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Emily Holmes Davis

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Protecting the "Marketplace of Ideas": The First Amendment and Public School Teachers' Classroom Speech

*Emily Holmes Davis**

INTRODUCTION

At Lakeland Community College near Cleveland, Ohio, a philosophy professor was punished for making statements about the development of his personal philosophy in his class lectures and on his class syllabi.[1] The controversy began in March 2003, when a student complained that Dr. Tuttle mentioned his personal philosophical beliefs too often in class.[2] As a result of the complaint, the college told Dr. Tuttle that he may no longer discuss his own philosophical beliefs in his discussion-based philosophy class.[3] This free speech dispute at Lakeland is just one example from the swelling tempest of similar disruptions recently occurring in public schools.[4]

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* Juris Doctor Candidate, University of North Carolina School of Law, 2006.

1. Jamilah Evelyn, *Saying He Was Punished for Revealing His Faith in Class, Adjunct Sues Ohio College*, CHRON. HIGHER EDUC., July 16, 2004, at A13.

2. *Id.*

3. *Id.*; *see also* Jennifer Gonzalez, *Religion in Class Sparks Conflict; Lakeland Prof Claims He Was Punished*, PLAIN DEALER (Cleveland, Ohio), Feb. 6, 2004, at B3.

4. For example, George Washington University will respond to any and all allegations of faculty "misconduct" if the complaints are made by calling the Compliance Line. A complaint may be made by someone who is not formally associated with the University. A complaint will trigger a formal investigation by the administration of the subject of the complaint. The administration will respond to all allegations of misconduct including "rudeness." *See* John Banzhaf, *Rudeness Police*, G.W. HATCHET (Wash., D.C.), Sept. 21, 2004, *available at* http://www.gwhatchet.com/news/2004/09/21/Opinions/Column.Rudeness.Police-723696.shtml. On the first day of her American Government class at

The classroom is a unique "marketplace of ideas"[5] where future leaders learn through a vigorous exchange of different arguments and theories. Society has an interest in exposing students

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Metropolitan State College of Denver, a professor told her students that education is dominated by liberal professors because conservative thinkers do not know how to think critically, and she suggested that conservative thinkers drop her class. As a result, a student filed a complaint and this professor began to receive death threats. *See* Steven K. Paulson, *Academic Rights Roil Colorado Campuses; Rules to Protect Conservative Students Led to Threats, Some Professors Say*, WASH. POST, Sept, 12, 2004, at A13. A sociology professor at Colorado State University made critical statements to his class about the United States military invasion of Iraq and one of his students, a former soldier and wife of a soldier who was in Iraq at the time, expressed her support for the troops; in response, the professor told her to drop the class. *See* David Harsanyi, *Ideologue's Class Lacked Education*, DENVER POST, Aug. 12, 2004, at B1. At the University of North Carolina at Chapel Hill, an English professor sent an e-mail to her entire class criticizing one student's views which he had expressed in class. *See* Jane Stancill, *Teacher 'Sorry' For Singling Out UNC Student*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 20, 2004, at A1. Instructor Elizabeth Ito expressed her own thoughts about the United States military invasion of Iraq during her business-writing class at Forsyth Technical Community College and invited her students to share their opinions about the war; Ito was fired for insubordination when she refused to promise she would never discuss the war again in her classroom. *See* Michelle Johnson, *Instructor Dismissed by Forsyth Tech Appeals Decision, Her Vocal Opposition to the Iraq War is Reason College Won't Renew Her Contract, Teacher Says*, WINSTON-SALEM J., Sept. 5, 2003, at B1. Harvard Law has considered a ban on offensive speech, and as a result some law professors are afraid to talk about any controversial issues in class. *See Harvard Law School Weighs Free-Speech Restrictions*, PROVIDENCE J., Nov. 22, 2002, at A9. After calling the United States a "terrorist nation," a professor at the University of Texas became the subject of a letter-writing campaign calling for his termination, and students at the University of New Mexico rallied against a professor who told his class, "Anyone who would blow up the Pentagon would have my vote." *See* Gregg Easterbrook, *Free Speech Doesn't Come Without Cost: The First Amendment Isn't a Shield Against Criticism*, WALL ST. J., Nov. 5, 2001, at A20.

5. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (quoting United States v. Assoc. Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'"); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (quoting *Keyshian*, 385 U.S. at 603 (1967)).

to this "robust exchange of ideas"[6] in order to train future leaders and members of a democracy to be critical and analytical thinkers.[7] In order to promote society's interest, educators concentrate on creating a classroom environment that sustains a robust forum for debate and allows students to develop the ability to disseminate information and think critically.[8] Simultaneously, states, through

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6. *Keyishian*, 385 U.S. at 603. *See generally Tinker*, 393 U.S. at 511 (recognizing that students benefit from the expression of diverse viewpoints in education); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257 (1961) ("Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents.").

7. *See generally* Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1987) (quoting Ambach v. Norwick, 441 U.S. 68, 76 (1979)) (acknowledging that public schools are vitally important "in the preparation of individuals for participation as citizens"); Ambach v. Norwick, 441 U.S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions."); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("That [schools] 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."); Gregory A. Clarick, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693, 728-29 (1990); Meiklejohn, *supra* note 6, at 255 ("Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."); Merle H. Weiner, *Dirty Words in the Classroom: Teaching the Limits of the First Amendment*, 66 TENN. L. REV. 597, 652-57 (1999).

8. *See generally Tinker*, 393 U.S. at 512 ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.") (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)); *see also* Meiklejohn, *supra* note 6 at 257 ("Education . . . is the attempt to so inform and cultivate the mind and will of a citizen that he shall have the wisdom, the independence, and, therefore, the dignity of a governing citizen. Freedom of education is, thus . . . a basic postulate in planning of a free society."). There is also an argument that academic freedom is an individual constitutional right, and restrictions on teachers' classroom speech are unconstitutional. *See generally Keyshian*, 385 U.S. at 603 ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us . . . . That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over

the public schools, have an interest in promoting community values, which they accomplish through control over public school curricula.[9] Therefore, the more discretion a school has in restricting teacher in-class speech, the more control the state maintains over the curriculum and value inculcation. However, when courts place fewer restrictions on teachers' classroom speech, teachers are better able to create a robust learning environment for their students.[10]

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the classroom."); AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS, *at* http://www.aaup.org/statements/Redbook/1940stat.htm (last modified Apr. 2004) (on file with the First Amendment Law Review) ("Academic freedom is essential to [the free search for truth and its free exposition] . . . . Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning.").

9. *See generally Pico,* 457 U.S. at 864 (stating that school boards have the power to set school curriculum in a way that promotes community values and teaches those values to students).

10. *See generally Keyishian*, 385 U.S. at 603; *Barnette,* 319 U.S. at 642 (stating that school officials may not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion"). *But see* Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (holding that a requirement that schools teach creationism violates the First Amendment's prohibition of establishment of religion). At least one member of the Court hesitated to recognize First Amendment rights of teachers when facilitating the curriculum:

> I am also not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed. This Court has said that the rights of free speech "while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."

Id. at 113-14 (Black, J., concurring) (quoting Cox v. Louisiana, 379 U.S. 536, 554 (1965)). Some commentators also reject the idea that teachers should enjoy the same free speech rights in the classroom that they do as citizens. *See* William Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE. L.J. 841, 856 (1970). Van Alstyne argues:

> [T]he use [by a teacher or professor] of his classroom . . . deliberately to proselytize for a personal cause or knowingly to emphasize only that selection of data best conforming to his own personal biases is far

The Supreme Court has not directly addressed the degree of First Amendment protection awarded in-class speech of teachers generally.[11] However, the Court has addressed the free speech rights of government employees[12] and of public high school students.[13] Without specific Supreme Court precedent to follow regarding a teacher's in-class speech, lower courts have used these two analogous lines of precedent to determine the level of First

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> beyond the license granted by the freedom of speech and furnishes precisely the just occasion to question his fitness to teach.

Id. at 856.

11. *See generally* Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 6-7 (2001) (stating that "[i]n the absence of a Supreme Court decision clarifying teachers' rights, in-class speech is chilled and the balance of interests between school boards and teachers is impermissibly titled in favor of the former"); Weiner, *supra* note 7 at 624 (citing Donna Propkop, *Controversial Teacher Speech: Striking a Balance Between First Amendment Rights and Educational Interests*, 66 S. CAL. L. REV., 2533, 2538 (1993)).

12. *See, e.g.,* Waters v. Churchill, 511 U.S. 661, 673 (1994) (explaining that a government employer can restrict employee speech based on an actual or potential disruption in workplace efficiency even when the speech at issue addresses a matter of public concern and in order to restrict speech based on a potential disruption, the employer's prediction of a potential disruption must be "reasonable"); Connick v. Myers, 461 U.S. 138, 146 (1983) (holding that, to determine if the speech at issue addresses a matter of public concern, the court must examine the content, form, and context of the speech in question); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (holding that, to determine the First Amendment protection of public employee speech, the court must "arrive at a balance between the interests of the [public employee], 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").

13. *See, e.g.,* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that a high school may restrict "student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns"); *Tinker,* 393 U.S. at 513 (holding that high school student speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" is not protected by the First Amendment). The Supreme Court has not directly addressed the First Amendment protection afforded to postsecondary school student speech, so lower courts have applied the existing high school student speech precedents to student speech at the university level. *See infra* Section I (B) (2).

Amendment protection such speech should receive.[14]

This Note examines whether the public employee and student speech standards are sufficient to determine the level of First Amendment protection that should be afforded high school and university teachers' in-class speech. This Note concludes that the public employee and student speech precedents are inadequate. In Part I, this Note describes the public employee and student free speech Supreme Court precedents. Part II examines five circuit court cases that determined the First Amendment protection of public teacher in-class speech, thereby demonstrating the confusion experienced by lower courts attempting to settle this issue. In Part III, this Note analyzes the methods lower courts have used in applying the existing precedent to teachers' classroom speech and addresses the inconsistency and confusion among lower courts in this area of the law. Part III further concludes that the public

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14. Several cases apply the public employee precedent to determine the level of First Amendment protection of teacher in-class speech. *See, e.g.*, Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1052 (6th Cir. 2001) (holding that speech about the environmental benefits of industrial hemp was a matter of public concern); Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 679 (6th Cir. 2001) (holding that college professor's use of "nigger" and "bitch" in connection with academic discussion of those terms during discussion on social deconstructivism, involved a matter of public concern); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 800 (5th Cir. 1989) (applying *Pickering-Connick* to determine that a teacher's supplemental reading list was not a matter of public concern); Martin v. Parrish, 805 F.2d 583, 585 (5th Cir. 1986) (holding that a college professor's use of profanity in the classroom was not speech addressing a matter of public concern); Loeffelman v. Bd. of Educ., 134 S.W.3d 637, 647 (Mo. Ct. App. 2004) (holding that a teacher's comments about biracial children were not a matter of public concern). There are several cases that apply the public school student speech precedent to determine the First Amendment protection of teacher in-class speech. *See, e.g.*, Miles v. Denver Pub. Sch., 944 F.2d 773, 776-78 (10th Cir. 1991) (holding that a classroom was a nonpublic forum, the teacher speech was school-sponsored, so a school could restrict teacher speech if reasonably related to a legitimate pedagogical concern); Bishop v. Aronov, 926 F.2d 1066, 1074 (11th Cir. 1991) (holding that a university's restrictions on a physical education professor's statements about his own understanding of the force behind human nature did not infringe the professor's free speech rights); Nicholson v. Bd. of Educ., 682 F.2d 858, 865-66 (9th Cir. 1982) (holding that a teacher who was also the school newspaper's advisor did not engage in protected speech when he encouraged students to publish controversial articles in the paper).

employee and student free speech precedents are inadequate tests for teacher in-class speech, at both the secondary and postsecondary levels, because these precedents fail to consider many important factors unique to the education process.

The doctrinal uncertainty and the inadequacy of the existing precedent demand that courts use a different approach when analyzing the First Amendment protection of teachers' classroom speech, and Part IV of this Note proposes an alternative test for public school teacher in-class speech. Courts have recently applied the same tests to high school and college student speech[15] and have applied the same standards to secondary and postsecondary teacher classroom speech;[16] therefore, the proposed test also applies to teachers at both education levels. The new test eliminates the "public concern" threshold test and instead considers whether the

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15. *See, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1285 (10th Cir. 2004) (applying the *Hazelwood* standard to a university student's curricular speech); Hosty v. Carter, 325 F.3d 945, 947-49 (7th Cir. 2003) (applying a standard similar to *Tinker* to a student school newspaper at Governors State University), *reh'g en banc granted, opinion vacated*, No. 01-4155 (7th Cir. June 25, 2003); Brown v. Li, 308 F.3d 939, 949 (9th Cir. 2002) (applying the *Hazelwood* standard to a graduate student's curricular speech). *See also infra* Section I (B) (2).

16. Courts have applied the *Pickering-Connick* standard to teachers' in-class speech at the secondary and postsecondary levels. *See, e.g.,* Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1052 (6th Cir. 2001) (applying the *Pickering-Connick* standard to a fifth-grade teacher's classroom speech); Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 678 (6th Cir. 2001) (applying the *Pickering-Connick* standard to a college instructor's classroom speech); Blum v. Schlegel, 18 F.3d 1005, 1012 (2d Cir. 1994) (applying the *Pickering-Connick* standard to determine that a law professor's in-class speech promoting the legalization of marijuana was a matter of public concern). Courts have also applied the *Hazelwood* standard to teachers' in-class speech at the secondary and postsecondary levels. *See, e.g.,* Vanderhurst v. Colo. Mountain Coll. Dist., 208 F.3d at 908, 914-15 (10th Cir. 2000). In *Vanderhurst*, the court applied *Hazelwood* to professor in-class speech without actually holding that *Hazelwood* is the proper analytical framework. The court did not need to decide this issue because the holding of the case relies on the fact that the appellant did not properly preserve the issue for appellate review. *Id.* However, the court's *Hazelwood* analysis is illustrative of how a court would apply *Hazelwood* to a professor's classroom speech. *See also Miles*, 944 F.2d at 777 (holding the *Hazelwood* standard applicable to a high school teacher's in-class speech).

teacher's classroom speech caused an actual or potential substantial disruption in the facilitation of the curriculum. If this threshold requirement is met, courts should then balance a number of interests, including an educator's interest in teaching the specified curriculum free from excessive speech restrictions and the school's interest in effectively promoting societal values through a particular curriculum. Such a test will provide courts with an adequate tool to analyze the unique category of teacher classroom speech while still providing schools with the authority to implement a particularized curriculum that reflects community values.

I. SUPREME COURT PRECEDENT

A. Free Speech Rights of Public Employees

1. *Pickering v. Board of Education*

Pickering v. Board of Education[17] constitutes a significant case in which the Supreme Court defined public employee speech rights.[18] Marvin Pickering, a public high school teacher, wrote and submitted a letter to a local newspaper criticizing the school board's misallocation of school funds.[19] The school board fired Pickering in response to the publication of his critical letter.[20] To determine the First Amendment protection afforded to a public employee's speech, the Court used a balancing test, weighing 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."[21]

The Court found Pickering's criticisms of the school board to be a "matter of public concern" because school funding was a

17. 391 U.S. 563 (1968).
18. *Id.* at 568.
19. *Id.* at 564.
20. *Id.* at 566.
21. *Id.* at 568.

topic of public debate.[22] In addition, the Court held that Pickering's interest in speaking as a citizen about the school board's allocation of funds outweighed the school board's interest in workplace efficiency; therefore, Pickering's speech was protected.[23] Although *Pickering* involved a teacher's speech, his speech occurred outside the classroom. The Court found he was speaking as a citizen on a matter of public concern rather than as an employee. Thus, *Pickering* did not directly address the protection of teachers' classroom speech.

2. *Connick v. Myers*

In *Connick v. Myers*,[24] another landmark public employee speech decision, the Court expanded upon the *Pickering* "public concern" test.[25] In *Connick,* Shelia Myers, an assistant district attorney, faced transfer to a different section of the criminal court.[26] Opposing the impending transfer, Myers distributed a questionnaire to her office co-workers in order to ascertain their views on certain issues.[27] The questionnaire covered issues like the "office transfer policy" and "whether employees felt pressured to work in political campaigns."[28] Myers was fired after distributing

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22. *Id.* at 571–72. The Court observed: "[T]he question whether a school system requires additional funds is a matter of legitimate public concern . . . On such a question free and open debate is vital to informed decision-making by the electorate." *Id.*

23. *Id.* at 572–73. The Court concluded that Pickering's statements did not hinder his work performance in the classroom or interfere with the school's daily operation, so "the interest of the school administration in limiting the teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.*

24. 461 U.S. 138 (1983).

25. *Id.* at 146 (holding that, to determine whether the employee speech in question addresses a matter of public concern, the court must examine the content, form, and context of the speech).

26. *Id.* at 140.

27. *Id.* at 141.

28. *Id.* (noting the questionnaire covered "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political

the questionnaire.[29] Augmenting the importance of the "public concern" doctrine, the Court held that, in order to apply the *Pickering* balancing test, the Court must first find as a threshold matter that the employee's speech was a "matter of public concern."[30] In order to determine if the speech addresses a "matter of public concern," the Court must analyze "the content, form, and context of a given statement, as revealed by the whole record."[31] The Court determined that one of the questions from the survey was a matter of public concern,[32] but the speech was unprotected because Myers's interest in speaking as a citizen on a matter of public concern did not outweigh her employer's interest in workplace efficiency.[33]

3. *Waters v. Churchill*

In a recent decision, *Waters v. Churchill*,[34] the Court emphasized the importance of a government employer's interest in workplace efficiency.[35] In *Waters*, a hospital fired a nurse after she criticized one of her superiors during a conversation with a co-worker.[36] The Court held that the government employer's interest in workplace efficiency is so substantial that an employer could

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campaigns").

29. *Id.*

30. *Id.* at 146. The Court stated: "[I]f Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge." *Id.*

31. *Id.* at 147–48.

32. *Id.* at 149. The Court held that the question, "[E]ver feel pressured to work in political campaigns on behalf of office supported candidates[?]," addressed a matter of public concern because the Court had recently held that "official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights." *Id.* (citing Branti v. Finkel, 445 U.S. 507, 515-16 (1980); Elrod v. Burns, 427 U.S. 347 (1976)).

33. *Connick*, 461 U.S. at 154.

34. 511 U.S. 661 (1994).

35. *Id.* at 673 (noting that Court precedent "giv[es] substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is a matter of public concern").

36. *Id.* at 664-65.

restrict speech based on an actual or potential disruption in workplace efficiency, even when the speech at issue addresses a matter of public concern.[37] To restrict speech based on a potential disruption, the employer's prediction of a potential disruption must be "reasonable."[38] Thus, the *Waters* holding substantiated a government employee's interest in workplace efficiency by permitting speech restrictions based on "reasonable" predictions of potential disruptions.[39]

In summary, when courts apply the *Pickering-Connick* standard to free speech challenges by public employees against their employers, they must first determine as a threshold matter if the speech in question is a matter of public concern, and the employee has the burden of showing that the speech addresses a matter of public concern.[40] Whether the speech in question addresses a matter of public concern is a question of law determined by the "content, form, and context of a given statement, as revealed by the whole record."[41] If the speech does not address a matter of public concern, the speech is not "totally beyond the protection not the First Amendment," but "absent the most unusual circumstances," federal courts are not the proper forums to review a public employee's discharge for that speech.[42] Thus, if the court determines the speech is merely a personal work grievance, the court is not required to balance the competing interests, and the employer's sanction for the speech will not be scrutinized under the First Amendment.[43]

If the employee's speech addresses a matter of public concern, the employer bears the burden of showing that its interest in workplace harmony and efficiency outweighs the employee's interest in commenting on matters of public concern.[44] If the employer meets its burden, the employee's speech is unprotected.

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37. *Id.* at 673.
38. *Id.*
39. *Id.*
40. Connick v. Myers, 461 U.S. 138, 146 (1983).
41. *Id.* at 147-48.
42. *Id.* at 147.
43. *Id.*
44. *Id.* at 150; *see also* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

However, if the court finds that the employee's interest in speaking on a matter of public concern outweighs the government employer's interest in workplace efficiency, the employee's speech is protected.[45]

B. Free Speech Rights of Public School Students

1. Secondary School Students

Tinker v. Des Moines Independent Community School District

In *Tinker v. Des Moines Independent Community School District*,[46] a seminal decision regarding students' speech rights, the Supreme Court held that a high school could not punish its students for wearing black armbands to school in protest of the Vietnam War.[47] According to the Court, in order for a school to restrict student speech, the school must show that the restriction "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[48] The Court held that the student speech restriction is unconstitutional unless there is evidence that such a restriction on speech is "necessary to avoid material and substantial interference with schoolwork or discipline"[49] or that the school had "reason to anticipate that [the student speech] would substantially interfere with the work of the school or impinge upon the rights of other students."[50] Because this student speech was not a material or substantial interference, the Court deemed the school's prohibition unconstitutional.[51]

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45. *Connick*, 461 U.S. at 150.
46. 393 U.S. 503 (1969).
47. *Id.* at 513–14.
48. *Id.* at 509.
49. *Id.* at 510-11.
50. *Id.* at 509.
51. *Id.* at 514.

Hazelwood School District v. Kuhlmeier

In *Hazelwood School District v. Kuhlmeier*,[52] the Court refined its test for determining the constitutionality of a school's restriction on student speech.[53] At Hazelwood East High School, the principal deleted two articles from an issue of the student newspaper, one about teen pregnancy and the other about divorce.[54] The United States Supreme Court held that the student newspaper was not a public forum[55] and was part of the school curriculum, so the newspaper constituted school-sponsored speech.[56] The Court stated that school-sponsored speech was speech that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[57] The

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52. 484 U.S. 260 (1988).

53. *Id.* at 273.

54. *Id.* at 263. The principal worried that the teen pregnancy article was inappropriate for younger readers and that the pregnant students' identities would be discovered. He was also concerned that the article about the effects of divorce on Hazelwood students was inappropriate because a father named in the article did not have a chance to respond to his daughter's comments or to consent to the article's publication. *Id.*

55. *Id.* at 267. The Court stated:

> The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that . . . "have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." . . . If the facilities have instead been reserved for other intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.

Id. (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983) (citations omitted). *See generally* William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST., 213, 250-55 (1999) (discussing the public forum analysis and explaining the differences between the traditional public forum, designated public forum, and the nonpublic forum).

56. *Hazelwood*, 484 U.S. at 271.

57. *Id.* The Court explained these activities are part of a school's curriculum "whether or not they occur in a traditional classroom setting, so

Court held that school officials could restrict student speech in school-sponsored activities, so long as the restrictions were "reasonably related to legitimate pedagogical concerns."[58] In addition, the Court stated that courts should give substantial deference to the school's legitimate pedagogical concerns.[59]

In summation, *Tinker* governs high school student speech that is not school-sponsored. Under *Tinker*, a secondary school may restrict extracurricular student speech when the speech materially or substantially interferes with classroom procedures or when the school can reasonably predict such disruption.[60] In contrast, *Hazelwood* governs student school-sponsored speech, which is any expressive activity that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[61] If the student speech at issue occurs in a nonpublic forum, is school-sponsored speech, and involves a legitimate pedagogical interest, the school may impose restrictions on the speech so long as the restrictions are reasonably related to the legitimate pedagogical concern.[62]

2. Postsecondary School Students

Although the Supreme Court has never expressly ruled on the free speech rights of postsecondary school students, the Court has noted that "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First

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long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.*

58. *Id.* at 273.

59. *Id.* at 271. The Court's stated legitimate pedagogical concerns included "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 view of the individual speaker are not erroneously attributed to the school." *Id.*

60. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969). *Cf.* Waters v. Churchill, 511 U.S. 661, 673 (1994) (holding that when determining free speech rights of public employees, the Court must give "substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern").

61. *Hazelwood*, 484 U.S. at 271.

62. *Id.* at 273.

Amendment protections should apply with less force on college campuses than in the community at large."[63] Still, in *Hazelwood*, the Court explicitly withheld decision regarding the applicability of the deferential *Hazelwood* standard to student curricular speech at the university level.[64] Without specific legal precedent to follow, lower courts have applied *Hazelwood* and *Tinker*, or similar standards, to college student speech.[65]

Brown v. Li

In *Brown v. Li*,[66] a thesis committee at the University of California at Santa Barbara refused to approve Brown's graduate thesis and grant his master's degree after he inserted an extra section criticizing the administration without the committee's knowledge or consent.[67] A divided Ninth Circuit panel upheld the committee's decision to deny approval of Brown's thesis; however, each judge authored a separate opinion.[68] Judge Graber's opinion,

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63. Healy v. James, 408 U.S. 169, 180 (1972).

64. *Hazelwood*, 484 U.S. at 273 n.7 ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.").

65. *See* Axson-Flynn v. Johnson, 356 F.3d 1277, 1289 (10th Cir. 2004) (applying the *Hazelwood* standard to a university student's curricular speech); Hosty v. Carter, 325 F.3d 945, 947-49 (7th Cir. 2003) (applying a standard similar to *Tinker* to a student school newspaper), *reh'g en banc granted, opinion vacated*, No. 01-4155 (7th Cir. June 25, 2003); *see also* Brown v. Li, 308 F.3d 939, 951 (9th Cir. 2002) (applying the *Hazelwood* standard to a graduate student's curricular speech).

66. 308 F.3d 939 (9th Cir. 2002).

67. *Id.* at 943.

> That section, entitled "Disacknowledgements," began: "I would like to offer special *Fuck You's* to the following degenerates for of [sic] being an ever-present hindrance during my graduate career[.]" It then identified the Dean and staff of the [University of California at Santa Barbara] graduate school, the managers of Davidson Library, former California Governor Wilson, [and] the Regents of the University of California . . . .

Id.

68. Judge Graber extended the *Hazelwood* standard to govern a

the opinion most relevant for purposes of this article, extended the *Hazelwood* standard to a graduate student's curricular speech[69] and held that the committee's decision not to approve Brown's thesis "was reasonably related to a legitimate pedagogical objective: teaching [Brown] the proper format for a scientific paper."[70] Therefore, the school did not violate his First Amendment rights.[71]

Axson-Flynn v. Johnson

In *Axson-Flynn v. Johnson*,[72] the Tenth Circuit Court of Appeals applied the *Hazelwood* standard to university student curricular speech that occurs in the classroom.[73] In *Axson-Flynn*, an acting student at the University of Utah claimed that her acting professor violated her First Amendment right to refrain from speaking by insisting that she perform scripts as written, without omitting or replacing words the student found offensive.[74] The

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graduate student's curricular speech. *Id.* at 951. Judge Ferguson argued Brown's speech was unprotected because Brown tried to publish his thesis in a deceptive manner, by inserting unauthorized material which amounted to cheating, so the First Amendment was not even triggered. *Id.* at 955-56. In his dissent, Judge Reinhardt argued that *Hazelwood* was not the correct standard to apply to graduate student speech because of the differences in maturity levels between high school and college students. *Id.* at 961-62 (Reinhardt, J., dissenting).

69. *Id.* at 951. Although Judge Graber applied *Hazelwood* to a graduate student's curricular speech, she also noted that other courts have held that "*Hazelwood* deference does not apply" to extracurricular student speech at the college level. *Id* at 949.

70. *Id.* at 952.

71. *Id.*

72. 356 F.3d 1277 (10th Cir. 2004).

73. *Id.* at 1289.

74. *Id.* at 1283. The First Amendment also prohibits being forced to speak. "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Id.* at 1284 n.4 (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, Inc., 515 U.S. 557, 573 (1995)). Christina Axson-Flynn, a student in the University of Utah's Actor Training Program, refused to say the words "goddamn" and "fucking" during a class exercise. She offered to omit or substitute those words or to perform a different scene, but her acting instructor denied her requests and threatened Axson-Flynn with a grade of zero if she did not perform the scene as scripted. *Id.* at 1282.

Tenth Circuit held that *Hazelwood* would apply even at the university level, but it remanded the case to determine whether the professor's justification for the strict adherence to the script as written was truly a pedagogical concern.[75]

Hosty v. Carter

In contrast, in *Hosty v. Carter*,[76] the Seventh Circuit Court of Appeals held that the deferential *Hazelwood* standard was not the appropriate standard to apply when determining the First Amendment protection afforded to student speech at the college level.[77] In *Hosty*, a dean at Governors State University told the publisher of the school newspaper that, prior to printing, the school had to review the paper's content.[78] The undivided panel did not apply the *Hazelwood* standard in this case because "*Hazelwood's* rationale for limiting the First Amendment rights of high school journalism students is not a good fit for students at colleges or universities."[79] To determine the First Amendment protection afforded to a student-run and student-edited school newspaper, the Seventh Circuit applied a standard similar to *Tinker*: "school administrators can only censor student media if they show that the speech in question is legally unprotected or if they can demonstrate that some significant and imminent physical disruption of the campus will result from the publication's content."[80] This standard is less deferential to school administration and more protective of

75. *Id.* at 1293 (questioning whether or not the strict script adherence was truly a pedagogical concern or whether it was a pretext for religious discrimination because the student was Mormon).

76. 325 F.3d 945 (7th Cir. 2003), *reh'g en banc granted*, *opinion vacated*, No. 01-4155 (7th Cir. June 25, 2003). Although the Seventh Circuit did rehear the case, that opinion was not yet available at the time this article was published.

77. *Id.* at 949. The court stated that the *Hazelwood* deference the "Supreme Court found necessary in the high school setting—and in the factual context of *Hazelwood*—is inappropriate for a university setting." *Id.*

78. *Id.* at 946–47. However, the newspaper's policy was that student staff members would "determine content and format of their respective publications without censorship or advance approval." *Id.*

79. *Id.* at 948.

80. *Id.* at 947.

student speech. Although the full Seventh Circuit Court vacated *Hosty* in 2003, the panel decision still stands as a persuasive example of how lower courts continue to apply high school student speech standards to college student speech.[81]

In conclusion, some lower courts have distinguished between curricular and extracurricular student speech at the university level and have applied the more deferential *Hazelwood* standard to curricular student speech.[82] Conversely, another court refused to draw that distinction at the college level and applied a standard similar to *Tinker* to a student-run school newspaper.[83] Regardless of whether a court draws this curricular-extracurricular distinction at the university level, the *Brown, Axson-Flynn,* and *Hosty* opinions illustrate that courts are applying the same or similar standards to student speech at the high school and college levels.

II. CONFUSION AND INCONSISTENCY IN THE CIRCUITS

Numerous circuit court decisions illustrate the confusion and inconsistency in the lower courts regarding the level of First Amendment protection of teachers' classroom speech.[84] These cases demonstrate two major uncertainties present in the lower courts' opinions. First, while some courts apply *Pickering-Connick*, others apply the *Hazelwood* precedent to teacher in-class speech,[85] thereby creating unpredictability in determining which precedent courts will follow.[86] Second, some courts actually combine the precedents and apply the *Pickering-Connick* "matter of public

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81. On June 25, 2003, the Seventh Circuit, sitting *en banc*, vacated the three-judge panel's April 2003 decision and granted a rehearing en banc.

82. *See* Axson-Flynn v. Johnson, 356 F.3d 1277, 1289 (10th Cir. 2004); Brown v. Li, 308 F.3d 939, 951 (9th Cir. 2002).

83. *See Hosty,* 325 F.3d at 947.

84. *See* Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1052 (6th Cir. 2001); Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 679 (6th Cir. 2001); Vanderhurst v. Colo. Mountain Coll., 208 F.3d 908, 914-15 (10th Cir. 2000); Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 368-71 (4th Cir. 1998); Miles v. Denver Pub. Sch., 944 F.2d 773, 776-78 (10th Cir. 1991).

85. *See supra* note 14.

86. *See* Daly, *supra* note 11, at 2.

concern" and the *Hazelwood* "legitimate pedagogical concerns" tests to determine the protection of classroom speech,[87] creating even more uncertainty as to which methods a court will use when applying precedent.[88] In this second situation, for example, when applying the "public concern" test, one court may focus solely on the content of the speech,[89] while another considers only the speaker's role when speaking.[90]

A. Cockrel v. Shelby County School District

In *Cockrel v. Shelby County School District*,[91] the Sixth Circuit Court of Appeals applied the *Pickering-Connick* standard to analyze the First Amendment protection of a fifth-grade teacher's in-class speech.[92] Donna Cockrel, an elementary school teacher, arranged for actor Woody Harrelson to speak to her class on two separate occasions about the environmental benefits of industrial hemp.[93] The school principal gave Cockrel permission to invite Harrelson on both occasions. Subsequently, Cockrel received poor evaluations and was fired.[94]

The Sixth Circuit held that Cockrel's invitation to certain guests to speak to her class constituted "speech" under the First

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87. *See Boring*, 136 F.3d at 368-71.

88. *See* Daly, *supra* note 11, at 2.

89. *See Cockrel*, 270 F.3d at 1050-51.

90. *See Boring*, 136 F.3d at 368; Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 800 (5th Cir. 1989).

91. 270 F.3d 1036 (6th Cir. 2001).

92. *Id.* at 1050-55.

93. *Id.* at 1042-44. There are two types of hemp plants:

> One is the marijuana plant itself, with approximately four to seven percent of its weight comprised of tetrahydrocannabinol ('THC'), the active chemical in the marijuana drug; the other is industrial hemp, a plant which grows in stalks and from which fibers can be taken to make various goods such as paper and clothes.

Id. at 1042 (citing John Mintz, *Splendor in the Grass?*, WASH. POST, Jan. 5, 1997, at H1).

94. *Id.* at 1045.

Amendment,[95] so the court applied the *Pickering-Connick* public concern test.[96] The court held that the public concern determination is "not [a question of] whether a person is speaking in his role as an employee or a citizen, but whether the employee's speech in fact touches on matters of public concern."[97] According to this interpretation of the public concern test, speech is protected – regardless of the speaker's role when speaking – if the content of the speech in question relates to a matter of public concern.[98] The court found that the content of Cockrel's speech, the environmental benefits of industrial hemp, touched on a matter of public concern.[99] Even though Cockrel had spoken in her role as a teacher, the content of her speech met the threshold "public concern" test.[100] Because the speech addressed a matter of public concern, the court applied the *Pickering-Connick* balancing test and held that the school's interest in workplace efficiency did not outweigh Cockrel's interest in speaking about industrial hemp.[101] Thus, her speech was constitutionally protected.[102]

B. Hardy v. Jefferson Community College

In *Hardy v. Jefferson Community College*,[103] the Sixth Circuit Court of Appeals applied the *Pickering-Connick* standard to analyze the First Amendment protection of a college instructor's classroom speech.[104] In *Hardy*, Kenneth Hardy, an adjunct instructor at Jefferson Community College, taught Introduction to Interpersonal Communication.[105] During the 1998 summer session, he presented his standard lecture on "language and social constructivism," during which students study how society uses

95. *Id.* at 1049.
96. *Id.* at 1050-55.
97. *Id.* at 1052.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 1055.
102. *Id.*
103. 260 F.3d 671 (6th Cir. 2001).
104. *Id.* at 678.
105. *Id.* at 674.

language to "marginalize minorities and other oppressed groups."[106] The lecture included identification and analysis of certain words "that have historically served the interests of the dominant culture in which they arise."[107] Hardy's students identified certain offensive words, and most of the class participated in the exercise, finding the discussion to be challenging.[108] However, one student objected to the in-class use of certain words and complained to the college administration.[109] Subsequently, the college informed Hardy that there were no classes available for him to teach.[110]

The court held that Hardy's lecture, "which explored the social and political impact of certain words," addressed a matter of public concern.[111] Although Hardy's classroom speech itself did not "constitute pure public debate," the words did "relate to matters of overwhelming public concern – race, gender, and power conflicts in our society."[112] Because Hardy's classroom speech addressed a matter of public concern, the court conducted the *Pickering-Connick* balancing test and held that Hardy's interest in free speech outweighed the college's interest in limiting that speech.[113]

C. Miles v. Denver Public Schools

In *Miles v. Denver Public Schools*,[114] the Tenth Circuit Court of Appeals held that *Hazelwood* was the proper standard to determine the First Amendment protection of a high school

106. *Id.*

107. *Id.* at 674-75.

108. *Id.* at 675. The words identified in class by students were: "lady," "girl," "bitch," "nigger," and "faggot." *Id.*

109. *Id.* An African-American female student complained to the administration about Hardy's use of the words "bitch" and "nigger" in class. *Id.*

110. *Id.*

111. *Id.* at 679.

112. *Id.*

113. *Id.* at 682. While conducting the balancing test, the court noted that only one student objected to the discussion of the offensive words, and Hardy finished the semester without any conflict. In addition, there was no evidence that his lecture impeded Hardy's working relationship with his co-workers or his performance of his duties in the classroom. *Id.* at 681.

114. 944 F.2d 773 (10th Cir. 1991).

teacher's classroom speech.[115] In *Miles*, John Miles, a ninth-grade government teacher, told his class that the quality of the school had been declining since 1967.[116] His students probed him for specific examples and he responded, "I don't think in 1967 you would have seen two students making out on the tennis court."[117] His statement referred to a rumor that two students were observed having sex on the tennis court during lunch the previous day.[118] Students' parents complained and the principal placed Miles on paid administrative leave for four days.[119] Subsequently, the principal issued a reprimand letter and placed it in Miles's file.[120]

In applying *Hazelwood*, the court noted that "[a] school's interests in regulating classroom speech . . . are implicated regardless of whether that speech comes from a teacher or student."[121] In the first step of the *Hazelwood* analysis, the court found that Miles's classroom was a nonpublic forum because there was no evidence that the school intended to open up his classroom

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115. *Id.* at 775. Notably, the Tenth Circuit considered but expressly rejected the application of the *Pickering-Connick* standard in this case. The court stated:

> Although the *Pickering* test accounts for the state's interests as an employer, it does not address the significant interests of the state as an educator. . . . *Hazelwood* recognized that a state's regulation of speech in a public school setting is often justified by peculiar responsibilities the state bears in providing educational services . . . [which] warrant application of the standard adopted in *Hazelwood* for reviewing regulation of classroom speech rather than the *Pickering* standard.

Id. at 777.

116. *Id.* at 774.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 774-75. In the reprimand letter, the principal told Miles that his comment about the students engaging in affectionate behavior on the tennis court was "an inappropriate topic for comment in a classroom setting" and instructed Miles to refrain from commenting on "any items which might reflect negatively on individual members of [the] student body." *Id.*

121. *Id.* at 777.

for public discourse.[122] The court also found that his statement to his government class bore the imprimatur of the school.[123] In the next step of the analysis, the court determined the school's restrictions were reasonably related to legitimate pedagogical concerns.[124] Therefore, the school's restrictions on Miles's speech were constitutional.[125]

D. Vanderhurst v. Colorado Mountain College District

In *Vanderhurst v. Colorado Mountain College District*,[126] the Tenth Circuit also applied the *Hazelwood* holding to govern the regulation of a college professor's classroom speech.[127] In *Vanderhurst*, Professor Stuart Vanderhurst taught classes at Colorado Mountain College, and some of his students complained that he made inappropriate and offensive comments during class.[128]

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122. *Id.* at 776.

123. *Id.* at 776 (referring to *Hazelwood*). The court stated: "We are convinced that 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." *Id.* (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988)).

124. *Id.* at 778-79. The school's legitimate pedagogical interests included interests in "preventing Miles from using his position of authority to confirm an unsubstantiated rumor[,] . . . ensuring that teacher employees exhibit professionalism and sound judgment[,] . . . [and] providing an educational atmosphere where teachers do not make statements about students that embarrass those students among their peers." *Id.* at 778.

125. *Id.*

126. 208 F.3d 908 (10th Cir. 2000).

127. *Id.* at 914-15. In *Vanderhurst*, the court applied *Hazelwood* to professor classroom speech without actually holding that *Hazelwood* is the proper analytical framework. The court did not need to decide this issue because the holding of the case is based on the fact that the appellant did not properly preserve the issue for appellate review. *Id.* However, the court's *Hazelwood* analysis is illustrative of how a court would apply Hazelwood to a professor's classroom speech.

128. *Id.* at 910-11. The specific allegations against Vanderhurst were:

> [H]e discussed the presence of tampons in a sewer plant while lecturing about animal parasites; he referred to human anal and oral sex and male orgasms during a lecture about the transmission of parasites; he used the terms "big dog," "big chair," and "floaters

The college suspended Vanderhurst without pay and later dismissed him.[129] In its *Hazelwood* analysis, the court found that the classroom was a nonpublic forum and that Vanderhurst's in-class speech was curricular and could be perceived as school-sponsored speech.[130] The Tenth Circuit affirmed the district court's holding that Vanderhurst's termination was reasonably related to specific legitimate pedagogical concerns, interests embedded in the school's code of ethics and sexual harassment policy.[131] Thus, his termination was constitutional and his speech unprotected.[132]

Notably, the Sixth Circuit in *Cockrel* and *Hardy*, and the Tenth Circuit in *Miles* and *Vanderhurst*, applied the same speech standards to teachers' classroom speech at the secondary and postsecondary levels. The Sixth Circuit applied the *Pickering-Connick* standard to determine the First Amendment protection of a fifth-grade teacher's and college instructor's classroom speech,[133] and the Tenth Circuit applied the *Hazelwood* standard to determine the protection of a high school teacher's and college professor's in-class speech.[134] Given the lack of Supreme Court precedent regarding the free speech rights of teachers, lower courts' similarity in treatment of student speech at the secondary and postsecondary levels,[135] and the circuits' similarity in treatment of

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> and sinkers" to describe feces; he made comments insulting to blondes; he called a female student "rose bud"; he degraded a student by discussing an incident in which she was bitten by a pig; he intimated that students were "dumb" . . . [and] he intimidated and humiliated students. . . .

Id. at 911.

129. *Id.*

130. *Id.* at 914-15.

131. *Id.* at 915.

132. *Id.* at 918.

133. *See* Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1050-55 (6th Cir. 2001); Hardy v. Jefferson Cmty. Coll. 260 F.3d 671, 678 (6th Cir. 2001).

134. *See* Miles v. Denver Pub. Sch., 944 F.2d 773, 775 (10th Cir. 1991); *Vanderhurst*, 208 F.3d at 914-15. Although the *Vanderhurst* court did not hold *Hazelwood* applicable to professor classroom speech, the court's *Hazelwood* analysis is illustrative of how a court would apply the standard to teacher classroom speech at the university level. *Id.*

135. *See supra* notes 68–88 and accompanying text.

teachers' classroom speech at the secondary and postsecondary levels, courts will likely follow the example of the Sixth and Tenth Circuits and apply the same standard to all teacher speech, at both the secondary and postsecondary levels.

E. Boring v. Buncombe County Board of Education

In *Boring v. Buncombe County Board of Education*,[136] the Fourth Circuit Court of Appeals applied the *Pickering-Connick* "public concern" threshold test[137] and the *Hazelwood* "legitimate pedagogical concern" test[138] to determine the First Amendment protection of teacher in-class speech. Margaret Boring, a high school drama teacher, chose the play *Independence* for her students to perform in an annual competition. *Independence* was about a divorced mother and her three daughters.[139] One daughter was unwed and pregnant and another was a lesbian.[140] The principal approved the play for the competition.[141] After the annual competition, parents expressed disapproval of the play's content, and the school transferred Boring from the high school.[142]

The court applied the *Pickering-Connick* public concern test as a threshold matter.[143] Using the public concern analysis, the court held that Boring's speech, the selection of the play, was a curricular decision made in Boring's role as an employee.[144] Therefore, her speech addressed an internal workplace matter, not a matter of public concern.[145] As a result, the court found her

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136. 136 F.3d 364 (4th Cir. 1998).

137. *Id.* at 368-69.

138. *Id.* at 369-70.

139. *Id.* at 366.

140. *Id.*

141. *Id.* The principal agreed to the performance of the play at the annual competition, but with "certain portions deleted." *Id.* The court assumed that the play was performed according to the principal's instructions. *Id.*

142. *Id.* at 366-67. The principal requested and the superintendent approved the transfer of Boring from the school, citing "personal conflicts resulting from actions she initiated during the course of the year." *Id.*

143. *Id.* at 368-69.

144. *Id.* at 368.

145. *Id.*

speech unprotected.[146] In dicta, the court explained that if Boring's speech had met the public concern threshold test, her speech would have failed the second part of their test, the *Hazelwood* legitimate pedagogical concern analysis.[147] Under *Hazelwood*, the court noted that her speech was curricular and curricular decisions are by definition legitimate pedagogical concerns.[148] Since Boring's termination was reasonably related to a legitimate pedagogical concern, her transfer was constitutional and her speech unprotected.[149]

III. COMPLEXITIES WITH THE EXISTING PRECEDENT AS APPLIED TO TEACHER IN-CLASS SPEECH

A. *Problems with the Pickering-Connick Standard*

The public concern threshold test "fails to account adequately for the unique character of a teacher's in-class speech"[150] and "ignores the essence of teaching – to educate, to enlighten, to inspire – and the importance of free speech to this most critical endeavor."[151] Distinct from the district attorney in *Connick* or the hospital nurse in *Waters*, teachers are hired and paid to discuss a variety of subjects in lectures. It is a teacher's job to present numerous topics, and this professional requirement should not be

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146. *Id.*

147. *Id.* at 370.

148. *Id.* The court stated:

> There is no doubt at all that the selection of the play . . . was a part of the curriculum . . . . The makeup of the curriculum of [a school] is by definition a legitimate pedagogical concern. . . . If the performance of a play under the auspices of a school and which is a part of the curriculum of the school, is not by definition a legitimate pedagogical concern, we do not know what could be. . . .

Id.

149. *Id.*

150. *Id.* at 378 (Motz, J., dissenting).

151. *Id.*

limited or determined by whether or not in-class speech addresses a matter of public concern.[152]

When courts conduct the public concern threshold test, they consider the role of the speaker[153] and the "content, form, and context" of the speech in question.[154] It is within a court's discretion to choose which of these factors to focus on most heavily, which causes further inconsistency in the application of this particular

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152. *See id.* In her dissent, Judge Motz noted:

> When a teacher steps into the classroom she assumes a position of extraordinary public trust and confidence: she is charged with educating our youth. Her speech is neither ordinary employee workplace speech nor common public debate. Any attempt to force it into either of these categories ignores the essence of teaching.

Id. Some commentators agree that the public concern test fails to account for the unique role of teachers in the education process and is not the proper standard to use when determining the First Amendment protection of a teacher's in-class speech. *See generally,* Daly, *supra* note 11, at 10; Weiner, *supra* note 7, at 627-31 (arguing that *Pickering-Connick* provides little protection for teachers' classroom speech and "the mere invocation of the *Pickering* test often means that the teacher will lose"); *see also* Clarick, *supra* note 7, at 702. Clarick states:

> Although *Pickering* [and] *Connick* . . . provide substantial protection for some speech of teachers, [the employee speech standard] provides an inappropriate model for examination of teachers' in-class speech. The distinction between speech related to issues of public concern and speech internal to an employees' [sic] workplace does not take into account the function and unique atmosphere of teaching. Teachers' in-class speech addressed to students is neither 'internal workplace speech,' analogous to the inter-office questionnaire at issue in *Connick*, nor explicitly a part of the public debate, as was Pickering's letter. Nonetheless, a teacher's in-class expression has dramatic public repercussions because of its role in educating students.

Id.

153. Connick v. Myers, 461 U.S. 138, 147 (1983).

154. *Id.* at 147-48.

standard.[155] To illustrate, the *Cockrel* court's public concern test was content determinative.[156] The court found the content of Cockrel's speech, the environmental benefits of using industrial hemp, to be a political and social concern in the community.[157] Therefore, her speech passed the public concern threshold test and received provisional protection.[158] In contrast, the *Boring* court's public concern test was role determinative.[159] Because Boring was speaking in her role as a teacher, she was not speaking as a citizen "but instead as an employee upon matters of personal interest."[160] Thus, the court held her speech failed the public concern threshold test and the school won.[161]

The *Cockrel* and *Boring* holdings illustrate the difficulties in applying the public concern threshold test to a teacher's in-class speech.[162] On one hand, the *Cockrel* content-determinative approach ignores the role of the speaker. Although lower courts have traditionally limited what constitutes a matter of public concern with regard to content,[163] the content-determinative approach gives teachers too much discretion.[164] For example, under

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155. *See generally* Daly, *supra* note 11, at 9-10.

156. Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1052 (6th Cir. 2001).

157. *Id.*

158. *Id.*

159. Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 368 (4th Cir. 1998).

160. *Id.*

161. *Id.*

162. *See generally* Karin B. Hoppmann, *Concern with Public Concern: Toward a Better Definition of the Pickering/Connick Threshold Test*, 50 VAND. L. REV. 993, 1012-19 (1997) (describing problems with the content-based public concern threshold test for public employees in general).

163. *See generally* Ann Hassenpflug, *Avoiding Violations of Faculty First Amendment Freedom of Speech Rights*, 134 EDUC. L. REP. 439, 443 (1999). With regard to content: "Speech that addresses issues of quality of education and safety for students, district use and misuse of public funds, a district's implementation of mandated instructional programs, electoral politics, and equity of personnel decisions and procedures is most likely to receive protection." *Id.*

164. *See generally* R. Weston Donehower, Boring *Lessons: Defining the Limits of a Teacher's First Amendment Right to Speak Through the Curriculum*, 102 MICH. L. REV. 517, 533-35 (2003) (arguing that *Cockrel's*

Cockrel's content-determinative approach, a teacher's in-class speech would pass the public concern test and receive provisional protection so long as the speech addressed a topic of community concern.[165] On the other hand, the *Boring* public concern analysis is solely role-determinative.[166] Under this approach, whenever a teacher facilitates the curriculum by speaking in class, regardless of the content of the speech, the teacher is always speaking as an employee on a matter of private concern.[167] Thus, the role-determinative approach provides little, if any, protection of teachers' classroom speech.[168]

Applying *Cockrel* and *Boring* to Dr. Tuttle's case[169] illustrates why the public concern test should be rejected as the test for determining the First Amendment protection of teachers' in-class speech. Under *Cockrel*'s content-determinative test, a court could reasonably conclude that philosophy, generally, and an individual's personal philosophy, specifically, are not matters of public concern. Matters of public concern are those matters over which "free and open debate is vital to informed decision-making by the electorate"[170] or "matter[s] of political, social, or other concern to the community."[171] Philosophy does not qualify as such. Thus, Dr. Tuttle's speech is not entitled to First Amendment protection. Alternatively, under *Boring*'s role-determinative public concern test, since Dr. Tuttle's speech occurred during his lectures, a court could reasonably conclude that he was speaking in his role as an employee and that his speech was merely internal workplace

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content-determinative public concern test grants more protection to teachers because so long as the content of the speech addresses a matter of public concern then the speech is given provisional First Amendment protection).

165. *See id.*

166. *See Boring*, 136 F.3d at 371.

167. *See id.* at 368. *See generally* Donehower, *supra* note 164, at 528.

168. *See generally* Weiner, *supra* note 7, at 630. Weiner argues that the "context in which the speech occurs tends to dominate the other factors that define 'public concern.'" *Id.* Thus, a "court may refuse to label the speech as a matter of public concern when a teacher addresses her speech only to her students [in her role as a teacher] and not to the community at large." *Id.*

169. *See supra* notes 1-3 and accompanying text.

170. Pickering v. Bd. of Educ., 391 U.S. 563, 571-72 (1968).

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

speech. If the court concluded that his case is "nothing more than an ordinary employment dispute,"[172] his speech would not receive First Amendment protection. Ultimately, the "public concern" test ignores a teacher's role, which is to discuss certain subjects in the school's curriculum regardless of whether they address matters of public concern.

B. Difficulties with the Hazelwood Standard

Because teacher in-class speech could be viewed as bearing the imprimatur of the school,[173] because a classroom is usually a nonpublic forum,[174] and because limitations on teacher speech may

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172. *See Boring,* 136 F.3d at 369 (quoting Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 802 (5th Cir. 1989)).

173. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988). *See generally* Bishop v. Aronov, 926 F.2d 1066, 1073 (11th Cir. 1991). The court in *Bishop* stated:

> While a student's expression can be more readily identified as a thing independent of the school, a teacher's speech can be taken as directly and deliberately representative of the school. Hence, where the in-class speech of a teacher is concerned, the school has an interest . . . in scrutinizing expressions that "the public might reasonably perceive to bear [its] imprimatur[.]"

Id. (alterations in original) (quoting *Hazelwood,* 484 U.S. at 271).

174. *Hazelwood*, 484 U.S. at 267. *See, e.g., Miles*, 944 F.2d at 776 (finding that a classroom was a nonpublic forum). Although courts conduct the public forum analysis as part of the *Hazelwood* standard, some argue that there are problems with the public forum analysis when determining the protection of teachers' classroom speech. *See generally* Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 119-20 (1986) (criticizing the labels of "public" and "nonpublic" forums when determining First Amendment protection of speech); Kevin G. Welner, *Locking up the Marketplace of Ideas and Locking out School Reform: Court's Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 U.C.L.A. L. REV. 959, 1020 (2003) (arguing that if the Court applies the narrow focus of the public forum analysis with regard to classrooms, the analysis would exclude the concerns about the open, robust marketplace of ideas that the Court has recognized as important); Clarick, *supra* note 7, at 712. Clarick argues:

> *Hazelwood* endangers the protection of teachers'

promote the inculcation of community values, lower courts have found it appropriate to apply the *Hazelwood* standard to teacher in-class speech even though *Hazelwood* governs student speech.[175] In addition, some lower courts hold that any curricular decisions or curricular in-class speech is by definition a legitimate pedagogical concern.[176] Thus, so long as a school's speech restriction is reasonably related to a teacher's curricular decisions or in-class speech, the restrictions are constitutional and the speech is unprotected.[177]

If a court were to apply *Hazelwood* to Dr. Tuttle's in-class statements, the court reasonbly could conclude that Tuttle's classroom, like the student newspaper in *Hazelwood*, is a nonpublic forum because it has not been opened up to the public.[178] In addition, the court could hold under *Hazelwood* that Tuttle's in-class speech reasonably could be perceived as school-sponsored since he was facilitating the school's curriculum through in-class speech.[179] If the court held Dr. Tuttle's classroom is a nonpublic forum and his in-class speech is school-sponsored, then under *Hazelwood*, the school may restrict his speech so long as the restrictions are reasonably related to legitimate pedagogical concerns.

IV. ALTERNATIVE TEST PROPOSED

The following proposed test constitutes an alternative to the

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> rights to speak freely. Although the *Hazelwood* opinion directly addressed students' rights, the Supreme Court's primary reliance on public forum analysis suggests the possibility that lower courts may find that other "school-sponsored, curricular" speech, particularly the in-class speech of employee teachers, occurs in nonpublic forums.

Id.

175. See *supra* note 14 for examples of lower courts' application of *Hazelwood* to teacher in-class speech.

176. *See Boring*, 136 F.3d at 370.

177. *Id.*

178. *See Hazelwood*, 484 U.S. at 267.

179. *See Boring*, 136 F.3d at 370.

tests discussed above. Because lower courts have applied the same standards to secondary and postsecondary student speech,[180] they are likely to apply the same standards to secondary school teachers and university professors when determining the First Amendment protection of their in-class speech. Furthermore, some courts, including the Sixth and Tenth Circuits, in fact have applied the same standard to teachers at both educational levels.[181] Thus, this alternative test would apply to educators at both secondary and postsecondary institutions. Under the proposed test, the school must prove as a threshold matter that the teachers' classroom speech caused an actual or potential substantial disruption[182] in the facilitation of the curriculum. To restrict speech based on a potential disruption, the school's prediction of disruption must be

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180. *See, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1286 (10th Cir. 2004) (applying the *Hazelwood* standard to a university student's curricular speech); *see also* Hosty v. Carter, 325 F.3d 945, 947-49 (7th Cir. 2003) (applying a standard similar to *Tinker* to a student school newspaper), *reh'g en banc granted, opinion vacated*, No. 01-4155 (7th Cir. June 25, 2003); Brown v. Li, 308 F.3d 939, 949 (9th Cir. 2002) (applying the *Hazelwood* standard to a graduate student's curricular speech). *But see* Healy v. James, 408 U.S. 169, 180 (1972) (stating, after noting the similarities between college campuses and the general public, "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large").

181. *See, e.g.*, Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1052 (6th Cir. 2001) (applying the *Pickering-Connick* standard to a fifth-grade teacher's classroom speech); Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 679 (6th Cir. 2001) (applying the *Pickering-Connick* standard to a college instructor's in-class speech). *See also* Vanderhurst v. Colo. Mountain Coll. Dist., 208 F.3d 908, 914-15 (10th Cir. 2000) (applying *Hazelwood* to a college professor's classroom speech); Miles v. Denver Pub. Sch., 944 F.2d 773, 778-79 (10th Cir. 1991) (applying the *Hazelwood* standard to a high school teacher's in-class speech).

182. *Cf.* Waters v. Churchill, 511 U.S. 661, 673 (1994) (explaining that the government employer's interest in workplace efficiency is so substantial that an employer may restrict employee speech based on an actual or potential disruption in workplace efficiency); Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 510-11 (1969) (holding that a student speech restriction is unconstitutional unless there is evidence that such a restriction on speech is "necessary to avoid material and substantial interference with schoolwork or discipline").

reasonable. A court may consider the context and content of the speech in its determination of this threshold matter.[183] If the school fails to prove that the speech at issue was a potential or actual substantial disruption, the teacher wins and the speech restrictions are unconstitutional.

If the school meets its burden by showing either that the speech caused an actual disruption or that the school's prediction of disruption was reasonable, the speech receives conditional First Amendment protection, and the court should then balance the involved interests.[184] The court will weigh the educator's interest in teaching students skills necessary to participate in a democracy through the designated curriculum[185] against the school's interest in promoting societal values through the particular curriculum.[186] If the school fails to show that its interest outweighs that of the educator, then the educator wins, and the speech is protected. However, if the school proves its interest is more substantial, the school wins, the speech restrictions are constitutional, and the speech is unprotected.

Under the proposed test, which rejects the *Pickering-Connick* public concern threshold test, a court should determine whether in-class speech caused an actual or potential substantial disruption to the facilitation of the curriculum by considering various contextual factors.[187] One important factor, for example, is the student-teacher relationship, a unique and vital part of the education system. In this relationship, teachers work to make

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183. *Cf.* Connick v. Myers, 461 U.S. 138, 147-48 (1983). The Supreme Court held that factors such as content, form, and context may be considered in determining whether speech is a matter of "public concern." *Id.* Similarly, in the proposed test, courts may consider these same factors to determine if the speech caused an actual or potential disruption.

184. *Cf.* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (holding that courts must use a balancing test that weighs "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").

185. *See generally supra* note 7.

186. *See generally supra* note 9.

187. *Cf. Connick*, 461 U.S. at 147–48 (holding that when conducting matter of public concern test, courts must examine the content, form, and context of the speech in question).

students feel comfortable expressing opinions and ideas in class in order to develop critical thinking skills. At the same time, however, teachers must maintain authority over students. Teachers' classroom speech should be protected when they use their special position of authority to open up the classroom to different ideas and arguments for debate. However, teachers' speech should be restricted when they use their authority to pressure students into supporting a certain opinion or preventing students from expressing their own ideas. If a teacher's classroom speech exerts this type of pressure on a student and discourages the student from thinking critically, the speech has obstructed the student's ability to learn the skills necessary to participate in a democracy.[188] Another contextual factor a court may consider under the proposed test is the content of the speech.[189] The fact that a teacher has been hired and paid to teach certain courses, devoting substantial amounts of class time to matters wholly unrelated to the course, could constitute a disruption in the curriculum.[190]

In the proposed test, if the court determines that the teacher's in-class speech caused an actual or potential substantial disruption in the facilitation of the curriculum, then the court will balance the respective interests. On one side of the balancing equation, a teacher's interest in unrestricted classroom speech is not an interest in speaking "as a citizen, in commenting upon matters of

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188. *See generally* Clarick, *supra* note 7, at 733. Clarick argues that when determining the First Amendment protection afforded a teacher's classroom speech, a court should consider how a teacher presents the statement, and that so long as "the teacher presents her statement as an argument – one of many – its impact [on the education process] most likely is not disruptive." *Id.*

189. Factors are not limited to the student-teacher relationship. A court might also consider the age and maturity level of students in the class, the number of students affected by the teacher's classroom speech, and the student's academic performance in that teacher's class.

190. Even the American Association of University Professors, which advocates for a right to academic freedom that attaches to the individual professor, believes that there should be at least some limitations on teachers' classroom speech. *See* AM. ASS'N OF UNIV. PROFESSORS, *supra* note 8 ("Teachers are entitled to full freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.").

public concern."[191] Instead, a teacher's interest is to create a robust learning environment for students while implementing the school's chosen curriculum.[192] Many education scholars agree that the primary societal goal of education in the United States is to teach students how to think independently and critically, enabling them to distinguish between competing arguments, a skill necessary to effective participation in a democratic society.[193] In order for students to learn how to discern truth and distinguish between competing arguments, they must understand that multiple viewpoints and ideas exist.[194] Even the Supreme Court has recognized that the learning process requires exposure to a multiplicity of competing views.[195] Restrictions on teachers' classroom speech cripple their ability to create the robust learning environment necessary to further the interests of society and the school.[196]

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191. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

192. *See supra* notes 6–9 and accompanying text.

193. *See generally* Clarick, *supra* note 7, at 725 ("[C]ontemporary educators . . . criticize indoctrinative teaching methods, instead advocating education that requires students to participate and think actively."); *Education for Democracy: A Statement Signed by Over 100 Distinguished Leaders*, AM. EDUCATOR, Fall 2003, at 6 (emphasizing the importance of the development of critical thinking skills to actively participate in a democracy: "Our purpose . . . is to strengthen schools' resolve to consciously impart to students the ideals and values on which our free society rests."); David Fellman, *Academic Freedom in American Law*, 1961 WIS. L. REV. 3, 6 (1961) ("A democratic society cannot function successfully without an enlightened public opinion emanating from an educated citizenry."); Jonathan Marks, Book Note, 86 MICH. L. REV. 1140, 1143 (1988) (reviewing AMY GUTMANN, DEMOCRATIC EDUCATION (1987)) (noting that, in her book, Democratic Education, Amy Gutmann argues that citizens can not participate fully in a democracy if they have not learned how to deliberate critically); David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951, 968 (1996) (emphasizing the importance of critical thinking and analytical skills as essential qualities for democratic citizens).

194. *See supra* notes 5–8 and accompanying text.

195. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Wieman v. Updegraff, 344 U.S. 183, 197 (1952).

196. *See generally* Clarick, *supra* note 7, at 725 ("[N]urturing thought in students . . . demands that teachers offer students choices between competing arguments and an open-minded presentation of diverse viewpoints."); Betsy

On the other side of the balancing equation is the school's interest in facilitating a particular curriculum. Although a school has a right to set the curriculum to inculcate community values,[197] it does not have the right to set a "pall of orthodoxy."[198] While a school may have more control over value inculcation when teachers' classroom speech is closely regulated, value inculcation is only one aspect of the chosen curriculum. Fewer restrictions on teachers' classroom speech enables teachers to more efficiently and effectively implement the school's official curriculum in a way that will expose students to different viewpoints instead of only "officially approved ideas."[199] Thus, students learn critical thinking skills not only from the substance of the official school-determined curriculum itself, but also from a teacher's own choices regarding how to facilitate the official curriculum.[200] This alternative balancing test, unlike the *Pickering-Connick* or *Hazelwood* standards, considers both the school's and the teacher's interests,

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Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School,* 95 YALE L.J. 1647, 1649 (1986). The author analyzed the conflicting interests at stake in teacher free speech cases:

> The dilemma is clear: Education necessarily involves the process of selection, but it also requires some degree of order within the institution to carry out the educational mission. . . . Socialization to values through a uniform educational experience necessarily conflicts with freedom of choice and the diversity of a pluralistic society.

Id.

197. *See supra* note 9 and accompanying text.

198. *Keyishian*, 385 U.S. at 603.

199. *See generally* Clarick, *supra* note 7, at 730-31. The author argues:

> By contributing their personal ideas and opinions, teachers implement officially approved curricula without limiting students' learning to officially approved ideas. Thus, robust [F]irst [A]mendment protection for teachers – which encourages them to voice diverse opinions and viewpoints without fear of retribution – diminishes the dangers of a government attempting to indoctrinate children with narrow-minded dogma though classroom communication.

Id.

200. *See generally id.*

which are unique to the education system.[201]

If a court were to apply the proposed test to Dr. Tuttle's situation and find that Tuttle presented his opinion as one of many opinions and encouraged students to participate by commenting on their own philosophies, then the court could reasonably conclude that his speech was not a disruption. Tuttle would win, and the school's restrictions on his speech would be unconstitutional. If, on the other hand, the court were to find that Tuttle presented his speech in a manner that pressured students to adopt his opinion, then a court may reasonably conclude that Tuttle's speech caused a disruption. His speech would receive conditional protection, and the court would conduct the balancing test. If a court found Tuttle had used substantial class time to comment on his personal philosophy and students had not learned the particular curriculum, then a court could find the school's interest weighed heavier. If the school's interest is heavier, the school wins and Tuttle's speech is unprotected. Conversely, a court could reasonably conclude that Tuttle's interest was more substantial. In that case he would win, and the school's restrictions on his speech would be unconstitutional.

CONCLUSION

Historically, the United States Supreme Court has recognized that public schools have the right to set and inculcate certain values through the curriculum. This right is promoted and more tightly controlled when the schools can easily regulate teachers' classroom speech.[202] Nevertheless, the Court has also recognized that teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[203] In fact, the Court has stated that teachers are the "priests of our democracy" because "[i]t is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an

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201. *See generally* Clarick, *supra* note 7 at 728-33.

202. *See supra* note 9 and accompanying text.

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

enlightened and effective public opinion."[204] In order for teachers to carry out society's interest in education, they must be free to create a learning environment that is free from indoctrination and open to debate, discussion, and differing opinions. In this environment, students will learn the critical and analytical skills necessary to contribute to a democracy through the school's specified curriculum. The alternative test proposed in this Note considers those interests that are unique to the education system more adequately than the existing public employee or student speech standards.

Until the Supreme Court decides to take up this issue, however, the inconsistencies and confusion in the circuit courts regarding the level of First Amendment protection that should be afforded to teachers' classroom speech will continue to produce unpredictable results. With this sort of uncertainty and unpredictability, educators will remain confused and uninformed with respect to their First Amendment free speech rights in the classroom.

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204. Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).