

## COMMENTS

### WHY CAN'T WE BE FRIENDS? THE BANNING OF TEACHER-STUDENT COMMUNICATION VIA SOCIAL MEDIA AND THE FREEDOM OF SPEECH

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*Undoubtedly, the sexual abuse of children by authority figures, particularly teachers and coaches, has been an issue of national concern for years. Recently, there have been several high-profile child sexual abuse scandals in the news, such as the ordeal involving Jerry Sandusky, a former Pennsylvania State University football coach, who was convicted of forty-five child sexual abuse counts for sexually abusing ten male children over the course of fifteen years. In an effort to prevent these tragic occurrences, state and school district officials have targeted social media as the culprit.*

*As states and school districts across the nation revisit or implement social-media policies, some take the extreme action of completely banning teachers from using social media to communicate with students. In addition to disadvantaging students in an*

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*electronic era, these bans are unconstitutional, running afoul of the First Amendment, because they are overbroad and do not pass intermediate scrutiny.*

*Although states and school districts have substantial leeway in disciplining their employees for online expressions, they cannot implement laws or policies that infringe upon employees' expression that is constitutionally protected by the First Amendment. States and school districts are continuously battling with the issue of how to regulate social-media use by teachers and need guidance in crafting policies. This Comment analyzes current laws and policies that are likely to be found unconstitutional by courts; this Comment also provides social-media policy guidelines that, in contrast, are likely to survive constitutional challenge.*

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## INTRODUCTION

When Amy Hestir was twelve years old, she was sexually abused by one of her male teachers.<sup>1</sup> This abuse lasted nearly a year.<sup>2</sup> Over thirty years later, in March of 2011, Hestir recounted her traumatic story to the Missouri General Assembly in order to galvanize support for legislation banning teacher-student communication via any exclusive electronic media, such as social-networking websites.<sup>3</sup> The law also contained various other provisions designed to curtail child sexual abuse by teachers.<sup>4</sup>

In her testimony before the Missouri House Education Committee, Hestir depicted how her abuser psychologically controlled her through the use of threats and a pornographic novel that featured a main character named “Amy.”<sup>5</sup> She also described when the abuse would occur: during her teacher’s planning hour, during the time when her teacher would take her home after she babysat for his daughter, and during the summer when she would meet him at church.<sup>6</sup> At the time, Hestir did not divulge the matter to any adults because of the shame and fear she felt, but after nine years of silence, she gathered the courage to report the incident and open an investigation.<sup>7</sup> Unfortunately, the investigation did not produce

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1. Sydney Muray, *A Close Look at Missouri’s “Amy Hestir Student Protection Act,”* ERIC GOLDMAN: TECH. & MARKETING L. BLOG (Aug. 16, 2011, 4:11 PM), [http://blog.ericgoldman.org/archives/2011/08/a\\_close\\_look\\_at.htm](http://blog.ericgoldman.org/archives/2011/08/a_close_look_at.htm).

2. *Id.*

3. *Id.*; see also S.B. 54, 96th Gen. Assemb., Reg. Sess. § 162.069 (Mo. 2011) (repealed 2011). For the purpose of this Comment, exclusive electronic media refers to the ability of teachers to directly and privately contact students via electronic media. I refer to all forms of Internet publications, as well as text messaging and e-mail, as electronic media. I consider social media, also known as social-networking websites, a subset of electronic media, referring specifically to websites that enable people to communicate via the Internet in order to share information and resources. The term “social media” includes audio, video, images, podcasts, and other multimedia communications.

4. Mo. S.B. 54 § 162.069; see also Allison Blood, *Legislature To Take Up Facebook Bill in Special Session*, MISSOURINET (Aug. 26, 2011), <http://www.missourinet.com/2011/08/26/legislature-to-take-up-facebook-bill-in-special-session/> (detailing the mandates of the Amy Hestir Act, such as requiring background checks of teachers, requiring suspension of teachers verified to have engaged in sexual misconduct, and prohibiting registered sex offenders from participation on school boards).

5. *Missouri: Amy Hestir Davis Student Protection Act—Student Abused by a Jr. High School Teacher*, SEXLAWS.ORG, [http://www.sexlaws.org/amy\\_hestir\\_davis\\_student\\_protection\\_act](http://www.sexlaws.org/amy_hestir_davis_student_protection_act) (last visited Oct. 11, 2012) [hereinafter *Missouri: Amy Hestir Davis Student Protection Act*].

6. *Id.*

7. *Id.*

results, and Hestir's abuser continued his career in teaching by transferring to a different school district.<sup>8</sup>

Accounts of abuse such as this one are not anomalies; many students around the nation share similar stories. In fact, Missouri, the state where Hestir was abused, is ranked only eleventh in the nation for the number of educators who have lost their licenses due to sexual misconduct.<sup>9</sup> States have addressed this issue in various ways. Even though social-networking sites were not yet conceived of when Amy Hestir was in school and sexual abuse by teachers was documented as early as 430 B.C.,<sup>10</sup> the Missouri General Assembly believed that banning teacher-student communication via electronic media would prevent sexual abuse.<sup>11</sup>

The Missouri General Assembly passed the bill, with Governor Jay Nixon signing it into law on July 14, 2011.<sup>12</sup> The new law, named the "Amy Hestir Student Protection Act," was scheduled to go into effect on August 28, 2011.<sup>13</sup> The Missouri State Teachers Association, however, opposed the law and quickly sprung into action, filing a

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8. *Id.*; accord Muray, *supra* note 1 (terming the act of transferring teachers who engage in sexual misconduct from district to district "passing the trash"); see also Conor Friedersdorf, *Let Teachers and Students Be Facebook Friends*, ATLANTIC (Aug. 9, 2011, 10:40 AM), <http://www.theatlantic.com/national/archive/2011/08/let-teachers-and-students-be-facebook-friends/243324> (revealing that while Amy Hestir reported the crime within the statute of limitations, police declined to file charges).

9. See *Missouri: Amy Hestir Davis Student Protection Act*, *supra* note 5 (citing a congressional investigation that uncovered that approximately one in ten U.S. students has been sexually abused during the student's primary education by a school employee).

10. See THORKIL VANGGAARD, PHALLOS: A SYMBOL AND ITS HISTORY IN THE MALE WORLD 87 (1972) ("Paiderasty served the highest goal—education (*paideia*). Eros was the medium of *paideia*, uniting tutor and pupil. The boy submitted and let himself be taken in the possession of the man."); see also Hein van Dolen, *Greek Homosexuality*, LIVIUS, <http://www.livius.org/ho-hz/homosexuality/homosexuality.html> (last visited Oct. 11, 2012) (recounting a story describing Socrates as "boy crazy" and how Socrates would lose his senses around the beautiful boys to whom he taught philosophy).

11. Editorial, *States Miss a Social-Media Education Opportunity*, WASH. POST (Aug. 19, 2011), [http://www.washingtonpost.com/opinions/states-miss-a-social-media-education-opportunity/2011/08/16/gIQATbqIqJ\\_story.html](http://www.washingtonpost.com/opinions/states-miss-a-social-media-education-opportunity/2011/08/16/gIQATbqIqJ_story.html); accord Kashmir Hill, *Why Missouri's Ban on Teacher-Student Facebook Friendships Is Doomed*, FORBES (Aug. 8, 2011, 1:56 PM), <http://www.forbes.com/sites/kashmirhill/2011/08/08/why-missouris-ban-on-teacher-student-facebook-friendships-is-doomed/> (stating that the purpose of the Hestir Act is to curtail improper sexual conduct between teachers and students).

12. Michael Ruff, *SB 54—Creates the Amy Hestir Student Protection Act and Establishes the Task Force on the Prevention of Sexual Abuse of Children*, MO. SENATE, [http://www.senate.mo.gov/11info/BTS\\_Web/Bill.aspx?SessionType=R&BillID=4066479](http://www.senate.mo.gov/11info/BTS_Web/Bill.aspx?SessionType=R&BillID=4066479) (last visited Oct. 11, 2012).

13. *Id.*

complaint against Governor Nixon for injunctive relief.<sup>14</sup> A Missouri trial court granted the injunction on August 26, 2011, finding “that the statute would have a chilling effect on speech.”<sup>15</sup> The court also noted that “[e]ven if a complete ban on certain forms of communication between certain individuals could be construed as content neutral and only a reasonable restriction on ‘time, place and manner,’ the breadth of the prohibition is staggering.”<sup>16</sup> Shortly after the court granted the injunction, the Missouri Senate repealed the ban by passing a narrower version of the law that delegated to school districts the authority to draft their own social-media policy.<sup>17</sup>

Missouri is not the only state where policymakers have taken measures to contend with concerns about the increase in social-media use and communication by and among teachers and students and the potential abuse associated with such use and communication.<sup>18</sup> For example, in 2009, the Louisiana Legislature passed a law categorically banning teacher-student communication via social-networking sites.<sup>19</sup> This law has yet to be challenged on

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14. See Petition for Injunctive Relief and Declaratory Judgment, Mo. State Teachers Ass’n v. State, No. 11AC-CC00553, 2011 WL 4425537, at \*1 (Mo. Cir. Ct. Sept. 23, 2011), available at [http://www.msta.org/news/Petition\\_final.pdf](http://www.msta.org/news/Petition_final.pdf) (outlining the Missouri State Teachers Association’s First Amendment free speech challenge to the ban).

15. Mo. State Teachers Ass’n, 2011 WL 4425537.

16. *Id.*

17. S.B. 1, 96th Gen. Assemb., 1st Extra. Sess. § 162.069 (Mo. 2011).

18. See, e.g., Frank LoMonte, *Louisiana Joins “Technophobia” Craze with Restraints on Teacher-Student Communications*, STUDENT PRESS L. CTR. (Nov. 16, 2009), <http://www.splc.org/wordpress/?p=308> (describing Louisiana’s social-media regulation that attempts to prevent inappropriate relationships between teachers and students); *Ohio District Limits Teachers’ Use of Social Media*, FIRST AMENDMENT CTR. (Sept. 1, 2011), <http://www.firstamendmentcenter.org/ohio-district-limits-teachers-use-of-social-media> (discussing the policy of Dayton Public Schools, one of Ohio’s largest school districts, that prohibits teachers from being friends with students on Facebook and other social-networking sites as well as “responding to students’ attempts at communicating through any personal or professional accounts not approved by the district”); *Should Teachers ‘Friend’ Students on Facebook?*, ALTA. SCH. BDS. ASS’N: VIS-À-VIS LEGAL COMMENT. (Sept. 2010), [https://www.asba.ab.ca/natlegalnews/sept10/files/hr\\_corner.html](https://www.asba.ab.ca/natlegalnews/sept10/files/hr_corner.html) (recognizing that Lee County may be the first school district in Florida to implement regulations banning all teacher-student communication via social-networking sites); Audrey Watters, *Virginia Poised To Ban Teacher-Student Texting, Facebooking*, READWRITEWEB (Jan. 9, 2011), [http://www.readwriteweb.com/archives/virginia\\_poised\\_to\\_ban\\_teacher-student\\_texting\\_fac.php](http://www.readwriteweb.com/archives/virginia_poised_to_ban_teacher-student_texting_fac.php) (outlining the Virginia Public Schools’ “model policy” that prohibits teachers from using any electronic communications to contact students outside those provided by the schools).

19. LA. REV. STAT. ANN. § 17:81(Q)(2)(b) (2009). The legislation passed in Louisiana mirrors the social-media policies of other school districts and states. See, e.g., DAYTON BD. OF EDUC., DAYTON PUBLIC SCHOOLS POLICY MANUAL: ACCEPTABLE USE AND INTERNET SAFETY FOR INFORMATIONAL AND EDUCATIONAL TECHNOLOGY (2012), available at [http://www.nctq.org/docs/Dayton\\_Policy\\_Manual-Aug\\_2012.pdf](http://www.nctq.org/docs/Dayton_Policy_Manual-Aug_2012.pdf).

constitutional grounds. Nevertheless, the question of whether schools can discipline public school teachers for their use of social media has not been free from judicial scrutiny, as lower courts in other states have adjudicated cases concerning the termination of public school teachers for inappropriately communicating with students via social-networking sites.<sup>20</sup> The analysis concerning state or school district categorical bans, however, does not center solely on a case-by-case determination of whether a particular teacher's speech is inappropriate and consequently unprotected by the First Amendment. Rather, the analysis focuses on whether such categorical bans, taken as a whole, are facially permissible under First Amendment doctrines.<sup>21</sup>

This Comment argues that state and school district regulations banning all teacher-student communication via social-networking websites, such as Missouri's and Louisiana's laws, are unconstitutional because they are overbroad and do not survive intermediate scrutiny. The bans are also impractical; they only target communication via electronic media, while ignoring all other modes of communication that can also lead to inappropriate conduct, like hand-written notes and in-person communication. In the process, the bans also restrict beneficial uses of electronic media that enhance education in our modern world. This Comment continues by highlighting guidelines that do not run afoul of the Constitution, but achieve the same goal desired by state and school district administrators, that of curtailing inappropriate teacher-student communication.

Part I of this Comment provides an overview of current state legislation and school district policies banning teacher-student communication via social media and sets forth the two available First Amendment challenges and the applicable standards courts should use to determine the constitutionality of such bans. Part I also discusses the Supreme Court's First Amendment jurisprudence regarding teacher speech and how lower courts have applied the Court's framework specifically to analyze out-of-school teacher-

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20. See, e.g., *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at \*1 (E.D. Pa. Dec. 3, 2008) (finding that a drunken-pirate photo and comments made by a public school teacher about other faculty were not a matter of public concern and therefore were not protected speech); *Spanierman v. Hughes*, 576 F. Supp. 2d 292 (D. Conn. 2008) (upholding the school board's decision not to renew a teacher's employment contract following the discovery of inappropriate communication with students through his MySpace page).

21. See *Snyder*, 2008 WL 5093140, at \*16 (holding that the First Amendment did not protect a teacher's online postings not because they were inappropriate, but because they did not touch on a matter of public concern).

student communication via social-networking sites. Part II argues that laws banning all teacher-student communication via electronic media are facially unconstitutional because they are overbroad and not sufficiently precise. Part II further argues that even if such bans survive an overbreadth challenge, they would not pass constitutional muster under the applicable standard of intermediate scrutiny. Finally, Part III proposes alternative guidelines that would regulate teacher-student communication via social-networking sites without violating the First Amendment.

## I. BACKGROUND

### A. *Current Regulations Banning Teacher-Student Communication via Electronic Media*

In an era of highly-publicized child sex abuse scandals,<sup>22</sup> state and school administrations are frantically grappling for solutions to protect students from inappropriate interactions with teachers.<sup>23</sup> In their attempt to eliminate such interactions, lawmakers and policymakers across the country are focusing their attention on the role that social media plays in facilitating communications between teachers and students due to the potential for abuse inherent in these communication media.<sup>24</sup> Several states and public school districts

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22. See, e.g., *Mo. State Teachers Ass'n v. State*, No. 11AC-CC00553, 2011 WL 4425537 (Mo. Cir. Ct. Sept. 23, 2011) (discussing a ban on student-teacher communication via social-media sites that resulted from what became a highly publicized sexual abuse case, Amy Hestir's case); *Inside the Penn State Scandal*, WASH. POST, <http://www.washingtonpost.com/wp-srv/special/sports/case-against-sandusky/?hpid=z3> (last visited Oct. 11, 2012) (summarizing the incidents of sexual abuse that Jerry Sandusky, former Pennsylvania State University football coach, committed against male children spanning from 1994 to 2009); *Sheriff: Shop Teacher Paid Teen Girl for Explicit Cell Pics of Herself*, KATU.COM (Aug. 17, 2012, 5:38 PM), <http://www.katu.com/news/local/166580236.html> (discussing the allegations against a shop teacher for paying a young girl money to send explicit picture and video texts via cell phone); *Texas Teacher of the Year Accused of 'Sexting' with Teenage Student*, FOXNEWS.COM (June 1, 2012), <http://www.foxnews.com/us/2012/06/01/texas-teacher-year-accused-exting-with-teenage-student/> (explaining that John McDaniel used text messages and the Internet to solicit and receive inappropriate photographs of one of his fifteen-year-old students).

23. Sara Pauff & Sonya Sorich, *Muscogee County Schools New Social Media Policy Discourages 'Friending,' Texting Between Teachers, Students*, TELEGRAPH (Jan. 14, 2012), <http://www.macon.com/2012/01/14/1862833/muscogee-county-schools-new-social.html>; *Schools Tackle Rules for Social Media*, WANE.COM (Jan. 15, 2012, 11:54 AM), <http://www.wane.com/dpp/news/education/schools-tackle-rules-for-social-media>.

24. See Mikel J. Sporer, *Social Media Laws Aim To Curb Bullying and Abuse of Children Online*, SILHA BULL., Fall 2011, 27, at 27, available at <http://www.silha.umn.edu/assets/doc/FallB2011printing.pdf> (commenting that states responded to teachers' potential abuse of social-media sites by passing

have recently revamped or implemented regulations and policies restricting or banning teacher-student communication via electronic means, including social-networking sites.<sup>25</sup> Other states plan to revisit their current social-media regulations to prohibit the abuse of social-media sites.<sup>26</sup> Surprisingly, the Missouri ban has been the only social-media ban to date that teachers have challenged on constitutional grounds.<sup>27</sup>

Prior to being repealed, Missouri's law banning teacher-student exclusive electronic communication stated that "[n]o teachers shall establish, maintain, or use a work-related [I]nternet site unless such site is available to school administrators and the child's legal custodian, physical custodian, or legal guardian."<sup>28</sup> Under the law, teachers also could not have a non-work-related website that allows exclusive communication with a student or a former student.<sup>29</sup> The language of the Missouri law could have been interpreted as extending the ban to all teacher-student communication via electronic media, including educational websites and services like Blackboard and Edmodo.<sup>30</sup> Additionally, the law treated exclusive

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legislation aimed at limiting student-teacher communication via social media); *Rules To Limit How Teachers and Students Interact Online*, TCHR. WORLD (Dec. 20, 2011), <http://www.teacher-world.com/teacher-blog/?tag=social-media-policies> (reacting to policies implemented after a minority of teachers misused social-media sites in communicating with their students).

25. See, e.g., LA. REV. STAT. ANN. § 17:81(Q)(2)(b) (2009) (proscribing the use of electronic modes of communication that are not specifically made available by the school); DAYTON Bd. OF EDUC., *supra* note 19 (prohibiting teachers from friending, messaging, or texting students, or from responding to students' messages on social-media sites); see also *Rules To Limit How Teachers and Students Interact Online*, *supra* note 24 (detailing the Statesboro, Georgia Public School policy that prohibits text messages and all other private electronic communications between teachers and students).

26. See Jennifer Preston, *Rules To Stop Pupil and Teacher from Getting Too Social Online*, N.Y. TIMES, Dec. 18, 2011, at A1 (stating that the school boards in California, Florida, Georgia, Illinois, Maryland, Michigan, Missouri, New Jersey, Ohio, Pennsylvania, Texas, and Virginia plan to revise their social-media policies in the fall of 2012).

27. See LoMonte, *supra* note 18 (noting that Louisiana's law has yet to be challenged and asserting that if it were, it would not survive).

28. S.B. 54, 96th Gen. Assemb., Reg. Sess. § 162.069 (Mo. 2011) (repealed 2011).

29. *Id.*

30. See Muray, *supra* note 1 (observing that the way the bill defines "exclusive access"—mutual consent by both teacher and student to have access to information—makes the scope of the bill extremely broad). Blackboard is an educational interactive platform that allows teachers to communicate with students and employs different technological tools to reach out to and engage students. *About Bb*, BLACKBOARD, <http://www.blackboard.com/About-Bb/Overview.aspx> (last visited Oct. 11, 2012). Edmodo is a social-networking website specifically designed for teachers and their students that allows teachers to create an online community for their classrooms. EDMODO, <http://about.edmodo.com> (last visited Oct. 11, 2012).



teacher-student communication in drastically different ways depending on the medium; the law categorically prohibited private communication through the Internet, but only mandated that districts create a policy to address all other avenues of communication.<sup>31</sup>

After the Missouri court temporarily enjoined the law, the Missouri Senate repealed the law by passing a new bill.<sup>32</sup> The new law requires that school districts formulate their own social-media policy “to prevent improper communications between staff members and students.”<sup>33</sup> Certain Missouri Representatives questioned the new bill because it does not detail what a policy should contain and does not assist school districts in drafting a policy that will pass constitutional muster.<sup>34</sup>

Although Missouri repealed its original ban, Missouri’s new law leaves the door open for Missouri school districts to pass overly restrictive bans, just like other states and school districts have passed.<sup>35</sup> For example, Louisiana’s ban requires that school-related electronic communication between teachers and students must take place via a means “provided by or . . . made available by the school system” for this purpose; electronic communication between teachers and students for purposes not related to educational service is prohibited.<sup>36</sup> Following suit, in Ohio, the Dayton Public School District implemented a comparable policy stating, “[D]istrict employees shall not ‘friend’ current students on social networking sites such as Facebook and MySpace . . . . [D]istrict employees will not ‘instant message’ or text message current students, and will not respond to student-initiated attempts at conversation through non-district-approved media, whether personal or professional accounts.”<sup>37</sup>

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There are several educational benefits associated with the use of these educational websites in schools. For example, they make instructors more accessible, enable student-centered teaching approaches, accommodate different learning styles, provide continual access to course material, and add pedagogical benefits. *Educational Benefits of Online Learning*, BLACKBOARD, [http://blackboardsupport.calpoly.edu/content/faculty/handouts/Ben\\_Online.pdf](http://blackboardsupport.calpoly.edu/content/faculty/handouts/Ben_Online.pdf) (last visited Oct. 11, 2012).

31. Mo. S.B. 54 § 162.069.

32. S.B. 1, 96th Gen. Assemb., 1st Extra. Sess. § 162.069 (Mo. 2011) (repealing Mo. S.B. 54 § 162.069).

33. Mo. S.B. 1 § 162.069.

34. See Sporer, *supra* note 24 (providing one representative’s objection that some of the 529 school districts will adopt unconstitutional policies).

35. See *supra* note 18 (listing examples of restrictive social-media regulations).

36. LA. REV. STAT. ANN. § 17:81(Q)(2)(b) (2009).

37. DAYTON BD. OF EDUC., *supra* note 19.

All of these regulations prohibit teachers from communicating with students via electronic media simply because these media allow exclusive interaction.<sup>38</sup> Some, if not all, of the regulations can be interpreted as extending the ban to all electronic media, regardless of its function, both inside and outside of school.<sup>39</sup> By attempting to curtail inappropriate interaction between teachers and students through social-media bans—which discriminatorily stymie exclusive electronic communication while ignoring other methods of exclusive communication—volumes of appropriate and beneficial speech are muffled.<sup>40</sup>

### B. *The Supreme Court's First Amendment Free Speech Jurisprudence*

The First Amendment of the U.S. Constitution protects from government interference the rights to freedom of speech and freedom of expression.<sup>41</sup> Beginning with *Gillow v. New York*,<sup>42</sup> the Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment<sup>43</sup> as applying the First Amendment to state and local governments.<sup>44</sup> Freedom of speech is not an absolute right, however, and the Supreme Court deems certain categories of speech,

38. See Anita Ramasastry, *Can Teachers and Their Students Be Banned from Becoming Facebook Friends?*, VERDICT (Sept. 13, 2011), <http://verdict.justia.com/2011/09/13/can-teachers-and-their-students-be-banned-from-becoming-facebook-friends> (defining exclusive interaction as “a private, one-on-one means of communication”). Senator Cunningham, in support of the Missouri law, stated that “[e]xclusive communication is a pathway into the sexual misconduct.” Oscar Michelen, *Missouri Ban on Student-Teacher Facebook Connection Will Not Survive First Amendment Challenge*, COURTROOM STRATEGY (Aug. 3, 2011, 11:48 PM), <http://www.courtroomstrategy.com/2011/08/missouri-ban-on-student-teacher-facebook-connection-will-not-survive-first-amendment-challenge>.

39. See David A. Lieb, *Mo. Repeals Teacher-Student 'Facebook' Ban*, NBCNEWS.COM (Oct. 21, 2011, 5:54 PM), [http://www.msnbc.msn.com/id/44994464/ns/technology\\_and\\_science-tech\\_and\\_gadgets/t/mo-repeals-teacher-student-facebook-ban](http://www.msnbc.msn.com/id/44994464/ns/technology_and_science-tech_and_gadgets/t/mo-repeals-teacher-student-facebook-ban) (providing an account of one teacher’s concern for how the law could be interpreted to ban the use of editing software for the school’s yearbooks because it has an instant-message type feature); Muray, *supra* note 1 (explaining that the language in Missouri’s Amy Hestir Student Protection Act may be so broad that it has the “unintended consequence” of banning teachers from simply having accounts on social-networking sites also used by students).

40. See *infra* notes 179–218 and accompanying text (applying the *Pickering* and *Connick* analyses to teacher speech to demonstrate examples of speech via social media that are protected by the First Amendment).

41. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

42. 268 U.S. 652 (1925).

43. See U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

44. *Gillow*, 268 U.S. at 666.

such as fighting words,<sup>45</sup> criminal speech,<sup>46</sup> and obscenity,<sup>47</sup> unprotected by the First Amendment.<sup>48</sup>

When challenging the constitutionality of laws allegedly infringing upon First Amendment free speech rights, two general facial challenges are available: overbreadth and failing to satisfy the applicable standard of judicial scrutiny.<sup>49</sup> A challenger who employs the overbreadth doctrine to challenge a law as facially invalid under the First Amendment would argue that the law extends too far by infringing upon constitutionally protected speech.<sup>50</sup> The overbreadth doctrine, however, is seldom applicable or successful.<sup>51</sup> Alternatively, a challenger who attacks a law as facially unconstitutional under the applicable standard of judicial scrutiny would argue that the state's legitimate interest is outweighed by First Amendment values.<sup>52</sup>

### 1. *The First Amendment overbreadth doctrine*

Although a First Amendment challenge is usually raised regarding the application of a law to a particular individual—referred to as an as-applied challenge—a challenger can also directly challenge a law that regulates speech, as a whole, contending that the law is facially

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45. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (creating the fighting words exception to the First Amendment protections of free speech with the test for such words being “what men of common intelligence would understand would be words likely to cause an average addressee to fight”).

46. See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (defining criminal speech as “speech or writing used as an integral part of conduct in violation of a valid criminal statute”).

47. See, e.g., *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 124 (1989) (holding “Dial-a-porn” to be obscene and not protected by the First Amendment).

48. See *Gilow*, 268 U.S. at 666 (articulating that it has been long established that the freedom of speech granted by the First Amendment does not accord an absolute right to speak or an unrestrained authority that protects all uses of language and prohibits the punishment of a person who abuses the freedom).

49. DANIEL A. FARBER, *THE FIRST AMENDMENT* 49–50 (2d ed. 2003); see Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 937 (2011) (describing the possible facial challenges under the First Amendment Free Speech Clause).

50. See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (outlining the appellants' argument that the law was overbroad because it prohibited allegedly protected activities).

51. *Infra* Part I.B.1; see also *The Supreme Court, 2007 Term—Leading Cases*, 122 HARV. L. REV. 276, 385, 390–91 (2008) (reporting that an overbreadth challenge is practically impossible to succeed on for a criminal defendant who cannot win an as-applied challenge, but that in the past thirty years civil litigants have had success employing the overbreadth doctrine).

52. See, e.g., *Police Dep't v. Mosley*, 408 U.S. 92 (1972) (applying the strict standard of judicial scrutiny to invalidate a law regulating speech, specifically the regulation of picketing based on its subject matter, as facially unconstitutional).

unconstitutional because it is overbroad.<sup>53</sup> Overbreadth is a powerful doctrine<sup>54</sup> that a challenger can use to challenge any governmental regulation restricting speech even if the regulation could constitutionally apply to the specific speech of the challenger.<sup>55</sup> A law is unconstitutionally overbroad if it regulates substantially more speech than the First Amendment allows.<sup>56</sup> A challenger can demonstrate that a law is overbroad by showing a significant number of situations where a law could be applied unconstitutionally.<sup>57</sup> The overbreadth doctrine uniquely permits an individual, whose speech is unprotected by the First Amendment and who could constitutionally be punished under a more narrow statute, to argue that the law is unconstitutional because of how it might be applied to third parties not before the court.<sup>58</sup> The fundamental concern of the doctrine is that overbroad laws will significantly chill constitutionally protected speech,<sup>59</sup> usually as a result of imprecise and imprudent legislative drafting.<sup>60</sup>

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53. See Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 40 (2003) (“[T]he law of overbreadth forbids legislatures to draft laws so broadly that they also prohibit, or could prohibit, substantial amounts of constitutionally protected expression.”); see also 16A AM. JUR. 2D *Constitutional Law* § 430 (2009) (explaining the differences between the overbreadth doctrine and a traditional as-applied challenge).

54. See *New York v. Ferber*, 458 U.S. 747, 769 (1982) (noting that although the doctrine is to be carefully applied, its effects are wide reaching, making it a “strong medicine”).

55. See, e.g., *Broadrick*, 413 U.S. at 612 (allowing appellants to challenge the law even though the state could constitutionally regulate the particular conduct of the appellants).

56. See *NAACP v. Button*, 371 U.S. 415, 432–33 (1963) (“The objectionable quality of . . . overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.”).

57. See *United States v. Williams*, 553 U.S. 285, 292 (2008) (emphasizing that under the overbreadth doctrine, a statute is facially invalid only if it bans a substantial amount of protected speech both in an absolute sense and relative to the speech within the scope of the statute that is legitimately regulated).

58. See *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (observing that the Court has repeatedly allowed overbreadth challenges without requiring the plaintiff to demonstrate that his conduct was constitutionally permissible under a valid statute).

59. *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989) (plurality opinion); *Ferber*, 458 U.S. at 772; JEROME A. BARRON & C. THOMAS DIENES, *FIRST AMENDMENT LAW* 46 (4th ed. 2008).

60. See Chen, *supra* note 53, at 31 (“[The doctrine] is designed to ensure that lawmakers regulate speech-related activities with great precision . . . . [T]his precision requirement can serve as a useful tool to test the legitimacy of lawmakers’ motives; the closer the fit between the government’s chosen means and its valid objectives, the more likely it is that lawmakers truly sought to fulfill those objectives.”).

The Supreme Court formulated the current overbreadth doctrine in *Broadrick v. Oklahoma*.<sup>61</sup> In *Broadrick*, the Court upheld the constitutionality of a statute that prohibited state employees from engaging in partisan political activities.<sup>62</sup> The Court explained that for an overbreadth argument to succeed in invalidating a statute primarily regulating conduct, the overbreadth of a statute must be real and substantial, which is judged in relation to the amount of speech and conduct that the statute legitimately restricts.<sup>63</sup> Although the statute in *Broadrick* was theoretically capable of stifling protected speech, such as political buttons and bumper stickers, it was not overbroad because it did not apply with certainty to a substantial amount of constitutionally protected expression.<sup>64</sup> Nevertheless, the Court emphasized the legitimacy of the First Amendment overbreadth doctrine by recognizing that “statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.”<sup>65</sup>

While the *Broadrick* decision was limited to regulations of expressive conduct,<sup>66</sup> the Court also applies the overbreadth doctrine to regulations of pure speech.<sup>67</sup> For example, in *New York v. Ferber*,<sup>68</sup> the Court employed the overbreadth doctrine but ultimately upheld the statute prohibiting the intentional distribution of child pornography.<sup>69</sup> The Court reasoned that the statute was not substantially overbroad because the impermissible applications of the statute arguably amounted only to a minute fraction of the speech

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61. 413 U.S. 601 (1973).

62. *Id.* at 610.

63. *Id.* at 615.

64. *See id.* at 609–10, 615, 618 (upholding the constitutionality of the statute because the appellants were unable to demonstrate that the statute prohibited protected conduct and that the protected conduct would be chilled by the statute).

65. *Id.* at 611–12.

66. Expressive conduct is action by a person that also communicates, or expresses, a point or ideology. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 420 (1989) (holding that burning an American flag is expressive conduct).

67. *See, e.g., New York v. Ferber*, 458 U.S. 747, 771–72 (1982) (examining the constitutionality of a statute prohibiting the intentional distribution of child pornography under the overbreadth doctrine). “Pure speech” is verbal communication or vocal discussion, as opposed to expressive conduct. *See Broadrick*, 413 U.S. at 615 (juxtaposing “pure speech” against expressive conduct).

68. 458 U.S. 747 (1982).

69. *Id.* at 749, 773.

within its scope.<sup>70</sup> Further, because such a law did not infringe upon a substantial amount of protected speech, a court could remedy any resulting overbreadth through a case-by-case analysis of the circumstances to which the law allegedly impermissibly applied.<sup>71</sup>

The degree to which the legislation targets the social problem largely contributes to its permissibility. Again, in *Members of the City Council v. Taxpayers for Vincent*,<sup>72</sup> the Court upheld an ordinance that prohibited the posting of signs on public property.<sup>73</sup> The Court found that the ordinance was not overbroad because it did not hinder any more speech than was necessary to accomplish the state's interest in eliminating visual clutter and promoting safety.<sup>74</sup> After determining that a large percentage of the signs posted in violation of the ordinance caused tangible safety and traffic issues, the Court rejected the overbreadth challenge because "[b]y banning [the] signs, the City did no more than eliminate the exact source of the evil it sought to remedy."<sup>75</sup>

The Court has also invalidated laws under the overbreadth doctrine. In *City of Houston v. Hill*,<sup>76</sup> for example, the Court used the overbreadth doctrine to invalidate a municipal ordinance that made it unlawful to interrupt a police officer in the performance of his duties.<sup>77</sup> The Court asserted that when confronted with a facial overbreadth challenge to a regulation of speech, a court must first determine whether a "substantial amount of constitutionally protected conduct" is within the reach of the regulation.<sup>78</sup> Employing this analysis, the Court found that the ordinance

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70. *Id.* at 773 (finding that it was unlikely that the statute reached protected expression, such as medical textbooks, because it is not often, if ever, necessary to utilize children to produce medical or educational material in the manner that the statute prohibited).

71. *Id.* at 773–74 (quoting *Broadrick*, 413 U.S. at 615–16).

72. 466 U.S. 789 (1984).

73. *Id.* at 791, 810.

74. *Id.* at 810.

75. *Id.* at 802, 808. In contrast, an ordinance that prohibits all hand-billing on public streets is overbroad and thus invalid because the state's interest in curtailing littering could be achieved without abridging protected speech simply by punishing littering. *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939). Compare *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 685 (1992) (upholding a more narrowly drawn regulation designed to prevent solicitation at airports against First Amendment challenges, although restrictions on distribution of publications were invalidated), with *Bd. of Airport Comm'rs. v. Jews for Jesus, Inc.*, 482 U.S. 569, 570–71, 577 (1987) (invalidating a regulation prohibiting First Amendment activities within a terminal area of Los Angeles International Airport).

76. 482 U.S. 451 (1987).

77. *Id.* at 453, 467.

78. *Id.* at 458.

criminalized a substantial amount of protected speech because, although the ordinance prohibited obscene language, it also prohibited all speech that could have been construed as interrupting an officer.<sup>79</sup> Additionally, the ordinance had the effect of making only speech, particularly protected speech, unlawful because the State Penal Code already expressly prohibited the targeted conduct such as assault.<sup>80</sup> Thus, the ordinance was not sufficiently precise to prohibit only disorderly conduct or unprotected, obscene language.<sup>81</sup> Consequently, precedent disfavors those ordinances that infringe, even inadvertently, upon constitutionally granted rights, particularly the freedom of speech.

The Court recently applied the overbreadth doctrine in *Ashcroft v. Free Speech Coalition*<sup>82</sup> and held that two provisions of the federal Child Pornography Protection Act of 1996 (CPPA) were facially unconstitutional.<sup>83</sup> In addition to banning the possession and distribution of pornographic material produced using actual children, CPPA extended the ban to material not produced using actual children.<sup>84</sup> Thus, CPPA was overbroad because the child-protection rationale for the speech restriction did not apply to the material produced without the use of actual children.<sup>85</sup> Further, under CPPA, a person possessing unobjectionable material—material produced not using actual children—that someone else had procured could be prosecuted.<sup>86</sup> The Court found that this provision did “more than prohibit pandering.”<sup>87</sup> Therefore, the provision was overbroad because it prohibited possession of material that could not otherwise be proscribed.<sup>88</sup> Even though the overbreadth doctrine is rarely employed and seldom victorious in comparison to other modes

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79. *Id.* at 460–62.

80. *Id.* at 460–63.

81. *Id.* at 465.

82. 535 U.S. 234 (2002).

83. *Id.* at 258.

84. *Id.* at 249–51.

85. *See id.* at 254 (rejecting the government’s arguments that erotic images using virtual children still promoted the trafficking of works featuring real children).

86. *See id.* at 257–58 (noting that under this understanding, a person could be prosecuted for possessing a movie with a suggestive title that the person knew was mislabeled).

87. *Id.* at 258.

88. *Cf.* United States v. Williams, 553 U.S. 285, 303–04 (2008) (distinguishing the reach of the statute in *Free Speech Coalition* from a statute that banned solicitation of child pornography and holding that the latter statute was not overbroad because it only criminalized unprotected speech—the distribution of real child pornography or pornography believed to contain real children).

of analysis applied in First Amendment challenges, it is still a recognized and viable doctrine.<sup>89</sup>

2. *Facial challenges of content-neutral regulations under the applicable standard of intermediate scrutiny*

In addition to an overbreadth challenge, government regulations of speech can be challenged as facially violative of the First Amendment under the traditional standards of judicial scrutiny.<sup>90</sup> To determine which standard of scrutiny—strict or intermediate—applies to a particular government regulation regarding speech, the Supreme Court distinguishes between content-based and content-neutral regulations.<sup>91</sup> The content distinction originated in *Police Department v. Mosley*,<sup>92</sup> where a Chicago ordinance prohibited only certain types of picketing by specific groups of individuals while exempting others.<sup>93</sup> The Court set forth the broad principle that the First Amendment prohibits the government from regulating

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89. See Chen, *supra* note 53, at 41–43 (detailing the need for the overbreadth doctrine and the values the Supreme Court seeks to preserve through the use of the doctrine).

90. The Supreme Court has recognized and applied three standards of judicial scrutiny: strict, intermediate, and rational basis. Strict scrutiny is the most demanding of the three standards; it requires that the challenged regulation be narrowly tailored to advance a compelling governmental interest. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 289 (3d ed. 2009). The law will only be upheld if the government can prove that it cannot achieve its goal through any less discriminatory alternative. *Id.* at 719. Strict scrutiny is generally applied to laws challenged under the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth and Fourteenth Amendments that create classifications based on race and national origin or that regulate fundamental rights. *Id.* at 289. Intermediate scrutiny requires that the law substantially relate to an important governmental interest. *Id.* The Court applies intermediate scrutiny to laws that create classifications based on gender or discriminate against non-marital children. See, e.g., Craig v. Boren, 429 U.S. 190, 197 (1976) (announcing that statutory gender classifications are to be subjected to an intermediate standard of review). The rational basis test is the least demanding level of scrutiny—a law will be upheld if it is rationally related to a legitimate governmental purpose. CHEMERINSKY, *supra*, at 723. Rational basis review is applied to all laws that are not subject to strict or intermediate scrutiny. *Id.* In the case of regulations placed on First Amendment rights, the Supreme Court has either applied strict or intermediate scrutiny because freedom of expression is viewed as a fundamental right, but the right is not absolute. *Id.* at 1212.

91. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994) (discussing the importance of the distinction in terms of the level of scrutiny used); see also *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring) (clarifying that when a regulation is challenged under the First Amendment doctrine, the court must first determine whether the regulation is content neutral and then apply the appropriate standard of scrutiny).

92. 408 U.S. 92 (1972).

93. See *id.* at 94, 100 (finding that Chicago prohibited picketing involving only labor disputes on school property to prevent school disruption).



expression based on the expression's message, idea, subject matter, or content.<sup>94</sup> A content-based law is generally defined as a law that is either a subject-matter or viewpoint restriction.<sup>95</sup> The Supreme Court has reaffirmed on several occasions that the government cannot regulate speech based on its content.<sup>96</sup> Appropriately, strict scrutiny, the most demanding level of scrutiny, applies when analyzing content-based regulations of speech.<sup>97</sup>

In contrast, a law regulating speech that applies to all speech, regardless of the message, is content neutral.<sup>98</sup> When a government regulation of speech is content neutral, an intermediate standard of scrutiny applies.<sup>99</sup> The Court has applied various balancing tests under the label intermediate scrutiny by weighing the government's interest against the speaker's interest.<sup>100</sup> The Court also factors the reasonableness of the time, place, and manner of content-neutral restrictions.<sup>101</sup> Importantly, the Court has, at times, described this standard in the context of regulations of speech in public fora.<sup>102</sup> However, the Court has also applied the standard to content-neutral

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94. *Id.* at 95.

95. *Id.* See *Texas v. Johnson*, 491 U.S. 397, 400 n.1 (1989), for an example of an offensive content discrimination—a statute that prohibited actions that “deface, damage, or otherwise physically mistreat [the flag].”

96. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (stating that content-based regulations of expression are presumptively violative of the First Amendment); *Mosley*, 408 U.S. at 95 (same).

97. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (explaining that the Court's precedent applies the most exacting standard of scrutiny to regulations that burden or hinder speech because of its content).

98. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (finding that a guideline mandating the use of city-provided sound equipment and technicians was content neutral); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984) (holding that a ban on the posting of signs on public property was content neutral); *United States v. O'Brien*, 391 U.S. 367, 385–86 (1968) (concluding that a ban on draft card burning was content neutral).

99. See, e.g., *Rock Against Racism*, 491 U.S. at 791 (applying intermediate scrutiny to analyze a content-neutral guideline).

100. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190 (1983) (stating that the Supreme Court applies an open-ended form of balancing, considering if the justification is significantly substantial and if the infringement could be lessened, to determine the constitutionality of content-neutral regulations of speech).

101. 16A AM. JUR. 2D *Constitutional Law* § 534 (Supp. 2009); see *Rock Against Racism*, 491 U.S. at 797 (assessing that precedent permits reasonable restrictions on time, place, and manner of speech).

102. See, e.g., *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322 (2002) (analyzing the applicability of restrictions to a municipal park ordinance requiring individuals to obtain a permit before holding large events); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46–47 (1983) (considering the permissibility of restrictions to a collective bargaining agreement limiting union access to the interschool mail system and teacher mailboxes).

regulations of speech on private property.<sup>103</sup> Thus, intermediate scrutiny applies to content-neutral regulations regardless of the location involved.

In *United States v. O'Brien*,<sup>104</sup> the Court announced the first version of its intermediate scrutiny balancing test: the Court will uphold a regulation if (1) the regulation “furthers an important or substantial government interest,” (2) the government interest does not suppress free expression, and (3) the regulation restricts no more speech than necessary to further the government’s interest.<sup>105</sup> The law at issue in *O'Brien* prohibited the mutilation or destruction of draft cards and was enacted primarily to ensure the proper functioning of the draft system.<sup>106</sup> Congress, in creating the law, had no other conceivable alternative method that would ensure the continued availability of the draft cards as precisely and narrowly as the enacted ban.<sup>107</sup> The Court concluded that the law passed intermediate scrutiny because it furthered a valid governmental interest and was narrowly tailored seeing as it was limited to the nonexpressive facet of O’Brien’s conduct—the burning of his draft card in what he claimed was a protest of the war—and prohibited nothing further.<sup>108</sup> However, the ban on burning draft cards, albeit a content-neutral ban, did not regulate time, place, or manner of protected speech.<sup>109</sup>

Twenty years later, the Court clarified its test for content-neutral, time, place, and manner regulations in *Ward v. Rock Against Racism*.<sup>110</sup> In *Rock Against Racism*, the Court considered the constitutionality under the First Amendment of a guideline that mandated the use of city-provided sound equipment and technicians to regulate the volume of performances in New York City’s Central Park.<sup>111</sup> New York City had received numerous noise complaints from park users and residents living in the surrounding neighborhoods.<sup>112</sup> After

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103. See, e.g., *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (applying reasonable time, place, and manner restrictions to an ordinance prohibiting door-to-door hand-billing).

104. 391 U.S. 367 (1968).

105. *Id.* at 377.

106. *Id.* at 378–81. The regulation was created pursuant to a substantial governmental interest. *Id.*

107. *Id.* at 381.

108. *Id.* at 381–82.

109. The ban regulated only expressive conduct that, even if considered to contain a communicative or speech element, was not constitutionally protected activity. *Id.* at 376.

110. 491 U.S. 781 (1989).

111. *Id.* at 787, 790.

112. *Id.* at 785.

considering various solutions, the city concluded the most effective way to reduce noise without limiting performances was to provide its own high-quality sound equipment and experienced sound technician.<sup>113</sup> The Court found that the city had a legitimate, substantial interest in limiting excessive and disruptive noise levels.<sup>114</sup> Additionally, the city narrowly tailored the guideline to achieve its significant interest because the guideline did not prohibit any expressive activity; the guideline effectively only regulated the volume of such expressions.<sup>115</sup> Finally, because the guideline did not make the forum inaccessible, there remained ample alternatives for communication.<sup>116</sup>

The Court articulated its current intermediate scrutiny test in analyzing *Rock Against Racism*: federal and local governments may impress “reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’”<sup>117</sup> This test modified the *O’Brien* version with respect to the narrow tailoring component by no longer requiring that a regulation be the least restrictive means of accomplishing the state’s interest.<sup>118</sup> However, the Court emphasized that this standard still does not permit such regulations to infringe upon substantially more speech than is necessary to advance the government’s justifiable interests.<sup>119</sup> Thus, a governmental regulation is invalid if a substantial amount of the speech it burdens does not further the state’s legitimate goals.<sup>120</sup>

Unlike the guideline in *Rock Against Racism*, the Court has found that bans on door-to-door solicitation are generally unconstitutional because a state’s interest in maintaining the cleanliness of streets<sup>121</sup> or

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113. *Id.* at 786–87.

114. *Id.* at 796.

115. *Id.* at 802.

116. *Id.* *But cf.* *City of Ladue v. Gilleo*, 512 U.S. 43, 58–59 (1994) (overturning a ban on lawn signs because the ban eliminated an entire form of communication). The Supreme Court has expressed its suspicion of regulations eliminating entire forms of communication. *Id.* at 55–56.

117. *Rock Against Racism*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

118. *Id.* at 798.

119. *See id.* at 799 (asserting that the government may not implement a restriction on expression unless the restriction substantially advances the stated goals).

120. *Id.*

121. *See Schneider v. New Jersey*, 308 U.S. 147, 162–65 (1939) (stating that the

preventing fraud<sup>122</sup> can be more effectively furthered by means that intrude less on First Amendment rights than a prohibition on all solicitation.<sup>123</sup> The Court in *Schneider v. New Jersey*<sup>124</sup> struck down a law banning the distribution of literature in streets and other public venues by holding that an anti-littering statute could have addressed the substantive evil the state sought to eliminate without prohibiting any expressive activity.<sup>125</sup> In sum, although intermediate scrutiny is not a highly demanding standard, the Court has used the standard to invalidate several laws regulating speech primarily because the laws were not sufficiently narrowly tailored, infringing upon substantially more speech than necessary to advance the government's legitimate interests.

### C. A Survey of Teacher Speech Jurisprudence

#### 1. The Supreme Court's teacher speech jurisprudence

In addition to applying an intermediate level of scrutiny to content-neutral speech regulations, the Supreme Court similarly employs an intermediate level of scrutiny when analyzing whether the First Amendment protects the speech of public employees, such as teachers. Beginning over four decades ago with *Pickering v. Board of Education*,<sup>126</sup> the Supreme Court has decided a long line of cases that analyze specific instances where teachers and other public employees have been fired based on speech that is allegedly inappropriate. Supreme Court jurisprudence regarding teacher speech rights, however, has yet to provide a framework for analyzing out-of-school teacher speech via social media. Generally, the Court has based its teacher speech jurisprudence on the concept that government employers have a dual obligation: (1) to effectively operate institutions providing public services and (2) to operate in a manner respectful of First Amendment protections.<sup>127</sup>

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interest in street cleanliness is an insufficient justification to abridge the freedom of speech in question).

122. See *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 638–39 (1980) (finding that the ordinance in question insufficiently related to privacy interests by applying it to public streets).

123. See, e.g., *id.* at 637 (asserting that the village's legitimate interest in preventing fraud could have been furthered through penal laws used to punish fraud directly).

124. 308 U.S. 147 (1939).

125. *Id.* at 162–65.

126. 391 U.S. 563 (1968).

127. See *id.* at 568 (observing that courts have rejected the assertion that the state's interest in running effective schools completely trumps the need to preserve certain aspects of teachers' First Amendment rights).

In *Pickering*, a high school teacher wrote a letter to a local newspaper criticizing his employer school board.<sup>128</sup> There, the Supreme Court first introduced the concept of balancing a public employee's free speech rights against a school's interest in maintaining efficient operations.<sup>129</sup> The Court considered four main factors when balancing the free speech rights of a teacher against the responsibility of the government to function effectively: the degree to which the speech (1) interfered with employee performance and operation, (2) created disharmony among co-workers, (3) undercut an immediate supervisor's effort to maintain discipline over an employee, and (4) undermined the relationship of loyalty and trust required of confidential employees.<sup>130</sup> When the above requirements are not met, the Court will conclude that the school's interest in regulating a teacher's ability to contribute to public discourse is not significantly greater than the school's interest in regulating such contributions by a member of the general public, and thus the speech in question would be protected.<sup>131</sup>

Fifteen years later, the Court in *Connick v. Myers*<sup>132</sup> clarified what constitutes a matter of public concern and used *Pickering* to create a two-part test: whether the speech is of public concern, and if so, what the effect of the speech is under the balancing factors of *Pickering*.<sup>133</sup> In *Connick*, the District Attorney of the Parish of Orleans terminated Myers, an assistant district attorney, for insubordination after Myers circulated a questionnaire regarding private internal matters at her place of employment.<sup>134</sup> Upholding Myers's termination, the Court reasoned that when an employee's speech is not related to any matter of political, social, or societal concern, government employers should have broad authority in managing their employees without the

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128. *Id.* at 566.

129. *See id.* at 568 (explaining that “[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees”).

130. *See id.* at 570–71 (finding that the teacher's critical letter presented no problems regarding the ability of the employer to maintain either discipline by an immediate superior or harmony among co-workers, did not involve a relationship requiring loyalty and confidence, and did not disrupt the operation of the schools).

131. *See id.* at 572–73 (declaring a teacher's dismissal by the school district unlawful as his “erroneous public statements,” while critical of his employer, neither impeded his proper performance of classroom duties, nor interfered with the regular operation of the school).

132. 461 U.S. 138 (1983).

133. *See id.* at 146–48 (determining that a public employee's speech is protected when he is speaking as a private citizen on a matter of public concern).

134. *Id.* at 141.

intrusion of the judiciary due to First Amendment challenges.<sup>135</sup> Hence, the Court elaborated upon the rule it established in *Pickering* by emphasizing that the determination of whether the First Amendment protects teacher speech turns first on whether the speech touches on a matter of public concern.<sup>136</sup> The Court noted that the judiciary is not the appropriate venue to review the termination or punishment of a public employee when the termination or punishment was ordered in response to that employee's speech concerning matters of personal interest and not those of public concern spoken as a citizen.<sup>137</sup> Under a matter of public concern analysis, a court focuses its analysis on the content, form, and context of the expression.<sup>138</sup> If the court finds that the employee spoke on a public subject, the court then applies the balancing factors from *Pickering* to examine the effect of the speech.<sup>139</sup>

More recently, the Supreme Court applied the same line of reasoning to public employee speech in *Garcetti v. Ceballos*.<sup>140</sup> The Court held that the First Amendment does not protect against employer disciplinary action statements made by public employees when the statements were made pursuant to employees' duties as public employees and not in their role as regular citizens.<sup>141</sup> Nevertheless, statements by public employees not made pursuant to their official duties might be protected under the First Amendment because such statements are of the kind regularly made by citizens not employed by the government.<sup>142</sup> Therefore, the *Garcetti* holding is arguably limited and applicable only to public employees' speech made pursuant to their official responsibilities and not to any speech made otherwise.<sup>143</sup> Additionally, the Court explicitly declined to decide whether the *Garcetti* holding extended to the teaching context.<sup>144</sup> Although the Supreme Court has not been confronted

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135. *Id.* at 147–48.

136. *See id.* (differentiating those matters of public concern, for which speech should be protected, from private matters, for which the state may impose punishment).

137. *See id.* (proclaiming that the responsibility of a court does not include the handling of private work-related grievances).

138. *Id.*

139. *Id.* at 146; *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

140. 547 U.S. 410 (2006).

141. *Id.* at 423.

142. *Id.*

143. *Id.* at 424.

144. *Id.* at 425.

with a teacher speech case specifically concerning teacher speech via social media, lower courts have faced the issue.

2. *Lower court cases analyzing teacher speech via social media*

Lower courts have taken slightly different approaches in their analyses addressing teacher-student communication via social media but have generally employed the Supreme Court's matters of public concern test.<sup>145</sup> In *Spanierman v. Hughes*,<sup>146</sup> a public school teacher challenged the termination of his employment that resulted from postings on his MySpace page, a social-networking website, which included various conversations with his students about their personal lives, naked pictures of men, and a poem he wrote in opposition to war.<sup>147</sup> The U.S. District Court for the District of Connecticut held that the comments regarding students' romantic lives were not a matter of public concern and thus were not protected by the First Amendment; however, the poem the teacher wrote qualified as a matter of public concern and thus was protected.<sup>148</sup> The district court applied the following framework: To succeed on a First Amendment retaliation claim, a plaintiff must make a showing by a preponderance of the evidence that the plaintiff's constitutionally protected speech was a "motivating factor" in bringing about the adverse employment decision or determination at issue.<sup>149</sup> First, the court focused on whether the teacher spoke pursuant to his official responsibilities under *Garcetti*.<sup>150</sup> The court held that the plaintiff teacher was not acting pursuant to his employment duties when using his MySpace account because he was not under any employment obligation to make statements that were not related to an educational subject.<sup>151</sup> Because the *Garcetti* test was not applicable, the court applied the *Connick* matter of public concern test.<sup>152</sup> The court clarified that the First Amendment generally protects expression that is related to any matter of political, social, or societal concern.<sup>153</sup>

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145. See *Connick v. Myers*, 461 U.S. 138, 159–60 (1983) (outlining the "two classes of speech of public concern: statements 'of public import' because of their content, form and context, and statements that, by virtue of their subject matter, are 'inherently of public concern'").

146. 576 F. Supp. 2d 292 (D. Conn. 2008).

147. *Id.* at 289.

148. *Id.*

149. *Id.* at 308.

150. *Id.* at 309 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)).

151. *Id.*

152. *Id.*

153. *Id.* (citing *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

Thus, the court concluded that the comments on the teacher's MySpace page were varied as to whether they were protected under the First Amendment.<sup>154</sup>

In *Snyder v. Millersville University*,<sup>155</sup> another district court applied the public concern test to determine whether a teacher's comments and pictures on MySpace were protected by the First Amendment.<sup>156</sup> The teacher had invited her students to view her personal MySpace page, which contained a photograph of herself drinking alcohol and comments relating to difficulties that she was having with a fellow teacher.<sup>157</sup> The court held that since the postings raised only issues of a personal nature, they did not relate to a matter of public concern and consequently were not protected speech.<sup>158</sup> Since the postings were not protected, the teacher's First Amendment rights were not violated when she was penalized for the postings.<sup>159</sup>

Although the courts in *Spanierman* and *Snyder* ultimately held that the First Amendment did not protect the teacher speech in question, circumstances exist under which teacher speech via social media is conceivably protected.<sup>160</sup> Thus, a court confronted with a First Amendment challenge of a regulation banning all teacher-student communication via electronic media would first need to determine whether the ban reaches speech that is protected by the First Amendment.<sup>161</sup> If all of the speech being regulated is not protected, the government has the authority to impose any restrictions it may desire because the speech does not come within the purview of the First Amendment.<sup>162</sup> If, however, the ban is found to extend to protected speech, then a court would analyze the ban under the applicable First Amendment doctrines.<sup>163</sup> If the speech is protected,

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154. *Id.* at 310.

155. No. 07-1660, 2008 WL 5093140 (E.D. Pa. Dec. 3, 2008).

156. *Id.* at \*14.

157. *Id.* at \*6.

158. *Id.* at \*16.

159. *Id.*

160. See *infra* notes 179–214 and accompanying text (discussing examples of protected and appropriate teacher speech via social media).

161. See FARBER, *supra* note 49, at 13–14 (maintaining that “the first step in analyzing any First Amendment” challenge is to determine whether the speech falls under an unprotected category of speech).

162. See CHEMERINSKY, *supra* note 90, at 1321, 1596 (explaining that the categories of speech the Supreme Court has deemed unprotected, such as fighting words and obscenity, can be prohibited and punished freely by the government and that speech by public employees is not protected unless it regards a matter of public concern).

163. The most integrated and common First Amendment doctrine is content distinction, which determines the level of judicial scrutiny that will be applied to analyze a regulation. FARBER, *supra* note 49, at 21. There are also three doctrines



employers cannot unduly restrict those expressions of their employees.

## II. REGULATIONS BANNING TEACHER-STUDENT COMMUNICATION VIA ELECTRONIC MEDIA ARE FACIALLY UNCONSTITUTIONAL BECAUSE THEY ARE OVERBROAD AND FAIL INTERMEDIATE SCRUTINY

First Amendment jurisprudence dictates that the right of free speech is not an absolute right protecting individuals from governmental intrusion.<sup>164</sup> Depending on the regulation's purpose—that is, whether it is to regulate the content of an expression or simply the time, place, or manner of an expression irrespective of its content<sup>165</sup>—courts employ different levels of judicial scrutiny.<sup>166</sup> An individual also can facially challenge a regulation under the First Amendment employing the overbreadth doctrine.<sup>167</sup>

Although the requisite showing under the overbreadth doctrine is a heavy burden, situations exist where a regulation does more than eliminate the exact source of evil it seeks to remedy and thus can be deemed overbroad.<sup>168</sup> A regulation banning all communication between teachers and students via electronic media reaches a substantial amount of expression that the First Amendment protects; the protected language that the broad ban reaches is not the evil that a teacher-student communication ban is meant to eliminate.<sup>169</sup> By seeking to curtail inappropriate interactions between teachers and students in order to prevent incidents of child sexual abuse, regulations on all electronic communication have the effect of banning ample beneficial and appropriate communications, while failing to eliminate inappropriate contact between teachers and

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that a speaker can invoke without having to demonstrate that his or her particular speech was protected: prior restraints, overbreadth, and vagueness. *Id.* at 45–46, 49.

164. See *supra* notes 45–48 and accompanying text (enumerating the categories of speech that the Supreme Court has deemed unprotected under the First Amendment).

165. See *supra* notes 91–103 and accompanying text (discussing the content-neutral and content-based distinction and the applicable standards of scrutiny).

166. See Russell W. Galloway, *Basic Free Speech Analysis*, 31 SANTA CLARA L. REV. 883, 886 (1991) (providing an overview of the standards of judicial scrutiny and the types of regulations to which each usually applies).

167. *E.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002); *City of Houston v. Hill*, 482 U.S. 451 (1987).

168. See discussion *supra* Part I.B.1 (detailing Supreme Court overbreadth jurisprudence).

169. See *infra* notes 179–214 and accompanying text (examining examples of teacher-student communication via social media that are protected under the Court's *Pickering* and *Connick* tests).

students.<sup>170</sup> Therefore, it is unlikely that such regulations would pass constitutional muster under the overbreadth doctrine.

Because a reviewing court would apply an intermediate standard of scrutiny to a content-neutral regulation of expression, such as a regulation banning all teacher-student communication via electronic media, most content-neutral regulations easily pass the not overly demanding standard.<sup>171</sup> Nevertheless, circumstances exist in which regulations would fail intermediate scrutiny.<sup>172</sup> For example, a regulation that serves a compelling governmental interest may fail intermediate scrutiny if the regulation does not effectively address this interest. Protecting a child's health and safety is a historically recognized compelling governmental interest and therefore satisfies the first prong of the intermediate scrutiny analysis.<sup>173</sup> Even though the end—protecting children from sexual abuse—is a valid compelling interest, a regulation that does not effectively address this end and also prohibits a large amount of appropriate and arguably protected speech will not survive the narrow tailoring prong of intermediate scrutiny.<sup>174</sup>

For a regulation on teacher-student communication to be valid, it must not prohibit entire modes of communication, and lawmakers must draw the regulation precisely to address the compelling governmental interest.<sup>175</sup> Because regulations banning entire modes of communication burden substantially more speech than necessary and several less restrictive effective alternatives are available, the teacher-student electronic communication bans would most likely not

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170. See *infra* notes 249–51 and accompanying text (arguing that bans on teacher-student communication via electronic media will not curtail child sex abuse by teachers).

171. See Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 785 (demonstrating that when applying intermediate scrutiny, courts usually favor the government and, as a consequence, substantial amounts of valuable speech are squelched).

172. See, e.g., *Schneider v. New Jersey*, 308 U.S. 147, 161–62 (1939) (invalidating a complete ban on hand-billing under intermediate scrutiny because the ban was not narrowly tailored to achieve the government's interests).

173. See, e.g., *New York v. Ferber*, 458 U.S. 747, 757 (1982) (recognizing the protection of children from sexual exploitation and abuse as a compelling state interest).

174. See, e.g., *Schneider*, 308 U.S. at 161–62; see also *infra* notes 245–58 and accompanying text (analyzing whether the bans further the state's interest in protecting children from sexual abuse and consequently whether they are narrowly tailored).

175. See Galloway, *supra* note 166, at 933–39 (outlining the components of intermediate scrutiny and demonstrating how a content-neutral regulation can satisfy the standard).

withstand a facial constitutional challenge under either the overbreadth doctrine or intermediate scrutiny.<sup>176</sup>

*A. Bans on Teacher-Student Electronic Communication Are Facially Unconstitutional Under the First Amendment Overbreadth Doctrine*

State and school district bans on teacher-student communication via social-networking sites and other exclusive electronic methods of communication are substantially overbroad because they prohibit a vast body of appropriate, protected speech, while only curtailing, at most, a limited amount of inappropriate speech. A law is unconstitutionally overbroad if it regulates substantially more speech than the First Amendment allows, and a person to whom the law can be permissibly applied can argue that it would be unconstitutional as applied to others.<sup>177</sup> Substantial overbreadth can be demonstrated by a showing of a significant number of situations where a law prohibits not just its intended target, but encompasses constitutionally protected expressions as well.<sup>178</sup>

There are a considerable number of situations in which bans on teacher-student electronic communication could be applied to prohibit constitutionally protected speech or, at the very least, beneficial and appropriate speech. When a law is being challenged under the overbreadth doctrine, a court will first determine whether a substantial amount of constitutionally protected expression is within the gamut of the law.<sup>179</sup> A court could also find overbreadth by determining that a regulation eliminates significantly more expression than the speech that is “the exact source of the evil it sought to remedy.”<sup>180</sup> To establish whether a law reaches protected teacher speech, a court would initially determine whether any of the

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176. See discussion *infra* Part II.A–B (applying the overbreadth doctrine and intermediate scrutiny to determine the constitutionality of the bans).

177. See *NAACP v. Button*, 371 U.S. 415, 432–33 (1963); *supra* Part I.B.1 (detailing the Supreme Court’s overbreadth jurisprudence).

178. See *United States v. Williams*, 553 U.S. 285, 293–94 (2008) (beginning the overbreadth analysis by construing the statute to determine what the statute covered and how far it reached).

179. See *City of Houston v. Hill*, 482 U.S. 451, 458 (1987) (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)) (acknowledging that a court’s initial task is to determine the effects of enactment on constitutionally protected behaviors).

180. See *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984) (noting that because the ordinance banned signs that constituted visual clutter and blight, the ordinance did no more than eliminate the exact source of evil sought to be remedied).

speech that is prohibited relates to a matter of public concern.<sup>181</sup> Then, the court would apply the *Pickering* analysis.<sup>182</sup>

There are a variety of purposes for which social media can generally be used, such as staying connected with friends and family, sharing pictures and information, marketing, and meeting new people.<sup>183</sup> Additionally, social media can be used to share art and news stories and to comment upon other matters of public concern contemplated in *Connick*.<sup>184</sup> There are certainly ample circumstances in which teacher speech via social media could be related to matters of political, social, or societal concern and consequently would satisfy the *Connick* analysis.<sup>185</sup> A teacher commenting on public issues such as war, politics, topics regarding the school district, and day-to-day problems teenagers face presumably would be speaking on matters of public concern under *Connick*, and therefore the speech would be protected by the First Amendment.<sup>186</sup>

After determining that the speech being banned relates to a matter of public concern, a court would next employ a *Pickering* analysis, balancing the speech rights of the individual against the responsibility of the government to function effectively.<sup>187</sup> Under the *Pickering* analysis, the four main factors courts consider are whether the speech (1) interfered with employee performance and operation, (2) created disharmony among co-workers, (3) undercut an immediate supervisor's discipline over an employee, and (4) destroyed the relationship of loyalty and trust required of

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181. See *Connick v. Myers*, 461 U.S. 138, 147–48 (1983) (acknowledging that it is inappropriate for a federal court to review the personnel decisions taken by an employer of a public employee who speaks as an employee on matters of personal interest).

182. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (describing the need to balance the competing interests of the public employee's free speech rights with those of the public employer striving to promote efficient public services).

183. *What Is Social Networking?*, SOCIAL NETWORKING, <http://www.whatissocialnetworking.com> (last updated July 18, 2012).

184. See, e.g., *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 309–10 (D. Conn. 2008) (determining that under *Connick*, a poem posted on MySpace by a teacher was a matter of public concern because it constituted a political statement).

185. See *Connick*, 461 U.S. at 152 (cautioning that a stronger showing of “disruption of the office and the destruction of working relationships” is necessary for an employer to take action if the employee's speech involves “matters of public concern”). But see Rachel A. Miller, Comment, *Teacher Facebook Speech: Protected or Not?*, 2011 BYU EDUC. & L.J. 637, 637 (describing the accounts of a teacher who resigned after posting that her students were “germbags” on Facebook and another teacher who was suspended after being tagged in a photo posted by another user that showed the teacher with a stripper at a bachelorette party).

186. *Connick*, 461 U.S. at 144–45.

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

confidential employees.<sup>188</sup> Further, speech determined to be on a matter of public concern may only lose its protected status under the First Amendment when actual disruption to the government's function is demonstrated.<sup>189</sup>

A large portion of teacher-student speech via social media, when balanced under *Pickering*, does not implicate any of the four factors and does not compromise the responsibility of the government to function effectively. Teacher-student communication via electronic media can either be related to education or can regard matters completely unrelated to education.<sup>190</sup> Teacher speech via social media does not generally implicate the *Pickering* factors;<sup>191</sup> additionally, inappropriate teacher speech via electronic media has seldom been found and can be remedied through employment termination on a case-by-case basis.<sup>192</sup> Teacher speech via social media can occur both inside and outside the school context.<sup>193</sup> But the bans seem to be concerned primarily with the use of electronic media outside the school context for purposes not pursuant to a teacher's official duties.<sup>194</sup> In such a context, the majority of teacher-student communication via electronic media would not interfere with

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188. *Id.* at 570–71 & n.3.

189. See *Connick*, 461 U.S. at 152 (cautioning that a substantial showing that the disruption and destruction of a workplace relationship will take place is necessary).

190. See Paul Forster, *Teaching in a Democracy: Why the Garcetti Rule Should Apply to Teaching in Public Schools*, 46 GONZ. L. REV. 687, 711 (2010) (advancing examples of electronic teacher speech ranging from speech for instructional purposes to speech on a social-media site expressed “for purely personal purposes”).

191. See *Pickering*, 391 U.S. at 570–71 & n.3 (noting that teachers who voice their differing opinions of school operations are not per se detrimental to the interests of the school).

192. See *Social Networking in Schools: Educators Debate the Merits of Technology in Classrooms*, HUFFINGTON POST (May 27, 2011, 6:12 AM), [http://www.huffingtonpost.com/2011/03/27/social-networking-schools\\_n\\_840911.html](http://www.huffingtonpost.com/2011/03/27/social-networking-schools_n_840911.html) (asserting that despite the fear created by sexual predators operating through social media, the risk is less than commonly believed).

193. See Tod Robberson, *Even Teachers Have Free-Speech Rights*, DALLASNEWS.COM (Aug. 29, 2011, 2:17 PM), <http://dallasmorningviewsblog.dallasnews.com/archives/2011/08/even-teachers-h.html> (discussing a teacher's suspension for posting a comment about same-sex marriage and explaining that if the teacher had posted the comment off the clock it would have had different legal implications than if the teacher had posted the comment during school).

194. This is clear from the stated purpose of these regulations and the statements made by advocates of the regulations, particularly Senator Cunningham's comments explaining that the focus of the Missouri law was only on teacher speech outside the school context. Joshua Rhett Miller, *New Missouri Law Bans 'Exclusive' Online Contact Between Teachers, Students*, FOXNEWS.COM (Aug. 2, 2011), <http://www.foxnews.com/us/2011/08/02/new-missouri-law-bans-exclusive-online-contact-between-teachers-students>. Yet the bans do not specifically distinguish social media used inside or outside of school or for what particular purpose it is being employed. *Id.*

employee performance and operation, would not create disharmony among co-workers, would not undercut an immediate supervisor's discipline over an employee, and would not affect the relationship of loyalty and trust required of teachers.<sup>195</sup>

Unlike the speech addressed in *Connick*, which was found to have created disharmony among co-workers and undermined the employer's authority,<sup>196</sup> teacher-student speech via social media would rarely, if ever, be related to the quality of the teacher's work environment or issues with the management or employer;<sup>197</sup> thus, it would not implicate the second and third *Pickering* factors.<sup>198</sup> Also, the speech that is being banned—speech that is between teachers and students—is not directed at employers or co-workers.<sup>199</sup> Further, the speech prohibited by these bans would not infringe on the relationship of loyalty and trust required of teachers because, as explained in *Pickering*, teachers are not in a position of public employment in which the need for confidentiality is notable due to the nature of the information accessible to them through their employment.<sup>200</sup> Even so, the banned speech is typically on educational topics and not about confidential employment information.<sup>201</sup> Teachers play a critical role in the development of their students; this role comes with certain obligations, such as setting positive examples, ensuring students receive the life skills they need

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195. See *Pickering*, 391 U.S. at 570–71 & n.3 (extrapolating the factors the Court uses to balance the free speech rights of a teacher with the state's interest in maintaining efficient functioning).

196. *Connick v. Myers*, 461 U.S. 138, 151–52 (1983).

197. See Emily H. Fulmer, iBrief, *Privacy Expectations and Protections for Teachers in the Internet Age*, 2010 DUKE L. & TECH. REV. 14, ¶ 64 (asserting that teachers who communicate with their students via social media do not inherently harm those students). *But see id.* (advancing that many teachers comment on their social-media profiles about their students and workplaces).

198. See *Pickering*, 391 U.S. at 570 (describing the second and third relevant factors in balancing the free speech rights of a teacher with the responsibility of the government to function effectively).

199. *Cf. id.* at 569–70 (holding that there was no question of maintaining either discipline by immediate superiors or harmony among co-workers under the circumstances because the statements that the teacher made were in no way directed toward any supervisor or co-worker that the teacher came in contact with in the course of his daily work).

200. *Cf. id.* at 570 n.3 (finding that the teacher who wrote the letter criticizing his employer did not have the kind of relationship with his employer for which personal loyalty and confidence are necessary to their effective functioning and that his position as a teacher was not a position in public employment for which the need for confidentiality is significant).

201. See *Social Networking in Schools*, *supra* note 192 (addressing a study in which a teacher initiated a social-media pilot program in her school that positively affected students' grades and improved rates of absenteeism).

for the future, and being accessible to students in order to assist them through any struggles that they may encounter.<sup>202</sup> Bans on teacher-student communication via social media significantly hinder teachers in their ability to cultivate a trusting environment because students and teachers heavily rely on such media to communicate about issues that students only feel comfortable confiding to their instructors.<sup>203</sup> Therefore, in the context of teacher-student communication via social media, the first *Pickering* factor—interference with employee performance and operation—is the most viable argument for banning such communications.<sup>204</sup>

There are several contexts, however, in which teacher speech via social media would enhance, rather than interfere with, employee performance and operation and thus would not fail under the *Pickering* analysis.<sup>205</sup> For example, teachers can utilize social media “to get to know their students better [and] to let students submit homework, share projects, and access calendars or a syllabus.”<sup>206</sup> Use of social media can serve as an “exoskeleton”—that is, educational support outside of the school context.<sup>207</sup> Social media can also be

202. See Michelle Blessing, *Teachers' Responsibilities to Students in the Classroom*, EHOW, [http://www.ehow.com/list\\_7623924\\_teachers-responsibilities-students-classroom.html](http://www.ehow.com/list_7623924_teachers-responsibilities-students-classroom.html) (last visited Oct. 11, 2012) (noting some roles for teachers in addition to the baseline responsibility to educate students); *What Makes a Great Teacher?*, GREAT SCHS., <http://www.greatschools.org/improvement/quality-teaching/79-what-makes-a-great-teacher.gs> (last visited Oct. 1, 2012) (explaining that great teachers are accessible to students and are available when students need them).

203. Jacqueline Vickery, *Missouri's New "Facebook Law"—Protecting Kids By Policing Teachers?*, (Aug. 10, 2011, 3:30 PM), <http://www.jvickery.com/2011/08/missouris-new-facebook-law-protecting.html>; see Allison Blood, *Interpretations Vary on New Online Communication Law*, MISSOURINET (Aug. 4, 2011), <http://www.missourinet.com/2011/08/04/interpretations-vary-on-new-online-communication-law-audio/> (asserting that social-media bans remove a valuable resource that permits teachers to connect with students through a means in which students feel comfortable); Josie Fraser, *Teachers Must Engage with Social Media*, OLIVER QUINLAN: LIVE BLOGS (Apr. 16, 2012), <http://www.oliverquinlan.com/liveblogs/?p=576> (arguing that teachers need to understand where students are coming from to effectively help them).

204. *Pickering*, 391 U.S. at 570. Skeptics of social-media use by teachers fear that social media will distract teachers and students in the classroom; lead to non-educational, inappropriate remarks; and negatively affect learning. Trip Gabriel, *Speaking Up In Class, Silently, Using Social Media*, N.Y. TIMES (May 12, 2011), <http://www.nytimes.com/2011/05/13/education/13social.html?pagewanted=all>. However, high school and elementary school teachers actually employing such technology with their students have found the opposite results. *Id.*

205. *Pickering*, 391 U.S. at 571.

206. See Laila Weir, *Kids Create—and Critique on—Social Networks*, EDUTOPIA (May 27, 2009), <http://www.edutopia.org/digital-generation-youth-network-literacy> (asserting that social media also assists students with interacting with their parents on an educational level).

207. See *id.* (equating social media to an “exoskeleton” in that it “exists on the outside but supports the inside”).

used to create a classroom community and nurture a sense of belonging among students.<sup>208</sup> Furthermore, teachers are mentors for many students and, at times, students will have issues that they only feel comfortable discussing with a teacher, such as parental abuse, bullying, or possibly thoughts of suicide.<sup>209</sup> Often, children may be embarrassed or scared when approaching an adult with these issues; consequently, communicating via social media is the only mode of communication children might feel comfortable using because they can avoid a face-to-face conversation.<sup>210</sup>

In contrast to the Missouri General Assembly, organizations, such as the National School Boards Association, and individuals in academia are advocating for greater use of social-networking media by teachers as an educational tool and a way to effectively communicate with students.<sup>211</sup> These advocates recognize that technology is variable and constantly advancing and, as a result, students should be exposed to this technology in order to be adequately prepared for the future.<sup>212</sup> Social media provides an

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208. *Connecting Your Classroom with Facebook*, NE. UNIV. EDTECH (Nov. 14, 2006), [http://www.northeastern.edu/edtech/demonstrations\\_events/connecting\\_your\\_classroom\\_facebook](http://www.northeastern.edu/edtech/demonstrations_events/connecting_your_classroom_facebook).

209. See Ramasastry, *supra* note 38 (addressing the policy and issues behind the Missouri law regarding teacher-student speech via social media); Vickery, *supra* note 203 (acknowledging the social-media interaction between student and teacher as another outlet available to students in need of personal guidance).

210. See Vickery, *supra* note 203 (arguing that beneficial conversations should not be prohibited just because students may not feel comfortable having them in person with the teacher).

211. See NAT'L SCH. BDS. ASS'N, *CREATING & CONNECTING: RESEARCH AND GUIDELINES ON ONLINE SOCIAL—AND EDUCATIONAL—NETWORKING 7* (2007), *available at* <http://socialnetworking.procon.org/sourcefiles/CreateandConnect.pdf> (asserting that it is in a school district's best interest to reexamine their social-media policy to allow the use of these media because study findings indicate both school district officials and parents believe that social media provides positive opportunities in education and plays a beneficial role in students' lives); Rich L. Kaye, *Social Network Technology in the Classroom*, *EZINE ARTICLES*, <http://ezinearticles.com/?Social-Network-Technology-in-the-Classroom&id=1087558> (last visited Oct. 11, 2012) (suggesting that teachers should be encouraged to utilize social media because of the speed at which technology is evolving); *Social Networking in the Classroom: Ideas for Social Networking with Students*, EDUC. TECH. NETWORK, [http://www.edtechnetwork.com/social\\_networking.html](http://www.edtechnetwork.com/social_networking.html) (last visited Oct. 11, 2012) (finding that because social media is used daily by students, teachers should take advantage of the opportunity by using these resources as part of their curriculum and using social media to enhance student-teacher communication).

212. See Steve Olenski, *Should Teachers and Students Be Allowed To Communicate via Social Media? Follow Up*, SOC. MEDIA TODAY (Nov. 9, 2011), <http://socialmediatoday.com/steve-olenski/385170/should-teachers-and-students-be-allowed-communicate-social-media-follow> (asserting that students who interact using social media and technology are prepared for the future as well as for career paths that have yet to be identified); Fran Smith, *How To Use Social-Networking Technology for Learning*, Edutopia (Apr. 20, 2007), <http://www.edutopia.org/social->



excellent educational tool for teachers and a method to reach out to less sociable students to get them involved and excited about learning.<sup>213</sup> Moreover, teachers can use these sites to provide critical support to students who are at-risk.<sup>214</sup>

Because a substantial amount of teacher speech in the context of teacher-student electronic communication can be classified as protected under a *Pickering* analysis, it is apparent that regulations banning teacher-student communications via electronic media are not narrowly tailored and thus are significantly overbroad.<sup>215</sup> The laws plainly prohibit teachers from using any electronic media, such as Blackboard, Facebook, and Gmail, because these media have functions that allow teachers to communicate with a student exclusively.<sup>216</sup> These regulations completely ban a form of communication between educators and students—a form of communication that encompasses several different media platforms

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networking-how-to (reporting the views of Chris Lehmann, principal of a Philadelphia school, regarding the beneficial uses of social media by educators, such as a method of teaching students how to effectively interact and collaborate with others and how to become informed and cultured citizens).

213. See NAT'L SCH. BDS. ASS'N, *supra* note 211, at 9 (“Some schools and educators are experimenting successfully with chat rooms, instant messaging, blogs, wikis and more for after-school homework help, review sessions and collaborative projects, for example. These activities appeal to students—even students who are reluctant to participate in the classroom.”); Preston, *supra* note 26 (intimating that educators are concerned that restrictive social-media policies will eliminate an effective tool for engaging students because students are regularly using social media to communicate); Curtis Clifford Cain, *Social Networking Teaching Tools: A Computer Supported Collaborative Interactive Learning Environment for K–12* (Aug. 9, 2010) (unpublished M.S. thesis, Auburn University), available at <http://etd.auburn.edu/etd/bitstream/handle/10415/2190/Cain.Thesis.Final.pdf?sequence=2> (concluding that using social media in school lectures facilitates collaboration between students in K–12 and creates a more engaging and thought-provoking learning experience); Alicia Russell, *Social Networking Tools Highlighted at Teaching with Technology Day: Knowledge Sharing and Creation*, NE. UNIV. EDTECH (Mar. 2007), [http://www.northeastern.edu/edtech/about/columns/social\\_networking\\_tools\\_highli](http://www.northeastern.edu/edtech/about/columns/social_networking_tools_highli) (highlighting various examples of social media that teachers effectively employ to engage their students in the classroom and promote collaboration).

214. See Ramasastry, *supra* note 38 (arguing that social-networking bans can possibly harm “students who face a crisis, need a role model, or simply want to talk to a teacher”).

215. But see Forster, *supra* note 190, at 711–13 (contending that *Pickering* provides limited protection to teacher speech via social media because even though the speech in question may involve nonschool matters, *Pickering* only protects speech involving a matter of public concern—a requirement that most teacher speech does not meet).

216. Rob Arcamona, *Facebook, Students and Teachers: A Question of Free Speech*, KQED, <http://mindshift.kqed.org/2011/09/facebook-students-and-teachers-a-question-of-free-speech> (last visited Oct. 11, 2012); see *supra* Part I.A (discussing current state legislation and school district policies banning teacher-student communication via social media).

and stifles an ample amount of protected speech.<sup>217</sup> As the Missouri court found, social media is generally the principal means of communication between teachers and students.<sup>218</sup> By banning this entire mode of communication, the laws are stifling the potential benefits of technology to students.

While in *Ferber*, the statute prohibiting child pornography could have only potentially overreached to appropriate speech in an insignificant number of instances, teacher-student communication bans regulate speech that is primarily appropriate.<sup>219</sup> In *Taxpayers for Vincent*, the appellees did not demonstrate a realistic danger that the ordinance compromised individuals' First Amendment protections or that a majority of the prohibited signs did not create safety or traffic problems that the ordinance sought to eliminate.<sup>220</sup> Unlike the circumstances in *Taxpayers for Vincent*, regulations like the Missouri ban present a verifiable danger to individuals' free speech rights and apply to many communications that do not relate to the evil the state is attempting to eliminate.<sup>221</sup> Here, the substantive evil—child sexual abuse—is not created by the medium of expression itself, but is merely a possible by-product of the activity.<sup>222</sup> Further, because the vast majority of the speech that the regulations ban does not trigger the state's interest in protecting students from sexual abuse, the

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217. *Mo. State Teachers Ass'n v. State*, No. 11AC-CC00553, 2011 WL 4425537 (Mo. Cir. Ct. Sept. 23, 2011); see Chad Garrison, *Missouri Teachers Sue State over Facebook Ban*, RIVERFRONT TIMES (Aug. 19, 2011, 4:13 PM), [http://blogs.riverfronttimes.com/dailyrft/2011/08/missouri\\_teachers\\_sue\\_state\\_over\\_social\\_media\\_law.php](http://blogs.riverfronttimes.com/dailyrft/2011/08/missouri_teachers_sue_state_over_social_media_law.php) (quoting Todd Fuller, a spokesman for the Missouri State Teachers Association, who stated that the Missouri ban completely inhibits a teacher's ability to communicate with students and parents); Ramasastry, *supra* note 38 (summarizing the Missouri court's ruling that found the social-media ban implicated teachers' free speech rights because it completely banned a form of communication).

218. *Mo. State Teachers Ass'n*, 2011 WL 4425537; Ramasastry, *supra* note 38.

219. Compare *New York v. Ferber*, 458 U.S. 747, 773 (1982) (giving examples of the protected forms of expression that could fall within the purview of the statute, such as medical textbooks and pictorials in *National Geographic*), with *Social Networking in Schools*, *supra* note 192 (reporting that the benefits of teachers using social media far outweigh the costs and quoting Amanda Lenhart with the Pew Research Center's Internet and American Life Project who explained that, generally, online child sexual predation is less of a risk than it is made out to be).

220. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 802 (1984).

221. See *supra* notes 179–214 and accompanying text (providing examples of social-media use by teachers that do not contribute to the threat of child sexual abuse).

222. Cf. *Taxpayers for Vincent*, 466 U.S. at 808–10 (distinguishing *Schneider's* overbroad ban on all hand-billing that attempted to curtail littering, a by-product of the expression, from the ordinance in this case that banned postings on public property to eliminate visual blight, which was itself created directly by the postings).

resulting overbreadth is so significant that it would not be curable through a case-by-case analysis of the fact situations in which the regulations arguably may not be applied.<sup>223</sup> In essence, because the inverse of the reasoning in *Broadrick* is logical in this context, the rare instances where teacher speech via social media is *inappropriate* should be remedied through a case-by-case approach.<sup>224</sup>

A law banning teacher-student communication via electronic media is analogous to the ordinance in *Hill*, which made it unlawful to interrupt police officers in the performance of their duties.<sup>225</sup> The *Hill* ordinance had the effect of making only speech, particularly protected speech, unlawful because the State Penal Code already expressly prohibited the targeted conduct, such as assaulting police officers.<sup>226</sup> A law banning student-teacher communication via electronic media, like the *Hill* ordinance, is an effort to eliminate inappropriate conduct, such as the abuse suffered by Amy Hestir, that is also already illegal.<sup>227</sup> Sexual harassment of students by their teachers, to which the Office of Civil Rights has given an expansive definition, is prohibited by Title IX of the Education Amendments of 1972,<sup>228</sup> just as assault was criminally prohibited by the State Penal

223. See *Ferber*, 458 U.S. at 773–74 (determining that because the statute only theoretically could overreach to protected material, any overbreadth that could have existed should have been “cured through [a] case-by-case analysis” of the circumstances (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615–16 (1973))).

224. Cf. *Broadrick*, 413 U.S. at 615–16 (directing that because the statute did not infringe upon a substantial amount of protected expressive conduct, any overbreadth that resulted should have been remedied through a case-by-case analysis of the circumstances in which the statute allegedly was unconstitutionally being applied).

225. *City of Houston v. Hill*, 482 U.S. 451, 451 (1987); *supra* notes 76–81 and accompanying text.

226. *Hill*, 482 U.S. at 460.

227. See, e.g., MO. REV. STAT. § 566.095 (2011) (“A person commits the crime of sexual misconduct in the third degree if he solicits or requests another person to engage in sexual conduct under circumstances in which he knows that his requests or solicitation is likely to cause affront or alarm.”).

228. See 20 U.S.C. § 1681 (2006) (prohibiting discrimination on the basis of sex, including sexual harassment, in private and public education programs and activities receiving federal financial assistance). Sexual harassment of students is a form of discrimination prohibited by Title IX. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., SEXUAL HARASSMENT: IT’S NOT ACADEMIC I (2008), available at <http://www.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf>.

The U.S. Department of Education’s Office for Civil Rights (OCR), the federal agency responsible for enforcing Title IX, has interpreted Title IX as a protection of students from sexual harassment by school employees, other students, or third parties. *Id.* OCR has delineated examples of conduct that constitute sexual harassment such as “making sexual propositions or pressuring students for sexual favors; . . . displaying or distributing sexually explicit drawings, pictures, or written materials; . . . [and] circulating or showing e-mails or Web sites of a sexual nature.” *Id.* at 3–4. Additionally, sexual harassment “occurs when a teacher . . . creates a

Code in *Hill*.<sup>229</sup> Also, the remainder of the speech banned by these regulations does not relate to the state's interest of curtailing child sexual abuse, just as the remainder of the speech banned by the *Hill* ordinance did not relate to the state's interest of curtailing disorderly conduct and unprotected, obscene language.<sup>230</sup> Therefore, bans prohibiting teacher-student communication via electronic media have the effect of only prohibiting appropriate and permissible speech because the speech and conduct sought to be eliminated is already deemed criminal by statute.

The expansive nature of social-media bans is blatantly overinclusive in the content restricted. In sum, the bans are overbroad because they prohibit (1) protected expressions, (2) communications by teachers with a large group of individuals that utilizes these types of sites, and (3) vast amounts of expression that do not contribute to the evil sought to be remedied. Nevertheless, succeeding on an overbreadth challenge has proven to be difficult and rare.<sup>231</sup>

*B. Bans on Teacher-Student Electronic Communication Will Also Fail a Facial Challenge Under Intermediate Scrutiny*

Even if an overbreadth challenge to laws banning teacher-student communication via electronic media fails, a facial challenge to these laws under the applicable standard of judicial scrutiny is still available and achievable. State and school district bans are not likely to pass constitutional muster when facially challenged under a traditional First Amendment intermediate scrutiny standard. The bans are not narrowly tailored because they do not effectively further the state's legitimate interest and burden a large amount of permissible speech, while also prohibiting all modes of communication via the Internet.<sup>232</sup> First, intermediate scrutiny is the applicable standard because the bans are content-neutral regulations of speech.<sup>233</sup> Regulations

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hostile environment that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the school's program." *Id.* at 6.

229. *Hill*, 482 U.S. at 460–63.

230. *See id.* at 462 (describing the ordinance as sweeping and "not limited to fighting words nor even to obscene or opprobrious language").

231. *See supra* note 51 and accompanying text (admitting the difficulty of succeeding on an overbreadth challenge of a regulation of speech).

232. *See Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (explaining that a narrowly tailored regulation must "serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so").

233. *See supra* notes 98–103 and accompanying text (describing content-neutral regulations as those that do not regulate subject matter and providing the Supreme Court's jurisprudence that applies intermediate scrutiny to such regulations). *But see*

banning teacher-student communication via social media prohibit entire modes of communication regardless of the content of the speech involved.<sup>234</sup> The bans seek to regulate a manner of speech, rather than a specific subject matter or message conveyed by the speech.<sup>235</sup> Thus, by qualifying as content neutral, the bans are subject to intermediate scrutiny when courts review them.<sup>236</sup>

In *Rock Against Racism*, the Supreme Court delineated the test for intermediate scrutiny.<sup>237</sup> Bans on teacher-student communication via electronic media will fail under intermediate scrutiny because they do not satisfy the second and third prongs under *Rock Against Racism*.<sup>238</sup> The bans are not narrowly tailored to serve the state's interest in protecting children from sexual abuse because they do not prevent sexual abuse from occurring and are substantially broader than necessary to achieve the interest.<sup>239</sup> The bans also eliminate all modes of electronic communication, which precludes essentially all

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Michelen, *supra* note 38 (applying strict scrutiny to analyze social-media bans by reasoning that laws that limit speech are usually subject to strict scrutiny); Jay Rivera, *New Student-Teacher Facebook Ban Raises Constitutional Concerns*, LEGALMATCH L. BLOG (Aug. 12, 2011), <http://lawblog.legalmatch.com/2011/08/12/student-teacher-facebook-ban-raises-constitutional-concerns-2> (examining social-media bans under a strict scrutiny standard by reasoning that the freedom of speech is a fundamental right and laws regulating fundamental rights must pass strict scrutiny).

234. *Mo. State Teachers Ass'n v. State*, No. 11AC-CC00553, 2011 WL 4425537 (Mo. Cir. Ct. Sept. 23, 2011); see also Michelen, *supra* note 38 (quoting Senator Cunningham stating that she supports the Missouri law because exclusive communication leads to sexual misconduct).

235. See *Rock Against Racism*, 491 U.S. at 791 (guidelines mandating the use of city-provided sound equipment and technicians were content neutral); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (ban on the posting of signs on public property was content neutral).

236. See *Rock Against Racism*, 491 U.S. at 791 (explaining that the government may impose "reasonable restrictions" as long as the restrictions are content neutral, narrowly tailored to serve a significant governmental interest, and leave open enough alternative channels for the communication of the information); *United States v. O'Brien*, 391 U.S. 367, 377 (1968) ("[G]overnment regulation is sufficiently justified . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

237. *Rock Against Racism*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). To meet intermediate scrutiny, the regulation must: (1) further a significant government interest; (2) be narrowly tailored to serve that interest; and (3) leave open ample alternative modes of communication. *Id.* at 792 (quoting *Clark*, 468 U.S. at 293).

238. *Id.*

239. *Id.*; see *infra* notes 245–58 and accompanying text (explaining that a complete ban of teacher-student electronic communication is an inefficient means of preventing child sexual abuse by teachers and that such a ban fails to pass intermediate scrutiny).

communication between teachers and students outside the classroom, leaving few, if any, alternative modes of communication.<sup>240</sup>

States and school districts undeniably have a compelling interest in protecting children from sexual abuse and other physical and emotional harms.<sup>241</sup> Child sexual abuse by teachers has existed for centuries,<sup>242</sup> and although it is possible that social media could facilitate teachers in communicating with their students to establish inappropriate relationships, social media did not create the problem and has not necessarily increased the number of incidents.<sup>243</sup> Even generally speaking, personally directed communications via electronic media between a child and another person that are of serious concern to the child and parents are rare.<sup>244</sup>

The bans do not effectively further the state's interest of protecting children from sexual abuse by their teachers and thus are not narrowly tailored.<sup>245</sup> For the bans to survive intermediate scrutiny, they must further a significant government interest,<sup>246</sup> and the means

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240. See *Mo. State Teachers Ass'n v. State*, No. 11AC-CC00553, 2011 WL 4425537 (Mo. Cir. Ct. Sept. 23, 2011) (finding that often, if not always, social media is the sole method of teacher-student communication); see also Garrison, *supra* note 217 (stating that the Missouri ban completely eliminates a teacher's ability to communicate with students and parents).

241. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (“[S]afeguarding the physical and psychological well-being of a minor [is] compelling . . . .”); see also Arcamona, *supra* note 216 (insisting that state legislators and public school officials have a high interest in protecting students from sexual assault, especially by state employees such as teachers).

242. See *supra* note 10 and accompanying text (demonstrating that child sexual abuse by teachers was prevalent long before social media existed).

243. Vickery, *supra* note 203 (asserting that social media is not the problem and that instead, criminal behavior is what causes child predation, and if a teacher has ill-intentions, a law banning him or her from communicating with a student via social media will not prevent inappropriate communication with that student through other means or by violating the ban). *But see* Ramasastry, *supra* note 38 (citing to the testimony of a police officer during the hearings on the Missouri law that revealed that there had been at least four cases in which teachers used text messaging and social media to have inappropriate sexual contact with students).

244. The National School Boards Association conducted a study regarding direct communications with children via social media and found:

About one in 14 students (7 percent) say someone has asked them for information about their personal identity on a social networking site; 6 percent of parents concur. About one in 14 students (7 percent) say they've experienced self-defined cyberbullying; 5 percent of parents concur. About one in 25 students (4 percent) say they've had conversations on social networking sites that made them uncomfortable; 3 percent of parents concur.

NAT'L SCH. BDS. ASS'N, *supra* note 211, at 6.

245. *Cf. Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 529 (2001) (finding that the state demonstrated a substantial interest in preventing access to tobacco products by children and adopted an adequately narrow ban advancing that interest).

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

used to accomplish that interest must serve the end goal being sought.<sup>247</sup> Here, the complete banning of teacher-student communication via electronic media does not efficiently further the end being sought: the prevention of child sexual abuse by teachers.<sup>248</sup> Moreover, the state's interest in protecting children from sexual abuse is not furthered by the bans any more than the interest would be furthered in the absence of these bans.<sup>249</sup> Teachers seeking inappropriate contact with students are still able to initiate such contact by speaking to students in person at school, calling students via the phone, or writing notes to students on paper.<sup>250</sup> Furthermore, there has been no demonstration that social media or other websites are more prone to abuse than any other form of communication, but nevertheless, the laws treat these different forms of communication in radically different ways.<sup>251</sup>

Paralleling the overbreadth argument, these laws also do not satisfy the narrow tailoring prong under *Rock Against Racism* because they are substantially broader than necessary to achieve the government's interest.<sup>252</sup> For a regulation to be narrowly tailored it must "target[]

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247. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

248. Teachers have other means of contacting students and thus those with inappropriate intentions can find other ways to initiate communication. Ramasastry, *supra* note 38.

249. *See Rock Against Racism*, 491 U.S. at 799 ("The requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985))); *see also* Casey Chan, *Missouri Has Banned Teachers from Being Facebook Friends with Students*, GIZMODO (Aug. 1, 2011, 11:15 AM), <http://gizmodo.com/5826539/missouri-has-banned-teachers-from-being-facebook-friends-with-students> (asserting that prohibiting teachers and students from communicating through Facebook could never stop teachers from inappropriately interacting with students when teachers still see their students in real life everyday); Michelen, *supra* note 38 (explaining that it is naïve to believe that a teacher will not violate these bans if the teacher is willing to engage in sexual misconduct in violation of criminal statutes); Vickery, *supra* note 203 (arguing that a ban on teacher-student communication via social media will not prevent teachers from inappropriately communicating with their students if the teachers so desire because teachers can communicate through different means, such as hand-written notes, and can also communicate in violation of the ban).

250. *See* Ramasastry, *supra* note 38 (rationalizing that even though there have been cases in which teachers have used social media and text messaging to inappropriately contact students, banning these modes of communication will not prevent such misconduct because teachers who desire to have sexual communications with students can still do so by speaking to students at school, via phone, or by school-approved e-mail).

251. *See* Murray, *supra* note 1 (discussing the radically different ways in which the bill handles private communication between teachers and students depending on the medium).

252. *See supra* Part II.A (analyzing the bans under the overbreadth doctrine and determining that the bans prohibit a substantial amount of protected and beneficial

and eliminate[] no more than the exact source of the ‘evil’ it seeks to remedy.”<sup>253</sup> Unlike in *Rock Against Racism*, where the exact source of evil, the volume of performances, was the only target of the statute,<sup>254</sup> a ban on all teacher-student communication via electronic media does not only target the few inappropriate interactions, but instead eliminates all possible expression through the banned media.<sup>255</sup> Furthermore, applying the reasoning detailed in *Free Speech Coalition*,<sup>256</sup> the child-protection rationale at the foundation of these bans does not apply to a majority of the expression banned by the regulations.<sup>257</sup> In other words, the expression the bans target is mostly speech that does not contribute or even relate to child sexual abuse and that has no reason to be curtailed because it is either educational or beneficial to students.<sup>258</sup>

Finally, regulations banning all communication via social media and electronic media fail the third prong of intermediate scrutiny because they do not allow for ample alternative modes of communication. Unlike the regulation on the volume of performances in *Rock Against Racism*, which the Court found did not foreclose ample alternatives of communication because the guideline did not close down the forum,<sup>259</sup> here the bans close down all electronic fora that allow for exclusive communication.<sup>260</sup> Even though there may be alternative approved methods of communication provided by the school, such as e-mail, the bans preclude the vast majority of modes of communication between

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speech, and thus the bans are not effectively furthering the state’s interest in protecting children from sexual abuse).

253. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

254. *Rock Against Racism*, 491 U.S. at 802.

255. See Lieb, *supra* note 39 (expressing the concern that bans prohibit the use of media regardless of whether the media is used in the classroom or outside the classroom).

256. See *supra* notes 82–89 and accompanying text (summarizing the reasoning expounded in *Free Speech Coalition*).

257. The purpose of the bans is to protect children from inappropriate contact with their teachers; however, the bans prohibit a vast amount of appropriate and beneficial speech. See *supra* notes 183–218 (arguing the positive value of social-media use by teachers, including the opportunity to comment on public interest issues and common issues relevant to students).

258. See *supra* notes 206–14 and accompanying text (providing examples of the positive and beneficial uses of social media by teachers, such as providing a safe and comfortable space for students to discuss sensitive issues, providing extra assistance outside the classroom, getting reluctant students more involved in the material, and preparing students for the role social media will play in their adult lives).

259. *Rock Against Racism*, 491 U.S. at 802.

260. See Muray, *supra* note 1 (discussing how the Missouri ban could be extended to educational services like Blackboard, which has a private messaging feature built in).



teachers and students, especially when the banned modes are the most prevalent, if not the sole, methods of communication teachers employ today.<sup>261</sup> Although bans on teacher-student communication via electronic media are likely to fail under either an overbreadth challenge or intermediate scrutiny, there are guidelines a state or school board can implement that would achieve the state's interest in protecting children from sexual abuse without running afoul of the First Amendment.

### III. CONSTITUTIONALLY PERMISSIBLE GUIDELINES REGULATING INAPPROPRIATE TEACHER-STUDENT COMMUNICATION VIA ELECTRONIC MEDIA

There are several guidelines a state or school district can implement in order to deter inappropriate interactions between teachers and students via social media without infringing upon teachers' First Amendment rights.<sup>262</sup> Constitutionally permissible guidelines for teacher-student communication via electronic media cannot proscribe complete modes of communication and must be drawn to address the compelling governmental interest of protecting students from sexual abuse more precisely.<sup>263</sup> Although the First Amendment gives school districts tremendous leeway in disciplining educators for their speech both within and outside of school, educators still retain some protection under the First Amendment.<sup>264</sup>

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261. See, e.g., *Mo. State Teachers Ass'n v. State*, No. 11AC-CC00553, 2011 WL 4425537 (Mo. Cir. Ct. Sept. 23, 2011) (enjoining the enforcement of a ban on teachers using Internet sites that "allow exclusive access with a current or former student" because the ban had a "chilling effect" on speech).

262. See, e.g., *Hamilton County Schools Technology Acceptable Usage Agreement*, HAMILTON CNTY. DEP'T OF EDUC., available at [http://www.hcde.org/media/HCDE\\_AUP\\_Employee\\_Student.pdf](http://www.hcde.org/media/HCDE_AUP_Employee_Student.pdf) (recommending specific social-networking websites and requiring parental consent for teachers contacting students via text messages); *St. Thomas Episcopal School Social Media Policy*, ST. THOMAS EPISCOPAL SCH., available at <http://www.stthomaskids.com/socialmedia.pdf> (recognizing the importance of social media in "engaging, collaborating, learning, and sharing in the fast-moving world of the Internet" and setting forth guidelines to ensure that such social media is used responsibly). See Meredith Hines-Dochterman, *Cedar Rapids School Board Reviews Social Media Policy*, GAZETTE (Sept. 12, 2011, 8:05 PM), <http://thegazette.com/2011/09/12/cedar-rapids-school-board-reviews-social-media-policy>, for an example of a proposed social-media regulation that also acknowledges teachers' First Amendment rights and balances those rights against the school district's right to regulate the speech of employees in certain circumstances.

263. See *supra* Part II.A-B (examining why the bans would violate the First Amendment and concluding that the main problem is that the bans are not narrowly tailored because they do not effectively further the state's interest while also overreaching to volumes of protected and appropriate speech).

264. See *Connick v. Myers*, 461 U.S. 138, 145-47 (1983) (declaring that the only public employee expression that is protected by the First Amendment is speech that

Thus, states and school districts cannot impose strict bans that would infringe on the remaining free speech rights that teachers possess.

Instead, schools should inform teachers about what conduct via social media is appropriate and what conduct might be construed as inappropriate and not tolerated.<sup>265</sup> Additionally, guidelines should provide suggestions that will assist teachers in ensuring that they are utilizing social media in an acceptable manner.<sup>266</sup> For example, teachers should be told to refrain from sharing information with students that would not be appropriate to share in the school environment.<sup>267</sup> In general, teachers should refrain from sharing their private cell phone numbers, pictures, and e-mail addresses with students.<sup>268</sup> Teachers must maintain a professional tone during all communications with students.<sup>269</sup> It is wise for teachers to also involve their students' parents by giving them access to the social-media websites used for classroom and educational activities.<sup>270</sup> Moreover, teachers should be cognizant that the majority of the information they post via social media can be accessed by anyone.<sup>271</sup> Consequently, they need to monitor their accounts and manage their privacy settings to ensure no inappropriate content exists or is visible.<sup>272</sup> The content on their sites should not include criticism of

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regards a matter of public concern—all other employee speech is unprotected and thus can be prohibited and punished by the government).

265. See Hines-Dochterman, *supra* note 262 (noting that public employees need guidance in this developing area of law).

266. See Daniel Solove, *Should Teachers Be Banned from Communicating with Students Online?*, CONCURRING OPINIONS (Dec. 17, 2011), <http://www.concurringopinions.com/archives/2011/12/should-teachers-be-banned-from-communicating-with-students-online.html> (enumerating several considerations that school districts should acknowledge when formulating their social-media policies).

267. See *Social Media in the Classroom: The Digital Safety Debate (Pt. 3)*, SAFE KEEPING BLOG (Mar. 20, 2012), <http://www.ikeepsafe.org/educational-issues/social-media-in-the-classroom-the-digital-safety-debate-part-3-of-3> (finding that teachers “over-share” information via social media and suggesting that teachers only engage in academic-related conversations with students in order to avoid disciplinary actions).

268. See ONT. COLL. OF TEACHERS, PROFESSIONAL ADVISORY: USE OF ELECTRONIC COMMUNICATION AND SOCIAL MEDIA 6 (2011), *available at* [http://www.oct.ca/publications/PDF/Prof\\_Adv\\_Soc\\_Media\\_EN.pdf](http://www.oct.ca/publications/PDF/Prof_Adv_Soc_Media_EN.pdf) (discussing how to minimize risks associated with online communication by interacting with students appropriately).

269. *Id.* at 6; see Hines-Dochterman, *supra* note 262 (stating that employees are expected to maintain appropriate professional boundaries when communicating with students via social media).

270. ONT. COLL. OF TEACHERS, *supra* note 268, at 6; *cf.* *Social Media in the Classroom*, *supra* note 267 (urging teachers to get parental consent before using social media to communicate with students). Students would still be able to privately contact teachers about personal problems through other media, such as e-mail.

271. ONT. COLL. OF TEACHERS, *supra* note 268, at 4; see Hines-Dochterman, *supra* note 262 (suggesting that teachers should set privacy settings at the highest level).

272. See ONT. COLL. OF TEACHERS, *supra* note 268, at 6 (discussing how to minimize

students or employers or other impulsive, heated, or inappropriate comments.<sup>273</sup>

Further, in order to address the compelling governmental interest more precisely, school districts should set forth clear examples of inappropriate conduct and communication.<sup>274</sup> Teachers should be specifically informed that such actions as sending graphic, sexual material to students, fraternizing with students and non-students, and engaging in behavior or making remarks of a sexual nature are inappropriate and can subject them to employment termination and criminal prosecution.<sup>275</sup> By doing so, states and school districts will be targeting the exact problem they are attempting to eliminate, without prohibiting any appropriate or protected speech.<sup>276</sup> As more and more children are communicating and getting their news and information via social media, regulations banning teacher-student electronic communication not only infringe upon teachers' First Amendment rights but also upon students' education.<sup>277</sup> Guidelines informing teachers how to use social media effectively and how to conduct themselves appropriately will allow teachers to utilize electronic media in a manner that benefits students while curtailing inappropriate communication and not violating the Constitution.

#### CONCLUSION

The controversy over the use of electronic media by teachers generally and in education is still unresolved and hotly debated throughout the nation. It is undeniable that social media may expose

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the risk of inappropriate teacher-student communication via electronic media); Nancy Solomon, *Friendly Advice for Teachers: Beware of Facebook*, NPR (Dec. 7, 2011), <http://www.npr.org/2011/12/07/143264921/friendly-advice-for-teachers-beware-of-facebook> (citing to Florida's Lake County Schools social-media guidelines).

273. ONT. COLL. OF TEACHERS, *supra* note 268, at 6; *see Connick v. Myers*, 461 U.S. 138, 146–47 (1983) (holding that criticism of the school was not a matter of public concern, and thus the employee could be terminated because her speech was not protected under the First Amendment); Solomon, *supra* note 272 (describing instances when teachers spoke negatively online about students and were suspended or fired as a result).

274. *See Michelen, supra* note 38 (explaining that there are other ways to limit the exposure to inappropriate communication between students and teachers, such as educating both about appropriate behavior in school and online).

275. ANDY MANN, CALHOUN INTERMEDIATE SCH. DISTRICT, *BEST PRACTICES FOR GUIDING STAFF IN USE OF SOCIAL MEDIA 4* (2010), *available at* <http://socialmedia.guidelines.pbworks.com/f/Social+Media+Best+Practices+IV+-+Andy+Mann.pdf>.

276. *See Ramasastry, supra* note 38 (describing the purpose of the ban: to protect school-aged children from sexual predators at school).

277. *See supra* notes 206–14 and accompanying text (illustrating the benefits of social media that would be curtailed if the ban were to be implemented).

students to inappropriate material and facilitate teacher predators in contacting students; however, social media is not the enemy and the educational benefits it provides far outweigh the risks.<sup>278</sup> Indeed, Amy Hestir's testimony demonstrated that child sexual abuse by teachers occurs even without the use of social media.<sup>279</sup> Thus, targeting social media will not completely resolve the issue and arguably will not ameliorate it either. As states and school districts continue to revisit and implement electronic and social-media policies, they must be careful not to draft regulations that would abridge teachers' freedom of speech and thus run afoul of the First Amendment.

Presently, there are robust arguments for a challenge of certain state and school district bans on teacher-student communication via electronic media as facially violative of the First Amendment of the Constitution under the overbreadth doctrine and under intermediate scrutiny. The bans are overbroad due to their exceedingly sweeping scope and ineffective response to the state's interest of protecting children from sexual abuse by their teachers. Under intermediate scrutiny, these bans are unconstitutional because they do not effectively further the legitimate state's interest in protecting children from sexual abuse and are not sufficiently narrowly tailored to that end. Nevertheless, alternative effective guidelines are available—guidelines that do not run afoul of the First Amendment while furthering the interest of protecting students from sexual abuse and allowing for the rich educational benefits that such media provide. In an electronic universe, where young people rely on electronic media to acquire information, become educated about certain topics, and contribute their ideas, banning teachers from tapping into such a powerful tool will only handicap the education and innovation of our youth.

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278. See *Social Networking in Schools*, *supra* note 192 (citing several studies on the use of social media by students and summarizing the benefits reported and the misconceptions about the risks involved with its use).

279. See Muray, *supra* note 1 (discussing the Amy Hestir Student Protection Act, which was named for a student-victim of an abusive sexual relationship with a teacher that did not originate online).