

TINKERING WITH RESTRICTIONS ON EDUCATOR SPEECH: CAN SCHOOL BOARDS RESTRICT WHAT EDUCATORS SAY ON SOCIAL NETWORKING SITES?

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I. INTRODUCTION

“[Y]ou’re a retard, but [I] love you.”² These words are visible to 525,000 people in the Washington D.C. geographic network via Erin Jane Webster’s Facebook page.³ The problem? Webster teaches students with emotional and learning disabilities.⁴ Click further into Webster’s Facebook profile, and one will find photographs of Webster lying on her back with a bottle of Jose Cuervo tequila and two young men flashing their middle fingers at the camera.⁵

Webster is not alone in her use of social networking sites to display inappropriate photographs and information. Although not all social network users are educators, approximately 60% of all Facebook accounts and 70% of all MySpace accounts are owned by individuals twenty-five years of age and older.⁶ Moreover, in the realm of education, where educators have chosen to post inappropriate statements or photographs on their social networking pages, school boards have been forced to discipline or to terminate employment.⁷ As a result, disputes and litigation between educators and school boards have begun to arise, thus forecasting the need

² Ian Shapira, *When Young Teachers Go Wild on the Web: Public Profiles Raise Questions of Propriety and Privacy*, WASH. POST, Apr. 28, 2008, at A01.

³ *Id.*

⁴ *Id.*

⁵ *Id.* Webster was eventually removed from her position as a long-term substitute teacher with the Prince William County Schools. *Id.*

⁶ Ken Burbary, *Dispelling the Youth Myth – Five Useful Facebook Demographic Statistics*, WEB BUSINESS BY KEN BURBARY (Jan. 13, 2010), <http://www.kenburbary.com/2010/01/dispelling-the-youth-myth-five-useful-facebook-demographic-statistics/> (citing that as of January 1, 2010, roughly fifty-one million people between the ages of twenty-six and fifty-five had Facebook accounts, amounting to over half of all Facebook users); see also *Age Demographics of MySpace Visitors*, ZDNET RESEARCH (Oct. 30, 2006, 12:30 AM), <http://www.zdnet.com/blog/itfacts/age-demographics-of-myspace-visitors/11967>.

⁷ See, e.g., Cindy Martin, *Can You Lose Your Job Over Facebook?*, CASHFORCREATIONS WEBLOG: EDUCATION (Mar. 28, 2009), <http://cashforcreations.wordpress.com/2009/03/28/can-lou-lose-your-job-over-facebook/> (citing numerous examples of teachers who are currently under investigation or have been dismissed for their use of social networking sites).

for a clear and concise judicial analysis.⁸

Social networking sites such as Facebook and MySpace provide individualized Internet web pages or profiles for users of their services.⁹ Both Facebook and MySpace advertise their services as a way for people and businesses to stay connected around the world.¹⁰ Facebook boasts that it offers networking tools and advertising for many corporations, while MySpace asserts that it provides a forum for members “to find and communicate with old and new friends.”¹¹ Regardless of the specifics, social networking sites allow users to create public web pages visible to people around the world.

Not surprisingly, the use of social networking sites by public school educators has created special concerns among school boards.¹² Postings similar to Webster’s undermine the educational missions of school boards, which many believe is to teach tolerance and the “fundamental values of ‘habits and manners of civility.’”¹³ Additionally, because the Internet provides a vehicle for content to travel inside the schoolhouse gate, as well as into the homes of students, school administrators have found it necessary to regulate educators’ private use of social networking sites.

In light of such regulations, educators are being dismissed for what school administrators consider inappropriate use of social networking sites. In response, educators have threatened and brought numerous claims for the violation of First Amendment rights.¹⁴ Although many of the claims have settled or been rejected at the district court level, questions arise as to whether school boards can restrict educators’ use of social networking sites after the school day ends.

⁸ See generally Jack Stripling, *Not So Private Professors*, INSIDE HIGHER ED (Mar. 2, 2010), <http://www.insidehighered.com/news/2010/03/02/facebook> (discussing social media policies for faculty and employee use of social media in the collegiate setting).

⁹ Although problems regarding educators’ use of social networking sites have predominately occurred on Facebook and MySpace, other Internet websites such as YouTube and Twitter have also led to problems for both the educators who use the sites and the school boards who wish to restrict educators’ speech on them. See generally Heather L. Carter et al., *Have You Googled Your Teacher Lately? Teachers’ Use of Social Networking Sites*, 89 PHI DELTA KAPPAN 681, 685 (2008) (discussing educators’ use of various social networking sites).

¹⁰ See *Facebook Pages*, FACEBOOK 1 (Mar. 2009), <http://www.facebook.com/advertising/FacebookPagesProductGuide.pdf>; see also *MySpace.com Terms of Use Agreement*, MYSPACE.COM (June 25, 2009), <http://www.myspace.com/help/terms>.

¹¹ *MySpace.com Terms of Use Agreement*, *supra* note 10 (stating that “MySpace, Inc. (‘MySpace’ or ‘we’) operates MySpace.com, which is a social networking platform that allows members to create unique personal profiles online in order to find and communicate with old and new friends.”); *Facebook Pages*, *supra* note 10, at 2 (stating that “[a] Facebook Page is a customizable presence for an organization, product, or public personality By leveraging the real connections between friends on Facebook, a Page lets Fans become brand advocates.”).

¹² See Carter et al., *supra* note 9, at 684.

¹³ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting CHARLES A. BEARD & MARY R. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

¹⁴ See discussion *infra* Sections III.A, C (discussing not only the claims pending in district courts, but also providing examples of a number of educators who have been dismissed as a result of their MySpace and Facebook conduct).

In an attempt to answer these questions, federal district courts have applied the balancing test created by the Supreme Court in *Pickering v. Board of Education of Township High School District 205*.¹⁵ Using the *Pickering* analysis, courts have balanced the interests of the educator against those of the state, and have thus far, unanimously restricted educators' speech on social networking sites.¹⁶ Moreover, because educators have long been held to a higher moral standard than other professionals, and in light of their contact with impressionable children, it is likely that courts will continue to restrict educators' speech on sites such as MySpace and Facebook.¹⁷ However, a more modern and less restrictive version of the *Pickering* analysis is needed in an era where social networking is commonplace for educators and other professionals.

Section II of this Comment examines the four Supreme Court cases¹⁸ that courts currently apply to cases involving educators' use of social networking sites. This Section explores the issues associated with applying the current Supreme Court tests enumerated under *Pickering*, *Mt. Healthy*, *Connick*, and *Garcetti*, and it considers the application of *Garcetti*, a non-education case, to employees in public school settings. Section III of this Comment analyzes the limited federal district court cases that have examined the problems surrounding educators' speech on Internet social networking sites. This Section also provides an overview of Supreme Court precedent dealing with student speech and discusses its application to educators' classroom speech. Finally, Section III explores the recent dismissals of educators for their speech on social networking sites and looks at the likelihood of litigation following a school board's actions.

Section IV of this Comment offers two solutions to the problem surrounding Internet speech. First, in the absence of judicial direction, school boards must update acceptable use policies to provide guidance on what educators may or may not do with respect to the use of social

¹⁵ See *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

¹⁶ See, e.g., *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at *14 (E.D. Pa. Dec. 3, 2008); see also *Weathers v. Lafayette Parish Sch. Bd.*, 520 F. Supp. 2d 827, 836-37 (W.D. La. 2007) (discussing an educator's right to place art on her webpage, but stating that full analysis was not required as plaintiff was unable to prove the threshold issue of law surrounding the liability of the school district).

¹⁷ See Todd A. DeMitchell, *Private Lives: Community Control vs. Professional Autonomy*, 78 EDUC. LAW REP. 187, 187-88 (1993) (stating that "parents and community with great sincerity believe a teacher should serve 'the community through an upright exemplary life and whose influence will give their children the characters they themselves aspired to and failed to gain.'" (quoting HOWARD K. BEALE, ARE AMERICAN TEACHERS FREE? AN ANALYSIS OF RESTRAINTS UPON THE FREEDOM OF TEACHING IN AMERICAN SCHOOLS 395 (1936))).

¹⁸ *Pickering*, 391 U.S. 563; *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (discussing the speech of public employees and stating that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."); see also *Waters v. Churchill*, 511 U.S. 661 (1994) (examining the First Amendment rights of government employees and analyzing the holdings of *Pickering*, *Mt. Healthy*, and *Connick*).

networking sites. Second, the Supreme Court must reexamine the issue in light of the inconsistent application of past Supreme Court precedent to educators' use of social networking sites. Work by both school boards and the Supreme Court will create uniformity in restricting educators' speech and place educators on notice regarding appropriate conduct on social networking sites.

II. BACKGROUND

The Free Speech Movement of 1964 brought educational speech rights to the forefront. During the 1960s at the University of California, Berkeley, and universities nationally and internationally, students began to hold unprecedented protests to lift bans on on-campus political activities.¹⁹ Not surprisingly, the movement soon made its way to educators at both the university and K-12 level. In 1968, the Supreme Court responded to concerns regarding educators' First Amendment rights by overturning the dismissal of an educator who wrote a letter to a local newspaper criticizing a proposed tax increase.²⁰ In 1969, the Supreme Court again addressed the First Amendment, noting that “[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”²¹ Ten years later, in a final act to preserve educators' First Amendment rights, the Supreme Court offered some protection to statements made by a public school educator when it found that statements regarding the substance of a memorandum relating to teacher dress and appearance were protected.²²

Subsequent case law began chipping away at the speech rights of educators. Fifteen years after its 1968 decision in *Pickering*, the Supreme Court revisited the First Amendment rights of public employees in *Connick v. Myers*.²³ Applying an expanded version of the test enunciated in *Pickering*, the Court upheld the dismissal of an Assistant District Attorney

¹⁹ See Leon F. Litwack, *Preface* to THE FREE SPEECH MOVEMENT: REFLECTIONS ON BERKELEY IN THE 1960S, at xiii (Robert Cohen & Reginald E. Zelnik eds., 2002); cf. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (illustrating protests at the high school level).

²⁰ See *Pickering*, 391 U.S. at 574-75. In issuing its landmark decision, the *Pickering* Court created a balancing test for courts to use when examining the First Amendment speech rights of educators. *Id.* at 568. Although discussed later in more detail, the test requires courts to balance “the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Id.*

²¹ *Tinker*, 393 U.S. at 506; see also *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979) (holding that the First Amendment “forbids abridgement of the ‘freedom of speech’” and noting that “[n]either the Amendment itself nor [the Court’s] decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.”).

²² See *Mt. Healthy*, 429 U.S. at 284-85. Although the Supreme Court found plaintiff’s speech in *Mt. Healthy* to be constitutionally protected, the Court upheld the school board’s decision to dismiss the plaintiff, stating that the school board would have reached the same decision even in the absence of protected conduct by the teacher. *Id.* at 285.

²³ *Connick*, 461 U.S. at 138.

who circulated a questionnaire regarding the office's transfer policy, the effectiveness of supervisors, and whether the employees felt pressure to work on political campaigns.²⁴ In refusing to protect the speech at issue, the Court effectively narrowed its 1968 decision in *Pickering*.²⁵ Additionally, the Court set landmark precedent when it used the *Pickering* balancing test to analyze only speech that could be interpreted as commenting on a "matter of public concern."²⁶ Consequently, *Connick*, as applied to educators' speech on social networking sites, has left the vast majority of speech unprotected.²⁷

In 2006, the Supreme Court again analyzed the dismissal of an Assistant District Attorney in *Garcetti v. Ceballos*.²⁸ However, the Court further narrowed the analysis utilized in *Pickering* and *Connick* by stating that public employees have no protection when making statements pursuant to their official duties.²⁹ In *Garcetti*, the Court failed to protect the speech of a public employee, placing what some refer to as the "final nail in the teacher speech coffin."³⁰

The 1968, 1983, and 2006 decisions of the Supreme Court have commonly been discussed as the *Pickering-Connick-Garcetti* line of case law.³¹ This analysis, along with the Court's decision in *Mt. Healthy*, is what district courts have attempted to apply to educators' speech on Internet social networking sites.

A. *Pickering v. Board of Education of Township High School District 205—The Initial Supreme Court Decision Analyzing Educators' Out-of-School Speech*

In 1968, the United States Supreme Court addressed the grievances of Marvin L. Pickering ("Pickering"), a public high school teacher in Will County, Illinois.³² In response to a proposed tax increase, Pickering wrote a letter to the editor of a local newspaper attacking the school board's allocation of financial resources between the school's educational and athletic programs.³³ Specifically, Pickering criticized the board stating, "[t]o sod football fields on borrowed money and then not be able to pay teachers'

²⁴ *Id.* at 141, 154.

²⁵ *Id.* at 146.

²⁶ *Id.*; see also *Waters v. Churchill*, 511 U.S. 661, 668 (1994) (stating that in order for a government employee's speech to be protected, it must be on a matter of public concern).

²⁷ *Connick*, 461 U.S. at 147-49.

²⁸ *Garcetti v. Ceballos*, 547 U.S. 410, 414-15 (2006).

²⁹ *Id.* at 421.

³⁰ 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, 1304-1305 (2009); see also *Garcetti*, 547 U.S. at 421.

³¹ See Wohl, *supra* note 30, at 1309-10.

³² *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 564 (1968).

³³ *Id.*

salaries is getting the cart before the horse.”³⁴ The school board dismissed Pickering for his comments, and Pickering subsequently filed suit alleging a violation of his First Amendment rights.³⁵ The Supreme Court of Illinois dismissed Pickering’s claims holding that because he was a public school teacher, he had no entitlement to speak adversely against the school.³⁶ The court explained that “[b]y choosing to teach in the public schools, [Pickering] undertook the obligation to refrain from conduct which in the absence of such position he would have an undoubted right to engage in.”³⁷

In overruling the judgment of the Illinois Supreme Court, the United States Supreme Court stated that one does not shed their First Amendment rights simply because he chooses to work as a public employee.³⁸ Additionally, the Court set forth a balancing test to determine the First Amendment rights of public employees.³⁹ The Court asserted that “[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”⁴⁰ In laying out what has been termed “the *Pickering* balance,” the Court effectively illustrated its disinclination to make an “across-the-board” decision on the dismissal of public employees for remarks critical of superiors or the school board as a whole.⁴¹ However, subsequent case law has narrowed the parameters of what constitutes speech on a matter of public concern, thereby effectively limiting the rights of educators to speak both inside and outside of the classroom.⁴²

Critics of the *Pickering* analysis have noted an evident flaw in the balancing test provided by the Supreme Court. According to these critics, when an educator speaks as a member of the general public, the interests of the school board should be no greater than its interests in limiting the speech of the general public.⁴³ Thus, the only time employment-related interests

³⁴ *Id.* at 577; see also Seog Hun Jo, *The Legal Standard on the Scope of Teachers’ Free Speech Rights in the School Setting*, 31 J. L. & EDUC. 413, 417 (2002).

³⁵ *Pickering*, 391 U.S. at 564.

³⁶ *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 225 N.E.2d 1, 6 (Ill. 1967), *rev’d sub nom.*, 391 U.S. 563 (1968).

³⁷ *Id.*

³⁸ See *Pickering*, 391 U.S. at 574. One year later, in 1969, the Supreme Court again protected the First Amendment rights of teachers and students stating that “[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

³⁹ *Pickering*, 391 U.S. at 568.

⁴⁰ *Id.*

⁴¹ *Id.* at 574.

⁴² See discussion *infra* Section II.C.1.

⁴³ See *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 798 (5th Cir. 1989) (stating that “public employees are entitled to the same measure of constitutional protection as enjoyed by their civilian counterparts when speaking as ‘citizens’ and not as ‘employees.’”); see also Jo, *supra* note 34, at 418 (discussing the “logical flaw” in the *Pickering* balance).

should be weighed against an educator's First Amendment rights is when the educator speaks solely as an employee and not as a member of the general population.⁴⁴ Critics argue that the *Pickering* analysis is contrary to this approach because the Court did not treat the educator as a private citizen in its balance.⁴⁵ Although the *Pickering* Court "conclude[d] that it [was] necessary to regard the teacher as the member of the general public he [sought] to be," the Court inquired into employment-related values such as maintaining discipline, the teacher's performance, and the ability of the speech to harm daily work.⁴⁶ Accordingly, the critics argue that putting these values on the scales can be justified only if the speech implicates the government's interests as an employer. Consequently, the ability of the Court to address employment-related values when analyzing speech on social networking sites may effectively limit educators' speech on such sites.

*B. Mt. Healthy City School District Board of Education v. Doyle—
Upholding Educators' Rights, but Adding an Additional Burden of Proof to
Pickering*

Similar to the situation addressed in *Pickering*, the Supreme Court in *Mt. Healthy* remanded the dismissal of an educator who contacted a local radio station and made statements regarding a school memorandum on teacher dress and appearance.⁴⁷ In *Mt. Healthy*, Fred Doyle ("Doyle") was an untenured educator who had previously been involved in several separate altercations, including swearing and making obscene gestures to female students.⁴⁸ However, following the school board's decision not to renew his contract, Doyle brought suit against the school board alleging that the decision was directly related to the statements he made to the radio station, and was therefore, a violation of his First Amendment rights.⁴⁹

In examining the school board's dismissal of Doyle, the *Mt. Healthy* Court applied the *Pickering* balance exactly as enumerated by the Supreme Court in 1968. The Court stated that a determination of whether speech of a government employee was a constitutionally protected expression required "striking 'a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"⁵⁰ In determining that Doyle had not violated any

⁴⁴ See *Connick v. Myers*, 461 U.S. 138, 157 (Brennan, J., dissenting); see also Jo, *supra* note 34, at 418.

⁴⁵ Jo, *supra* note 34, at 418-19; see also *Pickering*, 391 U.S. at 571.

⁴⁶ *Pickering*, 391 U.S. at 574.

⁴⁷ See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

⁴⁸ *Id.* at 274.

⁴⁹ *Id.*

⁵⁰ *Id.* at 284 (quoting *Pickering*, 391 U.S. at 568).

established policy by making the memorandum public, the Court held that the First Amendment protected his actions regarding the memorandum.⁵¹

The Supreme Court, however, then proceeded to impart an additional element of causation on both Doyle and the school board.⁵² The Court indicated that even when an educator's conduct is protected, the educator must prove "that the protected conduct played a 'substantial part' in the actual decision not to renew" his contract.⁵³ Once the educator has satisfied his burden of proof, the burden then shifts to the school board to show, by a preponderance of the evidence, that it would have reached the same decision even in the absence of the protected conduct.⁵⁴ Determining that Doyle had met his burden of proof, the Court remanded for a decision as to whether the school board would have decided not to rehire Doyle absent his statements to the radio station.⁵⁵ On remand, the Sixth Circuit upheld the dismissal of Doyle, finding that the school board would not have renewed Doyle's employment contract even absent his protected speech.⁵⁶

C. *Connick v. Myers*—*The Court Only Protects Speech That Addresses a Public Concern*

In 1983, the Supreme Court again addressed the First Amendment rights of a public employee in *Connick v. Myers*. Although *Connick* dealt with an action brought by a former Assistant District Attorney, the Court applied a modified version of the *Pickering* analysis.⁵⁷ Essentially, *Connick* utilized the Supreme Court's rationale in *Pickering* but created a two-part test.⁵⁸ The Court in *Connick* provided that prior to initiating the *Pickering* balance, it must first be determined whether the speech at issue is on a matter of public concern.⁵⁹ The second step then requires that only speech on a matter of public concern be subjected to the *Pickering* balance.⁶⁰ Courts have subsequently applied the requirements enumerated in *Connick* to educational cases, allowing "teachers [to] achieve a protected status only if [their] words are those of a detached citizen [speaking on matters of

⁵¹ *Id.*

⁵² *Id.* at 286 (stating that following the determination of whether an employee's conduct is constitutionally protected, the Court must engage in "a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused.").

⁵³ *Id.* at 285.

⁵⁴ *Id.* at 287. In examining the rule of causation and its application to protected First Amendment speech, the Court stated that an employee who engages in constitutionally protected conduct should not be able "to prevent his employer from assessing his performance record and reaching a decision not to rehire . . . simply because the protected conduct makes the employer more certain of the correctness of its decision." *Id.* at 285. Conversely, however, an employee "should not have the employment question resolved against him because of constitutionally protected conduct." *Id.*

⁵⁵ *Id.*

⁵⁶ *Doyle v. Mt. Healthy City Sch. Dist. Bd. of Educ.*, 670 F.2d 59, 61 (6th Cir. 1982).

⁵⁷ *Connick v. Myers*, 461 U.S. 138, 146 (1983).

⁵⁸ *Id.*; see also Jo, *supra* note 34, at 417.

⁵⁹ *Connick*, 461 U.S. at 146.

⁶⁰ *Id.*

public concern] and not [of] an interested employee.”⁶¹

In *Connick*, Sheila Myers (“Myers”), a former Assistant District Attorney, brought suit challenging her dismissal as a violation of her First Amendment right to free speech.⁶² Myers argued that her circulation of a questionnaire regarding other employees’ thoughts on the office’s transfer policy, ability of the supervisors, and pressure to work in political campaigns was within her First Amendment right to free speech.⁶³ In applying the two-part test to Myers’ speech, the Court found that the questionnaire discussed only internal office affairs, and therefore, was not a matter of public concern.⁶⁴ As a result, the Court rejected Myers’ claim, concluding that such speech was not for the judiciary to police, but rather for the government as the employer to restrict and monitor.⁶⁵

1. *Connick*’s Definition of “Public Concern”

The *Connick* Court shifted its focus from the balancing test enumerated in *Pickering* to a determination of whether the speech at issue was on a matter of public concern. The Court defined public concern as speech, evidenced by the “content, form, and context of a given statement” and related to a “matter of political, social, or other concern to the community, [or] government officials.”⁶⁶ The Court held that when an employee’s expression cannot be “fairly considered” a matter of public concern, employers should enjoy wide latitude in managing their offices without intrusive oversight by the judiciary in the name of the First Amendment.⁶⁷

Critics argue that the Supreme Court, in establishing the two-part test enumerated in *Connick*, incorrectly applied the *Pickering* analysis; therefore, creating a holding in dicta.⁶⁸ These critics assert that “the Court [in *Connick*] wrong-footed by establishing [a] threshold inquiry of whether the employee’s statements were upon ‘a matter of public concern’ before balancing the competing interests of the speaker and the state.”⁶⁹

⁶¹ Jo, *supra* note 34, at 417.

⁶² *Connick*, 461 U.S. at 140-41.

⁶³ *Id.*

⁶⁴ *Id.* at 154.

⁶⁵ *Id.*

⁶⁶ *Id.* at 146-48; *see also* CHARLES J. RUSSO, THE LAW OF PUBLIC EDUCATION 703 (7th ed. 2009) (providing that subjects which have met the criteria of public concern include “school employees [who have] suffered adverse employment actions due to criticisms of or questions about a delay by school officials in implementing federally mandated programs for students with disabilities; a medication policy; a policy that prevented teachers from making critical statements about school officials unless made directly to the person(s) being criticized; a principal’s failure to implement a school improvement plan; a board’s child abuse reporting policy; and a teacher’s complaining about classroom safety, even though he expressed his views privately, through approved, formal channels.”).

⁶⁷ *Connick*, 461 U.S. at 146.

⁶⁸ *See* Jo, *supra* note 34, at 421.

⁶⁹ *Id.*

Consequently, under the *Connick* test, if the answer to the threshold question is not in the affirmative, the case is determined against the employee without undertaking the *Pickering* balance.⁷⁰ The critics add that because the *Connick* test provides such great deference to the determination of public concern before balancing the competing interests of the speaker and the state, the Court effectively disintegrated the *Pickering* balance.⁷¹ Moreover, in placing a greater focus on the content of the speech rather than on the *Pickering* balance, it is possible that the *Connick* Court may have mitigated the First Amendment rights of educators both inside and outside of the classroom.

2. *Connick* Allows School Boards to Show a Likelihood of Disruption

Although the Court effectively dismissed the majority of Myers' speech as not of public concern, it went on to discuss *Pickering*.⁷² The Court stated that the "*Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public."⁷³ In analyzing the government's right to control the management of the District Attorney's Office, the *Connick* Court looked at whether the questionnaire circulated by Myers impeded her ability to perform her responsibilities.⁷⁴ Although the Court found no significant impediment, it stated that a current impediment or disruption was not necessary.⁷⁵

According to *Connick*'s interpretation of *Pickering*, a public employer is not required to wait for an actual disruption in the office before taking action.⁷⁶ However, this interpretation is distinguishable from the

⁷⁰ *Id.* (stating that "[t]he threshold standard marked a fundamental departure from *Pickering*.").

⁷¹ *Id.* at 422 (stating that "the Court eventually moved the focus from balancing to 'public concern.'). The dissenting opinion by Justice Brennan illustrates this shift of the pivot from balancing to public concern because he criticized the majority for not requiring the state to produce any evidence that Myers' conduct had actually disrupted the efficient functioning of the District Attorney's Office. *Connick*, 461 U.S. at 158 (Brennan, J., dissenting).

⁷² *Connick*, 461 U.S. at 149-152; see also *Waters v. Churchill*, 511 U.S. 661, 668 (1994). In *Waters*, the Court dismissed the First Amendment claims of a nurse, making the following statement:

There is no dispute about when speech by a government employee is protected by the First Amendment: To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Waters, 511 U.S. at 558 (quoting *Connick*, 461 U.S. at 142).

⁷³ *Connick*, 461 U.S. at 150.

⁷⁴ *Id.*

⁷⁵ *Id.* at 152. In allowing regulation of Myers' speech, the Court cautioned that a stronger showing of speech on a matter of public concern would require a stronger showing of imminent disruption before regulation could occur. *Id.*

⁷⁶ *Id.* This discussion parallels the discussion of the regulation of student speech in *Tinker*. In *Tinker*, the Court found that a showing of imminent disruption, as a result of student speech, was sufficient to allow school regulation. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). However, the *Connick* Court appears to have raised the standards, as it requires only a showing

Supreme Court's discussion of disruption in *Tinker v. Des Moines Independent Community School District*. In *Tinker*, students were disciplined for wearing black armbands in protest of the Vietnam War.⁷⁷ In upholding students' First Amendment rights, the Supreme Court articulated an operational test for when a school may regulate student speech or other First Amendment activities. The Court explained that "conduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."⁷⁸ Building on this standard, the Court provided that "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."⁷⁹ Consequently, in analyzing the disruption standard applied to public employees by the *Connick* Court, it is apparent that the Court narrowed the standard from that previously provided in *Tinker*.⁸⁰

D. *Garcetti v. Ceballos*—*The Final Limitation on Educators' Speech*

"The final nail in the teacher speech coffin" came in 2006 with the Supreme Court's decision in *Garcetti v. Ceballos*.⁸¹ Following in the footsteps of *Connick*, *Garcetti* is a non-educator case "that has had an enormous impact" on the First Amendment rights of public employees.⁸² Although some disagreement has arisen regarding the application of *Garcetti* to public school speech, recent case law indicates a willingness by courts to apply the decision when examining the First Amendment rights of educators.⁸³

that disruption is possible, and states that the employer does not have to foresee imminent disruption before regulated an employee's speech. *Connick*, 461 U.S. at 152.

⁷⁷ *Tinker*, 393 U.S. at 504.

⁷⁸ *Id.* at 513.

⁷⁹ *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

⁸⁰ Compare *Connick*, 461 U.S. at 154, with *Tinker*, 393 U.S. at 509. But see *Tinker v. Des Moines Indep. Cmty. Sch. Bd.*, 258 F. Supp. 971, 972-73 (S.D. Iowa 1966), *rev'd*, 393 U.S. 503 (1969) (finding in favor of the school board and stating that "[o]fficials of the defendant school district have the responsibility for maintaining a scholarly, disciplined atmosphere within the classroom . . . [and] [u]nless actions of school officials in this connection are unreasonable, the Courts should not interfere" on the basis of abridgement of free speech).

⁸¹ Wohl, *supra* note 30, at 1304.

⁸² *Id.*

⁸³ *Id.*; see, e.g., *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 692 (5th Cir. 2007); *Weintraub v. Bd. of Educ. of City Sch. Dist. of City of New York*, 593 F.3d 196, 203-04 (2d Cir. 2010); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479-80 (7th Cir. 2007). In *Mayer v. Monroe*, the Seventh Circuit not only rejected the educator's argument that "principles of academic freedom" should prevent the court from applying the *Garcetti* standard, it also turned down the previously acknowledged understanding that educators have a special role that requires additional protections for speech. *Mayer*, 474 F.3d at 479-80.

1. What Does *Garcetti* Say, and How Does It Affect Educators' Rights?

In 2000, Richard Ceballos (“Ceballos”), an Assistant District Attorney in Los Angeles County, California, was contacted regarding a pending criminal case and asked to examine an affidavit used in the investigation.⁸⁴ When Ceballos determined that the affidavit contained serious misrepresentations, he submitted a memorandum to his supervisors regarding his concerns.⁸⁵ Ceballos contended that as a result of his memorandum and subsequent testimony for the defense at trial, he was subjected to a series of retaliatory employment actions, including: reassignment from his calendar deputy position, transfer to another courthouse, and denial of a promotion.⁸⁶

The *Garcetti* Court applied the two-part test enumerated in *Connick*, looking first at whether Ceballos “spoke as a citizen on a matter of public concern.”⁸⁷ Second, the Court stated that the balancing test discussed in *Pickering* only applied if the speech was determined to be on a matter of public concern.⁸⁸ The Court then took the analysis one step further, explaining that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”⁸⁹ Because Ceballos’ examination of the affidavit was within his job description, the Court held that the actions and speech pertinent thereto fell clearly within its new classification of “official duties.”⁹⁰ Therefore, the Court held that the First Amendment did not protect the speech.⁹¹ As a result, *Garcetti* allows government entities “broader discretion to restrict speech when [the government] acts in its role as employer.”⁹²

2. Does *Garcetti* Apply to Speech by Educators Outside of the Classroom?

The effect of *Garcetti* on the educational world has left courts with no certain path to follow when looking to support an educator’s First Amendment rights.⁹³ Although not focused on K-12 education, Justice Souter, in his dissent, addressed *Garcetti* and its implications for higher education by stating that he hoped the majority did “not mean to imperil First Amendment protection of academic freedom in public colleges and

⁸⁴ *Garcetti v. Ceballos*, 547 U.S. 410, 413-14 (2006).

⁸⁵ *Id.* at 414.

⁸⁶ *Id.* at 415.

⁸⁷ *Id.* at 418.

⁸⁸ *Id.*

⁸⁹ *Id.* at 421.

⁹⁰ *Id.*; see also Wohl, *supra* note 30, at 1305.

⁹¹ *Garcetti*, 547 U.S. at 421.

⁹² *Id.* at 418.

⁹³ Wohl, *supra* note 30, at 1307.

universities”⁹⁴ The majority, in responding to Justice Souter’s concern, noted that “[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”⁹⁵ However, recent application of *Garcetti* to cases analyzing the First Amendment rights of educators in public schools indicates a likelihood that *Garcetti* will continue to be applied at least to cases involving K-12 public education.⁹⁶

III. ISSUES

Pickering and its progeny have created great inconsistency in the restrictions placed on the speech of public employees. Additionally, both *Connick* and *Garcetti* restricted *Pickering* to a point where presently little, if any, protection is provided to educators who wish to voice their opinions on Internet social networking sites. Beginning with *Spanierman v. Hughes* in September of 2008, and *Snyder v. Millersville University* in December of 2008, district courts have continuously struck down educators’ rights to First Amendment protection primarily on the basis that the speech written on social networking sites is not a matter of public concern. Although it is likely that restrictions will continue to be placed on speech by educators on Internet social networking sites, the decisions of the district courts to limit out of classroom speech, solely on the basis of public concern, may not be the answer. A more modern review of the restrictions imposed by *Pickering*, *Mt. Healthy*, *Connick*, and *Garcetti* is needed before educators can be dismissed for conduct on sites such as Facebook and MySpace.

A. District Courts Decide to Restrict Educators’ Speech on Internet Social Networking Sites

In the fall and winter of 2008, federal district courts in Connecticut and Pennsylvania upheld school boards’ restrictions of speech on educators’ personal MySpace pages.⁹⁷ Although applied somewhat inconsistently, both courts adopted the *Pickering* analysis. In *Spanierman v. Hughes*, the court

⁹⁴ *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting).

⁹⁵ *Id.* at 425 (majority opinion).

⁹⁶ See Wohl, *supra* note 30, at 1307.

⁹⁷ See, e.g., *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at *43 (E.D. Pa. Dec. 3, 2008); *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 313 (D. Conn. 2008); see also *Weathers v. Lafayette Parish Sch. Bd.*, 520 F. Supp. 2d 827, 836-37 (W.D. La. 2007) (determining that “public employees do not surrender all their *First Amendment* rights by reason of their employment. Rather, the *First Amendment* protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.”). In *Weathers*, the court held that the plaintiff, who produced “‘contemporary, feminist art’ which she displayed on her personal website,” was arguably speaking on a matter of public concern. *Weathers*, 520 F. Supp. 2d at 829, 837. Therefore, with regards to the First Amendment claims, the court required the defendants, if motivated by the contents of the plaintiff’s website, to provide an adequate justification for treating the plaintiff differently from any other member of the general public. *Id.* at 837.

upheld the termination of a non-tenured educator under a disjunctive application of the standards enumerated in *Pickering*, *Connick*, and *Mt. Healthy*.⁹⁸ Conversely, in *Snyder v. Millersville University*, the court upheld the termination of a student teacher from her placement at Conestoga Valley High School, solely on the basis that statements made on her MySpace page were not on a matter of public concern.⁹⁹ Consequently, the analysis provided in *Spanierman* and *Snyder* illustrates that discrepancies exist regarding how courts should apply the *Pickering* balancing test to educators' speech on social networking sites. In lieu of looming litigation surrounding educators' use of such sites, it is imperative that there be uniformity among the courts if it is determined that *Pickering* and its progeny apply.

1. *Spanierman v. Hughes*—A Disjunctive Approach to the Restriction of Speech

In October of 2005, Jeffrey Spanierman (“Spanierman”) created a MySpace profile under the username “Apollo68.”¹⁰⁰ The contents of Spanierman’s profile page were varied, including “comments from [Spanierman] to other MySpace users, comments from other MySpace users to [Spanierman], pictures, blogs, and poetry.”¹⁰¹ Specifically, the page contained a conversation with one student which stated, “I just like to have fun and goof on you guys. If you don’t like it. Kiss my brass! LMAO [Laughing My Ass Off],” and poetry in opposition to the Iraq War.¹⁰² In January of 2006, Spanierman met with a specialist from the Department of Education concerning his “MySpace activities” and was informed that the Department would not renew his contract for the 2006-2007 school year.¹⁰³ Spanierman brought a Section 1983 claim, arguing unsuccessfully that his First Amendment rights had been violated.¹⁰⁴

In applying *Pickering*, *Mt. Healthy*, *Connick*, and *Garcetti*, the court initially determined that *Garcetti* did not extinguish Spanierman’s First Amendment rights.¹⁰⁵ The court stated that pursuant to *Garcetti*, “[e]mployees who make public statements outside the course of performing their official duties retain some possibility of *First Amendment* protection”¹⁰⁶ The court next applied a three-prong *prima facie* test in evaluating whether Spanierman was entitled to First Amendment protection. The test

⁹⁸ *Spanierman*, 576 F. Supp. 2d at 308-09.

⁹⁹ *Snyder*, 2008 WL 5093140, at *16.

¹⁰⁰ *Spanierman*, 576 F. Supp. 2d at 298.

¹⁰¹ *Id.* at 310.

¹⁰² *Id.* at 310, 312.

¹⁰³ *Id.* at 299.

¹⁰⁴ *Id.* at 299, 313.

¹⁰⁵ *Id.* at 309.

¹⁰⁶ *Id.* (finding that *Garcetti* did not rid Spanierman of his First Amendment rights, therefore indicating that *Garcetti* applies only to statements made pursuant to the course of one’s government employment).

looked at whether: (1) the speech was on a matter of public concern; (2) an adverse employment action had occurred; and (3) there was a causal connection between the speech and the adverse employment action.¹⁰⁷ In applying the test, the court found that a portion of Spanierman's MySpace speech, a poem written in opposition to the Iraq War, was protected.¹⁰⁸ Focusing on the poem, the court looked at whether Spanierman suffered an adverse employment action and whether there was a causal connection between his poem and the decision not to renew his contract.¹⁰⁹ Although the court upheld Spanierman's dismissal, finding no direct evidence of a causal connection, the test applied by the court evidenced the application of *Connick* and *Mt. Healthy*, rather than *Pickering*.¹¹⁰ In essence, the court limited First Amendment protection to speech on a matter of public concern without ever weighing Spanierman's interests in his speech against the interests of the school board.¹¹¹

Adding to the confusion, the court later applied *Pickering* as a disjunctive alternative by which the school board could gain a second opportunity to limit Spanierman's speech.¹¹² Stating that a showing of disruption to school activity would "sufficiently outweigh[] the value of [Spanierman's] MySpace speech," the court determined that Spanierman's conduct on MySpace created a disruption, and therefore, authorized the school board's dismissal.¹¹³

Without condoning Spanierman's conduct on MySpace,¹¹⁴ it is important to note that rather than applying *Pickering* immediately to Spanierman's speech, the court first determined whether Spanierman's speech addressed a matter of public concern and then allowed the school board two separate avenues to limit Spanierman's speech.¹¹⁵ First, school officials were afforded an opportunity to show that, even absent Spanierman's MySpace page, they would have refrained from renewing his

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 310. The court dismissed the remainder of Spanierman's speech as unprotected because it was not on a matter of public concern. *Id.*

¹⁰⁹ *Id.* at 311.

¹¹⁰ *Id.*; see also *Connick v. Myers*, 461 U.S. 138, 148 (1983) (defining "public concern"); *Mt. Healthy Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 284-85 (1977) (stating that it must be proven that the "protected conduct played a 'substantial part' in the actual decision not to renew," and upon such a showing, the school board must show by a preponderance of the evidence that it would have reached the same decision in the absence of the protected conduct).

¹¹¹ *Spanierman*, 576 F. Supp. 2d at 311.

¹¹² *Id.* at 312.

¹¹³ *Id.* at 312-13.

¹¹⁴ The statements made by Spanierman to students on his MySpace page show a "potentially unprofessional rapport with students." *Id.* at 312. Such statements included discussions with a student about "getting any" (presumably sex), [and] a threat made to a student (albeit a facetious one) about detention." *Id.*

¹¹⁵ *Id.* at 308 (stating that "the government may nevertheless escape liability in one of two ways.").

contract.¹¹⁶ In the alternative, if the school board could not meet the requirements set forth under *Connick* and *Mt. Healthy*, the court allowed officials to argue under *Pickering* that Spanierman's conduct on MySpace was disruptive to school activities, and was therefore, outweighed by the school board's interests in restricting such speech.¹¹⁷ While Spanierman's conduct on MySpace was inappropriate, providing school boards with the use of two separate methods to restrict an educator's speech effectively leaves little protection for educators wishing to make statements on social networking sites.

Additionally, in examining the ability of the school board under *Pickering* to show disruption to school activities, the court raised the issue of whether statements made on the Internet, absent a showing of actual disruption, would provide enough weight to undermine an educator's interests in their speech. In *Spanierman*, the court noted evidence of complaints by students regarding the contents of Spanierman's MySpace page.¹¹⁸ However, the court cited no authority indicating whether the school board's interests would outweigh those of the educator without evidence of discomfort to students or disruption to school activities.¹¹⁹ Consequently, the *Spanierman* analysis begs the question of whether the *Pickering* Court, in its focus on promoting the efficiency of public services, intended such efficiency to be argued as a possible disruption as indicated by *Spanierman*, or as a "forecast [of] substantial disruption" as *Tinker* required not even a year later.¹²⁰ As discussed earlier, *Tinker* was clearly an analysis of student speech rights.¹²¹ Yet, because of the close proximity in which *Pickering* and *Tinker* were decided, it seems difficult to argue that the Supreme Court in *Pickering* intended to restrict the First Amendment speech rights of educators merely because statements could, through the use of social networking sites, cause a disruption at some point in the future.¹²²

¹¹⁶ *Id.* (providing that "[o]ne way the government may prevail is by demonstrating by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected speech.") (quoting *Mandell v. Cnty. of Suffolk*, 316 F.3d 368, 382 (2d Cir. 2003)).

¹¹⁷ *Id.* at 308-09 (indicating that the second way the government may prevail is to "show that plaintiff's speech was likely to disrupt the government's activities, and the likely disruption was sufficient to outweigh the First Amendment value of plaintiff's speech.").

¹¹⁸ *Id.* at 313. An affidavit submitted to the court indicated that Spanierman's MySpace conduct made students uncomfortable. *Id.*

¹¹⁹ *See id.* at 313-14. *But see* Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment at *8, *Spanierman v. Hughes*, 576 F. Supp. 2d 292 (D. Conn. 2007) (No. 3:06CV01196(DJS)), 2007 WL 4456151 (citing *Cobb v. Pozzi*, 363 F.3d 89, 102 (2d Cir. 2003), as support for the proposition that speech may be suppressed if it is likely to cause disruption).

¹²⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that students' First Amendment rights could not be suppressed where the "record [did] not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.").

¹²¹ *See* discussion *supra* Section II.C.2.

¹²² *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968) (decided June 3, 1968); *Tinker*, 393 U.S. 503 (1969) (decided February 24, 1969).

2. *Snyder v. Millersville University*—A Straightforward Application of *Pickering* and *Connick*

Roughly three months after *Spanierman*, a federal district court in Pennsylvania upheld the removal of a student teacher, Stacey Snyder (“Snyder”), from her public high school placement.¹²³ The basis of Snyder’s removal was a photograph on her MySpace page, which depicted her wearing a pirate hat and holding a plastic cup with a caption that read “drunken pirate.”¹²⁴ In applying the *Pickering* analysis, the court stated that “[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.”¹²⁵ However, Snyder conceded at trial that her postings on MySpace raised only personal matters; therefore, allowing the court under *Pickering* and *Connick* to uphold the termination of Snyder’s role as a student teacher without concern for her First Amendment right.¹²⁶

Although the severity of the court’s decision may appear harsh, the court clearly and concisely applied the authority set forth in *Pickering* and *Connick*. In looking first at whether Snyder’s speech was on a matter of public concern, the court eliminated any further analysis.¹²⁷ Additionally, the court pointed out that such an elimination is correct when performed in lieu of *Connick*, which provides that if the speech at issue is not on a matter of public concern, “it is unnecessary . . . to scrutinize the reasons for [an employee’s] discharge.”¹²⁸ As such, Snyder’s concession that her MySpace speech was not on a matter of public concern immediately allowed the school board to dismiss her without fear of constitutional violations.¹²⁹

¹²³ *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at *1, *6 (E.D. Pa. Dec. 3, 2008). The *Snyder* court held that the plaintiff’s position as a student teacher subjected her to the status of a certified teacher, thus enabling the court to apply the *Pickering* progeny public concern analysis. *Id.* at *10.

¹²⁴ *Id.* at *6. Snyder’s page also discussed problems between herself and her cooperating teacher. *Id.* at *5-6. Snyder, in one post to her MySpace page, stated: “[Students] keep asking me why I won’t apply [for a position at the school]. Do you think it would hurt me to tell them the real reason (or who the problem [is])?” *Id.* at *5.

¹²⁵ *Id.* at *14 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006)).

¹²⁶ *Id.* at *16.

¹²⁷ *Id.*

¹²⁸ *Connick v. Myers*, 461 U.S. 138, 146 (1983); see also *Snyder*, 2008 WL 5093140, at *16.

¹²⁹ *Snyder*, 2008 WL 5093140, at *16. As a result of Snyder’s MySpace conduct, Snyder was also unable to graduate from Millersville University with a degree in education. *Id.* at *13. The court upheld the University’s decision, stating that Snyder failed to complete the “approved teacher preparation program—which requir[ed] successful completion of Student Teaching” and was therefore ineligible for licensure. *Id.*

B. Does Hazelwood School District v. Kuhlmeier Apply?—A Look at the Circuit Split on the Issue of Educator Instructional Speech

The rapid development of technology has left courts without legal precedent applicable to educators' speech on Internet social networking sites.¹³⁰ Currently, courts are applying a test enumerated prior to the use of the Internet, and review of that test must occur. In the realm of educators' in-classroom speech, federal circuit courts have begun to apply student speech precedent enumerated by the Supreme Court in *Hazelwood School District v. Kuhlmeier*.¹³¹ The courts' use of *Hazelwood* consequently begs the question of whether such precedent could be applied to educators' speech on social networking sites.

1. The Application of *Hazelwood* to Educators' Instructional Speech

In *Hazelwood*, the Supreme Court held that "school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community" when such speech occurs in a non-public forum.¹³² Utilizing this language, courts examining educators' instructional speech have determined that school boards may exercise "editorial control . . . over the style and content of . . . [educators'] speech" if that control is "reasonably related to legitimate pedagogical concerns."¹³³

Adopting this approach, a federal district court in California upheld the right of Bradley Johnson ("Johnson") to hang banners in his classroom that read "In God We Trust" and "One Nation Under God."¹³⁴ In analyzing Johnson's speech, the court stated that *Pickering* and *Connick* would improperly strip Johnson of his First Amendment rights.¹³⁵ The court explained that because *Pickering* and *Connick* addressed a "public [employee's] speech that [was critical of] his government employer," the precedent did not apply to Johnson's case, as his classroom banners were in no way critical of his employer.¹³⁶

Additionally, in September of 1991, the Tenth Circuit, in *Miles v.*

¹³⁰ See Carter et al., *supra* note 9, at 682-83.

¹³¹ In 2005, the Fifth Circuit identified a split in the circuits regarding the analysis of "teacher's instructional speech." *Chiras v. Miller*, 432 F.3d 606, 617 n.29 (5th Cir. 2005). The court stated that several circuits, including the tenth, eighth, first and seventh, "applied the *Hazelwood* standard to a teacher's instructional speech." *Id.* "However, several circuits, including [the fifth], have recognized that a teacher's instructional speech is ordinarily governed by the specialized standard developed in *Pickering*." *Id.*

¹³² *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988).

¹³³ *Id.* at 273; see also *Johnson v. Poway Unified Sch. Dist.*, No. 07cv783 BEN (LSP), 2008 WL 5657801, at *7 (S.D. Cal. Sept. 4, 2008); *Ward v. Hickey*, 996 F.2d 448, 452-453 (1st Cir. 1993) (providing that educators' speech inside the classroom could be regulated as long as the regulation was reasonably related to legitimate pedagogical concerns and the school provided the educator with notice of what conduct was prohibited).

¹³⁴ *Johnson*, 2008 WL 5657801, at *1-3.

¹³⁵ *Id.* at *6.

¹³⁶ *Id.*

Denver Public Schools, discredited the *Pickering* analysis, stating that “[a]lthough the *Pickering* test accounts for the state’s interests as an employer, it does not address the significant interests of the state as [an] educator.”¹³⁷ In analyzing the school board’s discipline of John Miles for statements made in the classroom, the Tenth Circuit stated that the decision in *Hazelwood* “recognized that a state’s regulation of speech . . . is often justified by [the] peculiar responsibilities the state bears in providing educational services.”¹³⁸ Such responsibilities, the Tenth Circuit subsequently decided, warranted the application of the standard adopted in *Hazelwood* rather than *Pickering*.¹³⁹

2. The Application of *Hazelwood* to Speech on Internet Social Networking Sites

In considering the application of *Hazelwood* to educators’ speech on social networking sites, one must also consider the language of *Bethel School District No. 403 v. Fraser*. In *Fraser*, the Supreme Court provided, “[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the ‘work of the schools.’”¹⁴⁰ Consequently, educators, when speaking on social networking sites, must remember that they have a duty to demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of the classroom.¹⁴¹ “Inescapably, like parents, [teachers] are role models.”¹⁴²

As a result, it is likely that *Hazelwood*’s forum analysis alone will not provide an adequate solution to the issues surrounding educators’ use of social networking sites. Because the Internet blurs the line between speech on and off school grounds, the concern with social networking sites is that even when created by educators from the privacy of their home, students, parents, and the community at large will have access to educators’ personal MySpace and Facebook pages. Therefore, to analyze speech based solely on the forum in which it occurs will provide too little authority to school boards wishing to monitor educators’ speech on the Internet.

¹³⁷ *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 777 (10th Cir. 1991). In *Miles*, a public high school teacher in Denver, Colorado was disciplined for stating that the quality of the school had declined since 1967. *Id.* at 774. The Tenth Circuit provided that because the school was not a public forum, “school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.” *Id.* at 775 (quoting *Hazelwood*, 484 U.S. at 267).

¹³⁸ *Id.* at 777.

¹³⁹ *Id.* The court stated that the “concern addressed in *Pickering*—the right of an employee to participate as other citizens in debate on public matters—is simply less forceful when considered ‘in light of the special characteristics of the school environment.’” *Id.* (citing *Hazelwood*, 484 U.S. at 266).

¹⁴⁰ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986).

¹⁴¹ *Id.*

¹⁴² *Id.*

As stated by the court in *Miles*, what must be created is a balancing test that examines the state's interest as an educator rather than as an employer.¹⁴³ The obligation of the state is "to assure that [students] learn whatever lessons the activity is designed to teach, [and to assure] that readers or listeners are not exposed to material that may be inappropriate for their level of maturity."¹⁴⁴ Consequently, by focusing on the state's interests as an educator, courts will be able to analyze the disruption created by an educator's speech and examine the effect that the speech has on an educator's ability to fulfill their duties as a role model.

Under the current analysis, only statements of public concern deserve First Amendment protection. As a result, any statement made by an educator that is not on a matter of public concern, regardless of its content, if seen by a student, parent, or school board member, will subject the educator to discipline and possible termination. However, if educators make statements on their social networking pages that are not of public concern, but also not offensive or inappropriate, should they be punished? Of equal importance, can school boards legally restrict educators' use of such sites? These are the questions approaching courts. Under *Pickering* and its progeny, such a statement would be afforded no protection. But, under an analysis focusing on a balance between the educator's interests as a citizen, and the interests of the state as an educator rather than as an employer, some protection may be available.

C. School Boards Are Dismissing Educators Across the Nation for Their Use of Social Networking Sites—It is Only a Matter of Time Before Litigation on the Issue Arises

The judiciary has not established a clear-cut test to address what discipline is appropriate for the off-duty free expression of an educator that is not of public concern.¹⁴⁵ Currently, educators are being dismissed across the country for conduct on social networking sites. A Virginia high school art teacher, Stephen Murmer ("Murmer"), was fired after a video of an art project that involved the use of his buttocks and other body parts to spread paint on a canvas was discovered on YouTube.¹⁴⁶ In October 2007, with the help of the American Civil Liberties Union ("ACLU"), Murmer filed suit in federal court to challenge his dismissal.¹⁴⁷ The case subsequently settled in March of 2008, with the school board agreeing to pay Murmer \$65,000.¹⁴⁸

¹⁴³ *Miles*, 944 F.2d at 777.

¹⁴⁴ *Id.* (quoting *Hazelwood*, 484 U.S. at 271).

¹⁴⁵ See Carter et al., *supra* note 9, at 684.

¹⁴⁶ *Id.*; see also Press Release, ACLU, ACLU of Virginia Challenges Dismissal of Censored Art Teacher (Oct. 4, 2007), www.aclu.org/freespeech/censorship/32097prs20071004.html [hereinafter ACLU Press Release].

¹⁴⁷ See ACLU Press Release, *supra* note 146.

¹⁴⁸ *Murmer v. Chesterfield County School Board*, ACLU OF VA., <http://www.acluva.org/docket/murmer.html> (last visited Nov. 19, 2010).

Similarly, Tamara Hoover, an art teacher at Austin High School in Texas, resigned after receiving \$14,850 from the school board when inappropriate photographs of her were found on the Internet.¹⁴⁹

The issue of an educator's ability to utilize social networking sites is one that will come through the judicial system in greater numbers as educators begin to challenge dismissals as a violation of their First Amendment rights.¹⁵⁰ All of the cases maintain similar factual scenarios, as educators place arguably inappropriate pictures, statements, and videos on Internet sites such as Facebook and MySpace, and are dismissed for the inappropriate content when the materials are located by students, parents, or school board members. Although not all will approach the bench, as more educators are dismissed, more will begin to challenge their dismissals. As a result, courts must develop a uniform approach to these future cases.

IV. SOLUTIONS

Two possible solutions can create a more consistent manner in which to regulate educators' out-of-school speech. First, in the absence of judicial decision and in an effort to minimize litigation resulting from speech on social networking sites, school officials should place provisions regarding off campus Internet usage in adopted acceptable use policies.¹⁵¹ Such provisions will provide notice to educators regarding their ability to use social networking sites. Additionally, the provisions will provide an outline of conduct on social networking sites that may be seen as inappropriate and subject to discipline.

The second solution is to reevaluate the Supreme Court decisions of *Pickering*, *Mt. Healthy*, *Connick*, and *Garcetti*, in light of the recent case law surrounding educators' speech on Internet social networking sites. Although it is likely that the Court will continue to utilize the approach set forth under *Pickering*, the Court should reexamine the focus placed on whether speech constitutes a matter of public concern. Thus, instead of focusing on the issue of public concern, the Court should return to a balance between the interests of the educator and the state, focusing on the state's interests as an educator rather than the state's interests as an employer.

¹⁴⁹ *Statement from AISD on the Proposed Settlement with Former Austin High School Art Teacher*, AUSTIN INDEP. SCH. DISTRICT (Aug. 17, 2006), <http://www.austin.isd.tenet.edu/newsmedia/releases/index.phtml?more=1114&lang>. An additional example of an educator terminated for his use of a social networking site is John Bush, a middle school teacher in St. Augustine Florida. *Teacher Fights Firing Over MySpace Page*, NEWS4JAX.COM (Jan. 24, 2007), <http://www.news4jax.com/education/10835756/detail.html>. Bush was dismissed after his MySpace page depicted a self-portrait and a statement that he was divorced and looking to date and meet friends. *Id.* Following his dismissal, Bush retained an attorney in an attempt to regain his position. *Id.*

¹⁵⁰ See generally Martin, *supra* note 7 (citing numerous teachers who are currently under investigation or have been dismissed for their use of social networking sites).

¹⁵¹ Charles J. Russo, *Social Networking Sites and The Free Speech Rights of School Employees*, SCH. BUS. AFF., Apr. 2009, at 40-41.

Such a focus will allow courts to determine whether the speech inhibits an educator's ability to perform their duties and act as a role model to students. It will also ensure some protection to speech made not on a matter of public concern and provide a set list of factors for courts to consider when applying the *Pickering* analysis.

A. Solution One—Integrating Social Networking Sites into Acceptable Use Policies: School Boards Need to Place Educators on Notice That Certain Behavior Will Not Be Tolerated

“Whether we like it or not, teachers are held to a higher standard of moral behavior than is the population in general.”¹⁵² This expectation is reflected in the clauses of state certification procedures and school district acceptable use policies.¹⁵³ Arizona, for example, provides in their state certification that teachers shall not “[e]ngage in conduct which would discredit the teaching profession.”¹⁵⁴

Additionally, because of the possibility of consequences to educators for inappropriate conduct on Internet social networking sites, professional associations have published guidelines for educators to abide by when using the Internet. The Association of Texas Professional Educators suggests that educators should not post anything that would be embarrassing to have their supervisors discover.¹⁵⁵ The Texas association also provides guidelines for dealing with student-initiated contact such as “friend” invitations, by stating that educators should be mindful of adding students to their friends list as anything placed on a student's page or viewed by a student may lead to allegations of misconduct.¹⁵⁶ Moreover, the Ohio Education Association (“OEA”) has taken a stronger stance against educator participation on Internet social networking sites. In addition to strongly discouraging participation on social networking sites, the OEA also provides the following guidelines for educators who choose to use the sites:

Members should not post, do, say or write anything on a social network that they would not want to see on the front page of the local newspaper or would not say or do in front of students, parents, or the board of education.

Members should not post material to their sites that may be considered inappropriate or unprofessional, including pictures and links. Members should monitor the content of their “pages” and remove anything inappropriate or

¹⁵² Carter et al., *supra* note 9, at 684.

¹⁵³ *Id.*

¹⁵⁴ ARIZ. ADMIN. CODE § R7-2-1308(B)(12) (Supp. 2008).

¹⁵⁵ Carter et al., *supra* note 9, at 684.

¹⁵⁶ *Id.*

questionable immediately. Members should not join and should end affiliations with sites that are unprofessional or inappropriate.

Members should never post any information that would identify a student, and members should refrain from posting critical comments about students and school officials. Unfortunately, school employees do not have the same free speech rights as the general public, and the content and impact of some speech may subject members to discipline, including termination.

Members should educate themselves about and take all appropriate precautions available on the social networking sites they are using. For example, “pages” should be marked private, and all requests to become “friends” should be approved by the member. A member should never grant access to his or her “page” without knowing who the person making the request is.¹⁵⁷

Although state education associations have begun to adopt policies regarding the use of Internet social networking sites, cases such as *Snyder* and *Spanierman* highlight the need for school boards to also develop comprehensive acceptable use policies for all staff, including administrators, employees, substitute teachers, and student teachers.¹⁵⁸ “Most importantly, these policies must address the appropriate limits of employee speech on the Internet when Web sites can be accessed by students or the general public.”¹⁵⁹ Specifically, when creating acceptable use policies school boards should consider adhering to the following suggestions:

- (1) Policies should clearly state that because content placed on social networking sites is accessible on district-owned computers and Internet connections, the school may thereby restrict the use of such sites to legitimate academic and administrative uses.¹⁶⁰
- (2) Policies should require all educators and other staff to sign forms indicating that they agree to abide by the terms of acceptable use policies when working on district-operated Internet systems. Such forms should also indicate that educators use social networking sites outside of the school at their own risk, meaning that educators can and will be punished for inappropriate content found on their

¹⁵⁷ *Social Networking Sites – Update*, OHIO EDUC. ASS’N (Oct. 2009) (on file with author).

¹⁵⁸ Russo, *supra* note 151, at 40.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

websites.¹⁶¹

- (3) Policies should specify that when it comes to district-owned and operated systems, educational officials have the right to install firewalls or filtering software that block access to social networking sites.¹⁶²
- (4) “Consistent with the outcome in *Snyder*, . . . [policies] should remind student teachers . . . in particular that due to the professional duties they are assuming in schools . . . they, too, should avoid inappropriate postings . . . on social networking Web sites” such as MySpace or Facebook.¹⁶³
- (5) Policies should remind users that once they have made postings on the Internet, such postings can be easily retrieved. As such, users should be mindful of the content they post to Internet social networking sites.¹⁶⁴
- (6) School boards should revisit policies annually in order to make sure they are up-to-date with changes in the law and technology.¹⁶⁵

The awareness of educators via the use of acceptable use policies and procedure guides is likely to mitigate the amount of litigation, which may result from terminations surrounding the use of social networking sites. Educators must be reminded that while they do not shed their constitutional rights at the schoolhouse gate, they are held to a higher professional standard than many other public employees. Policies which bring these expectations to the forefront will provide adequate warning to educators that conduct below the heightened standard will result in consequences, possibly leading to termination from their position.

B. Solution Two—Judicial Action: Reevaluating Pickering and Its Progeny

The second solution calls for judicial action in light of the recent First Amendment issues surrounding educators’ speech on Internet social networking sites. Although no cases on this issue are currently pending before the Supreme Court, recent district court action, as illustrated by *Spanierman* and *Snyder*, indicates that the Supreme Court may at some point be asked to hear the issue. Consequently, when presented with the

¹⁶¹ *Id.*

¹⁶² *Id.* It is important to note, however, that the use of firewalls will not prevent employees from posting information on social networking sites while outside of the schoolhouse gates. *Id.* Such a prohibition merely mitigates the chance that students or other educators will be able to access social networking sites during school hours. *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 41.

issue, the Supreme Court should reexamine the holding of *Pickering* and its progeny. A clear and concise test is needed to ensure consistent application when determining whether educators' speech on social networking sites should be protected.

In returning to the *Pickering* balancing test, the Court should also focus on the factors to be analyzed when examining the state's interests in restricting speech. Rather than focusing solely on the state's interests as an employer, the Court should utilize the circuit courts' application of *Hazelwood* to focus on the state's interest as an educator.¹⁶⁶ Such interests include the mitigation of disruption to the learning process, fulfillment of an educator's duty as a role model, and protection against endorsement of inappropriate speech by the school board.¹⁶⁷ Through the application of such a test, the Court will ensure that uniform factors are balanced and restrictions are appropriate.¹⁶⁸ As discussed earlier, this balancing will allow courts to focus on how the speech affects or disrupts the educational mission of the school, rather than focusing solely on whether the speech addresses a matter of public concern.¹⁶⁹ Consequently, school boards using this proposed analysis will be limited to set factors and unable to dismiss an educator solely because the school board does not agree with the content of their speech.

Additionally, in looking at educators' use of social networking sites, public concern should be an additional supportive ground for the protection of First Amendment rights rather than a reason for restricting rights prior to the balancing of relevant interests.¹⁷⁰ Without such a re-ordering of the agenda set forth under *Pickering* and *Connick*, courts are likely to strike down educators' speech regardless of its content or its effect on the educational process simply because it does not fall within the narrow definition of "public concern."

As a result, the Court should adopt an approach that continues to apply a balancing test, much like the test in *Pickering*. However, instead of balancing the interests of the educator as a citizen in commenting on matters of public concern against the interest of the state as an employer, the Court must balance the interests of the educator against the interests of the state as an educator in promoting a non-disruptive and effective learning environment for students. Although dependent on judicial action, this solution will provide lower courts and school boards with an analytical framework to apply when analyzing the restriction of educators' speech on social networking sites.

¹⁶⁶ See, e.g., *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 777 (10th Cir. 1991).

¹⁶⁷ *Id.* at 777-78.

¹⁶⁸ See *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

¹⁶⁹ See discussion *supra* Section III.B.2.

¹⁷⁰ See Jo, *supra* note 34, at 429.

V. CONCLUSION

As the use of social networking sites continues to take hold in professional settings, the need for clear-cut guidelines and regulations within the realm of education is all too apparent. The legal framework set forth under *Pickering* is well-settled and a step in the right direction. Courts must utilize a balance, which focuses on the interests of both the educator and the state.¹⁷¹ However, courts currently facing issues surrounding educators' use of social networking sites have inconsistently applied Supreme Court precedent, focusing primarily on whether the speech is on a matter of public concern before looking at the competing interests of the educator and the state.¹⁷² Consequently, the courts have narrowed the scope of educators' First Amendment rights too far, and inconsistencies have led to two main problems.

First, and perhaps most disconcerting, is the fact that courts have narrowly construed the phrase "matter of public concern." Allowance of speech only in relation to a "matter of political, social, or other concern to the community" will undoubtedly eliminate a large majority of speech on social networking sites.¹⁷³ The determination of whether speech is on a matter of public concern must serve only as an additional supportive ground for the protection of an educator's First Amendment right, rather than as a reason for restricting educators' rights prior to the balancing of relevant interests.¹⁷⁴ Without such a re-ordering of the agenda set forth under *Pickering* and *Connick*, courts will repeatedly strike down educators' speech regardless of its content or effect on the educational process simply because it does not fall within the narrow definition of "public concern."

Second, focus by the courts solely on speech that is on a matter of public concern has left school boards facing numerous lawsuits and large settlements. Presently, school boards are unsure of whether speech outside the realm of public concern can be restricted, given its common use on social networking sites. Reevaluation of the Supreme Court decisions in *Pickering*, *Connick*, and *Garcetti* will allow courts to create a uniform approach to educators' speech on social networking sites. Focus by the courts on a modified version of the balancing test in *Pickering* will require an analysis not entirely based on the content of the speech, but rather on whether the speech affects or disrupts the educational mission of the school. Such a balance will require school boards to show a relationship between the restriction of educators' speech and a legitimate concern for the well-being of the school and its students.

¹⁷¹ *Pickering*, 391 U.S. at 568.

¹⁷² See, e.g., *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 309 (D. Conn. 2008); *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at *14 (E.D. Pa. Dec. 3, 2008).

¹⁷³ *Connick v. Myers*, 461 U.S. 138, 147-48 (1983) (defining "public concern").

¹⁷⁴ See *Jo*, *supra* note 34, at 429.

In the interim, school boards must create acceptable use policies that speak specifically to the use of social networking sites by educators. It is well-established that educators are held to a higher standard of moral behavior than the general population.¹⁷⁵ However, such a standard cannot be achieved if educators are unaware of their school boards' expectations when utilizing social networking sites. Once such policies are in place, school boards will have a stronger basis for the restriction of speech on social networking sites, and educators, in the interim of judicial action, will know exactly what First Amendment rights they enjoy while employed with a public school.

Lastly, educators can avoid unwanted embarrassment and loss of employment by simply erring on the side of caution. It is extremely difficult to draw a line between appropriate and inappropriate behavior. Educators who decide to place inappropriate comments, pictures, and videos on their social networking sites should be aware that they will be subject to termination. Under no test should courts allow such conduct to go unpunished. For decades, educators have been held to a higher standard of professional conduct than the general population. By refraining from having social networking pages, "friending" students and fellow faculty members, or placing questionable content on their pages, educators will ensure that they remain able to teach and free from unwanted questioning as to their conduct outside of the schoolhouse gates.

¹⁷⁵ See Carter et al., *supra* note 9, at 684.