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# Social Media, Public School Teachers, and the First Amendment

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## SOCIAL MEDIA, PUBLIC SCHOOL TEACHERS, AND THE FIRST AMENDMENT\*

MARY-ROSE PAPANDREA\*\*

*Education officials around the country are grappling with issues surrounding public school teachers' use of social media. Typically concerned that social media makes it easier for teachers to engage in inappropriate communications with their students, officials have adopted guidelines that prohibit K-12 teachers from using social media to communicate with their students for noncurricular purposes. In addition, teachers are frequently punished for content they or others post on social media even when their students and the school community were not the intended audience. Current doctrine leaves unclear how much authority schools have to restrict their teachers' use of social media to communicate with their students or to control what teachers post online.*

*This Article contends that these issues involving social media magnify pre-existing problems with the First Amendment doctrine governing public employees generally and teachers in particular and argues that the doctrine needs significant revisions and clarifications. The Court's decision under *Garcetti v. Ceballos* to strip public employees of their First Amendment rights for speech made "as employees" pursuant to their official job duties should be construed narrowly so that it applies only when teachers communicate with their students for school-related purposes. Furthermore, teachers should not have to demonstrate that their speech involves a matter of public concern to be entitled to First Amendment protection. Instead, this Article argues that in cases involving noncurricular speech that relates to the workplace, courts should apply a robust version of the *Pickering* balancing test that recognizes the value of teacher expression even when it does not involve a matter of public concern and that does not permit a hostile*

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*community reaction to figure into the calculus. In cases involving non-school-related expression, this Article contends that courts should abandon the balancing test and instead give the speech presumptive constitutional protection that can be overcome only if school officials can demonstrate a significant nexus between that speech and the teacher's fitness and ability to perform professional duties.*

*With the First Amendment doctrine governing public school teachers reformed in this way, broad social media bans that restrict or prohibit a teacher's use of social media to communicate with students for non-school-related purposes would be unconstitutional, and the ability of school officials to punish teachers for their online expression would not be as virtually unlimited as it currently is.*

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## INTRODUCTION

Ashley Payne was a 24-year-old public high school English teacher in Georgia when her principal called her into his office to tell her that she could be suspended because of content on her personal Facebook page.<sup>1</sup> The objectionable content? Standard tourist photographs of Payne drinking alcohol in European beer gardens and cafés during a recent vacation and a comment that she was attending a trivia contest called “Crazy Bitch Bingo” at a local restaurant.<sup>2</sup> Even though Payne used Facebook’s privacy settings, the principal had learned about the content from an anonymous email claiming one of Payne’s students had seen the pictures and the profanity.<sup>3</sup>

Around the country, public school districts have punished teachers like Ms. Payne for content they or others posted on social media sites. For example, a Virginia teacher who created artwork using body parts was fired when school officials learned of it;<sup>4</sup> a Nashville teacher was fired after posting “racy” photos of herself on her MySpace profile page;<sup>5</sup> a Spanish teacher in Pittsburgh was suspended for a month without pay when a fellow teacher posted a picture of her on Facebook with a stripper at a bachelorette party;<sup>6</sup> and a Wisconsin middle-school teacher was placed on administrative leave for posting a picture of herself with a gun on her Facebook page.<sup>7</sup> In other cases, teachers have found their jobs in jeopardy after

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1. Maureen Downey, *Court Rules Against Ashley Payne in Facebook Case. But More to Come.*, ATLANTA J.-CONST. (Oct. 10, 2011, 7:36 PM), <http://blogs.ajc.com/get-schooled-blog/2011/10/10/court-rules-against-ashley-payne-in-facebook-case/>.

2. *Id.*

3. Maureen Downey, *Barrow Teacher Done in by Anonymous “Parent” Email About Her Facebook Page*, ATLANTA J.-CONST. (Nov. 13, 2009, 3:12 PM), <http://blogs.ajc.com/get-schooled-blog/2009/11/13/barrow-teacher-done-in-by-anonymous-e-mail-with-perfect-punctuation/>.

4. See Complaint at 7–10, *Murmer v. Chesterfield Cnty. Sch. Bd.*, No. 3:07CV608 (E.D. Va. Oct. 4, 2007), 2007 WL 2914769. For more about the case, see *Teacher Hopes To Get Back at Va. District*, FIRST AMEND. CENTER (Oct. 6, 2007), <http://www.firstamendmentcenter.org/teacher-hopes-to-get-back-at-va-district-that-fired-him-over-butt-art>.

5. Michael D. Simpson, *The Whole World (Wide Web) Is Watching*, NEA TODAY, Apr. 2008, at 17, 17, available at <http://www.nea.org/home/12784.htm>.

6. *Settlement Reached in Teacher’s Stripper Photo Suspension*, WPXI.COM (Pittsburgh) (Aug. 17, 2010, 8:47 AM), <http://www.wpxi.com/news/24657376/detail.html> (explaining how the American Civil Liberties Union sued the school district on the teacher’s behalf and achieved reinstatement, back pay, and a monetary award).

7. Tony Galli, *Teacher Placed on Leave for Questionable Facebook Posting*, WKOW.COM (Madison, Wis.) (Feb. 3, 2009, 4:36 PM), [http://www.wkow.com/Global/story.asp?S=9781795&nav=menu1362\\_10](http://www.wkow.com/Global/story.asp?S=9781795&nav=menu1362_10).

school officials learned that they complained about their students or schools on social media sites<sup>8</sup> or made controversial statements about topics unrelated to their schools or their teaching.<sup>9</sup>

In most of these cases, the teachers did not intend to communicate with their students or other members of their school communities through social media. Some teachers, like Ms. Payne, thought they had used privacy settings on their pages that would prevent students from seeing them,<sup>10</sup> or, like the Virginia body-part artist, had taken great efforts to disguise their identity to prevent their students from discovering their work.<sup>11</sup> Others simply relied on the “practical obscurity” the Internet provides.<sup>12</sup>

In an effort to avoid the possibility of inappropriate communications with students, some states and school districts have adopted laws or policies restricting electronic communication between teachers and students, some of which require teachers to communicate with students only through school-provided or school-approved technology and/or provide that online communications must be limited to school related matters.<sup>13</sup> Other laws ban teachers

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8. See, e.g., Maureen Downey, *Facebook and Teachers: Still a Potentially Dangerous Combination for Your Career*, ATLANTA J.-CONST. (Aug. 23, 2010, 8:52 AM), <http://blogs.ajc.com/get-schooled-blog/2010/08/23/facebook-and-teachers-still-a-potentially-dangerous-combination-for-your-career/> (discussing a number of cases where teachers have been punished for their speech in social media, including a Massachusetts school administrator who resigned after school officials discovered that she had said on her Facebook page that the parents in her upscale town were “arrogant” and “snobby” and that she was not looking forward to the start of school).

9. See, e.g., Tim Padgett, *A Teacher Is Back in Class After Anti-Gay Diatribe, but Did He Really Win?*, TIME (Aug. 30, 2011), <http://www.time.com/time/nation/article/0,8599,2091038,00.html> (discussing high school teacher Jerry Buell, a devout Baptist and American history teacher at a public high school in Florida, who wrote on his personal Facebook page “that gay marriage is a ‘cesspool’ that makes him vomit and mocks God”).

10. *Did the Internet Kill Privacy?*, CBSNEWS (Feb. 6, 2011, 7:21 PM), <http://www.cbsnews.com/stories/2011/02/06/sunday/main7323148.shtml>.

11. *Teacher Hopes To Get Back at Va. District*, *supra* note 4.

12. Kayla Webley, *How One Teacher’s Angry Blog Sparked a Viral Classroom Debate*, TIME (Feb. 18, 2011), <http://www.time.com/time/nation/article/0,8599,2052123,00.html> (recounting how a teacher who wrote a blog critical of schools “maintains what she wrote was meant only to serve as amusement for herself, her husband and seven of her friends who read the site”).

13. Some policies require teachers to use social networks that the school or district either hosts or has approved. See, e.g., CMTY. UNIT SCH. DIST. 200, ILL., BOARD OF EDUCATION POLICY MANUAL 5:135 (2010), available at <http://www.barrington220.org/cms/lib2/IL01001296/Centricity/ModuleInstance/5958/Section5-7.11.pdf> (stating that employees may communicate with parents and students online only about school-related matters and only through district-approved networks); cf. MASS. ASSOC. OF SCH. COMM.,

from “friending” students in social media networks or otherwise giving students access to their social media profiles.<sup>14</sup> Still other regulations warn school employees that they may be subject to discipline if they use any social networking site inappropriately, even if the content is not directed at students and does not relate to

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POLICY ON FACEBOOK AND SOCIAL NETWORKING WEBSITES FOR MILTON PUBLIC SCHOOL EMPLOYEES 1 (2011), *available at* <http://www.miltonps.org/documents/SCPpolicyIJNDD.pdf> (requiring that all Internet contacts be made through the school email system). Other policies provide that teachers can use electronic media to communicate with students or other members of the school community about school-related business only. *See, e.g.*, CHI. PUB. SCH., ILL., CHICAGO PUBLIC SCHOOLS POLICY MANUAL: ACCEPTABLE USE OF THE CPS NETWORK AND COMPUTER RESOURCES 5 (2009), *available at* <http://policy.cps.k12.il.us/documents/604.1.pdf> (explaining that all emails sent by users in their capacity as representatives of the Chicago Public Schools must be sent from Board-authorized email systems); DAYTON BD. OF EDUC., OHIO, DAYTON PUBLIC SCHOOLS POLICY MANUAL: ACCEPTABLE USE AND INTERNET SAFETY FOR INFORMATIONAL AND EDUCATIONAL TECHNOLOGY 1–2 (2010), *available at* [http://www.nctq.org/docs/Dayton\\_Policy\\_manual\\_app\\_2009\\_doc\\_23\\_5\\_1418.pdf](http://www.nctq.org/docs/Dayton_Policy_manual_app_2009_doc_23_5_1418.pdf) (providing that teachers cannot respond to student-initiated conversations through social media not approved by the district); ECTOR CNTY., TEX., INDEPENDENT SCHOOL DISTRICT EMPLOYEE HANDBOOK (2011–2012) 49, *available at* <http://www.ectorcountysd.org/176610728111231193/lib/176610728111231193/ecisd-employeehandbook.pdf> (“An employee may use electronic media to communicate with a student within the scope of the professional responsibilities of his or her job.”).

14. *See* Katherine Bindley & Timothy Stenovec, *Missouri “Facebook Law” Limits Teacher-Student Interactions Online, Draws Criticism and Praise*, HUFFINGTON POST (Aug. 3, 2011, 8:58 AM), [http://www.huffingtonpost.com/2011/08/03/missouri-facebook-law\\_n\\_916716.html](http://www.huffingtonpost.com/2011/08/03/missouri-facebook-law_n_916716.html); *see also* DAYTON BD. OF EDUC., OHIO, *supra* note 13, at 1–2 (stating that employees may not “friend” students on social media sites unless they are related to the student and that they may not instant message or text current students or respond to student-initiated conversations through social media not approved by the district); GRANITE SCH. DIST., SALT LAKE CITY, UTAH, SOCIAL NETWORKING POLICY, ART. X.C.3. (2010), *available at* <http://www.graniteschools.org/districtpolicies/teachinglearningservices/Educational%20Technology/3.%20Social%20Networking%20policy.pdf> (explaining that employees may not allow students to access personal social networking sites); L.A. UNIFIED SCH. DIST., POLICY BULLETIN 3 (Feb. 1, 2012), *available at* [http://www.lausd.net/lausd/offices/Office\\_of\\_Communications/BUL-5688.0\\_SOCIAL\\_MEDIA\\_POLICY.pdf](http://www.lausd.net/lausd/offices/Office_of_Communications/BUL-5688.0_SOCIAL_MEDIA_POLICY.pdf) (accepting invitations to non-school-related social networking sites from “parents, students, or alumni under 18 is strongly discouraged”); MASS. ASSOC. OF SCH. COMM., *supra* note 13, at 1 (stating that teachers, staff, and coaches may not list current students as “friends” on social networking sites); SCH. BD. OF PINELLAS CNTY., FLA., BYLAWS AND POLICIES, COMMUNICATIONS WITH STUDENTS VIA ELECTRONIC MEDIA 253 (2012), *available at* [http://web.pcsb.org/Planning/neola/NewBoardPolicy\\_Entire.pdf](http://web.pcsb.org/Planning/neola/NewBoardPolicy_Entire.pdf) (requiring that employees communicate with students only by school-provided electronic devices and services); WEYMOUTH PUB. SCH., MASS., EMPLOYEE HANDBOOK 23 (2012), *available at* [http://www.weymouthschools.org/uploadedFiles/District\\_Forms\\_and\\_Information/Handbooks/Emp%20Handbook%2011-12\[1\].pdf](http://www.weymouthschools.org/uploadedFiles/District_Forms_and_Information/Handbooks/Emp%20Handbook%2011-12[1].pdf) (requiring that electronic communication between personnel and students must be for educational purposes only and that school staff may not share personal webpages or social media with current students).

school.<sup>15</sup> While these laws and policies have typically been passed in reaction to revelations that teachers had used social media to lure students into sexual relationships,<sup>16</sup> these social media bans and restrictions are troublesome given the rapidly increasing importance of social media as a communication platform and the growing recognition that social media can be an important pedagogical tool. Rather than attacking the inappropriate contact itself, these efforts single out a means of communication.

Although few cases involving teachers and social media have proceeded to judgment,<sup>17</sup> it is only a matter of time before the current trickle of cases becomes a torrent. Unfortunately, the doctrine governing teacher speech rights is nothing short of confusing. Current doctrine leaves unclear how much authority schools have to restrict their teachers' use of social media to communicate with their students or to control what teachers post online. The Supreme Court's framework for analyzing free speech rights of public employees—like public school teachers—strips First Amendment protection from speech they make “as employees” pursuant to their official job duties.<sup>18</sup> The Supreme Court left unclear whether this rule applies in the educational context given concerns about academic freedom; the Court also left unexplained how a court should determine whether expression is pursuant to “official” job duties. In addition, it appears that speech must involve a matter of public concern to receive constitutional protection, although the Court and the lower courts have left it unclear whether this is required in cases involving non-work-related expression. And even if employees can survive these two threshold tests, employees still cannot prevail unless they can demonstrate that their interest in the speech and the value of the speech outweigh the government's interest in restricting it.

For teachers, the uncertainty does not end there. Some courts have applied the framework developed for student speech rights to

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15. See *BD. OF EDUC., SOMERVILLE, N.J., 3000 SERIES: TEACHING STAFF MEMBERS: INAPPROPRIATE STAFF CONDUCT* § 3281 (2005), available at <http://www.somervillenjk12.org/cms/lib5/NJ01001815/Centricity/Domain/351/3000%20Series.pdf> (stating that school staff members are “advised to be concerned about” the use of emails, text messages, social networking sites, or any medium “that is directed and/or available to pupils or for public display”); *L.A. UNIFIED SCH. DIST.*, *supra* note 14, at 3 (warning that school employees who engage in the “inappropriate use” of social networking sites are subject to discipline).

16. See *Bindley & Stenovec*, *supra* note 14.

17. See, e.g., *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at \*1, \*15–16 (E.D. Pa. Dec. 3, 2008).

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

teachers' in-school expression and have permitted schools to punish teachers for any speech that interferes with legitimate pedagogical goals.<sup>19</sup> Although it is unclear whether this alternative framework is more or less speech protective than the public employee framework, the reality is that neither doctrine offers teachers much protection for their curricular and extracurricular speech.

Part I discusses the increasingly important role social media is playing in public schools around the country and the various objections some school officials and parents have to this development. Part II discusses the uncertainty regarding the appropriate doctrinal framework for analyzing the First Amendment claims of public school teachers. Although the Supreme Court has developed separate frameworks for analyzing the speech rights of government employees and public school students, the lower courts disagree about which of these frameworks applies to public school teachers. Part III argues that the public employee speech doctrine should apply in cases involving teachers, but this framework requires significant clarifications and revisions. The Court's decision to strip public employees of their First Amendment rights for speech made "as employees" pursuant to their official job duties should be construed narrowly so that it applies only when teachers use social media to communicate with their students for school-related purposes. Furthermore, teachers should not have to demonstrate that their speech involves a matter of public concern in order to bring a First Amendment claim. In cases involving school-related speech, courts should apply a vigorous balancing test that weighs the value of the speech against the government's interest in regulation. Moreover, courts should not permit a hostile community reaction to factor into the calculus. Most importantly, courts should not apply a balancing test to expression that is not school-related but should instead afford this noncurricular speech presumptive constitutional protection. This presumption can be overcome only if school officials can demonstrate a significant nexus between the speech and the teacher's fitness and ability to perform her educational duties.

Under this proposed approach, broad social media bans that restrict or prohibit a teacher's use of social media to communicate with students would be unconstitutional. In addition, schools would find it more difficult to punish teachers for the things they say and do on social media. At the same time, this approach would still not

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19. See *infra* Part II.C.



provide teachers the First Amendment rights ordinary citizens enjoy. Schools would maintain the power to restrict student-teacher conversations that are truly harmful and to punish teachers who engage in expression that reveals them to be unfit for the profession.

### I. SOCIAL MEDIA IN SCHOOLS

The role of social media in public schools is currently a divisive issue. Although it is increasingly common for school officials around the country—from individual schools<sup>20</sup> to school districts<sup>21</sup> to the U.S. Department of Education<sup>22</sup>—to use social media sites like Facebook, Twitter, and YouTube to communicate with students, parents, and the interested public about school-related events and issues,<sup>23</sup> the use of social media by teachers to communicate with their students is highly controversial. In addition, teachers who use social media in their personal lives have faced severe punishments for posting content that school officials claim interferes with a school's educational mission, sets a bad example for students, or is otherwise inappropriate or unprofessional.

#### A. Pedagogical Uses

Given that 73% of children ages 12–17 use social media and even elementary school students use social media websites like WebKinz and Club Penguin,<sup>24</sup> it is not surprising that some educators have embraced social media as a valuable pedagogical tool.<sup>25</sup> Many teachers around the country have successfully integrated various social media platforms like Twitter and Facebook into their

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20. See Kimberly Melton, *Schools Use Facebook, Twitter to Get Out Their Message*, OREGONLIVE.COM (Sept. 24, 2009, 6:22 PM), [http://www.oregonlive.com/education/index.ssf/2009/09/schools\\_turn\\_to\\_facebook\\_twitt.html](http://www.oregonlive.com/education/index.ssf/2009/09/schools_turn_to_facebook_twitt.html).

21. See, e.g., CHAPEL HILL-CARRBORO CITY SCHS., <http://www2.chccs.k12.nc.us/education/components/board/> (last visited May 8, 2012) (providing links to the school district's Facebook, Twitter, and Flickr pages).

22. See, e.g., *US Dept of Education*, TWITTER, <http://twitter.com/usedgov> (Twitter feed for the U.S. Department of Education).

23. Michelle R. Davis, *Social Networking Goes to School*, EDUC. WK.: DIGITAL DIRECTIONS (June 14, 2010), <http://www.edweek.org/dd/articles/2010/06/16/03networking.h03.html>.

24. *Id.*

25. See generally Heather L. Carter, Teresa S. Foulger & Ann Dutton Ewbank, *Have You Googled Your Teacher Lately? Teachers' Use of Social Networking Sites*, 89 PHI DELTA KAPPAN 681 (2008) (explaining how increasing numbers of teachers are using social media in their classrooms and personal lives).

classrooms, and their reasons for doing so vary.<sup>26</sup> These teachers claim that social media allows them to improve communication with their students individually and as a class.<sup>27</sup> Some teachers use Facebook and other social media websites to remind students about homework assignments and tests.<sup>28</sup> Teachers have also discovered that social media tools like Facebook make it easier for students to complete group projects and to continue the dialogue about their schoolwork outside of the classroom.<sup>29</sup> In addition, social media helps teachers reach and engage shy students who are more willing to contribute to the class conversation if they can do so anonymously or at least not in person in the classroom.<sup>30</sup>

Participating in social media can enhance communication and collaboration, facilitate social interaction, promote creativity, and help develop writing and technical skills.<sup>31</sup> For example, a pilot project in North Carolina public schools allows students to use their smart phones to communicate with their math teachers outside of school hours; in addition, students may collaborate with their fellow students through instant messages, blogs, and videos explaining how they solved a problem.<sup>32</sup> As a result of this project, students have reported they are more motivated and interested in math, and greater numbers have demonstrated proficiency in math.<sup>33</sup>

Social media also may help teachers and administrators reach troubled students who need more than just help with their academic work.<sup>34</sup> Teachers can provide needed emotional attention and moral support to overcome personal problems, such as abuse or family

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26. See Jessica Gross, *Embracing the Twitter Classroom*, HUFFINGTON POST (May 18, 2009), [http://www.huffingtonpost.com/jessica-gross/embracing-the-twitter-cla\\_b\\_204463.html](http://www.huffingtonpost.com/jessica-gross/embracing-the-twitter-cla_b_204463.html).

27. Carter et al., *supra* note 25, at 682–83.

28. *Id.* at 683.

29. *Id.*

30. *Id.* at 682–83; see also Gross, *supra* note 26 (noting that shy students are more willing to speak up online).

31. Davis, *supra* note 23.

32. *Id.*

33. Tina Barseghian, *Mobile Learning Proves to Benefit At-Risk Students*, MIND/SHIFT (July 20, 2011, 1:00 PM), <http://mindshift.kqed.org/2011/07/mobile-learning-proves-to-benefit-at-risk-students/>. Outside of the classroom, student club organizers have also found social media to be an effective way of attracting, retaining, and communicating with their members. See Carter et al., *supra* note 25, at 683.

34. David Murphy, *Missouri Bans Student-Teacher Facebook Friendships*, PCMAG.COM (July 31, 2011), <http://www.pcmag.com/article2/0,2817,2389485,00.asp>.

difficulties.<sup>35</sup> Students looking for adult mentoring and guidance might find it difficult to connect with a teacher during school hours; social networks can offer an easier and more approachable method of reaching teachers and school officials.<sup>36</sup>

Additionally, more and more schools are recognizing the importance of bringing social media into the classroom so that young people can learn how to use social media safely and effectively.<sup>37</sup> These educational efforts include teaching students about the dangers of sexting and cyberbullying; the potential for reputational harm; threats to students' privacy and safety that might result from posting personal or inappropriate information; the social isolation and depression that might result from spending too much time on Facebook and other social media websites; and the undue influence of websites that promote unsafe and self-destructive behaviors like bulimia, drug use, and self-cutting.<sup>38</sup> Schools can also play an important role in educating students about plagiarism, intellectual property rights, the credibility of sources of information, and responsible digital citizenship generally.<sup>39</sup>

#### *B. Teachers' Use of Social Media in Their Professional and Personal Lives*

Like students, teachers can also benefit from using social media outside of the classroom in their professional and personal capacities. As professionals, some teachers use social media to connect with other teachers, communicate with their unions, and learn more about innovative teaching techniques.<sup>40</sup> In their personal lives, teachers can use social media to keep in touch with their friends and family and to make connections with those with whom they have fallen out of

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35. danah boyd, *When Teachers and Students Connect Outside School*, AOPHENIA (May 27, 2009), [http://www.zephorio.org/thoughts/archives/2009/05/27/when\\_teachers\\_a.html](http://www.zephorio.org/thoughts/archives/2009/05/27/when_teachers_a.html).

36. *Id.*

37. Sarah Kessler, *The Case for Social Media in Schools*, MASHABLE (Sept. 29, 2010), <http://mashable.com/2010/09/29/social-media-in-school/>; see also Gross, *supra* note 26 (discussing benefits of using social media in the classroom).

38. *Social Media and Kids: Some Benefits, Some Worries*, AM. ACAD. PEDIATRICS (Mar. 28, 2011), <http://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/Social-Media-and-Kids-Some-Benefits,-Some-Worries.aspx>.

39. Stephanie Clifford, *Teaching About Web Includes Troublesome Parts*, N.Y. TIMES (Apr. 8, 2010), <http://www.nytimes.com/2010/04/09/education/09cyberkids.html>.

40. Davis, *supra* note 23.

touch.<sup>41</sup> Although most social media connections reflect pre-existing offline connections, social media also brings together strangers with similar hobbies, interests, and political views.<sup>42</sup>

Numerous teachers have faced discipline for posting what school officials regard as inappropriate and unprofessional content on social media, even though the content was posted during their personal time.<sup>43</sup> School officials have punished teachers for posting content that sets a poor example for their students because it involves sex, drugs, alcohol, or profanity.<sup>44</sup> In other instances, school districts have punished teachers and other school employees for content on social media sites that casts their schools in a negative light. This expression might take the form of negative comments about the school or students<sup>45</sup> or offensive comments about non-school-related topics.<sup>46</sup>

Although perhaps some teachers post this sort of content knowing that school administrators will see it, anyone who places information in digital form runs the risk that an unintended audience will discover it.<sup>47</sup> To avoid the problems of controlling the audience for their information, some teachers simply avoid using social media entirely or engage in significant self-censorship to post only the most benign content.<sup>48</sup> Even the teachers who take this conservative approach to social media, however, have no control over the

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41. Aaron Smith, *Why Americans Use Social Media*, PEW RES. CENTER (Nov. 15, 2011), <http://www.pewinternet.org/~media/Files/Reports/2011/Why%20Americans%20Use%20Social%20Media.pdf>.

42. danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 210 (2008), available at <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html>.

43. See Carter et al., *supra* note 25, at 682–83.

44. *Id.* at 683.

45. Zach Patberg & Carol Lawrence, *Facebook Comments Prompt Parents to Remove Children from Teacher's Class*, NORTHJERSEY.COM (Apr. 3, 2011), [http://www.northjersey.com/news/119115024\\_Facebook\\_comments\\_prompt\\_parents\\_to\\_remove\\_children\\_from\\_teacher\\_s\\_class.html](http://www.northjersey.com/news/119115024_Facebook_comments_prompt_parents_to_remove_children_from_teacher_s_class.html) (giving numerous examples of teachers who were punished for making derogatory comments about their students).

46. See, e.g., Padgett, *supra* note 9 (discussing a teacher who made offensive anti-gay marriage comments on Facebook).

47. Lance Ulanoff, *Your Digital Debris Is Haunting You*, PCMAG.COM (June 9, 2011), <http://www.pcmag.com/article2/0,2817,2386635,00.asp>.

48. See Frederic D. Stutzman & Woodrow N. Hartzog, *Boundary Regulation in Social Media* 5 (Oct. 8, 2009) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1566904](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1566904). Indeed, many educators suggest that teachers should avoid social media entirely. See, e.g., Jodi Weigand, *Pitfalls Await Teachers Who Publicize Lives on Social Media*, PITTSBURGH TRIB.-REV. (Aug. 18, 2011), [http://www.pittsburghlive.com/x/pittsburghtrib/news/state/s\\_752099.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/state/s_752099.html).

information others may post about them.<sup>49</sup> Furthermore, many active users of social media sites discover that the design of these platforms makes it difficult for them to control the disclosure of information in the same way they can in the offline world.<sup>50</sup>

With more than 800 million users, Facebook is the world's most popular social networking website.<sup>51</sup> It is not surprising, then, that Facebook frequently plays a role in cases where teachers are punished for posting inappropriate content.<sup>52</sup> But another reason Facebook is so often involved in these cases is that it is difficult for users to present multiple personas to different audiences.<sup>53</sup> Indeed, until May 2008, family, friends, acquaintances, work colleagues, and professional contacts were all merged online as a single social group and all indiscriminately labeled "friends."<sup>54</sup> Although Facebook now allows users to place contacts into different "lists" of friends, this process is imperfect and burdensome, especially for those who are not tech-savvy.<sup>55</sup> Furthermore, information on Facebook is public by default.<sup>56</sup> Even when Facebook users believe they are using the

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49. See, e.g., *Settlement Reached with School District over Teacher Who Was Suspended over Photo with Stripper at Bachelorette Party*, ACLU (Aug. 17, 2010), <http://www.aclu.org/free-speech/settlement-reached-school-district-over-teacher-who-was-suspended-over-photo-stripper-ba>; *Update: Jacksonville Teacher Resigns*, KETK NBC (Dec. 30, 2010), <http://www.ketknbc.com/news/update-jacksonville-teacher-resigns> (noting that a teacher resigned after someone else posted inappropriate pictures of her online).

50. Paul Adams, Slideshow Presentation at the Voices That Matter Web Design Conference: The Real Life Social Network v2, slides 188–206 (June 2010), available at <http://www.slideshare.net/padday/the-real-life-social-network-v2>.

51. *Facebook*, N.Y. TIMES, [http://topics.nytimes.com/top/news/business/companies/facebook\\_inc/index.htm](http://topics.nytimes.com/top/news/business/companies/facebook_inc/index.htm) (last updated Apr. 9, 2012).

52. Harry Ess Belch, *Teachers Beware! The Dark Side of Social Networking*, LEARNING & LEADING WITH TECH., Dec.–Jan. 2011–2012, at 15, 16, available at [http://www.iste.org/learn/publications/learning-and-leading/issues/Feature\\_Teachers\\_Beware\\_The\\_Dark\\_Side\\_of\\_Social\\_Networking.aspx](http://www.iste.org/learn/publications/learning-and-leading/issues/Feature_Teachers_Beware_The_Dark_Side_of_Social_Networking.aspx) (listing several examples involving Facebook).

53. Jens Binder, Andrew Howes & Alistair Sutcliffe, *The Problem of Conflicting Social Spheres: Effects of Network Structure on Experienced Tension in Social Network Sites*, CHI, 2009, at 965, 967 (Apr. 7, 2009).

54. *Id.*

55. For a discussion of Facebook's "list" function and recent efforts to improve it, see Jason Kincaid, *Facebook Officially Unveils Smart Friend Lists*, TECHCRUNCH (Sept. 13, 2011), <http://techcrunch.com/2011/09/13/facebook-officially-unveils-smart-friend-lists/>. Some of these efforts have been a response to newcomer Google+'s "Circles," which allows users to organize contacts into groups. *Id.* Google+ Circles may represent an improvement, but using it can be tedious and inconvenient. See Peter Pachal, *Google Circles: The Dumbest Thing About Google+*, PCMAG.COM (June 29, 2011), <http://www.pcmag.com/article2/0,2817,2387808,00.asp>.

56. *Why Facebook Won't Be Number One Forever: The Oversimplification of Identity Online Through the Blurring of 'Selves,'* ONLINE CONF. ON NETWORKS & CMTYS. (Apr.

maximum privacy settings Facebook offers—and therefore having “private” conversations with friends—these privacy settings are notoriously unreliable and easily bypassed.<sup>57</sup> Social science research demonstrates that although people frequently intend to share personal information with a small subset of their “friends,” they end up sharing information with many more people than they would offline.<sup>58</sup>

In addition to privacy and access controls, some social media users rely on a number of methods of “boundary regulation” to control the audience for their content.<sup>59</sup> These methods include anonymous or pseudonymous participation; the maintenance of multiple social profiles or the use of multiple social media sites; and reliance on the “practical obscurity” of most material on the Internet.<sup>60</sup> None of these methods is perfect, and teachers around the country have paid the price for this imperfection when parents, students, and school officials see content that teachers often did not intend for those audiences.<sup>61</sup>

### C. Resistance to Social Media in Schools

Despite the pervasive use of social media in society generally,<sup>62</sup> some school administrators and parents contend that using social media in schools causes more harm than good.<sup>63</sup> In addition to questioning the effectiveness of integrating technology into the classroom,<sup>64</sup> some express concern that encouraging students to use

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24, 2011), <http://networkconference.netstudies.org/2011/04/why-facebook-won't-be-number-one-forever-the-oversimplification-of-identity-online-through-the-blurring-of-selves/>.

57. Kurt Opsahl, *Facebook's Eroding Privacy Policy: A Timeline*, ELECTRONIC FRONTIER FOUND. (Apr. 28, 2010), <http://www.eff.org/deeplinks/2010/04/facebook-timeline>.

58. See *Why Facebook Won't Be Number One Forever: The Oversimplification of Identity Online Through the Blurring of 'Selves,' supra* note 56. Although on average Facebook users have 180 “friends,” they tend to interact regularly with only four to six people. See Adams, *supra* note 50, at slide 105.

59. See Stutzman & Hartzog, *supra* note 48, at 13–15.

60. *Id.*

61. See *supra* text accompanying notes 10–12.

62. A recent survey reported that sixty-six percent of online adults use social networking websites like Facebook, LinkedIn, Twitter, or MySpace. See Smith, *supra* note 41.

63. Davis, *supra* note 23. Indeed, many schools still block access to popular social networks like Twitter and Facebook. *Id.*

64. See, e.g., Matt Richtel, *In Classroom of Future, Stagnant Scores*, N.Y. TIMES (Sept. 3, 2011), <http://www.nytimes.com/2011/09/04/technology/technology-in-schools-faces->

social media will lead to more online harassment and sexual predators.<sup>65</sup> Others are worried that using social media as an educational tool intrudes inappropriately into the personal and social lives of students and undermines the appropriate professional boundary between teacher and student.<sup>66</sup>

Increasingly, school officials around the country have become so concerned about this boundary issue that they have adopted school policies forbidding or heavily restricting teachers' use of social media to contact students.<sup>67</sup> These policies vary widely and reflect school officials' uncertainty about social media. Some of the more extreme policies require that school employees use only their school email accounts to communicate with students or use social media to communicate with their students only about school-related matters.<sup>68</sup> Others mandate that employees not "friend" students or otherwise give them access to their personal webpages or social media networks.<sup>69</sup>

## II. FREE SPEECH RIGHTS OF K-12 PUBLIC SCHOOL TEACHERS

Courts have not yet adopted a consistent framework for cases involving teachers and social media. Although the Supreme Court has a relatively well-developed line of cases addressing the First Amendment rights of public employees, some lower courts have instead applied the Supreme Court's decisions made in the context of student speech rights. As more cases involving teachers and social media work their way through the judicial system, courts will first have to determine the proper doctrinal framework for analyzing these kinds of claims. The following Part examines these two frameworks

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questions-on-value.html?pagewanted=all (reporting that although schools spend billions on new technology, proving the educational value of such tools is difficult).

65. Davis, *supra* note 23.

66. *Id.*

67. Jennifer Preston, *Rules to Stop Pupil and Teacher from Getting Too Social Online*, N.Y. TIMES, Dec. 17, 2011, at A1.

68. See, e.g., CHI. PUB. SCH., *supra* note 13, at 5 ("Users are not allowed to use third-party email systems . . . in their capacity as representatives of Chicago Public Schools."); MASS. ASSOC. OF SCH. COMM., *supra* note 13, at 1 ("All e-contacts with students should be through the district's computer and telephone system."); Alexander Russo, *School Board Bans Facebook, Twitter for Teachers*, CHICAGONOW (Aug. 10, 2009, 8:16 AM), <http://www.chicagonow.com/district-299-chicago-public-schools-blog/2009/08/school-board-bans-facebook-twitter-for-teachers/> ("[R]equiring teachers to use official email for all communications with students.").

69. DAYTON BD. OF EDUC., OHIO, *supra* note 13, at 1–2 (stating that employees cannot "friend" students unless they are related or are a legal guardian).

with a focus on where they are unclear and how, in practice, they differ from each other.

A. *Current Doctrinal Framework for Public Employees*

For decades, courts commonly understood that the First Amendment placed no restrictions on the ability of the government to discipline its employees based on their expressive activities.<sup>70</sup> The basis for this understanding was a right-privilege distinction; in other words, being a public school teacher is a privilege, not a right, and the government is free to condition the exercise of that privilege on the relinquishment of constitutional rights.<sup>71</sup> As Oliver Wendell Holmes famously said while serving on the Supreme Judicial Court of Massachusetts, “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”<sup>72</sup>

Over time, the Supreme Court’s reliance on the right-privilege distinction diminished, and the Court instead required any restrictions on teachers and other public employees to pass constitutional scrutiny.<sup>73</sup> Cases involving public school teachers (on the secondary and university level) played an important role in this development. For example, in *Keyishian v. Board of Regents*,<sup>74</sup> the Court struck down a McCarthy-era law that required university faculty members to certify that they were not members of communist or other subversive organizations.<sup>75</sup> The Court explained that “the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”<sup>76</sup>

The watershed case for the First Amendment rights of public school teachers and public employees more generally came in 1968 when the Court decided *Pickering v. Board of Education*.<sup>77</sup> This case

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70. See William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439–40 (1968).

71. *Id.*

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

73. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1973) (holding that it is well settled that government employment cannot be denied or penalized “on a basis that infringes [the employee’s] constitutionally protected interests—especially, his interest in freedom of speech”).

74. 385 U.S. 589 (1967).

75. *Id.* at 608–10.

76. *Id.* at 603 (internal citations omitted).

77. 391 U.S. 563 (1968).



involved a public school teacher who wrote a letter to the editor of a local newspaper criticizing the school board's funding allocations.<sup>78</sup> The *Pickering* Court explicitly held that public employees retained a First Amendment right to make statements of public concern even when they involve the subject matter of their employment.<sup>79</sup> Recognizing that teachers' First Amendment rights are not absolute, the Court established a balancing test that considered "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>80</sup> Although the Court was unwilling to go so far as to offer public employees the same protection that ordinary citizens enjoy for their contributions to public debate, the Court recognized that public employees, as a class, can offer valuable insights and opinions regarding the government enterprise in which they are employed.<sup>81</sup> Applying its new balancing test to the facts at hand, the *Pickering* Court first noted that the teacher's letter was not directed toward his immediate supervisors or coworkers and therefore did not threaten to undermine discipline or harmony in the workplace.<sup>82</sup> Furthermore, the Court explained, the teacher's letter did not interfere with the operation of the school system in any way or undermine his ability to perform his daily duties as a teacher.<sup>83</sup> The Court concluded the government had no greater interest in suppressing his speech than it would have in suppressing the same speech by a member of the general public.<sup>84</sup>

*Pickering* recognizes the important contributions government employees can make to public debate and in some cases offers meaningful protection for those contributions. As with any balancing test, however, the outcome of any particular case will depend on the facts at issue. Indeed, *Pickering* itself made this clear with its constant references to the circumstances of that case<sup>85</sup> and caveats that the

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78. *Id.* at 564–65.

79. *Id.* at 571–72.

80. *Id.* at 568.

81. *Id.* (noting that teachers as a class are often in the best position to make valuable contributions to the public debate about school funding issues).

82. *Id.* at 569–70.

83. *Id.* at 572–73.

84. *Id.* at 574.

85. *See, e.g., id.* at 569 (expressing reluctance to "lay down a general standard" for all cases in which an employee makes statements critical of his supervisors given "the enormous variety of fact situations"); *id.* at 573 (reaching its conclusion in light of "the[] circumstances" of the case); *id.* at 574 (holding that the First Amendment protects a

balance reached might be different if a variety of other factors were present.<sup>86</sup> Accordingly, an employee who criticizes a direct supervisor or coworker or speaks on an issue that is directly related to his job duties might find that the *Pickering* balancing test results in an unfavorable outcome.

Since *Pickering*, the Supreme Court has placed additional obstacles in the way of any successful First Amendment claim a public employee might make.<sup>87</sup> In *Connick v. Myers*,<sup>88</sup> the Supreme Court held that a court must first determine as a threshold matter whether the speech at issue involves a matter of public concern before conducting *Pickering*'s balancing test.<sup>89</sup> The Court explained that government employers must be given "wide latitude" to restrict employee speech that does not involve a matter of public concern because federal courts should not get involved in personnel decisions regarding employee speech that involves a matter "only of personal interest."<sup>90</sup> To determine whether speech satisfies this public concern requirement, *Connick* instructed courts to consider the "content, form, and context" of the speech at issue.<sup>91</sup> Relevant factors might include whether the speech is directed to a public or private audience

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teacher's speech "in a case such as the present one" where the comments were only "tangentially" related to employment).

86. See, e.g., *id.* at 570 n.3 (noting the possibility of a different result in cases where "the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal," or where the employer and supervisor have such a "personal and intimate" working relationship such that any criticism would undermine the effectiveness of that relationship); *id.* at 572 (noting the possibility of a different result in a case where the employee has greater access to the real facts than the general public); *id.* at 573 n.5 (noting the possibility of a case where a teacher's statements "are so without foundation as to call into question his fitness to perform his duties in the classroom"); *id.* at 574 n.6 (noting the possibility of a different result if the employee's statements were intentionally or recklessly false).

87. In addition to the cases discussed in the text, the Court also watered down public employee speech rights in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977) (requiring employees to prove that their speech motivated the decision to discipline). To be fair, some of the Court's decisions in this area have been favorable for public employees. See, e.g., *Rankin v. McPherson*, 483 U.S. 378, 379–80, 383 (1987) (protecting the constitutional right of a clerical employee in the constable's office to say after Reagan assassination attempt, "[i]f they go for him again, I hope they get him"); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 411–13 (1979) (protecting a teacher's complaints to the principal about racial discrimination at school).

88. 461 U.S. 138 (1983).

89. For a more complete discussion of *Connick* and the confusion surrounding the public concern inquiry, see Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 BYU L. REV. 2117, 2125–27.

90. *Connick*, 461 U.S. at 146–47.

91. *Id.* at 147–48.

and whether the speech calls for a specific change in the employee's working conditions or invites a broader public debate concerning a government entity.<sup>92</sup>

Most recently, in its 2006 decision *Garcetti v. Ceballos*,<sup>93</sup> the Court held that a government employee has no First Amendment rights at all when he is speaking "pursuant to [his] official duties."<sup>94</sup> *Garcetti* invoked the old Holmesian principle that citizens who become government employees "by necessity must accept certain limitations on [their] freedom" so their employers can provide services efficiently.<sup>95</sup> The Court explained that restricting speech that owes its existence to a public employee's professional responsibilities does not implicate the First Amendment because the government has a right to control what the government itself has created.<sup>96</sup> *Garcetti* expressly left open the question of whether the doctrine of academic freedom provides teachers with some First Amendment rights in their scholarship or teaching.<sup>97</sup> Even prior to *Garcetti*, however, lower courts have been reluctant to recognize the protections of academic freedom for K-12 teachers.<sup>98</sup>

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92. See *id.* (distinguishing between speech that is merely of personal interest to the employee and speech that is of public interest).

93. 547 U.S. 410 (2006).

94. *Id.* at 421.

95. See *id.* at 418 (citations omitted). For a discussion of the Court's return to the Holmesian approach, see Paul M. Secunda, *Neoformalism and the Reemergence of the Right-Privilege Distinction in Public Employment Law*, 48 SAN DIEGO L. REV. 907, 943-44 (2011).

96. *Garcetti*, 547 U.S. at 421-22 ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995))).

97. *Id.* at 425 (recognizing that the First Amendment might provide protection for speech in the academic environment for which the public employee framework does not account).

98. See, e.g., *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007) (refusing to apply *Garcetti* in a case involving a high school teacher because "[t]he Court explicitly did not decide whether [*Garcetti* applies] . . . to a case involving speech related to teaching"); *Mayer v. Monroe Cnty. Cmty. Corp.*, 474 F.3d 477, 479-80 (7th Cir. 2007) (rejecting academic freedom for K-12 teachers); see also Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. L. REV. 54, 63-64 (2008) (arguing that *Garcetti* has little effect on K-12 teachers because "courts have uniformly ruled, before and after *Garcetti*, that teachers in elementary and secondary education do not have a First Amendment right of academic freedom to decide for themselves what should be taught and how"); *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1048, 1050 (1968) (arguing that although at the K-12 level "there is no strong tradition of intellectual freedom comparable to that which has characterized the development of the college and university," the quality of instruction requires freedom in the classroom and intellectual integrity).

The Supreme Court has decided three cases involving public employee “off duty” speech that did not directly relate to work. In *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO* (“*Letter Carriers*”),<sup>99</sup> the Court upheld provisions of the Hatch Act, which prevents all federal government employees from engaging in campaign activity.<sup>100</sup> The Court applied *Pickering*’s balancing test and upheld the law, deferring to Congress’s judgment that the rule is important to ensure that government employees enforce and execute the law without favoritism to a political party, to avoid the appearance of such favoritism, and to protect government employees from coercion to perform political acts in order to “curry favor” or maintain employment.<sup>101</sup>

In the second case, *United States v. National Treasury Employees Union* (“*NTEU*”),<sup>102</sup> the Court declined to give Congress the same broad deference lawmakers enjoyed in *Letter Carriers* and struck down a broad honoraria ban that prevented all federal employees from accepting compensation for their off-duty expressive activities.<sup>103</sup> The Court applied the *Connick/Pickering* framework. It first held that the ban touched on matters of public concern, noting that because the ban applied to off-duty expression, it concerned speech employees make “as citizens.”<sup>104</sup> The Court concluded that the expressive activities subject to the ban satisfied *Connick*’s public concern requirement because they “were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their Government employment.”<sup>105</sup> Moving on to the *Pickering* balancing test, the Court stated that public employees have the right to engage in expressive activities on their own time “as citizens,” absent some government interest in restricting those activities that is “far stronger than mere speculation.”<sup>106</sup> Unlike *Letter Carriers*, in which the Court upheld a broad ban on political campaigning, the Court declined to defer to Congress’s judgment and held that a broad honoraria ban was not sufficiently tailored to serve

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99. 413 U.S. 548 (1973).

100. *Id.* at 550–51.

101. *Id.* at 564–67.

102. 513 U.S. 454 (1995).

103. *See id.* at 457.

104. *Id.* at 465–66.

105. *Id.* at 466.

106. *See id.* at 465–66, 475 (citations omitted).

the government's asserted interest in avoiding impropriety.<sup>107</sup> With its broad definition of what constitutes a matter of public concern and its lack of deference to the government's asserted reasons for the honoraria ban, *NTEU* appears to give government employees robust protection for their off-duty, non-work-related expressive activities.

The third off-duty case, *City of San Diego v. Roe*,<sup>108</sup> appears to have undermined the broad protection *NTEU* offered. In *Roe*, a police officer had listed for sale on eBay videos of himself "stripping off a police uniform and masturbating."<sup>109</sup> A per curiam Court opinion stated that two tests have emerged for evaluating public employees' free speech claims: the *Connick/Pickering* framework, and then, from *NTEU*, a separate presumption of protection for expressive activities "on their own time on topics unrelated to their employment."<sup>110</sup> *Roe* stated that *NTEU* held that such speech is protected absent a significant government justification,<sup>111</sup> but *NTEU* itself applied the usual *Connick/Pickering* framework.<sup>112</sup> Some commentators have argued that, after *Roe*, the *Connick/Pickering* framework does not apply at all in off-duty, non-work-related cases,<sup>113</sup> although to date no lower courts have embraced this approach.

#### B. Applying the Public Employee Framework in Social Media Cases

Every step of the public employee framework outlined above offers potential obstacles for teachers who challenge adverse employment actions based on their social media communications. *Garcetti* left unclear when teachers are acting pursuant to their official job responsibilities as well as whether teachers enjoy any measure of

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107. *Id.* at 472–77.

108. 543 U.S. 77 (2004) (per curiam).

109. *Id.* at 78.

110. *Id.* at 80.

111. *Id.* at 80–82.

112. See *NTEU*, 513 U.S. at 465–70.

113. See, e.g., Cynthia Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 UCLA L. Rev. 1463, 1468 (2007) ("*City of San Diego*, and its reading of *NTEU*, appear to place an outer limit on the additional power of the government over the speech of its employees. While that outer limit is a bit further from the workplace than one might have expected, at some point along the spectrum of work-relatedness, the public employee apparently escapes the *Connick-Pickering* niche and recovers her freedom as a citizen vis-à-vis the government."); Paul M. Secunda, *Whither the Pickering Rights of Federal Employees*, 79 U. COLO. L. REV. 1101, 1108 (2008) ("The only thing that is apparently clear concerning the job-relatedness of speech is that public employee speech that occurs off-duty and is not work-related . . . does not come under the *Pickering* framework at all. Rather, under the *NTEU* line of cases, it is protected much like normal citizen speech.").

academic freedom to soften the decision's draconian effects. The Court's decisions have also left unclear when social media communications will pass the *Connick* public concern test and whether the public concern test is even necessary when the speech is not work-related. Finally, even if teachers can survive *Garcetti* and *Connick*, they must overcome the uncertainty of the *Pickering* balancing test, where it is unclear how courts should evaluate the "value" of an employee's speech and whether adverse public reaction is a relevant factor in evaluating the government's interest in restricting the expression at issue.

### 1. *Garcetti v. Ceballos*

*Garcetti* did not explain what it means for employees to speak "pursuant to their official duties" aside from mentioning that a job description is not dispositive and that "[t]he proper inquiry is a practical one."<sup>114</sup> Indeed, *Garcetti* expressly refused to give lower courts any guidance for defining the scope of an employee's duties.<sup>115</sup> As a result, lower courts disagree about whether *Garcetti* applies when an employee's speech is not required by, but is related to, his job duties.<sup>116</sup> This question could arise in a number of different ways in the social media context.

First, it is unclear whether a teacher's decision to use social media as a pedagogical tool is "pursuant to official duties" when a teacher is not "required" to do so. To date, only one court has addressed this issue. In *Spanierman v. Hughes*,<sup>117</sup> a high school teacher claimed he "used his MySpace account to communicate with students about homework, to learn more about the students so he could relate to them better, and to conduct casual, non-school related discussions."<sup>118</sup> The *Spanierman* court held that as long as a teacher is not required to use social media, *Garcetti* does not apply.<sup>119</sup> It is not

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114. *Garcetti v. Ceballos*, 547 U.S. 410, 421, 424–25 (2006).

115. *Id.*

116. *Compare* *Williams v. Dall. Indep. Sch. Dist.*, 480 F.3d 689, 692–94 (5th Cir. 2007) (holding that *Garcetti* barred an athletic director's First Amendment claim challenging his termination after he wrote a memorandum to the principal questioning use of athletic funds and reasoning that although the director was not required to write this letter, he wrote it in his capacity as an employee, not a citizen), *with* *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1332–33 (10th Cir. 2007) (holding that speech of a school superintendent was protected by the First Amendment because although her statement was related to her employment, it "fell sufficiently outside the scope of her office").

117. 576 F. Supp. 2d 292 (D. Conn. 2008).

118. *Id.* at 298.

119. *Id.* at 309.

clear whether all courts would adopt *Spanierman*'s approach to the applicability of *Garcetti*. In cases arising prior to *Garcetti*, some courts held that a school has a right to control not just the content of teachers' lessons but also the pedagogical methods they use.<sup>120</sup> Indeed, some commentators have noted that school officials must have the same ability to control the content of the curriculum and the methods used to teach the curriculum because "[i]n many cases what is taught is indistinguishable from how it is taught."<sup>121</sup> For example, the Third Circuit has held that the First Amendment offered no protection to a teacher who used a pedagogical technique called "LearnBall," which utilized attention-getting devices and rewards for student performance in an attempt to improve productivity, motivation, and behavior.<sup>122</sup> Teachers who use social media for the reasons discussed in Part I.A—to improve communication with students individually and as a class, to promote creativity and collaboration, to promote student engagement and motivation, etc.—are using social media as a pedagogical tool. *Garcetti* might give schools absolute authority to prevent or restrict their teachers' use of social media in this manner.

Answering the *Garcetti* question might depend upon *how* a teacher is using social media. It is not much of a stretch to view discussions of homework assignments on social media as part of a teacher's job duties; it is less clear whether more casual conversations with students on social media are considered part of a teacher's job. As the facts of *Spanierman* demonstrate, a teacher might use social media to have a mix of school-related and non-school-related exchanges with her students. Unfortunately, even before social media

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120. See, e.g., *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) ("In this case, it is undisputed that defendants have determined that Learnball is not an appropriate pedagogical method. They are entitled to make this determination."); see also *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 723–24 (8th Cir. 1998) (upholding dismissal of a teacher who permitted students to use profanity in the classroom); *Hetrick v. Martin*, 480 F.2d 705, 707–09 (6th Cir. 1973) (holding that the First Amendment does not give protection to a professor terminated because the university administration did not approve of her teaching methods and educational philosophy, which included giving students more responsibility to organize in-class and out-of-class assignments); *Ahern v. Bd. of Educ.*, 456 F.2d 399, 403–04 (8th Cir. 1972) (holding that a teacher has no First Amendment right to use a nonconventional teaching method that attempted to "shift[] to students many decisions customarily made by teachers").

121. Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1356 n.144 (1976).

122. *Bradley*, 910 F.2d at 1174, 1176 (holding that a school has the right to determine what is not an appropriate pedagogical method).

complicated the issue, it was unclear how much protection a teacher receives for “extracurricular” comments to students, whether they take the form of stray remarks during class or noncurricular expressive activities before or after school, between classes or during the lunch period, at school assemblies or athletic events, or on school bulletin boards.<sup>123</sup> For example, the Seventh Circuit recently held that *Garcetti* barred a First Amendment claim brought by a teacher who was fired for making a stray remark in class that revealed her personal anti-war beliefs.<sup>124</sup> Similarly, most courts—although not all—have applied *Garcetti* in cases where teachers used bulletin boards inside their classrooms or elsewhere in the school to post material not directly related to the curriculum.<sup>125</sup>

Indeed, it is not even clear whether *Garcetti* would apply if a teacher used social media to communicate with students about solely non-school-related topics. The line between “curricular” speech that the school has a right to control as government speech and “extracurricular” speech that retains at least some First Amendment protection is unclear at best. Some courts have held that a school retains the right to control what a teacher says to students not just during class time or in their classrooms but any time those students are required to be at school, including in between classes or at school assemblies.<sup>126</sup> In explaining that “teachers do not cease acting as teachers each time the bell rings or the conversation moves beyond the narrow topic of curricular instruction,”<sup>127</sup> the Ninth Circuit has

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123. See Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L.J. 37, 62–64 (2008) (noting that it is unclear whether *Garcetti* applies to “speech made outside of class to students, such as in the hall between classes, during the lunch period or perhaps even after school”).

124. *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 478–80 (7th Cir. 2007) (applying *Garcetti* to bar a teacher’s First Amendment claim challenging her dismissal based on her expression of anti-war sentiment during a class discussion of current events).

125. See, e.g., *Borden v. Sch. Dist. of E. Brunswick*, 523 F.3d 153, 171 n.13 (3d Cir. 2008) (holding that if *Garcetti* applies in an educational context, it would bar a First Amendment claim of a football coach who participated in student-led prayer in the locker room); *Caruso v. Massapequa Union Free Sch. Dist.*, 478 F. Supp. 2d 377, 384 (E.D.N.Y. 2007) (declining to grant summary judgment based on *Garcetti* in a case where a teacher posted a picture of George Bush on a classroom bulletin board); see also *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1006, 1009, 1013 (9th Cir. 2000) (rejecting a teacher’s claim, prior to *Garcetti*, where the teacher claimed he had a First Amendment right to post on a bulletin board in the school’s hallway materials objecting to the school’s gay and lesbian awareness month, as posting on the bulletin boards constituted government speech).

126. See, e.g., *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 967–68 (9th Cir. 2011).

127. *Id.*



explained that teachers are “never just . . . ordinary citizen[s]”<sup>128</sup> given “the position of trust and authority they hold and the impressionable young minds with which they interact.”<sup>129</sup> Some courts have similarly held that teachers continue to speak as employees when they hold “optional” class sessions or meetings off school grounds.<sup>130</sup> A possible argument based on these cases is that it is essentially impossible for a teacher to communicate directly with students without the students (and the larger school community) regarding this speech as representing the voice of the school. Other courts have defended the right of teachers to communicate as “private” citizens with students after school hours, even if on school grounds.<sup>131</sup>

Accordingly, it is possible that the government (whether a school, school district, county, or state) would attempt to rely on *Garcetti* to defend either its decision to punish a teacher for social media communications with students or the constitutionality of social media bans or restrictions that prevent teachers from having such conversations at all. The likelihood of the government prevailing on this issue will depend on how broadly a court interprets *Garcetti*'s scope. It will be harder, although not impossible, for the government to rely on *Garcetti* to defend a policy that restricts or punishes a teacher for communications with students about topics that are not obviously school-related.

## 2. Public Concern Requirement

Even if a teacher can survive the *Garcetti* threshold inquiry, many social media cases will struggle to survive the public concern test. First, some courts have held that speech involving curricular and pedagogical choices is not a matter of public concern because it is “nothing more than an ordinary employment dispute.”<sup>132</sup> Other

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128. *Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994).

129. *Johnson*, 658 F.3d at 968.

130. *See* *Bishop v. Aronov*, 926 F.2d 1066, 1076 (11th Cir. 1991) (rejecting a professor's First Amendment claim that his employer-university could not prohibit him from giving optional out-of-class lectures on the “Christian Perspective” that were connected to his coursework); *see also* *Braswell v. Bd. of Regents*, 369 F. Supp. 2d 1371, 1371, 1373, 1380 (N.D. Ga. 2005) (denying First Amendment claims on qualified immunity grounds where a cheerleading coach allowed students to come to her home for optional prayer sessions).

131. *Wigg v. Sioux Falls Sch. Dist.* 49-5, 382 F.3d 807, 807, 815 (8th Cir. 2004) (holding that a teacher had a First Amendment right to attend with students a religious meeting held after school hours at school).

132. *See, e.g., Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998) (holding that a teacher's First Amendment claim based on the selection of a play for students' theatrical performance was not a matter of public concern); *Kirkland v.*

courts have disagreed.<sup>133</sup> It is unclear how courts would apply the public concern inquiry in cases involving a teacher's in-class noncurricular speech.<sup>134</sup> This means that even if a teacher is punished for discussing political affairs with his students on social media, a court might hold that the speech is not a matter of public concern. *Connick* makes clear that complaining about work on social media is unlikely to pass the public concern test unless the speech presents broader issues of public importance.<sup>135</sup> Social media communications that simply discuss personal information will also fail *Connick's* test.<sup>136</sup>

On the other hand, statements that clearly relate to matters of public concern are more likely to receive protection, even if they are offensive. For example, a school district in Florida initially suspended a teacher who wrote on his personal Facebook page "that gay marriage is a 'cesspool' that makes him vomit and mocks God," but it later reinstated him, presumably because the school's lawyers believed that the First Amendment would likely protect what the teacher said on his own time about a matter of obvious public

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Northside Indep. Sch. Dist., 890 F.2d 794, 802 (5th Cir. 1989) (stating that a claim based on a teacher's selection of books for an optional reading list was an "ordinary employment dispute" and not a matter of public concern).

133. See, e.g., *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1051–52 (6th Cir. 2001) (rejecting the argument that a teacher's speech relating to curricular issues can never be a matter of public concern); *Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980) ("[C]lassroom discussion is protected activity."); see also *Boring*, 136 F.3d at 378–79 (Motz, J., dissenting) ("Although [the claimant's] in-class speech does not itself constitute pure public debate, obviously it does 'relate to' matters of overwhelming public concern . . .").

134. At least one judge has recognized the possibility that a teacher's in-class noncurricular speech should be given more protection than a teacher's in-class curricular speech. See *Boring*, 136 F.3d at 372–73 (Luttig, J., concurring).

135. See, e.g., *Richerson v. Beckon*, No. C07-5590 JKA, 2008 WL 833076, at \*4 (W.D. Wash. Mar. 27, 2008), *aff'd*, 337 F. App'x 637 (9th Cir. 2009) (holding that a blog post criticizing a new employee and boss did not satisfy the public concern test); Leslie Brody, *Paterson Teacher Suspended for Facebook Post Should Be Fired, Judge Rules*, NORTHJERSEY.COM (Nov. 8, 2011), [http://www.northjersey.com/news/Paterson\\_teacher\\_suspended\\_for\\_Facebook\\_post\\_should\\_be\\_fired\\_judge\\_rules.html?c=y&page=2](http://www.northjersey.com/news/Paterson_teacher_suspended_for_Facebook_post_should_be_fired_judge_rules.html?c=y&page=2) (reporting an administrative law judge's decision involving a teacher who said she felt like "a warden for future criminals").

136. See, e.g., *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 310–11 (D. Conn. 2008) (noting in dicta that a teacher's communications with other users and his creative writing on MySpace did not touch on matters of public concern and that only a poem about the Iraq War satisfied the test); *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at \*15–16 (E.D. Pa. Dec. 3, 2008) (holding that a student-teacher's MySpace page contained only personal information and therefore failed the public concern requirement).

concern, especially because the school had failed to demonstrate that his speech caused any problems at school.<sup>137</sup>

Courts currently disagree about whether the public concern requirement should apply at all in cases involving off-duty speech unrelated to the workplace.<sup>138</sup> As Judge Richard Posner explained in one of the leading cases arguing against the public concern approach, “[t]he First Amendment protects entertainment as well as treatises on politics and public administration.”<sup>139</sup> As a result, Posner continued, the government should be required to give a good reason for punishing an employee even for speech on matters of private concern.<sup>140</sup> Posner suggested that in cases involving off-duty expression, courts should skip *Connick*’s public concern test and simply conduct a *Pickering* balancing test, where the value of the speech could be taken into account.<sup>141</sup> Other courts have continued to apply *Connick* in off-duty cases but have taken a broader view of what constitutes a matter of public concern<sup>142</sup> or have stated that the public employee framework is simply inapplicable.<sup>143</sup>

### 3. *Pickering* Balancing Test

The outcome of the *Pickering* balancing test is entirely fact dependent and therefore uncertain. Although the test may appropriately balance the interests of teachers and students with respect to work-related expression, it offers insufficient protection for teachers’ non-work-related expressive activities. Specifically, on the “value” side of the balance, some courts have expressed concern that public employees will effectively have little right to engage in “free, uncensored artistic expression—even on matters trivial, vulgar, or profane”—if only political speech is given significant weight.<sup>144</sup>

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137. See Padgett, *supra* note 9.

138. See Papandrea, *supra* note 89, at 2139–58 (providing a more extensive discussion of the confusion in the lower courts).

139. Eberhardt v. O’Malley, 17 F.3d 1023, 1026 (7th Cir. 1994).

140. *Id.* at 1027.

141. *Id.* at 1026–27.

142. See, e.g., Berger v. Battaglia, 779 F.2d 992, 997–99 (4th Cir. 1985) (holding that an officer’s nightclub music performances were a matter of public concern).

143. See, e.g., Wigg v. Sioux Falls Sch. Dist. 49-5, 382 F.3d 807, 815 n.5 (8th Cir. 2004) (refusing to apply the *Pickering* balancing test in a case involving a teacher’s private, off-duty expression).

144. See Berger, 779 F.2d at 999–1000; see also Flanagan v. Munger, 890 F.2d 1557, 1564–65 (10th Cir. 1989) (holding that “it makes little sense” to apply the public concern test in cases involving nonverbal expression “that does not occur at work or is not about work”).

On the employer's side of the balance, it is unclear whether courts should consider public reaction to an employee's speech. In the education context, disruption often takes the form of students refusing to take a teacher's classes, parental complaints that overwhelm the school's administrative staff, and bad publicity more generally. Courts disagree over whether to take into account this sort of public reaction to the teacher's speech. Some courts have held that actual or threatened disruption to the functioning of a government entity is an appropriate consideration.<sup>145</sup> For example, the Second Circuit held that allowing the government to cite parental outrage when it was discovered that a teacher was a member of the North American Man/Boy Love Association ("NAMBLA") was appropriate because, without the cooperation and participation of parents, "public education as a practical matter cannot function."<sup>146</sup> Other courts have disagreed, noting that "[w]ith the greatest of respect to [complaining] parents, their sensibilities are not the full measure of what is proper education."<sup>147</sup> Along the same lines, some courts have explained that permitting consideration of the public's reaction is equivalent to permitting a typically impermissible "heckler's veto."<sup>148</sup> Some courts have tried to dodge the heckler's veto issue by holding that the requisite disruption is shown not by the public reaction itself but rather the internal disruption caused in the government workplace when it has to divert its resources to respond to an adverse public reaction.<sup>149</sup>

### C. *Applying Student Freedom of Speech Cases to Public School Teachers*

Although the Court has a well-developed (albeit unclear and overly complex) doctrine for analyzing the First Amendment claims

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145. See, e.g., *Meltzer v. Bd. of Educ.*, 336 F.3d 185, 199 (2d Cir. 2003).

146. *Id.* at 199.

147. *Keefe v. Geanakos*, 418 F.2d 359, 361–62 (1st Cir. 1969) (extending First Amendment protection to a teacher's decision to assign a magazine article containing the word "motherfucker" despite protests by parents).

148. See, e.g., *Flanagan*, 890 F.2d at 1566–67 ("The Supreme Court's rejection of the heckler's veto lends support to our holding that the defendants have only an attenuated interest in preventing plaintiffs' speech."); *Berger*, 779 F.2d at 1001 ("Historically, one of the most persistent and insidious threats to first amendment rights has been that posed by the 'heckler's veto,' imposed by the successful importuning of government to curtail 'offensive' speech at peril of suffering disruptions of public order.")

149. See, e.g., *Eaton v. Harsha*, 505 F. Supp. 2d 948, 969–70 (D. Kan. 2007) (recognizing an actual disruption to the internal functioning of a police department caused by having to respond to public criticism of an employee's blog posts).

of public employees, some lower courts deciding cases involving public school teachers have applied the significantly different framework that has developed for student speech rights.

A year after *Pickering*, the Court famously recognized in *Tinker v. Des Moines Independent Community School District*<sup>150</sup> that teachers and students do not “shed their constitutional rights . . . at the schoolhouse gate.”<sup>151</sup> Nevertheless, the Court continued, these rights must be “applied in light of the special characteristics of the school environment.”<sup>152</sup> The Court concluded that a school can restrict student speech at school only if it “materially and substantially” disrupts the work of the school or invades the rights of others.<sup>153</sup>

The Court’s subsequent cases have deviated from *Tinker*’s material disruption standard to impose greater restrictions on the speech rights of students. For example, students have no right to engage in lewd or obscene language at school<sup>154</sup> or to engage in expression that school officials reasonably regard as advocating drug use,<sup>155</sup> regardless of whether the speech disrupts school or interferes with the rights of others. In curbing student speech rights even when the expression does not disrupt the learning environment, the Court has explained that the process of education must not be “confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.”<sup>156</sup>

Although some courts have invoked *Tinker* in cases involving teachers,<sup>157</sup> in recent years the student speech decision upon which the lower courts most frequently rely is *Hazelwood School District v. Kuhlmeier*.<sup>158</sup> In that case, the Supreme Court held that schools had broad authority over the “expressive activities that students, parents,

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150. 393 U.S. 503 (1969).

151. *Id.* at 506.

152. *Id.*

153. *Id.* at 513–14 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

154. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

155. *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

156. *Fraser*, 478 U.S. at 683.

157. *See, e.g.*, *Roberts v. Madigan*, 921 F.2d 1047, 1056–57 (10th Cir. 1990) (“We find no reason here to draw a distinction between teachers and students where classroom expression is concerned.”); *James v. Bd. of Educ.*, 461 F.2d 566, 572 (2d Cir. 1972) (applying *Tinker* to a teacher’s decision to wear an armband where the school made no showing that the armband interfered with school activities); *Parducci v. Rutland*, 316 F. Supp. 352, 355–56 (M.D. Ala. 1970) (applying *Tinker* to the question of whether a teacher’s selections of reading materials for her students were appropriate).

158. 484 U.S. 260 (1988).

and members of the public might reasonably perceive to bear the imprimatur of the school.”<sup>159</sup> *Hazelwood* involved a challenge to a principal’s censorship of student-written articles about divorce and teen pregnancy slated to appear in the school newspaper.<sup>160</sup> After concluding that the newspaper was not a public forum,<sup>161</sup> the Court held that the school’s authority to restrict student speech was not limited to expression that substantially impeded its work or undermined the rights of other students.<sup>162</sup> Instead, the Court held, educators are permitted to control student speech in school-sponsored activities such as newspapers and theatrical productions that “may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting,”<sup>163</sup> provided that “their actions are reasonably related to legitimate pedagogical concerns.”<sup>164</sup> The Court explained that giving schools broad deference to restrict student speech in school-sponsored activities “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” and that judicial intervention under the First Amendment is permitted only when a censorship decision “has no valid educational purpose.”<sup>165</sup> Given *Hazelwood*’s deferential “legitimate pedagogical concerns” test, teachers typically lose when courts apply that case to their classroom speech or curricular decisions.<sup>166</sup>

Courts disagree on whether the student speech cases should play a role in analyzing First Amendment claims of teachers punished for

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159. *Id.* at 271.

160. *Id.* at 263.

161. *Id.* at 267–70.

162. *Id.* at 271.

163. *Id.*

164. *Id.* at 273.

165. *Id.*

166. *See, e.g.,* Ward v. Hickey, 996 F.2d 448, 456 (1st Cir. 1993) (holding unprotected a teacher’s discussion of abortion of Down’s Syndrome fetuses during class); Miles v. Denver Pub. Schs., 944 F.2d 773, 778 (10th Cir. 1991) (upholding disciplinary action against a teacher who commented during class on rumors about two students fornicating on school grounds); *see also* Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 375–78 (4th Cir. 1998) (Motz, J., dissenting) (arguing for a more rigorous application of the *Hazelwood* standard); Alan Brownstein, *The NonForum as a First Amendment Category: Bringing Order out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 775–76 (2009) (“[T]he range of concerns determined to be ‘legitimate’ and ‘pedagogical’ is so broad that one can only wonder whether anything meaningful is accomplished by requiring courts to ask and answer the question.”).

their curricular or pedagogical decisions or other forms of in-class speech.<sup>167</sup> Although some courts have held that the public employee framework controls all teachers' First Amendment claims,<sup>168</sup> other courts instead have applied *Hazelwood's* "legitimate pedagogical concerns" test<sup>169</sup> or have applied an amalgam of the two approaches.<sup>170</sup> To justify applying *Hazelwood*, lower courts have noted that the government employee speech cases fail to "address the significant interests of the state as educator."<sup>171</sup> Although recognizing that *Hazelwood* was a student speech case, some courts claim that the reasoning of the decision applies just as persuasively to teachers.<sup>172</sup> These courts note that a teacher's classroom speech bears the same imprimatur of the school as a student contribution to the school newspaper.<sup>173</sup> In addition, these courts argue that restricting teacher speech can be just as necessary as restricting student speech in order for a school to achieve its pedagogical goals<sup>174</sup> and that the classroom is a nonpublic forum subject to reasonable restrictions.<sup>175</sup> Others have argued in favor of *Hazelwood* because the public employee framework fails to "provide[ ] much assistance in assessing whether [a

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167. For an in-depth analysis of the disagreement in the lower courts, see Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 79–87 (2008).

168. See, e.g., *Borden v. Sch. Dist. of E. Brunswick*, 523 F.3d 153, 168–69 n.8 (3d Cir. 2008) (applying *Pickering* and *Connick*); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007) (holding that the First Amendment does not permit teachers to stray from the school system's curriculum); *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1048 (6th Cir. 2001) (applying the public concern balancing test).

169. See, e.g., *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 724 (8th Cir. 1998); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994); *Ward*, 996 F.2d at 453; *Bishop v. Aronov*, 926 F.2d 1066, 1072–74 (11th Cir. 1991); *Miles*, 944 F.2d at 775.

170. See, e.g., *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694–96 (4th Cir. 2007) (applying both *Pickering* and *Hazelwood*); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 795 (5th Cir. 1989) (same); *Nat'l Gay Task Force v. Bd. of Educ. of Okla. City*, 729 F.2d 1270, 1274 (10th Cir. 1984) (holding that a school can satisfy *Pickering* only when it can satisfy *Tinker's* substantial disruption standard); *Columbus Educ. Ass'n v. Columbus City Sch. Dist.*, 623 F.2d 1155, 1159–60 (6th Cir. 1980) (applying the public employee framework but also noting that the teacher's speech did not cause substantial disruption under *Tinker*).

171. See, e.g., *Miles*, 944 F.2d at 777.

172. See, e.g., *id.*

173. *Ward*, 996 F.2d at 453; *Miles*, 944 F.2d at 776; *Kirkland*, 890 F.2d at 800–01.

174. See, e.g., *Silano*, 42 F.3d at 722; *Miles*, 944 F.2d at 777.

175. *Ward*, 996 F.2d at 453; *Miles*, 944 F.2d at 776; *Bishop v. Aronov*, 926 F.2d 1066, 1071 (11th Cir. 1991).

teacher's in-class speech] is entitled to constitutional protection."<sup>176</sup> *Connick's* public concern inquiry is unworkable, critics contend, because a teacher's in-class speech is "neither ordinary employee workplace speech nor common public debate," and the government's interest in restricting teachers' speech does not typically rest in concerns for "workplace efficiency or harmony" but rather a need to control speech for pedagogical reasons.<sup>177</sup>

*Garcetti's* bright-line rule eliminating First Amendment protection for speech made in the course of job duties means that courts no longer have to rely on *Hazelwood* to give schools robust authority to control the speech of their teachers in the classroom. Nevertheless, it remains important to consider the application of the student speech cases. Some courts have held that *Garcetti* does not apply in cases involving teachers because the Court expressly left open the possibility that teachers are afforded the protections of academic freedom.<sup>178</sup> Furthermore, it remains unclear after *Garcetti* when a teacher is speaking as a citizen or as an employee. If *Garcetti* is interpreted narrowly, it may not apply in cases where a teacher is not required to use social media. *Hazelwood*, by contrast, may apply even if a teacher has not spoken pursuant to her official job duties as long as the teacher is using social media to communicate with students for at least partly pedagogical reasons<sup>179</sup> and "students, parents, and members of the public might reasonably perceive [the speech] to bear the imprimatur of the school."<sup>180</sup> A court applying the deferential *Hazelwood* standard is likely to accept that concerns about maintaining the boundary between teachers and students justify restrictions on a teacher's use of social media to communicate with students. It is unlikely that a court would apply *Hazelwood* in cases where a teacher is not communicating directly with her students because in such cases the speech is not part of the curriculum and does not reasonably bear the imprimatur of the school.

Given that in many social media cases it may not be possible to use *Hazelwood*, the question then becomes whether courts might

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176. See, e.g., *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 378 (4th Cir. 1998).

177. *Id.*

178. See, e.g., *Lee v. York Cnty. Sch. Dist.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007) (applying *Pickering* post-*Garcetti*).

179. See *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 298 (D. Conn. 2008) (recounting how a teacher used social media to communicate with students about homework but also about non-school-related subjects in order to get to know the students better).

180. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).



invoke *Tinker*'s substantial disruption standard, or even the prohibitions on speech that contains lewd or suggestive language or advocates for illegal drug use.<sup>181</sup> The Supreme Court has not determined whether the rules arising out of its student speech cases apply when students are not at school or participating in a school-sponsored activity.<sup>182</sup> If these rules can be applied to students' off-campus speech, it is possible that some courts will apply them to teachers' off-campus speech.

*D. Which Framework is More Speech Protective?*

Courts disagree about whether the public employee or student speech framework provides more protection for teachers' speech rights.<sup>183</sup> With the relatively recent *Garcetti* decision stripping public employees of First Amendment protection for speech made pursuant to their job duties, teachers may find the public employee framework provides less protection, depending on how broadly a court interprets the job of a teacher. Furthermore, even if a teacher can survive *Garcetti*, it is unclear what, if any, protection the *Pickering* framework provides for speech that does not implicate a matter of public concern. The student speech framework does not have a bright-line rule rejecting First Amendment protection in cases that involve on-the-job speech or matters of private concern. The only bright-line rules that come into play in the student framework are the prohibitions of lewd or profane speech or speech that advocates illegal drug use.

On the other hand, the *Pickering* framework offers more robust protection for speech on matters of public concern because courts must balance the value of the speech against the school's interest in restricting it.<sup>184</sup> *Hazelwood* gives schools broad power to restrict speech that undermines a legitimate pedagogical goal without conducting any sort of balancing test that weighs the importance of the speech at issue; teachers can prevail only when school officials fail to offer a legitimate educational purpose.<sup>185</sup> *Tinker* similarly does not require balancing but instead requires a school to demonstrate a

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181. See *supra* notes 154–56 and accompanying text.

182. See Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1054–71 (2008) (discussing disagreement among lower courts).

183. See Waldman, *supra* note 167, at 86.

184. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

185. *Hazelwood*, 484 U.S. at 273; see *supra* note 166 and accompanying text.

threat of substantial disruption.<sup>186</sup> That said, courts conducting the *Pickering* balancing test may end up reaching the same conclusion as a court using *Hazelwood* if these courts give little weight to a teacher's expression and great deference to a school's asserted pedagogical interests. As a result, *Tinker* may offer the most protection because a school must demonstrate not just interference with its pedagogical interests but threatened disruption to the school environment.<sup>187</sup>

### III. PROPOSED APPROACH

As the prior Part demonstrated, it is clear that the First Amendment rights of public school teachers stand on unstable ground. The application of *Hazelwood* and *Garcetti* to teacher speech threatens to strip teachers of First Amendment protection for any speech they might direct toward their students, whether inside or outside the classroom. It is also unclear what, if any, constitutional protection teachers have for speech unrelated to their job duties when it does not implicate a matter of public concern or when it engenders a hostile community reaction. The lower courts' disagreement about whether the public employee cases adequately take into account the unique circumstances of the school environment has only added to the confusion.

At the outset, it is important to distinguish between laws or regulations that prohibit teachers from using social media as a pedagogical tool and broader restrictions that prohibit teachers from using social media to communicate with students about both curricular and extracurricular subjects. Social media policies that focus solely on the use of social media as a pedagogical tool stand a much better chance of surviving constitutional scrutiny under current doctrine than broad policies that forbid teachers from using social media to communicate with students for any purpose. Most current social media bans and restrictions, however, are broad policies that prohibit teachers from using social media to communicate with their

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186. See, e.g., *Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113 n.4 (5th Cir. 1980) (ruling in favor of a teacher after rejecting the school district's argument that *Tinker* should apply in a case involving a controversial pedagogical method).

187. Some scholars have noted that if the *Pickering* balancing test is applied vigorously so as to require the same sort of substantial disruption *Tinker* requires, the tests may not be very different. See Paul Secunda, *The (Neglected) Importance of Being Lawrence*, 40 U.C. DAVIS L. REV. 85, 122 n.184 (2006) (arguing that the *Pickering* balancing test is really equivalent to a substantial disruption test and accordingly not much different from *Tinker*).

students not merely as part of the educational enterprise but for any purpose whatsoever. These policies fail constitutional scrutiny no matter what analytical framework is used to analyze them, whether the student speech framework, the public employee framework, or the time, place, and manner doctrine.

Teachers should enjoy robust First Amendment rights when they use social media networks in a noncurricular manner. Rather than applying the student speech framework, courts should apply a significantly revised public employee framework. *Garcetti* should be applied narrowly so that it applies only in cases where teachers use social media to communicate with students for curricular purposes. Moreover, *Connick's* public concern inquiry should be eliminated because it permits schools to restrict teacher speech without having to make any showing that the speech interferes with the educational mission in any way. Furthermore, in cases involving non-work-related expression, courts should abandon the *Pickering* framework entirely. Instead, courts should afford such speech presumptive constitutional protection that can be overcome only when the school can demonstrate a substantial nexus between the challenged expression and the teacher's ability to perform her job. This nexus requirement will be more easily met in cases involving a teacher's direct communications with students because schools have a much stronger and more legitimate interest in restricting what teachers say directly to students than they do when students are not the intended audience. This proposed "nexus" test revises the public employee doctrine in a way that simultaneously recognizes the right of schools to take a teacher's "off-duty" speech into account in determining whether a teacher is fit for the classroom and provides teachers with adequate breathing space for their expressive rights when they are speaking as citizens.

A. *The Need to Reform and Clarify the Doctrinal Framework for Teachers' First Amendment Rights*

In determining the appropriate framework for analyzing the free speech rights of teachers, it is important to establish at the outset that teachers and students should be treated differently, particularly with respect to speech that takes place outside of the classroom. As others have noted, one simple reason why the Court's student speech jurisprudence should not apply to teachers is that these cases all

involved students.<sup>188</sup> More significantly, teachers and students are not similarly situated. Applying student-centric speech rubrics to teachers' claims undervalues teachers' status as educators, professionals, and citizens.<sup>189</sup>

The courts do not need a special test for teachers distinct from the test that applies to public employees generally. The framework for analyzing the First Amendment rights of public employees already takes into account the special needs of the government to control the speech of its employees. Indeed, the public employee framework has been applied to teachers, as was the case in *Pickering*. Although *Hazelwood* does not bar all First Amendment claims relating to work-related expression or involving a matter of public concern, its deference to a school's legitimate pedagogical interests gives the government more power than necessary to control the speech of its employees. What is needed is a reconsideration of the public employee framework, not a complete rejection of it in favor of a doctrine developed for a different population.

Although teachers should be treated like public employees, the current framework for public employee speech rights requires significant revisions. The draconian threshold tests of *Garcetti* and *Connick* have already proven unworkable and should be eliminated. In cases involving non-work-related expression—in other words, cases in which the speech is not made in the scope of a teacher's professional duties and does not discuss school matters—courts should not apply *Pickering*'s balancing test. Instead, courts should give the speech presumptive constitutional protection that can be overcome only if school officials can demonstrate a substantial nexus between the expression and the teacher's fitness and ability to perform his job.

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188. See, e.g., Waldman, *supra* note 167, at 66 (“*Hazelwood* was a student speech case, and its rationale and approach are uniquely suited to that context.”); 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, 1309–10 (2009).

189. See Karen C. Daly, *Balancing Act: Teachers’ Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 13 (2001) (“The use of an undifferentiated standard for students and teachers ignores the legal distinctions and different level of constitutional protection afforded to children and adults, resulting in insufficient protection for teacher speech and contributing to the denigration of teachers as professionals.”); see also Waldman, *supra* note 167, at 79–87 (discussing the division among the circuits as to *Hazelwood*'s reach).

### 1. Limit *Garcetti*

As noted above, courts have struggled since *Garcetti* to determine when an employee is speaking “as an employee” performing official job duties or “as a citizen.”<sup>190</sup> The problems with *Garcetti* are both theoretical and practical. As a theoretical matter, public employees do not cease to be citizens even when they are performing their jobs, and they do not cease to be employees when they are away from work. The foundation for *Garcetti* is the government speech doctrine and the idea that the government has a right to control whomever is speaking for it. Although this concept may have a workable application in some contexts—such as a government spokesperson—in many professions, like teaching, no reasonable person would regard all expression in the classroom as representing the official views of the employer. It is one thing if a teacher decides not to teach the subjects and material designated in the school curriculum. It is quite another to assume that every stray remark a teacher makes in class, on a school bulletin board, or to a student in between classes is government speech that the school is entitled to control without limit.

As a practical matter, it is not easy to determine when *Garcetti* applies, particularly in the educational context and especially in cases involving social media. The Court stated that *Garcetti* applies whenever an employee is performing official job duties, but lower court decisions have revealed how difficult it is to determine the scope of those duties.<sup>191</sup> It is particularly difficult to determine when a teacher is speaking pursuant to her job duties. Even when a teacher communicates with students about topics that are not directly school related, these kinds of interactions can play an important role in the educational process, especially in the primary and secondary school context. Social media makes it even more difficult to determine when a teacher is speaking pursuant to her job duties because a court cannot rely on temporal and geographic clues to draw a line between “teacher” and “citizen.” A teacher can use social media to communicate with students from any location, at any time of day or night.

*Garcetti* expressly left open the question of whether teachers are entitled to the protections of academic freedom under the First

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190. For a discussion of issues arising since *Garcetti*, see *supra* text accompanying notes 114–31.

191. See *supra* text accompanying note 116.

Amendment, and it is beyond the scope of this Article to resolve that issue fully.<sup>192</sup> That said, it would make sense to give teachers some protection for the decision to use social media as a pedagogical tool. Although in some cases teaching methods may arguably interfere with the right of state and local communities to make value judgments regarding what they want their students to learn in the public schools, the use of social media does not, by itself, pose any threat to any discernable value judgment a community might make. It would be one thing if a school district were to ban a particular social networking website because it somehow conflicts with asserted community values or, if in a particular instance, school officials determined that the use of social media has disrupted the learning process or impaired classroom discipline. It is quite another to maintain a generally applicable policy that prohibits teachers from using social media in their teaching.

But because most, if not all, current social media policies do not merely limit curricular uses, it is not necessary to resolve the issue of whether teachers should have some right to decide *how* to teach a subject (distinct, perhaps, from any right to decide *what* should be taught). This Article merely argues that *Garcetti* should be read narrowly such that it does not apply when a teacher uses social media to communicate with students for noncurricular purposes. Although in some cases it may be difficult to draw a line between the curricular and noncurricular use of social media, courts should define curricular use as narrowly as possible such that it applies only in cases where students are required to use, view, or post content on social media to complete an assignment or participate in a class activity, not when teachers have more informal communications with their students through social media, even if about school-related matters.<sup>193</sup>

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192. For discussion of whether teachers are entitled to the protection of academic freedom under the First Amendment, see generally Theresa J. Bryant, *May We Teach Tolerance? Establishing the Parameters of Academic Freedom in Public Schools*, 60 U. PITT. L. REV. 579 (1999); Daly, *supra* note 189; Paul Forster, *Teaching in a Democracy: Why the Garcetti Rule Should Apply to Teaching in Public Schools*, 46 GONZ. L. REV. 687 (2011); Nahmod, *supra* note 98; Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62 (2002); W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301 (1998).

193. Under this approach, the manner in which the teacher in *Spanierman* acted would seem to follow outside of *Garcetti*, but more facts are needed to make that determination. It appears that the teacher primarily used social media to get to know his students better, but the record indicates that he also communicated with students about their homework. *Spanierman v. Hughes*, 576 F. Supp. 2d 282, 298 (D. Conn. 2008). If students were

## 2. Discard *Connick*

The Court should also discard *Connick*'s threshold public concern requirement. Even if it were possible to develop a workable standard to determine whether expression involves a matter of public concern, carving out from First Amendment protection all expression that does not satisfy this standard grossly undermines the First Amendment rights of employees without any demonstrated governmental need to restrict speech.

*Connick* itself involved work-related speech, and by limiting First Amendment protection to work-related speech that involved a matter of public concern, the Court hoped to prevent the constitutionalization of employee grievances.<sup>194</sup> Some courts applied the public concern requirement to strip teachers of First Amendment protection for any of their expressive activities related to the classroom.<sup>195</sup> The public concern requirement also undermines the constitutional protection for teachers' off-duty expressive activities. Determining what speech constitutes matters of public concern is a difficult inquiry. Cases involving teacher complaints about their students and schools on social media illustrate this difficulty perfectly. Although such comments may correctly be regarded as a teacher simply complaining about her job, in many cases these comments can equally be taken as providing important insights into the workings of the public school system. A threshold public concern inquiry potentially chills valuable speech without requiring any showing that the expression affects the government's ability to conduct its mission.

The unfairness of *Connick*'s threshold requirement is most apparent in cases involving non-work-related expression, which is frequently what appears in social media cases. The Supreme Court has left unclear whether the public concern inquiry applies in this context, and lower courts are divided on the issue.<sup>196</sup> The courts that are unwilling to extend the public concern test in off-duty cases correctly recognize that the First Amendment has always protected much more than simply expression about political and governmental affairs. Although speech on matters of public concern is generally regarded as having high First Amendment value, speech on matters

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required to communicate with the teacher via social media to discuss their homework, the use would be curricular, but facts we do know suggest that all the communications the teacher had with his students were informal and primarily not related to school.

194. *Connick v. Myers*, 461 U.S. 138, 154 (1983).

195. *See supra* note 132 and accompanying text.

196. *See supra* text accompanying notes 138–43.

of private concern can be equally as valuable to the speaker and listener.

*B. Broad Social Media Bans and Restrictions*

Laws or rules restricting or banning teachers from using social media to communicate with their students for noncurricular purposes should be struck down as unconstitutional. These rules fail constitutional scrutiny regardless of whether a court applies the public employee framework, *Hazelwood*, or a time, place, and manner test.

Under the current public employee framework, the school would argue that the First Amendment does not give a teacher the right to use social media for pedagogical purposes (because the communications relate to work duties and therefore *Garcetti* will most likely apply)<sup>197</sup> or that communications to students necessarily fail *Connick*'s public concern test. The problem is that most if not all of the current social media policies do not merely restrict the use of social networks for pedagogical purposes.<sup>198</sup> Accordingly, *Garcetti* likely will not bar a facial challenge unless a court takes the unlikely position that any communication a teacher has with a current student is part of the teacher's job.<sup>199</sup> *Connick* is also unlikely to support these laws and regulations because they tend not to have any exceptions for communicating with students about non-school-related topics that may be of great public concern. Such communications can be of great value, and a school does not have an interest in preventing all of them. Similarly, social media bans or restrictions are likely to fail the *Pickering* balancing test for the same reason the honoraria ban in *NTEU* failed that test: the rules are not sufficiently tailored to serve the government's interest.

*Hazelwood* is also unlikely to provide much support for these restrictions. Even if a court were willing to hold that all communications a teacher has with his students are somehow related to the curriculum and bear the imprimatur of the school, the broad social media restrictions that schools have adopted do not serve a legitimate pedagogical goal. Although some courts have given schools broad authority to control not just course content but also the

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197. For a discussion of the restrictions public employers are allowed to place on their employees, see *supra* Part II.A.

198. See *supra* notes 13–14 and accompanying text.

199. Laws or policies like Missouri's that also ban communications with former students are even less likely to find protection under *Garcetti*.



educational tools used to communicate that content,<sup>200</sup> most of the social media bans in place today go far beyond restricting the use of social media as a pedagogical tool.<sup>201</sup> Furthermore, even social media policies limited in this manner could have a difficult time surviving *Hazelwood* because courts might be unwilling to accept a school's assertion that it is necessary to ban teachers from communicating with students through social media. Using social media to communicate with students is not an inherently bad thing; indeed, as discussed in Part I, many educators increasingly regard social media as providing a multitude of educational benefits.

Only one court to date has addressed the constitutionality of a social media ban without applying either the public employee framework or *Hazelwood*.<sup>202</sup> That court, sitting in Missouri, applied the traditional time, place, and manner test and entered a preliminary injunction striking down a state law that prohibited teachers from using any non-work-related social networking site that allowed "exclusive access"<sup>203</sup> to current and former students, holding that "the breadth of the prohibition is staggering."<sup>204</sup> Under the time, place, and manner test, restrictions on a medium of communication are constitutional as long as they serve a substantial government interest, the government interest "is unrelated to the suppression of free expression," and the restriction is no greater than necessary to serve that interest.<sup>205</sup> The court noted that social media is often the only way that teachers can communicate with their students.<sup>206</sup> In addition, the broad ban would prohibit teachers from talking to their own children who are students.<sup>207</sup>

The Missouri court was correct to conclude that the broad social media ban at issue in that case failed the time, place, and manner test. Social media bans like Missouri's do not restrict what teachers can say to students; instead, they single out a particular mode of

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200. See *supra* text accompanying notes 120–21.

201. See *supra* notes 13–14 and accompanying text.

202. See Amended Order Entering Preliminary Injunction at 2–3, Mo. State Teachers Ass'n v. State, No. 11AC-CC00553 (Mo. Cir. Aug. 26, 2011), 2011 WL 4425537.

203. S.B. 54, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011). The statute defines "exclusive access" as occurring when "the information on the website is available only to the owner (teacher) and user (student) by mutual explicit consent and where third parties have no access to the information on the website absent an explicit consent agreement with the owner (teacher)." *Id.*

204. Amended Order Entering Preliminary Injunction, *supra* note 202, at 2.

205. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

206. Amended Order Entering Preliminary Injunction, *supra* note 202, at 2.

207. *Id.*

communication perceived as particularly dangerous. Although schools certainly have a substantial interest in maintaining the boundaries between teachers and students, social media bans are not sufficiently tailored to achieve this goal. Even though the Missouri law was particularly problematic because it included former students and did not have an exemption permitting teachers to communicate with their own children, even more limited social media bans are constitutionally problematic because they restrict too much speech. Such bans would apply even if the teacher is part of the same social network with a student in a non-school-related organization, including religious, athletic, or political groups.

Rather than banning or restricting communications between teachers and students on social media, schools should focus on restricting harmful communications themselves, regardless of the media in which they occur. Under the nexus approach outlined below, a school would be able to punish teachers for inappropriate communications with students. This approach permits teachers to take advantage of all the benefits social media has to offer while permitting schools to restrict speech that is truly harmful.

*C. Proposed Nexus Approach for Non-Work-Related Expression*

The public employee doctrine is based on the recognition that when the government is acting as an employer, it needs to have greater authority to restrict the speech of its employees than it does when it is acting as a sovereign attempting to restrict the speech of ordinary citizens. If *Garcetti* is read narrowly and *Connick*'s public concern requirement eliminated, *Pickering*'s balancing test does a respectable job of protecting teachers' work-related expression. Comments that attack particular students, teachers, or administrators, for example, undermine the teacher's ability to be trusted in the classroom and may undermine the teacher's professional relationships in her school community. More general comments about the state of the school, administrative decisions, or the community may anger members of that community, but they are more likely to make a valuable contribution to public discussion about the school system and educational issues.

With respect to non-school-related expression, however, courts should not apply *Pickering* but should instead adopt a test that offers presumptive protection for such speech that the school can overcome whenever it can demonstrate a substantial nexus between that speech and the teacher's fitness and ability to perform his job. This proposed

test is refreshingly simple yet offers the government adequate authority to restrict a teacher's speech when it is important to do so.

A nexus approach finds support in cases in which teachers have been punished for their off-duty conduct. Considering the law in this area is especially relevant given that in many cases where teachers are punished for posting online content—such as Ashley Payne's case involving drinking pictures<sup>208</sup>—it is hard to know whether the school is punishing the teacher for engaging in inappropriate speech or for the underlying conduct. Traditionally, courts evaluating challenges to conduct-based dismissals used a “role model” test to determine whether teachers can be punished for their off-duty conduct,<sup>209</sup> but more recently courts have tended to embrace a nexus approach that requires schools to demonstrate that the challenged conduct directly affects the performance or effectiveness of the teacher.<sup>210</sup> Commentators have noted that this shift to a nexus test reflects “that over the years courts have come to be somewhat more protective of the personal lives of educators.”<sup>211</sup> For example, there was a time when courts upheld the termination of teachers based on out-of-wedlock pregnancies or sexual orientation, but no court has reached a similar holding since the 1970s.<sup>212</sup> In addition, although historically a school district might punish a teacher for drinking in public,<sup>213</sup>

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208. See *supra* notes 1–3 and accompanying text.

209. See, e.g., *Toney v. Fairbanks N. Star Borough Sch. Dist.*, 881 P.2d 1112, 1114 (Alaska 1994) (“[I]t is well-established that there need not be a separate showing of a nexus between the act or acts of moral turpitude and the teacher's fitness or capacity to perform his duties.”); *Zelno v. Lincoln Intermediate Unit No. 12 Bd. of Dirs.*, 786 A.2d 1022, 1024 (Pa. Commw. Ct. 2001) (permitting discharge for “immoral” conduct provided “that the conduct claimed to constitute immorality actually occurred, that such conduct offends the morals of the community, and that the conduct is a bad example to the youth whose ideals the teacher is supposed to foster and elevate”).

210. See, e.g., *Morrison v. State Bd. of Educ.*, 461 P.2d 375, 386–87 (Cal. 1969) (listing factors a court can consider in determining whether a teacher is “unfit to teach”); *Lehto v. Bd. of Educ. of Caesar Rodney Sch. Dist.*, 962 A.2d 222, 227 (Del. 2008) (requiring nexus).

211. See Ruth L. Davison, John L. Strobe, Jr. & Donald F. Uerling, *The Personal Lives and Professional Responsibilities of P-12 Educators: Off-Duty Conduct as Grounds for Adverse Employment Actions*, 171 EDUC. L. REP. 691, 691 (2003).

212. *Id.* at 701 (out-of-wedlock pregnancy); *id.* at 703 (“[O]nly 30 year old cases demonstrate an employer prevailing in instances of adverse actions based on sexual orientation.”). Indeed, in 1974 the Supreme Court struck down a mandatory school board rule requiring all pregnant teachers—married or not—to take leave several months prior to the birth of the child. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 642–43, 651 (1974).

213. See generally *Horosko v. Mount Pleasant Twp. Sch. Dist.*, 6 A.2d 866 (Pa. 1939) (upholding termination of a teacher who worked part-time as a waitress and bartender and who drank and gambled in front of customers, some of whom were students).

modern courts are split on whether even a driving under the influence conviction can be a sufficient basis for termination.<sup>214</sup> Accordingly, one ironic twist of the current state of the law is that a teacher like Ashley Payne might find that she is more likely to win a lawsuit if the school says it fired her for the underlying conduct—drinking—than if it says she was fired for posting a picture of that conduct on her social media profile.

Courts should take care to examine both the validity of the school's purported mission as well as the nexus between the school's mission and the need to restrict the teacher's speech under review. Courts should not be permitted to assert that the challenged expression shows a lack of judgment or sets a bad example. Furthermore, community outrage alone should be insufficient to demonstrate inability to perform a job. Although community reaction may be based on justifiable concerns about a teacher's fitness, it may instead be based on intolerance for unpopular and minority opinions or unduly high standards for the way a teacher lives her life outside of work.

In evaluating whether the nexus requirement is met, courts should take into consideration whether the teacher knowingly and directly communicated with students, perhaps by "friending" them on Facebook or by sending them direct messages on Twitter. As discussed in Part I, it is difficult for any social media user to guarantee that no one but the intended audience will see her comments. This concern is not present when a teacher is communicating directly with students. Furthermore, when a teacher has direct communications with students—whether through social media or in the school hallway—there is a greater concern that the teacher's expression will have an undue influence on those students. In other words, it is important to distinguish between situations when a teacher like Ashley Payne posts drinking pictures on her social media profile without intending for her students to see them and those situations where a teacher intentionally sends such pictures to students. Although a teacher might not intend to communicate as a "teacher," teachers should assume that their minor students will regard them in

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214. *Compare In re Termination of Kibbe*, 996 P.2d 419, 424 (N.M. 1999) (stating that the school board's termination of a teacher for a driving while intoxicated conviction and not cooperating with police was arbitrary and capricious because there was no evidence these actions had any relationship to the teacher's competence as a teacher and coach), *with Zelno*, 786 A.2d at 1026 (upholding dismissal of a teacher convicted of drunk driving three times because her actions constituted immorality that was a bad example to youth).

that role—and be influenced accordingly—whenever they are having direct communications. Furthermore, inappropriate interactions with students—such as sexually charged conversations—can be sufficient on their own to indicate unfitness because they indicate, at best, that the teacher cannot maintain the appropriate boundary between teacher and student, and, at worst, that the teacher might sexually abuse students.<sup>215</sup>

A school might still be able to satisfy the nexus requirement with respect to a teacher's social media communications that are not directed at students, but it will be much more difficult to do so. The outcome of a nexus test does not depend on whether the teacher is speaking about a matter of public or private concern; instead, what matters is whether the communications reveal unfitness to serve as an educator. For example, any communications indicating sexual relations with a minor, or a belief that such relations are appropriate, would satisfy the nexus requirement because the school community reasonably would not be able to trust that teacher with minor children.<sup>216</sup> Schools should also be able to punish teachers based on comments that reveal the teacher is not performing her job duties.<sup>217</sup> By contrast, pictures or communications regarding alcohol or drug use, revelations of unpopular political positions, the use of profanity, and pornographic pictures do not by themselves indicate unfitness for the educational profession.

To be sure, even under this proposed test, the First Amendment rights of teachers will remain somewhat uncertain from case to case, but its benefits far outweigh its costs. Under this approach, schools could not simply argue that a teacher's speech reveals that she is a poor "role model" for students or that community outrage rendered the teacher ineffective. The nexus test is also preferable to the *Pickering* balancing test or the *Tinker* substantial disruption test. *Pickering* offers insufficient protection for speech that does not involve a matter of public concern because such speech is not valued and too easily outweighed by the school's preferred reasons for silencing it. *Tinker*'s substantial disruption test is appealing but fails

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215. Courts generally do not tolerate a teacher's sexual misconduct with students or other minors without expressly finding a nexus, see Davison et al., *supra* note 211, at 691 n.1 (citing a number of cases), but it is not difficult to imagine how a nexus requirement would be satisfied in such situations.

216. See, e.g., *Meltzer v. Bd. of Educ.*, 336 F.3d 185, 200 (2d Cir. 2003) (upholding dismissal of a teacher who was a member of NAMBLA).

217. For example, schools should be able to punish teachers if they discover through a teacher's confessions on social media that she took a sick day to go on vacation.

to take into account a school's interest in disciplining teachers whose speech may not be disruptive but nevertheless indicates unfitness to teach. Rather than formally labeling teachers as speaking "as employees" or "as citizens," the nexus approach recognizes that the two cannot be neatly separated. The proposed nexus test focuses on when a teacher's speech truly undermines a school's interests as an employer while respecting a teacher's free speech rights as a citizen.

#### CONCLUSION

Teachers around the country are increasingly finding themselves in trouble for their use of social media in and out of the classroom. In such cases, the application of the two potential legal frameworks to evaluate their First Amendment rights—the public employee doctrine and the student speech doctrine—are unclear and potentially grant schools an unjustifiable amount of power to restrict teachers' speech. Teachers are also more frequently getting in trouble for posting content deemed inappropriate or unprofessional during their personal time. No doubt relying on the current uncertain yet plainly speech-restrictive state of the law, increasing numbers of school districts and legislative bodies have enacted laws and regulations that ban teachers from using social media to communicate with their students.

This Article contends that no matter what legal framework is used, social media bans are unconstitutional because they do not merely forbid the use of social media for pedagogical purposes but restrict far more speech than is necessary to prevent inappropriate communications between students and teachers. Moreover, these bans fail to recognize the great value of social media as a pedagogical tool and a communicative platform. Instead of demonizing a mode of communication that is playing an increasingly important role in American society, schools should instead focus on restricting harmful speech itself.

The doctrinal framework governing the First Amendment rights of teachers is in dire need of clarification and reform. This Article contends that the public employee speech framework should apply in all cases involving teachers, but this framework needs major revisions. Specifically, the *Garcetti* rule stripping public employees of all First Amendment protection for their work-related speech should be eliminated or at least narrowly construed so that it applies only when teachers are engaged in curricular expression. *Connick's* public concern requirement should be eliminated because it gives schools

unwarranted control over their teachers' speech. Finally, although a rigorous version of *Pickering's* balancing test is appropriate for a teacher's work-related expression, it offers insufficient protection for non-work-related speech. Instead, courts should give such speech presumptive constitutional protection but permit public educational employers to overcome this presumption by demonstrating a substantial nexus between the speech and a teacher's ability and fitness to perform her professional duties. The increasing importance of social media as a communications platform renders these reforms more essential than ever. Teachers should not be required to use social media at their peril.