# Notes

# FIRST AMENDMENT PROTECTION OF TEACHER INSTRUCTIONAL SPEECH

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## INTRODUCTION

Rarely is a constitutional controversy exemplified by a Hollywood actor and industrial hemp. Actor Woody Harrelson, of "Cheers" and "White Men Can't Jump" fame, visited tenured Kentucky fifth-grade teacher Donna Cockrel and her class on two occasions in 1996 and 1997 to discuss industrial hemp with the students.[1] He had prior official approval for the visits[2] and brought along an "entourage, including representatives of the Kentucky Hemp Museum and Kentucky Hemp Growers Cooperative Association, several hemp growers from foreign countries, CNN, and various Kentucky news media representatives."[3] The actor "spoke with the children about his opposition to marijuana use, yet he distinguished marijuana from industrial hemp, and advocated the use of industrial hemp as an alternative to increased logging."[4] He also showed the class products made from hemp and hemp seeds, a banned substance in Kentucky.[5] In July 1997, after the second visit and an uncustomary review of her teaching methods,[6] Ms. Cockrel

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1. Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1042–43 (6th Cir. 2001).

2. *Id*. The principal claimed that "he was only told that the presentation to be given was about agriculture," before the first visit. After that visit, the superintendent "adopted a new visitors policy for 'controversial' topics" and told Ms. Cockrel that "it would not be in her best interests if Harrelson made any more visits to her class." In the end, though, Ms. Cockrel followed the visitors policy and each visit was approved. *Id.*

3. *Id*. at 1042.

4. *Id*.

5. *Id*. at 1042–43.

6. *See id*. at 1044 (explaining that Ms. Cockrel was the only tenured teacher at her school to be evaluated after two years instead of the customary three).

was terminated by the school district, allegedly over concerns about her teacher performance.[7] On June 4, 1998, Ms. Cockrel filed suit in federal district court, claiming that she was terminated in retaliation for exercising her First Amendment right to free speech by inviting Mr. Harrelson to make a presentation about industrial hemp to her class.[8]

Although Ms. Cockrel ultimately prevailed when the Sixth Circuit reversed the district court and held her speech was constitutionally protected,[9] difficult issues remain. This odd set of facts raises a number of important questions. For example, how should the courts balance the right of teachers to speak freely as individuals with the right of schools to control their message to students? Who controls, and who should control, curricula development? To what extent should schools be allowed to homogenize, and teachers be allowed to personalize, curricula? How should the law arrive at the correct balance between exposing students to a diversity of ideas to stimulate independent thought, and impressing upon students lasting societal values? The stakes are high, as the answers to these questions implicate everything from the civil liberties of individual citizens in their roles as governmental functionaries, to the homogeneity of the government's message to students and democracy's need for young people to develop the ability to thing independently and follow societal norms.

This Note argues that the current tests for deciding cases involving First Amendment protection of teacher instructional speech are inappropriate, and that a hybrid test should be adopted. Part I discusses background issues and introduces the two precedents currently used to decide instructional speech cases, *Hazelwood* and *Pickering*. Part II describes the evolution of the *Pickering* test and analyzes its benefits and shortcomings. Part III similarly evaluates the *Hazelwood* test. Finally, Part IV advocates the use of a hybrid test to decide future instructional speech cases and explores the possible outcomes of such a test. This Note concludes that a hybrid test would

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7. *See id.* at 1045 (indicating that Ms. Cockrel was terminated for deficient "communication with parents regarding student performance and teacher expectations; documentation of lesson plans; showing 'consistent sensitivity to individual academic, physical, social, and cultural differences and respond[ing] to all students in a caring manner;' and acting in accordance with laws and with school regulations and procedures").

8. *Id*.

9. *Id*. at 1055.

expand teacher freedom in the classroom by applying different standards for content and process restrictions of instructional speech.

## I. PRELIMINARY ISSUES

Although the Supreme Court has repeatedly held that public school teachers have First Amendment rights within the confines of the schoolhouse, it has never specifically addressed the degree of protection that the First Amendment provides for in-class instructional speech.[10] The protection of in-class speech implicates at least two competing interests: a teacher's right to expression under the First Amendment and a school system's right to set its curriculum and restrict the speech of its employees.[11] While teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[12] nor does the state discard its interest in safeguarding its message by regulating the speech of its employees.[13]

Further complicating the issue is the Supreme Court's conception of the goals of the public school system. At times, the Court has suggested that education demands open-mindedness and expression of multiple opinions,[14] but at others it has indicated that primary and secondary schools play a unique role in inculcating fundamental societal values.[15] The competing and sometimes conflicting aims of the

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10. Cal. Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1148 (9th Cir. 2001); Kara Lynn Grice, Note, *Striking an Unequal Balance: The Fourth Circuit Holds that Public School Teachers Do Not Have First Amendment Rights to Set Curricula in* Boring v. Buncombe County Board of Education, 77 N.C. L. REV. 1960, 1960 (1999); Jacinto Zavala, Comment, *Teachers Beware! You May Be Liable Under Proposition 227:* California Teachers Association v. State Board of Education, 37 U.S.F. L. REV. 493, 499 (2003).

11. Grice, *supra* note 10, at 1960.

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

13. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995) (stating that when a school speaks through its employees, it can "regulate the content of what is or is not expressed").

14. Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693, 718–19 (1990) (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969), and W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

15. The Supreme Court in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), held of the importance of such a role:

> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.

*Id.* at 683; *see also* Ambach v. Norwick, 441 U.S. 68, 76–80 (1979).

educational system are to expose students to a broad variety of ideas and "develop inquisitive minds and independent thought" by promoting tolerance of unpopular and controversial views, and provide "intellectual and moral guidance" by endorsing community values necessary to the maintenance of a democracy.[16] The first goal cannot be accomplished without giving teachers a measure of free expression and academic freedom, while the second justifies limitations on teachers' classroom expression.[17]

This Part outlines the competing interests implicated by instructional speech cases. First, Subpart A analyzes teachers' interests in freedom of expression as citizens and academics. Second, Subpart B examines the state's interest as an employer in regulating the speech of its employees. Third, Subpart C considers students' interest in being exposed to a variety of viewpoints. Finally, Subpart D briefly introduces the two cases currently used to decide instructional speech cases.

### *A. Teachers' Interests in Free Expression and Academic Freedom*

To effectuate the goal of introducing students to a broad spectrum of ideas, courts have recognized some constitutional academic freedom protections within the classroom, at least for college and university professors.[18] Teachers enjoy two legally protected types of academic freedom. First, they have the substantive right to choose a teaching method that serves a demonstrated educational purpose. Second, courts acknowledge a procedural right to not be discharged for using a teaching method that was not proscribed by a regulation, or for which, if forbidden, there was not adequate notice given of the restriction.[19]

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16. Krizek v. Bd. of Educ., 713 F. Supp. 1131, 1137 (N.D. Ill. 1989); Grice, *supra* note 10, at 1995.

17. Grice, *supra* note 10, at 1995.

18. *E.g.*, Keyishian v. Bd. of Regents of the Univ. of N.Y., 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is . . . a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."); Mailloux v. Kiley, 323 F. Supp. 1387, 1390 (D. Mass. 1971) ("[A] public school teacher has not only a civic right to freedom of speech both outside and inside the schoolhouse, but also some measure of academic freedom as to his in-classroom teaching." (citations omitted)).

19. *Mailloux*, 323 F. Supp. at 1390.

Despite the judicial recognition of academic freedom, though, the idea has not been extended beyond colleges and universities to secondary and elementary schools, and there is some question as to whether the doctrine extends beyond normal First Amendment free speech rights. The courts' reluctance to expand academic freedom rights to secondary and elementary school teachers results from the age and maturity of the students involved and the aforementioned dueling purposes of public schools to expose students to various ideas while inculcating them with societal values.[20] Colleges and universities, on the other hand, can focus exclusively on the former goal because of the relative maturity of their student audience. At least one court has held, however, that to the extent that there are any academic freedom rights beyond normal First Amendment freedom of speech, that right adheres to the college or university as a whole, rather than individual professors.[21] The Fourth Circuit held that academic freedom is a professional norm, not a legal right, and there is no right to academic freedom that extends beyond protection against dismissal for the exercise of one's First Amendment rights.[22] Under this holding, the two types of recognized academic freedom are imbedded in normal First Amendment rights, not a special right to academic freedom.[23] In support, the court notes that the Supreme Court has never set aside a state regulation on the ground that it infringed upon the First Amendment right to academic freedom.[24] Because most courts do not recognize a separate constitutional right to academic freedom, this Note will focus exclusively on the protection of instructional teacher speech by the more general First Amendment freedom of speech that all citizens enjoy.

### *B. Schools' Interests in Regulating Speech as Public Employers*

A school system's interest in restricting its employees' speech differs significantly from the state's interest in regulating the speech

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20. Grice, *supra* note 10, at 1995.

21. *E.g.*, Urofsky v. Gilmore, 216 F.3d 401, 410 (4th Cir. 2000) ("Our review of the law, however, leads us to conclude that to the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors . . . .").

22. *Id.* at 411.

23. *See id.* at 412 (explaining that, to the extent the Supreme Court has recognized a right of academic freedom at all, it is an institutional right to self-governance in academic affairs, and thus not a right of the individual professor).

24. *Id.*

of ordinary citizens.[25] The government can regulate the content of expression when it is the speaker and when it enlists private entities to communicate its message.[26] That is, when the government appropriates public funds to promote a particular policy of its own, it is entitled to say what it wishes, and when the government assigns public money to private entities to transmit its message, it "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted."[27] In the classroom context, this means that when the government funds speech with the goal of promoting a diversity of viewpoints (rather than the government's own view), it cannot restrict that speech.[28] The question, of course, is to what degree the government can restrict speech when it is paying teachers to both transmit its own message and to expose students to various viewpoints.

### *C. Protecting Students' Right to Hear*

The primary justification for recognizing protection of teachers' instructional speech is to defend the interest of the teacher in speaking on societal issues and/or influencing the curriculum. At least one federal court has suggested, however, that students' *right to hear* may serve as a basis for protecting teachers' *right to speak*.[29] Under that theory, safeguarding teacher instructional speech is mainly for the benefit of the students and community.[30] This intersects with the goal of the public school system to expose students to various ideas in an effort to foster intellectual curiosity and independent thought. Regulating teacher speech, the argument goes, deprives students of the diversity of views necessary to further their intellectual development and leaves them unprepared for the unfiltered cacophony of ideas outside the schoolyard.

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25. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995) (recognizing that "when the State is the speaker, it may make content-based choices"); Victor v. McElveen, 150 F.3d 451, 455 (5th Cir. 1998) ("The government has legitimate interests in regulating the speech of its employees, however, that differ significantly from its interests in regulating the speech of people generally.").

26. *Rosenberger*, 515 U.S. at 833.

27. *Id*. (citing Rust v. Sullivan, 500 U.S. 173, 196–200 (1991)).

28. *See id*. at 834 ("It does not follow . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.").

29. Krizek v. Bd. of Educ., 713 F. Supp. 1131, 1137 (N.D. Ill. 1989).

30. *Id.*

### D. The Two Tests: Pickering and Hazelwood

Because the Supreme Court has not specifically ruled on the matter of First Amendment protection for teachers' in-class speech, lower courts generally use one of two tests developed by the Court in other contexts:[31] *Pickering v. Board of Education*,[32] and *Hazelwood School District v. Kuhlmeier*.[33] Discussed in greater detail in Parts II and III, respectively, the facts of *Pickering* have to do with out-of-class speech by a teacher to a much broader audience than students,[34] while *Hazelwood* deals with student speech.[35] The use of the tests set forth in *Pickering* and *Hazelwood* demonstrates the difficulty of deciding instructional teacher speech cases without a clear Supreme Court precedent. Neither fact pattern is an ideal starting point for espousing a test to decide whether in-class speech by public school teachers is protected by the First Amendment.

## II. THE *PICKERING* TEST

Although *Hazelwood* has become the dominant test for instructional speech cases, the Fourth and Fifth Circuits have both used the *Pickering* test of whether the speech in question involves a matter of public concern.[36] First, in *Pickering v. Board of Education* a public school teacher was fired for sending a letter to a local newspaper critical of the way the school board and superintendent had handled past proposals to raise new revenue.[37] The Court used the test of whether the teacher's speech was made as a citizen commenting on matters of public concern, as opposed to as an employee speaking on matters of private concern, to decide whether the letter in question was protected by the First Amendment.[38] Once

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31. Grice, *supra* note 10, at 1975; Zavala, *supra* note 10, at 499.

32. 391 U.S. 563 (1968).

33. 484 U.S. 260 (1988).

34. *Pickering*, 391 U.S. at 564–65.

35. *Hazelwood*, 484 U.S. at 260.

36. Gary Young, *Teaching English in English: It's the Law*, NAT'L L.J., Sept. 24, 2001, at B6, *available at* http://onenation.org/0109/092401.htm.

37. *Id*. at 564–65.

38. *See id*. at 568 (stating that public school teachers may not be constitutionally compelled to relinquish the First Amendment rights they would otherwise have as citizens to speak on matters of public concern); Grice, *supra* note 10, at 1975–76 ("[Courts applying *Pickering*] have determined that when a teacher—a government employee—is speaking as a citizen on a matter of public concern, her speech is protected under the First Amendment, but when she is speaking as a government employee about her own personal interest, her speech is not protected."

it decided that the speech was on a matter of public concern, the Court balanced the interest of the teacher in making the statement against the interest of the government as an employer in promoting the efficiency of the public services it provided.[39] Ultimately, the Court held that there was no legal basis for the teacher's dismissal because the speech regarded a matter of public concern, the teacher's interest in making the statement outweighed the state's interest in restricting it, and the comment was not reckless or knowingly false.[40]

Under the *Pickering* test, if a teacher's speech is not on a matter of public concern, a school can constitutionally regulate it.[41] If the speech involves a matter of public concern, however, the court uses a balancing test to decide whether the school's interest as an employer in workplace efficiency and lack of disruption outweighs the teacher's interest in expression.[42] The *Pickering* test aims to recognize the enhanced interest of schools in regulating the speech of their employees while not allowing administrators to compel teachers "to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work."[43]

### *A. Rationale for Applying the Pickering Test*

*Pickering* protects the right to comment on matters of public concern because doing so is "'more than self-expression; it is the

(footnotes omitted)); Zavala, *supra* note 10, at 500 ("Under *Pickering*, a public employee's speech effectively 'receives no First Amendment protection unless it involves a matter of public concern.'" (quoting Cal. Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1149 n.6 (9th Cir. 2001))). *But see* Connick v. Myers, 461 U.S. 138, 147 (1983) ("We do not suggest, however, that [plaintiff's] speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment.").

39. *See Pickering*, 391 U.S. at 568–69 ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."); Miles v. Denver Pub. Sch., 944 F.2d 773, 777 (10th Cir. 1991) ("*Pickering* established a test that first asks whether a public employee's expression addresses a matter of public concern and then balances that employee's interest in making the statement with the interests of the government in 'promoting the efficiency of the public services it performs.'" (quoting *Pickering*, 391 U.S. at 568)).

40. *Pickering*, 391 U.S. at 574.

41. *See supra* note 38 and accompanying text.

42. *See supra* note 39 and accompanying text.

43. *Pickering*, 391 U.S. at 568; *see also* Clarick, *supra* note 14, at 699 (comparing the school's interests as an employer with the teacher's interests as a citizen).

essence of self-government.'"[44] The right to lend one's voice to the debate on public issues is fundamental to democracy.[45] The courts that use the *Pickering* analysis recognize this weighty interest and hold that a public employees do not have to relinquish their First Amendment rights to comment on matters of public concern by virtue of government employment.[46]

Competing with the citizen-teacher's right to speak on matters of public concern is the school's interest in ensuring workplace efficiency as well as employee discipline and harmony.[47] Under *Pickering*, this employer interest outweighs teachers' interests in free expression when the speech does not involve a matter of public concern, and the school can thus regulate the speech.[48] When teacher speech implicates the significant First Amendment interest of commenting on a matter of public concern, the school's interest as an employer does not disappear, but must be balanced against the teacher's right.[49] This structure for deciding whether speech is protected takes into account the interests of both parties.[50] It does not lightly dismiss teacher creativity and the need to foster debate within the classroom in the name of employee discipline and the school

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44. Connick v. Myers, 461 U.S. 138, 145 (1983) (quoting Garrison v. Louisiana, 379 U.S. 64, 75 (1964)).

45. *See id*. (recognizing the importance of the First Amendment right to comment on matters of public concern).

46. *E.g.*, *Pickering*, 391 U.S. at 568 ("To the extent that the Illinois Supreme Court's opinion [suggests] that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest . . . , [that premise] has been unequivocally rejected in numerous prior decisions of this Court."); Keyishian v. Bd. of Regents of the Univ. of N.Y., 385 U.S. 589, 605–06 (1967) ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." (citation omitted)); Urofsky v. Gilmore, 216 F.3d 401, 406 (4th Cir. 2000) ("It is well settled that citizens do not relinquish all of their First Amendment rights by virtue of accepting public employment." (citation omitted)).

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

48. *See supra* note 38 and accompanying text (highlighting the distinction between a teacher speaking as a citizen on a matter of public concern and a teacher speaking as a government employee).

49. *See supra* note 39 and accompanying text.

50. *See* Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 801–02 (5th Cir. 1989) ("Our decision should not be misconstrued as suggesting that a teacher's creativity is incompatible with the first amendment, nor is it intended to suggest that public school teachers foster free debate in their classrooms only at their own risk or that their classrooms must be 'cast with a pall of orthodoxy.'").

administration's conception of workplace efficiency.[51] Nor does the test derogate the employer's interest out of hand in response to any claim of First Amendment privilege by a teacher.

### *B. Defining Matters of Public Concern*

To prevail under *Pickering*, plaintiffs must almost invariably prove that their speech touches on a matter of public concern and that their interests in expression as citizens outweighs the state's interest as an employer in promoting the efficiency of the public services it performs through its employees.[52] Nonetheless, the question of what qualifies as a matter of public concern remains. Generally, speech involves a matter of public concern when it relates to an issue of "political, social, or other interest to a community."[53] To determine whether speech meets that test, courts examine the "content, form, and context" of the speech in light of the entire record,[54] with the content superseding form and context in importance.[55] Even if a public employee does not communicate in the form or context of a public airing, the speech touches on a matter of public concern so long as the content relates to a social, political, or other community concern.[56] While public employees need not make a public announcement for the speech to touch upon a matter of public concern, they cannot simply remain mute, internalize their concerns about censorship, and afterwards contend that their speech was on a matter of public concern.[57] For example, a public school teacher may not remain quiet about what she perceived as unconstitutional censorship of her teaching until her employment contract was not renewed and still receive protection under *Pickering*.[58] Even though

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51. *Id*.

52. *See* Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1048 (6th Cir. 2001) (giving the requirements for a public employee to establish a claim of First Amendment retaliation).

53. Connick v. Myers, 461 U.S. 138, 146 (1983); Urofsky v. Gilmore, 216 F.3d 401, 406 (4th Cir. 2000).

54. *Connick*, 461 U.S. at 147–48; *Urofsky*, 216 F.3d at 406.

55. Grice, *supra* note 10, at 1978.

56. *See Cockrel*, 270 F.3d at 1052 ("[E]ven if a public employee were acting out of a private motive with no intent to air her speech publicly. . . so long as the speech relates to matters of 'political, social, or other concern to the community,' as opposed to matters 'only of personal interest,' it shall be considered as touching upon matters of public concern." (quoting *Connick*, 461 U.S. at 146–49)).

57. Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 800 (5th Cir. 1989).

58. *Id.* at 799–800.

context and form are normally not the primary issues, they are considered in the analysis.

Some courts have held that whether the speech in question is primarily made in the public employee's role as a citizen or an employee, i.e. the speech's context or form, is critical to the determination of whether the speech concerns a public matter.[59] Other courts have expressly disclaimed this position, contending that the speaker's role is less important than the actual content of the speech. In other words, these courts consider whether the content of the speech actually involves matters related to the community's social and political concerns, rather than matters of private interest.[60] Under the latter inquiry, it is possible for speech to be "mixed," where the communication is made not only in the roles of both citizen and employee, but also involves matters of both public and private concern.[61] So long as any part of the speech relates to matters of public concern, the court must use the *Pickering* analysis and its associated balancing test.[62]

As critics of the Pickering test note, a focus on the employee's role leads to an essentially predetermined outcome for teacher speech cases.[63] That is, if one contends that anytime an employee is being paid to speak he is acting in his role as an employee, the First Amendment would afford essentially no protection for teacher instructional speech because the very act of teaching is what the employee is being paid to do.[64]

The guidelines for describing a matter of public concern discussed above are beneficial as general rules, but "[t]he definition of 'matters of public concern' is imprecise,"[65] so concrete examples of qualifying and nonqualifying speech might be more useful. Examples of public employee speech touching upon matters of public concern

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59. *E.g.*, *Urofsky*, 216 F.3d at 407.

60. *E.g.*, *Cockrel*, 270 F.3d at 1052.

61. *Id*. at 1052 n.5.

62. *Id*.; *see also* Rahn v. Drake Ctr., Inc., 31 F.3d 407, 411 (6th Cir. 1994).

63. *See id.* at 1051 (criticizing the Fourth and Fifth Circuits for deciding that when teachers are choosing a curriculum, they are speaking as employees on a private matter, rather than as citizens on matters of public concern).

64. *See id*. at 1051–52 ("Thus, when teaching, even if about an upcoming presidential election or the importance of our Bill of Rights, the Fourth and Fifth Circuits' reasoning would leave such speech without constitutional protection, for the teacher is speaking as an employee, and not as a citizen.").

65. Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 798 (5th Cir. 1989).

include: a public school teacher sending a letter to the local newspaper critical of the school administration's past handling of proposals to raise new revenue;[66] a public school teacher inviting a presenter on industrial hemp to her class;[67] and a deputy sheriff criticizing his superior for possible racial discrimination.[68] Illustrations of speech not held to be touching a matter of public concern include: a district attorney disbursing a questionnaire about workplace morale to fellow employees that implied misconduct by her superior;[69] a public school teacher's silence about what she perceived as unconstitutional censorship of her teaching until her employment contract was not renewed;[70] and professors accessing sexually explicit materials on state computers.[71] Perhaps the difference between the courts' decisions is that speech held as touching upon matters of public concern addresses macro, community-wide issues like school funding, substance legalization, and racism. On the other hand, unprotected speech relates to more private concerns like intraoffice politics.

### *C. The Balancing Test*

Once a court has answered the threshold question of whether the speech in question touches upon a matter of public concern, it balances the interest of the employee in commenting on such matters against the interest of the state employer in delivering efficient public services.[72] Thus, a public school that retaliates against a teacher engaging in speech involving a public concern does not automatically violate the First Amendment.[73] In administering the balancing test, courts "'consider whether an employee's comments meaningfully

66. Pickering v. Bd. of Educ., 391 U.S. 563, 571 (1968).

67. *Cockrel*, 270 F.3d at 1051.

68. Victor v. McElveen, 150 F.3d 451, 455–56 (5th Cir. 1998).

69. Connick v. Myers, 461 U.S. 138, 148 (1983).

70. *Kirkland*, 890 F.2d at 799–800.

71. Urofsky v. Gilmore, 216 F.3d 401, 409 (4th Cir. 2000).

72. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568–69 (1968) ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."); Miles v. Denver Pub. Sch., 944 F.2d 773, 777 (10th Cir. 1991) ("*Pickering* established a test that first asks whether a public employee's expression addresses a matter of public concern and then balances that employee's interest in making the statement with the interests of the government in 'promoting the efficiency of the public services it performs.'" (quoting *Pickering*, 391 U.S. at 563).

73. *Kirkland*, 890 F.2d at 799.

interfere with the performance of her duties, undermine a legitimate goal or mission of the employer, create disharmony among co-workers, impair discipline by superiors, or destroy the relationship of loyalty and trust required of confidential employees.'"[74]

Many of the considerations embedded in the balancing test are the same, or at least tangential to, the analysis of whether speech is related to a matter of public concern in the first place. The factors in the balancing test turn on whether the court defines the speech as commenting on matters of public concern. Taking an example from above, if a court decides that the speech of a public school teacher in writing a letter to the local newspaper criticizing the administration about school funding implicates a matter of public concern (funding of schools) instead of the private concern of intraoffice squabbling, it is unlikely to find that it "meaningfully interferes with the performance of her duties, undermines a legitimate goal or mission by the employer". Likewise, in holding that professors' criticism of a state policy on internet access implicates a purely private interest, the court may be focusing on the speech's "meaningful[] interfer[ence]" with the performance of the professors' duties. How a court characterizes speech as either a matter of public or private concern likely goes a long way toward determining whether the interests of the employer or employee outweigh the other. In essence, the threshold and balancing tests are not clearly distinct from one another.

Although speech that involves matters of public concern rarely causes any of the work interferences triggering the balance of interests to shift in the employer's favor, it sometimes might. For example, the balancing test would deny protection to speech in situations where "the need for confidentiality between the governmental employer and employee is so great, or the relationship is so personal and intimate in nature, that public criticism of the employer may furnish grounds for dismissal without violating the first amendment."[75] Thus, the government is justified in restricting intelligence officers from publicly speaking about antiterrorism operations because of the absolute necessity for confidentiality. A school's interest will rarely outweigh a teacher's in the educational

74. Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1053 (6th Cir. 2001) (quoting Williams v. Kentucky, 24 F.3d 1526, 1536 (6th Cir. 1994)).

75. *Kirkland*, 890 F.2d at 799 (discussing *Pickering*'s recognition of the need to balance competing interests).

context though, because as Justice White writes in his separate opinion in *Pickering*:

> The State may not fire the teacher for making [innocently or negligently false statements involving a matter of public concern] unless, as I gather it, there are special circumstances, not present in this case, demonstrating an overriding state interest, such as the need for confidentiality or the special obligations which a teacher in a particular position may owe to his superiors.[76]

Justice White also dissented in part to protest the majority's refusal to decide whether a knowingly or recklessly false statement that touches upon a matter of public concern is protected under the First Amendment if the statement had none of the "harmful effects" of interfering with the operation of the school or the individual teacher's duties.[77] The majority had stated that because the statements in *Pickering* were not knowingly or recklessly false, they could not decide that question.[78] Justice White contended that "deliberate or reckless falsehoods" deserve no protection under the First Amendment regardless of whether there were any harmful consequences therefrom.[79] Again, the issue of how a court defines speech as relating to a matter of public concern rears its head. If a statement is knowingly or recklessly false, it likely will not be found to legitimately comment on a matter of public concern, thus precluding First Amendment protection. However, if a court does find it to be touching on a matter of public concern, the court will probably have already decided that there was little harm incurred from the statement, hijacking the balancing test in favor of protection.

### *D. Criticism of the* Pickering *Test*

The most important criticism of applying *Pickering* to instructional speech cases is that the facts of the case do not exactly correspond to teacher speech within the classroom.[80] As a result, the case is an inappropriate starting point from which to analyze the

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76. *Pickering*, 391 U.S. at 582 (White, J., concurring in part and dissenting in part).

77. *Id.* at 583.

78. *Id.* at 575 n.6 (majority opinion) ("Because. . .appellant's statements were not knowingly or recklessly false, we have no occasion to [examine] whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment.").

79. *Id.* at 583–84 (White, J., concurring in part and dissenting in part).

80. *See supra* note 34 and accompanying text.

constitutional protection of instructional speech.[81] *Pickering* provides protection for a teacher's political expression in public, but does not directly deal with in-class speech or the right of students to hear diverse viewpoints in the classroom.[82] Because *Pickering* involved speech outside the classroom, its test fails to account for the importance of social value education and exposure to diverse opinions.

Second, the constitutionality of classroom speech regulations should not hinge upon the public or private nature of the speech because, whether public or private, teachers' speech gives students ideas that may be part of the public debate and educates students about the process of rational discourse.[83] Thus, while a teacher's speech may not touch on a matter of public concern, it still has a significant effect on society by instructing students on the process of public debate and exposing students to ideas they might encounter therein.[84] This criticism returns to the idea that the *Pickering* test does not reflect the goal of exposing students to diverse ideas. A test primarily concerned with the subject matter of the speech cannot account for the message's inherent positive value, regardless of the content.

## III. THE *HAZELWOOD* TEST

### *A. The Evolution of* Hazelwood

Lower courts have used the test enunciated in the 1988 case *Hazelwood School District v. Kuhlmeier*.[85] In that case, the student staff of a high school newspaper claimed First Amendment infringement for administration censorship of their articles.[86] The Court found that the administration could restrict the students' speech so long as the actions of the educators were "reasonably related to a legitimate pedagogical concern."[87] Thus, for the

81. Clarick, *supra* note 14, at 701.

82. *Id*.

83. *See id*. at 702 (offering that instead, "the extent of permissible regulation of a teacher's speech" should be determined by "the special concerns accompanying a teacher's in-class speech").

84. *Id*.

85. 484 U.S. 260 (1988).

86. *Id*. at 260.

87. *Id*. at 273.

restriction to be valid, the school's pedagogical interests must be identified and evaluated as to their legitimacy, and the school's actions must reasonably relate to the pedagogical interests it has identified.[88] Unlike in *Pickering*, the Court in *Hazelwood* decided that there was no violation of First Amendment rights because the regulation of speech was valid as a protection of the school's pedagogical interests.[89]

The First, Second, Seventh, Eighth, and Tenth Circuits have adopted the *Hazelwood* test to decide instructional speech cases.[90] In these circuits, schools can regulate in-class teacher speech for reasons reasonably related to legitimate pedagogical concerns.[91] *Hazelwood* addressed student speech in a high school newspaper, rather than in-class teacher speech.[92] *Hazelwood* was first transposed from student speech cases to elementary school teacher speech cases in the Tenth Circuit.[93] There, the court cited the case to support the holding that, in general, if in-school speech is "part of the school curriculum or school-sponsored activities," it is subject to greater restriction than personal expression such as the protest armbands in *Tinker*.[94] The first instance of *Hazelwood* being used in a higher education case was in the Eleventh Circuit.[95] The court extended the Tenth Circuit's earlier

88. Grice, *supra* note 10, at 1986.

89. *Hazelwood*, 484 U.S. at 260–61.

90. Young, *supra* note 36, at B6.

91. *Id*.

92. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 260 (1988).

93. *See* Roberts v. Madigan, 921 F.2d 1047, 1059 (10th Cir. 1990) (upholding the action of school authorities forbidding a fifth grade teacher from keeping two religious books in his classroom library and reading from the Bible during the class silent reading period).

94. In distinguishing between in-class and out of class speech, the *Roberts* court held:

> We find no reason here to draw a distinction between teachers and students where classroom expression is concerned. Thus, if the speech involved is not fairly considered part of the school curriculum or school-sponsored activities, then it may only be regulated if it would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.' If, on the other hand, the conduct endorses a particular religion and is an activity 'that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school,' creating the requisite state action, then the activity infringes on the rights of others and must be prohibited. (citations omitted).

*Roberts*, 921 F.2d at 1057; *see also* E. Edmund Reutter Jr., *Academic Freedom Advisory: Be Wary of the Long Arm of* Kuhlmeier, 89 Educ. L. Rep. (West Publ'g Co.) 347, 348–49 (May 1994) (discussing the Tenth Circuit's application of *Hazelwood* to elementary school teacher speech).

95. *See* Bishop v. Aranov, 926 F.2d 1066, 1078 (11th Cir. 1991) (disallowing a university professor from holding "optional" classes to espouse his religious views because terming the

ruling by deciding that while student expression can be more easily separated as independent from the school, teacher speech is more likely to be taken as "directly and deliberately representative of the school."[96]

The Tenth Circuit took another step towards blurring the line between student and teacher speech when it first used *Hazelwood* in a high school instructional speech case,[97] despite the fact that the parties agreed, both before the district court and on appeal, that the issue was controlled by *Pickering*.[98] There, the court justified using the pedagogical concerns test because the state had distinctive responsibilities as an educator, contending that while *Pickering* protected the interests of the state as an employer, it did not sufficiently recognize its interests as an educator.[99] The court also held that there was no reason to distinguish between in-class student and teacher speech for the purposes of deciding whether it was protected by the First Amendment.[100] It stated that the school's interests in regulating classroom speech—for example ensuring that students learned whatever lessons a particular exercise were designed to teach without being exposed to materials unsuitable for their maturity level—were implicated by both student and teacher expression.[101] From the initial judicial leap that speech involving curricular concerns is subject to greater school restrictions than ordinary classroom speech, to the total amalgamation of student and teacher speech, *Hazelwood* has steadily evolved as a standard for deciding instructional speech cases.

### *B. The Impact of Hazelwood*

*Hazelwood* marked a tipping point in the way the courts viewed First Amendment instructional speech cases. Prior to *Hazelwood*, when the *Pickering* test dominated, the vast majority of teachers

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meetings so gave the illusion of official sanction, which might have unduly pressured students into attending and adopting his beliefs).

96. *Id*. at 1073; *see also* Reutter, *supra* note 94, at 349 (observing that the Eleventh Circuit characterized *Roberts* as founded on *Hazelwood*).

97. *See* Miles v. Denver Pub. Sch., 944 F.2d 773, 774 (10th Cir. 1991) (affirming summary judgment against a First Amendment claim by a high school teacher who was disciplined for comments made in class).

98. Reutter, *supra* note 94, at 350–51.

99. *Id*. at 351.

100. *Id.*

101. *Id*.

alleging violations of their First Amendment rights prevailed in the courts.[102] Most pre-*Hazelwood* cases emphasized teachers' professional judgment and their right to academic freedom in the classroom, rather than the right of the school as an employer to regulate the speech of its employees.[103] The cases generally turned on the school's lack of notice to the teacher of the speech restriction—school officials having no policy prohibiting the teacher's conduct, acting after the fact, and then being displeased with a particular assignment or discussion.[104] In cases where the teacher's First Amendment claims were rejected, the administration generally had a separate valid ground for supporting their action.[105] Since the *Hazelwood* decision, though, only a few courts have applied the *Pickering* test to in-class speech cases,[106] with most courts opting for the test established in the more recent Supreme Court decision.

### *C. The Importance of Notice*

Notice is essential to instructional speech cases, like all First Amendment speech regulation cases, because for a restriction of otherwise free speech to be allowed, the Due Process Clause of the Fourteenth Amendment requires notice that the conduct or speech at issue is prohibited.[107] In order to avoid unconstitutionality on vagueness grounds, such notice must be in a form that would allow an

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102. Grice, *supra* note 10, at 1989.

103. *Id*.

104. *Id*. at 1989–99; *see* Cary v. Bd. of Educ., 598 F.2d 535, 541 (10th Cir. 1979) (Doyle, J., concurring) (finding lack of notice to be a decisive factor in suits that teachers won prior to 1979).

105. *See Cary*, 598 F.2d at 542 (Doyle, J., concurring) (citing Adams v. Campbell County Sch. Dist., 511 F.2d 1242 (10th Cir. 1975; Brubaker v. Bd. of Educ., 502 F.2d 973 (7th Cir. 1974); Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972).

106. *See* Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1187–88 (6th Cir. 1995) (applying the *Pickering* public concerns test to a university basketball coach's locker room speech employing racial slurs); Blum v. Schlegel, 18 F.3d 1005, 1012 (2d Cir. 1994) (applying the *Pickering* test to a law school professor's speech advocating legalization of marijuana and criticizing national drug policy); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 800 (5th Cir. 1989) (applying the *Pickering* test to a high school teacher's supplementary reading list); Scallet v. Rosenblum, 911 F. Supp. 999, 1011 (W.D. Va. 1996) (applying the *Pickering* test to the speech of a university professor because "the 'significant interests' discussed in *Hazelwood* that justify the restriction . . . of teachers' in-class speech, are not implicated to the same extent, if at all, in the context of higher education"), *aff'd per curiam* 106 F.3d 391 (4th Cir. 1997) (unpublished table decision).

107. *See, e.g.*, Dean v. Timpson Indep. Sch. Dist., 486 F. Supp. 302, 309 (E.D. Tex. 1979) (holding that a school district violated the due process rights of a public school teacher by firing her without notice that her conduct was forbidden).

average person to understand what conduct is prohibited.[108] Because proscription of teacher speech without prior notice could cause educators to internally censor their speech out of fear, thus defeating the goal of exposing students to a variety of ideas, courts stringently apply the vagueness doctrine in instructional speech cases.[109] While a school must be clear in its notice to teachers of prohibited material, it need not detail exactly what is offensive about the restricted speech[110] or expressly prohibit every imaginable inappropriate conduct.[111] Indeed, courts have directly rejected the notion that school administrations should try to proscribe all conceivable offending behaviors because it would be impossible to do so.[112]

In one post-*Hazelwood* decision, a federal court went so far as to separate the universe of instructional speech cases into two groups—those where the teacher's action violates the administration's predetermined curriculum content rules (notice given), and those where the teacher is disciplined for his expression despite the fact that it violated no specific administrative rule (no notice).[113] The court held that if notice was given, the teacher had no redress because the school's decision to censor that content was within its right to control the curriculum.[114] The disciplinary action taken by the school was not in response to the teacher's exercise of his First Amendment rights,

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108. *See id.* at 305 (finding that a teacher was not given sufficient notice because "either [the teacher] was never issued a warning . . . or the warning was of an ambiguous or vague nature, such that a reasonably prudent person could not discern what conduct the warning sought to prevent").

109. *See id.* at 309 ("Governmental regulation of First Amendment activities has traditionally been required to be precise. An offhand comment to [the teacher], the meaning of which was likely to be vague or ambiguous, cannot pass Constitutional muster . . . ." (citation omitted)).

110. *See* Muller *ex rel.* Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1542 (7th Cir. 1996) ("[W]e reject [plaintiff's] implication that a school must spell out in intricate detail precisely what is 'libelous or obscene language'. . . or which materials 'will greatly disrupt or materially interfere with school procedures and intrude into school affairs or the lives of others.'" (quoting RACINE UNIFIED SCH. DIST., CODE OF STUDENT RESPONSIBILITIES AND RIGHTS § 6144.11 (1994–1995))).

111. Ward v. Hickey, 996 F.2d 448, 454 (1st Cir. 1993) ("[W]e do not hold that a school must expressly prohibit every imaginable inappropriate conduct by teachers.").

112. *Id.*; Krizek v. Bd. of Educ., 713 F. Supp. 1131, 1140 (N.D. Ill. 1989).

113. *Krizek*, 713 F. Supp. at 1137–38 (noting that the "two types of cases involving teachers' expression in the classroom" are "cases involving curriculum content rules promulgated by the school administration and challenged by teachers" and "cases where a teacher is disciplined for expression in the classroom, despite the fact that the expression in question violated no specific rule").

114. *Id.* at 1139.

but rather to his flaunting a legitimate administrative rule.[115] If, on the other hand, the teacher had notice, the court must decide whether regulation of the speech after the fact was reasonably related to a legitimate pedagogical concern.[116] Although few cases turn so strongly on the presence of notice alone, it is an important factor throughout the case law.

### *D. The Rationale for Using the Hazelwood Test*

Courts justify using the *Hazelwood* test to decide instructional speech cases instead of *Pickering* because it appears to better recognize the interests of the state as an educator, rather than as an employer.[117] They contend that First Amendment speech cases in a school environment deserve a different standard than the *Pickering* test because, while the public concerns test may work in more general settings, the right of a public employee to participate as a citizen in the public debate is "less forceful" in the public school context.[118] Thus, the judgment of school administrators merits more deference in regulating the in-class speech of teachers than *Pickering* provides.[119]

Other courts have extended *Hazelwood*'s deference to regulation into the teacher speech context by focusing on the state's interests in ensuring that students learn their intended lessons without being exposed to material inappropriate for their maturity level, and that the views of the speaker are not erroneously attributed to the school.[120] Further, the school's interest in "preventing interference with the day-to-day operations of its classrooms" gives the administration reign to establish the focus and boundaries of the general subject matter of the curriculum.[121] In short, courts apply the *Hazelwood* test rather than *Pickering* because it appears better tailored to the school environment. As a result, courts place more

115. *Id*.

116. *See id*. at 1142–43 (adopting the *Hazelwood* test in a case of speech regulation without prior notice).

117. *E.g.*, Miles v. Denver Pub. Sch., 944 F.2d 773, 777 (10th Cir. 1991).

118. *Id*.

119. *See id*. ("Because of the special characteristics of a classroom environment, in applying *Hazelwood* instead of *Pickering* we distinguish between teachers' classroom expression and teachers' expression in other situations that would not reasonably be perceived as school-sponsored.").

120. *E.g.*, Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993).

121. Bishop v. Aranov, 926 F.2d 1066, 1073 (11th Cir. 1991).

emphasis on the role of teacher speech regulation in creating a conducive educational setting.

### *E. The Classroom is not a Public Forum*

The Supreme Court has recognized that regardless of the public employer's interest in regulating the speech of its employees, schools cannot restrict speech in public fora based on the message's viewpoint.[122] In fact, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[123] Once a school creates a public forum, it cannot discriminate against speech made in the forum because of its message.[124] Even if the forum is limited to the purposes for which it was created, a school cannot exercise viewpoint discrimination.[125] However, a school can exclude speech in a limited forum it created to preserve the limits of the forum, but only on the basis of subject matter rather than viewpoint.[126] Under either *Pickering* or *Hazelwood*, the analysis turns first on the threshold issue of whether the classroom is a public forum where viewpoint discrimination is forbidden.

Under *Hazelwood*, in the absence of a public forum a school may limit speech in a school-sponsored activity so long as the limitation reasonably relates to legitimate pedagogical concerns.[127] On the other hand, if the classroom constitutes a public forum, the school cannot exercise viewpoint discrimination.[128] The Court in *Hazelwood* addressed this question.[129] It observed that public schools do not possess "all of the attributes of streets, parks, and other traditional public forums that, 'time out of mind, have been used for purposes of

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122. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (stating that the state cannot "exercise viewpoint discrimination, even when the limited public forum is one of its own creation").

123. *Id*. at 828.

124. *Id*. at 829.

125. *Id*.

126. *Id*. at 829–30 ("[W]e have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.").

127. Henerey *ex rel* Henerey v. City of St. Charles, Sch. Dist., 200 F.3d 1128, 1132 (8th Cir. 1999).

128. *See supra* notes 122–25 and accompanying text.

129. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988) (observing that public schools are generally not forums for public expression).

assembly, communicating thoughts between citizens, and discussing public questions.'"[130] Schools can only be deemed public fora if the administration has "'by policy or by practice'" opened the facility "for indiscriminate use by the general public."[131] A school cannot "'create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.'"[132]

Although the *Hazelwood* Court did not specifically address whether classrooms are public fora because of the factual limitations of the case, its discussions of public school facilities in general have led other courts to decide that classrooms do not qualify.[133] One court held that elementary school classrooms are not public fora because while the verbal marketplace of ideas may be important for high schools to expose students to various viewpoints, it is inappropriate for the "delicate custodial and tutelary environment of an elementary school."[134] This suggests that a spectrum of public fora may exist where elementary schools can restrict the speech of teachers more than high schools, and high schools may in turn impose greater controls than colleges. This theory, however, is not borne out in the case law, as classrooms, whether in elementary schools or universities, have generally been held not to be public fora.[135] Classrooms do not

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130. *Id*. (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).

131. *Id*. (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983)).

132. *Id*. (quoting Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 802 (1985)).

133. For example, in *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), the Tenth Circuit explained:

> Nothing in the record leads us to conclude that . . . [the school's] classroom could reasonably be considered a traditional public forum. Neither could the classroom be considered a designated public forum, as there is no indication in the record that "school authorities have 'by policy or by practice' opened [the classroom] 'for indiscriminate use by the general public,' or by some segment of the public, such as student organizations."

*Id.* at 1285 (second alteration in original) (quoting *Hazelwood*, 484 U.S. at 267); *see also* Henerey *ex rel* Henerey v. City of St. Charles, Sch. Dist., 200 F.3d 1128, 1133 (8th Cir. 1999) (concluding that a public school election was not a public forum when the school district did not by policy or practice open campaigns to the public); Muller *ex rel.* Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1529–40 (7th Cir. 1996) (upholding the district court's conclusion that an elementary school was not a public forum); Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993) (finding that a ninth grade biology classroom was not a public forum); Bishop v. Aronov, 926 F.2d 1066, 1071 (11th Cir. 1991) (holding that a public university's classroom was not a public forum).

134. *Muller*, 89 F.3d at 1539.

135. *See supra* note 133 and accompanying text.

meet *Hazelwood*'s description of public fora as facilities or locations used by the general public for assembly and public debate.[136] Thus, teacher in-class speech generally falls outside the public forum prohibition against viewpoint discrimination. Though the circuits have split on whether the *Hazelwood* test itself allows viewpoint discrimination in the public school setting,[137] such regulation is generally not precluded in teacher instructional speech cases because the classroom does not qualify as a public forum.

### *F. Defining Pedagogical Concerns*

When deciding if speech restrictions implicate legitimate pedagogical concerns, courts begin with the school's interest in regulating curriculum-related speech.[138] Educational institutions can exercise more control over curricular speech than over speech relating to extracurricular activities because curricular speech is likely to be identified with the administration and "bear a school's 'imprimatur.'"[139] One court, however, has held that pedagogical concerns are not limited to the academic.[140] That is, in recognizing the goal of public schools to inculcate social values, the state may regulate employee speech involving traditional moral, social, and political norms, like civility.[141]

At least one court has eschewed bright-line rules, suggesting that the level of pedagogical concern should be decided on a case by case basis, depending on the age and sophistication of the students, the relationship between the teaching method and a valid educational

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136. *See supra* note 133 and accompanying text.

137. Susannah Barton Tobin, Note, *Divining* Hazelwood*: The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217, 231 (2004) ("Currently, the First, Third, and Tenth Circuits have stated that viewpoint discrimination is permissible, despite the Supreme Court's First Amendment jurisprudence to the contrary outside the context of schools. At the same time, the Sixth, Ninth, and Eleventh Circuits have indicated that viewpoint discrimination is not permissible.").

138. *See Axson-Flynn*, 356 F.3d at 1286 (defining school-sponsored speech as "'expressive activities' that 'may fairly be characterized as part of the school curriculum'" (quoting *Hazelwood*, 484 U.S. at 271)).

139. *Id*. at 1289.

140. *E.g.*, Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989) ("The universe of legitimate pedagogical concerns is by no means confined to the academic . . . .").

141. Muller *ex rel.* Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1540 (7th Cir. 1996) ("'[P]edagogical concerns' include not only the structured transmission of a body of knowledge in an orderly environment, but also the inculcation of civility (including manners) and traditional moral, social, and political norms.").

objective, and the context and manner of presentation.[142] These factors again point to an increasing spectrum of regulation where the less sophisticated the students and the more the speech relates to an educational objective, the greater the chance of constitutional regulation. By adopting these factors and articulating the need for notice of speech regulation, the First Circuit tempered the considerable deference that courts using the pedagogical concerns test give school administrations in regulating teacher speech since *Hazelwood*.[143]

At least one court, the Fourth Circuit in *Boring v. Buncombe County Board of Education*,[144] has held that the definition of pedagogical is "educational," thus encompasses any speech relating to the curriculum.[145] As a result, schools in the Fourth Circuit may regulate teacher speech without establishing the legitimacy of the pedagogical concerns ostensibly behind the censorship.[146] The court cited public policy reasons for entrusting all curricular decisions to the school administration while completely denying any free speech right to the faculty.[147] This is the ultimate in deference to school administration—because any speech-regulating decision by the state is by definition pedagogical, the state has an unlimited opportunity to censor teacher speech without even offering evidence that the restriction does, in fact, relate to legitimate pedagogical concerns.

The dissent in *Boring* argued that, while the administration has final control over the school's curriculum, that the limited First Amendment protection allowed for teacher in-class speech should fetter that authority.[148] "By holding that public school administrators can constitutionally discipline a teacher for in-class speech without demonstrating, or even articulating, some legitimate pedagogical concern related to that discipline, the majority extinguishes First

142. Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993).

143. *See* Reutter, *supra* note 94, at 354 (observing that "[t]hose who cherish responsible academic freedom as a necessity for the future of the country can be somewhat encouraged by the First Circuit's discussion.").

144. 136 F.3d 364 (4th Cir. 1998).

145. *Id.* at 370.

146. *Id*. at 376 (Motz, J., dissenting).

147. *Id.* at 371 (majority opinion) ("[I]t is far better public policy, absent a valid statutory directive . . . , that the makeup of the curriculum be entrusted to the local school authorities . . . , rather than to the teachers, who would be responsible only to the judges, had they a First Amendment right to participate in the makeup of the curriculum.").

148. *Id*. at 375 (Motz, J., dissenting).

Amendment rights in [public schools] where the Supreme Court has directed they should be brought 'vividly into operation.'"[149] One critic criticized the Fourth Circuit's decision because it implies that public school teachers have absolutely no First Amendment rights to control curriculum.[150] That commentator argued that both the teacher and school have constitutionally protected interests in the developing curriculum, and that the Fourth Circuit's approach destroyed any professional balance existing between employer and employee.[151]

While recognizing the relationship between curriculum and pedagogical concerns, other courts have required the state to demonstrate that the administration's action in regulating the teacher speech relates to a legitimate pedagogical concern.[152] The Supreme Court appears to have endorsed this approach in *Hazelwood*, by recognizing that a particular curricular decision may have "no valid educational purpose" and that in such a case, the First Amendment rights of the speaker are directly implicated.[153] The Eleventh Circuit recognized that curricular programs, by definition, have pedagogical purposes, but refrained from stating that every curricular decision constitutes a legitimate pedagogical concern.[154] In fact, it expressly rejected the Fourth Circuit's determination that the court must defer to the administration's decision and thus assume that the state's action relates to a legitimate pedagogical concern.[155] Indeed, the Fourth Circuit's acceptance of that argument is extreme because it defines pedagogical concerns in a way that virtually ensures the constitutionality of teacher speech regulation by the state.

### *G. Criticism of Hazelwood*

The *Hazelwood* dissent argued that allowing the state to restrict student speech whenever the censorship is reasonably related to a legitimate pedagogical concern could convert public schools into "enclaves of totalitarianism that strangle the free mind at its

149. *Id*. at 380.

150. *E.g.*, Grice, *supra* note 10, at 1970.

151. *Id*. at 2005.

152. Searcey v. Harris, 888 F.2d 1314, 1322 (11th Cir. 1989); *see also Boring*, 136 F.3d at 377 (Motz, J., dissenting).

153. 484 U.S. 260, 273 (1988).

154. *Searcey*, 888 F.2d at 1322.

155. *Id*. (Motz, J., dissenting) (citing *Searcey*, 888 F.2d at 1321).

source."[156] The same holds true when applying *Hazelwood* to teacher speech cases. The broader the definition of pedagogical concerns, the less authority teachers have to develop their own teaching material, and the greater the chance of anxiety-driven self-censorship.[157] Public schools' goal of exposing students to a diverse set of viewpoints and ideas is at risk under holdings like the Fourth Circuit's, where the administration has total control over curricular decisions and the courts provide no oversight to ensure that the actions of the state actually further legitimate pedagogical concerns. Not only do the teachers lose in the form of less freedom to speak and control curriculum decisions, but the students suffer in terms of exposure to ideas and intellectual development.

The very application of the *Hazelwood* standard to instructional speech cases comes under fire from commentators who find it "as ominous as it is questionable" that the test providing for greater administrative control in teacher speech cases "was developed in the context of student speech in supervised learning settings."[158] Indeed, the first court to apply the *Hazelwood* standard to teachers engaged in only the most cursory analysis, and failed to cite any First Amendment precedent involving teachers.[159] Creating a new standard out of a case with dissimilar facts should be done with careful explanation and thoughtful analysis of the connections between the different contexts, but instead, the predominant test for deciding instructional speech cases was tailored in response to student speech concerns and applied to teachers with little regard for the consequences.

## IV. PROPOSAL: A HYBRID TEST

Given the problems inherent in using the *Pickering* and *Hazelwood* tests to decide instructional speech cases, the public would be better served by a reformulated test where restrictions on content are held to a higher standard than restrictions on process. The possible outcomes of this hybrid system can be examined through the lens of the current *Pickering* and *Hazelwood* tests. Applying the

156. *Hazelwood*, 484 U.S. at 280 (Brennan, J., dissenting) (citation and internal quotations omitted).

157. Reutter, *supra* note 94, at 354.

158. *Id*. at 353.

159. *Id*.

*Pickering* public concerns test to content restrictions and the *Hazelwood* pedagogical concerns test to process restrictions would yield a system with greater educational diversity than using the *Hazelwood* test for both types of restrictions.

This hybrid system would allow teachers to expose students to matters of public concern while simultaneously permitting schools to retain control over instructional methods. While permitting greater educational diversity, the hybrid test would protect the state interests in ensuring that students learn the lessons intended and are not exposed to material inappropriate for their maturity level, and that the views of others are not erroneously attributed to the school. Schools could still restrict the substantive content of instruction through the *Pickering* balancing test if the interest of the state in promoting efficient public services through its employees outweighs the interests of the teacher in speaking. schools, however, would have substantially less control over the content of instructional speech than if the *Hazelwood* test applied alone.

Applying the hybrid test to the *Boring* factual situation—where a teacher was restricted from using a play about a dysfunctional family because of the school's obscenity concerns—the school could restrict the process of using the play as a teaching method under the *Hazelwood* standard, but could not restrict the teacher from approaching the subject matter of poverty and mental illness. If, however, the teacher were using the play to instruct students on a particular type of theatrical drama, for example, rather than to discuss poverty and mental illness, the school could restrict both process and content, as the content would not rise to the level of a matter of public concern.

The hybrid test would render a different outcome when applied to the facts in *Cockrel*, where the court had held that, under the *Pickering* test, the First Amendment protected a teacher who invited Woody Harrelson to present to her class on industrial hemp. Because the subject of industrial hemp rises to the level of a matter of public concern, under the hybrid test the school could not restrict Cockrel from speaking instructionally on the subject. The school, however, could restrict the process by which Cockrel approached the subject if the restriction was reasonably related to a pedagogical concern. For example, the school could restrict the process of Cockrel inviting Woody Harrelson to class because of concerns that the visit would cause instructional distractions or security problems. Thus, Cockrel could educate her class on industrial hemp as a matter of public

interest, but would have to employ a method that satisfied the school's legitimate pedagogical concerns.

The relatively recent question of how public school teachers should approach the first anniversary of the September 11 attacks provides yet another example of how the hybrid test would be applied. Around the first anniversary of September 11, the National Education Association (NEA) and affiliates of the American Federation of Teachers argued publicly over the best way to teach about the attacks.[160] The NEA suggested lesson plans that did not assign blame for the attacks and recommended that teachers discuss them in the context of "historical instances of American intolerance."[161] The New York and West Virginia affiliates of the American Federation of Teachers, among others, argued that the lessons should deal directly with the facts of the attacks and not "avoid explicit judgment about the aims and character of the terrorists."[162]

Many public school teachers used the NEA lesson plans to teach about September 11 in the context of historical examples such as the internment of Japanese-Americans after Pearl Harbor. The hybrid test would not allow a school district to prohibit a high school teacher from analogizing September 11 and the Japanese-American internment because they are certainly matters of public concern under *Pickering*. The school district, however, would be allowed to proscribe a teaching method that implicitly or explicitly placed sole blame on the American government for the 9/11 attacks by characterizing U.S. intolerance as the lone precipitating factor. The state's pedagogical concern in preventing its employees from teaching opinion as fact would be implicated by such an educational approach, so it would be justified in applying a process restriction. If a high school teacher introduced students to a balanced group of theories of September 11 causation, of which American intolerance was one, and identified the theories as such, the state would have a weaker argument for a pedagogical concern justifying a process restriction.

In contrast, if an elementary school teacher attempted to use the same balanced causation theory lesson plan to teach about the attacks, the school would be more justified in a process restriction

160. *See* Ellen Sorokin, *More Teachers Shun NEA's 9/11 Lessons*, WASH. TIMES, Aug. 24, 2002, at A01 (discussing the disagreement over the NEA's proposed lesson plans).

161. *Id.*

162. *Id.*

because of its pedagogical concern in protecting students from material inappropriate for their age. Under the hybrid test, the constitutionality of process restrictions would depend largely on the context of the speech that would be proscribed. Courts would have to carefully balance whether the speech would implicate legitimate pedagogical concerns of the state, just as they must with both content and process restrictions now analyzed under *Hazelwood*.

True, such a hybrid formulation would face the difficulty of differentiating between process and content. Using the *Boring* example again, a court would have to determine as a threshold matter whether the play's content itself is the substance of the instruction, or if the play's content is being used as a process to teach something else. In reality, the play could be used for both its procedural and content effects, making the hybrid test difficult to administer. Yet the current tests are also difficult to administer and are not as well tailored to dealing with the rigors of teacher speech cases.

Critics might also contend that because content and process are inseparably intertwined, the *Pickering* prong would place no practical limits on speech restrictions because they could still restrict process under *Hazelwood*. Yet the hybrid test would give courts the flexibility to provide some measure of protection to teachers approaching matters of public concern in the classroom, in contrast to using the more rigid *Hazelwood* pedagogical concerns test exclusively.

Without Supreme Court guidance on the issue, the circuits will continue to struggle over which test best decides instruction speech cases. Both the *Pickering* and *Hazelwood* tests suffer from the fact that they were not created with teacher speech cases in mind, and have been applied, or misapplied as the case may be, in an effort by the judiciary to do the best with what it has. Using either of these tests to decide instructional speech cases is like trying to fit a square peg in a round hole.

On one hand, the *Pickering* test protects the interests of citizens to participate in the public debate by commenting on matters of public concern, but only to the extent that this interest outweighs the state's interest as an employer in restricting that speech. Of course, as has been raised here, the question remains of whether the interest balancing test is largely conclusory, for the same factors that define speech as involving a matter of public concern suggest that the teacher's interests in speaking outweigh the state's interests in regulation. As commentators point out, the *Pickering* test may ignore the goal of exposing students to various ideas by allowing regulation

based on the content of the speech—whether it touches upon a matter of public concern—instead of recognizing the inherent value of all teacher speech in exposing students to ideas and educating them about the process of rational debate.

## CONCLUSION

Teacher speech restrictions raise provocative questions about the educational process and its role in society. Most importantly, to what extent do we value exposing public school students to diverse ideas in order to further their intellectual development? Do we trust our teachers to make the curricular decisions necessary to achieve this goal? As the pendulum shifts from *Pickering* to *Hazelwood*, more teacher speech is subject to regulation, and the public schools' goal of inculcating values begins to outweigh the goal of exposure to diverse ideas. If society truly benefits from a more uniform educational curriculum, where state conceptions of appropriate lessons trump a broader teacher-led learning experience, the broad application of *Hazelwood* accomplishes that goal. If, however, schools should be a more diverse marketplace of ideas where teachers help students gain critical thinking skills in order to prepare them to make independent judgments as adults, the system may be approaching failure in that endeavor. The problem of regulating instructional teacher speech requires finding the balance between an educational system that is primarily concerned with teaching the idea of democracy and an educational system that aspires to be a democracy of ideas.