

2009

## Symposium: Oiling the Schoolhouse Gate: After Forty Years of Tinkering with Teachers' First Amendment Rights, Time for a New Beginning

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### Recommended Citation

Wohl, Alexander. "Oiling the Schoolhouse Gate: After Forty Years of Tinkering with Teachers' First Amendment Rights, Time for a New Beginning." *American University Law Review* 58, no. 5 (June 2009): 1285-1321.

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## Symposium: Oiling the Schoolhouse Gate: After Forty Years of Tinkering with Teachers' First Amendment Rights, Time for a New Beginning

### **Abstract**

This Article will examine how (and how far) we have fallen from the legal precedent and educational principles behind *Tinker*, specifically the increasingly remote standards courts have used to chip away (and sometimes sledgehammer) the speech rights of teachers. To this end, the Article will consider some of the unique and fundamental characteristics associated with a profession that has at its core the mission of encouraging speech, raising questions, and teaching the ability to think—in short, “expressive activities.” It will also look at how the increasingly restrictive standards do not reflect fully the challenges posed by the advent of new technologies that increase (intentionally or not) communications between students and teachers. Finally, the Article will explore the possibility of future courses of action that can help restore teachers to their unique place in First Amendment (and public employee) law while maintaining an appropriate deference to the singular characteristics of our locally based and controlled educational system and appropriate limits on what a teacher may or may not say to students in or out of a classroom.

### **Keywords**

*Tinker*, First Amendment, Expressive Activities

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# OILING THE SCHOOLHOUSE GATE: AFTER FORTY YEARS OF *TINKERING* WITH TEACHERS' FIRST AMENDMENT RIGHTS, TIME FOR A NEW BEGINNING

ALEXANDER WOHL\*

## TABLE OF CONTENTS

Introduction.....	1286
I. The Story So Far—A History of Courts Embracing the Role of Teachers and Education .....	1288
II. Chipping Away at Teacher Rights .....	1295
A. Early Limits and Balancing.....	1295
B. The <i>Hazelwood</i> Hazard .....	1297
C. Closing the Schoolhouse Door—Teachers As (Just) Public Employees .....	1301
III. Considering the Consequences of a Forty-Year Journey Away From Common Sense—Some Areas For Improvement .....	1309
A. Legislative and Contractual Responses .....	1312
B. Technological Developments .....	1315
C. Rehabilitating the Reputation of Teachers.....	1318
Conclusion .....	1319

*"I cannot teach anybody. I can only make them think."*

Socrates

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## INTRODUCTION

The Supreme Court's 1969 decision in *Tinker v. Des Moines Independent Community School District*<sup>1</sup> is one of those rare rulings that almost immediately became a part of the pantheon of "hallmark" Supreme Court cases—opinions known not simply by lawyers as a matter of constitutional interpretation and precedent, but by a broader portion of the population as a piece of American history itself.<sup>2</sup> The decision was relatively straightforward, upholding the rights of three students to wear black armbands in connection with a Vietnam War protest and finding that school officials may restrict student speech only if that speech "materially and substantially disrupt[s] the work and discipline of the school."<sup>3</sup> Notwithstanding the ruling's relatively ordinary character, several possible reasons exist for its instant and continuing status: It may have been the general drama of a conflict that involved a student First Amendment symbolic speech challenge—the wearing of a black armband to protest a war at the height of '60s student activism. Or, it may have been because the prohibited speech directly involved the constitutional rights available to students and teachers, which in turn made the decision a "teachable moment" in classrooms across the country.<sup>4</sup> Perhaps it was the combination of the language and

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1. 393 U.S. 503 (1969).

2. See, e.g., Kay S. Hymowitz, *Tinker and the Lessons from the Slippery Slope*, 48 DRAKE L. REV. 547, 548 (2000) (calling *Tinker* a "signal moment" in our liberation from the social hierarchies of the 1950s); Leonard M. Niehoff, *The Student's Right to Freedom of Speech: How Much Is Left at the Schoolhouse Gate?*, 75 MICH. B.J. 1150, 1150 (1996) (calling *Tinker* a "landmark" decision); Nadine Strossen, *Keeping the Constitution Inside the Schoolhouse Gate—Students' Rights Thirty Years After Tinker v. Des Moines Independent Community School District*, 48 DRAKE L. REV. 445, 447 (2000) (discussing the importance of the *Tinker* case in free speech jurisprudence); William Bird, Note, *Constitutional Law—True Threat Doctrine and Public School Speech—An Expansive View of a School's Authority to Discipline Allegedly Threatening Student Speech Arising Off Campus*, 26 U. ARK. LITTLE ROCK L. REV. 111, 124 (2003) ("Any analysis of student free speech rights begins with the landmark case of *Tinker v. Des Moines Independent Community School District*"). It is worth noting that public knowledge of Supreme Court decisions is a relative concept given that lack of awareness of the Supreme Court and understanding of its rulings is more the rule. See, e.g., Findlaw.com, Findlaw's U.S. Supreme Court Awareness Survey, <http://public.findlaw.com/ussc/122005survey.html> (last visited Mar. 23, 2009) (finding that fifty-seven percent of adult American's could not name any current U.S. Supreme Court Justice). But see VALERIE HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS 6 (2003) (arguing that the conventional notion that the public is largely ignorant of information about the Court is flawed because this conclusion is often based on national public polls instead of examining how cases are viewed within the local communities they impact).

3. *Tinker*, 393 U.S. at 513.

4. Cf. Gary L. Reglin, *Public School Educators' Knowledge of Selected Supreme Court Decisions Affecting Daily Public School Operations*, 7 J. RES. RURAL EDUC. 17 (1990),

context of Justice Abe Fortas's opinion itself—the dramatic, bold and distinctly non-legalese turns of phrase used by the Court in stating that neither “students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”<sup>5</sup>—with the culmination of the individual rights revolution of the Warren Court.<sup>6</sup> Or perhaps it was that it weaved together themes and views that captured the essence of the profession of teaching and the role of education in our democracy. Whatever the reason, forty years later, *Tinker* remains one of the most resounding, eloquent, and perhaps utopian statements about free expression, a marker of the significance of the relationship between academic freedom and educational rigor in our democracy.

And yet, even as this reputation has been maintained and enhanced, with zealous students, committed teachers, and vigorous First Amendment and education lawyers continuing to cite *Tinker*'s prose as a virtual mantra, the disheartening truth is that the *Tinker* decision represented a high point of student and teacher rights. Since *Tinker*, these rights have been steadily whittled away, shortchanged in the name of enforcing academic discipline and pedagogical interests,<sup>7</sup> a purported need to balance school-related issues against the “public concern”<sup>8</sup> and even against the measure of a teacher's official duties itself.<sup>9</sup>

This Article will examine how (and how far) we have fallen from the legal precedent and educational principles behind *Tinker*, specifically the increasingly remote standards courts have used to chip away (and sometimes sledgehammer) the speech rights of teachers. To this end, the Article will consider some of the unique and fundamental characteristics associated with a profession that has

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available at <http://jrre.psu.edu/articles/v7,n1,p17-22,Reglin.pdf> (discussing how research indicating a lack of awareness among educators of Supreme Court decisions affecting education suggests a need for educator training in public school law).

5. *Tinker*, 393 U.S. at 506.

6. For background on the Warren Court, see generally LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000); Alexander Wohl, *The Warren Court*, in 5 *ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES* 173–79 (David S. Tanenhaus ed., 2008).

7. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (allowing schools to control student speech in “school-sponsored expressive activities” when the school’s action is “reasonably related to legitimate pedagogical concerns”).

8. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563, 568 (1968).

9. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding statements made by public employees pursuant to their official duties are not afforded full constitutional protection under the First Amendment).

at its core the mission of encouraging speech, raising questions, and teaching the ability to think—in short, “expressive activities.”<sup>10</sup> It will also look at how the increasingly restrictive standards do not reflect fully the challenges posed by the advent of new technologies that increase (intentionally or not) communications between students and teachers. Finally, the Article will explore the possibility of future courses of action that can help restore teachers to their unique place in First Amendment (and public employee) law while maintaining an appropriate deference to the singular characteristics of our locally-based and controlled educational system and appropriate limits on what a teacher may or may not say to students in or out of a classroom.

#### I. THE STORY SO FAR—A HISTORY OF COURTS EMBRACING THE ROLE OF TEACHERS AND EDUCATION

To best understand how this area of the law has developed, where it falls short, and what *Tinker* means today, it may be helpful to consider teacher speech issues in two broad categories: direct classroom speech and what can be most easily called (but which encompasses far more than this limited term) extracurricular speech. The first category involves speech by teachers that is arguably curricular in nature, classroom-based, and that has a direct and intentional impact on students. Ironically, perhaps, the leading cases in this area, known generically as the *Tinker-Hazelwood* line of cases, are premised on challenges to *student* speech, and simply apply those principles to teachers rather than establish a specific or distinct right of expression for teachers.<sup>11</sup> As one noted commentator in the field has explained, the Supreme Court “has danced around the issue of applying the First Amendment to teachers’ in-class speech.”<sup>12</sup>

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10. See Vikram Amar & Alan Brownstein, *Academic Freedom*, 9 GREEN BAG 17, 22–23 (2005) (noting that “public educational institutions are not unlike government owned and operated libraries, museums, and other organizations that have an essentially expressive function”); Zachary Martin, Comment, *Public School Teachers’ First Amendment Rights: In Danger in the Wake of “Bong Hits 4 Jesus,”* 57 CATH. U. L. REV. 1183, 1183 (2008) (stating that a “teacher’s typical school day involves . . . describ[ing] concepts, show[ing] pictures, play[ing] films,” all of which are “expressive activities”).

11. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

12. Karen C. Daly, *Balancing Act: Teachers’ Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 4 (2001); see also Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right To Teach*, 65 N.Y.U. L. REV. 693, 694–95 (1990) (stating that “the Supreme Court never has addressed directly the

This is not to say that the role of teachers and the importance of their speech have not been recognized by the courts for its unique and important role in shaping our democracy. Nor that it is on par with that of students, who must face the additional burden of being minors and, therefore, are not given the full range of rights they would have as adults in many areas of the law. When it comes to the specific role of teachers in classrooms, however, courts have shied away from establishing an individual standard. In part, this is because there have always been strong limits placed on teachers through this nation's tradition of local control of education. As the Supreme Court has noted, "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and the quality of the educational process."<sup>13</sup> Within this local control exists an inherent political structure and power arrangement in which school boards, not teachers, control curricula. The limited role of teachers also comes about from concerns over indoctrinating impressionable youth, whether related to values, politics, or personal behavior.<sup>14</sup> The younger a student is, the greater the concern about the subject matter being taught.<sup>15</sup> Accordingly, K-12 teachers are given less leeway on so-called academic freedom issues than are college instructors. Thus, for instance, there is little debate (but still frequent litigation) about elementary and secondary teachers who

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extent to which [public school teachers] carry first amendment rights into the classroom").

13. *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974); see Richard W. Riley, *The Role of the Federal Government in Education—Supporting a National Desire for Support for State and Local Education*, 17 ST. LOUIS U. PUB. L. REV. 29, 30 (1997) (noting that “the day-to-day administration and operation of schools have remained the work of local and private authorities”).

14. See Welner, *supra* note 22, at 975–79 (discussing schools’ inculcative role throughout American history). For example, Horace Mann, an education pioneer and the first Secretary of the Massachusetts Board of Education, “expressed concern that educators too often ignored students’ ‘moral natures’ and ‘social affections.’” *Id.* at 976–77. Accordingly, Mann “called for greater state control over school curricula and practices.” *Id.* at 977.

15. *Cf. Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988). There, the Court stated:

[A] school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting.

*Id.*

seek to wear campaign buttons into the classroom.<sup>16</sup> It is anything but a new concern. In the fourth century B.C., Socrates was sentenced to death after being found guilty of corrupting the minds of the youth of Athens.<sup>17</sup>

The second broad category involves speech by teachers in their personal capacity or, if made in their role as teacher, that which is unintended to have a direct impact or influence on students. This category includes communications on matters involving school-related issues, such as school conditions, education funding, or personnel matters. Unlike curricular speech, the Supreme Court has repeatedly and definitively outlined and embraced the rights of teachers with respect to this question.<sup>18</sup> More recently, however, the Court has grouped teachers within the broader category of public employees, which has led to a further limiting of their rights of expression and communication.<sup>19</sup> This analysis is known as the *Pickering-Connick-Garcetti* line of cases.<sup>20</sup>

Under both of these strands of analysis, teachers have lost ground. Furthermore, the courts have increasingly conflated and merged the two strands, blurring the line between curricular and non-curricular speech, in and out of class activities, and matters of public and non-public concern.<sup>21</sup> This blurring, combined with the failure of many courts to adequately address technological advances affecting communications, has created an area of murkiness for teachers and

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16. See, e.g., *Weingarten v. Bd. of Educ. of the City Sch. Dist. of the City of New York*, 591 F. Supp. 2d 511 (S.D.N.Y. 2008). While upholding the prohibition on campaign buttons, the judge allowed teachers to place campaign material into colleagues mailboxes and hang posters on bulletin boards maintained by the union, as long as they were off limits to students. *Id.* at 522; see also J.M. Brown, *Soquel High teachers asked to remove Obama Buttons in class*, SAN JOSE MERCURY NEWS, Oct. 1, 2008.

17. JAMES A. COLAICO, *SOCRATES AGAINST ATHENS: PHILOSOPHY ON TRIAL* 1 (2001).

18. See, e.g., *Connick v. Myers*, 461 U.S. 138, 147 (1983) (noting a threshold question of whether the statement is a matter of public concern); *Perry v. Sinderman*, 408 U.S. 593, 596 (1972) (affirming that a non-tenured teacher, whose contract was not renewed after he spoke out against the Board of Regents, must be afforded due process); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563, 568 (1968) (rejecting the implicit conclusion of the Illinois Supreme Court that teachers may be constitutionally compelled to surrender First Amendment rights in the context of public policy criticisms of their school boards).

19. See *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) (considering previous case law concerning teacher speech rights to determine whether a deputy district attorney's First Amendment rights were violated when he was terminated for a letter he wrote in favor of dismissing a case).

20. See *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007) (applying the *Pickering-Connick-Garcetti* analysis).

21. See *infra* Part IV (discussing *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989) and *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998)).



has limited their ability to be innovative in the classroom and responsive to the needs of the school environment.

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Though *Tinker* is among the most well-known and arguably most expansive free speech cases, it followed in a long line of cases that embraced the principle that a school should be a “marketplace of ideas”<sup>22</sup> and that teachers are a critical merchant within this marketplace. Indeed, the significance of teachers has a long and distinguished history within the case law that goes far beyond the two simple words in Justice Fortas’s opinion in *Tinker*—“or teachers”—that significantly broadened the population of who does not shed their rights at the schoolhouse gate. On numerous occasions, the Supreme Court had expounded on the significance of teaching and teachers as a critical part of our society in terms of development of students’ ability to be engaged fully in our democratic traditions. In *West Virginia State Board of Education v. Barnette*,<sup>23</sup> for instance, the Court upheld a student’s right not to say the Pledge of Allegiance to begin each school day, and in so doing laid the foundation for First Amendment protections for school-related activities.<sup>24</sup> As the Court explained, the fact that schools “are educating the young for citizenship is reason for scrupulous protection of Constitutional Freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”<sup>25</sup> This has special relevance related to the actions and speech of teachers, as Justice Felix Frankfurter noted in 1952:

It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and

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22. See Kevin Welner, *Locking up the Marketplace of Ideas and Locking Out School Reform: Courts’ Imprudent Treatment of Controversial Teaching in America’s Public Schools*, 50 UCLA L. REV. 959, 980–86 (2003) (discussing the “marketplace of ideas” concept originally set forth in *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967)). While the concept of the marketplace of ideas as embraced by the Supreme Court has significant positive ramifications for teacher speech, Professor Welner also notes that “the concept of schools as marketplace of ideas is most accurately viewed as protecting the right of students to shop, rather than as protecting the right of teachers to sell.” *Id.* at 987–88.

23. 319 U.S. 624 (1943).

24. *Id.* at 642.

25. *Id.* at 637.

practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied them.<sup>26</sup>

*Tinker* itself was actually the third of three significant Supreme Court cases decided in successive years at the end of the turbulent 1960s, each of which considered legal implications of, or protections for, speech in an education context.<sup>27</sup> In *Keyishian v. Board of Regents*,<sup>28</sup> the Court struck down a McCarthy-era New York law that forced university faculty members to certify that they were not members of communist or other subversive organizations.<sup>29</sup> Although it did not address or outline specific protections for teachers in rejecting that law, the Court did further enunciate the significance of the principles of the freedom to teach and learn:

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. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."<sup>30</sup>

The Court built on the language and principles of several earlier decisions that grew out of the McCarthy era, a period when freedom of thought and expression was in short supply. Indeed, teachers, among many others, were often required to sign loyalty oaths, and independent thought and speech were not simply grounds for discipline, but for firing and subsequent investigation and arrest.<sup>31</sup> Already noted was Justice Frankfurter's concurring opinion in *Wieman v. Updegraff*,<sup>32</sup> which struck down a state loyalty oath.<sup>33</sup> Justice William O. Douglas made a similar point in a dissenting opinion in

26. *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

27. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563 (1968); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

28. 385 U.S. 589 (1967).

29. *Id.* at 609–10.

30. *Id.* at 603 (alteration in original) (citations omitted).

31. Amar & Brownstein, *supra* note 10, at 22.

32. 344 U.S. 183, 194–98 (1952) (Frankfurter J., concurring).

33. *Id.* at 191.

another case involving state loyalty oaths, *Adler v. Board of Education*.<sup>34</sup> He stated: “The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it and none needs it more than the teacher.”<sup>35</sup>

One of the most important teacher-related decisions during the McCarthy era was *Sweezy v. New Hampshire*.<sup>36</sup> *Sweezy* was another ruling that flowed from the restrictive and often excessive McCarthy-era laws that seriously impinged First Amendment rights. In *Sweezy*, the Court explained that “scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”<sup>37</sup> It was an important point in which the Court implicitly stated that educators were different from other public employees. In fact, it was precisely because of principles of academic freedom that educators became more willing to challenge government authority, which in turn, strengthened the educational system and our democracy.<sup>38</sup>

The year after deciding *Keyishian*, the Court looked specifically at the level of scrutiny and protection that a teacher’s actions received within the school walls, though not directly related to teaching activities. *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*<sup>39</sup> involved a public school teacher who had written to the local newspaper criticizing the school board and superintendent for how they spent school funds.<sup>40</sup> In upholding the teacher’s right to express views on a matter of legitimate public concern and finding fault with the school policy as presenting inadequate grounds for dismissal, the Court again embraced the

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34. 342 U.S. 485 (1952), *overruled in part by* *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

35. *Id.* at 508 (Douglass, J., dissenting).

36. 354 U.S. 234 (1957).

37. *Id.* at 250.

38. See, e.g., GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 423–26 (2004) (discussing University of Chicago President Robert Maynard Hutchins’ efforts in 1949 to protect the free speech rights of the school’s faculty and students, who were under attack by red-baiting Illinois politicians). Some schools became havens for professors forced to leave their institutions as a result of the red-baiting of the period. Indeed, Brandeis University, created in 1948, quickly became a leading liberal arts institution because it refused to question the political background of its professors, judging them only on their intellectual merit. See MARTY JEZER, *ABBIE HOFFMAN: AMERICAN REBEL* 21 (1993) (stating that Senator Joseph McCarthy’s reluctance to investigate Brandeis University can be attributed to his fear that he would be accused of anti-Semitism and citing this as a reason that Brandeis became a home to many blacklisted professors).

39. 391 U.S. 563 (1968).

40. *Id.* at 564–67.

significance of the teacher's role as an important member of the community.<sup>41</sup> It stated:

To the extent that the [lower court's] opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.<sup>42</sup>

But even as the Court found favor in that historic principle, it created a standard that ultimately would bode ill for those rights—a balancing test for gauging the importance of teachers' speech within the context of their role as public employees.

Writing for the Court in *Pickering*, Justice Thurgood Marshall described the limits of criticism a teacher can constitutionally demonstrate, stating that courts must “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.”<sup>43</sup> Marshall's goal was to ensure that more high-minded critiques offered by teachers were protected, but that more mundane things, such as personal attacks, or statements based on private disagreements, were not. Ultimately, he concluded, the present case was one

in which a teacher 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 in the classroom or to have interfered with the regular operation of the schools generally.<sup>44</sup>

In these circumstances, he continued, “we conclude 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.”<sup>45</sup>

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41. See *id.* at 572 (stating that “[t]eachers are, as a class, the members of the community most likely to have informed and definite opinions as to how funds allotted to the operations of the school should be spent”).

42. *Id.* at 568 (citing *Wieman v. Updegraff*, 344 U.S. 183 (1952), *Shelton v. Tucker*, 364 U.S. 479 (1960), and *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967)).

43. *Id.* at 568.

44. *Id.* at 572–73.

45. *Id.* at 573.

In at least one respect, the Court's analysis in *Pickering*, elaborated on in subsequent decisions, indicated that teachers—in contrast to other public employees—play a special role when discussing issues of public concern, particularly those involving the school. In *Perry v. Sindermann*,<sup>46</sup> for instance, a case involving consideration of a professor's due process rights in light of the Texas state college system's failure to renew his contract after policy disputes with the Board of Regents, the Court specifically noted with favor the constitutional significance of "a teacher's public criticism of his superiors on matters of public concern."<sup>47</sup> Even more significant was the Court's decision in another case to uphold a nonunion teacher's right to speak on a matter related to ongoing collective bargaining. In *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*,<sup>48</sup> the Court reaffirmed that teachers "are the very core of [the school] system; restraining teachers' expressions to the board on matters involving the operation of the schools would seriously impair the board's ability to govern the district."<sup>49</sup> Thus, by the time the Court decided *Tinker*, it had provided plenty of legal and rhetorical ammunition to support the principles of free speech within an education setting.

## II. CHIPPING AWAY AT TEACHER RIGHTS

### *A. Early Limits and Balancing*

The *Tinker-Keyishian-Pickering* trio of cases provided an important marker that, in the short term at least, helped broaden the communication rights of teachers by emphasizing not only their value but also the important link between teaching, education, and principles of academic freedom.<sup>50</sup> But even as these decisions acknowledged this value and connection, they also unmistakably laid the groundwork for a virtual elimination of this right.<sup>51</sup> This was the result of both a narrowing of speech protections, through the creation of new legal tests, and a convergence of the two strands of analyses. In the case of in-class speech, the courts placed greater emphasis on the risk of that speech disrupting the school

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46. 408 U.S. 593 (1972).

47. *Id.* at 598 (citing *Pickering*, 391 U.S. at 568).

48. 429 U.S. 167 (1976).

49. *Id.* at 177.

50. *See supra* Part I.

51. *See infra* notes 54–56 and accompanying text (discussing language from *Tinker* that has been misapplied by courts).

environment or harming the students who might be on the receiving end.<sup>52</sup> In the case of extracurricular speech, the courts added new emphasis to the public value the speech was required to have.<sup>53</sup>

*Tinker* acknowledged and reaffirmed—in as prominent a place as the sentences immediately prior to and following the “schoolhouse gate” language—the need to balance what is said based on the potential disruption of the classroom and the maturity of who is on the receiving end.<sup>54</sup> In the preceding sentence the Court noted that “First Amendment rights, applied in light of the *special characteristics of the school environment*, are available to teachers and students.”<sup>55</sup> Just a few sentences later the Court stated, “[o]n the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of . . . school officials, consistent with fundamental constitutional safeguards, to . . . control conduct in the schools.”<sup>56</sup> Although the Court probably did not realize it at the time, that measured language would be misappropriated and become a primary rationale in subsequent decisions as a means of limiting the speech of teachers as well as students.

In *Board of Education v. Pico*,<sup>57</sup> the Court reached a decision that was positive for the First Amendment by finding unconstitutional a decision by school officials to remove books from a library on purely political grounds.<sup>58</sup> But the language in the decision nonetheless laid the groundwork for expanding the discretion that school boards have in this area to prescribe curriculum matters (including library resources) as part of the duty to teach community values. That next step was taken in *Bethel School District No. 403 v. Fraser*,<sup>59</sup> in which the Court allowed school officials to suppress vulgar speech by a student in a nominating speech for another student during a school-sponsored assembly.<sup>60</sup> Both the trial and appeals courts in *Fraser* had ruled that the school did not have the power to punish the student for the offensive speech, concluding that the speech was

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52. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)); *infra* notes 57–64 and accompanying text (discussing *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (plurality opinion)).

53. See *infra* Part III (discussing *Connick v. Myers*, 461 U.S. 138 (1983), *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989), and *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998)).

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

55. *Id.* (emphasis added).

56. *Id.* at 507.

57. 457 U.S. 853 (1982) (plurality opinion).

58. *Id.* at 871–72.

59. 478 U.S. 675 (1986).

60. *Id.* at 685.

“indistinguishable from the protest armband in *Tinker*.”<sup>61</sup> But the Supreme Court disagreed and rejected the comparison with *Tinker*.<sup>62</sup> In fact, the Court employed a subtle reference to the importance of education as a means of *limiting* the communications that go on in a school: “[S]chools must teach by example the shared values of a civilized social order,” the Court stated in language that previously might have prefaced a discussion striking down administrative sanctions.<sup>63</sup> Instead, the Court used this as a rationale for concluding that the school district was within its power to impose sanctions on Fraser for his “offensively lewd and indecent speech.”<sup>64</sup>

### B. *The Hazelwood Hazard*

The most significant of the post-*Tinker* decisions within the curriculum line of cases is *Hazelwood School District v. Kuhlmeier*.<sup>65</sup> In *Hazelwood*, the Supreme Court upheld a principal’s decision to censor the student newspaper by removing several articles that he felt were objectionable because they dealt with students’ experiences with pregnancy and the impact of divorce.<sup>66</sup> The crux of the decision was the Court’s finding that the school newspaper was a non-public forum and, as such, “school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.”<sup>67</sup> *Hazelwood* is another case in which the facts involved student speech and in which the negative application to teachers was derivative (but just as detrimental). Not only did teachers and administrators have the right to prevent this kind of speech, the Court continued, but they also could bar a variety of other types of speech under a standard that ultimately “may be higher than those demanded by some newspaper publishers or theatrical producers in the ‘real’ world.”<sup>68</sup> The bottom line, the Court stated, is that educators may exercise censorial powers over the style and content of student speech if that control is “reasonably related to legitimate pedagogical concerns.”<sup>69</sup>

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61. *Id.* at 679.

62. *Id.* at 685.

63. *Id.* at 683.

64. *Id.* at 685.

65. 484 U.S. 260 (1988).

66. *Id.* at 274–76.

67. *Id.* at 267.

68. *Id.* at 272.

69. *Id.* at 273.

The Court specifically sought to reassure that it was not rejecting its holding in *Tinker* or the “special characteristics of the school environment” that *Tinker* and previous decisions had emphasized.<sup>70</sup> To this end, the Court contrasted the personal expressions of a student that *happened* to occur on school premises (*Tinker*) with expressions or actions involved with *school-sponsored* activities and that “members of the public might reasonably perceive to bear the imprimatur of the school” (*Hazelwood*).<sup>71</sup> The Court further suggested that the issue was one of the differences between whether the First Amendment requires a school “to tolerate” particular speech rather than “affirmatively to promote” it.<sup>72</sup> But, as Justice Brennan noted in dissent, the opinion actually went much further.<sup>73</sup> Though Brennan focused on the impact to student speech rights and what he called high school students being “denude[d] . . . of much of th[eir] First Amendment protection,” he also highlighted the equally dangerous impact on the role played by educators themselves, noting that the effect is “particularly insidious from one to whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees.”<sup>74</sup>

*Hazelwood* has been criticized on many levels,<sup>75</sup> not the least of which is the way it contradicts and interferes with the underlying mission of the school itself by eliminating the balance between administrators, teachers, students, and parents in favor of the safety

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70. *Id.* at 266 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

71. *Id.* at 271.

72. *Id.* at 270–71 (emphasis added).

73. *Id.* at 277–91 (Brennan, J., dissenting).

74. *Id.* at 289.

75. See, e.g., Scott Andrew Felder, *Stop the Presses: Censorship and the High School Journalist*, 29 J.L. & EDUC. 433, 448–51 (2000) (arguing that the Court’s reasoning was flawed for a number of reasons, including its failure to “justify its creation of a second standard by which student speech would be tested”); Alexander Wohl, *The Hazelwood Hazard: Litigating and Legislating in the State Domain when Federal Avenues Are Closed*, 5 ST. THOMAS L. REV. 1, 9–13 (1992) (characterizing the decision as a “blight on the world of scholastic journalism”); Christopher J. Palermo, Note, *Only the News That’s Fit To Print: Student Expressive Rights in Public School Communications Media After Hazelwood v. Kuhlmeier*, 11 HASTINGS COMM. & ENT. L.J. 35, 68–70 (1988) (arguing that the *Hazelwood* standard is flawed because it is “subject to abuse from overly broad interpretation” and it “undermine[s] the effectiveness of student newspapers as an educational tool”); Jeffrey D. Smith, Comment, *High School Newspapers and the Public Forum Doctrine: Hazelwood School District v. Kuhlmeier*, 74 VA. L. REV. 843, 861 (1988) (“The . . . sweeping language has placed students at the mercy of school officials.”); see also Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L.J. 37, 63–67 (2008) (stating that “*Hazelwood* has often served as a basis for substantially restricting teachers’ First Amendment rights in the classroom”).



net of complete control in the name of pedagogical concerns.<sup>76</sup> But also, as Justice Brennan pointed out, the endorsement of administrative censorship undercuts the principles of teaching, learning, and intellectual questioning that are central to a school environment and the development of young minds.<sup>77</sup> This is especially harmful to teachers and their role in the broader educational mission of schools to help students learn how to think and be thoughtful participants in American democracy. Moreover, by further equating students and teachers within the framework of “legitimate pedagogical concerns,” the decision undermines what little intellectual independence or control teachers had left concerning either issues of curricula or the classroom.<sup>78</sup> It confirms that teacher innovation in support of developing intellectual curiosity and promoting educational rigor is less at the center of the mission of schools than intellectual control, conformity, and political expedience. A legitimate pedagogical concern is merely what a school board or other administrative authority says it is.<sup>79</sup>

As many subsequent lower court decisions citing *Hazelwood* have made clear, teachers have been left with little in the way of what they can say or the impact they can have on students or in-classroom activities, let alone curricular decisions.<sup>80</sup> Typical of this line of cases is a decision from the U.S. Court of Appeals for the Tenth Circuit that explicitly linked *Tinker* and *Hazelwood* in rejecting a challenge from a teacher placed on administrative leave.<sup>81</sup> In *Miles v. Denver Public Schools*,<sup>82</sup> a teacher had made statements in class concerning

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76. See Daly, *supra* note 12, at 11–16 (“The use of an undifferentiated standard for students and teachers ignores the legal distinctions and different level of constitutional protection afforded to children and adults, resulting in insufficient protection for teacher speech and contributing to the denigration of teachers as professionals.”).

77. *Hazelwood*, 484 U.S. at 283–85 (Brennan, J., dissenting).

78. Daly, *supra* note 12, at 13–16.

79. Amar & Brownstein, *supra* note 10, at 20 (citing *Settle v. Dickson County*, 53 F.3d 152 (6th Cir. 1996)).

80. See, e.g., *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 830 (9th Cir. 1991) (en banc) (upholding a school district’s refusal to allow Planned Parenthood to publish advertisements in school newspapers); *Poling v. Murphy*, 872 F.2d 757, 764 (6th Cir. 1989) (finding no First or Fourteenth Amendment violations of a student’s rights where a principal’s disqualified the student from student elections after the student made a campaign speech critical of the administration); *Krizek v. Bd. of Educ.*, 713 F. Supp. 1131, 1144 (N.D. Ill. 1989) (denying a preliminary injunction for a teacher whose employment contract was not renewed after she showed an R-rated film to her students).

81. *Miles v. Denver Pub. Sch.*, 944 F.2d 773 (10th Cir. 1991).

82. 944 F.2d 773 (10th Cir. 1991).

rumors that students were engaged in sexual activity during recess.<sup>83</sup> The circuit court noted that while “students in the public schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate, . . . educators do not offend the First Amendment by exercising editorial control over school-sponsored expression ‘so long as their actions are reasonably related to legitimate pedagogical concerns.’”<sup>84</sup>

Two parts of this encapsulation are particularly revealing and troubling in terms of their application to the rights of teachers. The first is that the court failed to even include the word “teacher” from the original quotation it cited from *Tinker*.<sup>85</sup> The second is that the court left out teachers from the category of “educators” who have “control over school-sponsored expression,” which directly prefates the “reasonably related to legitimate pedagogical concerns” language.<sup>86</sup> In short, teachers are in a virtual no-man’s land, stuck with the diminishing First Amendment rights applied to students and yet treated in an equally limited way by administrators.

An even more recent Supreme Court decision is worth noting in this brief survey of diminishing First Amendment returns. In *Morse v. Frederick*,<sup>87</sup> the Court added yet another limitation on student speech that is likely to have an impact on teacher speech. The school suspended a student, Joseph Frederick, who had held a large banner with the message “Bong Hits 4 Jesus” during a school-sanctioned activity, observing the torch relay for the Winter Olympic Games.<sup>88</sup> The Supreme Court narrowly upheld the student’s punishment even though the student was not in school or even on school grounds at the time.<sup>89</sup> The *Morse* Court based its decision on a confusing and incomplete examination of the public forum issue it had raised in *Fraser*, *Hazelwood*, and several other cases.<sup>90</sup> By failing to examine a

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83. *Id.* at 774–75.

84. *Id.* at 775.

85. Compare *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students *or teachers* shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” (emphasis added)), with *Miles*, 944 F.2d at 775 (noting that “students in the public schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” (internal quotation marks omitted)).

86. See *Miles*, 944 F.2d at 775 (failing to include teachers within its definition of educators).

87. 127 S. Ct. 2618 (2007).

88. *Id.* at 2622–23.

89. *Id.* at 2624, 2629 (finding that Frederick’s banner was “school speech,” despite being across the street from the school, because he displayed it at a school-sanctioned event while standing among teachers and fellow students).

90. *Id.* at 2626–28.

number of factual questions, such as whether Frederick should be considered a student at the time of his actions and whether the event was school-sponsored or mandatory, the Court essentially created another exception to the *Tinker* rule by expanding the world of the school's non-public forum.<sup>91</sup> The potential impact of this interpretation on teachers is significant in that it gives courts eager to limit teacher speech another bite at the apple. Not surprisingly, redefining where speech is prohibited or expanding the nature of the school workplace can have a significant impact on a school's ability to silence a teacher.<sup>92</sup> Even more deleterious to teacher speech, however, is placing teachers within a whole other category and creating a rule that makes virtually anything he or she says prohibited and punishable by school officials.

C. *Closing the Schoolhouse Door—Teachers As (Just) Public Employees*

The impact of *Hazelwood* and its progeny on teachers' rights was compounded as courts began to combine the curricular-based, pedagogical concerns test of *Hazelwood* and *Tinker* with the "matter of public concern" balancing test the Court had outlined in *Pickering*.<sup>93</sup> Worse yet, in subsequent decisions, the Court applied the *Pickering* test in a manner that completely eliminated what little "balance" there was. In *Pickering* the Court had recognized that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for a dismissal from public employment," even if that speech is inaccurate.<sup>94</sup> As the Court explained, the premise that "teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work" is "a premise that

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91. Martin, *supra* note 10, at 1207.

92. *Id.* at 1207–08 (noting that the Supreme Court's failure to even determine whether the banned student speech occurred in a public forum potentially bodes ill for teacher speech as well, since it "extends the classroom even further").

93. See, e.g., *Connick v. Myers*, 461 U.S. 139, 146 (1983) (concluding that government officials have wide latitude when their speech does not relate to political, social, or community concern); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 371 (4th Cir. 1998) (holding teachers' First Amendment rights are limited by school authorities); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 802 (5th Cir. 1989) (holding curriculum disputes are not matters of public concern and thus not constitutionally protected speech).

94. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist 205, Will County, Ill.*, 391 U.S. 563, 574 (1968).

has been unequivocally rejected in numerous prior decisions of this Court.”<sup>95</sup>

But subsequent decisions would severely limit the protection that teachers received for their traditional role as informed commentators on education-related issues. The Court’s holding in *Connick v. Myers*<sup>96</sup> was a first step. In *Connick*, the Court *upheld* the right of Sheila Myers, an assistant district attorney, to distribute a questionnaire to her colleagues concerning office transfer policy, morale, confidence in superiors, and other similar issues.<sup>97</sup> In reaching this conclusion, *Connick* applied *Pickering* and balanced the First Amendment rights of public employees against the rights of those employees as private citizens.<sup>98</sup> But the *Connick* decision added a new element to the analysis: whether the employee’s speech could be characterized as “a matter of public concern,” which the Court defined as “any matter of political, social, or other concern to the community.”<sup>99</sup> Employing a rationale that sounded remarkably similar to the Court’s determination in *Hazelwood* regarding the need to maintain discipline in schools, the Court explained that “the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs.”<sup>100</sup>

Although *Connick* seemed harmless enough at the time, in part because of its holding in support of the employee, the significance of the introduction of the “public concern” test would prove daunting to free speech advocates in the years to come. Indeed, it did not take long for other courts to link *Connick* to *Pickering* and *Hazelwood* and apply them as a one-two punch to teachers’ speech rights. In *Kirkland v. Northside Independent School District*,<sup>101</sup> for instance, the U.S. Court of Appeals for the Fifth Circuit considered and rejected the appeal of a high school history teacher who had been fired for using his own reading list rather than an administration-approved reading list.<sup>102</sup> The teacher also had failed to follow school guidelines for substituting alternative lists.<sup>103</sup> Applying both the *Pickering-Connick* and *Hazelwood* analyses, the court first concluded that the teacher’s reading list was not a matter of public concern.

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95. *Id.* at 568.

96. 461 U.S. 138 (1983).

97. *Id.* at 154.

98. *Id.* at 150–54.

99. *Id.* at 146.

100. *Id.* at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974)).

101. 890 F.2d 794 (5th Cir. 1989).

102. *Id.* at 795–96.

103. *Id.* at 796.

[I]ssues do not rise to a level of ‘public concern’ by virtue of the speaker’s interest in the subject matter; rather, they achieve that protected status if the words or conduct are conveyed by the teacher in his *role as a citizen* and not in his *role as an employee* of the school district.<sup>104</sup>

Then, in denying Kirkland’s claims of academic freedom, the court applied *Hazelwood*, noting that “school officials may impose reasonable restrictions on the speech of students, *teachers*, and other members of the school community.”<sup>105</sup> While it is certainly easier to justify the restraint on teacher speech in *Kirkland*, in light of the generally understood rules on curricula that the teacher failed to follow, other instances of legal analysis applying these principles are less straight forward.

Such was the case in the *en banc* opinion of the U.S. Court of Appeals for the Fourth Circuit in *Boring v. Buncombe County Board of Education*.<sup>106</sup> In *Boring*, the court found no constitutional protection (under either the *Hazelwood-Tinker* or *Pickering-Connick* analyses) for a high school drama teacher who had *complied* with school policies, but who had still been reassigned because of her involvement with the use and performance of an arguably controversial play by an advanced acting class.<sup>107</sup> The play, which included “mature subject matter,” had initially been used by the class at a regional drama competition.<sup>108</sup> Later, a scene was performed for an English class at the school, at which time the drama teacher, Boring, had suggested requiring parental permission slips.<sup>109</sup> After a parent complained, the principal cancelled the play’s remaining performances.<sup>110</sup> The drama students were allowed to perform at a state competition, at which they won second place, with an edited version of the material.<sup>111</sup> The

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104. *Id.* at 798–99.

105. *Id.* at 801 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988)).

106. 136 F.3d 364 (4th Cir. 1998).

107. *Id.* at 368.

108. *Id.* at 366.

109. *Id.*

110. *Id.*

111. *Id.* The principal allowed the students to participate in the state competition so long as objectionable scenes were deleted from the production. *Id.* While the complaint did not specifically allege that the students performed the edited version of the play, the court assumed that the performance was in conformity with the principal’s instructions. *Id.*

following year the principal requested Boring's transfer to another school.<sup>112</sup>

In rejecting Boring's claim, the court noted that under *Hazelwood*, the play was curricular in nature and therefore "by definition a legitimate pedagogical concern."<sup>113</sup> The court further noted that the play was not, as outlined in *Connick*, a matter of public concern, but simply an "ordinary employment dispute."<sup>114</sup> In a separate concurrence, Judge J. Michael Luttig left a bit of room for First Amendment protection of non-curricular teacher speech in the classroom<sup>115</sup> but reaffirmed his belief in the need for deference to school boards on *curricular* questions. Judge Luttig also made clear his skeptical view of teachers, stating that "were every public school teacher in America to have the constitutional right to design (even in part) the content of his or her individual classes . . . schools would become mere instruments for the advancement of the individual and collective social agendas of . . . teachers."<sup>116</sup>

In a dissenting opinion, Judge Diana Gribbon Motz sharply criticized the majority as offering a rationale that was legally and intellectually faulty.<sup>117</sup> Judge Motz suggested that, not only was the play a matter of public concern because it involved controversial and often debated topics, but also that no legitimate pedagogical concern was ever offered by the school.<sup>118</sup> Finally, Judge Motz suggested that there were inherent and significant problems that arise when trying to pigeonhole all in-class teacher speech within a public employee model.<sup>119</sup>

The final nail in the teacher speech coffin was hammered relatively recently with the Supreme Court's sweeping 2006 decision in *Garcetti v. Ceballos*.<sup>120</sup> *Garcetti* is another non-teacher case that has had an enormous impact on teachers by merging several analyses. The

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112. See *id.* at 366–67 (stating that the transfer was approved because Boring "had failed to follow the school system's controversial materials policy in producing the play").

113. *Id.* at 370.

114. *Id.* at 368.

115. See *id.* at 373 (Luttig, J., concurring) (conceding that when a teacher's in-class speech is non-curricular, it "assuredly enjoys some First Amendment protection," while curricular speech "assuredly does not").

116. *Id.*

117. See *id.* at 375–80 (Motz, J., dissenting) (finding fault with the majority for failing to apply the proper standard of review and misconstruing seminal cases, including *Kirkland* and *Connick*).

118. *Id.* at 375–79.

119. See *id.* at 378 (arguing that the uniqueness of a teacher's in-class speech prevents it from fitting neatly within *Connick*'s "public concern element").

120. 547 U.S. 410 (2006).

Supreme Court combined *Pickering*'s balancing with *Connick*'s "public concern" and then added an entirely new and arbitrary standard that severely limits the rights of public employees generally, and teachers specifically, by "remov[ing] from teachers' arsenal of protection . . . the long-recognized First Amendment right whereby an individual public employee's speech may be protected from the power of the state."<sup>121</sup> Richard Ceballos was a Los Angeles County Deputy District Attorney who received notice from a defense attorney that an affidavit in an ongoing case was allegedly erroneous.<sup>122</sup> After examining the warrant, Ceballos agreed with the defense attorney.<sup>123</sup> He subsequently wrote a memorandum to his supervisors on the issue and then met with them and the members of the sheriff's department who had sworn the affidavit.<sup>124</sup> In a motion on the warrant at trial, Ceballos was called as a witness by the defense attorney.<sup>125</sup> The Court allowed the warrant and Ceballos subsequently was on the receiving end of what he said were retaliatory employment actions.<sup>126</sup>

Justice Kennedy, speaking for a slim five-Justice majority, first applied the two-part *Pickering* test to determine whether Ceballos "spoke as a citizen on a matter of public concern," and if so, to determine whether "the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."<sup>127</sup> He then took that analysis a step further to find that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."<sup>128</sup> Since Ceballos's examination of the warrant was undoubtedly part of his job description, it clearly fell within the Court's new classification of "official duties," and therefore was not protected by the First Amendment.<sup>129</sup> In their dissenting opinions, Justices Stevens and Souter argued that the new bright-line rule imposed by the majority was both illogical and counterproductive.<sup>130</sup> "[I]t is senseless to let

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121. Susan P. Stuart, *Citizen Teacher: Damned If You Do, Damned If You Don't*, 76 U. CIN. L. REV. 1281, 1282 (2007).

122. *Garcetti*, 547 U.S. at 413.

123. *Id.* at 414.

124. *Id.*

125. *Id.* at 414–15.

126. *Id.* at 413–15.

127. *Id.* at 418.

128. *Id.* at 421.

129. *Id.*

130. *Id.* at 427 (Stevens, J., dissenting); *id.* at 430 (Souter, J., dissenting).

constitutional protection for exactly the same words hinge on whether they fall within a job description,” wrote Justice Stevens, noting further that such a rule would discourage employees from reporting questionable or even illegal behavior to their superiors precisely because of the fear of retaliation and the lack of protection.<sup>131</sup> Justice Souter pointed out that the rule would likely lead to the creation of arbitrary, overbroad, and inaccurate job descriptions.<sup>132</sup>

Not surprisingly, given that *Garcetti* shifted the burden to an employee when challenging an employer’s job-related action, the vast majority of decisions since then have gone against petitioners.<sup>133</sup> As one district judge noted, with *Garcetti*, “the Supreme Court dramatically changed the landscape of retaliation cases brought by public employees . . . . This holding imposes a substantial new obstacle for employees: most cases decided by the court of appeals since *Garcetti* have resulted in dismissal . . . .”<sup>134</sup> Nowhere is this impact felt more clearly than in the teaching world, where there is no longer a serious path to follow for a court interested in supporting a teacher’s historic First Amendment rights, a teacher’s role as intellectual leader and challenger, or even as gadfly or critic on “matters of public concern.”<sup>135</sup> Justice Souter addressed the all-

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131. *Id.* at 427 (Stevens, J., dissenting).

132. *Id.* at 431 n.2 (Souter, J., dissenting).

133. See Stuart, *supra* note 121, at 1283 (noting that in the year since the Court issued *Garcetti*, 280 lower court opinions have cited the ruling, most of which were favorable and upheld “the firing of any number of public employees including teachers”). A similar search of cases citing *Garcetti* since then shows continued reliance on the holding and similar trends in terms of the success of public employees, and particularly teachers, contesting job related actions. See, e.g., *Amos v. District of Columbia*, 589 F. Supp. 2d 48, 54–55 (D.D.C. 2008) (finding that a D.C. Department of Transportation worker’s statement to his superiors regarding contractor improprieties was made pursuant to his official duties and therefore, under *Garcetti*, not protected by the First Amendment); *Bryant v. Gardner*, 587 F. Supp. 2d 951, 962 (N.D. Ill. 2008) (holding that a teacher/high school basketball coach’s statements criticizing the principal’s decision to cancel “open gym” for his players were not protected speech because they were made pursuant to his official duties).

134. *Doucette v. Minocqua, Hazelhurst & Lake Tomahawk Joint Sch. Dist. No. 1*, No. 07-cv-292-bbc, 2008 WL 2412988, at \*1 (W.D. Wis. June 12, 2008). Some courts have refused to apply *Garcetti* to teachers, either because of specific facts in the case or because they do not believe teachers should fall under this classification. See *Doucette v. Minocqua*, No. 07-cv-292, 2008 WL 2412988 (W.D. Wis. June 12, 2008). However, even in cases in which courts have not applied *Garcetti* to public school teachers, they have still found against the teacher claims under the more traditional tests. *Evans-Marshall v. Bd. of Ed. of Tipp City Exempted Village Sch. Dist.*, No. 3:03cv091, 2008 WL 298174 (S.D. Ohio July 30, 2008).

135. *Garcetti*, 547 U.S. at 445 (Breyer, J., dissenting) (citing *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563, 568 (1968)).



encompassing quality of the ruling and the implications for higher education teachers in particular, saying he hoped the majority did “not mean to imperil First Amendment protection of academic freedom in public colleges and universities.”<sup>136</sup> In a vague response to this concern, Justice Kennedy noted that “[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence,” but added that such an issue was not before the Court.<sup>137</sup>

Though *Garcetti* may indeed leave some future room for the speech of college instructors, the likelihood that any protections will fall to K-12 teachers is extremely small. As the U.S. Court of Appeals for the Seventh Circuit noted in a post-*Garcetti* opinion, academic freedom for K-12 teachers is no longer even on the table.<sup>138</sup> In *Mayer v. Monroe County Community Corp.*,<sup>139</sup> the court rejected the appeal of a teacher who had been dismissed because she claimed she had offered her personal political views in a classroom current events discussion.<sup>140</sup> Not only did the court reject out-of-hand her argument that “principles of academic freedom” should prevent the court from applying the *Garcetti* standard, but it also turned down the previously acknowledged understanding that teachers have a special role that requires additional protections for speech.<sup>141</sup> “[P]ublic-school teachers must hew to the approach prescribed by principals (and others higher up in the chain of authority),”<sup>142</sup> Judge Easterbrook proclaimed, adding, in language that served both to deflate the role of teachers and inflate his own intellectual bona fides:

[T]he school system does not “regulate” teachers’ speech as much as it hires that speech. Expression is a teacher’s stock in trade, the commodity she sells to her employer in exchange for a salary. A

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136. *Id.* at 438 (Souter, J., dissenting).

137. *Id.* at 425 (majority opinion).

138. See *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 479–80 (7th Cir. 2007) (“Children who attend school because they must ought not be subject to teachers’ idiosyncratic perspectives.... [I]f indoctrination is likely, the power [to choose classroom subjects] should be reposed in someone the people can vote out of office, rather than tenured teachers.”).

139. 474 F.3d 477 (7th Cir. 2007).

140. *Id.* at 478. During the discussion, a student asked the teacher if she had ever participated in a demonstration, to which she answered that when passing a protest against the war in Iraq and seeing “a placard saying ‘Honk for Peace,’ she honked her car’s horn to show support for the demonstrators.” *Id.*

141. *Id.* at 479–80.

142. *Id.* at 479.

teacher hired to lead a social-studies class can't use it as a platform for a revisionist perspective that Benedict Arnold wasn't really a traitor, when the approved program calls him one; a high-school teacher hired to explicate *Moby-Dick* in a literature class can't use Cry, The Beloved Country instead, even if Paton's book better suits the instructor's style and point of view; a math teacher can't decide that calculus is more important than trigonometry and decide to let Hipparchus and Ptolemy slide in favor of Newton and Leibniz."<sup>143</sup>

Still another aspect of *Garcetti* has helped undermine the previously recognized role teachers have to comment on potential problems in the world of education generally and their schools specifically. As Justice Stevens stated, "it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors."<sup>144</sup> He distinguished the ruling with the Court's earlier decision in *Givhan v. Western Line Consolidated School District*,<sup>145</sup> noting that "[w]e had no difficulty recognizing that the First Amendment applied when Bessie Givhan, an English teacher, raised concerns about the school's racist employment practices to the principal. Our silence as to whether or not her speech was made pursuant to her job duties demonstrates that the point was immaterial."<sup>146</sup> In fact, *Garcetti*'s illogic makes a teacher's ability to do his or her job in a responsible manner a liability.

Thus, a high school science teacher who was also a sponsor of the cheerleading squad was punished for responding honestly to a questionnaire about the program—even though her supervisor requested her to reply to it—because she was speaking in her professional capacity and not as a citizen.<sup>147</sup> Similarly, a federal district court in New York, relying on *Garcetti*, found no First Amendment protection for several New York City public school teachers forced to resign in retaliation after reporting that their supervisor had sexually harassed students and other teachers.<sup>148</sup> Although the supervisor was eventually fired after the allegations were substantiated, the reports filed by the teachers were held to be

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143. *Id.*

144. *Garcetti v. Ceballos*, 547 U.S. 410, 427 (2006) (Stevens, J., dissenting).

145. 439 U.S. 410 (1979).

146. *Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting) (citation omitted).

147. *Gilder-Lucas v. Elmore County Bd. of Educ.*, 186 F. App'x 885, 887 (11th Cir. 2006).

148. *Pearson v. Bd. of Educ.*, 499 F. Supp. 2d 575, 588–89 (S.D.N.Y. 2007).

“an official duty” and therefore not covered under the *Garcetti* rule.<sup>149</sup> The absurdity of this policy is highlighted even further by the knowledge in that case that the school district policy *mandated* that employees report allegations of sexual harassment.<sup>150</sup> Certain retaliatory actions taken against an educator attempting to meet a legal requirement, such as reporting workplace safety, sex discrimination, or age discrimination, will be prevented by federal law.<sup>151</sup> But other actions, such as those involving the Individuals with Disabilities Education Act (IDEA) do not have such provisions.<sup>152</sup> The illogic and counter-productivity of the Court’s approach is plain.

### III. CONSIDERING THE CONSEQUENCES OF A FORTY-YEAR JOURNEY AWAY FROM COMMON SENSE—THREE AREAS FOR IMPROVEMENT

Four decades after the Supreme Court’s decision in *Tinker*, the two primary strands of legal analysis addressing teacher speech—the *Tinker-Hazelwood* and *Pickering-Garcetti* lines of cases—provide neither an intellectually satisfying, nor legally sound approach to the issue. What began as a sensible balancing of First Amendment rights, school disciplinary policy, and an understanding of the importance of dynamic, unhindered, and innovative teaching that should go into a school day, has evolved into a haphazard, arbitrary policy full of inconsistencies, exceptions, and a heavy bias toward limiting teacher speech. The specter of punishment that hangs over a teacher as the result of a potentially controversial comment in the course of a lesson or in response to a student’s question teaches “more about subservience than about participation and civic courage.”<sup>153</sup> The resulting self-censorship can often reach beyond classroom lessons to extra-curricular activities, such as school drama productions.<sup>154</sup>

The *Hazelwood* “pedagogical concerns” rationale that has evolved is inappropriate to apply to teachers for a number of reasons. The

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149. *Id.* at 589; *see also* *Worley v. Webb Consol. Indep. Sch. Dist.*, No. L-08-136, 2009 WL 87781, at \*2 (S.D. Tex. Jan. 9, 2009) (finding no First Amendment protection under *Garcetti* for a teacher who claimed she was fired for reporting to the principal a report that a coach had abused another coach).

150. *Id.* at 584.

151. *See* Stuart, *supra* note 121, at 1308 (noting that “[a] small handful of federal civil rights statutes have anti-retaliation provisions”).

152. *See id.* (contrasting Olga Yatzus’ unsuccessful retaliation claim brought under IDEA and her “more successful” claim against the school district under Title VII).

153. Stanley Ingber, *Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue*, 46 RUTGERS L. REV. 1473, 1575–76 (1994).

154. *See, e.g.*, Patrick Healy, *Even a Tamer Version of ‘Rent’ Is Too Wild for Some Schools*, N.Y. TIMES, Feb. 20, 2009, at A1 (discussing how and for what reasons high school officials continue to cancel school productions of the Broadway musical *Rent*).

most basic is that it simply was never intended to address teacher speech.<sup>155</sup> While there are numerous overlapping interests and applications between teachers and students, applying one analysis to both is like trying to fit a square peg into a round hole. Teachers are likely to be far more involved with curricular (and broad education-related) issues, so they are likely to suffer more than students when these legal standards are contracted. Furthermore, the very nature and significance of teacher speech within the school means that virtually all teacher speech potentially raises pedagogical concerns. Not surprisingly perhaps, many courts have “misconstrued” a teacher’s speech as “speech on behalf of the school,” resulting in an “all-or-nothing” approach to discussion of legitimate pedagogical concerns that has led to significant diminution of teachers’ rights.<sup>156</sup>

Likewise, the *Pickering-Connick-Garcetti* line of cases has seen its initial pragmatism left by the wayside as courts have created and over-applied new rules and exceptions.<sup>157</sup> Even acknowledging the importance of balancing the competing interests of teachers as citizens and members of a public institution (as well as influencers of individual students), the tests developed by the Court no longer provide teachers with the appropriate room to operate as the professionals they are. The “matter of public concern” rule, for instance, is as one informed commentator noted, “strained, contrived, and nonsensical; how does one characterize instruction as a ‘matter of public concern’ or ‘not a matter of public concern’?”<sup>158</sup> Furthermore, it is barely respectful of teachers as citizens and “inadequate to guard the interests of teachers as professionals.”<sup>159</sup> The rule laid out by the Court in *Garcetti* not only limits arguably

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155. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that educators do not violate a student’s First Amendment rights when they exert editorial control over the style and content of *student* speech in school-sponsored activities, as long as they are “reasonably related to legitimate pedagogical concerns”).

156. Daly, *supra* note 12, at 13–15.

157. See Neal Hutchens, *supra* note 75, at 59–61 (2008) (examining lower courts’ uncertainty and inconsistency in applying these standards to faculty members at public colleges and universities and theorizing that the First Amendment rights afforded to those professors will ultimately impact the protections provided to elementary and secondary school teachers).

158. Welner, *supra* note 22, at 1000.

159. Daly, *supra* note 12, at 11; 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, 418 (2002) (arguing that the “logical flaw” in the *Pickering* balancing test is that “[w]hen determining who should be the models for the competing interests, if a teacher has to be ‘acting as a citizen,’ the counterpart should be the State ‘as a supplier of public services’ rather than ‘as an employer’”).

disruptive or otherwise problematic speech, but also removes the likelihood, or even the possibility, that teachers can or will make the kind of appropriate and positive contributions to a school, such as reporting illegal or counterproductive activities, upon which communities depend.

The devolution in First Amendment protections for teachers since *Tinker* is further complicated because, as the two strands of legal analysis have worked individually to constrict the speech rights of teachers, the distinction between the two increasingly has been one without much of a difference.<sup>160</sup> Fewer courts cite solely a *Hazelwood* rationale for upholding disciplinary actions against teachers for in-class speech, and increasingly use the public employee analysis of *Pickering* and *Garcetti* to uphold those actions.<sup>161</sup> Many relate not to curriculum issues, but to teachers' in-class statements that parents and others perceived as ideological or political.<sup>162</sup> Courts today often use the two forms of analysis interchangeably or in tandem, blurring the distinction and the reasoning for a distinction between in-class and extra-curricular communications.<sup>163</sup> As one scholar succinctly put it, "the academy, not the academician, is the locus of 'academic freedom'."<sup>164</sup> In fact, however, it is more than just the principle of academic freedom being lost in this power struggle. It is the underlying value placed on innovative teaching and learning in our society, which in turn affects the value of a teacher within the education equation and the rigor of the educational system itself.<sup>165</sup> As one judge noted perceptively:

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160. See Hutchens, *supra* note 75, at 62 (discussing the confusion in the courts over "whether elementary and secondary public school teachers are subject to the *Garcetti* standards for speech related to curriculum or pedagogy or both").

161. See Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 79–80 (2008) (discussing the circuit split over the use of the two standards and noting that the Seventh Circuit recently adopted the *Pickering* analysis after following *Hazelwood* for nearly twenty years).

162. Stuart, *supra* note 121, at 1327.

163. See Welner, *supra* note 22, at 1009–10 ("Pursuant to *Hazelwood*, the First Amendment affords little oversight for curricular decisions. Pursuant to *Pickering*, the First Amendment affords little oversight of decisions to punish or squelch private speech. The dichotomies appear to leave no room for academic-freedom arguments protecting instructional techniques or curricular implementation that is too creative.").

164. Donald Uerling, *Academic Freedom in K-12 Education*, 79 NEB. L. REV. 956, 958 (2000).

165. See Welner, *supra* note 22, at 961–63 (noting that "educational experts strongly support the instructional inclusion of controversial issues to foster the development of skills needed for effective participation as a citizen in a democracy, as well as the development of interpersonal and critical thinking skills").

When a teacher steps into the classroom she assumes a position of extraordinary public trust and confidence: she is charged with educating our youth. Her speech is neither ordinary employee workplace speech nor common public debate. Any attempt to force it into either of these categories ignores the essence of teaching—to educate, to enlighten, to inspire—and the importance of free speech to this most critical endeavor.<sup>166</sup>

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There may be a positive side to merging these two strands of thought; they can be mutually supportive, thereby providing an opportunity to restore the underlying meaning and principles behind the long legal history of education and teachers.<sup>167</sup> Further, along with the restoration of this kind of freedom can come a link to greater accountability by teachers. To this end, this Article suggests three specific areas in which there may be opportunities for corrective action:

*A. Legislative and Contractual Responses*

Since the Supreme Court decided *Hazelwood* and threw a monkey wrench into the already challenging First Amendment calculus of the school environment, numerous local and state governments have enacted, or sought to enact, legislation intended to safeguard rights that were delineated prior to that decision.<sup>168</sup> While most of these have addressed the concerns of students, more recent efforts have added limited protections of teacher speech rights, usually in combination with the student speech protections. In Kentucky, for instance, a bill introduced in the state House of Representatives

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166. *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 378 (4th Cir. 1998) (Motz, J., dissenting).

167. See Welner, *supra* note 22, at 1017 (citing Professor William Foster, who explained that “if teachers ‘are to be held accountable, they must be given the power to make their own decisions regarding instruction’”).

168. See Wohl, *supra* note 75, at 16–36 (discussing and evaluating the efficacy of state legislative alternatives, including constitutional amendments and legislative initiatives, aimed at reclaiming students’ First Amendment rights after *Hazelwood*). Among the most recent efforts are those in California, Kentucky, and Connecticut. To date, seven states have enacted legislation restoring the First Amendment protection to high school media that existed prior to *Hazelwood*. See, e.g., *Conn. Senate Considers Anti-Hazelwood Bill*, STUDENT PRESS L. CENTER, Mar. 3, 2009, <https://www.splc.org/newsflash.asp?id=1874&year=2009> (detailing a Connecticut bill that would protect all student speech, “provided it is not ‘demonstrably likely to cause material and substantial disruption to the educational process’ or constitute an invasion of privacy”).

earlier this year seeks to restore the rights of student journalists that existed prior to *Hazelwood*, by ensuring free speech and press “whether or not the media are supported financially by the school or by use of school facilities or are produced in conjunction with a high school class.”<sup>169</sup> That legislation would also provide retaliation protection for faculty members who are newspaper advisors.<sup>170</sup> Two states, California and Kansas, already have laws with similar provisions protecting teachers and advisors.<sup>171</sup>

There have also been efforts to produce legislation protecting general speech rights of teachers. But some of these have a reverse intent. In Florida, for example, a number of “academic freedom” bills have been introduced or considered in recent years that would purportedly protect teachers (and students) from harassment or retaliation.<sup>172</sup> But a quick look at the debate over them makes clear the underlying political challenges. One bill introduced in Florida last year would provide protection for science teachers discussing theories critical of evolution.<sup>173</sup> In an effort to provide some form of equal treatment (or perhaps just highlight the ideological underpinnings of the legislative effort), an amendment was proposed to the legislation that would have given teachers in abstinence-only sex education programs legal cover to respond to students’ questions about “an unwanted pregnancy.”<sup>174</sup> Not surprisingly, in the Republican-controlled Florida Senate, the amendment was defeated by voice vote.<sup>175</sup> Still other legislation has been offered that would punish public school teachers for a lack of impartiality in the classroom. But as is often the problem with these types of “solutions,”

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169. H.B. 43, 2009 Leg., Reg. Sess. (Ky. 2009).

170. See *id.* (providing that “[a] student media adviser may not be terminated, transferred, removed, or otherwise disciplined for refusing to suppress the protected expression of student journalists”).

171. See CAL. EDUC. CODE § 48907 (West 2009) (drawing a distinction where expression is obscene, libelous, or slanderous); KAN. STAT. ANN. §§ 72.1504–72.1506 (1992) (forbidding the suppression of student journalism simply because it involves political or controversial subject matter); see also Robert Lopez, *New Law Protects School Journalism Advisors*, L.A. TIMES, Jan. 4, 2009, at B4.

172. Keith Morelli, *Storms’ Evolution Bill Lets Teachers Contradict Theory*, TAMPA BAY TRIB., Mar. 3, 2008, <http://www2.tbo.com/content/2008/mar/03/storms-evolution-bill-lets-teachers-contradict-the/>.

173. S.B. 2692, 2008 Leg., Reg. Sess. (Fla. 2008).

174. Linda Kleindienst, *No Free Speech Shield for Sex Ed Teachers*, S. FLA. SUN-SENTINEL, Apr. 19, 2008, at 8B.

175. *Id.* Ronda Storms, the state senator who had introduced the legislation on protecting teachers who teach creationist theories opposed the bill protecting sex education teachers, noting, “I’m concerned about prematurely deflowering kindergartners and first- and second-graders.” *Id.*

one person's impartiality is another's ideological agenda.<sup>176</sup> Add to this the problem of students potentially monitoring teachers and taking lessons or statements out of context and the challenge becomes even greater.<sup>177</sup> But these kinds of partisan battles do not necessarily mean that such legislation is unachievable. Indeed, beyond the underlying ideological conflicts (conflicts perhaps neither side is willing to fully recognize) is a shared understanding that teachers frequently face unfair limits and penalties just for doing their job. Since the First Amendment at its core does not favor one political party or ideology over another, reasonable, intelligent public officials should be able to come together in support of American education and produce legislation that provides fair protections for such an essential activity.

The second reason why legislative options have found only limited success is that a number of protections for teachers are, or can be included in, collective bargaining agreements. Indeed, although teachers' unions today encounter many of the same kind of ideological attacks as contained in the aforementioned legislation, historically, unions have provided essential dignity and professionalism, as well as certain on-the-job protections to a profession that had few such protections and was often treated arbitrarily and abusively by administrators.<sup>178</sup> Some collective bargaining agreements today also include language protecting "academic freedom."<sup>179</sup> Though such provisions do not close the door on the potential for legal limits or action, by their very existence they help ensure recognition by both teachers and administrators of the importance of this issue, the role teachers play, and, perhaps

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176. See Jessica Coomes, *Teachers' Political Talk Issue Heats Up*, ARIZONA REPUBLIC, Feb. 27, 2009 (noting some teachers' fears that discussions of controversial topics could be taken out of context as teachers standing on their soapboxes).

177. Vaishali Honawar, *Cellphones in Classrooms Land Teachers on Online Video Sites*, EDUCATION WEEK, Nov. 7, 2007, at 1.

178. See, e.g., RICHARD KAHLENBERG, *TOUGH LIBERAL: ALBERT SHANKER AND THE BATTLES OVER SCHOOLS, UNIONS, RACE, AND DEMOCRACY* 32-42 (2007) (detailing how Albert Shanker's experience teaching in New York City public schools led to his efforts to organize the United Federation of Teachers and his ultimate success in procuring collective bargaining rights).

179. It is interesting to note that in a research project involving teacher focus groups, teachers who were asked about "academic freedom" consistently referred to the concept of professionalism. As one teacher noted, "[y]ou get a little [academic freedom] when they hired you," and full academic freedom is "contingent upon a demonstration of competence." Kim Fries, Vincent J. Connelly & Todd A. DeMitchell, *Academic Freedom in the Public K-12 Classroom: Professional Responsibility or Constitutional Right? A Conversation with Teachers*, 227 Educ. L. Rep. (West) 505, 521 (Feb. 21, 2008).



most importantly, the understanding that “professional judgment” shall be exercised.<sup>180</sup> Additionally, in some states, teachers have a layer of protection through “just cause” provisions in their collective bargaining agreements that prevent discharge and disciplinary actions without “just cause.”<sup>181</sup> Not all teachers are covered by such agreements, however, and, therefore, they are the “most vulnerable” to school board retaliation.<sup>182</sup>

### *B. Technological Developments*

As new technologies change the way we communicate, the dynamics of teachers’ speech, and specifically the line between in-school or in-class communications and out-of-school communications, is becoming increasingly less clear. “‘Classroom’ is a term that no longer simply encompasses a room in a school with some desks and a chalkboard.”<sup>183</sup> Even more significant, in terms of the legal distinctions courts have to make, is that communications and exchanges by and between teachers and students are taking on new dimensions as both groups make greater use of alternative technologies, resulting in a virtual breaking down of the schoolhouse gate. For example, a federal judge in Connecticut recently upheld

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180. North Kitsap School District Contract, Art. IV, § 6, Academic Freedom, available at <http://www.nkschools.org/15891052891214933/site/default.asp> (follow “Bargaining Agreements” link; then follow “NKEA Final Contract 2007–2009”). The pertinent text of Section 6 reads:

Academic freedom must be exercised consistent with the curriculum of the District. Teachers shall take into account the relative immaturity of their students and the need for guidance and help in studying controversial issues. Teachers shall use prudent professional judgment in planning the inclusion of controversial issues or resources in classroom presentations. The foregoing matters shall be discussed with the teacher’s building principal. Guest speakers and their materials shall be discussed with the teacher’s building principal for approval.

*Id.*; see also Stuart, *supra* note 121, at 1340 (including text of a contract between Fort Wayne Community Schools and Fort Wayne Education Association providing that teachers may exercise “academic freedom,” but that freedom must be balanced by “academic responsibility”).

181. Stuart, *supra* note 121, at 1302 n.153.

182. *Id.* Yet another way in which teachers are protected from arbitrary administrative sanctions, including dismissal, is through the tenure system. See Kahlenberg, *supra* note 178, at 283. Although tenure today is often a target of criticism for what some have charged is its protection of inadequate teachers, see, e.g., Editorial, *Timeout for Teachers*, L.A. TIMES, Dec. 11, 2008, available at <http://www.latimes.com/news/opinion/editorials/la-ed-tenure11-2008dec11,0,6851509.story>, it also can offer an important means for ensuring job protections against arbitrary actions taken against legitimate teacher speech, as well as a standard for evaluating such claims.

183. See Martin, *supra* note 10, at 1183–84 (including a reference and link to the Global Virtual Classroom).

the school principal's decision to suspend a high school student because of comments she included on her private blog.<sup>184</sup> As the judge explained, "[o]ff-campus speech can become on-campus speech with the click of a mouse."<sup>185</sup> With relatively few cases testing the limits of online speech, the law is still evolving, offering plenty of opportunity to positively shape its development.<sup>186</sup>

The growth of personal web pages and social networking sites like Facebook and MySpace, which both teachers and students use, provides numerous additional opportunities for students and teachers to communicate—or at least reference each other's communications—often on matters that are decidedly non-curricular. Some school districts have implemented policies that make both teachers and students legally responsible for anything posted online, including material deemed defamatory, obscene, proprietary, or libelous.<sup>187</sup> Others have begun to institute policies for screening potential employees based on materials on their personal MySpace or Facebook pages. In one report, two thirds of employers say they have chosen not to hire a person because of what is posted online, a scenario similar to what many students find when they apply for college or jobs.<sup>188</sup> Increasing numbers of employer-employee

184. *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 212–16 (D. Conn. 2007), *aff'd*, 527 F.3d 41 (2d Cir. 2008).

185. See Arielle Levin Becker, *Web Speech: When May Schools Act?*, HARTFORD COURANT, Feb. 1, 2009, at A1 (reporting on the court's decision and state lawmakers' attempt to prevent schools from punishing students for communications made off-campus); see also Scott Ross, *'D Bag' Bill Would Protect Online Free Speech*, NBC CONN., Jan. 30, 2009, <http://www.nbcconnecticut.com/news/local/LeBeau-Takes-Free-Speech-Fight-to-Internet.html> (discussing Avery Doninger's removal from the student government after she referred to school officials as "douche bags" on her private blog and lawmakers' interest in the issue).

186. See Frank LoMonte, *Reaching Through the Schoolhouse Gate: Students Eroding First Amendment Rights in a Cyber-Speech World*, AM. CONST. SOC'Y, Feb. 2009, at 2, <http://www.acslaw.org/files/LoMonte%20Issue%20Brief.pdf> (noting that most of these cases have dealt with online postings that attacked teachers or school administrators, rather than content that was purely journalistic).

187. Michael W. Hoskins, *Courts grapple with issues arising from Internet, blogs*, 28 INDIANAPOLIS BUS. J., Mar. 12, 2007, at 20. A different kind of regulation of speech, to address a different kind of problem precipitated by the use of technology by students and teachers, is the prohibition on either "facebook friending" or text messaging between students and teachers that some school districts have instituted to eliminate the potential for sexual involvements between teachers and students. See Brittany Brown, *School Board Issues Warning*, HATTIESBURG AMERICAN, July 21, 2008; *Schools Adopt Rules Against Text Messaging*, UPI, July 24, 2008, available at [http://w3.nexis.com/new/results/docview/docview.do?docLinkInd=true&risb=21\\_T6478390975&format=GNBFI&sort=RELEVANCE&startDocNo=26&resultsUrlKey=29\\_T6478390930&cisb=22\\_T6478406490&treeMax=true&treeWidth=0&csi=8076&docNo=46](http://w3.nexis.com/new/results/docview/docview.do?docLinkInd=true&risb=21_T6478390975&format=GNBFI&sort=RELEVANCE&startDocNo=26&resultsUrlKey=29_T6478390930&cisb=22_T6478406490&treeMax=true&treeWidth=0&csi=8076&docNo=46).

188. Michael W. Hoskins, *Courts grapple with issues arising from Internet, blogs*, 28 INDIANAPOLIS BUS. J., March 12, 2007, at 20.

disputes are revolving around these kinds of Internet-based communications. In *Spanierman v. Hughes*,<sup>189</sup> for instance, a Court dismissed a challenge by a teacher who had been dismissed because the teacher's MySpace page, which he purportedly used to communicate with students about homework, included other inappropriate subject matter.<sup>190</sup> The Court appropriately did not give First Amendment protection to the material and ruled that the one claim the teacher had raised—that he was being fired for comments about the Iraq war—were not connected to the firing. In similar cases, courts have distinguished non-pornographic material on these personal sites that is nonetheless offensive and problematic for the teacher's relationships with students, and “not the sort of information that parents want students to know about their teachers.”<sup>191</sup> The tougher questions for school systems and courts arise when the “questionable” material on these personal sites is not intended for the use of students, but because of the nature of Web-based communications, students nonetheless find their way to it.<sup>192</sup>

Of course, teachers' private lives have never been completely private. For as long as teachers have been teaching, they have been held to various moral, aesthetic, and political standards. One 1915 document that outlined rules for teachers (and that is today often seen on teacher workroom or classroom walls as a joke) noted that “you are not to keep company with men” and “you must under no circumstances dye your hair.”<sup>193</sup> The developments in technology will have growing legal implications and, in some cases, are likely to lead to increased limitations on teacher speech, as the comment by the federal judge in Connecticut suggested.<sup>194</sup> One potential response will be legislative. A Connecticut state senator who is a former civics teacher has been working to enact legislation that would prohibit schools from punishing students for any non-threatening electronic correspondence transmitted outside school facilities and not on

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189. 576 F. Supp. 2d 292 (D. Conn. 2008).

190. *Id.* at 297.

191. See *Teacher Fired over MySpace Page*, TALLAHASSEE.COM, Jan. 25, 2007 [http://tallahassee.com/legacy/special/blogs/2007/01/teacher-fired-over-myspace-page\\_25.html](http://tallahassee.com/legacy/special/blogs/2007/01/teacher-fired-over-myspace-page_25.html) (last visited May 9, 2009) (holding that a Florida teacher's firing because of “inappropriate” photos and comments on a MySpace page did not implicate First Amendment issues).

192. Heather Carter, Teresa Foulger & Ann Dutton Ewbank, *Have You Googled Your Teacher Lately?*, 89 PHI DELTA KAPPAN 681, 683 (2008).

193. *Id.*

194. See *supra* note 185 and accompanying text (quoting the district judge's comments in the *Doninger* case that Internet communications have greatly expanded the scope of what constitutes on-campus speech).

school equipment.<sup>195</sup> At the same time, these technological advancements present the opportunity for greater recognition of teacher professionalism, as well as increased demonstrations of teacher responsibility, and improved preparation in the form of enhanced training in education colleges.<sup>196</sup> Ultimately, to ensure maximum benefits and minimal harm, this “brave new world” will require action in all of these areas.

### C. *Rehabilitating the Reputation of Teachers*

In *Fraser*, the Court stated that the process of education must not be “confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.”<sup>197</sup> There are few more qualified than a teacher to advance this effort.<sup>198</sup> And what better way to demonstrate these “shared values of a civilized social order” than through a robust classroom dialogue? Yet too often, administrators limit the communication, activities, and reach of teachers, through either actual punishment or the threat of sanctions. The result is that students are not only denied the opportunity to experience, learn, and dissect ideas or materials, but they get an eye-opening experience about a system that does not celebrate intellectual freedom.<sup>199</sup>

It is necessary to develop an affirmative strategy that paves the way for courts to restore precedent that recognizes the importance of teachers’ innovation. This will require building an understanding, in both the legal arena and elsewhere, of the significance of a teacher’s role in strengthening schools and developing critical thinking skills in students. There are a number of opportunities to pursue this strategy as a result of the many education reforms being considered

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195. See Ross, *supra* note 185 (discussing state Senator Gary LeBeau’s efforts to pass the bill in the wake of the *Doninger* case).

196. See Carter, *supra* note 193, at 684–85 (discussing the challenges facing teachers when using social networking sites and the need to prepare them to use those sites without compromising professionalism).

197. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

198. See Daly, *supra* note 12, at 13 (noting that teachers hold primary responsibility for student learning and acculturation).

199. See Welner, *supra* note 22, at 978. Welner wrote:

Ironically, one of the values frequently inculcated in American schools is the importance of freedom of speech and expression. To advocates of a traditional model of schooling, in which teachers supply knowledge and students passively receive that knowledge, there is no inconsistency to such instruction. However, for those who believe that the most important lessons in schools are actively lived, free speech and expression cannot be meaningfully taught in an environment where those freedoms are denied.

*Id.*

on both the national and local levels.<sup>200</sup> But it will also require factual, anecdotal, and sociological evidence. Equally important is the need to provide courts and others involved in the legal process a more complete and accurate understanding of what teachers really do: the contributions they make to students and the community, what their daily work involves, and the infrequency of problems resulting from unhindered teacher speech. Such an approach would contrast well with the hackneyed, often politically inspired stereotypes of teachers and teaching that too often make their way into, not only public discourse, but legal opinions.<sup>201</sup> In contrast to what former Judge J. Michael Luttig suggested, teachers do not want their classrooms to “become mere instruments for the advancement of the[ir] individual and collective social agendas.”<sup>202</sup> Indeed, on most days, the vast majority of teachers are simply struggling to find the time to prepare lessons that will provide guidance and training for young minds seeking to succeed in a rapidly changing world. They do this often in the face of classes that are too large, budgets and salaries that are too small, school buildings that are frequently unsafe or unhealthy, and constant oversight and input from school boards, principals, and parents on curriculum and virtually every other matter.<sup>203</sup>

#### CONCLUSION

After forty years of tinkering with and diluting the First Amendment rights of teachers, the legal challenges facing teachers today are far greater than they were in the 1960s. The passage of time and the rulings of the courts have not been good to those who believe in even limited academic freedom or freedom of speech in the education workplace. The issue is no longer one of “elementary

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200. See *id.* at 1010–20 (examining the decentralization, professionalization, and school choice reforms, all of which aim to give more power to teachers, students, and parents).

201. See, e.g., *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 372 (4th Cir. 1998) (Luttig, J., concurring) (“I agree fully with . . . the majority that *the First Amendment* does not . . . allow individual teachers . . . to determine the curriculum for their classrooms consistent with their own personal, political, and other views.”).

202. *Id.* at 373.

203. See, e.g., RICHARD INGERSOLL, CENTER FOR STUDY OF TEACHING AND POLICY, TEACHER TURNOVER, TEACHER SHORTAGES, AND THE ORGANIZATION OF SCHOOLS 21, (Dec. 2001), available at <http://depts.washington.edu/ctpmail/PDFs/Turnover-Ing-01-2001.pdf> (discussing the variety of frustrations teachers face that contribute to high teacher turnover); Michelle Rhee, *Teaching—The Toughest Job*, WASH. POST, Feb. 9, 2009, at A17 (describing the challenges and hardships faced by D.C. public school teachers and the reforms aimed at improving those schools).

and secondary teachers armed with extensive First Amendment academic freedoms running amok in the classroom and disregarding the approved curriculum.”<sup>204</sup> Rather, the challenge is restoring in the schools and courts some semblance of a consistent, yet limited protection for teachers, which allows them to fulfill the full measure of their profession—challenging and shaping young minds and strengthening the educational system and our nation.

The evolution of the law on teacher speech has been relatively straightforward, albeit not always logical or consistent with the goal of building an environment that encourages innovation and the teaching of critical thinking skills. The cases reflect a cross section of the social issues that regularly percolate across our nation. “[T]eachers’ free speech cases,” as one commentator noted, “do not fit neatly into a single pattern.”<sup>205</sup> In part, that is because teachers themselves do not fit neatly into a single pattern. The types of conflicts that teachers face—and even whether those conflicts ever materialize—depend a great deal on the characteristics of an individual teacher, including his background, age, where she is from and where she works, level of independence and industriousness, and other factors. Some teachers will not push the boundaries on so-called controversial speech, if for no other reason than the subject matter they teach does not lend itself to that. For instance, “[g]eometry teachers may seldom say anything on the job that is a matter of public concern, [while s]ocial studies teachers or law professors regularly speak on matters of public concern.”<sup>206</sup> Some teachers are more aggressive, take more initiative, or have more creativity or courage, and therefore are less likely to be threatened by a school administrator’s sword of Damocles that hangs over them. In short, teachers, like virtually any other segment of the population, are a diverse group, which is reflected by the case law.<sup>207</sup>

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204. Hutchens, *supra* note 75, at 74.

205. Daly, *supra* note 12, at 5.

206. Amar, *supra* note 10, at 19.

207. See Welner, *supra* note 22, at 1029–30. Welner observed:

Teachers in these cases tend to fall at one or the other extreme. Many teachers who bring controversy into the classroom are simply acting irresponsibly. In contrast, however, many others should be lauded for bringing enormously educative innovations to their work. . . . The challenge facing courts is to apply a standard that allows for educational authorities to discipline abuses yet protects one of the most valuable of American resources: the innovative teacher.

*Id.*

The historians Ariel and Will Durant wrote that “education is the transmission of civilization.”<sup>208</sup> But it is also the reflection of a civilization. The rigor of our schools, how challenging the classes are, how innovative the teachers are allowed to be, how free the process is, and how much the vision that new ideas are not to be feared, but embraced is reaffirmed—each shape not simply our education system, but our nation. “Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die,” the Court wrote more than half a century ago.<sup>209</sup> *Tinker* reaffirmed this understanding and awareness. If we as a nation are to continue to be defined by such bold, yet commonsense philosophies, then it is imperative we restore that understanding and approach.

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208. WILL & ARIEL DURANT, *THE LESSONS OF HISTORY* 101 (1968).

209. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).