

CRACKING OPEN THE CLASSROOM DOOR: DEVELOPING A FIRST AMENDMENT STANDARD FOR CURRICULAR SPEECH

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ABSTRACT—Around this country, courts have found that the discharge of public school teachers for their classroom speech does not implicate the First Amendment. Others have protected this speech, but only by importing analytical approaches from other areas of law ill suited to the unique interests at play in America’s public schools. The resulting patchwork of doctrinal approaches provides little clarity for courts and only illusory protection for teachers. This Note will start from scratch, examining the first principles at play in public school classrooms and tailoring a First Amendment approach to respect the needs of government, teachers, and students. When determining if the First Amendment protects classroom speech, the teacher’s interest in speaking on matters of legitimate pedagogical concern should be balanced against the school’s interest in providing an effective educational environment

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INTRODUCTION

In 2002, Deborah Mayer accepted a teaching position at Clear Creek Elementary School in Bloomington, Indiana.¹ Almost every Friday, Mayer used a newsletter—part of her approved curriculum—to teach her students about current events.² During one Friday session, her class read an article about peace demonstrations in protest of the Iraq War.³ When one of her students asked whether she had ever participated in a peace march, Mayer responded, “When I drive past the courthouse square and the demonstrators are picketing I honk my horn for peace because their signs say, ‘Honk for Peace.’”⁴ The class then spent a few minutes discussing the importance of conflict resolution and a school program to train children to be mediators on the playground.⁵ After parents complained about the views Mayer expressed during this discussion, the school’s principal banned her from discussing peace and cancelled the school’s annual peace month.⁶ Mayer’s relationship with the principal continued to deteriorate, and the school

¹ See *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, No. 1:04-CV-1695-SEB-VSS, 2006 WL 693555, at *2 (S.D. Ind. Mar. 10, 2006).

² See *id.*

³ See *id.*

⁴ *Id.*

⁵ See *id.*

⁶ See *id.* at *3.

board did not renew her contract. She claimed she lost her job because of the reaction to her class discussion.⁷

Elsewhere, teachers have experienced adverse employment actions under similar circumstances. One teacher chose to assign Herman Hesse's *Siddhartha*—a book purchased by her school board—to her high school English class and was ultimately fired after parent complaints about the book's allegedly offensive content.⁸ Another high school teacher selected a play for her advanced theater class that touched on issues of sexuality and single-parent families.⁹ The class performed the play at a regional competition and won seventeen awards.¹⁰ Although her principal had approved the play and she had complied with district policies, the district transferred the teacher to another school because of the play's content.¹¹

These three educators each claimed they suffered an adverse employment action as a result of expression directed towards students to effectuate their curriculum (curricular speech).¹² As a result, these teachers filed suit claiming that their employers acted in retaliation against the exercise of their First Amendment right to freedom of speech and expression.¹³ In all three cases, federal appellate courts ultimately rejected

⁷ *Id.* at *3–9.

⁸ See *Evans-Marshall v. Bd. of Educ. (Evans-Marshall I)*, 428 F.3d 223, 226–30 (6th Cir. 2005). The court does not specify precisely what about the book was found to be offensive—presumably some aspect of its sexual or religious content.

⁹ See *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 366 (4th Cir. 1998) (en banc).

¹⁰ *Id.*

¹¹ *Id.* at 375–76 (Motz, J., dissenting) (“Taking all of these allegations together, a fair reading of them is that Boring complied with the school administration’s requirements and policies in every respect . . .”).

¹² For the purposes of this Note, curriculum will be defined as “all planned school activities including . . . courses of study, organized play, athletics, dramatics, clubs, and homeroom program.” *Id.* at 367–68 (majority opinion) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 557 (1971)). *Accord Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (viewing a student newspaper as part of the curriculum). As speech has been construed by the Court to go beyond words spoken or written by the speaker, curricular speech includes all expressive activities of an educator used in implementing the educator’s curriculum, including choice of materials and media. *Cf. Texas v. Johnson*, 491 U.S. 397, 404 (1989) (“[W]e have acknowledged that conduct may be ‘sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.’” (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam))). This definition specifically excludes speech made by teachers related to other aspects of employment, which would continue to be analyzed under the current government employee speech framework. See *infra* Part I.A.1.

¹³ Often, the issue of whether an educator’s First Amendment rights were violated arises when a public employee claims the employee suffered an adverse employment action because the employee exercised his or her rights. Whether an employee engaged in protected activity—in these cases, the exercise of the First Amendment right to free speech—is only the first element of a successful retaliation claim under 42 U.S.C. § 1983. Additionally, a plaintiff must successfully demonstrate that the plaintiff suffered “an injury that would likely chill a person of ordinary firmness from continuing in that [protected] activity” and that the adverse action was substantially motivated by the protected conduct. *Evans-Marshall I*, 428 F.3d at 228 (quoting *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1048 (6th Cir. 2001)). For additional discussion of the causation prong, see *infra* note 47.

the notion that the teachers' circumstances triggered First Amendment protection.¹⁴

These cases demonstrate the troubled state of First Amendment protection for educators. First, school districts can discharge teachers for using their professional judgment in exposing students to culturally significant topics, often with the permission of their administration. Teaching is dynamic, and teachers are expected to engage young people with stimulating ideas and instruction. As they grow older, students frequently inquire about important, and at times controversial, topics related to religion, politics, and sexuality. While teachers should not be allowed to use their classrooms to proselytize to a captive audience, neglect the topic they are hired to teach, or expose students to materials inappropriate for their age, they should be encouraged to introduce America's youth to diverse perspectives and experiences vital to the success of a democratic society. Using contemporary, engaging, and relevant materials can increase student achievement across disciplines. Teachers have recently come under increased public scrutiny and pressure as reformers seek to improve public schools. The focus on improving test scores to comply with No Child Left Behind¹⁵ as well as movements opposing tenure¹⁶ and unionization¹⁷ have already lessened teachers' autonomy; fear of retaliation for effectuating their curriculum in a reasonable manner need not further that trend.¹⁸

Second, the outcome in these cases may have differed had they arisen elsewhere in the United States. Federal circuit courts have applied no fewer than four distinct doctrinal approaches to determine whether the First Amendment's Free Speech Clause protects curricular speech:

¹⁴ See *Evans-Marshall v. Bd. of Educ. (Evans-Marshall II)*, 624 F.3d 332, 334, 344 (6th Cir. 2010); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007); *Boring*, 136 F.3d at 368.

¹⁵ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.). The No Child Left Behind Act (NCLB) was passed to improve American education by implementing standards-based reforms. See *No Child Left Behind*, EDUC. WEEK (published Aug. 4, 2004; updated Sept. 19, 2011), <http://www.edweek.org/ew/issues/no-child-left-behind/>. NCLB makes federal education funding contingent on states implementing standardized tests that allow the tracking of assessment data for individual students. See *id.* Failure to meet annual goals for improving test scores may result in punishment, including state takeovers of a failing school. See *id.*

¹⁶ See, e.g., M.J. Stephey, *A Brief History of Tenure*, TIME (Nov. 17, 2008), <http://www.time.com/time/nation/article/0,8599,1859505,00.html> (discussing the efforts of Michelle Rhee—former head of Washington, D.C.'s public schools—to abolish tenure).

¹⁷ See, e.g., George F. Will, Op-Ed, *Liberals' Waterloo*, WASH. POST, Aug. 25, 2011, at A15 (discussing a political controversy in Wisconsin that included teachers' collective bargaining rights).

¹⁸ It has been suggested that this confluence of factors has contributed to a 15% drop in teacher job satisfaction over the past two years. See Kevin Welner, *Teacher Job Satisfaction Plummet (Perhaps Teacher-Bashing Isn't Productive)*, HUFFINGTON POST (Mar. 7, 2012, 10:35 AM), http://www.huffingtonpost.com/kevin-welner/teacher-job-satisfaction-_b_1312266.html.

(1) the *Pickering* balancing test, which protects speech made by a public employee when speaking as a citizen on a matter of public concern;¹⁹

(2) the *Pickering–Garcetti* approach, which applies the *Pickering* test but finds all speech made pursuant to a government employee’s official duties as outside the scope of the First Amendment;²⁰

(3) the *Hazelwood* test, which states that schools can restrict educators’ speech based on a legitimate pedagogical concern;²¹ and

(4) the *Rust* approach, which views curricular speech as government speech that affords the speaker no First Amendment protection.²²

Furthermore, different circuits have applied identical tests in radically different ways.²³ Alternative First Amendment protections under the banner of academic freedom²⁴ or a student’s right to be exposed to diverse ideas²⁵ are tenuous at best. This total uncertainty can chill educators’ speech and hamper their ability to find creative ways to engage young people without jeopardizing their careers.²⁶

This Note will attempt to disentangle this convoluted doctrine and propose a new standard for the analysis of K–12 educators’ free speech rights. When determining if the First Amendment protects curricular speech, the teacher’s interest in speaking on matters of legitimate pedagogical concern should be balanced against the school’s interest in providing an effective educational environment. Additionally, the proposed analysis will be specifically tailored to the realities of the schoolhouse.²⁷ In

¹⁹ See, e.g., *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 168 (3d Cir. 2008); *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 799 (5th Cir. 1989).

²⁰ See, e.g., *Evans-Marshall II*, 624 F.3d 332, 341 (6th Cir. 2010); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 478–80 (7th Cir. 2007).

²¹ See, e.g., *Lacks v. Ferguson Reorganized Sch. Dist.*, 147 F.3d 718, 724 (8th Cir. 1998); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 722–23 (2d Cir. 1994); *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 775–79 (10th Cir. 1991).

²² See, e.g., *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000).

²³ Compare *Evans-Marshall I*, 428 F.3d 223, 231 (6th Cir. 2005) (finding that controversial curricular speech was a matter of public concern), with *Kirkland*, 890 F.2d at 799–802 (finding that controversial curricular speech was not a matter of public concern).

²⁴ See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion).

²⁵ See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

²⁶ See Karen C. Daly, *Balancing Act: Teachers’ Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 7 (2001) (“In the absence of a Supreme Court decision clarifying teachers’ rights, in-class speech is chilled and the balance of interests between school boards and teachers is impermissibly tilted in favor of the former.”).

²⁷ A number of other commentators have put forth new modes of analysis for curricular speech claims that focus primarily on the addition of a notice requirement to existing approaches. See, e.g., *id.* at 52; Kimberly Gee, *Establishing a Constitutional Standard that Protects Public School Teacher Classroom Expression*, 38 J.L. & EDUC. 409, 412–13 (2009); Kevin G. 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, 1022–29 (2003). While incorporating

proposing this test, this Note works within existing Supreme Court doctrine while seeking to balance the interests of teachers, government, and students.

This Note will proceed in four parts. Part I discusses the current approaches to analyzing curricular speech under the Free Speech Clause and the related concepts of academic freedom and a student's "right to hear." Part II outlines the general principles and particularized concerns implicated by curricular speech. Part III proposes a new standard to evaluate curricular speech protection that incorporates the basic principles and concerns discussed in Part II, demonstrates how the test would be applied, and explores its benefits. Part IV concludes.

I. FIRST AMENDMENT APPROACHES TO CURRICULAR SPEECH

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech."²⁸ The application of First Amendment protections to public employees has evolved greatly over the last century. Until the 1960s, the government had broad latitude in restricting the constitutional rights of its employees.²⁹ Oliver Wendell Holmes succinctly articulated this position, writing that a police officer "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."³⁰ Likewise, the Supreme Court offered little in the way of First Amendment protection to public employees. In *Adler v. Board of Education*, the Court upheld a New York law prohibiting members of "subversive groups," such as the Communist Party, from being employed by public schools.³¹

This paradigm shifted following the Court's 1967 decision in *Keyishian v. Board of Regents*.³² Overruling its decision in *Adler*, the Court struck down laws requiring faculty at state universities to sign a certificate

notice, this Note goes beyond previous efforts by creating a test that delineates protected and unprotected speech on the merits of the expression itself.

²⁸ U.S. CONST. amend. I. The First Amendment has been the primary constitutional provision used to provide some level of protection to teaching in the United States. A number of other nations have explicit textual commitments to protecting teaching and academic inquiry in their constitutions. *See, e.g.*, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 5(3) (Ger.) (stating that "[a]rt and science, research and teaching shall be free" under the German Basic Law); Art. 33 Costituzione [Cost.] (It.) (stating that "[a]rt and science and the teaching of them shall enjoy complete freedom" under the Italian Constitution).

²⁹ *See* Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of Garcetti v. Ceballos on Public School Educators*, 17 B.U. PUB. INT. L.J. 209, 210 (2008); *see also* Connick v. Meyers, 461 U.S. 138, 143 (1983) ("For most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.").

³⁰ *McAuliffe v. City of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

³¹ 342 U.S. 485, 485–93 (1952) ("Has the State thus deprived them of any right to free speech or assembly? We think not.").

³² 385 U.S. 589 (1967).

stating they were not communists, explaining that “[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”³³ The Court rejected “the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable.”³⁴

By protecting the rights of public employees generally, *Keyishian* opened the door for the development of more refined analyses of First Amendment claims concerning curricular speech.³⁵ However, the Court has yet to rule on a case involving a K–12 teacher’s curricular speech.³⁶ The Court’s lack of guidance has resulted in federal circuit courts using a hodgepodge of approaches to determine whether the First Amendment shields this expression. Three distinct strands of First Amendment doctrine provide potential protection for curricular speech: free speech, academic freedom, and the right to hear.

A. Free Speech Standards for Curricular Speech

Given the absence of Supreme Court direction, lower courts have imported analytical frameworks from different areas of First Amendment free speech law into the curricular speech context. Each approach employed in the circuits reflects one element of the relationship between a teacher and the state. The *Pickering* line of cases balances the interests of government as sovereign and employer. *Hazelwood* examines the interests of the state in education. Meanwhile, *Rust* focuses on the state controlling the message of programs it funds. Each of these tests is appealing because it captures an important element of the educational setting: teachers are government employees, public schools are at the heart of our education system, and state, local, and national governments provide nearly all funding for public education. However, each test fails to capture all of these interests at once. Thus, a split developed in the circuit courts and each approach requires examination.

I. Teacher as Public Employee: *Pickering* and

Garcetti.—*Pickering*’s public employee speech framework is the most commonly used tool used by courts to analyze curricular speech. In 1968, the Court announced its landmark decision in *Pickering v. Board of Education*.³⁷ In *Pickering*, a public school teacher lost his job after writing a letter to a local newspaper criticizing the board of education and

³³ *Id.* at 604 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

³⁴ *Id.* at 605–06 (quoting *Keyishian v. Bd. of Regents*, 345 F.2d 236, 239 (2d Cir. 1965)).

³⁵ *See id.* at 606 (“It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.” (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963))).

³⁶ *Daly*, *supra* note 26, at 6.

³⁷ 391 U.S. 563 (1968).

superintendent for their handling of a bond referendum and financial expenditures.³⁸ Eschewing the standard public forum analysis due to the state's dual interests as employer and sovereign, the Court set up a test balancing the employee's interest "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."³⁹ Emphasizing that each application of this test must be context specific, the Court looked to whether the statements would make it difficult to "maintain[] either discipline by immediate superiors or harmony among coworkers" as well as interfere with the "performance of his daily duties in the classroom or . . . with the regular operation of the schools generally."⁴⁰ Despite numerous factual errors in the letter, the Court held that the First Amendment protected the teacher's speech unless he knew the statements were false or exhibited a reckless disregard for the truth. The teacher's speech had touched on a matter of public concern and did not interfere with his ability to do his job; thus, the First Amendment protected the letter's contents.⁴¹

Initially, courts granted increasingly broad First Amendment protection to public employees.⁴² The Supreme Court extended this protection to private conversations,⁴³ and lower courts protected educators' First Amendment rights to wear black armbands to protest the Vietnam War,⁴⁴ comment publicly on collective bargaining agreements,⁴⁵ and criticize school policies.⁴⁶ The Court also designed a framework to analyze causation in First Amendment retaliation cases.⁴⁷ However, the Court soon began to limit these protections. First, in *Connick v. Meyers*, it added greater scrutiny and rigor to determining what qualifies as a matter of

³⁸ See *id.* at 565–68.

³⁹ *Id.* at 568; see also *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 961 (9th Cir. 2011) ("However, the Supreme Court has held that where the government acts as both sovereign and employer, this general forum-based analysis does not apply.").

⁴⁰ *Pickering*, 391 U.S. at 570, 572–73 (footnote omitted).

⁴¹ See *id.* at 573–75.

⁴² See *McCarthy & Eckes*, *supra* note 29, at 211.

⁴³ See *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415–16 (1979) (describing a teacher who voiced concerns about racial discrimination in the school to her principal); see also *Rankin v. McPherson*, 483 U.S. 378, 392 (1987) (protecting a statement made during a private conversation).

⁴⁴ See *James v. Bd. of Educ.*, 461 F.2d 566, 572–76 (2d Cir. 1972).

⁴⁵ See *McGill v. Bd. of Educ.*, 602 F.2d 774, 778–79 (7th Cir. 1979).

⁴⁶ See *Lemons v. Morgan*, 629 F.2d 1389, 1390–91 (8th Cir. 1980); *Bernasconi v. Tempe Elementary Sch. Dist. No. 3*, 548 F.2d 857, 861–62 (9th Cir. 1977).

⁴⁷ This framework was announced in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977) (discussing the First Amendment suit by a teacher who claimed he was fired for publicly criticizing a dress code implemented by his school's principal). First, the plaintiff was required to show that his constitutionally protected conduct was a "motivating factor" in causing an adverse employment action. *Id.* Then, the defendant would have the opportunity to show she would have taken the same action absent the protected conduct. *Id.*

public concern.⁴⁸ The Court distinguished what it viewed as mere “employee grievances” from true matters of public concern that touch on issues “of political, social, or other concern of the community.”⁴⁹

The Court implemented a more striking limitation on public employee speech protection in *Garcetti v. Ceballos*.⁵⁰ Richard Ceballos was a deputy district attorney in Los Angeles County.⁵¹ During an investigation, he wrote a memo to his supervisors criticizing the veracity of an affidavit underlying a search warrant used to gather evidence in their case.⁵² The district attorney’s office proceeded with the prosecution, and Ceballos alleged he was subjected to retaliatory employment actions because he voiced concern in the memo.⁵³

In evaluating this claim, the Court applied and refined the *Pickering* standard.⁵⁴ In a five-to-four decision authored by Justice Kennedy, the Court rejected *Garcetti*’s claim. Much as *Connick* did for the notion of a “matter of public concern,” the Court further defined and emphasized the “citizen” component of the *Pickering* standard: “[W]hen 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.”⁵⁵

For educators, curricular speech is by its very definition pursuant to their official duties—applying *Garcetti* to teachers would effectively nullify their First Amendment protection. However, Justice Kennedy’s opinion explicitly did not reach issues related to “academic freedom.”⁵⁶ Because “classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence,” the Court declined to determine whether this analysis would apply to scholarship or teaching.⁵⁷

It is uncertain whether Justice Kennedy’s caveat was intended to apply to educators in K–12 schools as opposed to only those in higher education. The plain language of the opinion appears to exempt both “classroom instruction” and “teaching” from the *Garcetti* analysis, leaving the door

⁴⁸ 461 U.S. 138, 140–42, 154 (1983) (holding that a district attorney who circulated a questionnaire asking about office morale and supervisor competency was not entitled to First Amendment protection).

⁴⁹ *Id.* at 146–47.

⁵⁰ 547 U.S. 410 (2006).

⁵¹ *Id.* at 413.

⁵² *See id.* at 413–14.

⁵³ *See id.* at 414–15.

⁵⁴ *See id.* at 417–21.

⁵⁵ *Id.* at 421. The Court did state that “[t]he First Amendment protects some expressions related to the speaker’s job” and “expressions made at work” in accord with *Givhan*. *Id.* at 420–21 (discussing *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979)). However, the exact nature of these remaining protections was not defined.

⁵⁶ *Id.* at 425.

⁵⁷ *Id.*

open for protection of K–12 educators’ curricular speech. However, the relevant passage appears to respond to criticism leveled by Justice Souter in dissent that argued the majority’s holding may “imperil First Amendment protection of academic freedom in *public colleges* and *universities*.”⁵⁸ Additionally, the concept of academic freedom has primarily been applied to the university setting.⁵⁹ This uncertainty has led to two different applications of the public employee speech framework to curricular speech: one embracing Kennedy’s caveat and applying pre-*Garcetti* standards (*Pickering*) and the other applying *Garcetti* (*Pickering–Garcetti*) in full force.

a. The Pickering approach.—Although *Pickering* itself involved a teacher’s off-campus speech, several circuits have applied this test to educators’ speech within the schoolhouse.⁶⁰ At present, the Third,⁶¹ Fourth,⁶² and Fifth⁶³ Circuits apply the *Pickering* framework without *Garcetti*’s additional requirements.⁶⁴ Before switching approaches in light of *Garcetti*, the Sixth Circuit applied *Pickering*.⁶⁵ These Sixth Circuit cases, while no longer controlling, still provide insight into the application of the *Pickering* standard.

Courts employing *Pickering* have further split on whether the First Amendment protects curricular speech. These courts have differed on whether controversial curricular speech can touch on a matter of public

⁵⁸ *Id.* at 438 (Souter, J., dissenting) (emphasis added).

⁵⁹ See *infra* Part I.B.

⁶⁰ Some cases and articles have referred to this test, which applies pre-*Garcetti* public employee speech law, as “*Pickering–Connick*.” See Cal. Teachers Ass’n v. State Bd. of Educ., 271 F.3d 1141, 1149 n.6 (9th Cir. 2001); Alexander Wohl, *Oiling the Schoolhouse Gate: After Forty Years of Tinkering with Teachers’ First Amendment Rights, Time for a New Beginning*, 58 AM. U. L. REV. 1285, 1302 (2009). In the interest of brevity, this Note will use *Pickering* to refer to pre-*Garcetti* doctrine and *Pickering–Garcetti* to refer to current employee speech doctrine.

⁶¹ See *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 168 (3d Cir. 2008).

⁶² See *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007); *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 368–69 (4th Cir. 1998) (en banc).

⁶³ See *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 799 (5th Cir. 1989).

⁶⁴ The exact impact of the *Garcetti* decision in this area is still evolving and uncertain. Two courts have declined to reach the question of *Garcetti*’s application to curricular speech because the decision itself was unclear on that point and the speech at issue would not be protected even under preexisting standards. See *Panse v. Eastwood*, 303 F. App’x 933, 935 (2d Cir. 2008) (reasoning that because the plaintiff’s claim would fail under *Hazelwood*, the court “need not resolve the issue of whether *Garcetti* or some other standard applies here”); *Borden*, 523 F.3d at 171 n.13 (reasoning that because a coach’s participation in a student-led prayer was not a matter of public concern under *Pickering*, the court need not decide whether *Garcetti* applies in the educational context). The Fourth Circuit more explicitly addressed the issue, stating: “The Court explicitly did not decide whether [*Garcetti*] would apply in the same manner to a case involving speech related to teaching. Thus, we continue to apply the *Pickering–Connick* standard . . .” *Lee*, 484 F.3d at 694 n.11 (citation omitted). The Sixth, Seventh, and Ninth Circuits view *Garcetti* as controlling, see *infra* Part I.A.1.b, while the First, Fifth, Eighth, Tenth, and Eleventh Circuits have not addressed the issue since *Garcetti*.

⁶⁵ *Evans-Marshall I*, 428 F.3d 223, 228 (6th Cir. 2005).

concern—some viewing it instead as an internal grievance—and if teachers must be speaking as citizens in order to be protected.⁶⁶ In *Evans-Marshall v. Board of Education of Tipp City Exempted Village School District (Evans-Marshall I)*, the literary works being discussed—*To Kill a Mockingbird*, *Fahrenheit 451*, and *Siddhartha*—explored numerous culturally significant themes such as race, justice, gender, and power.⁶⁷ The court stated that these themes touched on matters of public concern and noted that “the Supreme Court has never removed in-class speech from its presumptive place within the ambit of the First Amendment.”⁶⁸ Thus, the analysis could proceed to the balancing of interests.⁶⁹

However, other courts have reasoned that curricular speech is inherently lacking expressive content, and thus unrelated to matters of public concern. In *Boring v. Buncombe County Board of Education*, Margaret Boring chose the play *Independence*, featuring controversial issues including homosexuality, for students in her class to perform at a competition.⁷⁰ The court held that conflict resulting from the selection and performance of the play did “not present a matter of public concern and is nothing more than an ordinary employment dispute.”⁷¹ Instead of viewing the play as expression in and of itself, the court reasoned that her speech was about the choice of curriculum.

While the line between protected expression and unprotected employment disputes rightly should be drawn, courts often fail to do so correctly by ignoring the reasons for adverse employment actions. For example, suppose a teacher decides to employ a book in her American literature class. Her principal later punishes her because she assigned the book. One can imagine reasons for the teacher’s firing that should not implicate the First Amendment because they are not based on protected expression. The teacher could have assigned *The Great Gatsby* when she was required to teach *Death of a Salesman*. She could have failed to consult the principal before selecting a new book in contradiction of school policy. Both of these scenarios are rightly characterized as run-of-the-mill employment disputes because the decisions were based on the teacher’s insubordination rather than the content of the curricular speech. On the other hand, if the firing were based on the teacher’s expression of the book’s ideas, the principal would clearly be reacting to the content of that

⁶⁶ See *id.* at 234–36 (Sutton, J., concurring); *Kirkland*, 890 F.2d at 799–800.

⁶⁷ 428 F.3d at 226–37.

⁶⁸ *Id.* at 229. This holding was reversed after *Garcetti*. See *Evans-Marshall II*, 624 F.3d 332 (6th Cir. 2010).

⁶⁹ *Evans-Marshall I*, 428 F.3d at 231.

⁷⁰ 136 F.3d 364, 366–68 (4th Cir. 1998) (en banc). Boring was transferred against her wishes for her choice of the play despite “compl[ying] with the school administration’s requirements and policies in every respect.” *Id.* at 375–76 (Motz, J., dissenting).

⁷¹ *Id.* at 368 (majority opinion).

speech. In that situation, the courts should determine whether that content touches on a matter of public concern. However, some courts, like that in *Boring*, appear to stop short of looking at the principal's motivation, instead viewing any dispute over curriculum as per se devoid of expressive content.

Additionally, the circuits have differed on the importance of speaking as a "citizen" to the *Pickering* balance. The Sixth Circuit reasoned that as long as speech related to a matter of public concern, it was insignificant whether the teacher was speaking as a public employee or private citizen.⁷² The Fifth Circuit held differently, denying First Amendment protection to the content of a reading list used by a high school history teacher. The court stated that the teacher "did not speak out as a citizen when he offered a separate body of material."⁷³

While theoretically applying the same test, these courts have taken fundamentally different approaches to defining the protection of curricular speech. Two main factors divide these circuits. First, they differ on what it means to speak as a citizen on a matter of public concern; while the Sixth Circuit views the "matter of public concern" language as determinative, the Fourth and Fifth Circuits also require the teacher to be speaking as a citizen. Second, they differ in how to characterize curricular decisions. A curricular decision can be viewed as expression, the substance of which can touch on a matter of public concern, or solely as a workplace decision divorced from its content. This characterization is important: conflict over the former implicates free speech protection while the latter, simply the ability to make a choice at work, does not trigger constitutional protections. While courts employing *Pickering* have been inconsistent in its application, unlike *Pickering-Garcetti*, it still theoretically protects curricular speech.

b. Pickering-Garcetti.—In the years since *Garcetti*, the Sixth,⁷⁴ Seventh,⁷⁵ and Ninth⁷⁶ Circuits have adopted the *Pickering-Garcetti*

⁷² See *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1051–53 (6th Cir. 2001) ("[T]he key question is not whether a person is speaking in his role as an employee or a citizen, but whether the employee's speech in fact touches on matters of public concern."). This case involved a fifth grade teacher in Kentucky who hosted a presentation by Woody Harrelson, in conjunction with a CNN special, in her classroom to discuss industrial hemp. See *id.* at 1041–43. Despite obtaining prior permission from her principal, the teacher was fired after a number of community members complained about the presentation. See *id.* at 1045. The court ultimately found that her speech was protected by the First Amendment. See *id.* at 1055.

⁷³ *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800 (5th Cir. 1989).

⁷⁴ See *Evans-Marshall II*, 624 F.3d 332, 341 (6th Cir. 2010).

⁷⁵ See *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 478–80 (7th Cir. 2007). This court differentiated the speech of post-secondary educators and those in primary and secondary education, stating "[h]ow much room is left for constitutional protection of scholarly viewpoints in post-secondary education was left open in *Garcetti* and need not be resolved today." *Id.* at 480; see also *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 670–72 (7th Cir. 2006) (stating the *Garcetti* decision did not apply to a post-secondary teacher's claim).

approach. The Seventh Circuit's analysis of curricular speech issues has seen the greatest impact from *Garcetti*, as the court previously applied the *Hazelwood* student speech standard.⁷⁷

Pickering–Garcetti likely affords no protection for curricular speech. *Garcetti* placed all speech made by public employees pursuant to their official duties outside the protection of the First Amendment. As implementing a curriculum is the primary job of a teacher, curricular speech is per se made pursuant to a teacher's official duties and thus lacks protection against retaliation. Courts may, as they have in other contexts, try to circumvent *Garcetti* by so narrowly defining employees' official duties that their conduct is not technically pursuant to their employment.⁷⁸ For instance, a math teacher's role may be to deliver a board-approved algebra curriculum. Accordingly, commenting on current events would not be pursuant to his official duties—current events generally have little to do with mathematics instruction. This sort of maneuver seems unlikely in the area of curricular speech where delivering instruction to a class is the quintessential duty of a teacher.⁷⁹ It would also lead to paradoxical results; a current events teacher discussing a political controversy would not be protected while a science teacher could be.

The public employee speech analysis found in the *Pickering* line of precedent has become the most common test among federal circuit courts. However, a number of circuits have also used the student speech framework to evaluate curricular speech claims.

2. *Student Speech: The Hazelwood Standard.*—While the *Hazelwood* standard was initially developed to determine the free speech rights of students within schools, several circuits have also applied it to teachers' classroom speech. Generally, this test allows restriction of curricular speech for legitimate pedagogical reasons. The First,⁸⁰ Second,⁸¹ Eighth,⁸²

⁷⁶ See *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 & n.12 (9th Cir. 2011).

⁷⁷ Compare *Mayer*, 474 F.3d at 477–80 (applying *Pickering–Garcetti*), with *Webster v. New Lennox Sch. Dist.* No. 122, 917 F.2d 1004, 1008 (7th Cir. 1990) (applying *Hazelwood*).

⁷⁸ See, e.g., *Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.*, 595 F.3d 1126, 1130–37 (10th Cir. 2010). The court held that a speech pathologist was not acting pursuant to her official duties in reporting to the state that she was not being given an accurate list of students needing services. See *id.* at 1135–37. The court reasoned that reporting violations of the Individuals with Disabilities Education Act (IDEA) to the state department of education was not pursuant to her official duties because she was not hired as an IDEA compliance officer and the reporting happened outside of her normal chain of command. See *id.*

⁷⁹ The Ninth Circuit soundly rejected this sort of argument where a math teacher posted banners in his classroom that took historical texts out of context to promote a religious message. See *Johnson*, 658 F.3d at 954, 968 (“Rather, because of the position of trust and authority they hold and the impressionable young minds with which they interact, teachers *necessarily* act as teachers for purposes of a *Pickering* inquiry when at school or a school function, in the general presence of students, in a capacity one might reasonably view as official.”).

⁸⁰ See *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993).

and Tenth⁸³ Circuits use this standard.⁸⁴ Additionally, the Seventh⁸⁵ and Ninth⁸⁶ Circuits had employed this test before *Garcetti*.

The Supreme Court first protected students' free speech rights in *Tinker v. Des Moines Independent Community School District*.⁸⁷ In *Tinker*, the Court held that the First Amendment shielded the right of students to wear armbands to protest the Vietnam War, stating: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁸⁸

The Court elaborated on students' rights within the schoolhouse in *Hazelwood School District v. Kuhlmeier*.⁸⁹ Unlike the very personal expression found in *Tinker*, the student speech at issue in *Hazelwood* appeared in a school newspaper.⁹⁰ The school's principal removed an article focusing on teen pregnancy from the paper before publication. In holding that the article lacked First Amendment protection, the Court reasoned that the newspaper was not a public forum.⁹¹ Thus, the school officials retained the power to control speech that "the public might reasonably perceive to bear the imprimatur of the school[,] . . . so long as their actions [were] reasonably related to legitimate pedagogical concerns."⁹²

Reasoning that teachers' curricular speech also bears the "imprimatur of the school," a number of circuits have applied *Hazelwood's* legitimate

⁸¹ See *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 722–23 (2d Cir. 1994).

⁸² See *Lacks v. Ferguson Reorganized Sch. Dist.*, 147 F.3d 718, 724 (8th Cir. 1998).

⁸³ See *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 775–79 (10th Cir. 1991).

⁸⁴ It should again be noted that the First, Eighth, and Tenth Circuits have not addressed curricular speech in light of *Garcetti*. The Seventh Circuit's move from *Hazelwood* to *Pickering-Garcetti* in *Mayer*, written by Chief Judge Frank Easterbrook, highlights the possibility that other courts may do the same. See *Mayer v. Monroe Cnty. Cmty Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007).

⁸⁵ See *Webster v. New Lennox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990).

⁸⁶ See *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1148–49 (9th Cir. 2001).

⁸⁷ 393 U.S. 503, 506 (1969).

⁸⁸ *Id.* While the facts of *Tinker* limit its holding to the rights of students, the Court used broad language in describing the First Amendment protections for both students and teachers within the school setting. See *id.* ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.")

⁸⁹ 484 U.S. 260 (1988).

⁹⁰ See *id.* at 262–64.

⁹¹ See *id.* at 267–70. The court also mentioned in dicta that "public schools do not possess all of the attributes of streets, parks, and other traditional public forums that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.* at 267 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939) (plurality opinion)). This Note proceeds on the assumption that the classroom during instruction time is not a public forum and thus is subject to reasonable, viewpoint-neutral restrictions on speech.

⁹² *Id.* at 271, 273.

pedagogical concern test to teachers' curricular speech.⁹³ In applying *Hazelwood*, courts have upheld restrictions on educators discussing school gossip,⁹⁴ allowing students to use profanity in class projects,⁹⁵ and showing videos containing nudity.⁹⁶

The First Circuit developed the most comprehensive approach to teachers' speech under *Hazelwood*. In *Ward v. Hickey*, the court analogized the classroom setting to the school newspaper in *Hazelwood*; neither are public forums, and therefore the school can reasonably restrict speech.⁹⁷ Additionally, both a teacher's instructional speech and a student newspaper are part of the curriculum.⁹⁸

Having tied the analysis of teachers' curricular speech into *Hazelwood*'s reasoning, the First Circuit applied a two-part test based on the Supreme Court's holding. The school "may regulate a teacher's classroom speech if: (1) the regulation is reasonably related to a legitimate pedagogical concern; and (2) the school provided the teacher with notice of what conduct was prohibited."⁹⁹ The court elaborated on the first element, taken expressly from *Hazelwood*, by articulating factors to guide what pedagogical concerns are reasonable, including the "age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation."¹⁰⁰

The notice prong of this test was inferred from *Hazelwood* and is unique to the First Circuit.¹⁰¹ *Hazelwood*'s statement that prepublication control of a school newspaper's content need not be pursuant to express regulation "suggests that the Court would agree that *postpublication retaliation* must derive from some prior limitation."¹⁰² In determining whether a teacher is on notice, the court examined whether, based on prior communications, it was "reasonable for the school to expect the teacher to know that her conduct was prohibited."¹⁰³ This standard does not require an

⁹³ See *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 776 (10th Cir. 1991) ("We are convinced that if students' expression in a school newspaper bears the imprimatur of the school, then a teacher's expression in the 'traditional classroom setting' also bears the imprimatur of the school." (quoting *Hazelwood*, 484 U.S. at 271)).

⁹⁴ See *id.* at 774, 779 (describing a teacher commenting to his class about a rumor that two students had been caught "making out on the tennis court").

⁹⁵ See *Lacks v. Ferguson Reorganized Sch. Dist.*, 147 F.3d 718, 719 (8th Cir. 1998).

⁹⁶ See *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 721, 723 (2d Cir. 1994) (describing a guest speaker in a mathematics class using a video featuring a topless woman to demonstrate the phenomenon of "persistence of vision").

⁹⁷ 996 F.2d 448, 453 (1st Cir. 1993).

⁹⁸ *Id.*

⁹⁹ *Id.* at 452 (citations omitted).

¹⁰⁰ *Id.* at 453. These factors to determine legitimate pedagogical interests have also been adopted by the Second Circuit. See *Silano*, 42 F.3d at 722–23.

¹⁰¹ See *Daly*, *supra* note 26, at 22–23.

¹⁰² *Ward*, 996 F.2d at 453.

¹⁰³ *Id.* at 454.

explicit prohibition of “every imaginable inappropriate conduct by teachers,” only that they would reasonably know their conduct was inappropriate.¹⁰⁴

While the First Circuit’s test, particularly the notice requirement, does provide some protection for teachers, other courts have been less rigorous in applying *Hazelwood*. Often, these courts fail to define what constitutes a legitimate pedagogical concern and instead merely defer to school administrators.¹⁰⁵ Despite these issues, the *Hazelwood* test still offers greater potential protection than afforded by courts applying *Rust*.

3. *Government as Speaker: The Rust Approach.*—In a far less common and more tenuous approach, some courts have imported the First Amendment analysis in *Rust v. Sullivan* and its progeny into the context of curricular speech.¹⁰⁶ Under this approach, the government subsidizes teachers’ curricular speech in order to convey a particular message; teachers in the classroom are essentially paid to speak on behalf of the government. Thus, governmental entities (like school boards) can define the scope of a teacher’s speech without violating the First Amendment—they are simply choosing what speech to subsidize and preventing their message from being distorted.¹⁰⁷ While not explicitly adopting *Rust* as controlling precedent, this general approach has influenced decisions in the Third¹⁰⁸ and Ninth¹⁰⁹ Circuits.¹¹⁰ However, the most recent decisions in these circuits have employed the *Pickering* test.¹¹¹

¹⁰⁴ *Id.*

¹⁰⁵ See Daly, *supra* note 26, at 13.

¹⁰⁶ 500 U.S. 173 (1991). In many ways, this Note uses *Rust* as shorthand for a general approach that is better developed in theory than in practice. It has been suggested that *Rust* be explicitly adopted in all curricular speech cases. See Emily White Kirsch, Note, *First Amendment Protection of Teachers’ Instructional Speech: Extending Rust v. Sullivan to Ensure that Teachers Do Not Distort the Government Message*, 58 CLEV. ST. L. REV. 185, 187 (2010).

¹⁰⁷ See Cal. Teachers Ass’n v. State Bd. of Educ., 271 F.3d 1141, 1149 n.6 (9th Cir. 2001) (“Under *Rust–Rosenberger*, when the government is the speaker, in the sense that the government is conveying a particular message through a person, that person receives no First Amendment protection.”).

¹⁰⁸ See Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990).

¹⁰⁹ See Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1013 (9th Cir. 2000).

¹¹⁰ These cases employ the general idea that curricular speech is government speech and thus the government can regulate it as it sees fit. Neither case explicitly states that *Rust* is controlling—the Third Circuit decision in *Bradley* actually predates *Rust*.

¹¹¹ See Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 960–61 (9th Cir. 2011); Borden v. Sch. Dist. of the Twp. of E. Brunswick, 523 F.3d 153, 168–69 (3d Cir. 2008). *Johnson* discussed this line of cases as informative in applying *Pickering*. *Johnson*, 658 F.3d at 957 (“[A teacher] speaks not as an individual, but as a public employee, and the school district is free to ‘take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted.’” (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995))). Indeed, the court categorically distinguished between speech of a private individual that could reasonably bear the imprimatur of the school (citing *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 697 (4th Cir. 2007), as standing for the “curricular speech doctrine”) and the state’s ability to speak through “the mouthpiece of one of its employees” (citing

The seminal case in this line is *Rust v. Sullivan*.¹¹² In *Rust*, private healthcare providers initiated a First Amendment challenge to a federal regulation that banned funding of family planning services that offered abortion counseling.¹¹³ In finding that the regulations did not violate the free speech rights of healthcare workers, the Court reasoned that Congress can define the scope of a discretionary government program as it sees fit; “the Government may choose not to subsidize speech.”¹¹⁴ This reasoning was stated even more directly in *Rosenberger v. Rector and Visitors of University of Virginia*.¹¹⁵ When funding a project, the government “may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted.”¹¹⁶ As a logical extension of this reasoning, “when the State is the speaker, it may make content-based choices.”¹¹⁷

As the government funds public schools and pays teachers’ salaries, courts have reasoned that the government may dictate the speech of educators without violating the First Amendment. In a decision citing both *Rust* and *Rosenberger*, the court in *Downs v. Los Angeles Unified School District* rejected protection for curricular speech.¹¹⁸ The court reasoned that because a teacher’s choice to put articles on a bulletin board was a “manifestation of the school board’s policy,” the teacher was speaking as the government.¹¹⁹ Thus, the speech “is not subject to the constraints of constitutional safeguards and forum analysis, but instead is measured by practical considerations applicable to any individual’s choice of how to

Downs, 228 F.3d at 1012). *Id.* at 966 n.11. While the former is subject to scrutiny for viewpoint neutrality, the latter is not. *See id.*

¹¹² 500 U.S. 173 (1991).

¹¹³ *See id.* at 177–82. This case involved a requirement in Title X of the Public Health Services Act that authorized funding family planning services—often carried out through contracts with private groups—pursuant to regulations. *See id.* at 178–81. The Act also specified that Title X funds should be used only for preventative family planning. *Id.* A subsequent regulation made clear that groups receiving funding could not counsel mothers to get abortions. *Id.*

¹¹⁴ *Id.* at 177–82, 193, 200 (“The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.”).

¹¹⁵ 515 U.S. at 833–34 (discussing *Rust* in a suit challenging university guidelines prohibiting the use of student funds for religious groups). The *Rust* decision itself did not explicitly state that family planning service providers were speaking for the government. This extension was based on other cases that are connected with *Rust* by the courts. *See Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998).

¹¹⁶ *Rosenberger*, 515 U.S. at 833.

¹¹⁷ *Id.*

¹¹⁸ 228 F.3d 1003, 1005, 1013 (9th Cir. 2000).

¹¹⁹ *Id.* at 1012–13. In response to a school diversity initiative supporting gay and lesbian students, the teacher put together a bulletin board intended to promote the traditional family, stating sixty percent of Americans viewed homosexuality as immoral and quoting a passage from Leviticus that refers to homosexual relations as “detestable.” *Id.* at 1006–08.

convey oneself: among other things, content, timing, and purpose.”¹²⁰ Only when the people have elected an individual does that individual have a right to speak as the government.¹²¹ This type of reasoning has also been applied to higher education¹²² and bears a striking resemblance to the reasoning of courts applying *Garcetti* to curricular speech.¹²³

4. *Problems with Existing Doctrine.*—While protecting curricular speech could be achieved without any change to existing Supreme Court precedent, the standards used by the circuit courts are fundamentally flawed. The *Pickering* standard simply does not provide significant protection for teachers.¹²⁴ Whether or not *Garcetti*’s holding applies to teaching, the standard on its face states that employees receive protection only when speaking as citizens. While this could protect a teacher making an offhand remark during a lesson, it would be inconsistent to protect that remark while not protecting the thoughtfully assembled content of her lesson plans. How a teacher would indicate that she is speaking as a private citizen or teacher when in front of a classroom is also unclear.

Pickering’s requirement of content about a public concern is similarly problematic. Courts have struggled to apply this test to educators. Expression that clearly implicates matters of political or social importance has been found to not touch on a matter of public concern.¹²⁵ Second, the premise that all speech on matters of public concern should be protected in schools deserves questioning. Should a middle school math teacher be protected in taking time away from teaching algebra to devote a class to expressing his view on who should be the next President? The classroom provides a teacher with a captive audience for the purpose of carrying out specific educational goals—a teacher should not be allowed to abuse that power on a whim. Also, the facts of *Pickering* show that speech on a matter of public concern can be protected even if entirely inaccurate.¹²⁶ Educators

¹²⁰ *Id.* at 1013.

¹²¹ *See id.* at 1016.

¹²² *See* *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998) (“Our conclusion that the First Amendment does not place restrictions on a public university’s ability to control its curriculum is consistent with the Supreme Court’s jurisprudence concerning the state’s ability to say what it wishes when it is the speaker.”).

¹²³ *See* *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007) (“[T]he school system does not ‘regulate’ teachers’ speech as much as it *hires* that speech.”).

¹²⁴ For a discussion of why this speech should be protected, see *infra* Part II.

¹²⁵ *See* *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998) (en banc) (holding that the choice to present a play dealing with homosexuality and single-parent families did not touch on a matter of public concern despite the clear social relevance of the issues—the court focused on the choice of curriculum in the abstract, instead of the specific characteristics of the play selected).

¹²⁶ *See* *Pickering v. Bd. of Educ.*, 391 U.S. 563, 582 (1968) (White, J., concurring in part and dissenting in part) (“The Court holds that truthful statements by a school teacher critical of the school board are within the ambit of the First Amendment. So also are false statements innocently or negligently made.”).

should not be allowed to mislead their students in the name of the First Amendment—such speech then goes to their competence, which is an appropriate basis for dismissal.

The use of the *Hazelwood* standard also has problems in theory and application. Many of these issues stem from *Hazelwood*'s original purpose: analyzing the ability of schools to restrain *student* speech. While its origins do not make the *Hazelwood* analysis inherently inapplicable to teachers, several problems emerge in equating student and teacher classroom speech. Unlike students, teachers are professional pedagogues. And like the school administration in *Hazelwood*, teachers have legitimate pedagogical interests in the happenings of their classrooms. The *Hazelwood* Court did state that school officials may impose reasonable speech restrictions on students and teachers. However, it does not follow that an identical restriction would be reasonable for both, as the Court recognized that teachers have a distinct responsibility to educate young people.¹²⁷ Additionally, this test only assesses the concerns of the censor of speech, entirely ignoring the targets of censorship and their expression. Thus, *Hazelwood* provides no enclave of First Amendment protection when a teacher and administration have legitimate pedagogical differences.

Likewise, courts have not been particularly rigorous in applying the “legitimate pedagogical concern” test to teacher speech. Many courts simply defer to the school administration or board in determining what is legitimate instead of actually analyzing whether the pedagogical concern truly supports the limitation on speech.¹²⁸ This deference is understandable because judges are not required to be well versed in pedagogy; determining what is a legitimate pedagogical concern is outside their general competence. The test is also vague, providing no guidance as to what concerns are truly legitimate.¹²⁹

In addition to providing no protection for curricular speech, the *Rust* government speech approach fundamentally misunderstands the basic operational realities of public schools. *Rust* is concerned with the government's ability to control the precise message of speech it subsidizes to prevent distortion. However, the government generally does not

¹²⁷ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (“This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials . . .”).

¹²⁸ Many cases in the circuit courts have no significant discussion of whether the actions of the school board were the result of legitimate pedagogical concerns. See, e.g., *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994) (reasoning that a teacher's use of a video was not protected because it was “unnecessary”).

¹²⁹ See *Boring*, 136 F.3d at 371–72 (Wilkinson, C.J., concurring) (“The dissenters [advocating adoption of the *Hazelwood* test] seize upon one loose, slippery, litigious phrase—‘legitimate pedagogical concern’—and consign it to the mercies of the federal courts. They provide not one iota of guidance to local school administrators on the interpretation of this tantalizing formulation, nor could they.”).

prescribe specific speech to educators. Most teachers are not provided with a script to follow in their classrooms. Instead, they receive their assigned curriculum, often in the form of a document, which guides their individualized instruction. These documents can vary widely from prescribing instruction on very specific content and concepts to more general topics to be covered.¹³⁰ Often, such documents do not even suggest what materials would be helpful in engaging students on that topic. Teachers take the general topic or concept to be illustrated and create a lesson by independently drawing from a variety of resources.

For example, suppose a teacher's curriculum directs him to teach the causes of the French Revolution. An instructor may create a lesson that employs video clips, political cartoons depicting the three estates, and a dramatic reading from the writings of Robespierre. None of this curricular speech was dictated by the government. Rather, this process of developing daily lessons and selecting materials for the classrooms bears greater resemblance to a delegation of authority than to a prescription of conduct. Thus, *Rust* does not afford teachers the necessary latitude to implement their curriculum within the parameters of the authority they have been delegated.

B. *Academic Freedom: A Right to Teach*

In addition to free speech approaches, the concept of academic freedom is another potential source of protection for teachers' curricular speech. In this context, academic freedom would protect the discretion of teachers, as professional educators, to run their classrooms as they see fit.¹³¹ The Supreme Court first endorsed the doctrine of academic freedom in *Sweezy v. New Hampshire*.¹³² The Court found that a professor's contempt conviction for refusing to answer questions pertaining to alleged subversive activities and academic lectures violated the professor's constitutional rights.¹³³ Academic freedom was considered vital for the development of

¹³⁰ For an illustration of typical curriculum documents, see *Model Curriculum: English Language Arts (K-12)*, NEW JERSEY DEPT. OF EDUC., <http://www.state.nj.us/education/modelcurriculum/ela/> (last visited June 2, 2013).

¹³¹ See Donald F. Uerling, *Academic Freedom in K-12 Education*, 79 NEB. L. REV. 956, 956 (2000) (defining academic freedom in K-12 education as "First Amendment protections of professional discretion that a public school teacher may exercise in the course of performing his or her teaching functions").

¹³² 354 U.S. 234, 250 (1957) (plurality opinion). Concurring and dissenting opinions had previously discussed notions of academic freedom. See *Wieman v. Updegraff*, 344 U.S. 183, 194-96 (1952) (Frankfurter, J., concurring) (stating "unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice" and calling teachers "the priests of our democracy"); *Adler v. Bd. of Educ.*, 342 U.S. 485, 508-11 (1952) (Douglas, J., dissenting).

¹³³ See *Sweezy*, 354 U.S. at 235-45 (plurality opinion).

American society.¹³⁴ In a concurring opinion, Justice Frankfurter specified four essential academic freedoms for a university: “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”¹³⁵ The Court in *Keyishian* reaffirmed this doctrine by calling it a “special concern of the First Amendment.”¹³⁶

While not directly applying the academic freedom doctrine to primary and secondary classrooms, courts have used the rhetoric of academic freedom in discussing cases involving secondary school teachers.¹³⁷ The First Circuit twice protected the expression of high school English teachers discussing vulgar language during lessons on academic freedom grounds.¹³⁸ But other circuits resisted the application of academic freedom in the content of classroom lessons.¹³⁹

Academic freedom protections are tenuous when imported from the university setting into primary and secondary schools. First, the doctrine itself is not well-defined or broadly applied even at the university level; the development of the academic freedom doctrine has arisen primarily from cases involving loyalty oaths for individual professors at public universities

¹³⁴ See *id.* at 250 (“The essentiality of freedom in the community of American universities is almost self-evident. . . . 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.”).

¹³⁵ *Id.* at 263 (Frankfurter, J., concurring in the judgment) (quoting CONFERENCE OF REPRESENTATIVES OF THE UNIV. OF CAPE TOWN AND THE UNIV. OF THE WITWATERSRAND, JOHANNESBURG, THE OPEN UNIVERSITIES OF SOUTH AFRICA 10–12 (1957)).

¹³⁶ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). The opinion in *Sweezy* discussed the First Amendment, but ultimately decided the case on the grounds of Fourteenth Amendment due process protection. See *Sweezy*, 354 U.S. at 235, 255 (plurality opinion).

¹³⁷ The Supreme Court in *Epperson v. Arkansas* noted that the nation’s courts “have not failed to apply the First Amendment’s mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief” and reasserted that courts should not tolerate “a pall of orthodoxy” in American classrooms. 393 U.S. 97, 104–05, 109 (1968) (quoting *Keyishian*, 385 U.S. at 603) (holding that a state statute that criminalized teaching evolution in public schools violated the Establishment Clause).

¹³⁸ See *Keefe v. Geanakos*, 418 F.2d 359, 361 (1st Cir. 1969) (protecting the discussion of “a vulgar term for an incestuous son” as used in an article in the *Atlantic Monthly*); *Mailloux v. Kiley*, 323 F. Supp. 1387, 1388 (D. Mass.), *aff’d per curiam*, 448 F.2d 1242 (1st Cir. 1971) (protecting a teacher who wrote a vulgar word on the board in her classroom as part of a discussion of taboo words).

¹³⁹ See *Cary v. Bd. of Educ.*, 598 F.2d 535, 543 (10th Cir. 1979) (“Undoubtedly [teachers] have some freedom in the techniques to be employed, but this does not say that they have an unlimited liberty as to structure and content of the courses, at least at the secondary level.” (quoting *Adams v. Campbell Cnty. Sch. Dist.*, 511 F.2d 1242, 1247 (10th Cir. 1975))); see also *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800 (5th Cir. 1989) (“Although the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula.” (footnote omitted)). These cases noted that academic freedom protections had primarily been applied to the university setting and even there had not been applied to “curricular decisions” and “teaching related speech.” See *id.*; *Cary*, 598 F.2d at 539–40.

or institutional protections for the university itself.¹⁴⁰ Additionally, the Court has not explained precisely how academic freedom and public employee speech analyses overlap.¹⁴¹ The cases applying academic freedom doctrine to secondary schools are limited to a small period of the 1960s and early 1970s, well before the Court's decision in *Hazelwood*; it appears that analysis of curricular decisions was subsumed by free speech analysis.¹⁴²

It is also uncertain if the rationale behind broadly defined academic freedom is applicable in compulsory primary and secondary education. University students are generally adults who have chosen to be in a particular course of study at a particular university. University professors are charged with developing new and creative ideas that add to human understanding. This mission is different from that of a primary or secondary school teacher whose job focuses far more on the development of skills and core knowledge. Broad protections meant to promote the development of new and bold ideas are not necessary for primary and secondary schools to carry out their purpose.

C. *A Student's Right to Hear*

While even more tenuous than academic freedom, another potential source of First Amendment protections for teachers is a student's right to be exposed to diverse ideas and avoid indoctrination by teachers.¹⁴³ This right to hear is derived from language in *Tinker*, stating that schools could not create "enclaves of totalitarianism" nor regard students "as closed-circuit recipients of only that which the State chooses to communicate."¹⁴⁴ This right was more explicitly stated in the plurality opinion in *Board of Education v. Pico*.¹⁴⁵ The plurality acknowledged a right to receive ideas

¹⁴⁰ Anne Gardner, Note, *Preparing Students for Democratic Participation: Why Teacher Curricular Speech Should Sometimes Be Protected by the First Amendment*, 73 MO. L. REV. 213, 227 (2008).

¹⁴¹ *Id.* at 227–28. *Regents of the University of California v. Bakke* relied on academic freedom protections to support its conclusion that the state had a compelling interest in the freedom of the university to decide the composition of its student body. See 438 U.S. 265, 311–12 (1978) (Powell, J.).

¹⁴² The First Circuit in *Ward* cited the circuit's previous academic freedom decisions, see *supra* note 138 and accompanying text, for the proposition that "postpublication retaliation must derive from some prior limitation. . . . [T]his circuit has long recognized a teacher's right to notice of what classroom conduct is prohibited." *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993). Additionally, one of these cases was cited as providing the factors used to determine the propriety of a school's regulation of teacher speech. *Id.* at 452 (citing *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971) (per curiam)). Thus, the First Circuit appears to have incorporated ideas of academic freedom into its free speech determination, suggesting that academic freedom per se is no longer the source of protection.

¹⁴³ See Daly, *supra* note 26, at 31 ("Students' right to hear rests on a relatively uncertain judicial foundation.").

¹⁴⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

¹⁴⁵ 457 U.S. 853 (1982) (plurality opinion). This case involved students suing the local school board after the board voted to remove a number of books, including Kurt Vonnegut's *Slaughterhouse-Five*, from the school library. See *id.* at 856–58 & n.3.

that “follows ineluctably from the *sender’s* First Amendment right to send them,”¹⁴⁶ and found that a school board could not simply remove books from a library because of partisan concerns.¹⁴⁷

Ironically, this decision actually muddied the overall protection of students’ rights while upholding them in the case before the Court. First, the holding was incredibly narrow, specifically stating it applied to the unique environment of the school library, not the classroom.¹⁴⁸ The holding also only applied to books already in a school library, leading then-Justice Rehnquist to refer to the majority’s holding as enunciating “a curious entitlement” that “exists only in the library of the school, and only if the idea previously has been acquired by the school in book form.”¹⁴⁹

Using a student’s right to hear to protect curricular speech requires significant logical acrobatics. First, the right of a teacher to speak on controversial topics would have to be recognized as a corollary of a student’s right to hear about those topics. However, the Court stated a student’s right to hear flowed from the speaker’s initial right to speak. This logic results in a catch-22 in which a teacher’s freedom of expression is contingent on a student’s right to hear, which is in turn derived from a teacher’s right to speak. Additionally, the Court in *Pico* specifically applied this protection only to the library, not to the classroom.

Given the multiplicity of underdeveloped and inconsistently applied First Amendment approaches to curricular speech protection discussed in this Part, a new standard is needed. While *Garcetti* left open the possibility of providing First Amendment protection for curricular speech, neither *Garcetti* nor any other Supreme Court decision has directly addressed the nature of that protection. Thus, Part II seeks to summarize the theoretical and practical concerns that inform the development of this new doctrine.

II. GENERAL PRINCIPLES AND PRAGMATIC CONCERNS

Universal public education in America has been both a linchpin of economic and political success as well as a crucible for debates on societal values.¹⁵⁰ As a result, there are many competing concerns that attach to

¹⁴⁶ *Id.* at 866–67 (reasoning “we have recognized that ‘the state may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge’” (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965))).

¹⁴⁷ *See id.* at 870–71.

¹⁴⁸ *See id.* at 868. This distinction seems to be at odds with the overall reasoning of the case. If a right exists to hear about certain topics through the books purchased with the school board’s approval for a library, it seems to follow that a teacher may receive some protection in telling the student about that same topic in a class. Otherwise, a teacher could be punished for simply reading aloud from a book found in a school’s own collection.

¹⁴⁹ *Id.* at 910 (Rehnquist, J., dissenting).

¹⁵⁰ *See, e.g.,* *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963) (relating to the broader discussion of separation of church and state in holding school-sponsored Bible reading unconstitutional); President John F. Kennedy, State of the Union Address (Jan. 14, 1963), *available at*

First Amendment rights in public schools. Starting with first principles, the Court has been clear that teachers have constitutional protections within the school¹⁵¹ and that schools should not be used to indoctrinate students;¹⁵² “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”¹⁵³ Failing to provide any First Amendment protection to curricular speech would allow local schools to dictate the opinions that can be shared in their classrooms with relative impunity.

While the Court has stated that teachers do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”¹⁵⁴ the exact contours of those rights have not been defined. The Court has articulated varying, often divergent interests concerning America’s public schools: (1) the need to preserve a marketplace of ideas and prepare students for participation in democratic government,¹⁵⁵ (2) the need to socialize students and help them develop economically useful skills,¹⁵⁶ and (3) the broad authority of local entities in determining appropriate curriculum and managing their employees.¹⁵⁷ Additionally, there are always archetypically problematic teachers that courts have rightly feared will abuse the captive audiences in their classrooms.¹⁵⁸ A standard properly defining First Amendment protections for curricular speech must balance these competing interests and concerns.

A. *The School as a Marketplace of Ideas*

An active, thriving democracy requires citizens to be exposed to diverse perspectives and to be able to think critically. America’s public schools play an important role in this preparation, and have been thought to do so since the Founding.¹⁵⁹ The importance of creating a marketplace of

<http://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-042-021.aspx> (“The future of any country which is dependent upon the will and wisdom of its citizens is damaged, and irreparably damaged, whenever any of its children is not educated to the full extent of his capacity, from grade school through graduate school.”); President Barack Obama, State of the Union Address (Jan. 25, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address> (“But to prepare for the jobs of tomorrow, our commitment to skills and education has to start earlier.”).

¹⁵¹ See *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹⁵² See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640–41 (1943).

¹⁵³ *Id.* at 642.

¹⁵⁴ *Tinker*, 393 U.S. at 506.

¹⁵⁵ See *infra* Part II.A.

¹⁵⁶ See *infra* Part II.B.

¹⁵⁷ See *infra* Part II.C.

¹⁵⁸ See *infra* Part II.D.

¹⁵⁹ See Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in 10 THE WRITINGS OF THOMAS JEFFERSON 161 (Paul Leicester Ford ed., 1899) (“I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened

ideas in American schools finds support in American history and jurisprudence. Thomas Jefferson viewed public education as necessary to create freethinking citizens.¹⁶⁰ Likewise, Benjamin Franklin advocated the discussion of “current controversies” in schools,¹⁶¹ and George Washington viewed the dissemination of knowledge as vital for Americans “to discern and provide against invasions of [their rights]; to distinguish between oppression and the necessary exercise of lawful authority.”¹⁶²

The Court has also latched onto the vision of the school as a 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.’”¹⁶³ Justice Frankfurter noted that democracy is able to thrive “only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens.”¹⁶⁴ The Court recognized that teachers need “wide discretion” to inspire students and inform their views on government, politics, and social issues.¹⁶⁵

This unique role of public education and public school teachers in a democracy differentiates curricular speech from a teacher’s expression in a

enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education.”).

¹⁶⁰ See Thomas Jefferson, *Notes on the State of Virginia*, in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 185, 265–66 (Adrienne Koch & William Peden eds., 1944).

¹⁶¹ Richard Rothstein & Rebecca Jacobsen, *The Goals of Education*, 88 *PHI DELTA KAPPAN* 264, 267 (2006).

¹⁶² President George Washington, First Annual Message to Congress (Jan. 8, 1790), in *JARED SPARKS & GEORGE WASHINGTON*, 12 *THE WRITINGS OF GEORGE WASHINGTON* 10 (1837).

¹⁶³ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)) (“The classroom is peculiarly the ‘marketplace of ideas.’”); see also *Morgan v. Swanson*, 659 F.3d 359, 402 (5th Cir. 2011) (en banc) (opinion of Elrod, J.) (“The habits and manners of a free people include tolerance and consideration of a range of political and religious views.”).

¹⁶⁴ *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring); *accord Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (“The role and purpose of the American public school system were well described by two historians, who stated: ‘[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.’” (quoting CHARLES A. BEARD & MARY R. BEARD, *THE BEARDS’ NEW BASIC HISTORY OF THE UNITED STATES* 228 (William Beard ed., rev. ed. 1968))).

¹⁶⁵ *Ambach v. Norwick*, 441 U.S. 68, 78–79 (1979) (“Within the public school system, teachers play a critical part in developing students’ attitude toward government. . . . Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students’ experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. . . . Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen’s social responsibilities. This influence is crucial to the continued good health of a democracy.”).

staff meeting or a local bureaucrat's discussion of her supervisor.¹⁶⁶ Without an enclave of First Amendment protection against majoritarian pressures, local entities could "cast a pall of orthodoxy over the classroom."¹⁶⁷

B. *The Socializing Function of Education*

Despite the importance of exposing students to diverse perspectives, legitimate countervailing interests suggest that curricular speech protection should not be absolute. The Court has recognized that schools play an important role in inculcating students with societal values.¹⁶⁸ Contrary to the vision of the school as a marketplace of ideas, education performs a socializing function through which the basic norms and skills needed to function in society are passed along to students. Additionally, this function is meant to prepare young people for success in their future careers.

The Court in *Brown v. Board of Education* stated that the school "is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."¹⁶⁹ While not specifying what values are properly imparted to children via public education,¹⁷⁰ the Court has suggested that society uses public education to pass along current values and norms, a conservative notion that cuts against protection of a radical teacher freely spreading her ideology among students at the expense of developing their basic skills.

C. *The Importance of Local Control*

Finally, the Court has also been clear that judges are to defer to the control of local authorities in management of schools and creation of their curricula. Our federal system has largely left the implementation of public education to local municipalities.¹⁷¹ These local entities are democratically

¹⁶⁶ This Note does not argue that teachers in general deserve greater First Amendment rights than other public employees for noncurricular speech—a teacher's expression outside the classroom does not implicate the separate interest of the state as educator.

¹⁶⁷ *Keyishian*, 385 U.S. at 603.

¹⁶⁸ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

¹⁶⁹ *Id.*; see also *Ambach*, 441 U.S. at 77 ("Other authorities have perceived public schools as an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground. These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists." (citations omitted)).

¹⁷⁰ In fact, the Court has placed a number of restrictions on the extent to which K–12 schools can force students to conform to political or religious values. See *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that a requirement that students recite the pledge of allegiance violated the Free Speech Clause of the First Amendment).

¹⁷¹ *Epperson*, 393 U.S. at 104 ("By and large, public education in our Nation is committed to the control of state and local authorities.").

elected, unlike individual teachers, and thus deserve substantial control over the curriculum.¹⁷² Additionally, courts have expressed concern about the inefficiency of judicial interference in the day-to-day operation of schools.¹⁷³ A standard is needed that balances these varying concerns, allowing sufficient local control of the curriculum and its implementation to ensure that students receive appropriate instruction and skill development while also giving educators the ability to expose their students to a variety of ideas vital to becoming good citizens.

D. Paradigmatic Problem Teachers

In addition to these broader interests, courts have worried that teachers will abuse the captive audience found in a public school classroom.¹⁷⁴ These concerns tend to fall along three main lines. I will refer to them as the rogue teacher, the proselytizing teacher, and the inappropriate teacher.

Courts have expressed significant concern about teachers using classroom time to discuss topics unrelated to the curriculum they were paid to teach.¹⁷⁵ This concern about rogue teachers has validity. Often, a school is judged by how well its students perform on standardized tests and tailors its curriculum to improve test scores. Thus, a teacher's decision to deviate from the curriculum for substantial periods can decrease those scores and lower the reputation of the school. Additionally, many curricula are designed so that courses build upon the knowledge a student should have gained in prior years. For example, a calculus class would be ineffective if the students' algebra teachers had neglected to teach them how to factor. Teachers simply disregarding the curriculum can thus harm both school and student.

¹⁷² See *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 371 (4th Cir. 1998) (en banc) (“[I]t is far better public policy . . . that the makeup of the curriculum be entrusted to the local school authorities who are in some sense responsible, rather than to the teachers, who would be responsible only to the judges, had they a First Amendment right to participate in the makeup of the curriculum.”).

¹⁷³ See, e.g., *Epperson*, 393 U.S. at 104 (“Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.”); *Evans-Marshall II*, 624 F.3d 332, 341 (6th Cir. 2010) (expressing concern that First Amendment protection for curricular speech would turn “run-of-the-mine curricular disputes into constitutional stalemates” requiring burdensome judicial oversight).

¹⁷⁴ See *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 968 (9th Cir. 2011); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007).

¹⁷⁵ See *Mayer*, 474 F.3d at 479 (“A 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.”).

Additionally, courts have seen potential danger in protecting a teacher who uses his position as a pulpit.¹⁷⁶ The trust imparted to teachers in shaping the minds of students can easily be misused.¹⁷⁷ Distinct from simply exposing students to new ideas, educators may attempt to force their own religious or political views on their pupils. This threat certainly poses a real concern that teachers, cloaked in a degree of legitimacy and having control over students' grades, may be able to abuse their positions if given overly broad free speech protections. To some, the answer to this problem is to give expansive power to school boards: "[I]f indoctrination is likely, the power should be reposed in someone the people can vote out of office, rather than tenured teachers."¹⁷⁸ However, this approach raises significant problems of its own, as majoritarian school boards could themselves engage in attempts to indoctrinate students, possibly with greater effect than a sole proselytizing teacher.¹⁷⁹ Thus, any First Amendment standard

¹⁷⁶ See *Johnson*, 658 F.3d at 957 ("We consider whether a public school district infringes the First Amendment liberties of one of its teachers when it orders him not to use his public position as a pulpit from which to preach his own views on the role of God in our Nation's history to the captive students in his mathematics classroom. The answer is clear: it does not."); *Mayer*, 474 F.3d at 480 ("The Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials.").

¹⁷⁷ There are numerous examples of free speech challenges concerning teachers presenting sectarian religious messages in their classrooms. See, e.g., *Johnson*, 658 F.3d at 958 (a math teacher had several large posters emphasizing the role of God in America's founding documents); *Webster v. New Lenox Sch. Dist.* No. 122, 917 F.2d 1004, 1005–06 (7th Cir. 1990) (a teacher presented Christian viewpoints on creation to his social studies class).

¹⁷⁸ *Mayer*, 474 F.3d at 479–80.

¹⁷⁹ The message of a single teacher can easily be ignored or countered by other teachers. However, a school board can mandate policy for every teacher a child is exposed to—potentially creating the very "pall of orthodoxy over the classroom" feared by the Court in *Keyishian*. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). This is particularly true when the teachers lack First Amendment protection for their curricular speech. While it is true that school boards are subject to democratic checks, some locales have majoritarian support for highly political or sectarian ideas. For example, according to a recent Gallup poll, 46% of Americans believe in new-earth creationism. Frank Newport, *In U.S., 46% Hold Creationist View of Human Origins*, GALLUP (June 1, 2012), <http://www.gallup.com/poll/155003/hold-creationist-view-human-origins.aspx>. It is likely that this number surpasses 50% in certain regions. Likewise, 52% of Republican voters in Mississippi polled in 2012 believed President Barack Obama is a Muslim, while only 12% affirmatively believed that he practices his actual religion, Christianity. Chris Moody, *More than Half of Mississippi GOP Voters Say Obama is a Muslim, New Poll Suggests*, YAHOO! NEWS (Mar. 12, 2012), <http://news.yahoo.com/blogs/ticket/poll-more-half-mississippi-voters-obama-muslim-192027518.html>. Furthermore, partisan behavior often makes its way into education policy. In 2010 the Texas Board of Education approved a social studies curriculum that explicitly required emphasis of "the superiority of American capitalism," teaching of McCarthyism alongside evidence of significant communist infiltration of government during the period, and teaching about "the conservative resurgence of the 1980s," including figures like Phyllis Schlafly, while removing Thomas Jefferson from a list of figures who inspired eighteenth-century revolutions (likely due to his coining the phrase "separation of church and state"). James C. McKinley Jr., *Conservatives on Texas Panel Carry the Day on Curriculum Change*, N.Y. TIMES, Mar. 13, 2010, at A10, available at <http://www.nytimes.com/2010/03/13/education/13texas.html>. While the Court has rejected certain school board

should work to prevent indoctrination of students by either teacher or school board.

Finally, courts are concerned about a teacher who exposes students to age-inappropriate material receiving First Amendment protection. There is always a danger that a teacher may exercise poor judgment and expose students to sexual or violent material that is inappropriate for their age or for the school environment generally.¹⁸⁰ For example, the First Circuit has explicitly looked to the “age and sophistication” of students in determining whether curricular speech is appropriate.¹⁸¹ Each of these concerns must be addressed by any standard for determining whether the First Amendment protects specific curricular speech.

III. A NEW STANDARD FOR CURRICULAR SPEECH

Educators in primary and secondary schools should be given limited but well-defined First Amendment protections for their curricular speech. This Note proposes that a new standard should be developed that accounts for the competing interests and valid concerns regarding curricular speech protection. This approach takes cues from *Pickering* and *Hazelwood*—in particular, the First Circuit’s approach in *Ward*—to create a new test specifically tailored for curricular speech in public schools.

A. The Proposed Test

Whether curricular speech implicates First Amendment protections should be determined by balancing a teacher’s interest in speaking on matters of legitimate pedagogical concern against the school’s interest in providing an effective educational environment. This analysis would proceed in two steps. First, it must be determined if there is a legitimate pedagogical interest in an educator’s speech. This determination would be made pursuant to two inquiries.

First, a court would ascertain whether the speech at issue is rationally related to a teacher’s assigned curriculum or established school programming.¹⁸² This inquiry is rather straightforward. A court would determine what curriculum—as defined by the school board and the

decisions as violative of the Establishment Clause, *see Epperson v. Arkansas*, 393 U.S. 97, 103 (1968), this protection does not apply to political manipulation.

¹⁸⁰ *See, e.g., Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 721 (2d Cir. 1994) (showing a film clip with nude actors in a sophomore math class); *Kenney v. Genesee Valley Bd. of Coop. Educ. Servs.*, No. 07-CV-6442 CJS, 2008 WL 343110, at *1 (W.D.N.Y. Feb. 6, 2008) (showing a graphic clip of a man committing suicide to demonstrate the properties of ballistics).

¹⁸¹ *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993).

¹⁸² “School programming” refers to any initiative, activity, or sport specifically authorized by a school. For example, many schools have character-education initiatives. By including these programs in the test, teachers may receive protection in facilitating a discussion related to that initiative within their classrooms.

teacher's supervisors in both written documents and informal communications—the teacher was tasked with implementing at the time of the speech in question. Then, the court would scrutinize the speech in question and determine if it was rationally related to this curriculum.

Second, the court would determine whether the speech complied with viewpoint-neutral school policies of which the teacher is on notice. School policies could be ascertained from a variety of sources, including state laws, employee manuals, office memoranda, and communications between a teacher and his supervisors. Next, a court would determine if these policies facially discriminated against a particular point of view. If so, the policy would be invalid and excluded from the remainder of the analysis. Finally, notice would be determined by examining whether a teacher would be reasonably expected to have actual or constructive notice of the policy.

If the teacher's speech meets both of these standards, the court would then proceed to balance these interests against the school's interest in providing an effective educational environment. Schools are mandated with providing the best education possible, and this standard specifically focuses on the needs of students. If the speech at issue harms student learning—for example, via poor quality instruction or introduction to age-inappropriate material—that effect should factor into the courts' ultimate determination. Also relevant is whether the speech would emotionally harm a reasonable student of that age. This standard explicitly targets harm to students, not conflicts between teachers and either parents or supervisors.¹⁸³ Additionally, if the school board or administrators specifically authorized the speech at issue, a strong presumption should exist that the speech did not harm the educational environment; both teacher and supervisor agreed *ex ante* that the expression was acceptable.

B. *Balancing in Practice*

The operation of this test is best illustrated by applying it to existing case law. While the published decisions in many past cases lack the relevant facts needed for application of the proposed standard, several cases provide opportunities to explore its operation—among these are *Mayer v. Monroe County Community School Corp.*,¹⁸⁴ *Boring v. Buncombe County Board of Education*,¹⁸⁵ and *Johnson v. Poway Unified School District*.¹⁸⁶

The curricular speech found in *Mayer* would be protected under the proposed standard. Ms. Mayer's speech satisfies both inquiries in step one. The discussion of peace was rationally related to her curriculum; the

¹⁸³ While parents are not included explicitly in this test, their views in the aggregate are included by proxy. Parents can and do participate in the operation of local schools through school board meetings and elections, which directly impact the specific curricular choices of a district.

¹⁸⁴ 474 F.3d 477 (7th Cir. 2007).

¹⁸⁵ 136 F.3d 364 (4th Cir. 1998) (en banc).

¹⁸⁶ 658 F.3d 954 (9th Cir. 2011).

newsletter that contained the article on peace protests was a part of her curriculum.¹⁸⁷ Also, the record does not indicate that a school policy requiring her to avoid discussion of peace, the Iraq War, or personal political opinions generally had been communicated to the staff at the time of her speech. Even if her principal's later ban on discussing peace had been in place at the time, her speech would still be protected because the policy lacked viewpoint neutrality.¹⁸⁸ Only a policy banning all discussion of the war or political beliefs would disqualify the speech from protection. In step two, there is no evidence in the case that her speech damaged the learning environment for her students. The speech at issue was very brief, and complaints came only from one set of parents with opposing political viewpoints, not her students.¹⁸⁹

Similarly, the curricular speech in *Boring* would likely be protected under this standard. In choosing a play for her high school theater class, Ms. Boring was carrying out the curriculum assigned to her. Not only did she comply with school policies, she actually got permission from her supervisor in advance of choosing the play.¹⁹⁰ While a colorable argument can be made that exposure to a play involving teen pregnancy, homosexuality, and dysfunctional families could be emotionally harmful, this would be unlikely to succeed. First, the school principal specifically authorized the performance of the play, creating a strong presumption that the play was not harmful. Additionally, participants in the play were high school students in an advanced acting class¹⁹¹ (likely an elective)—students of that age are generally aware of issues pertaining to sexuality and family strife.

The facts of *Johnson* demonstrate a scenario in which curricular speech falls outside the scope of the First Amendment. In *Johnson*, a high school mathematics teacher was forced to remove several large banners that emphasized the importance of God in America's founding documents.¹⁹² This speech fails both step-one inquiries. Even if the speech were found to be political rather than religious, it bore no rational relationship to the teaching of mathematics. Also, both preexisting school district policy and state law of which the teacher should have been aware contained provisions prohibiting the expression.¹⁹³ Thus, this speech would not be protected.

¹⁸⁷ See *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, No. 1:04-CV-1695-SEB-VSS, 2006 WL 693555, at *2 (S.D. Ind. Mar. 10, 2006).

¹⁸⁸ See *id.* at *3.

¹⁸⁹ *Id.* at *2–3.

¹⁹⁰ *Boring*, 136 F.3d at 375–76 (Motz, J., dissenting).

¹⁹¹ See *id.* at 366 (majority opinion).

¹⁹² See *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 957–59 (9th Cir. 2011).

¹⁹³ See *id.* at 959. The school policy instructed teachers to “refrain from using classroom teacher influence to promote partisan or sectarian viewpoints” and the state law stated that religious references

These examples demonstrate how the proposed standard would deal with past cases. With the basic operation of the test illustrated, the next section will examine its potential benefits and drawbacks.

C. Benefits of the Proposed Approach

The proposed test provides a limited but well-defined protection for curricular speech that has a number of distinct advantages over existing approaches. These benefits fall into three general categories: (1) proper balancing of interests, (2) a focus on institutional competency, and (3) practical benefits for educators. Each of these categories shall be discussed in turn.

First, this test properly balances the tension between maintaining a marketplace of ideas in schools with proper deference to local control and the need for basic socialization. The very existence of protection for curricular speech promotes the marketplace of ideas. More specifically, a teacher's ability to speak on matters rationally related to her curriculum ensures that any topic assigned to her can be viewed from multiple perspectives. Though the school can still create a policy limiting certain speech, it must do so on a viewpoint-neutral basis; the school may be able to prevent Ms. Mayer from discussing the Iraq War, but if she is allowed to discuss it, she can expose students to multiple perspectives, lessening concerns about indoctrination. However, the balancing step prevents this protection from becoming overly inclusive; speech that would harm a reasonable student or that simply demonstrates poor quality of instruction would fall outside the First Amendment.

Additionally, using the established curriculum as the anchor of protection gives proper deference to the control of local authorities. The curriculum assigned to a teacher embodies the will of the local school board and state authorities. A school board can then specify which topics it does and does not want covered. A school that wants to exert greater control over the content of a politically charged subject, like American government, can give very specific instructions, while a school that wants to give its teachers more leeway can give broad directives. Likewise, excluding speech unrelated to the curriculum ensures the First Amendment will not become an excuse for teachers to neglect developing their students' basic skills.

It could be argued that the proposed standard actually provides too much deference to local control. As the standard for First Amendment protection varies with school board decisions about curriculum and policy, schools could theoretically put in place draconian measures to limit a teacher's autonomy. Several factors work as a check against this kind of

are proper only when "incidental to or illustrative of matters properly included in the course of study." *Id.* at 959 & n.5 (citing CAL. EDUC. CODE § 51511 (West 2006)).

control. First, the test itself requires viewpoint neutrality in regulations—if the policy is facially biased toward a particular political party or religious sect, a teacher’s speech may still be protected. A school would have to limit speech on topics it does want to promote in order to suppress the speech it dislikes, increasing the burden in imposing a limit. Also, there are constitutional limitations on the conduct of school boards that come from outside the Free Speech Clause; both the First Amendment’s Establishment Clause¹⁹⁴ and the Fourteenth Amendment’s Due Process Clause¹⁹⁵ have been used to limit the actions of local education authorities and can check the most egregious actions.

Finally, a practical check on school boards imposing draconian limitations is the threat of diminishing educational quality. School boards and administrators have a strong interest in the performance of their students; poor performance can cost them their jobs through political pressure or legal sanction.¹⁹⁶ If a good teacher feels overly burdened by regulation, he can take his talents elsewhere. Inferior teaching quality can substantially lower student achievement.¹⁹⁷ The interests of administrators and school boards in providing a quality education would act as a check against abuse.

Also, requiring curricular speech to comply with school policy allows school administrators to set basic standards for educator conduct. A school would be free to require special permission for movies of a certain rating, ban the use of profanity, as well as prohibit teachers from advancing their own sectarian beliefs in classrooms. Policies of this sort would prevent an inappropriate teacher or proselytizing teacher from receiving First Amendment protection. Also, this approach naturally accounts for a student’s increasing maturity, as curricula tend to be set for specific courses offered to students of specific ages. The rational relationship requirement also accounts for the problem of rogue teachers; spending class time exploring topics unrelated to their curriculum would fail this test.

Second, the proposed standard is consistent with the differing competencies of educators and courts. At base, schools are experts in

¹⁹⁴ See *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968) (holding a state statute that prohibited teaching evolution in public schools unconstitutional on Establishment Clause grounds).

¹⁹⁵ See *Meyer v. Nebraska*, 262 U.S. 390, 399–400, 403 (1923) (holding that a Nebraska law outlawing foreign language education violated the Due Process Clause of the Fourteenth Amendment).

¹⁹⁶ See *supra* note 15 and accompanying text discussing the punishments that can result from failure to comply with No Child Left Behind.

¹⁹⁷ A recent empirical study relating student outcomes to teacher quality demonstrated that replacing a poor teacher with a higher quality one would increase the net lifetime income of a single class by more than \$250,000. Raj Chetty et al., *The Long-Term Impacts of Teachers: Teacher Value-Added and Student Outcomes in Adulthood* 47 (Nat’l Bureau of Econ. Research, Working Paper No. 17699, 2011), available at http://obs.rc.fas.harvard.edu/chetty/value_added.pdf. Students with higher quality teachers are also more likely to go to college and less likely to have children as teenagers than their similarly situated peers. See *id.* at 4, 36.

pedagogy and courts are experts in legal analysis. This test places the core pedagogical determinations in the hands of the schools. Instead of allowing courts to speculate about what a legitimate pedagogical purpose is, this standard allows educators creating a curriculum or a school policy to make the relevant determinations; schools are in charge of creating both the curricula and the policies that underpin the two inquiries into legitimate pedagogical concern. The court then takes this curriculum and policy and relates them to the facts of the case using well-established modes of legal analysis: determining rational relationships,¹⁹⁸ evaluating viewpoint neutrality,¹⁹⁹ determining whether the language of a text reaches a particular situation,²⁰⁰ and balancing competing interests.²⁰¹

Finally, this new standard would create several additional practical benefits for educators. First, the standard is written in language that teachers and administrators can understand. The vast majority of teachers have never taken a class in law,²⁰² but they do know the ins and outs of their schools' curricula and policies. Teachers can be confident in employing diverse methods in the classroom if they teach their assigned curriculum and follow school rules. Conversely, administrators gain clarity regarding the circumstances under which they can take disciplinary action against a teacher without violating the Constitution. Additionally, the first step's notice requirement incentivizes schools to develop clear, well-communicated policies. This approach would encourage schools to be proactive and create policies (preferably written) that are clearly communicated to their staffs to avoid potential liability. This new standard

¹⁹⁸ See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that rational basis review under the Equal Protection Clause requires a classification to bear a "rational relationship to legitimate state interests").

¹⁹⁹ See, e.g., *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.").

²⁰⁰ See, e.g., *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842 (1984) (requiring that courts, in evaluating agency regulations, determine "whether Congress has directly spoken to the precise question at issue"). The first step in this proposed test actually bears a resemblance to *Chevron* analysis. In both, an elected body (Congress or a school board) has delegated some of its authority to another party (agency or a teacher). The court determines whether or not a statement by the elected body (law or curriculum) has directly addressed an act by the party (rulemaking or curricular speech) to whom that body has delegated authority. If the elected body has not spoken to the act, then the court determines if the party acted reasonably given its prior direction. *Cf. id.* at 842–44.

²⁰¹ See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (balancing public employees' speech interests against public employers' interest in the efficiency of public services).

²⁰² One study found that 75% of teachers have never taken a class in school law. David Schimmel & Matthew Militello, *Legal Literacy for Teachers: A Neglected Responsibility*, 77 HARV. EDUC. REV. 257, 262 (2007). Even with a basic understanding of legal concepts, the convoluted nature of First Amendment protection under current law would likely make it difficult for educators to know what the First Amendment does and does not protect.

for curricular speech would give educators much-needed certainty concerning their First Amendment rights.

CONCLUSION

The long-term economic and political success of the United States rests largely on the shoulders of our public education system. Teachers are on the front lines of public education and should be able to expose young people to a wide variety of ideas within the bounds of the curriculum they are assigned to teach. Currently, First Amendment jurisprudence in this area is deeply conflicted and poorly developed. This Note proposes a new standard specifically designed for the realities of public schools: balancing a teacher's interest in speaking on matters of legitimate pedagogical concern against the school's interest in providing an effective educational environment. Determining what is a matter of legitimate pedagogical concern is not left to jurists but to pedagogues through the creation of curriculum and viewpoint-neutral school policies.

This new standard for curricular speech is designed to maintain a marketplace of ideas within America's schools while still respecting the important socializing function of schools and giving deference to local control. By providing clear, but limited, protection for a teacher's curricular speech, this standard would provide much-needed clarity to this area of the law and limit the ability of majoritarian bodies to "cast a pall of orthodoxy" over the nation's public schools.²⁰³

²⁰³ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

