

Fall 2012

Facebook off Limits? Protecting Teachers' Private Speech on Social Networking Sites

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Recommended Citation

Lumturije Akiti, *Facebook off Limits? Protecting Teachers' Private Speech on Social Networking Sites*, 47 Val. U. L. Rev. 119 (2012).
Available at: <http://scholar.valpo.edu/vulr/vol47/iss1/4>

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Notes

FACEBOOK OFF LIMITS? PROTECTING TEACHERS' PRIVATE SPEECH ON SOCIAL NETWORKING SITES

I. INTRODUCTION

Imagine that every year Lisa, a middle school English teacher in her late twenties, takes a trip to the Bahamas with a group of her closest girlfriends from college.¹ When she returns from the trip, she posts a photo of herself standing on the beach holding an alcoholic beverage on her Facebook profile. There is nothing revealing or inappropriate about the photo; however, a student's parent gains access to Lisa's Facebook profile and contacts Lisa's principal, voicing her concern regarding Lisa's recent posting. The next day, Lisa is called into the principal's office where the principal asks her a series of questions regarding her Facebook use. Shortly thereafter, Lisa is dismissed from her teaching position at the middle school for "immoral misconduct."

Now, take another hypothetical. This time, imagine Michelle, a high school teacher in her mid-twenties, who posts a similar photo to the one that Lisa had posted.² Michelle is on the beach, in a bathing suit, holding an alcoholic beverage. This time, however, one of Michelle's male students, who is friends with Michelle on Facebook, comments, *looking sexy*, on the photo. In response, Michelle sends her student a message via Facebook composed of explicit, sexual references. The conversations between Michelle and her student progress to a physical level and ultimately result in a sexual relationship. The student's parents uncover the Facebook messages between Michelle and their son and contact both the principal and the police. Like Lisa, Michelle is dismissed from her high school teaching position.

Although these two situations are similar in respect to teachers' use of Facebook, the two teachers were dismissed for very different reasons. In the first situation, the teacher was dismissed because a parent gained access to the teacher's profile and saw a seemingly innocent photograph posted to a Facebook wall. However, in the second situation, the teacher was dismissed because of the inappropriate conduct between the teacher

¹ This scenario is fictional and solely the work of the author to illustrate the issues presented in this Note.

² This scenario is fictional and solely the work of the author to illustrate the issues presented in this Note.

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and one of her minor students. Should these two teachers be treated the same based on their use of a popular social media website? Each instance resulted in the dismissal of the individual from her teaching position; however, many would argue that dismissal in the first case was unwarranted.³ Indeed, some contend that dismissal in the first situation infringes on a teacher's First Amendment free speech rights, rights that must be protected.⁴ Due to the inappropriate conduct of the teacher in the second scenario, it is easy to determine that dismissal from her position was warranted.

These situations briefly highlight the issues that arise when teachers use social networking websites like Facebook.⁵ To date, school boards and administrators have dealt with problems that have surfaced from teachers' use of social networking sites. One way that school boards have combatted this problem is by implementing district-level school board policies and acceptable use agreements, which restrict the use of social networking sites.⁶ In fact, one state has gone so far as to prohibit parents, who are also teachers, from "friending" their children, who are students, on Facebook.⁷ In light of such existing measures, teachers have been dismissed, suspended, and even coerced into resignation for what school administrators consider inappropriate use of social networking sites.⁸ In response, teachers have threatened and filed claims in district

³ See Constance Lindner, *Teacher Fired Over 'Friending'*, BOS. GLOBE (May 26, 2011), http://www.boston.com/news/local/articles/2011/05/26/facebook_misstep_gets_abingt_on_substitute_teacher_fired/ ("An Abington High School substitute teacher and boys' tennis coach has been fired following what school officials deemed his 'inappropriate communication' with students on Facebook."). "We have an ethics policy about appropriate boundaries and behavior, and certainly 'friending' students on a social network is not an appropriate boundary to cross," stated the Abington School Superintendent Peter Schafer. *Id.* See *infra* note 25 (describing various teacher dismissals resulting from teachers' Facebook use).

⁴ See *infra* Part II.C (discussing public employees' free speech rights protected under the First Amendment).

⁵ See *infra* note 17 (describing the increased use of Facebook by individuals of all walks of life). See generally Emily M. Janoski-Haehlen, *The Courts Are All A "Twitter": The Implications of Social Media Use in the Courts*, 46 VAL. U. L. REV. 43 (2011) (illustrating the various methods in which social networking sites that have influenced and impacted courtrooms, judges and juries).

⁶ See *infra* Part II.B (describing district-level policies and acceptable use agreements restricting teachers' social networking use).

⁷ See *infra* Part II.B (detailing a Missouri statute that prohibits virtually all teacher-student communication via online social networking sites).

⁸ See *infra* Part II.B (providing an overview of current disciplinary actions taken against teachers). See generally Shelbie J. Byers, Note, *Untangling the World Wide Weblog: A Proposal for Blogging, Employment-at-Will, and Lifestyle Discrimination Statutes*, 42 VAL. U. L. REV. 245 (2007) (discussing disciplinary actions taken against employees for their online blogging).

courts for violations of their First Amendment and due process rights.⁹ There is clearly a need to balance the rights of teachers, as private citizens outside the school setting, and the rights of school administrators looking out for the best interests of students.¹⁰

This Note seeks to provide the means for teachers to maintain their First Amendment rights despite schools' interests in restricting teachers' use of online social networking sites.¹¹ First, Part II of this Note describes the existing conflict between teachers' right to communicate via social networking sites and school boards' interests in restricting such communication, and explains the analytical framework employed by the courts in addressing teachers' First Amendment rights.¹² Second, Part III analyzes the Supreme Court's approach for when a teacher's speech is entitled to First Amendment protection and also evaluates the adequacy of the Court's approach when applied to cases involving both teachers' inappropriate and appropriate speech via social networking sites.¹³ Finally, Part IV proposes a new test, which should be employed by the courts to determine whether, if at all, the *Pickering-Connick* analysis should be applied to teachers' speech via social networking sites.¹⁴

II. BACKGROUND

Social networking websites such as Facebook, Myspace, and Twitter have revolutionized communication on the Internet.¹⁵ By making

⁹ See *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at *1, *6 (E.D. Pa. Dec. 3, 2008) (claiming First Amendment protection after the teacher was disciplined for her speech via a social networking site); *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 299 (D. Conn. 2008) (claiming First Amendment protection after the teacher was disciplined for his Myspace activities).

¹⁰ See *infra* Part III.A (analyzing the rights of teachers and school boards and evaluating the proper balance of such rights).

¹¹ See *infra* Part IV (arguing that teachers' fundamental rights outweigh school boards' interest in restricting teacher's private communications via social networking sites and proposing a new test that courts should use when addressing teachers' free speech claims).

¹² See *infra* Part II.A-C (providing an overview of the conflict and competing interests of teachers and school administrators, the current restrictions imposed on teachers' social networking use, and the analytical framework used to address teachers' First Amendment claims).

¹³ See *infra* Part III (examining the analytical frameworks developed by the Supreme Court in addressing public employees' First Amendment claims).

¹⁴ See *infra* Part IV (arguing that both teachers and school boards should provide policies and guidelines for appropriate teacher social networking use and not provide sole discretion to school boards).

¹⁵ See Stuart Elliott, *Report Details Rise of Social Media*, N.Y. TIMES (Sept. 11, 2011), <http://mediadecoder.blogs.nytimes.com/2011/09/11/report-details-rise-of-social-media/> ("Social media is becoming increasingly mainstream The social media brand that

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communication as easy as the click of a button, communicating via Facebook is quickly becoming a substitute for a telephone call, an email, or even a text message.¹⁶ What once began as a social networking outlet exclusively for college students, now captivates people of all ages, professions, and cultures.¹⁷ Facebook's platform is one of the most popular means for sharing personal information, keeping in contact with old and new friends, and even conducting business.¹⁸ As of July 2011,

Americans spend the most time with, the report finds, is Facebook, by an enormous margin."); *A World of Connections*, ECONOMIST (Jan. 28, 2010), <http://www.economist.com/node/15351002> (detailing the popularity of social networking sites like Facebook, Myspace, and Twitter, which provide great tools for mass communication). Although the same issues can be seen in all social media communications, the author will use Facebook to reference all social networking media throughout this Note.

¹⁶ See Sajai Singh, *Anti-Social Networking: Learning the Art of Making Enemies in Web 2.0*, 12 J. INTERNET L. 3, 3-4 (2008) (explaining the various benefits of social networking websites). "The common thread among most social networking Web sites is that they combine email, instant messaging, blogs, personal profiles, and photo galleries into one easily accessible interface." *Id.* at 4. See also Omar El Akkad, *The Medium is No Longer the Message*, THE GLOBE AND MAIL (Mar. 10, 2009), <http://v1.theglobeandmail.com/servlet/story/RTGAM.20090310.wcomputers10/BNStory/therules/News> ("Blogging and social-network sites such as Facebook and Twitter are now the fourth-most popular online activities, eclipsing e-mail and growing twice as fast as any other category in the top three."). The article also points out that "[i]ncreasingly, e-mail is yesterday's messaging platform" and "[w]ith social networks, you don't just connect in static manner, you connect in a dynamic manner—you're taking part in a community." *Id.*; see Jessi Hempel, *How Facebook is Taking Over Our Lives*, CNNMONEY (Mar. 11, 2009), http://money.cnn.com/2009/02/16/technology/hempel_facebook.fortune/index.htm (describing Facebook standardized communication and the marketing platform as "ubiquitous and intuitive as the telephone but far more interactive").

¹⁷ See Janet Kornblum, *Facebook Will Soon Be Available to Everyone*, USA TODAY (Sept. 11, 2006), http://www.usatoday.com/tech/news/2006-09-11-facebook-everyone_x.htm (stating that when Facebook was first introduced in 2006, it was only available to students who had valid college email addresses). "Now [Facebook] will be open to virtually anyone." *Id.* See also Laura Locke, *The Future of Facebook*, TIME (July 17, 2007), <http://www.time.com/time/business/article/0,8599,1644040,00.html> (illustrating the demographics of Facebook users). Facebook CEO Mark Zuckerberg explains:

Right now a lot of our growth is happening internationally. We have more than 10% or 15% of the population of Canada on the site. The U.K. has a huge user base. . . . What we're doing is pretty broadly applicable to people in all different age groups and demographics and places around the world.

Id.

¹⁸ See Eric Eldon, *New Facebook Statistics Show Big Increase in Content Sharing, Local Business Pages*, INSIDE FACEBOOK (Feb. 15, 2012), <http://www.insidefacebook.com/2010/02/15/new-facebook-statistics-show-big-increase-in-content-sharing-local-business-pages/> (detailing Facebook features such as uploading photos, creating events and pages, and updating statuses); see also Aaron Ricadela, *Fogey's Flock to Facebook*, BUS. WK. (Aug. 6, 2007), http://www.businessweek.com/technology/content/aug2007/tc2007085_051788.htm ("Among Silicon Valley executives, journalists, and publicists, Facebook has become the place to see and be seen. . . . As the site lures more professionals, it could attract more

Facebook had more than 750 million active users worldwide and about 157 million active users in the United States.¹⁹ In 2011, the largest group of Facebook users in the United States included people between the ages of eighteen and twenty-five, surpassing the second and fourth largest groups of Facebook users, people between twenty-six and thirty-four and thirteen and seventeen, combined.²⁰

With so many individuals connected in the same social networking sphere, groups of people who rarely crossed paths before now have the opportunity to peer into each other's lives—and teachers and students are no exception.²¹ Overlap between teachers' and students' Facebook use is evident; first-year teachers usually fall within Facebook's largest group of users, people between the ages of eighteen and twenty-five, and students usually fall within Facebook's fourth largest group of users, people between the ages of thirteen and seventeen.²² As teachers and

brand advertisers that want to aim word-of-mouth campaigns at an upscale audience," such as business professionals).

¹⁹ Kim-Mai Cutler, *Zuckerberg Confirms That Facebook Has Reached 750 Million Monthly Actives*, INSIDE FACEBOOK (July 6, 2011), <http://www.insidefacebook.com/2011/07/06/facebook-750-million-monthly-actives/>; see Amy Lee, *Facebook Users DROP in U.S.: Millions Left the Social Network in May 2011*, HUFFINGTON POST (June 13, 2011), http://www.huffingtonpost.com/2011/06/13/facebook-users-members-us-growth-drops-may-2011_n_875810.html ("U.S. accounts fell by close to 6 million, from 155.2 million at the beginning of May to 149.4 million at the end."). *But see* Jessica Van Sack, *Facebook Denies Loss of 6 Million U.S. Users*, BOS. HERALD (June 14, 2011), http://www.bostonherald.com/jobfind/news/technology/view/2011_0614facebook_denies_loss_of_6_million_us_users/ (reporting that Facebook directed the Boston Herald to industry-backed research, which said its research shows Facebook with an all-time high of 157 million U.S. visitors in May 2011).

²⁰ Ken Burbary, *Facebook Demographics Revisited – 2011 Statistics*, WEB BUS. (Mar. 7, 2011), <http://www.kenburbary.com/2011/03/facebook-demographics-revisited-2011-statistics-2/>. Facebook users between the ages of eighteen and twenty-five make up 35% of total users; ages twenty-six through thirty-four comprise 25%; and ages thirteen to seventeen make up 10%. *Id.* The third largest group of Facebook users, who make up 16%, are between the ages of thirty-five and forty-four. *Id.*

²¹ See Janet Kornblum & Mary Beth Marklein, *What You Say Online Could Haunt You*, USA TODAY (Mar. 8, 2006), http://www.usatoday.com/tech/news/internetprivacy/2006-03-08-facebook-myspace_x.htm (explaining that social networking use causes groups of people to cross paths who would otherwise rarely interact). In one instance, two Louisiana State swimmers were kicked off the swim-team for making comments about their coaches on Facebook. *Id.* In another case, an applicant was denied school admission partly because his entries on a blogging site included critical comments about the school. *Id.*

²² See Eric Benderoff, *Social Sites Go Political*, CHI. TRIBUNE (Sept. 23, 2007), http://www.chicagotribune.com/business/chi-sun_obama_websep23,04824579.story?page=2 (revealing new research released from Nielsen/NetRatings that "Facebook's greatest concentration of new users over the last year was between the ages of 12 and 17"); see also Matt Richtel & Miguel Helft, *Facebook Users Who Are Under Age Raise Concerns*, N.Y. TIMES (Mar. 11, 2011), <http://www.nytimes.com/2011/03/12/technology/internet/12underage.html?pagewanted=all> (reporting that in Aundrea Kaune's fifth-grade class at

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students both continue to use social networking sites, students' opportunity and ability to peer into the lives of their teachers has dramatically increased.²³ As a result, many acknowledge growing concerns over what happens once a teacher and student become "friends" on Facebook.²⁴ While most teachers use social media appropriately, some teachers have set poor examples by posting lurid comments or photographs involving sex or alcohol on social media sites; others have had inappropriate contact with students, which blurs or even crosses the teacher-student boundary.²⁵ In response to such

Commodore Sloat Elementary school, fifteen of the thirty students reported having Facebook accounts). "And you should see all the third-graders who are on. . . . Last year, she went onto Facebook and was shocked by how many students from the school were there." *Id.*

²³ See Allison Manning, *Be Less Social, Teachers Told*, COLUMBUS DISPATCH (Sept. 20, 2010), <http://www.dispatch.com/content/stories/local/2010/09/20/belesssocialteacherstold.html> ("It used to be that the biggest peek students got into their teachers' out-of-school life was bumping into them at the mall. Now, students can log onto their computers and find their teachers' public Facebook profiles, Twitter pages or personal blogs, with a little bit of Internet searching."). However, "[w]ith online profiles and communication, teachers' personal lives and activities are much more easily accessed by today's students." *Id.* See also Merritt Melancon, *Teacher Facebook Flap Stirs Debate*, ATHENS BANNER-HERALD (Nov. 14, 2009), http://onlineathens.com/stories/111409/new_516320164.shtml ("Facebook . . . also can give students unprecedented access to the private lives of their teachers."); Peter Schworm, *Norton Warns Teachers Not to 'Friend' Students*, BOS. GLOBE (Oct. 25, 2010), http://www.boston.com/news/education/k_12/articles/2010/10/25/norton_warns_teachers_not_to_friend_students/ (stating that forming teacher-student friendships on social networking sites, "gives students a broader look into teachers' personal lives, and risks exposing them to adult content").

²⁴ See Kathy McCabe, *School Districts Consider Social Media Policy*, BOS. GLOBE (Sept. 22, 2011), http://articles.boston.com/2011-09-22/yourtown/30190217_1_social-media-social-networking-school-districts (voicing growing concerns, Lynn School Superintendent, Catherine Latham stated that, "[w]e need to educate our faculty, staff and the public on the ramifications of using social networking, and Internet sites, for any school communications"). An advocate for a social media policy, Superintendent Marie Galinski expressed safety as a priority, stating that "[b]ased on the current climate, where students are on Facebook all the time, we have to make sure they are safe . . ." *Id.* See also Jennette Barnes, *Schools Set Rules for Social Networks*, BOS. GLOBE (July 10, 2011), http://www.boston.com/news/local/articles/2011/07/10/schools_set_rules_for_social_networks/ ("Social networking between students and staff could create the perception of inappropriate relationships, even where none exist, so staff members should avoid getting involved in students' social world online."). "Schools [sic] officials say they want not only to protect students from predators, but also to protect teachers who have good intentions from getting involved in students' lives in inappropriate ways or ways that create the appearance of impropriety." *Id.*

²⁵ See Jennifer Preston, *Rules to Stop Pupil and Teacher from Getting Too Social Online*, N.Y. TIMES (Dec. 18, 2011), <http://query.nytimes.com/gst/fullpage.html?res=9A00E1D8103AF93BA25751C1A9679D8B63&ref=jenniferpreston> ("In extreme cases, teachers and coaches have been jailed on sexual abuse and assault charges after having relationships with

concerns, school boards, school districts, and even legislatures are implementing policies restricting online teacher-student communication.²⁶ However, questions arise as to whether school boards, school districts, and legislatures can properly and lawfully restrict teachers' use of social networking sites after the school day ends.²⁷

To begin, Part II.A of this Note provides an overview of teachers' interests in using social networking websites, as well as school boards' interests in restricting teachers' social networking use.²⁸ Second, Part II.B discusses a Missouri statute, existing district-level policies, and schools' acceptable use policies, all of which restrict and prohibit teachers' social networking activity.²⁹ Lastly, Part II.C examines the Supreme Court's analytical framework for addressing public employees' First

students that, law enforcement officials say, began with electronic communication."). For example:

In Illinois, a 56-year-old former language-arts teacher was found guilty in September on sexual abuse and assault charges involving a 17-year-old female student with whom he had exchanged more than 700 text messages. In Sacramento, a 37-year-old high school band director pleaded guilty to sexual misconduct stemming from his relationship with a 16-year-old female student; her Facebook page had more than 1,200 private messages from him In Pennsylvania, a 39-year-old male high school athletic director pleaded guilty . . . to charges of attempted corruption of a minor; he was arrested for offering a former male student gifts in exchange for sex.

Id. See also Kevin Sieff, *Reading and Writing and Tweets and Clicks*, WASH. POST, Mar. 25, 2011, at A01 (stating that teacher-student contact via Facebook "makes it easier for predators to engage in what experts call 'sexual grooming,' the first stages of an inappropriate teacher-student relationship"). See, e.g., Cindy Martin, *Can You Lose Your Job Over Facebook?*, CASHFORCREATIONS WEBLOG (Mar. 28, 2009), <http://cashforcreations.wordpress.com/2009/03/28/can-lou-lose-your-job-over-facebook/> (citing numerous examples of teachers who are currently under investigation or have been dismissed for their use of social networking sites).

²⁶ See Preston, *supra* note 25 ("Lewis Holloway, the superintendent of schools in Statesboro, Ga., imposed a new policy this fall prohibiting private electronic communications after learning that Facebook and text messages had helped fuel a relationship between an eighth grade English teacher and her 14-year-old male pupil."). The teacher was arrested by authorities and charged with aggravated child molestation and statutory rape. *Id.*

²⁷ Although conflicts regarding educators' use of social networking sites predominately occur on Facebook and Myspace, other Internet websites such as YouTube and Twitter have also led to conflicts for both teachers who use the sites and school boards who wish to restrict teachers' speech on social networking sites. See generally Heather L. Carter, Teresa S. Foulger & Ann Dutton Ewbank, *Have You Googled Your Teacher Lately? Teachers' Use of Social Networking Sites*, 89 PHI DELTA KAPPAN 681, 682-83 (2008) (discussing educators' use of various social networking sites).

²⁸ See *infra* Part II.A (addressing school boards' and teachers' competing interests regarding teachers' social networking use).

²⁹ See *infra* Part II.B (discussing various restrictions on teacher-student communication via social networking sites).

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Amendment rights, which currently applies to cases involving teachers' speech via social networking sites.³⁰

A. *Understanding the Interests: Teachers vs. School Boards*

Like most adults in the workplace, teachers have personal lives outside of their careers.³¹ Whether social networking entails engaging with fellow colleagues outside the classroom, re-connecting with old friends from college, or simply sharing private information, such as a thought or feeling, teachers have a legitimate, personal interest in online social networking use.³² Most notably, teachers, as private citizens, have a First Amendment interest in expressing themselves regardless of whether it is through a column in the newspaper or through a post on Facebook.³³ Additionally, distinct from teachers' First Amendment

³⁰ See *infra* Part II.C (examining the Supreme Court's analytical framework applied in public employees' First Amendment free speech claims).

³¹ See Todd A. DeMitchell, Commentary, *Private Lives: Community Control vs. Professional Autonomy*, 78 ED. LAW REP. 187, 188 (1993) ("[T]he private acts of a teacher were considered just that, private, unless it could be shown that those acts damaged his or her ability to perform the job."). "The control and degree of pressure that the community brought" upon teachers was both imposing and shocking. *Id.* at 191. "Such activities as dancing, smoking, drinking, divorce, marriage, dating and pregnancy were looked at askance by school authorities and frequently any indulgence in these activities resulted in disciplinary action." *Id.* See also Laura Sofen, *Why Can't We Be (Digital) Friends*, TEACHING TOLERANCE (Apr. 6, 2011), <http://www.tolerance.org/blog/why-can-t-we-be-digital-friends> ("Some would argue that teachers are simply not entitled to the same level of privacy as other citizens because [they are] influencing youth all day and thus a higher standard of behavior is expected. . . . [T]eachers are private citizens who live private lives outside of school.").

³² See Michelle A. Todd, John L. Dijon & Shayne L. Aldridge, *Employee Use, Misuse, and Abuse of Social Network Sites*, NAT'L SCH. BOARDS ASS'N (Feb. 26, 2008), <http://www.vineland.org/tech/socialnet.pdf> (discussing the different ways in which teachers use social networking sites).

Teachers utilize blogs and social networking sites for varying purposes. Some educators have embraced blogs as a way to engage colleagues, administrators, students, and parents in thoughtful educational discourse. Others have used their blogs as a forum to rant about colleagues, administrators, students, and parents. Still others use social networking sites to interact with others on topics of mutual interest that are wholly unrelated to their employment as teachers.

Id.

³³ See Rachel A. Miller, *Teacher Facebook Speech: Protected or Not?*, 2011 BYU EDUC. & L.J. 637, 658-59 (2011) (discussing teachers' online, private, off-the-job, speech). "Teachers used to hold [] conversations with their friends and relatives through the telephone, letters, and e-mail. With the mainstreaming of social media, personal conversations have become more public and the law has to answer whether it will allow school districts to curb this sort of teacher speech." *Id.* See also Ewan McIntosh, *Teachers and Facebook: Please, Miss, Can I Friend You On Facebook?*, EDU.BLOGS.COM (Feb. 15, 2011), <http://edu.blogs.com/edublogs/2011/02/teachers-and-facebook-please-miss-can-i-friend-you-on-facebook.html> ("No employer has the right to tell a member of staff [sic] that they cannot interact on social

interest in expressing their personal opinions, teachers also have a First Amendment interest in communicating with their students through technology as a teaching tool for conveying their instructional methods.³⁴

1. Teachers' Interest in Free Expression and Academic Freedom

The Supreme Court has recognized some First Amendment protection within the classroom for teachers' academic or instructional speech.³⁵ Teachers' academic freedom includes a substantive right to express or choose a teaching method that serves an educational purpose.³⁶ Because teachers are in direct, day-to-day contact with students both in the classroom and other activities, such as after-school programs, teachers, by necessity, have wide discretion over the manner in which the course material is communicated to students.³⁷ The court in *Cockrel v. Shelby County School District* recognized this principle of

networks or publish their work and thoughts freely on the web—this is the right to express oneself, a fundamental [right], if ever there was one.”).

³⁴ See *infra* Part II.A (describing teachers' academic freedom and instructional speech via social media).

³⁵ See *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”); see also *Mailloux v. Kiley*, 323 F. Supp. 1387, 1390 (D. Mass. 1971) (“[A] public school teacher has not only a civic right to freedom of speech both outside . . . and inside . . . the schoolhouse, but also some measure of academic freedom as to his in-classroom teaching.”). However, it is important to note that both cases involved college and university professors.

³⁶ See, e.g., *Stachura v. Truszkowski*, 763 F.2d 211, 215 (6th Cir. 1985) (recognizing that a teacher's First Amendment rights encompass the notion of academic freedom to exercise professional judgment in selecting topics and materials for use in the course of the educational process). See generally *Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980); *Cary v. Bd. of Educ.*, 598 F.2d 535, 539–41 (10th Cir. 1979); *Keefe v. Geanakos*, 418 F.2d 359, 362 (1st Cir. 1969); *Dean v. Timpson Indep. Sch. Dist.*, 486 F. Supp. 302, 307 (E.D. Tex. 1979).

³⁷ See *Ambach v. Norwick*, 441 U.S. 68, 78–79 (1979) (noting the important role teachers play within the public school system in developing students' attitudes). The court held:

[Teachers] are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy.

Id.

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academic freedom when 5th grade teacher, Donna Cockrel, filed a suit, claiming First Amendment protection after being terminated for inviting actor Woody Harrelson into her classroom to talk to students about marijuana and industrial hemp.³⁸ The court not only held that a teacher's decision to present these speakers to the class itself constitutes an act of speech or expression, but that a teacher's very decision to present materials to a class also constitutes "speech," even if the teacher has no "advocative purpose" in doing so.³⁹

Teachers' freedom to convey their instructional methods through technological communications such as Blackboard, web pages, and school blogs, has opened the door for teachers' use of social media, which has become an increasingly effective classroom tool for teaching and learning.⁴⁰ Teachers have expanded classroom participation by

³⁸ *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1041-42 (6th Cir. 2001). Mr. Harrelson had prior official approval by school administration for the visit and brought along an "entourage, including representatives of the Kentucky Hemp Museum and Kentucky Hemp Growers Cooperative Association, several hemp growers from foreign countries, CNN, and various Kentucky news media representatives." *Id.* at 1042 (internal quotation marks omitted). The actor "spoke with the children about his opposition to marijuana use, yet he distinguished marijuana from industrial hemp and advocated the use of industrial hemp as an alternative to increased logging efforts." *Id.* He also showed the class products made from hemp and hemp seeds, a banned substance in Kentucky. *Id.* at 1042-43. Ms. Cockrel was terminated for deficient "communication with parents regarding student performance and teacher expectations; documentation of lesson plans; showing 'consistent sensitivity to individual academic, physical, social, and cultural differences and respond[ing] to all students in a caring manner' [and] acting in accordance with laws and with school regulations and procedures." *Id.* at 1045.

³⁹ *Id.* at 1049. The court ultimately rejects Judge Milburn's analysis in *Fowler v. Bd. of Educ.*, 819 F.2d 657, 662 (6th Cir. 1987). In *Fowler*, a high school teacher, at the request of her students, showed them *Pink Floyd – The Wall*, an "R" rated film containing nudity and a great deal of violence, on the last day of school while she completed grade cards. *Id.* at 658-59. After the teacher was later terminated for showing the film, she brought suit, claiming that she was terminated in retaliation for exercising her First Amendment rights. *Id.* Judge Milburn argued that a teacher's decision to present materials to a class cannot be considered expression unless the teacher intended to convey a particular message. *Id.* at 662-64.

⁴⁰ See *What is Blackboard?*, BOISE STATE UNIV., <http://at.boisestate.edu/elearning/blackboard/BbDocs/general/whatisblackboard.asp> (last visited on Aug. 2, 2012) ("Blackboard is a Web-based course-management system designed to allow students and faculty to participate in classes delivered online or use online materials and activities to complement face-to-face teaching. Blackboard enables instructors to provide students with course materials, discussion boards, virtual chat, online quizzes, an academic resource center, and more."); see also Caroline Lego Munoz, *Opening Facebook: How to Use Facebook in the College Classroom* (2009), <http://www46.homepage.villanova.edu/john.immerwahr/TP101/Facebook.pdf> (discussing the benefits of using Facebook as an educational tool for both students and teachers). Facebook helps teachers connect with their students about assignments, useful links, upcoming events, and samples of work outside the classroom. *Id.* at 5. Not only can students use Facebook to contact other students regarding

effectively reaching students through their most commonly exercised social medium, and many teachers find that online social networking sites provide an open and supportive environment for teacher-student interaction.⁴¹ For example, Facebook features include bulletin boards, instant messaging, email, and the ability to post videos and pictures.⁴² Facebook also has downloadable features, such as applications, which may have superior quality of use compared to similar courseware options, such as Blackboard, and without the cost.⁴³ Facebook not only connects students with other students by indirectly creating a learning

assignments or exams, but Facebook also allows student collaboration for group assignments and projects in an online environment. *Id.* Facebook simply sets up a platform for students' courses atop the community already established by the students themselves. *Id.*; *Social Networking In Schools: Educators Debate The Merits Of Technology In Classrooms*, HUFFINGTON POST (May 27, 2011), http://www.huffingtonpost.com/2011/03/27/social-networking-schools_n_840911.html (describing the positive affects social networking sites have on students and the essential tools they provide for education in today's digital climate). "Through utilizing teaching techniques that incorporate social media, teachers are able to increase students' engagement in their education, increase technological proficiency, contribute to a greater sense of collaboration in the classroom, and build better communication skills." *Id.*

⁴¹ See Munoz, *supra* note 40 (discussing the benefits of using Facebook as a means of building teacher-student relationships). For example, teacher-student relationships on social networks "allow students to glimpse instructor profiles containing personal information, interests, background, and 'friends,' which can enhance student motivation, affective learning, and classroom climate." *Id.* at 5.

⁴² See Jeffrey Weiss, *As Budgets Get Stretched, Schools Turn to Free Digital Tools*, DALL. MORNING NEWS, Dec. 6, 2001, § 5, at 4 (discussing cheap or free high-quality education tools). "Teachers and school districts are turning online for teaching games, collaborative tools and even custom-made entire textbooks." *Id.* See also Brian Jenkins, *Awesome Facebook Apps for Educators*, TEACH HUB.COM, <http://www.teachhub.com/awesome-facebook-apps-educators> (last visited Jan. 15, 2012) (describing some of Facebook's educational applications). Some of Facebook's educational applications include: study groups, collaboration with "group projects, shar[ing] notes, discuss[ing] assignments, and help[ing] students prepare for tests." *Id.* Other educational applications include "SAT Quest," "Quizlet," and "GRE/GMAT Vocabulary Flashcards," all designed to help students prepare for the standardized exams. *Id.* Additionally, the "To Do List" and "Zoho Online Office" applications help students manage and organize assignments, class presentations, and other documents online.

⁴³ See Michelle R. Davis, *Social Networking Goes to School*, EDU. WK. (June 14, 2010), <http://www.edweek.org/dd/articles/2010/06/16/03networking.h03.html> (reporting a comment from a New Jersey principal who stated, "I'm just someone who is passionate about engaging students and growing professionally, and I'm using these free tools to do it"); see also Claire Smith, *Benefits of Facebook Application Development For Educational Institutes*, SOOPERARTICLES.COM (Dec. 1, 2010), <http://www.sooperarticles.com/internet-articles/social-networking-articles/benefits-facebook-application-development-educational-institutes-216392.html> ("[A]pplications [on Facebook] can be targeted to fulfill students[] needs along with teachers and the institute. This serves as one in all packages and gives a very cheap solution for education institutes to correspond with other institutions and with learners and lecturers of organizations.").

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community by which students can help and support one another, but it also builds teacher-student relationships.⁴⁴

2. School Boards' Interest in Restricting Teachers' Social Networking Speech

With the growth and advancement of social networking use, boundary lines between what is considered appropriate teacher-student communication and what is inappropriate have become blurred.⁴⁵ The school district, both as employer and educator, has an important interest in its employees' conduct that potentially interferes with their mission to provide, as well as maintain, a healthy environment conducive to student learning.⁴⁶ This overarching interest encompasses not only employing highly qualified teachers but also holding teachers to a higher moral standard.⁴⁷ Because teachers serve as role models to the students,

⁴⁴ See Lisa Nielsen, *10 Ways Facebook Strengthens the Student-Teacher Connection*, INNOVATIVE EDUCATOR BLOG (Feb. 3, 2011), <http://theinnovativeeducator.blogspot.com/2011/02/10-ways-students-feel-facebook.html> (suggesting that Facebook can be an effective tool in strengthening the teacher-student bond).

Students shared that sometimes it's hard for them to approach a teacher or even really reach out for help face-to-face. Sharing a disappointment on Facebook can be easier. Students shared how touched they were by encouraging words from a teacher either on their page, or as a face-to-face follow up.

Id. The students also explained how the use of Facebook has helped strengthen their connections with teachers and their principal and that they did not "expect" their teachers to be friends with them on Facebook, but appreciate it when they do." *Id.*

⁴⁵ See Lynn Moore, *Teachers' Facebook Pages Face Scrutiny in Reeths-Puffer*, MLIVE.COM (Mar. 12, 2011), http://www.mlive.com/news/muskegon/index.ssf/2011/03/teachers_facebook_pages_face_s.html ("Social media tends to blur some of those lines that are necessary to keep and maintain professional relationships [among teachers and students.]").

⁴⁶ See Monica D. Hutchinson, *What You Know About and Don't Deal with Can Cost You: A School District's Potential Liability for Student-on-Student Sexual Harassment*, 65 MO. L. REV. 493, 502 (2000) (discussing school districts' liability for matters that harm both students and their education environment, such as teacher-on-student sexual harassment). However, some courts have argued that a school district could only be held liable for damages under Title IX where the school district had actual knowledge of the teacher-on-student harassment and was deliberately indifferent to the harassment. *Id.* See also *Cape Henlopen School District Board Policy*, at 323, <http://teachers.cape.k12.de.us/~ritter/boardpolicy.pdf> (discussing a school district's responsibilities, which include electing all employees/teachers through the school board).

⁴⁷ See *Chi. Bd. of Educ. v. Payne*, 430 N.E.2d 310, 315 (Ill. App. Ct. 1981) ("We are aware of the special position occupied by a teacher in our society. As a consequence of that elevated stature, a teacher's actions are subject to much greater scrutiny than that given to the activities of the average person."); *Adler v. Bd. of Educ.*, 342 U.S. 485, 493 (1952), *overruled in part by Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) ("A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the

schools have a legitimate interest in preventing inappropriate teacher activities, regardless of whether the inappropriate conduct occurs inside or outside the classroom.⁴⁸ Consequently, in an attempt to set boundaries for appropriate online teacher-student communication, school boards, through enactments of broad ranges of rules and regulations, began outlining conduct for both their students and their employees.⁴⁹

B. Means for Restricting Teachers' Use of Social Networking Sites

A school board's chief responsibility is to protect as well as maintain the professional rapport between teachers and students.⁵⁰ Because schools have legitimate interests in maintaining the boundary lines between teachers and students, schools across the country, including the Missouri state legislature, have addressed these issues in several ways.⁵¹ A common course of action that many school districts take to limit a teacher's ability to access social networking sites is through disciplinary procedures.⁵²

society in which they live. In this, the state has a vital concern."); *Horosko v. Sch. Dist. of Mount Pleasant Twp.*, 6 A.2d 866, 868 (Pa. 1939) ("It has always been the recognized duty of the teacher to conduct himself in such a way as to command the respect and good will of the community . . ."). See also Marka B. Fleming, Amanda Harmon Cooley & Gwendolyn McFadden-Wade, *Morals Clauses for Educators in Secondary and Postsecondary Schools: Legal Applications and Constitutional Concerns*, 2009 BYU EDUC. & L.J. 67, 102 (2009) (discussing and examining the influence of postsecondary school teachers and their positions as role models). Specifically, the author addresses the legal applications of statutory provisions for secondary and postsecondary school teachers, including the implications of contractual morality clauses for secondary and postsecondary school teachers. *Id.* at 69.

⁴⁸ See Preston, *supra* note 25 (describing various inappropriate teacher-student relationships stemming from social networking use); see also Perry Chiamonte & Yoav Gonen, *Teachers Fired for Flirting on Facebook with Students*, N.Y. POST (Oct. 18, 2010), http://www.nypost.com/p/news/local/teachers_friending_spree_JVfEO8TmN7XCnWpX5s5hnO (providing numerous examples of inappropriate teacher conduct stemming from communication with students via messaging on Facebook).

⁴⁹ See generally *What Does the School Board Do?*, NEV. ASS'N OF SCH. BDS., <http://www.nvasb.org/Publications/Governance/What%20Does%20the%20School%20Board%20Do.pdf> (last visited Jan 4, 2012) (describing school boards' responsibilities, such as policy making and evaluation).

⁵⁰ See *Professional Responsibilities*, NSW DEPT. OF EDUC. AND CMTYS., <https://www.det.nsw.edu.au/about-us/careers-centre/school-careers/teaching/your-teaching-career/approved-teachers/casual-teacher-induction/professional-responsibilities> (last visited Jan. 4, 2012), (outlining the professional boundaries between teachers and students). Teacher-student relationships involve "develop[ing] a relationship with clear professional boundaries that cannot be misinterpreted as a personal, rather than a professional, interest in the student[.]" *Id.*

⁵¹ See *infra* Part II.B (detailing current measures for prohibiting teachers' social networking use).

⁵² See Part II.B (discussing disciplinary actions taken against teachers).

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Virtually every state has an administrative code section for education, which includes professional standards and guidelines for how teachers should act within the teaching profession.⁵³ For example, grounds for disciplinary actions against teachers most commonly include incompetence, negligence of duty, substantial noncompliance with school laws, insubordination, and immoral conduct.⁵⁴ A teacher's ability to know and understand just what conduct is prohibited in regards to their teaching is an important aspect of such disciplinary actions.⁵⁵ Yet school administrators admit that new technologies create a gray area as to what online conduct or speech merits such disciplinary actions.⁵⁶ In addition to disciplinary actions, teachers' online social networking use may also be curbed through other means—including a state statute.⁵⁷

⁵³ See 22 PA. CODE § 235.2 (2011) ("Violations of the Code may also be used as supporting evidence, though may not constitute an independent basis, for the suspension or revocation of a [teaching] certificate."). See generally 23 ILL. ADM. CODE § 24.100 (2000) (describing various professional teaching standards that educators must abide by to receive teaching certification).

⁵⁴ See CAL. EDUC. CODE § 44434 (West 1999) (recognizing immorality as a grounds for teacher dismissal). See generally ALASKA STAT. ANN. § 14.20.170(2) (West 1999); GA. CODE ANN. § 20-2-940(a)(4) (West 2000); MO. REV. STAT. § 168.114(2) (West 1999); TENN. CODE ANN. § 49-5-501 (West 1999); W. VA. CODE ANN. § 18A-2-8 (West 2000).

⁵⁵ See *Thompson v. Sw. Sch. Dist.*, 483 F. Supp. 1170, 1178 (W.D. Mo. 1980) ("[O]ur judicial system has always insisted that laws give persons of ordinary intelligence an opportunity to know what conduct is prohibited so that they will have an opportunity to avoid that type of conduct."). The court agreed that, in the abstract, the phrase "immoral conduct" was constitutionally suspect under the strict standards of construction to be employed in criminal and First Amendment contexts. *Id.* at 1179. The court went on to say, however, that the phrase was part of a statutory scheme that, construed with the other subsections of the statute, is "capable of being given a more precise judicial construction so as to avoid the vagueness issue." *Id.* at 1180. The court concluded that immoral conduct relates to conduct rendering a teacher unfit for the performance of his duties. *Id.* More precisely, the court found that immoral conduct means "conduct rendering plaintiff unfit to teach." *Id.* at 1181. See also *Alford v. Ingram*, 931 F. Supp. 768, 771 (M.D. Ala. 1996) (upholding the constitutionality of a statute permitting a teacher's termination for "immoral conduct"). The court held that although the statute was plagued with vagueness, it did imply an unfitness to teach. *Id.*

⁵⁶ See Melancon, *supra* note 23 ("It's a clear violation if a teacher invites students to join his Facebook friends and has inappropriate material on his page. . . . If a teacher posts nude pictures somewhere where students can find them, that's probably a violation too."). However, school administrators acknowledge that "if someone complains because there's a photo of (a teacher) with a glass of wine or because of the clothes they're wearing—well, there's a whole lot of gray area there[.]" *Id.*

⁵⁷ See Ned Potter, *Missouri Teachers Protest 'Facebook Law' Meant to Protect Students From Sexual Predators*, ABC NEWS (Aug. 24, 2011), <http://abcnews.go.com/Technology/missouri-facebook-law-bans-teachers-contacting-students-internet/story?id=14364188#.TrQ-MXJLM3E> (stating that the law was "meant to protect children from sexual predators at school"); Jane Cunningham, *Senator Cunningham's "Amy Hestir Student Protection Act" Signed by Governor*, SENATE.MO.GOV, <http://www.senate.mo.gov/media/11info/>

Missouri is currently the only state to prohibit social networking communication between teachers and students through a statute.⁵⁸ On May 12, 2011, the Missouri General Assembly passed a bill prohibiting teachers from using non-work related websites to gain “exclusive access” to current or former students who are under the age 18 and who have not yet graduated.⁵⁹ The statute was to take effect beginning on August

Cunningham/releases/SB54Signed071411.htm (last visited Jan. 15, 2011) (promoting her proposed bill).

This legislation is vital to protect our children from sexual predators in our schools—places meant as safe learning environments. Aside from mandatory extensive background checks, my bill will make it possible for school officials to be aware of sexual misconduct exhibited by potential hires and their employees when making staffing decisions. This will serve as an invaluable tool for protecting our children.

Id. (internal quotes omitted).

⁵⁸ See Anita Ramasastry, *Can Teachers and Their Students Be Banned from Becoming Facebook Friends? The Missouri Legislature Says Yes, But a Missouri Court Suggests the Answer Is No*, JUSTIA.COM (Sept. 13, 2011), <http://verdict.justia.com/2011/09/13/can-teachers-and-their-students-be-banned-from-becoming-facebook-friends> (providing that Senate Bill 54’s sponsor, Senator Cunningham “argued that all she wanted to do was to limit ‘hidden communications’ between teachers and students, which could not be monitored readily by parents or school administrators”); see also Kayla Webley, *Missouri Law: Teachers and Students Can’t Be Facebook Friends*, TIME.COM (Aug. 1, 2011), <http://newsfeed.time.com/2011/08/01/in-missouri-teachers-and-students-legally-cant-be-facebook-friends/> (“With [the] new law, Missouri has become [sic] the first in the nation to prohibit social networking [between students and teachers].”).

⁵⁹ S. 54, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011), <http://www.senate.mo.gov/11info/pdf-bill/intro/SB54.pdf>. Senate Bill 54, also known as the Amy Hestir Student Protection Act, was sponsored by Senator Jane Cunningham and signed into law by Missouri Governor, Jay Nixon. *Id.* Section 162.069 of Senate Bill 54 provides:

1. Every school district shall, by January 1, 2012, promulgate a written policy concerning teacher-student communication and employee-student communication. Such policy shall contain at least the following elements:

- (1) Appropriate oral and nonverbal personal communication, which may be combined with or included in any policy on sexual harassment; and
- (2) Appropriate use of electronic media such as text messaging and internet sites for both instructional and personal purposes, with an element concerning use of social networking sites no less stringent than the provisions of subsections 2, 3, and 4 of this section.

2. As used in this section, the following terms shall mean:

- (1) “Exclusive access”, the information on the website 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);

28, 2011, but faced opposition from a petition for injunctive relief initiated by the Missouri State Teachers Association.⁶⁰ The Cole County

(2) "Former student", any person who was at one time a student at the school at which the teacher is employed and who is eighteen years of age or less and who has not graduated;

(3) "Nonwork-related internet site", any internet website or web page used by a teacher primarily for personal purposes and not for educational purposes;

(4) "Work-related internet site", any internet website or web pages used by a teacher for educational purposes.

3. No teacher shall establish, maintain, or use a work-related internet site unless such site is available to school administrators and the child's legal custodian, physical custodian, or legal guardian.

4. No teacher shall establish, maintain, or use a nonwork-related internet site which allows exclusive access with a current or former student. Nothing in this subsection shall be construed as prohibiting a teacher from establishing a nonwork related internet site, provided the site is used in accordance with this section.

5. Every school district shall, by July 1, 2012, include in its teacher and employee training, a component that provides up-to-date and reliable information on identifying signs of sexual abuse in children and danger signals of potentially abusive relationships between children and adults. The training shall emphasize the importance of mandatory reporting of abuse under section 210.115 including the obligation of mandated reporters to report suspected abuse by other mandated reporters, and how to establish an atmosphere of trust so that students feel their school has concerned adults with whom they feel comfortable discussing matters related to abuse.

Id.

⁶⁰ Petition for Injunctive Relief and Declaratory Judgment at 1, Missouri State Teachers Ass'n v. Missouri., Civ. No. 11AC-CC00553 (Mo. Cir. Ct. Aug. 19, 2011), http://www.msta.org/news/Petition_final.pdf. The Missouri Teachers Association raised the following contentions:

12. Section 160.069 makes it unlawful for school teachers to communicate with their children, relatives, church youth group members, and even news paper reporters who happen to be current or former students using Facebook-type web sites or by many of the other popular and increasingly indispensable computer and cell phone based technologies in wide-spread use in society today [to communicate with students using non-work-related social media regarding religious activities].

....

14. The Act is so vague and overbroad that the Plaintiffs cannot know with confidence what conduct is permitted and what is prohibited....

....

19(a). The Act violates Plaintiffs' freedom of speech, which is guaranteed under the Missouri Constitution, Article I, Section 8, and the First Amendment of the United States Constitution because it is a prior restraint on a form of expression included within the free speech

Circuit Court granted the request for a preliminary injunction, finding that “the statute would have a chilling effect on speech.”⁶¹ Shortly thereafter, the Missouri Governor called upon Missouri lawmakers to repeal the law in a special legislative session.⁶² On September 23, 2011, Missouri lawmakers repealed the statute and required public school districts to adopt policies on employee-student communications, including “the use of electronic media...to prevent improper communications” by March 1, 2012.⁶³ The aftermath surrounding Missouri’s controversial statute lead many school districts to implement their own district-level policies.⁶⁴

Many school districts across the United States, following in the footsteps of the Missouri legislature, began implementing their own district-level policies addressing online teacher-student communications.⁶⁵ In Wisconsin, the Elmbrook School District’s policy

guarantees of the first and fourteenth amendments of the United States Constitution.

....

20(a). The Act would ban and make unlawful communications via non-work-related websites and other social networking sites between parents who are teachers and their children who are students.

....

21(b). The Act violates Plaintiffs’ and other teachers’ freedom of association because it is facially coercive in derogation of Plaintiff’s First Amendment rights.

Id. at 3–6.

⁶¹ Order Entering Preliminary Injunction at 2, *Missouri State Teachers Ass’n v. Missouri*, Civ. No. 11ACC-CC00553 (Mo. Cir. Ct. Aug. 24, 2011), <http://www.msta.org/files/resources/publications/injunction.pdf>. The court recognized that the statute “clearly prohibits communication between family members and their teacher parents using these type of sites[]” and, if permitted, would constitute an “immediate and irreparable harm.” *Id.* The court also stated that it was required to “balance the individual rights of the Plaintiffs against the public interest.” *Id.* at 3. In doing so, the court found that the “public interest is best served by allowing a trial and ruling on the merits before the statute is implemented.” *Id.*

⁶² See David A. Lieb, *Facebook Law Limiting Missouri Teachers Friending Students Gets Repealed, Goes to Governor*, HUFFINGTON POST (Sept. 23, 2011), http://www.huffingtonpost.com/2011/09/23/facebook-law-limiting-mis_n_978200.html?view=print&comm_ref=false (reporting Governor Jay Nixon’s reaction to Missouri’s law). The Missouri Governor narrowly worded his written message to Missouri lawmakers by limiting them to only repealing the law. *Id.*

⁶³ *Id.* The Missouri House passed the legislation to repeal and replaced the law by a 139-2 vote. *Id.* The Missouri Senate passed it by a 33-0 vote. *Id.*

⁶⁴ See Part II.B (describing district-level policies restricting online teacher-student communication).

⁶⁵ See, e.g., School District of Elmbrook, *Appropriate Use of Technology-Policy 4511*, <http://www.elmbrookschools.org/elmbrook-school-district/board/district-policies/4000-human-resources/appropriate-use-of-technology-policy-4511.html> (2011) [hereinafter School District of Elmbrook]; see also Tim Barker, *Backlash Over Missouri’s Teacher ‘Facebook*

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states that “[p]ersonal communication via non-District sponsored applications/devices between staff and students, including, but not limited to, the use of social networking sites and instant messaging” is prohibited.⁶⁶ The policy further states that the consequences for violating the Elmbrook policy include “termination and/or legal action, if warranted.”⁶⁷

Similarly, in Ohio, the Dayton Public School District’s newly enacted policy prohibits teachers from “friending” students via online social networking sites in order “[t]o maintain a more formal staff-student

Law, SLTTODAY.COM (Aug. 10, 2011), http://www.stltoday.com/news/local/education/article_048b2b2f-04b4-576f-b878-b8080800e94e.html (arguing that school districts are recommending that teachers refrain from using social networking sites, in addition to deleting and refusing to communicate with students online); Michael Walsh, *Tolland School Board to Review Social Media Policy for District Employees*, HARTFORD COURANT (Sept. 26, 2011), http://articles.courant.com/2011-09-26/community/hc-tolland-social-media-policy-0927-20110926_1_social-media-social-networking-employees (describing a Holland, Connecticut, school board policy designed to prevent inappropriate teacher use of social networking sites). The policy states “it is not appropriate for a teacher or administrator to ‘friend’ a student or his/her parent or guardian . . . through social media.” *Id.* (internal quotations omitted). The proposed “policy does allow employees to use social media as an educational tool, but asks that permission be obtained before implementation and that the employee follow a number of guidelines.” *Id.* However, “[p]unishment could go as far as termination of employment” for any violations. *Id.*

⁶⁶ School District of Elmbrook, *supra* note 65; see also Stephanie Horvath, *Teachers Get Tough Lesson: Go Private on Facebook Pages*, SUN-SENTINEL (June 1, 2008), http://articles.sun-sentinel.com/2008-06-01/news/0805310363_1_teacher-s-certification-facebook-page (“Concerns about social networking sites led the Ohio Education Association to recommend last year that its members avoid MySpace and Facebook altogether.”). However, some school districts in Palm Beach and Broward counties in Florida have no policies on online content. *Id.* Nonetheless, state education officials report that they could still “yank a teacher’s certification if his or her online content violated the state ethics code.” *Id.*

⁶⁷ School District of Elmbrook, *supra* note 65. The policy provides staff with access to information technology and communication resources to accomplish its mission of teaching, learning, and public service operations. *Id.* However, such uses shall be related to educational programs or operations of the District. *Id.* See also Nancy Gier, *Dist. 203 Looks at Rules for Social Media in the Classroom*, TRIBLOCAL (Oct. 5, 2010), <http://triblocal.com/naperville/2010/10/05/dist-203-looks-at-rules-for-social-media-in-the-classroom/> (discussing a Naperville School Board’s proposed policy that covers topics such as the use of cell phones, texting, Twitter, blogging, and Facebook accounts for academic purposes). “Key among the guidelines is prohibiting staff members from becoming ‘friends’ with students on Facebook for non-academic purposes, and prohibiting staff members from using texts rather than voice to communicate with students via cell phones.” *Id.* According to policy, “texting can be easily misinterpreted.” *Id.* However, the current policy permits employees to use district e-mail to contact students, and students may carry cell phones to campus but must turn them off during school hours. *Id.* “It’s a huge issue for districts all across the state,” the interim director of communications said. *Id.* “We want to set clear expectations for the use of technology in the classroom. We’ll use whatever time is necessary to get the best policy.” *Id.*

relationship.”⁶⁸ Furthermore, the policy states that any violations will result in staff or student discipline.⁶⁹

In Manatee County, Florida, the teachers union, the Manatee Education Association, filed suit, challenging the constitutionality of a proposed Manatee School District policy prohibiting teachers from posting negative statements or photos about the district, employees, or students from their home or work computers on social networking sites.⁷⁰ Similar to other district-level policies, Manatee School District’s

⁶⁸ Dayton Public Schools Policy Manual, http://www.dps.k12.oh.us/documents/contentdocuments/doc_23_5_1418.pdf (updated Nov. 30, 2010). The policy provides that:

[D]istrict 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). In addition, district employees will not “instant message” or text message current students, and will not respond to student-initiated attempts at conversation through non-district-approved media, whether personal or professional accounts.

Id. at 274. Additionally, the policy includes a specific section concerning social networking websites. This subsection provides:

1. District staff who personally participate in social networking web sites are prohibited from posting data, documents, photographs or inappropriate information on any website that might result in a disruption of classroom, school or district activity. The Superintendent/designee has full discretion in determining when a disruption of classroom, school or district activity has occurred.
2. District staff is prohibited from providing personal social networking web site passwords to students.
3. Fraternization between District staff and students via the Internet, personal e-mail accounts, personal social networking websites and other modes of virtual technology is also prohibited.
4. Unauthorized access of personal social networking web sites during school hours is prohibited.

Id. at 379–80.

⁶⁹ *Id.* at 380; see Sylvia Lim, *School Boards: No Tweets, Friending*, ST. PETERSBURG TIMES, June 19, 2011, at A1 (stating that Manatee School Board members stopped working on policies limiting how teachers use social media after teachers’ unions threatened legal action). During a last-minute addition to the policy at the School Board’s meeting, teachers will be allowed to use their personal cell phones to contact students in cases such as field trips. *Id.* Board members raised the possibility of teachers facing an unwarranted penalty for using personal phones to contact students and that “[s]ometimes, the teacher is responsible for students off school property.” *Id.*

⁷⁰ Richard Dymond, *Teachers Sue Over Florida District’s Facebook Policy*, BRADENTON HERALD (Nov. 13, 2010), <http://www.mcclatchydc.com/2010/11/13/103700/teachers-sue-over-florida-districts.html>. “The policy would also require teachers to get written permission from parents if they want to communicate with students on those websites, or by personal e-mail.” *Id.* See Petition to Invalidate Proposed Rule at 10, Manatee Educ. Ass’n v. Sch. Dist. of Manatee Cnty. (Fla. Div. of Administrative Hearings, Oct. 19, 2010), No. 10-9760RP, <http://www.doah.state.fl.us/docdoc/2010/009760/10009760M-101910-12273827.PDF>. The policy provides in pertinent part:

policy also emphasized that violations were subject to employee discipline.⁷¹ In addition to district-level policies, schools have also created and implemented acceptable use policies prohibiting teachers' social networking use.⁷²

g. "Employees are to refrain from electrically posting in publicly accessible websites any statements, documents, or photographs that might cast the employee, the students, or the District in a negative, scandalous, or embarrassing light,"

h. "Any inappropriate statements, documents, or photographs viewed by the public reflects poorly on the District as a whole and can negatively impact the school setting and subject the employee to discipline."

Id. (emphasis in original).

⁷¹ *Manatee Educ. Ass'n*, *supra* note 70, at 11. The Manatee Education Association challenged the constitutionality of the proposed policy for the following reasons: (1) the policy granted the District unbridled discretion in disciplining employees, regardless of the severity of the conduct; (2) it violated a Florida statute by determining appropriate discipline without collective bargaining, which is required by law; (3) it disciplined employees for engaging in aspects of their private lives protected by the Florida Constitution ("Right of Privacy"); and (4) the policy disciplined employees for exercising speech on matters of public concern. *Id.* at 7, 11.

⁷² See FINALSITE, *Social Media Acceptable Use Policies*, <http://www.finalsite.com/file.cfm?resourceid=388&filename=Social%20Media%20Acceptable%20Usage%20Policies.pdf>. (last visited Jan. 15, 2012) (providing examples of various schools' acceptable use policies concerning teachers' use of social media tools). For example, Castilleja School's acceptable use policy provides:

The following are guidelines for school employees who use online social networking applications which may be frequented by current or former students:

1. COURSE USE OF SOCIAL NETWORKING: In order to provide equal, age-appropriate access for students to course materials, faculty should limit class activities to school-sanctioned online tools. New social networking tools and features are being continually introduced which may or may not be appropriate for course use. The same care must be taken in choosing such tools as other tools and support materials.

2. MODEL APPROPRIATE BEHAVIOR: Exercise appropriate discretion when using social networks for personal communications (friends, colleagues, parents, former students, etc.) with the knowledge that adult behavior on social networks may be used as a model by our students.

3. FRIENDING ALUMNI: Accept social network friend requests only with alumni over the age of 18. Do not initiate friend contacts with alumni.

4. UNEQUAL RELATIONSHIPS: Understand that the uneven power dynamics of the school, in which adults have authority over former students, continues to shape those relationships.

5. OTHER FRIENDS: Remind all other members of your network of your position as an educator whose profile may be accessed by current or former students, and to monitor their posts to your network accordingly. Conversely, be judicious in your postings to all friends

Acceptable use policies are strategies that school districts can employ to accomplish the dual goals of providing notice of expected behaviors to technology users and setting forth the consequences of misuse.⁷³ Under acceptable use policies, teachers are expected to comply by signing waiver agreements as part of their employment contracts.⁷⁴ In addition, many adopted acceptable use policies state that violations to the acceptable use agreements may result in dismissal or other disciplinary actions.⁷⁵ Although varying methods have been used to restrict teachers'

sites, and act immediately to remove any material that may be inappropriate from your site whether posted by you or someone else.

6. GROUPS IN YOUR SOCIAL NETWORK: Associate with social networking groups consistent with healthy, pro-social activities and the mission and reputation of the school, acting with sensitivity within context of a diverse educational environment in which both students and adults practice tolerance and accept competing views.

7. PRIVACY SETTINGS AND CONTENT: Exercise care with privacy settings and profile content. Content should be placed thoughtfully and periodically reviewed to maintain this standard.

8. MISREPRESENTATION: Faculty who use social networks should do so using their own name, not a pseudonym or nickname.

9. PUBLIC INFORMATION: Recognize that many former students have online connections with current students, and that information shared between school adults and former students is likely to be seen by current students as well.

Id. at 1.

⁷³ See Kathleen Conn & Perry A. Zirkel, Commentary, *Legal Aspects of Internet Accessibility and Use In K-12 Public Schools: What Do School Districts Need to Know?*, 146 EDUC. L. REP. 1, 30 (2000) (providing general guidelines for drafting acceptable use policies). In addition to providing specific examples of the speech, expression, and conduct proscribed, Acceptable Use Policies, at a minimum, should state:

- 1) the district's expectation that district computing facilities will be used exclusively for educational purposes;
- 2) the district's expectations that students and teachers will use educationally appropriate speech and expression when using the Internet and other technological tools;
- 3) users' responsibilities to avoid copyright violations;
- 4) users' reasonable expectations (or lack of such expectations) of privacy in any and all uses of district technology resources; and
- 5) users' responsibility to avoid substantial and material disruption of the educational process for the school community.

Id.

⁷⁴ See *id.* at 3 (discussing acceptable use policies and the legal implications of the increased use of such policies). "Most public school districts require [that] teachers agree to abide by district policies as a condition of their employment. The teacher contract itself details the consequences of teachers' disregard or violation of its provisions." *Id.* at 34.

⁷⁵ See generally FINALSITE, *supra* note 72 (providing examples of various school acceptable use policies). The acceptable user policy states, "[i]f the School believes that an employee's activity on a social networking site, blog, or personal website may violate the School's policies, the School may request that the employee cease such activity. Depending on the severity of the incident, the employee may be subject to disciplinary action." *Id.* at 2.

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use of social networking sites, many have suggested that such restraints implicate a teacher's First Amendment rights of free speech and expression.⁷⁶ Teachers' First Amendment free speech rights are considered under the Supreme Court's jurisprudence for public employees' speech.⁷⁷

C. *The Free Speech Rights of Public Employees*

As public employees, teachers' speech is protected only if they speak out as citizens on matters of "public concern" and if their speech does not disrupt the school activity.⁷⁸ In *Pickering v. Board of Education*, the Supreme Court set forth a balancing test to determine whether a teacher can be terminated for his or her speech.⁷⁹ The Court stated that "[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."⁸⁰ The Court's

⁷⁶ See *supra* Part II.A (discussing teachers' First Amendment rights).

⁷⁷ See *infra* Part II.C (discussing the Court's analytical framework for public employee speech).

⁷⁸ See *Pickering v. Bd. of Educ. of Twp. H.S. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 568 (1968) (holding that where a teacher has made public statements that are critical of an employer but do not interfere with neither the teacher's performance of his duties in the classroom, nor the regular operation of schools, then such speech is protected); see also *Waters v. Churchill*, 511 U.S. 661, 668 (1994) (stating that in order for a government employee's speech to be protected, it must be on a matter of public concern). In *Waters*, the Court held that a public hospital employee's alleged speech was unprotected and could be the basis for discharge when the nurse's speech was critical of one of the hospital's departments. *Id.* at 681. The Court stated that, even if criticism of nursing cross-training was a matter of public concern, her comments substantially dampened another nurse's interest in working in a particular department; therefore, her comments were unprotected. *Id.*

⁷⁹ *Pickering*, 391 U.S. at 568. The *Pickering* case involved a public high school teacher who sent a letter to a local newspaper critical of the school's handling of proposals for tax increases to raise new revenue for the schools. *Id.* at 566. As a result of the letter's publication, the teacher was dismissed by the school board. *Id.* The board concluded that the teacher's letter had been "detrimental to the best interests of the schools" because it contained false statements which "unjustifiably impugned" the "integrity, truthfulness, responsibility and competence" of the Board, "would be disruptive of faculty discipline, and would tend to foment 'controversy, conflict, and dissension' among teachers, administrators, the Board of Education, and the residents of the district." *Id.* at 567.

⁸⁰ *Id.* at 568. The Court discusses some of the general lines along which an analysis of the controlling interests should run because there are various fact situations in which critical statements by employees are made against their superiors and an attempt to provide a general standard is not feasible. *Id.* at 569. The Court denies any suggestion that teachers may constitutionally be compelled to give up their First Amendment rights that they would otherwise enjoy as citizens to comment on matters of public interest in connection with the schools in which they work. *Id.* at 568. However, at the same time, the

balancing test requires a two-prong inquiry: “1) whether the speech that led to the adverse employment action relate[d] to a matter of ‘public concern’; and 2) whether, under the balancing test, the public employer can demonstrate that its legitimate interests outweigh the employee’s First Amendment rights.”⁸¹ The State’s interests, as a public employer, include preventing disharmony and disruption in the workplace, as well as ensuring a school’s regular operations are maintained.⁸² *Pickering* laid the foundation for analyzing teachers’ speech; however, it left questions as to what exactly constitutes speech involving matters of “public concern.”⁸³

State has interests as an employer in regulating the speech of its employees, which are different than those it has in connection with regulating the speech of citizens in general. *Id.*

⁸¹ *Hudson v. Craven*, 403 F.3d 691, 696 (9th Cir. 2005). In *Hudson*, a college instructor’s contract was not renewed after she and her students attended a public rally and march opposing the World Trade Organization. *Id.* at 693. The court applied *Pickering*’s two-prong test. *Id.* at 698–700.

[Under the first prong the court] applied *Pickering*’s balancing test only when the employee spoke *as a citizen* upon matters of public concern rather than *as an employee* upon matters only of personal interest. Thus, private speech that involves nothing more than a complaint about a change in the employee’s own duties may give rise to discipline without imposing any special burden of justification on the government employer.

Id. at 698 (quoting *United States v. Nat’l Treasury Emp. Union*, 513 U.S. 454, 466 (1995)). However, the court found the college instructor’s speech did meet the public concern test because neither the instructor nor the students expressed any private concerns at the rally. *Id.* at 699. However, the court, under *Pickering*’s second prong, found that the State’s interest in student safety and pedagogical oversight outweighed those of the instructor to participate in a public rally with her students. *Id.* at 700–01.

⁸² *See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (finding restrictions on free speech were inappropriate because the risk of a substantial disruption was negligible); *Waters*, 511 U.S. at 673 (holding the State employer has a significant interest in the efficiency of public services provided by and through its employees). The court stated that:

The government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

Id. at 675; *Pickering*, 391 U.S. at 569–71 (discussing that the State employer failed to show *Pickering*’s speech would create disharmony among employees); *Melzer v. Bd. of Educ.*, 336 F.3d 185, 198–99 (2d Cir. 2003) (noting the special position of a teacher and emphasizing the State’s interest in ensuring students feel at ease in the classroom).

⁸³ *See City of San Diego v. Roe*, 543 U.S. 77, 83 (2004) (acknowledging that “the boundaries of the public concern test are not well defined” and providing further guidance for proper application of the public concern test); *Rankin v. McPherson*, 483 U.S. 378, 380

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Fifteen years later, in *Connick v. Myers*, the Court narrowly addressed the public concern question, and ultimately *Pickering's* balancing test, by defining public concern as speech that is evidenced by the “content, form, and context of a given statement” and related to a “matter of political, social, or other concern to the community, [or] government officials.”⁸⁴ If the employee’s speech does not touch upon a matter of public concern, then the second prong of *Pickering's* analysis—balancing the interests of the speaker and the State—should not be undertaken nor addressed.⁸⁵ Instead, the Court held that “government officials should

(1987) (holding that a speech wishing harm to the President touched on a matter of public concern because it occurred during a discussion about the President’s policies); *Connick v. Myers*, 461 U.S. 138, 147–48 (1983) (determining whether speech touches on a matter of public concern depends on the “content, form, and context of a given statement”); 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, 417 (2002) (“The balancing test of *Pickering*, which was reiterated in all of *Pickering's* progeny including *Connick*, has a logical flaw.”).

⁸⁴ *Connick*, 461 U.S. at 146–48. In *Connick*, a former assistant district attorney strongly opposed a proposed transfer to a different section of the criminal court. *Id.* at 140. She distributed to other assistant district attorneys a questionnaire soliciting their views regarding criticism of the district attorney’s employment practices and whether any political pressure was placed on employees to work on political campaigns. *Id.* at 141. Subsequently, she was fired because she refused to accept the transfer and because her distribution of the questionnaire was considered an act of insubordination. *Id.* After she was fired, Myers filed suit “contending that her employment was wrongfully terminated because she had exercised her constitutionally-protected right of free speech.” *Id.* See *First Nat’l Bank of Bost. v. Bellotti*, 435 U.S. 765, 776–77 (1978) (holding the presumption that speech about any aspect of governmental affairs is also generally considered a matter of public concern); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (explaining that the First Amendment was intended to promote and protect the discussion of governmental affairs); see also CHARLES J. RUSSO, *THE LAW OF PUBLIC EDUCATION* 703 (7th ed., 2009) (discussing the subjects which have met the criteria of public concern) Subjects of public concern include:

School employees [who have] suffered adverse employment actions due to criticisms of or questions about a delay by school officials in implementing federally mandated programs for students with disabilities; a medication policy; a policy that prevented teachers from making critical statements about school officials unless made directly to the person(s) being criticized; a principal’s failure to implement a school improvement plan; a board’s child abuse reporting policy; and a teacher’s complaining about classroom safety; even though he expressed his views privately, through approved, formal channels.

Id.

⁸⁵ *Connick*, 461 U.S. at 147. The dissent found three primary flaws in the majority’s reasoning. *Id.* at 157. The majority considered the form and context of the speech, first in determining whether the speech touched on a matter of public concern and again in determining the disruptive impact of that speech. *Id.* at 157–58. The dissent maintained that the form and context of the speech was not relevant in considering whether the speech was on a matter of public concern. *Id.* at 158. That an employee chose to conduct the speech in private did not lessen its public impact. *Id.* Nor did the form of the employee’s speech characterize its content. *Id.* at 159. Second, the majority narrowed the scope of

enjoy wide latitude in managing their offices without intrusive oversight by the judiciary in the name of the First Amendment," consequently, providing greater deference to public employers.⁸⁶

To date, there are three notable cases involving teachers who claimed that their First Amendment rights were violated due to social networking use.⁸⁷ In each case, the *Pickering-Connick* analysis was applied.⁸⁸ In *Spanierman v. Hughes*, Jeffrey Spanierman's contract for employment was not renewed after the school's principal learned that Mr. Spanierman communicated with students through his Myspace page "about homework, to learn more about the students so he could relate to them better, and to conduct casual, non-school related discussions."⁸⁹ The court applied a three-prong test in determining whether

those things that constitute a matter of public concern extensively, excluding speech on some important public issues, such as the performance of elected officials and government employee morale. *Id.* at 161. Thus, the dissent concluded that the content of the questionnaire was of public concern "because it discussed subjects that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which . . . an elected official . . . discharges his responsibilities." *Id.* at 163. Third, the majority misapplied the *Pickering* test by holding that the mere apprehension of disruption was sufficient justification for suppression of speech. *Id.* See *Bradshaw v. Pittsburgh Indep. Sch. Dist.*, 207 F.3d 814, 816 (5th Cir. 2000) (holding that full First Amendment protection only attaches to speech that the teacher has shown to rise to the level of a public concern); *Denton v. Morgan*, 136 F.3d 1038, 1042 (5th Cir. 1998) (asserting that a public employee's speech is only protected when it addresses a matter of public concern).

⁸⁶ *Connick*, 461 U.S. at 146. The court held that "federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* at 147. According to *Connick's* interpretation of *Pickering*, a public employer is not required to wait for an actual disruption in the office before taking action. *Id.* at 152.

⁸⁷ *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 297 (D. Conn. 2008); see also *Richerson v. Beckon*, 337 F. App'x 637, 637 (9th Cir. 2009); *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at *5 (E.D. Pa. Dec. 3, 2008).

⁸⁸ See, e.g., *Richerson*, 337 F. App'x at 637 (ruling in favor of the school board). See generally *Snyder*, 2008 WL 5093140, at *5; *Spanierman*, 576 F. Supp. 2d at 297.

⁸⁹ *Spanierman*, 576 F. Supp. 2d at 298. The contents of Spanierman's profile page were varied, including "comments from [Spanierman] to other MySpace users, comments from other MySpace users to [Spanierman], pictures, blogs, and poetry." *Id.* at 310. Specifically, the page contained a conversation with one student which stated, "I just like to have fun and goof on you guys. If you don't like it. Kiss my brass! LMAO [Laughing My Ass Off]," and poetry in opposition to the Iraq War. *Id.* at 310, 312. In January of 2006, Spanierman met with a specialist from the Department of Education concerning his "MySpace activities" and was informed that the Department would not renew his contract for the 2006-2007 school year. *Id.* at 299. Spanierman brought a Section 1983 claim, arguing unsuccessfully that his First Amendment rights had been violated. *Id.* at 299. The principal conveyed to Spanierman that "he had exercised poor judgment as a teacher" by connecting with students through MySpace. *Id.*

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Spanierman's speech was protected.⁹⁰ The court examined (1) whether the speech was a matter of public concern, (2) whether adverse employment action had occurred, and (3) whether there was a causal connection between the speech and the adverse employment action.⁹¹ The court held that most of Mr. Spanierman's speech on his Myspace page did not relate to matters of public concern and therefore was unprotected by the First Amendment.⁹² Likewise, the court found that Mr. Spanierman's speech was "likely to disrupt school activities."⁹³ However, after affirming that Mr. Spanierman's speech was not a matter of public concern, the court failed to apply the second prong of the *Pickering* analysis, which involves balancing the interests of the speaker against those of the State.⁹⁴

Only three months after *Spanierman*, the court in *Snyder v. Millersville University*, upheld the removal of a student-teacher, Stacey Snyder, after she posted a photograph that depicted her wearing a pirate hat and holding a plastic cup with a caption that read "drunken pirate."⁹⁵ Applying the first prong of the *Pickering-Connick* analysis, the court held that Ms. Snyder's speech was not a matter of public concern, stating "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary

⁹⁰ See *Spanierman*, 576 F. Supp. 2d at 309 (holding there was no indication that Spanierman made his statements pursuant to his official duties, and his statements on Myspace were not pursuant to his responsibilities as a teacher, therefore indicating that *Garceetti* is not dispositive and the three-prong test can be applied).

⁹¹ See *id.* (quoting *Connick*, 461 U.S. at 146) ("Central to this inquiry is whether the speech may be fairly characterized as constituting speech on a matter of public concern.").

⁹² *Id.* at 310-11. In applying the test, the court found that a portion of Spanierman's Myspace speech, a poem written in opposition to the Iraq War, was protected. *Id.* at 310. The court dismissed the remainder of Spanierman's speech as unprotected because it was not on a matter of public concern. *Id.* Focusing on the poem, the court looked at whether Spanierman suffered an adverse employment action and whether there was a causal connection between his poem and the decision not to renew his contract. *Id.* at 311.

⁹³ *Id.* at 313. The court held:

It is reasonable for the Defendants to expect the Plaintiff, a teacher with supervisory authority over students, to maintain a professional, respectful association with those students. . . . Plaintiff would communicate with students as if he were their peer, not their teacher. Such conduct could very well disrupt the learning atmosphere of a school, which sufficiently outweighs the value of Plaintiff's MySpace speech.

Id.

⁹⁴ *Id.*

⁹⁵ *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at *6 (E.D. Pa. Dec. 3, 2008). Snyder's page also discussed problems between herself and her cooperating teacher. *Id.* Snyder, in one post to her Myspace page, stated, "[Students] keep asking me why I won't apply [for a position at the school]. Do you think it would hurt me to tell them the real reason (or who the problem [is])?" *Id.* at *5.

for their employers to operate efficiently and effectively.”⁹⁶ The court noted that, through Ms. Snyder’s own admission, her expression on Myspace was on purely personal matters.⁹⁷ Therefore, in looking first at whether Snyder’s speech was on a matter of public concern, the court eliminated any further analysis and allowed the school board to dismiss her without fear of constitutional violations.⁹⁸

In a recent decision, *Richerson v. Beckon*, the Ninth Circuit Court of Appeals rejected a teacher’s First Amendment argument concerning comments made on a personal blog.⁹⁹ Tara Richerson, a mentor for beginning teachers, was demoted from a K–12 science curriculum

⁹⁶ *Id.* at *14. The court held that the plaintiff’s position as a student teacher subjected her to the status of a certified teacher, thus enabling the court to apply the *Pickering* progeny public concern analysis. *Id.* at *10.

⁹⁷ *Id.* at *16. On several occasions, Snyder informed the students during class that she had a Myspace page. *Id.* at *5. Snyder was advised that it was not proper to discuss her Myspace account with the students, and a teaching supervisor urged her not to allow students to become involved in her personal life. *Id.* At one point, Snyder posted the following message:

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 that they would stoop that 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)?

Id.

⁹⁸ *Id.* at *16. As a result of Snyder’s Myspace conduct, Snyder was prohibited from graduating from Millersville University with a degree in education. *Id.* at *13. The court upheld the University’s decision, stating that Snyder failed to complete the “approved teacher preparation program—which requires successful completion of Student Teaching” and was therefore ineligible for licensure. *Id.*

⁹⁹ See *Richerson v. Beckon*, No. C07-5590 JKA, 2008 WL 833076, at *2 (W.D. Wash. Mar. 27, 2008), *aff’d*, 337 Fed. App’x 637 (9th Cir. 2009) (discussing the content of Richerson’s blog entries). The court included the following blog entry entitled “Save us White Boy!” to demonstrate the nature of Richerson’s comments:

I met with the new me today: the person who will take my summer work and make it a full-time year-round position. I was on the interview committee for this job and this guy was my third choice . . . and a reluctant one at that. I truly hope that I have to eat my words about this guy. . . . But after spending time with this guy today, I think Boss Lady 2.0 made the wrong call in hiring him He comes across as a smug know-it-all creep. And that’s probably the nicest way I can describe him. . . . He has a reputation of crapping on secretaries and not being able to finish tasks on his own. . . . And he’s white. And male. I know he can’t help that, but I think the district would have done well to recruit someone who has other connections to the community. . . . Mighty White Boy looks like he’s going to crash and burn.

Id.

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specialist to a classroom teaching position after she posted comments describing an administrator as “a smug know-it-all creep” who has “a reputation of crapping on secretaries.”¹⁰⁰ The court held that Richerson’s transfer was appropriate under the balancing test laid out in *Pickering*.¹⁰¹ However, the court assumed without actually deciding that some of Richerson’s speech was of public concern.¹⁰² Nevertheless, when applying the second prong of the *Pickering* analysis, the court considered relevant factors, such as whether Richerson’s speech disrupted co-worker relations or whether such speech interfered with the employee’s performance of his or her duties.¹⁰³ In the end, the court tipped the balance in favor of the interests of the school district.¹⁰⁴ Moreover, when

¹⁰⁰ *Id.* The court noted that not only did the first blog posting represent a breach of confidentiality, but “it was racist, sexist, and bordered on vulgar,” and it was inconsistent with the types of public concern issues contemplated by the *Pickering* line of cases. *Id.* at *4.

¹⁰¹ *Richerson*, 337 Fed. App’x at 638. The court held, “[w]e nevertheless affirm the summary judgment because Richerson’s transfer was appropriate under the balancing test laid out in *Pickering* *Id.* (quoting *Pickering v. Bd. of Educ. of Twp. H.S. Dist. 205, Will, Cnty., Ill.*, 391 U.S. 563 (1968)). “Richerson’s publicly-available blog included several highly personal and vituperative comments about her employers, union representatives, and fellow teachers.” *Id.*

¹⁰² *Id.* at 638. The court decided that the “district court did not err in concluding that the legitimate administrative interests of the School District outweighed Richerson’s First Amendment interests in not being transferred because of her speech.” *Id.* at 639. See Lindsay A. Hitz, Note, *Protecting Blogging: The Need for an Actual Disruption Standard in Pickering*, 67 WASH. & LEE L. REV. 1151, 1179–81 (2010) (discussing the court’s reasoning behind finding that Richerson’s speech was a matter of public concern).

¹⁰³ *Richerson*, 337 Fed. App’x at 638. The court reasoned that Richerson’s speech had a “significantly deleterious effect” in that “several individuals refused to work with Richerson in the future.” *Id.* Additionally, the court concluded that “few teachers would expect that they could enter into a confidential and trusting relationship with Richerson after reading her blog” and that such effect demonstrates injury to the school’s legitimate interests. *Id.* See Interview with Todd Fuller, Communications Director, Missouri State Teachers Association (Dec. 28, 2011) (describing the secondary effects of teachers’ online social networking use and how other teachers, students, and parents are usually unwilling to cooperate with a teacher who was disciplined for his or her online social networking use). Mr. Fuller stated, “We are willing to fight for teachers’ rights, but we can’t control some of the consequences from teachers’ social networking use.” *Id.*

¹⁰⁴ *Richerson*, 337 Fed. App’x at 639; see Paul M. Secunda, *Bloggng While (Publicly) Employed: Some First Amendment Implications*, 47 U. LOUISVILLE L. REV. 679, 691 (2009) (discussing Richerson’s speech as applied under the *Pickering* and *Connick* analysis).

Applying this balance to the Richerson case, it appears clear that the school district would have won the balancing of interests. Although, the court did not expressly base its decision on *Pickering*, there is language in other parts of the opinion that implies that the district’s interest in efficiency would have outweighed Richerson’s First Amendment concerns. More specifically, Richerson was causing a substantial disruption in the workplace and the school district had the right to foster a harmonious working environment. Certainly, given her penchant for gossip, it does not seem that the school district should

deciding similar cases involving teachers' First Amendment free speech claims, it is necessary to closely examine not only the competing interests of both teachers and school boards but also the Court's analysis for public employees' speech.¹⁰⁵

III. ANALYSIS

This part of the Note analyzes and assesses teachers' speech under *Pickering's* balancing test, *Connick's* "public concern" test, and Missouri's statute.¹⁰⁶ Part III.A examines the competing rights of both teachers', in their use of social networking sites, and school districts' interest in restricting teachers' online speech.¹⁰⁷ Next, Part III.B reveals the flawed logic within the *Pickering* balancing test established by the Court for analyzing public employee speech as applied to social networking.¹⁰⁸ Part III.C of this Note analyzes *Connick's* public concern test and argues that this test is inapplicable to purely private speech outside of the workplace.¹⁰⁹ Part III.D addresses the inconsistencies courts face when forced to apply the *Pickering-Connick* analysis to teachers' speech on social networking sites.¹¹⁰ Finally, Part III.E argues that the Missouri statute is unconstitutional because it not only prohibits teacher-student

have been forced to tolerate her as a mentor in an instructional program that requires trust and sensitivity.

Id.

¹⁰⁵ See Karin B. Hoppmann, Note, *Concern with Public Concern: Toward A Better Definition of the Pickering/Connick Threshold Test*, 50 VAND. L. REV. 993, 996-97 (1997) (arguing for a new standard for public employee speech). "If the Court insists on preserving the threshold public concern test, it should recast the test to focus on the distinction between workplace speech and speech outside the working environment." *Id.* at 1119-20. The author argues that, "[i]f the speech is of public concern, it deserves full and absolute protection. If it is not of public concern, it should still be evaluated under the second prong of the *Pickering/Connick* test: the Court should weigh the speech's 'value' against its potential for disruption." *Id.* Consequently, "[s]peech outside the scope of employment should thereby receive full protection, while speech within the scope of employment may be subjected to the balancing test currently embodied in the second prong of the *Pickering/Connick* test. *Id.*

¹⁰⁶ See *infra* Parts III.B-E (discussing the tests used for analyzing public employee speech, as well as the constitutionality of Missouri's statute restricting teacher-student communication through social networking sites).

¹⁰⁷ See *infra* Part III.A (analyzing the competing interest of both the teachers and the school districts concerning teachers' use of social networking sites).

¹⁰⁸ See *infra* Part III.B (dissecting the *Pickering* balancing test and discussing the Court's logical flaws within the balancing analysis).

¹⁰⁹ See *infra* Part III.C (arguing that *Connick's* "public concern" analysis is inapplicable to speech outside the workplace, including teachers' speech via social networking sites).

¹¹⁰ See *infra* Part III.D (evaluating both tests laid out in *Pickering* and *Connick* as applied to cases involving teachers' speech via social networking sites).

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communication but restricts teachers' private speech via social networking sites as well.¹¹¹

A. *Teacher vs. School Board Interests*

Because public school teachers play a unique role in shaping the minds of our youth, teachers are held to higher standard of professionalism and moral character.¹¹² School districts and administrators, as public employers, undoubtedly have an interest not only in fostering an environment that promotes effective learning but also in maintaining its employees' conduct, because inappropriate conduct could potentially interfere with that mission.¹¹³ As a result, school districts have an interest in regulating teacher speech that occurs outside of the classroom, primarily because teachers' conduct, regardless of when or where it is occurring, reflects on the teacher's own professional status and also on the school district's image.¹¹⁴ Even though a school district has an interest in ensuring that its teachers are held to a higher professional standard, courts must be careful not to allow this interest to extend so far as to infringe on a teacher's basic First Amendment freedoms when that teacher speaks outside his or her duties as an educator.¹¹⁵

¹¹¹ See *infra* Part III.E (discussing the unconstitutionality of Missouri's statute restricting teachers' speech via social networking sites).

¹¹² See Fleming et. al., *supra* note 47, at 67-68 (asserting that teachers are subject to greater scrutiny due to their elevated stature and special position in society). The author argues that:

[T]eaching is an important profession, in which the educator may serve as a role model, mentor, friend, and/or parental figure. Indeed, teachers have an extraordinary responsibility: they "leave indelible impressions on the minds of their young students, because they are entrusted with the safe keeping and education of children during their most impressionable and formative years."

Id. at 69.

¹¹³ See *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) ("Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services"); see also *Hutchinson*, *supra* note 46, at 501-02 (discussing school districts liability for matters that harm both students and their education environment, such as a teacher-on-student sexual harassment).

¹¹⁴ See *Pickering v. Bd. of Educ. of Twp. H.S. Dist. 205, Will Cnty. Ill.*, 391 U.S. 563, 568 (1968) (holding that the government functions as an employer, it has interests "that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general"); see also *supra* note 25 (detailing numerous instances where teachers have been disciplined because of their inappropriate speech and conduct with students via social networking sites).

¹¹⁵ See *infra* Part IV (proposing that the analytical guidelines that are entered into when examining teacher speech be changed).

It is imperative that the law recognize a teacher's interest in speaking as a public employee because it serves an educational purpose, which is drastically different from the teacher's interest in her own private speech.¹¹⁶ Although the *Pickering-Connick* test is appropriate for assessing the free speech claims of public employees, it should not apply when an individual is speaking as a private citizen on purely private matters.¹¹⁷ To highlight some of the problems associated with the *Pickering-Connick* test, Part III.B evaluates these decisions in terms of how they apply to analyzing teachers' speech via social media.¹¹⁸

B. *Balancing Interests of Citizen vs. Employee under the Pickering Analysis*

Courts have unanimously restricted teachers' speech on social networking sites by balancing the interests of the teacher against those of the State.¹¹⁹ In such cases, courts frequently use the test articulated in *Pickering*, which requires a court to balance "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."¹²⁰ Although the Court in *Pickering* laid the foundation for evaluating teachers' speech, this decision left questions as to what exactly constitutes speech involving matters of public concern.¹²¹

Although the balancing test articulated in *Pickering* attempts to set a proper standard for determining when a teacher's speech may be regulated, the Court's own application of this test is flawed.¹²²

¹¹⁶ See *supra* notes 17-18 and accompanying text (describing the various educational benefits of teacher-student communication and interactions through Facebook).

¹¹⁷ See *infra* Part IV (arguing that the *Pickering-Connick* analysis is not applicable to teachers' purely private speech on social networking sites).

¹¹⁸ See *infra* Part II.B (scrutinizing the ways in which courts have balanced interests of citizens versus employees under the test set forth in *Pickering*).

¹¹⁹ See *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 313 (D. Conn. 2008) (holding that Spanierman's conduct on Myspace was disruptive to school activities and was, therefore, outweighed by the school board's interests in restricting such speech).

¹²⁰ *Pickering*, 391 U.S. at 568.

¹²¹ See *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004) (acknowledging that "the boundaries of the public concern test are not well defined," and providing further guidance for proper application of the public concern test); see also *Rankin v. McPherson*, 483 U.S. 378, 380 (1987) (holding that speech wishing harm to the President touched on a "matter of public concern" because it occurred during a discussion about the President's policies); *Connick v. Myers*, 461 U.S. 138, 147 (1983) (determining whether speech touches on a matter of public concern depends on the "content, form, and context of a given statement").

¹²² See *Jo*, *supra* note 83, at 418-19 (discussing the "logical flaw" in the *Pickering* balance because the Court did not treat the teacher as a general citizen in its balance).

[The *Pickering* decision] suggests that only if a teacher could be regarded as a citizen whose speech would have little effect on the

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Specifically, the only time that employment-related interests should be weighed against a teacher's First Amendment rights is when the teacher speaks solely as an employee and not as a member of the general public.¹²³ Although the Court in *Pickering* stated that it regarded *Pickering* as a private citizen, the Court placed far too much weight on his duties as a teacher in its analysis.¹²⁴ Instead, the Court should have maintained its position when considering *Pickering* as a member of the general public.¹²⁵ Since it did not, the Court was able to justify entering into the balancing test, which should only be utilized in situations where the teacher is speaking on matters that implicate the government's interest as an employer.¹²⁶ Consequently, the Court's decision in *Pickering* gives the State far more leeway in qualifying a teacher as an employee, which bolsters its ability to tip the balancing scale in its favor and thereby limiting teachers' speech.¹²⁷ The Court in *Connick* followed in *Pickering's* footsteps and further limited teachers' private speech.¹²⁸

teacher's employment relationship, would he be entitled to the same First Amendment protection as if he were a member of the general public; if not, his comments would not be so protected.

Id. at 417.

¹²³ *Pickering*, 391 U.S. at 574; see *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 798 (5th Cir. 1989) ("[P]ublic employees are entitled to the same measure of constitutional protection as enjoyed by their civilian counterparts when speaking as 'citizens' and not as 'employees.'"); see also *Terrell v. Univ. of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986) ("[O]ur task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee.").

¹²⁴ See *Connick*, 461 U.S. at 157 (1983) (holding that it was necessary to regard the teacher as a member of the general public). Similar to *Pickering*, the Court in *Connick* inquired into employment-related activities, such as whether the teacher's speech had an effect on the operation of the school. *Id.* See also *Jo*, *supra* note 83, at 419 ("The *Pickering* Court did 'conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.' Nevertheless, the Court inquired into such employment-related values as maintaining discipline and harmony among coworkers, in addition to any effect of the speech on the actual operation of the school.").

¹²⁵ See *Pickering*, 391 U.S. at 572 (describing *Pickering* as a "teacher [who] has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties"). The Court concluded that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.* at 573.

¹²⁶ *Pickering*, 391 U.S. at 571; see *Jo*, *supra* note 83, at 418 ("When a teacher speaks as a citizen, the interests of the school system in limiting his speech should be no more than when any other citizen speaks."). If a teacher speaks in her role as an employee, then the school's interests should be balanced against the teacher's constitutional rights, which includes taking into account employment-related interests such as "discipline, teaching performance, and harmony in the daily work." *Id.*

¹²⁷ See *Jo*, *supra* note 83, at 419 ("[W]hen teachers engage in expression as citizens outside the context of employment, the government cannot contend that employment-related

C. *Narrowing the Scope of Teachers' First Amendment Rights Under Connick's "Public Concern" Test*

The Court took a step further in limiting employees' speech-based claims in its decision in *Connick*.¹²⁹ The Court in *Connick* first determined whether the speech at issue involved a matter of public concern.¹³⁰ The second step then required that only speech on a matter of public concern be subjected to the *Pickering* balance and thus potentially eligible for protection.¹³¹ By establishing the threshold inquiry of whether the speech relates to a matter of public concern, the Court effectively eliminated a teacher's ability to enjoy protection for her speech through social media.¹³² It is unlikely that a court will ever find that such speech, which is inherently private, touches on matters of public concern, depriving it of First Amendment protection.¹³³ As a result, the teacher

values should be weighed against teachers' interests in the *Pickering* balance."). Furthermore, "when speaking as a citizen and not as an employee, teachers should be entitled to the same measure of constitutional protection as enjoyed by their civilian counterparts." *Id.* at 418.

¹²⁸ See *Connick*, 461 U.S. at 149. (holding that an employee grievance over internal office matters did not meet the definition of public concern in the public employee speech context). Public employee speech concerning internal office affairs is considered speech of purely private concern. *Id.* But see *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776-77 (1978) (holding the presumption that speech about any aspect of governmental affairs is also generally considered a matter of public concern).

¹²⁹ See *Jo*, *supra* note 83, at 419 ("*Connick* follows the presumption that an employee's statement as a mere citizen is inherently concerned with the public affairs, while his speech as an employee may pertain to personal grievances and internal disputes."). "The counterpoise of this presumption and the possibility has led to the burden being unfairly placed on the teacher to demonstrate that his speech was about a matter of public concern." *Id.*

¹³⁰ See *Connick*, 461 U.S. at 146 (holding that if an employee's speech does not touch upon a matter of public concern, then the courts should not examine the government's reasons for discharging an employee). The court stated that, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.*

¹³¹ See *Jo*, *supra* note 83, at 421 ("[T]he Court wrong-footed [*Pickering*] by establishing the threshold inquiry of whether the employee's statements were upon 'a matter of public concern' before balancing the competing interests of the speaker and the state."). If the answer to the question of whether the speech is a matter of public concern is not affirmative, the case is determined against the employee without undertaking the *Pickering* balance. *Id.* Therefore, *Connick's* threshold standard marked a fundamental departure from *Pickering*, because in *Pickering*, "the Court focused on exploring what actual interests were involved, and attempted to balance them in a fair way." *Id.* at 421-22.

¹³² See *supra* notes 84-86 and accompanying text (explaining the Court's decision in *Connick*).

¹³³ See *Connick*, 461 U.S. at 157 (Brennan, J., dissenting) (discussing the three primary flaws in the majority's reasoning). The majority considered the form and context of the speech, first in determining whether the speech touched on a matter of public concern and again in determining the disruptive impact of that speech. *Id.* at 157-58. The dissent

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never receives the chance to have his or her rights balanced against the State's interests as required by *Pickering*.¹³⁴ In placing a greater focus on the content of the speech rather than on the *Pickering* balancing test, *Connick* essentially restricted *Pickering* to a point where little, if any, protection is provided to teachers who wish to voice their opinions on social media sites.¹³⁵

Furthermore, school boards may avoid *Pickering* and First Amendment liability altogether by successfully characterizing a teacher's speech as private.¹³⁶ *Connick* conveys what types of speech are considered matters of public concern by describing speech that *does not* in fact constitute a matter of public concern, such as speech concerning purely personal matters.¹³⁷ As a result, lower courts have inconsistently applied the test because the central concern is addressing only internal personal matters and, therefore, such decisions fail to take into account

maintained that the form and context of the speech was not relevant in considering whether the speech was on a matter of public concern. *Id.* at 159–60. That an employee chose to conduct the speech in private did not lessen its public import. *Id.* at 160. Nor did the form of the employee's speech characterize its content. *Id.* at 159. Second, the majority extensively narrowed the scope of those things that constitute a matter of public concern, excluding speech on some important public issues, such as the performance of elected officials and government employee morale. *Id.* at 164–65. Thus, the dissent concluded that the content of the questionnaire was of public concern "because it discussed subjects that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which . . . an elected official . . . discharges his responsibilities." *Id.* at 163. Third, the majority misapplied the *Pickering* test by holding that the mere apprehension of disruption was sufficient justification for suppression of speech. *Id.* at 166.

¹³⁴ See Hoppmann, *supra* note 105, at 1004 (analyzing *Connick's* application of the public concern test and arguing that "[t]he degree of public concern becomes a factor in this [*Pickering*] balance"). After applying the test to the facts of the case, the *Connick* Court found that "Myers's questionnaire consisted entirely of unprotected, non-public concern speech, except for the single question about pressure to participate in public campaigns." *Id.* Because the "questionnaire's potential for disruption of the workplace outweighed the [F]irst [A]mendment value of that single question," all of Myer's speech was unprotected. *Id.*

¹³⁵ See Secunda, *supra* note 104, at 691 ("Richerson suggests that public employee bloggers might have the hardest time finding First Amendment speech protection under *Connick's* public concern test, given the personal nature of many blog postings.").

¹³⁶ See *Connick* 461 U.S. at 147–48 (holding that courts must look at the "content, form, and context of a given statement, as revealed by the whole record" to determine whether an employee's speech touches upon a matter of public concern). Justice Brennan, in the dissenting opinion, argued that "[i]n my view, however, whether a particular statement by a public employee is addressed to a subject of public concern does not depend on where it was said or why." *Id.* at 160.

¹³⁷ See *id.* at 152 (holding that "we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action" and thus illustrating that the Court's central focus was internal speech and not speech outside the workplace).

speech that occurs outside the workplace.¹³⁸ *Connick's* public concern test fails to focus on the distinction between workplace speech and speech outside the working environment, because the test requires both a content-based (what) and context-based (where) analysis.¹³⁹ By focusing on the content of an employee's speech, rather than the context, the Court classifies an employee's speech as anything but speech concerning matters of public concern, thereby eliminating *Pickering's* balancing test.¹⁴⁰ Because of the difficulties associated with these two central decisions, lower courts have reached inconsistent outcomes when examining teachers' speech on social networking sites.¹⁴¹

¹³⁸ See Hoppmann, *supra* note 105, at 1008 ("Though the Supreme Court in *Pickering* and *Connick* established a new [F]irst [A]mendment test to cover public employee free speech, it failed to define a key element of that test: public concern. This has led to great confusion among the lower courts."). Furthermore, "[i]n seeking to apply the *Pickering/Connick* test, the lower courts engage in convoluted factor analysis schemes to determine what speech is of 'public concern.'" *Id.*

¹³⁹ See *id.* at 1019–20 (proposing the elimination of the content-based analysis in favor of a pure context-based analysis).

If the Court insists on preserving the threshold public concern test, it should recast the test to focus on the distinction between workplace speech and speech outside the working environment. This distinction can be best described by analogy to the 'scope of employment' test currently used in both agency and employment law.

Id.

¹⁴⁰ See *id.* at 1012 (illustrating the problems with a content-based analysis of the public concern test). Hoppmann argues that defining public concern solely on the content of the speech creates dangers of misapplication and learnability. *Id.* Hoppmann contends that:

The Court later reinjected content-based public concern analysis into its defamation jurisprudence based on *Connick* and in apparent disregard for its own proclamation. The Court's self-criticism, however, must still hold true. A judge cannot feasibly 'learn' what is of public concern if the category is defined by the actual content of the speech; there is nowhere to turn for a definition of which issues concern the public. The Court could perhaps look to the media's newsworthiness determinations as a guide to public concern issues. Yet basing public concern on media proclamations strips the actual "public" of the power to determine what speech is of concern and delegates that power to an entity whose concerns do not necessarily reflect those of the *whole* public. It also creates an ever-changing definition of public concern--what is news today may not be news tomorrow, nor may it be news somewhere else--that further decreases the predictability of the public concern test.

Id. at 1012–13.

¹⁴¹ See *infra* Part III.D (analyzing the inconsistencies that have emerged post *Pickering-Connick*).

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D. *Inconsistencies in Applying Pickering and Connick to Teachers' Speech on Social Networking Sites*

The district courts in the *Spanierman*, *Snyder*, and *Richerson* cases illustrate the difficulties and inconsistencies caused when courts are forced to apply *Pickering* and its progeny.¹⁴² In employing the *Pickering-Connick* analysis, the court concluded that almost none of *Spanierman's* Myspace page touched on matters of public concern and was therefore unprotected.¹⁴³ By determining that the speech was not a matter of concern, the court failed to recognize and take into account any speech that could be classified as a matter of public concern, such as a political poem that was posted.¹⁴⁴ The court's holding permitted the school board to restrain *Spanierman's* speech even if some of the speech was protected.¹⁴⁵ As a result, *Spanierman's* First Amendment claim failed without ever considering his interest in commenting on political issues or matters of public concern.¹⁴⁶

Furthermore, by focusing only on the *Pickering-Connick* analysis, the court failed to recognize and consider *Spanierman's* academic freedom.¹⁴⁷ *Spanierman* used his Myspace account to "communicate with students about homework [and] to learn more about the students so he could relate to them better," which was an application of *Spanierman's* right to choose and convey his instructional methods to his

¹⁴² See *supra* notes 87-98 and accompanying text (detailing the courts' application of the *Pickering-Connick* tests in *Spanierman* and *Snyder*).

¹⁴³ See *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 310-11 (D. Conn. 2008) ("[A]lmost none of the contents of the Plaintiff's profile page touched on matters of public concern."). The court held that a majority of *Spanierman's* profile page contained personal conversations between *Spanierman* and other Myspace users or creative writing. *Id.*

¹⁴⁴ See *id.* at 310 ("The only portion of the profile page that the Plaintiff argues is protected speech is a poem. . ."). The court ultimately concludes that, "construing all ambiguities in favor of the Plaintiff, the poem could constitute a political statement. That is, one could consider this poem to be an expression of the Plaintiff's opposition to the Iraq War." *Id.* at 310-11.

¹⁴⁵ See *id.* at 312 (discussing that *Spanierman's* protected speech concerning the Iraq War was not connected to his termination and that his speech on Myspace created a school disruption). *Spanierman* failed to establish the necessary causal connection between his exercise of the right to free speech and the allegedly retaliatory action against him. *Id.* at 311. The court held that "it was not unreasonable for the [school board] to find that [*Spanierman's*] conduct was disruptive to school activities" and that there was "evidence of complaints about [*Spanierman's*] Myspace activities." *Id.* at 312-13. The court indicated that "[s]uch conduct could very well disrupt the learning atmosphere of a school, which sufficiently outweighs the value of [*Spanierman's*] Myspace speech." *Id.* at 313.

¹⁴⁶ *Id.* at 311.

¹⁴⁷ See *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1049 (6th Cir. 2001) (recognizing teachers' right of academic freedom); see also *supra* Part II.A (describing teachers' substantive right to express and convey instructional methods to their students).

students.¹⁴⁸ However, the court did not address Spanierman's academic rights because Spanierman claimed a violation of his free speech rights, which is distinct from a teacher's right to express or choose a teaching method that serves an educational purpose.¹⁴⁹

Similarly, the court in *Snyder* incorrectly applied the *Pickering-Connick* analysis and, as a result, upheld Snyder's removal from her public high school placement.¹⁵⁰ The court concluded that the "drunken-pirate" photo and comments about her cooperating teachers were in fact purely personal speech and not a matter of public concern; however, the court failed to determine whether Snyder's speech was that of a teacher or a citizen.¹⁵¹ By focusing primarily on whether the speech was a matter of public concern, rather than considering whether Snyder was speaking as a private citizen or an employee, the court eliminated further analysis.¹⁵² As a result, under the *Pickering-Connick* analysis, teachers' purely private speech via social networking is unprotected even if a teacher is speaking as a private citizen, because the online speech is not a matter of public concern.¹⁵³

Lastly, the court in *Richerson* was correct in deciding that the *Pickering-Connick* analysis was the appropriate standard to be used in

¹⁴⁸ *Spanierman*, 576 F. Supp. 2d at 298; see *Cary v. Bd. of Educ.*, 598 F.2d 535, 539-42 (10th Cir. 1979) (recognizing that a teacher's First Amendment rights encompass the notion of academic freedom to exercise professional judgment in selecting topics and materials for use in the course of the educational process).

¹⁴⁹ See *Keefe v. Geanakos*, 418 F.2d 359, 361 (1st Cir. 1969) (holding that the "question in this case is whether a teacher may, for demonstrated educational purposes," receive constitutional protection, separate and distinct from teachers' private speech). The court noted that teachers' principle argument is "that his conduct was within his competence as a teacher, as a matter of academic freedom, whether the defendants approved of it or not." *Id.* at 360.

¹⁵⁰ See *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at *14 (E.D. Pa. Dec. 3, 2008) (holding that Millersville University did not violate Snyder's First Amendment rights).

¹⁵¹ See *id.* at *1 (holding that Snyder's position as a teacher subjected her to the status of a certified teacher, thus enabling the court to apply the *Pickering* progeny public concern analysis); see also *Jo*, *supra* note 83, at 419 ("[W]hen teachers engage in expression as citizens outside the context of employment, the government cannot contend that employment-related values should be weighed against teachers' interests in the *Pickering* balance."). When speaking as a citizen and not as an employee, "teachers should be entitled to the same measure of constitutional protection as enjoyed by their civilian counterparts" and the "interests of the State vis-à-vis employees are certainly different from its interests in relation to a citizen." *Id.* at 418-19.

¹⁵² See *Snyder*, 2008 WL 5093140, at *16 ("[T]he First Amendment does not protect Plaintiff's Myspace posting.") (quoting *Connick v. Myers*, 461 U.S. 138, 147 (1983)). Once the court eliminated further analysis, the school board could dismiss Snyder without fear of constitutional violations. *Id.* at *11.

¹⁵³ See *infra* Part IV (proposing a test designed to protect teachers' purely private speech via social networking sites).

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ultimately determining that Richerson's First Amendment rights had not been violated.¹⁵⁴ The court properly categorized Richerson's online speech, describing an administrator as a "smug know-it-all creep," as unprotected speech because Richerson was speaking as an employee about matters directly related to her employment as a teacher.¹⁵⁵ Although the court assumed that some of Richerson's speech was a matter of public concern because Richerson's blog was publicly available, Richerson was not speaking as a citizen on purely private matters.¹⁵⁶ In deciding whether the application of the *Pickering-Connick* analysis was in fact appropriate, the court was successful in its straightforward application.¹⁵⁷

Teachers speaking as citizens on purely personal matters are left with neither constitutional protection for their speech, nor recourse or remedy for their subsequent dismissals stemming from that speech when the *Pickering-Connick* analysis is applied to their private, online speech.¹⁵⁸ Nonetheless, teachers continue to challenge school boards across the nation for what is deemed unprotected speech.¹⁵⁹ School districts and

¹⁵⁴ See *Richerson v. Beckon*, 337 F. App'x 637, 638 (9th Cir. 2009) ("We nevertheless affirm the summary judgment because Richerson's transfer was appropriate under the balancing test laid out in *Pickering v. Board of Education*." (citing *Pickering v. Bd. of Educ. of Twp. H.S. Dist. 205, Will, Cnty., Ill.*, 391 U.S. 563 (1968))).

¹⁵⁵ *Richerson v. Beckon*, No. C07-5590 JKA, 2008 WL 833076, at *2 (W.D. Wash. Mar. 27, 2008); see *Connick*, 461 U.S. at 146 (holding that if a public employee's speech does not touch on a matter of public concern, the judiciary should not scrutinize the reasons for that employee's dismissal). The court held that public employers "enjoy wide latitude" in supervising and dismissing employees, and the courts should not be implicated each time a public employee is dismissed for her speech. *Id.* If the employee is not speaking about a matter of public concern, but rather only upon a matter of personal interest, a federal court is not the appropriate forum for reviewing the employer's decision. *Id.*

¹⁵⁶ See *Richerson*, 337 F. App'x at 638 (contending that Richerson's blog was publically-available and included "several highly personal and vituperative comments about her employers, union representatives, and fellow teachers"). The court found that Richerson's speech on her blog constituted an "actual injury to the school's legitimate interests." *Id.* at 639. Furthermore, the court held that "a public employee's speech [that] touches on matters of public concern is a 'necessary, but not a sufficient condition of constitutional protection.'" *Id.*

¹⁵⁷ See *infra* Part IV (discussing when the application of the *Pickering-Connick* analysis is appropriate for teacher's speech via social networking sites).

¹⁵⁸ See Ramasastry, *supra* note 58 (providing that Senate Bill 54's sponsor, Senator Cunningham, "argued that all she wanted to do was to limit 'hidden communications' between teachers and students, which could not be monitored readily by parents or school administrators"). "Cunningham focused on the fact that in certain instances, teachers may have sexually exploited children who were under their supervision—and that some communications, in those instances, involved social networking sites." *Id.*

¹⁵⁹ See *supra* note 59 and accompanying text (providing an example of the elements required for drafting written school district policies concerning teacher-student communication in response to the passage of Missouri's statute).

the Missouri legislature, in an unsuccessful attempt to offer a solution to school boards' concerns arising from teachers' online speech, have unconstitutionally restricted teachers' private speech.¹⁶⁰

E. Missouri's Overbroad and Vague "Facebook" Law

The Missouri legislature has imposed an overbroad and vague statute that restricts teachers' social networking use.¹⁶¹ Senate Bill Number 54 prohibits every teacher in Missouri from having any "nonwork-related internet site which allows exclusive access with a current or former student."¹⁶² Although the statute aims to protect school districts from situations whereby teachers cast a negative light on the school district, the standard set by the Missouri legislature extends too far.¹⁶³ First, the statute is unclear as to who is considered a current or former student.¹⁶⁴ The statute's opponents, particularly the Missouri State Teachers Association, point to the fact that former students could include any student that a teacher taught in the classroom or any student attending a teacher's school.¹⁶⁵ Failing to adequately define "student"

¹⁶⁰ See *infra* Part II.B (describing Missouri's statute restricting both teacher-student communication and teachers' private speech via social networking sites, such as Facebook).

¹⁶¹ See Potter, *supra* note 57 (stating that the law was "meant to protect children from sexual predators at school"). Additionally, Senator Jane Cunningham, the statute's chief sponsor, stated that "the law is not nearly as onerous as teachers and school districts claim," citing an Associated Press investigation that found that 87 Missouri teachers lost their licenses because of sexual misconduct. *Id.* Senator Cunningham stated the following:

This legislation is vital to protect our children from sexual predators in our schools—places meant as safe learning environments. Aside from mandatory extensive background checks, my bill will make it possible for school officials to be aware of sexual misconduct exhibited by potential hires and their employees when making staffing decisions. This will serve as an invaluable tool for protecting our children.

Cunningham, *supra* note 57.

¹⁶² S.B. 54, 96th Gen. Assemb., 1st Reg. Sess., at 14, ¶4 (Mo. 2011), <http://www.senate.mo.gov/11info/pdf-bill/intro/SB54.pdf>.

¹⁶³ See Cunningham, *supra* note 57 ("[The] legislation is vital to protect our children from sexual predators in our schools—places meant as safe learning environments."). Senator Cunningham goes on to say, "Aside from mandatory extensive background checks, my bill will make it possible for school officials to be aware of sexual misconduct exhibited by potential hires and their employees when making staffing decisions. This will serve as an invaluable tool for protecting our children." *Id.*

¹⁶⁴ See S.B. 54, 96th Gen. Assemb., 1st Reg. Sess., at 14, ¶2 (Mo. 2011), <http://www.senate.mo.gov/11info/pdf-bill/intro/SB54.pdf>. (providing that although the statute states that "former student" includes "any person who was at one time a student at the school at which the teacher is employed and who is eighteen years of age or less and who has not graduated;" many critics argue the ambiguity of the word "former").

¹⁶⁵ See *Facebook Movement Opposes Missouri Law*, ABC NEWS VIDEO (Aug. 23, 2011), <http://abcnews.go.com/Technology/video/facebook-movement-opposes-missouri-law-14366793> (depicting the statute's ambiguities in the exact meaning of "former student").

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imposes an unduly burdensome expectation on teachers because it does not take into consideration complications that may arise.¹⁶⁶ For example, if a teacher transfers into another school district, there is no clear indication as to whether students in a teacher's former school or school district are still considered a "former student" as the statute's language imposes.¹⁶⁷ The statute is unconstitutionally vague because it fails to provide clear language as to who the teacher is prohibited from communicating with, which is the chief concern and purpose of the legislation itself.¹⁶⁸

Another problem is that the statute makes it unlawful for teachers to "establish, maintain, or use a work-related internet site unless such site is available to school administrators and the child's legal custodian, physical custodian, or legal guardian."¹⁶⁹ Therefore, teachers who are parents and their children who are students are essentially prohibited from communicating via non-work related websites such as Facebook.¹⁷⁰ The statute also is void on its face because it stifles a teachers's freedom of personal choice in family matters, which is protected by the Due Process Clause of the Fourteenth Amendment.¹⁷¹ The statute unlawfully intrudes upon teachers' religious freedom and right of association by making it unlawful to communicate with youth leaders, church

¹⁶⁶ *Id.*

¹⁶⁷ See S.B. 54, 96th Gen. Assem., 1st Reg. Sess., at 14, (Mo. 2011), <http://www.senate.mo.gov/11info/pdf-bill/intro/SB54.pdf>. (explaining that "exclusive access" is "the information on the website [] 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)").

¹⁶⁸ See Petition for Injunctive Relief and Declaratory Judgment, *supra* note 60, at 3, ¶14 ("The Act is so vague and overbroad that the Plaintiffs cannot know with confidence what conduct is permitted and what is prohibited[.]").

¹⁶⁹ S.B. 54, 96th Gen. Assem., 1st Reg. Sess., at 14, ¶2 (Mo. 2011), <http://www.senate.mo.gov/11info/pdf-bill/intro/SB54.pdf>.

¹⁷⁰ See Petition for Injunctive Relief and Declaratory Judgment, *supra* note 60, at 5, ¶ 20(a) ("The Act would ban and make unlawful communications via non-work-related websites and other social networking sites between parent who are teachers and their children who are students.").

¹⁷¹ See *id.* at 5, ¶ 20(c) ("The Act interferes with the rights of parents and guardians to direct the upbringing and education of children under their control, and places a significant infringement on a fundamental right."). The Missouri Teachers Association continues, "[p]arents have a recognized liberty interest in the care, custody, and management of their children, and the Act would deprive parents of a means of communicating with their children without having afforded the parent a pre- or post-deprivation hearing." *Id.* at 5, ¶ 20(e).

members, or even newspaper reporters without the consent of the student's legal custodian or guardian.¹⁷²

Last, the statute offends teachers' academic and instructional rights because it potentially prohibits other communication sites, such as "Blackboard, Virtual Classroom, Angel, and other sites commonly used by teachers for online classes and distance learning."¹⁷³ Prohibiting such communication would be detrimental to both teachers and students, because online teacher-student interaction is not only one of the most effective teaching tools for teachers, but it is also one of the most valuable means for student learning.¹⁷⁴ By expressly prohibiting teachers from communicating with students online through messages or chats, teachers are getting a clear message that Facebook should simply be off limits, even if a teacher's social networking use entails communication with his or her students.¹⁷⁵ The statute assumes that teachers do not have the best judgment, which runs contrary to the school board's beliefs and expectations that all teachers should behave ethically and in a professional manner with their students.¹⁷⁶ The statute not only infringes on teachers' purely private or out-of-the-classroom speech, but it also acts as a prior restraint on a teacher's form of expression.¹⁷⁷ Whether teachers' private speech is unconstitutionally restricted by the legislatures or incorrectly examined and analyzed by the courts, it must be protected.¹⁷⁸ Therefore, a change in the judicial test applied by courts in teachers' online speech cases is necessary to protect

¹⁷² See *id.* at 3, ¶ 12 (discussing the statute's restriction of many popular and "increasingly indispensable computer and cell phone based technologies in wide-spread use in society today"). The Missouri State Teachers Association argued that the statute "unlawfully intrudes upon [the Missouri State Teachers Association's] religious freedom and right of association granted to [the Teachers Association] in Article I, Section 5 of the Missouri Constitution, and the [F]irst [A]mendment and the [F]ourteenth [A]mendment of the United States Constitution." *Id.* at 6, ¶ 21.

¹⁷³ *Id.* at 3, ¶ 13.

¹⁷⁴ See *supra* note 40 (discussing the various educational benefits of online interaction for both teachers and students).

¹⁷⁵ See *supra* notes 24–26 (discussing the implications of teachers' Facebook use).

¹⁷⁶ See Interview with Todd Fuller, *supra* note 103 (proclaiming that many teachers view legislative statutes as unnecessary because state administrative codes already address how teachers should conduct themselves within the education profession).

¹⁷⁷ See Petition for Injunctive Relief and Declaratory Judgment, *supra* note 60, at 4, ¶ 19(a) (arguing that the statute acts as a prior restraint on teachers' freedom of expression).

¹⁷⁸ See *supra* Part II.A.1 (discussing the importance of protecting the rights of teachers in their speech); see also *infra* Part IV (proposing a new test to ensure protection of private speech made by teachers on online social media sites).

the rights of teachers while maintaining the high standard of professionalism expected by school boards.¹⁷⁹

IV. CONTRIBUTION

The Court's current analysis for deciding whether a teachers' speech is protected should not apply to teachers who speak as private citizens on purely private matters via social networking sites.¹⁸⁰ Unfortunately, addressing all forms of teachers' online speech under the *Pickering-Connick* approach leaves teachers' private speech, which would otherwise be wholly protected absent social networking mediums, unprotected.¹⁸¹ Courts are striking down teachers' First Amendment claims because, under *Pickering-Connick*, most social networking speech is not considered a matter of public concern and therefore fails the first prong of the Supreme Court's analysis articulated in *Pickering*.¹⁸² To protect teachers' speech as applied to social networking sites, the courts must first address whether the *Pickering-Connick* analysis is in fact applicable.¹⁸³ This Note proposes a preliminary test to help courts ascertain whether the *Pickering-Connick* approach should be applied.

In addressing teachers' online speech, the courts should (1) determine whether the content of the speech is purely private and then (2) identify if the speaker is acting as a private citizen or a public employee. Only after both steps are completed can the courts determine whether application of the *Pickering-Connick* analysis is appropriate.¹⁸⁴

¹⁷⁹ See *infra* Part IV (proposing a judicial standard that courts can consistently apply to teachers' online speech cases).

¹⁸⁰ See *supra* Part III.C (arguing the inapplicability of *Connick's* public concern test to cases involving restrictions of teachers' speech on online social networking sites).

¹⁸¹ See *supra* Part II.A.1 (discussing teachers' First Amendment interest in expressing themselves regardless of whether it is through a column in the newspaper or through a post on Facebook).

¹⁸² See *supra* Part II.C (discussing the courts' dismissal of the First Amendment claims concerning speech via social networking sites in *Synder* and *Spanierman*).

¹⁸³ See *infra* text accompanying 183 (proposing a test that courts should apply when assessing teachers' social networking speech).

¹⁸⁴ See *Pickering v. Bd. of Educ. of Twp. H.S. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 568 (1968) (discussing (1) whether the speech that led to the adverse employment action related to a matter of public concern, and (2) whether, under the balancing test, the public employer can demonstrate that its legitimate interests outweigh the employee's First Amendment rights).

A. *Identifying the Content of the Speech*

Under the proposed test, the first step is to determine whether the content of the speech is purely private.¹⁸⁵ By first assessing the content of a teacher's speech, courts can decide whether, if at all, the *Pickering-Connick* analysis is applicable.¹⁸⁶ Teachers' online speech can be organized through a spectrum of speech including: (1) purely private speech, (2) political or social speech, and (3) speech relating to employment.¹⁸⁷ At one end of the spectrum lies teachers' purely private speech, which is the furthest from application of the *Pickering-Connick* analysis and the most protected under the First Amendment.¹⁸⁸ At the other end of the spectrum lies speech relating to a teachers' employment, which is the closest to the application of the *Pickering-Connick* analysis and presumably the least protected type of speech.¹⁸⁹

More specifically, purely private speech includes personal posts and blogs via social networking sites.¹⁹⁰ This speech most commonly includes private behavior, such as posting personal comments or photos online. Private speech also includes drinking, running a marathon, using profanity, congratulating a newlywed couple, or presumably talking about similar matters with friends online.¹⁹¹ The courts can easily identify this type of private speech by asking whether a teacher would hold these same conversations with their friends and relatives in person, through the telephone, letters or e-mail.¹⁹² This type of speech has nothing to do with the teachers' professional work and therefore should be the most protected under the First Amendment, because it is purely private speech.¹⁹³

¹⁸⁵ *Pickering*, 391 U.S. at 568.

¹⁸⁶ See *supra* Part II.C (explaining the test as provided by *Pickering* and *Connick*).

¹⁸⁷ See *supra* Part II.C (describing cases concerning purely private, political, and work-related speech).

¹⁸⁸ See *supra* Part III.D (analyzing the decisions in *Pickering* and *Connick*).

¹⁸⁹ See *Richerson v. Beckon*, 337 F. App'x 637, 638 (9th Cir. 2009) ("Richerson's transfer was appropriate under the balancing test laid out in *Pickering* . . . [H]er publicly-available blog included several highly personal and vituperative comments about her employers, union representatives, and fellow teachers.") (citing *Pickering*, 391 U.S. 563).

¹⁹⁰ See *supra* note 32 and accompanying text (describing social media sites as a way to share private information, such as a thought or feeling).

¹⁹¹ See *supra* Part II.A (discussing the various reasons and interests in communicating on social networking sites).

¹⁹² See *supra* text accompanying note 16 (explaining how social media sites are quickly becoming a substitute for a telephone call, an email, or even a text message).

¹⁹³ See *supra* Part II.C (describing the types of speech that are subject to the most exacting of First Amendment protection).

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The middle of the spectrum consists of political and social speech via social networking sites.¹⁹⁴ This speech includes commenting about a war, abortion, marijuana legalization, or politics, for example.¹⁹⁵ The courts can identify this speech by looking into both the purpose behind the speech, whether it is the subject of legitimate news interest, and whether the speech was intended for a public audience.¹⁹⁶ If answered in the affirmative, this type of speech is most likely political or social speech and is thus protected by the First Amendment because it is core political speech.¹⁹⁷

At the opposite end of the spectrum is speech that is intimately related to the speaker's employment.¹⁹⁸ This speech includes a speaker's personal grievances about his or her job, whether it includes criticizing the principal and the school district or commenting about the speaker's students online.¹⁹⁹ The courts can easily identify this type of speech by determining whether the speech has a direct impact on the speaker's employment and whether the speech would likely have an impact on the speaker's relationship with supervisors, co-workers, and students.²⁰⁰ By categorizing the content of a teacher's speech within that spectrum, the court is one step closer to determining the second part of the proposed test, which requires a court to characterize the identity of the speaker either as a private citizen or public employee.²⁰¹

B. Identifying the Speaker

In the second step of the proposed test, once the content of the speech is determined to be purely private, political or social, or work-related, the court must then resolve whether the speaker is speaking as a

¹⁹⁴ See *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 310 (D. Conn. 2008) (holding that a poem about the Iraq War on Spanierman's Myspace page could be considered political speech).

¹⁹⁵ See *Connick v. Myers*, 461 U.S. 138, 141 (1983) (finding that some of Connick's questionnaire included speech about political pressure placed on employees to work on political campaigns).

¹⁹⁶ See *supra* Part III.C (analyzing *Connick's* public concern test relating to the context and content of speech).

¹⁹⁷ See *Hudson v. Craven*, 403 F.3d 691, 699 (9th Cir. 2005) (finding that the college instructor's speech was political because the speech concerned a public rally and march opposing the World Trade Organization).

¹⁹⁸ See *supra* Part III (explaining that speech that is a matter of public concern may be regulated by the State).

¹⁹⁹ See *supra* text accompanying note 182-83 (proposing a new test that should be adopted to help determine whether *Pickering-Connick* should be applied).

²⁰⁰ See *supra* Part III.A (analyzing the competing interests at stake when teachers speak through social media sites).

²⁰¹ See *supra* text accompanying notes 182-85 (defining the proposed test that should be entered into when analyzing teachers' speech through social media).

private citizen or a public employee.²⁰² If the content of the speech is purely private, the speaker is speaking as a private citizen and thus should be afforded complete First Amendment protection.²⁰³ Whether it is updating a status on Facebook about drinking the night before or posting a picture wearing a bikini, the teacher is speaking about purely private matters, which have nothing to do with her employment and position as a teacher. When Lisa posts a picture of herself holding a glass of wine, she is not acting as Ms. Hall, but as Lisa Hall. This is not to say, however, that school boards give up their discretion in disciplining teachers' behavior. Teachers may still be disciplined for conduct that may be "immoral" or "unbecoming" to the teaching profession.²⁰⁴ However, this a distinction that both the courts, in addressing claims, and teachers, in pleading their cases, must recognize as a disciplinary issue, rather than a First Amendment issue.²⁰⁵ Whether a teacher has received adequate notice for what constitutes appropriate or inappropriate online behavior that ultimately leads to a teacher's dismissal concerns a teacher's due process rights, not the First Amendment—which does not, and should not, regulate a citizen's purely private speech.²⁰⁶

Accordingly, if the content of the online speech is political or intimately related to the speaker's employment, then the *Pickering-Connick* analysis should be applied.²⁰⁷ Under the *Pickering-Connick* analysis, a public employee's speech is protected when the speaker is commenting on matters of public concern, which inherently includes

²⁰² See *supra* Part III.A (explaining that school districts and administrators, as public employers, undoubtedly have an interest not only in fostering an environment that promotes effective learning, but also in maintaining its employees' conduct because inappropriate conduct could potentially interfere with that mission).

²⁰³ See *supra* note 33 (arguing that First Amendment protection is extended to private individuals speaking on matters of private concern).

²⁰⁴ See CAL. EDUC. CODE § 44434 (West 1999) (recognizing "immoral and unprofessional conduct" as a grounds for teacher dismissal); ALASKA STAT. ANN § 14.20.170(2) (West 1999) (allowing teacher dismissal for immorality); GA. CODE ANN. § 20-2-940(a)(4) (2000) (finding teachers may be dismissed for immoral conduct); see also MO. REV. STAT. § 168.114(2) (1999); TENN. CODE ANN. § 49-5-501 (1999); W. VA. CODE ANN. § 18A-2-8 (West 2000).

²⁰⁵ See *supra* Part III.D (discussing how the court in *Spanierman* failed to acknowledge teachers' academic freedom rights, partly because of an improper pleading of the case).

²⁰⁶ See *supra* Part III.B (defining the protection afforded by the First Amendment as applied to purely private speech).

²⁰⁷ Compare *Richerson v. Beckon*, 337 F. App'x 637, 639 (9th Cir. 2009) (rejecting Richerson's First Amendment challenge concerning statements made on a personal blog), *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at *16 (E.D. Pa. Dec. 3, 2008) (upholding Snyder's removal and rejecting her free speech challenge), and *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 313 (D. Conn. 2008) (upholding Spanierman's dismissal and rejecting his free speech challenge), with *supra* Part IV (suggesting that these cases would likely have turned out differently under this Note's proposed method of analysis).

political or social speech.²⁰⁸ Thus, a teacher's online speech on a blog or Facebook about a war, abortion, or the legalization of marijuana, would be protected under the First Amendment.²⁰⁹ Teachers' political or social speech via social networking sites has a greater likelihood of tipping the balance in the teacher's favor because political speech is at the core of protected, First Amendment speech. Additionally, if a teacher is speaking about matters directly relating to his or her employment and profession as a teacher, the *Pickering-Connick* analysis would also be applicable.²¹⁰ However, teachers' online speech criticizing the school, its administrators, or students, will likely fall under personal grievances, which is speech that is unprotected under the *Pickering-Connick* analysis.²¹¹

Teachers, just like any other public employees, have lives outside of their employment. Similar to the mailman who leaves the post office at the end of day and is no longer considered a public employee but rather a private citizen, the teacher who walks out of the classroom and is in the privacy of his or her home, is also no longer considered a public employee but a private citizen. Whether it is the mailman or the teacher, each speaker is speaking as a private citizen when they sign into their Facebook accounts. However, school boards and administrators argue that teachers are unlike all other public employees because of their elevated status and unique role they perform in educating our youth.²¹² School administrators should have the discretion to draw the line as to whether a teacher is speaking as a private citizen or a public employee.²¹³ By identifying the speaker as a citizen or a public employee after addressing the content of teachers' speech via social networking sites, the courts will eliminate such discretion.²¹⁴

²⁰⁸ See *Connick v. Myers*, 461 U.S. 138, 145 (1983) ("The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.") (internal quotation marks omitted).

²⁰⁹ See *supra* Part III.B (defining the protection afforded by the First Amendment for political or social speech).

²¹⁰ See *supra* text accompanying note 182-88 (providing a model analysis that courts should apply before analyzing a teacher's social media speech claims under the *Pickering-Connick* test).

²¹¹ See *supra* Part III.B-C (explaining that a teacher's complaints are not protected speech under the tests laid out in *Pickering* and *Connick*).

²¹² See *supra* Part III.A (describing the unique role that teachers play in educating our youth).

²¹³ See *supra* Part II.B (describing the Missouri statute that attempts to draw the line for teachers' online speech).

²¹⁴ See *Pickering v. Bd. of Educ. of Twp. H.S. Dist. 205, Will, Cnty., Ill.*, 391 U.S. 563, 568 (1968) (balancing the "interests of the teacher, as a citizen" in commenting upon matters of public concern).

The proposed test for determining whether the *Pickering-Connick* framework should be applied to teachers' online speech not only protects teachers' purely private speech, but it also preserves the *Pickering-Connick* framework laid out by the Supreme Court.²¹⁵ The inconsistency among the courts applying the *Pickering-Connick* analysis is a direct result of the Supreme Court's failure to first identify the content of the teacher's speech.²¹⁶ However, once the proposed test is applied and the content of the teacher's speech is not identified as a private citizen speaking on purely private matters, then the *Pickering-Connick* analysis is correctly applied to online social networking speech.²¹⁷

However, this does not imply that inconsistencies will not develop in the courts' application of the proposed test. Critics will argue that identifying the speech as purely private versus political or work-related speech may result in some courts incorrectly categorizing the content of the teachers' online speech.²¹⁸ But by relying on the spectrum of speech proposed, ranging from purely private speech at one end of the spectrum to public speech falling under the *Pickering-Connick* analysis at the other end of the spectrum, courts identifying the content of the speech would properly recognize the distinction between purely private versus every other type of speech.²¹⁹ Therefore, teachers' purely private speech will always be protected, assuming there is no misidentification of the content of a teacher's online speech.

Critics will also argue that school administrators, parents, and communities have a legitimate and superior interest in restricting teachers' online speech because students may see their teachers implicitly endorsing alcohol use or exposing students to sexually explicit material.²²⁰ Although administrators wish to hold teachers to the highest moral standard, it is legal for teachers to consume alcohol, use profanity, and engage in other adult activities, or discuss those activities with their

²¹⁵ See *supra* text accompanying note 185 (providing the proper test that should be entered into when analyzing teacher's speech through social medium).

²¹⁶ See *Pickering*, 391 U.S. at 568 ("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.").

²¹⁷ See Part IV (proposing a preliminary test that must be applied by the courts when assessing teachers' speech on social media sites).

²¹⁸ See *supra* Part III.D (describing the courts' misidentification of the content of teachers' speech on social networking sites).

²¹⁹ See *supra* Part IV (suggesting that courts (1) determine whether the content of the speech is purely private and (2) identify the speaker either as a private citizen or a public employee).

²²⁰ See *supra* Part II.A.2 (describing school boards' interest in restricting teachers' speech via social networking sites).

friends even if such speech is via an online Facebook posting.²²¹ This is not to say that teachers who decide to place inappropriate comments, pictures, or videos on social networking sites are not still subject to disciplinary action or termination.²²² Under no test should courts allow such inappropriate speech or conduct to go unpunished.²²³ The proposed test is designed to protect teachers' purely private speech, which was already entitled to First Amendment protection despite any technological advancement that transforms the method in which people communicate with one another. The proposed test accomplishes that purpose by protecting teachers who are acting as private citizens and speaking on purely private matters, eliminating any concerns school administrators, parents, or communities may have for permitting inappropriate or unprotected speech that may disrupt students' learning environment.²²⁴

V. CONCLUSION

Regulation of teachers' online speech, whether through a statute, district-level policy, or acceptable use agreement, creates First Amendment concerns when teachers' online speech consists of purely personal matters. Such limitations have caused school boards to impose disciplinary actions against teachers for their purely private speech. Under the *Pickering-Connick* approach, almost all of teachers' online speech is categorized as matters of private concern, and, as a result, teachers unwillingly forfeit their First Amendment claims merely because they decided to express their private speech through a posting on Facebook, rather than talking to a friend in the privacy of their homes. Despite this parallelism, the courts, under the *Pickering-Connick* analysis, have concluded that teachers' online speech is unprotected. The proposed preliminary test is designed to assist courts in distinguishing purely private speech from any other type of online speech; thus, it acts as a guideline to whether the *Pickering-Connick* analysis should even be applicable. It also aids to prevent the courts' misapplication of the

²²¹ See *supra* text accompanying note 112 (explaining that because public school teachers play a unique role in shaping the minds of our youth, teachers are held to higher standard of professionalism and moral character).

²²² See *supra* Part II.B (depicting various grounds for disciplinary action against teachers, such as incompetence, negligence of duty, substantial noncompliance with school laws, insubordination, and immoral conduct).

²²³ See *supra* note 25 (detailing numerous examples of teachers who were, or are, currently under investigation or have been dismissed for their inappropriate conduct on social networking sites).

²²⁴ See *supra* text accompanying note 50 (describing the legitimate interest schools have in maintaining a professional rapport between teachers and students).

Pickering-Connick analysis by limiting its application to the appropriate type of speech.

The proposed test protects Lisa and any other teacher who posts a photo of herself standing on the beach holding an alcoholic beverage on her Facebook profile.²²⁵ Under the current application of the *Pickering-Connick* analysis, Lisa would likely lose her First Amendment claim because her speech is not considered a matter of public concern. However, under the proposed test courts would easily recognize that the photo is a purely private expression by a private citizen and, therefore, enjoys First Amendment protection. On the other hand, even if courts determine that Michelle's online speech is purely private, and therefore protected, school boards still maintain the authority to discipline clearly inappropriate speech or conduct.²²⁶ Although the proposed test is intended to protect teachers' purely private speech under the First Amendment, such inappropriate speech or conduct that crosses the teacher-student boundary is not exempt from discipline by school boards and administrators. The proposed test protects teachers' purely private speech while simultaneously giving school administrators the discretion to determine the best interests of the students and all parties involved.

Lumturije Akiti*

²²⁵ See *supra* text accompanying note 1 (detailing a hypothetical situation that contextualizes the problems addressed by this Note).

²²⁶ See *supra* text accompanying note 2 (detailing a second hypothetical situation that contextualizes the problems addressed by this Note).

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