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# *Boring* Lessons: Defining the Limits of a Teacher's First Amendment Right to Speak Through the Curriculum

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# NOTE

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## INTRODUCTION

Margaret Boring's classes were anything but boring. She taught Advanced Acting at Owen High School in rural Buncombe County, North Carolina, and her classes' performances regularly won regional and state awards.[1] In the fall of 1991, Ms. Boring chose a controversial play, *Independence* by Lee Blessing, for her students to perform. *Independence* "powerfully depicts the dynamics within a dysfunctional, single-parent family — a divorced mother and three daughters; one a lesbian, another pregnant with an illegitimate child."[2] Prior to the first

* The author thanks Patricia Donehower and Heather Rosmarin for their emotional and intellectual support during the time when this Note was written.

1. *See* Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 366, 375 (4th Cir. 1998) (en banc) [hereinafter *Boring III*]; Boring v. Buncombe County Bd. of Educ., No. 93-CV-230, 1995 WL 17001368, at *2 (W.D.N.C. June 1, 1995) [hereinafter *Boring I*].

2. *Boring III*, *supra* note 1, 136 F.3d at 366 (quoting Plaintiff-Appellant's Amended Complaint).

performance at the school, Ms. Boring informed the principal of the play's title but not its content.[3] After the presentation of the play, she was transferred to a middle school.[4] Viewing her transfer as a demotion, she filed suit, claiming that the First Amendment protected her decision to teach controversial material.[5]

A federal trial court dismissed her complaint for failure to state a claim.[6] On appeal, a three-judge panel of the Fourth Circuit reversed the trial court, finding that Ms. Boring's choice of the play was speech protected by the First Amendment.[7] Later, a sharply divided Fourth Circuit, sitting *en banc*, split 7-6 to reverse the panel decision, finding that curricular speech[8] garners no First Amendment protection.[9]

In evaluating Ms. Boring's First Amendment claim, the Fourth Circuit looked to *Pickering v. Board of Education*[10] and *Connick v. Myers*,[11] leading First Amendment decisions by the Supreme Court establishing the free speech rights of public employees. Under the test articulated in *Pickering* and *Connick*, courts must first determine whether the speech at issue is a matter of public concern. "Matter of public concern" is a term of art.[12] The Court has variously described such matters as those dealing in some way with "the essence of self-government,"[13] matters as to which "free and open debate is vital to an informed decision-making by the electorate,"[14] matters as to which "debate . . . should be uninhibited, robust, and wide-open,"[15] and mat-

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3. *Id.*

4. Boring v. Buncombe County Bd. of Educ., 98 F.3d 1474, 1485 (4th Cir. 1996) (Widener, J., dissenting) [hereinafter *Boring II*], *overruled by Boring III, supra* note 1, 136 F.3d 364 (4th Cir. 1998).

5. *See Boring III*, *supra* note 1, 136 F.3d at 367.

6. *Boring I*, *supra* note 1, No. 93-CV-230, 1995 WL 17001368 (W.D.N.C. June 1, 1995).

7. *Boring II*, 98 F.3d 1474 (4th Cir. 1996), *overruled by Boring III*, *supra* note 1, 136 F.3d 364 (4th Cir. 1998).

8. Curricular speech, as used in this Note, means any expression that occurs either through the choice of what to teach or through the actual teaching of that material. The First Amendment rights of teachers when they speak in the classroom generally, other than through the curriculum, are not at issue in this Note.

9. *See Boring III*, *supra* note 1, 136 F.3d at 368.

10. 391 U.S. 563 (1968).

11. 461 U.S. 138 (1983).

12. *See* Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794 (5th Cir. 1989); *see also*, *e.g.*, D. Gordon Smith, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 258 (1990).

13. Garrison v. Louisiana, 379 U.S 64, 74-75 (1964).

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

15. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 755 (1985) (plurality opinion) (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)); *see also Kirkland*, 890 F.2d at 798 n.9 ("Justice Scalia notes that the concept of 'public concern' has been described variously, but all attempts fail to advance the definition beyond the circular state-

ters "currently the subject of public attention."[16] While the content of the speech helps determine whether an employee's speech is a matter of public concern, the determination is not made by content alone, but rather "by the content, form, and context of a given statement, as revealed by the whole record."[17]

If public employee speech qualifies as a matter of public concern, it receives provisional First Amendment protection, which means that the government employer must prove that the speech would hinder the efficiency of the workplace,[18] and that its interest in prohibiting the speech outweighs the public employee's interest in speaking.[19] Courts must then balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[20] On the other hand, if a public employee's expression does not qualify as a matter of public concern, it receives no First Amendment protection.[21] Achieving public concern status does not mean the speech is ultimately protected. For example, in *Connick* some of the controversial expression was deemed a matter of public concern, but was ultimately unprotected because it failed to pass the second hurdle, the balancing test.[22]

The Supreme Court has never squarely addressed the scope of teachers' free speech rights in the classroom.[23] Lower courts are there-

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ment that 'speech on matters of public concern is that speech which lies "at the heart of the First Amendment's protection." ' ") (quoting Rankin v. McPherson, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting)).

16. *Pickering*, 391 U.S. at 572.

17. *Connick*, 461 U.S. at 147-48.

18. *See Pickering*, 391 U.S. at 568, 570-71; *see also* Henton v. Carlson, No. C 97-4735 SI, 1999 WL 219739, at *6 (N.D. Cal. April 13, 1999) ("If Henton can show that his flyer involved a matter of public concern, then the burden shifts to defendants to demonstrate that the superior court's interest in maintaining an effective and operational workplace outweighs the First Amendment interest in Henton's freedom of speech.") (citing *Pickering*, 391 U.S. at 568; *Johnson v. Multnomah County*, 48 F.3d 420, 422 (9th Cir. 1995)); Seog Hun Jo, *The Legal Standard on the Scope of Teachers' Free Speech Rights in the School Setting*, 31 J.L. & EDUC. 413, 419 (2002).

19. *Connick*, 461 U.S. at 153 ("When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office.").

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

21. *See Connick*, 461 U.S. at 146 ("*Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge.").

22. *See also* Rice-Lamar v. City of Fort Lauderdale, 54 F. Supp. 2d 1137, 1144 (S.D. Fla. 1998) (finding that speech passed the first hurdle, but not the second).

23. *See, e.g.*, Karen Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 1-2 (2001).

fore confused about how much protection to give to curricular speech. Margaret Boring's case illustrates how, in the aftermath of the Supreme Court's ruling in *Connick*, federal courts have struggled with the question of whether a teacher's curricular speech touches upon a matter of public concern and thereby passes the first hurdle on the road to First Amendment protection.[24] The Fourth Circuit decided to tie provisional protection to the role of the speaker; the court characterized the curricular speech in *Boring* as not presenting a matter of public concern and as "nothing more than an ordinary employment dispute."[25]

In *Kirkland v. Northside Independent School District*,[26] the Fifth Circuit held that speech achieves the protected status of a "matter of public concern" only "if the words or conduct are conveyed by the teacher in his *role as a citizen* and not in his *role as an employee* of the school district," and that a teacher expressing himself via the curriculum is expressing himself in his role as an employee.[27] As a result, the teacher's decision to teach nonapproved books did not rise to the level of a matter of public concern.[28] Both *Boring* and *Kirkland* held that a teacher's curricular speech is an action as an employee, and therefore state abridgement of such speech does not violate the First Amendment.[29]

In *Cockrel v. Shelby County School District*,[30] however, the Sixth Circuit found that curricular speech could constitute a matter of public concern. In *Cockrel*, a Kentucky teacher decided to present a series of

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24. *Cf.* Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1048-49 (6th Cir. 2001); *Boring III*, *supra* note 1, 136 F.3d 364, 366, 375 (4th Cir. 1998) (en banc); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794 (5th Cir. 1989). Notice that the disagreement focuses on whether curricular speech deserves any protection, not whether it is speech. When a teacher chooses what to teach and what not to teach, that act of choosing is expression falling within the First Amendment's definition of speech. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 570 (1995) (holding that the selection of contingents for a parade constituted speech, and that in order to receive First Amendment protection, a speaker does not have "to generate, as an original matter, each item featured in the communication").

25. *Boring III*, *supra* note 1, 136 F.3d at 368.

26. 890 F.2d 794 (5th Cir. 1989).

27. Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794 (5th Cir. 1989).

28. *Id.*

29. For that assertion, they rely on the following language from *Connick*:

> [W]hen 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.

*Boring III*, *supra* note 1, 136 F.3d at 368 (citing *Connick*, 461 U.S. at 147); *Kirkland*, 890 F.2d at 798-99 (same).

30. 270 F.3d 1036 (6th Cir. 2001).

lessons on industrial hemp to her fifth grade class. The lessons included a visit by a high-profile guest, the actor Woody Harrelson, along with several hemp farmers.[31] The teacher, Ms. Cockrel, was terminated, and when she sued the school board for infringing upon her free speech right, a federal trial court dismissed her legal challenge.[32] On appeal, the Sixth Circuit found that Ms. Cockrel's choice to teach about industrial hemp was a matter of public concern.[33] Unlike the Fourth and Fifth Circuits, the Sixth Circuit de-emphasized the importance of the speaker's role as employee or citizen and interpreted *Connick* as holding that matters of public concern are all those that can "be fairly considered as relating to any matter of political, social, or other concern to the community."[34]

This Note addresses the confusion among lower courts regarding whether curricular speech can ever pass the first hurdle of the *Pickering/Connick* test, that is, whether curricular speech can ever amount to a matter of public concern. At stake in this determination is the very power structure of public schools. Power to set curricula will either remain with school boards or come under the control of individual teachers.[35] If courts adopt a narrow definition of public concern, school boards will select curricula for the guidance of children;[36] if, on the other hand, courts adopt an expansive understanding of public concern, teachers will decide what children are taught.[37] Dissenting

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31. *Cockrel*, 270 F.3d at 1042.

32. *Id.* at 1046.

33. *Id.* at 1051.

34. *Id.* at 1050-51 (quoting *Connick*, 461 U.S. 138 at 146).

35. Public schools in general, and their curricula in particular, have traditionally been governed locally through elected school boards and state laws. *See* Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process . . . local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.' ") (internal citations omitted); Ann Hassenpflug, *Drama in the Classroom: No Judicial Applause for Teachers' Freedom of Speech*, 132 EDUC. L. REP. 21 (1999) ("[S]tate laws give school boards the responsibility for selection of curriculum in schools. . . .").

36. *See, e.g.*, Todd A. Demitchell, *A New Balance of In-Class Speech: No Longer Just a "Mouthpiece,"* 31 J.L. & EDUC. 473, 476, 479 (2002) ("Schools serve the public good and are answerable to the public through elections and budget sessions. Parents and the community must remain aligned with the public schools and the schools must remain responsive to their concerns.").

37. *See, e.g.*, Daly, *supra* note 23, at 1-2. Daly rejects the *Pickering/Connick* test for public concern because it "provides inadequate protection for teachers' in-class speech, a problem made acute by the courts' narrow and often conflicted definition of what constitutes speech relating 'to matters of public concern.' " *Id.* at 2. In place of the *Pickering/Connick* test, Daly proposes increasing teacher academic freedom by linking such freedom to students' alleged right to hear multiple viewpoints. *Id.* at 31.

from the Fourth Circuit's initial decision in *Boring*, Judge Widener proclaimed:

> I do not know of a more significant case to be decided in this court in my experience. The question is who is to set the curriculum, the teachers or the school authorities. Who is to influence young minds? From Plato to Burke, the greatest intellects of Western civilization have acknowledged the importance of the very subject at hand . . . .[38]

This Note argues that teacher curricular speech does not attain public concern status unless it falls within a narrow exception for allegations of constitutional violations. Part I contends that, as a general rule, the First Amendment provides no protection for public employees speaking in their roles as employees. Part I further maintains that the Court has carved out a narrow exception to its general rule: when an employee alleges a constitutional violation by her government employer, that allegation will receive public concern protection even if it is delivered on the job. Part II argues that the Sixth Circuit's broad, content-focused test for public concern is unsatisfactory and should be rejected. Part III argues that a narrow exception limited to constitutional complaints[39] makes sense from a policy standpoint.

## I. SPEECH BY A PUBLIC EMPLOYEE IN HER ROLE AS AN EMPLOYEE MAY BE PROTECTED ONLY IF IT IS "INHERENTLY OF PUBLIC CONCERN"

Supreme Court decisions regarding public employee speech establish that context, particularly the role of the speaker, is central to the determination of whether speech receives the provisional[40] protection accorded matters of public concern. Section I.A concludes that because curricular speech is speech as an employee, under most circumstances the First Amendment provides no protection for curricular speech. Section I.B argues that *Connick* carves out a narrow exception to the general rule developed in Section I.A. The narrow exception grants special protection to allegations of constitutional violations by government employers, even when those allegations arise from a government employee on the job.

### A. *The Broad Category: Matters of Public Concern*

According to *Connick*, speech touching on a matter of public concern is best identified by the "content, form, and context" of the

38. *Boring II*, 98 F.3d 1474, 1488 (4th Cir. 1996) (Widener, J., dissenting), *overruled by Boring III*, *supra* note 1, 136 F.3d. 364 (4th Cir. 1998) (en banc).

39. This Note uses the phrase "constitutional complaint" as shorthand for "an allegation of a constitutional violation."

40. *See supra* note 19 and accompanying text.

speech.[41] Since the speaker's role is part of the context of the speech, the fact that a viewpoint would qualify as a matter of public concern when expressed as a citizen does not automatically mean the same viewpoint deserves public-concern protection when expressed as an employee.

*Connick*'s context-sensitive test fits with the history of the Supreme Court's First Amendment jurisprudence. For much of the twentieth century, public employees enjoyed no First Amendment protection from disciplinary action, even when they spoke as citizens.[42] But the Court's First Amendment jurisprudence has undergone significant changes in the century since Justice Holmes proclaimed that, "[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman,"[43] and the Constitution now generally prevents the government from silencing public employees when they speak as citizens.[44] The historic evolution of the rights of public employees reveals a concern that citizens not be forced to choose between serving as government employees and exercising their fundamental right to speak about public affairs.[45]

Following *Connick's* directive to determine provisional protection based on "content, form, and context," some lower courts have emphasized content,[46] while others have emphasized context, including

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41. Connick v. Myers, 461 U.S. 138, 147-48 (1983). While a topic might qualify as a matter of public concern under a particular circumstance, that alone does not elevate the speech to public-concern status under all circumstances. *Id.* at 148-9 n.8 ("[Expression] not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest. The dissent's analysis of whether discussions of office morale and discipline could be matters of public concern is beside the point — it does not answer whether *this* questionnaire is such speech.").

42. *See id.* at 144-47 (detailing the historical evolution of public employees' speech rights).

43. McAulliffe v. Mayor of New Bedford, 155 Mass. 216, 220 (1892) (opinion by Holmes, J.) (upholding disciplinary action against a policeman's public, political speech).

44. In the context of a government employee's speech, the government plays the role of sovereign and also the role of employer. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 578 (1968) ("[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

45. *Connick*, 461 U.S. at 143 ("The repeated emphasis in *Pickering* on the right of a public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental. This language, reiterated in all of *Pickering's* progeny, reflects both the historical evolvement of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter." (citations omitted) (quoting *Pickering*, 391 U.S. at 568)).

46. *See, e.g.*, McKinley v. City of Eloy, 705 F.2d 1110, 1113-14 (9th Cir. 1983) (finding police officer's discharge violated his First Amendment right to publicly criticize the city's decision not to give police officers an annual raise) ("The initial question is whether the First Amendment protected plaintiff against discharge for the type of speech in which he engaged."); *see also* Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1052 (6th Cir. 2001).

the speaker's role, manner, audience, and motive.[47] The Supreme Court, however, has placed special emphasis on the speaker's role. *Pickering* and *Connick* strongly suggest that First Amendment protection is contingent upon the government employee having spoken in her role as a citizen, rather than as an employee.[48] In *Pickering*, a teacher wrote a letter to the editor of the local newspaper criticizing decisions by the local school board, his employer. The teacher expressed himself as a citizen — as opposed to as an employee — and his speech was found to be a matter of public concern.[49] By contrast, the *Connick* Court sustained an assistant prosecutor's dismissal after she circulated an intra-office questionnaire about the performance of the chief prosecutor.[50] The Court held that speech by a public employee should be given less protection when that speech is delivered as an employee rather than as a citizen.[51] The assistant prosecutor delivered the intra-office questionnaire as an employee, and therefore all but one of the questions fell short of public-concern status.[52]

Distinguishing between an employer-employee relationship and a sovereign-citizen relationship, *Waters v. Churchill*[53] re-emphasized the crucial importance of whether the government is restricting employee

47. *See, e.g.*, Terrell v. Univ. of Tex. Sys. Police, 792 F.2d 1360, 1362 (5th Cir. 1986) ("[T]he mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment."); *see also Boring III*, 136 F.3d 364, 372 (4th Cir. 1998) (Luttig, J., concurring); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 798-99 (5th Cir. 1989).

48. *See Connick*, 461 U.S. at 143 ("The repeated emphasis in *Pickering* on the right of a public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental." (quoting *Pickering*, 391 U.S. at 568)); *Pickering*, 391 U.S. at 568. Several circuits have followed the Court's speaker-focused approach. *See* Youker v. Schoenenberger, 22 F.3d 163, 166 (7th Cir. 1994) ("Simply stated, the speech in the present case is not protected because it was not speech as a citizen [because the employee used an official medium to convey his message]."); Bausworth v. Hazelwood Sch. Dist., 986 F.2d 1197, 1198-99 (8th Cir. 1993) (holding that plaintiff's speech did not amount to a matter of public concern because she spoke as an employee and not as a concerned citizen.) ("In making our examination, we focus on the employee's role in conveying the speech . . . . Thus, speech is a matter of public concern when a public employee speaks as a concerned citizen, but not when the employee speaks as an employee."); Schalk v. Gallemore, 906 F.2d 491, 495 (10th Cir. 1990) (per curiam) ("The pertinent inquiry is whether the actor is speaking as a citizen or an employee.").

49. *See Pickering*, 391 U.S. at 571. For the Court's analysis of whether a speaker communicates as a citizen or as an employee, *see infra* notes 66-78 and accompanying text.

50. *Connick*, 461 U.S. at 138.

51. *Id.* at 138.

52. *See id.* at 147, 149. The one question which did attain public-concern status was an attempt to redress a constitutional violation. The question asked whether other assistant prosecutors "ever feel pressured to work in political campaigns on behalf of office supported candidates." *Id.* at 149. Official pressure to work for political candidates violates an employee's constitutional freedom of belief. *Id.* at 149. When a constitutional right is threatened, "it is essential that public employees be able to speak out freely without fear of retaliatory dismissal." *Id.* at 149. This Note fully discusses the special status of constitutional complaints in Part I.B, *infra*.

53. 511 U.S. 661 (1994).

speech or citizen speech. "The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer."[54] The speaker's role determines the government's legitimate power.[55]

When deciding whether to grant provisional protection, courts need to ask whether the individual expressed herself "as a citizen . . . upon matters of public concern."[56] The foremost question, therefore, is a context question, namely, whether the speech was expressed as a citizen.[57] The government pays its employees to advance its mission, and it must have the freedom to discipline employee speech which detracts from its mission — even if the same speech would find First Amendment protection when expressed by someone speaking as a citizen.[58] The First Amendment does not turn government offices into roundtable discussions,[59] nor does it mandate that government offices

54. Waters v. Churchill, 511 U.S. 661, 675 (1994). *See also* Rankin v. McPherson, 483 U.S. 378, 393 (1987) (Powell, J., concurring) ("[T]he Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial." (citation omitted) (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

55. *See Waters*, 511 U.S. at 675 ("The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate."); *Rankin*, 483 U.S. at 384 (plurality opinion) ("[P]ublic employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions.").

56. Connick v. Myers, 461 U.S. 138, 143 (1983).

57. *See id.* at 144-47; *see also* Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 798-99 (5th Cir. 1989); Terrell v. Univ. of Tex. Sys. Police, 792 F.2d 1360, 1362 (5th Cir. 1986) ("[O]ur task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee.").

58. *See Waters*, 511 U.S. at 674-75 ("[C]onstitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign. . . . [T]he extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her."); Demitchell, *supra* note 36, at 475 ("Employers hire employees to perform a specific function. Teachers as employees are essentially hired to speak. Their speech forms the basis of the employment relationship. Public school teachers teach the adopted curriculum using methods that the board may specify, or, in the alternative, that comports with the standards of practice, even if those standards are not clearly defined and universally accepted. Essentially, teachers are hired to speak for the school board thus furthering the school board's message, which is the curriculum.").

59. *See Connick*, 461 U.S. at 149 ("[T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.").

be subject to more internal disruption than private offices.[60] The Court has expanded its jurisprudence to protect Mr. Pickering's letter to the editor, but it has not expanded it to protect on-the-job efforts to frustrate an employer's policies.

A context-sensitive test does not hinder the First Amendment goal of promoting an exchange of political and social ideas among citizens.[61] Since *Connick's* test leaves employees free to express themselves as citizens,[62] it does not prevent any viewpoints from reaching the marketplace of ideas. Where alternative channels for expression exist, the First Amendment's goal of fostering an exchange of ideas among citizens is fulfilled.[63] *Connick's* test leaves open many off-the-job channels for expressing ideas. Federal courts need not protect on-the-job speech; they need only ensure that citizens are not deprived of fundamental rights[64] by virtue of working for the government.[65]

The Supreme Court has never put forward a test for determining whether a person speaks as an employee or as a citizen. The facts of Supreme Court cases, however, indicate several factors involved in such a determination: whether the expression occurred at work, whether the expression occurred as part of the employee's duties,[66] and whether the expression occurred during time for which the em-

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60. *See Rankin*, 483 U.S. at 393 (Powell, J., concurring) ("[A] public employer, no less than his private-sector counterpart, must have authority to maintain the efficiency as well as the integrity of his office."); *Connick*, 461 U.S. at 147 (stating that the Free Speech Clause "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.").

61. *See Connick*, 461 U.S. at 145 ("The First Amendment was 'fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " (quoting Roth v. United States, 354 U.S. 476, 484 (1957); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964))); *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas... The best test of truth is the power of the thought to get itself accepted in the competition of the market...."); Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 496 (1996); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 831, 850 (1995); Swank v. Smart, 898 F.2d 1247, 1250-51 (7th Cir. 1990) (opinion by Posner, J.) ("The purpose of the free-speech clause... is to protect the market in ideas, broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions — scientific, political, or aesthetic — to an audience whom the speaker seeks to inform, edify, or entertain.").

62. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (overturning a public school teacher's dismissal for criticizing school board decisions in a letter to the editor).

63. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Metromedia, Inc. v. San Diego, 453 U.S. 490, 516 (1981).

64. Among fundamental rights is the proposition that the government, as sovereign, cannot silence citizen speech it does not like. *See, e.g.*, *Rosenberger*, 515 U.S. at 828. That explains why Mr. Pickering could not legitimately be fired for writing his letter to the editor. *See Pickering*, 391 U.S. 563 (1968).

65. *Connick*, 461 U.S. at 147 ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances").

66. *See* Knight v. State Dep't of Health, No. 97-CV-2114, 2000 WL 306447, at *3 (D. Conn. Feb. 22, 2000).

ployee was being paid.[67] An employee speaks unambiguously as a citizen if his expression occurs off-work and outside his employee duties. The Court in *Pickering*, for example, granted First Amendment protection to the schoolteacher who wrote a letter to the editor of the local newspaper, because the schoolteacher expressed himself as a citizen.[68] An employee can also speak as a citizen at the workplace, if the expression occurs outside of the time for which the employee is paid and outside of the employee's duties. The Supreme Court found, for example, that a teacher's speech is communicated as a citizen[69] when the speech occurs separately from the teacher's duties and in a private meeting with the principal which any citizen might have requested.[70] Finally, the status of a speaker whose speech occurs at work and while being paid, but which does not affect or interfere with the employee's duties, is ambiguous. In *Rankin v. McPherson*,[71] for example, the Court declined to address the issue of whether a deputy sheriff spoke as a citizen or as an employee, where her controversial language occurred at work and during working hours, but was part of a private conversation with a coworker that did not interfere with her duties.[72]

If, on the other hand, an employee's expression occurs at the workplace and interferes with her duties,[73] she speaks as an employee and not as a citizen. In *Connick*, for example, the Court found that Assistant Prosecutor Myers expressed herself as an employee when she distributed her questionnaire at work.[74] The Court noted that "the questionnaire was prepared and distributed at the office; the manner

67. *See* Seog Hun Jo, *supra* note 18, at 420 ("[A] speaker is an employee for the purpose of the *Pickering* balance when he aired his views at the office, or used the resources of the office, or implied a real or symbolic position by representing the office in some way, or took advantage of the authoritative position of an employee.").

68. *Pickering*, 391 U.S. at 578.

69. *Connick*, 461 U.S. at 148 n.8.

70. Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 411-13 (1979).

71. 483 U.S. 378 (1987).

72. Rankin v. McPherson, 483 U.S. 378, 393 (1987) (Powell, J., concurring) ("[T]here is no objective evidence that McPherson's lone comment had any negative effect on the morale or efficiency of the Constable's office."). Justice Powell's concurrence is the controlling opinion in *Rankin*, and it explicitly reaffirmed *Connick* and *Pickering*: "I do not read the Court's opinion as extending the *Connick/Pickering* test, or otherwise making it more difficult for employers to discipline workers whose speech interferes with these goals." *Id.*; *see also* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.5 (1976))).

73. One could argue that Mr. Pickering's letter interfered with his duties as teacher because it upset his employer. The school board made that argument in *Pickering*, but the Court rejected it. *Pickering*, 391 U.S. at 570 (1968) ("[N]o question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here.").

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

of distribution required not only Myers to leave her work but for others to do the same in order that the questionnaire be completed."[75] The Court found that she therefore expressed herself as an employee even though she distributed some of her questionnaires during the lunch hour,[76] did not express herself via official duties, and spoke on issues related to the functioning of the government.[77] Her expression did not pass the public-concern hurdle.[78]

When teachers express themselves via the curriculum, they do so unambiguously as employees. Expression via curriculum takes place during time for which the teacher is paid, as a part of the teacher's official duties, and not in a public forum like letters to the editor. A teacher expressing herself through the curriculum deserves no more First Amendment protection than any other government employee expressing herself through the official policies of her office.[79]

The Supreme Court has never confronted a "public concern" case in which the public employee was so unambiguously speaking *qua* employee as a teacher does when speaking via the curriculum. If Assistant Prosecutor Myers spoke as an employee when she distributed her questionnaires during the lunch hour, then surely a teacher speaks as an employee when she expresses herself via the curriculum. Curricular speech is expression made at work, during working hours, with the employer's resources,[80] while being paid by the employer, and via a medium — the curriculum — traditionally controlled by the employer.[81] The outcome of this comparison is that courts have even less reason to grant provisional protection to curricular speech than to the unprotected speech in *Connick* or to the speech in any other case which has come before the Court.[82]

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75. *Id.* at 153.

76. *Id.* at 153 n.13.

77. *Id.* at 154.

78. *Id.*

79. *See* Hankard v. Town of Avon, 126 F.3d 418, 422 (2d Cir. 1997) ("Specifically, the First Amendment's shield does not extend to speech and conduct closely connected with insubordination 'that impedes an employee's performance of his duties or that interferes with the proper functioning of the workplace.' " (quoting Domiano v. Vill. of River Grove, 904 F.2d 1142, 1145 (7th Cir. 1990)); Benson v. Daniels, 89 F. Supp. 2d 212, 216 (D. Conn. 2000) (same); Knight v. State Dep't. of Health, No. 97-CV-2114, 2000 WL 306447, at *3 (D. Conn. Feb. 22, 2000) (same); Rice-Lamar v. City of Fort Lauderdale, 54 F. Supp. 2d 1137, 1144 (S.D. Fla. 1998) (finding no First Amendment protection for an employee who inserted her own personal views on affirmative action into a city's formal report).

80. *See* Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000) (holding that professors restricted from downloading sexually explicit material onto state-owned computers were acting in their roles as employees).

81. *See supra* note 35 and accompanying text.

82. *See* Youker v. Schoenenberger, 22 F.3d 163, 166 (7th Cir. 1994) ("Simply stated, the speech in the present case is not protected because it was not speech as a citizen [because the employee used an official medium to convey his message].").

### B. *The Sub-Category: Matters Inherently of Public Concern*

Section I.A. detailed the Supreme Court's emphasis on protecting citizen speech, not employee speech. The Court, however, has stopped short of declaring the role of citizen an absolute prerequisite for provisional protection, because a narrow category of speech deserves provisional protection even when expressed as an employee. Content is "inherently of public concern" if an employee alleges a constitutional violation.

Both precedent and policy indicate that constitutional complaints deserve provisional protection when expressed by an employee speaking as an employee. The Supreme Court has given only two examples of speech inherently of public concern, and both those examples are constitutional complaints.[83] While the Court has never explicitly determined the scope of matters inherently of public concern, the Court's implicit distinction between allegations of violations of the Constitution and other speech is sensible from a policy standpoint.

In *Connick*, the Court held that while most of Ms. Myers' speech as an employee was not of public concern, the content of one question pushed that speech into an area of intrinsic public concern.[84] That question asked employees whether they felt "pressured to work in political campaigns on behalf of office supported candidates."[85] The Court held that, even though Myers was speaking as an employee out of her private interest in combating her supervisors' decision to transfer her, the fact that one of her questions dealt with the fundamental constitutional right not to be coerced into campaigning for a political candidate sufficed to shift the burden to the government to show the speech would disrupt the workplace.[86] Similarly, the Court noted that protesting racial discrimination would also touch upon a matter of public concern, even if exercised at work during working hours.[87] With

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83. *See infra* notes 84-88 and accompanying text.

84. *See* Connick v. Myers, 461 U.S. 138, 149 (1983).

85. *See id.*

86. *See id.*

87. *See id.* at 146, 148 n.8 ("Mrs. Givhan's right to protest racial discrimination [was] a matter inherently of public concern...") (discussing Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414 (1979)); Chateaubriand v. Gaspard, 97 F.3d 1218, 1222-23 (9th Cir. 1996) (recognizing expression "inherently of public concern"); O'Connor v. Steeves, 994 F.2d 905, 913 (1st Cir. 1993) (same). While the *Connick* Court declared Mrs. Givhan to have spoken "as a citizen," the use of the word "inherently" carries the implication that her protest would have enjoyed threshold protection even if she had spoken in her role as employee. *See Connick*, 461 U.S. at 148 n.8. *But see* Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988) (noting that several courts have refused to recognize even racial discrimination as a matter inherently of public concern when the alleged discrimination was against the complainer herself). This Note deals only with *public* school teachers, and therefore racial discrimination is a constitutional violation, not merely a Title VII or IX violation, as it would be for private employees.

these two examples, the *Connick* Court indicated that speech addressing fundamental constitutional rights deserves provisional protection regardless of whether it is expressed on the job or not.[88] If Ms. Boring's expression via the curriculum had alleged a constitutional violation, she would also have deserved provisional First Amendment protection.

A narrow exception for constitutional complaints is necessitated by the government's unique role as both employer and sovereign. While "government officials should enjoy wide latitude in managing their offices without intrusive oversight by the judiciary in the name of the First Amendment,"[89] the government should not be free to act in a way that helps cover up its own violation of its most sacred duty — to abide by and protect the Constitution.[90] The government should not in one role violate the Constitution and in another role frustrate attempts to redress the violation. Consequently, if a government employee, believing that her constitutional rights are being violated, expresses herself in an effort to redress that violation and is fired for that expression, the government's duty to ensure that her fundamental rights are not violated demands that such a decision at least be scrutinized.[91] In such cases, the government should be required to show that the speech is likely to be disruptive before the speaker can be sanctioned.[92] An allegation of constitutional violations is so serious that it cannot be expressed as a mere employee. The government's desire as employer to silence a worker making allegations against it does not justify ignoring its duty as sovereign to preserve fundamental rights, even if the allegation was made by an employee on the job.[93] The im-

88. *See* Moray v. City of Yonkers, 924 F. Supp. 8, 11 (S.D.N.Y. 1996) ("[W]hen the employee's complaints to a supervisor implicate system-wide discrimination, they unquestionably involve a matter of public concern."); Marshall v. Allen, 984 F.2d 787 (7th Cir.1993) (permitting § 1983 claim when employee was discharged for supporting employees who had filed gender discrimination suit).

89. *Connick*, 461 U.S. at 146.

90. The Constitution is our most basic, fundamental, and sacred law. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 733 (1999); Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 275-76 (1997).

91. *See Connick*, 461 U.S. at 149.

92. The First Amendment's heightened protection for constitutional complaints reflects a special wariness that such important speech could be squelched. Even constitutional complaints, however, are not guaranteed more than provisional protection. An employee can make these allegations in a number of ways, some of which would be non-disruptive, while others would disrupt the learning atmosphere. Only those whose value outweighs the likely disruption should ultimately receive protection. *See Connick*, 461 U.S. at 149-54. Notice also that constitutional complaints will not necessarily shield a public employee from discipline if there are independent grounds for discipline. *See* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (finding that an employer is entitled to show "that it would have reached the same decision as to [the employee's] reemployment even in the absence of the protected conduct").

93. *See, e.g.*, Kinsey v. Salado Indep. Sch. Dist., 950 F.2d 988, 1000 (5th Cir. 1992) (" '[A]s the employee['s] speech moves closer to core 'public concerns,' the law requires a

portance of fundamental rights should excuse an employee from being obliged to choose the most appropriate forum in which to express her discontent.[94] An allegation that our basic law is being violated is, by its very nature, of concern to the general public.[95] Reaffirming the central importance of constitutional rights, the *Connick* Court declared that citizens should never have to choose between retaining their fundamental rights and working for the government.[96]

One may reasonably question why the subcategory of matters "inherently of public concern" is limited to constitutional violations and does not include statutory violations. Four reasons apply.

First, allegations of statutory violations are ordinary employment disputes, and therefore not subject to judicial review under the First Amendment.[97] Violations of the basic law, on the other hand, are of special interest to the public. Some courts might want to follow the Sixth Circuit and expand the subcategory of speech inherently of public concern. The subcategory might be expanded, for example, to include allegations of unfair labor practices or violations of health and safety regulations. Complaints about these statutory violations, however, would amount to nothing more than employee grievances, which are not subject to judicial review.[98] Likewise, some courts might want to expand the subcategory to include whistleblower statutes. Whistleblower protection is protection *above and beyond* the First Amendment. It is not included in the First Amendment.[99]

Second, in *Connick* and *Pickering*, the Court sought to balance the practical realities involved in administering a government office with freedom of speech.[100] Those precedents suggest that constitutional

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*stronger* showing of disruption by the government.' " (quoting plurality opinion) (internal quotations omitted)).

94. *See Connick*, 461 U.S. at 149 (granting provisional protection even though Ms. Myers could have distributed her questionnaires outside of work).

95. *See, e.g.*, O'Donnell v. Yanchulis, 875 F.2d 1059, 1061 (3d Cir. 1989).

96. *See Connick*, 461 U.S. at 147 ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government . . . .").

97. *See id.* at 146-48.

98. *See id.* at 146-47 ("[O]rdinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable."); *see also id.* at 154 ("[I]t would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance that we see presented here.").

99. *See* Waters v. Churchill, 511 U.S. 661, 674 (1994) ("[T]he government may certainly choose to give additional protections to its employees beyond what is mandated by the First Amendment, out of respect for the values underlying the First Amendment, values central to our social order as well as our legal system. *See, e.g.*, Whistleblower Protection Act of 1989 . . . .").

100. *See Connick, 461 U.S.* at 154.

complaints, more than any other type of complaint, force the government to acknowledge its role as sovereign. More than with ordinary complaints, the government cannot react to violations of the basic law merely as an employer.[101] The balance sought in *Connick* and *Pickering* is upset by ignoring the difference between constitutional violations and other violations.

Third, the Supreme Court has given only two examples of matters inherently of public concern, and both of those examples are constitutional violations.[102] If a court were to draw a different line from the one the Supreme Court has drawn, it isn't clear where the line could be drawn. Matters inherently of public concern cannot include, for example, all health and safety statutes. Suppose there were a statute addressing the number of restrooms in a school building, and a teacher were to complain about an alleged shortage of restrooms. His complaint would constitute an allegation of a health and safety statute violation, but surely a teacher could not complain that his fundamental First Amendment rights were violated when he insisted on using class time to address restroom issues. Federal court is not the appropriate forum for such complaints. The exception for matters inherently of public concern is — and should be — limited to cases in which the employee is rightly excused from having chosen an inappropriate medium for communicating her complaint.[103]

Finally, even if courts *could* draw other principled lines, that would not detract from the reasonableness of the line the Supreme Court has already drawn. Courts might, like the Fourth and Fifth Circuits, grant less protection to teachers; or courts might, like the Sixth Circuit, grant more protection to teachers. Since Constitutional rights have special importance in American law, it makes sense that the sphere of Constitutional rights be the sphere in which heightened protection kicks in.

Applying the general rule of Section I.A — that on-the-job public employee speech generally fails to attain public concern status — and the exception limited to constitutional complaints outlined in Section I.B., curricular speech should garner no First Amendment protection, except in the unusual circumstance in which a public school teacher uses the curriculum to protest a constitutional violation by the employer.[104]

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101. *See* notes 53-55, 89-96, 136-140 and accompanying text.

102. *See infra* notes 84-88.

103. *See supra* note 94 and accompanying text.

104. For example, imagine that a teacher assigns students the task of writing a letter to their parents. The letter informs parents that the school forces teachers to lead students in mandatory prayers every morning. The letter further informs parents that this practice is a violation of the United States Constitution. Finally, the letter suggests that the prayers will stop if parents complain to the school board and the U.S. Department of Justice, and gives the contact information for those authorities.

## II. THE SIXTH CIRCUIT'S CONTENT-FOCUSED APPROACH TO CURRICULAR SPEECH SHOULD BE REJECTED

This Part argues that the Sixth Circuit's content-focused approach to curricular speech fails to recognize that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[105] The Sixth Circuit's approach follows *Connick*'s dissent rather than its majority opinion, ignores *Connick*'s emphasis on the history of public-employee speech, and clashes with common sense.

In *Cockrel*, the Sixth Circuit adopted an expansive concept of public concern that encompassed a teacher's lesson on the legalization of industrial hemp. Focusing on the content of controversial speech, the Sixth Circuit's approach places little or no weight on the role of the speaker. Seizing upon the finding in *Connick* that one question was a matter of public concern even when the speaker expressed herself in the role of an employee,[106] the *Cockrel* court concluded that "so long as the speech relates to matters of 'political, social, or other concern to the community,' as opposed to matters 'only of personal interest,' it shall be considered as touching upon matters of public concern."[107] While the *Cockrel* court properly chastises the *Boring* and *Kirkland* courts for overlooking *Connick*'s exception to the general rule protecting only citizen speech,[108] the *Cockrel* court in turn overlooks the importance of the role of the speaker in *Connick*'s analysis.[109]

*Connick* held that while the content of the employee's speech helps determine whether that speech is a matter of public concern, the

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105. Pickering v. Bd. of Educ., 391 U.S. 563, 578 (1968); *see also Connick*, 461 U.S. at 140 (1983).

106. *See* Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1052 (6th Cir. 2001) ("[T]he Court held that, even though Myers was speaking as an employee out of her private interest in combating her supervisors' decision to transfer her, the fact that one of her questions dealt with the fundamental constitutional right not to be coerced into campaigning for a political candidate was enough to make this particular issue touch on a matter of public concern.").

107. *Id.* at 1052. The Sixth Circuit derives this content-centered test from the following sentence in *Connick*: "When employee expression cannot *be fairly considered as relating to any matter of political, social, or other concern to the community*, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 146-47 (emphasis added). In *Cockrel*, the Sixth Circuit holds the inverse: whenever employee speech can "fairly be considered as relating to any matter of political, social, or other concern to the community," the judiciary should intrusively oversee the management of government offices. The *Cockrel* court unjustifiably expands *Connick's* holding to include its inverse.

108. *Cockerel*, 270 F.3d at 1052 ("If the Fourth and Fifth Circuits' interpretation of *Connick* were correct, then any time a public employee was speaking as an employee, like Myers was when she asked her question about employees being pressured to campaign, the speech at issue would not be protected.").

109. *See supra* Part I.A.

determination is not made by content alone, but rather "by the content, form and context of a given statement, as revealed by the whole record."[110] The *Connick* majority clearly did not hold that speech touches upon a matter of public concern merely because its content relates to any matter of political, social, or other concern to the community. The *Cockrel* court's standard follows not from Connick's majority but rather from *Connick*'s dissent.[111] If the *Connick* majority's understanding of content-based public concern were as broad as the *Cockrel* court's, it would encompass Myers' questionnaire taken as a whole, since the questionnaire was speech about "the manner in which government is operated or should be operated."[112] That Myers' questionnaire taken as a whole touches upon a matter of public concern is exactly what the *Connick* dissent argued, and exactly what the *Connick* majority rejected. In sum, *Cockrel* mistakenly replaces the context-based standard for public concern with the content-based standard appropriate only to the narrow subcategory of speech that is inherently of public concern.[113] The content-based standard thereby destroys the distinction between speech on matters of public concern — which the courts must analyze contextually — and the narrow subcategory of speech on matters inherently of public concern — which is provisionally protected by the First Amendment. *Cockrel*'s expansive understanding of content-based public concern is, therefore, overly inflated and should be rejected.

Further, the Sixth Circuit has set up a misleading dichotomy between matters "of political, social, or other concern to the community" and matters "only of personal interest."[114] To achieve that dichotomy, the *Cockrel* court quoted selectively from the *Connick* text. The Sixth Circuit's emphasis on "matters of political, social, or other concern to the community" derived from the following sentence in *Connick*: "When employee expression *cannot be fairly* considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their of-

110. *Connick*, 461 U.S. at 147-48.

111. *See id.* at 160 (Brennan, J., dissenting) ("In my view, however, whether a particular statement by a public employee is addressed to a subject of public concern does not depend on where it was said or why."). This Note argues that with regard to *some* content — constitutional complaints — it does not matter where or why it was said. *See supra* Part I.B.

112. *Id.* at 156 (Brennan, J., dissenting); *see also id.* at 158 ("[T]aken as a whole, the issues presented in the questionnaire relate to the effective functioning of the District Attorney's Office and are matters of public importance and concern." (quoting Myers v. Connick, 507 F. Supp. 752, 758 (E.D. La. 1981))).

113. *See supra* Part I.B.

114. Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1052 (6th Cir. 2001) ("[S]o long as the speech relates to matters of 'political, social, or other concern to the community,' as opposed to matters 'only of personal interest,' it shall be considered as touching upon matters of public concern.").

fices, without intrusive oversight by the judiciary in the name of the First Amendment."[115] In *Cockrel*, the Sixth Circuit held the inverse: whenever employee speech *can fairly be* considered as relating to any matter of political, social, or other concern to the community, the judiciary should intrusively oversee the management of government offices.[116] According to the Sixth Circuit's reading of *Connick*, Assistant Prosecutor Myers would have found protection if she had walked into court and read aloud her ten favorite op-ed pieces from the New York Times, so long as she spoke on a matter of political, social, or other concern to the community, and so long as the expression was not an extension of an employment dispute.[117] The *Cockrel* court unjustifiably expands *Connick's* holding to include its inverse.

In addition to conflicting with the *Connick* majority's holding, *Cockrel* ignores the development of the law concerning public-employee speech. The progression of the law makes clear that the crucial distinction is whether the employee is speaking as an employee or as a citizen. *Pickering*[118] and its progeny[119] emphasize the right of a public employee "as a citizen, in commenting upon matters of public concern."[120] *Pickering* is part of the First Amendment's evolution into an instrument protecting employees from government attempts to condition employment on off-the-job association or speech.[121] The opinion in *Connick* devotes several pages to this evolution to show that while the First Amendment has evolved — from offering public employees no protection to firmly protecting public employees speaking as citizens — its protection stops short of protecting public employees as employees.[122] *Cockrel* unjustifiably extends First Amendment protection beyond the holdings of *Pickering* and *Connick*.

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115. *Connick*, 461 U.S. at 146-47 (emphasis added).

116. *See Cockrel*, 270 F.3d at 1052.

117. Applying the Sixth Circuit's reasoning to *Rankin*, Deputy Rankin would have found provisional protection even if she had used a police cruiser's bullhorn to announce her disapproval of President Reagan, because the subject matter was political and not an extension of an employment dispute.

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

119. *See* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414 (1979); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284 (1977); Perry v. Sindermann, 408 U.S. 593, 598 (1972).

120. *Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 143 ("The repeated emphasis in *Pickering* on the right of a public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental. This language, reiterated in all of *Pickering's* progeny, reflects both the historical evolvement of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter." (footnote omitted)).

121. *Connick*, 461 U.S. at 144-46.

122. *Id.*

Finally, *Cockrel*'s holding also clashes with common sense. As noted above,[123] government offices could not operate with reasonable efficiency if every employee-employer dispute touching a subject of political, social, or other concern to the community contained the seeds of constitutional litigation.[124] School authorities have a vital interest as employers in curricular uniformity and in the correspondence of the curriculum to the pedagogical views of democratically elected school boards.[125]

It could be argued that the Sixth Circuit's holding makes sense because the teacher's actions are distinguishable from the assistant prosecutor's actions in *Connick*. Many of the assistant prosecutor's questions were considered mere extensions of an ongoing dispute she was having with her superiors,[126] while there is no evidence that the teacher in *Cockrel* was involved in an ongoing employment dispute. But the two cases are also distinguishable in a way that places the teacher in a less favorable light than the assistant prosecutor. *Connick* mandates that the issue of public concern be decided based on the content, form, and context of the expression, given the whole record, and curricular speech always takes the form of expression via the employer's medium. School boards specifically hire teachers to speak to captive[127] and impressionable[128] audiences, and they trust the teachers

123. *See supra* notes 58-60.

124. *See* Rankin v. McPherson, 483 U.S. 378, 384 (1987) (plurality opinion) ("[P]ublic employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions."); *Connick*, 461 U.S. at 149 ("To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark — and certainly every criticism directed at a public official — would plant the seed of a constitutional case."); *Boring III*, *supra* note 1, 136 F.3d 364, 373 (4th Cir. 1998) (en banc) (Luttig, J., concurring) ("[T]he requirement that school systems across the country make their curriculum decisions in anticipation of litigation, and then engage in the time-consuming processes of discovery, pretrial litigation, and trial in federal court to defend as 'legitimately pedagogical' their individual curriculum decisions, would itself represent a crushing burden, not to mention a surrender to unelected federal judges of the 'final authority over curriculum decisions' that is properly that of school boards and parents.").

125. *Boring III*, *supra* note 1, 136 F.3d at 373 (Luttig, J., concurring) ("[W]ere every public school teacher in America to have the constitutional right to design (even in part) the content of his or her individual classes, as the dissent would have it — the Nation's school boards would be without even the most basic authority to implement a uniform curriculum and schools would become mere instruments for the advancement of the individual and collective social agendas of their teachers."); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 795 (5th Cir. 1989) ("Public schools have a legitimate pedagogical interest in shaping their own secondary school curricula and in demanding that their teachers adhere to official reading lists unless separate materials are approved. The first amendment has never required school districts to abdicate control over public school curricula to the unfettered discretion of individual teachers.").

126. *Connick*, 461 U.S. at 148.

127. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (granting the government increased power to prohibit speech when the audience is a captive group of minors).

to teach a curriculum that the board will find acceptable.[129] As an assistant prosecutor attorney, Myers was also paid to speak, and the District Attorney trusted her to carry out the mission of the office as he defined it. Unlike Ms. Cockrel the schoolteacher, Assistant Prosecutor Myers never made use of her official capacity to communicate her personal beliefs on a controversial issue.[130]

Three Circuit Courts of Appeals have considered whether curricular speech deserves the provisional First Amendment protection afforded matters of public concern,[131] and each of them has misapplied the holding in *Connick*. The Fourth and Fifth Circuits treat the role of the speaker as determinative in all cases, thereby ignoring the subcategory of speech which is inherently of public concern. The Sixth Circuit recognizes that speech can be inherently of public concern, but expands that sub-category to the extent that the speaker's role — the determinative issue — becomes irrelevant. The best reading of *Connick* — a reading which fits with the First Amendment's goal to foster a marketplace of ideas among citizens,[132] which comports with the history of the Supreme Court's First Amendment jurisprudence, and which is desirable from a policy standpoint — reveals a broad standard for citizen speech and a narrow standard for employee speech. The best reading of *Connick* protects the public employee who is addressing matters of public concern in her role as a citizen but, if the employee is speaking in her role as an employee, protects only that speech which rises to the level of constitutional complaint.

## III. A NARROW SUB-CATEGORY IS SENSIBLE FROM A POLICY STANDPOINT

This Note argues that curricular speech will rarely receive First Amendment protection. Excluding most employee-as-employee speech from protection is sensible from a policy standpoint. While this Note's interpretation of the First Amendment may restrict the expressive freedom of teachers, it also allows communities to retain control

128. Courts might adopt a sliding scale of protection based on the age of the children in the teacher's audience. *See Boring II*, 98 F.3d at 1489 (Widener, J., dissenting) (raising the possibility of a sliding scale which would give teachers more discretion as students grow older) ("[T]he younger the student, the more especially my complaint should apply."), *overruled by Boring III*, *supra* note 1, 136 F.3d 364.

129. *See, e.g.*, Demitchell, *supra* note 36, at 475 ("Essentially, teachers are hired to speak for the school board thus furthering the school board's message, which is the curriculum.").

130. Likewise, neither schoolteacher Pickering, nor schoolteacher Givhan, nor Deputy Rankin used his or her government position to make the controversial speech.

131. Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036 (6th Cir. 2001); *Boring III*, *supra* note 1, 136 F.3d 364 (4th Cir. 1998); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794 (5th Cir. 1989).

132. *See supra* note 60 and accompanying text.

over the ideas being taught to their children,[133] to develop core curricula which ensure basic minimums and encourage shared learning, and to experiment with scripted teaching[134] — particularly when qualified teachers cannot be found.

Broader First Amendment protection for teachers would fail to give school authorities any real control over the curriculum. Under an expanded subcategory of matters inherently of public concern, a teacher would find First Amendment protection if she used her Algebra class to regularly give speeches in favor of a political candidate.[135] Restricting the subcategory to constitutional complaints allows government employers to act as employers. Unless employee speech has the gravity of a constitutional complaint, governmental effectiveness demands that the government act as employer rather than speech-protecting sovereign. Protection for large swathes of content, regardless of the speaker's role, would threaten to destroy context as a factor in the provisional-protection analysis.[136]

This Note's reading of the cases offers little First Amendment protection to curricular speech, but leaves teachers an array of extra-Constitutional protections. Except when alleging constitutional wrongs,[137] curricular speech does not amount to a matter of public concern, and teachers must seek relief elsewhere than the First Amendment. No small relief is to be found in collective bargaining, contractual rights,[138] due process hearings and lawsuits,[139] legislation,[140]

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133. Teachers speak to captive audiences. When people cannot easily avoid exposure to an expression, the Court weighs that factor in favor of allowing restrictions on that expression. *See* Hill v. Colorado, 530 U.S. 703, 715-17 (2000) (upholding a "buffer zone" on picketing and leafleting outside abortion clinics); Frisby v. Schultz, 487 U.S. 474, 486-87 (1988) (upholding a restriction on picketing in front of a residence); Lehman v. City of Shaker Heights, 418 U.S. 298, 303-04 (1974) (upholding restrictions of print advertising on city-owned buses).

134. *See, e.g.*, the curricula of scripted teaching developed by the Success for All Foundation. Their website claims scripted teaching has led to increased student learning. Success for All Foundation, Frequently Asked Questions, *at* http://www.successforall.net/resource/faqgeneral.htm#results (last visited April 2, 2004).

135. *See supra* Part I.B.

136. De-emphasizing or eliminating context from the public-concern analysis is exactly what the *Connick* dissent proposed. *See* Connick v. Myers, 461 U.S. 138, 157-58 (1983) (Brennan, J., dissenting) ("[T]he Court distorts the balancing analysis required under *Pickering* by suggesting that one factor, the context in which a statement is made, is to be weighed *twice* — first in determining whether an employee's speech addresses a matter of public concern and then in deciding whether the statement adversely affected the government's interest as an employer.").

137. *See supra* Part I.B.

138. K-12 teachers, like university professors, can change their contracts through collective bargaining. *See, e.g.*, William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213, 276-77 (1997) ("[L]argely as a result of the work of the AAUP [American Association of University Professors] over the years, a university is likely to identify itself as a university where professors have academic freedom because the university knows that it will not be respected as a good univer-

electing school board candidates who support increased teacher autonomy, and market forces — teachers may simply leave oppressive work environments.

It is true that restrictions on academic freedom could permit school districts to treat teachers like automata, forced to mindlessly conform to minutely orchestrated curricula. From Socrates to Galileo, history contains many examples of innovative teachers who upset the authorities and were accused of corrupting young minds. Such dangers are real, but that does not mean a remedy is to be found in the First Amendment. Academic freedom may be appropriate in most schools, but that alone does not enshrine unlimited academic freedom into the fundamental law of the nation.[141] The First Amendment is not meant to redress all wrongs and rightly leaves questions of prudence to the administrators on the ground.[142] Nor is the First Amendment meant to set detailed policy or best practices for every school board; it merely defines minimum standards to which the government must adhere.[143]

A democratically elected government allows citizens to re-evaluate and change the course of policy. Reading allegedly prudent courses of action into the Constitution would remove decisions from the democ-

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sity unless it does so. As a consequence, a university is likely to have written policies and established practices that clearly acknowledge a professor's freedom in the classroom.").

139. *See* Perry v. Sindermann, 408 U.S. 593, 603 (1972) (holding that any teacher with a reasonable expectation of continued employment cannot be dismissed without cause, and that proof of reasonable expectation of continued employment "obligate[s] [school] officials to grant a hearing at [the teacher's] request, where he could be informed of the grounds for his nonretention and challenge their sufficiency").

140. *See supra* note 99.

141. *See, e.g.*, *Connick*, 461 U.S. at 149 ("While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require [such receptivity] . . . ."); Bishop v. Wood, 426 U.S. 341, 349 (1976) ("[W]hether or not [a city manager's] decision to discharge the petitioner was correct or prudent neither enhances nor diminishes petitioner's claim that his constitutionally protected interest in liberty has been impaired."); *see also* Rankin v. McPherson, 483 U.S. 378, 399 (1987).

142. *Bishop*, 426 U.S. at 349-50 ("The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error.").

143. *See, e.g.*, *Connick*, 461 U.S. at 149 ("While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require [such receptivity] . . . ."); *Rankin*, 483 U.S. at 399 (Scalia, J., dissenting) ("We are not deliberating, in other words, (or at least should not be) about whether the sanction of dismissal was, as the concurrence puts it, 'an . . . intemperat[e] employment decision.' It may well have been — and personally I think it was. But we are not sitting as a panel to develop sound principles of proportionality for adverse actions in the state civil service. We are asked to determine whether, given the interests of this law enforcement office, McPherson had a *right* to say what she did — so that she could not only not be fired for it, but could not be formally reprimanded for it, or even prevented from repeating it endlessly into the future. It boggles the mind to think that she has such a right.").

ratic sphere and place judges in charge of detailed school policy.[144] Teachers are paid to adhere to a curriculum; their speech is government-subsidized speech, and the Constitution leaves school boards free to regulate that speech.[145]

Ideally, wise school boards would always make wise choices regarding curricular requirements or lack thereof, and wise principals would always give wise advise to teachers, whether that meant supporting proposed lesson plans or cautioning against them. Of course, schools will not always be run by wisdom alone. But at least administrators cannot say to a parent, "We see that your complaint is just, but our hands are tied by the First Amendment. We are sorry, there is nothing we can do."[146] Teachers have special expertise in pedagogy, but curricular decisions often involve value judgments regarding the proper use of resources or the aims of education. Those judgments are political judgments, and teachers have no special expertise in political judgment.[147] Curricular decisions should ultimately lie in the hands of the community's elected representatives on the school board, rather than in the hands of each individual teacher. Democratic decision-making does not always result in the wisest course of action, but at least that course is selected by those whom it affects, and not by unaccountable experts in pedagogy.[148]

## CONCLUSION

Ms. Boring's play was too liberal for her rural North Carolina community, but it is not hard to imagine a conservative teacher in a liberal community inappropriately using his classroom to advance a pro-life agenda. In most cases, courts should automatically treat public school teachers' curricular speech as outside the realm of "matters of public concern." The First Amendment protects public-employee speech when those employees speak as citizens, not as employees. A teacher expressing herself through her curriculum does so unambigu-

144. *See, e.g.*, United States. v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) ("The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution.").

145. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982) ("Local school boards must be permitted to establish and apply their curriculum in such a way as to transmit community values, and . . . there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.") (internal citations omitted).

146. *See* Buss, *supra* note 138, at 278.

147. *See* Stephen Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1356 (1976).

148. AMY GUTMAN, DEMOCRATIC EDUCATION 11 (1987). Of course, a school board's freedom to restrict speech is subject to the exception outlined in Part I.B of this Note.

ously as an employee. Curricular decisions require political judgment and should be made by democratically elected officials.

There is one exception to this general rule regarding curricular speech. Since the First Amendment has a special concern for ensuring that fundamental constitutional rights are not violated, constitutional complaints merit heightened scrutiny. Allegations of constitutional violations deserve provisional protection, thereby forcing the government to show that the speech was likely to have disrupted the working environment. Only the rare case in which a teacher uses the curriculum to allege a constitutional violation by the employer would clear the public-concern hurdle.