

COMMENTS

“JUST SAY NO” TO PRO-DRUG AND ALCOHOL STUDENT SPEECH: THE CONSTITUTIONALITY OF SCHOOL PROHIBITIONS OF STUDENT SPEECH PROMOTING DRUG AND ALCOHOL USE¹

INTRODUCTION

Schools across the country prohibit students from promoting or advertising drugs and alcohol.² Juneau-Douglas High School in Juneau, Alaska, is no different.³ So when a student, Joseph Frederick, unfurled a banner reading “BONG HITS 4 JESUS” while standing outside the school and watching the 2002 Olympic Torch Relay, Principal Deborah Morse requested that he remove it.⁴ When Frederick refused, Principal Morse confiscated the banner and suspended him for ten days.⁵ Frederick sued, alleging a violation of his constitutional rights. When the district court found for the school, he appealed.⁶

In response to Frederick’s appeal, the Ninth Circuit held that schools may not prohibit pro-drug and alcohol student speech.⁷ *Frederick v. Morse* marks

¹ This Comment was written before the Court issued its decision in *Frederick v. Morse*, 127 S. Ct. 2618 (2007). The majority opinion largely mirrors this Comment’s suggestions and reasoning for allowing schools to regulate pro-drug and alcohol student speech detailed in Part IV. See *id.* at 2626–29; *infra* Part IV.B. Unfortunately, while the Court offered some clarification of its prior student speech cases, the majority opinion stopped short of constructing a comprehensive framework applicable in student speech cases, such as the one suggested in Part IV. See *infra* Part IV.A.

² NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., INDICATORS OF SCHOOL CRIME AND SAFETY app. A, at 117 (1999), available at <http://nces.ed.gov/pubs99/1999057.pdf>. The study showed that eighty-seven percent of schools had “zero tolerance” policies for alcohol offenses and eighty-eight percent for drugs. *Id.* A zero-tolerance policy mandates predetermined consequences for certain conduct violations. *Id.*

³ *Frederick v. Morse*, 439 F.3d 1114, 1116 (9th Cir. 2006), *rev’d*, 127 S. Ct. 2618 (2007).

⁴ Petition for Writ of Certiorari at 5–6, *Frederick v. Morse*, 439 F.3d 1114 (9th Cir. 2006), *rev’d*, 127 S. Ct. 2618 (2007) (No. 06-278) [hereinafter Petition].

⁵ *Frederick*, 439 F.3d at 1115.

⁶ *Frederick v. Morse*, No. J 02-008 CV (JWS), 2003 WL 25274689 (D. Alaska May 27, 2003), *vacated*, 439 F.3d 1114 (9th Cir. 2006).

⁷ *Frederick*, 439 F.3d at 1123.

the first time a court directly considered whether a school may constitutionally restrict pro-drug and alcohol student speech.⁸

Ever since the Supreme Court decided that Mary Beth Tinker could protest the Vietnam War by wearing a black armband to school, courts and scholars have disagreed about how to define students' First Amendment speech rights.⁹ The concept that students do not "shed their constitutional rights . . . at the schoolhouse gate"¹⁰ conflicts with one of the main objectives of a public school education: "the inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."¹¹ Schools should balance their interest in preparing students for democratic discourse with their interest in inculcating students with necessary social values.¹² They should encourage the development and discussion of different viewpoints while protecting impressionable children from harmful messages.¹³

Schools seek to protect children from messages that promote drug and alcohol abuse.¹⁴ The Supreme Court has recognized that administrators may wish to distance their schools from such messages.¹⁵ However, while the Court has stated that "school[s] must . . . retain the authority to refuse to *sponsor* student speech that might reasonably be perceived to advocate drug or alcohol use,"¹⁶ it has not considered if a school can prohibit such speech when it occurs independently from school activities.

⁸ *Id.*

⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969); *see also, e.g.*, Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623 (2002) (contending that the rights of children are not absolute and that school tolerance of both student views and student civility is necessary); S. Elizabeth Wilborn, *Teaching the New Three Rs—Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119 (1995) (arguing that the current approach to student speech gives schools too much authority to ban unpopular viewpoints); Michael C. Jacobson, Note, *Chaos in Public Schools: Federal Courts Yield to Students While Administrators and Teachers Struggle to Control the Increasingly Violent and Disorderly Scholastic Environment*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 909 (2006) (arguing that the *Tinker* standard severely restricts educators' ability to maintain order in public schools).

¹⁰ *Tinker*, 393 U.S. at 506.

¹¹ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)) (alteration in original).

¹² Miller, *supra* note 9, at 627.

¹³ *Id.*

¹⁴ Petition, *supra* note 4, at 4.

¹⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

¹⁶ *Id.* (emphasis added). School-sponsored speech is speech that occurs as part of the educational curriculum under the supervision of faculty. *Id.* at 271. Independent speech is "a student's personal expression that happens to occur on the school premises." *Id.*

This Comment argues that the current legal framework of First Amendment student speech rights denies schools the necessary authority to prohibit pro-drug and alcohol student speech. Nonetheless, schools should have this authority to aid their efforts in combating teen drug and alcohol abuse. Therefore, the Supreme Court should create a new category of student speech that schools may restrict.

The Court’s decisions in cases involving student rights and drug testing in schools reflect the Court’s willingness to create a new category of speech. In two Fourth Amendment cases considering the issue of drug testing in schools, the Supreme Court expressed serious concerns about drug use in our nation’s schools.¹⁷ In response, the Court gave schools more power over students under the doctrine of *in loco parentis*.¹⁸ Therefore, the Court may be willing to follow this trend and allow schools to restrict pro-drug and alcohol student speech.

Public schools need the authority to restrict pro-drug and alcohol speech because drug and alcohol use has detrimental effects on children.¹⁹ In addition to the physical and psychological effects of drug and alcohol use,²⁰ early drug use is a significant factor in drug dependence later in life.²¹ Furthermore, peer approval and the perception that peers are drug or alcohol users significantly affects a child’s decision to use drugs and alcohol.²²

Part I of this Comment introduces the concept of the “school power continuum” as a way of understanding the Supreme Court’s approach to defining the nature of school power and ability to limit or restrict free speech. Part II analyzes the case law relating to student expression, beginning with the trilogy of Supreme Court student-speech cases. This Part contends that, under

¹⁷ Bd. of Educ. v. Earls, 536 U.S. 822, 834–35 (2002) (5-4 decision); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661–63 (1995) (6-3 decision).

¹⁸ The term *in loco parentis* is Latin for “in place of a parent.” BLACK’S LAW DICTIONARY 803 (8th ed. 2004).

¹⁹ Ann B. Bruner & Marc Fishman, *Adolescence and Illicit Drug Use*, 280 J. AM. MED. ASS’N 597, 597 (1998); see also discussion *infra* Part III.B.

²⁰ Bruner & Fishman, *supra* note 19, at 597.

²¹ NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUM. U., MALIGNANT NEGLECT: SUBSTANCE ABUSE AND AMERICA’S SCHOOLS 14–15 (2001), available at <http://www.omegalabs.net/media/documents/pdf/MalNeglect.pdf> [hereinafter MALIGNANT NEGLECT].

²² JULIE LANE ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., RISK AND PROTECTIVE FACTORS FOR ADOLESCENT DRUG USE, at ch. 1 (2004), available at <http://www.drugabusestatistics.samhsa.gov/NHSDA/NAC97/report.htm#3.3>.

most interpretations of these cases, schools lack the authority to restrict pro-drug and alcohol student speech.

Part III demonstrates the importance of this issue and why schools should have the authority to restrict pro-substance use speech. That Part also describes the current state of drug and alcohol use in schools and illustrates the influence pro-substance use messages have on an adolescent's decision to use drugs or alcohol. Finally, Part IV asserts that the best solution is to create a new category of student speech. This contention is supported by evidence that the Court has increased school power in relation to students' constitutional rights when the issues involved drug and alcohol use. That Part also addresses arguments that schools already wield too much power over student speech.

I. THE NATURE OF SCHOOL POWER: THE SCHOOL POWER CONTINUUM

In attempting to define the extent of students' constitutional speech rights, the Supreme Court has never clearly described the nature of school power.²³ Instead, the Court's opinions on student speech implicitly create a continuum of school power.²⁴ On one end of this continuum is the power of the state and, on the other, the power of the parent.²⁵

Traditionally, at common law, schools cared for and disciplined students by acting *in loco parentis*.²⁶ Sir William Blackstone discussed the doctrine of *in loco parentis* in his Commentaries:

[The father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.²⁷

Therefore, when a parent entrusted his child into the schoolmaster's care, the parent bestowed a measure of his parental power to the teacher.²⁸

²³ Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 59 (1996).

²⁴ *Id.*

²⁵ *Id.*

²⁶ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1769).

²⁷ *Id.*

²⁸ *Id.*

However, the rise of the American public school changed the face of school authority. Before public schools became common, parents chose whether to send their children to school and therefore voluntarily delegated their parental authority to the schoolmaster.²⁹ Compulsory education laws undermine this concept of voluntary delegation, and school authority has become, in part, a delegation of state power.³⁰ As government actors, schools must abide by the limitations on State power set forth in the Constitution.³¹ The Court has consistently recognized this aspect of school power³² and suggested that failure to protect constitutional rights in schools “strangle[s] the free mind at its source and teach[es] youth to discount important principles of our government as mere platitudes.”³³

Though public schools are in some respects state actors, the doctrine of *in loco parentis* survives.³⁴ The Court has preserved this doctrine in public schools by recognizing the “special characteristics of the school environment.”³⁵ The doctrine of *in loco parentis* loosens some of the “governmental” constraints placed on public schools, giving school administrators more power over students than the government has over adults.³⁶

The Court has never delineated just how much parental authority a public school retains in relation to student speech rights, despite acknowledging that a

²⁹ See Paul O. Proehl, *Tort Liability of Teachers*, 12 VAND. L. REV. 723, 726–27 (1959); BLACKSTONE, *supra* note 26.

³⁰ Proehl, *supra* note 29, at 726. Public schools “act in furtherance of *publicly mandated* educational and disciplinary policies.” *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) (emphasis added).

³¹ See, e.g., *T.L.O.*, 469 U.S. at 333 (holding Fourth Amendment prohibition against unreasonable searches applicable in school searches); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 511 (1969); Dupre, *supra* note 23, at 59.

³² *Tinker*, 393 U.S. at 506. “[S]tudents [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.*

³³ *T.L.O.*, 469 U.S. at 334 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

³⁴ See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995).

³⁵ *Tinker*, 393 U.S. at 506; see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988) (noting that schools are the “principal instrument in awakening the child to cultural values . . . and in helping him to adjust normally to his environment”) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681–84 (1986) (discussing a special objective of schools to teach and inculcate fundamental values and socially accepted behavior).

³⁶ *Vernonia*, 515 U.S. at 655. “When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them.” *Id.* at 654. While public schools do not have parental power to the same extent as private schools, public schools nonetheless have greater control and supervision over children than the state has over adults. *Id.* at 655–56.

school's authority is not strictly limited to the powers of the state.³⁷ The Court has placed markers on the school-power continuum with each case it has decided.³⁸ For example, when schools attempt to restrict political speech, the Court tends to define school authority in terms of governmental power and thus constrained by the Constitution.³⁹ This places the marker closer to the state end of the continuum.⁴⁰ However, in cases involving obscenity, the Court defines school authority as parental power and loosens the constitutional constraints on student speech regulation.⁴¹

II. DEFINING THE BOUNDARIES OF SCHOOL POWER AND THE EXTENT OF STUDENTS' RIGHTS TO FREEDOM OF SPEECH

While the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech," the Supreme Court has determined that the Constitution does not protect all types of speech.⁴² Moreover, the rights of children are not coextensive with those of adults.⁴³ Therefore, the primary recurring issue in student-speech cases is when the Constitution permits limitations on student expression. Whether a school may restrict or limit student speech depends on whether the student speech at issue falls into one of three categories: offensive speech, school-sponsored speech, or speech that causes a substantial disruption in school function.

A. *Constructing the Framework: Supreme Court Decisions*

Prior to *Frederick v. Morse*, The Supreme Court had decided three major student speech cases in the last thirty years: *Tinker v. Des Moines Independent Community School District*,⁴⁴ *Bethel School District No. 403 v. Fraser*,⁴⁵ and

³⁷ Dupre, *supra* note 23, at 59–60. Professor Dupre argues, however, that the Court has begun to define school power in the context of the Fourth Amendment in *Vernonia*. *Id.* at 86–93.

³⁸ *Id.* at 61.

³⁹ *Id.* at 59 (discussing the school power continuum and *Tinker*).

⁴⁰ *Id.*

⁴¹ *Id.* at 61 (discussing the school power continuum and *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986)). Part IV demonstrates that the Court tends to place the marker closer to parental power in cases involving drug use in schools. *See infra* Part IV.B.

⁴² U.S. CONST. amend. I; *see Roth v. United States*, 354 U.S. 476 (1957) (holding that obscenity is not protected by the First Amendment); *Chaplinski v. New Hampshire*, 315 U.S. 568 (1942) (holding that fighting words are not protected by the Constitution).

⁴³ *Fraser*, 478 U.S. at 682 (citing *New Jersey v. T.L.O.*, 496 U.S. 325, 340–42 (1985)).

⁴⁴ 393 U.S. 503.

⁴⁵ 478 U.S. 675.

Hazelwood School District v. Kuhlmeier.⁴⁶ *Tinker* considers independent student speech and marks a low point for school power.⁴⁷ *Fraser* returned some power to the school to limit obscene or offensive speech and recognized a school’s parental power is appropriate if necessary to protect children.⁴⁸ Finally, while *Hazelwood* increased school power to restrict school-sponsored speech, the Court characterized this authority as state power.⁴⁹

1. *Tinker v. Des Moines Independent Community School District*

In *Tinker v. Des Moines Independent Community School District*, a group of students wore black armbands to school to protest the Vietnam War.⁵⁰ The Court held that a school could not restrict this expression unless it could show that the students’ conduct would materially and “substantially interfere with the work of the school or impinge upon the rights of other students.”⁵¹ The Court recognized that student rights must be balanced with the needs of school authority “in light of the special characteristics of the school environment.”⁵² Ultimately, the majority’s reasoning did not hinge on the special needs of schools. Rather, the majority’s holding stemmed from the concept that children are persons under the Constitution, and they do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁵³

The majority feared that public schools would become “enclaves of totalitarianism” and vehicles of indoctrination.⁵⁴ This concern was especially relevant because the black armbands were a form of political speech,

⁴⁶ 484 U.S. 260 (1988).

⁴⁷ *Tinker*, 393 U.S. at 514.

⁴⁸ *Fraser*, 478 U.S. at 685.

⁴⁹ *Hazelwood*, 484 U.S. at 271–73.

⁵⁰ 393 U.S. at 504. The school board learned about the students’ plan to wear the armbands and subsequently adopted a rule prohibiting such expression. *Id.* The students knew of this new policy and defied it. *Id.*

⁵¹ *Id.* at 509. Under *Tinker*, courts will assess whether a student’s expression “interrupted school activities [or] . . . intrude[d] in the school affairs or the lives of others.” *Id.* at 514. Schools may also prohibit expression if administrators reasonably believe student speech poses a substantial risk of interfering with class work or causing disorder, based on prior experience within the school or incidents within the community. *Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 857 (E.D. Mich. 2003).

⁵² *Tinker*, 393 U.S. at 506.

⁵³ *Id.* at 506. Courts often cite this language in student-rights cases, especially in cases implicating the First and Fourteenth Amendments. *E.g.*, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656–57 (1995) (Fourth Amendment case); *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 468 (6th Cir. 2000) (First Amendment case).

⁵⁴ *Tinker*, 393 U.S. at 511.

protesting the government's escalation of the Vietnam War.⁵⁵ Therefore, the Court held that school officials must have some justification for restricting speech beyond "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."⁵⁶

Tinker "set[] forth a standard for constitutional review that placed a somewhat lower burden on the school's ability to [restrict] student speech than would be placed on the State in other contexts."⁵⁷ While public schools are subject to a lower burden than other governmental actors, the Court nonetheless characterized schools as state actors and, therefore, placed *Tinker* nearer to the state end of the school power continuum.⁵⁸ Ultimately, *Tinker* marks a low point of school power because schools must tolerate any student expression that does not cause a substantial disruption.⁵⁹

Justice Black passionately disagreed with the majority.⁶⁰ In his dissent, Justice Black argued:

It may be that the Nation has outworn the old-fashioned slogan that "children are to be seen not heard," but one may, I hope, be permitted to harbor the thought that taxpayers send their children to school on the premise that at their age they need to learn, not teach.⁶¹

Justice Black feared not that schools were indoctrinating students but that uncontrolled and unrestricted youth would lead to turmoil and chaos in schools.⁶² His dissent, which evokes the doctrine of *in loco parentis*,⁶³ would have done more to preserve the school's role in teaching civility and manners.⁶⁴

2. Bethel School District No. 403 v. Fraser

In its second major student speech case, *Bethel School District No. 403 v. Fraser*,⁶⁵ the Court limited the sweeping student rights granted in *Tinker*

⁵⁵ *Id.* at 510–11.

⁵⁶ *Id.* at 509.

⁵⁷ Dupre, *supra* note 23, at 60.

⁵⁸ *Id.* at 60.

⁵⁹ *Tinker*, 393 U.S. at 509.

⁶⁰ *Id.* at 515 (Black, J., dissenting).

⁶¹ *Id.* at 522.

⁶² *Id.* at 524.

⁶³ See *supra* notes 26–28 and accompanying text (describing the *in loco parentis* doctrine).

⁶⁴ *Id.* at 522.

⁶⁵ 478 U.S. 675 (1986).

(perhaps influenced by Justice Black’s dissent).⁶⁶ The case concerns student government nomination speech that student Matthew Fraser gave at a school assembly:

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

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

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

So vote for Jeff for A.S.B. vice-president—he’ll never come between you and the best our high school can be.⁶⁷

The Court found that this speech contained “an elaborate, graphic, and explicit sexual metaphor.”⁶⁸ In determining whether the school had authority to discipline the student, the Court held that the First Amendment does not protect a student’s use of vulgar, offensive, lewd, or obscene language in school.⁶⁹

In *Fraser*, the Court conceded that it must weigh a student’s freedom of speech against a school’s responsibility to teach “the boundaries of socially appropriate behavior.”⁷⁰ Furthermore, the majority recognized that society, parents, and school authorities acting *in loco parentis* have an important interest in protecting children from offensive language.⁷¹ The Court, citing the doctrine of *in loco parentis*, placed the marker near the parental end of the school power continuum.⁷²

⁶⁶ *Id.* at 686 (quoting *Tinker*, 393 U.S. at 526 (Black, J., dissenting)).

⁶⁷ *Id.* at 687 (Brennan, J., concurring in the judgment) (quoting Student Government Speech, App. 47).

⁶⁸ *Id.* at 678 (majority).

⁶⁹ *Id.* at 685. Obscenity does not receive constitutional protection even when used by an adult. *See* *Roth v. United States*, 354 U.S. 476, 484–85 (1957).

⁷⁰ *Fraser*, 478 U.S. at 681.

⁷¹ *Id.* at 684. The Court demonstrated this interest by citing several cases, including *Board of Education v. Pico*, 457 U.S. 853 (1982) (plurality) (supporting school’s authority to remove vulgar books from the school library), *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (plurality) (upholding the administrative regulation of “indecent but not obscene” broadcasts during hours when children may be listening), and *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding a ban on selling sexually explicit material to minors). *Id.* at 729.

⁷² Dupre, *supra* note 23, at 61 (“[T]he Court established two places on the school power continuum . . . : one for speech like that of Matthew Fraser’s where school power was closer to that of a parent and another for speech like that of Mary Beth Tinker where school power was closer to that of the state.”).

This interest in protecting children justifies restricting student rights in ways that an adult's rights may not be limited.⁷³ “[T]he First Amendment gives a high school student the classroom right to wear Tinker’s armband, but not Cohen’s [‘Fuck the Draft’] jacket.”⁷⁴ Because these societal interests outweigh a student’s interest in offensive or vulgar language, schools retain the authority to restrict such speech.⁷⁵

3. Hazelwood School District v. Kuhlmeier

In *Hazelwood School District v. Kuhlmeier*,⁷⁶ the Court gave schools more power to restrict student speech than in *Tinker*, but characterized this power as governmental power⁷⁷ and placed the marker nearer to the state end of the continuum.⁷⁸ The issue in *Hazelwood* was whether an administrator could restrict student speech in a school newspaper published for a journalism class.⁷⁹

High school administrators removed two articles from the newspaper.⁸⁰ The first was about teen pregnancy and contained interviews with several pregnant students.⁸¹ The principal feared that the references to teenage sexual activity and birth control were too mature for the school’s younger students.⁸² The second article included interviews of students dealing with divorce.⁸³ Administrators removed the article pursuant to concerns of journalistic integrity: the parents discussed in the article did not receive an opportunity to respond to the interviewees’ negative remarks.⁸⁴

⁷³ See *supra* note 36 and accompanying text (discussing the control school officials have over children that they do not have over adults).

⁷⁴ *Fraser*, 478 U.S. at 682–83 (Newman, J., concurring in the result) (quoting *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1057 (2nd Cir. 1979)). In *Cohen v. California*, Paul Robert Cohen was prosecuted for “offensive conduct” after wearing a jacket emblazoned with the phrase “Fuck the Draft” in a courtroom. 403 U.S. 15, 16 (1971). The Supreme Court held that the First Amendment protected an adult’s right to such public expression, regardless of whether the message offends some viewers or hearers. *Id.* at 26.

⁷⁵ The majority opinion quoted Justice Black’s *Tinker* dissent: “I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.” *Fraser*, 478 U.S. at 686 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 526 (1969) (Black, J., dissenting)).

⁷⁶ 484 U.S. 260 (1988).

⁷⁷ *Id.* at 271–73.

⁷⁸ Dupre, *supra* note 23, at 61–62.

⁷⁹ *Hazelwood*, 484 U.S. at 262.

⁸⁰ *Id.* at 264.

⁸¹ *Id.* at 263.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

The Court described two main types of student speech.⁸⁵ The first is a student’s personal expression that occurs on school property,⁸⁶ and the second is speech that occurs during school-sponsored activities.⁸⁷ Ultimately, whether a school must allow individual student speech is separate from the question of “whether the First Amendment requires a school affirmatively to promote particular student speech.”⁸⁸

The majority held that educators have greater discretion and authority to control school-sponsored speech.⁸⁹ A school may refuse to promote student speech by “exercising editorial control . . . so long as their actions are reasonably related to legitimate pedagogical concerns.”⁹⁰ Legitimate pedagogical concerns include ensuring students learn the intended lesson of the activity, protecting young and immature students from inappropriate subject matter, and preventing the public from mistakenly perceiving an individual’s views as “bear[ing] the imprimatur of the school.”⁹¹

The Court’s decision implicitly differentiated between government speech and government censorship.⁹² *Hazelwood* “allow[s] the school to ensure the integrity of its message, but not to quash dissent from that message.”⁹³ Therefore, a school may refuse to publish inappropriate material in the school newspaper to protect the integrity of the school’s sponsored message,⁹⁴ but the school may not restrict student speech dissenting from that editorial action.⁹⁵ While this distinction increased school power with respect to the limited category of student-sponsored speech, it nonetheless moved the marker closer to the state power end of the continuum by characterizing school-sponsored speech as state speech.⁹⁶

⁸⁵ *Id.* at 271.

⁸⁶ *Id.*

⁸⁷ *Id.* The Court considers school-sponsored speech as speech that is “part of the school curriculum, . . . supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.” *Id.*

⁸⁸ *Id.* at 270–71.

⁸⁹ *Id.* at 271.

⁹⁰ *Id.* at 273.

⁹¹ *Id.* at 271.

⁹² Jonathan Pyle, Comment, *Speech in Public Schools: Different Context or Different Rights?*, 4 U. PA. J. CONST. L. 586, 613 (2002).

⁹³ *Id.*

⁹⁴ *Hazelwood*, 484 U.S. at 271 (noting that schools can “exercise greater control . . . to assure that participants learn whatever lessons the activity is designed to teach”).

⁹⁵ However, if student dissent causes a substantial disruption, a school can restrict that dissent under *Tinker*. See *supra* Part II.A.1 (discussing the holding of *Tinker*).

⁹⁶ Dupre, *supra* note 23, at 61–62.

Overall, *Tinker* marks a low point in school power, equating school authority closely with state authority.⁹⁷ *Fraser*'s increase in a school's parental power was a retreat from *Tinker*'s dismissal of the doctrine of *in loco parentis*.⁹⁸ Finally, *Hazelwood* categorizes school speech in terms of the state's authority to preserve the integrity of its message.⁹⁹

B. *Fraser in Action: Lower Court Decisions and Pro-Drug and Alcohol Student Speech*

While *Fraser* returned some measure of parental power to schools, lower courts disagree about the scope of this power.¹⁰⁰ This disagreement arises from three different possible interpretations of *Fraser*'s holding: narrow, moderate, or broad.¹⁰¹ In addition to the confusion over the breadth of *Fraser*, courts also disagree over what sort of speech is offensive.¹⁰² The core issue is whether offensive speech is only that which contains obscene or offensive words or whether offensiveness goes beyond the words to the message conveyed. The interpretation that a court adopts is paramount in cases involving pro-drug and alcohol speech because, under *Fraser*, a school may only prohibit independent student speech that does not disrupt school functioning if that speech is offensive.

Several student speech cases have touched upon speech that promotes or expresses positive views of drug or alcohol use. The outcomes of these cases have ultimately turned upon which interpretations of *Fraser* the courts adopt. The narrow and moderate interpretations tend to result in pro-student speech

⁹⁷ *Id.* at 60.

⁹⁸ *Id.* at 61.

⁹⁹ *Hazelwood*, 484 U.S. at 271; Pyle, *supra* note 92, at 613.

¹⁰⁰ Scholars tend to disagree as much as the lower federal courts about how *Tinker*, *Fraser*, and *Hazelwood* apply. See, e.g., 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, 748 (2000) (interpreting *Fraser* and *Hazelwood* as creating one broad category of speech schools may restrict); Miller, *supra* note 9, at 649–50 (contending *Tinker*, *Fraser*, and *Hazelwood* each create a different category of student expression); Wilborn, *supra* note 9, at 135 (arguing *Fraser* and *Hazelwood* at least partially overrule *Tinker*).

¹⁰¹ David L. Hudson, Jr. & John E. Ferguson, Jr., *The Courts' Inconsistent Treatment of Bethel v. Fraser and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181 (2002). Hudson and Ferguson refer to the different interpretations of *Fraser* as a narrow view, a broader view, and the broadest view. *Id.* at 191, 194, 197.

¹⁰² Scholars also disagree over what constitutes offensive speech. Compare, e.g., Hudson & Ferguson, *supra* note 101, at 207–09 (concluding that in order to teach students about constitutional values, including the right to “offend and be offended,” schools should not regulate any nondisruptive speech), with, e.g., Miller, *supra* note 9, at 664 (suggesting that, absent a showing of disruption, *Fraser* regulates only sexually explicit speech).

outcomes and further diminution of school power.¹⁰³ Conversely, courts that broadly interpret *Fraser* are more likely to find that a school did not overstep its power by regulating student speech.¹⁰⁴ Section 1 examines the narrow interpretations of *Fraser*. Sections 2 and 3 analyze the moderate and broad interpretations, respectively.

1. *The Narrow Interpretation*

The narrow interpretation of the three Supreme Court cases creates two categories of student speech.¹⁰⁵ The first category is disruptive speech, covered by *Tinker*, and the second category is school-sponsored speech under *Hazelwood*.

One approach to this interpretation emphasizes the fact that Matthew Fraser’s speech occurred during a school assembly.¹⁰⁶ If the determinative fact is that the speech occurred during a school assembly, and not that the speech was obscene and offensive, then *Fraser* applies only in situations where a student uses inappropriate language during a school-sponsored activity.¹⁰⁷ Under this reading, *Hazelwood* has the effect of rephrasing and expanding the law set out in *Fraser*: a school may regulate any speech, not just the offensive or obscene, which occurs during a school-sponsored activity or lesson, as long as the regulation is reasonably related to pedagogical concerns.¹⁰⁸

A second approach to the narrow interpretation considers *Fraser*’s offensive speech as a specific category of expression that causes disruption, implicating the *Tinker* standard.¹⁰⁹ *Hazelwood* then creates a second category of speech—speech that is sponsored or endorsed by the school.¹¹⁰ Generally, either approach to the narrow interpretation of *Fraser* tends to equate school

¹⁰³ See *infra* Part II.B.1–2 (discussing cases that have adopted the narrow or moderate interpretation of *Fraser*).

¹⁰⁴ See *infra* Part II.B.3 (discussing cases that have adopted the broad interpretation of *Fraser*).

¹⁰⁵ *McIntire v. Bethel Sch.*, 804 F. Supp. 1415, 1426 (W.D. Okla. 1992); see *Hudson & Ferguson, supra* note 101, at 191–93.

¹⁰⁶ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677 (1986).

¹⁰⁷ *Hudson & Ferguson, supra* note 101, at 191–94.

¹⁰⁸ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

¹⁰⁹ *Frederick v. Morse*, 439 F.3d 1114, 1119 (9th Cir. 2006), *rev’d*, 127 S. Ct. 2618 (2007). In discussing *Fraser*, the court noted “sexual speech can be expected to stimulate disorder among those new to adult hormones.” *Id.*

¹¹⁰ *Id.* at 1119.

power with the power of the state, allowing restriction of speech only for school-sponsored speech or upon a showing of substantial disruption.¹¹¹

a. *McIntire v. Bethel School*

*McIntire v. Bethel School*¹¹² illustrates the first narrow interpretation of *Fraser*. Students at Bethel High School made and wore t-shirts with the phrase, “[t]he best of the night’s adventures are reserved for people with nothing planned.”¹¹³ The school district believed the phrase promoted the use of alcohol because it originated from a Bacardi Black advertising campaign.¹¹⁴ The school principal banned the shirts under a policy prohibiting the use or promotion of alcohol.¹¹⁵

In its analysis, the court struggled to synthesize *Fraser* and *Hazelwood*.¹¹⁶ The court focused on the fact that Matthew Fraser’s speech occurred during a school-sponsored assembly and held that *Fraser* and *Hazelwood* stand for the same narrow proposition: educators may restrict school-sponsored speech when such restrictions are reasonably related to legitimate pedagogical concerns.¹¹⁷ This interpretation combined *Fraser* and *Hazelwood* into one category of student speech. The court recognized, but rejected, the broad reading of *Fraser*, which would allow schools to restrict any speech that is “inconsistent with the school’s educational mission.”¹¹⁸

Ultimately, the court determined that *Fraser* and *Hazelwood* were inapplicable because the shirts did not bear the imprimatur of the school and were not school sponsored.¹¹⁹ The school failed to provide evidence that the shirts caused a substantial disruption or that a substantial disruption was

¹¹¹ See *supra* notes 57–59, 93–96 and accompanying text (discussing opinions in which courts equate school power with state power).

¹¹² 804 F. Supp. 1415 (W.D. Okla. 1992).

¹¹³ *Id.* at 1418.

¹¹⁴ *Id.* at 1423. Bacardi Black is a brand of black rum. DrinksMixer, <http://www.drinksmixer.com/desc186.html> (last visited Apr. 14, 2008).

¹¹⁵ *McIntire*, 804 F. Supp. at 1418.

¹¹⁶ See *id.* at 1426.

¹¹⁷ *Id.* “The [c]ourt finds that the shirts . . . could not reasonably be viewed . . . as bearing the imprimatur of the school or as school-sponsored shirts. Accordingly, the [c]ourt concludes that the [sic] *Hazelwood* . . . and *Fraser* . . . are inapplicable.” *Id.* (citations omitted). The court failed to consider whether *Fraser* applied to a separate category of plainly offensive speech. *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

reasonably foreseeable.¹²⁰ Therefore, the court held that the school’s ban on the shirts violated the students’ First Amendment rights under *Tinker*.¹²¹

b. Frederick v. Morse

*Frederick v. Morse*¹²² provides an example of the second narrow interpretation of *Fraser*. The 2002 Olympic Torch Relay passed in front of Juneau-Douglas High School, and school administrators and teachers took their students outside to participate in the event.¹²³ The school allowed students to stand in front of the school, either on campus or across the street.¹²⁴ Joseph Frederick, in a bid to capture the attention of the television cameras, displayed a banner with the phrase “BONG HITS 4 JESUS” while standing across the street.¹²⁵ Principal Deborah Morse suspended Frederick when he refused her request to remove the banner.¹²⁶ The school cited a policy prohibiting the display of “offensive material, including material that advertises or promotes use of illegal drugs.”¹²⁷ The school argued that, under a broad reading of *Fraser*, the banner was offensive because its message was inconsistent with the school’s “basic educational mission to promote a healthy, drug-free life style.”¹²⁸

The Ninth Circuit, holding that the school violated Frederick’s First Amendment rights, decided the case under *Tinker*.¹²⁹ First, the court found that the school suspended Frederick merely because it disagreed with his message,¹³⁰ invoking *Tinker*’s principle that students “may not be confined to the expression of those sentiments that are officially approved.”¹³¹ Second, by characterizing Frederick’s speech as political expression supporting the

¹²⁰ *Id.*

¹²¹ *Id.* The court first found that the school failed to show by a preponderance of the evidence that the shirts actually promoted or had the effect of promoting alcohol. *Id.* at 1425.

¹²² 439 F.3d 1114 (9th Cir. 2006), *rev’d*, 127 S. Ct. 2618 (2007).

¹²³ Petition, *supra* note 4, at 4.

¹²⁴ *Id.* at 5.

¹²⁵ *Frederick*, 439 F.3d at 1115. Even though Frederick’s banner was technically displayed off-campus, the court treated it as on-campus speech because the circumstances and context in which Frederick displayed the banner supported the school’s argument that “Frederick was a student, and school was in session.” *Id.* at 1117.

¹²⁶ Petition, *supra* note 4, at 4.

¹²⁷ *Frederick*, 439 F.3d at 1116.

¹²⁸ *Id.*; *see infra* Part II.B.3.

¹²⁹ *Frederick*, 439 F.3d at 1123.

¹³⁰ *Id.* at 1118. “Under *Tinker*, a school cannot censor or punish students [sic] speech merely because the students advocate a position contrary to government policy.” *Id.*

¹³¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

legalization of marijuana, the court attempted to analogize “BONG HITS 4 JESUS” with Mary Beth Tinker’s armband.¹³² It is questionable, however, whether supporting the *use* of marijuana is a proper political statement for a student to make in support of the *legalization* of marijuana, especially in a school setting.

In applying *Tinker*, the court held that the school violated Frederick’s constitutional rights because his speech did not cause a substantial disruption.¹³³ The Ninth Circuit rejected the school’s argument that *Fraser* controlled.¹³⁴ The court adopted a narrow interpretation and described *Fraser* as creating a subset of disruptive speech under *Tinker*.¹³⁵ According to the Ninth Circuit, *Fraser* applies only to “vulgar, obscene, lewd, or sexual speech that, especially with adolescents, readily *promotes disruption and diversion from the educational curriculum*.”¹³⁶ The Ninth Circuit allowed *Tinker* to swallow *Fraser*. Thus, while “[t]he phrase ‘Bong Hits 4 Jesus’ may be funny, stupid or insulting, depending on one’s point of view, . . . it is not ‘plainly offensive’ in the way sexual innuendo is”¹³⁷ because the speech was not disruptive.

The Ninth Circuit also rejected a broad interpretation of *Fraser*, which would give educators discretion to decide which messages were appropriate for school.¹³⁸ The court remarked, “Public schools are instrumentalities of government, and government is not entitled to suppress speech that undermines whatever missions it defines for itself.”¹³⁹ Furthermore, the court contended

¹³² The court noted that the legalization of marijuana is a current political issue in Alaska, and therefore, “messages about marijuana have a degree of political salience to them and might be understood as political advocacy.” *Frederick*, 439 F.3d at 1118 n.4.

¹³³ *See id.* at 1119 (distinguishing this case from *Fraser*, where a student made a sexually suggestive statement at a school assembly). The court also found *Hazelwood* inapplicable because the school did not in any way sponsor the banner and the banner was not part of any curricular activity. *Id.* The Torch Relay was “an approved social event or class trip,” not a school-sponsored event. *Id.* at 1116.

¹³⁴ *Id.* at 1119.

¹³⁵ *Id.* While the court noted that in past cases it had adopted the moderate interpretation, *see id.* at 1121, the language used in *Frederick* suggests that the court adopted a narrow interpretation of *Fraser*, *see id.* at 1122 n.44 (noting that *Fraser* only allows schools to ban vulgar, obscene, lewd, or sexual speech that may disrupt the school environment).

¹³⁶ *Id.* at 1122 n.44 (emphasis added).

¹³⁷ *Id.* at 1119.

¹³⁸ *See id.* at 1122 (citing *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 470 (6th Cir. 2000)) (rejecting the right of a school to prohibit speech merely because it conflicts with a vaguely defined educational mission).

¹³⁹ *Id.* at 1120.

that the *Fraser* majority did not intend “offensive” to provide a catchall justification for censoring speech that may insult or upset some individuals.¹⁴⁰

Under either narrow reading of *Fraser*, a school may only prohibit school-sponsored speech or disruptive speech.¹⁴¹ This seems inconsistent with the *Fraser* Court’s interest in protecting children from inappropriate language.¹⁴² First, school-sponsored speech does not include independent vulgar, lewd, obscene, or offensive speech that happens to occur on school grounds. Second, while some vulgar, lewd, obscene, or offensive speech may cause a substantial disruption of school functioning, other such speech may cause only a minimal disruption and, therefore, will not satisfy the *Tinker* standard.¹⁴³ The Court seeks to protect children from obscene language because society deems its sexual content to be damaging, not because it occurs during a class or an assembly or because it disrupts school functioning.¹⁴⁴ Therefore, allowing schools to prohibit vulgar, lewd, obscene, or offensive speech only when it causes a substantial disruption or occurs during school-sponsored activities frustrates the larger goal of protecting children from inappropriate speech.

2. Moderate Interpretation

Under the moderate interpretation, *Tinker*, *Fraser*, and *Hazelwood* each create a distinct category of student expression that schools may restrict.¹⁴⁵ Under *Fraser*, schools may restrict vulgar, lewd, obscene, or plainly offensive speech, regardless of the precise setting in which such speech occurs.¹⁴⁶ *Hazelwood*, on the other hand, pertains to school-sponsored speech that occurs

¹⁴⁰ *Id.* at 1122 n.44 (citing *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524 (9th Cir. 1992) (holding that a school could not prohibit students from supporting a teacher strike by wearing buttons referring to replacement teachers as “scabs,” even if the term was offensive and insulting to some)).

¹⁴¹ *McIntire v. Bethel Sch.*, 804 F. Supp. 1415, 1426 (W.D. Okla. 1992).

¹⁴² See sources cited *supra* note 72. Some commentators and judges disagree, however, and argue that a narrow reading of *Fraser* is more consistent. See, e.g., *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1193 n.1 (9th Cir. 2006) (Kozinski, J., dissenting) (suggesting that a narrow reading of *Fraser* is most appropriate); Anthony B. Schutz, Note, *Public School Restrictions on “Offensive” Student Speech in Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (6th Cir. 2000); Has Fraser’s “Exception” Swallowed *Tinker’s Rule?*, 81 NEB. L. REV. 443, 461 (2002) (contending that *Fraser* and *Hazelwood* both address only school-sponsored speech).

¹⁴³ See *supra* notes 54–56 and accompanying text.

¹⁴⁴ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684–85 (1986); see sources cited *supra* note 72 and accompanying text.

¹⁴⁵ *Hudson & Ferguson*, *supra* note 101, at 194–97.

¹⁴⁶ *Id.* at 196–97; see, e.g., *Guiles v. Marineau*, 461 F.3d 320, 325 (2d Cir. 2006). Under *Fraser*, “schools have wide discretion to prohibit speech that is less than obscene—to wit, vulgar, lewd, indecent or plainly offensive speech.” *Id.*

within the curriculum or during school-related activities.¹⁴⁷ *Tinker* allows schools to regulate speech that causes a substantial disruption of school functioning.¹⁴⁸ The Constitution protects all other student speech, barring any general restrictions found in First Amendment jurisprudence.¹⁴⁹

Courts adopting the moderate view tend to look to the language used to convey the message, rather than the message itself.¹⁵⁰ This “language versus message” approach is inconsistent with the Court’s *Fraser* opinion, since Matthew Fraser conveyed a lewd message using “clean” language.¹⁵¹

a. *Barber v. Dearborn Public Schools*

In the Eastern District of Michigan, the court adopted a moderate reading of *Fraser* in *Barber v. Dearborn Public Schools*.¹⁵² Bretton Barber, a high school junior, wore a t-shirt to school depicting an image of President George W. Bush and the words “International Terrorist.”¹⁵³ The school prohibited Barber from wearing the shirt, claiming it was inappropriate and could cause a disruption.¹⁵⁴ The court, deciding the case under *Tinker* because the shirt was political speech, held that the school could not censor the shirt because administrators could not prove more than an unsubstantiated fear of substantial disruption.¹⁵⁵

The court touched upon speech promoting drug and alcohol use when it determined that *Fraser* was inapplicable.¹⁵⁶ The court, in dicta, discussed a moderate interpretation of *Fraser*, reading the case as creating a distinct category of speech.¹⁵⁷ The majority wrote, “*Fraser* is inapplicable as Barber’s

¹⁴⁷ See, e.g., Miller, *supra* note 9, at 649–50.

¹⁴⁸ See, e.g., Pinard v. Clatskanie Sch. Dist. 6J, 446 F.3d 964 (9th Cir. 2006); Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157 (D. Mass. 1994).

¹⁴⁹ See *supra* note 42.

¹⁵⁰ *Id.*

¹⁵¹ See *supra* note 69 and accompanying text.

¹⁵² See *Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 856 (E.D. Mich. 2003) (noting that *Fraser* applies to speech regarding sex, drugs, and alcohol).

¹⁵³ *Id.* at 849.

¹⁵⁴ *Id.* at 851. School administrators were concerned that the school’s Iraqi students would see the shirt as a personal attack, which might cause a disturbance, particularly in light of the tense atmosphere due to the impending war in Iraq. *Id.*

¹⁵⁵ *Id.* at 856.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 854–56.

shirt did not refer to *alcohol, drugs, or sex*. Furthermore, [the shirt] was neither obscene, lewd, nor vulgar.”¹⁵⁸

Because the court mentions sex, drugs, and alcohol separately from the adjectives “obscene,” “lewd,” and “vulgar,” one can infer that the court considered sex and substance abuse as “plainly offensive” under *Fraser*. This seems redundant because the terms *obscene, lewd, vulgar, and indecent* may all refer to sex,¹⁵⁹ and therefore, it is unnecessary to discuss sexual speech separately. Additionally, the court did not explain how speech promoting drugs and alcohol is plainly offensive in the same way sexual speech may be offensive.

b. Guiles v. Marineau

The Second Circuit recently expressed approval of the moderate approach in *Guiles v. Marineau*.¹⁶⁰ Zachary Guiles, a thirteen-year-old student, claimed that his school violated his First Amendment rights when an administrator told him to cover up images of drugs and alcohol on his t-shirt protesting President George W. Bush.¹⁶¹ The school’s dress code prohibited “[c]lothing displaying alcohol, drugs, violence, obscenity, and racism.”¹⁶²

The Second Circuit found that, under a moderate interpretation of *Fraser*, the school failed to show that the shirt was offensive, and therefore, *Tinker* controlled.¹⁶³ The images of drugs and alcohol were not lewd, vulgar, or indecent, as those three terms “normally connote sexual innuendo or profanity.”¹⁶⁴ Turning to whether the images were plainly offensive, the court determined that plainly offensive speech was “something less than obscene but related to that concept, that is to say, speech containing sexual innuendo and

¹⁵⁸ *Id.* at 856 (emphasis added).

¹⁵⁹ *See, e.g., Miller, supra* note 9, at 659.

¹⁶⁰ 461 F.3d 320 (2d Cir. 2006).

¹⁶¹ *Id.* at 323. The shirt displayed a picture of President George W. Bush below the phrase “Chicken-Hawk-In-Chief” along with several images, including three lines of cocaine and a martini glass with an olive in it. *Id.* at 322. The back of the shirt contained several phrases, such as “Crook,” “Cocaine Addict,” and “Lying Drunk Driver.” *Id.*

¹⁶² *Id.* (citing the WMHS dress code). The school argued that, through its dress code policy, it took an “environmental approach” to education and sought to prevent student exposure to *all* images of drugs or alcohol, even if the images discouraged substance abuse. *Id.* at 323.

¹⁶³ *Id.* at 327.

¹⁶⁴ *Id.* (citing MERRIAM-WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, 1147, 1301, 2566 (1st ed. 1981)).

profanity.”¹⁶⁵ The Second Circuit accounted for the fact that Matthew Fraser’s speech used no vulgar words, but essentially limited *Fraser* to sexual speech.¹⁶⁶

The court declined to adopt a broad reading of *Fraser* because the broad interpretation “conflates the rule of *Hazelwood* with *Fraser*.”¹⁶⁷ According to the court, if speech could be “plainly offensive” under *Fraser* simply because the expression conflicted with an educational mission, “then *Fraser* would effectively swallow *Hazelwood*[] . . . [and] *Tinker* would no longer have any effect.”¹⁶⁸

The court attempted to limit its holding to speech that *disapproves* of substance abuse, finding that Guiles’ shirt conveyed drug and alcohol use in a negative light.¹⁶⁹ School officials, while arguing that the shirt was contrary to their environmental policy and school mission, failed to present evidence that *anti*-drug and alcohol images were harmful in some way to the students.¹⁷⁰ The court specifically stated that its holding did not reach “whether images of illegal drugs and alcohol on a t-shirt that *promotes* drug and alcohol use could be censored under the Supreme Court’s student-speech cases.”¹⁷¹

Under a moderate reading of *Fraser*, it is unclear how a pro-drug message such as, “Do Drugs,” could be “plainly offensive.” If language must be sexual in order to be offensive,¹⁷² “Do Drugs” is not offensive under *Fraser*. Absent a substantial disruption, *Tinker* would protect “Do Drugs” as a “clean” message that may offend some listeners.¹⁷³ This reading of the Court’s student speech cases leaves no avenue open for the prohibition of a message promoting

¹⁶⁵ *Id.* at 328 (citing *Frederick v. Morse*, 439 F.3d 1114, 1118–19 (9th Cir. 2006), *rev’d*, 127 S. Ct. 2618 (2007)).

¹⁶⁶ The court defines lewd, vulgar, indecent, and offensive as terms that contain “sexual innuendo or profanity.” *Id.* at 327–28. Therefore, *Fraser* would apply only to sexual innuendo, profanity, and obscenity.

¹⁶⁷ *Id.* at 330.

¹⁶⁸ *Id.*

¹⁶⁹ *See id.* at 331 (refusing to extend the holding to t-shirts *promoting* drug and alcohol use).

¹⁷⁰ *Id.* at 330.

¹⁷¹ *Id.* at 331 (emphasis added). The Second Circuit noted that the Supreme Court’s only treatment of the matter came from dicta in *Hazelwood*, giving schools the authority to refuse to sponsor pro-drug and alcohol messages. *Id.* (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988)).

¹⁷² *See id.* at 328; *see also* *Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 856 (E.D. Mich. 2003) (limiting *Fraser* to “plainly offensive” conduct that is vulgar and lewd).

¹⁷³ *Guiles*, 461 F.3d at 328 (quoting *Frederick v. Morse*, 439 F.3d 1114, 1119 (9th Cir. 2006), *rev’d*, 127 S. Ct. 2618 (2007) (“The phrase ‘Bong Hits 4 Jesus’ may be funny, stupid or insulting, depending on one’s point of view, but it is not ‘plainly offensive’ in the way sexual innuendo is.”)).

drugs that contains no sexual innuendo or inherently obscene, vulgar, or lewd language.

3. *The Broad Interpretation*

The broad reading of *Fraser* allows a school to restrict any speech that is inconsistent with the school’s educational mission or conflicts with the fundamental values of public school education.¹⁷⁴ Proponents of the broad view emphasize the *Fraser* majority’s statement: “[T]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as [*Fraser*’s] would *undermine the school’s basic educational mission*.”¹⁷⁵ This interpretation of *Fraser* tends to emphasize a school’s power to act *in loco parentis*.¹⁷⁶

Schools have advocated for this reading of *Fraser* in cases involving drug- or alcohol-related speech.¹⁷⁷ For instance, many schools embrace educational missions to advocate healthy, drug- and alcohol-free lifestyles.¹⁷⁸ Speech that promotes drug use or drinking would undermine this type of educational mission.¹⁷⁹

a. *Boroff v. Van Wert City Board of Education*

The Sixth Circuit adopted this broad interpretation in *Boroff v. Van Wert City Board of Education*.¹⁸⁰ The school prohibited a student from wearing a Marilyn Manson t-shirt, which displayed an image of a three-faced Jesus, along with the phrase, “See No Truth. Hear No Truth. Speak No Truth” on the front and the word the word “BELIEVE” with the letters “LIE” highlighted on the back.¹⁸¹ Citing the school dress code forbidding “clothing with offensive illustrations, drug, alcohol, or tobacco slogans,”¹⁸² the school argued

¹⁷⁴ Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986).

¹⁷⁵ *Id.* at 685 (emphasis added).

¹⁷⁶ See *supra* notes 71–72 and accompanying text.

¹⁷⁷ See, e.g., Frederick v. Morse, 439 F.3d 1114, 1116 (9th Cir. 2006), *rev’d*, 127 S. Ct. 2618 (2007) (finding that school had a “basic educational mission to promote a healthy, drug-free life style”); Guiles v. Marineau, 461 F.3d 320, 323 (2d Cir. 2006) (finding that school took an “environmental approach” to education and sought to prevent student exposure to all images of drugs or alcohol in promotion of a healthy lifestyle).

¹⁷⁸ See *supra* note 177.

¹⁷⁹ See *supra* note 162 and accompanying text; *infra* note 183 and accompanying text.

¹⁸⁰ 220 F.3d 465 (5th Cir. 2000).

¹⁸¹ *Id.* at 467.

¹⁸² *Id.*

that the t-shirt was offensive because of the immoral values and unhealthy conduct Marilyn Manson promoted, including substance abuse, racism, suicide, and murder.¹⁸³

The majority agreed and held that, under *Fraser*, the school had the authority to prohibit Boroff's t-shirt because its message was offensive "and counter-productive to education."¹⁸⁴ Because the Marilyn Manson t-shirt "contain[ed] symbols and words that promote values that are so patently contrary to the school's educational mission, the School has the authority . . . to prohibit those T-shirts."¹⁸⁵ This application of *Fraser* gives a school the authority to protect students from harmful values and propaganda, which invokes *Fraser's* endorsement of the *in loco parentis* doctrine.¹⁸⁶

Judge Gilman dissented, arguing that the school prohibited Boroff's t-shirt merely because administrators disagreed with the shirt's message—a justification that the Supreme Court explicitly rejected in *Tinker*.¹⁸⁷ Advocating for a moderate interpretation of *Fraser*, the dissent would have limited vulgar and offensive speech to speech that uses "words and phrases that are themselves coarse and crude, regardless of whether one disagrees with the overall message that the speaker is trying to convey."¹⁸⁸ The dissent also contended that the majority ignored the principal's focus on the shirt's anti-Christian message.¹⁸⁹

Despite his contention that *Fraser* should be limited only to vulgar language, Judge Gilman stated that he would have agreed with the majority if the record supported the proposition that the school banned the shirt primarily

¹⁸³ *Id.* at 469–70. In his affidavit, the principal explained he banned the shirt because "the band promotes destructive conduct and demoralizing values that are contrary to the educational mission of the school." *Id.*

¹⁸⁴ *Id.* at 470–71.

¹⁸⁵ *Id.* at 470; see *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) ("The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic education mission.").

¹⁸⁶ *Fraser*, 478 U.S. at 684; see *supra* notes 71–72 and accompanying text.

¹⁸⁷ *Boroff*, 220 F.3d at 472–73 (Gilman, J., dissenting). The *Tinker* Court required that a school demonstrate more than "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" when limiting a student's personal expression on campus. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

¹⁸⁸ *Boroff*, 220 F.3d at 473 (Gilman, J., dissenting). Judge Gilman failed to note that the Supreme Court in *Fraser* was not commenting on the student's use of "crude words"—there were none.

¹⁸⁹ *Boroff*, 220 F.3d at 472–74 (Gilman, J., dissenting). The principal also argued that the shirt violated the school's educational mission of teaching tolerance and respect because the Jesus image mocked a major religious figure. *Id.* at 469 (majority).

due to its pro-drug *message*.¹⁹⁰ Judge Gilman, who would limit *Fraser* to inherently coarse and crude words or phrases, failed to define how the promotion of drugs and alcohol is, in itself, coarse or crude.¹⁹¹ He merely wrote, “If the majority . . . suggest[ed] . . . that Marilyn Manson’s apparent endorsement of, say, illegal drug use, makes his picture an unacceptable image for students to wear in high school, I would agree.”¹⁹²

Therefore, Judge Gilman, who did not find Marilyn Manson’s picture inherently coarse or crude, would find the image inappropriate if its message promoted drugs and alcohol.¹⁹³ This is inconsistent. If Marilyn Manson is not inherently offensive, the most plausible justification for Judge Gilman’s contention is that he disagrees with the message promoting substance abuse. Yet Judge Gilman himself said that *Tinker* and *Fraser* protect student speech that is not per se offensive, regardless of whether school (or government) officials agree or disagree with the message conveyed by the speech.¹⁹⁴

While a broad reading of *Fraser* would give schools authority to restrict pro-drug and alcohol student speech, courts usually reject this interpretation.¹⁹⁵ First, a broad reading has the effect of implicitly overruling the propositions set forth in *Tinker*.¹⁹⁶ By requiring a showing of substantial disruption, *Tinker* rejected the contention that a school could prohibit any point of view it found disagreeable.¹⁹⁷ The broad interpretation of *Fraser* would seem to engulf this principle.

Second, allowing a school to suppress all speech that is contrary to its self-defined educational mission gives it a vast amount of discretion and creates the potential for abuse.¹⁹⁸ The *Hazelwood* dissent, discussing this broad reading of *Fraser*, argued, “If mere incompatibility with the school’s pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor [any student speech] . . . ,

¹⁹⁰ *Id.* at 474 (Gilman, J., dissenting).

¹⁹¹ *Id.* at 473–74.

¹⁹² *Id.* at 474.

¹⁹³ *Id.*

¹⁹⁴ *See id.* at 473–74.

¹⁹⁵ Many scholars agree that a broad interpretation, as adopted in *Boroff*, gives schools too much power and discretion over student speech. *See, e.g.,* Hudson & Ferguson, *supra* note 101, at 200; Miller, *supra* note 9, at 660.

¹⁹⁶ *See supra* notes 138–40, 168 and accompanying text.

¹⁹⁷ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509, 511 (1969).

¹⁹⁸ The Ninth Circuit expressed this very concern in *Frederick v. Morse*, 439 F.3d 1114, 1120 (9th Cir. 2006), *rev’d*, 127 S. Ct. 2618 (2007).

converting our public schools into ‘enclaves of totalitarianism.’”¹⁹⁹ Resistant to granting schools such discretion, many courts and scholars have adopted instead a moderate or narrow interpretation, refusing to read *Fraser* as “an invitation to censor and punish any speech that offends school authorities.”²⁰⁰

Ultimately, most interpretations of the Court’s student speech jurisprudence deny schools the authority to restrict student speech advocating for drug and alcohol use. Returning to Joseph Frederick’s “BONG HITS 4 JESUS” banner for illustration,²⁰¹ neither narrow approach provides justification for Frederick’s suspension. Frederick did not display his banner during a school-sponsored activity under the first narrow reading,²⁰² nor did the banner cause a substantial disruption under the second.²⁰³

Under a moderate reading, Frederick’s banner may have been annoying or immature, but it was not obscene, vulgar, lewd, or plainly offensive under *Fraser*.²⁰⁴ A broad reading would justify Frederick’s suspension because his banner was offensive and undermined the educational mission of the school.²⁰⁵ However, most courts and commentators are quick to reject the broad reading because it gives schools far-reaching discretion to censor student speech.²⁰⁶

III. PRO-DRUG AND ALCOHOL STUDENT SPEECH IS DETRIMENTAL TO YOUTH

As the previous Parts of this Comment have shown, most student speech advocating the use of illegal drugs or alcohol falls through the cracks between *Tinker*, *Fraser*, and *Hazelwood*. The question of why schools should have the authority to restrict such speech remains. This Part first demonstrates the prevalence of adolescent drug and alcohol use, followed by evidence that teen drug and alcohol use negatively affects teenagers and children. Part III concludes by examining how student speech promoting substance abuse influences a teenager’s decision to use drugs or alcohol.

¹⁹⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 280 (1988) (Brennan, J., dissenting) (quoting *Tinker*, 393 U.S. at 511).

²⁰⁰ *Frederick*, 439 F.3d at 1122 n.44; see *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 473–74 (6th Cir. 2000) (Gilman, J., dissenting); *Hudson & Ferguson*, *supra* note 101, at 206.

²⁰¹ *Frederick*, 439 F.3d at 1115.

²⁰² *Id.* at 1116; see *supra* note 133.

²⁰³ *Frederick*, 439 F.3d at 1115–16, 1117.

²⁰⁴ See *supra* notes 134–37 and accompanying text.

²⁰⁵ See *supra* note 128 and accompanying text.

²⁰⁶ See, e.g., *Guiles v. Marineau*, 461 F.3d 320, 329 (2d Cir. 2006) (citing *Frederick*, 439 F.3d at 1122); see also *supra* note 195.

A. *Prevalence of Adolescent Drug and Alcohol Use*

Drug and alcohol abuse is a pressing concern for many parents and educators, and significant numbers of teens use these substances.²⁰⁷ Recent studies have shown that illicit drug use among teens has declined slightly, although abuse of prescription drugs and inhalants continues to increase.²⁰⁸ Despite this general decrease, the percentage of students using drugs or drinking alcohol is still significant.²⁰⁹

In a biennial survey conducted by the Department of Health and Human Services, 74.3% of high school students reported having tried alcohol, 43.3% of students had consumed alcohol recently, and a quarter of students had recently engaged in episodic binge drinking.²¹⁰ Just over one fifth of students, 20.2%, had used marijuana,²¹¹ and 12.4% of students have used inhalants.²¹² Additionally, substance-abuse prevention remains an ongoing battle as new drugs come to the market because “word of the supposed benefits of using a drug usually spreads much faster [among students] than information about the adverse consequences.”²¹³

B. *Consequences of Drug and Alcohol Use*

The prevalence of teen drug use is a major public health problem; it “interferes with normal cognitive, emotional, and social development, and is closely linked with psychiatric disorders and delinquency.”²¹⁴ The use of marijuana, for example, impairs memory, attention span, and the ability to understand complex information.²¹⁵ Stimulants, such as cocaine and methamphetamine, may cause nervousness, insomnia, panic, paranoia, impaired memory and learning, and neurological damage.²¹⁶

²⁰⁷ CTR. FOR DISEASE CONTROL, DEP’T OF HEALTH & HUMAN SERVS., YOUTH RISK BEHAVIOR SURVEILLANCE—UNITED STATES, 2005, at 13–18 (2005) [hereinafter YOUTH RISK BEHAVIOR SURVEILLANCE].

²⁰⁸ See NAT’L INST. ON DRUG ABUSE, U.S. DEP’T OF HEALTH & HUMAN SERVS., MONITORING THE FUTURE: NATIONAL RESULTS ON ADOLESCENT DRUG USE: OVERVIEW OF KEY FINDINGS, 2003, at 5 (2005) [hereinafter MONITORING THE FUTURE].

²⁰⁹ See *infra* notes 210–13 and accompanying text.

²¹⁰ YOUTH RISK BEHAVIOR SURVEILLANCE, *supra* note 207, at 13–14.

²¹¹ *Id.* at 14–15.

²¹² *Id.* at 15–16. Usage of other drugs, including cocaine, illegal steroids, heroin, hallucinogens, methamphetamine, and ecstasy, ranged from 2.1% to 8.5%. *Id.* at 15, 16–17.

²¹³ MONITORING THE FUTURE, *supra* note 208, at 6.

²¹⁴ Bruner & Fishman, *supra* note 19, at 597.

²¹⁵ MONITORING THE FUTURE, *supra* note 208, at 21.

²¹⁶ NAT’L INST. ON DRUG ABUSE, COMMONLY ABUSED DRUGS (2007), available at <http://www.nida.nih.gov/PDF/CADChart.pdf>.

In addition to these immediate effects, early drug and alcohol use is a significant factor in later drug dependence.²¹⁷ A significant majority of students who experiment with drugs or alcohol continue using the substance with which they experimented.²¹⁸ Individuals who begin smoking or drinking by the age of fifteen are at significantly higher risk of becoming dependent smokers or drinkers.²¹⁹ Therefore, teenage substance use not only has numerous immediate harmful effects on children, but it significantly raises the risk that these children will face negative consequences far into adulthood.²²⁰

Substance use has also been associated with behaviors that lead to public health problems.²²¹ For example, according to the National Institute of Drug Abuse, drug use directly and indirectly contributes to the spread of HIV and AIDS when users engage in high-risk sexual behavior while under the influence.²²² Almost a quarter of sexually active students reported using drugs or alcohol before the last time they had sex.²²³

Moreover, alcohol-related car accidents are a significant cause of teen death and injury.²²⁴ Roughly ten percent of students reported driving after drinking, and about thirty percent reported riding in a car driven by a driver who had been consuming alcohol.²²⁵ Twenty-eight percent of fifteen- to twenty-year-old drivers involved in fatal car accidents had been drinking.²²⁶ Furthermore, drivers are less likely to use seatbelts when drinking, which leads to an increase in the severity of the crash.²²⁷

Studies have also tied violence and suicide to the use of illicit drugs and alcohol. Substance abuse places adolescents at a significantly higher risk of

²¹⁷ MALIGNANT NEGLECT, *supra* note 21, at 14–15.

²¹⁸ *Id.* at 15. For example, seventy-four percent of students who had ever tried marijuana were still using it as seniors in high school. *Id.*

²¹⁹ *Id.* at 14–15. For instance, children who begin drinking before age fifteen are four times more likely to become dependent on alcohol than children who abstain until age twenty-one. *Id.*

²²⁰ *Id.* at 15.

²²¹ Bruner & Fishman, *supra* note 19, at 597.

²²² NAT'L INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH & HUMAN SERVS., INFO FACTS: DRUG ABUSE AND THE LINK TO HIV/AIDS AND OTHER INFECTIOUS DISEASES 1 (2006), <http://www.nida.nih.gov/PDF/Infofacts/DrugsAIDS06.pdf>.

²²³ YOUTH RISK BEHAVIOR SURVEILLANCE, *supra* note 207, at 21.

²²⁴ NAT'L CTR. FOR STATISTICS & ANALYSIS, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS: 2005 DATA: YOUNG DRIVERS 4 (2005).

²²⁵ YOUTH RISK BEHAVIOR SURVEILLANCE, *supra* note 207, at 5.

²²⁶ NAT'L CTR. FOR STATISTICS AND ANALYSIS, *supra* note 224, at 2.

²²⁷ *Id.* at 4. In 2005, sixty-four percent of fifteen- to twenty-year-old impaired drivers involved in fatal crashes were unrestrained. *Id.*

suicide.²²⁸ For example, teens who reported using an illegal drug other than marijuana faced almost triple the risk of suicide than non-users.²²⁹ Additionally, teenagers who use illicit drugs are almost twice as likely to participate in violent behaviors, including gang fights and attacking others with intent to cause serious harm.²³⁰

Finally, at least one study has shown that substance abuse and academic performance are related.²³¹ Only 27.5% of students surveyed who had not used alcohol within the past month earned grades of *C* or lower versus 42.3% students who reported binge alcohol use within the last month.²³² Marijuana shows an even greater correlation with poor academic performance; marijuana users were over twice as likely than non-users to have grades of *C* or lower.²³³

C. Positive Messages and Peer Pressure

While there are many factors that contribute to youth drug and alcohol use, one of the most prevalent is a child's exposure to positive messages about substance use from peers and the media.²³⁴ Joe Camel is perhaps one of the most infamous examples of the effect that substance-related messages can have on children.²³⁵ In 1988, just before the introduction of the Joe Camel cartoon ad campaign, only one percent of adolescent smokers smoked Camel

²²⁸ NAT'L HOUSEHOLD SURVEY ON DRUG ABUSE, SUBSTANCE USE AND THE RISK OF SUICIDE AMONG YOUTHS 2 (2002), available at <http://www.drugabusestatistics.samhsa.gov/2k2/suicide/suicide.pdf>.

²²⁹ *Id.* (finding that non-users of illicit drugs other than marijuana had a 10.1% risk of suicide, while users were at a 29.4% risk).

²³⁰ NAT'L HOUSEHOLD SURVEY ON DRUG ABUSE, YOUTH VIOLENCE AND ILLICIT DRUG USE 1, 2 (2006), available at <http://www.drugabusestatistics.samhsa.gov/2k6/youthViolence/youthViolence.pdf>.

²³¹ NAT'L SURVEY ON DRUG USE AND HEALTH: ACADEMIC PERFORMANCE AND SUBSTANCE USE AMONG STUDENTS AGED 12 TO 17: 2002, 2003, AND 2004, at 1 (2006) [hereinafter ACADEMIC PERFORMANCE]. This study demonstrated only the correlation between drug use and academic achievement, not causation. *Id.* Regardless of whether drug use caused students to achieve lower grades, or whether students with lower grades are simply more likely to use drugs or alcohol, it is clear that young drug and alcohol users need guidance and, in some cases, treatment. See Brief for D.A.R.E. Am. et al. as Amici Curiae in Support of Petitioners at 8, *Frederick v. Morse*, 439 F.3d 1114, 1120 (9th Cir. 2006), *rev'd*, 127 S. Ct. 2618 (2007) (discussing the high percentage of teen drug users requiring treatment for addiction and the significant percentage of drug users experiencing “major depressive episodes” in comparison to non-users). This correlation should worry educators, even if both lower grades and drug use are merely symptoms of a larger problem.

²³² ACADEMIC PERFORMANCE, *supra* note 231, at 3.

²³³ *Id.* Twenty-seven percent of non-drug users had a *C*-average or lower, versus 55.1% of marijuana users. *Id.*

²³⁴ LANE ET AL., *supra* note 22.

²³⁵ Joe Camel is an animal character that the R.J. Reynolds Company created to promote Camel Cigarettes. See Stuart Elliot, *Adoring or Abhorring the Camel*, N.Y. TIMES, July 29, 1992, at D17.

cigarettes.²³⁶ Several years after Camel began the Joe Camel advertising campaign, a 1991 study showed that children recognized Joe Camel as often as they recognized Mickey Mouse.²³⁷ By 1993, Camel's share of the adolescent market jumped to thirteen percent.²³⁸ This evidence suggests brand recognition and advertising influences children's smoking behavior.²³⁹

Similarly, a student's perception of peer behavior and approval also has a significant impact on youth substance abuse.²⁴⁰ One recent study has suggested that a youth's likelihood of trying alcohol or binge drinking is higher when norms within the school reflect greater tolerance for drug and alcohol abuse.²⁴¹ Additionally, students who reported that their close friends were likely to disapprove of drug or alcohol use were, in turn, less likely to try or use substances.²⁴² Conversely, youths that believed their friends would *not* disapprove at all were much more likely to use drugs or drink.²⁴³

Furthermore, some of the most effective anti-drug programs are the programs that seek to counteract positives messages about drug use and to dispel norms that tolerate substance use. These programs follow the "social influence model" with curricula geared toward counteracting pro-drug messages, helping children understand that most people do not use drugs, and teaching students to identify and resist pressures to use drugs or alcohol.²⁴⁴

Based on this information, one can infer that student speech advocating drug and alcohol use causes harm in several ways. First, allowing students to advocate substance use will give teens a greater perception of drug and alcohol

²³⁶ See CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL (2000), available at http://www.cdc.gov/tobacco/data_statistics/sgr/sgr_2000/highlights/highlight_advertising.htm [hereinafter REDUCING TOBACCO USE].

²³⁷ P.M. Fischer et al., *Brand Logo Recognition by Children Aged 3 to 6 Years, Mickey Mouse and Old Joe the Camel*, 266 J. AM. MED. ASS'N 3145, 3147 (1991).

²³⁸ REDUCING TOBACCO USE, *supra* note 236.

²³⁹ "[C]hildren smoke fewer brands of cigarettes than adults, and those choices track the most heavily advertised brands, unlike adult choices, which are more dispersed and related to pricing." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 558 (2001).

²⁴⁰ LANE ET AL., *supra* note 22.

²⁴¹ Revathy Kumar et al., *Effects of School-Level Norms on Student Substance Use*, 3 PREVENTION SCI. 105, 121 (2002). When a child has the perception that their peers drink or do drugs often, the child is more likely to engage in those activities. Danice K. Eaton et al., *Factors Related to Alcohol Use Among 6th Through 10th Graders: The Sarasota County Demonstration Project*, 74 J. SCH. HEALTH 95, 103 (2004).

²⁴² LANE ET AL., *supra* note 22, at ch. 3.

²⁴³ *Id.*

²⁴⁴ Phyllis L. Ellickson & Robert M. Bell, *Drug Prevention in Junior High: A Multi-Site Longitudinal Test*, 247 SCIENCE 1299, 1300, 1303 (1990).

use by their peers.²⁴⁵ Forcing schools to stand idly by while students promote drugs and alcohol creates a perception in students’ eyes that schools tolerate substance abuse, which in turn leads more students to use drugs and alcohol.²⁴⁶ Second, students who believe that their close friends will not disapprove of their drug use, a belief undoubtedly influenced by their friends’ promotion of drug use, are more likely to use drugs themselves.²⁴⁷ Third, if pro-drug and alcohol speech in schools goes unchecked, the likely increase in such messages may counteract the effects of “social influence model” anti-drug education programs.²⁴⁸

IV. SOLUTION: CLARIFY *FRASER* AND CREATE A FOURTH CATEGORY OF SPEECH

Frederick v. Morse provided an opportunity for the Supreme Court to address the issues presented in this Comment. First, there was an opportunity to clarify the confusion surrounding *Fraser* and clarify how the Court’s speech cases fit together. This Comment argues that the moderate interpretation is the best solution because it allows schools to protect students from inappropriate language, yet prevents schools from freely defining what is offensive (a criticism of the broad interpretation of *Fraser*).²⁴⁹ Second, *Frederick* presented an opportunity for the Court to create a new category of student speech that schools may restrict. This outcome would follow the trend the Court has followed in two cases considering drug testing in schools.²⁵⁰

A. *Lifting the Fog: Defining the Scope of Fraser*

Courts have exhibited great confusion about *Fraser*.²⁵¹ Judge Kozinski, on the Ninth Circuit, recently observed that “[r]econciling *Tinker* and *Fraser* is no easy task.”²⁵² Judge Kozinski noted that in *Frederick*, the Ninth Circuit held

²⁴⁵ Eaton, *supra* note 241, at 103; Kumar et al., *supra* note 241, at 121.

²⁴⁶ Eaton, *supra* note 241, at 103; Kumar et al., *supra* note 241, at 121.

²⁴⁷ LANE ET AL., *supra* note 22.

²⁴⁸ Ellickson & Bell, *supra* note 244.

²⁴⁹ See *Frederick v. Morse*, 439 F.3d 1114, 1120 (9th Cir. 2006), *rev’d*, 127 S. Ct. 2618 (2007) (finding that the school must be limited in its authority to forward its mission).

²⁵⁰ See *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (holding, in a 5-4 decision, that mandatory drug testing to participate in a school’s extracurricular activities is constitutional); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (holding, in a 6-3 decision, that a school’s policy to authorize random drug testing of students is constitutional under the Fourth and Fourteenth Amendments); discussion *infra* Part IV.B.

²⁵¹ See *supra* Part II.B.

²⁵² *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1193 n.1 (9th Cir. 2006) (Kozinski, J., dissenting).

that *Fraser* applies to plainly offensive language, not to ideas, which *Tinker* protects.²⁵³ The student speech in *Fraser*, however, “used no dirty words.”²⁵⁴ Judge Kozinski ponders whether a narrow reading of *Fraser* is more consistent with the Court’s holdings, limiting *Fraser* as “merely a precursor to *Hazelwood*, [with] no application at all to speech that has no school sponsorship.”²⁵⁵ The Supreme Court should take the opportunity presented in *Frederick* to clarify this confusion and redefine how *Tinker*, *Fraser*, and *Hazelwood* work in tandem.

The best option among the three potential interpretations is the moderate view, under which *Fraser* applies to expression that is obscene, vulgar, lewd and plainly offensive.²⁵⁶ *Lewd* and *vulgar* are both defined as “[o]bscene” or “indecent.”²⁵⁷ *Black’s Law Dictionary* defines *indecent* as “[t]he state or condition of being outrageously offensive.”²⁵⁸ Indecent speech tends to contain a prurient element and includes “the so-called ‘bad words’ of [the] English language.”²⁵⁹ While the First Amendment generally protects indecency, the Supreme Court has restricted the right to use indecent language in the interest of protecting children from exposure to inappropriate and harmful ideas and language.²⁶⁰

The Court has defined a standard for obscenity, asking “whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest.”²⁶¹ Ultimately, all of these terms share a common prurient element that is inappropriate for schools.²⁶²

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ See *supra* notes 145–48 and accompanying text.

²⁵⁷ *Black’s Law Dictionary* defines *lewd* as “[o]bscene or indecent.” BLACK’S LAW DICTIONARY 927 (8th ed. 2004). *Webster’s Dictionary* defines *vulgar* as “[i]ndecent or obscene.” WEBSTER’S NEW WORLD COLLEGE DICTIONARY 1604 (4th ed. 1999).

²⁵⁸ BLACK’S LAW DICTIONARY 783.

²⁵⁹ Miller, *supra* note 9, at 659.

²⁶⁰ In *FCC v. Pacifica Foundation*, the Court held that the FCC could constitutionally regulate an indecent, but not obscene broadcast. 438 U.S. 726, 749, 750–51 (1978). The broadcast in question aired George Carlin’s monologue, *Filthy Words*, in which he repeated “words you couldn’t say on the public . . . airwaves” at 2 P.M. when children were listening. *Id.* at 729.

²⁶¹ Miller v. California, 413 U.S. 15, 24 (1973) (quoting Roth v. United States, 354 U.S. 476, 489 (1957)). The Supreme Court has often stopped short of trying to define the obscene or pornographic. One of the most well-known examples is Justice Stewart’s quip, “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

²⁶² Miller, *supra* note 9, at 659, 663.

Additionally, *plainly offensive* speech should include speech that may not necessarily rise to the level of obscenity or indecency, but that nonetheless “causes a break in the learning process.”²⁶³ This definition draws from the *Tinker* substantial disruption standard.²⁶⁴ For speech to be “plainly offensive” under *Fraser*, the school must show not only that the speech was somehow inappropriate for school but also that it caused some disruption of school functioning.²⁶⁵

Defining *offensive* in this way precludes the broad reading of *Fraser*, in response to criticisms that this interpretation swallows *Tinker*.²⁶⁶ *Tinker* held that school administrators do not have the authority to “suppress ‘expressions of feelings with which they do not wish to contend.’”²⁶⁷ The broad interpretation contravenes this holding by allowing a school to define whatever mission it sees fit and then argue that whatever speech disagrees with or undermines that mission is offensive.²⁶⁸ The proposed definition of *plainly offensive* provides a compromise between *Fraser*’s focus on inappropriate messages and *Tinker*’s concern for censorship of unpopular speech.²⁶⁹

The narrow interpretation of *Fraser* is also inferior to the moderate view. The first approach to the narrow interpretation combines *Fraser* and *Hazelwood*.²⁷⁰ Schools may only prohibit obscene or offensive student speech if it causes a disruption or occurs during a school-sponsored activity.²⁷¹ This ignores the Court’s general concern with protecting children from inappropriate language.²⁷² The Court supported its holding in *Fraser* by citing cases that restrict obscene and indecent language with the goal of protecting children outside of the school context.²⁷³ Limiting *Fraser* to school assemblies, while ignoring school hallways and locker rooms, frustrates this larger concern.

²⁶³ *Id.* at 659.

²⁶⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

²⁶⁵ Miller, *supra* note 9, at 659, 663.

²⁶⁶ See Rosemary C. Salomone, *Free Speech and School Governance in the Wake of Hazelwood*, 26 GA. L. REV. 253, 319 (1992) (arguing that *Hazelwood*’s broad dicta severely circumscribes *Tinker*’s applicability); Wilborn, *supra* note 9, at 135 (arguing that *Hazelwood* and *Fraser* at least partially overrule *Tinker*).

²⁶⁷ *Tinker*, 393 U.S. at 511 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir 1966)).

²⁶⁸ *Frederick v. Morse*, 439 F.3d 1114, 1120 (9th Cir. 2006), *rev’d*, 127 S. Ct. 2618 (2007).

²⁶⁹ Miller, *supra* note 9, at 659, 664.

²⁷⁰ See *supra* notes 107–08 and accompanying text.

²⁷¹ *Id.*

²⁷² See *supra* note 71 and accompanying text.

²⁷³ *Id.*

The second narrow interpretation of *Fraser*, adopted by the Ninth Circuit in *Frederick*, has a similar flaw.²⁷⁴ According to this view, *Fraser* gives authority to restrict obscene or offensive student speech that causes a disruption.²⁷⁵ This has the same effect of ignoring the *Fraser* Court's larger concern of protecting children from obscenity and indecency, whatever the setting.²⁷⁶ Just because obscene language fails to cause a substantial disruption of school activities does not make that language any less inappropriate for young listeners.

Ultimately, the moderate approach addresses some of the criticisms of *Fraser*, while remaining loyal to the underlying purpose of protecting children from inappropriate material.²⁷⁷ Additionally, it provides a clearer and more workable test for the lower courts.

B. Allowing Schools to Prohibit Pro-Drug and Alcohol Student Speech

While clarifying its student-speech jurisprudence, the Court should also address whether schools may restrict pro-drug and alcohol student speech.²⁷⁸ The best method of providing schools with this authority is to create a new category of speech within the *Tinker-Fraser-Hazelwood* framework. This solution remains loyal to the Court's past precedents regarding the treatment of student-speech rights, and limits the potential for abuse by narrowly defining this increase in school power.²⁷⁹ The school power continuum provides a useful vehicle for comparison between the issue of pro-drug and alcohol student speech and two Supreme Court cases considering suspicionless drug testing in schools.²⁸⁰

The Court has shown a willingness to protect students from inappropriate or harmful messages. A central motivation of the *Fraser* Court was to protect younger students from exposure to inappropriate, sexually explicit speech.²⁸¹ Even in *Hazelwood*, the Court expressed concern for immature audiences,

²⁷⁴ See *supra* notes 109–10 and accompanying text.

²⁷⁵ *Id.*

²⁷⁶ See *supra* note 71 and accompanying text.

²⁷⁷ *Id.*

²⁷⁸ Petition, *supra* note 4, at i.

²⁷⁹ The Court embodied the clearest expression of their concern about abuses of power in *Tinker* in its refusal to allow schools to become “enclaves of totalitarianism.” *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

²⁸⁰ *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (5-4 decision); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (6-3 decision).

²⁸¹ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684–85 (1986).

holding in part that “[e]ducators are entitled to exercise greater control over [school-sponsored] student expression to assure that . . . readers or listeners are not exposed to material that may be inappropriate for their level of maturity.”²⁸²

The Court has gone even further when addressing the issue of drug and alcohol use and drug testing in schools. In *Vernonia School District 47J v. Acton* and *Board of Education v. Earls*, the Court described schools as having a custodial or tutelary relationship with students,²⁸³ placing markers on the parental end of the school power continuum.²⁸⁴

I. Vernonia School District 47J v. Acton

In *Vernonia School District 47J v. Acton*,²⁸⁵ the Court determined that a public school’s suspicionless drug-testing program for school athletes did not violate students’ Fourth Amendment rights.²⁸⁶ The school faced a pervasive and serious drug culture, led by student athletes.²⁸⁷ As disciplinary problems and classroom disruptions increased, students began to speak out, boasting that the school could do nothing about their drug use.²⁸⁸

The Court began by noting again that, while student rights are not necessarily coextensive with those of adults,²⁸⁹ the law is clear that children do not “shed their constitutional rights . . . at the schoolhouse gate.”²⁹⁰ Additionally, the majority acknowledged that public schools, unlike private

²⁸² *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

²⁸³ *Vernonia*, 515 U.S. at 655; *Earls*, 536 U.S. at 830.

²⁸⁴ Dupre, *supra* note 23, at 87. Professor Dupre argues that the Court in *Vernonia* defined the nature of school for the first time. *Id.* For the purposes of this Comment, however, it is more relevant that the Court cited the doctrine of *in loco parentis* within the context of the school power continuum for the purposes of comparison to cases involving pro-drug and alcohol student speech.

²⁸⁵ 515 U.S. 646 (1995).

²⁸⁶ *Id.* at 648. The policy required all athletes to submit to a drug test at the beginning of the sports season, and random testing throughout the season. *Id.* at 650–51. A positive test result required either voluntary participation in a six-week treatment program or a suspension from athletics for the current and subsequent athletic season. *Id.* Second and third offenses resulted in longer suspensions from athletic eligibility. *Id.*

²⁸⁷ *Id.* at 648, 649.

²⁸⁸ *Id.* at 648.

²⁸⁹ *Id.* at 654. The Court noted that children lack even “the most fundamental rights of self-determination . . . , *i.e.* the right to come and go at will.” *Id.*

²⁹⁰ *Id.* at 655–56 (quoting *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

schools, do not act solely *in loco parentis* and that school power is in part a derivation of state power and thus constrained by the Constitution.²⁹¹

The Court, however, also acknowledged the special needs and circumstances of schools, noting that “the nature of [student] rights is what is appropriate for children in school.”²⁹² The Court emphasized the parental nature of school power, and although the Court acknowledged that the Constitution constrains school actions, the Court defined the nature of school power as “custodial and tutelary.”²⁹³ The majority concluded, “Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children.”²⁹⁴ Confronted with student drug and alcohol abuse, the Court placed the marker on the parental end of the school power continuum.

The majority’s definition of school power stemmed from the Court’s agreement with the appellant’s argument that schools must continue to actively combat student drug abuse.²⁹⁵ Drug use in developing teenagers is particularly harmful, with serious long-term effects.²⁹⁶ Additionally, the Court acknowledged the “role model” effect.²⁹⁷ Vernonia school athletes, admired through their school and community, were the leaders of the school’s drug culture, inspiring other students to use drugs.²⁹⁸ Therefore, in light of the seriousness of Vernonia High School’s drug problem and the custodial nature of school power, the school’s drug testing program was constitutional.

2. Board of Education v. Earls

The Supreme Court upheld a second public school drug-testing program in *Board of Education v. Earls*.²⁹⁹ In *Earls*, the school required students to consent to random suspicionless drug testing as a prerequisite for participation in extracurricular activities, not just sports.³⁰⁰ The majority followed *Vernonia* in affirming the special needs of the public school environment and that

²⁹¹ *Id.* at 654–55.

²⁹² *Id.* at 656.

²⁹³ *Id.* at 655.

²⁹⁴ *Id.* at 656.

²⁹⁵ *Id.* at 661.

²⁹⁶ *Id.* at 661–62.

²⁹⁷ *Id.* at 662–63.

²⁹⁸ *Id.* at 648–49.

²⁹⁹ 536 U.S. 822 (2002) (5-4 decision).

³⁰⁰ *Id.* at 826.

“Fourth Amendment rights . . . are different in public schools than elsewhere.”³⁰¹ Additionally, the Court reiterated that schools act as tutors and guardians over their students.³⁰²

While the Court did not use the term *in loco parentis* in referring to a school’s power over students, the Court noted ““that the subjects of the Policy are (1) children, who (2) have been committed to the *temporary custody of the State as schoolmaster.*””³⁰³ Referring to the state as “schoolmaster” invokes the doctrine of *in loco parentis*, recalling Sir William Blackstone’s description of the father delegating his parental authority to the schoolmaster.³⁰⁴ Therefore, the Court followed *Vernonia*’s view of the school as tutor and guardian, moving the marker toward the parental end of the continuum.

In fact, the Court did more than just affirm *Vernonia*. First, the drug-testing program was required for all extracurricular activities, not just competitive sports.³⁰⁵ Second, the Court declined to require that schools produce evidence of a pervasive drug problem within the district.³⁰⁶ While the school in *Earls* demonstrated that student drug use was a problem,³⁰⁷ the problem was not as severe or pervasive as the drug culture in *Vernonia*.³⁰⁸ The Court found that schools have an interest in protecting children from drugs, and do not have to wait until a significant number of students begin using drugs to do so.³⁰⁹ In so holding, the Court expanded upon the authority granted in *Vernonia* to address the concern of student drug use.

The Court supported this increase in school power by citing concerns about teen drug use. The majority stated, “Indeed, the nationwide drug epidemic makes the war against drugs a pressing concern in every school.”³¹⁰ In a concurring opinion, Justice Breyer elaborated upon this concern, providing

³⁰¹ *Id.* at 829–30 (quoting *Vernonia*, 515 U.S. at 656).

³⁰² *Id.* at 830.

³⁰³ *Id.* (emphasis added) (quoting *Vernonia*, 515 U.S. at 654).

³⁰⁴ See *supra* notes 26–28 and accompanying text.

³⁰⁵ *Earls*, 536 U.S. at 826.

³⁰⁶ *Id.* at 835–36.

³⁰⁷ *Id.* at 834–35. Teachers reported seeing students they believed to be under the influence, a drug dog had found marijuana near the school parking lot and drug paraphernalia in a student’s car, and concerned community members had called the school about the “drug situation.” *Id.*

³⁰⁸ *Vernonia*, 515 U.S. at 648–49.

³⁰⁹ *Earls*, 536 U.S. at 835–36.

³¹⁰ *Id.* at 834.

evidence of the seriousness of the nation's drug problem.³¹¹ He noted further that the government's focus on "supply side interdiction" had not alleviated the problem.³¹² Finally, Justice Breyer straightforwardly concluded, "public schools systems must find effective ways to deal with this problem."³¹³

In *Vernonia* and *Earls*, the Court expressed a serious concern about drug use in schools and the immediate and long-term effects of substance abuse.³¹⁴ The Court also acknowledged the effects of pro-drug and alcohol norms in schools in its discussion of the "role model" effect.³¹⁵ The evidence that peer messages promoting drugs and alcohol use have a significant influence on a youth's decision to experiment and use drugs³¹⁶ supports the school's right to restrict speech that promotes drug and alcohol use.

The majority *Earls* and *Vernonia* acted on these concerns by invoking the doctrine of *in loco parentis* and placing a marker near the parental end of the school power continuum.³¹⁷ In each case, the Court cited *Tinker* for the proposition that students do have constitutional rights in school, but the Court limited those rights to what is appropriate for children in school.³¹⁸ Then, by describing a school's tutelary and guardian relationship with students,³¹⁹ the Court approved school action to protect students from substance abuse.³²⁰ Similarly, prohibiting pro-drug and alcohol student speech will assist schools in protecting students from the effects of drugs and alcohol. First, by sending a message that substance abuse is harmful and that schools will not tolerate the promotion of drugs and alcohol, educators will reinforce "social influence" model anti-drug education programs.³²¹ Second, prohibiting such messages will decrease a student's perception that her peers use drugs, which in turn will decrease the likelihood that she will decide to use drugs and alcohol.³²²

³¹¹ *Id.* at 839 (Breyer, J., concurring). Justice Breyer cited findings that drug abuse causes serious human and economic damage each year, that more than half of students have used illegal drugs before they graduate from high school, and that early drug use leads to later drug dependence. *Id.*

³¹² *Id.*

³¹³ *Id.* at 840.

³¹⁴ See *supra* notes 296–97, 310–13, and accompanying text.

³¹⁵ See *supra* notes 297–98 and accompanying text.

³¹⁶ See *supra* Part III.C.

³¹⁷ *Earls*, 536 U.S. at 830; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995).

³¹⁸ *Earls*, 536 U.S. at 829–30; *Vernonia*, 515 U.S. at 656.

³¹⁹ *Earls*, 536 U.S. at 830; *Vernonia*, 515 U.S. at 655.

³²⁰ *Earls*, 536 U.S. at 836–37; *id.* at 840 (Breyer, J., concurring); *Vernonia*, 515 U.S. at 664–65.

³²¹ See Ellickson & Bell, *supra* note 244, at 1300, 1303 (discussing the social-influence model of drug prevention and noting its success curbing drug use, especially in relation to marijuana and cigarette use).

³²² See *supra* notes 240–43 and accompanying text.

The Court’s acknowledgement of and concern for the seriousness of the teenage drug problem,³²³ together with the Court’s approval of school action taken to prevent student drug and alcohol abuse,³²⁴ suggests that the Court is becoming more willing to increase school authority regarding drug- and alcohol-related speech. Additionally, restricting a narrow form of student expression is a more limited increase in school power than allowing suspicionless drug testing as a prerequisite for all extracurricular activities.³²⁵ Therefore, in *Frederick*, the Court should create a new category of student speech that a school may constitutionally prohibit.

C. But Schools Already Have Too Much Power, and Students Need More Freedom!

Even though pro-drug and alcohol speech contributes to the problem of drug use and drinking in schools, many scholars argue that our schools already exert too much power over student speech.³²⁶ This section responds to two significant criticisms of increasing school authority to restrict student expression.

1. “Do As I Say, Not As I Do”

Some scholars have argued that censorship of student speech threatens one of the main functions of a public education, which is to prepare children for democratic participation.³²⁷ This participation requires children to respect

³²³ *Vernonia*, 515 U.S. at 661–63; *Earls*, 536 U.S. at 834.

³²⁴ *Vernonia*, 515 U.S. at 664–65; *Earls*, 536 U.S. at 838.

³²⁵ *Earls*, 536 U.S. at 826, 838.

³²⁶ See, e.g., Calvert, *supra* note 100, at 740 (“[T]he censorship occurring today is far from justified . . .”); Wilborn, *supra* note 9, at 120 (noting that the current approach to student speech “attempt[s] to provide school administrators with unfettered discretion to implement their educational programs at the cost of student speech rights”); Justin T. Peterson, Comment, *School Authority v. Students’ First Amendment Rights: Is Subjectivity Strangling the Free Mind at Its Source?*, 2005 MICH. ST. L. REV. 931, 932 (“[F]ederal courts are allowing school officials too much discretion to censor student speech with which officials subjectively disagree.”).

³²⁷ See, e.g., Hudson & Ferguson, *supra* note 101, at 181 (“A fundamental purpose of public education is to teach . . . the values and responsibilities of . . . citizenship. Unfortunately, many public schools fail . . .”); Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1648 (1986) (“Americans believe that education is central to the realization of a truly democratic and egalitarian society.”); Nadine Strossen, *Students’ Rights and How They Are Wronged*, 32 U. RICH. L. REV. 457, 461 (1998) (quoting *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 972 (5th Cir. 1972)) (“[Y]oung people, disillusioned by our political processes, are disengaging from political participation. It is most important that our young become convinced that our Constitution is a living reality,

certain core constitutional values, including the right to free speech.³²⁸ Giving schools additional authority to silence student speech hinders this important educational goal by stifling free discourse in violation of *Tinker*'s purpose of preventing schools from becoming vehicles of indoctrination.³²⁹ Some commentators argue that "democratic norms cannot be taught in an institution that suppresses democratic values,"³³⁰ and such policies send the disingenuous message, "Do as I say, not as I do."³³¹

While instilling respect for constitutional values is an important element of any democratic education, students who are dependant upon illegal drugs and alcohol may be unprepared to participate responsibly within society. Schools must strike a balance between the goal of inculcating constitutional values and the need to foster norms that disapprove of substance abuse.³³² The Supreme Court recognized this need for protection when it decreed that educators are custodians of their students in *Vernonia* and *Earls*.³³³ At a time when children are most susceptible to pressures and norms promoting substance abuse³³⁴ and the long-term effects of drug and alcohol use are most significant,³³⁵ it seems clear that "children are not prepared to assess the consequences of their choices."³³⁶ Schools must remain involved in the fight to prevent teen drug and alcohol abuse.

Furthermore, the freedom of speech has never been an absolute freedom.³³⁷ The law recognizes several restrictions upon an adult's freedom of expression.³³⁸ If an adult's freedom of speech is not absolute, then a child's

not parchment preserved under glass."); Wilborn, *supra* note 9, at 121 ("[T]he exchange of ideas . . . is essential to foster precollege students' future civic competence.").

³²⁸ Levin, *supra* note 327, at 1647.

³²⁹ Peterson, *supra* note 326, at 932; Wilborn, *supra* note 9, at 121.

³³⁰ Levin, *supra* note 327, at 1648.

³³¹ Miller, *supra* note 9, at 625–26. The Supreme Court has also given voice to this concern. *See, e.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985).

³³² Miller, *supra* note 9, at 627.

³³³ *Bd. of Educ. v. Earls*, 536 U.S. 822, 830 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56 (1995).

³³⁴ *See supra* Part III.C.

³³⁵ MALIGNANT NEGLECT, *supra* note 21, at 14–15.

³³⁶ Amitai Etzioni, *On Protecting Children from Speech*, 79 CHI.-KENT L. REV. 3, 48 (2004). While some may call this argument paternalistic, one scholar has responded, "Paternalism means treating adults like children, not treating children as children. Paternalism is exactly what the law and society expects from parents, and we hold them accountable when they fail." *Id.* at 48–49.

³³⁷ *E.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.").

³³⁸ *See, e.g.*, cases cited *supra* note 42.

freedom of expression is certainly not infinite.³³⁹ A child is not yet an adult, and therefore, the law has long recognized that children receive different legal treatment and protection.³⁴⁰ Accordingly, some additional regulation of student speech is appropriate within schools.

Finally, giving schools the authority to restrict a narrow class of student speech does not preclude schools from teaching students to respect the values instilled within the Constitution. The solution proposed in this Part does not prohibit students from advocating for the legalization of marijuana or a decrease in the legal drinking age.³⁴¹ Students may even debate the constitutionality of any school censorship, including pro-drug and alcohol speech. The political debate and democratic traditions the *Tinker* Court valued remain alive in schools.³⁴² Thus, prohibiting student speech that advocates illegal and harmful activities is not tantamount to political censorship and the strangulation of the free mind at its source.³⁴³

2. Overregulation and the Potential for Abuse

Perhaps one of the most compelling criticisms of giving schools additional authority is the potential for abuse.³⁴⁴ *Broussard v. School Board of the City of Norfolk*³⁴⁵ is one example that scholars and commentators cite as an abuse of power.³⁴⁶ The court upheld the school’s suspension of a student wearing a t-shirt with the phrase “Drugs Suck!”³⁴⁷ The court agreed with the school that, under *Fraser*, the shirt was offensive because the term “suck” has sexual or vulgar connotations.³⁴⁸ Most children testified that their primary

³³⁹ Miller, *supra* note 9, at 643.

³⁴⁰ For example, the Supreme Court, considering whether a law prohibiting children from street preaching was constitutional when adults were not so restricted, held, “the power of the state to control the conduct of children reaches beyond the scope of its authority over adults,” especially where the child has not reached the “age of full and legal discretion” to decide to accept the dangers of such an activity. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

³⁴¹ Supporting the *use* of illegal drugs is distinct from supporting the *legalization* of drugs.

³⁴² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511–12 (1969).

³⁴³ *See id.* at 507 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

³⁴⁴ *See Calvert, supra* note 100, at 748 (noting that *Fraser* and *Hazelwood* give schools “considerable discretion”); *Hudson & Ferguson, supra* note 101, at 197 (arguing the broadest reading of *Fraser* provides schools with *carte blanche* power to define any speech with which administrators disagree).

³⁴⁵ 801 F. Supp. 1526 (E.D. Va. 1992).

³⁴⁶ *E.g.*, Miller, *supra* note 9, at 656; Pyle, *supra* note 92, at 620.

³⁴⁷ *Broussard*, 801 F.Supp. at 1534.

³⁴⁸ *Id.* at 1537.

understanding of the term “suck” was “disapproval,” and “Drugs Suck!” communicates the message that drugs are bad.³⁴⁹

Some might assert that the school in *Broussard* was overzealous in its attempt to protect students from inappropriate language.³⁵⁰ Moreover, teachers may face disciplinary action for *failing* to enforce rules against profanity.³⁵¹ Unfortunately, this liability may make teachers and administrators even “more likely to err on the side of censorship.”³⁵²

However, unless the Court is prepared to impose an under-inclusive list of inappropriate words and specific instances of conduct school may regulate, or perhaps have no rules at all, some school discretion is necessary. This discretion means that this Comment’s proposed solution of adopting a moderate interpretation of *Fraser* creates some room for abuse. Under this interpretation, administrators and courts must decide whether student speech is lewd, vulgar, obscene, or offensive.³⁵³ The discretion to make such determinations creates room for over-regulation and errors in judgment.

Despite this potential for abuse, the moderate view proposed in Part IV.A dispels some of the confusion as to *Fraser*’s breadth, and the additional definitions may help educators and courts make the correct determinations in each case. First, by providing clearer definitions of indecent, lewd, and vulgar expression, schools will have more guidance in correctly recognizing speech that falls within these categories.³⁵⁴ Second, the greatest potential for abuse arises in the context of “offensive” speech.³⁵⁵ The moderate interpretation of *Fraser* denies schools carte blanche authority to define what is offensive.³⁵⁶ The definition of “offensive” supported in Part IV incorporates part of the *Tinker* standard, forcing schools to justify claims that speech is offensive.³⁵⁷ This acts as an additional check on school authority.

Finally, while creating a new category of speech that schools may constitutionally prohibit does increase school power over student expression,

³⁴⁹ *Id.* at 1533.

³⁵⁰ Miller, *supra* note 9, at 656.

³⁵¹ *See* Lacks v. Ferguson Reorganized Sch. Dist. R-2, 147 F.3d 718 (8th Cir. 1998) (upholding the termination of a teacher for failure to enforce the school’s prohibition of profanity).

³⁵² Hudson & Ferguson, *supra* note 101, at 204.

³⁵³ *See supra* notes 256–63 and accompanying text.

³⁵⁴ *See* Miller, *supra* note 9, at 646.

³⁵⁵ *See supra* notes 267–68 and accompanying text.

³⁵⁶ *See supra* note 269 and accompanying text.

³⁵⁷ *See supra* notes 264–66 and accompanying text.

this increase in authority is narrow. Pro-drug and alcohol speech is a clearly defined category of student speech that does not give a school broad authority to censor additional student expression.³⁵⁸ As noted above, students may still support the legalization of drugs or dissent from the school policy prohibiting speech.³⁵⁹ Therefore, this narrow increase in power is unlikely to provide an opportunity for administrators to abuse their authority over students.

CONCLUSION

Public schools exist primarily to educate the nation’s children and prepare them to join society as responsible, productive citizens. This education includes teaching children the value of democratic participation and instilling them with respect for the rights and privileges protected by the Constitution. Public schools also act as tutors and guardians, however, and in that role, educators inculcate students with social values, protect them from harmful messages, and dissuade them from dangerous activities.

Adolescent drug abuse is a scourge upon the nation’s schools. The variety of health risks and the commonality of adolescent drug use “make[] the war against drugs a pressing concern in every school.”³⁶⁰ Schools use several tactics to address this concern, one of which is to prohibit pro-drug and alcohol messages that create norms tolerant of drug and alcohol use. Currently, the only interpretation of the Supreme Court’s student speech cases that would support the constitutionality of these prohibitions gives schools far too much power to determine what speech is appropriate for schools and severely restricts the applicability of the *Tinker* standard.

In compromise, the Supreme Court should, and did, clarify *Bethel School District No. 403 v. Fraser*, and limit its applicability to indecent and obscene speech. This reading respects the *Fraser* Court’s focus on the inappropriateness of such speech within schools. Adopting a moderate interpretation of *Fraser* allows schools to regulate obscene or indecent speech regardless of whether the expression causes a disruption or occurs independently of school activities.

Additionally, if a school seeks to prohibit “offensive” speech, administrators should have to show that the speech was not only inappropriate

³⁵⁸ See *supra* notes 263–69, 341–43 and accompanying text.

³⁵⁹ See *supra* notes 341–43 and accompanying text.

³⁶⁰ *Bd. of Educ. v. Earls*, 536 U.S. 822, 834 (2002).

for school, but that it also caused some disruption of school function. This restricts school authority in two ways. First, by rejecting the broad interpretation of *Fraser*, the Court will deny schools carte blanche authority to define what speech is appropriate for schools. Second, forcing schools to justify prohibitions of “offensive” speech respects *Tinker*’s holding that schools may not censor speech simply because administrators find such speech to be disagreeable.

Furthermore, the Court properly granted schools the narrow authority to prohibit pro-drug and alcohol student speech, allowing schools to continue to foster norms that discourage and disapprove of drug use. This narrow increase in school authority will help prevent abuses of power and over-censorship of student speech. Through this compromise, administrators may protect its students while maintaining the public school as a marketplace of ideas and training our future leaders “through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues.’”³⁶¹

SARAH TOPE REISE*

³⁶¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

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