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Teaching from the Closet: Freedom of Expression and Outspeech by Public School Teachers

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Teaching from the Closet: Freedom of Expression and Out-Speech by Public School Teachers

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“That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”¹

INTRODUCTION

Wendy Weaver taught psychology and physical education and coached volleyball for nineteen years at Spanish Fork High School in the predominantly Mormon community of Nebo, Utah.² Ms. Weaver received tenure after her fourth year of teaching and had never received any disciplinary action in all her years of teaching.³ No one questioned her ability to do these jobs well—until the spring and

1. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

2. *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1280 (D. Utah 1998); see also *Lesbian Coach Fighting Ouster by School District*, RECORD (Bergen County, N.J.), Oct. 22, 1997, at A8 (describing the Spanish Fork community as “conservative” and “mostly Mormon”).

3. *Weaver*, 29 F. Supp. 2d at 1280.

summer of 1997, when many members of the Nebo community learned that Ms. Weaver is a lesbian.⁴ The subject of Ms. Weaver's sexual orientation was first raised with the school principal and school district administrators by Ms. Weaver's ex-husband, who also worked for the school district, and other unidentified callers.⁵ The only time that Ms. Weaver discussed her own sexuality with anyone in the school community was in a phone call to a volleyball team member about summer volleyball camp. The high school senior asked her teacher, "Are you gay?" Ms. Weaver responded simply, "Yes."⁶ That student and her parents called the principal and later met with district officials to inform them that the student was uncomfortable and would no longer play on the volleyball team because the coach was gay.⁷

School district officials decided to take action against Ms. Weaver for commenting on her sexual orientation, so in the summer of 1997 the principal informed her that she would not be coaching the volleyball team that year.⁸ The next day, district officials called her in and presented her with a letter ordering her not to speak to any students, staff members, or parents regarding her "homosexual orientation or lifestyle," even in response to direct questions.⁹ This letter was placed in her personnel file.¹⁰

Ms. Weaver challenged the district's action in federal district court as a vague and overbroad restraint on her constitutionally protected speech.¹¹ Although she won a resounding victory on the First Amendment issue, she was then forced to defend herself against a lawsuit filed by a group of parents and former students who called themselves "Citizens of Nebo School District for Moral and Legal Values."¹² The second suit, dismissed by the courts for lack of

4. *Id.* at 1281.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 1281-82.

10. *Id.* (noting that a similar letter was delivered to her ex-husband, a school psychologist, ordering him not to talk to anyone about his ex-wife's sexual orientation).

11. *Id.* at 1282.

12. *See Miller v. Weaver*, 66 P.3d 592, 601 (Utah 2003) (affirming the district court's dismissal for lack of standing of a complaint against Weaver and the board of education brought by parents and former students charging she was an unfit teacher). The claims that made it to appellate review alleged that Weaver administered personality tests in her psychology class, discussed dream interpretation, criticized the Church of Jesus Christ of Latter-day Saints, and encouraged students to question authority and "determine for themselves whether 'alternative lifestyles' are right or wrong." *Id.* at 593. The Utah Supreme Court determined that there was no private right of action under Utah law

standing, charged that Ms. Weaver was an unfit teacher for several reasons, including because she was a lesbian and therefore was violating state laws against sodomy and engaging in immoral activities unbecoming a teacher.¹³

Although Ms. Weaver's willingness to fight this restraint in court may have garnered her more publicity than other teachers in similar situations, her experience was far from unique. Many other employers and communities continue to punish gay or lesbian teachers for not staying closeted.¹⁴ For example, in 1996, the Williamsburg, Ohio, School Board chose not to renew the teaching contract of elementary school teacher Bruce Glover after an unidentified caller reported to school administrators that she had seen Glover holding hands with his male partner at a school holiday party.¹⁵ Also in 1996, members of the Grand Rapids, Michigan, community discovered that a high school music teacher, Gerry Crane, was gay, and waged a campaign of harassment against Mr. Crane that included pulling their children from his classes, distributing fliers in church parking lots about the "sodomite music teacher," and mailing

concerning the competence or ethical conduct of a teacher. *Id.* at 598; *see also* Hilary Groutage, *Judge Limits Claims in Suit Against Embattled Lesbian Teacher, but Lets Two Issues Stand*, SALT LAKE TRIB., Mar. 17, 1999, at A1. (reporting that the district court judge dismissed seven of nine counts in the complaint, including claims that Weaver violated parental rights protected by the state constitution and that she violated state teacher certification laws by committing sodomy and living with her same-sex partner); Elizabeth Neff, *High Court Awards Round to Teacher*, SALT LAKE TRIB., Apr. 5, 2003, at B1 (reporting that the Utah Supreme Court dismissed the lawsuit, saying parents must take their claims to the State education agency).

13. *See* Neff, *supra* note 12; *see also* Kirsten Sorenson, *Group Takes Stand Against Lesbian Teacher, Board*, DESERET NEWS (Salt Lake City, Utah), Nov. 12, 1998, at B3 (describing parents' argument that Weaver is morally unfit because she is a lesbian).

14. This Comment uses the term "gay" to describe teachers identifying themselves as gay, lesbian, and bisexual. Although some of the conclusions herein may apply to transgender and transsexual individuals as well, they face different challenges in seeking public employment, including discrimination based more on appearance than expression, and thus require a more specialized analysis that is beyond the scope of this piece. For a discussion of the new area of litigation involving rights of transsexuals and transvestites, *see generally* Ralph D. Mawdsley, *The Law in Providing Education: School Board Control Over Education and a Teacher's Right to Privacy*, 23 ST. LOUIS U. PUB. L. REV. 609, 611-12 (2004) (discussing new area of litigation involving rights of transsexuals and transvestites). *See also* *Ashlie v. Chester-Upland Sch. Dist.*, No. 78-4037, 1979 U.S. Dist. LEXIS 12516, at *13 (E.D. Pa. May 9, 1979) (finding against a junior high school art teacher who had a sex change operation over the summer and was fired upon her return; the court found that while private sexual behavior is not an appropriate consideration in a teacher's fitness, a sex change is by nature a public action).

15. *See* *Glover v. Williamsburg Local Sch. Dist.*, 20 F. Supp. 2d 1160, 1164 (S.D. Ohio 1998). The rumor turned out to be false, but none of the administrators involved investigated its truth before making their employment decision. *Id.*

videos about the evils of homosexuality to all the families whose children were in Crane's classes.¹⁶ Far from protecting Crane, the Grand Rapids School Board issued a statement condemning homosexuality and stating that Crane would be "closely watched."¹⁷ Mr. Crane eventually chose to resign with a settlement¹⁸ from the school board rather than do battle in court.¹⁹

Although public acceptance of gay citizens has increased in recent decades,²⁰ these anecdotes reveal that school administrators in some communities still face strong incentives to keep gay teachers in the closet for fear of community reaction.²¹ This Comment argues that, despite those concerns, the First Amendment prevents the state from pressuring gay teachers to remain closeted. Part I of this Comment gives a brief overview of the legal and social history of gay Americans in public employment. Part II addresses teachers' speech about their sexual orientation outside the classroom setting, by combining the First Amendment jurisprudence that has developed specifically for public school teachers with new developments in the law's attitude toward homosexuals. Part II concludes that teachers' constitutionally guaranteed freedom of expression should protect their out-speech in the workplace as well as in the community. Part III examines the separate line of precedent covering teachers' speech in the classroom setting, and finds that while schools may have greater control over teachers' expression within the classroom, they must exercise that control through viewpoint neutral policies.

16. *20/20: Please Don't Teach Our Kids* (ABC television broadcast Mar. 13, 1998), available at LEXIS, ABC News Transcripts no. 98031303-j99; see also Christine Yared, *Where are the Civil Rights for Gay and Lesbian Teachers?*, HUM. RTS., Summer 1997, at 22 (describing Crane's ordeal and fight to retain his job).

17. *20/20*, *supra* note 16.

18. *Id.*

19. Yared, *supra* note 16, at 22. Crane died of an apparent stress-induced heart attack soon after his resignation. *Id.*; see also Tracy Dell'Angela, *Gay Educators Discovering Strength in Honesty*, CHI. TRIB., Apr. 19, 2000, at N1 (discussing Crane's resignation and death).

20. See, e.g., *Irizarry v. Bd. of Educ. of Chi.*, 251 F.3d 604, 606 (7th Cir. 2001) (describing Chicago public schools' decision to extend benefits to same-sex partners of teachers, in order to recruit gay teachers to the district); Jamie Malernee & Peter Bernard, *Teacher Tackles Tough Issues*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Mar. 1, 2002, at 1B (describing the story of a Florida elementary school teacher who thanked her same-sex partner during her Teacher of the Year acceptance speech).

21. See Dell'Angela, *supra* note 19 (discussing education as "a profession that remains deeply closeted" and noting that "gay teachers face enormous pressures to lie about their private lives" for fear of losing their jobs and facing protests and alienation from parents, colleagues, and students).

I. HISTORICAL CONTEXT: GAYS IN PUBLIC EMPLOYMENT

The first high-profile cases regarding the rights of gays in public employment emerged in the late 1960s and 1970s, in the wake of the sexual revolution and the beginning of a strong cultural backlash that targeted homosexuals in all aspects of public life.²² Bias against homosexuals was by no means limited to small towns or conservative state capitals; until the early 1970s, the personnel manual of the United States Civil Service Commission contained the following language: "*Homosexuality and Sexual Perversion*: Persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts with them, without evidence of rehabilitation, are not suitable for federal employment."²³

In 1969, the D.C. Circuit set a precedent of distinguishing between homosexual status and public homosexual conduct when it held that the Federal Civil Service Commission could not dismiss employees for private homosexual conduct without some showing that the conduct had impaired the efficiency of the Service.²⁴ However, the court suggested several ways in which private homosexual activity by an employee might impair an agency, including the potential for blackmail, providing evidence of an "unstable personality," and, "if his conduct is notorious," causing disruptions because of the reactions of other employees or the public.²⁵

In 1976, the Ninth Circuit seized on this reasoning in *Singer v. United States Civil Service Commission*.²⁶ John Singer was a typist in the Seattle office of the Equal Employment Opportunity Commission, and when he was hired he informed his employer that he was gay.²⁷ Almost a year after he was hired, he was called before

22. See *infra* notes 32–38 and accompanying text.

23. *Singer v. U.S. Civil Serv. Comm'n*, 530 F.2d 247, 254 n.12 (9th Cir. 1976), *vacated* 429 U.S. 1034 (1977). In 1973, the United States District Court for the Northern District of California found that the Commission could discharge employees under this section only if the behavior actually affected the efficiency of the agency. *Id.* at 254 (citing *Soc'y for Individual Rights, Inc. v. Hampton*, 63 F.R.D. 399 (N.D. Cal. 1973)).

24. *Norton v. Macy*, 417 F.2d 1161, 1167 (D.C. Cir. 1969). Norton was a budget analyst for NASA; a morals squad arrested and interrogated him in the middle of the night after seeing him pick up a man from the curb, drive around the block, and then drop him off again. *Id.* at 1163. The morals squad then called NASA and turned him over to his employer for additional interrogation and eventual termination on the grounds of having made a "homosexual advance." *Id.* at 1162–63.

25. *Id.* at 1166.

26. 530 F.2d 247 (9th Cir. 1976).

27. *Id.* at 248.

an investigative commission to respond to charges that he “flaunted” his sexuality by allegedly kissing a man at a previous workplace, giving an interview to the *San Francisco Chronicle* in which he identified himself as homosexual, openly admitting to his sexuality, and applying for a marriage license with another man.²⁸ The Ninth Circuit agreed with the D.C. Circuit that a person could not be fired from government employment for being a homosexual or engaging in private homosexual activity, but held that by “openly and publicly flaunting his homosexual way of life” Singer could lessen public confidence in the government agency and thus impair its efficiency.²⁹ This holding exemplifies the distinction between being gay and “acting gay” that faces many gay citizens even after *Romer v. Evans*³⁰ and *Lawrence v. Texas*.³¹

At the time of these decisions, the political atmosphere for gay teachers in the public schools was even more hostile than that facing other government employees. For example, in 1977, singer Anita Bryant gained national publicity with her Save the Children campaign, which was aimed at banning homosexuals from teaching in public schools.³² Save the Children was successful in its campaign to repeal the human rights ordinance of Dade County, Florida, which prevented discrimination on the basis of sexual orientation.³³ Bryant, a Miss America runner-up and the voice of Florida Orange Juice, grounded her campaign in Biblical passages and dire warnings that homosexuals would use teaching positions to recruit children and possibly molest them.³⁴ A 1978 California referendum, which was

28. *Id.* at 249.

29. *Id.* at 255.

30. 517 U.S. 620 (1996) (holding that a Colorado amendment prohibiting all legislative, executive, or judicial action designed to protect homosexuals from discrimination, violated equal protection).

31. 539 U.S. 558 (2004) (holding a Texas sodomy statute unconstitutional as applied to adult men engaging in consensual acts in the privacy of their own home); see, e.g., Kenji Yoshino, *The Pressure to Cover*, N.Y. TIMES MAG., Jan. 15, 2006, at 32, 34–35 (exploring the “new discrimination” in the form of pressure on homosexuals and other minorities to avoid actions and appearances that openly proclaim their minority status).

32. See Tom Mathews, *Battle Over Gay Rights*, NEWSWEEK, June 6, 1977, at 16, 16–17 (describing Bryant’s campaign rhetoric and its effect beyond Florida); see also Phil McCombs, *Anita Bryant Visit Here Sparks Demonstration*, WASH. POST, Jan. 23, 1978, at C1 (discussing Bryant’s depictions of homosexuals and large-scale protests provoked by her appearance at a Washington, D.C. convention).

33. Richard Steele & Holly Camp, *A ‘No’ to the Gays*, NEWSWEEK, June 20, 1977, at 27, 27–30 (describing the defeat of the Dade County human rights ordinance by a wide margin as a “stunning setback for gay activists”).

34. See Mathews, *supra* note 32, at 16 (Bryant “feared that homosexuals would use the schools to influence children in favor of homosexuality or perhaps even to molest them”); Denise A. Williams, *Homosexuals: Anita Bryant’s Crusade*, NEWSWEEK, Apr. 11,

only narrowly defeated, would have banned gays and lesbians from teaching in the State's public schools.³⁵ And in 1984, the Oklahoma legislature enacted a statute allowing schools to fire or refuse to hire teachers who had been rendered unfit by means of engaging in "public homosexual activity."³⁶ Some state courts, perhaps under the influence of this political outcry, as well as their judicial view of the unique role of schoolteachers in society, showed themselves even less tolerant than the *Singer* court. Appellate courts in two states in the late 1970s found homosexuality to be a proper basis for firing a teacher under the state's "immorality" clause³⁷ and for ordering a teacher to undergo a mental health examination.³⁸

In the almost thirty years since Anita Bryant's campaign, American attitudes toward homosexuality and gay people have undergone a sea change in many areas. For example, gay characters have become, if not uncontroversial, at least commonplace in popular television shows and movies.³⁹ In Broward County, Florida (which borders Dade County), the 2003 Teacher of the Year used her acceptance speech to thank her longtime same-sex partner, a fellow teacher at the same middle school.⁴⁰ Chicago public school authorities recently went to court to defend their decision to extend same-sex benefits to teachers and their partners, in part in order to attract gay teachers to serve as role models.⁴¹

1977, at 39, 39–40 ("As a Miss America runner-up, a popular singer billed as 'the voice that refreshes,' and the symbol of Florida orange juice, Anita Bryant has projected an image of devout wholesomeness for nearly two decades.").

35. See *California Referendums; Witch-Hunting*, ECONOMIST, Oct. 28, 1978, at 50, 50.

36. See *Nat'l Gay Task Force v. Bd. of Educ. of Okla. City*, 729 F.2d 1270, 1272–74 (10th Cir. 1984) (finding that the part of the statute that prohibits public homosexual "conduct" is overbroad and infringes upon constitutionally protected speech, although the part that prohibits public homosexual "activity" does not violate the Constitution).

37. See *Gaylord v. Tacoma Sch. Dist.*, 559 P.2d 1340, 1347 (Wash. 1977).

38. See *Gish v. Bd. of Educ.*, 366 A.2d 1337, 1342 (N.J. Super. Ct. App. Div. 1976) (per curiam) (holding that a school board acted rationally in determining that a teacher's decision to assume the presidency of the New Jersey Gay Activists Alliance displayed evidence of deviation from normal mental health, and ordering him to undergo psychiatric examination).

39. See, e.g., Walt Belcher, 'Will & Grace' Leaves Behind a More Accepting America, TAMPA TRIB., May 18, 2006, at 1 (discussing the last episode of the television show that "pushed the boundaries of how gay characters are portrayed on broadcast network television"); Bob Fischbach, 'Brokeback Mountain' About Love, Not Sex, OMAHA WORLD-HERALD, Dec. 18, 2005, at 1A7 (describing possible Midwestern reception for film featuring gay cowboys, and noting that "Middle America has more than tolerated gay characters on hit television shows").

40. Malernee & Bernard, *supra* note 20.

41. See *Irizarry v. Bd. of Educ. of Chi.*, 251 F.3d 604, 606 (7th Cir. 2001) (upholding the school board's decision to offer same-sex partner benefits against equal protection and

Federal courts have also made strides in recognizing the rights of gay citizens. Between 1967 and 1984, the United States Supreme Court refused to hear arguments on any cases about gay rights.⁴² Finally, in 1996, the Court recognized gays as a political and social group in *Romer v. Evans*.⁴³ In *Romer*, the Court invalidated on equal protection grounds a state statute that prohibited municipalities from passing ordinances to protect the rights of homosexuals.⁴⁴ The *Romer* opinion announced that mere animosity against homosexuals cannot serve as a rational basis for state action.⁴⁵ Most recently, in *Lawrence v. Texas*,⁴⁶ the Court struck down state sodomy statutes as an invasion of privacy rights, ending the specter of criminal prosecutions of homosexuals.⁴⁷

Nonetheless, in many communities across the country, anti-gay sentiment has become particularly focused on school teachers. In a 2001 Gallup Poll, although 85% of respondents agreed that homosexuals should have equal access to job opportunities in general, 33% felt that gays should not be allowed to be high school teachers, and 40% said that they should be barred from teaching elementary school.⁴⁸ Justice Scalia likely spoke for many of these Americans when he wrote in his *Lawrence v. Texas* dissent that “[m]any Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, [or] as teachers in their children’s schools.”⁴⁹ The South Carolina Republican Party echoed this statement in the 2004 elections when the party platform advocated banning openly gay men and women from teaching in the State’s public schools.⁵⁰ In addition

due process challenges by a teacher who lived with an unmarried partner of the opposite sex, and thus did not qualify for partner benefits).

42. Christopher R. Leslie, *The Importance of Lawrence in the Context of the Supreme Court’s Historical Treatment of Gay Litigants*, 11 WIDENER L. REV. 189, 210 (2005). When the Supreme Court finally did hear a civil rights case brought by a gay plaintiff, in 1986, the result was a further setback in the campaign for basic gay rights: the Court upheld a state law criminalizing sodomy against due process and equal protection challenges. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

43. 517 U.S. 620 (1996).

44. *Id.* at 635–36.

45. *Id.* at 634.

46. 539 U.S. 558 (2003).

47. *Id.* at 578–79.

48. Anne Wagner, *Poll Track*, 33 NAT’L J. 1759, 1759 (2001).

49. *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

50. Schuyler Kropf, *Gays Want DeMint to Apologize*, POST COURIER (Charleston, S.C.), Oct. 5, 2004, at B1 (discussing one candidate who openly agreed with this platform

to community opposition to gay teachers, school officials may face pressure from national advocacy groups.⁵¹ In this atmosphere, it is not surprising that administrators and school boards may desire that gay teachers stay closeted in the community as well as in the classroom. As outlined below, however, becoming a public school teacher does not require giving up one's First Amendment right to freedom of expression, even if some in the community may disagree with what the teacher has to say.

II. OUT-SPEECH OUTSIDE THE CLASSROOM

This Part analyzes the application of First Amendment jurisprudence to out-speech by teachers that does not take place in the classroom, but somehow becomes known within the school community. Sections A and B discuss the foundation of First Amendment protections for teachers and students, *Tinker v. Des Moines*,⁵² and subsequent Supreme Court cases dealing specifically with teacher speech. Section C then outlines the use of Supreme Court precedent in existing cases involving teacher out-speech and their use of Supreme Court precedent. Finally, Section D argues that federal courts have misapplied Supreme Court precedent regarding First Amendment protection for teachers' public criticism of the schools to cases of out-speech. The misuse of these cases has resulted in a tangled and illogical process for what should be a straightforward First Amendment analysis.

First Amendment jurisprudence often involves drawing clear lines: certain expressive conduct or spaces for expression are protected from government regulation, others are not.⁵³ Regulating the speech of state employees, however, requires special balancing because the state acts as both government and as employer. The Supreme Court has long recognized that the state has special interests

in a televised debate); *see also* Editorial, *Leave Gay Teachers Alone*, HERALD (Rock Hill, S.C.), Oct. 7, 2004, at 7A (discussing the platform and one Senate candidate's response).

51. *See* David R. Anderson, *School Chief Draws High Marks: Beaverton Superintendent Jerry Colonna Ends His First Year With a Push for Literacy and Leadership, and a Long List of Goals*, OREGONIAN (Portland, Or.), July 1, 2004, at 1 (noting that when the Beaverton, Oregon superintendent faced a controversy over a proposal to bring "a national photo exhibit on family diversity that included images of same-sex parents" to the Beaverton schools, a radical anti-gay group from Kansas sent out press releases attacking him).

52. 393 U.S. 503 (1969).

53. *See, e.g.*, ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 952-1082 (2002) (delineating categories of speech that receive little or no protection under the First Amendment).

in regulating the speech of its employees that it does not have in regulating other citizens, because of its need to promote the efficient administration of government and maintain public confidence in its agencies.⁵⁴ On the other hand, state employees are still citizens, and may not be required to give up their fundamental right to free speech in order to secure government employment.⁵⁵

An even narrower branch of First Amendment jurisprudence governs attempts to regulate the speech of public school teachers. The state's interest in regulating speech is arguably even stronger for teachers than other government employees, because teachers perform a long-recognized special role in society as role models and purveyors of society's values.⁵⁶ Nonetheless, both teachers and students retain some level of freedom of speech and expression when they enter the

54. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (finding that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general . . . [including] promoting the efficiency of the public services it performs through its employees"); see also *Shahar v. Bowers*, 114 F.3d 1097, 1102 (11th Cir. 1997) (recognizing that the government may have different interests as an employer than it does as a sovereign).

55. See *Connick v. Myers*, 461 U.S. 138, 142 (1983) (holding that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression"); see also *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06 (1967) (confirming that the Court had emphatically overturned previous precedent allowing school authorities to set conditions of employment that infringed on freedom of expression or association). It was not always this way; before 1961, the Supreme Court saw public employment as a privilege, not a right, and thus subject to "reasonable regulations" even though such regulations might infringe upon fundamental rights of employees. See *Adler v. Bd. of Educ.*, 342 U.S. 485, 492 (1952) (holding that people have the right to free association, but they have no right to work for the state; if they do not like the conditions laid down, "they are at liberty to retain their beliefs and associations and go elsewhere"); *Bailey v. Richardson*, 182 F.2d 46, 57 (D.C. Cir. 1950) (holding that government employment is not property, nor is it a right, and thus it is not subject to deprivation without due process); *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892) (upholding the firing of a policeman for political comment; Justice Holmes held that while a citizen has a right to speak out on politics, he does not have a right to be a policeman). In 1961, the Court rejected this rights/privileges distinction in favor of a balancing approach that weighed the rights of the employee against the interests of the state as employer in restricting those rights. *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

56. See, e.g., *Ambach v. Norwick*, 441 U.S. 68, 78-79 (1979) ("[A] teacher serves as a role model for . . . students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities."); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("[Public education] is a principal instrument in awakening the child to cultural values . . . and in helping him to adjust normally to his environment.").

schoolhouse.⁵⁷ Since the 1960s, federal courts have attempted, in a long line of cases, to define the limits of First Amendment freedom of speech for public school teachers.

A. *The Foundation: Tinker v. Des Moines Independent Community School District*⁵⁸

The seminal Supreme Court case on free speech in the schools, *Tinker v. Des Moines Independent Community School District*, was a product of the 1960s antiwar protest era. The plaintiffs in *Tinker* were teenagers who chose to protest the Vietnam War by wearing black armbands to their public schools.⁵⁹ The principals of the plaintiffs' schools responded by adopting a policy against armbands and suspended the plaintiffs from school for violating the new rule.⁶⁰ The Supreme Court found that the students' right to free speech under the First Amendment had been violated, and its opinion set a new standard of freedom of expression in the schools with Justice Fortas's now-famous pronouncement that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁶¹

The *Tinker* decision highlighted the tension between the rights of public officials to control conduct within the schools and the fundamental freedoms of students and teachers.⁶² The Court resolved this tension by requiring that schools have good reason to censor speech, beyond just "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"⁶³ or "undifferentiated fear or apprehension of disturbance."⁶⁴ Under

57. See, for example, 1 RONNA GREFF SCHNEIDER, *EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION* 343–45 (2004), for an overview of the Court's attempts to balance state authority over the schools with the special need for First Amendment freedom in the educational environment.

58. 393 U.S. 503 (1969).

59. *Id.* at 504.

60. *Id.*

61. *Id.* at 506. In fact, it could have been, and was, argued that teachers, at least, could be required to shed certain rights, under the rights/privileges distinction employed by the Court in state employment cases until 1961. See *supra* note 55.

62. See *Tinker*, 393 U.S. at 506–07 (“[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.”).

63. *Id.* at 509.

64. *Id.* at 508. General references to censorship or restriction of teacher speech in this Comment encompass both prior restraint on that speech, and to adverse employment action taken in retaliation for certain speech perceived as objectionable. See, e.g., *Perry v.*

Tinker, school authorities must justify censorship by showing that the forbidden conduct would “ ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.’ ”⁶⁵ This test set an important standard by recognizing that students and teachers have important—but not unlimited—First Amendment rights at school; however, it left questions about the weight to be given to these competing interests, and how they might differ when applied to teachers instead of students.⁶⁶

While *Tinker* specifically involved student speech, the Court’s language encompassed teachers.⁶⁷ However, it quickly became clear that different issues arise when teachers, as employees, speak out in the workplace. Therefore, the Supreme Court in *Pickering v. Board of Education*⁶⁸ developed a new balancing test to determine when the state may properly regulate or sanction a teacher’s expressive conduct.⁶⁹

B. *Private Expression by Teachers: Pickering and Connick*

In 1968, the Township District Board of Education dismissed Marvin Pickering, a high school teacher, after he sent a letter to the editor of the local newspaper referring to a proposed tax increase.⁷⁰ Pickering’s letter criticized the board of education’s past handling of tax revenue and charged the superintendent with attempting to silence teacher dissent.⁷¹ The board charged that Pickering’s letter damaged the reputation of board members and would foment conflict and controversy in the school.⁷² The Illinois Supreme Court found

Sindermann, 408 U.S. 593, 598–603 (1972) (holding that if a public university declined to renew a professor’s employment contract in retaliation for constitutionally protected speech, then it had violated his constitutional rights, even if he had no legitimate “expectancy” of continued employment); see also *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283–84 (1977) (following *Perry v. Sindermann* in this respect).

65. *Tinker*, 393 U.S. at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

66. See Rodric B. Schoen, *Pickering Plus Thirty Years: Public Employees and Free Speech*, 30 TEX. TECH. L. REV. 5, 12–13 (1999) (noting that the case-by-case balancing required by *Pickering* and *Connick* created confusion for lower courts).

67. *Tinker*, 393 U.S. at 506 (holding that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” (emphasis added)).

68. 391 U.S. 563 (1968).

69. *Id.* at 568.

70. *Id.* at 564.

71. *Id.*

72. *Id.* at 567.

the board had ample support for its decision,⁷³ but the U.S. Supreme Court reversed, holding that the State court had not given sufficient protection to the teacher's First Amendment rights as a citizen, which must be balanced against the State's interests as an employer.⁷⁴

The *Pickering* test starts with the notion that teachers should have the right of any citizen to speak out on matters of public concern, unless that right is outweighed by the school system's educational, disciplinary, and administrative interests.⁷⁵ *Pickering* creates a two-step analysis.⁷⁶ First, does the speech in question touch on a legitimate matter of public concern?⁷⁷ If the teacher is speaking on a matter of public concern, then the second question is whether the state's interest in its educational goals or maintaining order and discipline in the schools outweighs the teacher's interest in free expression.⁷⁸

When the Court first formulated the "public concern" issue in *Pickering*, the Justices did not spend much time outlining the type of issues that constitute a public concern.⁷⁹ *Pickering's* letter to the

73. See *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 225 N.E.2d 1, 6-7 (Ill. 1967) (finding no First Amendment protection for teachers speaking out against their employers and refusing to set aside the board's decision because it was not arbitrary or capricious).

74. *Pickering*, 391 U.S. at 568 ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

75. *Id.* at 571-72.

76. See *Cox v. Dardanelle Pub. Sch. Dist.*, 790 F.2d 668, 672 (8th Cir. 1986) (applying *Pickering* as a two-step inquiry to a teacher's claim of retaliation for protected speech).

77. *Connick v. Myers*, 461 U.S. 138, 146-47 (1983) (clarifying that the "public concern" test is a threshold question implicit in *Pickering*); *Cox*, 790 F.2d at 672 (applying *Pickering* as a two-step inquiry to a teacher's claim of retaliation for protected speech). Whether certain speech touches on a matter of public concern is a question of law for the court, not a factual determination. *Shahar v. Bowers*, 114 F.3d 1097, 1103 n.12 (11th Cir. 1997).

78. *Pickering*, 391 U.S. at 572-73; see also *Shahar*, 114 F.3d at 1103 (applying *Pickering* balancing test). The Court subsequently held in *Mt. Healthy School District Board of Education v. Doyle*, 429 U.S. 274 (1977), that where the teacher's speech is protected by the First Amendment, the teacher still bears the burden of proving that the speech was a "substantial" or "motivating" factor in the decision to discipline him; the burden then shifts to the administration to prove by a preponderance of the evidence that it would have taken the same action in the absence of the protected speech. *Id.* at 287. This provides an opportunity for school boards to rehabilitate an otherwise unconstitutional action by providing evidence of other wrongs by the teacher beside his speech. See, e.g., *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444, 450 (6th Cir. 1984) (holding that if the school board had both permissible and constitutionally impermissible reasons for taking disciplinary action against school personnel, under *Mt. Healthy*, the disciplinary action could stand).

79. *Pickering*, 391 U.S. at 569.

editor regarded a bond issue that was the subject of public debate and was slated to come before voters; on such a topic, the Court proclaimed, "free and open debate is vital to informed decisionmaking by the electorate."⁸⁰ Pickering's letter was a model of speech on a matter of clear public concern, so it was not necessary to parse the gray area between public concerns and private matters.⁸¹

In 1983, the Court took the opportunity in *Connick v. Myers*⁸² to further explain and develop the "public concern" step of the *Pickering* test.⁸³ Sheila Myers, an assistant district attorney in New Orleans, developed concerns about some management decisions made by her supervisors, so she distributed a questionnaire to her coworkers in the district attorney's office about their level of confidence in supervisors, whether they felt pressured to engage in political campaigning, and other grievances.⁸⁴ Myers' supervisors immediately terminated her for insubordination.⁸⁵ The Supreme Court held that Myers' conduct in distributing the questionnaire was an extension of a private dispute between her and her supervisors, and did not touch on a matter of public concern.⁸⁶ If the employee's speech does not touch on a matter of public concern, then the restriction is treated as a private personnel matter, rather than a state restriction on speech.⁸⁷ The Court determined that because Sheila Myers' questionnaire was not speech on a matter of public concern the First Amendment was not implicated, and there was no need to conduct further analysis.⁸⁸ The dissent in *Connick* argued that these were issues related to the performance of an elected public official (the district attorney), and therefore were clearly of public concern.⁸⁹ The majority disagreed, finding instead that the employer deserved some latitude in regulating such speech because "[t]o presume that all matters which transpire within a government office are of public

80. *Id.* at 571-72.

81. *Id.*

82. 461 U.S. 138 (1983).

83. *Id.* at 140.

84. *Id.* at 140-41.

85. *Id.* at 141.

86. *Id.* at 148.

87. *Id.* at 147.

88. *Id.* at 154.

89. *Id.* at 156 (Brennan, J., dissenting) ("It is hornbook law . . . that speech about the manner in which government is operated or should be operated is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment." (internal quotations omitted)).

concern would mean that virtually every remark . . . would plant the seed of a constitutional case.”⁹⁰

The *Connick* opinion adopted a narrow view of what constitutes a “public concern,” characterizing the speech in *Pickering* and its antecedents and progeny as involving the right to participate in politics and engage in expressive conduct “relating to any matter of political, social, or other concern to the community.”⁹¹ Subsequent to *Connick*, however, many courts have erred more on the side of the speaker in defining matters of public concern; the line that has been drawn is essentially between personnel issues and internal workplace disputes, and almost everything else.⁹² The internal operations of public schools are arguably even more important to the public than in other public offices such as the district attorney, due to the special place schools occupy in the life of the community.⁹³ This concept was fundamental to the *Pickering* decision: the voters have an interest in how their local schools are being managed, and teachers are especially well situated to provide that information.⁹⁴

Although *Connick* did not take place in the school context, it is generally seen as a companion to *Pickering* and is applied to teachers as well as any other state employee.⁹⁵ Thus, most First Amendment claims by public school teachers are decided using the two-step

90. *Id.* at 149 (majority opinion).

91. *Id.* at 144–46.

92. *See, e.g.,* *Altman v. Minn. Dep’t of Corr.*, 251 F.3d 1199, 1202 (8th Cir. 2001) (finding that the way the corrections department dealt with the issue of gays in the workplace “affects the performance of their public duties and is a matter of political and social concern to the general public,” and therefore employees’ protests at a sensitivity training seminar were speech on a matter of public concern); *Tucker v. Cal. Dep’t of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996) (noting that “[t]his circuit and other courts have defined public concern speech broadly to include almost any matter other than speech that relates to internal power struggles within the workplace” (emphasis omitted)); *Nat’l Treasury Employees Union v. United States*, 990 F.2d 1271, 1273 (D.C. Cir. 1993) (observing that the distinction between public concern speech and nonpublic concern speech “was between issues of external interest as opposed to ones of internal office management” and that the term “public concern” refers “not to the number of interested listeners or readers but to whether the expression relates to some issue of interest beyond the employee’s bureaucratic niche”), *aff’d in part, rev’d in part*, 513 U.S. 454 (1995).

93. *See supra* note 56 (discussing the Supreme Court’s recognition of the special role of teachers as purveyors of society’s values and morals).

94. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571–72 (1968).

95. *See, e.g.,* *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444, 449 (6th Cir. 1984) (applying *Connick* to find teacher’s private speech not protected under *Pickering* “public concern” test).

Pickering-Connick test.⁹⁶ First, the courts decide whether the speech in question touched on a matter of public concern, as defined in *Connick*. If it does not, the inquiry ends and the speech is not protected by the First Amendment from state employer censorship or retaliation. If the speech does touch on a matter of public concern, then the court balances the employee's private interest in speaking out with the employer's interest in controlling his or her speech.

C. *Applications to Out-Speech*

In subsequent decisions, courts have repeatedly applied the *Pickering-Connick* test to free speech claims by gay civil servants, and teachers in particular. For example, in *Acanfora v. Board of Education of Montgomery County*⁹⁷ the Fourth Circuit found public advocacy by a gay teacher to be protected under *Pickering*, although it still allowed the school to fire him.⁹⁸ The Montgomery County, Maryland, school system hired Joseph Acanfora as a junior high school science teacher.⁹⁹ A few weeks after school began the administration discovered that Acanfora was a homosexual and in college had been an active member of an organization called "Homophiles of Penn State."¹⁰⁰ Acanfora was quickly transferred to a position with no student contact.¹⁰¹ During his appeal of the decision to transfer him, Acanfora gave several media interviews about his treatment by the school system.¹⁰²

The Fourth Circuit found that Acanfora's membership in the Homophiles organization and his subsequent media interviews about the school system's handling of his homosexuality were a matter of public concern under *Pickering*.¹⁰³ Specifically, the court held that because these activities caused no disruption at school or impairment of his teaching capacities, the school board's actions violated his First Amendment rights and were not justified by *Pickering*.¹⁰⁴ Nonetheless, the court found Acanfora lacked standing to challenge his dismissal because his failure to list the homosexual organization

96. See generally SCHNEIDER, *supra* note 57, at 510-14 (describing the mode of inquiry into whether a teacher's speech is protected by the First Amendment, beginning with *Pickering* and including *Connick*).

97. 491 F.2d 498 (4th Cir. 1974).

98. *Id.* at 503-04.

99. *Id.* at 500.

100. *Id.* at 499-500.

101. *Id.* at 500.

102. *Id.*

103. *Id.* at 500-01.

104. *Id.*

on his teaching application amounted to a lie, and estopped him from challenging the constitutionality of the question on the application.¹⁰⁵

Ten years later, the Tenth Circuit invalidated a state statute governing teachers on grounds that it punished speech protected by *Pickering*. In *National Gay Task Force v. Board of Education of Oklahoma City*,¹⁰⁶ the Tenth Circuit struck down part of an Oklahoma statute¹⁰⁷ that allowed for punishment or dismissal of teachers for “public homosexual conduct,” which was defined as “advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity.”¹⁰⁸ The court found the statute was overbroad to the extent that it punished speech that might be allowed under *Pickering* and *Tinker*.¹⁰⁹ The court pointed out that the First Amendment protects public advocacy, even of illegal conduct (as sodomy was at that time), as long as that advocacy is not “directed to inciting or producing imminent lawless action.”¹¹⁰

In addition to public advocacy, some courts have also applied *Pickering* and *Connick* to out-speech by gay teachers that becomes known in the school community, but would not be considered a public statement in the same sense as a media interview. In the leading case on this question, *Rowland v. Mad River Local School District*,¹¹¹ the Sixth Circuit declared that “coming out” was not a matter of public concern.¹¹² In *Rowland*, the school suspended, transferred to an administrative position, and ultimately dismissed a guidance counselor after she told administrators and coworkers, in private conversations, that she was bisexual and had a female lover.¹¹³ The jury found the decision to suspend her was motivated at least in part by her statements regarding her bisexuality, and the trial judge entered a verdict against the school board on both free speech and equal protection grounds.¹¹⁴ Between Ms. Rowland’s trial and the school board’s appeal before the Sixth Circuit, the Supreme Court handed down *Connick*.¹¹⁵ Using *Connick*’s public concern test, the

105. *Id.* at 504. Interestingly, the Montgomery County administrators admitted that had Acanfora been honest on his application, they would not have hired him. *Id.* at 501.

106. 729 F.2d 1270, 1274 (10th Cir. 1984), *aff’d* by an equally divided court, 470 U.S. 903 (1985).

107. OKLA. STAT. ANN. tit. 70, § 6-103.15 (West 2002) (repealed 1989).

108. *Nat’l Gay Task Force*, 729 F.2d at 1274.

109. *Id.* at 1275.

110. *Id.* at 1274 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

111. 730 F.2d 444 (6th Cir. 1984).

112. *Id.* at 449.

113. *Id.* at 446.

114. *Id.* at 447.

115. *Id.* at 449 (citing *Connick v. Myers*, 461 U.S. 138 (1983)).

Sixth Circuit reversed the lower court's verdict, and found that Ms. Rowland's statements were not protected by the First Amendment.¹¹⁶ The court considered two types of evidence in determining that Ms. Rowland's speech was not a matter of public concern: the content and the context in which she spoke.¹¹⁷ The court found "[t]here was absolutely no evidence of any public concern in the community or at Stebbins High with the issue of bisexuality among school personnel when she began speaking to others about her own sexual preference."¹¹⁸ Moreover, the court saw the fact that Ms. Rowland had asked the school secretary to keep her disclosure of her bisexuality in confidence as evidence of the nonpublic nature of her speech.¹¹⁹

The result in *Rowland* could lead to the somewhat ironic conclusion that a teacher would be more likely to find First Amendment protection for public out-speech than for quiet discussions with coworkers. If Ms. Rowland had written a letter to the local newspaper about the school system's policy regarding the employment of gay teachers and identified herself as bisexual in the letter, a court applying *Pickering* would be almost certain to identify this as speech on a matter of public concern.¹²⁰ Surely a school board concerned with community disapproval of gay teachers would prefer that its teachers not face this perverse incentive.

However, the Supreme Court has specifically held that an employee's choice to express herself in one-on-one conversation, rather than in a public declaration, does not preclude First Amendment protection. In *Givhan v. Western Line Consolidated School District*,¹²¹ a teacher faced dismissal after a series of private encounters with her principal in which she criticized school district policies and practices that she considered racist.¹²² The Fifth Circuit concluded that the teacher's speech was not protected under *Pickering* because she expressed her concerns in private.¹²³ The Supreme Court reversed, stating that its previous holdings "do not support the conclusion that a public employee forfeits his protection

116. *Rowland*, 730 F.2d at 449.

117. *Id.*

118. *Id.*

119. *Id.*

120. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571-72 (1968) (characterizing school board policy as a matter of public concern, and one about which teachers as a class are likely to be informed and have definite opinions).

121. 439 U.S. 410 (1979).

122. *Id.* at 412-13.

123. *Ayers v. W. Line Consol. Sch. Dist.*, 555 F.2d 1309, 1318 (5th Cir. 1977).

against governmental abridgement of freedom of speech if he decides to express his views privately rather than publicly.”¹²⁴ The Court did note, however, that while a *Pickering* analysis of public speech generally focuses on content alone, private expression may require the consideration of the time, place, and manner of speech as well.¹²⁵ Taken together, therefore, the holdings in *Rowland* and *Givhan* lead to the conclusion that, while a teacher will not be automatically penalized for discussing her sexuality privately with her supervisors or colleagues as opposed to announcing it publicly, her decision to keep it quiet may be considered as evidence that it is not a matter of public concern.

Lower courts have repeatedly used the *Rowland* approach, applying *Pickering* and *Connick* to cases of retaliation against expressions of nonheterosexual orientation. The most recent example is the Eleventh Circuit’s decision in *Shahar v. Bowers*.¹²⁶ Robin Shahar accepted a job offer in the office of Georgia Attorney General Michael Bowers after she graduated from law school.¹²⁷ When it became known in the office that Shahar was planning to wed another woman, her offer was rescinded.¹²⁸ The court applied *Pickering* and found that the State had a strong interest in not allowing people who publicly did not support its laws (such as bans on sodomy and gay marriage) to hold positions with the responsibility to uphold those laws, and this State interest outweighed Shahar’s interest in engaging in constitutionally protected free expression of her lesbianism.¹²⁹ Because the court found for Shahar’s employers in

124. *Givhan*, 439 U.S. at 414; see also *Rankin v. McPherson*, 483 U.S. 378, 384–87 (1987) (holding employee’s disparaging comment about President Reagan to a coworker touched on a matter of public concern).

125. *Givhan*, 439 U.S. at 415 n.4; see also Schoen, *supra* note 66, at 15–16 (discussing the impact of *Givhan* footnote 4).

126. 114 F.3d 1097 (11th Cir. 1997) (en banc); see also *Johnson v. Orr*, 617 F. Supp. 170, 176 (E.D. Cal. 1985) (employing *Pickering* and *Connick* in a case challenging the military’s then-policy of automatically discharging homosexuals, to find that a soldier’s letter to her supervisor disclosing her homosexuality was not speech on a matter of public concern), *aff’d*, 787 F.2d 597 (9th Cir. 1986).

127. *Shahar*, 114 F.3d at 1100. Attorney General Bowers had just successfully defended his State’s sodomy laws before the Supreme Court. See *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

128. *Shahar*, 114 F.3d at 1100–01. Shahar told her future employer that she would be getting married before starting work, but the same-sex nature of the marriage came to his attention after an attorney from the office ran into Shahar and her partner at a local restaurant, where they were working on their wedding invitations. *Id.*

129. *Id.* at 1104–05. The precedential value of *Shahar* is called into question by the subsequent decision in *Lawrence v. Texas*, because the Eleventh Circuit placed much weight on Shahar’s presumed difficulty in upholding and enforcing Georgia’s sodomy

the balancing test, it chose to assume without deciding that the applicant's conduct in having such a wedding ceremony was protected speech on a matter of public concern.¹³⁰

D. Pickering Is the Wrong Test for Out-Speech

The use of *Pickering* and *Connick* to analyze out-speech by teachers can lead to absurd results, as demonstrated by the *Rowland* case—the absurdity being that Ms. Rowland would apparently have been protected by the First Amendment had she discussed her sexuality in response to a reporter's queries, but was not protected because she chose to discuss it privately.¹³¹ The post-*Romer* and post-*Lawrence* era has not seen a new rash of gay teacher plaintiffs, so it is impossible to have a clear idea of how most courts today might apply or depart from the precedents of the 1970s and 1980s. This is in part due to the nature of the problem of stifling free speech; when schools are successful in preventing or punishing out-speech by teachers, the result is silence. The continued existence of precedents like *Rowland* may also discourage many gay teachers from bringing suit when their employers censor or punish their self-expression. As the stories of Gerry Crane and other teachers described in the Introduction demonstrate, however, a lack of widespread litigation should not be interpreted as widespread tolerance of teacher out-speech by school administrators.¹³² The possibility that the teachers named in lawsuits and news reports represent many more who have remained silent

laws, and the *Lawrence* decision held similar laws invalid. See *Lawrence*, 539 U.S. at 577–79.

130. See *Shahar*, 114 F.3d at 1106 n.19 (stating that the court will assume a right in order to proceed to the *Pickering* balancing test). More recently, a federal district court judge in Utah applied *Pickering* to the case of Wendy Weaver, the teacher discussed in the Introduction who brought a First Amendment claim after her private acknowledgements of her sexuality led to public controversy and, eventually, action against her by her school board. See *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1280 (D. Utah 1998). As will be discussed in more detail below, see *infra* notes 140–42 and accompanying text, the court in *Weaver* used the same *Pickering* test used in *Rowland* but came to the opposite conclusion, finding that Ms. Weaver's revelations did touch upon a matter of public concern and were protected by the First Amendment. However, this different result further highlights how poor a tool *Pickering* is for analyzing private out-speech by teachers. See *infra* notes 155–57 and accompanying text.

131. See also *Johnson v. Orr*, 617 F. Supp. 170, 176 (E.D. Cal. 1985) (finding plaintiff soldier's letter to her supervisor admitting her homosexuality was not a matter of public concern).

132. See *supra* notes 14–19 and accompanying text.

makes it all the more important that this area of First Amendment jurisprudence be clarified.¹³³

There are two ways to criticize the reasoning in *Rowland* and its progeny. The first is that *Rowland* is incorrect because it ignores the reality that, in today's society, a public school teacher's sexual orientation is inherently a matter of public concern.¹³⁴ This approach has some commonsense appeal, but it sets a problematic precedent by relying on the community's reaction to the teacher's speech as a measure of how much protection it should receive. The second and more persuasive criticism is that *Rowland* and other cases fail because they do not involve the type of facts that *Pickering* and *Connick* were meant to cover in the first place. *Pickering* and *Connick* concerned state employees who made statements meant to bring public attention to some condition within a government agency, not statements of private self-expression completely unrelated to the speaker's government employ.

The first argument, that homosexuality is inherently a matter of public concern under *Pickering*, was originally raised by Justice Brennan in his dissent from the Supreme Court's denial of certiorari to the *Rowland* case.¹³⁵ Brennan recalled that *Connick* recognized some issues as "inherently of public concern," such as racial discrimination.¹³⁶ In Brennan's view, the current public debate on homosexuality also falls into that category:

I think it impossible not to note that a similar public debate is currently ongoing regarding the rights of homosexuals. The fact of petitioner's bisexuality, once spoken, necessarily and ineluctably involved her in that debate. Speech that "touches upon" this explosive issue is no less deserving of constitutional attention than speech relating to more widely condemned forms of discrimination.¹³⁷

In other words, at least in the 1980s when *Rowland* was decided, any statement about homosexuality automatically involved the speaker in a larger public debate.

133. See Yared, *supra* note 16, at 22 (describing how Gerry Crane's public struggle mirrors many private struggles and may lead some teachers to face increased anxiety and choose to remain closeted).

134. See, e.g., *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009 (1985) (Brennan, J., dissenting from denial of certiorari).

135. *Id.* at 1012 (citing *Connick v. Myers*, 461 U.S. 138, 148 n.8 (1983)).

136. *Id.*

137. *Id.* (footnote omitted).

Brennan's commonsense approach has resonated with at least one federal judge, who relied on his argument in deciding the case of Wendy Weaver, the teacher discussed in the Introduction.¹³⁸ Ms. Weaver's homosexuality became a public controversy after it was disclosed to certain administrators by another party and then confirmed in a private conversation between teacher and student.¹³⁹ Ms. Weaver's case involved just the type of situation of concern to Brennan in his dissent: a teacher who discussed her sexual orientation only in private conversation, and only in response to direct questioning from a student and administrators, and yet whose school and community turned those private revelations into a public controversy.¹⁴⁰ In finding that the administrators' memo requiring Ms. Weaver not to speak of her orientation violated her First Amendment rights, the district court relied principally on Brennan's *Rowland* dissent:

[I]t could be said that a voluntary "coming out" or an involuntary "outing" of a gay, lesbian, or bisexual teacher would always be a matter of public concern. Indeed, the public reaction in the Nebo School District to the rumors about Ms. Weaver's sexual orientation clearly evidence public concern over her sexual orientation.¹⁴¹

The *Weaver* opinion also referenced a recent public debate in Utah concerning the sexual orientation of a candidate for state legislature as evidence that, at least in Utah, questions of sexual orientation are almost always a matter of public concern.¹⁴² Thus, the social reality on which Brennan relied in 1985 had not changed significantly by the time Ms. Weaver arrived in federal court more than a decade later.

138. See *supra* notes 1–12 and accompanying text (discussing Ms. Weaver's story).

139. See *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1281 (D. Utah 1998).

140. For a discussion of the *Weaver* fact pattern, see *supra* notes 1–13 and accompanying text.

141. *Weaver*, 29 F. Supp. 2d at 1284 (citing *Rowland*, 470 U.S. at 1012 (Brennan, J., dissenting from denial of certiorari)).

142. *Id.* at 1284 n.3. In addition, the court found for Ms. Weaver under the *Pickering* balancing test, because the school could show no evidence of material and substantial disruption of the school's operations or educational mission. *Id.* at 1284–85. Although the Nebo School District did not appeal beyond the district court level, at least one Tenth Circuit judge has approved of the district court's holding in *Weaver*. See *Maldonado v. Altus*, 433 F.3d 1294, 1323 (10th Cir. 2006) (Seymour, J., concurring in part and dissenting in part) (discussing a suit by Hispanic city employees challenging a policy that required them to speak English and arguing that plaintiffs' use of Spanish proclaimed their identities and involved them in an ongoing public debate about "diversity in America and linguistic integration").

The merits of Brennan's approach are manifold. First, it simply recognizes a current social reality in which homosexuality and the homosexual lifestyle are hot topics in a wider cultural battle. Second, it recognizes the logical inference that if a community is concerned about the content of a teacher's speech, then it is a matter of public concern, whether or not it was initially intended as a private disclosure. Third, it prevents teachers from being punished for the indiscretion of school district personnel in handling sensitive information, as Ms. Rowland was when her requests for confidentiality were disregarded by her coworkers.

The drawback of this approach, however, is that First Amendment protection for out-speech still depends on the community's reaction to that speech, and specifically on a court finding public concern about the sexual orientation of teachers in a certain community.¹⁴³ In other words, the idea of an inherent public concern is subject to social change and the subjective impressions of judges. Brennan penned his *Rowland* dissent more than twenty years ago; today, while it would still apply in the communities where Wendy Weaver and Gerry Crane worked, a court in another community could find that school administrators censored a teacher's out-speech without evidence of public concern about the issue.¹⁴⁴ And yet, the changing landscape of social acceptance does not prevent teachers in certain communities from being silenced, by public protest in some instances, but perhaps also by over-cautious or prejudiced school administrators.

The difficulty of maneuvering within the *Pickering-Connick* "public concern" test when it comes to private coming-out speech should lead to a reexamination of the entire approach. The facts of *Pickering*, and the way in which the Supreme Court has subsequently used the case, show that the Court meant to apply the "public concern" test to state employees seeking to shine the light of day on revelations or grievances related to their government workplace. In *Pickering*, the teacher wrote a letter to the editor criticizing his school

143. See, e.g., Yared, *supra* note 16, at 22 (noting, in a discussion about *Acanfora*, that under a *Pickering* analysis "the teacher's First Amendment rights are dependent upon the ability of the students and parents to process the information that one of the teachers is gay").

144. The *Weaver* court, for example, was faced with an extreme reaction in a conservative Mormon community, so its application of Brennan's logic might not be as easy in another community. See *Weaver*, 29 F. Supp. 2d. at 1284 n.3 (taking notice of public debate concerning sexual orientation of a candidate for the Utah State Legislature); see also *supra* note 48 and accompanying text (discussing the results of a 2001 Gallup Poll finding that a sizable minority of Americans do not think gays should be teachers).

board and its use of funds.¹⁴⁵ In *Connick*, the plaintiff's questionnaire was intended to raise questions about the leadership of the district attorneys for whom she worked.¹⁴⁶ Both of these were attempts to bring public attention to matters the employee felt were being mishandled within a public agency. These situations deserve special protection, both because citizens have an interest in the operation of public agencies, for which they pay tax dollars, and because public employees are specially situated to provide that vital information.¹⁴⁷ For these reasons, the Court created in *Pickering* and *Connick* a special doctrine to deal with this difficult balancing of public and private interests.

This is not to say that the quest for public attention must be an indispensable element of a *Pickering* or *Connick* case. The Supreme Court made that explicit in *Givhan*, a decision that was grounded in solid public policy, to avoid the undesirable result—demonstrated in the *Rowland* case—that a public employee has an incentive to take her grievances about the management of her agency to the public rather than first raising them internally.¹⁴⁸ Still, the teacher in *Givhan* was expressing concerns about school policy and procedure, just as in *Pickering*.¹⁴⁹

In contrast, Ms. Rowland and Ms. Weaver were speaking about themselves, not their employers. In *Rowland v. Mad River*,¹⁵⁰ the Sixth Circuit found it significant that Ms. Rowland purposefully did not seek a public audience, a solid instinct after *Givhan*.¹⁵¹ However, the Sixth Circuit misused this fact when it concluded that if Ms. Rowland was speaking privately about her sexuality, her speech was clearly not of public concern and therefore did not deserve First Amendment protection.¹⁵² When the speaker is speaking privately

145. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968).

146. *Connick v. Myers*, 461 U.S. 138, 141 (1983).

147. *Pickering*, 391 U.S. at 572; see also *Altman v. Minn. Dep't of Corr.*, 251 F.3d 1199, 1202 (8th Cir. 2001) (finding that the way the corrections department dealt with the issue of gays in the workplace "affects the performance of their public duties and is a matter of political and social concern to the general public," and therefore employees' protests at a sensitivity training seminar were speech on a matter of public concern).

148. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415 (1979).

149. *Id.* at 412–13; see also *Cox v. Dardanelle Pub. Sch. Dist.*, 790 F.2d 668, 670–71 (8th Cir. 1986) (holding that under *Pickering*, the dismissal of a representative of the teachers' association who brought grievances to the principal and spoke out in disagreement with him violated the representative's First Amendment rights to speak out on a matter of public concern).

150. 730 F.2d 444 (6th Cir. 1984).

151. *Id.* at 449.

152. *Id.*

about a private and personal matter, the “public concern” test should be irrelevant.¹⁵³

In both *Pickering* and *Connick*, the fact that the employee’s speech was about her government employers was critical to the Court’s decision.¹⁵⁴ Because the speech was about the government employer, it made sense to inquire into whether the employee was speaking out as a citizen on a matter of public concern or as an employee on an internal personnel matter and, if the employee was speaking as a citizen, to balance government and employee interests before awarding First Amendment protection. Both *Pickering* and *Connick* are concerned with the opposing concerns of employee loyalty and the public’s need for information from inside its government agencies. When a teacher makes a statement about his own sexual orientation without seeking to engage in a wider political debate on the issue, that teacher is not broadcasting information gained through his special access as a public employee; he is imparting information only about himself, not about the operations of his school. As *Rowland* and subsequent cases demonstrate, the logic of *Pickering* and *Connick* is strained beyond its capacity when it is used to analyze speech that has nothing to do with one’s employer.

By this reasoning, the facts of *Connick* would still call for a court to apply the *Pickering* analysis, because the plaintiff in that case was seeking public discussion of management decisions made by her employer, the district attorney.¹⁵⁵ On the other hand, *Rowland* would not be a candidate for *Pickering* analysis because Ms. Rowland was expressing something about herself, not her employer. The *Shahar* case is a closer question because it is not clear whether Ms. Shahar intended with her commitment ceremony to make a public statement

153. See *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 480 (1995) (O’Connor, J., concurring in part and dissenting in part) (finding that a First Amendment claim by public employees regarding off-duty activity does not present the threshold “public concern” question, although it should still be analyzed under the balancing portion of *Pickering*); see also *Melzer v. Bd. of Educ.*, 336 F.3d 185, 196 (2d Cir. 2003) (noting that courts have questioned whether the public concern test is appropriate in cases of off-duty activity).

154. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568–70 (1968) (discussing the state’s interests in employee loyalty in the context of statements made by state employees that are critical of their employers); *Connick v. Myers*, 461 U.S. 138, 145–46 (1983) (discussing cases preceding and following *Pickering*, all dealing with speech critical of government employers); see also Schoen, *supra* note 66, at 8–9 (discussing the predominant role of the employer-employee relationship in employee claims under *Pickering* and the factors considered in the *Pickering* opinion, all of which were related to the fact that *Pickering*’s speech was critical of his government employer).

155. See *supra* notes 84–87 and accompanying text (discussing the facts of *Connick*).

about the state attorney general's prosecution of antisodomy laws or other discriminatory policies; but in the absence of evidence that she had such intent, her commitment ceremony was a private statement of private beliefs, and as such should not fall under *Pickering*.¹⁵⁶ By employing this logic, the *Weaver* court, although commendable for its instinct to protect Ms. Weaver's First Amendment rights, erred in relying on *Pickering*.¹⁵⁷

Instead, the teacher who faces retaliation for expressing her own sexual orientation should be able to seek First Amendment protection under the general standard of *Tinker*.¹⁵⁸ *Tinker* dealt with the expression of personal convictions, not statements about the school itself, and therefore is closer to the situation of a teacher speaking about sexual orientation than is the *Pickering* analysis.¹⁵⁹ Under *Tinker*, the state must justify its desire to censor or sanction a teacher's speech by reference to its core educational mission and a showing of "material or substantial disruption" of the operation of its schools.¹⁶⁰

The principals of the schools where Ms. Rowland, Ms. Weaver, and Mr. Crane worked could certainly demonstrate that their schools had been disrupted.¹⁶¹ In the case of Ms. Weaver, students quit the volleyball team, and administrators fielded phone calls and held multiple meetings on the issue of Ms. Weaver's sexuality.¹⁶² At Mr. Crane's school, parents pulled their children out of his class, and even

156. See *supra* notes 127–30 and accompanying text (discussing the facts of *Shahar*).

157. See *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1283–84 (D. Utah 1998) (applying the *Pickering* analysis).

158. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (holding that in order to justify a prohibition on certain expression, the state must show at least that it would or did "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966))).

159. See *id.* at 504 (describing the student speech at issue, a protest against the Vietnam War).

160. *Id.* at 509 (finding that the Court's "independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students").

161. See *supra* notes 12–13 and accompanying text (discussing community reaction to Ms. Weaver); *supra* notes 15–17 and accompanying text (discussing community campaign to oust Mr. Crane).

162. *Weaver*, 29 F. Supp. 2d at 1281.

those parents with no objection to his teaching found themselves the subject of mailings and flier campaigns led by other parents.¹⁶³

However, the language of the *Tinker* opinion makes clear that this type of disruption is not the type that should justify suppressing First Amendment rights. The “heckler’s veto” is a proposition of First Amendment jurisprudence that prevents private citizens from being able to censor free expression by reacting in such a disruptive manner that the state shuts down the speech itself.¹⁶⁴ The essence of the heckler’s veto doctrine is that courts must separate the speech from the resulting disruption, and determine whether the disruption was truly caused by the speaker or instead by her opponents. The classic example arose in the 1949 Supreme Court decision in *Terminello v. Chicago*.¹⁶⁵ Terminello gave a speech to a large audience in a public meeting hall; outside, an angry crowd of protesters condemned his speech and created a violent disturbance.¹⁶⁶ Terminello was charged and convicted under a city ordinance forbidding anyone to aid or assist in any riot, disturbance, or breach of peace.¹⁶⁷ The Supreme Court reversed his conviction, holding that the ordinance as applied violated Terminello’s First Amendment right to freedom of speech.¹⁶⁸ The *Terminello* Court stated clearly that:

[S]peech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive

163. See Jill Smolowe, *The Unmarrying Kind: Focusing on Local Targets, Religious Conservatives Wage a Fervent Campaign to Stomp Out Gay Rights*, TIME, Apr. 29, 1996, at 68, 68–69 (describing harassment campaign against Gerry Crane).

164. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 33 (2004) (holding that to allow one objecting parent to end the voluntary recitation of the Pledge of Allegiance by willing students would be an unwarranted “heckler’s veto”); *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (striking down a law that would allow citizens to censor indecent speech on the internet simply by suggesting that an under-eighteen-year-old might be listening).

165. 337 U.S. 1 (1949).

166. *Id.* at 2–3. The Court’s opinion is not specific about the contents of Terminello’s speech, other than to note that he “vigorously, if not viciously, criticized various political and racial groups.” *Id.*

167. *Id.* at 2 n.1.

168. *Id.* at 4.

evil that rises far above public inconvenience, annoyance, or unrest.¹⁶⁹

Tinker makes clear that expressing concern for “disruption” of the school community is not opening the door for a heckler’s veto:

[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression Any word spoken in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.¹⁷⁰

The disruption to the Nebo school community caused by Ms. Weaver’s disclosure of her homosexuality, just like that caused by Ms. Rowland’s disclosures more than twenty years earlier, were not caused by those teachers—who in fact took strides to avoid public conflict—but by the actions of colleagues and parents.¹⁷¹ To allow those reactions to serve as a legitimate basis for school actions to “closet” gay teachers would be to allow the quintessential heckler’s veto.¹⁷²

This reasoning can be extended to create a sort of estoppel in situations where a school’s actions, not the teacher’s speech, create a public controversy over the teacher’s “coming out.” The *Weaver* decision highlighted this problem, stating that “[e]ven if Ms. Weaver’s statement about her sexual orientation in response to a question is not viewed as a matter of public concern, the actions of the

169. *Id.* (citation omitted).

170. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969) (citation omitted).

171. *See Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1285 (D. Utah 1998) (finding that the inquiries and complaints the school received are not evidence of substantial disruption of the school community).

172. The Second Circuit has taken the opposite view on this point. *See Melzer v. Bd. of Educ.*, 336 F.3d 185 (2d Cir. 2003). In declining to find a heckler’s veto caused by parental disruption, the court stated that “[p]arents are not outsiders seeking to heckle Melzer into silence, rather they are participants in public education, without whose cooperation public education as a practical matter cannot function. Any disruption created by parents can be fairly characterized as internal disruption to the operation of the school” *Id.* at 199. The *Melzer* case can be distinguished from cases involving gay teachers by its extreme facts; Mr. Melzer was in fact advocating sexual relationships with boys the same age as his students, which is very different from homosexuality and gives rise to legitimate anxiety and disruption of his ability to teach. *See id.* at 189, 198.

defendants . . . transmuted what should have been a private issue into a matter of public concern.”¹⁷³ These actions began when Ms. Weaver’s ex-husband spoke to faculty members and administrators about her sexual orientation—before she had ever spoken about it—and the information spread into the community, sparking calls from community members and meetings about the topic among administrators.¹⁷⁴ The district court stated that, in its *Pickering* analysis, the behavior of Ms. Weaver’s employers in spreading the information around the school system and into the community should preclude those defendants from later claiming that her sexuality was merely a private matter.¹⁷⁵ This conclusion would follow equally had the court used a *Tinker* analysis: any disruption of the school community resulted from the actions of the school administrators, and therefore they should be estopped from citing it as a justification for silencing Ms. Weaver.

In addition, a school should not be able to legitimately base its suppression of teachers’ out-speech on those disruptive actions that are caused by private anti-gay prejudice.¹⁷⁶ “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”¹⁷⁷ The *Romer* decision highlights a judicial shift from considering animus against homosexuals to be an acceptable government rationale, to treating it like any other racial, ethnic, or religious bias.¹⁷⁸ Especially after *Romer*, instances of personal animus should not weigh on the side of the school in any decision to sanction the teacher for his speech. If, for example, a teacher’s participation in a gay pride parade resulted in complaints from parents or students

173. *Weaver*, 29 F. Supp. 2d at 1284.

174. *Id.*

175. *Id.*

176. *See Romer v. Evans*, 517 U.S. 620, 634 (1996) (stating that animus toward an unpopular group “cannot constitute a *legitimate* government interest” (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973))).

177. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (referring to the potential effect of racial prejudice on a biracial child); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (holding the city may not give effect to the prejudices of community members against the mentally retarded); *Weaver*, 29 F. Supp. 2d at 1289 (holding that a school cannot take action against a teacher because of a negative community reaction that is based purely on private antipathy against homosexuals).

178. *See Romer* 517 U.S. at 634–35 (stating that animus toward an unpopular group, specifically homosexuals, “cannot constitute a *legitimate* government interest” (quoting *Moreno*, 413 U.S. at 534)); *see also, e.g., Norton v. Macy*, 417 F.2d 1161, 1166 (D.C. Cir. 1969) (suggesting ways in which private homosexual activity by an employee might impair a government agency, including the potential for blackmail, providing evidence of an “unstable personality,” and causing disruptions because of the reactions of other employees or the public).

because they feel that such a stance is immoral and those who advocate it are per se unfit to be teachers, the resulting disruption in the school's operation is caused not by the teacher, but by the private prejudices of those parents or students. In addition, any disruption of the working relationship between the teacher and her supervisor or colleagues is likely to result only if those coworkers find homosexuality distasteful.¹⁷⁹

This is not to say that teachers can engage in any and all expressive activities related to sexuality without consequence. Teachers' contracts are generally subject to state law provisions about their "fitness" to teach, and many still contain "immorality" clauses.¹⁸⁰ Courts must still determine whether a parental complaint is motivated wholly by animosity toward the teacher's viewpoint or expresses a legitimate concern about fitness to teach. These are, to a point, subjective judicial judgments. In the 1970s, public out-speech by a teacher was considered legitimate grounds for concern about his mental health¹⁸¹ or fitness to teach.¹⁸² Today, many would agree that those decisions arose from unfounded stereotypes about gay people.

However, a recent Second Circuit decision, *Melzer v. Board of Education*,¹⁸³ demonstrates that even today, courts must make value judgments about what type of expression gives rise to legitimate parental concerns. Mr. Melzer, a high school teacher, was an active member of, and occasionally wrote newsletters for, the North American Man-Boy Love Association ("NAMBLA"), an organization that advocates for the abolition of laws limiting sexual

179. The Court in *Pickering* was especially concerned with the effect, or lack of effect, that the teacher's speech might have on relationships with and among administrators and coworkers, especially when that speech is about his employer. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569–70 (1968).

180. See, e.g., N.C. GEN. STAT. § 115C-325(b) (2005) (stating the grounds for dismissal of a career employee, including "immorality"); see also *Shaw v. Minn. Bd. of Teaching*, No. C0-00-2173, 2001 Minn. App. LEXIS 609, at *22–23 (Minn. Ct. App. June 5, 2001) (upholding a two-year suspension of a teaching license under an "immoral conduct" provision of a state teaching statute, after a teacher engaged in homosexual conduct in a public bathroom); Jason R. Fulmer, *Dismissing the "Immoral" Teacher for Conduct Outside the Workplace*, 31 J.L. & EDUC. 271, 272 n.10 (2002) (listing a sample of state statutes that make "immorality" grounds for dismissal).

181. See *Gish v. Bd. of Educ.*, 366 A.2d 1337, 1341–42 (N.J. Super. Ct. App. Div. 1976) (per curiam) (holding that a school board acted rationally in determining that a teacher's decision to assume the presidency of the New Jersey Gay Activists Alliance displayed evidence of deviation from normal mental health, and ordering him to undergo psychiatric examination).

182. *Gaylord v. Tacoma Sch. Dist.*, 559 P.2d 1340, 1347 (Wash. 1977).

183. 336 F.3d 185 (2d Cir. 2003).

activity between adult men and underage boys.¹⁸⁴ There was no evidence that Mr. Melzer had ever engaged in inappropriate sexual conduct with any of his students.¹⁸⁵ The Second Circuit applied *Pickering* and found that, because of NAMBLA's mission of advocating social change, Mr. Melzer's association with this group was probably speech on a matter of public concern.¹⁸⁶ Nonetheless, under *Pickering*'s balancing test, the court found that Melzer's employers did not violate the First Amendment by terminating him.¹⁸⁷ The court was convinced that the anxiety his beliefs would cause students and parents would likely cause substantial disruption—from students unable to concentrate in class or unwilling to be alone with their teacher, to parents removing their children from his class.¹⁸⁸ The *Melzer* opinion does note that the government generally may not help members of the public express their anger against the expression of unpopular ideas, but seems to find (without explicitly stating) that the reaction of parents to Melzer's particular beliefs is more than just personal prejudice or animus.¹⁸⁹ This example does not serve by any means to place pedophilia on the same spectrum of scenarios as homosexuality, but simply to demonstrate that courts must make value judgments in determining the outer limits of protected private speech.

Today's courts are not without guidance in making this distinction between prejudice and legitimate concern. The Supreme Court's decisions in *Romer* and *Lawrence* demonstrate that, at the very least, gay Americans are now to be treated as a legitimate social and political group.¹⁹⁰ Thus, acknowledging one's own sexual

184. *Id.* at 189 (describing NAMBLA and Melzer's self-described pedophilia). Mr. Melzer did not make his membership public, but was "outed" as a NAMBLA member during an undercover investigation by a local television station. *Id.* at 191.

185. *Id.* at 189.

186. *Id.* at 196 (noting that the plaintiff's association with NAMBLA would probably pass the public concern test, but not explicitly holding that it does because it is not essential to the outcome, as the plaintiff loses in the balancing portion of *Pickering* analysis).

187. *Id.* at 198–99.

188. *Id.*

189. *Id.* at 199 ("We acknowledge the truism that community reaction cannot dictate whether an employee's constitutional rights are protected. We also recognize that allowing the public, with the government's help, to shout down unpopular ideas that stir anger is generally not permitted under our jurisprudence. . . . Yet, Melzer's position as a teacher leaves him somewhat beholden to the views of parents in the community." (citations omitted)).

190. See Leslie, *supra* note 42, at 215 (noting that "*Lawrence* is a historic landmark because it changes the entire relationship between gay Americans and their Supreme Court" by virtue of the fact that the Court agreed to hear the case at all). See generally

orientation or expressing support for gay issues is an expression of membership in this social group or solidarity with its members; this type of speech must fall on the “protected” side of the line drawn by the First Amendment, even in the more restricted environment of the public school.¹⁹¹

III. OUT-SPEECH INSIDE THE CLASSROOM

The teachers whose cases are addressed in Part II all made statements about their sexual orientation outside the context of the classroom. This Part will conduct a separate analysis of teacher out-speech that occurs in a classroom setting. Courts evaluate speech in the classroom (and other “curricular” settings)¹⁹² in a very different way from speech outside the classroom. This reflects the difference between clearly personal acts of expression (like the black armbands at issue in *Tinker*), and occasions when observers might believe that the speaker is speaking for the school.¹⁹³ Teachers’ First Amendment freedom of speech is more limited in the classroom than outside it. However, this Comment argues that schools must still exercise this heightened control in a narrowly tailored and viewpoint neutral manner.

When the issue arises of whether certain speech in the school setting could be attributed to the school or the state itself, courts have

Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2003) (noting that the importance of *Lawrence* goes far beyond sodomy laws, to the stereotypes and maltreatment that those laws were used to justify).

191. Note that, by extension, teachers and students must receive a certain amount of First Amendment protection in expressing a belief that homosexuality is wrong, as long as their expression does not infringe upon the rights of others or violate the *Tinker* standard. See, e.g., *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 955 (7th Cir. 2002) (holding in favor of the school district in an equal protection suit brought by a gay teacher who suffered a mental breakdown after alleged harassment by students and parents, and discussing the fine line schools must walk in not censoring students expressing sincere belief and the fact that schools have no control over the prejudices of parents).

192. See SCHNEIDER, *supra* note 57, at 374 (citing copious authority for the proposition that “curricular areas of the school typically are not public forums”).

193. See *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 777 (10th Cir. 1991) (expressly choosing to apply *Hazelwood* instead of *Pickering* to evaluate classroom speech by a teacher, because *Pickering* dealt with the state’s interest as an employer but not as an educator). The 2006 Supreme Court opinion in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), makes an explicit distinction between speech by a government employee while acting pursuant to his official duties, and speech by a government employee when acting as a citizen. *Id.* at 1960. This holding echoes the distinction made in this Comment between private speech and school-sponsored speech, although it is not clear what further ramifications the *Garcetti* decision will have on First Amendment cases in the school setting.

integrated the First Amendment concept of forum analysis, a concept that has not been used in the cases governed by *Tinker* or *Pickering* in which speech just happens to be on school grounds.¹⁹⁴ In brief, forum analysis is a First Amendment doctrine developed to accommodate the government's need to regulate freedom of expression on government property, depending on the geographical and social context.¹⁹⁵ Courts applying forum analysis have divided public property into three types of forums: public, limited public, and nonpublic. A public forum is a public place that "by long tradition or by government fiat ha[s] been devoted to assembly and debate."¹⁹⁶ When the state opens up public property to only certain types of expressive activity or discussion of certain subjects, it creates a limited public forum.¹⁹⁷ In a public forum, the government cannot impose content-based restrictions unless they are necessary to achieve a compelling government interest and are narrowly drawn to that end.¹⁹⁸ In limited public forums, the government may impose reasonable regulations on the content of speech in order to confine the forum to the purposes for which it was created.¹⁹⁹ In either public or limited public forums, any viewpoint-based restrictions of speech face a strong presumption of unconstitutionality.²⁰⁰

In the school context, for example, the Supreme Court has used the limited public forum concept to require that if a university has a policy of funding student publications, it cannot deny funds to those that espouse a religious viewpoint.²⁰¹ It has also held that if a school

194. See SCHNEIDER, *supra* note 57, at 371–72 (discussing the lack of forum analysis in *Tinker v. Des Moines* and subsequent confusion over whether it applies in schools).

195. For a full discussion of forum analysis, see CHEMERINKSY, *supra* note 53, at 1082–1111.

196. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

197. *Id.* at 46–47.

198. See, e.g., *Boos v. Berry*, 485 U.S. 312, 321 (1988); *Perry Educ. Ass'n*, 460 U.S. at 46–47. Public forums are divided into traditional public forums (like sidewalks and streets), and designated public forums, which the state has taken steps to open up to free expression. *Perry Educ. Ass'n*, 460 U.S. at 45–46.

199. See *Perry Educ. Ass'n*, 460 U.S. at 45–46 ("In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."); see also *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) (holding that "the total ban on using district property for religious purposes could survive First Amendment challenge only if excluding this category of speech was reasonable and viewpoint neutral").

200. See *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 828–29 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional . . . [V]iewpoint discrimination is thus an egregious form of content discrimination.").

201. *Id.* at 832–33.

district has a policy of allowing its buildings to be used by community groups after school hours, it cannot deny access only to religious groups.²⁰²

Finally, public property that is not opened for public communication by tradition or designation is a nonpublic forum, and the state may use reasonable content regulations to reserve this forum for its intended purposes, as long as the regulations are viewpoint neutral.²⁰³ For example, in *Perry Education Association v. Perry Local Educators' Association*,²⁰⁴ a group of teachers brought suit seeking access to the teachers' mailbox system in their school to distribute fliers for their organization.²⁰⁵ The Supreme Court held that the school district had not created a public forum with its internal mailbox system.²⁰⁶ Therefore, the school could reserve the forum for its intended purpose (allowing only communications from the official teachers' union) as long as the regulations were reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view."²⁰⁷ Also relevant in the school context is "government speech," which falls outside the spectrum of forum analysis.²⁰⁸ When the government itself is speaking through its representatives or agents, it can adopt a viewpoint to the exclusion of others, and it can take steps to make sure that its message is not garbled by the speakers.²⁰⁹

In public schools jurisprudence, most speech in the classroom or other curricular settings has been designated "school-sponsored"

202. *Lamb's Chapel*, 508 U.S. at 392–93.

203. *Perry Educ. Ass'n*, 460 U.S. at 46.

204. 460 U.S. 37 (1983).

205. *Id.* at 40.

206. *Id.* at 38–39. The Perry Township public school system had granted the official teachers' union (elected by the teachers as their bargaining representative) access to the mailbox system, and the plaintiff was a rival teachers' group that sought the same free access. *Id.*

207. *Id.* at 46.

208. See *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 626 n.5 (2d Cir. 2005) ("The Supreme Court has indicated . . . that when the government restricts its *own* speech, the appropriate level of judicial scrutiny falls somewhere off the . . . spectrum of forum analysis."), *cert. denied*, 126 S. Ct. 1880 (2006).

209. See *Rust v. Sullivan*, 500 U.S. 173, 192–93 (1991) (upholding federal regulations preventing recipients of Title X funding from engaging in advocacy of, counseling for, or referrals for abortion); see also *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000) (holding that a bulletin board placed by administrators in a school hallway was government speech and that administrators could restrict discussion of sexual orientation on the board to advocating tolerance, without allowing expression of opposing views).

speech, which is a school-specific type of nonpublic forum.²¹⁰ The Court began to distinguish school-sponsored speech from private expression in *Bethel v. Fraser*,²¹¹ a suit brought by a student who was disciplined after giving a bawdy speech at a school-sponsored student assembly.²¹² The Supreme Court held that the student's speech was not protected by the First Amendment, and preventing this kind of speech was properly a matter for the discretion of the school board.²¹³ The Court took pains to distinguish this type of student speech from the speech in *Tinker* because it was both intentionally disruptive and not related to the expression of a political viewpoint.²¹⁴ The *Bethel* opinion emphasized the school's role in inculcating " 'habits and manners of civility' " ²¹⁵ in the students, and its need to disassociate itself from the student's uncivil expression.²¹⁶ The Court also asserted that the school must consider the age and maturity level of the audience in making its decisions about what content is appropriate in school-sponsored speech.²¹⁷ These considerations demonstrate how the control the school exerts over speech in this forum was related to the purpose for which the forum was created.

Two years after *Bethel*, the Court further refined its attitude toward school-sponsored speech in *Hazelwood School District v. Kuhlmeier*.²¹⁸ In *Hazelwood*, a high school principal removed some content related to teenage pregnancy and divorce from a student newspaper produced by the high school journalism class.²¹⁹ The *Hazelwood* Court employed forum analysis and determined that the student newspaper was not a public forum, but instead was a "school-sponsored forum."²²⁰ As such, the school had the right to regulate content based on its legitimate pedagogical concerns, as well as its need to avoid the perception that the school was endorsing or

210. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267–70 (1988) (referring to a student newspaper as a "school-sponsored" forum).

211. 478 U.S. 675 (1986).

212. *Id.* at 677–79. The Court's opinion does not quote the student's speech, in support of a candidate for student government, but simply notes that "[d]uring the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor." *Id.* at 677–78.

213. *Id.* at 683.

214. *Id.* at 680.

215. *Id.* at 681 (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

216. *Id.* at 685–86.

217. *Id.* at 684.

218. 484 U.S. 260 (1988).

219. *Id.* at 263–64.

220. *Id.* at 267–70.

sanctioning certain statements.²²¹ In keeping with its longstanding tradition of deferring to the educational judgment of school boards, the Court made clear that when the context of certain speech can be seen as curricular, regulations on the content of that speech are properly left up to the school board.²²²

As with *Tinker*, the Court used language in *Hazelwood* that encompassed not just the student speech at issue but “the speech of students, teachers, and other members of the school community.”²²³ Federal courts have repeatedly employed *Hazelwood* to find that school administrators can and should reserve classrooms for the purpose of teaching a specific subject, and “if students’ expression in a school newspaper bears the imprimatur of the school, then a teacher’s expression in the ‘traditional classroom setting’ also bears the imprimatur of the school.”²²⁴

Courts have been uncertain on how to reconcile *Hazelwood* with other tests of speech in the schools,²²⁵ but at least one commentator has suggested that *Hazelwood* should only apply when the location or context of the speech, rather than its content, makes the speech objectionable to school authorities.²²⁶ In practice, this idea leads to the conclusion that while *Pickering* is the rule for most speech by teachers in public forums or outside the classroom, within the classroom the *Hazelwood* analysis dominates.²²⁷ Teachers’ classroom

221. *Id.* at 270–73.

222. *Id.* at 267 (holding that “[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board” (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986))).

223. *Kuhlmeier*, 484 U.S. at 267; see also SCHNEIDER, *supra* note 57, at 481–82 (citing inclusive language of *Hazelwood* opinion, but noting confusion among lower courts about the different degrees of protection afforded to teachers and students). *But see* Karen C. Daly, *Balancing Act: Teachers’ Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 12–13 (2001) (explaining that “[a]lthough lower courts have assumed otherwise, nothing in *Hazelwood* mandates the use of an identical standard for teacher and student” and that lower courts have not articulated a sufficient reason for their decision to do so).

224. *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 776 (10th Cir. 1991); see also *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993) (holding that a teacher could be denied tenure based on discussion of abortion in a biology classroom because “[l]ike the newspaper, a teacher’s classroom speech is part of the curriculum. Indeed, a teacher’s principal classroom role is to teach students the school curriculum. Thus, schools may reasonably limit teachers’ speech in that setting.”).

225. See SCHNEIDER, *supra* note 57, at 375 (describing the difficulty of reconciling *Hazelwood*’s forum analysis with *Tinker*).

226. See *id.* at 375–77 (setting forth the argument that “the Court intended that the material and substantial disruption test should be applied . . . where the restriction is unrelated to the character of the specific location where the speech is expressed”).

227. See, e.g., *Ward*, 996 F.2d at 452 (applying *Hazelwood* and making no reference at all to *Pickering* in finding that a high school biology teacher could properly be denied

speech is therefore subject to content-based regulations that are “reasonably related to a legitimate pedagogical interest.”²²⁸ Instead of focusing on the reaction to the speech, as the *Pickering* analysis does, the *Hazelwood* analysis of classroom speech focuses on the school’s reasons for restricting the speech.

The *Hazelwood* decision lists three types of legitimate pedagogical concerns that could justify restricting the content of expressive activities in the classroom or other settings “that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”²²⁹ These reasons include the need “to assure that [students] 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.”²³⁰

These rationales can cover a broad range of situations, as ensuing lower court decisions demonstrate. In *Miles v. Denver Public Schools*,²³¹ the plaintiff teacher was disciplined after he commented in class about what he saw as the declining quality of the school and made reference to a recent rumor about two students “making out” on the school tennis courts.²³² The Tenth Circuit held that the school advanced legitimate pedagogical interests under *Hazelwood* when it prevented the teacher from using his authority to confirm an unsubstantiated rumor; the school was ensuring professionalism and

tenure for a classroom discussion of abortion); *Miles*, 944 F.2d at 777 (expressly choosing to apply *Hazelwood* instead of *Pickering* to evaluate classroom speech by a teacher, because *Pickering* dealt with the state’s interest as an employer, but not as an educator); see also Daly, *supra* note 223, at 7–11 (discussing why *Pickering* is inapplicable to in-class speech).

228. *Miles*, 944 F.2d at 778; see also *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 628 (2d Cir. 2005) (regarding censorship of a student-produced poster that contained religious content), *cert. denied*, 126 S. Ct. 1880 (2006); *Ward*, 996 F.2d at 452 (finding that a school may regulate a teacher’s classroom speech if “the regulation is reasonably related to a legitimate pedagogical concern” and the teacher has some notice of what conduct is prohibited).

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

230. *Id.*; see also *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986) (discussing a school district’s need to prohibit lewd or age-inappropriate conduct). For an analogous discussion in the context of private employers, see Rachael Knight, Comment, *From Hester Prynne to Crystal Chambers: Unwed Mothers, Authentic Role Models, and Coerced Speech*, 25 BERKELEY J. EMP. & LAB. L. 481 (2004) (discussing cases in which an employer’s First Amendment right not to be associated with certain conduct of which it disapproves—which Knight terms “coerced speech”—has trumped an employee’s Title VII discrimination claim).

231. 944 F.2d 773 (10th Cir. 1991).

232. *Id.* at 774.

sound judgment among its teachers and preventing teachers from making statements about students that could embarrass them.²³³ In *Silano v. Sag Harbor*,²³⁴ the Second Circuit found that a school acted pursuant to legitimate pedagogical concerns when it censored a guest lecturer who showed a film clip of bare-breasted women to a tenth grade mathematics class, where the images were irrelevant and unnecessary to his ability to convey the information he was teaching, and were, in the school's judgment, inappropriate.²³⁵ These decisions show that courts tend to grant wide deference to school administrators' educational judgment when it comes to restricting classroom speech.²³⁶

A. Viewpoint Neutrality and Prior Notice Under *Hazelwood*

Courts operating under *Hazelwood* give greater deference to schools in censoring classroom speech, as opposed to private speech, as long as the restriction is motivated by concern "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

233. *Id.* at 778.

234. 42 F.3d 719 (2d Cir. 1994).

235. *Id.* at 723–24.

236. In 2006, the Supreme Court added a potential new wrinkle to this analysis with its decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006). Ceballos was a deputy district attorney who, as part of his job duties, investigated a warrant issued in a criminal case and wrote two memos to his supervisors stating that he felt the warrant was based on misrepresentation and the case should be dropped; he also testified to that effect on behalf of the defendant in a hearing on the subject. *Id.* at 1955–56. Ceballos claimed that he was thereafter subject to retaliation at work, including a transfer and a denied promotion. *Id.* at 1956. The Ninth Circuit applied a *Pickering-Connick* analysis, finding that Ceballos's speech was on a matter of public concern and deserved First Amendment protection. *Id.* The Supreme Court reversed, holding that Ceballos's speech was not protected by the First Amendment because he was speaking not as a citizen, but as an employee carrying out his official duties. *Id.* at 1960. Thus, the Court created a new distinction in public employee speech cases: is the employee speaking as a citizen—as the Court said the plaintiffs in *Pickering* and *Connick* were—or is he simply making statements pursuant to his official duties? *See id.* It is too early to tell how this decision will apply in the school setting. It would be logical to see a teacher delivering a lesson, at least, as speech in the performance of his or her official duties, and thus not protected under *Garcetti*. However, Justice Kennedy noted in the majority opinion that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence," and therefore explicitly did not decide whether the *Garcetti* analysis would apply to a case involving teaching. *Id.* at 1962. Based on this caveat, it is possible that, faced with another First Amendment case involving a teacher, the Court would still revert to its *Hazelwood* analysis.

are not erroneously attributed to the school.”²³⁷ However, the circuits are split over whether *Hazelwood* opened the door, not only to regulation of the content of classroom speech, but also to restrictions based specifically upon the viewpoint expressed—for instance, sanctioning a gay teacher for discussing her orientation or answering questions about homosexuality, but not imposing similar restrictions on straight teachers or discussions about other sexual orientations.²³⁸ The Second and Tenth Circuits have held that *Hazelwood* allows viewpoint discrimination as long as it is reasonably related to a legitimate pedagogical concern, while the Ninth and Eleventh Circuits have retained the notion that, even though *Hazelwood* does allow content-based restriction, the government is still barred from viewpoint discrimination in nonpublic forums.²³⁹ The district court in *Weaver* took up the latter distinction, finding that the school district committed viewpoint discrimination when it “only targeted speech concerning homosexual orientation and not heterosexual orientation.”²⁴⁰ As the *Weaver* verdict was not appealed to the Tenth Circuit, it is unclear whether this reasoning would have survived appellate scrutiny.²⁴¹

237. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988); see also *Silano*, 42 F.3d at 722–23 (noting that “the Court also has recognized that public schools may limit classroom speech to promote educational goals”); *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993) (noting that “[i]t stands to reason that whether a regulation is reasonably related to legitimate pedagogical concerns will depend on, among other things, the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation”).

238. See *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 632 n.9 (2d Cir. 2005) (discussing whether *Hazelwood* permits viewpoint discrimination and describing the “conflicting conclusions” reached by various circuits), *cert. denied*, 126 S. Ct. 1880 (2006).

239. *Id.*; see also *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 925–28 (10th Cir. 2002) (finding that *Hazelwood* does not require viewpoint neutrality, and that the desire to avoid controversy is a valid pedagogical concern); *Ward*, 996 F.2d at 454 (noting that “the Court in *Kuhlmeier* did not require that school regulation of school-sponsored speech be viewpoint neutral”). But see *Planned Parenthood of S. Nev. Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (en banc) (considering viewpoint neutrality as one element of reasonable content regulation by a school); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1010–11 (9th Cir. 2000) (affirming *Planned Parenthood* as to its use of viewpoint neutrality analysis); *Searcey v. Harris*, 888 F.2d 1314, 1319 (11th Cir. 1989) (finding *Hazelwood* did not intend to rewrite First Amendment law on viewpoint neutrality); *Hansen v. Ann Arbor Pub. Sch.*, 293 F. Supp. 2d 780, 797 (E.D. Mich. 2003) (confirming that viewpoint neutrality is still the rule in the Eleventh Circuit). The Third Circuit is apparently internally divided on this question. See *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 172 (3d Cir. 1999) (holding that “a viewpoint-based restriction on student speech in the classroom may be reasonably related to legitimate pedagogical concerns and thus permissible”), *aff’d en banc by an equally divided court*, 226 F.3d 198 (3d Cir. 2000).

240. *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1286 (D. Utah 1998).

241. See, e.g., *id.* at 1286.

In addition to the question of viewpoint discrimination, some courts have expressed concern that teachers have advance notice of what they can and cannot say in the classroom.²⁴² Overbroad policies prohibiting any discussion of homosexuality may be challenged as not providing precise enough guidance for teachers and thus chilling speech beyond the scope of the justification for the regulation. The Supreme Court addressed this problem during the McCarthy era, striking down a state law that required teachers to certify in writing that they were not members of the Communist Party; the policy was unconstitutional because, among other reasons, it was too vague and broad to give teachers notice of what activity was prohibited.²⁴³ The Court proclaimed:

When one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.²⁴⁴

This concern with advance notice is related to Due Process Clause concerns about vagueness and overbreadth, which apply to restrictions on speech as well as to other types of school policies; the Due Process Clause is implicated whenever someone could be punished for an action without sufficient notice that such action was punishable.²⁴⁵ The Court seemed to reinforce this in *Mt. Healthy v. Doyle*²⁴⁶ when it found that a teacher's conduct in communicating with a local radio show about an internal school policy was protected by the First Amendment, citing as evidence only that "[t]here is no suggestion by the Board that Doyle violated any established policy, or

242. See, e.g., *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977) (finding for the plaintiff teacher on the basis of *Pickering* and citing as evidence that the teacher's conduct did not violate any existing board policy); *Ward*, 996 F.2d at 453 (holding that post-speech retaliation against a teacher must be based on some prior prohibition).

243. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967).

244. *Id.* (internal citations and quotations omitted); see also *Daly*, *supra* note 223, at 5 n.16 (suggesting that homosexuality is arguably the Red Scare of the 1990s).

245. See *Smith v. Goguen*, 415 U.S. 566, 573-74 (1974) (striking down a Massachusetts statute regarding misuse of the American flag because it was so vague that it allowed authorities to enforce it according to their own viewpoints); see also SCHNEIDER, *supra* note 57, at 383 (discussing how "vague or overbroad restrictions on speech ordinarily will not pass constitutional muster").

246. 429 U.S. 274 (1977).

that its reaction to his communication to the radio station was anything more than an ad hoc response to Doyle's action"²⁴⁷

Despite this precedent, only the First Circuit has explicitly required advance notice of prohibitions on classroom speech under *Hazelwood*.²⁴⁸ The First Circuit test requires that, under existing regulations and procedures, it be reasonable for the school to expect a teacher to know that certain conduct was prohibited.²⁴⁹ The Second Circuit has made some movement in the opposite direction, dismissing the need for "clearly established rules and procedures" before a school could censor a guest speaker's use of a video depicting bare-chested women.²⁵⁰ *Silano* cited to a footnote in *Hazelwood* which declared, "We reject respondents' suggestion that school officials be permitted to exercise prepublication control over school-sponsored publications only pursuant to specific written regulations. To require such regulations in the context of a curricular activity could unduly constrain the ability of educators to educate."²⁵¹ However, because *Hazelwood* dealt with prepublication censorship, it does not speak to the issue of post hoc retaliation in the absence of advance notice that the speech was proscribed. Other courts have not made advance notice an explicit requirement but have noted that teachers' First Amendment claims in the classroom may carry more weight when they have violated no existing school policy.²⁵²

B. Restrictions on Classroom Speech Should Be Viewpoint Neutral and Written in Advance

In applying the heightened state interests of *Hazelwood* to gay teachers wishing to be open about their orientation in their classes, the first question is whether the speech may properly be considered

247. *Id.* at 284.

248. See *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993) (holding that notice of what conduct is prohibited is one element of permissible regulation of teachers' speech).

249. *Id.* at 454.

250. *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994).

251. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.6 (1988), cited in *Silano*, 42 F.3d at 723.

252. See *supra* note 242 (discussing cases in which the court emphasized the lack of advance notice); see also *Cary v. Bd. of Educ.*, 598 F.2d 535, 539-42 (10th Cir. 1979) (surveying cases regarding teachers' First Amendment rights within the classroom, and finding that in most instances when the teacher prevailed, school authorities acted in the absence of a general policy, after the fact, and had little to charge against the teacher other than the assignment with which they were unhappy); *Daly*, *supra* note 223, at 19-24 (discussing how "[c]ourts are more likely to vindicate a teacher's First Amendment rights when [the teacher] had no [advance] notice that her speech was proscribed").

school-sponsored, as in *Hazelwood*, or government speech. When speaking in front of a classroom or school assembly, teachers are state employees, imparting a state-created curriculum. They are often asked to pass along a state-chosen perspective, as demonstrated by recent debates over teaching evolution and intelligent design.²⁵³ However, although courts have long given state and local authorities full authority over curricular decisions, they have generally not gone so far as to treat teachers as mere mouthpieces of the state.²⁵⁴ Speech by school administrators or others in policymaking positions may be treated as government speech.²⁵⁵ However, it is hard to imagine that a teacher's discussion with his class about sexual orientation could be considered government speech, unless perhaps it occurs in the context of a class on human sexuality with a specific policy on the topic. Therefore it is safe to assume that teacher speech on the topic of sexual orientation in a classroom setting would be considered school-sponsored speech and analyzed under the *Hazelwood* standard.

Those circuits maintaining that *Hazelwood* allows viewpoint discrimination reason, in general, that the desire to avoid controversy—and avoid allowing the imprimatur of the school to rest on a controversial viewpoint—can constitute a valid pedagogical concern.²⁵⁶ The First Circuit in *Ward v. Hickey*²⁵⁷ emphasized this concern by distinguishing *Hazelwood* from its predecessor, *Perry Education Association v. Perry Local Educators' Association*,²⁵⁸ which dealt with access to teacher mailboxes and explicitly required

253. See *Edwards v. Aguillard*, 482 U.S. 572 (1987) (striking down a Louisiana statute prohibiting teachers from teaching evolution in public classrooms unless accompanied by instruction in creation science); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005) (reversing Dover school board adoption of a script for teachers regarding intelligent design).

254. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (affirming that teachers have First Amendment rights inside the school); *Cary*, 598 F.2d at 543 (holding that teachers have some right to freedom of expression in the classroom and cannot be made to merely read from a school-board-approved script). But see *Daly*, *supra* note 223, at 3 (arguing that by inconsistent application of *Pickering* and *Hazelwood*, courts have allowed school boards to create excessive restrictions on teachers' speech, reducing the teacher's role to that of a "hired mouthpiece").

255. See, e.g., *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1011 (9th Cir. 2000) (finding that a hallway bulletin board overseen by the school administrators is government speech); *Hansen v. Ann Arbor Pub. Sch.*, 293 F. Supp. 2d 780, 794–95 (E.D. Mich. 2003) (giving as evidence that a school-sponsored forum was not government speech the fact that "not a single school administrator or teacher conveyed any viewpoint or message," implying that presentations by these figures might have moved it from a limited public forum toward government speech).

256. *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 925–27 (10th Cir. 2002).

257. 996 F.2d 448 (1st Cir. 1993).

258. 460 U.S. 37 (1983).

viewpoint neutrality.²⁵⁹ The First Circuit stated that the difference lay in the fact that any decision made by the school administrators in *Perry* about access to teacher mailboxes was not motivated by concerns about students learning appropriate classroom lessons.²⁶⁰ This dichotomy implies that the decision of what is “appropriate” for students may require rejection of certain expressed viewpoints.

It is reasonable to allow schools to avoid certain controversial subjects in school-sponsored speech. From *Tinker* through *Bethel* to *Hazelwood*, courts have consistently recognized the desire to avoid disruption, maintain order, and model civility, as a legitimate pedagogical interest.²⁶¹ However, avoiding controversial subjects altogether is not the same as discriminating based on the viewpoint expressed. The prohibition on censorship based on the viewpoint expressed has been such a fundamental part of First Amendment jurisprudence for so long that it is hard to imagine that the Supreme Court in *Hazelwood* would obviate that rule without giving it some attention in the opinion.²⁶² In fact, the Court did not mention viewpoint discrimination because there was no controversial viewpoint at issue in the censorship of the student newspaper articles in *Hazelwood*; the concerns of the administration, as accepted by the district court, had to do with possible violations of privacy or anonymity and the appropriateness of the subject matter for some of the younger students at the school.²⁶³ This was in line with the concerns in *Bethel* about obscenity and age-appropriateness.²⁶⁴ Interpreting this silence as disregard for the issue of viewpoint discrimination is thus unwarranted.

259. *Ward*, 996 F.2d at 454.

260. *Id.*

261. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (holding that schools need not tolerate speech that is inconsistent with their educational mission); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986) (finding that schools may prohibit speech and conduct that goes against the lessons of “civil, mature conduct”); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (“[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”).

262. *See Rosenberger v. Univ. of Va.*, 515 U.S. 819, 828 (1995) (holding that “[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys”); *see also Searcey v. Harris*, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989) (finding no indication in *Hazelwood* that the Supreme Court intended to “drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker’s views”).

263. *Hazelwood*, 484 U.S. at 264–65.

264. *See Bethel*, 478 U.S. at 684 (discussing the importance of a school’s ability to regulate speech for the maturity of the audience).

From the facts of the circuit court cases that led to this split, it appears that the confusion actually lies around the definition of “viewpoint discrimination.” In some cases in which the court approved of viewpoint discrimination, the speech restriction in fact most resembled the *Hazelwood* approach of avoiding certain controversial topics altogether. For example, *Fleming v. Jefferson County School District*²⁶⁵ involved a memorial art project organized by Columbine High School when it reopened after the infamous school shooting of 1999.²⁶⁶ The plaintiffs challenged the school’s policy prohibiting the hanging of tiles that included, among other elements, references to the attack or religious symbols.²⁶⁷ These blanket policies placed certain symbols off-limits, perhaps in part to avoid controversy, but also because the goal of the project was to “assist in community healing” and make the school a positive learning environment again, goals that the school argued would not be furthered by displaying tiles with messages that reminded the students of violence or caused emotional distress.²⁶⁸ Likewise, the teacher in *Ward v. Hickey*²⁶⁹ was punished for a discussion about abortion in her biology class; the district court, in finding for the defendant school board members, apparently found that their action had not been viewpoint-based.²⁷⁰ The issue of the teacher’s views on abortion and whether they formed the basis for her termination was not before the First Circuit on appeal, and the decision does not discuss it, other than its aside stating that the lower court had been wrong about viewpoint neutrality.²⁷¹ In neither of these cases did the court find that the school had chosen to censor a certain perspective while allowing teachers or students to air opposing viewpoints unpunished.

This is admittedly a fine distinction, because to many, disallowing religious expression or discussion of abortion—or homosexuality—may be tantamount to expressing disapproval of those topics.²⁷² For example, a parent whose child was not allowed to read a Bible story

265. 298 F.3d 918 (10th Cir. 2002).

266. *Id.* at 920–22.

267. *Id.* at 921.

268. *Id.*

269. 966 F.2d 448 (1st Cir. 1993).

270. *Id.* at 451 (discussing trial court’s finding that a key board member did not in fact disagree with the plaintiff’s views).

271. *Id.* at 454.

272. See *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 831 (1995) (describing viewpoint discrimination as a subset of content discrimination, but acknowledging that the distinction between content and viewpoint discrimination “is not a precise one”).

to his first grade class interpreted this action by the teacher as conveying disapproval of his Christian views.²⁷³ The Third Circuit agreed with the plaintiff, holding that state policies restricting certain religious expression discriminated against nonsecular viewpoints.²⁷⁴ The issue of prohibitions on religious speech is a complex legal morass, but fortunately it is a special problem that does not extend to out-speech by teachers. Viewpoint neutrality in the context of homosexuality is much easier to demonstrate: a school action or policy that censors discussions by gay teachers (but not straight ones), or prohibits discussions about homosexuality (but not other sexual orientations), would constitute viewpoint discrimination.

A policy that teachers not discuss their private lives, or the topic of sexual orientation in general, could be crafted and employed in a viewpoint neutral manner that would not offend the First Amendment. The school has an interest in class time being used for teaching the subject at hand, as well as in avoiding controversial and intimate discussions in a forum designed for conveying a certain curriculum. However, schools should be required to keep those policies viewpoint neutral, applying to all types of private revelations and to all teachers, not just the gay ones.²⁷⁵

First and foremost, a discriminatory speech policy would “cast a pall of orthodoxy over the classroom,” which First Amendment law has long disfavored.²⁷⁶ Despite the frequent judicial emphasis on the state’s heightened need to curb certain freedoms in the public school context,²⁷⁷ the First Amendment’s traditional loathing of government interference in free expression based on the viewpoint expressed is too fundamental to be left vulnerable to school administrators uncomfortable with homosexuality or fearful of potential controversy. For a school board wishing to avoid discussions about homosexuality in school-sponsored forums, crafting a policy that achieves that goal while remaining viewpoint neutral will be difficult. Asking teachers to avoid all discussion of their personal lives and refuse responses to

273. *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 170 (3d Cir. 1999), *aff’d en banc by an equally divided court*, 226 F.3d 198 (3d Cir. 2000).

274. *Id.* at 170–71. However, the court held that viewpoint neutrality is not required under *Hazelwood*. *Id.*

275. *See Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1286 (D. Utah 1998) (“Because the restrictions imposed . . . only targeted speech concerning homosexual orientation and not heterosexual orientation, the restrictions are properly considered viewpoint restrictions.”).

276. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (noting that “the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom”).

277. *See supra* note 56 (discussing special role of teachers in society).

all questions may be unrealistic or unenforceable. But that is as it should be; government regulations in the area of free expression must be drawn with “narrow specificity” in order to avoid chilling free expression of all citizens—even teachers.²⁷⁸ Protecting these most fundamental freedoms in the context of public education has never been easy, but it remains vitally important. “That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”²⁷⁹

Courts can impose a procedural safeguard to encourage viewpoint neutrality by requiring that teachers have reasonable advance notice of what speech is prohibited. Advance notice is important, first, because of our long tradition of viewing with suspicion any government action that might “chill” free speech.²⁸⁰ If, as the Supreme Court pointed out in *Keyishian v. Board of Regents*,²⁸¹ teachers have reason to fear ad hoc retaliation for their speech in the classroom without knowing the boundaries they must not cross, the classroom will cease to be the “marketplace of ideas.”²⁸² Although, as discussed above, at least one court has interpreted *Hazelwood* as not requiring some policy written in advance, this interpretation is misguided, because *Hazelwood* dealt with a prepublication decision.²⁸³ The due process dimension of *Keyishian* and its progeny requires much more concern when a teacher faces discipline for speech that she did not know was prohibited when she made it, than when an administrator censors a student publication before it is published.²⁸⁴

278. *Keyishian*, 385 U.S. at 604 (emphasizing the need for precise, narrowly drawn regulations targeting free expression).

279. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

280. See *supra* notes 242–47 and accompanying text (discussing the advance notice issue).

281. 385 U.S. 589 (1967).

282. *Id.* at 603; see also Melanie Eversley, *An Empowering Loss: Resignation Brought Gay Teacher Peace of Mind*, DETROIT FREE PRESS, July 31, 1996, at 1B (Gerry Crane describes the difficulty of going to work after administrators informed him that they knew he was gay, but had not decided what to do with that information: “It was a very precarious situation. I wondered if I was going to be allowed to teach . . . or if I was going to be handcuffed and thrown out.”).

283. See *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994) (dismissing need for clear rules and procedures in advance); see also *supra* notes 219–22 and accompanying text (discussing the facts of *Hazelwood*).

284. See *supra* notes 277–79 and accompanying text (discussing *Keyishian v. Board of Regents* and its disapproval of overbroad restrictions).

In addition, a clear written policy is the best way a school system can guard against the kind of post hoc responses to teacher speech that would expose them to First Amendment suits—not just because it puts teachers on notice, but because it provides school board members and administrators with a tool to mediate responses from parents or other members of the school community. If the Grand Rapids school board that employed Gerry Crane had a clear written policy that teachers will not discuss their private lives in the classroom, that policy could at least have provided a concrete starting point for responding to the complaints of parents who learned about Crane’s orientation. Such a policy would have given the school board a concrete answer to reassure parents that Crane’s sexuality would not be allowed to affect his teaching, instead of reacting in a manner that validated parents’ worst fears.²⁸⁵ By finding for teachers who had no notice that their classroom comments about homosexuality would expose them to adverse employment action, courts can encourage schools to think about these issues beforehand and put their values into writing, rather than waiting until they are in the midst of an emotionally charged conflict. In addition, because a school speech policy must be written with enough specificity that it does not on its face prohibit conduct protected by the First Amendment,²⁸⁶ encouraging such policies will put administrators on notice that they cannot censor teachers in a manner that discriminates against the expression of gay teachers only.

CONCLUSION

Teachers do not, and should not, surrender their constitutionally guaranteed freedom of expression at the schoolhouse gate.²⁸⁷ That freedom protects their out-speech in the workplace as well as in the wider community, as long as they are expressing themselves in an appropriate and nondisruptive manner. Schools should not be allowed to legitimate private prejudice by enforcing a “heckler’s veto” against gay teachers. Outside the classroom, teachers should be entitled to make statements about their own sexual orientation as long as they are not disruptive in the manner proscribed by *Tinker*. Inside the classroom, the best way to protect teachers’ First

285. See *supra* notes 16–19 and accompanying text (discussing the story of Gerry Crane, and his school board’s response in the form of an official statement that it would watch Crane closely).

286. See *supra* notes 277–80 and accompanying text (discussing the problem of vague or overbroad speech policies).

287. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

Amendment freedoms and prevent emotional, ad hoc retaliation for protected speech is for schools to create in advance a narrowly drawn, viewpoint neutral classroom speech policy.

Important educational policy goals underlie this argument. Teachers are charged with a sensitive and complicated mission: to prepare youth for active participation in American society, shaping their attitudes toward their country and fellow citizens.²⁸⁸ It is inevitable that their actions and utterances will be subject to close scrutiny. In focusing on whether students are learning values at school that do not fit exactly with their parents' preferences, however, it is too easy to forget that schools are first and foremost incubators of democracy. The state's interest in inculcating values of civility and maturity in its future citizens extends to teaching "tolerance of divergent political and religious views, even when the views expressed may be unpopular."²⁸⁹ The students in Wendy Weaver's and Gerry Crane's classrooms surely learned a lasting and negative lesson when they watched administrators bow to community pressures and force good teachers from their jobs. Those students have not been well prepared by their public schools to function in a wider society that includes many gay members.

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288. See, e.g., *Ambach v. Norwick*, 441 U.S. 68, 78–79 (1979) (“[A] teacher serves as a role model for . . . students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen’s social responsibilities.”); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (stating that “[public education] is a principal instrument in awakening the child to cultural values . . . and in helping him to adjust normally to his environment”).

289. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986) (“These fundamental values of ‘habits and manners of civility’ essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular.”); see also *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (holding that it is even more important to protect the free expression rights of teachers, in order to teach students the importance of those rights).

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