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PUBLIC SCHOOL TEACHERS' FIRST AMENDMENT RIGHTS: IN DANGER IN THE WAKE OF "BONG HiTS 4 JESUS"

Zachary Martin⁺

Teachers are not just teachers. They have lives outside of their jobs. Many attend political rallies carrying signs, some decorate their cars, and others wear clothes bearing logos of their favorite sports teams, all of which may be considered expressive activities.¹ However, every day at school they must put these lives aside and go to work. A teacher's typical school day involves standing in front of a classroom full of children and explaining the day's lesson. They describe concepts, show pictures, play films, sketch drawings, conduct experiments, and make models. These are all expressive activities. Thus, a vital question implicated by this dual role is what expression by teachers is constitutionally protected in the classroom? Can teachers post materials on their walls that have a religious theme?² Is bringing Woody Harrelson into the classroom to advocate the use of industrial hemp³ constitutionally protected?⁴ What about voicing complaints regarding class size and the lack of student discipline?⁵

Before answering these questions, another threshold question must first be answered: what exactly is a classroom? Webster's dictionary defines classroom as "any place where one learns or gains experience."⁶ "Classroom"

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1. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 434 (1990) (holding that painting messages on cars is expressive); *Ayres v. City of Chicago*, 125 F.3d 1010, 1014 (7th Cir. 1997) (The court asserted that "there is no question that the T-shirts [containing social advocacy messages] are a medium of expression prima facie protected by the free-speech clause of the First Amendment . . ."); *Baldwin v. Redwood City*, 540 F.2d 1360, 1367 n.16 (9th Cir. 1976) (noting that expressive activity includes political signs at a rally).

2. *See Lee v. York County Sch. Div.*, 418 F. Supp. 2d 816, 820, 829 (E.D. Va. 2006), *aff'd*, 484 F.3d 687 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 387 (2007) (concluding the answer is "no").

3. Industrial hemp is a plant that can produce either marijuana or a valuable fiber that can be used to make paper and clothing. *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1042 (6th Cir. 2001); *see also* Ray Hansen, *Industrial Hemp Profile*, Dec. 2006, <http://www.agmrc.org/agmrc/commodity/biomass/industrialhemp/industrialhempprofile.htm> (noting that industrial hemp is a cannabis plant made illegal by the Controlled Substances Act and that it can be used to make "sails, riggings, canvas, ropes, clothing and paper").

4. *See Cockrel*, 270 F.3d at 1055 (concluding the answer is "yes").

5. *See Cliff v. Bd. of Sch. Comm'rs*, 42 F.3d 403, 411 (7th Cir. 1994) (concluding this was not constitutionally protected speech).

6. RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 381 (2d ed. 2001).

is a term that no longer simply encompasses a room in a school with some desks and a chalkboard. Teachers sometimes take their students outside to show them wildlife or to take them on field trips. Learning presumably takes place and the students gain practical hands-on experience from those exercises. With recent technological advances,⁷ the scope of what constitutes a classroom continues to expand. It is not far-fetched to imagine holographic teachers visible to students through a virtual classroom in the near future. Herein lies one of the problems facing traditional teachers' free speech rights: at present, where does the classroom stop? Teachers may end up living in a "Big Brother" situation.⁸ They may feel as though their speech is constantly being monitored, ultimately chilling⁹ their speech.

7. See Global Virtual Classroom, <http://www.virtualclassroom.org> (last visited Oct. 4, 2007), for an example of how the internet has expanded the scope of providing education. The "Global Virtual Classroom (GVC) project is a collection of free, on-line educational activities and resources. It aims to complement the efforts of governments and education departments around the world to integrate technology into their classrooms and curricula and to link their schools to the information superhighway." *Id.*; see also Classroom Connection Program, http://www.creativeconnections.org/classroom_connection/ (last visited Oct. 4, 2007). Through the Internet, Classroom Connection creates "partnerships between 8-to-18-year-old students from the United States and countries around the world." Classroom Connection Program, *supra*. This partnership is furthered by giving "all participating teachers and students . . . the opportunity to exchange ideas and insights with one another on [their] specially designed ExchangeOnline Website." *Id.*

8. Big Brother is a concept taken from George Orwell's *Nineteen Eighty-Four*. GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* 2-3 (David Levin ed., Harcourt, Brace & World, Inc. 1963). The novel begins with Winston Smith, a citizen of Oceania, ascending a flight of stairs in order to reach his flat. *Id.* In the staircase, there were large pictures "of a man of about forty-five, with a heavy black mustache and ruggedly handsome features." *Id.* at 2. The pictures were only of the man's head, with the caption: "Big Brother Is Watching You." *Id.* (emphasis omitted). Orwell paints a picture of a society that is completely monitored by the government, one in which citizens have "no way of knowing whether [they are] being watched at any given moment." *Id.* at 3. This was because everyone in Oceania had telescreens in their homes, which could hear and see everything. *Id.* The telescreens were also constantly monitored by the Thought Police. *Id.* As a result, people lived with the "assumption that every sound [they] made was overheard, and, except in darkness, every moment scrutinized." *Id.*

In addition to being constantly monitored, the society banned expression:

The thing [Winston] was about to do was to open a diary. This was not illegal (nothing was illegal, since there were no longer any laws), but if detected it was reasonably certain that it would be punished by death, or at least by twenty-five years in a forced-labor camp.

Id. at 4. The society also aired a program every day called "the Two Minutes Hate" in which citizens were forced to watch the telescreens. *Id.* at 6. The primary focus of "the Two Minutes Hate" was on a man named Emmanuel Goldstein. *Id.* In all of the telecasts, Goldstein "was abusing Big Brother, he was denouncing the dictatorship of the Party, he was demanding the immediate conclusion of peace with Eurasia, he was advocating freedom of speech, freedom of the press, freedom of assembly, freedom of thought." *Id.* at 7 (emphasis added). Citizens were raised to hate Goldstein who vouched for these freedoms of expression, *id.*, freedoms that are embraced by our society's First Amendment.

9. See *NAACP v. Button*, 371 U.S. 415, 433 (1963) (The "threat of sanctions may deter [the exercise of expression] almost as potently as the actual application of sanctions.") The chilling effect arises from the fear of reprisal from exercising constitutionally protected freedom

There is no Supreme Court precedent analyzing whether a teacher's¹⁰ classroom speech¹¹ is protected by the First Amendment.¹² A teacher's First Amendment rights become an issue when a teacher is disciplined for an action that arguably can be considered an exercise of free speech.¹³ As a result, the United States Circuit Courts of Appeals¹⁴ have adopted two very different tests

of expression. *Id.*; see also *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (naming the phenomenon described in *Button* as the "chilling effect"). In other words, people will not express themselves in a manner that is constitutionally protected because they fear the repercussions from doing so. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) ("When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone'").

10. For purposes of this Comment, a "teacher" means a public school teacher who teaches in a primary or secondary school. Private primary or secondary school teachers and college professors are not discussed.

11. This Comment will not discuss a teacher's right to academic freedom in the classroom. "Academic freedom," as used in this Comment, is the teacher's ability to choose his "own curriculum or classroom management techniques in contravention of school policy or dictates." *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990). The courts have uniformly held that the First Amendment does not protect the right to academic freedom. *Id.*; see also *Adams v. Campbell County Sch. Dist.*, 511 F.2d 1242, 1247 (10th Cir. 1975) ("In the case at bar the teaching methods . . . may have had educational value as the expert testified, but this is not equivalent to saying that [the teachers] had a constitutional right absolute in character to employ their methods in preference to more standard or orthodox ones."); *Ahern v. Bd. of Educ.*, 456 F.2d 399, 403-04 (8th Cir. 1972) ("[O]ur conclusion is that Miss Ahern was invested by the Constitution with no right . . . to persist in a course of teaching behavior which contravened the valid dictates of her employers, the public school board, regarding classroom method").

12. See *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 229 (6th Cir. 2005) (predicting how the Supreme Court would examine teachers' free speech rights in the classroom); Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 4 (2001) (discussing the Supreme Court's avoidance of the issue); Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693, 694-95 (1990) (noting the Supreme Court's lack of case law addressing the First Amendment rights of teachers); Kara Lynn Grice, Note, *Striking an Unequal Balance: The Fourth Circuit Holds that Public School Teachers Do Not Have First Amendment Rights to Set Curricula in Boring v. Buncombe County Board of Education*, 77 N.C. L. REV. 1960, 1985 (1999) (explaining that the Supreme Court has never explicitly addressed the issue of the First Amendment protections of a teacher's classroom speech).

13. See, e.g., *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1041-42 (6th Cir. 2001) (addressing a teacher's claim that she was terminated for her decision to bring Woody Harrelson into the classroom to speak to her students, an action later held to be within the realm of protected speech).

14. For examples of each Circuit's approach, see *Roberts v. Newark Pub. Sch.*, 232 F. App'x 124, 127 (3d Cir. 2007) (holding that a teacher's speech was on a matter of private concern and was therefore afforded no First Amendment protection); *Leary v. Daeschner*, 228 F.3d 729, 738 (6th Cir. 2000) (stating that a teacher's right to speak on a matter of public concern outweighed the school's interest); *Lacks v. Ferguson Reorganized Sch. Dist.*, 147 F.3d 718, 724 (8th Cir. 1998) (holding that a teacher's speech was not protected by the First Amendment); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 369 (4th Cir. 1998) (holding that a teacher's speech did "not constitute protected speech and [had] no First Amendment protection"); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 724 (2d Cir. 1994) (showing a picture of a topless woman in the classroom was not constitutionally protected); *Cliff*

to address this issue.¹⁵ A few circuits¹⁶ borrow standards developed in Supreme Court cases involving the free speech rights of government employees¹⁷ to create a standard that is referred to as the *Pickering-Connick* standard throughout this Comment. Other circuits employ principles developed in Supreme Court cases analyzing the free speech rights of students¹⁸ to create a standard that this Comment refers to as the *Tinker-Hazelwood* standard.

v. Bd. of Sch. Comm'rs, 42 F.3d 403, 411 (7th Cir. 1994) (holding the teacher's First Amendment claims failed because the speech did not touch upon a matter of public concern); *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993) (holding that the teacher's classroom speech was subject to a reasonable restriction and thus not protected by the First Amendment); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 779 (10th Cir. 1991) (concluding that the teacher's speech was not constitutionally protected); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 802 (5th Cir. 1989) (finding that the teacher's speech was not protected); *Ferrara v. Mills*, 781 F.2d 1508, 1516 (11th Cir. 1986) (holding that the speech did not amount to a matter of public concern, resulting in a failed First Amendment claim); *Nicholson v. Bd. of Educ. Torrance Unified Sch. Dist.*, 682 F.2d 858, 864-85 (9th Cir. 1982) (finding that the plaintiff's First Amendment claim failed). The District of Columbia nearly addressed the issue in *Goldwasser v. Brown*, 417 F.2d 1169, 1177 (D.C. Cir. 1969). However, *Goldwasser* involved a civilian employee hired by the Air Force to teach language at a Texas Air Force base. *Id.* at 1171. Thus, *Goldwasser* does not fall within the scope of this Comment because the educational setting was military-operated rather than a public school. See also Lackland Air Force Base, <http://www.lackland.af.mil/> (last visited Oct. 7, 2007) (The website states that "Lackland Air Force Base is no longer an open installation." It "provides basic military, professional and technical skills, and English language training for the Air Force . . .").

15. See, e.g., *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1149 n.6 (9th Cir. 2001) (alleging that *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491-92 (3d Cir. 1998) employs a different view that is, arguably, a third test). However, *Edwards* involved a state university teacher, as opposed to a public school teacher as defined in this Comment. *Edwards*, 156 F.3d at 489.

16. "Circuits," as used in this Comment, means the United States District Courts and the United States Courts of Appeals, or both. Circuits and courts are used interchangeably in this Comment, unless otherwise noted.

17. See *Roberts*, 232 F. App'x at 127 (analyzing whether the speech was on a matter of public concern and quoting *Connick*); *Leary*, 228 F.3d at 737 (noting that *Connick* requires the speech to be on a matter of public concern and that *Pickering* requires the interest in speaking on that matter must outweigh the government's interest); *Boring*, 136 F.3d at 368-69 (beginning the analysis with *Connick's* requirement that the speech must be on a matter of public concern); *Cliff*, 42 F.3d at 409 (setting the analytical framework with the principles established in *Connick* and *Pickering*); *Kirkland*, 890 F.2d at 797, 799 (noting *Connick* requires the speech to be on a matter of public concern and that the principles of *Pickering* balance the competing interests of the speaker and the employer); *Ferrara*, 781 F.2d at 1513-14 (citing *Connick* and *Pickering* when setting forth the court's framework for the analysis); *Nicholson*, 682 F.2d at 865 (using the principles established in *Pickering*); *Lee v. York County Sch. Div.*, 418 F. Supp. 2d 816, 822-24 (E.D. Va. 2006), *aff'd*, 484 F.3d 687 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 387 (2007) (explaining and applying the *Pickering-Connick* standard).

18. See *Lacks*, 147 F.3d at 724 (using the principles from *Tinker* and *Hazelwood*); *Silano*, 42 F.3d at 722-23 (using the analysis employed in *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993) which borrowed the principles established in *Hazelwood*); *Ward*, 996 F.2d at 452 (using the principles of *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967), which are the same as in

The Court paved the road for evaluating government employee speech in *Pickering v. Board of Education*.¹⁹ Essentially, the Court created a test in which the determination of whether the individual's speech is on a matter of public concern is outcome determinative.²⁰ *Connick v. Myers* evoked the same principles as *Pickering*, but in a factually different setting that provided an illustration of the doctrine at work.²¹

Although the *Pickering-Connick* standard seems like an appropriate methodology to employ when analyzing a teacher's speech, because teachers are government employees, several circuits have refused to do so.²² Instead, these courts use the principles established in the Supreme Court cases that evaluate whether student classroom speech is protected.²³ This test, the *Tinker-Hazelwood* standard, originated from the Vietnam protest case, *Tinker v. Des Moines Independent Community School District*.²⁴ The *Tinker* Court held that students and teachers retain their First Amendment rights when in school.²⁵ *Hazelwood School District v. Kuhlmeier* further clarified and limited the *Tinker* doctrine by holding that schools may limit student expression, provided that the restrictions are linked to "legitimate pedagogical" interests.²⁶

The absence of Supreme Court precedent concerning the First Amendment rights of teachers in the classroom created dissonance among the circuits in deciding which standard to apply.²⁷ Not only are there different standards, but

Hazelwood); *Miles*, 944 F.2d at 777 (discussing the *Pickering* principles in contrast to the *Hazelwood* principles and ultimately choosing to employ the *Hazelwood* principles).

19. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569 (1968).

20. *See, e.g., id.* at 574 (holding that a teacher's right to speak on a matter of public importance is not grounds for his dismissal). *Compare Cliff*, 42 F.3d at 411 (holding speech was not on a matter of public concern so plaintiff's "claims fail as a matter of law"), and *Lee*, 418 F. Supp. 2d at 829 (finding no triable issue of whether the teacher's speech was on a matter of public concern, therefore rejecting his First Amendment claim), with *Cockrel*, 270 F.3d at 1053, 1055 (finding that the speech was on a matter of public concern and holding it constitutionally protected), and *Leary*, 228 F.3d at 737-38 (holding that speech on a matter of public concern is constitutionally protected).

21. *Connick v. Myers*, 461 U.S. 138, 147 (1983) (holding that an employer has great latitude in reprimanding an employee who speaks on a matter of private concern).

22. *See supra* note 18 and accompanying text.

23. *See supra* note 18 and accompanying text.

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

25. *Id.* at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

26. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) ("[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.").

27. *See* W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 304 (1998) (stating that the *Hazelwood-Connick* standard is the dominate standard, but noting disagreement over how it should be applied); Grice, *supra* note 12, at 1985-86 (explaining the use of various standards by the lower courts).

the circuits also have competing views on how those standards should be applied.²⁸

This Comment examines the application of the two tests adopted by the circuits to evaluate whether a teacher's speech is protected by the First Amendment. First, this Comment discusses the origins of the *Pickering-Connick* standard and its application by the courts. Next, this Comment explains the Supreme Court cases from which the *Tinker-Hazelwood* standard arose and evaluates its use by the courts. Then it examines a recent development in student speech jurisprudence and its implications on the *Tinker-Hazelwood* standard. Last, this Comment argues that both the *Pickering-Connick* standard and the *Tinker-Hazelwood* standard are inadequate means of analyzing whether a public school teacher's speech is protected by the First Amendment. Several commentators have already reached this conclusion.²⁹ However, this Comment addresses the issue of the expanding classroom, a point overlooked by both courts and commentators alike.³⁰ This Comment concludes by arguing that the *Pickering-Connick* standard is an appropriate means to analyze a teacher's First Amendment rights only if it is modified to incorporate an objective standard within the first prong of the analysis.

I. THE SUPREME COURT CASES GIVING RISE TO THE CONFUSION THAT IS TEACHER FREE SPEECH JURISPRUDENCE

The circuits have developed two tests to analyze whether a public school teacher's classroom speech is protected by the First Amendment.³¹ The first approach, the *Pickering-Connick* standard, was derived from two Supreme

28. See Daly, *supra* note 12, at 16–17 (discussing the lack of predictability created by the circuits in their choice to apply either the *Pickering* or the *Hazelwood* standard); Grice, *supra* note 12, at 1983, 1985–89 (addressing the courts' use of the two standards in varying ways).

29. Daly, *supra* note 12, at 1–2 (proposing a balancing test with notice in place of either standard); Clarick, *supra* note 12, at 696 (citing both the *Hazelwood* and the *Pickering* standards); Grice, *supra* note 12, at 1960–61 (stating that neither the *Pickering* nor the *Hazelwood* test is appropriate when evaluating a teacher's in-class rights).

30. Daly, *supra* note 12, at 51–62 (proposing a balancing test without addressing the expansion of the classroom); Clarick, *supra* note 12, at 732–33 (proffering a sophisticated version of the *Pickering* analysis without mentioning the expanding classroom); Grice, *supra* note 12, at 2005 (suggesting a two-part test, consisting of a reasonableness prong and a notice prong, without noting the additional complications arising from the expanding classroom).

31. *Lee v. York County Sch. Div.*, 418 F. Supp. 2d 816, 821 (E.D. Va. 2006), *aff'd*, 484 F.3d 687 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 387 (2007). The two tests have been termed the *Pickering-Connick* standard and the *Tinker-Hazelwood* standard. *Id.* The same terminology will be used throughout this Comment. There is arguably a third test used by the Third Circuit. See *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1149 n.6 (9th Cir. 2001) (alleging that *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491–92 (3d Cir. 1998) employs a different mode of analysis than either the *Pickering-Connick* standard or the *Tinker-Hazelwood* standard). However, *Edwards* involved a state university teacher, as opposed to a public school teacher as defined in this Comment. *Edwards*, 156 F.3d at 489.

Court cases which evaluated the free speech rights of government employees.³² The second approach, the *Tinker-Hazelwood* standard, also arose from two Supreme Court cases which analyzed students' rights to free speech under the First Amendment.³³ It seems logical that courts considering the constitutional protection afforded to teachers' classroom speech would provide guidance as to why they choose one test over the other; however, that is not always the case.³⁴ Many courts simply begin the analysis without providing a solid rationale to support the application of one standard over another.³⁵

Some courts have given a minimal explanation for choosing a particular standard. For example, one court vaguely stated the teacher was arguing his First Amendment rights were violated while he was a public employee, so the court applied the *Pickering-Connick* standard.³⁶ Another court simply argued that a teacher's classroom speech is part of the curriculum, and thus the *Tinker-Hazelwood* methodology was the appropriate standard to apply.³⁷ The Tenth Circuit gave the best explanation, stating that the *Pickering-Connick* standard

32. *Lee*, 418 F. Supp. 2d at 821 & n.7 (citing *Pickering* and *Connick*).

33. *Id.* at 821 & n.6 (citing *Tinker* and *Hazelwood*).

34. *See, e.g.*, *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 775, 777 (10th Cir. 1991) (beginning its analysis with the *Hazelwood* test, only later rationalizing this choice). In deciding what standard to use, the *Miles* court started by determining whether the classroom was a public forum. *Id.* at 776. The court found that the school had no intention of opening the building for use by the public, thus maintaining the classroom as a nonpublic forum. *Id.* Then, the Court analyzed whether "students, parents, and members of the public might reasonably perceive [the expressive activities] to bear the imprimatur of the school." *Id.* The court found that teacher expression inside the classroom's ordinary framework certainly bears the imprimatur of the school. *Id.* Thus, the court stated that it would use the *Tinker-Hazelwood* standard. *Id.*

35. *See* *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1048 (6th Cir. 2001) (merely stating that a teacher is a public employee and then beginning the analysis without providing an explanation of why it chose the *Pickering-Connick* standard); *Leary v. Daeschner*, 228 F.3d 729, 737 (6th Cir. 2000) (applying the *Pickering-Connick* standard without addressing the rationale behind this choice); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998) (beginning the *Pickering-Connick* analysis with no explanation of why it chose that standard); *Cliff v. Bd. of Sch. Comm'rs*, 42 F.3d 403, 409 (7th Cir. 1994) (beginning the analysis, simply by stating that the speech must be on a matter of public concern without explaining why this *Pickering* principle was applicable); *Miles*, 944 F.2d at 775 ("In determining whether *Miles* has satisfied the initial burden of showing his classroom expression is constitutionally protected, we look to the Supreme Court's decision in *Hazelwood* . . ."); *Cliff v. Bd. of Sch. Comm'rs*, No. IP 89-1091-C, 1993 WL 761180, at *5 (S.D. Ind. May 21, 1993) ("In analyzing whether Plaintiff's speech was protected conduct, the court must first determine whether the 'context, content and form of [her] statements . . . indicate that they were on a matter of public concern.'" (quoting *Connick*, 461 U.S. at 147-48) (alteration and omission in original)).

36. *Lee*, 418 F. Supp. 2d at 821-22 ("This case is not about what free speech rights *Lee* has as an individual expressing himself on private property. Rather, this case is a question about what free speech rights *Lee* has as a public school teacher-employee. Therefore, the *Pickering-Connick* standard applies.").

37. *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993) (noting that "a teacher's statements in class during an instructional period are also part of a curriculum and a regular class activity," so the *Tinker-Hazelwood* standard applied).

does not account for the special circumstances of the school environment.³⁸ As a result, it opted for the *Tinker-Hazelwood* standard.³⁹ The difficulty of analyzing teacher speech does not stop there. Not only are there problems with both tests, but courts have not adopted a uniform application of their principles.

A. *The Origins of Protecting Government Employees*

The *Pickering-Connick* standard derives primarily from the principles established by the Supreme Court in *Pickering v. Board of Education*.⁴⁰ Subsequently, in *Connick v. Myers*, the Court applied the *Pickering* principles to a very different fact pattern: a situation in which a government employee's speech does not warrant First Amendment protection.⁴¹

In *Pickering*, the Supreme Court dealt directly with a public school teacher's right to free speech.⁴² Marvin Pickering, a public school teacher, wrote a letter to a local newspaper criticizing the school board for its poor job regarding the passage of bond issue proposals and its financial allocation decisions, particularly with regard to the school's athletic programs.⁴³ The school board dismissed Pickering because of the letter and held a hearing on the matter.⁴⁴ The board upheld the dismissal,⁴⁵ finding that Pickering made false statements in his letter.⁴⁶

38. See *Miles*, 944 F.2d at 777.

39. *Id.*; see also Daly, *supra* note 12, at 10 (arguing that “[t]he *Pickering* line of cases fails to account for the unique job requirements of public school teachers”); Clarick, *supra* note 12, at 696 (arguing that existing standards “fail to account for the unique factors at play in the teacher’s role in the education process”).

40. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968) (occurring in the context of a teacher acting in his capacity as a private citizen).

41. *Connick v. Myers*, 461 U.S. 138, 140 (1983); see also *Lee v. York County Sch. Div.*, 418 F. Supp. 2d 816, 822 n.9 (E.D. Va. 2006), *aff’d*, 484 F.3d 687 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 387 (2007) (explaining that a comparison of the facts in *Pickering* with the facts in *Connick* illustrates the difference between an individual acting as a citizen versus an individual acting as an employee).

42. *Pickering*, 391 U.S. at 564–65.

43. *Id.* at 566. The Court explained:

The letter constituted, basically, an attack on the School Board’s handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools’ educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue.

Id. The bond issue proposals, and proposed tax increases, were both failed attempts to raise money to build new schools in the district. *Id.* at 565–66.

44. *Id.* at 566.

45. See *id.* The board was able to dismiss Pickering pursuant to an Illinois statute protecting “the efficient operation and administration of . . . schools.” *Id.* at 564–65.

46. *Id.* at 567. One of the false statements alleged was the misrepresentation of money allocated to athletics. *Id.* at 572.

Pickering appealed the decision to the state court, claiming his First Amendment rights had been violated.⁴⁷ The state court reviewed the decision on two grounds: (1) whether the school board had sufficient evidence to make its determination; and (2) whether it could reasonably conclude that Pickering's letter was detrimental to the schools' interests.⁴⁸ The court dismissed Pickering's First Amendment claim on the basis that his voluntary acceptance of a teaching position precluded him from making statements criticizing the administration.⁴⁹ The Illinois Supreme Court affirmed the lower court's ruling that Pickering's letter was not constitutionally protected.⁵⁰ The Supreme Court granted certiorari to evaluate the First Amendment issue.⁵¹

The Court began by stating its consistent rejection of the notion that teachers relinquish their First Amendment rights by accepting their teaching position.⁵² However, the Court acknowledged that the state has a special interest in regulating a teacher's speech in the classroom that does not apply to citizens in other environments.⁵³ In order to account for these conflicting principles, the Court proffered a balancing test.⁵⁴ This test balances "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."⁵⁵

Applying this test, the Court began by examining the statements in the letter taken as a whole.⁵⁶ It found that the statements in the letter presented no danger of causing disorder at the school.⁵⁷ The Court reasoned that the

47. *Id.* at 565. Pickering actually claimed violations of the First and Fourteenth Amendments, invoking the Fourteenth Amendment to make the First Amendment applicable to the state action. *Id.*

48. *Id.* at 567.

49. *Id.*

50. *Pickering v. Bd. of Educ.*, 225 N.E.2d 1, 6 (Ill. 1967), *rev'd*, 391 U.S. 563 (1968). In its decision, the Supreme Court stated "[i]t is not altogether clear whether the Illinois Supreme Court held that the First Amendment had no applicability to appellant's dismissal for writing the letter in question or whether it determined that the particular statements made in the letter were not entitled to First Amendment protection." *Pickering*, 391 U.S. at 567. The Illinois Supreme Court rejected Pickering's First Amendment claim in one paragraph, echoing the proclamation from the court below: "By choosing to teach in the public schools, [Pickering] undertook the obligation to refrain from conduct which in the absence of such position he would have an undoubted right to engage in." *Pickering*, 225 N.E.2d at 6.

51. *See Pickering*, 391 U.S. at 565. The Court noted probable jurisdiction in regard to Pickering's constitutional claims. *Id.*

52. *Id.* at 568 (citing *Wieman v. Updegraff*, 344 U.S. 183, 191–92 (1952) (holding that constitutional protections apply to public employees); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 601–02 (1967) (holding that constitutional protections apply in the educational community)).

53. *Pickering*, 391 U.S. at 568.

54. *Id.*

55. *Id.*

56. *Id.* at 569.

57. *Id.* at 569–70.

statements were not aimed at any school employee with whom Pickering came into regular contact while at work.⁵⁸

Of particular importance, the Court rejected the school board's contention that Pickering's false statements, regarding funding of athletics, were detrimental to the operation of the school.⁵⁹ The Court highlighted the fact that Pickering's teaching position did not lend him any more insight into the allocation of funds than any other taxpayer.⁶⁰ The letter did not contain statements to which the public would give extra weight because they came from someone in a position with a special perspective.⁶¹ The subject matter was not tied tightly to the school's daily affairs, but rather was readily available information to which a teacher did not have any unique access.⁶² Furthermore, Pickering disseminated his speech to the public,⁶³ and the public was concerned with the issues he addressed.⁶⁴ Thus, the Court concluded that Pickering's statements were on a matter of public concern and were made in his capacity as a private citizen.⁶⁵ Because his employment was only incidental to his statements, Pickering's speech was constitutionally protected.⁶⁶

Fifteen years later, the Court reaffirmed its holding in *Pickering*.⁶⁷ In *Connick*, Justice White, writing for the Court, began by citing the *Pickering*

58. *Id.* The Court alleged that neither discipline by Pickering's superiors nor cohesiveness with Pickering's colleagues would be in jeopardy as a result of Pickering's letter. *Id.* at 570. The Court also noted that the relationship between a teacher and superintendent is not one "for which it can persuasively be claimed that personal loyalty and confidence are necessary [for the relationship's] proper functioning." *Id.*

59. *Id.* at 572.

60. *Id.* (noting that the financial figures relating to the athletics program were publicly accessible).

61. *Id.*

62. *Id.*

63. *Id.* at 574 (explaining that Pickering made a "public communication" rather than a private one).

64. *See id.* at 565-66.

65. *Id.* at 574.

66. *Id.* The Court conducted separate evaluations for Pickering's factually correct statements and his factually incorrect statements. *Id.* at 570-71. In both cases, the Court found that his statements were not detrimental to the operation of the school. *Id.* The Court noted that to hold the false statements to be per se detrimental to the school would be "to equate the Board members' own interests with that of the school[']s." *Id.* at 571.

67. *See Connick v. Myers*, 461 U.S. 138, 144-46 (1983).

holding.⁶⁸ Yet *Connick* did not involve a teacher at all.⁶⁹ Rather, the respondent was an Assistant District Attorney named Sheila Myers.⁷⁰ Myers was informed that she was going to be transferred to a different department of criminal prosecution, which she adamantly opposed.⁷¹ In fact, Myers was so infuriated by the situation that she created a survey for her co-workers that included, among other things, questions regarding the transfer policy and the general office attitude.⁷² After Myers disseminated the survey, Myers's supervisor fired her, citing "refusal to attempt the transfer" and "insubordination" as the reasons for her termination.⁷³ Myers sued in federal court, alleging that her First Amendment rights had been violated.⁷⁴

Myers prevailed in district court.⁷⁵ Based on the evidence presented, the court found that Myers was fired as a direct result of distributing the survey.⁷⁶ Next, the court held that the issues contained in the survey were on matters of public concern because they addressed the operation of the district attorney's office.⁷⁷ Therefore, the court held that disseminating the survey was a constitutionally protected exercise of expression.⁷⁸ The court of appeals

68. *Id.* at 140. Justice White wrote:

[W]e stated that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment. We also recognized that the State's interests as an employer in regulating the speech of its employees "differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." The problem . . . was arriving "at a balance between the interests of the [employee], as a citizen, in commenting upon matters of a public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Id. (quoting *Pickering*, 391 U.S. at 568) (citations omitted).

69. *Id.*

70. *Id.*

71. *Id.* Myers appealed to numerous superiors, but was rebuffed. *Id.* at 140–41. Further, she was told that "her concerns were not shared by others in the office." *Id.* at 141.

72. *Id.* at 141. The "questionnaire . . . concern[ed] 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 campaigns." *Id.*

73. *Id.*

74. *Id.*

75. *See* *Myers v. Connick*, 507 F. Supp. 752, 760 (E.D. La. 1981).

76. *Id.* at 755.

77. *Id.* at 758.

78. *Id.* at 759.

affirmed the district court's ruling,⁷⁹ and the Supreme Court granted certiorari.⁸⁰

The Supreme Court began its discussion with a brief history of the Court's evolving position on public employee First Amendment rights.⁸¹ The Court concluded this discussion by noting that "speech on public issues occupies the "highest rung of the [hierarchy] of First Amendment values.""⁸² Based on the Court's precedent, if Myers's speech was not considered to be a matter of public concern, then there would be no need for the Court to evaluate the reasons behind her termination.⁸³

To determine whether the speech regarded a matter of public concern, the Court evaluated the statements taken as a whole, focusing on the form, context, and content.⁸⁴ The Court defined a matter of public concern as "any matter of political, social, or other concern to the community."⁸⁵ It then rejected the notion that the matters contained in Myers's survey were of public concern.⁸⁶ The Court noted that Myers did not intend to distribute her information to the

79. *Myers v. Connick*, 654 F.2d 719 (5th Cir. 1981). The Court of Appeals for the Fifth Circuit affirmed the district court decision without rendering its own opinion, which is permissible in the Fifth Circuit under certain circumstances. *See, e.g., Perimeter Park Inv. Assocs. v. Acacia Mut. Life Ins. Co.*, 616 F.2d 150–51 (5th Cir. 1980) (noting the Fifth Circuit rule that a court may affirm without an opinion if "no error of law appears." (quoting 5TH CIR. R. 21)).

80. *Connick*, 461 U.S. at 142.

81. *Id.* at 143–45 (discussing the Court's move away from subjecting public employees to harsh constitutional violations based on their positions as government employees).

82. *Id.* at 145 (quoting *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980))).

83. *Id.* at 146. The Court held that "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment" when the speech is not on a matter of public concern. *Id.* However, the Court limited its holding by conceding that speech on a matter of private concern is still afforded some constitutional protection. *Id.* at 147. The Court stated:

We do not suggest, however, that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment. . . . We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id.

84. *Id.* at 147–48.

85. *Id.* at 146.

86. *Id.* at 143. The Court stated that "[t]he District Court got off on the wrong foot . . . by initially finding that . . . 'the issues presented in the questionnaire relate[d] to the effective functioning of the District Attorney's Office and are matters of public importance and concern.'" *Id.* (quoting *Myers v. Connick*, 507 F. Supp. 752, 758 (E.D. La. 1981)). However, the Court found that one of the questions in the survey was on a matter of public concern. *Id.* at 149. The Court then performed a balancing test, which resulted in the finding that the question "touched upon matters of public concern in only a most limited sense . . ." *Id.* at 154.

public, but rather to stir controversy in the office relating to a personal matter.⁸⁷ As a result, the Court held that the survey was not constitutionally protected.⁸⁸

B. *Pickering and Connick Go to School*

When dealing with the issue of whether a public school teacher's speech is constitutionally protected, several circuits have applied the rules established in *Pickering* and *Connick*.⁸⁹ These courts begin by asking if the speech was on a matter of public concern.⁹⁰ If the speech is not on a matter of public concern, the First Amendment claim fails.⁹¹ If the speech is on a matter of public concern, a First Amendment violation will be found if the interest in speaking exceeds the state's interest in maintaining the effective functioning of the services the state conducts by restricting the speech.⁹² At first glance, this analysis seems relatively straightforward, but a closer reading of the reported decisions uncovers major problems with this methodology.

The question of whether speech is on a matter of public concern can be difficult to answer and the courts have not settled on a single definition of "public concern."⁹³ The Fifth Circuit noted this problem⁹⁴ and, therefore, did not attempt to define the term.⁹⁵ Instead, the court simply analogized the facts to previous determinations of what constituted a matter of public concern.⁹⁶ Some courts avoid attempting to define the term at all and, instead, just begin the analysis.⁹⁷

87. *Id.* at 148. The Court found that the questionnaire "reflect[ed] one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause célèbre." *Id.*

88. *Id.* at 154.

89. See *supra* note 17 and accompanying text.

90. See, e.g., *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 230 (6th Cir. 2005) (beginning the inquiry of whether the speech is protected by asking if the speech touched on a matter of public concern); *Leary v. Daeschner*, 228 F.3d 729, 737 (6th Cir. 2000) (stating that the first step in the analysis is that "the employee must show that her speech touched on matters of public concern").

91. See, e.g., *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 799 (5th Cir. 1989) (noting that private speech warrants no First Amendment protection).

92. See *Evans-Marshall*, 428 F.3d at 229 (explaining that in order to enjoy constitutional protection, the plaintiff must have an interest in speaking that outweighs the school's interest in restricting the speech); *Leary*, 228 F.3d at 737 (stating that the "employee's interest 'in commenting upon matters of public concern' must be found to outweigh 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees'" for it to be afforded First Amendment protection).

93. *Kirkland*, 890 F.2d at 798.

94. *Id.*

95. *Id.*

96. *Id.* at 789–99.

97. See *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 369 (4th Cir. 1998) (stating that an employment dispute affords no First Amendment protection if it does not constitute a matter of public concern); *Nicholson v. Bd. of Educ. Torrance Unified Sch. Dist.*, 682

When courts do attempt to define the term, the difficulty becomes apparent. For example, when trying to clarify the matter, the Court of Appeals for the Seventh Circuit asked: “[W]as it the employee’s point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?”⁹⁸ Yet, the court stated that the teacher’s motive is not dispositive on the question of whether the speech is on a matter of public concern.⁹⁹ The court then noted that a teacher’s private speech does not become a matter of public concern merely because the public will be interested in the topic.¹⁰⁰ To determine whether the teacher was speaking as an angry employee or as a citizen, the court decided it was necessary to look “deeper into the precise content, form, and context of [the] speech.”¹⁰¹ Although the court finally came to a conclusion,¹⁰² its sporadic methodology illustrates the need for a clearer definition of what constitutes “a matter of public concern.”

The District Court for the Eastern District of Virginia took a different approach. In *Lee v. York County School Division*, William Lee was the Spanish teacher in a public high school.¹⁰³ Lee posted materials on his classroom walls, some of which had a religious theme.¹⁰⁴ While he was sick and away from the school, the principal received complaints regarding the religious material, went into Lee’s classroom, and removed the material.¹⁰⁵ Lee subsequently brought a claim in district court alleging that his First Amendment rights had been violated.¹⁰⁶

Before providing any guidance as to what constitutes speech on a matter of public concern, the court held that curricular speech never constitutes a matter of public concern.¹⁰⁷ The court provided an extremely broad definition of curricular speech: curricular speech is all expressive activity “supervised by

F.2d 858, 865 (9th Cir. 1982) (beginning the analysis with factors taken into account by the *Pickering* Court when it balanced the competing interests without defining a matter of public concern); see also *Ferrara v. Mills*, 781 F.2d 1508, 1514 (11th Cir. 1986) (stating that a matter of public concern does not turn on the degree of public interest, but defining a matter of public concern no further).

98. *Cliff v. Bd. of Sch. Comm’rs*, 42 F.3d 403, 410 (7th Cir. 1994) (internal quotation marks omitted).

99. *Id.*

100. *Id.* at 411.

101. *Id.* at 410.

102. *Id.* The court concluded: “Consideration of the *Connick* factors here convinces us that the district court correctly characterized Cliff’s speech as merely of private rather than public concern.” *Id.*

103. *Lee v. York County Sch. Div.*, 418 F. Supp. 2d 816, 819 (E.D. Va. 2006), *aff’d*, 484 F.3d 687 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 387 (2007).

104. *Id.* at 820.

105. *Id.*

106. *Id.*

107. *Id.* at 822–24. The court held that “curricular speech fails *per se* to be a matter of public concern.” *Id.* at 824.

faculty members and designed to impart knowledge or skills to student participants and audiences [as well as] teaching methodology.”¹⁰⁸ The court pointed out that these activities *do not* have to take place in the ordinary classroom so long as they impart knowledge to the students.¹⁰⁹ The court explained that the definition of curricular speech includes teaching methodology because a teaching method is merely the manner in which the teacher fulfills his obligation as an employee.¹¹⁰ Using this approach, the court found that the petitioner’s religious materials were curricular speech.¹¹¹ The court stated that because Lee used these materials to catch the students’ attention to teach them Spanish, the materials were part of his teaching methodology and were thus afforded no First Amendment protection.¹¹²

The court did not end its discussion there, however. It also found that Lee’s speech was not constitutionally protected because it failed to satisfy the first prong of *Pickering*, as the speech was not on a matter of public concern.¹¹³ The four factors evaluated by the court in *Lee* were: (1) whether the speech was expressed in public or in the workplace; (2) whether it was addressed to the public; (3) whether the speech was intended to be political or a matter of public interest; and (4) whether the speech was in a public debate regarding a precise issue.¹¹⁴ Taking these factors into account, the court quickly dismissed Lee’s argument that his expression was on a matter of public concern.¹¹⁵

Both the *Cliff* and *Lee* courts provide examples of the difficulty in attempting to define what is a matter of public concern. However, the difficulty is not insurmountable. Several courts rely on the definition provided in *Connick*.¹¹⁶ Defining a matter of public concern as “any matter of political, social, or other concern to the community,”¹¹⁷ is one way of addressing this challenge. This definition allows courts to take issues into consideration that

108. *Id.* at 825.

109. *Id.*

110. *Id.* at 826–27.

111. *Id.* at 825.

112. *Id.* at 826–27.

113. *Id.* at 827–28. *See also, e.g.,* *Cliff v. Bd. of Sch. Comm’rs*, 42 F.3d 403, 409 (7th Cir. 1994) (beginning the analysis with whether the speech was on a matter of public concern).

114. *Lee*, 418 F. Supp. 2d at 828.

115. *Id.* at 829. The court held: “Not only does an analysis of all of these factors reveal that there is no genuine dispute that Lee’s speech was not a matter of public concern, but there is no genuine dispute that each individual factor requires a finding for Defendants.” *Id.* at 828.

116. *Roberts v. Newark Pub. Sch.*, 232 F. App’x 124, 127 (3d Cir. 2007) (using the definition of “political, social, or other concern to the community”); *accord* *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 229 (6th Cir. 2005) (applying the same definition found in *Connick*); *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1050–51 (6th Cir. 2001); *Leary v. Daeschner*, 228 F.3d 729, 737 (6th Cir. 2000).

117. *Connick v. Myers*, 461 U.S. 138, 146 (1983); *see also supra* note 116.

are,¹¹⁸ or might become,¹¹⁹ important to the community on a case-by-case basis.¹²⁰ Further, the size of the community is not limited by adopting this definition; it can either be on a local or on a national scale.¹²¹

Once the court surmounts the hurdle of deciding whether the speech is on a matter of public concern, the *Pickering-Connick* balancing test works well. For example, in *Cockrel v. Shelby County School District*, the court found that inviting advocates of the environmental benefits of industrial hemp¹²² into the classroom constituted speech.¹²³ Further, it held the speech was on a matter of public concern because the community of Kentucky was concerned with industrial hemp at the time.¹²⁴ The school claimed it had significant interests in restricting the speech, namely loyalty, efficiency in school operation, and workplace harmony.¹²⁵ The court found these interests to be significantly impacted by inviting the advocates into the classroom to speak.¹²⁶ Despite the school's interests, the court ultimately held that the teacher's speech was protected because the school initially approved the speakers' invitation into the classroom.¹²⁷ This holding demonstrates that *Pickering-Connick* balancing can

118. *Cockrel*, 270 F.3d at 1050–51 (concluding that speaking about industrial hemp is a matter of public concern to some citizens of Kentucky).

119. *Connick*, 461 U.S. at 164 n.4 (Brennan, J., dissenting). The Court stated:

[W]hether a government employee's speech is of "public concern" must be determined by reference to the broad conception of the First Amendment's guarantee of freedom of speech found necessary by the Framers "to supply the public need for information and education with respect to the significant issues of the times Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

Id. (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).

120. *See, e.g., supra* notes 118–19.

121. *Compare Cockrel*, 270 F.3d at 1051 (finding speech was important to the community of Kentucky), with *Evans-Marshall*, 428 F.3d at 231 (holding that themes of race and justice in the American South are clearly matters of public concern).

122. *Cockrel*, 270 F.3d at 1041–42. The presentations at issue were conducted by Woody Harrelson, members of the Kentucky Hemp Museum, members of the Kentucky Hemp Growers Cooperative Association, and foreign hemp growers. *Id.* These speeches promoted the use of industrial hemp in place of increased logging efforts, which presumably would be better for the environment. *See id.* at 1042.

123. *Id.* at 1050.

124. *Id.* at 1052. Kentucky law prohibited possession of industrial hemp, even though it has properties that permit it to be developed into a valuable fiber. *Id.* at 1042 (citing KY. REV. STAT. §§ 218A.1422, 218A.010(14) (2007)); *see also supra* note 3.

125. *Cockrel*, 270 F.3d at 1053.

126. *Id.* at 1054 (noting that the plaintiff created difficulties with maintenance of the school's efficiency and harmony by inviting the industrial hemp advocates).

127. *Id.* at 1054–55; *see also Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 231 (6th Cir. 2005) ("[W]e cannot allow [concerns of harmony, efficiency, and discipline] to tilt the *Pickering* scale in favor of the government . . . when the disruptive consequences of the employee speech can be traced back to the government's express decision permitting the employee to engage in that speech." (quoting *Cockrel*, 270 F.3d at 1054–55) (alteration in original)).

be used effectively,¹²⁸ particularly because the *Cockrel* court recognized that the school's proffered interests for restricting the teacher's speech were merely a pretext.¹²⁹ This case illustrates that courts can use *Pickering-Connick* balancing to account for unfounded bases for regulating a teacher's speech.

C. Black Armbands, Protected—School Newspaper, Unprotected: The Origins of Analyzing Student Speech

The case that set the standard for evaluating a student's free speech rights in the classroom is *Tinker v. Des Moines Independent Community School District*.¹³⁰ *Tinker* involved three high school students during the Vietnam War era.¹³¹ The students gathered with several other community members in one of the student's homes and decided to wear black armbands to school until New Year's Day in protest of the conflict.¹³² The students' school learned of the plan, and implemented a policy of suspending anyone who wore an armband to school.¹³³ The suspension would last until the suspended student came to school without wearing an armband.¹³⁴ The three students disobeyed, were suspended, and did not return until the planned protest was over.¹³⁵ The students brought a claim in district court alleging that their First Amendment rights had been violated.¹³⁶ The district court dismissed the claim, ruling that the school's policy was constitutional because it prevented a disturbance in school.¹³⁷

In reviewing the ruling, the Supreme Court originated the well-known phrase of student free speech jurisprudence: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or

128. See *Leary v. Daeschner*, 228 F.3d 729, 738 (6th Cir. 2000) (conducting the *Pickering* balancing test and finding that the teacher's speech was a matter of great public concern and it outweighed the school's interest in efficient functioning).

129. *Cockrel*, 270 F.3d at 1054. The court stated:

We are troubled by the fact that, whereas school officials gave plaintiff prior approval to host all three of the industrial hemp presentations at issue in this case, defendants now forward concerns of school efficiency and harmony as reasons supporting their decision to discharge Cockrel We do not believe that defendants can use the outcry within the school community protesting Cockrel's speech, speech that was approved by school officials in advance, as a shield for their decision to discharge her.

Id.

130. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

131. *Id.* at 504. Two of the petitioners were in high school, and the third was in junior high school. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 504–05.

137. *Id.* The Court of Appeals for the Eighth Circuit affirmed the district court's ruling without rendering an opinion. *Id.* at 505. The Supreme Court granted certiorari. *Id.*

expression at the schoolhouse gate.”¹³⁸ However, the Court recognized that the school is a unique environment that requires the state and its officials to give special attention to the maintenance of discipline.¹³⁹ The Court coined the well-settled First Amendment notion that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”¹⁴⁰ It then wrote that the state must show that a policy restricting speech is justified by something more than mere fear of others disliking a minority viewpoint.¹⁴¹ The Court held that for a school to prohibit speech, it must be able to show that the speech will “materially and substantially disrupt the work and discipline of the school.”¹⁴² Because the Court found no evidence that the protest would cause any disruption, it ruled in favor of the students.¹⁴³

Hazelwood School District v. Kuhlmeier,¹⁴⁴ decided almost twenty years after *Tinker*, provides the second piece of the *Tinker-Hazelwood* standard. The dispute in *Hazelwood* arose from three high school students’ participation in the publication of their school’s newspaper.¹⁴⁵ The newspaper was the product of a journalism class that received funds from both newspaper sales and the school board’s budget.¹⁴⁶ Before publication of each issue, the school’s policy was for the journalism teacher to provide the principal with a copy of each article that was to be included in the issue.¹⁴⁷ Three days before printing the issue that caused the controversy, the principal was given the articles that were to be published.¹⁴⁸ The principal disapproved of two of the articles because he believed they were “inappropriate for some of the younger students.”¹⁴⁹ Because the deadline for printing was near, the journalism teacher printed the

138. *Id.* at 506.

139. *Id.* at 507 (“[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.”).

140. *Id.* at 508.

141. *Id.* at 509. A state “must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Id.*

142. *Id.* at 513.

143. *Id.* at 514.

144. 484 U.S. 260 (1988).

145. *Id.* at 262.

146. *Id.* at 262–63.

147. *Id.* at 263.

148. *Id.*

149. *Id.* One of the articles described a few Hazelwood students’ pregnancies. *Id.* Although the names were changed in the text, the principal feared that the students might be recognized by the content of the article. *Id.* The second article dealt with divorce and its effects on Hazelwood students. *Id.* The principal objected to this article because the newspaper staff did not provide the parents of one student, who was referenced by name, the opportunity to consent to the article’s publication. *Id.*

issue without the two articles to which the principal objected: this gave rise to the students' claim that their First Amendment rights were violated.¹⁵⁰

The Supreme Court began its review of the students' First Amendment argument by analyzing whether the school was a public forum, which is created proactively by opening the premises for use by the entire general public or a segment of it.¹⁵¹ When a public forum is not created, schools may constitutionally impose reasonable speech restrictions.¹⁵² Finding no intention to create a public forum, the Court distinguished the facts before it from *Tinker*.¹⁵³ The Court noted that the case essentially required a determination of whether the school is required to promote its students' speech.¹⁵⁴ It ruled that the school need not promote certain speech, namely, expressive activities that "the public might reasonably perceive to bear the imprimatur of the school."¹⁵⁵ The Court held that schools can restrict speech constitutionally "by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."¹⁵⁶

D. Student Speech Meets Teacher Speech

Some circuits have taken the principles from *Tinker* and *Hazelwood* and applied them to the First Amendment analysis of the protections afforded to a teacher's classroom speech.¹⁵⁷ For example, *Miles v. Denver Public Schools* involved a teacher's First Amendment claim against the school district for its decision to place the teacher on administrative leave, based on his in-class statements.¹⁵⁸ Miles's comments involved a rumor that students were engaging in sexual activity on the playground during recess.¹⁵⁹ In analyzing the claim, the court combined the principles of *Tinker* and *Hazelwood*:

150. *Id.* at 263–64. The teacher believed that his only options were either to print an abridged version of the paper or not to print one at all because the school year was coming to an end. *Id.* Thus, he opted for the former. *Id.* at 264.

151. *Id.* at 267.

152. *Id.*

153. *Id.* at 270–71 (noting that unlike *Tinker*, where the question regarded a school's toleration of student speech, the issue in *Hazelwood* was whether a school was affirmatively required to promote student speech).

154. *Id.*

155. *Id.* at 271.

156. *Id.* at 273.

157. *See supra* note 18.

158. *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 774 (10th Cir. 1991).

159. *Id.* The questionable comment was made in response to a request that Miles provide an example of his contention that there was a decline in school quality. *Id.* Referring to an unsubstantiated rumor, Miles said, "I don't think in 1967 you would have seen two students making out on the tennis court." *Id.* Miles first heard the rumor from a fellow teacher who was told the story by two students alleging that they saw the incident. *Id.*

Although the Court emphasized that “students in the public schools do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,’” the Court held that educators do not offend the first amendment by exercising editorial control over school-sponsored expression “so long as their actions are reasonably related to legitimate pedagogical concerns.”¹⁶⁰

The *Miles* court began its analysis as the Supreme Court did in *Hazelwood* by asking whether the school was a public forum.¹⁶¹ Because the school did not affirmatively open itself for public debate, the court found that it was not a public forum.¹⁶² Next, the court determined that the school had legitimate pedagogical concerns in regulating Miles’s speech: it had (1) an interest in precluding Miles from using his position to circulate a rumor; (2) an interest in employee professionalism; and (3) an interest in providing a sound learning environment.¹⁶³ The court then examined whether the actions taken against Miles were reasonably related to legitimate pedagogical interests, finding that they were.¹⁶⁴ As a result, the court held that it would not interfere with the school’s administration of its affairs.¹⁶⁵

Likewise, the First Circuit adopted a similar approach in *Ward v. Hickey*;¹⁶⁶ however, it added the additional safeguard that notice be given to the teacher.¹⁶⁷ Toby Ward’s teaching job was not renewed after she had a dialogue with her students concerning the abortion of fetuses with Down’s syndrome.¹⁶⁸ Ward claimed that her First Amendment rights had been violated, alleging that she was not reappointed to her teaching position in retaliation for her classroom discussion.¹⁶⁹ After Ward lost her claim in district court,¹⁷⁰ the appellate court began its review by reiterating *Tinker*’s general principle that teachers have a right of free speech in the classroom.¹⁷¹ The court then stated the caveat that schools may limit expression, provided the

160. *Id.* at 775 (quoting *Hazelwood*, 484 U.S. at 273 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969))).

161. *Id.* at 776; *see also* *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993) (starting with the public forum inquiry and holding that the classroom is not a public forum); *Williams v. Vidmar*, 367 F. Supp. 2d 1265, 1272 (N.D. Cal. 2005) (beginning the analysis with a determination of whether a public forum was created and stating that “[t]he key to the holding in *Hazelwood* is its discussion of the importance of determining whether the expression allegedly being interfered with is being made in a public forum or a nonpublic forum.”).

162. *Miles*, 944 F.2d at 776.

163. *Id.* at 778.

164. *Id.*

165. *Id.* at 779.

166. *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993).

167. *Id.* at 452 (adding a notice prong to the *Tinker-Hazelwood* standard).

168. *Id.* at 450.

169. *Id.*

170. *Id.* at 451.

171. *Id.* at 452.

reason for the limitation is to promote scholastic goals.¹⁷² The court articulated the *Tinker-Hazelwood* standard: “[W]e find that a school committee may regulate a teacher’s classroom speech if: (1) the regulation is reasonably related to a legitimate pedagogical concern; and (2) the school provided the teacher with notice of what conduct was prohibited.”¹⁷³ The notice requirement is meant to prevent the chilling effect that can arise from not knowing what conduct is prohibited and what conduct is permitted.¹⁷⁴

In addition to the chilling effect problem, numerous interests may be considered legitimate pedagogical concerns, which has the potential to severely diminish a teacher’s First Amendment rights. For example, the plaintiff in *Silano v. Sag Harbor Union Free School District*¹⁷⁵ was reprimanded as a consequence of his lecture regarding the persistence of vision phenomenon.¹⁷⁶ In order to illustrate the phenomenon, the plaintiff disseminated 35mm pictures, one of which depicted a birth scene containing a bare-chested lady.¹⁷⁷ In rendering its opinion, the court merely stated that “school officials had a legitimate pedagogical purpose in restricting the display of photographs of bare-chested women in a tenth-grade classroom.”¹⁷⁸ It did not offer any precise explanation of why the school had a legitimate pedagogical purpose, aside from stating that the picture was unnecessary for the presentation.¹⁷⁹ The court’s scant reasoning illustrates that a school does not need to offer much of a policy reason for a court to find that the school has an interest in restricting a particular viewpoint.¹⁸⁰ Were it otherwise, the *Silano* court would have explained the rationale behind its holding that the school had a pedagogical purpose for restricting the picture.

172. *Id.*

173. *Id.* (citations omitted); *see also* *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 23 (1st Cir. 1999) (adding the notice requirement to the *Tinker-Hazelwood* standard); *Lacks v. Ferguson Reorganized Sch. Dist.*, 147 F.3d 718, 723 (8th Cir. 1998) (same).

174. *Ward*, 996 F.2d at 453 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967)).

175. *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719 (2d Cir. 1994). The plaintiff in this case was a guest lecturer at a public school. *Id.* at 721. Despite the plaintiff’s status, the court stated that he was “entitled to no more deference than a trained education professional.” *Id.* at 723. The court used the same analysis it would have used if the plaintiff had been a teacher. *Id.*

176. *Id.* at 721. Persistence of vision is “the retention of a visual image for a short period of time after the removal of the stimulus that produced it: the phenomenon that produces the illusion of movement when viewing motion pictures.” *RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY* (2d ed. 2001).

177. *Silano*, 42 F.3d at 721.

178. *Id.* at 723.

179. *Id.*

180. *See, e.g., id.* The court concluded: “Given that the disputed film clip was entirely unnecessary to the subject matter of [the] lecture, the school officials had a legitimate pedagogical purpose in restricting the display of photographs of bare-chested women in a tenth-grade classroom.” *Id.*

E. “BONG HiTS 4 JESUS”

Recently the Supreme Court dealt a blow to students’ free speech rights. *Morse v. Frederick* involved the now infamous banner bearing the phrase “BONG HiTS 4 JESUS.”¹⁸¹ Joseph Frederick was a student at an Alaskan high school that permitted its students to leave class so they could witness the Olympic torch relay pass through town.¹⁸² On the day of the relay, Frederick did not make it to school because of car trouble.¹⁸³ In fact, he never set foot on school grounds prior to the torch relay.¹⁸⁴ However, Frederick was able to get to the sidewalk across the street from his school where several of his friends were positioned to watch the torch pass.¹⁸⁵ As the camera crews were filming the torch pass by, Frederick displayed a banner reading “BONG HiTS 4 JESUS” in order to attract media attention.¹⁸⁶ The school principal immediately crossed the street and confiscated the banner.¹⁸⁷ She then suspended Frederick for ten days in accordance with a school policy banning any expression that “advocates the use of substances that are illegal to minors.”¹⁸⁸

The Supreme Court held that a school may constitutionally restrict speech at a school-sponsored event if the speech can reasonably be perceived as promoting illegal drug use.¹⁸⁹ Before beginning its analysis, the Court quickly dismissed Frederick’s argument that the case was not a student speech case because he was on a sidewalk at the time he displayed the banner.¹⁹⁰ Next, the Court noted that schools have a compelling interest in regulating illegal drug use.¹⁹¹ It then stated that this interest, in addition to the special circumstances of the school environment, provides schools with the authority to “restrict student expression that they reasonably regard as promoting illegal drug use.”¹⁹² As the Court wrote, schools do not need to tolerate expression that contributes to the dangers of promoting illegal drug use at school events.¹⁹³ This means that a school can enact a constitutionally-sound policy restricting a

181. *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007). This banner has gained so much popularity that the Newseum, a museum focusing on news located in Washington, D.C., wants to acquire it. *Museums Seek Banner at Crux of Legal Battle*, ANCHORAGE DAILY NEWS, July 7, 2007, at B1. The Newseum intends to put it next to Mary Beth Tinker’s black armband that was involved in the *Tinker* case. *Id.* at B2.

182. *Morse*, 127 S. Ct. at 2622.

183. *Frederick v. Morse*, 439 F.3d 1114, 1115 (9th Cir. 2006), *rev’d*, 127 S. Ct. 2618 (2007).

184. Brief for the Respondent at 2, *Morse v. Frederick*, No. 06-278 (U.S. Feb. 20, 2007).

185. *Morse*, 127 S. Ct. at 2622.

186. *Id.*

187. *Id.*

188. *Id.* at 2622–23 (quoting Juneau School Board Policy No. 5520).

189. *Id.* at 2624–25.

190. *Id.* at 2624.

191. *Id.* at 2628.

192. *Id.* at 2629.

193. *Id.*

viewpoint it finds unacceptable, provided it has a compelling interest in doing so. The school can also reprimand a student who reasonably was perceived to have articulated that viewpoint.

In a sweeping concurrence, Justice Clarence Thomas joined the majority opinion only because it diminished the standard set forth in *Tinker*.¹⁹⁴ Justice Thomas vouched for the doctrine of *in loco parentis*, which essentially provides the school with complete control over the regulation of student conduct and speech.¹⁹⁵

Justice John Paul Stevens wrote a dissent in which he stated that the decision “does serious violence to the First Amendment in upholding—indeed, lauding—a school’s decision to punish Frederick for expressing a view with which it disagreed.”¹⁹⁶ Justice Stevens quoted *Rosenberger v. Rector & Visitors of University of Virginia*¹⁹⁷ to assert that viewpoint discrimination is the most blatant form of First Amendment violation, and therefore, subject to the strictest burden.¹⁹⁸ Also, he noted that punishing a viewpoint that promotes unlawful activity is constitutional only if the speech is likely to cause the unlawful conduct the government seeks to prohibit.¹⁹⁹ Justice Stevens argued that the majority’s decision violated both of these well-established First Amendment principles.²⁰⁰

II. THE TROUBLE CAUSED BY “BONG HITS 4 JESUS”: UNINTENDED CONSEQUENCES FOR TEACHER SPEECH JURISPRUDENCE

Morse diminished the free speech rights of students by carving out an exception to the First Amendment rights protected by *Tinker*.²⁰¹ *Morse* has significant unintended consequences for teacher free speech rights under the *Tinker-Hazelwood* standard, and further illustrates an enormous problem in the analysis. The *Tinker-Hazelwood* standard normally begins with a discussion of whether the speech was made in a public forum.²⁰² However, some courts

194. *Id.* at 2636 (Thomas, J., concurring).

195. *Id.* at 2635. Justice Thomas summed the doctrine’s main points as follows:

(1) [U]nder *in loco parentis*, speech rules and other school rules were treated identically; (2) the *in loco parentis* doctrine imposed almost no limits on the types of rules that a school could set while students were in school; and (3) schools and teachers had tremendous discretion in imposing punishments for violations of those rules.

Id.

196. *Id.* at 2644 (Stevens, J., dissenting).

197. 515 U.S. 819, 828–29 (1995).

198. *Morse*, 127 S. Ct. at 2644 (Stevens, J., dissenting) (quoting *Rosenberger*, 515 U.S. at 828–29).

199. *Id.* at 2645.

200. *Id.* at 2644–46.

201. *See, e.g., id.* at 2638 (Alito, J., concurring).

202. *See, e.g., Williams v. Vidmar*, 367 F. Supp. 2d 1265, 1272 (N.D. Cal. 2005) (“The key to the holding in *Hazelwood* is its discussion of the importance of determining whether the

have completely disregarded this portion of the test.²⁰³ Further, the *Morse* Court limited the circumstances in which a student is considered to be in a public forum. In *Morse*, Frederick was on a public sidewalk at the time of his speech.²⁰⁴ Public streets have consistently been held to be public forums,²⁰⁵ yet the Court held that Frederick was at a school event, subject to greater speech restrictions.²⁰⁶ These two facts—the courts disregarding a vital part of the analysis and the *Morse* Court diminishing the scope of what constitutes a public forum—present a dangerous situation for teachers because they expand the classroom tremendously under the *Tinker-Hazelwood* standard.²⁰⁷

The *Morse* Court ignored other relevant facts in determining whether the speech occurred in a public forum.²⁰⁸ The parties involved and the courts that heard the case disagreed on whether permitting the students to watch the Olympic torch relay was a school-sponsored event.²⁰⁹ The Ninth Circuit took Frederick's side,²¹⁰ while the Supreme Court agreed with *Morse*.²¹¹ However, the evidence showed, without contradiction, that the event was not

expression allegedly being interfered with is being made in a public forum or a nonpublic forum.”).

203. See, e.g., *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 22–23 (1st Cir. 1999) (beginning the analysis without evaluating whether the speech was made in a public forum); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 722–24 (2d Cir. 1994) (failing to examine whether the statements were made in a public forum).

204. *Morse*, 127 S. Ct. at 2622.

205. *Frisby v. Schultz*, 487 U.S. 474, 480–81 (1988) (“[O]ur decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a ‘cliché,’ but recognition that ‘[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.’” (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939))).

206. *Morse*, 127 S. Ct. at 2622.

207. *Compare Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (holding that a school can be a public forum if it opens itself up to the public), with *Morse*, 127 S. Ct. at 2629 (holding that school-sponsored activities that take place in a public forum may be subject to school speech restrictions).

208. *Frederick v. Morse*, 439 F.3d 1114, 1116 (9th Cir. 2006), *rev'd*, 127 S. Ct. 722 (2006) (acknowledging that there were genuine disputes of fact concerning the nature of the relay, ultimately dismissing them as immaterial).

209. See *infra* notes 210–11.

210. *Frederick*, 439 F.3d at 1115 (“Coca-Cola and other private sponsors supported a ‘Winter Olympics Torch Relay’ in Juneau, Alaska.”); Brief for the Respondent, *supra* note 184, at 1 (“Coca-Cola and local businesses sponsored the relay.”); James Kilpatrick, ‘*Bong Hits for Jesus*’ was the Worst Ruling of the Year, *OLYMPIAN* (Washington), July 3, 2007, at A6 (“The school turned out a small band, but that was the beginning and end of the school’s involvement.”); Op-Ed, *Justices Missed the Point of Teen’s Banner*, *THE MORNING CALL* (Pennsylvania), June 28, 2007, at A12 (“The relay was sponsored by Coca-Cola, not the school.”).

211. *Morse*, 127 S. Ct. at 2622 (stating that Frederick unfurled the banner “[a]t a school-sanctioned and school-supervised event”); Reply Brief for the Petitioner at 4, *Morse v. Frederick*, No. 06-278 (U.S. Mar. 12, 2007) (Noting that “Respondent insist[s] that the factual record supports a finding that this is a ‘speech on a public sidewalk’ case rather than a ‘student speech’ case. They are wrong.”).

mandatory,²¹² and that Frederick arrived late to the relay, never setting foot on school grounds that day.²¹³ Further, the Court's assertion that the event happened during school hours is also debatable.²¹⁴ One commentator argued that school was not in session at the time.²¹⁵ Even if it is conceded that was in session at the time of the relay, students were not being supervised in the traditional school manner.²¹⁶ These disputable facts illustrate the Court's willingness to find that an event is school-sponsored when there is a controversy.

Was Frederick really a student at the time? The facts certainly are not convincing that he was, and at least one commentator agrees that he was not.²¹⁷ What if Frederick lived across the street from the school, never came to school on the day of the relay, and unfurled the banner from his window without ever stepping foot outside of his home? Nothing stops the Court from finding that Frederick would be a student in that situation, and this is problematic. The *Tinker-Hazelwood* standard provides no safeguards for teachers in this situation. After determining if the speech takes place in a public forum, a step that some courts bypass completely, the standard provides that a school can

212. *Morse*, 127 S. Ct. at 2622 (“Students were allowed to leave class to observe the relay” (emphasis added)); *Frederick*, 439 F.3d at 1116 (“[S]tudents filed affidavits saying that they were just released, not required to stay together or with their teachers” (emphasis added)); *Frederick v. Morse*, No. J 02-008 CV(JWS), 2003 WL 25274689, at *1 (D. Alaska May 29, 2003), vacated by, 439 F.3d 1114 (2006), rev'd, 127 S. Ct. 2618 (2007) (“Students at JDHS were permitted to leave their classes to watch the relay from the sidewalk outside the school.” (emphasis added)); Brief for the Respondent, *supra* note 184, at 1 (“Teachers at JDHS were permitted to release their students from class to witness the Olympic flame travel past the high school.” (emphasis added)); Brief for the Petitioner, *supra* note 211, at 3 (“[T]he Juneau School District allowed students to observe and participate in the ceremony.” (emphasis added)).

213. *Morse*, 127 S. Ct. at 2622 (conceding that Frederick came late to school and “[w]hen he arrived, he joined his friends . . . across the street from the school to watch the event”); *Frederick*, 439 F.3d at 1115 (“Frederick . . . never made it to school that morning because he got stuck in the snow in his driveway, but he made it to the sidewalk, across from the school”); *Frederick*, 2003 WL 25274689, at *1 (noting that Frederick “arrived at school late and immediately joined his friends to watch the event, across the street from [the school]”).

214. *Cf. Morse*, 127 S. Ct. at 2624.

215. Kilpatrick, *supra* note 210 (alleging that Frederick's school was not in session and students “were free to watch the parade, throw snowballs or stay home, as they wished”).

216. *Frederick*, 439 F.3d at 1116 (“[S]tudents filed affidavits saying that they were just released, not required to stay together or with their teachers, except for the gym class, and school administrators did not attempt to stop students who got bored and left.”); Brief for the Respondent, *supra* note 184, at 34 (“Except for members of the school pep band, cheerleaders, and one gym class, students were not required to remain together and some students apparently took advantage of the occasion to leave for the day”).

217. *See* Kilpatrick, *supra* note 210 (“Not a single class was in session as the torch passed by.”).

limit school-sponsored expression²¹⁸ or classroom speech.²¹⁹ As seen in *Morse*, courts are willing to find that functions are school-sponsored, even when the functions are not truly sponsored by the school.²²⁰ This extends the classroom even further, which presents a danger for teachers.²²¹

Moreover, because of the aftermath of *Morse*, under the *Tinker-Hazelwood* standard, teachers are now at the “mercy of the varied understanding of [their] hearers and consequently of whatever inference may be drawn as to [their] intent and meaning.”²²² Justice Stevens argued persuasively in his *Morse* dissent: “[I]t is one thing to restrict speech that *advocates* drug use. It is another thing entirely to prohibit an obscure message with a drug theme that a third party subjectively—and not very reasonably—thinks is tantamount to express advocacy.”²²³ There are always a few selected students who dislike their teachers. Teachers are now subject to angry students’ perceptions of what the teachers say or express, or the students’ biased opinions and the spin that the students put on the teachers’ speech.

Lastly, the Court leaves open the possibility of creating more exceptions to *Tinker*, which is particularly unsettling to the application of the *Tinker-Hazelwood* standard. Creating exceptions to *Tinker*, in the manner that the *Morse* Court did, violates a fundamental concept of the First Amendment: “the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”²²⁴ In *Morse*, the school’s interest was deterring illegal drug use by students.²²⁵ The school had an established policy in place that barred any expression advocating illegal substance use.²²⁶ It is valid to argue that schools always have an interest in deterring illegal activity. However, what if abortion becomes illegal? Under

218. *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 775 (10th Cir. 1991) (citing *Hazelwood*).

219. *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993). “It is well-settled that public schools may limit classroom speech to promote educational goals.” *Id.* (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969)).

220. See *supra* note 208–11 and accompanying text.

221. See Op-Ed, *supra* note 210, at A12 (noting that *Morse* “allows schools to reach beyond the schoolhouse gate”).

222. *Morse v. Frederick*, 127 S. Ct. 2618, 2648 (2007) (Stevens, J., dissenting). Justice Stevens discussed the Court’s constitutional obligations:

To the extent the Court defers to the principal’s ostensibly reasonable judgment, it abdicates its constitutional responsibility. The beliefs of third parties, reasonable or otherwise, have never dictated which messages amount to proscribable advocacy. Indeed, it would be a strange constitutional doctrine that would allow the prohibition of only the narrowest category of speech advocating unlawful conduct, yet would permit a listener’s perceptions to determine which speech deserved constitutional protection.

Id. at 2647–48 (citation and footnote omitted).

223. *Id.* at 2646 (emphasis in original).

224. *Id.* at 2645. Justice Stevens wrote that this concept “is a bedrock principle underlying the First Amendment . . .” *Id.*

225. *Id.* at 2628 (majority opinion).

226. *Id.* at 2623 (referencing Juneau School Board Policy No. 5520).

the *Tinker-Hazelwood* standard, a school could potentially ban any expression with an obscure reference to promoting abortion. As seen in *Silano*, the Second Circuit would have no problem upholding a ban on the promotion of an illegal abortion, and may not provide a rationale regarding the school's legitimate pedagogical purpose for the restriction.²²⁷

These three problematic issues: (1) the expanding classroom due to the disintegration of the public forum analysis and the willingness to find events school-sponsored; (2) putting the teacher at the mercy of his students; and (3) the possibility for viewpoint discrimination, are illustrative of the inadequacies of the *Tinker-Hazelwood* standard in the teacher speech analysis.

III. A DIFFERENT FOCUS PROVIDES CLARITY: OBJECTIVITY AVOIDS COMPLEXITY

The *Pickering-Connick* standard provides a solid basis for analyzing teacher speech. However, the lower courts have focused on the wrong words of the test.²²⁸ The beginning of the analysis should be a determination of whether the teacher is an *employee* or a *citizen* at the time of the speech, not whether the expression is on a matter of public concern. This can be done objectively by adopting a principle of labor law concerning the validity of no-solicitation rules.

The National Labor Relations Board (NLRB) has interpreted the National Labor Relations Act²²⁹ (NLRA) in a manner useful to the present inquiry. The NLRB has made a distinction between “company time” and “working time.”²³⁰ The NLRB stated that the NLRA “does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work.”²³¹ Based on this proposition, the NLRB concluded that it was impermissible for an employer to regulate an employee's conduct outside of working time, including lunch and break periods.²³² The

227. *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994) (providing no explanation for why the school had a legitimate pedagogical purpose in censoring pictures of bare-chested women).

228. *See supra* note 90 and accompanying text.

229. Labor Management Relations Act, 1947, 29 U.S.C. §§ 141-97 (2000).

230. *In re Peyton Packing Co. v. Amalgamated Meat Cutters*, 49 N.L.R.B. 828, 843 (1943).

231. *Id.* (addressing the validity of an employer's no-solicitation rule).

232. *Id.* (“[T]ime outside working hours . . . is an employee's time to use as he wishes without unreasonable restraint . . .”); *see also* *NLRB v. Ertel Mfg. Corp.*, 352 F.2d 916, 920 (7th Cir. 1965) (“It is well established that an employer's rule which bars union solicitation by employees during non-working time or distribution of union literature during non-working time in non-working areas, in the absence of unusual circumstances, violates . . . the Act.”); *NLRB v. Miller*, 341 F.2d 870, 873 (2d Cir. 1965) (enforcing the Board's order for the employer to “cease and desist from promulgating or enforcing a rule prohibiting solicitation during nonworking time . . . [i]n the absence of any special circumstances”); 48A AM. JUR. 2D *Labor and Labor Relations* § 1436 (2005) (“An employer unlawfully interferes with the protected rights of employees by promulgating and enforcing a rule that precludes employees from engaging in union solicitation

interest that the NLRB was protecting was primarily the employer's production interest.²³³ The Court found that this interest was not furthered when the employee is outside of working time or on a lunch or break period.²³⁴ Taking this principle into account, courts can objectively determine whether a teacher is an employee or a citizen at the time he is engaged in expressive activities.

The "production interest" that a school has as an employer is molding students to become individuals with different qualities than before they started their schooling,²³⁵ and is measured by student achievement.²³⁶ Thus, in any situation in which the teacher is not involved in the process of furthering student education, the teacher should enjoy the freedom of expression as would any typical citizen. The possible situations that a teacher could be in fit into three categories: (1) direct involvement with student development; (2) development of personal teaching skills during normal school time; or (3) conduct wholly unrelated to the production interest of the school.²³⁷

When a teacher falls within the first category, direct involvement with student development, that teacher is an employee. The teacher falls into this category when he is in school during school hours performing the tasks for which a teacher is paid.²³⁸ This includes chaperoning field trips that extend beyond the normal hours of the school day because the teacher is still acting in the capacity of a teacher.²³⁹ During a lunch or break period in which the

on the employer's property during nonworking time, unless it can show that the rule is necessary to maintain production or discipline.").

233. *Peyton Packing*, 49 N.L.R.B. at 844 ("If the rule had been promulgated for a bona fide purpose, e. g., to prevent impairment of production, such purpose would have been served by disciplining, in a reasonable manner, those employees who were apprehended in the act of violating the rule." (emphasis added)).

234. *Id.* at 843 ("[T]ime outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint . . .").

235. Eric A. Hanushek, *The Economics of Schooling: Production and Efficiency in the Public Schools*, 24 J. ECON. LITERATURE 1141, 1150 (1986) ("[Schooling] is a service that transforms fixed qualities of inputs (that is, individuals) into individuals with different qualities. Educational studies concentrate—as they should—on 'quality' differences.").

236. *Id.* ("The output of the education process—that is, the achievement of individual students—is directly related to a series of inputs.").

237. See E-mail from Thomas P. Christensen, Superintendent of Schools, Shamong Township Public Schools (Oct. 31, 2007, 08:08 EDT; Oct. 10, 2007, 08:43:36 EDT) (on file with author) (stating the possible situations that a teacher can be in include: (1) being in school during school hours; (2) taking a professional day; (3) taking a sick or bereavement day; (4) being on maternity or disability leave; (5) taking a personal day; (6) not being in school because school is out of session because of a holiday or summer vacation; (7) being on sabbatical leave; or (8) being on leave under the Family Medical Leave Act).

238. See, e.g., *Peyton Packing*, 49 N.L.R.B. at 843 ("Working time is for work.").

239. E-mail from Thomas P. Christensen, Superintendent of Schools, Shamong Township Public Schools (Oct. 10, 2007, 08:43:36 EDT) (on file with author) ("A field trip is a part of the school day It is just an extension of the classroom and the teacher has the same responsibilities as he/she would in the classroom.").

teacher does not need to supervise students, however, a teacher may express himself freely because he is not affecting the production interest of the school (the furtherance of the students' education).²⁴⁰ But, this freedom is limited by the *Tinker* principle that the expression cannot "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others."²⁴¹ Thus, a teacher could not use his lunch period to express himself in school or on school grounds if his expression would interfere with the ability for the school to effectively further its students' education.

When a teacher falls within the second category, developing personal teaching skills during normal school time, that teacher is also an employee. This category includes professional days, which are defined as:

[D]ay[s] where a teacher is engaging in an activity(ies) that either further their personal professional development or the professional development of other staff members or even professionals outside the district. For example, a teacher could be granted a professional day to teach or in-service other teachers, to deliver a speech or presentation to a group[](such as legislators, a community organization, a professional organization), receive an award or honor, etc.²⁴²

Teachers are employees when they fall into this category because they are affecting the production interest of the school, even if only indirectly. The purpose of these days is for teachers to better their personal teaching skills or to instruct other teachers.²⁴³ Ultimately this affects the production interest of the school because better teachers theoretically should be able to teach in a more effective manner so their students' achievement will be higher than it would be otherwise.

A teacher who falls within the third category, not affecting the production interest of the school, is not an employee at all. This category includes days when the teacher does not come into school for a reason other than

240. See *Peyton Packing*, 49 N.L.R.B. at 843. The NLRB stated that "time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint . . ." *Id.* (emphasis added).

241. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969); see also *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972) (extending the *Tinker* holding to sidewalks outside of the classroom). The *Grayned* Court explained:

[I]t would be highly unusual if the classic expressive gesture of the solitary picket disrupts anything related to the school, at least on a public sidewalk open to pedestrians. On the other hand, schools could hardly tolerate boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse.

Grayned, 408 U.S. at 119 (footnote omitted).

242. E-mail from Thomas P. Christensen, Superintendent of Schools, Shamong Township Public Schools (Oct. 31, 2007, 08:08 EDT) (on file with author).

243. *Id.*

professional development and a substitute is hired.²⁴⁴ In this category, a teacher informs the school of his or her expected absence from school,²⁴⁵ and must have lesson plans prepared for the substitute.²⁴⁶ Learning, typically in the form of review, takes place when a substitute teaches in lieu of the permanent teacher.²⁴⁷ Thus, the production interest of the school is not at stake when a substitute is in the classroom rather than the permanent teacher. In addition, a teacher falls into this category when he is not at school, during a holiday or summer vacation. There is no production interest at stake when school is not in session because students are not gathered in the classroom waiting to be taught.

Taking these principles into account, any concern arising from the expansion of the classroom is eliminated. The problem regarding the disintegration of the public forum presented by the *Tinker-Hazelwood* standard is eradicated by making this objective determination. A teacher's expression, while acting as a private citizen, cannot be reprimanded by the school for his speech unless the expression fails to meet the standard First Amendment analysis.²⁴⁸ This objective prong provides a vital safeguard to teachers and is simple to apply.

244. See *id.* Examples are sick days, personal days, maternity leave, disability leave, leave under the Family Medical Leave Act, bereavement days, personal days, and sabbatical leave. *Id.*

245. E-mail from Deb Bailey, Math Teacher, Central School, Glencoe, Ill. (Nov. 3, 2007, 15:33 EDT) (on file with author) (stating that a Central School teacher fills out a form to give to the school detailing the date and reason for taking a personal day and explaining that a teacher simply calls the school's secretary when he intends to take a sick day); e-mail from Thomas P. Christensen, Superintendent of Schools, Shamong Township Public Schools (Nov. 2, 2007, 08:14 EDT) (on file with author) (explaining that a teacher posts his absence on a computer system for substitutes to fill and noting that other districts have a "sub caller who fills positions by calling subs after teachers call in their absence"); e-mail from Adrienne Warner Lopez, Third Grade General Education Teacher, P.S. 146, New York, N.Y. (Nov. 1, 2007, 19:38 EDT) (on file with author) (stating that approval from the principal is required for a personal day and informing the school by telephone is required for a sick day); e-mail from Charlene Martin, Sixth Grade Math Teacher, Indian Mills Memorial School (Nov. 1, 2007, 19:24 EDT) (on file with author) (explaining the school's requirement that a teacher must inform the school of his or her absence when taking a day off).

246. E-mail from Deb Bailey, Math Teacher, Central School, Glencoe, Ill. (Nov. 3, 2007, 15:33 EDT) (on file with author) (noting that Central School requires its teachers to "provide detailed lesson plans for each of [their] classes . . ."); e-mail from Adrienne Warner Lopez, Third Grade General Education Teacher, P.S. 146, New York, N.Y. (Nov. 1, 2007, 19:38 EDT) (on file with author); e-mail from Charlene Martin, Sixth Grade Math Teacher, Indian Mills Memorial School (Nov. 1, 2007, 19:24 EDT) (on file with author) (stating that the school requires teachers who take a day off to provide lesson plans for their substitutes).

247. E-mail from Adrienne Warner Lopez, Third Grade General Education Teacher, P.S. 146, New York, N.Y. (Nov. 11, 2007, 15:00 EDT) (stating that "substitutes are really just doing review work"); e-mail from Charlene Martin, Sixth Grade Math Teacher, Indian Mills Memorial School (Nov. 1, 2007, 19:24 EDT) (on file with author) (noting that the lesson plans that she provides to substitutes "enhance the lessons" that she has "previously taught").

248. *Connick v. Myers*, 461 U.S. 138, 157 (1983) (Brennan, J., dissenting) ("When public employees engage in expression unrelated to their employment while away from the workplace, their First Amendment rights, are of course, no different from those of the general public.").

If the teacher is an employee at the time of the expression, the teacher does not enjoy the same First Amendment protection as a private citizen.²⁴⁹ The classroom is not the same as other settings. As courts have pointed out, the classroom is unique,²⁵⁰ and there is a captive audience problem.²⁵¹ However, *Pickering-Connick* balancing can account for these special circumstances when the school proffers its interest for restricting the speech.

As previously discussed, the Sixth Circuit illustrates that *Pickering-Connick* balancing is effective when used properly.²⁵² Categorizing the speech as something that touches upon a matter of political, social, or other significant concern to the community is the appropriate beginning of this balancing test.²⁵³ The definition of “a matter of public concern” allows courts to be flexible when determining whether the speech will fall within the sphere of protection.²⁵⁴ First Amendment jurisprudence has consistently held that speech on a matter of public concern is of the highest importance.²⁵⁵ Speech that does not touch on a matter of public concern, but rather is a private grievance, does not and should not be afforded special First Amendment protection.

249. See *infra* notes 250–51 and accompanying text.

250. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (noting “special characteristics of the school environment”).

251. *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007). The court explained the captive audience phenomenon as follows: “Education is compulsory, and children must attend public schools unless their parents are willing to incur the cost of private education or the considerable time commitment of home schooling. Children who attend school because they must ought not be subject to teachers’ idiosyncratic perspectives.” *Id.* at 479.

252. See *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1053–55 (6th Cir. 2001) (performing the balancing test and taking all interests into account as well as the interests’ legitimacy).

253. See *supra* notes 116–21 and accompanying text.

254. See *supra* notes 118–19, 121.

255. *Connick v. Myers*, 461 U.S. 138, 145 (1983) (“[T]he Court has frequently reaffirmed that speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values’ and is entitled to special protection.” (internal quotation marks omitted)). The *Connick* Court cited *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). The *Claiborne* Court found that “a major purpose of the boycott at issue was to influence governmental action.” *Claiborne*, 458 U.S. at 914. The Court held that “[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.” *Id.* The *Connick* Court also cited *Carey v. Brown*, 447 U.S. 455 (1980). The *Carey* Court stated:

Public-issue picketing, “an exercise of . . . basic constitutional rights in their most pristine and classic form,” has always rested on the highest rung of the hierarchy of First Amendment values: “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”

Carey, 447 U.S. at 466–67 (citation omitted).

The next step in the analysis requires the school to proffer an interest that outweighs the interest of speaking on matters of public concern.²⁵⁶ The Sixth Circuit shows that this part of the *Pickering-Connick* balancing can be done effectively.²⁵⁷ The *Cockrel* court wisely took into consideration evidence showing the school's proffered interests were not legitimate.²⁵⁸ Furthermore, contrary to some contentions,²⁵⁹ the *Pickering-Connick* standard takes into account the special circumstances of the classroom when addressing the interests of the school.²⁶⁰ The standard expressly requires that the school have an interest that outweighs the interest of speaking on a matter of public concern in order to justify its restriction of speech.²⁶¹ Schools have argued that their interests of harmony in the workplace and efficiency trump the interest of free speech in cases where the court found the speech was on a matter of public concern.²⁶² Their proffered interests most likely stem from the *Pickering* wording: "the interest of the State, as an employer, in promoting the *efficiency* of the public services it performs through its employees."²⁶³ However, there is nothing to stop the school from arguing that the school's special environment goes hand-in-hand with running an efficient school. Thus, a school could successfully defend against a First Amendment claim by creatively incorporating the special circumstances of the school environment into its argument of efficiency.

IV. CONCLUSION

The *Tinker-Hazelwood* standard should not be used to determine whether public school teachers' classroom speech is protected by the First Amendment. The *Morse* Court has blurred the line on what constitutes student speech, namely, whether someone is a student or a citizen at the time of the expression. As a result, the *Tinker-Hazelwood* standard, through *Morse*, erodes the First Amendment protection afforded teachers. This is a fundamental flaw in the *Tinker-Hazelwood* standard. The *Pickering-Connick* standard, however, makes this distinction expressly, albeit the courts' have focused on the wrong words of the standard. The *Pickering-Connick* standard is well suited for

256. See, e.g., *Cockrel*, 270 F.3d at 1053. The court explained: "Having held that *Cockrel's* speech touches on matters of public concern, we must now weigh the employee's interest in speaking against the employer's interest in regulating the speech to determine if the speech is constitutionally protected." *Id.*

257. *Id.* at 1054 (noting that the school's interests were not legitimate); see also *supra* note 127.

258. *Cockrel*, 270 F.3d at 1054.

259. See *supra* note 39.

260. See *Cockrel*, 270 F.3d at 1054-55 (finding that the school's proffered interest in efficient school operation does not outweigh the teacher's speech on a matter of public concern).

261. See, e.g., *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 799 (5th Cir. 1989) (stating that "*Pickering* recognizes the need to balance competing interests.").

262. See *Cockrel*, 270 F.3d at 1054; *Leary v. Daeschner*, 228 F.3d 729, 738 (6th Cir. 2000).

263. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (emphasis added).

analyzing public school teachers' free speech rights if the courts begin the inquiry with an objective finding of whether the teacher was "on the clock" at the time of expression.²⁶⁴ Otherwise, free speech protection afforded to teachers when they are acting as ordinary citizens, as recognized in *Pickering*, is diminished, thereby implicating the chilling effect that is so greatly undesired.

264. See *supra* notes 238–43 and accompanying text.

