

Chapter 8

Lewd, Vulgar, Plainly–Offensive, and Obscene Speech

ABSTRACT

This chapter focuses on the Bethel School District No. 403 v. Fraser (1986) case – the United States Supreme Court’s second review of students’ speech rights under the Free Speech Clause of the First Amendment. It discusses the test created in the case for determining when schools can regulate students’ speech. This test, referred to as the Bethel test or the Fraser test authorizes schools to censor students’ speech if the speech is vulgar, lewd, plainly offensive or obscene. The chapter also discusses the Supreme Court’s decision on the scope of students’ free speech rights. The ultimate goal of the chapter is to analyze the Bethel School District No. 403 v. Fraser case in order to determine if it empowers schools to censor off-campus student speech.

INTRODUCTION

This chapter examines the United States Supreme Court’s decision in Bethel School District No. 403 v. Fraser (1986). This case is important in student-speech jurisprudence as it retreated from the expansive recognition of students’ right to free speech in Tinker v. Des Moines Independent Community School District (1969). The Court removed an entire category of student speech from First Amendment protection. The chapter discusses the new test for student-speech censorship created in the case. This test authorizes schools to censor student speech that is vulgar, lewd, obscene or plainly offensive. As discussed in chapter five, obscenity is unprotected speech. Given that the Supreme Court had already created a test for obscenity many years before Bethel School District No. 403 v. Fraser (1986), this chapter per the authors examines the Court’s decision to specifically identify obscenity as unprotected student speech in the *Bethel* case. The chapter discusses what this seemingly redundant decision to exclude obscene student speech from First Amendment protection could mean for students’ right to free speech. While the Supreme Court did not define the terms “vulgar, lewd, plainly offensive or obscene” the chapter per the authors analyzes the case to determine keys for assessing whether student speech qualifies as one of those terms. The chapter also analyzes the Court’s reasoning in the case in order to determine whether,

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in *Bethel School District No. 403 v. Fraser*, the Supreme Court intended to empower schools to censor students' off-campus speech that is vulgar, lewd or plainly offensive; and whether schools are authorized to censor off-campus student speech that is obscene according to the *Bethel* case but not obscene under the traditional-obscenity jurisprudence.

MAIN FOCUS OF THE CHAPTER

After *Tinker v. Des Moines Independent Community School District* in 1969, the United States Supreme Court was silent on students' First Amendment right to free speech for almost two decades. Finally, in 1986, in *Bethel School District No. 403 v. Fraser*, the Court revisited the scope of school authority to censor students' speech under the Free Speech Clause. In this case, the Supreme Court created another test for determining whether schools can constitutionally censor student speech: if the speech is vulgar, lewd, plainly offensive or obscene, it can be constitutionally censored. The Court, however, failed to define these terms, appearing to leave them to common understanding. Unlike the expansive approach to student speech in *Tinker v. Des Moines Independent Community School District* (1969), the *Bethel School District No. 403 v. Fraser* (1986) case constricted students' free speech rights as it carved out an entire category of speech for school censorship. While the case involved on-campus student speech, it sheds some light on the Court's thinking about off-campus student speech. However, as the Supreme Court stated in 2007, the "mode of analysis employed in *Fraser* [*Bethel* case] is not entirely clear" (*Morse v. Frederick*, 2007, p. 404). We examine the *Bethel* case as well as the test created in the case in order to determine what guidance we can glean therein about the rights of students to speak off-campus.

The Speech Incident

In 1983, Bethel High School in Washington conducted an assembly to teach students about self-government (*Bethel School District No. 403 v. Fraser*, 1986). One of the students, Matthew Fraser, spoke at the assembly in support of his friend and schoolmate's candidacy for a student government position. Matthew delivered his speech despite warnings from his teachers not to deliver the speech. The teachers had told him that the speech was not appropriate and that he could face serious repercussions for the speech. The school also had a policy that was based on the material and substantial disruption test created in *Tinker v. Des Moines Independent Community School District* (1969). This policy stated that "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures" (*Bethel School District No. 403 v. Fraser*, p. 678). The case arose during a period of increased sexual programming on television that was opposed by many parents and politicians (Moss, 2011).

In the speech, laden with double entendre, Matthew stated:

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.

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