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THE COURTS' INCONSISTENT TREATMENT OF *BETHEL V. FRASER* AND THE CURTAILMENT OF STUDENT RIGHTS

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Students in school as well as out of school are 'persons' under our Constitution.[1]

Public high school students need to understand the Bill of Rights in order to appreciate our constitutional democracy. A fundamental purpose of public education is to teach young people the values and responsibilities of United States citizenship.

Unfortunately, many public schools fail to teach an appreciation for the key to the American form of government—the First Amendment. Many administrators seek to silence any student expression that they deem too controversial or offensive.[2] This movement toward increasing censorship by school officials has only escalated after a series of school shootings, culminating in the tragedy at Columbine High School in Littleton, Colorado.[3]

Many courts appear to sanction this conduct by school

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1. Justice Abe Fortas in Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

2. David Hudson, *First Amendment Spirit Fighting to Survive in Schools*, (Apr. 21 1998), *at* www.freedomforum.org/templates/document asp?documented=9520, (last visited Sept. 27, 2002).

3. Clay Calvert, *Free Speech and Public Schools in a Post Columbine World: Check Your Speech Rights at the Schoolhouse Metal Detector*, 77 DENV. U. L. REV. 739, 740 (2000); David L. Hudson Jr., *Censorship of Student Internet Speech: The Effect of Diminishing Student Rights, Fear of the Internet and Columbine*, 2000 L. REV. M.S.U.-D.C.L. 199, 209 (2000).

administrators by granting them more deference.[4] The result has been a reduced level of constitutional protection for student free-expression rights. The courts have also created a separate body of case law dealing with the free-speech rights of public high school students.[5] Many general First Amendment principles do not apply, or apply with reduced force, to public school students.

The First Amendment ensures that individuals may speak freely about important issues in their lives without fear of government reprisal. Generally, government officials may not punish someone for expressing their views, even if that expression is controversial, offensive, or even repugnant.[6]

The First Amendment protects speech that challenges and disrupts the status quo. Justice William O. Douglas expressed this concept eloquently in a short opinion in 1949:

> Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas, either by legislatures, courts, or dominant political or community groups.[7]

Our nation's public schools fail these general principles. Recently they have become bastions of hegemony, designed to standardize thought and ostracize dissent. An important point in this trend of diminishing student rights occurred nearly twenty years ago, when seventeen-year-old senior Matthew Fraser delivered a nominating speech containing an extended sexual metaphor before the student body at Bethel High School in Tacoma, Washington.

The school suspended Fraser for three days and removed him from the list of possible graduation speakers. When Matthew Fraser gave his speech in April 1983, he never imagined that he would become a Supreme Court litigant. But he did.

In 1986, the U.S. Supreme Court reversed the decisions of two

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4. Stuart Leviton, Comment, *Is Anyone Listening To Our Students? A Plea For Respect and Inclusion,* 21 FLA. ST. U. L. REV. 35, 39 (1993).

5. *See generally* Kevin F. O'Neill, *A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework,* 29 SW. U. L. REV. 223, 291-94 (2000) (examining the diminished speech protection in schools, prisons and the military).

6. Texas v. Johnson, 491 U.S 397, 414 (1989). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.*

7. Terminiello v. City of Chicago, 337 U.S. 1, 4-5 (1949).

lower courts and sided with the school.[8] The high court voted 7-2 that the school could prohibit Fraser's "vulgar" speech before the student body.[9] The court ruled "[s]urely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."[10]

What Matthew Fraser and perhaps even the members of the Supreme Court could not have foreseen is how important the *Fraser* decision has become in the jurisprudence of student First Amendment rights.

The lower courts have applied the decision in different ways to reach different outcomes. The majority of courts have cited *Fraser* in such a way as to give public school officials free reign to censor vulgar, lewd, or plainly offensive student speech. Some courts have gone a step further and prohibited student speech that contains offensive ideas. This article seeks to explain how the *Fraser* decision curtailed student rights recognized in the Supreme Court's last pure student speech case, *Tinker v. Des Moines Independent Community School District*.[11]

Part I examines the *Tinker* and *Fraser* decisions. Part II explains the different ways that the lower courts have applied the *Fraser* decision. Some courts apply *Fraser* only to student speech that is school-sponsored, or given before a student assembly. Other courts apply the decision to any student speech that contains vulgar and lewd language. Still other courts apply the decision to any student expression they deem offensive. Part III will discuss the pitfalls of applying the broadest view of *Fraser*. Part IV offers the authors' view on how the courts should handle *Fraser* and student speech. The authors advocate a narrow reading of *Fraser* and a return to the principles of *Tinker*. In a democracy, free speech is a vital, fundamental right, and if students are to receive any protection beyond the vagaries of geographic location, then the High Court must explain the limits of students' rights to freedom of expression.

I. TINKER/FRASER

For most of the Twentieth century, public school students possessed little, if any, free-speech protections. The Court did not even apply the First Amendment to the states until 1925.[12] This meant that public school students could not sue local school officials for First Amendment violations. For example, in 1908, the Supreme Court of Wisconsin ruled that school officials could suspend two students who wrote a poem ridiculing their teachers

8. Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).
9. *Id.* at 683.
10. *Id.*
11. *Tinker*, 393 U.S. at 504.
12. Gitlow v. New York, 268 U.S. 652 (1925).

that was published in a local newspaper.[13] The Wisconsin court reasoned that "[s]uch power is essential to the preservation of order, decency, decorum, and good government in the public schools."[14] In 1915, the California Court of Appeals ruled school officials could suspend a student for criticizing and "slamming" school officials in a student assembly speech.[15]

The U.S. Supreme Court first extended the reach of the First Amendment free-speech clause to cover actions by state officials in its 1925 decision *Gitlow v. New York*.[16] But it was not until 1943 that the U.S. Supreme Court extended First Amendment protection to public school students in the flag-salute case of *West Virginia v. Barnette*.[17]

U.S. Supreme Court precedent painted a bleak picture for the students. Just a few years earlier, during the jingoism surrounding World War II, the Supreme Court had ruled by an 8-1 vote in favor of a similar compulsory flag-salute law in *Minersville School District v. Gobitis*.[18] The Court noted that religious liberty must give way to political authority.[19]

Despite their previous views, the Supreme Court overruled *Gobitis* in its 6-3 ruling in favor of the Barnette family, finding that the First Amendment protects a person's right not to speak.[20] Writing for the Court, Justice Robert Jackson overruled *Gobitis* noting that the Supreme Court must ensure "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."[21]

The Supreme Court recited historical evidence showing the dangers of trying to coerce conformity. The Court concluded in oft-cited language: "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[22]

A. Tinker: The High-Water Mark of Student First Amendment

13. Dresser v. Dist. Bd. of Sch. Dist. No. 1, 116 N.W. 232 (Wis. 1908).
14. *Id.* at 235.
15. Wooster v. Sunderland, 148 P. 959 (Cal. App. 1st Dist. 1915).
16. *Gitlow* , 268 U.S. at 652.
17. *See* West Virginia v. Barnette, 319 U.S. 624, 642 (1943) (noting that because several students who were Jehovah Witnesses refused to salute the flag for religious reasons, school officials punished the students and their parents who sued claiming a violation of their First Amendment rights).
18. 310 U.S. 586 (1940).
19. *Id.* at 594-95.
20. *Barnette*, 319 U.S. at 637.
21. *Id.*
22. *Id.* at 642.

Rights

Little else was made of this issue until 1969 when the Supreme Court accepted another student speech case. The case arose in Des Moines, Iowa, when fifteen-year-old John Tinker, his sister, Mary Beth Tinker, thirteen, and Christopher Eckhardt, sixteen, wore black armbands to their public schools in December 1965 to protest the Vietnam conflict.[23] They never imagined that their actions would lead to a landmark First Amendment decision, but it did. Their actions eventually culminated in the leading First Amendment free-speech case for public school students.[24]

The case arose when a group of parents and students in Des Moines, Iowa, met at the Eckhardt home and decided to protest U.S. involvement in the Vietnam War.[25] The group agreed that one way to protest would be to have the students wear black armbands to their public schools.[26]

School officials learned of this and quickly enacted a no-armband policy. Under the policy, students would be suspended for wearing armbands. The school enacted its no-armband rule, but allowed the wearing of other symbols, including the Iron Cross.[27]

Several students—including Eckhardt and the Tinker siblings—wore the armbands to school anyway.[28] Predictably, school officials suspended them.[29]

The students sued and lost before a federal trial court.[30] The case eventually made its way to the United States Supreme Court, which ruled in favor of the students.[31] In oft-cited language, the Supreme Court wrote, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[32]

Writing for the majority, Justice Abe Fortas noted that the school officials could point to no evidence that the wearing of armbands would disrupt the school environment.[33] The majority wrote that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[34]

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23. *Tinker*, 393 U.S. at 504.
24. David Hudson, *On 30-year Anniversary, Tinker Participants Look Back on Landmark Case*, *at* http://www.freedomforum.org, Feb. 24, 1999 (last visited Aug. 27, 2002).
25. *Tinker*, 393 U.S. at 504.
26. *Id.*
27. *Id.* at 510.
28. *Id.* at 504.
29. *Id.*
30. *Id.* at 505.
31. *Id.* at 514.
32. *Id.* at 506.
33. *Id.* at 514.
34. *Id.* at 508.

The Supreme Court established what has become known as the *Tinker* standard to evaluate freedom of speech and expression within public school doors. According to the *Tinker* court, "[t]he record does not demonstrate any facts which might reasonably have led school authorities to *forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.*"[35]

Other portions of the opinion read like a paean to student free-speech rights. For example, Justice Fortas wrote in his opinion:

> • In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students.[36]
>
> • In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.[37]
>
> • But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.[38]
>
> • And our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society.[39]

Still other portions of the opinion indicate that the Supreme Court is more concerned with discrimination against a particular political viewpoint.[40] The Court noted that the prohibition of expression of one particular opinion, without evidence that prohibition is necessary to avoid material and substantial interference in school, is not constitutionally permissible.[41]

Whatever the reading of *Tinker*, most legal commentators believe that it stands as the high water mark for student First Amendment rights.[42] For example, Kevin O'Shea, publisher of

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35. *Id.* at 514 (emphasis added).
36. *Id.* at 511.
37. *Id.*
38. *Id.* at 513.
39. *Id.* at 508-9.
40. *Id.* at 510-11.
41. *Id.* at 511.
42. Broussard v. Sch. Bd. of Norfolk, 801 F. Supp. 1526, 1534 (E.D. Va. 1992) (noting that "*Tinker*. . .is the high-water mark for public school students' First Amendment rights"); *see also* Hudson, *supra* note 3, at 202 (noting that the *Tinker* Court established the rule that school officials may only restrict students' freedom of expression where the school officials reasonably believe

First Amendment Rights in Education, writes:

> The *Tinker* opinion effectively launched the modern era of First Amendment rights in the public education setting because it imposed a clear burden on school officials who would seek to restrict student expression: they would be required to establish that the speech in question would create a material and substantial interference with the educational environment or the rights of others.[43]

The *Tinker* standard still applies to much student-initiated expression. School officials cannot, under *Tinker*, silence student expression simply because they dislike it.[44] They must reasonably forecast that the student expression would lead to substantial disruption or invade the rights of others.[45] Yet this level of protection is in decline.[46]

Even when the *Tinker* standard is applied, there are often questions of line drawing and appropriate standards. The Confederate-flag clothing cases provide a clear example of courts struggling to apply the *Tinker* standard. If a school can point to evidence of racial conflict within the school, then a court will likely side with the school. If the school cannot provide such evidence, then a court may determine that the school officials acted out of "undifferentiated fear or apprehension."[47]

B. Fraser - Tinker Curtailed

Despite the strong headway *Tinker* made towards protecting students rights, the mid 1980s ushered in a more conservative U.S. Supreme Court, and the devolution of student's rights. In December 1983, seventeen-year-old Matthew Fraser spoke on behalf of fellow student Jeff Kuhlman before a school assembly. His short speech read:

> 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 drives hard, pushing and pushing until finally—he succeeds.
>
> Jeff is a man who will go to the very end—even the climax,

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that a substantial disruption of school activities will occur without restriction).

43. Kevin O'Shea, *First Amendment Rights in Education*, First Amendment Rights in Education Project, Sept. 2000, at 16.

44. *See Tinker*, 393 U.S. at 511 (noting that school officials cannot suppress student expression with which they do not wish to contend).

45. *Id.* at 513.

46. *See generally* O'Shea, *supra* note 41, at 3 (recognizing a new trend where courts have been more willing to tolerate the restriction of student expression to prohibit certain inappropriate speech).

47. Denno v. Sch. Bd. of Volusia County, 218 F.3d 1267, 1274-75 (11th Cir. 2000).

for each and every one of you.

So vote for Jeff for ASB vice-president—he'll never come between you and the best our high school can be.[48]

The day after his speech, an assistant principal called Fraser into the office and notified him that he had violated the school's "disruptive-conduct" rule.[49] The ruled provided that "[c]onduct which materially and substantially interfere[d] with the educational process [was] prohibited, including the use of obscene, profane language or gestures."[50]

When Matthew Fraser filed his lawsuit, he relied on *Tinker*. He argued that his speech did not cause a substantial disruption. According to the Ninth Circuit, Bethel school officials could not carry their burden of showing that the speech caused a disruption.[51] The Ninth Circuit reasoned that Matthew Fraser's speech did not disrupt the assembly program and the administration had no difficulty in keeping the assembly under control. The students' reaction to Fraser's speech may fairly be characterized as rowdy but, it was hardly disruptive.[52] The school officials argued that Fraser could be punished because his speech was inappropriate. The Ninth Circuit rejected that argument and reasoned that the mere fact that some members of the school community considered Fraser's speech to be inappropriate does not necessarily mean it was disruptive of the educational process.[53] The standard *Tinker* requires courts to apply is material disruption, not inappropriateness.[54]

Furthermore, the Ninth Circuit reasoned that school officials could not punish student speech that was not materially disruptive unless it was obscene.[55] In advancing this argument, the Ninth Circuit cited the Supreme Court's famous decision in *Cohen v. California*.[56] In *Cohen*, the Supreme Court ruled that government officials could not punish a man for wearing a jacket to a courthouse wearing the words "Fuck the Draft."[57] Using the Supreme Court's reasoning in *Cohen*, the Ninth Circuit reasoned that high school students were young adults who had already been exposed to many different viewpoints in the world.[58] The Court noted that high school students are beyond the point of being

48. Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1357 (9th Cir. 1985).
49. *Bethel Sch. Dist,* 478 U.S. at 678.
50. *Id.*
51. *Fraser*, 755 F.2d at 1359.
52. *Id.* at 1360.
53. *Id.* at 1361.
54. *Id.*
55. *Id.* at 1362-63.
56. 403 U.S. 15 (1971).
57. *Id.* at 26.
58. *Fraser*, 755 F.2d at 1362.

sheltered from the outside world.[59] The Ninth Circuit concluded that"[a]s long as the speech was neither obscene nor disruptive, the First Amendment protects [Fraser] from punishment by school officials."[60] This particularly broad statement by the Ninth Circuit perhaps ensured Supreme Court review.

The school district appealed the Ninth Circuit's decision to the U.S. Supreme Court. Seven members of the United States Supreme Court sided with the school, disagreeing that the *Tinker* standard controlled the outcome of the decision.[61] The majority distinguished *Tinker* and made several important rulings, including: (1) emphasizing that students don't possess the same level of constitutional rights as adults;[62] (2) pointing out that public school officials can prohibit vulgar and plainly offensive language before a student assembly in their capacity as educators and developers of young minds;[63] and (3) distinguishing Fraser's sexual speech with what they determined was the pure political speech of the black armbands in *Tinker*.[64]

Matthew Fraser argued that his speech nominating another classmate for a student elective office was entitled to as much protection as the black armbands in *Tinker*. The Supreme Court disagreed, distinguishing his "vulgar" speech from the pure political speech in the *Tinker* decision.

In its opinion, the majority stated that constitutional rights of students in public schools are not given the same treatment as the rights of adults in other settings.[65] To determine the constitutional rights of students in public schools, the Supreme Court set up a balancing test. The Court held that students' freedom to advocate unpopular and controversial views in school assemblies and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior.[66] The Court added that it is clearly appropriate for public school officials to prohibit the use of vulgar and offensive terms in a public school speech.[67]

Disagreeing with the Ninth Circuit, the majority noted that "the First Amendment gives a high school student in the classroom the right to wear Tinker's armband, but not Cohen's jacket."[68] The majority added that Fraser's punishment was unrelated to the

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59. *Id.* at 1363.
60. *Id.* at 1365.
61. *Bethel Sch. Dist.*, 478 U.S. at 685.
62. *Id.* at 682.
63. *Id.* at 683.
64. *Id.* at 685.
65. *Id.* at 682.
66. *Id.* at 681.
67. *Id.* at 683.
68. *Id.* at 682 (citing Thomas v. Bd. of Educ., 607 F.2d 1043, 1057 (2nd Cir. 1979)).

student's political views.[69] Thus, the Supreme Court appeared to take the view that *Tinker* was primarily a viewpoint discrimination case.

Jeff Haley, Fraser's attorney, pointed out the irony of the Court's decision—that Matthew Fraser' speech was a *purely political* speech.[70] In Fraser's speech, he nominated a student for an elective office. According to Haley, Fraser's speech was more obviously political to an outside observer than Tinker's armband.[71] Fraser himself, looking back fifteen years later has stated that there should be a heightened level of protection for speech in a student assembly. If there is a specific time where students are entitled to First Amendment protection, it should be when students give nominating speeches for student political offices.[72]

Matthew Fraser noted that the *Fraser* decision effectively overruled *Tinker*. "*Tinker* may still be good law *de jure*, but it has been *de facto* obliterated."[73] Some courts agree with this assessment. For example, one federal appeals court bluntly stated that since *Tinker*, however, the Supreme Court has cast some doubt on the extent to which students retain free-speech rights in the school setting.[74]

Two years after *Fraser*, the Supreme Court continued the trend of curtailing student First Amendment rights when they decided a student press case—*Hazelwood School District v. Kuhlmeier*.[75] In *Kuhlmeier*, a school principal pulled two student articles from the school newspaper, fearing that the topics of teen pregnancy and divorce were inappropriate for younger students.[76] The Supreme Court distinguished between the school-sponsored speech in *Kuhlmeier* and the student-initiated speech in *Tinker*. The Court determined that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities like student newspapers, so long as their actions are related to legitimate educational concerns.[77]

Commentators blasted the *Hazelwood* decision as taking away the rights given to students in *Tinker*. The bulk of literature on student rights seems to emphasize *Hazelwood* as the primary

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69. *Id.* at 685.

70. David Hudson, *Matthew Fraser Speaks Out on 15-year-old Supreme Court Free-Speech Decision*, *at* http://www.freedomforum.org, Apr. 17, 2001 (last visited Sept. 30, 2002).

71. *Id.*

72. *Id.*

73. *Id.*

74. Baxter by Baxter v. Vigo County Sch. Corp., 26 F.3d 728, 737 (7th Cir. 1994).

75. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

76. *Id.* at 263.

77. *Id.* at 273.

culprit, while leaving *Fraser* in the background. However, recent developments in the lower courts show the *Fraser* decision may do more to curtail the rights *Tinker* recognized than *Hazelwood*. The problem originates in the way *Fraser* is interpreted by some lower courts. The issue that has caused a split in the First Amendment's application is whether *Fraser* allows schools to censor any speech deemed vulgar or offensive (broad reading), or whether *Fraser* only allows the regulation of speech that is sponsored by the school (narrow reading).

II. How the Courts Have Applied *Fraser*

Courts distinguished *Tinker* and *Fraser* in two ways. First, the speech in *Fraser* was "vulgar, lewd and plainly offensive," and second, given at an official school assembly.[78] Some courts take a narrow view of *Fraser*, making the second factor a threshold issue that must be met before applying the Fraser standard. Most courts focus on the first factor and apply *Fraser* to any student speech officials find vulgar and plainly offensive.[79] A few recent courts have taken the additional step of applying *Fraser* in the broadest sense to prohibit not only offensive language, but even offensive ideas.

A. A Narrower Viewer of Fraser — Limiting Application to School-Sponsored Speech

A few courts have taken a narrow view of *Fraser*. For example, some district courts in the Tenth Circuit apply *Fraser* only to school-sponsored expression. Two illustrative cases are *McIntire v. Bethel School*[80] and *D.G. v. Independent School District #11*.[81]

1. McIntire v. Bethel School

In November of 1991, Janet Corso, a cheerleader from Bethel High School designed a T-shirt emblazoned with a graphic of a "typical teenager" and the phrase, "the best of the night's

78. *See* Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992) (holding that school officials may suppress speech that is vulgar, lewd, obscene, or plainly offensive regardless of whether it occurred during a school-sponsored event). *See also* Heller v. Hodgin, 928 F. Supp. 789 (S.D. Ind. 1996) (holding that the Court has a "legitimate, pedagogical interests in forbidding the use of language that incenses students to fight, either physically or verbally, with one another").

79. *See, e.g., Chandler*, 978 F.2d at 529 (noting that school officials may suppress speech that is vulgar, lewd, or obscene).

80. McIntire v. Bethel Sch., Indep. Sch. Dist. No. 3, 804 F.Supp. 1415 (W.D. Okla. 1992).

81. D.G. v. Indep. Sch. Dist. No. 11, No. 00-C-0614-E, 2000 U.S. Dist. Lexis 12197 (N.D. Okla. Aug. 21, 2000).

adventures are reserved for people with nothing planned."[82] Over the next four months, Corso and other students wore these T-shirts during the school day and to after-school events.[83] The student testified that she did not consider the shirt offensive.[84] She intended to wear the shirt to present an anti-drug message.[85] Two of her classmates testified that they understood the shirt as an anti-drug message.[86]

Occasionally the shirts were worn over cheerleader's uniforms before basketball games and at halftime.[87] School Official Harrod testified that no disturbances occurred due to the T-shirts during this time, other than the disturbance eventually created by the media and attorneys based on the ensuing controversy.[88]

School officials suspended twenty-six students for wearing the T-shirts, claiming that the quote came from a Bacardi Rum liquor ad.[89] The school Superintendent argued that the shirts gave the impression that the school supported student drinking.[90] In response, students and their parents brought suit to enjoin the Bethel school district and its agents from suspending the students.[91] They claimed a violation of their First Amendment free-speech rights.[92]

Defendants filed a motion to dismiss plaintiff's suit based on claims of qualified immunity.[93] Judge David L. Russell ruled that the plaintiff must prove that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right."[94] With this in mind, Judge Russell made the rather remarkable finding that "[t]he law regarding students' First Amendment right . . . was clearly established at the time Defendant school official directed the student Plaintiff's suspension . . . [and] his conduct violated the law."[95] Judge Russell said that *Fraser* and *Hazelwood* both applied only to school-sponsored speech.[96] He explained that since the T-shirts did not bear the imprimatur of the school, neither the *Hazelwood* nor *Fraser* decisions applied.[97] The shirts fell instead

82. *McIntire*, 804 F.Supp. at 1418.
83. *Id.*
84. *Id.* at 1422.
85. *Id.*
86. *Id.* at 1425.
87. *Id.* at 1422.
88. *Id.* at 1423.
89. *Id.* at 1422.
90. *Id.*
91. *Id.* at 1418.
92. *Id.*
93. *Id.* at 1419.
94. *Id.* (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).
95. *Id.* at 1420.
96. *Id.*
97. *Id.* at 1426

under the ambit of *Tinker*.[98]

Later in the opinion, Judge Russell softened the blow by conceding that "[t]he Supreme Court's opinion in *Fraser* is oblique at best and certainly less than clear."[99] He even acknowledged that there could be a broad reading of *Fraser*—"that school officials may prohibit and punish any manner or content of speech regardless of whether the speech may reasonably be viewed as school-sponsored. . . ."[100]

Despite these rather confusing concessions, the judge still ruled that the Superintendent could be held liable.[101] Judge Russell held that *Fraser* should only apply when school sponsored speech is involved.[102]

2. *D.G. v. Independent School District No. 11*[103]

On May 3, 2000, a junior student at Owasso High School in Tulsa, Oklahoma, wrote a poem during free time in class.[104] The poem used profanity and imagined student violence against her teacher, to the point of killing the teacher.[105] However, the student never directly threatened the teacher and only showed the poem to one close friend.[106] School officials learned of the poem after an undisclosed person found a copy on the floor of another teacher's classroom.[107] While the school administrators did not believe the poem to be a true or real threat, nor did the teacher fear for her life when she read the poem, the school still suspended the student for the rest of the school year and the next fall semester.[108] After the student's father availed himself to the appeals process within the school system, he brought suit in federal court claiming a Section 1983 violation of his daughter's First Amendment right to free speech.[109]

School officials argued they had broad discretionary powers under the *Fraser* case.[110] Under *Fraser*, the school could suspend the student because the school need not tolerate any student speech inconsistent with its "basic educational mission."[111] The district court, however, limited *Fraser* to cases involving student

98. *Id.* at 1426-27.
99. *Id.* at 1426.
100. *Id.*
101. *Id.*
102. *Id.*
103. D.G. v. Indep. Sch. Dist. No. 11, (No. 00-C-0614-E) 2000 U.S. Dist. LEXIS 12197 (Aug. 21 2000).
104. *Id.*
105. *Id.*
106. *Id.* at *2-4.
107. *Id.* at *4.
108. *Id.* at *6-7.
109. *Id.* at *8.
110. *Id.* at *10.
111. *Id.* at *10.

speech that is school-sponsored. The court wrote:

> *Fraser* and similar cases have created a category of exceptions to the general rule that deal with 'school-sponsored speech' such as speeches at a school assembly or articles in a school newspaper. In such cases, the school administration has greater authority to limit the speech. Neither party contends that school sponsored speech is involved in this case.[112]

The Court instead noted that the case should be analyzed under the *Tinker* "substantial disruption" rule and the "true threat" line of cases.[113] Under the *Tinker* standard, the student's poem did not cause a substantial disruption and was not a true threat.[114]

Other courts have recognized the disagreement between the broad and narrow readings of *Fraser*. For example, the Eleventh Circuit recently found that "strong arguments can be mounted to the effect that the more flexible *Fraser* standard is limited to situations in which the speech involved is likely to be perceived as bearing the imprimatur of the school."[115]

B. A Broader View of Fraser — Curtailing Vulgar and Lewd Student Speech

Most courts apply *Fraser* beyond its set of facts and extend *Fraser's* holding to allow school officials to regulate any student speech that is vulgar, lewd, or plainly offensive.[116] These courts focus on the actual words used rather than the underlying message. In other words, these courts would prohibit a T-shirt saying "Fuck Censorship" but would not prohibit a T-shirt saying "Censorship is Wrong." Though the two T-shirts advance the same message, the first one uses an explicative — a word commonly considered vulgar, lewd, and plainly offensive.

1. Broussard v. School Board of Norfolk[117]

In 1991, school officials in Norfolk County schools suspended a middle school student for wearing a T-shirt to class with the words "Drugs Suck."[118] School officials determined that the word "Suck" was inappropriate for the school environment.[119] The

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112. *Id.* at *10-11.
113. *Id.* at *12-15.
114. *Id.* at *14-15.
115. Denno v. Sch. Bd. of Volusia County, 218 F.3d 1267, 1275, n. 5 (11th Cir. 2000).
116. *See, e.g.*, Broussard v. Sch. Bod. of Norfolk, 801 F. Supp. 1526, 1536 (E.D. Va. 1992) (noting that speech that is merely lewd, indecent, or offensive is subject to limitation).
117. *Broussard*, 801 F. Supp. at 1526.
118. *Id.* at 1527.
119. *Id.*

principal said the shirt was in bad taste and had sexual connotations.[120]

School officials charged the student with violating "Rule One" of the student rulebook.[121] That rule provided that a student does not have the right to engage in conduct that will cause a disruption, disturbance, or interruption of any school activity.[122] The student rulebook listed as an example of conduct in violation of the rule as the wearing of any clothing that distracts other students and interferes with school activities.[123]

The student sued on due process and First Amendment grounds.[124] She argued that the shirt did not disrupt any school activities.[125] In support of her argument, she presented evidence that she had worn the T-shirt in question eight other times without incident.[126]

The principal countered that the word had a sexual connotation for a majority of students irrespective of context.[127] Both sides even presented experts to testify on the etymology and meaning of the word.[128] The Court sided with the school officials and held that "a reasonable middle school administrator could find that the word 'suck,' even as used on the shirt, may be interpreted to have a sexual connotation."[129]

2. *Heller v. Hodgin*[130]

Five years later, a district court in South Dakota ruled in the case of *Heller v. Hodgin*. Emily Heller, a high school senior, became involved in an altercation with another student.[131] The dispute arose when another student, who was a sophomore, cut into the senior cafeteria line.[132] Heller told the other student to remove herself from the line.[133] The other student then allegedly called Heller a "white ass fucking bitch."[134] Heller allegedly responded using the same language to dispute the assertion.[135]

School officials suspended both students for five days. They determined that the curse words constituted obscenity and

120. *Id.* at 1528-29.
121. *Id.*
122. *Id.* at 1529.
123. *Id.*
124. *Id.* at 1530-33.
125. *Id.* at 1533.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 1534.
130. Heller v. Hodgin, 928 F.Supp. 789 (S.D. Ind. 1996).
131. *Id.* at 792.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*

fighting words — two categories of expression that receive no First Amendment protection.[136] Heller alleged, among other claims, that school officials violated her First Amendment rights.[137]

The federal court rejected her claim, noting that school officials have the authority to censor student speech in school even though that speech would be protected outside of school.[138] The court relied heavily on *Fraser*, writing: "We believe, however, that *Fraser* stands for a somewhat broader principle than what the Court articulated in *Hazelwood*: namely, that some student language is not protect[ed] speech *regardless of the context in which it is uttered.*"[139] The court found Heller's speech to be vulgar and offensive.[140] "This fact alone justified the school in disciplining her."[141]

3. Other Courts

Other courts also apply a broad reading of *Fraser*. The Fifth, Eighth and Ninth Circuits have read *Fraser* broadly, using it to allow schools to prohibit any student speech deemed "vulgar and offensive," irrelevant of the context or forum where the speech occurred.[142] These courts fixed their reasoning on the following select language in *Fraser*: "[i]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse"[143] and "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[144] Courts have used these passages to justify applying the *Fraser* standard to all student expression, rather than just school-sponsored speech.

More recently, courts have come to rely on footnote four in the *Hazelwood* decision that explains the difference between *Tinker* and *Fraser*. The footnote reads: "The decision in *Fraser* rested on the 'vulgar,' 'lewd,' and 'plainly offensive' character of a speech delivered at an official school assembly rather than on any

136. *Id.* at 793. *See also* Roth v. U.S., 354 U.S. 476 (1957) (holding that obscenity is not protected speech); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (holding that fighting words are not protected speech).

137. *Heller*, 928 F. Supp. at 791.

138. *Id.* at 797.

139. *Id.* (emphasis added).

140. *Id.* at 798.

141. *Id.*

142. Canady v. Bossier Parish Sch. Bd., 240 F.3d 437 (5th Cir. 2001); *Heller*, 928 F. Supp. at 797 ("We believe, however, that *Fraser* stands for a somewhat broader principle than what the Court articulated in *Hazelwood*: namely, that some student language is not protect[ed] speech regardless of the context in which it is uttered."); Chandler v. McMinnville Sch. Dist., 978 F.2d 524 (9th Cir. 1992).

143. Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 469 (6th Cir. 2000) (citing *Fraser*, 478 U.S. at 683).

144. *Fraser*, 478 U.S. at 683.

propensity of the speech to 'materially disrup[t] class work or involve[e] substantial disorder or invasion of the rights of others."[145]

A court taking a broad view of *Fraser* focuses on the distinction between the vulgar, lewd, and plainly offensive nature of Fraser's speech rather than its disruptiveness,[146] yet fails to recognize the middle portion of the footnote stating that *Fraser* applies to "a speech delivered at an official school assembly."[147]

Moreover, a court taking a broad view of *Fraser* also focuses on whether student language is vulgar or lewd and plainly offensive.[148] If the court determines that the language fits these categories, *Fraser* controls and school officials prevail.

C. The Broadest View of Fraser *– Prohibiting Any Student Speech That Is Offensive*

Still other more recent court decisions have taken an even broader view of *Fraser*. These courts have interpreted the *Fraser* decision as providing school officials with carte blanche power to censor any student speech that they find *offensive*—even if the expression is not vulgar or lewd. These courts extend *Fraser* beyond mere form to pure content. The Supreme Court in *Fraser* allowed school officials to prohibit the use of certain vulgar, lewd and plainly offensive *expression* in public discourse.[149] Some court decisions have extended this rationale to apply "offensive" not just to the way an idea is expressed, but to the *idea* itself.

1. Boroff v. Van Wert City Board of Education

In 1999, high school senior Nicholas Boroff wore a T-shirt to Van Wert High School featuring the shock-rocker Marilyn Manson.[150] The front depicted Manson and of a three-faced Jesus with the words "See No Truth. Hear No Truth. Speak No Truth."[151] The back of the shirt bore the word "BELIEVE" with the letters "LIE" highlighted.[152]

School officials sent Boroff home from school several times for wearing the Manson shirt.[153] Contending he had a First Amendment right to wear the shirt he sued in federal court, where a district court rejected his claim.[154] On appeal, a three-judge

145. *Hazelwood*, 484 U.S. at 272.
146. *Boroff*, 220 F.2d at 470.
147. *Hazelwood*, 484 U.S. at 272.
148. *Id.*
149. *Fraser*, 478 U.S. at 683.
150. *Boroff*, 220 F.2d at 467.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*

panel of the Sixth Circuit agreed by a 2-1 vote.[155]

The majority began its analysis by citing *Fraser* for the proposition that "[i]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."[156] Thus, with the issue so framed, the Court analyzed the *Tinker*, *Fraser* and *Hazelwood* triology.[157] The majority cited *Hazelwood* for its treatment of *Tinker* and *Fraser*.[158] According to the Sixth Circuit, the Supreme Court in *Hazelwood* distinguished between the First Amendment analysis applied in *Tinker* and the analysis applied in *Fraser*.[159] The Court noted that the *Fraser* decision applied to the vulgar and offensive nature of speech, whereas *Tinker* rested on the tendency of the speech to disrupt class work or create a substantial disorder in the classroom.[160] *Fraser* sets forth the standard for reviewing the suppression of vulgar or plainly offensive speech.[161] The principal believed the shirt to be offensive because the band depicted promotes destructive conduct and demoralizing values contrary to the school's educational purpose.[162]

Boroff argued that the school officials had engaged in viewpoint discrimination, much like the singling out of black armbands in *Tinker*.[163] Boroff cited school officials' allowance of T-shirts promoting other bands, such as Slayer and Megadeth.[164] The majority glossed over this fact, reasoning that school officials could prohibit student expression that promotes "disruptive and demoralizing values."[165]

Boroff also pointed to the affidavit of the school principal who stated that the Manson T-shirt with the three-headed Jesus was offensive because "it mocks a major religious figure."[166] The majority dismissed this statement as "one sentence" insufficient to create a jury question on the issue of viewpoint discrimination.[167] The majority went so far in its opinion to say the "the record is devoid of any evidence that the T-shirts, the 'three-headed Jesus' T-shirt particularly, were perceived to express any particular political or religious viewpoint."[168]

The *Boroff* Court extended the *Fraser* interpretation beyond

155. *Id.* at 471.
156. *Id.* at 468.
157. *Id.* at 468-69.
158. *Id.*
159. *Id.* at 469.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 470.
164. *Id.* at 469.
165. *Id.* at 471.
166. *Id.* at 470.
167. *Id.*
168. *Id.* at 469.

"vulgar terms" to offensive ideas. This left the court with a reading of *Fraser* that creates a paradigm by which a school official first determines if the speech in question is "vulgar *or* offensive."[169] If it is found to be either, then the school may censor the speech. If the speech is found to be neither vulgar nor offensive, then the school must resort to the *Tinker* standard to determine if it is censorable.[170]

The *Boroff* dissent criticized the majority for failing to recognize that the three-headed Jesus shirt conveyed a political or religious viewpoint.[171] The dissent stated that the majority misunderstood the meaning of the terms "vulgar" and "offensive" reasoning that those terms apply to expression that is "coarse and crude," rather than to the expression of a "repellent" viewpoint.[172]

Legal commentator Kevin O'Shea has also criticized the *Boroff* decision, noting that "its rationale would permit public school officials to restrict virtually any student speech they deem to be offensive."[173]

2. *Denno v. School Board of Volusia County* [174]

Wayne Denno, a Florida high school student and Civil War re-enactor, displayed a Confederate battle flag to his friends as they were discussing Civil War history.[175] An assistant principal saw the flag and ordered Denno to remove it.[176] When Denno tried to explain the historical significance of the flag, the official ordered

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169. *Id.* It should be noted that the Court in *Boroff* changes the language of *Fraser*. While the *Fraser* opinion consistently refers to language that is "vulgar *and* offensive," the Sixth Circuit modifies the wording to "vulgar *or* offensive." This is an expansion of *Fraser* that seems novel, though easily replicated.

170. *Id.*

171. *Id.* at 473.

172. *Id.* at 473-74. A later Sixth Circuit decision shows that consistent application of *Fraser* can be elusive, even within the same circuit. In *Castorina v. Madison County School Board*, 246 F.3d 536 (6th Cir. 2000), the Sixth Circuit examined whether school officials violated the First Amendment rights of two students who wore Hank Williams, Jr. T-shirts that also displayed the Confederate flag. *Id.* at 542. This panel reasoned that the school dress case was properly examined under the *Tinker* standard. *Id.* The panel determined that both *Fraser* and *Hazelwood* "contain important factual differences that distinguish them from the instant controversy." *Id.* According to the Sixth Circuit panel in *Castorina*, *Fraser* represented a case where the school officials "had wide latitude in determining 'the manner of speech' that was permissible on school grounds." *Id.* The panel then went so far as to say that *Fraser* was primarily a case about disruptive speech. *Id.* Suffice it to say, this panel went out of its way to distinguish Fraser and simply apply the *Tinker* standard.

173. O'Shea, *supra* note 41, at 16.

174. *Denno*, 218 F.3d at 1267.

175. *Id.* at 1270.

176. *Id.*

him to the principal's office and suspended him.[177]

The student sued, claiming a violation of his First Amendment rights.[178] The Eleventh Circuit, however, granted qualified immunity to the school officials, finding that a reasonable school official could believe that he or she could prohibit the display of the Confederate flag.[179] The Court found that the school officials reasonably could have believed that such displays, like those referred to in *Fraser*, are offensive when worn on a T-shirt or otherwise displayed.[180] The gravamen of this decision was not that the Confederate flag was in itself vulgar or lewd, but the ideas and history that it represented were offensive. This alone was enough to insulate the school officials from liability.

Kevin O'Shea has identified these two decisions as a "troubling new trend in which federal and state courts are more willing to tolerate the restriction of student expression in the name of prohibiting so-called inappropriate speech . . . [they] have declared that public high school officials may prohibit student expression deemed to be offensive without showing that it is disruptive."[181]

III. TAKING EXCEPTION TO THE BROAD VIEW

Currently, most courts apply *Fraser* to both school-sponsored and student-initiated expression that is lewd, vulgar or plainly offensive. But, as *Boroff* demonstrates, there is an even greater danger. Some courts have extended the "vulgar, lewd, and plainly offensive terms" to any offensive "idea." The authors take exception to both the broad and broadest approaches to *Fraser* for a number of reasons, including the difficulty of deciding which words are vulgar, who gets to decide what is offensive, and the likelihood of over-regulation.

A. Per Se 'Vulgar' Words

Using the facts from *Broussard* as an example, suppose a student wears a T-shirt to class that says "Censorship Sucks." This statement is a classic example of political speech and an affirmation of the value of the First Amendment. Yet, school officials might argue that the term is simply inappropriate in the school environment and can be prohibited. They can argue that this type of student-initiated expression can be silenced under *Fraser*. Is this the aspiration of our schools, the very training grounds for the next generation of participants in the market place

177. *Id.* at 1270-71.
178. *Id.* at 1271.
179. *Id.* at 1274.
180. *Id.*
181. O'Shea, *supra* note 41, at 3.

of ideas?

Recall in *Broussard*, a student was punished for wearing a T-shirt conveying an anti-drug message because she used the words "Drugs Suck."[182] While the *Broussard* Court determined that the school officials should prevail under either the *Tinker* or *Fraser* standards, it was *Fraser* that carried the day. The Court noted that "[t]he *Fraser* Court enunciated a balancing test: the freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[183]

The problem with this balancing test is that it fails to provide any guidance as to how the issues should be weighed. While one would assume that fundamental, First Amendment values such as free speech would carry great weight, *Broussard* and other recent decisions indicate otherwise. It seems that understanding the boundaries of socially appropriate behavior even trumps protection of expressing socially important messages. This balance appears to simply give lip service to free-speech interests while placing a thumb on the side of an administrator's understanding of good manners. For example, the *Broussard* Court censored a powerful anti-drug message. Is that the First Amendment that we want for our young citizens?

The broad view of *Fraser* follows this logic to promote form over function (or content). The broadest view takes this to the extreme, ignoring form and prohibiting function. This absurdity is supposedly designed to help create the environment necessary to teach students about the importance of freedom.

B. The Subjectivity of "Vulgarity and Offensiveness"

Similar to the issues surrounding vulgarity, there are many problems when federal courts explicitly state what many school officials implicitly assume is their mandate—to limit any student speech that *they* consider vulgar and offensive. The broad reading of *Fraser* makes this difficult. The *Boroff*-esque movement to restrict any so-called "offensive" speech is even more troubling, and leads to the evisceration of any controversial and hard-hitting student expression.[184]

Problems in this area are manifold. The *Broussard* Court explained that "[s]peech need not be sexual to be prohibited by school officials; speech that is merely lewd, indecent, or offensive is subject to limitations."[185] The Court concluded that "[s]chools thus may limit usage of the word 'suck,' which in today's vernacular is

182. *Broussard*, 801 F. Supp. at 1529.
183. *Id.* at 1535.
184. O'Shea, *supra* note 41, at 16.
185. *Broussard*, 801 F. Supp. at 1536.

more offensive than 'damn.'"[186] Yet this belies one of the difficulties of defining vulgarities. While at one time in American history theaters refused to show a movie with the word "damn," it has now fallen in vulgarity below "suck."[187]

Who should make such decisions and orderings? As ambiguous as this area is, even if some sense of community standards within the school were taken into account, it would quickly get mired in subjective sensibilities as it often does in other areas. This can lead to students given little guidance or notice as to the appropriateness of expression. More importantly, it binds the student to the sensitivities of the particular school administrator they happen to be before. For these reasons, as *Tinker* demonstrates, a better approach would not focus on the expression itself, but on its effects in the school environment.

The issue of offensiveness is even more contentious. Attempts by the broadest readers of *Fraser* to route offensiveness run counter to fundamental First Amendment principles. The U.S. Supreme Court has stated: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[188] While the school environment is admittedly not equivalent to the public forum found on a street corner or in a city park, the school environment must still adhere to the Constitution. The same First Amendment principles and ideals that shape and control the broader American society should inform and guide public schools.

Another troubling aspect of this issue is that offensiveness is often in the eye of the beholder. In the *Cohen* decision, the normally conservative Justice John Marshall Harlan expressed this concept well in language that has become First Amendment lore:

> For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.[189]

Granted the U.S. Supreme Court has made clear that students do not possess the same level of constitutional rights as adults. One federal district judge captured this sentiment more than twenty years ago, when he differentiated between Tinker's

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186. *Id.*
187. *Id.*
188. *Johnson*, 491 U.S. at 414.
189. *Cohen*, 403 U.S. at 25.

armband and Cohen's Jacket.[190]

School officials have avoided the *Tinker* approach that focuses on the impact of student expression on the educational mission, and replaced it with a *Fraser-Hazelwood* approach that promotes censorship. Many school officials are applying *Fraser* to more than purely vulgar or offensive expression. Not only are schools applying *Fraser* to "suck" and other terms deemed offensive by the nature of the words themselves, but school officials are also applying *Fraser* to *viewpoints* and *ideas* that are deemed offensive. As the *Boroff* decision demonstrates, courts are applying *Fraser* to T-shirts that clearly depicted a political and religious viewpoint.[191] Other schools, emboldened by the current interpretations of *Fraser* have disallowed historical memorabilia,[192] union buttons sympathetic to striking teachers,[193] and religious T-shirts[194] without evidence of disruption, but merely because the ideas expressed are disfavored by the government.

This flies in the face of Constitutional principles that are designed to protect against just this sort of governmental preference for certain ideas while punishing those with non-conforming views.

Recall, Matthew Fraser himself made a political speech, even if the majority of the Supreme Court defrocked it of its political nature by casting it as "vulgar and lewd."[195] To many people, it seems odd that a nomination speech would not constitute "political speech." The problem with the broader readings of *Fraser* is that it can be applied to political speech where school officials find the political idea expressed vulgar or offensive, thus providing further inroads for viewpoint discrimination.

C. Likelihood of Over-Regulation

Another danger with the broad reading of *Fraser* is that it places educators in the unenviable position of determining what is vulgar or profane. If they assess the situation incorrectly, they risk disciplinary action and discharge. In *Lacks v. Ferguson Reorganized School District R-2*,[196] the Eighth Circuit held that a teacher could be fired for failing to enforce a student-speech

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190. *Thomas*, 607 F.2d at 1057.

191. *Boroff*, 220 F.3d at 473 (Gilman, J., dissenting) (noting that "the three-headed Jesus T-shirt was perceived to express a political or religious viewpoint").

192. *Denno*, 218 F.3d at 1270 n.5.

193. *See Chandler*, 978 F.2d at 526 (describing buttons worn by students which were deemed disruptive by the school).

194. *See Boroff*, 220 F.3d at 467 (describing a Marilyn Manson T-shirt which was deemed offensive by the school).

195. *Bethel Sch. Dist.*, 478 U.S. at 685.

196. Lacks v. Ferguson, 147 F.3d 718 (8th Cir. 1998).

restriction on the use of profanity.[197] The court of appeals repeatedly cited *Fraser* in reaching its decision.[198]

Given this context, teachers are far more likely to err on the side of censorship, thus restricting more speech than is necessary and violating one of the most sacred principles in a free society, namely the right to express unpopular ideas, sometimes in offensive ways. Instructing teachers to determine if certain expression is vulgar and offensive forces them into the quandaries the court finds itself mired in when dealing with such issues as obscenity, e.g., "can't define it, but know it when I see it."[199]

Such subjective determinations are untenable burdens on educators, and lead to a chilling effect on speech. It is far easier for a classroom teacher to determine whether a student's private speech is causing a disruption or is otherwise interfering with the program of instruction. Such determinations, while still problematic, provide an objective reference point. Such objective-based determinations will also assist teachers when they encounter situations where offensiveness to an official may be grounded in dominant cultural constructs that are deemed important to a minority student group's personal identity.

The application of *Fraser* to any "offensive" student speech could also implicate other fundamental rights, such as the right to freely exercise one's religious beliefs. Take for example the East Tennessee students who arrived at school wearing shirts emblazoned with the rather blunt assertion, "Liars go to Hell."[200] In such a situation, school officials are saddled with the determination of whether the word "hell" is a profanity or a theological term. Questions will arise as to whether context is important. Would a similar shirt that implores others to "Raise Some Hell" be allowed?

In effect, these broad readings of *Fraser* create the very situation the Supreme Court has avoided time and again in Establishment Clause jurisprudence. Under the Establishment Clause, government cannot define religion, for in so doing, they establish what is and is not a religion, and thus violate the very clause they intend to interpret. To operate with this predicament, some courts have come to use a functionalist approach in defining what falls under the religion clause arena.[201] Such catch-22's are made even more difficult by situations where a student wishes to wear a shirt that is not vulgar in its wording, but conveys a religious message that many may find offensive. For example,

197. *Id.* at 719.

198. *Id.* at 723-24.

199. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

200. On file with author. Based on author's discussion with superintendent of schools. Due to privacy interests, neither the name of the school nor the administrator will be provided.

201. Malnak v. Yogi, 592 F.2d 197, 199 (3d Cir. 1979).

proclaiming, "We are the chosen people and you are not" or "non-Christians face eternal torment" will cause some students to take great offense. In some cases, such expression may even be in violation of school speech codes.[202] But should school officials expunge it from the school's marketplace of ideas in an effort to create a "non-offensive" environment for other students?

While the First Amendment religion clauses are beyond the scope of this article, it is important to note that the religion clauses provide an insight into those areas where the state may not make judgments or determinations about validity or appropriateness. Under the religion clauses, a school may limit religious expression if it interferes with others or the educational activities of the school, but the school cannot prohibit a religious message because it disagrees with the underlying faith or belief.[203] This should be highly instructive for administrators grappling with student expression issues.

Finally, there is the question of the educational mission of public education. Lower courts cite the Supreme Court's references in *Fraser* to Robert's Rules of Order and Jeffersonian rules about appropriate conduct in Congress as examples of how civil debate should be conducted. Yet their examples seem to contradict the very point they attempt to make. In all of those instances, the rules are targeted at conduct of government officials acting in their official capacity. Few would assert that school officials do not retain control over the speech that can reasonably be attributed to the school, or that occurs during instructional time. At issue in the *Fraser-Tinker* dichotomy is when a school addresses *private student speech*.

This of course leads to a broader investigation of the purpose of education in America. It has been said that if school officials are allowed to censor any student expression they deem offensive, students will indeed live in what Justice Fortas warned of in the *Tinker* case—schools becoming "enclaves of totalitarianism."[204]

It should be noted that students in a public school are a captive audience. Those who favor greater school control over student speech often highlight this point as a reason why more control is needed. Yet this cuts both ways. Both student-speaker and student-listener are required to be at school. To void all communication except that which is suitable to the most sensitive, leaves pabulum instead of thought. As Dr. Charles Haynes, Senior Scholar at the First Amendment Center said, "Silencing

202. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 203 (3d Cir. 2001).

203. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107 (2001) (holding that disallowing alternate religious viewpoints is discriminatory and a violation of the Free Speech Clause). *See also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 647 (2000) (identifying alternate religious, political and cultural views as protected rights under the First Amendment).

204. *Tinker*, 393 U.S. at 511.

students only breeds the very alienation and resentment that cause many of the problems in the first place."[205]

Finally, public schools should be in the business of educating students about living in a constitutional democracy. Freedom of expression is arguably the most important building block in a democracy. As Professor Erwin Chemerinsky writes: "Schools cannot teach the importance of the First Amendment and simultaneously not follow it."[206]

IV. THE FATE OF FRASER AND TINKER IN THE SCHOOL SETTING

The danger in applying *Fraser* too broadly is that it could swallow *Tinker* and eliminate protection of First Amendment freedoms for public school students. Several appellate courts have already interpreted *Fraser* as seriously calling into question the First Amendment rights of students.[207] The authors contend that the *Fraser* standard should be limited to school-sponsored student speech, and that all other student expression should be governed by the *Tinker* standard.

There is no question that the government, whether represented by the President or a classroom teacher, should have substantial control over what will be interpreted as bearing the imprimatur of the government. In a school context, what is attributed to the school will impact how students are educated. For instance, minority students may feel uncomfortable and suspicious of a school that flies a Confederate flag and has Johnny Rebel as a mascot.[208] On the other hand, a student who wearing a confederate flag or a shirt with Johnny Rebel will clearly be a case of individual speech, and while it may still cause some discomfort for some students, it is not as likely to impugn the credibility of the educational system as a whole.

The *Tinker* standard provides the appropriate calculus for protecting student expression in schools. Only when school officials can reasonably forecast that the expression will create a substantial disruption of the school environment should they be allowed to censor individual student expression. Using this formulation, concerns about Cohen's jacket and profanity-laced name-calling can be addressed through character education

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205. Charles Haynes, *Recognizing students' rights makes for safer schools*, Sept. 2, 2001 *at* http://www.freedomforum.org/templates/document.asp?documentID=14778 (last visited Aug. 27, 2002).

206. Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 DRAKE L. REV. 527, 545 (2000).

207. *See* Baxter v. Vigo County Sch. Corp., 26 F.3d 728, 737 (7th Cir. 1994) (agreeing with the Court in *Tinker* that students do not relinquish their constitutional rights upon entering the school); Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 468 (6th Cir. 2000).

208. Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988).

training and even curtailed when it disrupts the learning environment. At the same time, important social messages, some of which only have their full impact when expressed in seemingly objectionable ways, should be protected in this training ground for civil discourse. Similarly, students' taste in music and in the methods they use to express their identity—whether through a rock T-shirt, off-beat hair and clothing, or even expressive elements of their faith—should be protected up to the point that it interferes with the school's ability to educate the student body. It should not be left to the aesthetic tastes and sensibilities of government officials, especially when students are required to be in school.

Yet even this standard could lead to a heckler's veto, allowing the elimination of certain messages or even viewpoints if it created too much of a disturbance.[209] However, if a student wears Confederate flag clothing to school and it leads to fights and exacerbates racial tensions, school officials must be allowed to meet their compelling interest goals of educating students.[210]

Schools can avoid the specter of majoritarian or even minority veto by abiding by the spirit of First Amendment law in other areas. Primarily, this would include the application of the least restrictive means to meet the desired compelling interest. This means using censorship as a last resort, instead of the first. Civics and character education, peer counseling, opportunities for expression and debate of ideas that may be outside the mainstream, and other alternative education opportunities not only protect the free expression rights of students, but they also provide a more robust educational environment that leads to better educated students. Schools must aggressively educate students on issues of civil debate and ways in which divergent, emotional ideas can be expressed without resort to violence or disruption. When objectionable speech occurs on campus, the resolution should not focus on silencing the offender, but on educating both the offending and the offended about appropriate responses.[211]

A large part of American public life includes the opportunity to offend and be offended. Just as one person's terrorist is another's freedom fighter, one person's vulgar and offensive speech is another's political opus. Schools are precisely the places where these realities need to be fleshed out, where students have the

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209. Doe v. Yunits, No. 00-1060-A, 2000 Mass. Super. LEXIS 491, at *14 (Mass. Super. Oct. 11, 2000) (noting that "[t]o rule in defendant's favor in this regard, however, would grant those contentious students a 'heckler's veto.'").

210. Melton v. Young, 465 F.2d 1332 (6th Cir. 1972).

211. Whitney v. California, 274 U.S. 357, 377 (1927). "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Id.*

opportunity to engage in civic behavior, even when unseemly, in a controlled environment. A prohibition on "plainly offensive" speech in the school environment is a heckler's veto writ large. And what more democratic principle can schools teach the next generation than the importance of free speech?

Lower courts apply the trilogy of *Tinker*, *Fraser* and *Hazelwood* randomly, selectively siphoning passages to fit "desired ends."[212] It is imperative that the Supreme Court once again take a pure student speech case, whether it be in the context of Confederate flags, rock star T-shirts, or religious proselytization, and require governments to protect the free speech rights of public school students.

While waiting for action by the Supreme Court, some state legislators have taken matters into their own hands and recognized the wisdom of the a narrow reading of *Fraser*. Massachusetts has recognized that the *Tinker* standard should control the regulation of student speech.[213] The statute provides:

> The right of students to freedom of expression in the public schools of the Commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school. Freedom of expression shall include without limitation, the rights and responsibilities of students, collectively and individually, (a) to express their views through speech and symbols. . . .[214]

The Supreme Judicial Court of Massachusetts interpreted this statute to prohibit the regulation of student speech simply because it was vulgar or offensive.[215] Students were allowed to wear T-shirts, bearing messages such as "See Dick Drink. See Dick Die. Don't be a Dick." And "Coed Naked Band: Do It To the Rhythm."[216] At least one legal commentator has said that the Massachusetts model should be adopted in other jurisdictions, noting that "the constitutional analyses employed by courts at all levels reflect a model for other courts to follow."[217]

The First Amendment must be taught, not ignored, in our public schools. The purpose of education is to teach young people how to become citizens and functioning members of our constitutional democracy. This requires an environment where students understand and appreciate First Amendment values. School officials must adhere to the First Amendment and not

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212. *Id.* at 371.

213. MASS. ANN. LAWS. Ch.. 71, § 82 (2001).

214. *Id.*

215. Pyle v. S. Hadley Sch. Comm., 667 N.E.2d 869, 872 (Mass. 1996).

216. *Id.* Pyle v. S. Hadley Sch. Comm. of South Hadley, 55 F.3d 20, 21 (1st Cir. 1995). The Circuit Court certified the question of whether students had the right, under the statute, to wear the shirts, to the Massachusetts Supreme Court. *Id.*

217. Clay Weisenberger, *Constitution or Conformity: When the Shirt Hits the Fan in Public Schools*, 29 J.L. & EDUC. 51, 58 (2000).

censor ideas simply because they find them offensive. As the Supreme Court said nearly sixty years ago: "That they are educating the young for citizenship is 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."[218]

218. *Barnette*, 319 U.S. at 637.