AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employers, and Schools

**Nuxoll v. Indian Prairie School District No. 204, 523 F.3d 668 (7th Cir. 2008)**

*The Gay, Lesbian and Straight Education Network promoted an annual event called the “Day of Silence,” which called attention to ways in which homosexuals were silenced by harassment. A student club at Neuqua Valley High School in Naperville, Illinois, sponsored a local version of the event, encouraging participating students to refuse to speak while on campus except when called on in class and wear a t-shirt with the slogan “Be Who You Are.” Other students, including Alexander Nuxoll, participated in a counter-protest in the form of the “Day of Truth” on the day after the “Day of Silence.” As part of that event, student wore t-shirts with their own slogans, including “Be Happy, Not Gay.” A school official inked out “Not Gay” on those shirts. The school maintained a general ban on “derogatory comments that refer to race, ethnicity, religion, gender, sexual orientation, or disability” and deemed the Day of Truth slogans as running afoul of the ban.*

*Nuxoll sued the school in federal district court seeking an injunction against applying the rule to the Day of Truth t-shirt slogans on the grounds that the t-shirts conveyed constitutionally protected speech. The district court denied his petition for a preliminary injunction, and on appeal the federal circuit court reversed that ruling. While the majority opinion by the influential circuit court judge Richard Posner emphasized that schools needed substantial discretion to make schools a nurturing educational environment for sensitive adolescents with a kind of expansive fighting words doctrine, the concurring opinion thought the case required a much more straight-forward application of existing precedents protecting the rights of students to advocate controversial political and social views on school grounds.*

*A sequel to the case returned to the same circuit panel in 2011. Nuxoll had won a permanent injunction against school officials, but they asserted that the injunction did not apply to Nuxoll’s graduation ceremony off school grounds and expired at the moment of Nuxoll’s graduation. Moreover, the school pointed to a Facebook group that formed in order to post messages hostile to one of the students participating in the “Day of Truth” and the opinion of a sociologist that the Day of Truth slogan was “particularly insidious” as evidence that the slogans were disruptive and should be banned. The circuit court rejected those arguments as adequate reasons for suppressing otherwise constitutionally protected speech and affirmed the permanent injunction.*

JUDGE POSNER.

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The plaintiff challenges the rule, as well as its application in this case.   He believes that the First Amendment entitles him to make, whether in school or out, any negative comments he wants about the members of a listed group, including homosexuals (a group defined of course by sexual orientation), provided they are not inflammatory words – that is, not “fighting words,” words likely to provoke a violent reaction and hence a breach of the peace.   The Supreme Court has placed fighting words outside the protection of the First Amendment. *Chaplinsky v. New Hampshire* (1942). . . .

The concession is prudent.   A heavy federal constitutional hand on the regulation of student speech by school authorities would make little sense.   The contribution that kids can make to the marketplace in ideas and opinions is modest and a school's countervailing interest in protecting its students from offensive speech by their classmates is undeniable.   Granted, because 18-year-olds can now vote, high-school students should not be “raised in an intellectual bubble,” as we put it in *American Amusement Machine Association v. Kendrick* (7th Cir. 2001), which would be the effect of forbidding all discussion of public issues by such students.   But Neuqua Valley High School has not tried to do that.   It has prohibited only (1) derogatory comments on (2) unalterable or otherwise deeply rooted personal characteristics about which most people, including-perhaps especially including-adolescent schoolchildren, are highly sensitive.   People are easily upset by comments about their race, sex, etc., including their sexual orientation, because for most people these are major components of their personal identity – none more so than a sexual orientation that deviates from the norm.   Such comments can strike a person at the core of his being.

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A judicial policy of hands off (within reason) school regulation of student speech has much to recommend it.   On the one hand, judges are incompetent to tell school authorities how to run schools in a way that will preserve an atmosphere conducive to learning;  on the other hand the suppression of adolescents' freedom to debate sexuality is not one of the nation's pressing problems, or a problem that can be solved by aggressive federal judicial intervention.   A far more urgent problem, the high dropout rates in many public schools will not be solved by First Amendment free-for-alls. . . .

It may not be obvious to an outsider how a T-shirt on which is written the slogan “Be Happy, Not Gay” will poison the school atmosphere, but the outsider is-an outsider.   And of course the plaintiff doesn't want to stop there.   He wants to wear T-shirts that make more emphatically negative comments about homosexuality, provided only that the comments do not cross the line that separates nonbelligerent negative comments from fighting words, wherever that line may be.   He also wants to distribute Bibles to students to provide documentary support for his views about homosexuality.   We foresee a deterioration in the school's ability to educate its students if negative comments on homosexuality by students like Nuxoll who believe that the Bible is the word of God to be interpreted literally incite negative comments on the Bible by students who believe either that there is no God or that the Bible should be interpreted figuratively.   Mutual respect and forbearance enforced by the school may well be essential to the maintenance of a minimally decorous atmosphere for learning.

But we cannot accept the defendants' argument that the rule is valid because all it does is protect the “rights” of the students against whom derogatory comments are directed.   Of course a school can – often it must – protect students from the invasion of their legal rights by other students.   But people do not have a legal right to prevent criticism of their beliefs or for that matter their way of life. *R.A.V. v. City of St. Paul* (1992). There is no indication that the negative comments that the plaintiff wants to make about homosexuals or homosexuality names or otherwise targets an individual or is defamatory. . . .

The school is on stronger ground in arguing that the rule strikes a reasonable balance between the competing interests – free speech and ordered learning – at stake in the case.   But the plaintiff tells us that the Supreme Court has placed a thumb on the balance – that it has held that a school unable to prove that student speech will cause “disorder or disturbance.” *Tinker v. Des Moines Independent School District* (1969). . . .

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If the schoolchildren are very young or the speech is not of a kind that the First Amendment protects . . . the school has a pretty free hand. . . . But it does not follow that because those features are missing from this case the school must prove that the speech it wants to suppress will cause “disorder or disturbance,” or that it “materially disrupts classwork or involves substantial disorder” or “would materially and substantially disrupt the work and discipline of the school.”

. . . . Taking the case law as a whole we don't think a school is required to prove that unless the speech at issue is forbidden serious consequences will in fact ensue.   That could rarely be proved. . . . It is enough for the school to present “facts which might reasonably lead school officials to forecast substantial disruption.” *Boucher v. School Board of School District of Greenfield* (7th Cir. 1998).

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From *Morse v. Frederick* (2007) and *Bethel School District v. Fraser* (1986) we infer that if there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school – symptoms therefore of substantial disruption – the school can forbid the speech.   The rule challenged by the plaintiff appears to satisfy this test.   It seeks to maintain a civilized school environment conducive to learning, and it does so in an even-handed way.   It is not as if the school forbade only derogatory comments that refer, say, to religion, a prohibition that would signal a belief that being religious merits special protection. . . .

. . . . This particular restriction, it is true, would not wash if it were being imposed on adults, because they can handle such remarks better than kids can and because adult debates on social issues are more valuable than debates among children.   It probably would not wash if it were extended to students when they are outside of the school, where students who would be hurt by the remarks could avoid exposure to them.   It would not wash if the school understood “derogatory comments” to embrace any statement that could be construed by the very sensitive as critical of one of the protected group identities. . . . But high-school students are not adults, schools are not public meeting halls, children are in school to be taught by adults rather than to practice attacking each other with wounding words, and school authorities have a protective relationship and responsibility to all the students. . . .

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Nevertheless, “Be Happy, Not Gay” is only tepidly negative; “derogatory” or “demeaning” seems too strong a characterization.   As one would expect in a school the size of Neuqua Valley High School, there have been incidents of harassment of homosexual students.   But it is highly speculative that allowing the plaintiff to wear a T-shirt that says “Be Happy, Not Gay” would have even a slight tendency to provoke such incidents, or for that matter to poison the educational atmosphere.   Speculation that it might is, under the ruling precedents, and on the scanty record compiled thus far in the litigation, too thin a reed on which to hang a prohibition of the exercise of a student's free speech. . . .

. . . . The district judge will be required to strike a careful balance between the limited constitutional right of a high-school student to campaign inside the school against the sexual orientation of other students and the school's interest in maintaining an atmosphere in which students are not distracted from their studies by wrenching debates over issues of personal identity.

*Reversed*.

JUDGE ROVNER, concurring.

I agree that we should reverse and remand this case to the district court with instructions to enter an injunction allowing Nuxoll to wear a shirt bearing the slogan “Be Happy, Not Gay” on the school day following the Day of Silence. I view this as a simple case. We are bound by the rule of Tinker. . . . Tinker straight-forwardly tells us that, in order for school officials to justify prohibition of a particular expression of opinion, they must be able to show that this “action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” . . . The school district has “not demonstrate[d] any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,” and no such disruption occurred two years earlier when Nuxoll’s co-plaintiff wore such a shirt to school following the Day of Silence. Therefore, this particular expression must be allowed.

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. . . . Open debate is the very value preserved by the First Amendment and yet the majority reduces it to stealth viewpoint expression. The majority expends much ink trying to strike a balance between the interests of free speech and ordered learning, a discussion which sounds remarkably similar to the rule of *Hazelwood School District v. Kulmeir* (1988), where the Supreme Court set a balancing rule for school-sponsored speech. This case does not involve school-sponsored speech, and there is no need for us to strike a new balance; the Supreme Court has already set the applicable standard in Tinker.

Moreover, I heartily disagree with my brothers about the value of the speech and speech rights of high school students, which the majority repeatedly denigrates. Youth are often the vanguard of social change. Anyone who thinks otherwise has not been paying attention to the civil rights movement, the women’s rights movement, the anti-war protests for Vietnam and Iraq, and the recent presidential primaries where the youth voice and the youth vote are having a substantial impact. And now youth are leading a broad, societal change in attitude towards homosexuals, forming alliances among lesbian, gay, bisexual, transgendered (“LGBT”) and heterosexual students to discuss issues of importance related to sexual orientation. They have initiated a dialogue in which Nuxoll wishes to participate. The young adults to whom the majority refers as “kids” and “children” are either already eligible, or a few short years away from being eligible to vote, to contract, to marry, to serve in the military, and to be tried as adults in criminal prosecutions. To treat them as children in need of protection from controversy, to blithely dismiss their views as less valuable than those of adults is contrary to the values of the First Amendment. . . .

. . . . In any case, there is no doubt that the slogan is disparaging. That said, it is not the kind of speech that would materially and substantially interfere with school activities. I suspect that similar uses of the word “gay” abound in the halls of Neuqua Valley High School and virtually every other high school in the United States without causing any substantial interruption to the educational process. There is a significant difference between expressing one’s religiously-based disapproval of homosexuality and targeting LGBT students for harassment. Though probably offensive to most LGBT students, the former is not likely by itself to create a hostile environment. Certainly, this is not a case like *Nabozny v. Podlesny* (7th Cir. 1996), where students repeatedly called a gay classmate a “faggot,” struck him, spit on him, threw him into a urinal, beat him to such a degree that he suffered internal bleeding, and subjected him to a mock rape in a classroom while a few dozen people looked on and laughed at him. So severe and constant and enduring was his classmates’ abuse, that Nabozny twice attempted suicide. . . .

. . . . The First Amendment provides the school with an opportunity for a discussion about the values of free speech and respect for differing points of view but it does not grant a license to shut down dissension because of an “undifferentiated fear or apprehension of disturbance.” Contrary to the majority’s view that “free speech and ordered learning” are “competing interests,” I would argue that these values are compatible. The First Amendment as interpreted by Tinker is consistent with the school’s mission to teach by encouraging debate on controversial topics while also allowing the school to limit the debate when it becomes substantially disruptive. Nuxoll’s slogan-adorned t-shirt comes nowhere near that standard. . . .