implication of his concurrence was that children in the classroom could justifiably be prohibited from voicing their opinions to an even greater extent than the majority suggested.[38] In his dissent, Justice Black suggested that the scope

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31. Tinker v. Des Moines Independent School District, 393 U.S. 503, 513 (1969).

32. *Id.* at 514.

33. *Id.* at 511. The *Tinker* decision clearly indicates that student speech may be regulated under appropriate circumstances. School officials bear the burden, though, of showing that the restrictions are necessary under those circumstances. The value of the *Tinker* decision came with "its implicit message that school officials [could not] arbitrarily, unreasonably, and without sufficient justification, curtail students' rights of free expression." Note, *Beyond the Schoolhouse Gate: Protecting the Off-Campus First Amendment Freedoms of Students*, 59 NEB. L. REV. 790, 794 (1980).

34. *See* Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 483 (1981); Comment, *The Supreme Court and the Decline of Students' Constitutional Rights: A Selective Analysis*, 65 NEB. L. REV. 161, 165-66 (1986).

35. *Tinker*, 393 U.S. at 515 (Stewart, J., concurring).

36. 390 U.S. 629, *reh'g denied*, 391 U.S. 971 (1968). In *Ginsberg*, the Supreme Court upheld the constitutionality of a state statute which prohibited the sale of "girlie" magazines to minors. These same magazines were deemed not to be obscene for adults and were therefore within the realm of first amendment protection. *Id.* at 634-35. In support of the finding that a state could justifiably adjust the definition of obscenity with regard to minors, the Court held that "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults. . . .'" *Id.* at 638 (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)).

37. *Tinker*, 393 U.S. at 515 (quoting *Ginsberg*, 390 U.S. at 649-50) (Stewart, J., concurring).

38. The extent to which the *Tinker* rationale protected the rights of students and teachers was tested in a flood of litigation. *See, e.g.*, Shanley v. Northeast

of *Tinker* was overly broad.[39] Black felt the majority opinion served only to encourage the myth that a child could say "what he pleases, where he pleases, and when he pleases."[40] The State had a valid interest in regulating conduct which distracted from the school's educational purposes. Prohibiting speech which caused such diversions was, according to Black, consistent with the first amendment.[41]

Two years after the *Tinker* decision, in *Cohen,* an individual's right to employ profanity in expressing political viewpoints was established.[42] Cohen was arrested in a county courthouse while wearing a jacket bearing explicit sexual language.[43] Although no hostile reactions or other disruptions occurred in response to the message, Cohen was charged with disturbing the peace through use of offensive conduct. He was convicted and sentenced to thirty days imprisonment.[44]

Indep. School Dist., 462 F.2d 960 (5th Cir. 1972) (court of appeals found unconstitutional a school board practice of punishing students for publishing and distributing "underground" newspapers while off school property and during out-of-school hours); Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971) (court held that a school policy which prohibited students from distributing printed material was unconstitutional); Butts v. Dallas Indep. School Dist., 436 F.2d 728 (5th Cir. 1971) (court of appeals held that, as school environment was not disrupted, students wearing black armbands were improperly disciplined for expressing their opposition to the Vietnam War); Scoville v. Board of Educ., 425 F.2d 10 (7th Cir. 1970) (en banc) (appellate court found that the sale of student newspapers, which included sexually explicit phrases and critiques of school administrators, did not bring about substantial disruption with school activities; therefore, the expulsion of students selling the paper was unconstitutional), *cert. denied,* 400 U.S. 826 (1970); Kuhlmeier v. Hazelwood School Dist., 607 F. Supp. 1450 (E.D. Mo. 1985) (trial court found that students' first amendment rights had not been violated when school officials refused to allow controversial articles to appear in school newspaper), *rev'd,* 795 F.2d 1368 (8th Cir. 1986); Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass. 1971) (secondary school teacher was found to have been deprived of his constitutional rights when suspended for utilizing a nontraditional teaching method which included the use of a four-letter word), *aff'd,* 448 F.2d 1242 (1st Cir. 1971); *see also* Egner v. Texas Indep. School Dist., 338 F. Supp. 931 (S.D. Tex. 1972).

39. *Tinker,* 393 U.S. at 526 (Black, J., dissenting). Justice Black asserted that he wished no part in a holding which "compels teachers, parents, and elected school officials to surrender control of the American public school system to public school students." *Id.* (Black, J., dissenting).

40. *Tinker,* 393 U.S. at 522 (Black, J., dissenting). Justice Black stated: "While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the *content* of speech, I have never believed that any person has a right to give speeches or engage in demonstrations *where* he pleases and *when* he pleases." *Id.* at 517 (Black, J., dissenting) (emphasis added).

41. *Id.* at 517-18 (Black, J., dissenting).

42. Cohen v. California, 403 U.S. 15, 26, *reh'g denied,* 404 U.S. 876 (1971).

43. *Id.* at 16. Cohen's jacket bore the words "Fuck the Draft."

44. *Id.* Cohen's conviction was based on the violation of section 415 of the

The Supreme Court held that Cohen's conviction violated his right of free expression.[45] Speaking for the Court, Justice Harlan recognized that the Constitution did not protect every form of expression in all situations,[46] but the Court held that the mere presence of unwilling or unsuspecting "listeners" did not automatically justify the prohibition of all speech capable of offending its audience.[47] Speech, albeit offensive, could not be curtailed absent a showing that "substantial privacy rights [of bystanders were] being invaded in an essentially intolerable manner."[48] In finding no such invasion of rights, the Court focused on the element of choice available to Cohen's audience. The Court stressed that "[t]hose in the . . . courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes."[49] Those unable to avoid brief exposure to the message, on the other hand, were free to express their objections to the "speaker."[50]

The Court also employed a balancing test in reaching their decision. An individual's freedom to express his opinions was balanced against the State's need to regulate public conduct to maintain order. On one hand, the right to voice dissident political viewpoints was to be "protected from arbitrary governmental interference."[51] On the other, the State's interest in prohibiting certain forms of expression was based on the need to avoid violent reaction to controversial messages.[52] The Court held that the mere apprehension of a disturbance did not overcome an individual's right to voice his opinions.[53]

California Penal Code which prohibited, in part, "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by offensive conduct." CAL. PENAL CODE § 415 (West 1970).

45. *Cohen*, 403 U.S. at 26.

46. Id. at 19; *see, e.g.*, Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966) ("The Constitution does not confer 'unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom.'" *Id.* at 754 (quoting Whitney v. California, 274 U.S. 357, 371 (1927))).

47. *Cohen*, 403 U.S. at 21.

48. *Id.*

49. *Id.*

50. *Id.* at 22.

51. *Id.* at 19. The Court stated that it could not "indulge the facile assumption that one [could] forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." *Id.* at 26.

52. *Id.* at 22-23.

53. *Id.* at 23 (quoting Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 508 (1969)). The Court noted: "At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected." *Id.* at 18.

Moreover, the prohibition of language on the grounds of vulgarity was arbitrary at best.[54] In reversing Cohen's conviction, the Court made it clear that "the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."[55]

The *Cohen* Court was sharply divided. Justice Blackmun's dissenting opinion suggested that prior decisions were directly at odds with the majority ruling.[56] Blackmun, with whom Chief Justice Burger and Justice Black joined, believed that *Chaplinsky v. New Hampshire*[57] governed the *Cohen* situation. In *Chaplinsky*, the prohibition of obscenities in public was upheld. Obscene utterances were deemed as having "such slight value as a step to the truth that any benefit that may be derived from them [was] clearly outweighed by the social interest in order and morality."[58] Using this rationale, Blackmun characterized the *Cohen* Court's "agonizing over First Amendment rights" as "misplaced and unnecessary."[59]

The problem which faced the lower courts following the *Tinker* and *Cohen* decisions came with the merging of the two fact situations. A number of cases moved to the dockets concerning vulgarity or "immoral messages" being conveyed in the presence of children at school.[60] It was not until

54. *Id.* at 25 (noting that "one man's vulgarity is another's lyric").

55. *Id.* The rationale of the Court in *Cohen* was consistent with the underlying policy of the *Tinker* decision. In *Tinker*, the Court held that state regulation of speech was to be based on "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509.

56. *Cohen*, 403 U.S. at 27 (Blackmun, J., dissenting).

57. 315 U.S. 568 (1942).

58. *Id.* at 572.

59. *Cohen*, 403 U.S. at 27 (Blackmun, J., dissenting).

60. *E.g.*, Board of Educ., Island Trees Union Free School Dist. v. Pico, 457 U.S. 853 (1982) (school officials violated students' constitutional rights when they removed "immoral" books from the library with the intent to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Id.* at 854 (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943))); Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981) (school officials did not violate students' first amendment rights when they cancelled a school sponsored play due to sexual content); Thomas v. Board of Educ., Granville Cent. School Dist., 607 F.2d 1043 (2d Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980) (students responsible for the writing and distribution of a newspaper which was deemed "morally offensive, indecent, and obscene" by school officials, were wrongly punished since all but insignificant occurrences took place off school property and after school hours); *see also* FCC v. Pacifica Found., 438 U.S. 726 (1978).

Although not dealing with indecent language in a school setting, the Court in *Pacifica* made it clear that prohibition of offensive language did not violate the speaker's constitutional rights when there was a "reasonable risk that children may be in the audience." *Pacifica*, 438 U.S. at 732. The Court distinguished *Cohen* on the basis that *Pacifica* dealt with vulgar language communicated over the radio, while the *Cohen* communication was in writing. According to the Court's reasoning, a child may not have been able to read the message on the jacket, but "Pacifica's broadcast could have enlarged a child's vocabulary in an instant." *Id.* at 749.

Fraser, though, that the Supreme Court stepped in to determine the effect of the *Cohen* standard on the first amendment protection afforded students in *Tinker*.

The dispute in *Fraser* arose when a high school senior delivered a sexually explicit speech at an assembly.[61] The assembly was attended by approximately 600 high school students.[62] A graphic metaphor, "glorifying male sexuality,"[63] was employed by Fraser in nominating a fellow classmate for student office.[64] Student reaction to the speech included embarrassment, hoots and yells, and gestures simulating the sexual activities to which the speaker alluded.[65] The following day, Fraser was suspended.[66] This action was based on the violation of a disciplinary rule which read: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."[67]

The Ninth Circuit Court of Appeals utilized the *Tinker* balancing test in deciding the *Fraser* case.[68] The focus of their decision centered on the minimal amount of physical outbursts or other student reaction in response to the metaphor.[69] The administration, the court noted, "had no difficulty in maintaining order during the assembly."[70] Therefore, the appellate court concluded that *Fraser* was indistinguishable from *Tinker* on the issue of disruption.[71] In finding for Fraser, the court held that "a noisy response

61. *Fraser*, 106 S. Ct. at 3162. The text of Fraser's speech follows: "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." *Id.* at 3167 (Brennan, J., concurring) (quoting Brief for Appellant at 47).

62. *Id.* at 3162.

63. *Id.* at 3165.

64. *Id.* at 3162.

65. *Id.* After the assembly, one teacher found it necessary to devote a portion of the class period to discuss the speech with her students. *Id.*

66. *Id.* Fraser served two days of a three day suspension. He was permitted to return to class on the third day. *Id.* at 3163. In addition to the suspension, Fraser's name was removed from the list of candidates for speaker at the graduation ceremonies. Despite the omission of his name from that list, Fraser won the election for graduation speaker through write-in votes. Following the district court's decision in Fraser's favor, Fraser delivered the graduation address on June 8, 1983. *Id.*

67. *Id.*

68. Fraser v. Bethel School Dist., 755 F.2d 1356, 1358 (9th Cir. 1985), *rev'd*, 106 S. Ct. 3159 (1986).

69. *Id.* at 1359-60.

70. *Id.* at 1360.

71. *Id.*

to the speech and sexually suggestive movements by three students in a crowd of 600 fail to rise to the level of material interference with the educational process that justifies impinging on Fraser's first amendment right to express himself freely."[72]

The Supreme Court, critical of the appellate court decision, held that the disciplinary action taken by school officials did not violate Fraser's first amendment rights.[73] Chief Justice Burger reaffirmed that students enjoyed constitutional protection in school. This protection, however, was maintained only so long as the speech does not interfere with "the work of the schools or the rights of other students."[74]

A "marked distinction" was drawn between the political message conveyed by Tinker's armband and the lewd content of Fraser's speech.[75] Tinker's demonstration was described by the Court as a "nondisruptive" and "passive" political message.[76] Alternatively, Fraser was characterized as a "confused boy" using indecent and insulting language which interfered with the basic instruction of community values. School officials did not have to tolerate the latter.[77]

The Court proceeded to distinguish *Fraser* from *Cohen* as well. The constitutional rights of a public school student were deemed not necessarily "coextensive" with those of an adult in different surroundings.[78] The Court held that "[i]t does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults . . . that the same latitude be permitted to children in the public school."[79]

Again the Court utilized a balancing test in reaching its conclusion. The standard adopted in *Fraser* dictates that "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[80]

Two overriding State interests were delineated by the Court. First, the necessary instruction of mature and civil conduct could not survive in an institution infested with indecent speech and conduct.[81] The use of vulgar

72. *Id.*
73. *Fraser*, 106 S. Ct. at 3166.
74. *Id.* at 3163 (quoting Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 508 (1969)).
75. *Id.* at 3163.
76. *Id.*
77. *Id.* at 3165-66.
78. *Id.* at 3164 (citing New Jersey v. T.L.O., 469 U.S. 325 (1985)).
79. *Id.*
80. *Id.*
81. *Id.* at 3165.

language was deemed inherently inconsistent with the "fundamental values"[82] of public school education.[83] Second, the State had a basic interest in "protecting minors from exposure to vulgar and offensive spoken language."[84] State imposed limitations on the speaker's rights were justified when his sexually explicit message was directed at an audience of children.[85]

In essence, the Court held that the Constitution did not prohibit the State from determining that certain forms of expression, including indecent language, were unsuitable within the school.[86] As such, the function of school officials clearly encompassed the reasonable regulation of student speech. The imposition of punishment in response to a student's inappropriately lewd mode of expression was well within the scope of their authority.[87] To hold otherwise, the Court reasoned, would surely "undermine the school's basic educational mission."[88]

The emphasis which the Court places on this newly defined educational mission is the focal point of the *Fraser* test.[89] The creation of this standard appears to come about with the Court's realization that, where indecent language is employed by a student on school premises, neither the *Tinker* nor the *Cohen* standard is adequate.[90] In this situation, the State's interest, against which the speaker's interest must be weighed, must clearly be more complicated than merely maintaining order.[91] Therefore, the differentiated facts of the *Fraser* case seem to have brought with them an individualized perspective from which to view the State's objectives and interests. Where,

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82. In Ambach v. Norwick, 441 U.S. 68 (1979), the Court held that public schools play a vital role in the "preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests. . . ." *Id.* at 76. The Court further stated that one goal of public school education was the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system. . . ." *Id.* at 77. This principle was echoed by the *Fraser* majority. *Fraser*, 106 S. Ct. at 3164.

83. *Fraser*, 106 S. Ct. at 3165-66. The Court held that it was, in fact, the *function* of the public school to prohibit the use of offensive language and that role was logically compatible with the teaching of the "values of a civilized social order." *Id.* at 3165; *see also* Haskell, *Student Expression in the Public Schools: Tinker Distinguished*, 59 GEO. L.J. 37, 56 (1970).

84. *Fraser*, 106 S. Ct. at 3165. *See generally* Seyfried v. Walton, 668 F.2d 214, 220 (3d Cir. 1981) (Rosenn, J., concurring).

85. *Fraser*, 106 S. Ct. at 3165; *see* FCC v. Pacifica Found., 438 U.S. 726, 757 (1978) (Powell, J., concurring).

86. *Fraser*, 106 S. Ct. at 3165; *see* Thomas v. Board of Educ., Granville Cent. School Dist., 607 F.2d 1043, 1055 (2d Cir. 1979) (Newman, J., concurring), *cert. denied*, 444 U.S. 1081 (1980).

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

88. *Id.*

89. *Id.* at 3165-66.

90. *Id.* at 3163-64.

91. *Id.*

prior to *Fraser*, the Court had repeatedly delineated the primary interest as the need to maintain control,[92] the focus of the *Fraser* standard shifts the emphasis placed on the State's objectives to include the maintenance of proper societal values.[93] Under the *Fraser* test, then, indecent student language which provokes a substantial disruption of the teaching of these values would justify State regulation of the speech.[94]

The *Fraser* test does not appear to be in conflict with the *Tinker* or *Cohen* decisions. Rather, it seems that all three standards will co-exist, each to be utilized in the particular fact situations under which they arose. It appears, then, that the *Cohen* test will be applicable in deciding appropriate limitations on the use of vulgar language by adults. By the same token, *Tinker* will be utilized by the courts in determining proper regulation of purely political or otherwise inoffensive student speech. The *Fraser* decision will be the guidepost in situations where vulgar student speech is regulated by school officials.

The question remains, however, whether the *Fraser* test will act as a comprehensive ban on indecent language within the school setting.[95] Although the ultimate message relayed by the *Fraser* Court is that a student can "wear Tinker's armband, but not Cohen's jacket,"[96] it is unclear whether the jacket must remain at the schoolhouse gate throughout the entire day. For example, the door is left open as to the prohibition of indecent language in situations where children do not comprise a captive audience.[97] Restrictions may or may not be permissible when the message is relayed on the playing field, in the principal's office, or in casual conversation between students.[98]

Justice Stevens touched on this matter in his dissenting opinion. He stated that it was "fairly obvious that [Fraser's] speech would be inappropriate in certain classroom and formal social settings. On the other hand, in a locker room or perhaps in a school corridor the metaphor in the speech

92. Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 507 (1969); Cohen v. California, 403 U.S. 15, 18, *reh'g denied*, 404 U.S. 876 (1971).

93. *Fraser*, 106 S. Ct. at 3164.

94. *Id.* at 3165-66.

95. *Id.* at 3167 (Brennan, J., concurring).

96. *Id.* at 3164-65 (quoting Thomas v. Board of Educ., Granville Cent. School Dist., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring), *cert. denied*, 444 U.S. 1081 (1980)).

97. *Id.* at 3165. The Court noted that school authorities could protect children, "especially in a captive audience," from exposure to lewd speech. *Id.* An implication may therefore be drawn that children may not be deemed a captive audience at all times while on school property. *Cf.* Egner v. Texas City Indep. School Dist., 338 F. Supp. 931, 944 (S.D. Tex. 1972) (since children are compelled to attend school, they comprise a captive audience during the entire school day).

98. *Fraser*, 106 S. Ct. at 3167-68 (Brennan, J., concurring).

might be regarded as rather routine comment."[99] Justice Brennan, concurring in the judgment, also recognized this issue. He stated that Fraser's speech "may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty."[100]

The *Fraser* decision draws no bright lines to distinguish the specific time, place or manner[101] that State interests outweigh those of the student. It does seem clear that the Court will continue the trend of balancing a student's interests against those of the State to ascertain where these boundaries lie. That balancing process will determine whether upcoming litigation will result in the expansion or continued restriction of student speech in public schools.

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99. *Id.* at 3171 (Stevens, J., dissenting).
100. *Id.* at 3168 (Brennan, J., concurring).
101. *Id.*; *see also* Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 513, 517, 522 (1969) (Black, J., dissenting).