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PLAINLY OFFENSIVE BABEL: AN ANALYTICAL FRAMEWORK FOR REGULATING PLAINLY OFFENSIVE SPEECH IN PUBLIC SCHOOLS

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Abstract: The First Amendment to the United States Constitution guarantees the right to free speech. The guarantee is not absolute, however, and the U.S. Supreme Court has said that the First Amendment does not fully protect student speech in public schools. In *Bethel School District v. Fraser*, the Court held that schools could regulate "plainly offensive" speech. Circuit courts have interpreted and applied *Fraser* in an inconsistent manner, disagreeing as to what constitutes plainly offensive speech. The resulting case law is confusing and fails to provide lower courts with a clear analytical framework for evaluating First Amendment challenges to regulations of student speech. This Comment clarifies the methodology applied in *Fraser* by demonstrating that the Court considered several distinct factors lower courts should analyze when determining whether student speech is plainly offensive. This Comment further proposes an analytical framework that follows the Court's approach in *Fraser*; lower courts evaluating the propriety of student speech should focus on the content, context, and consequence of the speech.

Although students in public schools do not "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate,"[1] those rights receive less protection in the school context.[2] In three separate cases, the U.S. Supreme Court has approved limitations imposed by a school on student speech. First, in *Tinker v. Des Moines Independent School District*,[3] the Court held that schools can regulate student speech that substantially disrupts school discipline.[4] In *Bethel School District v. Fraser*,[5] the Court went further, authorizing schools to regulate "plainly offensive" speech.[6] Finally, in *Hazelwood School District v. Kuhlmeier*,[7] the Court established that schools may regulate school-sponsored speech—regardless of whether the particular school-sponsored speech in question could be deemed disruptive under *Tinker* or plainly offensive under *Fraser*—provided that such regulation furthers legitimate

1. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
2. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682 (1986).
3. 393 U.S. 503 (1969).
4. *See id.* at 509.
5. 478 U.S. 675 (1986).
6. *Id.* at 683.
7. 484 U.S. 260 (1988).

pedagogical concerns.[8]

Despite the guidance provided by these student speech cases—referred to by commentators as "the *Tinker* trilogy"[9]—the exact borders of First Amendment protection of student speech in public schools remain unclear.[10] Although hundreds of lower court cases have attempted to grapple with various restrictions imposed by schools on student speech,[11] the Supreme Court has not revisited the topic.[12] Lower courts are thus forced to rely on their own interpretations and analyses of the *Tinker* trilogy without further guidance from the Supreme Court.

In particular, while the *Fraser* opinion discusses several factors relevant to determining whether speech is plainly offensive, it does not explicitly provide a coherent analytical framework.[13] Lacking clear guidance, lower courts have not consistently interpreted and applied *Fraser* to determine if student speech is plainly offensive.[14] This inconsistency is twofold. Some circuits have claimed to follow *Fraser* without applying all of the factors that the Court analyzed in its opinion.[15] Other circuits have applied most or all of the factors discussed in *Fraser* without identifying a framework for lower courts and other

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8. *Id.* at 273.

9. *See, e.g.*, Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 646 (2002).

10. *See* Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 321 (2d Cir. 2006) ("This case requires us to sail into the unsettled waters of free speech rights in public schools, waters rife with rocky shoals and uncertain currents.").

11. Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 528 (2000).

12. As of this Comment's publication, the Supreme Court has heard oral arguments on *Frederick v. Morse*, 439 F.3d 1114 (9th Cir. 2006), *cert. granted*, 127 S. Ct. 722 (Dec. 1, 2006) (argued March, 19, 2007), a student free speech case where the district and appellate courts disagreed about whether the speech in question was plainly offensive. For further discussion of *Frederick*, see *infra* Part III.B.

13. *See Guiles*, 461 F.3d at 330 ("[T]he exact contours of what is plainly offensive are not so clear to us as the star Arcturus is on a cloudless night . . . ."); *see also* Miller, *supra* note 9, at 640–41. Miller explains that the *Tinker* trilogy has left the lower courts in a state of confusion. Courts have stretched "[t]he *Fraser* and [*Hazelwood*] 'categories' of speech" to cause "almost any speech to be regulated under the more lenient standards." *Id.* at 646. Thus, precise definitions of the categories of speech are necessary "in order for the *Tinker* trilogy to create a workable and understandable framework for dealing with student expression in schools. Without guidance, the rules espoused by *Tinker*, *Fraser*, and [*Hazelwood*] have become nebulous and unpredictable." *Id.*

14. *See* David L. Hudson, Jr. & John E. Ferguson, Jr., *The Courts' Inconsistent Treatment of* Bethel v. Fraser *and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 191 (2002) (discussing the circuit split that has resulted from inconsistent lower court interpretations of *Fraser*).

15. *See infra* Part III.A.

circuit courts to follow.[16]

This Comment clarifies the methodology applied in *Fraser* and, based on that methodology, argues that several circuit courts have misapplied the decision. In *Fraser*, the Court implicitly focused on the content, context, and consequence of speech in determining whether it was plainly offensive. This Comment argues that to remain faithful to *Fraser*, lower courts should apply a framework that would only find student speech plainly offensive when the speech satisfies the content, context, and consequence factors of *Fraser*.

Part I of this Comment briefly explains free speech rights under the First Amendment and the narrow circumstances where the government can regulate free speech. Part II of this Comment discusses the limitations that may be imposed on student free speech under *Tinker*, *Fraser*, and *Hazelwood*. It also addresses the three factors applied by the Supreme Court in *Fraser*, outlining why each factor is essential to prevent unconstitutional proscription of student speech. Part III analyzes decisions from four circuit courts of appeals to illustrate their inconsistent application of the *Fraser* opinion. Finally, Part IV argues that the Sixth and Eleventh Circuits have engaged in an overly broad reading of *Fraser* and that the Ninth and Second Circuits, while appearing to properly apply most or all the factors of *Fraser*, have not done so with sufficient clarity to allow lower courts to reach consistent outcomes. This is potentially problematic because circuit courts often look to one another for guidance, and until one court sets forth a clear framework, the law in this area will remain confused.

I. THE GOVERNMENT CAN REGULATE SPEECH IN LIMITED AREAS, BUT SUCH REGULATIONS CANNOT BE OVERLY BROAD

The First Amendment to the U.S. Constitution guarantees the right of free speech.[17] The U.S. Supreme Court has recognized that the First Amendment prevents government from "proscribing" speech or expressive conduct solely because the government "disapprov[es] of the ideas expressed."[18] Accordingly, content-based regulations are

16. *See infra* Parts III.B & III.C.

17. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

18. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); *see also* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself

presumptively invalid.[19] However, the Court has permitted content-based restrictions of free speech in a few limited cases,[20] such as "fighting words,"[21] or substantially-disruptive student speech in public schools.[22]

The Court has recognized that, even in those limited circumstances where the government can regulate speech, such regulation cannot be overly broad.[23] There are two purposes to this overbreadth doctrine. First, it ensures that regulations do not outlaw constitutionally protected speech.[24] Second, it helps prevent the "chilling effect" overly broad laws may have on third parties.[25] An overly broad law could "chill" a person from engaging in a constitutionally guaranteed activity, such as criticizing government officials, because she may fear that the law would regulate her seemingly constitutional conduct.[26]

This same analysis is appropriate for overly broad exceptions to a rule. The Court has recognized that exceptions to First Amendment rights should be narrowly construed.[27] Narrow interpretations of exceptions to constitutionally granted rights prevent a broadly construed

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offensive or disagreeable.").

19. *See R.A.V.*, 505 U.S. at 382.

20. *See id.* at 382–83.

21. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." (citations omitted)).

22. *See infra* Part II.A.

23. *See generally* City of Houston v. Hill, 482 U.S. 451, 458–59 (1987); *see also* KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW, 321 (1999) ("Overbreadth . . . results in the invalidation of a law 'on its face' rather than 'as applied' to a particular speaker. Ordinarily, a particular litigant claims that a statute is unconstitutional as applied to him or her . . . . If a law restricting speech is invalidated as applied to a protected speaker, it is held inapplicable to that speaker.").

24. *See Hill*, 482 U.S. at 459 (explaining that criminal statutes "that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application."); *see also* Gooding v. Wilson, 405 U.S. 518, 522 (1972) ("[T]he statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression.").

25. *See Gooding*, 405 U.S. at 521.

26. *See id.* (justifying broad standing doctrine in First Amendment cases because "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression").

27. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 428 (1992) (Stevens, J., concurring) ("[W]e have consistently construed the 'fighting words' exception set forth in *Chaplinsky* narrowly." (internal citations omitted)).

exception from swallowing the rule.[28]

II. SCHOOLS MAY RESTRICT SUBSTANTIALLY DISRUPTIVE, PLAINLY OFFENSIVE, OR SCHOOL-SPONSORED SPEECH

Students do not lose their First Amendment right to freedom of speech or expression when they arrive at school. Student speech rights, however, are limited due to the "special characteristics of the school environment."[29] The Supreme Court has held that a student's right to free speech is subject to restriction by school officials when the speech falls into any of three categories: substantially disruptive,[30] plainly offensive,[31] or school-sponsored.[32]

A. Schools May Regulate Student Speech that Substantially Disrupts School Discipline or Invades the Rights of Other Students

Under *Tinker v. Des Moines Independent Community School District*,[33] schools may regulate student speech otherwise protected by the First Amendment if the regulation at issue targets speech which substantially disrupts school discipline or invades the rights of other students.[34] *Tinker* involved a challenge to a ban on wearing black armbands in schools.[35] Principals of the Des Moines schools instituted the ban after learning that a group of parents and students planned to

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28. *See, e.g.*, Bernal v. Fainter, 467 U.S. 216, 222 n.7 (1984). ("We emphasize, as we have in the past, that the political-function exception must be narrowly construed; otherwise the exception will swallow the rule.") *Bernal* involved a resident alien who challenged a statute requiring that a notary public be a U.S. citizen as overly broad and violative of equal protection. *See id.* at 213–14.

29. Tinker v. Des Moines Indep. Cmty. Sch. Dist, 393 U.S. 503, 506 (1969); *see also infra* Part II.B.

30. *See infra* Part II.A.

31. *See infra* Part II.B.

32. *See infra* Part II.C.

33. 393 U.S. 503 (1969). *Tinker* is often characterized as the Court's seminal student free speech decision. *See* Chemerinsky, *supra* note 11, at 527 ("*Tinker v. Des Moines Independent Community School District* is the most important Supreme Court case in history protecting the constitutional rights of students."); *see also* Hudson & Ferguson, *supra* note 14, at 185 (referring to *Tinker* as the "leading First Amendment free-speech case for public school students").

34. *See Tinker*, 393 U.S. at 513 ("But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of free speech.").

35. *See id.* at 504.

wear black armbands to protest the Vietnam War.[36] Despite the ban, several students, including siblings John and Mary Beth Tinker, wore black armbands to school.[37] School officials suspended students who defied the ban until they agreed to return without their armbands.[38] The parents of the suspended students sued the school district.[39]

In ruling that the school district's prohibition of black armbands was unconstitutional, the Court articulated a protective standard for regulating student speech.[40] The Court first established that the First Amendment protects student speech in the school environment.[41] School officials may not regulate a student's speech merely to avoid controversy.[42] Instead, school officials bear the burden of demonstrating that the challenged speech substantially disrupts school discipline[43] or invades the rights of other students.[44] Applying this standard, the Court held that the armband ban unconstitutionally restricted the students' speech because school officials failed to provide sufficient evidence that the restriction was necessary to prevent a substantial disruption.[45]

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36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

40. *See* Chemerinsky, *supra* note 11, at 530 ("The majority's [opinion] might be termed the 'speech protective model.'").

41. *See Tinker*, 393 U.S. at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

42. *See id.* at 509 ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

43. *See id.* ("Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." (citations omitted)).

44. *See id.* at 508 (defining "invades the rights of other students" as the "collision with the rights of other students to be secure and to be let alone"); *see also, e.g.*, Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006), *vacated as moot* Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 127 S.Ct. 1484 (2007). The Court in *Harper* defined the "invasion" prong of *Tinker* to mean physical safety and peace of mind. *See id.* at 1177–78. Specifically, the Court stated that students should be secure from "physical assaults" and "psychological attacks that cause young people to question their self-worth and their rightful place in society." *See id.* at 1178. The invasion prong also encompasses the right to be let alone, a "recognizable privacy interest in avoiding unwanted communication." *See id.*

45. *See Tinker*, 393 U.S. at 514 ("[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption or material interference with school activities, and no disturbances or disorders occurred. These petitioners merely went about their ordained rounds in school."); *see also id.* at 511 ("Clearly, the prohibition of expression of one

B. *Schools May Regulate Plainly Offensive Student Speech Under the Framework Implicitly Provided in* Fraser

In *Bethel School District v. Fraser*,[46] the Supreme Court held that the First Amendment does not prohibit schools from regulating student speech that is "plainly offensive."[47] Matthew Fraser, a student at Bethel High School, delivered a speech nominating a classmate for student office at an assembly of approximately 600 students.[48] Throughout his speech, Fraser explained the qualities of the candidate "in terms of an elaborate, graphic, and explicit sexual metaphor."[49] During Fraser's speech some students yelled and others used gestures to simulate the sexual activities to which he alluded.[50] Some students were "bewildered and embarrassed."[51] The school suspended Fraser for three days.[52] In response, his parents sued the school district.[53]

As a general proposition, the Court held that school officials may constitutionally regulate "plainly offensive"[54] student speech such as that engaged in by Fraser.[55] In coming to its conclusion, the Court did not explicitly announce an analytical framework for identifying plainly offensive student speech. Nevertheless, a close reading of *Fraser* reveals that the Court evaluated three factors in determining whether the student

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particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.").

46. 478 U.S. 675 (1986).

47. *See id.* at 683.

48. *Id.* at 677.

49. *Id.* at 678. In his speech, Fraser said, "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." *See id.* at 687 (Brennan, J., concurring).

50. *Id.* at 678.

51. *See id.*

52. *See id.* at 679.

53. *See id.*

54. *See id.* at 683.

55. *See id.* at 685; *see also id.* at 681 (explaining that the need for a "plainly offensive" exception to student free speech is based on the school's duty to balance the "freedom to advocate unpopular and controversial views in schools and classrooms" against "society's countervailing interest in teaching students the boundaries of socially appropriate behavior").

speech at issue was plainly offensive:[56] content, context, and consequence.[57]

1. *Content:* Fraser *Defines Plainly Offensive Speech as Lewd, Indecent, or Vulgar*

Schools may not constitutionally regulate student speech simply because it contains a controversial message.[58] This was the holding of *Tinker*, and *Fraser* in no way undermines that conclusion.[59] In fact, nowhere in *Fraser* does the Court imply that regulating a speech such as Matthew Fraser's on the basis that it conveyed a controversial message would be constitutionally permissible.

The problem, then, was not with the political message expressed in Fraser's speech, but with the manner in which that message was conveyed—specifically, the Court focused on the lewd, indecent, and vulgar content of Fraser's speech.[60] The Court found Fraser's speech plainly offensive because of its sexually explicit metaphors.[61] Additionally, the Court held that "offensively lewd and indecent" speech, such as the nomination speech, could be regulated by the schools.[62] In order for student speech to be constitutionally regulated as plainly offensive under *Fraser*, the threshold question is one of content: is the student speech lewd, indecent, or vulgar?

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56. Chief Justice Burger coined the term "plainly offensive." He explained, "[t]he pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students." *Fraser*, 478 U.S. at 683.

57. The Court analyzed these three factors, and the facts of the case satisfied all three factors. *See infra* notes 58–76 and accompanying text. However, the Court did not categorize those factors as content, context, and consequence, and did not explicitly require that all future instances of offensive speech must satisfy the three factors to constitute plainly offensive speech. *See infra* notes 58–76 and accompanying text. The lack of an explicit requirement to follow the Court's factors contributes to the confusion in the circuits. *See* Miller, *supra* note 9, at 640.

58. *See Fraser*, 478 U.S. at 681.

59. *See id.* at 680. The Court preserved the holding of *Tinker* by distinguishing the speech involved in *Tinker* from that in *Fraser*. The court noted 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." *Id.* The Court more directly distinguished *Fraser* from *Tinker* by stating, "[u]nlike the sanctions imposed on the students wearing armbands in *Tinker*, penalties imposed in this case were unrelated to any political viewpoint." *Id.* at 685.

60. *See id.* at 683.

61. *See id.*

62. *See id.*

2. *Context: Under* Fraser, *Speech Must Occur in a Curricular Context To Be Plainly Offensive*

The second factor the Court examined was the curricular context[63] in which the speech took place.[64] The Court emphasized that Fraser's sexually-charged speech occurred during a mandatory school assembly.[65] The Court noted, "[a] high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students."[66] Thus, the context of Fraser's speech—a mandatory school assembly—was a crucial factor in the Court's analysis.

Importantly, Justice Brennan's concurrence explained that student speech does not necessarily occur in a curricular context merely because it takes place on school grounds.[67] For example, *Fraser* might have been decided differently had Fraser given his speech in the locker room.[68] Although the Court did not explicitly adopt Justice Brennan's reasoning, the Court's language is revealing: instead of using a blanket statement such as "school is no place for a sexually explicit monologue," the Court limited its discussion of plainly offensive conduct to that which occurs in the "school assembly" and "classroom."[69] The classroom and school assembly room are spaces where students are normally educated; by definition then, speech which occurs in these spaces normally happens in

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63. By curricular context, the author means a space where a school educates students, such as the classroom, assembly room, auditorium, or gymnasium. The author credits the term curricular context to Justice Brennan's dissent in *Hazelwood*, where he wrote that "[m]anifestly, student speech is more likely to disrupt a curricular function when it arises in the context of a curricular activity—one that is 'designed to teach' something—than when it arises in the context of a noncurricular activity." *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 283 (1988) (Brennan, J., dissenting). Justice Brennan fleshed out the idea of a curricular context with the following example: "the school may constitutionally punish the budding political orator if he disrupts calculus class but not if he holds his tongue for the cafeteria." *Id.*

64. *See Fraser*, 478 U.S. at 683 (noting that "[t]he determination of what manner of speech *in the classroom or in school assembly* is inappropriate properly rests with the school board" (emphasis added)).

65. *See id.* at 677.

66. *See id.* at 685.

67. *See id.* at 689 (Brennan, J., concurring) ("Respondent's speech may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty."). Brennan's concurrence appears to suggest that a student's expression on campus does not automatically or necessarily implicate curricular concerns.

68. *See id.* at 696 (Stevens, J., dissenting).

69. *See id.* at 683.

the curricular context.[70] Thus, while the Court did not explicitly identify classroom speech as taking place in a curricular context, the fact that it focused its discussion only on the classroom and the assembly indicates that a finding of a curricular context is necessary for the "plainly offensive" analysis. This reading is strengthened by Justice Brennan's concurrence, which stated that Fraser's speech might have been protected had it been delivered in a non-curricular setting.[71]

3. *Consequence: Under* Fraser, *Speech Must Disrupt a Curricular Activity or Educational Mission of the School To Be Plainly Offensive*

The last factor the Court focused on in determining that speech such as Fraser's may be constitutionally regulated was the disruptive consequence of Fraser's speech on the curricular activity or educational mission.[72] The Court emphasized that not only did Fraser's speech take place in a curricular context, but that it also had a disruptive effect on the assembly, as evidenced by students yelling, gesturing, or appearing "bewildered" and "embarrassed."[73] The Court explained that the consequence of the speech is relevant because the First Amendment does not prevent school officials from regulating speech that would "undermine the school's basic educational mission."[74] As a result, a school may constitutionally proscribe speech or conduct that: is lewd, indecent, or vulgar; takes place in a curricular context; has a disrupting consequence in that context; and as such is "wholly inconsistent with the 'fundamental values' of public school education."[75]

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70. *See supra* note 63.

71. *See Fraser*, 478 U.S. at 688–89 (Brennan, J., concurring).

72. *See id.* at 683 ("[T]he schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy."); *see also id.* at 689 (Brennan, J., concurring) ("[T]he 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.").

73. *See id.* at 678.

74. *Id.* at 685; *see also id.* at 683–84.

75. *Id.* at 685–86. In dicta, the Court also indicated that schools could prospectively regulate speech likely to disrupt the curricular activities. *See id.* at 683 ("Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the 'fundamental values necessary to the maintenance of a democratic system' disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate

C. *Schools May Regulate School-Sponsored Student Speech If Reasonably Related to Legitimate Pedagogical Concerns*

Finally, school officials may also constitutionally regulate "school-sponsored" student speech if the regulation furthers legitimate pedagogical concerns.[76] *Hazelwood School District v. Kuhlmeier*[77] addressed student speech in a high school sponsored newspaper. Journalism students at Hazelwood East High School were permitted to publish articles in the school's newspaper only after the principal approved page proofs.[78] The journalism students sued when the principal refused to allow publication of two stories, one discussing teen pregnancy and the other discussing the impact of divorce on students at the high school.[79]

The Supreme Court ruled in favor of the school district, holding that school officials have the authority to regulate school-sponsored student speech "so long as their actions are reasonably related to legitimate pedagogical concerns."[80] The Court declined to apply *Tinker*, distinguishing it as a case concerning a school's ability to silence student speech.[81] In contrast, the Court characterized *Hazelwood* as reviewing a school's authority to exercise editorial control over school-sponsored student speech.[82] The Court reasoned that a school is "entitled to exercise greater control" over student speech "to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."[83] Accordingly, schools do not violate the First Amendment by "exercising editorial control over the style and content of student speech" in a context such as a school-

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and subject to sanctions.").

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

77. 484 U.S. 260 (1988).

78. *See id.* at 263.

79. *See id.* at 263–64.

80. *See id.* at 273.

81. *See id.* at 271–72.

82. *See id.* at 271 ("The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. . . . Educators are entitled to exercise greater control over this second form of student expression . . . .").

83. *See id.*

sponsored newspaper.[84]

In establishing the school's authority to regulate school-sponsored student speech, the Court also recognized the outer limit of such authority. The Court held that editorial control over school-sponsored student speech is constitutionally permissible so long as it relates to "legitimate pedagogical concerns."[85] Although the Court did not define "legitimate pedagogical concerns," it noted that when a school's regulation "has no valid educational purpose," the First Amendment protects students' free speech rights.[86]

D. Fraser *Should Be Read as an Exception to* Tinker*'s Speech-Protective Model*

In the course of its analysis in *Hazelwood*, the Court distinguished *Tinker* from *Fraser* based on the degree of disruption required by each test. The Court first acknowledged that different First Amendment analyses were applied in *Tinker* and *Fraser*.[87] In *Tinker*, the Court required "substantial" disruption.[88] In *Fraser*, the Court discussed the disruption that occurred at the assembly and recognized school officials' ability to prevent speech that would undermine their educational mission.[89] In so doing, however, the Court in *Fraser* did not use the adjective "substantial" or any comparable term to denote the degree of disruption required.[90] Thus, the disruption in *Tinker* is a greater threshold for school officials to meet than the disruption in *Fraser*.[91] *Tinker* therefore appears to impose a higher burden of proof on school officials than *Fraser*.

Fraser should thus be read as an exception to the speech-protective

84. *Id.* at 273.

85. *See id.*

86. *See id.*

87. *See id.* at 271 n.4.

88. *See* Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 509 (1969).

89. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 678, 685 (1986).

90. *See id.* at 685.

91. *See Hazelwood*, 484 U.S. at 271 n.4. Lower courts have similarly distinguished *Tinker* from *Fraser*. In *Guiles ex rel. Guiles v. Marineau*, the Second Circuit noted that *Fraser* "declined to apply *Tinker's* more exacting material and substantial disturbance test." 461 F.3d 320, 325 (2d Cir. 2006). Additionally, in *Saxe ex rel. Saxe v. State College Area School District*, the Third Circuit noted that *Fraser* defined a narrow category of speech "that a school may restrict even without the threat of substantial disruption." 240 F.3d 200, 212 (3d Cir. 2001).

model of *Tinker*.[92] The Court itself distinguished *Fraser* from *Tinker*,[93] explaining that the legal analysis in *Fraser* was based on the "plainly offensive" model, rather than *Tinker*'s substantial-disruption model.[94] Thus, while the Court has not explicitly termed *Fraser* as an "exception" to *Tinker*, the differences in the legal analysis and threshold for disruption are sufficient to constitute a departure from *Tinker*.

In sum, *Tinker*, *Fraser*, and *Hazelwood* have carved out three specific and narrow areas where schools may constitutionally regulate student speech that is otherwise protected by the First Amendment. The general rule is that student speech may be proscribed only if it substantially disrupts school discipline or invades the rights of others. Even if student speech is not substantially disruptive, it may be regulated if it is either: (1) plainly offensive or (2) school sponsored and the regulation furthers legitimate pedagogical concerns.[95]

III. LOWER COURTS INCONSISTENTLY INTERPRET AND APPLY *FRASER*

Lacking clear guidance from the U.S. Supreme Court, the circuit courts have inconsistently applied *Fraser*.[96] Two circuits have concluded that certain student speech is plainly offensive and as such may be

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92. *See* Chemerinsky, *supra* note 11, at 536; *supra* part II.A. Professor Chemerinsky has noted that the Supreme Court has yet to follow the *Tinker* model in its subsequent student free speech cases. *See id.* ("Tinker has never been expressly overruled or even openly questioned in later Supreme Court opinions. But its approach has also never been followed in cases involving elementary, middle school, and high school students.").

93. *See Hazelwood*, 484 U.S. at 271 n.4.

94. *See id.*

95. For convenience, courts look first to whether speech is plainly offensive or school sponsored before applying the more general *Tinker* rule. *See, e.g.*, *Guiles*, 461 F.3d at 325; *Saxe*, 240 F.3d at 214 ("To summarize: Under *Fraser*, a school may categorically prohibit lewd, vulgar, or profane language. Under *Hazelwood*, a school may regulate school-sponsored speech . . . . Speech falling outside of these categories is subject to Tinker's general rule . . . ."); Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992). This analysis in this Part is organized to show that *Tinker* is the rule and *Fraser* and *Hazelwood* are the exceptions.

96. *See* Hudson & Ferguson, *supra* note 14, at 191 (discussing a split among the circuits between those who hold that *Fraser* "allows schools to censor any speech deemed vulgar or offensive" and those who hold that *Fraser* "only allows the regulation of speech that is sponsored by the school"); *see also* Jonathan Pyle, *Speech in Public Schools: Different Context or Different Rights?* 4 U. PA. J. CONST. L. 586, 597 (2002) ("The opinion in *Fraser* is the crux of confusion in the field."). The inconsistency can be seen in many circuits. *See* Chemerinsky, *supra* note 11, at 529 (noting that "lower federal courts have not followed a consistent pattern over the last thirty years"). This Comment examines and attempts to resolve the issue by reviewing cases from the Second, Sixth, Ninth, and Eleventh Circuits.

constitutionally regulated without applying all three factors analyzed in *Fraser*.[97] One circuit court has examined all three *Fraser* factors in determining whether student speech could be constitutionally regulated as plainly offensive, but has done so in a haphazard manner lacking a clear analytical framework.[98] Finally, another circuit court has examined at least two out of three *Fraser* factors, but also does not provide a clear analytical framework, making it unclear whether this circuit has adopted all three of *Fraser*'s prongs.[99]

A. *Two Circuit Courts Have Neither Examined Nor Required All Three* Fraser *Factors in Determining Whether Student Speech Is Plainly Offensive*

Of the circuit courts of appeal that have squarely addressed questions about regulation of plainly offensive student speech, two do not analyze all three *Fraser* factors. The Sixth and Eleventh Circuits focus primarily on the content of student speech in determining whether it is plainly offensive. These circuits do not always examine the context or consequence factors of *Fraser*.

For example, in *Boroff v. Van Wert City Board of Education*,[100] the Sixth Circuit focused only on the content prong of *Fraser* in concluding that a school could properly prohibit a student from wearing a t-shirt that a school official considered both offensive[101] and contrary to the school's educational mission.[102] In ruling for the school, the court

97. *See infra* Part III.A; Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465 (6th Cir. 2000); Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246 (11th Cir. 2003).

98. *See infra* Part III.B; Frederick v. Morse, 439 F.3d 1114 (9th Cir. 2006), *cert granted*, 127 S. Ct. 722 (Dec. 1, 2006).

99. *See infra* Part III.C; Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320 (2d Cir. 2006).

100. 220 F.3d 465 (6th Cir. 2000).

101. *See Boroff*, 220 F.3d at 467. The front of the t-shirt had a "three-faced Jesus" with the words "See No Truth. Hear No Truth. Speak No Truth." *Id.* On the back of the t-shirt, the word "BELIEVE" was spelled out with the letters "LIE" highlighted. *Id.* Marilyn Manson's name, although not his picture, was displayed on the front of the shirt. *Id.* School officials objected to the t-shirt and ordered the student to turn the shirt inside-out, go home and change, or leave school and be considered truant. *Id.* The student left school, but returned to school wearing a different Marilyn Manson t-shirt on each of the next four school days. *Id.* Each day, the student was told that he could not attend school while wearing Marilyn Manson t-shirts. *Id.*

102. *See id.* at 469 ("The School in this case, according to the affidavit of Principal Clifton, found the Marilyn Manson T-shirts to be offensive because the band promotes destructive conduct and demoralizing values that are contrary to the educational mission of the school."); *see also id.* at 470 (noting that the principal deemed Marilyn Manson's lyrics to be "contrary to the school['s] mission and goal of establishing 'a common core of values that include . . . human dignity and

interpreted *Fraser* to give school officials the authority both to determine whether student speech is appropriate or inappropriate and to regulate inappropriate speech.[103] The court ruled that because the student's t-shirt was offensive and contrary to the school's educational mission,[104] the school could constitutionally prohibit the wearing of the t-shirt on school grounds.[105] In reaching its conclusion, however, the court did not discuss the context in which the t-shirt was worn.[106] The court also did not discuss whether the student's t-shirt was indeed contrary to and negatively impacted the school's educational mission, seemingly deferring to the school's categorization of the shirt as inappropriate.[107]

The Eleventh Circuit has also interpreted *Fraser* as supporting school officials' decision to prohibit speech because the officials deem it offensive, without considering all three *Fraser* factors. In *Scott v. School Board of Alachua County*,[108] the Eleventh Circuit considered whether school officials could forbid a student's display of the Confederate flag on school grounds.[109] The court in *Scott* ultimately sided with the school in holding that the ban did not violate the student's constitutional

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worth . . . self respect, and responsibility' and also the goal of instilling 'into the students, an understanding and appreciation of the ideals of democracy and help them to be diligent and competent in the performance of their obligations as citizens'").

103. *See id.* at 470. By contrast, the Sixth Circuit has analyzed a similar set of factual circumstances under *Tinker*. *See* Castorina *ex rel.* Rewt v. Madison County Sch. Bd., 246 F.3d 536 (6th Cir. 2001). In *Castorina*, students were suspended for wearing t-shirts displaying the Confederate flag. *Id.* at 538. Instead of applying *Fraser*, the court determined that *Tinker* provided the most relevant test. *Id.* at 543. "*Castorina* and *Boroff* concisely demonstrate the lower courts' confused application of *Tinker*, *Fraser*, and *Kuhlemier*." *See* Miller, *supra*, note 9 at 649.

104. *See Borroff*, 220 F.3d at 470.

105. *See id.*

106. The author acknowledges that a student wearing a questionable t-shirt will eventually walk into the curricular context, such as a classroom and thus the t-shirt could be considered curricular per se. However, the author submits that treating a t-shirt as curricular per se is overly broad because a student could put the t-shirt on at lunch or in the parking lot, and then change before he enters the classroom or a school assembly. For this reason, courts should not judge t-shirts under a per se rule; they should evaluate t-shirts on a case-by-case basis.

107. *See Boroff*, 220 F.3d at 471 (Gilman, J., dissenting) (arguing that "[a] fair reading of the record, however, suggests that the 'disruptive and demoralizing values' that the School was really concerned about was disrespect for a specific venerated religious figure" and criticizing the majority for "dropp[ing] its guard much too quickly at the School's conclusory invocation of 'disruptive and demoralizing values'").

108. 324 F.3d 1246 (11th Cir. 2003).

109. *See id.* at 1247.

rights.[110] In so holding, the court focused on the offensive nature of the flag and the likelihood that disruptive conduct would occur because of the flag.[111] The court did not mention the context in which the flag was displayed.

In determining whether the content of the Confederate flag was offensive, the court in *Scott* relied[112] on *Denno v. School Board of Volusia County*,[113] a prior Eleventh Circuit decision. Like *Scott*, *Denno* considered whether under *Fraser* the school could forbid a student's display of the Confederate flag during school hours and on school grounds.[114] The court in *Denno* acknowledged that the Confederate flag is offensive to many people.[115] The court also explained that school officials are charged with the duty of instructing students in civility and socially appropriate behavior.[116] Because the display of an offensive

110. *See id.* at 1249.

111. *See id.* at 1248–49 (citing Denno v. Sch. Bd. of Volusia County, 218 F.3d 1267 (11th Cir. 2000)). The court in *Scott* upheld the ban under *both Tinker* and *Fraser*. *See id.* at 1249. In upholding the ban under *Tinker*, the court necessarily found the display of the flag to be so controversial as to likely cause an appreciable disruption in the school's discipline. *See id.* at 1248. Therefore, it can be argued that the court in *Scott* impliedly considered the *Fraser* consequence factor. However, outside of speculative reasoning, the court in *Scott* did not set forth any clear evidence of disruption to the curricular context caused by the flag. *See Scott*, 324 F.3d at 1249 (discussing a fight that occurred at the school which appeared to be racially motivated, but failing to mention if the fight occurred because of the flag or if the fight disrupted teaching or discipline in the curricular context).

112. *See id.* at 1248 (citing *Denno*, 218 F.3d at 1267–70).

113. 218 F.3d 1267 (11th Cir. 2000).

114. *See id.* at 1270–71. Unlike *Scott*, *Denno* concerned a determination of qualified immunity for the school officials from whom *Denno* sought monetary compensation. *See id.* at 1269. Thus, instead of simply deciding whether school officials violated the student's constitutional rights, the court in *Denno* had to decide if the student's right to display the flag was *clearly* protected by the constitution. *See id.* (citing Santamorena v. Georgia Military Coll., 147 F.3d 1337, 1339–40 (11th Cir. 1998)). Because the Eleventh Circuit saw fit to rely heavily on *Denno* in *Scott*, it appears that the Eleventh Circuit will use the *Denno* analysis even in "plainly offensive" cases where qualified immunity is not an issue. Accordingly, this Comment will explore the decision in *Denno* because it reflects the state of Eleventh Circuit "plainly offensive" jurisprudence.

115. *See id.* at 1274. During an outdoor lunch break at school, Denno displayed a 4" by 4" Confederate battle flag to his friends as he discussed "historical issues of Southern heritage." *See id.* at 1271. Without any disruption, the assistant principal approached Denno and ordered him to put away his small flag. *See id.* When Denno tried to explain the historical importance of the flag, the assistant principal suspended him from school. *See id.*

116. *See id.* at 1274–75 ("We do not believe that it would be unreasonable for a school official to believe that such displays have uncivil aspects akin to those referred to in *Fraser*, in that many people are offended when the Confederate flag is worn on a tee-shirt or otherwise displayed. We cannot conclude that only a plainly incompetent school official would have viewed the instant circumstances as implicating legitimate school functions relating to civility, and thus subject to . . .

symbol would conflict with this duty, the court held that *Fraser* provided a proper basis to forbid the display of the Confederate flag.[117]

Although on its face, parts of the opinion arguably could be read to constitute a context and consequence inquiry, the court's indulgence of these two *Fraser* factors was superficial at best. While the court discussed the school's duty in instructing civility, the court did not analyze whether the student's speech would indeed undermine or disrupt such a duty.[118] The court also did not look at the context carefully. Instead, the court was satisfied that the uncivil aspects of the Confederate flag triggered "legitimate school functions relating to civility, and thus subject to the school's authority under the more flexible *Fraser* standard."[119]

B. *The Ninth Circuit Has Examined All Three* Fraser *Factors in Determining Whether Speech Is Plainly Offensive, but It Has Not Provided a Clear Analytical Framework*

In contrast to the Sixth and Eleventh Circuit's selective application of one or more of the *Fraser* factors when evaluating whether a regulation permissively targets plainly offensive speech, the Ninth Circuit has examined all three factors. In doing so, however, the Ninth Circuit did not explicitly identify these factors. The Ninth Circuit also did not provide a clear analytical framework for approaching plainly offensive speech.

In *Frederick v. Morse*,[120] the Ninth Circuit considered whether a student's sign reading "Bong Hits 4 Jesus," displayed during a Winter Olympics Torch Relay near, but not on campus, constituted plainly offensive speech under *Fraser*.[121] The Court held that *Tinker*, not

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Fraser.").

117. *See id.* at 1275. The *Denno* court ultimately ruled in the school's favor by affirming the district court's grant of qualified immunity. *Id.* at 1278. The court declined to "decide the correct legal standard" regarding student free speech. *Id.* at 1274 n.5. Instead, the court held that pre-existing law did not dictate "the conclusion that the *Tinker* standard applies to the exclusion of the *Fraser* standard." *Id.* (internal citation omitted).

118. *See Denno*, 218 F.3d at 1274–75.

119. *Id.*

120. 439 F.3d 1114 (9th Cir. 2006), *cert granted*, 127 S. Ct. 722 (Dec. 1, 2006) (argued March, 19, 2007).

121. *Id.* at 1115. This case implicated the school's authority to silence student speech because it was a quasi-school sponsored event. The school let students out of class early to watch the Olympic Torch Relay go by the school (students stood on the sidewalk across from the school), the pep band played, the cheerleaders greeted the torchbearers, and administrators such as the defendant assistant

Fraser, controlled in this context because the speech was not "plainly offensive."[122]

In determining that the student speech was not plainly offensive, the Ninth Circuit considered all three *Fraser* factors. However, it did not use a clear analytical framework for identifying plainly offensive speech, let alone direct lower courts to evaluate the three factors in order to properly apply *Fraser*. First, the court addressed the content of the speech by noting, "Frederick's speech was not sexual."[123] Second, the court examined the context of the student's speech and noted that the speech did not occur in a classroom.[124] Lastly, the court reviewed the consequence of the speech and determined that the student speech did not have the requisite disruptive effect.[125] Accordingly, the court held, "[t]he phrase 'Bong Hits 4 Jesus' may be funny, stupid, or insulting, depending on one's point of view, but it is not 'plainly offensive' in the way sexual innuendo is."[126]

C. *Although the Second Circuit Has Examined Two of the Three* Fraser *Factors, It Did Not Use a Clear Analytical Framework and It Is Thus Unclear Whether It Adopts All Three Factors*

In the vague opinion of *Guiles ex rel. Guiles v. Marineau*,[127] the Second Circuit found that the student speech at issue did not meet the *Fraser* test after analyzing only the content and consequence factors without considering the context of the speech. The question in *Guiles* was whether a student's political t-shirt could be regulated as plainly offensive under *Fraser*.[128] The court acknowledged that *Fraser* granted

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principal were present. *See id.* at 1115–16.

122. *See id.* at 1122; *see also id.* at 1123 ("We therefore hold that Frederick's punishment for displaying his banner is best reviewed under *Tinker* . . . .").

123. *Id.* at 1119.

124. *Id.* at 1123 ("Frederick's banner . . . was displayed outside the classroom, across the street from the school, during a non-curricular activity that was only partially supervised by school officials.").

125. *See id.* ("It most certainly did not interfere with the school's basic educational mission.").

126. *Id.* at 1119.

127. 461 F.3d 320 (2d Cir. 2006).

128. *See id.* at 322–23. Zachary Guiles, a 13-year-old middle school student, wore a t-shirt critical of George W. Bush to school. *Id.* at 322. The front of the shirt had a large print that read "George W. Bush" and "Chicken-Hawk-in-Chief." *Id.* Directly below these words was a picture of the President's face, wearing a helmet, superimposed on the body of a chicken. *Id.* The front of the t-shirt also featured images of dollar symbols, oil rigs, three lines of cocaine, and a razorblade. *Id.* The back of the t-shirt had images of lines of cocaine, a martini glass, and phrases such as "Crook,"

schools wide discretion to proscribe speech that is less than obscene.[129] However, the court held that *Fraser* was not the appropriate standard because the student's t-shirt was not plainly offensive.[130]

The Second Circuit reached its conclusion by focusing on whether the student's t-shirt was offensive in the same way as the speech in *Fraser*.[131] The court explained, "[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."[132] Because the court found that the t-shirt lacked sexual innuendo or profanity, it was not plainly offensive.[133] The court also considered the consequence of the t-shirt, rejecting the school's claim that the speech had disrupted its educational mission.[134]

The Second Circuit may have declined to examine the context of the speech because, having found neither the content nor consequence factors satisfied, it did not need to continue with the *Fraser* inquiry. By determining that the student's t-shirt was not sexually explicit and disruptive, the court technically did not need to answer the context question to justify its refusal to apply *Fraser*.[135] Perhaps, given a different set of facts, the court would have continued and applied all three factors in its inquiry. However, as written, the court's opinion does not indicate clearly whether it requires that all three *Fraser* factors be

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"Cocaine Addict," and "Lying Drunk Driver." *Id.* After a parent objected to the t-shirt, the school decided that the shirt violated the dress code and banned the t-shirt. *See id.* at 322–23.

129. *Id.* at 325.

130. *See id.* at 327 ("*Fraser* permits schools to censor student speech that is 'lewd,' 'vulgar,' 'indecent,' or 'plainly offensive.' . . . [T]hese depictions on their own are not lewd, vulgar, or indecent. Lewdness, vulgarity, and indecency normally connote sexual innuendo or profanity. . . . [T]he images depicted on Guiles's T-shirt are not plainly offensive as a matter of law." (internal citations omitted)).

131. *See id.* at 327–29.

132. *Id.* at 328 ("In fact, the Supreme Court deemed Fraser's speech could be freely censored because it was imbued with sexual references, bordering on the obscene.").

133. *See id.* at 329.

134. *Id.* at 330. The school claimed, "*all* images of illegal drugs and alcohol—even images expressing an *anti-drug* view, such as those on Guiles's T-shirt—are plainly offensive because they undermine the school's anti-drug message." *Id.* at 329. The court rejected the argument, noting that "the phrase 'plainly offensive' as used in *Fraser* cannot be so broad as to be triggered whenever a school decides a student's expression conflicts with its 'educational mission.'" *Id.* at 330.

135. The court may also have assumed that a t-shirt worn by a student is in a curricular context per se, however this assumption is overly broad and inappropriate. *See supra* note 106.

present to permit regulation of student speech as plainly offensive.

In sum, lower courts do not consistently interpret and apply *Fraser*. The Sixth and Eleventh Circuits have focused mainly on the content of the student speech in determining whether it is plainly offensive. The Ninth Circuit examined all three *Fraser* factors, and the Second Circuit examined two out of three, but neither circuit provided a clear analytical framework or explained their methodologies in determining plainly offensive speech.

IV. THE CIRCUIT COURTS HAVE FAILED TO CLEARLY—AND SOMETIMES ACCURATELY—APPLY *FRASER*

The Supreme Court, through the *Tinker* trilogy, established three tests to evaluate the regulation of student speech.[136] When a court encounters a student speech issue, it should first determine whether the speech is school-sponsored under *Hazelwood*.[137] If the restricted speech is not school-sponsored but is sexually explicit or otherwise offensive, the court should perform a *Fraser* analysis.[138] Finally, if the restricted speech is not plainly offensive under *Fraser*, the court should apply *Tinker* to determine whether the speech nevertheless threatened substantial disruption of schoolwork or invaded the rights of other students.[139] Absent applicability of any of the trilogy cases, students retain their First Amendment free speech rights in the school context.[140] In order to avoid inadvertently chilling the exercise of these retained rights,[141] it is essential that lower courts adhere to the *Fraser* framework and include a discussion of the content, context, and consequence of the proscribed speech when addressing questions of plainly offensive student speech.

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136. *See supra* Part II.

137. *See supra* Part II.C.

138. *See supra* Part II.B.

139. *See supra* Part II.A.

140. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1968) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate.").

141. *See* Hudson & Ferguson, *supra* note 14, at 183 ("The majority of courts have cited *Fraser* in such a way as to give public school officials free reign to censor vulgar, lewd, or plainly offensive student speech. Some courts have gone a step further and prohibited student speech that contains offensive ideas."); *see also id.* at 204 (explaining that an overly broad reading of *Fraser* will "lead to a chilling effect on speech"); Miller, *supra* note 9, at 646 (noting that "[w]ithout guidance, the rules espoused by *Tinker*, *Fraser*, and [*Hazelwood*] have become nebulous and unpredictable").

A. *The "Plainly Offensive" Framework Requires Evaluation of the Content, Context, and Consequence of Student Speech*

Once a court decides that analysis under *Fraser* is appropriate, in order to avoid broadening the plainly offensive exception beyond that approved of in *Fraser*, the court should then use a three-part analytical framework derived from the *Fraser* opinion. Under this framework, courts should focus on the content,[142] context,[143] and consequence[144] of the student speech. A court may determine that speech is plainly offensive only when all three factors are satisfied. The proposed framework organizes the factors implicitly relied upon by the Court in *Fraser*.[145] This framework strikes the appropriate balance between protecting students' free speech and the allowing school officials to fulfill their educational mission. Exceptions to free expression protections are to be narrowly construed,[146] and this framework prevents the narrow exception of *Fraser* from swallowing *Tinker*'s more general rule.[147] This Part illustrates that court decisions made in the absence of such a framework have failed to provide guidance to lower courts and are overly broad and thus excessively restrict student speech.[148]

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142. *See supra* Part II.B.1.

143. *See* supra Part II.B.2.

144. *See supra* Part II.B.3.

145. *See supra* Part II.B.

146. *See supra* Part I (explaining narrow interpretations of limitations on free speech); *see also supra* Part II.D (demonstrating why *Fraser* is an exception to *Tinker*).

147. *See supra* text accompanying note 28.

148. While the Ninth Circuit properly considered all three *Fraser* factors, the right decision, without a clear framework, does not lessen the confusion that already exists in applying *Fraser*. *See* Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 321 (2d Cir. 2006) (despite using *Frederick* for guidance, the court still lamented the "unsettled waters of free speech rights in public schools, waters rife with rocky shoals and uncertain currents"). In order to reduce confusion and disagreement about what constitutes plainly offensive speech, the circuits that analyze all relevant factors from *Fraser* should provide a proper framework. *See* Miller, *supra* note 9, at 646, 649. A proper framework is necessary to clearly identify those factors of *Fraser* that courts must analyze. *See id.* at 646. Such an approach allows resolution of the confusion surrounding *Fraser*, improves judicial efficiency, and most importantly, enables school officials to do their jobs without violating the free speech rights of students. *See id.* (arguing that judges and school officials will be able to do their jobs more efficiently with a proper framework in place because a framework is likely to prevent "the rules espoused by *Tinker*, *Fraser*, and [*Hazelwood*]" from being "nebulous and unpredictable").

B. *Lower Courts Have Neither Consistently Nor Clearly Applied All Three of the* Fraser *Factors*

By failing to explicitly enumerate the three factors it focused on in *Fraser*, or to explicitly require lower courts to analyze those precise factors, the Court created a vague "plainly offensive" standard that continues to cause confusion among lower courts today.[149] Absent clearer guidance from the Supreme Court about the proper application of *Fraser*, some circuit courts pick and choose among the *Fraser* factors.[150] The Ninth Circuit appeared to examine all the *Fraser* factors, and the Second Circuit examined two out of three factors, but both circuits failed to provide a framework that lower courts can follow.[151] Most importantly, the absence of a clear framework for determining plainly offensive speech has led both to overregulation by school officials and the deterioration of student free speech rights recognized in *Tinker*.[152]

1. *The Proposed Framework Demonstrates that the Sixth and Eleventh Circuit Courts Have Applied an Overly Broad Interpretation of* Fraser

The Sixth and Eleventh Circuits strayed from *Fraser*'s holding in two respects. First, the courts incorrectly applied some of the *Fraser* factors. Both the Sixth and Eleventh Circuits erred in applying the content factor, by employing an overly broad definition of "offensive" content.[153] The Eleventh Circuit also erred in applying the consequence factor by failing to require more evidence than mere speculation that the speech would cause a disruptive consequence on the curricular context.[154] Second, both

149. *See supra* Part III.

150. Several cases illustrate what happens when courts fail to focus on all the relevant factors from *Fraser*. *See, e.g.*, Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246 (11th Cir. 2003) (focusing only on content and arguably consequence) (citing Denno *ex rel.* Denno v. Sch. Bd. of Volusia County, 218 F.3d 1267 (11th Cir. 2000) (content)); Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465 (6th Cir. 2000) (content); *see also* Part III.A.

151. *See* Frederick v. Morse, 439 F.3d 1114 (9th Cir. 2006), *cert. granted*, 127 S. Ct. 722 (Dec. 1, 2006) (argued March, 19, 2007) (content, context, consequence); *Guiles*, 461 F.3d at 321–31 (content, consequence); *infra* Part IV.B.2.

152. *See* Hudson & Ferguson, *supra* note 14, at 183; *see also id.* at 203–04 ("Another danger with the broad reading of *Fraser* is that it places educators in the unenviable position of determining what is vulgar or profane . . . teachers are . . . likely to err on the side of censorship, thus restricting more speech than is necessary.").

153. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986); *supra* Part II.B.1.

154. *See Fraser*, 478 U.S. at 683; *supra* Part II.B.3.

circuits failed to analyze all three *Fraser* factors.[155]

Student speech triggers plainly offensive analysis when it contains lewd, indecent, or vulgar content.[156] In *Boroff*, the Sixth Circuit held that a student's t-shirt was offensive because it promoted demoralizing values and mocked a religious figure.[157] The court's analysis, however, departs from *Fraser*, which focused on offensive content, not controversial messages.[158]

The Eleventh Circuit similarly engaged in an overly-broad interpretation of *Fraser*'s content factor. In *Denno*, the Eleventh Circuit found that the Confederate flag was offensive to many people.[159] Subsequently, in *Scott*, the Eleventh Circuit affirmed the analysis in *Denno* that found the Confederate flag to be offensive.[160] The Eleventh Circuit erred in its analysis because to censor the Confederate flag on the basis of *Fraser*'s content prong, the flag itself has to be sexually explicit or lewd.[161] However, the flag itself, while offensive to many because of the controversial message of racism, is not sexually explicit or lewd.[162] Because the flag itself is not sexually explicit or lewd, it cannot be considered plainly offensive under *Fraser*'s content prong. The Eleventh Circuit should have concluded that lacking sexually explicit content, *Fraser* should not have entered the court's analysis, and that *Tinker* was the controlling case.

To be regulated as plainly offensive, speech must also have a disruptive consequence on a school's curricular activity or educational mission.[163] In *Scott*, the Eleventh Circuit merely noted that because

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155. *See Fraser*, 478 U.S. at 683; *supra* Parts II.B.1–3.

156. *See Fraser*, 478 U.S. at 683 (1986); *supra* Part II.B.1.

157. *See Boroff*, 220 F.3d at 470; *supra* Part III.A.

158. *See Fraser*, 478 U.S. at 683; *supra* Parts II.B.1 and III.A.

159. Denno *ex rel.* Denno v. Sch. Bd. of Volusia County, 218 F.3d 1267, 1274 (11th Cir. 2000). As discussed *supra* note 114, *Denno* dealt with qualified immunity, the abrogation of which required the court to find not only that the student had a right to the speech in question, but also that such a right was *clearly* established.

160. *See* Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1248 (11th Cir. 2003) (citing *Denno*, 218 F.3d at 1267–70).

161. *See Fraser*, 478 U.S. at 683; *supra* Part II.B.1.

162. *See Denno*, 218 F.3d at 1274 n.6 ("Similarly, it is not dispositive that common experience teaches us that the Confederate flag is honored by many people as a non-racist memorial to their Southern heritage; common experience also teaches that many people perceive the flag as offensive, constituting either a racist message or at least reflecting an uncivil lack of sensitivity to the sensibilities of many people.").

163. *See Fraser*, 478 U.S. at 683 ("[T]he schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd,

racial incidents had occurred in the past at the school, the display of the Confederate flag would have a disruptive consequence on the school's ability to instruct students in civility.[164] However, in *Fraser*, the Court examined evidence indicating the speech actually disrupted the curricular context.[165] In dicta, the Court also indicated that schools could prospectively regulate speech likely to disrupt the curricular activities.[166] However, *Fraser* should be narrowly interpreted as an exception to student free speech,[167] so courts should require more significant evidence beyond mere speculation that an activity is likely to disrupt the school's curricular activity.[168] In *Scott*, the Eleventh Circuit merely noted that because racial incidents had occurred in the past at the school, the display of the Confederate flag would have a disruptive consequence on the school's ability to instruct students in civility.[169] The Eleventh Circuit should have required evidence beyond mere speculation that the Confederate flag would disrupt the school's activity or educational mission.

To avoid extending *Fraser*'s restrictions on speech to situations not encompassed by that decision, a court must analyze all three *Fraser* factors: content, context, and consequence.[170] In *Boroff*, the Sixth Circuit only examined the content factor by explaining that the t-shirt contained vulgar and offensive messages.[171] The court examined neither the context in which the t-shirt was worn, nor whether the t-shirt was contrary to and negatively impacted the school's educational mission.[172] The court in *Boroff* might have arrived at a different conclusion if it had

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indecent, or offensive speech and conduct such as that indulged in by this confused boy."); *see also id.* at 689 (Brennan, J., concurring) ("[T]he 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.").

164. *See Scott*, 324 F.3d at 1248–49.

165. *See Fraser*, 478 U.S. at 678.

166. *See supra* Part II.B.3.

167. *See supra* Parts I & IV.A.

168. For example, the school should present and the court should examine evidence in the form of news stories or studies indicating that such speech has been disruptive to curricular activities in other schools.

169. *See supra* Part III.A.

170. *See supra* Parts II.B & IV.A.

171. *See* Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 467 (6th Cir. 2000); *supra* Part III.

172. *See supra* Part III.A.

properly applied *Fraser* by examining all three factors.[173]

The *Denno* and *Scott* cases demonstrate that the Eleventh Circuit also failed to apply all three *Fraser* factors.[174] The court in *Denno* cited *Fraser* and its command for courts to balance a student's right to free expression and the countervailing interest of schools to teach students the boundaries of civility.[175] The court reasoned that because the Confederate flag was offensive and uncivil, it triggered *Fraser* and its "more flexible" standard for restricting student speech.[176]

Even assuming the Eleventh Circuit properly applied *Fraser's* content factor in *Denno*, the court did not inquire into the context and consequence factors. While the court in *Denno* noted the school's duty to teach students civility, it did not analyze whether the display of the Confederate flag disrupted the school's ability to instruct the students about civility.[177] The court also failed to analyze the context in which the Confederate flag displayed on campus.[178] Later, the Eleventh Circuit made a similar omission of one *Fraser*'s factors in *Scott.* Again citing to *Denno*, the Eleventh Circuit in *Scott* held that because the flag was offensive and might disrupt the school's ability to teach civility, *Fraser*'s more flexible standard for evaluating free speech applied.[179] In *Scott*, the court failed to examine the context in which the flag was displayed. Had the Eleventh Circuit appropriately applied all three *Fraser* factors, it may have arrived at a different conclusion.[180]

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173. For example, if the court had examined the context factor, it might have found that the student was willing to cover up the t-shirt while in class, but just wanted to wear the t-shirt on school grounds during school breaks and lunch periods. If the court had examined the consequence factor, the court might have found that even if the student wore the shirt during class, the t-shirt did not disrupt curricular activities.

174. *See supra* Part III.A.

175. Denno *ex rel.* Denno v. Sch. Bd. of Volusia County, 218 F.3d 1267, 1275 (11th Cir. 2000); *see also* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986).

176. *See Denno*, 218 F.3d at 1274–75.

177. *See id*; supra Part III.A.

178. *See supra* Part III.A.

179. *See* Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1249 (11th Cir. 2003) (citing *Denno*, 218 F.3d at 1273).

180. For example, had the court in *Scott* examined the context factor, it may have found that the ban even prohibited students from displaying the Confederate flag in the school parking lot; a situation far removed from the curricular context.

2. *The Proposed Framework Demonstrates that the Ninth and Second Circuits Could Have More Clearly Applied* Fraser

The Ninth Circuit, in determining whether student speech is plainly offensive, appears to apply all three of the *Fraser* factors but nevertheless fails to provide a clear analytical framework to guide other courts in doing the same. In *Frederick*, the court held that a student's "Bong Hits 4 Jesus" banner was not plainly offensive.[181] In reaching its decision, the court declined to follow the Sixth Circuit's broad reading of *Fraser*.[182] The court explained that the *Boroff* court interpreted *Fraser* to grant school officials too much discretion to regulate certain messages at school.[183] Specifically, the court disagreed with the Sixth Circuit's loose interpretation of "plainly offensive speech."[184] Instead, the Ninth Circuit held that *Fraser* permits schools to prohibit only vulgar, obscene, lewd, or sexual speech that would promote "disruption and diversion from the *educational curriculum*."[185] Accordingly, the Ninth Circuit evaluated the content of the student's speech, its context,[186] and its consequence.[187] But while the Ninth Circuit relied on factors from *Fraser*, it did not explicitly organize those factors into a clear analytical framework for other courts to follow.

Similarly, the Second Circuit in *Guiles* declined to follow *Boroff*'s broad reading of *Fraser*.[188] However, the *Guiles* opinion only explicitly analyzed the factors of content and consequence from *Fraser*; regarding

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181. Frederick v. Morse, 439 F.3d 1114 (9th Cir. 2006), *cert. granted*, 127 S. Ct. 722 (Dec. 1, 2006) (argued March, 19, 2007).

182. *See id.* at 1122.

183. *Id.*

184. *See id.* ("[T]o the degree *Boroff* implies that student speech may be prohibited as 'plainly offensive' whenever it conflicts with a vaguely-defined 'educational mission,' we decline to follow it."); *see also id.* at 1122 n.44 ("The word 'offensive' is not a catch-all to embrace any speech that might offend some hearers. Nor was *Fraser* an invitation to censor and punish any speech that offends school authorities.").

185. *Id.* at 1122 n.44.

186. *See id.* at 1123 ("Boroff sought to wear his T-shirt in the classroom, where its message would be more likely to interfere with the school's core educational mission. Frederick's banner, by comparison, was displayed outside the classroom, across the street from the school, during a non-curricular activity that was only partially supervised by school officials.").

187. *See id.* ("It most certainly did not interfere with the school's basic educational mission.").

188. *See* Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 329 (2d Cir. 2006) (declining "to adopt the position of the Sixth Circuit in *Boroff* that a school has broad authority under *Fraser* to prohibit speech that is 'inconsistent with its basic educational mission'" (quoting Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 470 (6th Cir. 2000))).

context, the opinion is silent. Specifically, the *Guiles* court first determined that the student's t-shirt could not be plainly offensive because it did not contain profanity or sexual innuendo.[189] The court also did not accept the school's claim that the student's t-shirt disrupted its educational mission.[190] By analyzing content and consequence, the court determined that *Fraser* did not apply and never reached the question of context.[191] In so doing, the court reached the correct result but did not provide a clear framework.

The failure of the Ninth and Second Circuits to provide a clear analytical framework is problematic because it contributes to an inconsistent application of *Fraser*.[192] By failing to adhere to all three factors identified in *Fraser*, courts effectively lower the threshold that school officials must meet to invoke *Fraser*.[193] In turn, *Fraser* may encourage school officials to overregulate student speech.[194] Both circuits could have achieved greater clarity by explicitly organizing their analysis according to the content, context, and consequence prongs of the proposed framework. In so doing, the courts could have lessened existing confusion regarding *Fraser*'s application and helped ensure that schools do not rely on *Fraser* to overregulate student speech.

IV. CONCLUSION

In *Fraser*, the Supreme Court determined that students in public schools do not possess a First Amendment right to engage in "plainly offensive" speech. In establishing that plainly offensive speech may be regulated, the Court did not clearly identify the factors or characteristics that must be present for a student's speech to be proscribed. Nevertheless, in coming to its conclusion that the speech at issue in *Fraser* met the criteria, the Court focused on certain elements of the speech that can be categorized into three factors: content, context, and

189. *See id.* at 327–28.

190. *See id.* at 329.

191. *See supra* Part II.A.

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

193. *See, e.g.*, Hudson & Ferguson, *supra* note 14, at 183 (noting that a "majority of courts have cited *Fraser* in such a way as to give public school officials *free reign* to censor vulgar, lewd, or plainly offensive student speech" (emphasis added)).

194. *See id.* at 203–04 (regarding the danger of reading *Fraser* broadly, the court stated that "teachers are far more likely to err on the side of censorship, thus restricting more speech than is necessary").

consequence. Absent a clear mandate from the Court that these three factors must be analyzed when addressing whether certain speech is plainly offensive, lower courts have struggled to apply *Fraser*. Applying the three *Fraser* factors consistently would both eliminate the confusion surrounding the parameters of what constitutes plainly offensive speech and prevent the unapproved expansion of schools' power to regulate speech. The current confused practice risks unconstitutional regulation of student speech to which *Tinker*, *Fraser*, or *Hazelwood* do not apply and which the First Amendment thus protects.