MIXED MESSAGES, MUDDLED MEANINGS, DRUNK DICKS, AND BOOBIES BRACELETS: SEXUALLY SUGGESTIVE STUDENT SPEECH AND THE NEED TO OVERRULE OR RADICALLY REFASHION *FRASER*

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ABSTRACT

More than a quarter-century after the U.S. Supreme Court handed down its ruling in the student-speech case of *Bethel School District v. Fraser*, the problems wrought by the case's meanings-based approach and exceedingly deferential deployment were exposed in 2012 by several cases involving censorship of the message "I ♥ Boobies! (Keep A Breast)." This Article initially explores the U.S. Supreme Court's adoption in *Fraser* of what amounts to a two-track or bifurcated approach—one track that focuses on effects and one that centers on meanings—for deciding when censorship of on-campus student speech is permissible. Using multiple examples from actual cases, the Article then illustrates the slipperiness of determining meaning when messages are imbued with sexual overtones but may or may not cross *Fraser*'s suspect censorial threshold of conveying a sexually vulgar or lewd meaning. The Article proposes several possible solutions to the problems posed by *Fraser*, from completely overruling it to several more nuanced approaches, including melding a portion of Justice Alito's controlling concurrence in *Morse v. Frederick* onto *Fraser*.

TABLE OF CONTENTS

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INTRODUCTION

> The mode of analysis employed in *Fraser* is not entirely clear.
>
> —Chief Justice Roberts[1]

That was Chief Justice John Roberts's rather damning observation conveyed five years ago in the student speech case of *Morse v. Frederick* about the Court's 1986 ruling in *Bethel School District No. 43 v. Fraser*.[2] Indeed, as civil libertarian and free speech activist Nat Hentoff opined in the pages of the *Washington Post* shortly after *Fraser* was rendered, the decision "added a new, large, fog-like category"[3] to unprotected student expression.

Peering through the fog more than a quarter-century later, however, one thing is readily apparent about *Fraser*'s mode of analysis: it marked an abrupt departure from what this Article calls an "effects-based approach" for the censorship of student speech that began in 1969 with the Court's seminal ruling[4] in *Tinker v. Des Moines Independent Community School District*.[5] As Chief Justice Roberts remarked in *Morse*, "*Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the

1. Morse v. Frederick, 551 U.S. 393, 404 (2007).
2. 478 U.S. 675 (1986).
3. Nat Hentoff, *Student Free Speech Is in Trouble*, WASH. POST, Aug. 30, 1986, at A23.
4. *See* Nadine Strossen, *A Framework for Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free Speech in the Wall Separating Church and State?*, 71 CORNELL L. REV. 143, 150 (1985) (calling *Tinker* the Court's "seminal decision" recognizing the free speech rights of students).
5. 393 U.S. 503 (1969); *see generally* Clay Calvert, Tinker*'s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1168–75 (2009) (providing an overview of the Court's ruling in *Tinker* and its significance forty years later).

'substantial disruption' analysis prescribed by *Tinker*."[6] The *Fraser* Court pivoted, albeit without overruling *Tinker*,[7] to what this Article dubs a "meanings-based approach" to student censorship that it later extended in *Morse*.[8]

What is the difference between these two modes of analysis? The answer ultimately boils down to the distinction between searching for a disruptive effect among the student body (*Tinker*) and rummaging through message content for an impermissible meaning (*Fraser* or *Morse*).[9] The word "rummaging" is suitably employed here because, as this Article makes evident, student messages may be obtuse, pun-laden, or polysemic. Divining a definitive, correct, or controlling meaning, to put it bluntly, often proves a thorny task.

Tinker, in contrast, embodies an effects-based tack because it permits censorship of student speech only if facts indicate to school officials that the message in question will likely affect or cause a "substantial and material" disruption or interference.[10] In other words, *Tinker* mandated a search among school officials for a reaction (or possible reaction) to a message—a search for a message effect—and the legal question becomes one of causal attribution: *Whether student message X will reasonably cause a substantially disruptive effect Y*.

Conversely, *Fraser* and *Morse* embrace a meanings-based methodology that permits censorship based purely upon the resolution of the meaning of a message—regardless of its likely or actual disruptive effect among students—and whether, in turn, that meaning contradicts some aspect of a school's educational mission.[11] As Professor Mary-Rose Papandrea wrote, the Court in *Fraser* "did not find that the speech was ma-

6. *Morse*, 551 U.S. at 405.

7. *See* Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1591 n.267 (1998) (observing that "*Fraser* did not overrule the venerable *Tinker* decision outright").

8. *See* discussion *infra* Part I.C (addressing the Court's decision in *Morse*).

9. The word "meaning" itself can, somewhat ironically, take on multiple meanings. *See generally* Louis B. Salomon, *"Meaning:" A Word for All Seasons*, 41 AM. SPEECH 108 (1966) (examining varying uses of the words "meaning," "meaningful" and "meaningless" during a three-month period in 1966).

10. The Court wrote in *Tinker* that school authorities must demonstrate a set of actual facts that might reasonably lead them "to forecast substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514 (1969). The Court also suggested that censorship was permissible when the speech in question "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 513. It emphasized that an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508.

11. In *Hazelwood School District v. Kuhlmeier*, the majority made it clear that *Fraser* allowed for censorship of speech based on its meaning rather than on any disruptive effect. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 n.4 (1988) ("The decision in *Fraser* rested on the 'vulgar,' 'lewd,' and 'plainly offensive' character of a speech delivered at an official school assembly rather than on any propensity of the speech to 'materially disrup[t] classwork or involv[e] substantial disorder or invasion of the rights of others.'" (alterations in original) (quoting *Tinker*, 393 U.S. at 513)).

terially disruptive nor did it find that the speech interfered with the rights of other students, as *Tinker* would seem to require."[12]

Instead, censorship is permitted under *Fraser* whenever a message can be interpreted—with great deference given by the Court to the linguistic powers of school officials[13]—as conveying a sexually lewd or vulgar meaning[14] and under *Morse* when it "can reasonably be regarded as encouraging illegal drug use."[15] When school officials, in other words, can reasonably take away a disfavored meaning from a muddled message—in *Morse*, it meant wringing a pro-drug-use meaning from the obscure slogan "BONG HiTS 4 JESUS"[16]—censorship is permissible.[17] Under *Fraser*, a message determined to possess a sexual connotation can be permissibly punished despite the absence of any evidence suggesting it will have even the slightest disruptive effect among the student body. The *Fraser* formula for censorship, as described later in Part I, translates as follows: Whether student message X conveys a disfavored and inappropriate meaning Y that conflicts with educational mission Z. This is a two-step process: it initially requires school officials (and potentially courts) to ferret out the meaning of a message and then mandates that they decide whether that meaning conflicts with some aspect of a school's educational mission.

That the *Fraser* Court decided to embrace an approach dependent upon deciphering meaning rather than evaluating disruptive reaction is somewhat odd. After all, it was nearly one century ago that Justice Oliver Wendell Holmes Jr.[18] cogently observed that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time

12. Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1048 (2008).

13. *See* Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 537 (2000) (observing that in *Fraser*, "Chief Justice Burger's majority opinion proclaimed the need for judicial deference to the authority and expertise of school officials"); S. Elizabeth Wilborn, *Teaching the New Three R's—Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 136 (1995) (describing "*Fraser*'s *deference* to school authorities' regulation of student speech" (emphasis added)).

14. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (allowing for censorship of student speech if the meaning of a student's message is "sexually explicit, indecent, or lewd").

15. Morse v. Frederick, 551 U.S. 393, 397 (2007).

16. *Id.*

17. *Cf.* Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113, 1119 (2010) (observing that *Fraser* and *Morse* "provide special rules for particular categories of disfavored student speech—that is, plainly offensive speech and advocacy of illegal drug use").

18. When it comes to First Amendment speech issues, Justice Holmes is perhaps best known for bringing the "marketplace of ideas" metaphor into American jurisprudence. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3 (1984) (asserting that Holmes first introduced the marketplace of ideas "concept into American jurisprudence in his 1919 dissent to *Abrams v. United States*").

in which it is used."[19] Such ambiguity and variance in the meaning of words is especially true when dealing with, as *Fraser* purported to do, vulgarity and lewdness. Indeed, as the Supreme Court memorably wrote in *Cohen v. California*,[20] just fifteen years before *Fraser*, it is often true that "one man's vulgarity is another's lyric"[21] and that "governmental officials cannot make principled distinctions in this area."[22] Despite such dicta, the Court in *Fraser* charted the very same convoluted and complicated course it astutely advised avoiding in *Cohen*.[23]

Fast-forward to the twenty-first century, and battles over meaning affecting the relatively nascent First Amendment[24] speech rights of public-school students are proving a thorny thicket for judges under *Fraser* to traverse. When words and messages are ambiguous and arguably carry multiple meanings—including sexual ones, as well as more noble ones—judges are placed squarely in the middle, situated between school officials and students, to determine which meaning should control. In the process, the judiciary must decide just how much deference[25] it will accord to the institutional authority of adults vested with educating the nation's youth. The problem for the judiciary is compounded by the cultural and generational gaps that separate and distance the minors who speak the phrases from the adults who squelch them.

As explored in detail later, the split of authority that arose among federal courts in 2012 on how to interpret the silicone bracelet-emblazoned message "I ♥ Boobies! (Keep A Breast)" aptly illustrates the problems with a meanings-based approach that hinges on the subjective interpretation of whether speech conveys a "vulgar and lewd"[26] connotation. In February 2012, U.S. District Judge Barbara B. Crabb in *K.J. v. Sauk Prairie School District*[27] denied a thirteen-year-old student's motion for a preliminary injunction to stop officials at Sauk Prairie Middle School in Wisconsin from prohibiting her from donning this wrist-worn accessory. Applying *Fraser* and using what she called "[a] reasonableness standard"[28] of message interpretation, Judge Crabb held that it was

19. Towne v. Eisner, 245 U.S. 418, 425 (1918).
20. 403 U.S. 15 (1971).
21. *Id.* at 25.
22. *Id.*
23. *Id.* at 24–25.
24. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).
25. *See generally* Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1078 (2008) (defining deference "as a decisionmaker's decision to follow a determination made by some other individual or institution that it might not otherwise have reached had it decided the same question independently").
26. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).
27. No. 3:11-cv-00622 (W.D. Wis. Feb. 6, 2012) (order denying preliminary injunction).
28. *Id.*, slip op. at 13.

indeed "reasonable for school officials to conclude that this phrase is vulgar."[29] This holding came despite the fact that the Keep A Breast Foundation, which sponsors the bracelets, describes the "I ♥ Boobies!" campaign as

> a new approach and positive style of communication about breast cancer. The campaign is meant to encourage young people to target their breast health. The t-shirts and bracelets act as an awareness-raising tool, allowing young people to engage and start talking about a subject that is scary and taboo and making it positive and upbeat.[30]

In stark contrast to the pro-censorship result in *Sauk Prairie School District*, U.S. District Judge Mary A. McLaughlin in April 2011 in *H. v. Easton Area School District*[31] granted an injunction on behalf of two female middle-school students in Pennsylvania and concluded that "[T]hese bracelets cannot reasonably be considered lewd or vulgar under the standard of *Fraser*. The bracelets are intended to be and they can reasonably be viewed as speech designed to raise awareness of breast cancer and to reduce stigma associated with openly discussing breast health."[32] This diametrically opposite result occurred regarding the exact same message, despite the fact that both Judge McLaughlin[33] and Judge Crabb[34] purported to apply the same reasonableness-meaning standard under *Fraser* in precisely the same context of a middle-school setting.

This Article argues that *Fraser* finally must either be: (1) overruled and replaced with an effects-based model for censoring arguably sexually lewd or vulgar messages; or (2) applied in a much more rigorous and consistent analytical fashion that not only is significantly less deferential to school authorities but also deploys clear and specific evidentiary presumptions and standards in the determination-of-meaning process. The Article further asserts that the crucial and controlling concurrence of Justice Samuel Alito Jr.[35] joined by Justice Anthony Kennedy in *Morse v. Frederick*[36] actually provides an important mechanism or standard for resolving meaning disputes under *Fraser*. Specifically, Justice Alito wrote that the Court's ruling in *Morse* does not support the censorship of even pro-drug messages if those messages "*can plausibly be interpreted*

29. *Id.* at 17.

30. *"I Love Boobies!" Campaign*, KEEP A BREAST FOUND., http://www.keep-a-breast.org/programs/i-love-boobies (last visited June 19, 2012).

31. 827 F. Supp. 2d 392 (E.D. Pa. 2011).

32. *Id.* at 394.

33. *See id.* at 405 ("The Court concludes that a reasonableness standard properly applies to a school's *Fraser* determination.").

34. *See supra* note 29 and accompanying text.

35. *See* Palmer v. Waxahachie Indep. Sch. Dist., 579 F.3d 502, 508 n.8 (5th Cir. 2009) (observing that "that Justice Alito's concurrence is 'controlling' for our interpretations of *Morse*"); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 874–75 (2008) (observing that "Justice Alito's *controlling concurrence*, joined by Justice Kennedy, clarifies the limited holding of [*Morse*]" (emphasis added)).

36. 551 U.S. 393, 422–25 (2007) (Alito, J., concurring).

as commenting on any political or social issue."[37] This Article contends that if such a "plausibility standard" for the presence of political or social commentary is enough to protect—at least in the eyes of Justices Alito and Kennedy—speech that conveys ambiguous messages about illegal drugs, then so too should it be sufficient to protect messages like "I ♥ Boobies! (Keep A Breast)" that carry somewhat sophomoric sexual overtones in the process of raising awareness of breast cancer. In brief, grafting this strand of reasoning from *Morse* onto *Fraser*—moving it from the realm of drug messages to the province of sexual ones—may help cure some of the flaws that now plague lower court *Fraser* analyses.

Part I of this Article explores the U.S. Supreme Court's adoption in *Fraser* of what amounts to a bifurcated approach—one track that focuses on effects and one that centers on meaning—for deciding when censorship of on-campus student speech is permissible. Part II, using multiple examples from actual cases, illustrates the slipperiness of meaning determinations when messages are imbued with sexual overtones but may or may not cross *Fraser*'s suspect censorial threshold of conveying a sexually vulgar or lewd meaning. The phrases used here as analytical springboards are: (1) "Drugs Suck!";[38] (2) "See Dick Drink. See Dick Drive. See Dick Die. Don't be a Dick";[39] and (3) "I ♥ Boobies! (Keep A Breast)."[40] In the process of analyzing the cases involving these phrases, the Article demonstrates the vast deference paid on the question of meaning to school authorities and the amorphousness of the reasonableness standard applied by the likes of Judges Crabb and McLaughlin.

Part III then argues, as noted above, that *Fraser* either should be overruled or significantly refashioned. It explores several options for different standards of proof that courts might adopt to approach meaning determinations in a more First Amendment-friendly fashion. It also expands on the argument above that Justice Alito's concurrence in *Morse* may hold a key for resolving some of the current problems courts face under *Fraser*. Finally, the "Conclusion" urges courts, in light of the arguments set forth in Part III and the trio of cases presented in Part II, to finally abandon *Fraser*'s relaxed and deferential meanings-based approach to censorship of student expression.

37. *Id.* at 422 (emphasis added).
38. Broussard *ex rel.* Lord v. Sch. Bd., 801 F. Supp. 1526, 1528 (E.D. Va. 1992).
39. Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157, 158 (D. Mass. 1994).
40. H. v. Easton Area Sch. Dist., 827 F. Supp. 2d 392, 393 (E.D. Pa. 2011) (order granting preliminary injunction).

I. FROM *TINKER* TO *FRASER* TO *MORSE*: SHIFTING FROM DISRUPTIVE EFFECTS TO INAPPROPRIATE MEANINGS

At least two potential justifications exist for squelching student speech that is neither school sponsored nor part of the curriculum.[41] One focuses on the deleterious and disruptive effects of speech, and the other centers on the inappropriate or educationally incompatible meanings of speech. This distinction is important. For instance, a student's message might mean one thing to school administrators—something that is negative or contrary to the school's educational mission—and quite another to members of the student body. Furthermore, even if students do take away the same negative meaning as the one found by school administrators, the majority of students simply might not care about it or react to it a disruptive way. In other words, where a school administrator might interpret the phrase "I ♥ Boobies!" on a bracelet worn by a boy as sexually lewd or vulgar, students might merely view the phrase as an amusing way to highlight breast cancer and, in turn, not react to it in any way that it is detrimental or disruptive to the educational process. To put it bluntly, if a school official interprets the meaning of a message in a way that students either (a) don't understand or (b) don't care about, then (c) there will be no disruption caused by it. A meaning held in the mind of a school official thus does not necessarily lead to a disruptive effect among students.

As this part of the Article makes clear, the Supreme Court has shifted from an effects-based approach adopted more than forty years ago in *Tinker* to a meanings-based methodology embraced more recently in *Fraser* and *Morse*. Subpart A initially provides a brief overview of *Tinker*, in which the Court focused on the disruptive effects of student expression. Subpart B then turns to *Fraser*, which focused on the meaning of messages that are contrary to the purpose of a public-school education. Next, subpart C examines how the majority in *Morse* extended a meanings-based approach to censorship of student expression.

41. Cases involving school-sponsored student speech are governed by a standard different from those articulated in both *Tinker* and *Fraser*. In particular, the Court held in 1988 that "[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 261 (1988). The Court reasoned "that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression." *Id.* at 272–73. Professor Douglas Laycock writes that *Kuhlmeier* stands for the proposition that the *Tinker* "rule does not apply if the speech is school-sponsored." Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111, 112 (2008).

A. Searching for Message Effects: Causal Disruption and Tinker

In *Tinker*, the Supreme Court adopted in 1969 an effects-based approach that permits school officials to punish students for speech only if their expression is likely to cause a substantial and material disruption of the educational environment or interference with the rights of other students.[42] The fact that a student's message may carry an offensive meaning is not a sufficient justification for its censorship under the *Tinker* tack. As Justice Abe Fortas wrote for the majority, the "mere desire to avoid the discomfort and unpleasantness"[43] of a particular expression of opinion cannot support its prohibition. Instead, there must be evidence that its suppression "is necessary to avoid material and substantial interference with schoolwork or discipline."[44]

Applying this causal-reaction or effects-based approach to censorship to the facts of *Tinker*, which involved students wearing black armbands "to publicize their objections to the hostilities in Vietnam and their support for a truce,"[45] the majority concluded that "the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred."[46] The only thing the armbands "caused [was] discussion outside of the classrooms."[47] *Tinker*, as constitutional law scholar Erwin Chemerinsky writes, constitutes "the high watermark of the Supreme Court protecting the constitutional rights of students."[48]

B. Searching for Meaning: The Shift to Preserving Educational Mission and Censoring Mission-Conflicting Messages

Seventeen years after *Tinker*, the Court in *Fraser* deviated sharply from its effects-based approach to student censorship to one that focuses on the meaning of a message and whether that meaning conflicts with the educational mission of a public school. The case centered on high school student Matthew Fraser's sexual innuendo-laden speech nominating a fellow student for elective office before an estimated 600 minors as part of a school-sponsored educational program in self-government.[49] Thus, like disputes involving the "I ♥ Boobies! (Keep A Breast)" bracelets described earlier, *Fraser* is, at its very core, a case about sifting and sorting through mixed messages—one political (nominating a student for government) and one sexual (the innuendos used). Instead of letting student

42. *See supra* notes 4–7 and accompanying text.
43. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).
44. *Id.* at 511.
45. *Id.* at 504.
46. *Id.* at 514.
47. *Id.*
48. Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 124 (2004).
49. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1986).

reaction to Matthew Fraser's mixed message dictate the outcome of the case—rather, in other words, than examining whether it caused a substantial and disruptive effect, per *Tinker*—the majority in *Fraser* transformed the case into a battle over meaning and, in particular, whether that meaning conflicted with the educational mission of the school.

Chief Justice Warren Burger, in writing the majority opinion for a fractured Court, characterized the speech as "an elaborate, graphic, and explicit sexual metaphor."[50] The reaction among the students was mixed. Some apparently understood the sexual connotations quite well, as they "hooted and yelled"[51] and via "gestures graphically simulated the sexual activities pointedly alluded to"[52] by Matthew Fraser. Conversely, other students apparently did not get it, as it were, as they "appeared to be bewildered and embarrassed."[53] Apparently, only one teacher "found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class."[54]

Matthew Fraser, in fact, likely knew the receptive reaction he would receive from some of his fellow students by making sexual innuendos. After all, the United States Court of Appeals for the Ninth Circuit affirmed the district court's ruling in his favor, writing that Fraser "was a member of the Honor Society and the debate team and the recipient of the 'Top Speaker' award in statewide debate championships for two consecutive years."[55] In brief, Matthew Fraser was a young man who knew how to turn a phrase, even if it simultaneously meant turning the heads of school officials with negative shakes of disapproval. Anything but ironically, Fraser attended college at the home of the 1960s free speech movement,[56] the University of California, Berkeley.[57]

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50. *Id.* at 678. Specifically, Matthew Fraser allegedly said the following about the student he was nominating for student-government office:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.
>
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
>
> Jeff is a man who will go to the very end—even the climax, for each and every one of you.
>
> So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

Id. at 687 (Brennan, J., concurring) (internal quotation marks omitted).

51. *Id.* at 678 (majority opinion).

52. *Id.*

53. *Id.*

54. *Id.*

55. Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1357 (9th Cir. 1985), *rev'd*, 478 U.S. 675 (1986).

56. *See generally* THE FREE SPEECH MOVEMENT: REFLECTIONS ON BERKELEY IN THE 1960S (Robert Cohen & Reginald E. Zelnik eds., 2002) (providing a collection of essays regarding the free speech movement at the University of California, Berkeley).

In ruling in Matthew Fraser's favor, the Ninth Circuit applied *Tinker*'s substantial and material disruption standard and determined that "the Bethel School District has failed to carry its burden of demonstrating that Fraser's use of sexual innuendo in the nominating speech substantially disrupted or materially interfered in any way with the educational process."[58] The Ninth Circuit characterized the crucial facts used to reach a decision as follows:

> Fraser's speech evoked a lively and noisy response from the students, including applause, and . . . a few of the students reacted with sexually suggestive movements. The administration had no difficulty in maintaining order during the assembly and Fraser's speech did not delay the assembly program. Fraser was the second to last speaker, followed by his candidate, Jeff Kuhlman, who then made the final speech of the afternoon without incident. The assembly, which took place after the last school class of the day, was dismissed on schedule.[59]

Rather than apply the same *Tinker* standard, as did the Ninth Circuit, the U.S. Supreme Court charted a new course when it took up the case one year later. This novel approach was telegraphed in the very first sentence of the majority opinion, in which the Chief Justice framed the issue as "whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly."[60] That framing says naught about the effects of speech but simply references its content—a student "giving a lewd speech at a school assembly."[61] As Chief Justice Roberts wrote about *Fraser* in *Morse*, "The Court was plainly attuned to the content of Fraser's speech."[62]

The Court in *Fraser* soon thereafter parted ways with the reasoning of the Ninth Circuit by asserting that "[t]he marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals."[63] Yet the majority's quick dismissal of the political nature of Matthew Fraser's speech gives short shrift to a fundamental reality: "The purpose of the speech was to get [Kuhlman] elected,

57. *See* Ruth Marcus, *Student Suspended After Speech: Supreme Court Renters Debate Over Power of School Officials*, WASH. POST, Mar. 2, 1986, at A12 (describing Fraser as "now a junior at the University of California at Berkeley").

58. *Fraser*, 755 F.2d at 1359.

59. *Id.* at 1360.

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

61. *Id.*

62. Morse v. Frederick, 551 U.S. 393, 404 (2007).

63. *Fraser*, 478 U.S. at 680.

and it worked," as Fraser told a reporter for the *Washington Post* back in 1986.[64]

As with its framing of the issue noted above,[65] the majority's factual distinction between the political content of *Tinker* and the sexual content of *Fraser* says nothing about the effects of the speech, but only about its meaning—specifically, political versus sexual meaning. This too rigid dichotomy,[66] in turn, launched the *Fraser* majority down an untraveled road that would require it to analyze (1) the purpose of public-school education; and (2) whether sexually themed messages conflict with that purpose, considering the appropriateness of the context and situation in which such messages arise.

In a nutshell, the majority reasoned that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse"[67] because to allow such speech would "undermine the school's basic educational mission."[68] That mission includes the inculcation of values, including learning the habits of civility and taking into account the sensibilities of others, that are essential for the proper functioning of a self-governing democracy.[69]

Here, the sensibilities of others, included young females present in the audience for Matthew Fraser's nominating speech; the majority wrote that "[b]y glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students."[70] In addition, and regardless of gender, the majority seemed acutely concerned about the sensibilities of those in the audience who "were only 14 years old and on the threshold of awareness of human sexuality."[71]

Ultimately, then, the majority's analysis of the purpose of public education did not concentrate on teaching substantive subjects—math, English, or geography, for instance—but rather on "teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences."[72] As Chief Justice Burger wrote, the "process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics

64. Marcus, *supra* note 57 (internal quotation marks omitted).
65. *Fraser*, 478 U.S. at 677.
66. The author uses the term "too rigid" here because Matthew Fraser's speech fused political content with sexual metaphors; it simply is impossible to clearly demarcate the political from the sexual.
67. *Fraser*, 478 U.S. at 683.
68. *Id.* at 685.
69. *Id.* at 681.
70. *Id.* at 683.
71. *Id.*
72. *Id.* at 681.

class; schools must teach by example the shared values of a civilized social order."[73]

In summing up *Fraser*, constitutional law scholar Kathleen Sullivan wrote that the Court "denied First Amendment protection to a student who made sexual remarks in a mandatory school assembly, holding that such speech may be restricted as pedagogically inappropriate and contrary to the school's educational mission."[74] Kenneth Starr, the attorney who successfully argued on behalf of Principal Deborah Morse in *Morse*, wrote that *Fraser* provides schools with "greater leeway to prevent *Fraser*-like speakers from undermining public education's communitarian aims."[75]

The Court arguably did not need to go down this track in order to punish Matthew Fraser, however, as the concurrence of Justice William Brennan intimated. In particular, Brennan scoffed at the notion that Matthew Fraser's speech was obscene, vulgar, lewd, or offensively lewd.[76] Furthermore, he criticized the idea that Fraser's speech could be punished because its content was insulting to young girls and damaging to fourteen-year-olds.[77]

Instead, Justice Brennan adopted an effects-based approach to explain why censorship of the speech was justified, writing that it could be stopped in order "to *prevent disruption* of school educational activities"[78] and in the interest of "*avoiding disruption* of educational school activities."[79] Brennan's opinion can be interpreted as an attempt to read a disruption standard—an effects-based standard—back into the majority's holding. As Brennan ultimately concluded, "I believe that school officials did not violate the First Amendment in determining that respondent should be disciplined for *the disruptive language*."[80] In an effort to narrow the majority's holding, he added that "the Court's holding concerns only the authority that school officials have to restrict a high school student's use of *disruptive language* in a speech given to a high school assembly."[81] In brief, Justice Brennan invoked variants of the word "disruption" four different times in attempting to confine the breadth of *Fraser*.

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73. *Id.* at 683.

74. Kathleen M. Sullivan, *Free Speech*, 35 PEPP. L. REV. 533, 538 (2008).

75. Kenneth W. Starr, *From* Fraser *to* Frederick*: Bong Hits and the Decline of Civic Culture*, 42 U.C. DAVIS L. REV. 661, 672 (2009).

76. *Fraser*, 478 U.S. at 687 (Brennan, J., concurring) ("Having read the full text of respondent's remarks, I find it difficult to believe that it is the same speech the Court describes.").

77. *See id.* at 689 n.2 (writing that "[t]he Court speculates that the speech was 'insulting' to female students, and 'seriously damaging' to 14-year-olds, so that school officials could legitimately suppress such expression in order to protect these groups," and concluding that "[t]here is no evidence in the record that any students, male or female, found the speech 'insulting'").

78. *Id.* at 687 (emphasis added).

79. *Id.* at 688 (emphasis added).

80. *Id.* at 690 (emphasis added).

81. *Id.* at 689 (emphasis added).

Justice Thurgood Marshall authored a brief dissent in favor of Matthew Fraser, making it clear that *Tinker* provided the correct rule to apply and that "the School District, despite a clear opportunity to do so, failed to bring in evidence sufficient to convince either of the two lower courts that education at Bethel School was disrupted by respondent's speech."[82] Justice John Paul Stevens also penned a dissent that foreshadowed future problems with a meanings-based approach to censorship of student speech. Specifically, Justice Stevens wrote that Matthew Fraser "was probably in a better position to determine whether an audience composed of 600 of his contemporaries would be offended by the use of a four-letter word—or a sexual metaphor—than is a group of judges who are at least two generations and 3,000 miles away from the scene of the crime."[83] The latter part of this sentence highlights the meaning quagmire that judges today find themselves trapped in when they are forced to determine whether in-school speech by minors is or is not sexually offensive. In addition, Justice Stevens focused on the due process or lack-of-notice problem[84] inherent with a meanings-based approach that attempts to punish metaphorical expression, reasoning that Matthew Fraser should have been provided with an "unambiguous warning"[85] under the school's disciplinary policy.[86] Clear lines related to the meaning of ambiguous messages and metaphors are simply too difficult to draw in order to provide fair notice to students about when they will be punished for their speech activities.

But perhaps the most important part of Justice Stevens's dissent follows: "I believe a strong presumption in favor of free expression should apply whenever an issue of this kind is arguable."[87] Although the precise issue to which Justice Stevens may have been referring was whether Matthew Fraser had sufficient advance notice that he would be suspended for presenting his speech,[88] the broader point, explored later in Part III, is that there should be a presumption in favor of protecting speech whenever it is arguable whether it should be punished because of a meaning it allegedly conveys.

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82. *Id.* at 690 (Marshall, J., dissenting).

83. *Id.* at 692 (Stevens, J., dissenting).

84. *See* David M. Pedersen, *A Homemade Switchblade Knife and a Bent Fork: Judicial Place Setting and Student Discipline*, 31 CREIGHTON L. REV. 1053, 1078 (1998) ("Justice Stevens was concerned about due process not being followed because, in Justice Stevens' view, Fraser was not given sufficient notice that his speech would subject him to punishment.").

85. *Fraser*, 478 U.S. at 695, n.5 (Stevens, J., dissenting).

86. *See id.* at 695 (characterizing the school's disciplinary rule as "sufficiently ambiguous that without a further explanation or construction it could not advise the reader of the student handbook that the speech would be forbidden").

87. *Id.* at 696.

88. This meaning is plausible, given that the sentence coming immediately before the previous quote is: "First, it seems highly unlikely that he would have decided to deliver the speech if he had known that it would result in his suspension and disqualification from delivering the school commencement address." *Id.*

In summary, three Justices in *Fraser*—Justices Brennan, Marshall, and Stevens—attempted either to limit or to reject the meanings-based approach to censorship adopted by the majority. Ironically, for a case that stands for the proposition that student speech can be squelched when it conveys a particular meaning that conflicts with rules of civility and respect for the sensibilities of others, the majority opinion was appallingly loose with its own use of language and what it meant by the words it deployed. At various points in the majority opinion, Chief Justice Burger suggested that it is permissible for schools to restrict student speech that is "lewd,"[89] "vulgar and offensive,"[90] "lewd, indecent, or offensive," "sexually explicit, indecent, or lewd,"[91] or "offensively lewd and indecent."[92]

Maddeningly, the Court never attempted to define what any of these words or phrases means. If a legislative body had fashioned a statute featuring such terms but failed to explicate them, the statute likely would be subject to a successful "void for vagueness" challenge.[93] Criticizing the Supreme Court's ruling in *Fraser* on the question of meaning, Professor Christopher Fairman wrote:

> Despite the opportunity to clarify the boundaries of offensive language, the Court failed to carefully define the speech at issue. It called the speech "offensively lewd and indecent," "vulgar and lewd," and "sexually explicit" all in the same opinion. What then is the difference between the *Fraser*-speech subsets of lewd, indecent, vulgar, offensive, or sexually explicit?[94]

A point that seemingly has not been previously addressed in any law journal article is that the term "vulgarity" actually reflects class-based distinctions between highbrow and lowbrow culture.[95] This observation is troubling if the term is used to distinguish between what is and is not protected under the U.S. Constitution. That First Amendment protection should hinge on such a distinction strikes one as antithetical to the

89. *Id.* at 677 (majority opinion).
90. *Id.* at 683.
91. *Id.*
92. *Id.* at 685.
93. *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (observing that "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined" such that they fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited"); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 910 (2d ed. 2002) ("A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted. Unduly vague laws violate due process whether or not speech is regulated.").
94. Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711, 1762–63 (2007).
95. *See* Emily Ravenwood, *The Innocence of Children: Effects of Vulgarity in South Park*, 1.2 CLCWEB: COMP. LITERATURE & CULTURE 1, 2 (1999), http://docs.lib.purdue.edu/clcweb/vol1/iss2/5 ("Vulgarity . . . has distinct class overtones. Even those who acknowledge the use of shock-value in bringing an audience to appreciate a new thought or emotion, probably would not wish to align themselves with the great masses of the common people who are not cultivated, refined and upper-class.").

ideal that all individuals, no matter how properly or inarticulately they express their sentiments, are deserving of equal free speech rights. Viewed in this light, the word "boobies" is censored as vulgar under *Fraser* simply because it is a lowbrow term for the more clinically accurate and correct term "breasts."

The Supreme Court's ruling in *Morse* began to rein in the potential reach of *Fraser*, at least as applied to "offensive" expression. It wrote that *Fraser* "should not be read to encompass any speech that could fit under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some."[96] Although not explicitly stating as such, at least one federal appellate court had previously suggested that the statement intimates that *Fraser* is limited to *sexual* offensiveness—sexual vulgarity, sexual lewdness, and sexual indecency.[97]

The bottom line is that the holding in *Fraser* can be read very narrowly or exceedingly broadly. When confined to its rather peculiar set of facts, the holding in *Fraser* would be strictly limited to (1) on-campus speech[98] (2) that transpires in captive-audience scenarios[99] (3) and involves spoken, not printed, words (4) that are uttered at school-sponsored assemblies (5) and that convey a sexually vulgar, lewd, or indecent connotation that allegedly overwhelms any political meaning, while simultaneously glorifying male sexuality in such a way that "could well be seriously damaging to its less mature audience."[100]

Under such a narrow reading of *Fraser*, the "I ♥ Boobies! (Keep A Breast)" bracelets described in the "Introduction" would never be subject to a *Fraser* analysis for several reasons grounded in factual distinctions. First, the words on the bracelet are printed, not spoken. Second, there is no captive-audience scenario; no one is forced to stare at the bracelets. Third, the words do not glorify male sexuality; there is merely one slang-based reference to a part of the female anatomy. Fourth, the word "boobies" simply cannot be said, at least with a straight face, to be "seriously

96. Morse v. Frederick, 551 U.S. 393, 409 (2007).

97. *See* Guiles v. Marineau, 461 F.3d 320, 328 (2d Cir. 2006) (opining that "[w]hat is plainly offensive for purposes of *Fraser* must therefore be somewhat narrower than the dictionary definition," and adding that "[c]ourts that address *Fraser* appear to *treat 'plainly offensive' synonymously with and as part and parcel of speech that is lewd, vulgar, and indecent*—meaning speech that is something less than obscene but related to that concept, that is to say, *speech containing sexual innuendo and profanity*" (emphasis added)), *cert. denied*, 551 U.S. 1162 (2007).

98. *See* T.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767, 779 (N.D. Ind. 2011) (noting that *Fraser* does not apply to off-campus expression).

99. *See* Joseph A. Tomain, *Cyberspace Is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 DRAKE L. REV. 97, 104 (2010) ("*Fraser* holds that three factors are important for schools to assert jurisdiction over student speech: (1) *there must be a captive audience*; (2) the speech must involve lewd or indecent sexual content; and (3) the school must have a need to disassociate itself from the speech." (emphasis added)).

100. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

damaging" to middle-school students, be it teenage girls or fourteen-year-old students generally.

When read broadly, however, *Fraser* permits stifling any manner and any mode, spoken or printed,[101] of any plainly offensive expression, sexual or otherwise,[102] that conflicts with society's "interest in teaching students the boundaries of socially appropriate behavior."[103] As one district court expansively characterized the holding in an approach that hints at near judicial abdication of authority, "*Fraser* teaches that judgments regarding what speech is appropriate in school matters should be left to the schools rather than the courts."[104]

Under such an expansive interpretation of *Fraser*, Marilyn Manson t-shirts that are completely devoid of any sexual references[105] can be prohibited because they "contain symbols and words that promote values that are so patently contrary to the school's educational mission."[106] Indeed, it has been observed that "[m]ost courts apply *Fraser* beyond its set of facts and extend *Fraser*'s holding to allow school officials to regulate any student speech that is vulgar, lewd, or plainly offensive."[107] *Fraser*, as Professor Richard Roe wrote, leaves "little room for freedom of student speech,"[108] with its combined emphasis on the inculcation of values of civility and the majority's "deference to the schools' determination of the form and content of those values."[109]

C. Continuing the Battle over Meaning: The Morse *Extension from Sexual Innuendos to Drug References*

Twenty-one years after *Fraser*, and in its most recent ruling involving the speech rights of public-school students, the U.S. Supreme Court in *Morse* again adopted a meanings-based approach to censorship.[110] This time, however, the message at issue purportedly carried overtones of illicit drug use rather than sexual connotations. *Morse* pivoted on the

101. *See, e.g.*, R.O. v. Ithaca City Sch. Dist., No. 5:05-CV-695 (NAM/GJD), 2009 U.S. Dist. LEXIS 130993, at *59 (N.D.N.Y. Mar. 24, 2009) (noting that "district courts have extended *Fraser* beyond the realm of spoken speech").

102. *Id.* at *67 (asserting that "[u]nder *Fraser*, a school may *categorically* prohibit vulgar, lewd, indecent or *plainly offensive speech*" (second emphasis added)).

103. *Fraser*, 478 U.S. at 681.

104. Posthumus v. Bd. of Educ., 380 F. Supp. 2d 891, 901 (W.D. Mich. 2005).

105. *See* Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 467 (6th Cir. 2000) ("The front of the t-shirt depicted a three-faced Jesus, accompanied by the words 'See No Truth. Hear No Truth. Speak No Truth.' On the back of the shirt, the word 'BELIEVE' was spelled out in capital letters, with the letters "LIE" highlighted. Marilyn Manson's name (although not his picture) was displayed prominently on the front of the shirt.").

106. *Id.* at 470.

107. David L. Hudson & John E. Ferguson, *The Courts' Inconsistent Treatment of* Bethel v. Fraser *and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 194 (2002).

108. Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CALIF. L. REV. 1271, 1284 (1991).

109. *Id.* at 1284–85.

110. Morse v. Frederick, 551 U.S. 393, 400–03 (2007).

meaning of a student-created banner emblazoned with the ambiguous statement "BONG HiTS 4 JESUS."[111]

The majority held that public-school officials could permissibly censor student "speech that can reasonably be regarded as encouraging illegal drug use."[112] This constitutes a meanings-based approach to censorship because speech can be censored simply because it carries a particular meaning—one that "is reasonably viewed as promoting illegal drug use."[113] There is no need for school officials to demonstrate actual facts that the message in question actually *caused* illegal drug use among students. Furthermore, the "BONG HiTS" message need not *cause* a *Tinker* disruption of the educational atmosphere. Indeed, as the U.S. Court of Appeals for the Ninth Circuit wrote in favor of student Joseph Frederick:

> The school principal and school board do not claim that the display disrupted or was expected to disrupt any classroom work. They concede that their objection to the display, and the reason why the principal ripped down the banner, was not concern that it would cause disruption but that its message would be understood as advocating or promoting illegal drug use.[114]

Importantly, the Supreme Court's ruling in *Morse* illustrates the vast judicial deference granted to school officials in deciphering the meaning of ambiguous messages, a deference that easily squelches First Amendment speech rights. In particular, the threshold issue in *Morse* was the meaning of the banner. Its student-creator, Joseph Frederick, "claimed that the words were just nonsense meant to attract television cameras"[115] and "meaningless and funny."[116] Principal Deborah Morse, however, believed that the banner "would be construed by students, District personnel, parents, and others witnessing the display of the banner, as advocating or promoting illegal drug use."[117]

In penning the majority opinion against Joseph Frederick, Chief Justice John Roberts dubbed Principal Morse's interpretation of the banner "plainly a reasonable one."[118] This decision came despite Roberts's open acknowledgement that "[g]ibberish is surely a possible interpretation of the words on the banner"[119] and the dissent's characterization of the banner's meaning as "silly"[120] and "nonsensical."[121] The *Morse* ma-

111. *Id.* at 397–99.
112. *Id.* at 397.
113. *Id.* at 403.
114. Frederick v. Morse, 439 F.3d 1114, 1117 (9th Cir. 2006), *rev'd*, 551 U.S. 393 (2007).
115. *Morse*, 551 U.S. at 401 (internal quotation marks omitted).
116. *Id.* at 402 (internal quotation marks omitted).
117. *Id.* at 401.
118. *Id.*
119. *Id.* at 402.
120. *Id.* at 446 (Stevens, J., dissenting).

jority's decision to adopt the principal's interpretation of a pro-drug-use meaning is consistent with what Professor Lee Goldman recently called the Court's "increasing deference to the choices made by school administrators"[122] since *Tinker*.

Finally, although the Court found that the sexual meaning it rooted out in Matthew Fraser's speech conflicted with the educational mission of teaching students about civility and the sensibilities of others,[123] in *Morse* it concluded that the pro-drug-use meaning it found lurking in Joseph Frederick's banner conflicted with the educational mission of teaching students that "the illegal use of drugs [is] wrong and harmful."[124] *Morse* thus reinforces *Fraser*'s two-step, meanings-based approach to censorship of student expression: (1) Does a student message reasonably convey a particular meaning? (2) If the answer to that query is yes, then does that meaning conflict with some aspect of the educational mission of a public school?

D. Summary

From *Tinker* to *Fraser* (and later reinforced in *Morse*), the Supreme Court has pivoted from a search for the disruptive effects of student speech to a search through metaphorical (*Fraser*) and obtuse (*Morse*) messages for possible meanings that conflict with aspects of a school's educational mission. As the next part of this Article illustrates, *Fraser*'s meanings-based approach is particularly troubling when applied to real-life cases in which multiple meanings—including some very laudable ones, such as messages against illegal drugs, against drunk driving, and in favor of raising breast-cancer awareness—reasonably can be derived. The *Fraser* methodology proves especially dangerous for First Amendment speech rights due to the vast deference courts continually grant to school officials when deciphering ambiguous or polysemic messages.

II. DIVING INTO THE MORASS OF MIXED MEANINGS: A TRIO OF LOWER COURT EXAMPLES ILLUSTRATE PROBLEMS WITH *FRASER*'S MEANINGS-BASED APPROACH TO CENSORSHIP

This part of the Article uses three real-life examples of student expression that demonstrate the problems for freedom of speech when courts deploy *Fraser*'s meanings-based approach to censorship and, in the process, give a heaping helping of deference to the interpretative powers of school authorities. In each instance, the message in question is polysemic and thus places courts deeply into a linguistic quicksand.

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121. *Id.*

122. Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 398 (2011).

123. *See supra* notes 67–69 and accompanying text.

124. *Morse*, 551 U.S. at 408 (quoting 20 U.S.C. § 7114(d)(6) (2006)) (internal quotation mark omitted).

A. Drugs Suck: A Sexually Vulgar Anti-drug Message?

Six years after the Supreme Court's ruling in *Fraser*, U.S. District Judge Robert G. Doumar found himself bogged down in a semantic quagmire in *Broussard ex rel. Lord v. School Board*.[125] The case centered on a message emblazoned on the front of a New Kids on the Block t-shirt worn by a twelve-year-old seventh grader, Kimberly Broussard.[126] The blunt two-word message at issue was "Drugs Suck!"[127] Officials at Blair Middle School found it offensive, contending the word suck "had sexual connotations."[128]

Broussard, however, testified otherwise about the nature of the message. She claimed:

> [T]he word "suck" did not have an offensive, vulgar, or sexual connotation to her. She testified that the shirt's message was that it is "not right to use drugs," a message that she wanted to convey to others. She intended the shirt to be provocative in its anti-drug message. Plaintiff asserts that children her age generally do not consider the word "suck" to have a vulgar or sexual connotation.[129]

Two of Broussard's classmates also testified that the message meant "drugs are bad,"[130] although they acknowledged during cross-examination that the word suck carries a vulgar connotation.[131]

The massive efforts in *Broussard* to determine the meaning of one word—suck—worn on a seventh grader's boy-band t-shirt demonstrate the utter foolishness of *Fraser*'s meanings-based approach to censorship. As described in the opinion:

> Both sides presented experts to testify on the etymology and meaning of the word in the usage "X sucks," "X" being a noun used as a subject, and "sucks" being an intransitive verb. The experts presented their interpretations of the derivation and meaning of the word "suck," after consulting dictionaries and articles on slang usage and searching the popular press for usage of the phrase "X sucks."[132]

Expert witnesses often are expensive, and apparently, in *Broussard*, public officials from Norfolk, Virginia expended taxpayer money to hire two expert witnesses: a professor from Virginia Wesleyan College and a professor from Old Dominion University.[133] The former explained "that

125. 801 F. Supp. 1526 (E.D. Va. 1992).
126. *Id.* at 1528.
127. *Id.*
128. *Id.* at 1528–29.
129. *Id.* at 1533.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 1534.

'sucks' may have a sexual connotation even when used as an intransitive verb, as in 'X sucks.' She testified that the Oxford English Dictionary listed a usage of the word 'suck' without a direct object that had the sexual meaning of 'fellatio.'"[134]

Kimberly Broussard's attorneys, in turn, hired their own expert—a Duke University English professor who testified that the word suck "has a meaning of disapproval or disparagement among younger people."[135] He added that suck "is in a state of amelioration in that its recent meaning of disapproval is not as crude as its older meaning of oral-genital sexual contact."[136]

Clearly, *Fraser*'s meanings-based test for censorship is flawed, if for no other reason than because it too easily can become mired in in-court battles between expensive and time-consuming expert witnesses. Perhaps the Justices never anticipated such a result because the sexual innuendo was so clear to them in *Fraser*, but the fact that *Broussard* required testimony from three college professors to help determine if censorship of a seventh grader's two-word, anti-drug message was justified seems absurd.

Ultimately, Judge Doumar sided with the school and concluded that it was reasonable for officials to find that suck conveys "a sexual connotation of oral-genital contact."[137] Under *Fraser*, the *Broussard* court did not violate Kimberly Broussard's speech rights.[138] The judge reasoned "that Blair Middle School officials had an interest in protecting their young students from exposure to vulgar and offensive language."[139] Interpreting *Fraser* to stand for the proposition that "speech that is merely lewd, indecent, or offensive is subject to limitation," Judge Doumar engaged in an approach to meaning that was vastly deferential to school authorities.[140] Asserting that "[t]he Supreme Court has given great deference to school boards, as in *Fraser*,"[141] Judge Doumar wrote that "[t]he federal courts, ill-suited as they are to second guess decisions of school authorities, should interfere only in the most stringent circumstances. This is not such a case."[142] Although Judge Doumar also found the shirt could be stopped under *Tinker*,[143] he nonetheless "followed *Fraser* and

134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *See id.* at 1537 ("Under either *Tinker*, a content-based case, or *Fraser*, which, like this case, is content-neutral, the defendants did not violate Kimberly's First Amendment rights by suspending her for refusing to change her shirt.").
139. *Id.*
140. *Id.* at 1535–36.
141. *Id.* at 1536.
142. *Id.* at 1536–37 (citation omitted).
143. *See id.* at 1535 ("Even if *Tinker* were the appropriate test, however, the school met the *Tinker* requirements.").

deferred to school officials to decide what language may be proscribed as offensive, indecent, or lewd."[144]

And what was the reaction of the case's young protagonist, Kimberly Broussard, to Judge Doumar's decision? "I'm kind of surprised . . . . I don't think they should be able to get away with it," she is quoted as stating in a *Washington Post* article.[145] Her mother, Ruth Lord, expressed similar dismay, stating, "I'm amazed—absolutely. I expected that the First Amendment would prevail."[146] This mother and daughter were not the only people to question the outcome.

Criticizing Judge Doumar's decision, Professor Fairman wrote that "courts often sexualize other nonsexual language to enforce a prohibition against the speech. For example, a federal district court upheld the suspension of a middle school student for wearing a t-shirt that said 'Drugs Suck!' because the message was vulgar and offensive."[147] More importantly, cases like *Broussard* highlight what Fairman calls the "level of confusion among the courts on both linguistics and the legal standard of vulgar and offensive speech."[148]

Also using *Broussard* to illustrate problems under *Fraser*, First Amendment Center attorneys David Hudson and John Ferguson wrote that the battle over vernacular in *Broussard* "belies one of the difficulties of defining vulgarities. While at one time in American history theaters refused to show a movie with the word 'damn,' it has now fallen in vulgarity below 'suck.'"[149]

In line with Professor Fairman's point about the *Broussard* court sexualizing non-sexual language,[150] attorney Andrew Miller adds that "[e]ven if one accepts the courts [sic] dubious assumption that the word 'suck,' standing alone, is a sexual innuendo, it is very hard to imagine the erotic nature of the student's t-shirt."[151] In order for "suck" to take on an erotic or sexual meaning in the phrase used by Kimberly Broussard, Miller writes that the court would have had to be "concerned that someone may read the t-shirt to connote drugs—inanimate objects often consisting of powders, fluids, pills, weeds, etc.—engaging in the act of fellatio.

144. Clay Weisenberger, *Constitution or Conformity: When the Shirt Hits the Fan in Public Schools*, 29 J.L. & EDUC. 51, 56 (2000); *see also* Christopher Cavaliere, Student Work, *Category Shopping: Cracking the Student Speech Categories*, 40 STETSON L. REV. 877, 904 (2011) ("One court even used [*Fraser*] to uphold a school's decision to punish a student for wearing a shirt reading 'Drugs Suck!'").

145. *Va. Judge Rejects Free Speech Claim*, WASH. POST, Sept. 5, 1992, at B5 (internal quotation marks omitted).

146. *Anti-drug Message Not Free Speech*, WASH. TIMES, Sept. 6, 1992, at A12 (internal quotation marks omitted).

147. Fairman, *supra* note 94, at 1764.

148. *Id.* at 1764–65.

149. Hudson & Ferguson, *supra* note 107, at 201–02.

150. *See supra* note 147 and accompanying text.

151. Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 656 (2002).

This, however, is a very unlikely concern."[152] Miller's reasoning, of course, channels the Supreme Court's logic in *Cohen v. California*[153] that even the phrase "Fuck the Draft" would not conjure up "psychic stimulation."[154]

Beyond these points, the decision in *Broussard* also overlooks the emotive function of speech—that saying "Drugs Suck!" is a much more powerful and attention grabbing anti-drug message than "Drugs are Bad." Writing the majority opinion in *Cohen* and protecting an adult's right to wear a jacket emblazoned with the message "Fuck the Draft" in a Los Angeles courthouse corridor, Justice John Marshall Harlan observed "that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force."[155] Put differently, uttering "Fuck the Draft" deserves protection because it packs an emotional power that an alternative message such as "The Draft is Bad" simply cannot muster.

Kimberly Broussard, it must be remembered, was not even using the alternative term "fuck." The fact that some people might feel there is a substantial degree of difference between a seventh-grader saying "suck," rather than "fuck," is illustrative of another problem with *Fraser*-based censorship. In particular, *Fraser* embraces a dichotomized, black-and-white tack to meaning. It assumes that speech either is or is not lewd, vulgar, or indecent, regardless of how those terms ultimately are defined. In other words, *Fraser* knows no nuance when it comes to shades and variations of meaning. *Fraser*'s all-or-nothing approach to meaning fails to account for and acknowledge shades of sexual overtones.

Broussard, however, represents one of only several decisions involving ambiguous messages with such sexual connotations that illustrate problems with *Fraser*'s meanings-based approach to censorship.

B. Of Dicks and Drunks: "Pyling" on the Censorship

In a memorable scene from the 1998 movie *The Big Lebowski*, the character Maude Lebowski, played by Julianne Moore, explained to the character Jeffrey Lebowski, performed by Jeff Bridges, that "without batting an eye a man will refer to *his dick* or his rod or his Johnson"[156] instead of using the term "penis."

152. *Id.* at 656 & n.217.
153. 403 U.S. 15, 23–26 (1971).
154. *Id.* at 16, 20.
155. *Id.* at 26.
156. *See* THE BIG LEBOWKSI (Universal Studios 1998) (emphasis added).

Administrators at South Hadley High School, however, batted far more than an eye when they spotted sophomore Jonathan Pyle on May 3, 1993, wearing a t-shirt emblazoned with the words "See Dick Drink. See Dick Drive. See Dick Die. Don't Be A Dick."[157] In fact, they told Pyle his shirt was unacceptable and gave him "the usual three options: First, turn the T-shirt inside out; second, change into another T-shirt, or third, go home and change."[158]

As the word "usual" in the above-quoted sentence connotes, it was not the first time that Jonathan Pyle and his brother, Jeffrey, had challenged school authorities with their sartorial choices. On March 24, 1993, for instance, Jeffrey Pyle wore a shirt that read "Coed Naked Band; Do It To The Rhythm."[159] In fact, the Pyle brothers repeatedly pressed and pushed the boundaries of school censorship with a series of t-shirts bearing slogans such as "Coed Naked Censorship—They Do It In South Hadley"[160] and "Coed Naked Civil Liberties: Do It To The Amendments."[161] As U.S. Judge Michael Ponsor observed, the brothers "both admit that they selected these T-shirts to protest censorship and to test the capacity of the administration to distinguish prohibited from permitted messages."[162]

In June 1993, Judge Ponsor denied a motion for a temporary restraining order filed by the Pyle brothers that sought to stop school officials from prohibiting the wearing of the "Coed Naked Band" and "Don't Be a Dick" shirts.[163] After initially finding that the case more closely resembled *Fraser* than *Tinker*, Judge Ponsor launched into an opinion that although ultimately going in the school's favor, brilliantly made the point about the problematic nature of *Fraser*-based censorship. Among Judge Ponsor's observations, the following stand out as targeting specific aspects of *Fraser* analyses:

Measuring Offensiveness: "[T]he T-shirts themselves are not horribly offensive. Particularly when compared to other influences twelve-year-olds encounter in today's world, they could be seen as fairly innocuous."[164] This remark illustrates the vagueness inherent in the concept of offensiveness as well as *Fraser*'s inability to recognize degrees and shades of gray—that not all speech that is offensive at some minimal level (as compared to that which, to use the judge's term, is "horribly offensive") requires its in-school censorship. It arguably is even healthy

157. Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157, 162 (D. Mass. 1994).
158. *Id.*
159. *Id.* at 161.
160. *Id.* at 163.
161. *Id.* at 162.
162. *Id.* at 163.
163. *See* Pyle v. S. Hadley Sch. Comm., 824 F. Supp. 7, 9, 11 (D. Mass. 1993) ("[T]he T-shirts in question bear the slogans: 'Coed Naked Band; Do It To The Rhythm' and 'See Dick Drink. See Dick Drive. See Dick Die. Don't Be A Dick.'").
164. *Id.* at 10.

for students to be exposed to some modest levels of offensiveness in school settings to prepare them for much more offensive content they may need to cope with as adults in real-world settings.[165]

The statement also intimates that what adults may find or believe is offensive for minors is not coextensive with what minors themselves find offensive. In other words, there is likely a generational gap regarding what adults over a certain age may find offensive for minors and what adolescents and juveniles consider offensive. This is not surprising because communication research supports the proposition that we tend to believe that others are more affected by media messages than we are.[166] In brief, adults may believe that minors are going to be more harmed than they actually are by hearing an occasional in-school sexual expletive or double entendre.

Drawing Lines: "[L]ine-drawing with adolescents is never simple; instances falling on one side or the other of the boundary will be forever subject to debate,"[167] and "[t]he difficulty of establishing and maintaining boundaries in this area was highlighted by plaintiffs' counsel's hint that, while his present motion only deals with two T-shirts, he might at some future date apply for relief with regard to others."[168] These quotations tap directly into the disconnect between the slipperiness of message meaning on the one hand, and the desire of both the legal and school systems to impose clear-cut, black-and-white rules, on the other.[169] The creation of meaning has been described as "a process that modern linguistic and literary theory has shown is fraught with ambiguity, subjectivity, and complexity."[170] In brief, creating and imposing bright-line legal doctrines around message meanings is an extremely problematic task.

Deference Due School Officials: "[I]t is important to emphasize that the First Amendment does not require the court to substitute its own judgment on these issues for that of the defendants, but only to determine based on the record whether [their] concerns are reasonable,"[171] and "this

165. *Cf.* Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 573, 577 (7th Cir. 2001) ("[T]he right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either. People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.").

166. *See generally* Clay Calvert, *The First Amendment and the Third Person: Perceptual Biases of Media Harms & Cries for Government Censorship*, 6 COMMLAW CONSPECTUS 165 (1998) (describing the third-person-effect theory in communication research).

167. *Pyle*, 824 F. Supp. at 10.

168. *Id.* at 10 n.2.

169. This is not the only area of First Amendment jurisprudence where such line drawing and distinction making are difficult tasks. *See* Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045, 1085 (1985) (observing that efforts to punish subversive speech, "like those which arguably characterize political giving and spending, have been fraught with the line-drawing difficulties of accurately distinguishing between inherently valuable speech on the one hand and clearly punishable speech on the other").

170. David McCraw, *How Do Readers Read? Social Science and the Law of Libel*, 41 CATH. U. L. REV. 81, 85 (1991).

171. *Pyle*, 824 F. Supp. at 10.

case is not about the policy that this judge, if he were a member of the School Committee, might personally argue for."[172] Ultimately, this stance reflects the type of broad deference that courts consistently give to the censorial decisions of school officials today.[173] Such deference is given, as the Eleventh Circuit put it, because the First Amendment rights of students "should not interfere with a school administrator's professional observation that certain expressions have led to, and therefore could lead to, an unhealthy and potentially unsafe learning environment for the children they serve."[174]

Such deference provided to school officials, rather than to students, stacks the deck from the start against free speech interests when there is a battle over meaning under *Fraser*. For instance, if two meanings of a message are equally plausible—a political meaning asserted by a student and a sexually vulgar meaning asserted by school officials—the deference granted to school officials seems to virtually ensure that their interpretation will prevail and that censorship, in turn, will be permissible.

In August 1994, fourteen months after denying the Pyle brothers' motion for a temporary restraining order, Judge Ponsor issued an opinion after a four-day bench trial considering the prohibition of both the "Don't Be A Dick" and "Coed Naked Band" t-shirts, as well as selected portions of the school's dress code.[175] Judge Ponsor again ruled in favor of the school as to both t-shirts, writing that under *Fraser* "the school's exercise of its authority to limit the sexual double entendre on these T-shirts, even where there was no immediate prospect of disruption, did not run afoul of the First Amendment."[176] Seemingly sensing that Judge Ponsor was not particularly offended by t-shirts, which he characterized rather benignly as carrying "sexual witticism,"[177] the Pyle brothers during the trial made a new argument—that Judge Ponsor and the "court must itself weigh the slogans on its own scale of offensiveness and conclude that these particular T-shirts simply were *not* vulgar."[178] Parsed differently,

172. *Id.*

173. *See, e.g.*, Palmer v. Waxahachie Indep. Sch. Dist., 579 F.3d 502, 505, 510–11, 513 (5th Cir. 2009) (observing, in the context of a case involving and upholding the censorship of a student's t-shirt carrying the overtly political and non-sexual message "John Edwards for President '08," that "federal courts should give *substantial deference* to schools where they present their reasons for passing a given dress code" (emphasis added)); Lavine v. Blaine Sch. Dist., 257 F.3d 981, 988 (9th Cir. 2001) (writing that "[i]n the school context, we have granted educators *substantial deference* as to what speech is appropriate" (emphasis added)); T.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767, 784 (N.D. Ind. 2011) (describing as "considerable" the level of deference "that is so often due" public-school authorities); Deana Pollard Sacks, *Children's Developmental Vulnerability and the Roberts Court's Child-Protective Jurisprudence: An Emerging Trend?*, 40 STETSON L. REV. 777, 778–79 (2011) (noting "the longstanding deference conferred upon local officials in the educational setting").

174. Scott v. Sch. Bd., 324 F.3d 1246, 1247 (11th Cir. 2003).

175. Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157, 158–59 (D. Mass. 1994).

176. *Id.* at 159.

177. *Id.*

178. *Id.*

the Pyles contended that the ultimate arbiter of message meanings—vulgar meanings, in particular—should not be school officials but rather members of the judiciary.

Judge Ponsor rejected this proposition, asserting that the limits of acceptability of vulgarity in school settings "are to be debated and decided within the community; the rules may even vary from one school district to another as the diversity of culture dictates. The administrators here acted within reason, and the court's inquiry need go no further."[179] The interpretation, of course, is highly deferential to school administrators because (1) it recognizes that school districts can establish their own, localized community standards of vulgarity rather than being subjected to a national standard; and (2) it subjects school officials' determinations merely to a reasonableness standard of judicial review (i.e., "[t]he administrators here acted within reason").[180]

Fleshing out these two points, Judge Ponsor described "the inappropriateness of setting up a federal judge to second guess school administrators' decisions regarding student messages containing sexual innuendo."[181] Rather than the judiciary taking on this obligation, "the limits on vulgarity in secondary schools, *assuming a general standard of reasonableness*, are to be defined by school administrators, answerable to school boards and ultimately to the voters of a community."[182]

Judge Ponsor also rejected the Pyles argument that the "Don't Be A Dick" shirt should be protected because of its political message against drunk driving. "At least in high school, a political message does not justify a vulgar medium," Judge Ponsor wrote.[183] Ultimately, Judge Ponsor summed up his decision in a rather colorful statement, writing that "on the question of when the pungency of sexual foolery becomes unacceptable, the school board of South Hadley is in the best position to weigh the strengths and vulnerabilities of the town's 785 high school students. The First Amendment does not compel the court into this arena."[184] Such a judicial hands-off approach to *Fraser* gives school administrators latitude for censorship, bounded only by a standard of reasonableness.

The case of *Pyle v. South Hadley School Committee* features an interesting post-script. In a 2002 article written several years after the case, then-law student Jonathan Pyle asserted that the primary legal point he and his brother sought to make in court was "that the Constitution makes the reasonable person's measure of appropriateness irrelevant and denies

179. *Id.*
180. *Id.*
181. *Id.* at 169–70.
182. *Id.* at 170 (emphasis added).
183. *Id.* at 169.
184. *Id.* at 170.

school officials the power to curtail any student speech that is not materially disruptive."[185] In other words, *Fraser*'s meanings-based approach to censorship of inappropriate language needed to be replaced with *Tinker*'s effects-based model. "[T]he [*Tinker*] disruption standard, and nothing more, should govern the school's regulation of independent student speech," as Pyle succinctly put it.[186]

C. Of Boobies and Bracelets: A Split of Authority Emerges over a Slang Term for Breasts

Whereas Jonathan Pyle ran afoul of school administrators in the 1990s for deploying a slang term for penis, students in the second decade of the twenty-first century are finding themselves in trouble for using a slang term for breasts. The on-campus wearing by public-school students of bracelets bearing the message "I ♥ Boobies! Keep A Breast" has sparked instances of censorship across the nation, from Plant City, Florida[187] to Saratoga Springs, New York[188] and from Kitsap County, Washington[189] to Fort Wayne, Indiana.[190] Indeed, as the *Tampa Bay Times* reported in March 2012, there is "an ongoing nationwide clash between students and school officials who contend the word 'boobies'—even in the context of cancer awareness—is inappropriate in schools."[191]

From a cultural perspective, the battles may reflect the reality that in the United States "the female bosom has been elevated to a kind of paradoxical cultural touchstone—ubiquitous in helping sell everything from cars to candy yet so controversial we have to pass laws to protect women

185. Jonathan Pyle, Comment, *Speech in Public Schools: Different Context or Different Rights?*, 4 U. PA. J. CONST. L. 586, 588 (2002).

186. *Id.* at 633.

187. *See* Keith Morelli & Jose Patiño Girona, *'Boobies' Bracelet Gets Kid in Trouble*, TAMPA TRIB., Mar. 31, 2010, at Local News 4 (describing a controversy involving the bracelets at the Tomlin Middle School in Plant City, Florida, in which a teacher and an administrator found the message to be "disruptive and sexually harassing" and, as a result, seized the bracelet from a fourteen-year-old student and punished him with a one-day, in-school suspension).

188. *See* Mareesa Nicosia, *Anti-breast Cancer Bracelet Controversy Spurs Debate*, TROY RECORD, Mar. 25, 2010, http://www.troyrecord.com/articles/2010/03/25/news/doc4baae9fd86dfd811320446.txt (describing how two sixth-grade twin brothers at Maple Avenue Middle School in Saratoga Springs, New York, were "sent to the principal's office several times" for wearing the bracelets because school officials believed the word boobies "is offensive and should not be visible on students' clothing or accessories").

189. *See* Marietta Nelson, *Bracelet Raises Ire of Kitsap School Officials*, KITSAP SUN (Bremerton, Wash.), May 10, 2010, at A2 (reporting that school administrators at Klahowya Secondary School in Central Kitsap, Washington, asked students to either "leave their ['I ♥ Boobies' bracelets] at home, or to wear them turned inside out").

190. *See* Jeff Wiehe, *Teen Sues FWCS to Wear 'Boobies' Bracelet*, J. GAZETTE (Fort Wayne, Ind.), May 22, 2012, http://www.journalgazette.net/article/20120522/LOCAL04/305229985/1002/LOCAL (reporting that "[a] teenage girl and her mother are suing the superintendent of Fort Wayne Community Schools because the student had a bracelet with the words 'I (heart) boobies' taken away from her by an assistant principal this year").

191. Tony Marrero, *Wearing Their Heart, and More, on Their Wrist*, TAMPA BAY TIMES (Fla.), Mar. 18, 2012, at 1.

who want to breastfeed in public."[192] As one journalist recently put it, the in-school skirmish "is as much about the way we perceive our bodies as it is about the appropriateness of certain types of language for middle-schoolers."[193] The "I ♥ Boobies!" campaign also has been criticized as one of several "sexy breast cancer"[194] and "[k]ittenish"[195] campaigns that result in "pathologizing and fetishizing women's breasts at the expense of the bodies, hearts and minds attached to them. In that way, they actually suppress discussion of real cancer, rendering its sufferers—those of us whom all this is supposed to be for—invisible."[196]

But from a legal perspective, the bracelets provide the perfect proving ground for demonstrating the futility of *Fraser*'s meanings-based approach to censorship. The recent split of authority described in the "Introduction" further illustrates this point well,[197] even as more lawsuits were being filed over bracelet bans in 2012 that surely will continue to test the limits of student speech under *Fraser*.[198]

In April 2012, during oral argument before a panel of judges from the U.S. Court of Appeals for the Third Circuit in *B.H. v. Easton Area School District*, the attorney for the school district uttered, in apparently irony-free fashion, the following phrase: "We're not here to demonize boobies."[199] Yes, the city that is home to the Liberty Bell—long "considered a crucial representative of the heritage of the American Revolution"[200]—had in 2012 become ground zero for a seemingly silly semantic and censorial battle over the word boobies. Indeed, Amy Martinez, the

192. Chris Rickert, *Bracelet Brouhaha Exposes Obsession*, WIS. ST. J. (Madison), Feb. 9, 2012, at A3.

193. *Id.*

194. Peggy Orenstein, *The Problem with Boobies*, L.A. TIMES, Apr. 19, 2011, at A15.

195. *Id.*

196. *Id.*

197. For a discussion of a recent split at the federal district court level over whether schools may appropriately censor "I ♥ Boobies" bracelets, see sources cited *supra* notes 26–34 and accompanying text.

198. *See* Complaint for Declaratory and Injunctive Relief, L.G. v. Twin Lakes Sch. Corp., No. 4:12-CV-00004 (N.D. Ind. Feb. 6, 2012); Complaint for Declaratory and Injunctive Relief, J.A. v. Fort Wayne Cmty. Schs., No. 1:12-CV-00155 (N.D. Ind. May 18, 2012); Press Release, Am. Civil Liberties Union of Ind., "I ♥ BOOBIES" Protected First Amendment Speech (Feb. 6, 2012), http://www.aclu-in.org/LG%20v.%20Twin%20Lakes%20School%20Corp%202-6-2012.pdf (describing the factual underpinnings in *L.G. v. Twin Lakes School Corp.*); Wiehe, *supra* note 190 (describing the lawsuit of *J.A. v. Fort Wayne Community Schools*, filed on behalf of a female high-school sophomore and based upon the confiscation of her bracelet by school officials in March 2012 after she allegedly had worn "the bracelet for months without incident"); *Student Sues to Wear Breast Cancer Bracelet*, EVENING NEWS & TRIB. (Jeffersonville, Ind.), Feb. 6, 2012, http://newsandtribune.com/clarkcounty/x318441913/Student-sues-to-wear-breast-cancer-bracelet (describing the federal lawsuit of *L.G. v. Twin Lakes School Corp.* filed on behalf of a male eighth-grade student, at Roosevelt Middle School in Monticello, Indiana, who was ordered to turn the bracelet inside out after having worn it for two days without allegedly causing a disruption).

199. Zach Lindsey, *'I Heart Boobies' Bracelet Ban Appeal Under Way in Philadelphia*, EXPRESS-TIMES (Lehigh Valley, Pa.), Apr. 11, 2012, http://www.lehighvalleylive.com/easton/index.ssf/2012/04/arguments_in_i_heart_boobies_b.html.

200. 2 PAUL A. GILJE, ENCYCLOPEDIA OF REVOLUTIONARY AMERICA 416 (2010).

mother of Kayla Martinez, one of the litigants in the case along with Brianna Hawk expressed shock that the dispute wound up in federal court.[201]

But then again, as Justice John Marshall Harlan II wrote in the opening sentence of *Cohen v. California* where the dispute pivoted on the phrase "Fuck the Draft,"[202] "[t]his case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance."[203] Indeed, the dispute over the word "boobies," as used in the phrase "I ♥ Boobies," is of no small constitutional significance to students who want to wear a bracelet to their public school bearing that phrase. These students have found themselves, as Matthew Fraser might put it in pun-intended fashion, caught in a censorial booby trap[204] with suspensions doled out as booby prizes.[205]

The issue carries more than just constitutional significance. It also comes at a large monetary cost for schools that seemingly have no better way to spend their budgets than to fight cases in court rather than to settle them expeditiously. By June 2011, for instance, "Easton Area School District ha[d] rung up nearly $50,000 in legal bills defending its ban on breast cancer awareness bracelets."[206]

The "I ♥ Boobies" disputes also illustrate the generational gap problem that *Fraser* carries with it, as older adults who hold the reins of censorship may interpret words in very different ways than the minors who are subjected to their censorial wrath. For instance, in the Pennsylvania case, plaintiffs Brianna Hawk and Kayla Martinez both testified that "they used the word 'boobies' at home to refer to breasts and considered it harmless slang."[207] In contrast, school officials interpreted the word boobies to be lewd and vulgar.[208] Yet, other minors might wear the bracelets as reminder of a loved one who has passed away from breast cancer.[209]

201. Peter Hall, *Students Can Wear 'Boobies' Bracelets*, L.A. TIMES, Apr. 13, 2011, at A15.

202. Cohen v. California, 403 U.S. 15, 16 (1971).

203. *Id.* at 15.

204. *See generally* I. Willis Russell, *Among the New Words*, 20 AM. SPEECH 221, 222 (1945) (noting that the term "booby trap" was originally used in a military sense dating from the end of World War I).

205. *See, e.g.*, Marisa Guthrie, *The Networks Take Out the Trash*, BROADCASTING & CABLE, Nov. 16, 2009, at 3 (using the phrase "booby prize" in the negative sense of the cancellation of a television show).

206. Samantha Marcus, *'Boobies' Case Costs District $17,500 So Far*, MORNING CALL (Allentown, Pa.), June 14, 2011, at A6 (explaining that district's out-of-pocket costs are $17,500, with its insurance policy covering the rest).

207. Christopher Baxter, *Students Defend Wearing 'Boobies' Bracelets in Class*, L.A. TIMES, Dec. 17, 2010, at A27.

208. *Id.*

209. *See* Pia Hallenberg, *Teen Presses on Toward Graduation Day*, SPOKESMAN-REV. (Spokane, Wash.), May 24, 2012, at 2S (reporting that Washington state high school student Frank Herner III "wears a black 'I love boobies' rubber bracelet in his mother's memory").

This conundrum illustrates the most obvious problem with *Fraser*: trying to comprehend which words, at any given time, will be considered vulgar or lewd in the eyes of school officials. A study published in 2002 in the journal *American Speech* does not include the word "boobies" among a list of forty taboo words for human body parts, but the word "tit" does make the inventory as a taboo term for breasts.[210] On the other hand, the key word from *Pyle* —"dick"—does appear on the list,[211] but it can be used to mean "nothing" rather than "penis," as in the phrase "Nobody saw dick."[212] Radio talk-show host Howard Stern, however, frequently uses "boobies," along with the term "cans," as synonyms for breasts.[213]

With the multitude of problems posed by *Fraser* in mind, the next part of the Article turns to possible solutions to these difficulties. These options stretch from overruling *Fraser* in outright fashion and replacing it with a *Tinker* analysis to modifying *Fraser* by grafting onto it a key aspect from Justice Alito's controlling concurrence in *Morse*.

III. FINDING A SOLUTION TO *FRASER*: OVERRULE IT OR REFASHION IT

There are several potential ways to address the problems posed by *Fraser*'s meanings-based approach to censorship. This part proposes and explores three possible ways to ameliorate the difficulties wrought by *Fraser* censorship, ranging from completely overruling *Fraser* and substituting in its place the *Tinker* standard to embracing a more modified approach in which a portion of Justice Alito's *Morse* concurrence is melded onto *Fraser* in a concerted effort to address polysemic messages that fuse the sexual with the political.

Each of the three proposed tacks are set forth below merely as starting points for spurring further academic and judicial discussion about the ways in which *Fraser* analyses might be improved. These tacks, of course, are not the only possibilities nor are they necessarily the most viable or best ones.

A. Overruling Fraser *and Replacing It with* Tinker

Perhaps the easiest and cleanest way to address the problems with *Fraser*'s meanings-based to student censorship is to adopt the advice provided by Jonathan Pyle in his 2002 law review comment: "[T]he [*Tinker*] disruption standard, and nothing more, should govern the school's regulation of independent student speech."[214] This approach, of

210. Robert S. Wachal, *Taboo or Not Taboo: That Is the Question*, 77 AM. SPEECH 195, 196 (2002).
211. *Id.*
212. *Id.* at 204.
213. Lawrence Soley, *Sex and Shock Jocks: An Analysis of the* Howard Stern *and* Bob & Tom Shows, 13 J. PROMOTION MGMT. 75, 89 (2007).
214. Pyle, *supra* note 185, at 633.

course, entails jettisoning *Fraser* to the ashcan of quickly overruled precedents.[215]

This would mean that censorship of sexual expression, including polysemic messages imbued with sexual overtones but simultaneously possessing political meaning like those described in Part II, would be subjected to *Tinker*'s substantial and material disruption standard. *Tinker*, it must be emphasized, is already deployed by courts to address polysemic messages. Specifically, *Tinker* is used to determine whether censorship of clothing and other objects bearing the Confederate flag, about which heated disputes in meaning exist,[216] is justified.

For instance, in 2009, the U.S. Court of Appeals for the Fifth Circuit applied *Tinker* to uphold a policy adopted by Burleson High School (BHS) in Texas that prohibits the display of the Confederate flag on school grounds.[217] The appellate court concluded that school officials "reasonably anticipated that visible displays of the Confederate flag would cause substantial disruption of or material interference with school activities,"[218] in part because of "ample, uncontroverted evidence"[219] demonstrating that certain elements

> of the BHS student body have continually manifested racial hostility and tension. This tension has become evident in the various events described above, including racially hostile graffiti and vandalism, multiple disciplinary referrals involving racial epithets, and a physical confrontation between white BHS students and the African-American students of another high school.[220]

Similarly, in 2008, the U.S. Court of Appeals for the Sixth Circuit applied *Tinker* and held that a "school's dress code as applied to ban the Confederate flag is constitutional because of the disruptive potential of the flag in a school where racial tension is high and serious racially mo-

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215. For instance, the Supreme Court's opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), handed down the same year as *Fraser*, was reversed just seventeen years later in *Lawrence v. Texas*, 539 U.S. 558 (2003).

216. It has been observed that "the most widespread and vitriolic debates over southern symbols have pertained to the public display and meaning of the Confederate battle flag." Gerald R. Webster & Jonathan I. Leib, *Whose South Is It Anyway? Race and the Confederate Battle Flag in South Carolina*, 20 POL. GEOGRAPHY 271, 272 (2001). Professors Webster and Leib add:

> Various polls have indicated that most African Americans view the Confederate battle flag as racist and emblematic of 19th century efforts to preserve slavery as well as 20th century efforts to maintain a segregated South. The battle flag is thus seen as an icon of hate. In contrast, a significant majority of white Southerners view the battle flag as symbolic of their ancestors' struggle, sacrifice and heroism against the perceived destructive power and tyranny of the federal government during the Civil War and Reconstruction.

Id. at 275; *see generally* Robert E. Bonner, *Flag Culture and the Consolidation of Confederate Nationalism*, 68 J. S. HIST. 293 (2002) (providing a comprehensive examination of the history of the confederate flag).

217. A.M. v. Cash, 585 F.3d 214, 220, 224 (5th Cir. 2009).

218. *Id.* at 222.

219. *Id.*

220. *Id.*

tivated incidents, such as physical altercations or threats of violence, have occurred."[221] Other circuits are in accord.[222] Surely if *Tinker* is capable of coping with a polysemic message like the Confederate flag that might cause a violent disruption among students, then it should be more than able to handle far less dangerous polysemic messages like "I ♥ Boobies! (Keep A Breast)" and Jonathan Pyle's "Don't Be A Dick" t-shirt—messages that might provoke laughter not fisticuffs.

Under such a Confederate flag-like *Tinker* analysis, school officials could permissibly censor sexually suggestive t-shirts like "Don't Be A Dick" if (1) in the recent past, their wearing had caused substantial and material disruptions of the educational atmosphere, thus providing school officials with actual facts and reasons to forecast their future wearing will cause future disruptions; or (2) on the occasion of their current wearing, they create substantial and material disruptions of the educational atmosphere. A teacher trying to hush or stifle a few giggles that might arise from wearing such shirts should not, of course, constitute a substantial and material disruption. Worries about scattered giggles aroused by words like "dick" or "boobies" simply won't cut it because "*Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance."[223] Repeated instances of classroom interruptions due to such laughter, however, might eventually rise to a level where censorship would be permissible.

Even if sexually suggestive t-shirts draw no reaction whatsoever from students and thus would be permitted under *Tinker*, teachers would still be able to present their own views to students about whether or not they considered the messages emblazoned on them appropriate or improper. In other words, rather than engage in censorship, teachers could use a non-disruptive, sexual-overtoned message as a starting point for an in-class conversation about precisely the same points stressed by the *Fraser* majority—civility, respect, and consideration of the sensibilities of others.

This approach would embrace the logic and reasoning of the late Justice Louis Brandeis, who wrote for the Court eighty-five years ago, "[I]f there be time to expose through discussion the falsehood and falla-

221. Barr v. Lafon, 538 F.3d 554, 568 (6th Cir. 2008).

222. *See, e.g.*, B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734, 739 (8th Cir. 2009) (observing that "*Tinker* and its progeny allow a school to 'forecast' a disruption and take necessary precautions before racial tensions escalate out of hand," concluding in the case at bar that "[a]s a result of race-related incidents both in and out of the school, the administration reasonably denied the display of the Confederate flag within the school," and noting that "[o]ur holding is in line with our sister circuits that have addressed this issue"); West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1365 (10th Cir. 2000) (applying *Tinker* in concluding that a school district did not violate a student's "First Amendment right to free speech when it suspended him from school for three days after he drew a picture of the Confederate flag during class in violation of the school district's harassment and intimidation policy").

223. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 211 (3d Cir. 2001).

cies, to avert the evil by the processes of education, *the remedy to be applied is more speech, not enforced silence*."[224] Put differently, a teacher who feels that an otherwise non-disruptive t-shirt is somehow offensive and inappropriate possesses the opportunity to educate through counterspeech.[225] This approach could prove to be an extremely valuable pedagogical opportunity, especially if a teacher explained that in the United States, citizens demonstrate strength by tolerating a diversity of opinions, including offensive ones,[226] and a diversity of ways of expressing them.[227] Such education amounts to teaching minors about the limits of free speech through in-class discussion rather than through the blunt force of censorship.

Yet school officials—who reject such a self-help, counterspeech remedy yet who also fear that, under *Tinker*, students will get away with too much ribald and naughty yet non-disruptive on-campus speech—still possess a remedy: adopt a uniform policy that prohibits students from displaying *any* printed messages on their clothing and accessories. Such uniform policies amount to content-neutral restrictions on speech and, importantly, are upheld by courts.[228] Implementing such uniform policies may seem like administrative overkill, however, as the measures would squelch *all* clothing and accessory-based messages rather than merely sexual ones. But given the immense deference courts have provided to school officials over the years, it would be within their educational prerogative to adopt such an all-or-nothing option.

B. Revamping Fraser *by Shifting Presumptions, Crafting Concise Definitions, and Ramping Up Standards of Review*

An alternative approach to overruling *Fraser* is to add significantly more analytical rigor to its application to help ensure that student speech rights are not given short shrift. A starting point here is to circle back to Justice Stevens's remark in his dissenting opinion in *Fraser* that "a

224. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (emphasis added).

225. *See generally* Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 BYU L. REV. 553, 553–56 (2000) (discussing the counterspeech doctrine and providing examples of its use).

226. *See* Lee C. Bollinger, Commentary, *The Tolerant Society: A Response to Critics*, 90 COLUM. L. REV. 979, 979 (1990) ("I also felt a strong intuition that free speech has powerful meaning for society, that somehow *it seems to strengthen society even by protecting the most appalling speech acts*." (emphasis added)).

227. Cohen v. California, 403 U.S. 15, 24–25 (1971) ("To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.").

228. *See* Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 428 (9th Cir. 2008) ("[C]ontent-neutral school uniform policies need only survive intermediate scrutiny to be constitutional—a level of scrutiny we find the uniform policies easily withstand.").

strong presumption in favor of free expression should apply whenever an issue of this kind is arguable."[229] Although school administrators may initially be entitled to judicial deference and a presumption that their censorial decisions are valid, one must ask whether such deference still is due once a student has demonstrated that another meaning—a political meaning or social commentary—for the same message is reasonably possible. In other words, if a student can demonstrate an alternative meaning to a message that school officials interpret as vulgar or lewd, then why should school administrators still be afforded a presumption in their favor that censorship is the preferred or correct interpretation? In baseball terms, shouldn't a tie on first base go to the free speech runner?

Riffing from Justice Stevens's assertion, the question becomes, Why should there not be a strong presumption (a constitutional one under the First Amendment, no less) of protecting a student's message if the student has demonstrated to school officials that a message carrying political or social commentary is equally plausible? At this stage, when a student has, in a sense, rebutted school officials' initial interpretation of a message by offering up an equally viable one, Why should the initial level of judicial deference due school officials continue?

In addition to reducing deference to school authorities after a student has proffered a plausible non-sexual meaning, the judiciary could also take up the obvious, albeit exceedingly difficult, task of explicating the key terms used by the Court in *Fraser*: lewd, vulgar, indecent, and offensive.[230] The vagueness of such words provides educational authorities with immense flexibility and broad discretion when they want to squelch student speech. Defining such terms is not impossible; after all, the U.S. Supreme Court has adopted and used the same definition of obscenity for nearly forty years.[231] Furthermore, the Federal Communications Commission has adopted its own definition of indecency for the terrestrial broadcast medium.[232]

Yet the reality, of course, is that not only would defining terms like lewd and vulgar prove difficult for courts, but the resulting definitions

229. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 696 (1986) (Stevens, J., dissenting).

230. *See supra* Part I.B.

231. Obscenity is one of the few categories of expression that is not protected by the First Amendment's guarantee of free speech. *See* Roth v. United States, 354 U.S. 476, 485 (1957) ("[O]bscenity is not within the area of constitutionally protected speech or press."). The Supreme Court's current three-part test for obscenity asks the factfinder to determine if the material in question (1) appeals to a prurient interest in sex, when taken as a whole and as judged by contemporary community standards from the perspective of the average person; (2) is patently offensive, as defined by applicable state law; and (3) lacks serious literary, artistic, political, or scientific value. Miller v. California, 413 U.S. 15, 24 (1973).

232. The FCC today defines indecent content as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities." *Guide: Obscenity, Indecency and Profanity*, FED. COMMC'NS. COMM'N, http://www.fcc.gov/guides/obscenity-indecency-and-profanity (last visited Oct. 28, 2012).

might also be quite different among the multiple federal appellate circuit courts. For instance, the U.S. Court of Appeals for the Ninth Circuit might define "lewd" differently than would the Fourth Circuit. The result would be a patchwork of definitions across the United States, with judicial variance doing little to clarify matters. Unifying and binding definitions would need to be supplied by the Supreme Court, of course, were the Court ever (1) to hear a *Fraser*-based case (i.e., were one of the many "I ♥ Boobies!" cases described earlier[233] ever to reach the Supreme Court); and, in turn, (2) to decide not to completely overrule *Fraser* (if given the opportunity) but to invest the time and effort into refining and explicating is critical terms.

Another mechanism that courts might adopt to make *Fraser* more rigorous (and more free speech friendly) is to reconsider the current "reasonableness" approach to meaning interpretations and determinations.[234] Reasonableness is such a low and deferential threshold that it arguably is akin to traditional "rational basis" review in Equal Protection Clause[235] cases involving non-suspect classes and non-fundamental interests.[236] For instance, the Supreme Court recently wrote that "rational basis review requires deference to reasonable underlying legislative judgments."[237] More specifically, under rational basis review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[238] Similarly, since the 1980s and *Fraser*, "school authorities have broad discretion to restrict student speech that ostensibly interferes with the school's intended curriculum. In short, when school-sponsored speech is involved, government need act with only *minimal rationality*."[239]

The problem with applying such a low rational basis threshold, cloaked in *Fraser*'s reasonableness and deferential approach, is that free speech is a fundamental interest under the First Amendment, and singling out particular types of content—content that is lewd, vulgar, and

233. *See supra* notes 27–34 and Part II.C (referencing these cases).

234. *See supra* notes 28–29, 33–34 & 118 and accompanying text (referencing judicial use of a reasonableness standard in meaning interpretations in student-speech cases).

235. The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*.

U.S. CONST. amend. XIV, § 1 (emphasis added).

236. *See* Heller v. Doe, 509 U.S. 312, 319–20 (1993) ("[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. . . . Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.").

237. Armour v. City of Indianapolis, 132 S. Ct. 2073, 2080 (2012).

238. Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring) (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)) (internal quotation marks omitted).

239. Wilborn, *supra* note 13, at 122 (emphasis added).

offensive—typically would trigger a much stricter standard of review.[240] Because the setting is educational and the speech involves minors, however, *Fraser* veered off this normal course and down an easy path toward censorship. Replacing a reasonableness and rationality approach under *Fraser* with at least an "intermediate scrutiny" standard of review in cases involving messages that allegedly carry sexual overtones would moderately ramp up First Amendment safeguards.[241]

C. Refashioning Fraser *in Light of Justice Alito's* Morse *Concurrence*

Whereas the vast deference to school officials exhibited by the majority in *Morse v. Frederick* illustrates the problem for safeguarding student speech under a meanings-based approach,[242] Justice Alito's concurring opinion in *Morse* took pains to make clear that mixed and muddled drug-themed messages merit First Amendment protection if they "can plausibly be interpreted as commenting on *any* political or social issue."[243] Justice Alito noted that this would include commentary on topics such as the advisability of the war on drugs and the usefulness of medical marijuana laws.[244] The only limit on such messages for Justice Alito presumably would come under *Tinker*'s substantial and material disruption standard, as Alito expressed his agreement several times in *Morse* with the rule created in *Tinker*.[245]

Now imagine grafting Justice Alito's *Morse* principle—that student speech, which is plausibly interpretable as commenting on any political or social issue, merits First Amendment protection unless it causes a *Tinker* disruption—onto the Court's ruling in *Fraser*. In other words, envision his concurrence as applicable not only to speech with a muddled message that reasonably may be about illegal drug use but also to student expression tinged with sexual innuendos or double entendres. More specifically, What would the outcome be in a case involving a public-school student who wears an "I ♥ Boobies!" bracelet to his or her school?

The inquiry under this *Morse*-modified *Fraser* standard would involve the application of a three-step rule:

1. *Is it reasonable for a school administrator to conclude that the message in question carries a sexually vulgar or sexual-*

240. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011) (observing, in the context of a state statute targeting minors' access to violent video games, that because the law in question "imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest").

241. *See generally* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783 (2007) (providing a timely and comprehensive review of intermediate scrutiny).

242. *See* discussion *supra* Part I.C.

243. Morse v. Frederick, 551 U.S. 393, 422 (Alito, J., concurring) (emphasis added).

244. *Id.*

245. *Id.* at 422–23.

ly lewd message? If the answer is no, then the message is presumptively protected and the inquiry would skip the second step and proceed directly to the third question. Conversely, if the answer to this threshold question is yes, then the second step—the part borrowed from Justice Alito's concurrence in *Morse*—is triggered.

2. *Can the same sexually vulgar or sexually lewd message nonetheless plausibly be interpreted as commenting on any political or social issue?* If the answer to this question is no, then the message may be permissibly censored. Alternatively, if the answer to this question is yes, then the message is presumptively protected by the First Amendment, unless the answer to the third and final step—the *Tinker* part of the analysis—also is in the affirmative.

3. *Do school officials have actual facts—"something more than a mere desire to avoid . . . discomfort and unpleasantness"*[246] *and more than an "undifferentiated fear or apprehension of disturbance"*[247]*—"to forecast substantial disruption of or material interference with school activities"*[248] *that would be caused by the message in question?* If the answer to this final query is yes, then the speech may permissibly be squelched per this *Tinker*-fashioned step.

Applying this three-part test to any case involving the wearing of an "I ♥ Boobies! (Keep A Breast)" bracelet would almost inevitably and invariably proceed to the third and final step: a *Tinker* analysis. For instance, if a court were to find that "I ♥ Boobies! (Keep a Breast)" does *not* convey a sexually lewd or vulgar meaning—the finding reached by U.S. District Judge Mary A. McLaughlin in *H. v. Easton Area School District*[249]—then the message is presumptively protected, the second step is rendered moot, and the inquiry proceeds directly to the third step (the *Tinker* analysis).

On the other hand, if a court were to find that "I ♥ Boobies! (Keep A Breast)" connotes a sexually lewd or vulgar meaning—the conclusion reached by U.S. District Judge Barbara A. Crabb in *K.J. v. Sauk Prairie School District*[250]—then the court would need to proceed to the second

246. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).
247. *Id.* at 508.
248. *Id.* at 514.
249. 827 F. Supp. 2d 392, 394 (E.D. Pa. 2011).
250. No. 3:11-cv-00622, slip op. at 17 (W.D. Wis. Feb. 6, 2012) (order denying preliminary injunction) ("It is reasonable for school officials to conclude that this phrase is vulgar and inconsistent with their goal of fostering respectful discourse by encouraging students to use 'correct anatomical terminology' for human body parts.").

step to determine if the message nonetheless was plausibly imbued with any political or social commentary. Speech designed to raise awareness about breast cancer would clearly seem to fit this bill. In fact, even Judge Crabb acknowledged that "the bracelets promote a worthy cause,"[251] and she wrote that "as plaintiffs argue, the phrase "I ♥ Boobies!" is always accompanied by the phrase '(Keep A Breast).' When one reads the entire phrase, it is clearly a message designed to promote breast cancer awareness."[252]

Thus, a finding of mixed meanings—affirmative answers to both questions one and two—leads to the third step: the *Tinker* analysis. It is here where courts must not conflate or confuse a few scattered giggles and laughs over the word "boobies" with a *substantial* or *material* disruption of the educational environment. Assuming a teacher could capture the proverbial "teachable moment"[253] and simply take one or two minutes to explain to his or her pupils, "Yes, boobies is a funny word for breasts, but the cause promoted here by these bracelets—raising awareness of breast cancer—is extremely serious, as breast cancer affects and afflicts many, many women every year," then whatever fleeting or minor disturbance that might occur would be resolved.

The same analysis would hold true for the primary statement at issue in *Pyle*: "See Dick Drink. See Dick Drive. See Dick Die. Don't be a Dick."[254] The word "dick," at step one of the test, may reasonably be found to convey a sexually vulgar or sexually lewd message, at least to the extent that it is a commonly used slang term for penis. As one federal court in a post-*Pyle* case wrote, "dick" is "a term widely considered to be lewd or vulgar and, especially when used towards a person in authority, disrespectful."[255]

But at step two, the overall statement, when viewed in its totality of four short sentences, plausibly conveys social commentary about drinking and driving and, in particular, an anti-drunk-driving message (that those who drink and drive are dicks). T-shirts conveying this message could thus be stopped only if a court answered the third and final query in the affirmative. It is hard to imagine such a t-shirt causing a substantial and material disruption of the educational atmosphere; a teacher could simply ignore it, and the few brief chuckles that it probably would attract in a classroom of teenagers would not rise to a substantial disruption. Of

251. *Id.* at 14.

252. *Id.* at 13.

253. *See generally* Stephen R. White & George A. Maycock, *College Teaching and Synchronicity: Exploring the Other Side of Teachable Moments*, 36 CMTY. COLL. J. RES. & PRAC. 321, 322–23 (2012) (addressing the "teachable moment" concept and the various ways it has been interpreted and defined).

254. Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157, 158 (D. Mass. 1994).

255. Posthumus v. Bd. of Educ. of Mora Shores Pub. Schs., 380 F. Supp. 2d 891, 901 (W.D. Mich. 2005).

course, the specific facts of any given case must be determined to resolve the *Tinker* analysis at step three.

What, then, would be the outcome for Kimberly Broussard's "Drugs Suck" t-shirt? Even if, at the first stage of the analysis, one assumes that "suck" still can reasonably be interpreted to convey a sexually vulgar or lewd message—even when used adjacent to a word like "drugs" that has no sexual reference or connotation—it does not take a cunning linguist to also plausibly decipher a dose of social commentary that drugs are bad, given the reality that "sucks" to many people is a slang term for "bad." Censorship of Kimberly Broussard's t-shirt thus would only be justified if, at stage three of the analysis, there were actual facts to support the prediction that it would cause a substantial and material disruption of the educational process.

On the other hand, a t-shirt such as that printed with the message "Coed Naked Band; Do It To The Rhythm"[256] and worn by Jeffrey Pyle likely would be prohibited under this three-part, modified *Fraser* test. This would be the case if, at the first stage, school administrators found the sexual references of "naked" and "do it" to be vulgar or lewd. Such a finding would trigger the second stage, and it is here where the First Amendment side of the equation would probably lose out. Why? Because, as Judge Michael Ponsor wrote, "Except for the sexual innuendo, it is hard to discern any substance in the invocation to, 'Do It To The Rhythm.'"[257] In other words, no political or social commentary plausibly is conveyed. The sexual innuendo of naked band members having rhythmic coitus may be humorous, but it is not humorous in the name of advancing or commenting on some larger cause like that against drunk driving or raising breast-cancer awareness. In brief, then, the "Coed Naked Band; Do It To The Rhythm" t-shirt could permissibly be censored after the second stage of analysis; there would be no need to conduct a third-stage *Tinker* analysis.

The ultimate litmus test for this three-part test, of course, is the resolution of the dispute in *Fraser*. The ruling would hinge, at the end of the legal day, on the third stage of the analysis—whether Matthew Fraser's speech caused a substantial and material disruptive effect under *Tinker*. That's because, at the first stage of the analysis, it seems reasonable to find that the double entendres of pounding and climaxing created a sexually lewd message. Yet at the second stage, it also is more than plausible that Matthew Fraser was engaging in political commentary because his speech was part of a forum on government and because he was praising and nominating a fellow student for elected office. Thus, because Fraser's speech was one consisting of mixed meanings—both

256. *Pyle*, 861 F. Supp. at 161.
257. Pyle v. S. Hadley Sch. Comm., 824 F. Supp. 7, 10 (D. Mass. 1993).

sexual and political—the test for censorship should boil down to one of message effects not message meaning. The Supreme Court in *Fraser*, of course, never addressed this issue, although Justice Brennan suggested the speech was disruptive,[258] whereas Justice Marshall suggested it was not.[259] The U.S. Court of Appeals for the Ninth Circuit, however, applied *Tinker* and determined that "the record now before us yields no evidence that Fraser's use of a sexual innuendo in his speech materially interfered with activities at Bethel High School. While the students' reaction to Fraser's speech may fairly be characterized as boisterous, it was hardly disruptive of the educational process."[260]

In summary, there are multiple options for dealing with the problems wrought by *Fraser*'s meanings-based methodology for the censorship of student messages that allegedly are vulgar, lewd, indecent, or otherwise offensive. Overruling *Fraser* and replacing it with *Tinker* provides one clear-cut option, whereas melding Justice Alito's principle of plausible social or political commentary from *Morse* onto *Fraser* provides a more nuanced, three-step solution.

CONCLUSION

> Feel for lumps, save your bumps.
>
> —Gilbert High School cheerleaders[261]

Cheerleaders at Arizona's Gilbert High School planned to wear t-shirts printed with that message in fall 2011 in an effort to raise money for breast-cancer awareness during a football game.[262] The school's principal took exception to the slogan, however, and prohibited the t-shirts from being worn.[263] The cheerleaders found it particularly galling because members of the school's choir were permitted to wear shirts with the message "I'd Hit That,"[264] and members of the sign-language club had worn shirts sporting the message "I'm good with my hands."[265] School officials, however, took the "bumps" message so seriously that during one football game they reportedly did "not allow anyone wearing the shirt to speak with a newspaper reporter threatened with arrest, and they barred a television crew from entering the stadium."[266]

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258. *See supra* notes 79–81 and accompanying text.
259. *See supra* note 82 and accompanying text.
260. Fraser v. Bethel Sch. Dist. No. 43, 755 F.2d 1356, 1360 (9th Cir. 1985).
261. Hayley Ringle, *School Calls Slogan on T-shirts Inappropriate*, ARIZ. REPUBLIC (Phoenix), Oct. 13, 2011, at B1.
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. Jim Walsh & Hayley Ringle, *Students' Cancer T-shirts Become Hit*, ARIZ. REPUBLIC (Phoenix), Oct. 15, 2011, at B3.

This incident indicates that there never will be a shortage of controversies involving the wearing of mixed messages that carry sexual overtones. But, as Professor Wat Hopkins recently observed, "[W]e can maintain hope that the Court recognizes the inherent benefits of abandoning efforts to define words for the public, and then restrict those words based on narrow judicial definitions."[267] This Article, in turn, argues that abandoning a meanings-based approach to the censorship of student expression embraced in *Fraser* and restoring an effects-based model adopted in *Tinker* provides one feasible solution.[268]

Viewed at a macro-level, *Fraser*'s embrace of the principle that the meaning of a message, standing alone and without proof of any harm caused by it, can lead to its censorship directly conflicts with the heart of modern First Amendment theory, which holds that society must tolerate some level of demonstrable harm. As Professor Frederick Schauer observed two decades ago:

> [E]xisting understandings of the First Amendment presuppose that legal toleration of speech-related harm is the currency with which we as a society pay for First Amendment protection. Paying a higher price by legally tolerating more harm is thus taken to be necessary in order to get more First Amendment protection.[269]

Although the content of Matthew Fraser's speech recently was disparaged by one legal scholar as "idiotic juvenilia,"[270] the Court's approach to resolving the case that Fraser's speech spawned was arguably anything but transparent and coherent. From Chief Justice Roberts's observation in *Morse* about the ambiguity of *Fraser*'s mode of analysis that was quoted at the start of this Article[271] to Professor Scott Moss's more recent characterization that "*Fraser*'s various ill-explained rationales made it a Rorschach precedent,"[272] it becomes obvious that *Fraser* was plagued from the start as a precedent for censoring student expression. *Fraser*'s problems, from a pro-free speech perspective, are compounded by the vast deference courts traditionally give to the decisions of school officials.[273]

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267. W. Wat Hopkins, *When Does F*** Not Mean F***?:* FCC v. Fox Television Stations *and a Call for Protecting Emotive Speech*, 64 FED. COMMC'NS L.J. 1, 45 (2011).

268. *See* discussion *supra* Part III.A.

269. Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1322 (1992).

270. John M. Kang, *In Praise of Hostility: Antiauthoritarianism as Free Speech Principle*, 35 HARV. J.L. & PUB. POL'Y 351, 419 (2012).

271. *See supra* note 1.

272. Scott A. Moss, *The Overhyped Path from* Tinker *to* Morse*: How the Student Speech Cases Show the Limits of Supreme Court Decisions—For the Law and for the Litigants*, 63 FLA. L. REV. 1407, 1425 (2011).

273. *See, e.g.*, Augustus v. Sch. Bd. Escambia Cnty., 507 F.2d 152, 158 (5th Cir. 1975) ("Only as a last resort should the court arrogate to itself the position of administering any part of the day-to-day operation of the school system.").

This Article has emphasized *Fraser*'s core problems. The decision provides a meanings-based approach to censorship that deploys vague words like lewd, vulgar, and offensive, while simultaneously granting expansive deference to school administrators to decide whether any given instance of student speech can be made to fit within the reaches of such terms, even when such speech is polysemic, obtuse, or simultaneously conveys a political meaning. Furthermore, *Fraser* gives school administrators vast deference to assert what constitutes an educational mission of public schools with which such meanings may conflict. Additionally, the debate in 2012 over the seemingly simple phrase "I ♥ Boobies! (Keep A Breast)" captures exceedingly well the problems for free expression proponents wrought by *Fraser* in cases such as *Broussard* and *Pyle*.

Finally, the Article suggested in Part III a trio of possible and different paths forward. Ultimately, whereas overruling *Fraser* and replacing it with a traditional *Tinker* analysis in cases involving speech that allegedly carries sexual overtones would provide a bright-line solution, the proposal of merging and melding part of Justice Alito's concurrence from *Morse* onto *Fraser*'s extant precedent provides a more nuanced tack. In particular, sexually lewd messages that lack any plausible social or political commentary can be censored under *Fraser*, yet those messages that do contain such commentary—those that contain mixed meanings—would only be censored under *Tinker*. The bottom line is that until courts act to revamp *Fraser* in one manner or another, the now twenty-six-year-old case provides a far too easy vehicle for school officials to censor mixed messages with political and worthy meanings.