

**KEEPING THE “FREE” IN TEACHER SPEECH RIGHTS:
PROTECTING TEACHERS AND THEIR USE OF
SOCIAL MEDIA TO COMMUNICATE WITH STUDENTS BEYOND
THE SCHOOLHOUSE GATES**

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I. INTRODUCTION

[1] Debate is raging within many school districts around the country about public school teachers’ interactions with their students outside of school through social media sites, such as Facebook and MySpace.¹

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¹ See Jennifer Preston, *Rules to Stop Pupil and Teacher From Getting Too Social Online*, N.Y. TIMES (Dec. 17, 2011), <http://www.nytimes.com/2011/12/18/business/media/rules-to-limit-how-teachers-and-students-interact-online.html>; see also Karen Matthews, *Should teachers “friend” students?*, USA TODAY (Apr. 19, 2012), <http://www.usatoday.com/tech/news/story/2012-04-19/facebook-teachers-social-students/54416058/1> (“At least 40 school districts nationwide have approved social media policies.”). Nothing in this Article should be interpreted as requiring teachers to engage in off-campus communications with students using social media. Under current law, if schools require this type of speech, schools can regulate it. Rather, this Article assumes that some teachers may choose to communicate with students in this context.

While most of the controversy involves only the major social media sites, the overall debate is not so limited and includes teachers' communications with students through other electronic means, such as Tweeting or even texting.² Attempts to regulate the use of social media and other forms of electronic communication between teachers and students have occurred both on the state level,³ and more frequently, on the local school district level.⁴ In fact, local school boards in California, Florida, Georgia, Illinois, Maryland, Michigan, Missouri, New Jersey, Ohio, Pennsylvania, Texas, and Virginia have all updated, or are currently revising, their social media policies, focusing on limiting teacher-student contact through social media.⁵ The New York City Department of Education recently unveiled a new policy, which bans interactions between teachers and students on

² See, e.g., M.L. Schultze, *Schools, lawmakers develop social media bans*, WKSU NEWS (Sept. 1, 2011), <http://www.wksu.org/news/story/29290> (noting that the Dayton Public School District instituted a ban that includes Tweeting, instant messaging, and texting). Most of these prohibitions or restrictions do not yet specifically include blogging. See *id.* But see, e.g., N.Y.C. DEP'T OF EDUC., NYC DEPARTMENT OF EDUCATION SOCIAL MEDIA GUIDELINES 1 (2012), available at <http://schools.nyc.gov/NR/ronlyres/BCF47CED-604B-4FDD-B752-DC2D81504478/0/DOESocialMediaGuidelines20120430.pdf> (including restrictions on blogging).

³ See, e.g., MO. REV. STAT. § 162.069.1 (2012).

⁴ See Preston, *supra* note 1. Local school boards in Connecticut have also joined the fray. See David Moran, *Interim Superintendent Says Controversial Social Media Policy Copied From Other Towns*, MANCHESTER PATCH (May 31, 2012), <http://manchester.patch.com/articles/interim-superintendent-says-controversial-social-media-policy-copied-from-other-towns>.

⁵ See Preston, *supra* note 1. While attempts to restrict teachers' use of social media are a relatively recent occurrence, attempts to restrict teachers' off-campus conduct are not new. See Jonathan Zimmerman, *When Teachers Talk Out of School*, N.Y. TIMES (June 3, 2011), www.nytimes.com/2011/06/04/opinion/04zimmerman.html. In 1927, a schoolteacher in New Jersey lost her teaching license for smoking cigarettes after school hours. *Id.* Additional grounds for teacher dismissal included card playing, dancing, and even failure to attend church. *Id.* After Prohibition ended, teachers could still be dismissed for drinking or frequenting a place where liquor was served. *Id.*

non-school sanctioned social media sites.⁶

[2] Districts imposing these bans and lesser restrictions generally justify them based on two major concerns: first, the worry that teachers will reveal inappropriate information about themselves to students; and, second, the fear that teachers will use social media to develop inappropriate relationships with their students.⁷ Typically, these limitations on speech do not distinguish between speech originating on school grounds and “off-campus speech.”⁸

[3] Of course, other educational stakeholders, including teachers, administrators, and parents, oppose any restrictions on teacher-student interactions beyond a teacher’s existing professional obligations, such as student confidentiality.⁹ While acknowledging the concerns underlying the movement to restrict teacher-to-student social media speech, these advocates oppose any ban or restrictions on teacher communication with students via social media, arguing that a teacher’s use of social media can create a more effective, inclusive learning environment and develop

⁶ See NYC DEPARTMENT OF EDUCATION SOCIAL MEDIA GUIDELINES, *supra* note 2, at 4. Over thirty years ago, the Second Circuit warned of the danger of school officials “ventur[ing] out of the school yard and into the general community.” *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979). That danger has arrived.

⁷ See *Rules to Limit How Teachers and Students Interact Online*, TEACHER WORLD (Dec. 20, 2011), <http://www.teacher-world.com/teacher-blog/?p=2248>.

⁸ See, e.g., MO. REV. STAT. §162.069.1. For purposes of this Article, “on campus” speech includes any speech made on school premises or using school technology, or any speech made at a school-sanctioned event, even if the event occurs off-campus. “Off-campus” speech refers to any other teacher speech. This Article prefers “off-campus” speech to “off-duty” speech because the best teachers are seldom “off-duty.”

⁹ See, e.g., 20 U.S.C. § 1232g (2006) (protecting student records); CONN. AGENCIES REGS. § 10-145d-400a(b)(1)(J) (1998). This Article supports extensive protection of teachers’ First Amendment rights, but given special student confidentiality and safety issues, it does not support full First Amendment rights for teachers.

stronger teacher-student relationships.¹⁰ Furthermore, social media have become, to a large extent, “Main Street.”¹¹ Because a school district could not ban or restrict a conversation between a teacher and student that occurs outside of campus on Main Street, the district should not be able to ban or restrict the electronic equivalent of a Main Street interaction.

[4] The law governing teacher-student interactions through social media and other electronic communication is still evolving. At present, no state has regulated this type of communication, although Missouri has come close.¹² The most widely publicized statewide attempt to regulate teacher-student interactions through social media, Missouri’s Amy Hestir Student Protection Act,¹³ failed when a Missouri court enjoined it shortly

¹⁰ These proponents note that teachers, especially newly-trained teachers, use social media. See Emily H. Fulmer, *Privacy Expectations and Expectations for Teachers in the Internet Age*, 2010 DUKE L. & TECH. REV. 14, ¶ 6 (2010) (citing Teresa S. Foulger et al., *Moral Spaces in MySpace: Preservice Teachers’ Perspectives about Ethical Issues in Social Networking*, 42 J. RES. ON TECH. & EDUC. 1, 7 (2009)). Furthermore, given the pivotal role this technology has played in recent history in social movements around the world, banning its use within an educational context seems myopic and antiquated.

¹¹ See *State of the Media: The Social Media Report Q3 2011*, NIELSEN, <http://blog.nielsen.com/nielsenwire/social/> (last visited Oct. 15, 2012) (noting that “nearly 4 in 5 active Internet users visit social networks” and “[a]cross a snapshot of 10 major global markets, social networks and blogs reach over three-quarters of active Internet users,” suggesting that social media is the “Main Street” of the Internet).

¹² See Amy Hestir Student Protection Act, 2011 MO. LEGIS. SERV. S.B. 54 (West) (providing that “[n]o teacher shall establish, maintain, or use a nonwork-related internet site which allows exclusive access with a current or former student”); Amended Order Entering Preliminary Injunction, *Missouri State Teachers Ass’n v. Missouri*, No. 11AC-CC0053, 2011 WL 4425537 (Mo. Cir. Ct. Sept. 23, 2011).

¹³ See *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 (last visited Nov. 17, 2012) (describing that Amy Hestir, while a seventh grade student, was repeatedly molested by one of her junior high school teachers); cf. Brett Borders, *A Brief History Of Social Media*, COPY BRIGHTER MARKETING (June 2, 2009), <http://copybrighter.com/history-of-social-media> (demonstrating that social media sites

before it was to go into effect.¹⁴ In response, the Missouri legislature revised the statute, thereby eliminating the regulation of teachers' use of social media. Instead, the Missouri legislature settled for encouraging school districts to promulgate a written policy concerning school employee-student communication using social media.¹⁵ At the moment, there exists sparse case law examining this issue.

[5] This Article aims to provide a consistent approach for protecting off-campus teacher-to-student speech using social media, which protects most teacher-student speech so long as the speech does not unduly disrupt the workplace or the school learning environment.

[6] Given the dearth of authority, the trends regarding First Amendment¹⁶ protection provided to teachers, particularly with respect to off-campus speech, are difficult to discern. To date, the United States Supreme Court has not examined the issues concerning off-campus teacher-to-student communication. Furthermore, a few lower courts have issued rulings in this area, but these decisions are not particularly illuminating. For instance, the speech in the most frequently cited teacher-

like Facebook or MySpace did not exist at the time Amy was molested). *See generally infra* Part II(A)(1) (discussing the Amy Hestir Student Protection Act in further detail).

¹⁴ Amended Order Entering Preliminary Injunction, *supra* note 12.

¹⁵ *See* Mo. REV. STAT. § 162.069.1 (2012).

¹⁶ The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I. The First Amendment’s speech protections apply to the states through the due process clause of the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925). The government can regulate speech in two capacities: as a sovereign or as an employer. *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion). The government’s authority to regulate speech as a sovereign is far more limited than its authority to regulate speech as an employer. *Id.* (stating that the government has “far broader powers” to regulate speech than it does “as [a] sovereign” in its role as an employer). This Article contends that the government is also limited in regulating speech occurring on the outer fringes of the employment relationship.

to-student social media case involved egregious conduct on the teacher's part, thus providing little guidance as to how courts would treat teacher conduct not rising to that level.¹⁷

[7] This Article focuses on a public school teacher's off-campus use of social media to communicate with students.¹⁸ This type of communication does not fit neatly into the developing free speech jurisprudence. Under current law, to receive First Amendment protection, a teacher must establish that she did not speak pursuant to her official job duties¹⁹ and that her speech implicated a matter of public concern.²⁰ If so, the burden of production shifts to the school to establish that the government's interests in providing efficient services, including a safe learning environment, outweigh the citizen-teacher's interests in commenting on these matters and the public's interests in hearing the speech.²¹

[8] This Article explains how the Court's current free speech jurisprudence governs this type of speech, concluding that any wholesale ban on teacher-to-student speech in this context is likely overbroad, and therefore violates the First Amendment. In addition, these categorical bans might also be unconstitutional "as-applied" to particular speech.

¹⁷ See *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 298 (D. Conn. 2008) (stating that the teacher's MySpace page included "pictures of naked men with . . . 'inappropriate comments'" below the pictures).

¹⁸ As previously stated, "on-campus" speech includes any speech made on school premises or using school technology, or any speech made at a school-sanctioned event, even if the event occurs off-campus. "Off-campus" speech refers to any other teacher speech.

¹⁹ See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

²⁰ See *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

²¹ See *Nagle v. Marron*, 663 F.3d 100, 106 (2d Cir. 2011); *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 334, 338 (6th Cir. 2010); *Eng v. Cooley*, 552 F.3d 1062, 1070-72 (9th Cir. 2009).

[9] Finally, the Article suggests a simpler test for evaluating teacher-student speech using social media, which seeks to balance a teacher's interest in speech with a school's interest in promoting an efficient workplace and providing an effective learning environment. This test would offer protection to any teacher speech in this context if, first, the teacher communication is not made pursuant to the teacher's official duties or, second, the message's recipient could not reasonably conclude that the expression was made in the teacher's official capacity. However, this protection is not absolute. If school officials can then establish that the school's interests in prohibiting the speech outweigh the teacher's free speech interests, the teacher's speech can still be restricted. In a departure from current law, this test would not require that the speech implicate a matter of public concern to receive First Amendment protection.²²

[10] Under this proposed test, to restrict a teacher's off-campus speech to a student using social media, a school administrator would need to demonstrate that the school's interests in maintaining an effective learning environment or efficient working environment outweigh the teacher's free speech interests. The political nature of the speech is a crucial component in weighing these concerns. The more political the speech, the greater the level of disruption that school administrators would need to demonstrate in order to restrict the speech. Nevertheless, even speech with no political import would require some on-campus disruption, whether actual or foreseeable, to limit this type of teacher-student communication.

[11] This proposed framework attempts to honor the competing policies underlying free speech jurisprudence by balancing a public teacher's off-campus rights to free speech with a school district's interests in providing an age-appropriate learning environment and efficient working

²² The public concern requirement should be eliminated for all public employees. The focus of this Article, however, is on teachers using social media to communicate with students in an off-campus setting. Given the interactive, rapidly evolving nature of social media speech and the indirect benefits this speech might generate, a public concern limitation is particularly unnecessary.

environment.²³ The framework recognizes that while the government, as an employer, can at times limit employees' speech based on workplace efficiency concerns, the government's ability to restrict employees' speech is more limited when the government seeks to restrict speech at the outer edges of the employment relationship and is far more limited when the government restricts speech as a sovereign.²⁴ In the case of most off-campus teacher-to-student communications using social media, school districts are regulating teacher speech at the outer fringes of the employment relationship because teachers are under no obligation to engage in this speech.²⁵ The proposed framework for regulating teacher-to-student communication using social media also recognizes the special relationships existing within schools and therefore does not provide full First Amendment protection to teacher off-campus speech with students. Instead, it provides extensive protection for teacher off-campus speech since the framework requires some disruption to the working or learning environment before a teacher's speech can be regulated.

[12] In addition, this framework seeks to engender some parity between the treatment of off-campus teacher speech using social media and off-campus student speech using social media.²⁶ While teachers and students

²³ The Supreme Court has justified First Amendment free speech protection on two grounds: the rights of the speaker to engage in the speech and the rights of the audience to hear the speech. The Court has never endorsed one theory to the exclusion of the other. See Kermit Roosevelt III, *Not as Bad as You Think: Why Garcetti v. Ceballos Makes Sense*, 14 U. PA. J. CONST. L. 631, 641 (2012).

²⁴ See *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion) (“[T]he government as employer indeed has far broader powers than does the government as sovereign.”).

²⁵ This Article posits that, in most circumstances, school districts will be regulating teachers' off-campus, social-media speech to students almost in a “sovereign” role because the districts are regulating speech that lies on the fringes of the employment relationship. Courts should be more hostile to government speech regulation when the regulation does not directly involve an employee's core job responsibilities.

²⁶ See generally *Lowery v. Euverard*, 497 F.3d 584, 596-600 (6th Cir. 2007) (deciding a student-athlete free speech claim by analogizing to public employee cases).

are not similarly situated with respect to their First Amendment rights and therefore the protection of their speech need not be identical, the disparity in courts' protection of teacher and student speech is apparent. The trend with respect to student off-campus speech using social media is that this speech receives virtually full First Amendment protection.²⁷ By contrast, the few existing decisions with respect to teacher off-campus speech using social media have ruled in favor of the school district. While public school teachers' and students' free speech rights to use social media need not be identical, there should be more parity in their treatment.

[13] This proposal focuses on regulating teacher-student communication using social media, given the special concerns applicable to the relationship between public school teachers and students.²⁸ This Article does not contend that this test is appropriate in all public-employee contexts.

²⁷ See, e.g., *J.S. ex rel. Synder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920 (3d Cir. 2011) (holding that a student's criticism of his principal is protected speech even though it contained false allegations of sexual misconduct between the principal and students at the school because the speech did not disrupt the school environment). Notably, the speech at issue was not "political" speech. *Id.* at 939 (Smith, J., concurring).

²⁸ This Article will not address any potential teacher First Amendment freedom of association claims, nor will it address any potential academic freedom exception to the *Pickering-Connick* test. See *Jeffries v. Harleston*, 52 F.3d 9, 14-15 (2d Cir. 1995) (implying, in dicta, that there may be an academic freedom exception to *Pickering-Connick*). Whether academic freedom is itself constitutionally required or is merely an academic tradition embraced by the free speech clause is debatable. See RONNA GREFF SCHNEIDER, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION § 2:2 (2011). Post *Garcetti*, lower courts have been hostile to free speech arguments grounded on academic freedom concerns when non-university level faculty make these arguments. See, e.g., *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 334 (6th Cir. 2010) (holding that a teacher's curricular speech was made pursuant to her official duties).

II. RECENT DEVELOPMENTS IN THE REGULATION OF TEACHERS' OFF-CAMPUS SPEECH

A. Statewide Regulation

1. Missouri: The Amy Hestir Student Protection Act

[14] The most widely publicized attempt to prohibit off-campus teacher-student speech is Missouri's Amy Hestir Student Protection Act ("AHSPA").²⁹ In July 2011, Missouri Governor Jay Nixon signed the AHSPA into law.³⁰ According to the AHSPA's sponsor, Missouri Senator Jane Cunningham, the law's purpose was to limit private communications between teachers and students on social networking sites in order to prevent sexual abuse of students by their teachers.³¹ Cunningham noted that in certain cases of teachers' sexual exploitation of students, some of the communications between teachers and students occurred on social networking sites.³²

[15] The AHSPA required every school district to promulgate a policy concerning teacher-student communication.³³ The less controversial part of AHSPA mandated that each school district's policy must include, at a minimum, that "no teacher shall establish, maintain, or use a work-related

²⁹ See Kayla Webley, *Missouri Law: Teachers and Students Can't Be Facebook Friends*, TIME (Aug. 1, 2011), <http://newsfeed.time.com/2011/08/01/in-missouri-teachers-and-students-legally-cant-be-facebook-friends/>.

³⁰ See Tanya Roscorla, *The Reason Why Missouri Passed the Amy Hestir Student Protection Act*, CTR. FOR DIGITAL EDUC. (Oct. 31, 2011), <http://www.centerdigitaled.com/policy/Missouri-Electronic-Communications-Part-One.html>.

³¹ *Id.*

³² *Id.*

³³ Amy Hestir Student Protection Act, 2011 MO. LEGIS. SERV. S.B. 54 (West).

internet site unless such site is available to school administrators and the child's legal custodian, physical custodian, or legal guardian."³⁴ However, the statute went beyond regulating work-related Internet sites to include social networking sites. In short, the AHSPA required that each school district's policy prohibit teachers from "establish[ing], maintain[ing], or us[ing] a nonwork-related site which allows exclusive access with a former or current student."³⁵ Under the AHSPA, "exclusive access" means "the information is available only to the owner (teacher) and user (student) by mutual explicit consent and where third parties have no access to the information on the website absent an explicit consent agreement with the owner (teacher)."³⁶ A "nonwork-related internet site" means "any internet website or web page used by a teacher primarily for personal purposes and not for educational purposes."³⁷ In essence, the statute aimed to prevent any private communication between teachers and students attending the teachers' schools through sites like Facebook and MySpace, at least until the student reaches the age of nineteen or graduates.³⁸

[16] The Missouri State Teachers Association ("MSTA") sought to enjoin the AHSPA, claiming that it violated the free speech clauses of both the United States Constitution and the Missouri Constitution.³⁹ A few days before the AHSPA was scheduled to take effect, a Missouri Circuit Court granted a preliminary injunction to the MSTTA prohibiting its enforcement.⁴⁰ The court concluded that social networking is "extensively

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *See id.*

³⁹ Amended Order Entering Preliminary Injunction, *supra* note 12.

⁴⁰ *Id.*

used by educators.”⁴¹ In particular, the court found the “breadth of the prohibition [to be] staggering.”⁴² Consequently, the court held that the AHSPA would have a significant “chilling effect” on free speech.⁴³ Because this “chilling effect” resulted in the deprivation of free speech rights, the court held that the resulting injury was irreparable.⁴⁴ Finally, the court concluded that the MSTA had demonstrated a substantial likelihood of success on the merits of its free speech claims and that the public interest was best served by delaying the implementation of the AHSPA until a trial occurred.⁴⁵

[17] Shortly following the enjoining of the AHSPA, the Missouri legislature passed a revised law requiring each school district to promulgate a written policy concerning employee-student communication.⁴⁶ These policies must cover the use of electronic media to prevent improper communications between staff members and students.⁴⁷ In October 2011, Governor Nixon signed the bill into law before the preliminary injunction expired, effectively repealing the portion of the AHSPA related to teachers’ use of social media.⁴⁸ The new law

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Amended Order Entering Preliminary Injunction, *supra* note 12; *see also* Elrod v. Burns, 427 U.S. 347, 373-74 (1976) (plurality opinion) (“The loss of First Amendment freedoms, for even minimal periods of time . . . constitutes irreparable injury.”).

⁴⁵ Amended Order Entering Preliminary Injunction, *supra* note 12.

⁴⁶ *See* MO. REV. STAT. § 162.069(1) (2012).

⁴⁷ *See id.*

⁴⁸ *See* David A. Lieb, *Missouri Repeals Law Restricting Teacher-Student Internet and Facebook Interaction*, HUFFINGTON POST (Oct. 21, 2011, 6:06 PM), http://www.huffingtonpost.com/2011/10/21/missouri-repeals-law-rest_n_1025761.html.

does not provide any guidance as to the appropriate limits on teachers' use of social media sites for Missouri's 523 public school districts.⁴⁹ The critics of the new law contend that it is unlikely that individual school districts will properly balance the rights involved given that the state itself could not do so.⁵⁰

2. Virginia

[18] Although Missouri was the first state to codify a prohibition against exclusive teacher and student speech using social media, Virginia's Board of Education considered a teacher-student social media ban in November 2010.⁵¹ The primary purpose of this ban was to deter sexual conduct between school employees and students.⁵² The proposed guidelines would have limited teachers' electronic communication with students to accounts, systems, and platforms provided by the school.⁵³ Similar to Missouri's original law, Virginia's proposed guidelines would have prohibited any "texting" between teachers and students as well as any teacher-student interaction through social networking sites.⁵⁴ Ultimately, the Virginia Board of Education passed guidelines merely calling for transparency in communication between employees and students, accessibility to parents and administrators, and professionalism in content and tone.⁵⁵

⁴⁹ See MO. REV. STAT. § 162.069(1).

⁵⁰ See Lieb, *supra* note 48.

⁵¹ VA. DEP'T OF EDUC., PROPOSED GUIDELINES FOR THE PREVENTION OF SEXUAL MISCONDUCT & ABUSE IN VIRGINIA PUBLIC SCHOOLS 5-12 (Jan. 13, 2011), *available at* http://www.doe.virginia.gov/boe/meetings/2011/01_jan/agenda_items/item_j.pdf.

⁵² See *id.*

⁵³ *Id.* at 8.

⁵⁴ *Id.*

⁵⁵ VA. DEP'T OF EDUC., GUIDELINES FOR THE PREVENTION OF SEXUAL MISCONDUCT AND

3. Louisiana

[19] In 2009, Louisiana enacted a law that requires school employees who contact students by phone, email, or other electronic means to use only school-provided devices and to discuss only "educational services" in these communications.⁵⁶ If a teacher violates this provision, he or she must report the violation in a manner that the school board sanctions.⁵⁷ These restrictions have not yet faced any constitutional challenge.

B. Local School Districts

[20] As recently reported, local school boards in California, Connecticut, Florida, Georgia, Illinois, Maryland, Michigan, Missouri, New Jersey, Ohio, Pennsylvania, Texas, and Virginia have updated or are in the process of revising their social media policies, focusing on limiting teacher-student contact using social media.⁵⁸ As previously stated, the New York City Department of Education recently unveiled its new policy banning interaction between teachers and students on social media web pages, at least when these sites are not school-sponsored.⁵⁹

[21] The policy adopted by Dayton, Ohio, is illustrative. In Dayton, the Board of Education's new social networking policy bars teachers from "friending" their students on Facebook.⁶⁰ It also prohibits educators from

ABUSE IN VIRGINIA PUBLIC SCHOOLS 3 (Mar. 24, 2011), *available at* http://www.doe.virginia.gov/boe/guidance/safety/prevent_sexual_misconductabuse.pdf.

⁵⁶ LA. REV. STAT. ANN. § 17:81(Q)(2)(b) (2012).

⁵⁷ *Id.* at § 17.81(Q)(2)(c).

⁵⁸ *See* Preston, *supra* note 1; *see also* Moran, *supra* note 4.

⁵⁹ NYC DEPARTMENT OF EDUCATION SOCIAL MEDIA GUIDELINES, *supra* note 2, at 4.

⁶⁰ *See* Margo Rutledge Kissell, *Local teachers banned from 'friending' students on Facebook*, DAYTON DAILY NEWS (Aug. 30, 2011, 11:22 PM), <http://www.daytondailynews.com/news/news/local/local-teachers-banned-from->

texting or sending instant messages to their students.⁶¹

[22] While courts have not yet been required to decide many of these disputes, this situation will undoubtedly change shortly.⁶²

**III. TEACHERS' OFF-CAMPUS SPEECH TO STUDENTS USING SOCIAL
MEDIA: A BRIEF EXAMINATION OF THE COSTS AND BENEFITS OF
CATEGORICALLY BANNING THIS SPEECH**

[23] To date, there have been no academic studies regarding primary and secondary school teachers' use of social media with students beyond the classroom setting. This Article posits that without empirical support for restricting teacher speech in this context, school districts should be apprehensive about censoring this speech even if the censorship does not violate the First Amendment.⁶³

[24] The policy arguments surrounding the regulation of teacher-to-student communication through social media are complex. On a general level, categorical bans of this type of speech are driven by a fear of newer technologies; few of the bans include older technologies such as the telephone, or perhaps even the most dangerous type of off-campus

friending-students-on-f/nMtkR/; *see also* DAYTON PUBLIC SCHOOLS, DAYTON PUBLIC SCHOOLS POLICY MANUAL 295 (Apr. 27, 2012), *available at* http://www.dps.k12.oh.us/documents/contentdocuments/document_23_5_2038.pdf (“To maintain a more formal staff-student relationship, district employees shall not ‘friend’ current students on social networking sites such as Facebook and MySpace (except when that employee is a relative or legal guardian of the student).”).

⁶¹ Kissell, *supra* note 60.

⁶² *See* Thomas v. Bd. of Educ., 607 F.2d 1043, 1050 (2d Cir. 1979) (warning of the danger of school officials “ventur[ing] out of the school yard and into the general community”).

⁶³ *See infra* Part XIII (concluding that categorical bans are likely unconstitutional).

interactions between teachers and students, those occurring “in-person.”⁶⁴ But concern about new technologies is rarely used to justify these bans or restrictions.

[25] In the debates surrounding the passage of these bans or restrictions, the benefits of this speech are infrequently discussed. Consequently, these benefits are likely underestimated. More typically, bans or restrictions on this type of speech are justified on two concerns: the concern that teachers may disclose inappropriate information and the concern that teachers may potentially use these mediums to engage in predatory conduct.⁶⁵ These concerns are certainly legitimate, but likely overstate the dangers of this speech.

[26] There are tangible benefits to allowing this type of teacher off-campus speech. Teachers are trained to interact with minors and can serve as role models for appropriate social media discourse. In addition, teachers may discover bullying or other dangerous behavior by participating in social media with students. Even if teachers are off-duty, they could intervene in constructive ways.⁶⁶

⁶⁴ See *supra* Part II (discussing the social media website and text messaging focus in the teacher-student communication bans in Missouri, Virginia, and New York).

⁶⁵ Two incidents sparked the Amy Hestir Student Protection Act. One incident included reports of teachers being disciplined for compromising photos found online. Another incident involved a teacher exchanging more than 700 text messages with a student while the teacher engaged in a sexual relationship with the student. See Roscorla, *supra* note 30.

⁶⁶ For example, as an adult trained to deal with school-aged children, a teacher may be well-positioned to encourage a suicidal student to seek help. Allowing social media interaction between teachers and students may also benefit students’ emotional and social development in other, more general, ways. In one recent study, the authors concluded that social media helps teens develop empathy. See B. A. Birch, *Study: Social Media Helps With Teenage Empathy, Awareness*, EDUC. NEWS (Feb. 27, 2012), <http://www.educationnews.org/technology/study-social-media-helps-with-teenage-empathy-awareness/>.

[27] Furthermore, allowing this type of off-campus teacher speech with students may have important residual educational benefits to the school's learning environment as well. One potential benefit of these communications is that they may help develop a better learning environment at school by making students more comfortable with their teachers.⁶⁷ Current primary and secondary school students, as well as many of the newer teaching graduates, are immersed in this electronic environment. As a recent study indicates, the number one technology that students use outside of school is social networking.⁶⁸ Prohibiting off-campus communication between teachers and students in this context—widening the gap between in-school and out-of-school life for the student—potentially inhibits the development of better relationships between teachers and students.⁶⁹

[28] In addition, the use of social media may allow teachers to better target particular learning styles in the classroom.⁷⁰ For example, students who are uncomfortable speaking during class may be less hesitant to converse through social media.⁷¹ Once these students gain confidence by

⁶⁷ See Katherine Bindley & Timothy Stenovec, *Missouri 'Facebook Law' Limits Teacher-Student Interactions Online, Draws Criticism And Praise*, HUFFINGTON POST (Aug. 8, 2011, 8:58 AM), http://www.huffingtonpost.com/2011/08/03/missouri-facebook-law_n_916716.html.

⁶⁸ Christine Greenhow, an assistant professor at the College of Education and the College of Information Studies at the University of Maryland, whose area of expertise is learning in social media contexts, notes that social media is students' "one-stop place for communication." *Id.*

⁶⁹ *Id.* For this reason, Greenhow argues that limiting communication between teachers and students only furthers the gap between a student's in-school life and his or her life outside of school.

⁷⁰ See *Editorial - Facebook not appropriate for students, teachers, but alternatives possible*, STARNEWS ONLINE (Aug. 5, 2011), <http://www.starnewsonline.com/article/20110805/ARTICLES/110809781>; see also Preston, *supra* note 1.

⁷¹ See Bindley & Stenovec, *supra* note 67.

interacting through social media, they may more readily participate in classroom discussions.⁷²

[29] However, teachers' off-campus use of social media with students is not without its drawbacks. As previously mentioned, those who advocate restricting or banning teachers' use of social media to communicate with students argue two points. First, these advocates contend that teachers' use of social media will facilitate inappropriate relationships, particularly sexual relationships, between teachers and students.⁷³ Second, these

⁷² See *id.*

⁷³ See Dariena Bonds, *Past sexual misconduct in Missouri: FaceBook ban teachers using site with students*, ALLVOICES (Aug. 23, 2011, 7:21 AM), <http://www.allvoices.com/contributed-news/10103283-past-sexual-misconduct-in-missouri-facebook-ban-teachers-using-site-with-students>; see also *States miss a social-media opportunity*, WASH. POST (Aug. 19, 2011), www.washingtonpost.com/opinions/states-miss-a-social-media-education-opportunity/2011/08/16/gIQA_TbqlQJ_story.html (quoting the Director of the American Civil Liberties Union who described these types of bans as "taking a bazooka to a fly"). But the underlying concern is certainly valid. Unfortunately, there is no national public database of sexual misconduct by teachers. See Preston, *supra* note 1. The statistics cited in most media articles are uncertain, however, because no one has ever designed a nationwide study for the expressed purpose of measuring the prevalence of sexual abuse by educators. See Brian Palmer, *How Many Kids are Sexually Abused by Their Teachers?*, SLATE (Feb. 8, 2012, 7:14 PM), http://www.slate.com/articles/news_and_politics/explainer/2012/02/is_sexual_abuse_in_schools_very_common_.html. One impetus behind New York City's Department of Education's policy is a number of incidents of alleged sexual misconduct within City schools. *NYC Teachers Could Soon be Banned from 'Friending' Students on Facebook*, CBS N.Y. (Mar. 22, 2012, 6:00 PM), <http://newyork.cbslocal.com/2012/03/22/nyc-teachers-could-soon-be-banned-from-friending-students-on-facebook/>. These bans continue to be controversial. With respect to New York City Department of Education's ("NYCDOE") restrictions, NYCDOE's Chancellor supported the policy but, at least before its adoption, the Director of Technology Innovation for Manhattan Schools, who argued that educators need to "interact with young people using the tools of their world", opposed it. See Francesca Duffy, *Should Teachers Defriend Students?*, EDUCATION WEEK TEACHER (Mar. 28, 2012, 4:16 PM), <http://bit.ly/TiiXIT>.

advocates argue that since teachers are “role models,”⁷⁴ students may lose respect for a teacher due to a teacher’s inadvertent or deliberate disclosure of compromising information,⁷⁵ such as a Facebook photograph of a teacher drinking while wearing a pirate hat captioned “drunken pirate.”⁷⁶ In turn, this disclosure may undermine the student’s educational experience in the classroom. Both of these concerns are heightened since most American K-12 students are minors.⁷⁷

[30] The dangers of categorical bans of this type of speech are likely overstated. With respect to a teacher’s use of social media to develop inappropriate sexual relationships with a student, which is certainly an

⁷⁴ Public school teachers have a long history of discrimination based on this role-model rationale. Although public school teachers are protected under the First Amendment, their conduct, historically, has been highly regulated. *See Fulmer, supra* note 10, at ¶ 28. In 1915, unmarried female teachers were prohibited from smoking cigarettes, dressing in bright colors, keeping company with men, loitering in front of ice cream stores, wearing fewer than two petticoats, and riding in any carriage or automobile with any man who was not an immediate family member. *See id.* (citing *Rules For Teachers --1915*, N.H. HIST. SOC’Y, <http://www.nhhistory.org/edu/support/nhrowingup/teacherrules.pdf> (last visited Nov. 26, 2012)). Currently, most state certification procedures still prohibit teachers from “engaging in conduct which would discredit the teaching profession.” Fulmer, *supra* note 10, at ¶ 28; *see also* CONN. AGENCIES REGS. § 10-145d-400a(c)(2)(C) (1998) (requiring teachers to conduct themselves as professionals, avoiding any misconduct that would impair the teacher’s ability to teach). Most state teaching licenses contain moral codes governing teacher conduct. *See Fulmer, supra* note 10, at ¶ 28 (citing Kellie Hayden, *Teachers & Social Networking Sites*, SUITE101 (May 18, 2008), <http://suite101.com/article/teachers-social-networking-sites-a54245>).

⁷⁵ *See* Josh Wolford, *Should Teachers and Students Be Friends on Facebook?*, WEBPRONWS (Aug. 1, 2011), <http://www.webpronews.com/should-teachers-and-students-be-friends-on-facebook-2011-08>.

⁷⁶ *See Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at *6 (E.D. Pa. Dec. 3, 2008).

⁷⁷ *See* Susan E. Hume, *The American Education System*, INT’L STUDENT GUIDE, http://www.internationalstudentguidetotheusa.com/articles/american_education_system.php (last visited Jan. 25, 2013).

important concern, opponents of categorical bans of this type of speech argue that it is highly unlikely that a ban on this interaction will reduce any predatory teacher conduct.⁷⁸ Moreover, if this conduct occurs, electronic evidence will exist to prosecute the offense.⁷⁹ Importantly, while a few teachers have used social media to foster inappropriate relationships with students and others have shared questionable information,⁸⁰ presumably the overwhelming majority of teachers use these mediums appropriately.

[31] Furthermore, categorically banning all off-campus teacher to student speech using social media because some teachers might share inappropriate information and thus be poor “role models” is a disproportionate response to the perceived transgression, akin to “killing a fly with a bazooka.”⁸¹ As this Article will discuss, there are better ways to address these issues.

⁷⁸ See Anita Ramasastry, *Can Teachers and Their Students Be Banned from Becoming Facebook Friends?*, JUSTIA.COM (Sept. 13, 2011), <http://verdict.justia.com/2011/09/13/can-teachers-and-their-students-be-banned-from-becoming-facebook-friends>.

⁷⁹ See Mark L. Krotoski & Jason Passwaters, *Using Log Record Analysis to Show Internet and Computer Activity in Criminal Cases*, 59 U.S. ATT’YS BULL. 12 (2011), available at http://www.justice.gov/usao/eousa/foia_reading_room/usab5906.pdf (stating web access logs can essentially retrace a Facebook user’s activity on the site).

⁸⁰ Documented abuse issues have been facilitated through social media. See generally Jordan Bienstock, *Students, Teachers and Social Networking*, CNN (Jan. 20, 2012, 2:38 PM), <http://schoolsofthought.blogs.cnn.com/2012/01/20/students-teachers-and-social-networking>. But it is unclear whether the abuse would have occurred in the absence of a teacher’s use of social media. Once again, in the absence of evidence linking teachers’ use of social media with sexually predatory behavior, school districts should be apprehensive about curtailing teachers’ use of social media.

⁸¹ See *States miss a social-media education opportunity*, *supra* note 73 (quoting the American Civil Liberties Union of Eastern Missouri’s legal director, Tony Rothert).

[32] Notably, any bans or restrictions on teachers' use of social media to communicate with students will be difficult to draft and costly to enforce. Would only "traditional" social media mediums like Facebook or MySpace count? What about new technologies? Who would monitor the sites? Even assuming school districts could effectively monitor teachers' social media usage, this monitoring would likely be time-consuming and costly.

[33] Categorical bans on teachers' use of social media with students fail to recognize that social media, in some form, are here to stay. As a recent New York Supreme Court Judge observed, Facebook has rapidly evolved from a platform used solely by American college students to a worldwide social and professional network, which is commonly used to advertise businesses, organize parties, debate politics, and air grievances.⁸² Social media and blogs continue to dominate Americans' online activity, accounting for nearly a quarter of all time spent online.⁸³ Nearly four in five Internet users visit social networks and blogs.⁸⁴ Americans now spend more time on Facebook than they do on any other webpage.⁸⁵ As the technologies behind social media continue to evolve, the challenges of monitoring any bans or restrictions on teachers' speech would likely increase as well.

[34] Given that the benefits of teacher off-campus communications with students are likely understated and the dangers overstated, and given that the costs of implementing and monitoring these bans may be significant,

⁸² Rubino v. City of N.Y., No. 107292/11, 2012 WL 373101, at *7 (N.Y. Sup. Ct. Feb. 1, 2012) (citing Somini Sengupta & Evelyn Rusli, *Personal Data's Value? Facebook Set to Find Out*, N.Y. TIMES, Feb. 1, 2012, available at http://www.nytimes.com/2012/02/01/technology/riding-personal-data-facebook-is-going-public.html?pagewanted=all&_r=0).

⁸³ See *State of the Media: The Social Media Report Q3 2011*, *supra* note 11.

⁸⁴ See *id.*

⁸⁵ See *id.*

school officials should be wary of censoring this speech, even if this censorship is allowed under the First Amendment.⁸⁶ School districts do not ban teacher-to-student communications on Main Street; they should not ban these communications using other newer mediums either.

IV. CURRENT FRAMEWORKS FOR ANALYZING TEACHERS' OFF-CAMPUS SPEECH

[35] The framework for analyzing teacher free speech cases with respect to teachers' off-campus rights under the United States Constitution is evolving. To date, there is little case authority examining teacher free speech rights with respect to communications with students using social media. But given the widespread attempts to ban or limit teacher to student speech using social media, courts will be forced to address this issue sooner rather than later.⁸⁷

[36] Due to the current paucity of authority, confusion exists as to what proper analytical framework courts should employ to evaluate these free speech disputes, though it is likely that courts will use the public employee framework or some variation of it in this context.⁸⁸ Of course, other potential frameworks also exist and this Article will briefly discuss these approaches as well.

⁸⁶ See *infra* Part XIII (concluding that categorical bans of off-campus teacher to student speech using social media are likely unconstitutional).

⁸⁷ Courts might have an easier time with this issue if there were consensus regarding the limits of teacher speech on-campus and the limits of student speech off-campus. But these areas of law are evolving simultaneously.

⁸⁸ See *infra* Part IV.A.

A. Public Employee Framework⁸⁹

[37] Public employees can challenge government restrictions of their free speech rights in two basic ways. First, although a relatively rare occurrence, an employee can bring a facial challenge to the regulation based on overbreadth or vagueness grounds.⁹⁰ Second, the employee can bring an as-applied challenge to the regulation as a retaliatory discharge claim.⁹¹

[38] Most public employee claims brought under this framework are retaliatory discharge claims.⁹² To state a retaliatory discharge claim based on a violation of free speech rights, a teacher would need to establish the following:⁹³ (1) her speech was made outside of her official duties rather

⁸⁹ Historically, public employees had no right to object to conditions placed on employment, including those restricting the exercise of constitutional rights. *See Connick v. Myers*, 461 U.S. 138, 143 (1983); *see also Adler v. Bd. of Educ.*, 342 U.S. 485, 496 (1952) (upholding a New York law empowering the Board of Regents to dismiss teachers who were members of the Communist party or other organizations advocating the overthrow of the United States government). As Justice Holmes once remarked, “‘A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.’” *Connick*, 461 U.S. at 143-44 (quoting *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892)). As discussed *infra*, Justice Holmes’ observation is no longer an accurate statement of the law.

⁹⁰ *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *see also L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 39 (1999).

⁹¹ *See Reed v. Town of Gilbert*, 587 F.3d 966, 974 (9th Cir. 2009) (quoting *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1034 (9th Cir. 2006)).

⁹² *See* STEVEN BADERIAN, TRENDS IN THE LAW OF EMPLOYMENT RETALIATION AND WHISTLEBLOWING, CNA PRO (2011), *available at* <http://www.cnapro.com/pdf/EPL%20-%20Retaliation%20and%20Whistleblowing%20%28JacksonLewis%29%209-7-11.pdf>.

⁹³ The Supreme Court has not had the opportunity to articulate, post *Garcetti*, a test for evaluating a public employee’s retaliatory discharge claim based on a violation of the employee’s First Amendment free speech rights. Circuit Courts, however, generally apply a five-part test to examine these claims: (1) Did the employee speak pursuant to the employee’s official job duties?; (2) Did the employee’s speech implicate a matter of

than pursuant to her official duties, (2) her speech implicated a public concern, and (3) school officials took an adverse employment action that was substantially motivated by her speech.⁹⁴ If the teacher meets this evidentiary threshold, school officials, in order to regulate her speech, would need to establish that (1) the school's interests in providing efficient services outweigh the teacher's interests in commenting on these matters and the student's interests in hearing the speech, or (2) school officials would have taken the adverse employment action even in the absence of the protected speech.⁹⁵ The challenges with respect to this test are evidenced by lower courts' struggles to determine whether these elements are questions of law, fact, or both.⁹⁶

public concern?; (3) Did the government take an adverse employment action that was substantially motivated by the speech?; (4) Did the government's interests in providing efficient services outweigh the citizen's interests in commenting on these matters and the public's interests in hearing the speech?; and (5) Would the government have taken the adverse employment action even in the absence of the protected speech? *See, e.g., Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009); *Nagle v. Marron*, 663 F.3d 100, 105 (2d Cir. 2011). Courts sometimes analyze these elements in different orders, and the test is often phrased in slightly different terms. *See, e.g., Nagle*, 663 F.3d at 105 (quoting *Cotarelo v. Vill. of Sleepy Hollow Police Dep't*, 460 F.3d 247, 251 (2d Cir. 2006)).

⁹⁴ The plaintiff must establish the first three elements. *See Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 337-38 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 3068 (2011); *Eng*, 552 F.3d at 1070-71.

⁹⁵ If the plaintiff succeeds in meeting this threshold, the burden of production shifts to the government to establish the last two elements. *See Eng*, 552 F.3d at 1071-72; *Nagle*, 663 F.3d at 105.

⁹⁶ The issues of whether the government took an adverse employment action that was substantially motivated by the speech and whether the government would have taken the adverse employment action even in the absence of the protected speech are typically treated as issues for the fact finder. *See Morris v. City of Colo. Springs*, 666 F.3d 654, 661 (10th Cir. 2012). Whether a public employee's speech implicated a public concern is a question of law. *Connick v. Myers*, 461 U.S. 138, 147-48 n.7 (1983). Whether the employee spoke as a citizen rather than pursuant to her official job duties is generally treated as a mixed question of law and fact. *See SCHNEIDER*, *supra* note 28, § 2:20 n.188.02. Finally, whether the government's interest in providing efficient services outweighs the citizen's interests in communicating on these matters and the public's

1. Teacher Speech Cases

[39] The current public employee law framework makes no distinction between the speech rights of teachers and those of other public employees;⁹⁷ the following two Supreme Court cases involving teacher speech rights are discussed first for convenience purposes only.

a. Teacher Off-Campus Speech: *Pickering v. Board of Education*

[40] The seminal case governing teacher off-campus free speech rights under the United States Constitution is *Pickering*.⁹⁸ Ultimately, the Supreme Court held that Pickering's speech criticizing school officials was protected under the First Amendment.⁹⁹ In reaching this conclusion, the Court refused to provide a definitive test governing when a teacher's off-campus speech can be limited.¹⁰⁰ However, the Supreme Court did provide some general guidelines, including a general analytical framework for analyzing whether a teacher's off-campus speech is protected under the First Amendment.¹⁰¹

[41] Under the guidelines set out in the *Pickering* decision, at least as

interests in hearing the speech is a question of law or fact is unresolved. *See id.* (noting a federal circuit split). This Article will not focus on issues solely within the province of the fact finder.

⁹⁷ *See, e.g.,* *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568-69 (1968); *Connick*, 461 U.S. at 142-43.

⁹⁸ *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

⁹⁹ *Id.* at 574-75.

¹⁰⁰ *See id.* at 568-70.

¹⁰¹ *Id.* at 569-73.

modified by later case law,¹⁰² a teacher's speech is protected if it satisfies a two-part test. First, the teacher's speech must involve a matter of legitimate public concern.¹⁰³ Second, if the speech does involve a matter of legitimate public concern, a court should employ a balancing test to determine whether the employer's interests in prohibiting the speech outweigh the teacher's interests in making the speech.¹⁰⁴ If the speech meets both parts of this test, it is protected under the First Amendment.¹⁰⁵

[42] The situation in *Pickering* predates social media.¹⁰⁶ In this case, Marvin L. Pickering, an Illinois public school teacher, was dismissed from his teaching position for sending a letter to a newspaper regarding a recently proposed tax increase to support the district schools.¹⁰⁷ In his letter, Pickering objected to the tax increase, which was earmarked for building schools.¹⁰⁸ Pickering wrote the letter in response to articles supporting the passage of the tax increase and following a vote that

¹⁰² See *Connick v. Myers*, 461 U.S. 138 (1983).

¹⁰³ *Id.* at 147-48. Some commentators have concluded that *Pickering* did not require speech implicating a public concern. See, e.g., D. Gordon Smith, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 257 (1990) (observing that "public concern" was merely one of several factors in the analysis); Karin B. Hoppmann, *Concern with Public Concern: Toward a Better Definition of the Pickering/Connick Threshold Test*, 50 VAND. L. REV. 993, 996 (1997) (noting that while *Pickering* did refer to speech upon matters of "public concern," it never identified the degree of public concern required).

¹⁰⁴ See *Pickering*, 391 U.S. at 571-74.

¹⁰⁵ See *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 466-67 (1995).

¹⁰⁶ It even predates the rumor Vice President Al Gore invented the Internet. See *Transcript: Vice-President Gore on CNN's 'Late Edition'*, CNN (Mar. 9, 1999 5:06 PM), <http://www.cnn.com/ALLPOLITICS/stories/1999/03/09/president.2000/transcript.gore/>.

¹⁰⁷ *Pickering*, 391 U.S. at 564.

¹⁰⁸ *Id.* at 566.

defeated the tax increase.¹⁰⁹ In essence, Pickering's letter criticized the Board of Education's handling of an earlier bond issue and its subsequent allocation of financial resources between the school's educational and athletic programs.¹¹⁰ The letter also criticized both the Board and the superintendent's methods of informing the district's taxpayers of the reasons why additional tax revenue was needed.¹¹¹ In addition, Pickering's letter charged the superintendent of schools with attempting to prevent teachers in the district from criticizing the bond issue.¹¹² Some of Pickering's criticism was based on inaccurate information.¹¹³

[43] Pickering was dismissed from his teaching position and he challenged his dismissal, claiming that his letter was protected speech under the First and Fourteenth Amendments to the United States Constitution.¹¹⁴ Following a full hearing, the Board of Education rejected his claims.¹¹⁵ His subsequent appeals to both the Illinois trial court and the Illinois Supreme Court were denied.¹¹⁶ The United States Supreme Court eventually reversed the Illinois Supreme Court's decision.¹¹⁷

[44] The Supreme Court rejected the notion that teachers are not

¹⁰⁹ *Id.* at 565-66.

¹¹⁰ *Id.* at 569.

¹¹¹ *Id.* at 566.

¹¹² *Pickering*, 391 U.S. at 566.

¹¹³ *Id.* at 570, 582.

¹¹⁴ *Id.* at 564-65.

¹¹⁵ *Id.* at 565.

¹¹⁶ *See id.*

¹¹⁷ *Pickering*, 391 U.S. at 565.

entitled to First Amendment rights, reasoning that “the public interest in having free and unhindered debate on matters of public importance . . . is a core value of the Free Speech Clause of the First Amendment.”¹¹⁸ Consistent with this principle, the Court strove to balance the interests of the teacher, as a citizen commenting on matters of public concern, and the interests of the State, as an employer promoting the efficiency of the public services it performs through its employees.¹¹⁹ Noting the myriad situations in which teachers can criticize their superiors, the Court refused to provide a “general standard against which all such statements may be judged.”¹²⁰ However, the Court did provide some guidance for analyzing these issues.¹²¹

[45] First, the Supreme Court determined whether the subject involved a matter of legitimate public concern.¹²² Without defining the phrase “legitimate public concern,” the Court concluded that the question of whether a school system requires additional funding is a matter of legitimate public concern.¹²³ On such a question, the Court observed that “free and open debate is vital to informed decision-making by the electorate.”¹²⁴ The Court reasoned that teachers as a class are members of the community most likely to have informed and definite opinions as to how things such as school funds should be allocated; therefore, it is essential that teachers be able to speak freely on such questions.¹²⁵

¹¹⁸ *Id.* at 573.

¹¹⁹ *See id.* at 568.

¹²⁰ *Id.* at 569.

¹²¹ *See id.*

¹²² *See Pickering*, 391 U.S. at 571.

¹²³ *Id.*

¹²⁴ *Id.* at 571-72.

¹²⁵ *Id.* at 572.

[46] Because the letter's subject involved a matter of legitimate public concern, the Court then examined whether the employer's interest in prohibiting the speech outweighed the teacher's right to speak, focusing on the letter's impact on workplace relationships and Pickering's work responsibilities.¹²⁶ In short, the Court examined whether the actual or potential disruption to Pickering's workplace caused by his letter outweighed his free speech rights. More specifically, the Court examined whether the speech would create conflict with his co-workers or supervisors, destroy the relationship of loyalty and trust required in the employment context, or interfere with the employee's performance.¹²⁷ The Court found the disruption to his employer caused by the letter was minimal for a number of reasons. First, Pickering's statements were not directed at a particular person with whom Pickering would be in contact during his daily work as a teacher.¹²⁸ Consequently, the Court concluded that Pickering's case did not involve any issue of discipline by his immediate supervisors at school and Pickering's actions did not disrupt any harmony among co-workers.¹²⁹ Second, Pickering's speech did not impede his performance of his daily duties in the classroom nor did it interfere with the regular operations of the school.¹³⁰ Notably, the Court did not find any disruption to the workplace even though some of Pickering's criticism was inaccurate.¹³¹

[47] Furthermore, the school administration's interests in limiting a teacher's opportunity to engage in public debate are further limited when

¹²⁶ *Id.* at 569-70.

¹²⁷ See Ronald D. Wenkart, *The Free Speech Rights of K-12 Teachers After Garcetti*, 269 EDUC. L. REP. 1, 3 (2011).

¹²⁸ *Pickering*, 391 U.S. at 569-70.

¹²⁹ *Id.* at 570. Of course, Pickering was disciplined; he was fired. *Id.* at 564.

¹³⁰ See *id.* at 572-73.

¹³¹ *Id.* at 570.

the teacher is speaking as a member of the general public.¹³² Where the fact of employment is only tangentially and insubstantially involved in the subject matter of the teacher's public communication, the Court concluded that it is necessary to treat the teacher as a member of the general public.¹³³ Thus, absent proof that the teacher's statements were knowingly or recklessly false, a teacher has a right to speak on issues of public importance.¹³⁴ Consequently, his erroneous statements criticizing his employer on a matter of legitimate public concern were protected speech.¹³⁵

[48] Notably, the opinion is silent as to where and when Pickering wrote his letter and who read it. Presumably, however, his letter was not written at the school during instructional time.¹³⁶ Also, some members of Pickering's audience were likely students in the school, possibly even his students. The Court did not qualify its holding even though Pickering's audience likely included some minors.

b. Teacher On-Campus Speech: *Givhan v. Western Line Consolidated School District*

[49] More than a decade after deciding *Pickering*, the Supreme Court decided *Givhan*, using *Givhan* to further explain *Pickering*.¹³⁷ Unlike *Pickering*, *Givhan* did not involve a public communication, off-campus

¹³² See *id.* at 573.

¹³³ See *Pickering*, 391 U.S. at 572.

¹³⁴ See *id.* at 574.

¹³⁵ See *id.*

¹³⁶ See generally *Pickering*, 391 U.S. 563 (discussing the content and publication of the letter). The briefs filed with the Supreme Court are also silent as to where and when Pickering wrote his letter.

¹³⁷ See *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979).

speech, or even teacher-to-student speech.¹³⁸ While both Givhan's speech and Pickering's speech implicated a matter of legitimate public concern,¹³⁹ Givhan's speech, unlike Pickering's speech, was communicated privately to a school administrator during working hours.¹⁴⁰ In short, *Givhan* held that when a public employee speaks as a citizen on a matter of general concern, the speech is protected under the First Amendment, even if the speech is made privately.¹⁴¹

[50] The district court in *Givhan* ordered the teacher's reinstatement, finding that the primary reason Bessie B. Givhan was discharged was due to her criticism of the policies and practices of the school district, especially the school in which she was assigned to teach.¹⁴² She focused her complaints on the school's alleged racially discriminatory policies and practices.¹⁴³ The Fifth Circuit reversed the district court's order reinstating Givhan, concluding that because Givhan had privately expressed her concerns to the principal, her expression was not protected under the First Amendment.¹⁴⁴ The Fifth Circuit ultimately "concluded that there is no constitutional right to press even good ideas on an unwilling recipient."¹⁴⁵

¹³⁸ *Id.* at 412-13.

¹³⁹ *See id.* at 414.

¹⁴⁰ *Id.* at 412.

¹⁴¹ *Id.* at 415-16. A critical, enduring aspect of *Givhan* is that a public employee's private speech can be protected under the First Amendment.

¹⁴² *Givhan*, 439 U.S. at 412-13.

¹⁴³ *Id.* at 413.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (internal quotation marks omitted).

[51] The Supreme Court reversed, reasoning that a public employee does not forfeit her First Amendment freedoms if she decides to express her views privately rather than publicly.¹⁴⁶ The Court observed that the First Amendment’s protections of government employees extends to private as well as public expression.¹⁴⁷

[52] However, the Court noted that “striking the *Pickering* balance in each context may involve different considerations.”¹⁴⁸ The Court stated, “When a teacher speaks publicly, it is generally the *content* of the statements that must be assessed to determine whether they ‘in any way either impeded the teacher’s proper performance of his daily duties in the classroom . . . or interfered with the regular operation of schools generally.’”¹⁴⁹ On the other hand, when a teacher speaks privately, this communication “may in some situations bring additional factors to the *Pickering* calculus.”¹⁵⁰ For example, the Court noted that “[w]hen a government employee personally confronts her immediate superior, the employing agency’s institutional efficiency may be threatened not only by the content of the employee’s message but also by the manner, time, and place in which it is delivered.”¹⁵¹ Importantly, the Court, even in the context of private speech, focused on the impact of the speech on the workplace.¹⁵²

¹⁴⁶ *Id.* at 413-14.

¹⁴⁷ *Givhan*, 439 U.S. at 413.

¹⁴⁸ *Id.* at 415 n.4.

¹⁴⁹ *Id.* (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572-73 (1968)).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *See Givhan*, 439 U.S. at 414 n.3, 415 n.5. Ultimately, the Supreme Court remanded the case to the district court for further proceedings consistent with its *Mount Healthy* decision, which was decided after the district court’s decision in *Givhan*. *Id.* at 417; *see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

2. Other Relevant Public Employee Speech Cases

a. Public Employee Speech Outside the Workplace: *NTEU* and *City of San Diego*

[53] Under the public-employee framework, the Supreme Court cases do not clarify the extent of First Amendment protection for off-duty public employees. In particular, the cases do not provide clear guidance on the degree of public concern that the employee's speech must implicate, nor do they explain how closely the off-duty speech must relate to the employee's official work duties.¹⁵³

[54] With respect to non-teacher public employee speech occurring outside the workplace, the Supreme Court's leading decisions, *United States v. National Treasury Employees Union* ("*NTEU*")¹⁵⁴ and *City of San Diego v. Roe*,¹⁵⁵ are, on one level, easy to reconcile. In *NTEU*, the Supreme Court held that a ban on honoraria for public employees was unconstitutional even if the speech was work-related because this speech might implicate a public concern and pass the *Pickering* balancing test.¹⁵⁶

Although the district court had concluded that Givhan's protected speech played a substantial role in the school district's decision not to rehire her, the district court did not make any findings concerning whether the school district established, by a preponderance of the evidence, that it would have reached the same decision even in the absence of the protected speech; therefore, the Court remanded the case. *Givhan*, 439 U.S. at 417.

¹⁵³ See Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 BYU L. REV. 2117, 2130 (2010).

¹⁵⁴ *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 466 n.10, 477 (1995) (holding that a ban on honoraria for public employees was unconstitutional even if the speech was work-related because this speech might implicate a public concern and pass the *Pickering* balancing test).

¹⁵⁵ *City of San Diego v. Roe*, 543 U.S. 77, 80, 84 (2004) (holding that a police officer's speech could be censored because his speech did not implicate a public concern).

¹⁵⁶ *Nat'l Treasury Emps. Union*, 513 U.S. at 466 n.10, 477.

The Court in *City of San Diego* held that a police officer's speech could be censored because his speech did not implicate a "public concern."¹⁵⁷

[55] However, on another level, one implication of these cases is potentially worrisome. In *NTEU*, Congress, at least in part, sought to regulate federal employees' speech when the speech was related to the employees' job responsibilities and thus could directly impact the work environment.¹⁵⁸ In *NTEU*, the Supreme Court held this regulation unconstitutional.¹⁵⁹ By contrast, in *City of San Diego*, the police department sought to regulate an "off-duty" officer's speech even though the nexus between the officer's speech and his job was, at best, attenuated.¹⁶⁰ Nevertheless, the Court held that the officer's speech was unprotected.¹⁶¹ These cases raise some question as to how closely the speech regulation must relate to the employee's work responsibilities.¹⁶²

¹⁵⁷ *City of San Diego*, 543 U.S. at 80, 84. However, if "public concern" is defined broadly to include everything that might concern the public, the Court's holding in *City of San Diego* is more difficult to understand because even prurient speech might implicate a "public concern." See Papandrea, *supra* note 153, at 2140-42; see also *infra* Part X(B)(1).

¹⁵⁸ See *Nat'l Treasury Emps. Union*, 513 U.S. at 459-60.

¹⁵⁹ *Id.* at 457.

¹⁶⁰ See *City of San Diego*, 543 U.S. at 79, 81.

¹⁶¹ *Id.* at 79-80.

¹⁶² The Supreme Court has repeatedly emphasized that a government entity has far greater leeway to regulate an employee's speech than to regulate a citizen's speech. See *Waters v. Churchill*, 511 U.S. 661, 671-72 (1994). In *City of San Diego*, the nexus between the police officer's speech and his job responsibilities was attenuated. Thus, the San Diego Police Department, in regulating his speech, was regulating speech on the outer fringes of the employment relationship: in short, the San Diego Police Department was acting almost in a "sovereign" capacity.

**i. *United States v. National Treasury
Employees Union***

[56] In *NTEU*, the Supreme Court held that a congressional ban prohibiting almost all federal employees from receiving honoraria for making speeches or writing articles violated the plaintiff-respondents' First Amendment free speech rights.¹⁶³ In essence, the ban restricted a federal employee from accepting honoraria for this expression even when the expression was unrelated to work.¹⁶⁴ The ban did not directly “prohibit[] any speech nor discriminate[] among speakers based on the content or viewpoint of their message[].”¹⁶⁵ However, the Court concluded that the “prohibition on compensation unquestionably impose[d] a significant burden on expressive activity,” and therefore violated the First Amendment.¹⁶⁶

[57] In *NTEU*, the Justices agreed that *Pickering-Connick* provided the proper test to evaluate the plaintiff-respondents' facial challenge to Section 501(b) of the Ethics in Government Act of 1978.¹⁶⁷ The majority held that the ban in Section 501(b) was overbroad, regulating more speech than allowed under the *Pickering-Connick* test.¹⁶⁸ First, based on the types of speech for which public employees had previously received honoraria, the Court concluded that much of the banned speech would qualify as citizen-expression on matters of public concern rather than employee-expression on matters of personal interest.¹⁶⁹ Importantly, the

¹⁶³ *Nat'l Treasury Emps. Union*, 513 U.S. at 457.

¹⁶⁴ *See id.*

¹⁶⁵ *Id.* at 468.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 465-66.

¹⁶⁸ *See Nat'l Treasury Emps. Union*, 513 U.S. at 466-70.

¹⁶⁹ *Id.* at 466.

Court concluded that a public employee speaks as a citizen on matters of public concern when the employee's speech is addressed to a public audience, is made outside of the workplace, and involves content largely unrelated to the employee's government work.¹⁷⁰

[58] Furthermore, with respect to the second part of the *Pickering-Connick* test, which concerns the balancing of the employees' free speech interests against the employers' interests in an efficient workplace, the Court concluded that the *Pickering* calculus weighed heavily in favor of the plaintiff-respondents.¹⁷¹ The Court observed that the government's burden was heavy because the honoraria ban was a "wholesale deterrent to a broad category of expression by a massive number of potential speakers."¹⁷² Furthermore, the government was required to show that the ban would affect actual workplace efficiency.¹⁷³ The Court concluded that the honoraria ban would deter an enormous quantity of speech based only on speculation that it might threaten the government's interest, and the government had provided no evidence of misconduct related to honoraria in the "vast rank and file of federal employees" it covered.¹⁷⁴ Furthermore, because the vast majority of the speech at issue presumably would not involve the subject matter of government employment and would take place outside the workplace, the government could not justify the ban on the grounds of immediate workplace disruption based on *Pickering* and its progeny.¹⁷⁵ In particular, the Court observed that the speech did not address audiences composed of co-workers or supervisors, but rather involved speech for the general public, further limiting any

¹⁷⁰ *Id.*

¹⁷¹ *See id.* at 477.

¹⁷² *Id.* at 467.

¹⁷³ *Nat'l Treasury Emps. Union*, 513 U.S. at 467 n.11.

¹⁷⁴ *Id.* at 472.

¹⁷⁵ *Id.* at 470.

workplace impact effects.¹⁷⁶ Ultimately, the Court held that the speculative benefits the honoraria ban might provide the government were insufficient to justify the burden on the plaintiff-respondents' expression.¹⁷⁷

ii. *City of San Diego v. Roe*

[59] The police officer's speech in *City of San Diego* was made outside the workplace and did not involve any workplace grievance issues.¹⁷⁸ The Supreme Court applied the *Pickering-Connick* test, holding that the officer's speech did not touch on a matter of public concern and therefore was not entitled to protection under the First Amendment.¹⁷⁹ The circumstances in *City of San Diego*, however, were rather extreme. The police officer's speech was commercial speech and, at least in the Court's view, exploited his status as a city police officer.¹⁸⁰ Crucial to the Court's decision was the fact that the officer's speech did not inform the public about any aspect of the functioning of the San Diego Police Department.¹⁸¹

¹⁷⁶ *Id.* at 465.

¹⁷⁷ *Id.* at 477. Justice O'Connor, concurring in the judgment, explained that section 501(b) involved a ban on off-hour speech that did not relate to internal office affairs or the employee's status as an employee. *Id.* at 480 (O'Connor, J., concurring) (citing *Connick v. Myers*, 461 U.S. 138, 149 (1983)). Justice O'Connor added that "[a]s the magnitude of intrusion on an employee's [or at least off-duty employee's] interests rises, so does the [g]overnment's burden of justification." *Id.* at 483 (O'Connor, J., concurring) (citing *Connick*, 461 U.S. at 150).

¹⁷⁸ 543 U.S. 77, 81 (2004).

¹⁷⁹ *Id.* at 84.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

[60] In this case, the City of San Diego terminated a police officer for selling videotapes he made and for other related activity.¹⁸² The tapes showed the respondent engaging in sexually explicit acts, including stripping off a police uniform.¹⁸³ The uniform was not the specific uniform of his employer, the San Diego Police Department (“SDPD”), but it was identifiable as a police uniform.¹⁸⁴ He sold his videos as well as police equipment, including official uniforms of the SDPD, on his EBay account.¹⁸⁵ His account indicated that he was employed in law enforcement.¹⁸⁶

[61] After Roe’s activities on eBay were discovered, the SDPD held a hearing and Roe was directed to stop displaying, manufacturing, distributing, or selling any sexually explicit materials.¹⁸⁷ Roe removed some material from his account, but he did not fully comply with this directive.¹⁸⁸ The SDPD then terminated Roe.¹⁸⁹ Roe sued, claiming the SDPD violated his First Amendment free speech rights when it discharged him.¹⁹⁰

[62] The lower courts disagreed as to whether Roe’s speech implicated

¹⁸² *Id.* at 78.

¹⁸³ *City of San Diego*, 543 U.S. at 78.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 79.

¹⁸⁸ *City of San Diego*, 543 U.S. at 79.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

a public concern.¹⁹¹ The district court held that the sexually explicit, made-for-profit videos did not involve a "matter of public concern."¹⁹² The Ninth Circuit Court of Appeals reversed, holding that Roe's conduct fell within the protected category of citizen commentary on matters of public concern.¹⁹³ Central to the Court of Appeals' conclusion was that Roe's expression did not involve an internal workplace grievance, took place while he was off duty and away from his employer's premises, and was unrelated to his employment.¹⁹⁴

[63] The Supreme Court reversed the Court of Appeals' decision, holding that Roe's claim failed for two reasons.¹⁹⁵ First, the Supreme Court reasoned that Roe's claim failed under the line of cases protecting a public employee's speech when the speech is made on the employee's own time on topics unrelated to employment.¹⁹⁶ In these circumstances, the speech is entitled to First Amendment protection unless the government can justify its regulation based on something "far stronger than mere speculation."¹⁹⁷ The Supreme Court reasoned that this line of cases, culminating in *NTEU*, did not control Roe's case because the speech involved in these cases was unrelated to the claimant's employment and had no effect on the employer's mission.¹⁹⁸ In *City of*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *City of San Diego*, 543 U.S. at 79-80.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 81-82, 84.

¹⁹⁶ *Id.* at 80.

¹⁹⁷ *Id.* (quoting *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 455 (1995)).

¹⁹⁸ *City of San Diego*, 543 U.S. at 80 (citing *Nat'l Treasury Emps. Union*, 513 U.S. at 459).

San Diego, the SDPD had demonstrated substantial interests of its own that were compromised by Roe's expression.¹⁹⁹ In short, Roe took "deliberate steps to link his videos and other wares to his police work," all in ways injurious to his employer.²⁰⁰ The use of a police uniform, the law enforcement reference in his web site, the listing of the speaker as "in the field of law enforcement," and the debased parody of an officer performing indecent acts while in the course of his official duties, all served to bring the mission of his employer and the professionalism of its officers into serious disrepute.²⁰¹ Consequently, although the speech was made on the employee's own time and did not involve any particular work-related dispute with the SDPD, the speech was "linked to his official status as a police officer" and "designed to exploit his employer's image."²⁰² Thus, Roe's speech detrimentally affected the employer's mission.²⁰³

[64] Second, after concluding that *Pickering-Connick* provided the proper framework for analyzing Roe's claim, the Supreme Court held that his speech was not protected because the videos did not implicate a "matter of public concern," which typically involve matters of government policy that are of interest to the public at large.²⁰⁴ The Court noted that the "boundaries of the public concern test are not well defined."²⁰⁵ In reaching its holding, the Court reasoned that the interests being protected under *Pickering-Connick* are as much about the public's interest in

¹⁹⁹ *Id.* at 81.

²⁰⁰ *Id.*

²⁰¹ *Id.* (quoting *Roe v. City of San Diego*, 356 F.3d 1108, 1111 (9th Cir. 2004)).

²⁰² *Id.* at 84.

²⁰³ *City of San Diego*, 543 U.S. at 84.

²⁰⁴ *Id.* at 80-82.

²⁰⁵ *Id.* at 83.

receiving informed opinion as they are about the employee's own right to disseminate it.²⁰⁶ Relying on its earlier decision in *Connick*, the Court examined “the ‘content, form, and context of a given statement, as revealed by the whole record’” to assess whether the employee's speech addressed a matter of public concern.²⁰⁷

[65] The Supreme Court explained that “public concern” is something that is a subject of “legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.”²⁰⁸ Therefore, even certain private remarks made at the workplace during working hours, such as negative comments about the President of the United States, “touch on matters of public concern” and should thus be analyzed under *Pickering-Connick*.²⁰⁹

[66] The Court had little difficulty holding that Roe's expression did “not qualify as a matter of public concern” under any interpretation of the public concern test.²¹⁰ In particular, Roe's speech did nothing to inform the public about any aspect of the SDPD's functioning or operation.²¹¹ Nor was his speech anything like the speech in *Rankin v. McPherson*, where a co-worker commented privately on political news.²¹² Roe's

²⁰⁶ *Id.* at 82.

²⁰⁷ *Id.* at 83 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)).

²⁰⁸ *City of San Diego*, 543 U.S. at 83-84.

²⁰⁹ *Id.* at 84.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Compare *id.*, with *Rankin v. McPherson*, 483 U.S. 378, 381, 392 (1987) (holding that a clerical employee's remark, made privately in a county constable's office and never disseminated to the public, was protected speech) (The employee, after hearing of an attempt on the life of then President Reagan, said, “[I]f they go for him again, I hope they get him.”). *Rankin* was a pre-*Garcetti* case. If *Rankin* were decided today, it would likely be decided under *Garcetti*.

expression was widely broadcast, linked to his official status as a police officer, and designed to exploit his employer's image.²¹³ Consequently, Roe's speech was not protected under the First Amendment.²¹⁴

**b. Public Employee Speech Within the
Workplace: *Connick* and *Garcetti***

[67] The Supreme Court's decisions regarding non-teacher public employee speech within the workplace leave a number of questions unanswered. In particular, the Court has not provided guidance on when a public employee acts pursuant to the employee's official duties²¹⁵ and the Court has not clarified the extent to which *Garcetti* modifies *Connick*.

[68] In *Connick*, the Supreme Court observed that *Pickering*'s balancing test applies only when the employee spoke "as a citizen upon matters of public concern" rather than "as an employee upon matters" only of private interest.²¹⁶ In *Garcetti*, the Supreme Court held that when a public employee speaks pursuant to the employee's "official duties," the First Amendment does not protect the employee's speech, regardless of whether the speech implicates a public concern.²¹⁷ While *Garcetti* represented an opportunity to clarify this area of law, many commentators agree the opinion did not achieve this result.²¹⁸

²¹³ *City of San Diego*, 543 U.S. at 84.

²¹⁴ *See id.*

²¹⁵ *See Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006) (refusing to provide a comprehensive framework for determining when an employee speaks pursuant to the employee's official duties).

²¹⁶ 461 U.S. 138, 147 (1983).

²¹⁷ 547 U.S. at 422.

²¹⁸ *See, e.g.,* Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines: Garcetti v. Ceballos in the Federal Appellate Courts*, 262 EDUC. L. REP. 357, 358 (2011).

i. *Connick v. Myers*

[69] In early 1983, the Supreme Court explained the parameters of speech involving "public concern" more fully, ultimately holding in a 5-4 decision that the First Amendment did not protect a state employee when she circulated a questionnaire concerning internal office affairs.²¹⁹ Sheila Myers was employed by the District Attorney's Office.²²⁰ At work, she finalized a questionnaire soliciting "the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."²²¹ Myers distributed the survey at work.²²² Although some surveys were distributed during lunch, others were distributed during working hours.²²³ Myers was subsequently discharged.²²⁴

[70] The district court found that Myers' distribution of the questionnaire was the real reason for her termination.²²⁵ The district court then held that the questionnaire involved matters of public concern and that the state had not "clearly demonstrated" that the survey "substantially interfered" with the operations of the District Attorney's Office.²²⁶ The

²¹⁹ *Connick*, 461 U.S. at 154.

²²⁰ *Id.* at 140.

²²¹ *Id.* at 141.

²²² *Id.*

²²³ *See id.* at 153 & n.13.

²²⁴ *Connick*, 461 U.S. at 141.

²²⁵ *Id.* at 142.

²²⁶ *Id.*

Fifth Circuit affirmed.²²⁷

[71] The Supreme Court reversed, holding that Myers' speech was unprotected despite reaffirming that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values."²²⁸ In reaching this result, the Court established a two-part test for determining whether a public employee's speech receives First Amendment protection.²²⁹ First, the public employee's speech must implicate a public concern.²³⁰ Second, if the employee's speech does involve a public concern, a court should determine whether the employer's interests in prohibiting the speech outweigh the employee's interests in speaking and the audience's interest in hearing the speech.²³¹ Thus, a public employee's speech is protected if it involves a "public concern" and on balance, the speaker and audience's interests in the speech outweigh, or are at least equal to, the employer's interests.²³²

[72] In determining whether the speech could be fairly characterized as constituting speech on a matter of public concern, the Court explained that if speech cannot be fairly considered as relating to any matter of political, social, or other concern to the community, it can be regulated.²³³ The

²²⁷ *Id.*

²²⁸ *Id.* at 145, 154 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

²²⁹ *Connick*, 461 U.S. at 142, 146, 149-50.

²³⁰ *Id.* at 144-45. *See generally* 2 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 18:10 (2012) (citing *Nichol v. Arin Intermediate Unit 28*, 268 F. Supp. 2d 536, 557 (W.D. Pa. 2003) ("Public concern" is a term of art under the *Pickering-Connick* test, a term "measured more by what it is not than by what it is.")).

²³¹ *See Connick*, 461 U.S. at 140 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

²³² *See id.* at 154.

²³³ *Id.* at 146.

Court, however, avoided drawing any bright lines, noting that its holding should not be read to suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carry so little social value, such as obscenity, that the state can prohibit this expression by all persons in the jurisdiction.²³⁴ The Court observed that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent unusual circumstances, a federal court is not an appropriate forum.²³⁵ Further, the Court explained that “[w]hether an employee’s speech addresses a matter of public concern must be determined by examining the content, form, and context of a given statement as revealed by the whole record.”²³⁶ This inquiry into the protected status of speech is “one of law, not fact.”²³⁷

[73] Because one of the matters in Myers’ survey did touch on a matter of public concern, namely whether attorneys in the office were pressured to work in political campaigns, the Court moved onto the second part of the *Pickering* test—balancing the interests of both the employer and the employee—ultimately holding that these interests weighed in the employer’s favor.²³⁸ The Court noted that “[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment is appropriate.”²³⁹ The Court cautioned that “a stronger showing may be necessary if the employee’s speech more substantially involved matters of public

²³⁴ *Id.* at 147.

²³⁵ *Id.*

²³⁶ *Connick*, 461 U.S. at 147-48.

²³⁷ *Id.* at 148 n.7.

²³⁸ *See id.* at 149-52.

²³⁹ *Id.* at 151-52.

concern.”²⁴⁰

[74] In balancing the competing interests under the second part of the *Pickering* test, the Court weighed Myers’ free speech interests against her employer’s interests in curtailing her speech.²⁴¹ In the second part of the test, the “manner, time and place” of the employee’s statement is again relevant, as is the context in which the dispute arose.²⁴² In particular, with respect to the employer’s interests, the Court examined “whether the statement impair[ed] discipline by superiors or harmony among co-workers, ha[d] a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impede[d] the performance of the speaker’s duties or interfere[d] with the regular operation of the enterprise.”²⁴³

[75] The majority opinion concluded that Myers’ questions were not aimed at helping the public evaluate the performance of a government agency but rather at "gathering ammunition" for a battle with Myers’ supervisors regarding her transfer.²⁴⁴ The majority observed that Myers’ supervisors were not required to wait until the office was disrupted and working relationships destroyed before quelling, in the words of a supervisor, Myers’ “mini-insurrection.”²⁴⁵

[76] The manner, time, and place in which the questionnaire was

²⁴⁰ *Id.* at 152.

²⁴¹ *See Connick*, 461 U.S. at 140, 154.

²⁴² *See id.* at 152-53.

²⁴³ *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570-73 (1968)); *see Connick*, 461 U.S. at 150-54.

²⁴⁴ *See Connick*, 461 U.S. at 148.

²⁴⁵ *See id.* at 151-52 (internal quotation marks omitted).

distributed were crucial to the Court's disposition.²⁴⁶ Although the Court found that Myers' questionnaire did not impede her ability to perform her job responsibilities,²⁴⁷ she did prepare and distribute the questionnaire at the office, and the manner of distribution required Myers to leave her work and for others to do the same in order to complete it.²⁴⁸ This supports the idea that the functioning of the office was disrupted.²⁴⁹ Finally, the Court observed that "[e]mployee speech which transpires entirely on the employee's own time, and in non-work areas of the office, may bring different factors into the *Pickering* calculus."²⁵⁰

[77] The context in which the dispute arose is also significant.²⁵¹ This was not a case where an employee, out of purely academic interest, circulated a questionnaire.²⁵² Therefore, Myers' survey was "most accurately characterized as an employee grievance concerning internal office policy."²⁵³ Again, the Court refused to lay down a general standard

²⁴⁶ See *id.* at 152-53. The majority opinion ignored Justice Brennan's critique that the context of the message is used twice in the *Pickering* analysis - both in determining whether the speech was political and in evaluating the competing interests in allowing or prohibiting the speech. See *id.* at 157-58 (Brennan, J., dissenting). Justice Brennan would have defined public concern more broadly than the majority: "public concern" means "to supply the public need for information and education with respect to the significant issues of our times." See *id.* at 164 n.4 (Brennan, J., dissenting).

²⁴⁷ *Id.* at 151.

²⁴⁸ *Id.* at 153.

²⁴⁹ See *Connick*, 461 U.S. at 153.

²⁵⁰ *Id.* at 153 n.13.

²⁵¹ *Id.* at 153.

²⁵² *Id.*

²⁵³ *Id.* at 154.

for deciding all such cases.²⁵⁴

ii. *Garcetti v. Ceballos*

[78] The Court's decision in *Garcetti* has been widely criticized.²⁵⁵ However, one positive aspect of the decision is that it attempts to clarify when an employee speaks as a "citizen."²⁵⁶ In short, a public employee speaks as a citizen when the speech is not made "pursuant to his official duties."²⁵⁷

[79] In *Garcetti*, the Court held by a 5-4 margin that the First Amendment does not protect a public employee's speech when the speech is made "pursuant to [the employee's] official duties."²⁵⁸ However, the

²⁵⁴ *Connick*, 461 U.S. at 154. In a later decision, the Court, observed that lower courts have struggled to apply the *Pickering-Connick* test. See *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) ("[C]onducting these [*Pickering-Connick*] inquiries has sometimes proved difficult.").

²⁵⁵ See Roosevelt III, *supra* note 23, at 631, 631 & n.6 (as the title indicates, concluding otherwise, but observing that most academic discussion is highly critical).

²⁵⁶ See *Garcetti*, 547 U.S. at 418-22.

²⁵⁷ *Id.* at 421.

²⁵⁸ *Id.* Justice Stevens advocated a broader test, emphasizing that the answer to whether the First Amendment protects public employee speech, even when the speech is made pursuant to the employee's official duties, should be "sometimes" rather than "never." *Id.* at 426 (Stevens, J., dissenting) (internal quotation marks omitted). Justice Souter's dissent echoed this sentiment, cautioning that "when constitutional interests clash, [courts should] resist the demand for winner-take-all; [instead, they should] try to make adjustments that serve all of the values at stake." *Id.* at 434 (Souter, J., dissenting). Justice Souter would protect public employee speech if the speech involved "comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety." See *id.* at 435. Justice Breyer concluded that because Ceballos's speech was governed by professional canons and supported by special constitutional considerations regarding professional duties, the need to protect the speech is augmented, and the speech should be protected unless it fails the *Pickering* balancing test. See *id.* at 447 (Breyer, J., dissenting).

parties in *Garcetti* agreed that the plaintiff, Richard Ceballos, spoke pursuant to his official duties.²⁵⁹ The Supreme Court refused to provide a comprehensive framework for determining when an employee speaks pursuant to the employee's official duties.²⁶⁰ Unsurprisingly, lower courts have struggled to apply the *Garcetti* holding.²⁶¹

[80] Although the Supreme Court's decision in *Garcetti* did not involve a teacher, lower courts have frequently applied its holding to teacher free speech claims, at least those arising from on-campus speech.²⁶² Its relevance to off-campus speech, particularly with respect to public school teachers, is unclear. At its core, the Court concluded that much like *Connick*, *Garcetti* involved a work-related dispute.²⁶³

[81] In *Garcetti*, the plaintiff, Richard Ceballos, claimed that his free speech rights were violated when he suffered an adverse employment action based on memoranda he wrote regarding a pending criminal case.²⁶⁴ During this time, Ceballos was a supervising deputy district attorney.²⁶⁵ At the request of a defense attorney, Ceballos investigated whether an

²⁵⁹ *Id.* at 424.

²⁶⁰ *Id.* (noting that since the parties agreed the speech was made pursuant to Ceballos' official duties, this was not the proper "occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate").

²⁶¹ See Bauries & Schach, *supra* note 218, at 358.

²⁶² See, e.g., Weintraub v. Bd. of Educ., 593 F.3d 196, 198 (2d Cir. 2010) (holding that *Garcetti* barred a teacher's claim arising from the teacher's filing of a grievance); Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 480 (7th Cir. 2007) (holding that *Garcetti* governed a teacher's in-class speech).

²⁶³ See *Garcetti*, 547 U.S. at 420-21.

²⁶⁴ *Id.* at 414-15.

²⁶⁵ *Id.* at 413.

affidavit used to support a search warrant was inaccurate; he concluded it was.²⁶⁶ Ceballos informed his supervisors of his conclusion and then wrote a disposition memorandum recommending that the pending charges be dismissed.²⁶⁷ Nonetheless, his supervisors proceeded with the prosecution.²⁶⁸ Ceballos claimed that, based on his memorandum, he was subsequently reassigned to another position, transferred to another courthouse, and denied a promotion.²⁶⁹

[82] Unlike the lower courts in *Connick*, the lower courts in *Garcetti* split as to whether Ceballos' speech was protected.²⁷⁰ The district court granted summary judgment against Ceballos, holding that since Ceballos wrote his memorandum pursuant to his employment duties, his speech was not entitled to First Amendment protection.²⁷¹ The Court of Appeals for the Ninth Circuit reversed, holding that Ceballos' allegations of wrongdoing in the memorandum were protected speech.²⁷²

[83] The Ninth Circuit employed the *Pickering-Connick* test, first concluding that Ceballos' memorandum satisfied the public concern requirement.²⁷³ Noting that the memorandum did not create any disruption or inefficiency in the workplace, the Court of Appeals concluded that, on balance, Ceballos' memorandum was protected

²⁶⁶ *Id.* at 413-14.

²⁶⁷ *Id.* at 414. Ceballos wrote a follow-up memorandum as well. *Id.*

²⁶⁸ *Garcetti*, 547 U.S. at 414.

²⁶⁹ *Id.* at 415.

²⁷⁰ *Id.*; *Connick v. Myers*, 461 U.S. 138, 141-42 (1983).

²⁷¹ *Garcetti*, 547 U.S. at 415.

²⁷² *Id.*

²⁷³ *Id.* at 415-16.

speech.²⁷⁴

[84] The Supreme Court reversed, adding a new threshold requirement for public employee speech claims while simultaneously restricting the application of the *Pickering-Connick* test.²⁷⁵ The Court noted that the *Pickering-Connick* line of public-employee speech cases establishes a two-part test governing when speech is protected.²⁷⁶ The first prong is whether the employee speech implicates a matter of public concern.²⁷⁷ If so, the second prong requires the employer to establish that its interests in regulating the speech outweigh the employee's interests in speaking and the employee's and audience's interests in hearing the message.²⁷⁸ However, after *Garcetti*, in order to reach the *Pickering-Connick* test, a public employee must first establish that the employee's speech was not made pursuant to his official duties,²⁷⁹ because an employer can regulate speech made pursuant to a public employee's official duties.²⁸⁰

[85] In reaching this result, the Supreme Court explained the competing interests involved in public employee free speech cases.²⁸¹ An employer has significant interests in regulating a public employee's speech.²⁸² First,

²⁷⁴ *Id.*

²⁷⁵ *See id.* at 424, 426 (at least with respect to speech made at work during working hours).

²⁷⁶ *Garcetti*, 547 U.S. at 418.

²⁷⁷ *Id.* (finding that if the employee's speech does not involve a legitimate matter of public concern, an employer may regulate the employee's speech).

²⁷⁸ *See id.*

²⁷⁹ *See id.* at 421-22.

²⁸⁰ *See id.* at 422-23.

²⁸¹ *Garcetti*, 547 U.S. at 423.

²⁸² *See id.* at 418-19. While "[a] government entity has broader discretion to restrict

a public employee “must accept certain limitations on his or her freedom” because “[g]overnment employers, like private employers, need a significant degree of control over their employees’ words and actions[]” in order to provide efficient government services.²⁸³ Second, public employees “often occupy trusted positions in society[,]” and “[w]hen [these employees] speak out, they can express views that contravene government policies or impair the proper performance of government functions.”²⁸⁴ Thus, “[s]upervisors must ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission.”²⁸⁵

[86] On the other hand, the Supreme Court “has recognized that a citizen who works for the government is [still] a citizen.”²⁸⁶ “So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.”²⁸⁷ “The Court has acknowledged the importance of promoting the public’s interest in receiving well-informed views of government employees engaging in civic discussion.”²⁸⁸ One key premise underlying the Court’s public

speech when it acts in its role as employer,” the Court noted that “the restrictions it imposes must be directed at speech that has some potential to affect the entity’s operations.” *Id.* at 418.

²⁸³ *Id.* at 418.

²⁸⁴ *Id.* at 419.

²⁸⁵ *Id.* at 422-23; *cf.* *Morse v. Frederick*, 551 U.S. 393, 410 (2007). In *Morse*, the Court found that a school’s prohibition of student speech at a school event did not violate the free speech clause because the speech could reasonably be perceived as promoting illegal drug use. 551 U.S. at 410. The Court justified its holding by observing that the school’s mission included preventing student drug abuse. *Id.* at 408-09.

²⁸⁶ *Garcetti*, 547 U.S. at 419.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

employee free speech cases is that “while the First Amendment invests public employees with certain rights, it does not empower them to ‘constitutionalize the employee grievance.’”²⁸⁹

[87] In weighing these concerns in Ceballos’s circumstances, the Supreme Court explained in detail the factors that were not dispositive in *Garcetti*.²⁹⁰ First, it was not dispositive that Ceballos expressed his views inside his office, rather than publicly, because First Amendment protects some expression made at work.²⁹¹ Thus, the Court refused “to hold that all speech within the office is automatically exposed to restriction.”²⁹² Second, the Court reasoned that even though the subject matter of the memorandum was Ceballos’s employment, this, too, was not dispositive.²⁹³

[88] The controlling factor, however, was that Ceballos’s “expressions were made pursuant to his [official] duties.”²⁹⁴ “Ceballos spoke as a prosecutor fulfilling [his] responsibility to advise his supervisor about how best to proceed with a pending case”²⁹⁵ The Court held that when public employees make “statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”²⁹⁶

²⁸⁹ *Id.* at 420 (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1983)).

²⁹⁰ *Id.* at 420-421.

²⁹¹ *Garcetti*, 547 U.S. at 420.

²⁹² *Id.* at 420-21.

²⁹³ *Id.* at 421.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Garcetti*, 547 U.S. at 421.

[89] The Court reasoned that “[w]hen he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee.”²⁹⁷ He “did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings.”²⁹⁸ Nor did he speak as a citizen when he wrote a memorandum addressing the disposition of a pending criminal case.²⁹⁹

[90] The Court opined about the danger of undue judicial interference in government business, noting that a holding in Ceballos’ favor “would commit the state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business.”³⁰⁰ Additionally, the Supreme Court emphasized that “[w]hen a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees.”³⁰¹ Ultimately, the Court concluded that Ceballos wrote the memorandum pursuant to his official duties.³⁰² The Court declined to “articulate a comprehensive framework for defining the scope of an

²⁹⁷ *Id.* at 422.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 423.

³⁰¹ *Garcetti*, 547 U.S. at 424. Based on some questionable assumptions, the Supreme Court concluded that a powerful network of legislative enactments, including whistleblower protections laws and labor codes, will likely protect public employees who expose wrongdoing. *See id.* at 425. As Justice Souter noted, however, the whistle-blowing and other worker protection statutes are no substitute for First Amendment protection. *See id.* at 439-41 (Souter, J., dissenting). At a minimum, the protection will differ depending on the local, state, or federal jurisdictions employing the worker. *Id.*

³⁰² *Id.* at 424.

employee's duties in cases where there is room for serious debate."³⁰³

[91] Furthermore, the Court rejected the notion that employers could curtail public employees' speech rights by creating excessively broad job descriptions.³⁰⁴ The Court cautioned that the inquiry into whether speech is made pursuant to the official duties of a public employee is "a practical one" because "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform."³⁰⁵

[92] Finally, the majority opinion ends with a discussion of academic freedom, emphasizing that its decision does not apply to cases involving speech related to scholarship or teaching.³⁰⁶ The Court remarked that expression related to academic scholarship or classroom instruction may implicate "additional constitutional interests that are not fully accounted for by [the] Court's customary public employee-speech jurisprudence."³⁰⁷ The Court declined to decide whether the analysis would apply in the same manner to a case involving speech related to scholarship or teaching.³⁰⁸

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 424-25.

³⁰⁶ *Garcetti*, 547 U.S. at 425.

³⁰⁷ *Id.*

³⁰⁸ *Id.* Lower courts have struggled as to whether this dictum applies to K-12 teacher speech or whether this exception applies solely to professor speech at the university level. *See* SCHNEIDER, *supra* note 28, § 2.20 at n.138.74. One significant difference between teachers and university professors is that professors are expected to produce independent scholarship that no reasonable person would impute to the university itself. *See* Weintraub v. Bd. of Educ., 593 F.3d 196, 207-08 (2d Cir. 2011) (Calabresi, J., dissenting) (concluding that *Garcetti*, properly understood, rests on a government speech rationale); *see also infra* Part IV.C for a further discussion of the government speech doctrine.

B. Another Possible Framework for Regulating Teachers' Off-Campus Speech to Students Using Social Media: Treating Teachers' Speech as School-Sponsored Speech

[93] A few courts have regulated on-campus teacher speech under *Hazelwood School District v. Kuhlmeier*,³⁰⁹ but this framework would apply only in extremely limited circumstances with respect to teachers' off-campus speech.³¹⁰ *Hazelwood* would apply to teacher-student speech using social media only if *Garcetti* does not. Thus, if a teacher speaks pursuant to her official duties, *Garcetti* provides the proper test.³¹¹ However, assuming that a teacher does not speak pursuant to her official duties, *Hazelwood* would govern if, first, one could reasonably perceive the teacher's speech as the school's speech and, second, one could reasonably characterize the teacher-student interaction as a supervised learning experience.³¹²

[94] In *Hazelwood*, the Supreme Court held that school administrators

³⁰⁹ 484 U.S. 260 (1988); *see, e.g.*, *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 722-23 (2d Cir. 1994); *Kramer v. N.Y.C. Bd. of Educ.*, 715 F. Supp. 2d 335, 353-54 (E.D.N.Y. 2010) (noting that there is disagreement among the federal courts of appeals on whether teacher classroom speech should be analyzed under *Garcetti* or *Hazelwood*; the court analyzed the issue under both tests). According to *Kramer*, the Second Circuit is among the courts that have extended the Supreme Court's standard for student speech to teachers' instructional speech. 715 F. Supp. 2d at 354. *But see Weintraub*, 593 F.3d at 198 (determining that a grievance filed by a teacher was unprotected speech pursuant to *Garcetti* without considering the relevance of the teacher's position as an educator under *Hazelwood*). Most of the cases applying *Hazelwood* to teachers' instructional speech were decided pre-*Garcetti*. *See, e.g.*, *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir.1993).

³¹⁰ Some courts have concluded that *Hazelwood* does not apply to off-campus student speech. *See, e.g.*, *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 937 (3d Cir. 2011) (citing *Morse v. Frederick*, 551 U.S. 393, 400-01 (2007)).

³¹¹ *See* 547 U.S. at 424.

³¹² *See* 484 U.S. at 271.

could regulate student speech if one could reasonably interpret the speech as the school's speech and the school has a legitimate pedagogical reason for regulating the speech.³¹³ The Court reasoned that this standard is consistent with the Court's "oft-expressed view that the education of the [n]ation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges."³¹⁴

[95] The Court concluded that educators may exercise control over the contents of a high school newspaper that is produced as part of the school's journalism curriculum,³¹⁵ "so long as [the official's] actions are reasonably related to legitimate pedagogical concerns."³¹⁶ In this case, the school principal objected to two articles scheduled to appear in a school newspaper.³¹⁷ One article "described three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school."³¹⁸ The school's journalism students wrote and

³¹³ *Id.* at 273. The speech in *Hazelwood* can be interpreted in two ways: as school speech under the government speech doctrine, discussed *infra* Part IV.C, or as student speech within a nonpublic forum. *See id.* at 276, 270. The crucial distinction between these competing interpretations is that there is no requirement of viewpoint neutrality under the former; the only requirement is the reasonableness standard the Fifth and Fourteenth Amendments impose on all government action. *See id.* at 267, 270, 273. Under the nonpublic forum rationale, the perception that the speech could be interpreted as the school's speech is relevant because this perception provides the school with a rational basis for censoring the newspaper. In short, it is reasonable for a school to want to dissociate itself from speech of which it disapproves. *See id.* at 266-67, 269-73.

³¹⁴ *Id.* at 273.

³¹⁵ *Id.* at 260-61.

³¹⁶ *Id.* at 273. The Court concluded that the faculty-supervised student newspaper was a nonpublic forum. *Id.* at 269-70. With respect to nonpublic forums, the school can regulate speech within the forum subject to the rational basis test; regulations supported by legitimate pedagogical reasons do not violate the First Amendment. *Id.* at 273.

³¹⁷ *Hazelwood*, 484 U.S. at 263.

³¹⁸ *Id.* at 263.

edited the newspaper under the supervision of faculty, and the Board of Education provided some of the newspaper's funding.³¹⁹

[96] The principal was concerned with, among other things, privacy issues, because, although the article used pseudonyms for the girls involved, the pregnant students might be identifiable from the story.³²⁰ He also was worried that "references to sexual activity and birth control were inappropriate for some . . . students at the school."³²¹

[97] The Supreme Court held that since the newspaper was a supervised learning experience provided by the school, school officials were entitled to regulate the contents of the newspaper in any reasonable manner.³²² In reaching this conclusion, the Court noted the distinction between requiring a school to tolerate particular student speech and requiring a school to affirmatively promote particular student speech.³²³ Ultimately, the Court held that school-sponsored publications that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" can be regulated as long as the school official has a legitimate pedagogical reason for doing so.³²⁴ The Court defined school-sponsored activities as those that may "be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."³²⁵

³¹⁹ *Id.* at 262-63.

³²⁰ *Id.* at 263.

³²¹ *Id.*

³²² *Hazelwood*, 484 U.S. at 271, 273.

³²³ *Id.* at 270-71.

³²⁴ *Id.* at 271, 273.

³²⁵ *Id.* at 271.

[98] The Court emphasized that educators are entitled to exercise greater control over school-sponsored speech “to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.”³²⁶ Schools need to “retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or [other such] conduct.”³²⁷

C. The Government Speech Doctrine: *Garcetti* and *Hazelwood* in a Different Light

[99] The government speech doctrine is intertwined with both the public employee and school-sponsored speech frameworks. Some commentators contend that the government speech doctrine best explains both *Garcetti* and *Hazelwood*.³²⁸

[100] In essence, the government speech doctrine provides that the First Amendment’s free speech clause restricts government regulation of private speech, but does not restrict the government’s speech.³²⁹ Under

³²⁶ *Id.*

³²⁷ *Hazelwood*, 484 U.S. at 272. Courts of Appeals are split as to whether *Hazelwood* allows viewpoint based restrictions on student speech. See Nicholas J. Wagoner, *Does the 1st Amendment Permit Viewpoint Based Restrictions on School-Sponsored Speech?*, CIRCUIT SPLITS (Jan. 30, 2012, 5:19 AM), <http://www.circuitsplits.com/student-speech/>. Whether viewpoint restrictions on student speech are allowed may depend on whether *Hazelwood* is best explained as a government speech case or a nonpublic forum decision. See *Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 631-33 (2d Cir. 2005).

³²⁸ See, e.g., Nicole B. Casarez, *The Student Press, The Public Workplace, and Expanding Notions of Government Speech*, 35 J.C. & U.L. 1, 7, 17-19 (2008).

³²⁹ See *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009); *Nat’l Endowment of Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) (“It is the

this recent doctrine,³³⁰ the Court has held that a city's selection of a permanent monument for a public park constitutes government speech and is therefore not curtailed by the First Amendment's free speech clause.³³¹ Even though a private organization donated the monument, the speech was government speech because the city "effectively controlled" the messages sent by the monuments in the Park by exercising "final approval authority" over their selection" and by taking ownership of most of the permanent monuments.³³² In the words of Justice Souter, the city's selection of a permanent monument was government speech because a "reasonable and fully informed observer would understand the expression to be government speech."³³³

[101] Both *Hazelwood* and *Garcetti* can be interpreted as "government speech" cases, though *Garcetti* fits less readily within this framework. Although *Hazelwood* predates the government speech doctrine, the Court's conclusion in *Hazelwood* that educators can regulate school-sponsored publications that might be perceived to "bear the imprimatur of the school"³³⁴ fits readily within the government speech doctrine since, in these circumstances, the school effectively controls the message. On the

very business of government to favor and disfavor points of view . . ."); *see also* *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553, 562, 565-67 (2005) (holding that generic advertising funded by assessments on beef producers was "government speech," and therefore not restricted by the First Amendment); *Rust v. Sullivan*, 500 U.S. 173, 174 (1991). Of course, the Establishment Clause, Equal Protection Clause and, ultimately, the electoral process do restrict government speech. *Cf. Pleasant Grove City, Utah*, 555 U.S. at 468-69; *id.* at 482 (Stevens, J., concurring).

³³⁰ The Court first explicitly referred to the "government speech doctrine" in *Pleasant Grove City, Utah*, 555 U.S. at 481 (Stevens, J., concurring).

³³¹ *Id.* at 467-68, 470.

³³² *Id.* at 473.

³³³ *Id.* at 487 (Souter, J., concurring).

³³⁴ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-71 (1988).

other hand, despite the Court's mention, at least implicitly, of the government speech doctrine within *Garcetti* itself, *Garcetti* fits less easily within this framework.³³⁵ The Court in *Garcetti* reasoned that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."³³⁶ "It simply reflects the exercise of employer control over what the employer itself has commissioned or created."³³⁷ Thus, at least implicitly, the Court acknowledged the application of the government speech doctrine.³³⁸

[102] However, the government speech doctrine is not an entirely convincing explanation for *Garcetti*. Presumably, Ceballos was hired to exercise independent judgment in his disposition memoranda³³⁹ and his speech was not speech that a reasonable and fully informed person would understand to be government speech, particularly because his speech was not made outside the workplace. However, if the government speech doctrine includes any speech that a public employee is required to produce within the scope of his employment, as was the case with Ceballos' speech in *Garcetti*, then *Garcetti* is consistent with this doctrine.³⁴⁰ Under this

³³⁵ Roosevelt III, *supra* note 23, at 635 (arguing that *Garcetti* is better interpreted as a public employee work performance case).

³³⁶ *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006).

³³⁷ *Id.* at 422.

³³⁸ *See id.*

³³⁹ Roosevelt III, *supra* note 23, at 635 (arguing that *Garcetti* is better interpreted as a public employee work performance case); *see also* Mark Strasser, *Ignore the Man Behind the Curtain: On the Government Speech Doctrine and What it Licenses*, 21 B.U. PUB. INT. L.J. 85, 107 (2011) (concluding that "the Court did not need to invoke the government speech doctrine to decide [*Garcetti*]").

³⁴⁰ *See* Strasser, *supra* note 339 (noting that the Court, in *Garcetti*, implicitly adopted the theory that "any statement made within the scope of public employment is (or should be treated as) the government's own speech") (internal quotation marks omitted).

interpretation, the fact that Ceballos was expected to exercise independent judgment is immaterial because his work product bears the imprimatur of his office and the public will perceive his speech as the speech of his office.

D. Similar Yet Different: The Framework for Evaluating Student Off-Campus Speech, an Analogous Area of Law

[103] At one point, teachers' and students' free speech rights were roughly comparable.³⁴¹ Currently, students' off-campus free speech rights exceed their teachers' off-campus free speech rights.³⁴² Although teachers and students are not similarly situated with respect to the First Amendment and therefore need not receive equivalent speech protection, the disparate development of these areas of law is concerning.

[104] Despite a number of opportunities to do so, the Supreme Court has not yet heard a student First Amendment free speech case when the speech arises beyond the "schoolhouse gates." Lower courts that have addressed

³⁴¹ At least when teachers were "off-duty," teacher speech rights were roughly comparable to student speech rights. *Compare* *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571-74 (1968) (teacher speech protected when the speech implicates a public concern and the school's interests in prohibiting the speech do not outweigh the speaker's interests in speaking) *with* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (student speech protected when the speech is political and the speech will not result or foreseeably result in a material or substantial disruption to the school environment). Alternatively, because the Supreme Court did not explicitly require that a teacher's speech implicate a public concern in *Pickering* nor explicitly require that a student's speech be political in *Tinker*, teacher and student rights were, at least arguably, comparable in a different way. *Compare* *Pickering*, 391 U.S. at 571-74 (teacher speech protected when the school's interests in prohibiting the speech do not outweigh the speaker's interests in speaking) *with* *Tinker*, 393 U.S. at 509 (student speech protected when the speech will not result or foreseeably result in a material or substantial disruption to the school environment).

³⁴² *See, e.g.*, *J.S. ex rel. Synder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 926-27 (3d Cir. 2011) (holding that a student's off-campus speech deserves greater protection than "speech that a reasonable observer would view as the school's own speech").

this issue typically allow schools to regulate off-campus student speech under *Tinker* if the speech arrives on campus.³⁴³ Despite the divergence in protection provided to off-campus teacher and student speech in recent years, *Tinker* remains an influential framework for analyzing teacher-to-student off-campus speech.

1. *Tinker v. Des Moines Independent Community School District*

[105] Under the Court’s decision in *Tinker*, a student’s political speech may be regulated only if the speech is potentially or actually disruptive to the school environment.³⁴⁴ In essence, students have the right to express their opinions as long as the expression does not “materially and substantially” disrupt school activities.³⁴⁵

[106] In *Tinker*, the Court sought to balance the free speech rights of students with the need for school officials to maintain control over the school environment.³⁴⁶ The plaintiffs in *Tinker*, three high school

³⁴³ See, e.g., *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38 (2d Cir. 2007) (holding that *Tinker* is the appropriate standard for evaluating a student threat made off-campus); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1107 (C.D. Cal. 2010) (observing that “the majority of courts will apply *Tinker* where speech originating off campus is brought to school or to the attention of school authorities, whether by the author himself or some other means”); *J.S. ex rel. Synder*, 650 F.3d at 926 (assuming without deciding that *Tinker* was the appropriate standard); *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008) (concluding that the *Tinker* standard was not met, but leaving open whether a stricter standard might apply; the extent of this holding is unclear because the case involved both on-campus and off-campus student speech). *But see J.S. ex rel. Synder*, 650 F.3d at 937-39 (observing that lower courts are divided on whether *Tinker*’s substantial disruption test applies to off-campus speech; five concurring justices would have provided full First Amendment free speech rights to the student’s off-campus speech).

³⁴⁴ See *Tinker*, 393 U.S. at 509.

³⁴⁵ *Id.*

³⁴⁶ See *id.* at 507, 509.

students, were suspended for wearing black armbands to school in protest of the Vietnam War.³⁴⁷ The Court noted that First Amendment rights are available to teachers and students and that “[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”³⁴⁸ However, the Court also emphasized that local school officials must have the ability to “prescribe and control conduct in the schools.”³⁴⁹ Because the speech in *Tinker* was “a silent, passive expression of opinion, unaccompanied by any disorder or disturbance,” school officials could not prohibit the speech.³⁵⁰

[107] The Court reasoned that personal expression of opinion, even on controversial matters, cannot be prohibited unless the speech “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school” or “collid[es] with the rights” of other students.³⁵¹ The school, however, does not have to wait until a disruption occurs before acting: if facts are present “which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,” the school may ban the speech.³⁵²

[108] The Court distinguished between a reasonable forecast of substantial disruption and an “undifferentiated fear or apprehension of disturbance” in some depth.³⁵³ It acknowledged that any statement that

³⁴⁷ *Id.* at 504.

³⁴⁸ *Id.* at 506.

³⁴⁹ *Tinker*, 393 U.S. at 507.

³⁵⁰ *Id.* at 508.

³⁵¹ *Id.* at 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

³⁵² *See id.* at 514.

³⁵³ *Id.* at 508.

was different from the viewpoint of another student might cause an argument or disturbance, but that under our Constitution, schools “must take this risk,”³⁵⁴ because “this sort of hazardous freedom—this kind of openness—is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.”³⁵⁵ A school official must be able to show that his or her action to prohibit an expression of opinion “was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”³⁵⁶ In *Tinker*, the authorities appeared to have been motivated by a wish to avoid the controversy surrounding opposition to the war.³⁵⁷ The Court also noted that this particular symbol seemed to have been singled out for prohibition.³⁵⁸ Consequently, the prohibition of expression of one particular opinion, at least without evidence of material and substantial interference with schoolwork or discipline, is not constitutionally permissible.³⁵⁹

[109] In *Tinker*, some disruption to school activities did occur, but it was insufficient to justify banning the student speech.³⁶⁰ The Court found that

³⁵⁴ *Tinker*, 393 U.S. at 508.

³⁵⁵ *Id.* at 508-09.

³⁵⁶ *Id.* at 509.

³⁵⁷ *Id.* at 510.

³⁵⁸ *Id.* at 510-11.

³⁵⁹ *Tinker*, 393 U.S. at 510-11.

³⁶⁰ *Id.* at 514. According to Justice Black’s dissenting opinion, while the record did not demonstrate that the students wearing the armbands shouted, used profane language, or were violent, testimony supported the conclusion that their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, non-protesting students had better leave them alone. *Id.* at 517 (Black, J., dissenting). In addition, Justice Black noted that there was “evidence that a teacher of mathematics had his lesson period practically wrecked” by disputes with one of the

the wearing of the armbands precipitated “discussion outside of the classrooms, but no interference with work and no disorder.”³⁶¹ Although outside the classroom some hostile remarks were directed to the students wearing the armbands, “there were no threats or acts of violence on school premises.”³⁶² This was not a “material” or “substantial” disruption and thus, the school erred in prohibiting the armbands.³⁶³

[110] Furthermore, *Tinker* placed the burden of justifying the prohibition of a particular expression of opinion on school authorities.³⁶⁴ With respect to the nation’s school systems, the Court noted that public schools “may not be enclaves of totalitarianism.”³⁶⁵ The Court reasoned that the classroom is a microcosm of the “marketplace of ideas,”³⁶⁶ and that “[t]he Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues.”³⁶⁷ Importantly, the principle of student speech cases “is not confined to the supervised and ordained discussion which takes place in the classroom.”³⁶⁸ “When [the student] is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects”³⁶⁹ However,

students wearing an armband. *Id.* at 517-18. Justice Black concluded that the armbands did take “the students’ minds off their classwork.” *Id.* at 518.

³⁶¹ *Id.* at 514.

³⁶² *Id.* at 508.

³⁶³ *Id.* at 509.

³⁶⁴ *See Tinker*, 393 U.S. at 509-10.

³⁶⁵ *Id.* at 511.

³⁶⁶ *Id.* at 512.

³⁶⁷ *Id.* (internal quotation marks omitted).

³⁶⁸ *Id.*

the First Amendment does not protect conduct by the student, “in class or out of it,”³⁷⁰ “which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork.”³⁷¹ The Court did not “confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to a supervised and ordained discussion in a school classroom.”³⁷²

2. Recent Court of Appeals Student Off-Campus Speech Cases

[111] As previously noted, the Supreme Court has not yet heard a student First Amendment free speech case where the speech arises beyond the “schoolhouse gates.” The Courts of Appeals’ decisions regarding the parameters of public school students’ off-campus speech demonstrate that this area of law is still in flux.³⁷³

[112] The Fourth Circuit³⁷⁴ and most likely the Second Circuit³⁷⁵ employ

³⁶⁹ *Tinker*, 393 U.S. at 512-13.

³⁷⁰ There has been some confusion among the lower courts as to whether the phrase “or out of [the classroom]” means speech occurring on school premises or whether it extends to students’ off-campus speech. *See* J.S. *ex rel.* Synder v. Blue Mountain Sch. Dist., 650 F.3d 915, 938 n.1 (3d Cir. 2011).

³⁷¹ *Tinker*, 393 U.S. at 513.

³⁷² *Id.*

³⁷³ The purpose of this discussion is to demonstrate the divide between teacher and student free speech rights with respect to speech off-campus. At present, the most restrictive test courts use to evaluate student off-campus speech is *Tinker*. *See, e.g.*, *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38 (2d Cir. 2007) (holding that *Tinker* is the appropriate standard for evaluating off-campus student speech). *Wisniewski* involved a student threat against his teacher. *Id.*

³⁷⁴ *See* *Kowalski v. Berkeley Cnty. Sch. Dist.*, 652 F.3d 565, 574 (4th Cir. 2011).

³⁷⁵ *Wisniewski*, 494 F.3d at 38-39. The two leading Second Circuit decisions are not

a two-tier approach to resolving speech issues arising from student off-campus speech. Under this framework, the court first determines whether the student speech will foreseeably arrive on campus.³⁷⁶ If so, school officials can regulate the speech under *Tinker*, which allows school officials to regulate speech if the speech causes an actual disruption to school activities or if it will foreseeably disrupt school activities.³⁷⁷

[113] The Third Circuit may employ a different framework, although the framework is difficult to discern from one of its recent decisions involving student off-campus speech.³⁷⁸ This recent *en banc* decision held that the student speech was protected under the First Amendment.³⁷⁹

[114] The Third Circuit's decision in *J.S. ex rel. Snyder (J.S.)* is puzzling, as the court applied the *Tinker* test to student speech despite refusing to decide whether *Tinker* was the proper standard.³⁸⁰ Ultimately,

directly on point. In *Wisniewski*, the student speech involved threats of violence against one of his teachers. *Id.* In *Doninger*, part of the plaintiff's speech, her original email which was later republished by her off-campus, was composed and sent from campus. *Doninger v. Niehoff*, 527 F.3d 41, 44 (2d Cir. 2008). Furthermore, the district court found that although created off-campus, the speech "was purposefully designed by [the student] to come onto the campus." *Id.* at 50. The Second Circuit also emphasized that the student's punishment was limited; she was not allowed to participate in the school's student government. *Id.* at 46. Ultimately, the Second Circuit concluded that the school administrators were entitled to qualified immunity on the plaintiff's free speech claim because the law governing off-campus student speech was difficult for school administrators to discern. *See id.* at 54. Thus, the court did not resolve the underlying constitutional issues.

³⁷⁶ *See Kowalski*, 652 F.3d at 574; *Wisniewski*, 494 F.3d at 40-41; *Doninger*, 527 F.3d at 48.

³⁷⁷ *See Kowalski*, 652 F.3d at 574; *Wisniewski*, 494 F.3d at 38-40; *Doninger*, 527 F.3d at 48.

³⁷⁸ *See, e.g., J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011).

³⁷⁹ *See id.* at 930-33.

³⁸⁰ *Id.* at 926.

the Third Circuit held that the *Tinker* test was not met, and, therefore, the school could not regulate the student's speech.³⁸¹ In *J.S.*, the student's speech occurred off-campus and was brought onto campus only at the principal's request.³⁸² The student's MySpace profile targeted her principal, insulting the principal and his family, and accusing him of sexual misconduct with students.³⁸³ The six dissenting judges, and presumably, the five judges not joining in the concurring opinion, would have evaluated the student speech under *Tinker*.³⁸⁴ Of course, the majority and dissent disagreed as to how *Tinker* applied.³⁸⁵

[115] By contrast, five judges in a separate concurrence concluded that *Tinker* does not apply to student off-campus speech and that student off-campus speech should enjoy the same protections enjoyed by citizens in

³⁸¹ *Id.* at 928-31.

³⁸² *Id.* at 921.

³⁸³ *J.S. ex rel. Snyder*, 650 F.3d at 920-21. The majority concluded that the student's profile of her principal was "so outrageous that no one could have taken it seriously, and no one did." *Id.* at 930. The dissent disagreed with this conclusion. *See id.* at 947-48 (Fisher, J., dissenting).

³⁸⁴ *Id.* at 941.

³⁸⁵ The dissent focused extensively on the pernicious effects this type of speech may have on educators. *Id.* at 946-47 (quoting Jina S. Yoon, *Teacher Characteristics as Predictors of Teacher-Student Relationships: Stress, Negative Effect, and Self-Efficacy*, 30 SOC. BEHAV. & PERSONALITY 485, 491 (2002) ("Not only does teacher stress affect teachers' general attitude toward teaching, but also it is likely to influence the quality of their relationships with students"); Suzanne Tochtermann & Fred Barnes, *Sexual Harassment in the Classroom: Teachers as Targets*, 7 RECLAIMING CHILD & YOUTH 21, 22 (1998) ("noting that educators who are subject to sexual harassment feel "'detachment; shame; horror; uncertainty; demoralization; fear; feelings of being unappreciated, targeted, objectified, belittled, and victimized; sadness; anger; avoidance; feeling defeated; blame; separation; and attack'"). Furthermore, the dissent observed that "[e]ducators become anxious and depressed and feel unable to relate to their students" and lose their motivation to teach; their students suffer as a result. *J.S. ex rel. Snyder*, 650 F.3d at 946-47.

the community at large.³⁸⁶ Importantly, the court noted that this case did not involve political speech.³⁸⁷ However, the concurring justices concluded that the speech was nonetheless protected because there is no First Amendment exception for offensive speech that lacks social value.³⁸⁸

V. TEACHERS' OFF-CAMPUS SPEECH TO STUDENTS USING SOCIAL MEDIA: RECENT CASES

[116] Currently, there are few reported decisions examining a teacher's rights with respect to off-campus speech using social media.³⁸⁹ The two

³⁸⁶ *J.S. ex rel. Snyder*, 650 F.3d at 936.

³⁸⁷ *Id.* at 939 (Smith, J., concurring). Furthermore, according to the concurring opinion, the speech need not be political for First Amendment purposes. *Id.* The speech in *J.S.* was merely insulting. *Id.*

³⁸⁸ *Id.* at 939 (citing *Snyder v. Phelps*, 131 S. Ct. 1207, 1219-20 (2011)).

³⁸⁹ Many of these disputes are not litigated or settle privately before a verdict. *See Teacher Fired for Ripping Students, Blames Facebook*, CBS NEW YORK (Aug. 20, 2010, 11:23 PM), <http://newyork.cbslocal.com/2010/08/20/teacher-fired-for-ripping-students-blames-facebook/> (firing teacher for writing on her Facebook that “[t]he town is so arrogant and snobby,” and that she was “so not looking forward to another year at Cohasset schools.”); *see also* Fulmer, *supra* note 10, at ¶ 31 (citing Mario Roldan, *Another CMS Teacher Faces Termination over Facebook Post*, WCNC.COM (Nov. 1, 2009, 6:06 PM), <http://www.wcnc.com/news/local/68701507.html>) (“At least four teachers, of Charlotte-Mecklenburg Schools have faced disciplinary action due to their social networking website activity.”); *see also id.* (quoting Roldan, *supra*) (dismissing teacher for describing her workplace on Facebook as “the most ghetto school in Charlotte”); *see also* Michael May, *Hoover: Caught in the Flash*, AUSTIN CHRONICLE, June 23, 2006, <http://www.austinchronicle.com/news/2006-06-23/378611/> (firing art teacher because her partner posted non-erotic, partially nude pictures of her photography webpage). Other cases have been decided on alternate grounds. In *Rubino v. City of New York*, No. 107292/11, 2012 WL 373101, at *6-8 (N.Y. Sup. Ct., Feb. 1, 2012), the trial court held that the termination of the teacher was disproportionate to the teacher's speech. In reaching this decision, the court did not address the teacher's First Amendment claim, noting that New York law prohibited the court's reexamination of the hearing officer's conclusion the claim had no merit. *See id.* at *5 (noting that a hearing officer's errors of law and fact are not, except in extraordinary circumstances, reviewable). In this case, the

leading district court decisions, however, were both decided in favor of school authorities.³⁹⁰

A. *Spanierman v. Hughes*

[117] In *Spanierman*, the court concluded that *Garcetti* did not apply because the teacher was not speaking pursuant to his official duties and responsibilities as a teacher.³⁹¹ Notably, the court observed that the teacher was not acting pursuant to his responsibilities as a teacher because

speech was not made directly to her students, but posted to other adults on the teacher's Facebook page. *See id.* at *1. While the court described her reference to a child's death as "repulsive," the court held that her termination was disproportionate to her speech. *See id.* at *7-8. The teacher, one day after a New York City school student drowned during a school field trip, posted on her Facebook page that she was "thinking the beach sounds like a wonderful idea for my 5th graders! I HATE THEIR GUTS! They are the devils [sic] spawn." *Id.* at *1. In response to another poster's comments asking whether she would save a particular student, the teacher responded, "Yes, I wld [sic] not throw a life jacket in for a million!!" *Id.* A number of cases have been tried before administrative law judges. *See* Emil Protalinski, *Teacher Should be Fired for Facebook Comment, Judge Rules*, ZDNET (Nov. 15, 2011, 6:20 AM PST), <http://www.zdnet.com/blog/facebook/teacher-should-be-fired-for-facebook-comment-judge-rules/5375> (concluding that a New Jersey teacher who posted on Facebook that she was "not a teacher [but] a warden for future criminals" should be terminated). Other cases may be tried shortly. *See* 'It's a Perverted Sin and Breeds Like Cancer': High School Teacher Faces Sack Over Anti-Gay Facebook Comments, MAIL ONLINE (Jan. 13, 2012, 6:31 AM), <http://www.dailymail.co.uk/news/article-2086043/Viki-Knox-NJ-teachers-anti-gay-Facebook-comments-Its-sin-breeds-like-cancer.html> (termination proceedings have been started against a New Jersey teacher based on an anti-gay diatribe she posted on Facebook); *see also* Jonathan Turley, *Beaver Damned: Wisconsin Teacher Suspended For Picture on Facebook*, JONATHAN TURLEY (Feb. 9, 2009), <http://jonathanturley.org/2009/02/09/beaver-damned-wisconsin-teacher-suspended-for-picture-on-facebook/> (teacher placed on leave as a result of her posting a Facebook picture showing her aiming a shotgun at the viewer).

³⁹⁰ *See* *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *see also* *Spanierman v. Hughes*, 576 F. Supp. 2d 292 (D. Conn. 2008).

³⁹¹ *Spanierman*, 576 F. Supp. 2d at 309.

he was under no “obligation to make the statements he made on MySpace.”³⁹² In addition, the court did not use *Hazelwood*’s framework to analyze the speech, presumably because the teacher’s speech could not reasonably be perceived as the school’s speech. Also, the court did not discuss any off-campus student speech decisions. Instead, the court analyzed the speech under the *Pickering-Connick* framework, ultimately granting summary judgment to the defendants.³⁹³

[118] The speech in *Spanierman* was extreme.³⁹⁴ Jeffrey Spanierman, a Connecticut public high school English teacher, used MySpace, a social media website, to communicate with his students.³⁹⁵ Spanierman “testified that he used his MySpace account to communicate with students about homework, to learn more about the students so he could relate to them better, and to conduct casual, non-school related discussions [with students].”³⁹⁶ However, his MySpace account contained pictures of naked men with “inappropriate comments” underneath.³⁹⁷ Some students complained about Spanierman’s MySpace page to school personnel.³⁹⁸ A guidance counselor learned of Spanierman’s account, viewed the account, and confronted Spanierman about it.³⁹⁹ The counselor suggested that Spanierman use only “the school email system for the purpose of educational topics and homework.”⁴⁰⁰ Furthermore, the school guidance

³⁹² *Id.*

³⁹³ *See id.* at 309, 313.

³⁹⁴ *See id.* at 297-98.

³⁹⁵ *Id.*

³⁹⁶ *Spanierman*, 576 F. Supp. 2d at 297-98.

³⁹⁷ *Id.* at 298.

³⁹⁸ *Id.* at 313.

³⁹⁹ *Id.* at 298.

counselor testified that the account would “be disruptive to students.”⁴⁰¹

[119] Following his meeting with the school guidance counselor, Spanierman deleted his account, but then set up a nearly identical account on MySpace with the same people as friends.⁴⁰² Spanierman was not rehired.⁴⁰³

[120] Spanierman sued, alleging among other claims that the school administration had violated his First Amendment free speech rights.⁴⁰⁴ The district court held that even if the plaintiff’s speech involved a matter of public concern under *Pickering-Connick*, the plaintiff’s claim still failed.⁴⁰⁵

[121] The district court explained that *Garcetti* did not apply because its holding is limited to the expressions an employee makes pursuant to the employee’s official responsibilities rather than to statements or complaints made outside the duties of employment.⁴⁰⁶ Despite the plaintiff’s testimony that he used his MySpace account to communicate with his students about homework and to learn more about the students so he could relate to them better, the district court concluded that *Garcetti* was inapplicable, noting that no evidence in the record supported the notion that Spanierman was under any obligation to make the statements he made

⁴⁰⁰ *Id.*

⁴⁰¹ *Spanierman*, 576 F. Supp. 2d at 298.

⁴⁰² *Id.*

⁴⁰³ *Id.* at 299.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at 314.

⁴⁰⁶ *See Spanierman*, 576 F. Supp. 2d at 309.

on MySpace.⁴⁰⁷ The district court noted that public employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who are not government employees.⁴⁰⁸

[122] The district court employed the *Pickering-Connick* framework to analyze Spanierman's speech, first examining whether Spanierman's speech might relate to a "public concern."⁴⁰⁹ The court stretched to find some part of the teacher's web page that implicated a public concern.⁴¹⁰ The contents of Spanierman's MySpace page were varied; the profile contained comments from the teacher to other MySpace users, comments from other users to the teacher, and pictures, blogs, and poetry.⁴¹¹ Even though the court found that almost none of the contents on the plaintiff's

⁴⁰⁷ *Id.* at 298, 309. Currently, the Second Circuit employs a different test for determining whether an employee's speech is made "pursuant to his official duties." *See Weintraub v. Bd. of Ed.*, 593 F.3d 196, 198 (2d Cir. 2010). This test is two-pronged: (1) whether the speech is "in furtherance of" an employee's "core duties," and (2) whether there is a relevant "citizen analogue" to the employee's speech. *Id.* at 198. Judge Calabresi, in dissent, proposed a narrower rule: "an employee's speech is 'pursuant to official duties' when the employee is required to make such speech in the course of fulfilling his job duties." *Id.* at 208 (Calabresi, J., dissenting). In short, the employer must in some way rely on the employee's speech, as is the case where the speech is an official communication or is used by the employer to promote the employer's mission. *See id.* Even under the majority's broader test, Spanierman's speech would not qualify as speech made pursuant to his official duties: his speech was not in furtherance of any core duty, and citizen analogues existed. Off-campus teacher-to-student social media speech should not be regulated under *Garcetti* regardless of the precise contours of *Garcetti*'s reach. *See infra* Part VI.A.

⁴⁰⁸ *Spanierman*, 576 F. Supp. 2d at 309 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006)).

⁴⁰⁹ *Id.*

⁴¹⁰ *See id.* at 310-11.

⁴¹¹ *Id.* at 310.

profile page touched on matters of public concern, the court concluded that one of the plaintiff's poems, if all ambiguities were construed in the plaintiff's favor, might implicate a matter of public concern.⁴¹² However, the district court ultimately held that there was no causal connection between the plaintiff's poem and the school's decision not to rehire the plaintiff.⁴¹³

[123] Furthermore, even if the plaintiff could establish a causal connection between the poem and his discharge, the defendants would still prevail because the plaintiff's claim failed the *Pickering* balancing test.⁴¹⁴ In essence, the defendants had provided sufficient evidence that the plaintiff's conduct on MySpace, as a whole, disrupted school activities.⁴¹⁵ In particular, Spanierman's discussion on MySpace "with a student about 'getting any' (presumably sex) or a threat made to a student (albeit a facetious one) about detention" supported the district court's conclusion that school administrators could have reasonably surmised that Spanierman's MySpace conduct was disruptive to school activities.⁴¹⁶

[124] Spanierman's speech involved egregious, repeated conduct.⁴¹⁷ Therefore, the opinion provides little guidance as to how courts would treat less extreme conduct. Given the sexual overtones and the disruptive effect the speech had on school activities, this was not a difficult case.

⁴¹² *Id.* at 310-11.

⁴¹³ *Spanierman*, 576 F. Supp. 2d at 311-12.

⁴¹⁴ *See id.* at 311-12.

⁴¹⁵ *See id.* at 312.

⁴¹⁶ *Id.*

⁴¹⁷ *See id.* at 298.

B. *Snyder v. Millersville University*

[125] Millersville University denied Stacey Snyder an education degree because she had not successfully completed her student-teaching experience at a local high school.⁴¹⁸ In response to Snyder's "unprofessional" speech on MySpace, the local high school had barred Snyder from campus.⁴¹⁹ Thus, she could not complete her student-teacher practicum and based on this deficiency, Millersville University did not award her an education degree.⁴²⁰

[126] The dispositive inquiry was whether Snyder's role was that of a teacher or student.⁴²¹ Ultimately, the district court found that her role as a student-teacher was similar to that of a public employee rather than a student.⁴²² Consequently, the court applied public employee speech law rather than student speech law.⁴²³

[127] Snyder experienced some difficulties during her student-teaching placement.⁴²⁴ According to evaluations from both her university professor and her supervising teacher, Snyder had issues regarding her competence and her over-familiarity with students.⁴²⁵ In particular, "on several

⁴¹⁸ *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at *8 (E.D. Pa. Dec. 3, 2008).

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *See id.* at *10, *15. Presumably, if the court had concluded Snyder was a student, her comments would have been protected speech. *See id.* at *14.

⁴²² *Id.* at *15.

⁴²³ *See Snyder*, 2008 WL 5093140, at *14.

⁴²⁴ *Id.* at *4.

⁴²⁵ *Id.* at *3-4.

occasions, she informed students during class that she had a MySpace webpage.”⁴²⁶

[128] In part, Snyder’s difficulties stemmed from two MySpace postings.⁴²⁷ The first referenced Snyder’s supervising teacher somewhat obliquely, referring to her as “the problem.”⁴²⁸

[A friend of Snyder’s] said that one of my students was on here looking at my page, which is fine. I have nothing to hide. I am over 21, and I don’t say anything that will hurt me (in the long run). Plus, I don’t think they will stoop so low as to mess with my future. So, bring on the love! I figure a couple of students will actually send me a message when I am no longer their official teacher. They keep asking me why I won’t apply there. Do you think it would hurt me to tell them the real reason (or who the problem was)?⁴²⁹

[129] The other posting was a photograph of Snyder wearing a pirate hat and holding a plastic cup containing a mixed beverage with a caption reading “drunken pirate.”⁴³⁰ The supervising teacher, although she did object to the posting of the photograph, was more upset about the text referring to the supervisor as “the problem.”⁴³¹ The supervising teacher concluded that Snyder had acted unprofessionally in criticizing the

⁴²⁶ *Id.* at *5.

⁴²⁷ *Id.* at *5-6.

⁴²⁸ *See Snyder*, 2008 WL 5093140, at *5-6.

⁴²⁹ *Id.* at *5.

⁴³⁰ *Id.* at *6.

⁴³¹ *See id.* at *7.

supervisor on her web page.⁴³²

[130] The plaintiff conceded that her postings involved only personal matters rather than any matter of public concern.⁴³³ Given *Pickering-Connick*'s requirement that public employee speech must implicate a public concern in order to be protected, Snyder's concession that her speech was "personal" made this a relatively easy case.⁴³⁴ Unsurprisingly, the court returned a verdict in favor of the defendants.⁴³⁵

**VI. IN MOST CIRCUMSTANCES, *PICKERING-CONNICK* IS THE
APPLICABLE TEST FOR EVALUATING WHETHER SCHOOLS CAN
RESTRICT TEACHERS' OFF-CAMPUS SPEECH TO STUDENTS USING
SOCIAL MEDIA**

**A. *Garcetti* Will Rarely Apply to Teachers' Off-Campus
Speech to Students Using Social Media**

[131] Except in extraordinary circumstances, the holding in *Garcetti*, excluding First Amendment free speech protection for public employee speech made "pursuant to [the employee's] official duties," is not applicable to teacher-to-student off-campus speech using social media.⁴³⁶

⁴³² *Id.* at *8.

⁴³³ *Snyder*, 2008 WL 5093140, at *16.

⁴³⁴ *See id.* at *14, *16. But what if her comments could have been construed as a critique of the teacher-training process? What if the picture of her with alcohol could be been interpreted as a warning not to drink alcohol? Even if the message regarding her supervisor and the picture of her drinking did not implicate matters of public concern, what if her MySpace page included other matters of public concern? In short, some creative lawyering may have made this a far more difficult case for the court.

⁴³⁵ *See id.* at *16.

⁴³⁶ *See Garcetti v. Ceballos*, 547 U.S. 410, 424-25 (2006). These extraordinary circumstances would include situations in which the social media usage was part of the school curriculum. In this case, school officials could regulate its use. *See id.* at 423-25.

Even though some teachers' communications with students using social media might foreseeably involve instruction and guidance, thus arguably falling within a teacher's "official duties," *Garcetti* should be interpreted in its proper context and not be extended to limit this speech.⁴³⁷

In addition, schools could likely regulate teachers' communications with students using social media during working hours or using school equipment. *See id.*

⁴³⁷ *Garcetti* has been criticized on many fronts. *See* Roosevelt III, *supra* note 23, at 636. Some commentators have argued that the *Garcetti* holding should apply only to a public employee's "required" speech. *See* Weintraub v. Bd. of Ed., 593 F.3d 196, 208 (2d Cir. 2010) (Calabresi, J., dissenting) (proposing that an employee's speech is "pursuant to official duties" when the employee is required to make such speech in the course of fulfilling his job duties); *see also* Bauries & Schach, *supra* note 218, at 372 (concluding that an employee's speech made "pursuant to official duties" means speech an employee could be punished for if she refused to speak, rather than speech "related to" her employment or made "in the course" of her employment). Another commentator has concluded that "pursuant to official duties" should encompass all aspects of a public employee's job performance. *See* Roosevelt III, *supra*, at 646. Yet another concluded that an employee's speech is pursuant to her official duties if the speech is generally consistent with the type of activities the employee is paid to perform. *See* Wenkart, *supra* note 127, at 6. While the outer reaches of *Garcetti* are uncertain, lower courts have not limited *Garcetti*'s application to a public employee's required speech. *See, e.g.,* Weintraub, 593 F.3d at 198 (holding that a teacher's complaint concerning classroom discipline was made pursuant to his official duties). Lower courts have considered a number of non-exhaustive factors to determine if the speech was made pursuant to an employee's official job responsibilities: whether the employee was required or paid to produce the speech, whether the speech was made within the chain of command, whether it was made at the workplace, whether it could be perceived as the employer's speech, whether it derived from special knowledge acquired by the employee in the course of her employment, and whether there is a citizen-analogue to the speech. *See, e.g.,* Decotiis v. Whittmore, 635 F.3d 22, 32 (1st Cir. 2011). Regardless of the outer limits of *Garcetti*, *Garcetti* likely applies only if some of the speech is made during working hours or using workplace equipment. *See* *Garcetti*, 547 U.S. at 424. Furthermore, a government entity can likely restrict speech under *Garcetti* if the speech sufficiently distracts the employee, her co-workers, or her superiors from performing official job responsibilities. *See* Connick v. Myers, 461 U.S. 138, 150-53 (1983). *But see* Reinhardt v. Albuquerque Pub. Sch. Bd. of Ed., 595 F.3d 1126, 1135 (10th Cir. 2010) (concluding that the test for whether a teacher's speech is made pursuant to her official job duties is whether the speech was "commissioned" by the employer, not whether the speech was made during the employee's working hours or whether it concerned the subject matter of the person's employment). Presumably, though, one factor in determining whether the speech was

[132] *Garcetti* and *Connick* both involved a dispute arising during working hours and relating to the employee's work responsibilities.⁴³⁸ Even though these cases involve both of these factors, it is unclear whether both factors are necessary to establish that the plaintiff acted pursuant to his official duties. However, most off-campus teacher-to-student speech will likely involve neither of these factors.

[133] In essence, *Garcetti* concerned a public employee's job performance.⁴³⁹ Crucially, the speech in *Garcetti* occurred at the workplace during working hours and involved the use of the employer's workplace, presumably including its technology and materials, to create the speech.⁴⁴⁰ The Court reasoned that when the plaintiff in the case,

"commissioned" by the employer would be whether the employee's speech is created during working hours or using workplace equipment. While the outer reaches of *Garcetti* are unclear, *Garcetti* provides no basis for limiting teacher off-campus speech using social media under any of these interpretations.

⁴³⁸ In particular, the speech in these cases resulted from the claimant's dissatisfaction with working conditions or the work process itself. *See Garcetti*, 547 U.S. at 413-15 (Ceballos expressed his concern that the documents submitted to support a search warrant were inaccurate); *see also Connick*, 461 U.S. at 140-41 (noting that her questionnaire solicited coworkers views regarding "office transfer policy, office morale, the need for a grievance committee, the level of confidence in her supervisors, and whether employees felt pressured to work in political campaigns").

⁴³⁹ *See* Roosevelt III, *supra* note 23, at 633.

⁴⁴⁰ *See Garcetti*, 547 U.S. at 420. Both of these factors may not be required to establish that a plaintiff acted pursuant to his "official duties." However, *Garcetti* and *Connick* involved both factors. As previously noted, lower courts have considered a number of non-exhaustive factors to determine if the speech was made pursuant to an employee's official job responsibilities. *See, e.g., Decotiis*, 635 F.3d at 32. The more the employee's role requires confidentiality, policymaking or public contact, the greater the employer's interest in regulating the speech. Christopher B. McLaughlin, *The Intersection of the First Amendment and Professional Ethics for Government Attorneys*, U.N.C. SCH. GOV'T 1, 10, available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Microsoft%20Word%20-%20manuscript_mclaughlin_workplace_and_constitution_0.pdf (citing *Sheppard v. Beerman*, 190 F. Supp. 2d 361, 374 (E.D.N.Y. 2002)).

Ceballos, “*went to work* and performed the tasks he was paid to perform,” he acted pursuant to his official duties as opposed to acting as a citizen.⁴⁴¹ In addition, he did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings.⁴⁴² Nor did he speak as a citizen when he wrote a memorandum addressing the disposition of a pending criminal case.⁴⁴³ In short, Ceballos’ speech resulted from an investigation he conducted during working hours, presumably using workplace technology and materials, resulting in a confrontation with his supervisor at his workplace during working hours. As the Court reasoned, there is no citizen analogue for speech like Ceballos’ because his speech arose within the context of his required job responsibilities.⁴⁴⁴

[134] However, when a teacher’s speech is made off-campus and without the use of any workplace technology or equipment, the *Garcetti* holding should not apply because under these conditions, a teacher’s speech is not made pursuant to the teacher’s “official duties.” *Garcetti* should not be applied even if the speech involves homework help or some other form of guidance and thus falls within the outer stretches of “official duties.”⁴⁴⁵ Primary and secondary school public teachers are not required or even expected to communicate with students using social media like Facebook or MySpace, and, therefore, these communications are not made pursuant to a teacher’s official duties.⁴⁴⁶ Furthermore, these communications will

⁴⁴¹ *Garcetti*, 547 U.S. at 422 (emphasis added).

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Id.* at 423-24.

⁴⁴⁵ See *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 309 (D. Conn 2008) (quoting *Garcetti*, 547 U.S. at 421).

⁴⁴⁶ Many states require unions and school districts to bargain on “wages, hours, and terms and conditions of employment.” *Teacher’s Unions and Collective Bargaining: Resolving Conflicts*, FINDLAW.COM,

likely occur after school hours when the teachers are not on school premises and will not involve the use of school equipment.⁴⁴⁷ Therefore, unlike the attorney-plaintiff's speech in *Garcetti*, these communications will almost always not be made pursuant to a teacher's "official duties" even if the communication is consistent with a teacher's official duties while the teacher is present at school.⁴⁴⁸

[135] Notably, neither of the two most frequently discussed district court decisions involving teachers' free speech claims regarding social media communications with students applied the *Garcetti* holding.⁴⁴⁹ In *Spanierman*, the district court concluded that *Garcetti* did not apply because the teacher was not obligated to make the speech⁴⁵⁰ noting that the

<http://education.findlaw.com/teachers-rights/teacher-s-unions-and-collective-bargaining-resolving-conflicts.html> (last visited Oct. 8, 2012) (internal quotation marks omitted). Thus, the line between "on-duty" and "off-duty" teacher responsibilities may be specified in a collective bargaining agreement.

⁴⁴⁷ See *Spanierman*, 576 F. Supp. 2d at 309.

⁴⁴⁸ See *id.* In a slightly different context, the Supreme Court acknowledged this point in *Connick* when the Court observed that employee speech which transpires entirely on the employee's own time, and in non-work areas of the office, may bring different factors into the *Pickering* calculus. *Connick v. Myers*, 461 U.S. 138, 153 n.13 (1983). A teacher's off-campus speech to students using social media, because it does not involve use of the employer's premises, is yet another step removed from the situation described in *Connick*.

⁴⁴⁹ See *Spanierman*, 576 F. Supp. 2d at 309; see also *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at *16 (E.D. Pa. Dec. 3, 2008).

⁴⁵⁰ *Spanierman*, 576 F. Supp. 2d at 309. The Second Circuit's current test is broader. See *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 198 (2d Cir. 2010). This test is two-pronged: (1) whether the speech is "in furtherance of" an employee's "core duties," and (2) whether there is a relevant "citizen analogue" to the employee's speech. See *id.* at 198, 203, 208. But even under this broader test, *Spanierman*'s speech would not qualify as speech made pursuant to his official duties—his speech was not in furtherance of any core duty, and citizen analogues existed. Off-campus teacher-to-student social media speech should not be regulated under *Garcetti* regardless of the precise contours of *Garcetti*'s reach. See *supra* Part VI.A. Judge Calabresi, dissenting in *Weintraub*,

record contained no evidence that the plaintiff “was under any obligation to make the statements he made on MySpace.”⁴⁵¹ Instead, the court used the *Pickering-Connick* standard.⁴⁵² Similarly, in *Snyder*, the district court analyzed the claim under *Pickering-Connick* instead of *Garcetti*.⁴⁵³

[136] The policy concerns enumerated in *Garcetti* should be construed in light of *Garcetti*’s facts. One major concern underlying *Garcetti* was the Court’s fear of “constitutionaliz[ing] the employee grievance [process].”⁴⁵⁴ To avoid this result in *Garcetti*, the Court justified the quelling of Ceballos’ speech based on workplace efficiency concerns.⁴⁵⁵ However, the district attorney’s speech in *Garcetti* occurred at the workplace, presumably distracting the attorney, his superiors, and others from performing their official duties.⁴⁵⁶ While it is possible that off-campus teacher-to-student speech using social media might result in some workplace disruption, this speech, unlike the speech in *Garcetti*, will less directly impair workplace efficiency.⁴⁵⁷ Thus, the *Garcetti* Court’s

proposed a test similar to the district court’s test in *Spanierman*. Judge Calabresi proposed that an employee’s speech is “pursuant to official duties” when the employee is required to make such speech in the course of fulfilling his job duties. *Weintraub*, 593 F.3d at 208 (Calabresi, J., dissenting). In short, the employer must in some way rely on the employee’s speech, “as where the speech is an ‘official communications’ or is used by the employer to ‘promote the employer’s mission.’” *Id.* (citing *Garcetti v. Ceballos*, 547 U.S. 410, 422-23 (2006)).

⁴⁵¹ *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 309 (D. Conn 2008).

⁴⁵² *See id.* at 309.

⁴⁵³ *See Snyder*, 2008 WL 5093140, at *14, 16.

⁴⁵⁴ *Garcetti*, 547 U.S. at 420 (citing *Connick v. Myers*, 461 U.S. 138, 154 (1983)).

⁴⁵⁵ *See Garcetti*, 547 U.S. at 418-19.

⁴⁵⁶ *Id.* at 422-23.

⁴⁵⁷ This Article contends that the *Pickering* balancing test is still the proper standard for evaluating teacher speech made outside the workplace.

workplace efficiency concerns do not justify extending *Garcetti* to a teacher's off-campus speech to students using social media.

[137] Workplace efficiency concerns are important, but with respect to a teacher's off-campus speech to students, they are better addressed using the *Pickering* balancing test. This Article's proposed test for evaluating teacher-to-student speech allows school districts to regulate speech based on its disruptive effect on school grounds.

[138] Furthermore, in *Garcetti*, the Court also acknowledged that its holding might not be appropriate in an educational context even when that context involves on-campus speech.⁴⁵⁸ The Court declined to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there "[may be] room for serious debate."⁴⁵⁹ In *Garcetti*, the majority, in discussing academic freedom, declined to decide whether this rule would apply to cases involving educational speech.⁴⁶⁰ The Court remarked "that expression related to academic scholarship or classroom instruction [may] implicate[] additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."⁴⁶¹ These concerns are heightened with respect to the regulation of teacher off-campus speech.

[139] Lower courts have often applied the *Garcetti* requirement to

⁴⁵⁸ See *Garcetti*, 547 U.S. at 425.

⁴⁵⁹ *Id.* at 424.

⁴⁶⁰ *Id.* at 425. The Court did not explicitly differentiate between university-level professor speech and K-12 teacher speech protections when it discussed academic freedom. See *id.* But there may be reasons for extending greater First Amendment protection to the former. See *supra* note 309.

⁴⁶¹ *Garcetti*, 547 U.S. at 425. While these concerns certainly encompass university-level professor speech, the extent to which they apply to secondary or primary teacher speech remain unclear, since the Court cited only university-level speech cases in support of this proposition.

teacher speech *made on campus during working hours*,⁴⁶² but no federal court has yet used *Garcetti* to evaluate a teacher's off-campus speech to a student. There is good reason for this: allowing states or school districts to limit teacher-to-student speech using social media would cast an extraordinarily wide net, essentially prohibiting the electronic equivalent of a student-teacher interaction on Main Street.

[140] Furthermore, treating any teacher-student off-campus communication as a teacher's official speech, and therefore unprotected speech, would be inconsistent with the Supreme Court's wariness regarding blanket restrictions on public employees' speech.⁴⁶³ Even when a public employee's speech is made in a work setting, the Court has refused to recognize that "all speech within the office is automatically exposed to restriction."⁴⁶⁴ The Court in *Garcetti* noted that some speech made by a public employee is protected even when the speech occurs *while the employee is working* at his workplace.⁴⁶⁵ In *Connick*, the Court also addressed this issue, cautioning that its holding should not be read to "suggest that speech on [even] private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit . . . [this] expression by all persons in [the] jurisdiction."⁴⁶⁶ Importantly, *Garcetti* did not overturn *Givhan*, a case recognizing a teacher's free speech rights *on campus* when the speech occurred *during working hours*.⁴⁶⁷ *Garcetti*, of course, did not

⁴⁶² See, e.g., *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007).

⁴⁶³ See *United States v. Nat'l Treasury Emp. Union*, 513 U.S. 454, 457 (1995).

⁴⁶⁴ *Garcetti*, 547 U.S. at 420-21.

⁴⁶⁵ See *id.*

⁴⁶⁶ *Connick v. Myers*, 461 U.S. 138, 147 (1983).

⁴⁶⁷ See *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 412-13, 415-16 (1979).

overrule *Pickering*.⁴⁶⁸

[141] Finally, the Court in *Garcetti* warned about the danger of undue judicial interference in *government business*, noting that if the Court were to hold in favor of the plaintiff, this decision “would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the *course of official business*.”⁴⁶⁹ Because these teacher communications would occur outside the course of official business, the *Garcetti* Court’s concerns are not applicable.

B. *Hazelwood* Will Rarely Apply to Teachers’ Off-Campus Speech to Students Using Social Media

[142] Most, if not all, off-campus teacher-student communications using social media will not be school-sponsored speech. Therefore, *Hazelwood* should rarely, if ever, be applied to regulate this speech.

[143] Under *Hazelwood*, school administrators can regulate student speech if three requirements are met: (1) the speech is part of a school supervised learning experience, (2) the speech could reasonably be interpreted as the school’s speech, and (3) the school has a legitimate pedagogical reason for regulating the speech.⁴⁷⁰ In *Hazelwood*, the Supreme Court held that school officials “may exercise control over the contents of a high school newspaper produced as part of the school’s journalism curriculum,”⁴⁷¹ so long as the official’s actions were “reasonably related to legitimate pedagogical concerns.”⁴⁷² The Court

⁴⁶⁸ *Garcetti*, 547 U.S. at 418-19.

⁴⁶⁹ *Id.* at 423 (emphasis added).

⁴⁷⁰ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-73 (1988).

⁴⁷¹ *Id.* at 262, 273.

⁴⁷² *Id.* at 273.

concluded that the school principal's actions were reasonable in prohibiting the publication of two articles because of privacy concerns for the subject of the stories and for third parties, and because the subject matter was inappropriate for some of the younger students at the school.⁴⁷³

[144] While some lower courts have used the *Hazelwood* test to evaluate teachers' classroom speech,⁴⁷⁴ these cases invariably involved speech related to school curriculum. Although the Internet does blur the boundaries between speech on and off-campus, the *Hazelwood* test should not be applied to a teacher's off-campus communications with students.

[145] *Hazelwood* is not the proper test for evaluating teacher-student communication using social media for many reasons. First, *Hazelwood* involved on-campus speech by students.⁴⁷⁵ For this reason alone, it is difficult to apply *Hazelwood* to teachers' off-campus speech.

[146] Second and more importantly, crucial to the Court's holding in *Hazelwood* was its conclusion that the school newspaper was a "school supervised learning experience" that might reasonably be perceived as the school's speech.⁴⁷⁶ The Court defined "school supervised learning

⁴⁷³ See *id.* at 261, 263.

⁴⁷⁴ See *Kramer v. N.Y.C. Bd. of Educ.*, 715 F. Supp. 2d 335, 353-54 (E.D.N.Y. 2010) (noting that there is disagreement among the federal courts of appeals on whether teacher classroom speech should be analyzed under *Garcetti* or *Hazelwood*; the court analyzed the issue under both tests). The Second Circuit is among the courts that have extended the Supreme Court's standard for student speech to teachers' instructional speech. *Id.* at 354; see, e.g., *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 722-23 (2d Cir. 1994). But see *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 198 (2d Cir. 2010) (determining that a grievance filed by a teacher was unprotected speech pursuant to *Garcetti* without considering the relevance of the teacher's position as an educator under *Hazelwood*). Most of the cases applying *Hazelwood* to teachers' instructional speech were decided pre-*Garcetti*. See, e.g., *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993).

⁴⁷⁵ *Hazelwood*, 484 U.S. at 262.

⁴⁷⁶ *Id.* at 270-71, 273.

experiences” as those activities that may be characterized as *part of the school curriculum*, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.⁴⁷⁷ The Court’s inclusion of “activities outside the traditional classroom” in context refers to school-sponsored activities, such as a student newspaper.⁴⁷⁸

[147] It is highly likely that most, if not all, teacher-student communication via social media would not qualify as “school supervised learning experiences.” Particularly if the teacher speech is created off-campus, without using any school-supplied technology or equipment, it is difficult to perceive this speech as part of the school curriculum. By contrast, in *Hazelwood*, while the school’s journalism students wrote and edited the newspaper, this work was formally supervised by a faculty member and funded by the local board of education.⁴⁷⁹ As previously discussed, teachers are not required to communicate with students using social media. A teacher who chooses to interact with students using these technologies is not, in any formal sense, supervising a student’s learning experience, and, therefore, it is difficult to envision most of these interactions as part of any formal school curriculum. Furthermore, unless school equipment or technology is used in this communication or unless the local school district requires the teacher to communicate in this fashion, the school district is not “funding” this interaction.

[148] In sum, even if students might reasonably perceive a teacher’s speech to be the speech of the school, the *Hazelwood* test would not apply because it is highly likely that a teacher’s off-campus speech will not be part of any formalized school curriculum.

⁴⁷⁷ *Id.* at 271 (emphasis added).

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.* at 262-63.

[149] Finally, even if students might reasonably perceive a teacher's speech to be the speech of the school, and even if the teacher's speech might reasonably be interpreted as curricular speech, the *Hazelwood* test is still inapplicable. If a teacher's speech is deemed "part of the curriculum" and thus a "school supervised learning activity," *Garcetti* would govern this question because the speech would almost certainly involve a teacher's "official duties."⁴⁸⁰ As previously discussed, *Garcetti* does not apply either.

C. The Government Speech Doctrine Will Rarely Apply to Teachers' Off-Campus Speech to Students Using Social Media

[150] Whatever the outer limits of the evolving government speech doctrine and whether or not it is distinct from *Garcetti*, this doctrine would not apply to most, maybe the vast majority, of teacher off-campus communications with students using social media since a reasonable observer would rarely conclude that this speech was the school's speech. More specifically, since teacher speech in this context will rarely be made pursuant to a teacher's official duties nor qualify as school-sponsored speech, the government speech doctrine does not apply.⁴⁸¹

D. Because *Garcetti*, *Hazelwood*, and the Government Speech Doctrine Rarely Apply to Teachers' Off-Campus Speech to Students Using Social Media, the Applicable Test in Most Circumstances is *Pickering-Connick*

[151] Except in extraordinary circumstances, neither *Garcetti*, *Hazelwood*, nor the government speech doctrine will apply to a teacher's

⁴⁸⁰ In these circumstances, *Garcetti* would govern even when a teacher's speech pursuant to his "official duties" is limited to required speech: if the speech is part of the curriculum, the teacher's speech is "commissioned," and therefore made pursuant to the teacher's official duties. *See generally* *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

⁴⁸¹ As previously discussed, there is a significant overlap between *Garcetti* and the government speech doctrine. *See supra* Part VI.A.

off-campus communications to a student using social media since the speech is not made pursuant to a teacher's official duties, is not school-sponsored, and is not "government speech." Consequently, in most circumstances, the appropriate test for evaluating a teacher's constitutional rights with respect to off-campus communications to students using social media is *Pickering-Connick*.⁴⁸²

[152] As previously noted, public employees can challenge government restrictions of their free speech rights by bringing a facial challenge to the regulation or by bringing an "as applied" challenge, typically a retaliatory discharge claim.⁴⁸³ Either way, the governing law is *Pickering-Connick*.⁴⁸⁴

[153] In *Pickering*, the Supreme Court addressed a teacher's off-campus free speech rights, holding that a teacher's speech criticizing school officials was protected under the First Amendment.⁴⁸⁵ The Supreme Court

⁴⁸² A public entity's ability to regulate an employee's speech is lowest when the employee is speaking as a citizen. See *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion) ("[T]he government as employer . . . has far broader powers than does the government as sovereign."). A public entity's ability to regulate an employee's speech at the outer fringes of the employment relationship is less than its ability to regulate an employee's required speech. See *Garcetti*, 547 U.S. at 423-24.

⁴⁸³ See *supra* Part IV.A.

⁴⁸⁴ The *Pickering* balancing test mirrors the Supreme Court's approach to content neutral speech regulations: in short, the *Pickering* balancing test is an intermediate scrutiny test. See Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 796 (2007). Under intermediate scrutiny, speech restrictions must be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); see also *Waters*, 511 U.S. at 675. "Narrowly tailored" means the restriction is not "substantially broader than necessary to achieve the government's interest;" it does not require the restriction to be the least restrictive means to achieve this goal. *Ward*, 491 U.S. at 800; see also *Waters*, 511 U.S. at 674-75.

⁴⁸⁵ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564, 572-74 (1968).

rejected the notion that teachers are not entitled to First Amendment rights, reasoning that “[t]he public[’s] interest in having free and unhindered debate on matters of public importance . . . [is a] core value of the Free Speech Clause of the First Amendment.”⁴⁸⁶ Under the guidelines set out in the *Connick* decision, a teacher’s off-campus speech must satisfy a two-part test.⁴⁸⁷ First, the teacher’s speech must involve a matter of legitimate public concern.⁴⁸⁸ To make this determination, courts examine the “content, form, and context” of the speech.⁴⁸⁹ Second, if the speech does involve a matter of legitimate public concern, courts employ a balancing test to determine whether the employer’s interests in prohibiting the speech outweigh the teacher’s interests in making the speech and the audience’s interests in hearing the speech.⁴⁹⁰ If the speech meets both parts of this test, it is protected under the First Amendment, but if it fails either part, the speech is unprotected.⁴⁹¹ In other words, schools can suppress teacher speech only when the teacher’s speech either fails to implicate a public concern or fails the *Pickering* balancing test.⁴⁹²

[154] Notably, even when a teacher’s social media speech is made in private, the First Amendment is still applicable.⁴⁹³ With respect to the *Pickering* balancing test, the analysis of a public employee’s private expression may bring additional factors to this calculus, such as the

⁴⁸⁶ *Id.* at 573-74.

⁴⁸⁷ *See Connick v. Myers*, 461 U.S. 138, 148-50 (1983).

⁴⁸⁸ *See id.* at 146.

⁴⁸⁹ *Id.* at 147-48.

⁴⁹⁰ *See id.* at 149-50.

⁴⁹¹ *See id.* at 154.

⁴⁹² *See Connick*, 461 U.S. at 149-151, 154.

⁴⁹³ *See Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 412-13 (1979).

manner, time, and place of the employee's speech.⁴⁹⁴ However, if the speech meets both required elements of the *Pickering-Connick* test, the speech is protected even if it is expressed privately.⁴⁹⁵

VII. UNDER *PICKERING-CONNICK*, SCHOOL DISTRICTS' CATEGORICAL BANS OF TEACHERS' OFF-CAMPUS SPEECH TO STUDENTS USING SOCIAL MEDIA ARE LIKELY OVERBROAD AND THUS UNCONSTITUTIONAL

A. Overbreadth Doctrine: Facial Challenges

[155] In a First Amendment free speech context, litigants are permitted to challenge a government speech restriction when it abridges the speech rights of parties not before the court, even if the restriction would be constitutional as-applied to the litigant.⁴⁹⁶ Thus, facial challenges are an exception to the general notion that constitutional rights are personal.⁴⁹⁷

[156] A speech restriction is overbroad and therefore unconstitutional when the restriction substantially burdens protected speech and the restriction is not amenable to a limiting interpretation.⁴⁹⁸

[157] A remedy based on the overbreadth doctrine is "strong medicine."⁴⁹⁹ However, this medicine is necessary because the threat of

⁴⁹⁴ *Id.* at 415 n.4.

⁴⁹⁵ *See id.* at 412-13, 415.

⁴⁹⁶ *See* L.A. Police Dep't v. United Reporting Publ'g. Corp., 528 U.S. 32, 39 (1999); *see also* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

⁴⁹⁷ *See* L.A. Police Dep't, 528 U.S. at 39.

⁴⁹⁸ *See* Broadrick, 413 U.S. at 613-16.

⁴⁹⁹ *Id.* at 613. The Court noted that the overbreadth doctrine has been employed "sparingly, and only as a last resort." *Id.* This observation is questionable. *See* United States v. Stevens, 130 S. Ct. 1577, 1579, 1592 (2010) (holding that a federal statute criminalizing the commercial creation, sale, or possession of certain depictions of animal

enforcement of an overbroad restriction may deter or chill others' constitutionally protected speech.⁵⁰⁰ Rather than "vindicating their rights through case-by-case litigation, [many people] will choose simply to abstain from protected speech."⁵⁰¹ This chilling effect harms society as a whole, adversely affecting the marketplace of ideas.⁵⁰²

[158] Nevertheless, the overbreadth doctrine also creates social costs when it blocks the application of a speech restriction to constitutionally unprotected speech.⁵⁰³ To ensure that these costs do not outweigh the benefits of declaring a speech restriction overbroad, a claimant must establish that there is a real danger that the restriction will substantially burden protected speech.⁵⁰⁴ In short, a court may find a restriction

cruelty was overbroad); *see also* *City of Houston v. Hill*, 482 U.S. 451, 467 (1987) (holding that a municipal ordinance making it unlawful to interrupt a police officer during the officer's performance of his duties was overbroad); *see also* *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 577 (1987) (holding an airport regulation prohibiting the exercise of any First Amendment rights was overbroad). *But see Broadrick*, 413 U.S. at 618 (holding that a state statute prohibiting certain public employees from engaging in active, partisan political campaigning was not overbroad, even though the statute purportedly restricted the wearing of political buttons or the use of bumper stickers). *See generally* Richard H. Fallon, Jr., *Fact and Fiction about Facial Challenges*, 99 CALIF. L. REV. 915 (2011) (noting that "rare" facial challenges are not so rare).

⁵⁰⁰ *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (noting that this is especially true when the statute imposes criminal sanctions).

⁵⁰¹ *Id.*

⁵⁰² *Id.*

⁵⁰³ *Id.*

⁵⁰⁴ *See Broadrick*, 413 U.S. at 615. A number of Supreme Court decisions have held that speech restrictions substantially infringed on protected speech. *See Stevens*, 130 S. Ct. at 1592 (concluding that the burden on protected speech was substantial because the animal cruelty statute would limit protected speech like hunting magazines and videos); *see also Jews for Jesus, Inc.*, 482 U.S. at 574-75 (concluding that the burden on protected speech was substantial because the restriction prohibited any First Amendment expression).

overbroad and therefore unconstitutional when “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”⁵⁰⁵ Thus, “[t]he first step in overbreadth analysis is to construe the challenged statute [because] it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.”⁵⁰⁶ Notably, “[f]acial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute” that would remove the threat or deterrence to constitutionally protected speech.⁵⁰⁷

[159] The regulation in *Jews for Jesus, Inc.* is an example of the Supreme Court’s use of the overbreadth doctrine to invalidate a blanket ban of speech.⁵⁰⁸ In this case, the regulation banned all First Amendment expression, including talking and reading, within the Central Terminal Area of the Los Angeles International Airport.⁵⁰⁹ The Court concluded that no conceivable government interest could justify this categorical ban.⁵¹⁰ Because the regulation could not be limited to ameliorate this

⁵⁰⁵ *Stevens*, 130 S. Ct. at 1587 (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). See *Broadrick*, 413 U.S. at 615-16. A restriction should not be invalidated on its face merely because it is possible to conceive of a single impermissible application. *City of Houston v. Hill*, 482 U.S. 451, 458 (1987) (citing *Broadrick*, 413 U.S. at 630 (Brennan, J., dissenting)).

⁵⁰⁶ *Stevens*, 130 S. Ct. at 1587 (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)).

⁵⁰⁷ *Broadrick*, 413 U.S. at 613, 617-18 (noting that the state interpreted the statute to forbid only active, partisan political campaigning).

⁵⁰⁸ *Jews for Jesus, Inc.*, 482 U.S. at 569; see *Harman v. City of N.Y.*, 140 F.3d 111, 124 (2d Cir. 1998) (holding that a regulation requiring employees of two of New York’s largest social services agencies to obtain approval before speaking to the media was unconstitutional on both overbreadth and as-applied grounds).

⁵⁰⁹ See *Jews for Jesus, Inc.*, 482 U.S. at 570-71, 574-75.

⁵¹⁰ *Id.* at 575 (noting that this would be the case even assuming the airport was a nonpublic forum).

substantial burden on protected speech, the Court held the ban unconstitutional.⁵¹¹

[160] Similarly, as previously discussed, in *National Treasury Employees Union* (“*NTEU*”), the Supreme Court held that a congressional ban prohibiting almost all federal employees from receiving honoraria for making speeches or writing articles was overbroad and thus violated the plaintiff-respondents’ First Amendment free speech rights.⁵¹² In essence, the ban restricted a federal employee from accepting honoraria for this expression, even when the expression was unrelated to work.⁵¹³ The ban did not directly prohibit any speech and did not discriminate “among speakers based on the content or viewpoint of their message[.]”⁵¹⁴ However, the Court concluded that the prohibition on compensation imposed a significant burden on protected expressive activity and therefore violated the First Amendment.⁵¹⁵

[161] *NTEU* demonstrated the Court’s willingness to apply facial analysis to a workplace regulation.⁵¹⁶ Notably, the ban on receiving honoraria did not seek to regulate particular employees’ workplace responsibilities; rather, the ban attempted to regulate speech on the outer fringes of the employment relationship.⁵¹⁷ Despite the relative deference

⁵¹¹ *See id.* at 577.

⁵¹² *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 457 (1995). In *NTEU*, the Court limited the remedy to employees below grade GS-16. *Id.* at 478.

⁵¹³ *Id.* at 457.

⁵¹⁴ *Id.* at 468.

⁵¹⁵ *Id.*

⁵¹⁶ *See id.* at 477-78.

⁵¹⁷ *See Nat’l Treasury Emps. Union*, 513 U.S. at 478.

provided by *Pickering-Connick's* intermediate level review,⁵¹⁸ the Court found the ban facially unconstitutional.⁵¹⁹

[162] In both *Jews for Jesus, Inc.* and *NTEU*, the Supreme Court has demonstrated its apprehension regarding broad restrictions on speech, particularly when the restrictions prohibit speech before it occurs.

B. Categorical Bans on Teachers' Off-Campus Speech to Students Are Likely Overbroad and Thus Facially Unconstitutional

[163] Categorical bans⁵²⁰ regarding off-campus teacher-to-student speech using social media at least arguably prohibit a substantial amount of protected speech. Furthermore, given the absolute proscription on speech contained in these bans, courts will be unable to curtail this substantial overbreadth by limiting the restriction. Consequently, school districts' bans within this area of speech are, at least arguably, facially unconstitutional.⁵²¹

[164] Under *Pickering-Connick*, teacher speech is protected when the speech implicates a public concern and survives the *Pickering* balancing

⁵¹⁸ See Bhagwat, *supra* note 484, at 795 (noting that the *Pickering* balancing test is essentially an intermediate scrutiny test).

⁵¹⁹ See *Nat'l Treasury Emps. Union*, 513 U.S. at 454, 477-78. *NTEU* provides a basis for facial challenges to public employee workplace speech regulations, and, analogously, student speech regulations. See *id.*

⁵²⁰ Many policies regulating teacher-student communication using non-school sanctioned social media are categorical bans. See generally NYC DEPARTMENT OF EDUCATION SOCIAL MEDIA GUIDELINES, *supra* note 2, at 1, 2, 4.

⁵²¹ In the absence of studies indicating that little speech in this area is protected speech, courts should err on the side of protecting teacher speech. Further study of the content of these communications would be helpful; unfortunately, blanket bans make these studies impossible.

test.⁵²² Certainly, some teacher-student speech using social media would implicate a public concern. In addition, some of this speech would pass the *Pickering* balancing test because the teacher's interest in uttering the speech and the students' interest in hearing the speech would outweigh the school's interests in censoring the speech. Therefore, if the amount of protected speech restricted is substantial and the composition of the audience does not provide a sufficient justification for this ban, then the restriction is unconstitutional. School districts' blanket bans of this speech, at least arguably, curtail a substantial amount of protected speech.

[165] The Supreme Court has demonstrated its wariness of large-scale restrictions on public employee speech, at least when the restriction prohibits speech before the speech occurs.⁵²³ In *NTEU*, the Court set a high bar when it observed that the government, in the context of a blanket policy designed to restrict expression by a large number of potential speakers, “‘must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression’s ‘necessary impact on the actual operation’ of the Government.’”⁵²⁴ A categorical ban of off-campus teacher-to-student speech using social media likely fails this test.

[166] The Supreme Court, in both *Jews for Jesus, Inc.* and *NTEU*, has held that regulations restricting large quantities of speech before the speech occurs are overbroad and thus unconstitutional even when the bans were content neutral.⁵²⁵ In *Jews for Jesus, Inc.*, the Supreme Court

⁵²² See discussion *supra* Part IV.A.1.a.

⁵²³ See *Nat'l Treasury Emps. Union*, 513 U.S. at 468; see also *Jews for Jesus, Inc.*, 482 U.S. at 576-77.

⁵²⁴ *Harman v. City of N.Y.*, 140 F.3d 111, 118 (1998) (quoting *Nat'l Treasury Emps. Union*, 513 U.S. at 468 (quoting *Pickering*, 391 U.S. at 571)).

⁵²⁵ See *Nat'l Treasury Emps. Union*, 513 U.S. at 468; see also *Jews for Jesus, Inc.*, 482 U.S. at 577. *But see Broadrick v. Oklahoma*, 413 U.S. 601, 616-17 (1973) (implying that the speech restriction protected public employees from being coerced to participate in partisan political activities).

observed that the ban was overbroad even if the airport was a nonpublic forum.⁵²⁶ A ban on off-campus teacher speech to students using social media is similar to the complete ban of all First Amendment expression in *Jews for Jesus, Inc.* because at least in the area of teacher social media communications to students off-campus, these policies typically make no exceptions for any protected speech.⁵²⁷ Furthermore, these categorical bans exceed the ban involved in *NTEU*. Notably, the ban in *NTEU* eliminated the financial incentive to engage in speech, but did not forbid the speech itself.⁵²⁸ With respect to bans on teacher speech in the social media context, the restriction directly regulates speech.

[167] Under these categorical bans, a teacher would be prohibited from allowing a student to view her social media page even if the page contained her reasons for supporting a local political candidate or, similar to the criticism in *Pickering*, her criticism of the Board of Education's funding priorities. The Supreme Court has held that speech made privately is still protected under *Pickering-Connick*.⁵²⁹

[168] Moreover, the amount of restricted teacher speech is staggering. In New York City alone, the policy restricts approximately 75,000 teachers.⁵³⁰

[169] Of course, the Supreme Court precedents mostly involve speech

⁵²⁶ *Jews for Jesus, Inc.*, 482 U.S. at 575.

⁵²⁷ See NYC DEPARTMENT OF EDUCATION SOCIAL MEDIA GUIDELINES, *supra* note 2, at 1, 4 (noting that even in the case of a prior restraint, there is at least a possibility that the speaker will be allowed to communicate her message).

⁵²⁸ See *Nat'l Treasury Emps. Union*, 513 U.S. at 468.

⁵²⁹ See, e.g., *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 412, 414 (1979).

⁵³⁰ See *NYC Dramatically Slashes Number of Teachers Granted Tenure*, CBS NEW YORK (July 27, 2011, 10:27 PM), <http://newyork.cbslocal.com/2011/07/27/nyc-dramatically-slashes-number-of-teachers-granted-tenure/>.

between adults. However, banning this speech because the audience is students is inconsistent with the First Amendment for many reasons. First, at least some of these students will have reached the age of majority. Second, and more importantly, there is no limit as to when students should begin learning about the political process and other current issues. While some issues might not be appropriate for the maturity level of younger students, a complete ban is a flawed response to this concern. The Supreme Court in *Pickering* protected the teacher's speech even though some of his audience could have been his own students. The Court did not distinguish among *Pickering*'s audience members based on age, student status, or voting eligibility. Furthermore, the Court's observation that "free and open debate is vital to informed decision-making by the electorate"⁵³¹ also applies to the future electorate.

[170] Unsurprisingly, the only time that a court has addressed a categorical ban of this nature, the court enjoined the speech restriction.⁵³² The court concluded that "social networking is extensively used by educators."⁵³³ Furthermore, the court found the "breadth of the prohibition [to be] staggering."⁵³⁴ Consequently, the court held that the

⁵³¹ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571-72 (1968).

⁵³² *See, e.g.*, NYC DEPARTMENT OF EDUCATION SOCIAL MEDIA GUIDELINES, *supra* note 2, at 4 (2012). A more narrowly drawn ban restricting particular conduct, such as sexual assault, would be constitutional. But school districts typically ban all speech in order to address issues like inappropriate sexual contact between teachers and students. *See also* David W. Chen and Patrick McGeehan, *Social Media Rules Limit New York Student-Teacher Contact*, N.Y. TIMES, May 1, 2012, <http://www.nytimes.com/2012/05/02/nyregion/social-media-rules-for-nyc-school-staff-limits-contact-with-students.html?pagewanted=all>. The impetus behind the NYC DOE's ban was inappropriate relationships between teachers and students that began or were conducted using social media. Notably, the DOE's policy does not address teacher cell phone use. Teachers can thus still call students, although they can still be disciplined for inappropriate conduct. *See id.*

⁵³³ Amended Order Entering Preliminary Injunction, *supra* note 12.

⁵³⁴ *Id.*

AHSPA would have a significant “chilling effect” on free speech.⁵³⁵ Since this “chilling effect” was sufficiently immediate, the court held that the resulting injury was irreparable.⁵³⁶ Other categorical bans on this type of speech are likely similarly unconstitutional.

**VIII. UNDER *PICKERING-CONNICK*, SCHOOL DISTRICTS’ MORE
NARROWLY DRAWN RESTRICTIONS OF TEACHERS’ OFF-CAMPUS
SPEECH TO STUDENTS USING SOCIAL MEDIA WILL PROBABLY NOT BE
OVERBROAD**

[171] More narrowly drawn restrictions governing off-campus teacher-to-student speech using social media will probably not be overbroad. For example, speech prohibiting a teacher from disclosing confidential student information or engaging in sexually predatory speech would not be facially unconstitutional. The constitutionality of these restrictions would need to be addressed on an as-applied basis. However, instead of narrowly restricting teacher speech in this more focused manner, many districts have categorically banned all teacher-to-student speech using social media.⁵³⁷

**IX. UNDER *PICKERING-CONNICK*, SCHOOL DISTRICTS’ CATEGORICAL
BANS OF TEACHERS’ OFF-CAMPUS SPEECH TO STUDENTS USING SOCIAL
MEDIA WILL BE UNCONSTITUTIONAL “AS-APPLIED” TO AT LEAST
SOME TEACHER SPEECH**

[172] A categorical ban of off-campus teacher speech to students using social media may also be unconstitutional under the more common “as-applied challenge.”⁵³⁸ In an “as-applied” challenge, the litigant argues that

⁵³⁵ *Id.*

⁵³⁶ *Id.*

⁵³⁷ See NYC DEPARTMENT OF EDUCATION SOCIAL MEDIA GUIDELINES, *supra* note 2, at 1, 4.

⁵³⁸ Reed v. Town of Gilbert, 587 F.3d 966, 974 (9th Cir. 2009) (citing Santa Monica Food

the law is unconstitutional as applied to the specific facts of the claimant's case.⁵³⁹

[173] Under *Pickering-Connick*, teacher speech is protected when the speech implicates a public concern and survives the *Pickering* balancing test.⁵⁴⁰ For many of the same reasons a categorical ban would be unconstitutionally overbroad, the ban would also be unconstitutional as applied to a specific claimant. Notably, at least some teacher-student speech using social media would implicate a public concern and at least some of this speech would also pass the *Pickering* balancing test because the teacher's interest in uttering the speech and the students' interest in hearing the speech would outweigh the school's interests in censoring the speech. Consequently, in at least some circumstances, a ban on teacher speech would be unconstitutional as applied to this teacher speech under the current *Pickering-Connick* test.

[174] The *Pickering* balancing test is essentially an intermediate scrutiny test.⁵⁴¹ Therefore, intermediate scrutiny cases are helpful in understanding *Pickering*.

[175] Under an intermediate scrutiny analysis, speech restrictions must

Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1034 (9th Cir. 2006)).

⁵³⁹ *Reed*, 587 F.3d at 974 (citing *Santa Monica Food Not Bombs*, 450 F.3d at 1034).

⁵⁴⁰ See discussion *supra* Part IV.A.1.a.

⁵⁴¹ See Bhagwat, *supra* note 484, at 792. Intermediate scrutiny applies when courts determine the constitutionality of content-neutral speech restrictions enacted by a government entity in its "sovereign" capacity. See *id.* at 791-92. Courts employ the *Pickering-Connick* standard to analyze public employee free speech issues, at least when *Garcetti* does not apply. See *City of San Diego v. Roe*, 543 U.S. 77, 80-82 (2004) (analyzing the plaintiff's speech in under the *Pickering-Connick* standard). These standards overlap. In particular, the time, place, and manner factors involved in intermediate scrutiny are relevant in analyzing both the public concern and balancing requirements of *Pickering-Connick*. See *id.* at 80-81.

(1) serve a significant government interest, (2) leave open ample alternative channels for communication of the information, and (3) be narrowly tailored to serve that interest.⁵⁴² “Narrowly tailored” means that the restriction is not “substantially broader than necessary to achieve the government’s interest.” it does not require the restriction to be the least restrictive means to achieve this goal.⁵⁴³ The latter two components of this test are particularly instructive in understanding *Pickering*.

[176] While categorical bans of off-campus teacher-to-student speech using social media leave open ample traditional channels of communication for the information, in the social media age, this may not be sufficient. *City of Ladue* is illustrative even if distinguishable.⁵⁴⁴ When the *City of Ladue* prohibited a venerable, cost-effective way of communicating important speech using homemade signs on property owners’ lawns, the Court held the restriction unconstitutional.⁵⁴⁵ The Court noted its historical “concern with laws that foreclose an entire medium of expression.”⁵⁴⁶ In particular, the Court reasoned that “[r]esidential signs are an unusually cheap and convenient form of

⁵⁴² See *Waters v. Churchill*, 511 U.S. 661, 675 (1994); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

⁵⁴³ *Ward*, 491 U.S. at 800; see *Waters*, 511 U.S. at 675.

⁵⁴⁴ See *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994). This case is not directly on point. In *City of Ladue*, the Court assumed, *arguendo*, that the restrictions were content-neutral, but ultimately subjected the restrictions to a heightened standard of review. See *id.* at 49, 58-59. As one commentator has observed, despite citing many content-neutral cases involving intermediate scrutiny, the Court applied a more stringent standard because of the long constitutional tradition of respecting “individual liberty in the home,” including the liberty to speak there. Bhagwat, *supra* note 484, at 790. In effect, the Court subjected the regulation to strict scrutiny. Commentators have speculated that a heightened standard of review may be appropriate when the speech occurs on private property. See, e.g., *id.* at 790-91.

⁵⁴⁵ See *City of Ladue*, 512 U.S. at 58-59.

⁵⁴⁶ *Id.* at 55.

communication,” for both the affluent and the less-than-affluent, and no “practical substitute” for this speech may exist.⁵⁴⁷

[177] Similarly, although social media may not qualify as a “venerable” means of communication, categorical bans on teacher-to-student off-campus speech using social media foreclose an entire medium of expression and this medium is relatively inexpensive. Furthermore, given the amount of time people devote to using social media, there may be no “practical substitute” for this communication. Therefore, in our electronic age, keeping open traditional channels of communication may not be enough.

[178] But even assuming these bans serve a legitimate government interest and leave open ample channels of communication, these bans may also be unconstitutional as applied to particular teacher speech because they are substantially broader than necessary to achieve the government’s interest. More specifically, if the legitimate government interest is protecting students from predatory sexual conduct, prohibiting all off-campus teachers to student social media speech is similar to killing a fly with a bazooka.⁵⁴⁸ Presumably, the vast majority of teacher speech will not involve predatory sexual conduct.

X. DIFFICULTIES WITH THE CURRENT APPROACH TO REGULATING TEACHERS’ OFF-CAMPUS SPEECH TO STUDENTS USING SOCIAL MEDIA

A. *Pickering-Connick* Revisited

[179] School officials’ interests in limiting a teacher’s opportunity to engage in public debate is most limited when the teacher is speaking as a member of the general public, and at least some teacher social media speech will be made in the teacher’s role as a member of the general

⁵⁴⁷ *Id.* at 57.

⁵⁴⁸ *States miss a social-media education opportunity, supra* note 73.

public. As the Court in *Pickering* observed, where “the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication by the teacher . . . it is necessary to regard the teacher as a member of the general public.”⁵⁴⁹

[180] Under *Pickering-Connick*, school authorities can regulate teacher speech when the speech does not implicate a public concern or the speech fails the *Pickering* balancing test.⁵⁵⁰ Therefore, any teacher speech that addresses a matter of public concern is protected regardless of whether the medium of expression involves social media or whether the primary audience is students, unless the speech fails the second part of the *Pickering* test. In essence, school authorities can regulate a teacher’s speech to students, at least when the speech implicates a public concern, only when the school’s interests in prohibiting the speech outweigh the teacher’s interests in disseminating the information and the audience’s interests in hearing the information.

**B. One Major Drawback of the Current Law: Under
Pickering-Connick, Teacher Speech is Protected Only if the
Speech Implicates a Matter of Public Concern**

[181] The *Pickering-Connick* test has one major drawback. Under this test, school officials can censor any teacher-student speech that does not implicate a public concern, regardless of the outcome under the *Pickering* balancing test.⁵⁵¹ In particular, the requirement that the speech implicate a public concern might enable school officials to regulate a significant amount of teachers’ communications with students using social media.⁵⁵²

⁵⁴⁹ *Pickering v. Bd. of Ed.*, 391 U.S. 563, 574 (1968).

⁵⁵⁰ See discussion *supra* Part IV.A.1.a.

⁵⁵¹ See generally *Pickering*, 391 U.S. 563 (of course, school officials can also prohibit teacher speech that fails the *Pickering* balancing test).

⁵⁵² To date, no systematic studies analyzing the types of speech that might occur between teachers and students using non-school-sanctioned social media are available. But a

[182] As this Article suggests, teachers' off-campus speech rights using social media should be more fully protected: in particular, teacher speech, absent disruption to the work or learning environment, should be protected because the speech is made at the outer fringes of the employment relationship.⁵⁵³ Consequently, this Article proposes eliminating the public concern requirement with respect to teacher speech in this context.⁵⁵⁴

1. A Long-Standing Struggle for Lower Courts: Deciding Whether Speech Implicates a Public Concern

[183] The Supreme Court recently observed, more than forty years after its decision in *Pickering*, that “the boundaries of the public concern test are not well defined.”⁵⁵⁵ Legal commentators have repeatedly voiced this same concern.⁵⁵⁶ Whether speech implicates a “public concern” has as

significant portion of this speech might not implicate a public concern. As discussed more fully *infra* Part X.B.1, in the context of social media, the “public concern” threshold would not provide a pretrial, gatekeeping function.

⁵⁵³ As explained more fully *infra* Part X.B.3, the public concern element is best treated, at least in the context of off-campus teacher-to-student speech using social media, as a limitation on the reach of *Garcetti*'s holding, rather than as a separate element.

⁵⁵⁴ Given the doctrinal confusion created by the “public concern” requirement and the adequacy of the *Pickering* balancing test to address the competing free speech concerns, the “public concern” requirement should be eliminated for all public employees. The focus of this Article, however, is on teachers using social media to communicate with students in an off-campus setting. Given the interactive, rapidly evolving nature of social media speech and the indirect benefits this speech might generate, a public concern limitation is particularly unnecessary.

⁵⁵⁵ *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011) (quoting *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004)).

⁵⁵⁶ One legal commentator has criticized the public-concern requirement because of its “inherent elasticity.” See Pengtian Ma, *Public Employee Speech and Public Concern: A Critique of the U.S. Supreme Court's Threshold Approach to Public Employee Speech Cases*, 30 J. MARSHALL L. REV. 121, 125 (1996). The Supreme Court's explanations of “public concern” “have provided enough guidance to confuse everyone.” *Id.* at 131 (quoting D. Gordon Smith, *Beyond “Public Concern”: New Free Speech Standards for*

much to do with creative lawyering as it does with the speech itself.⁵⁵⁷

[184] With respect to “public concern,” the Supreme Court recently summarized its guidelines in *Snyder*.⁵⁵⁸ “Speech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’”⁵⁵⁹ or when it “‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’”⁵⁶⁰ In contrast, private speech is speech “‘solely in the individual interest of the speaker and [the speaker’s] audience’”⁵⁶¹ that does nothing to inform the public about any aspect of the employing agency’s functioning or operation.⁵⁶²

Public Employees, 57 U. CHI. L. REV. 249, 258 (1990)). Another commentator has suggested that employees can manipulate the requirement by stating “‘virtually any criticism of a public employer in terms that will satisfy the public concern test.’” David L. Hudson, Jr., *Balancing Act: Public Employees and Free Speech*, 3 FIRST REP. 2, 25 (Dec. 2002), <http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FirstReport.PublicEmployees.pdf> (quoting Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 556 (1998)). A number of commentators have concluded that the fundamental problem with the “public concern” threshold test is that no one knows how “public concern” is defined. See *id.* at 25 (citing Smith, *supra*, at 258); Darryn Cathryn Beckstrom, Note, *Reconciling the Public Employee Speech Doctrine and Academic Speech after Garcetti v. Ceballos*, 94 MINN. L. REV. 1202, 1221 (2010) (noting that “[i]t is unclear what constitutes a matter of public concern under the public employee speech doctrine”).

⁵⁵⁷ See Hudson, *supra* note 556, at 25 (citing Rosenthal, *supra* note 556, at 556).

⁵⁵⁸ See *Snyder*, 131 S. Ct. at 1211.

⁵⁵⁹ *Id.* at 1216 (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

⁵⁶⁰ *Id.* (quoting *City of San Diego*, 543 U.S. at 83-84).

⁵⁶¹ *Id.* (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985)).

⁵⁶² *Id.* (quoting *City of San Diego*, 543 U.S. at 84).

[185] Deciding whether speech implicates a public or private concern requires courts to examine the content, form, and context of the speech.⁵⁶³ “In considering [the] content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.”⁵⁶⁴ In *Snyder*, the Court observed that reaching as broad a public audience as possible was one aspect in evaluating whether the content implicated a public concern.⁵⁶⁵ This is true even when part of the speech is false, as it was in *Snyder*.⁵⁶⁶

[186] In addition to the content, form, and context of the speech, courts may also examine the motivation behind the speech.⁵⁶⁷ This inquiry involves determining whether the public concern or private grievance aspect of the speech was the primary motivation behind the speech.⁵⁶⁸

⁵⁶³ *Snyder*, 131 S. Ct. at 1216 (citing *Dun & Bradstreet, Inc.*, 472 U.S. at 761).

⁵⁶⁴ *Id.* The public concern requirement also involves courts in evaluating the content of the speech, something the First Amendment generally forbids.

⁵⁶⁵ *See id.* at 1217.

⁵⁶⁶ *See id.* at 1225 (Alito, J., dissenting). The Supreme Court concluded that protest signs at a soldier’s funeral were protected speech. *See id.* at 1219. The signs stated, “You’re Going to Hell,” and “God Hates Fags.” *Id.* at 1213. These sentiments suggested, falsely, that the soldier was gay. *Id.* at 1225 (Alito, J., dissenting).

⁵⁶⁷ *See* SCHNEIDER, *supra* note 28. If speech involves both public and private motivations, it is simpler for courts to err on the side of classifying speech as implicating a public concern and concentrate on the disruption issue. *See* SMOLLA, *supra* note 230.

⁵⁶⁸ *See* SMOLLA, *supra* note 230. A speaker’s motive is generally relevant but not dispositive. *Sousa v. Roque*, 578 F.3d 164, 166 (2d Cir. 2009), *aff’d*, 410 Fed. App. 411, 411 (2011), *cert. denied*, 132 S. Ct. 104 (2011); SMOLLA, *supra* note 230; *see also* Ma, *supra* note 556, at 133. But “if an examination of the ‘point of the speech in question’ reveals that the speech is not intended to bring wrongdoing to light or raise issues because they are of public concern, but instead is intended to further some purely private interest, the speech is not protected even though it touches upon an issue of public concern.” 16B MCQUILLIN MUN. CORP. § 46:76 (3d ed. 2012) (citing *Vukadinovich v. Bartels*, 853 F.2d 1387, 1390 (7th Cir. 1988)).

[187] As many commentators have observed, the “public concern” requirement has created “doctrinal confusion.”⁵⁶⁹ In particular, it is unclear whether the “public concern” inquiry is normative or descriptive.⁵⁷⁰ In other words, there is confusion over whether courts should focus on what should be a public concern or what the public is concerned about.⁵⁷¹ In addition, it is unclear how large the audience must be to qualify as “public” and how interested this audience must be to qualify as “concerned.”⁵⁷² The vagaries of this standard make it difficult to determine whether speech is protected, thereby potentially chilling protected speech.⁵⁷³ Judge Posner has argued that the public concern test is simply a way for distinguishing between speech that has social value and speech that does not.⁵⁷⁴ However, this statement masks unresolved difficulties with the public concern test.⁵⁷⁵

[188] Underlying this “doctrinal confusion” is another fundamental issue: who decides what constitutes a public concern? At present, “public concern” is a question of law.⁵⁷⁶ But are judges best situated to determine

⁵⁶⁹ See, e.g., Papandrea, *supra* note 153, at 2145.

⁵⁷⁰ *Id.* at 2144.

⁵⁷¹ See *id.*

⁵⁷² *Id.*; see also Hoppmann, *supra* note 103, at 1015 (on problem with defining “public concern” is how much of the public must be interested in order for the concern to qualify as public: requiring more than a few interested people runs counter to the anti-majoritarian emphasis of First Amendment jurisprudence).

⁵⁷³ See Papandrea, *supra* note 153, at 2145.

⁵⁷⁴ See *id.* (citing *Eberhardt v. O’Malley*, 17 F.3d 1023, 1027 (7th Cir. 1994)).

⁵⁷⁵ As discussed within this section, the public concern standard is imprecise, allows too much leeway for subjective judicial value judgments, and provides insufficient guidance regarding whether judges or the general public should determine social value.

⁵⁷⁶ *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983).

what should concern or does concern the public?⁵⁷⁷

[189] For many of these reasons, lower courts, in a general public employee context, have declined to apply the public concern test in certain circumstances,⁵⁷⁸ embraced a “broad conception” of public concern,⁵⁷⁹ or

⁵⁷⁷ The Supreme Court has not definitively resolved whether hierarchies of protected speech exist. The Court has often acknowledged that speech on public issues occupies the “highest rung of the hierarchy of First Amendment values.” *Id.* at 145, 154 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980))) (implying that a hierarchy exists). The Court has, however, recently refused to recognize new categories of unprotected speech. *See, e.g.*, *U.S. v. Stevens*, 130 S. Ct. 1577, 1592 (2010). Furthermore, even if these hierarchies of protected speech should exist, the question remains as to whether judges are best situated to determine these hierarchies.

⁵⁷⁸ *See Papandrea, supra* note 153, at 2145-49 (discussing the lower court decisions); *see also Eberhardt*, 17 F.3d at 1026-27; *Flanagan v. Munger*, 890 F.2d 1557, 1564 (10th Cir. 1989)). The “public concern” threshold does not apply to artistic endeavors. *Eberhardt*, 17 F.3d at 1026-27 (reasoning that the plaintiff’s novel was presumptively protected by the First Amendment, even if the novel did not implicate a public concern). Nor does it apply to nonverbal expression when the speech does not occur at work or when the speech is not about a work-related subject. *See Flanagan*, 890 F.2d at 1560, 1564 (concluding that the “public concern” test did not apply when the speech involved a police officer’s ownership interest in a video store, which rented some sexually explicit videos, because this nonverbal expression was not made at work nor about work). And there is some question as to whether the “public concern” test applies to hybrid constitutional claims, those involving intertwined First Amendment claims such as free speech and free association. *See Melzer v. Bd. of Educ.*, 336 F.3d 185, 196 (2d Cir. 2003) (assuming the teacher’s speech implicated a public concern). The “public concern” test has many purposes. According to the Seventh Circuit, the purpose of the “public concern” requirement is not to fix the boundaries of the First Amendment, but rather to allow courts to distinguish between entirely personal grievances and statements of broader concern regarding a public employee’s job. *Eberhardt*, 17 F.3d at 1026. As one commentator observes, “public concern” is “‘measured more by what it is not than what it is.’” *SMOLLA, supra* note 230 (quoting *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536, 558 (W.D. Pa. 2003)). Courts tend to conclude that speech implicates a public concern so long as the employee’s speech is not merely about mundane grievances exclusively of interest to the affected employee. *Id.* (citing *Nichol*, 268 F. Supp. 2d at 558). But, at present, *Garcetti* likely eliminates most employee, grievance-related speech, particularly if the speech is made at work. The Second Circuit has observed that the purpose of the “public concern” threshold is to provide a gatekeeping function for

sidestepped the issue by holding that other aspects of the claim were not established.⁵⁸⁰

[190] In light of these concerns, some commentators have advocated eliminating the public concern test and applying a general balancing test instead.⁵⁸¹ In the context of off-campus teacher speech using social media, the “public concern” threshold is an unnecessary requirement since the balancing aspect of the *Pickering* test adequately protects all

public employee speech claims. *Melzer*, 336 F.3d at 193. The threshold applies when the speech is directed to the employer, made at the place of employment, or directly concerns the employer in some way. *Id.* But the amount and interactive, fluid nature of social media speech likely undermines this gate-keeping function as well.

⁵⁷⁹ Papandrea, *supra* note 153, at 2145-46, n.150 (citing *Berger v. Battaglia*, 779 F.2d 992, 997, 999 (4th Cir. 1985) (concluding that performing in “blackface” implicated a public concern)). If a public employee’s message implicates both a public concern and a private matter, the speech is protected, unless the employer can prove it would have disciplined the employee despite the protected public concern speech. *See Spanierman v. Hughes*, 576 F. Supp. 2d 292, 310-11 (D. Conn. 2008) (observing that a poem about the Iraq war on the claimant’s web page might implicate a matter of public concern, even though the poem was tangential to the dispute); *see also Connick*, 461 U.S. at 147-49. A plaintiff may have a personal interest in the matter, but this should not be an overriding one. *See Johnson v. Ganim*, 342 F.3d 105, 114 (2d Cir. 2003). But, at times, courts have refused to define “public concern” to include anything that garners the public’s attention, particularly if that interest is prurient. *See City of San Diego v. Roe*, 543 U.S. 77, 84-85 (2004).

⁵⁸⁰ *See Spanierman*, 576 F. Supp. 2d at 312 (holding that even if the teacher’s speech implicated a matter of public concern, his claim failed on other grounds); *Melzer*, 336 F.3d at 200 (assuming the speech implicated a public concern, but holding that the *Pickering* balancing test weighed in favor of the defendants); Papandrea, *supra* note 153, at 2146 (citing *Dible v. City of Chandler*, 515 F.3d 918, 927, 929 (9th Cir. 2008)).

⁵⁸¹ *See, e.g., Ma*, *supra* note 556, at 123. Alternative approaches have also been proposed. *See, e.g., Papandrea*, *supra* note 153, at 2120 (proposing, at least presumptively, full First Amendment protection for off-duty, non-work related public employee speech, unless the speaker is perceived to be speaking for the employer or is interfering with a clearly articulated message from his employer, or unless the speech indicates the employee is unfit to perform the duties of his position).

stakeholder rights. Furthermore, *Pickering*'s balancing test brings some parity between the treatment of off-campus social media speech for teachers and students.

[191] Speech in the social media context adds additional complications to this "doctrinal confusion." The amount of social media speech and its rapidly changing nature pose special problems for the public concern requirement. A typical Facebook page, for example, contains numerous text postings and a variety of pictures and videos.⁵⁸² These postings likely involve some political or religious speech as well as speech on personal matters.⁵⁸³ A Facebook user can also share messages, comments, pictures, and video with other users.⁵⁸⁴ Furthermore, the information is updated rapidly; about 62% of Facebook users update their status at least once every two weeks.⁵⁸⁵ Most Facebook users comment on other users' statuses even more frequently, at least one to two days per week.⁵⁸⁶ Thus, social media involves extensive amounts of rapidly changing, interactive speech.

[192] In terms of the "public concern" threshold, the nature of social media speech poses a number of particular problems. First, the amount

⁵⁸² See Kyle A. Ferachi, *Social Media for Employers and Lawyers Who Advise Employers*, THOMSON REUTERS NEWS & INSIGHT (Nov. 14, 2011), http://newsandinsight.thomsonreuters.com/Legal/Insight/2011/11_-_November/Social_media_for_employers_and_lawyers_who_advise_employers/.

⁵⁸³ *Id.*

⁵⁸⁴ See Mark Zuckerberg, *Our Commitment to the Facebook Community*, THE FACEBOOK BLOG (Nov. 29, 2011, 12:39 PM), <http://blog.facebook.com/blog.php?post=10150378701937131>.

⁵⁸⁵ See Keith N. Hampton et. al., *Social Networking Sites and Our Lives, Part 2: Who are Social Networking Site Users*, PEW INTERNET (June 16, 2011), <http://www.pewinternet.org/Reports/2011/Technology-and-social-networks/Part-2/Facebook-activities.aspx>.

⁵⁸⁶ *Id.*

and interactive nature of social media speech may make it even more difficult for courts to distinguish speech implicating a public concern from unprotected speech. In a similar context, appellate courts have struggled to apply the “public concern” threshold to hybrid First Amendment claims, those involving intertwined free speech and free association, because of the challenges involved in determining whether an association’s speech implicates a public concern.⁵⁸⁷ As the Second Circuit has observed, it is problematic for a court to determine whether the activity of an association—that speaks and acts in a myriad of different ways—relates to a matter of public concern.⁵⁸⁸ Associations may deliver many different statements at many different times and places under many different circumstances. “What statements, at what locations and in what context are the ones that should be analyzed is shrouded in uncertainty.”⁵⁸⁹ The extensive, interactive, and rapidly evolving nature of social media creates similar uncertainties as to whether a teacher’s social media speech implicates a public concern.

[193] Second, and relatedly, given the broad test for “public concern” and the varied contents of a typical social media page like Facebook, it is likely that some aspect of a social media page will implicate a public concern.⁵⁹⁰ Consequently, any benefit of judicial efficiency inuring from

⁵⁸⁷ See, e.g., *Melzer v. Bd. of Educ.*, 336 F.3d 185, 196 (2d Cir. 2003).

⁵⁸⁸ See *id.*

⁵⁸⁹ *Id.*

⁵⁹⁰ See *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 310-11 (D. Conn 2008). When government employees comment on matters outside the issues of their workplace, “they are more likely to be perceived as commenting on issues of public concern.” SMOLLA, *supra* note 230. Courts tend to conclude that speech implicates a public concern so long as the employee’s speech is not merely about mundane grievances exclusively of interest to the affected employee. *Id.* (citing *Nichol v. Arin Intermediate Unit 28*, 268 F. Supp. 2d 536, 558 (W.D. Pa. 2003)). Social media communication will almost assuredly include speech on matters outside of workplace issues.

the “public concern” threshold will be lost in the context of social media⁵⁹¹ because courts can less readily decide before trial, as a matter of law, that claims do not implicate a matter of public concern. Instead, in each case, courts will need to determine whether the claimant’s adverse employment action was a result of the employee’s “public concern” speech rather than other unprotected speech or conduct.⁵⁹² This inquiry is generally a question of fact.⁵⁹³ Thus, any judicial efficiency benefit of maintaining the “public concern” threshold, at least in the social media arena, is likely illusory.

[194] A broad interpretation of “public concern” in the context of teachers’ off-campus speech to students using social media would achieve the same result as eliminating the “public concern” element. Teachers could argue that even if the expression’s content does not implicate a matter of public concern, these communications help develop better teacher-student relationships and thus foster a better on-campus learning environment. Moreover, since improved public education is a matter of public concern, this element is established by the context of the message even if the content fails to implicate a matter of public concern.⁵⁹⁴ Nevertheless, a more forthright approach would be to dispense with this requirement altogether.

⁵⁹¹ See *Melzer*, 336 F.3d at 193 (according to the Second Circuit, one purpose of the “public concern” threshold is its gatekeeping function).

⁵⁹² See *Waters v. Churchill*, 511 U.S. 661, 681 (1994).

⁵⁹³ See *id.* at 668-72.

⁵⁹⁴ Thus far, the only court to encounter this “bootstrap” argument did not explicitly address it. See *Spanierman*, 576 F. Supp. 2d 292. In addition, such a broad interpretation of “public concern” is not easy to reconcile with the Supreme Court’s decision in *City of San Diego v. Roe*, 543 U.S. 77, 78, 84-85 (2004), a case involving off-duty speech by a police officer.

2. The Double-Counting of "Public Concern"

[195] Dispensing with this element would have the additional advantage of eliminating the redundancy of evaluating this element twice: once as a distinct threshold element and again within the *Pickering* balancing test.⁵⁹⁵ As numerous commentators have noted, this is duplicative.⁵⁹⁶

3. *Garcetti*'s Silver Lining?

[196] One benefit of the *Garcetti* decision is that it allows employers to regulate public employees' expressions made pursuant to their official duties and thereby avoids allowing employees to constitutionalize private work grievances. Consequently, the need for a "public concern" threshold is greatly reduced. In short, after *Garcetti*, the "public concern" element is less crucial to bar grievance-related claims, particularly if these disputes are pursued at the workplace.

[197] *Garcetti* granted school districts, as employers, greater ability to regulate teachers' performance of their official duties.⁵⁹⁷ However, given the increased control *Garcetti* allows school districts as employers, the offset should be that a school district's ability to regulate a teacher's off-duty off-campus speech is more limited.⁵⁹⁸ In summary, the silver lining in *Garcetti* is that although public employees have fewer speech rights

⁵⁹⁵ See *Connick v. Myers*, 461 U.S. 138, 157-58 (Brennan, J., dissenting); see also Seog Hun Jo, *The Legal Standard on the Scope of Teachers' Free Speech Rights in the School Setting*, 31 J. L. & EDUC. 413, 427 (2002).

⁵⁹⁶ See, e.g., Ma, *supra* note 556, at 138-39. Justice Brennan raised this issue in *Connick*. See *Connick*, 461 U.S. at 157-58 (Brennan, J., dissenting).

⁵⁹⁷ See *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (holding that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and thus the Constitution does not insulate their communications from employer discipline).

⁵⁹⁸ Lower courts have not yet interpreted *Garcetti* in this manner.

while performing their official duties, they should have greater free speech rights while off-duty.⁵⁹⁹ In fact, as this Article proposes, the *Pickering* balancing test alone is sufficient to protect the competing concerns involved in teachers' off-campus speech to students.

XI. A PROPOSED TEST FOR EVALUATING TEACHERS' OFF-CAMPUS SPEECH TO STUDENTS USING SOCIAL MEDIA: SIMPLIFICATION BY SUBTRACTION

[198] The proposed test seeks both to protect teachers' speech rights off-campus and to streamline a court's analysis in this context. With respect to the two decisions involving teachers' off-campus speech using social media to communicate with students, namely *Spanierman* and *Snyder*, the speech in *Spanierman* would remain unprotected under the proposed test while the speech in *Snyder* would be a much closer question, with her speech probably protected under the First Amendment.⁶⁰⁰

[199] In order for a teacher's speech to receive First Amendment protection under the proposed test,⁶⁰¹ the teacher would need to

⁵⁹⁹ In a more generalized public employee context, the "public concern" element could be viewed as a limitation on *Garcetti*—that speech is unprotected only if the employee speaks pursuant to the employee's official duties and the speech does not involve a legitimate "public concern." But the majority opinion in *Garcetti* rejected this approach. A complete discussion of this issue is beyond the scope of this Article.

⁶⁰⁰ The court held that *Snyder*'s claim was barred because her speech did not implicate a public concern. *See Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at *14-16 (E.D. Pa. Dec. 3, 2008). The court made no mention of any adverse impact on the classroom-learning environment because of *Snyder*'s speech. Nor did the court explain whether *Snyder*'s speech would have sufficiently disrupted workplace harmony to fail the *Pickering* balancing test. Because the workplace disruption stemmed largely from the supervising teacher's response to mild, indirect criticism, *Snyder*'s speech would probably survive the *Pickering* balancing test.

⁶⁰¹ The speech must also foreseeably arrive on campus. In the context of student speech, school administrators can discipline a student's off-campus speech if the speech will foreseeably come to the attention of school administrators. *See Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38-39 (2d Cir. 2007). However, given the context of the speech

demonstrate that her speech was made outside her official job duties rather than pursuant to her job duties and that it could not reasonably be perceived as the latter. A teacher's official job duties would include her employer's reasonable performance expectations regarding her teaching duties.⁶⁰² These reasonable expectations would likely include most speech made during working hours or using school equipment when the teacher's speech is subsidized or "commissioned" by her employer. If the teacher meets this burden, the school would then need to establish that its interests in maintaining an effective learning environment and an efficient workplace outweighed the teacher's interests in speaking and her students' interests in hearing the speech.⁶⁰³ In this context, the school must demonstrate some level of actual or foreseeable disruption to the workplace or the learning environment, but the level of disruption will vary with the nature of the speech. In short, a school must tolerate more disruption with respect to speech implicating a public concern. With respect to other teacher-student speech, the school needs to demonstrate a much lower level of disruption. Furthermore, in evaluating whether the teacher's speech disrupts or will disrupt the learning environment, particularly the classroom learning environment, courts should provide some deference to school officials' decisions regarding the age-appropriateness of the speech. In evaluating whether the teacher's speech

involved in this Article, speech made directly from a teacher to a student, the foreseeability that this speech will enter the school environment is assumed.

⁶⁰² Teacher collective bargaining agreements often specify working hours and responsibilities; many states require unions and school districts to bargain on "wages, hours, and terms and conditions of employment." *Teacher's Unions and Collective Bargaining: Resolving Conflicts*, *supra* note 446.

⁶⁰³ School officials would also need to establish that the communication would foreseeably arrive on campus. In the context of this Article's focus on communications by teachers to students using social media, school officials would likely face few challenges in establishing this element. But if a student were to "hack" or gain unlawful access to a teacher's social media page, it is unlikely this foreseeability requirement would be met. The proposed test still requires a court to examine the content of the teacher's speech, but current law also requires this step. *See Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415 (1979).

disrupts or will disrupt workplace relationships between school employees, courts should not show the same degree of deference to school officials' determinations.

[200] This proposed test does not require a teacher to prove that her speech implicated a public concern. It simply requires the school to tolerate more disruption for speech involving public matters. This recognizes the difficulties courts have faced in defining public concern and the particular challenges courts will confront in defining public concern in the context of social media. Furthermore, it recognizes that the school district is regulating speech occurring on the outer fringes of the employment relationship. Of course, the proposed test does not eliminate the challenge in defining the contours of "public concern," but it allows courts more flexibility to treat this as one factor in weighing the competing concerns.

[201] Importantly, given the special characteristics of teacher-to-student communication, particularly the potential confidentiality issues and the fact that the vast majority of primary and secondary students are minors, teachers should not receive full First Amendment protection for this speech. However, this type of teacher speech should be protected if it passes the *Pickering* balancing test.

[202] Furthermore, the proposed test simplifies the current test to address Justice Brennan's double-counting concerns because the content and context of the speech is evaluated just once in the *Pickering* balancing test.⁶⁰⁴ In short, the test attempts to achieve a crucial First Amendment jurisprudential goal of properly balancing the many competing interests.⁶⁰⁵

⁶⁰⁴ See *Connick v. Myers*, 461 U.S. 138, 157 (1982) (Brennan, J., dissenting).

⁶⁰⁵ See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (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.").

[203] Finally, the proposed test would make the analysis of off-campus teacher speech more consistent with the treatment of off-campus student speech. As previously discussed, most circuits use *Tinker* to evaluate off-campus student speech.⁶⁰⁶ *Tinker* provides that student speech can be regulated if it causes actual or foreseeable disruption to the school environment.⁶⁰⁷ Furthermore, at least in the Third Circuit's recent decision, the student off-campus speech was protected even though the speech was not political speech.⁶⁰⁸

A. The Teacher Must Establish that Her Speech Was Made Outside Her Official Job Duties Rather than Pursuant to Her Job Duties and Could Not Reasonably Be Perceived as Speech Made Pursuant to Her Official Job Responsibilities

[204] As previously discussed, except in rare circumstances, teachers are not obligated or even encouraged to communicate with students using social media beyond the school day or using school equipment.⁶⁰⁹ Furthermore, the teacher must establish that her off-campus speech using social media could not reasonably be perceived as speech made pursuant to her teaching responsibilities. Therefore, if the teacher can establish that she is neither acting in her official capacity nor perceived to be acting in her official capacity when she engages in this type of communication, she meets the first part of the test. With respect to most teacher-student off-campus communications with students using social media, this element should be met.

⁶⁰⁶ See *supra* Part IV.D.2.

⁶⁰⁷ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

⁶⁰⁸ See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 926 (3d Cir. 2009) (observing that although *Tinker* involved political speech, *Tinker* has not been confined to just political speech) (citing *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215-17 (3d Cir. 2001)). See also *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38 (2d Cir. 2007) (noting, in dictum, that protected speech includes "student expression").

⁶⁰⁹ See *supra* Part VI.A.

B. The Teacher Need Not Establish that Her Speech Implicated a Public Concern

[205] Even when the content of teacher speech involves no public concern, this speech should be entitled to some First Amendment protection.⁶¹⁰ Under the proposed test, a teacher's speech receives additional protection if it does involve a "public concern," but it receives some protection even if it fails to do so.

[206] Protecting teacher-to-student communication even when the communication does not involve a "public concern" is consistent with many educational studies assessing the value of using social media to enhance students' educational experience.⁶¹¹ Unfortunately, at present, no court has fully addressed the policy considerations in regulating teacher-to-student communications using social media.

C. School Officials Must Demonstrate That They Can Regulate the Speech Under the *Pickering* Balancing Test

[207] Importantly, under this proposed test, teachers' off-campus speech rights are not protected to the full extent of the First Amendment. Under the *Pickering* calculus, school officials may still limit teachers' speech in this context, but only if the school can demonstrate that its interests in curtailing the speech outweigh both the teacher's interests in the speech

⁶¹⁰ Unless it falls into a traditional First Amendment exception like child pornography, the speech should be entitled to some protection. *See, e.g.*, *N.Y. v. Ferber*, 458 U.S. 747, 764-65 (1982).

⁶¹¹ *See Social Networking in Schools: Educators Debate the Merits of Technology in Classrooms*, HUFFINGTON POST, (last updated May 27, 2011, 6:12 AM), http://www.huffingtonpost.com/2011/03/27/social-networking-schools_n_840911.html (concluding that students using social media were practicing useful skills); *see also Educational Benefits of Social Networking Sites*, UMNEWS, (July 10, 2008), http://www1.umn.edu/news/features/2008f/UR_191308_REGION1.html (concluding that social media offers many benefits in the college learning environment).

and the audience's interests in the speech.⁶¹² More specifically, courts should focus on whether the speech caused an actual or foreseeable disruption to the administrative functioning of the school or its learning environment and whether this disruption was offset by the teacher's and students' interests in the message.⁶¹³ In other words, the disruption must be sufficient to impair or foreseeably impair employer discipline, damage close working relationships, impede the performance of the speaker's duties, or interfere with the regular operation of the enterprise.⁶¹⁴

[208] Even when the teacher speech does not directly involve a public concern, school officials would need to demonstrate some level of disruption to the school environment in order to regulate the speech. However, the school officials' required showing of disruption would be significantly less when the speech does not implicate a public concern. In short, the less the speech involves a public concern, the less disruption to the school environment school officials need to demonstrate to restrict the speech.⁶¹⁵

⁶¹² See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569-70 (1968). The *Pickering* "balancing test is less a matter of calculating and comparing absolute values than it is a *process* that looks at all the circumstances in a given situation and determines which interest weighs more heavily." *Melzer v. Bd. of Educ.*, 336 F.3d 185, 197 (2d Cir. 2003) (emphasis in original).

⁶¹³ See *Tinker v. De Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

⁶¹⁴ See *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (employer satisfies this test by demonstrating an actual disruption or a reasonable prediction of disruption); see also *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (the plurality opinion gives substantial weight to government employers' reasonable predictions of disruption). The government employer "is more likely to meet its burden when an employee's disruptive activity occurs in the workplace than when the equivalent activity occurs on an employee's own time, away from work." *Melzer*, 336 F.3d at 197 (citing *Connick v. Meyers*, 461 U.S. 138, 152-53 (1983)).

⁶¹⁵ In a slightly different context, the Supreme Court has already employed this approach. In *Connick*, the Court cautioned that the District Attorneys Office might have to make a stronger showing of disruption if the employee's speech more substantially involved matters of public concern. *Connick*, 461 U.S. at 152 (the Court's observation was made

[209] While not perfect, the *Pickering* balancing test is a time-tested approach for resolving these disputes. It best answers Justice Stevens concerns about First Amendment free speech jurisprudence: “when constitutionally significant interests clash, resist the demand for a winner-take-all [and] try to make adjustments that serve all of the values at stake.”⁶¹⁶

1. The Teacher’s Interests in Communicating and the Students’ Interests in Hearing the Speech

[210] The teacher and students’ interests in the speech would, of course, vary based on the content of the speech. The more political the speech, the greater the teacher interests in making the speech and the greater the student interests in hearing the speech.⁶¹⁷ As the *Pickering* Court observed, “[t]eachers are, as a class, the members of a community most

when weighing the employee’s interests in prohibiting the speech against the employee’s interests in making the speech).

⁶¹⁶ *Garcetti v. Ceballos*, 547 U.S. 410, 434 (2006) (Stevens, J., dissenting). The *Pickering* balancing test requires an analysis of the nature of the employee’s position, the context of the employee’s speech, and the extent to which it disrupts the organization. *See McVey v. Stacy*, 157 F.3d 271, 278 (4th Cir. 1998). When considering these factors, courts should examine whether the speech (1) impairs discipline by superiors, (2) impairs harmony among co-workers, (3) has a detrimental effect on close relationships, (4) impedes the performance of the public employee’s duties, (5) interferes with the operation of the agency, (6) undermines the mission of the organization, (7) is communicated to the public or to co-workers in private, (8) conflicts with the responsibilities of the employee within the organization, and (9) makes use of the authority and public accountability the employee’s role entails. *McLaughlin*, *supra* note 440, at 10 (citing *McVey*, 157 F.3d at 278). The more the employee’s role requires confidentiality, policy making or public contact, the greater the employer’s interest in regulating the speech. *See id.* (quoting *Sheppard v. Beerman*, 190 F. Supp. 2d 361, 374 (E.D.N.Y. 2002)).

⁶¹⁷ *See Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (“[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values” (quoting *Connick*, 461 U.S. at 145)).

likely to have informed and definite opinions” as to education-related issues and “it is essential that they be able to speak out freely on such questions.”⁶¹⁸ It is also important that teachers be allowed to speak, at least off-campus, on less consequential issues without fear of discipline.

[211] The nature of a teacher’s responsibilities is another consideration in the *Pickering* balancing test. The level of protection afforded to an employee’s activities varies with the amount of authority and public accountability that the employee’s position entails.⁶¹⁹ “A position requiring confidentiality, policymaking, or public contact lessens the public employer’s burden in [disciplining] an employee for expression that offends the employer.”⁶²⁰ A public school teaching position requires a high degree of trust.⁶²¹

[212] Depending on the circumstances, the nature of a teacher’s responsibilities may support allowing or restricting a teacher’s speech. Public school teachers certainly have student-confidentiality responsibilities and a degree of public accountability.⁶²² Nevertheless, although teachers may be required to have some contact with students’ parents or guardians, they are not usually required to interact with the general public. Furthermore, a typical public school teacher will have few, if any, policymaking duties. Thus, the nature of a teacher’s

⁶¹⁸ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968).

⁶¹⁹ *See Rankin*, 483 U.S. at 390-91.

⁶²⁰ *Melzer v. Bd. of Educ.*, 336 F.3d 185, 197 (2d Cir. 2003) (citing *McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir.1997)).

⁶²¹ *See id.* at 198.

⁶²² *See, e.g.*, 20 U.S.C. § 1232(g) (2006) (protecting student records); *see also, e.g.*, *Code of Prof’l Conduct for Teachers*, REGS. CONN. STATE AGENCIES § 10-145(d)-400(a) (West 2012). Nothing in this Article is intended to curtail any teacher-confidentiality requirements under federal or state law. Breaching student-confidentiality will, of course, tip the balance in favor of the school.

responsibilities with respect to particular speech will be a fact-specific inquiry.

2. The School's Interests in Prohibiting Speech

[213] Under the proposed test, courts would need to weigh the school's interests in prohibiting the speech against the teacher's interests in speaking and the students' interests in hearing the speech. The school has a number of important interests, such as providing an effective learning environment,⁶²³ including protecting students from teacher predatory conduct, and ensuring an efficient workplace.⁶²⁴

[214] With respect to providing an effective learning environment, courts should provide some deference to school administrators in weighing the competing interests.⁶²⁵ In the context of primary and secondary school teacher speech using social media, the student-audience's interests in hearing the information may be limited by age or maturity level.⁶²⁶ Courts

⁶²³ Providing an effective learning environment would encompass teachers' inappropriate, but non-predatory, disclosures to students.

⁶²⁴ See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572-73 (1968) (to determine whether Pickering's speech was disruptive, the Court examined whether the speech interfered with his effectiveness in the classroom or with workplace harmony). The Court found that the disruption to his employer caused by the letter was minimal: the Court concluded that Pickering's speech did not impede his performance of his daily duties in the classroom nor did it interfere with the regular operations of the school. *See id.* Workplace harmony was not disrupted because Pickering's statements were not directed at a particular person with whom Pickering would be in contact during the course of his daily work as a teacher, Pickering's speech did not involve any issue of discipline by his superiors, and Pickering's speech did not impact his relationships with his co-workers. *Id.* at 569-70.

⁶²⁵ See *Wenkart*, *supra* note 127, at 19-20.

⁶²⁶ See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684-86 (1986) (providing some deference to school officials' conclusion that a student's in-school speech was lewd). Thus, somewhat ironically, the student-audience might have an interest in not hearing the message.

should provide some deference to school authorities in these circumstances because school administrators are best situated to decide what is appropriate for K-12 students' maturity levels.⁶²⁷

[215] In addition, protecting students from teacher predatory conduct and the speech facilitating this conduct is an obviously important school interest. Within this context, school administrators are best situated to determine what speech is indicative of predatory conduct. Thus, the courts should provide some deference to school authorities' conclusions regarding predatory conduct.

[216] An effective learning environment extends to all school activities. Because parental involvement in public education is crucial for its success, courts should consider, in some circumstances, disruption created by parents as well.⁶²⁸ Any parental disruption would need to affect the school's ability to provide an effective learning environment.

[217] Additionally, with respect to efficient workplace concerns, workplace harmony is as important in schools as it was in the District Attorney's Office in *Connick*.⁶²⁹ However, courts need not provide any particular deference to school authorities in these circumstances because school officials have no particular expertise regarding workplace employment issues.

⁶²⁷ See, e.g., *Morse v. Frederick*, 551 U.S. 393, 418 (2007) (citing *Fraser*, 478 U.S. at 683).

⁶²⁸ See *Melzer v. Bd. of Educ.*, 336 F.3d 185, 199 (2d Cir. 2003) (reasoning that any disruption created by parents can be characterized as internal disruption to the school because the parents threatened to remove their children from the school, impairing the school's reputation, and impairing educationally desirable cooperation between parents, teachers, and administrators). In *Melzer*, the Second Circuit held that the school could discipline a high school teacher based on the teacher's advocacy for legalizing sex between adult men and boys. See *id.* at 200. In these circumstances, the court concluded the discipline did not result from a "heckler's veto." *Id.* at 199.

⁶²⁹ See *Connick v. Myers*, 461 U.S. 138, 165 (1983).

[218] Finally, the extent of the restriction on teacher speech is relevant in assessing the school's interests in prohibiting the speech.⁶³⁰ With respect to both facial and "as-applied" challenges, a school must demonstrate that the benefits of a categorical ban outweigh the competing interests.⁶³¹ Depending on the circumstances, this may be a heavy burden.⁶³²

XII. THE PROPOSED TEST BRINGS THE PROTECTION OF TEACHER-STUDENT OFF-CAMPUS SPEECH CLOSER TO THE PROTECTION OF STUDENT OFF-CAMPUS SPEECH UNDER *TINKER*

[219] Employing *Pickering* in this fashion also provides some rough parity between the treatment of teachers' off-campus student speech and students' off-campus speech. Student off-campus speech is generally regulated under *Tinker*,⁶³³ which provides that off-campus student speech

⁶³⁰ See *Harman v. City of N.Y.*, 140 F.3d 111, 118 (2d Cir. 1998) (in the context of discussing prior restraints, the Second Circuit noted that "concerns that lead courts to invalidate a statute on its face may be considered as factors in balancing the relevant interests under *Pickering*").

⁶³¹ See *id.*; see also *supra* Part VII(B) for a discussion of these interests.

⁶³² See *Harman*, 140 F.3d at 118 (concerns underlying a facial challenge are relevant in balancing the interests under *Pickering*); see also *U.S. v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 466-67 (1995) (noting that, in the context of a facial challenge, the government's burden was heavy because the honoraria ban was a "wholesale deterrent to a broad category of expression by a massive number of potential speakers").

⁶³³ *Tinker* involved student on-campus, political speech. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512-14 (1969). There is some question as to whether student off-campus speech must also be political to be protected. See *J.S. ex rel. Synder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 939 (3d Cir. 2011) (Smith, J., concurring). A number of lower courts analyzing off-campus student speech do not explicitly require nor even discuss whether the student speech was political. See, e.g., *Evans v. Bayer*, 684 F. Supp. 2d 1365 (S.D. Fla. 2010). In *Evans*, the district court applied *Tinker* to the student's off-campus speech on her Facebook page. See *id.* at 1367, 1370. The student established a Facebook page entitled, "Ms. Sarah Phelps [one of the student's teachers] is the worst teacher I've ever met." *Id.* at 1367. The district court held that the speech was protected speech because school activities were not disrupted and school administrators could not reasonably forecast that a substantial disruption

can be regulated if the speech causes “substantial and material disruption” to the school environment.⁶³⁴ Under *Tinker* and the lower court cases interpreting *Tinker*, there is no public concern requirement.⁶³⁵ Furthermore, the proposed test maintains existing parity regarding the employers’ burden: *Tinker*, like *Waters*, places the burden of justifying the prohibition of a particular expression of opinion on the school authorities.⁶³⁶

[220] Although teachers and students are not similarly situated with respect to their First Amendment rights, it seems incongruent that students’ speech receives more protection than their teachers’ speech.

XIII. CONCLUSION

[221] Movements to ban teacher-to-student communication using social media are misguided. These categorical bans are likely facially overbroad and may be subject to successful “as-applied” challenges as well. A better

would occur. *See id.* at 1373. The court did not discuss whether the student’s speech was political. In a typical student off-campus speech case, the dispositive inquiry is whether the student speech was disruptive. *See, e.g.,* *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 572 (4th Cir. 2011). In *Kowalski*, the Fourth Circuit applied *Tinker*’s disruption test to the student’s off-campus speech, holding that the student’s web page, “Students Against Sluts Herpes,” which criticized another student, was sufficiently disruptive under *Tinker* to be regulated. *Id.* at 572-73. The Court did not discuss whether the student’s speech was political. Similarly, most off-campus student threat cases are decided on disruption grounds rather than political speech grounds. *See, e.g.,* *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35 (2d Cir. 2007) (holding that the student’s claims were properly dismissed by the district court because, under *Tinker*, it was reasonably foreseeable that the student’s off-campus threats would disrupt the school environment).

⁶³⁴ *See Tinker*, 393 U.S. at 513-14.

⁶³⁵ *But see supra* note 633 (under a narrow reading of *Tinker*, a student’s on-campus speech may need to be political to be protected).

⁶³⁶ *See Tinker*, 393 U.S. at 509; *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion).

approach to regulating these communications would be to evaluate the speech under the *Pickering* balancing test.

[222] As long as a teacher's communication is not made pursuant to her official duties or the message's recipient could not reasonably conclude the expression was made in a teacher's official capacity, a school should be allowed under *Pickering* to restrict this type of speech only when the school's interests in prohibiting the speech outweigh the teacher's interests in making the speech and the student's interests in hearing the speech. In a departure from current law, this proposed test would not require that the teacher's speech implicate a matter of public concern in order to receive First Amendment protection.

[223] Under the *Pickering* balancing test, to restrict a teacher's off-campus speech to a student using social media, a school administrator would need to demonstrate that the school's interests in maintaining an effective learning environment or efficient working environment outweigh the teacher's and student's free speech interests. In balancing these interests, courts should focus on whether the speech caused an actual or foreseeable disruption to the administrative functioning of the school or its learning environment and whether this disruption was offset by the teacher's and students' interests in the message.

[224] The political nature of the speech would be a crucial component in weighing these concerns: the more political the speech, the greater the level of disruption that school administrators would need to demonstrate in order to restrict the speech. However, even speech with no political import would require some on-campus disruption, whether actual or foreseeable, to limit this type of teacher-student communication.

[225] This proposed framework attempts to honor the competing policies underlying free speech jurisprudence: balancing a public teacher's off-campus rights to free speech with a school district's interests in providing an age-appropriate learning environment and efficient working

environment.⁶³⁷ The framework recognizes that while the government, as an employer, can at times limit employees' speech based on workplace efficiency concerns, the government's ability to restrict employees' speech is far more limited when the government seeks to restrict speech at the outer fringes of the employment relationship.⁶³⁸ The proposed framework for regulating teacher-to-student communication using social media also recognizes the special relationships existing within schools and therefore does not provide full First Amendment protection to teacher off-campus speech with students. Instead, it provides extensive protection for teacher off-campus speech since the framework requires some disruption to the working or learning environment before a teacher's speech can be regulated. Finally, this framework engenders some parity between the treatment of off-campus teacher speech using social media and off-campus student speech using social media.⁶³⁹ The *Pickering* balancing test is a time-tested approach for resolving these types of free speech disputes and sufficiently protects the interests of teachers, students, and school administrators.

⁶³⁷ The Supreme Court has justified First Amendment free speech protection on two grounds: the rights of the speaker to engage in the speech and the rights of the audience to hear the speech. The Court "has never endorsed one theory to the exclusion of the other." Roosevelt III, *supra* note 23, at 641.

⁶³⁸ See *Waters*, 511 U.S. at 671 (plurality opinion) ("[T]he government as employer indeed has far broader powers than does the government as sovereign"). This Article posits that, at least in most circumstances, school districts will be regulating teachers' off-campus, social-media speech to students almost in a "sovereign" role, rather than an employer role, because the restrictions involve speech on the fringes of the employment relationship.

⁶³⁹ For a general comparison of public employee and student free speech rights, see *Lowery v. Euverard*, 497 F.3d 584, 596-600 (6th Cir. 2007). In deciding a student free speech claim, the Sixth Circuit analogized to public employee cases. See *id.*