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## Note

### **Disrupting the *Pickering* Balance: First Amendment Protections for Teachers in the Digital Age**

*Emily McNee\**

In August 2011, Jerry Buell, a Florida public school teacher, made headlines when he was investigated for posting anti-gay comments on his Facebook page.<sup>1</sup> Buell is one of many teachers who end up in the press because the school he worked at sought to intrude on his private life.<sup>2</sup> Buell wrote on his Facebook page that he “almost threw up” when he saw the news

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1. *Veteran Teacher Suspended over Facebook Post: Anti-Gay Comments Spark Outrage*, SUN SENTINEL, Aug. 18, 2011, at 6B, available at 2011 WLNR 16450258.

2. See *1st-Grade Teacher Suspended for ‘Derogatory’ Facebook Posts About Her Students*, HUFFINGTON POST (Apr. 1, 2011, 3:22 PM), [http://www.huffingtonpost.com/2011/04/02/1st-grade-teacher-suspended-facebook-posts\\_n\\_843982.html](http://www.huffingtonpost.com/2011/04/02/1st-grade-teacher-suspended-facebook-posts_n_843982.html) (discussing teacher who was suspended after parents complained that she posted comments about her students on her Facebook page); J. David McSwane, *Facebook Comment Could Cost Manatee County Teacher Her Job*, HERALD-TRIB. (July 4, 2012, 5:32 PM), <http://www.heraldtribune.com/article/20120704/article/120709831> (discussing teacher who could lose her teaching license because of a Facebook comment that her students “may be the evolutionary link between orangutans and humans”); Erin Moriarty, *Did the Internet Kill Privacy?*, CBS NEWS (Feb. 6, 2011, 7:21 PM), [http://www.cbsnews.com/2100-3445\\_162-7323148.html](http://www.cbsnews.com/2100-3445_162-7323148.html) (discussing a teacher who resigned after a parent complained to the principal that the teacher had a photo of a glass of wine and a mug of beer on her Facebook page); *Teacher Placed on Leave for Questionable Facebook Posting*, WKOW NEWS (Feb. 3, 2009, 3:36 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) (discussing teacher placed on administrative leave after school discovered a photo of the teacher with a gun on her Facebook page); 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> (discussing Natalie Munroe, a teacher who was fired for blogging about her students).

about New York's decision to allow same-sex marriage.<sup>3</sup> Buell was suspended and investigated by the school district, but has since been reinstated and has returned to teaching.<sup>4</sup> During October 2011, Viki Knox, a New Jersey special education teacher, was investigated by her school for making anti-gay comments that she posted on her Facebook page.<sup>5</sup> Knox's post criticized a lesbian, gay, bisexual and transgender (LGBT) history month display at the school where she works.<sup>6</sup> In her post, Knox referred to homosexuality as a "perverted spirit that has existed from the beginning of creation,"<sup>7</sup> a "sin' that 'breeds like cancer,'" and she wrote, "Why parade your unnatural immoral behaviors before the rest of us?"<sup>8</sup> One community member stated, "[i]f these Facebook posts are from Ms. Knox, she should not be teaching our children in public schools."<sup>9</sup> A municipal judge who was also a former township councilman obtained a copy of the comments and wrote to Knox's principal requesting that she be suspended.<sup>10</sup> These situations are not uncommon, due to the popularity of websites like Facebook that encourage users to share their thoughts and opinions.<sup>11</sup> For most people, the end of the work day marks the end to their status as an "employee" and a return to their status as an "individual."<sup>12</sup> However, teachers must take extra care. Unlike ordinary citizens, teachers at public schools are public employees, and are subject to a stricter standard when it comes to free speech under the First Amendment.<sup>13</sup>

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3. *Veteran Teacher Suspended over Facebook Post: Anti-Gay Comments Spark Outrage*, *supra* note 1, at 6B.

4. Erica Rodriguez, *Teacher Back in Class After Being 'in the Blender'*, ORLANDO SENTINEL, Aug. 29, 2011, at D1, available at 2011 WLNR 17078814.

5. Winnie Hu, *High School Teacher Posts Anti-Gay Entry on Facebook*, N.Y. TIMES, Oct. 14, 2011, at A28.

6. *Id.*

7. *Id.*

8. Jeanette Rundquist, *Anti-Gay Rant on Teacher's Facebook Page Stirs Firestorm*, STAR-LEDGER, Oct. 14, 2011, at 1, available at 2011 WLNR 21081143.

9. Hu, *supra* note 5, at A28.

10. Rundquist, *supra* note 8, at 1 ("She has a right to say it. But she does not have a right to keep her job after saying it." (quoting John Paragano, a local municipal judge)).

11. See *Key Facts*, FACEBOOK, <http://newsroom.fb.com/Key-Facts> (last visited Apr. 02, 2013).

12. Jonathan Turley, *Teachers Under the Morality Microscope*, L.A. TIMES (Apr. 02, 2012), <http://articles.latimes.com/2012/apr/02/opinion/la-oe-turley-teachers-under-scrutiny-20120402>.

13. See *infra* Part I.B.

Unlike other public employees, teachers who are fired or merely investigated for their Facebook posts are made famous by news media.<sup>14</sup> Many school districts and states have tried to restrict teachers from using Facebook.<sup>15</sup> In fact, in 2011 Missouri attempted to enact a statute that would prohibit teachers from using or maintaining an Internet site that would allow contact with students.<sup>16</sup> The unique position that teachers have within the educational system makes them more visible to the general public. The current First Amendment standards for public employees may give teachers a reason to think twice before speaking on matters of public concern.<sup>17</sup> As Tony Rothert, the legal director for the ACLU of Eastern Missouri, noted, “reasonable teachers are going to be afraid to use Facebook or Twitter at all.”<sup>18</sup> These considerations become even more important because of the moral standard that the community expects teachers to meet.<sup>19</sup>

Litigation about speech on social networking sites has already begun.<sup>20</sup> Given the high moral standard teachers are held

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14. See, e.g., Rodriguez, *supra* note 4, at D1.

15. Rachel A. Miller, Note, *Teacher Facebook Speech: Protected or Not?*, 2011 BYU EDUC. & L.J. 637, 638.

16. See, e.g., S.B. 54, 96th Gen. Assemb., First Reg. Sess. (Mo. 2011) (“No teacher shall establish, maintain, or use a nonwork-related internet site which allows exclusive access with a current or former student.”); see also *Mo. State Teachers Ass’n v. Missouri*, No. 11AC-CC00553, 2011 WL 4425537, at 2 (Mo. Cir. Sept. 23, 2011) (“[T]he statute . . . would prohibit all teachers from using any non-work-related social networking sites which allow exclusive access with current and former students . . . . The Court finds that the statute would have a chilling effect on speech.”).

17. See, e.g., Lindsay A. Hitz, Note, *Protecting Blogging: The Need for an Actual Disruption Standard in Pickering*, 67 WASH. & LEE L. REV. 1151, 1189 (2010) (explaining that unpredictable standards would deter individuals from expressing their thoughts).

18. See Patrik Jonsson, *Will Missouri ‘Facebook Law’ Spook Teachers Away from Social Media?*, CHRISTIAN SCI. MONITOR, Aug. 3, 2011, available at 2011 WLNR 15369961.

19. See, e.g., Emily H. Fulmer, Note, *Privacy Expectations and Protections for Teachers in the Internet Age*, 14 DUKE L. & TECH. REV. 1, 28 (2010).

20. See, e.g., *Bland v. Roberts*, 857 F. Supp. 2d 599, 603–04 (E.D. Va. 2012) (holding that “liking” the page of the sheriff’s election opponent on social networking website was not constitutionally protected speech). The case has been appealed to the Fourth Circuit Court of Appeals and Facebook has filed an amicus brief. Brief for Facebook, Inc. as Amicus Curiae Supporting Plaintiff-Appellant, *Bland v. Roberts*, No. 4:11-cv-00045, 857 F. Supp. 2d 599 (4th Cir. Aug. 6, 2012), available at <http://www.delawareemploymentlawblog.com/Bland%20v.%20Roberts%20Facebook%2C%20Inc.%20Amicus%20Brief.pdf>. In June 2012, a teacher who was fired for her Facebook posts sued the school district, claiming that the school deprived her of her First Amendment rights.

to, along with modern concerns about privacy and social media,<sup>21</sup> this situation calls for a re-evaluation of First Amendment speech standards. Currently, teacher social networking speech receives too little protection. This Note seeks to understand the challenges of regulating social media speech and proposes a new standard for evaluating speech by teachers on social networking websites such as Facebook.<sup>22</sup> Part I of this Note provides background information about the use of Facebook and sets forth the legal framework courts have used to evaluate First Amendment claims by public employees. Part II analyzes the shortcomings of the current methods for regulating teacher Internet speech by discussing how the nature of social networking websites requires a new standard for analyzing teacher speech. In short, teacher speech on social networking websites is increasingly vulnerable to restrictions by schools and should receive greater protection. Part III proposes a refinement of the *Pickering* balancing test for evaluating First Amendment speech claims. This Note argues that as part of the *Pickering* test, a school should be required to show evidence of an actual disruption resulting from teacher speech that occurs on a social networking site like Facebook.

#### I. THE FIRST AMENDMENT INQUIRY: THE LEGAL FRAMEWORK FOR ANALYZING PUBLIC EMPLOYEE SPEECH

This Part first discusses the controversy surrounding Facebook and explains why teacher conduct on social networking sites is a matter of public debate. Next, this Part sets forth the legal framework courts have created to evaluate public employee speech. This Part also discusses the doctrine used to evaluate student speech, as a comparison to the teacher speech analysis. Finally, this Part discusses recent cases that involve

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Complaint at 8, *Munroe v. Cent. Bucks Sch. Dist.*, No. 2:12-cv-03546 (E.D. Pa. June 22, 2012); *see also* *Rubino v. City of New York*, 950 N.Y.S.2d 494 (N.Y. Sup. Ct. 2012) (challenging hearing award where teacher was terminated for Facebook post but not deciding teacher's First Amendment claim).

21. *See Social Networks Getting a Bit Less Social: Poll*, REUTERS (Feb. 24, 2012, 1:35 PM), <http://www.reuters.com/article/2012/02/24/internet-privacy-pew-idUSL2E8DO87R20120224>.

22. This author refers to Facebook and "Facebook speech" throughout this Note because Facebook is arguably the most popular social networking site today, but the problems posed by Facebook speech could apply equally to other social networking websites with the same features, such as Google Plus or Twitter.

teachers who suffered adverse employment actions due to their speech on the Internet, pointing out the limitations of using the traditional analysis for social media speech.

#### A. ISSUES SURROUNDING TEACHER USE OF SOCIAL MEDIA

Teacher use of social media is currently a hot topic in the news. On one hand, many teachers use social networking websites such as Facebook for personal use and are not likely to stop doing so because of their jobs as teachers.<sup>23</sup> According to a 2011 study of 3000 college students and young professionals, one in three believes the Internet is “*as important as air, water, food, and shelter.*”<sup>24</sup> Facebook is similar to a virtual town square where users log in and connect by posting comments, status updates, and personal opinions.<sup>25</sup> However, unlike a traditional public forum, users have the option of limiting their profile visibility and controlling who they share information with.<sup>26</sup> On the other hand, others want to regulate teachers’ conduct on social networking sites, desiring to “protect students from inappropriate contact with teachers that could lead to illegal actions”<sup>27</sup> or seeking to keep teachers (and their unpopular opinions) off the Internet.

To further complicate matters, the public holds teachers to a higher moral standard than other individuals in the community.<sup>28</sup> Because of the public education setting where teachers work, speech by teachers is highly scrutinized.<sup>29</sup> Teachers are expected to exhibit model behavior at all times—as opposed to

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23. For an argument that it is unrealistic to expect teachers to give up their presence on online social networking sites like Facebook, see for example Fulmer, *supra* note 19, at 27.

24. CISCO CONNECTED WORLD TECHNOLOGY REPORT, 2011 REPORT, available at <http://www.cisco.com/en/US/netsol/ns1120/index.html#~2011>.

25. *Obama to Hold Town Hall at Facebook Headquarters*, NAT’L PUB. RADIO (Apr. 20, 2011), <http://www.npr.org/2011/04/20/135578893/Obama-to-hold-town-hall-at-facebook-headquarters> (“Facebook is the biggest town square in the world.”).

26. *How to Post & Share*, FACEBOOK, <http://www.facebook.com/help/333140160100643/>.

27. Miller, *supra* note 15, at 638.

28. See Fulmer, *supra* note 19, at 29; see also Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 53 (2009) (explaining that teachers “face strong public role expectations that they may not escape even when away from work”).

29. See KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1058 (17th ed. 2010) (“[P]ublic education is a context in which speech is highly controlled.”).

the majority of workers, who have merely “role-specific expectations” which are limited to their behavior while at work.<sup>30</sup> As a result, teachers’ use of social networking websites has come under attack because both students and teachers have access to the website, which leads to the potential for off-campus student-teacher interaction and the potential for in-class disruption.<sup>31</sup>

Teachers have always had both public and private lives.<sup>32</sup> Before the advent of social media, students only interacted with teachers outside of the classroom if they encountered a teacher in public.<sup>33</sup> Now more than ever, students and teachers have an online presence.<sup>34</sup> This online forum makes it more difficult to draw the line between public and private information.<sup>35</sup> Many schools have considered implementing a social media policy, and some schools have already done so.<sup>36</sup> For most teachers, using Facebook is not problematic because teachers use the website responsibly and keep their private information private.<sup>37</sup> However, a handful of teachers who post controversial information end up in the principal’s office after parents or community members discover and dislike the content.<sup>38</sup> With the advent of new technology like Facebook, schools are struggling to determine where to draw the line at regulating teacher speech on websites like Facebook and when they can properly discipline teachers for these activities.<sup>39</sup>

30. Norton, *supra* note 28, at 53.

31. 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, 1316 (2009).

32. See Miller, *supra* note 15, at 639.

33. See John Henley, *Blurred Boundaries for Teachers*, GUARDIAN, (Sept. 22, 2009), <http://www.guardian.co.uk/education/2009/sep/23/teacher-pupil-sexual-relationship> (“Once upon a time, teachers simply did not exist outside of school.”).

34. Wohl, *supra* note 31, at 1316 (explaining that sites such as Facebook are used by both students and teachers and thus provide numerous opportunities for student-teacher communication).

35. Miller, *supra* note 15, at 652.

36. Gracie Bond Staples, *Facing Troubles with Facebook*, ATLANTA J. & CONST., Nov. 18, 2009, available at 2009 WLNR 23217627 (discussing the use of social media policies by schools).

37. Amy W. Estrada, Note, *Saving Face from Facebook: Arriving at a Compromise Between Schools’ Concerns with Teacher Social Networking and Teachers’ First Amendment Rights*, 32 T. JEFFERSON L. REV. 283, 284 (2010).

38. See, e.g., Hu, *supra* note 5, at A28.

39. Mary-Rose Papandrea, *Social Media, Public School Teachers, and the First Amendment*, 90 N.C. L. REV. 1597, 1610–16 (2012) (explaining that the

B. TRADITIONAL LEGAL STANDARDS FOR SPEECH BY PUBLIC EMPLOYEES

The First Amendment declares that “Congress shall make no law . . . abridging the freedom of speech.”<sup>40</sup> Despite the absolute language in the First Amendment, the Supreme Court has held that the First Amendment does not prohibit the government from regulating speech, and historically, the First Amendment did not provide much protection for employees.<sup>41</sup> Until the late twentieth century, government employers had the same rights as private employers to discipline their employees for their speech; that is, government employers could discharge or discipline their employees for their speech without limit.<sup>42</sup>

Beginning in the 1960s, the Supreme Court developed a free speech doctrine for public employees through several key decisions. In summary of the current standards, when a public employee makes a claim that his or her speech is protected under the First Amendment, the court will consider whether the employee is making a statement pursuant to official duties.<sup>43</sup> If the employee is not speaking as a citizen, but as an employee of the government, the speech will not be protected.<sup>44</sup> If the employee is speaking as a citizen, then a court will consider whether the speech is a matter of public concern.<sup>45</sup> If the answer to that question is no, the inquiry will stop there because the speech is not protected.<sup>46</sup> If speech is a matter of public concern, then the court will apply the *Pickering* balancing test,

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current doctrine is ambiguous on schools’ authority to regulate social media use by teachers); see, e.g., Michael Schwanke, *Teachers, Students and the Blurry Social Media Line*, KWCH (May 23, 2012), [http://articles.kwch.com/2012-05-23/math-teacher\\_31829956](http://articles.kwch.com/2012-05-23/math-teacher_31829956) (discussing school social media policies, noting that they are new territory for schools, thus developing policies is challenging).

40. U.S. CONST. amend. I.

41. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 923–24 (3d ed. 2006).

42. Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 BYU L. REV. 2117, 2122 (explaining that government employers “could limit their employees’ speech no matter where the employees spoke or what they said”).

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

44. *Id.*

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

46. *Id.*

weighing the interests of the state as an employer and the interests of the employee as a citizen.<sup>47</sup>

Speech is thus protected if it meets all the following elements: it is not made pursuant to official duties, is a matter of public concern, and the interests of the employee in the speech outweigh the employer's interests in restricting the speech.<sup>48</sup> On the other hand, speech is not protected if any of these elements are present: it is made pursuant to official duties, is not a matter of public concern, or the employer's interests in restricting the speech outweigh the employee's interest in speaking.<sup>49</sup> Significantly, these standards only apply to public employees—private employees are left with a lack of protection, and only covered to the extent protected by statutes such as the Sarbanes-Oxley Act (which protects employees who blow the whistle on illegal actions) and the National Labor Relations Act (which protects employees who are engaged in concerted activity for mutual protection in the workplace).<sup>50</sup>

*Pickering v. Board of Education* was the first important decision in the realm of free speech by public employees because it recognized that teachers have First Amendment rights that must be balanced with the state's interests.<sup>51</sup> In *Pickering*, a teacher was fired for sending a letter to a newspaper in which he criticized the way the school board dealt with allocation of funds and school fundraising.<sup>52</sup> The Supreme Court held that firing the teacher violated the First Amendment.<sup>53</sup> In evaluating the teacher's speech, the Court held that a balancing test must be applied, in which the court will 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."<sup>54</sup> The Court listed several factors to consider when engaging in the balancing test, such as whether the statements were directed toward a person with whom the speaker would "normally be in contact in the course of his daily

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47. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572–73 (1969).

48. See *supra* notes 43–47 and accompanying text.

49. See *supra* notes 43–47 and accompanying text.

50. STEPHEN F. BEFORT & JOHN W. BUDD, *INVISIBLE HANDS, INVISIBLE OBJECTIVES* 96–97 (2009).

51. *Pickering*, 391 U.S. at 568.

52. *Id.* at 566.

53. See *id.* at 573–74.

54. *Id.* at 568.

work”;<sup>55</sup> whether maintaining “discipline by immediate supervisors or harmony among coworkers” would be threatened by the speech;<sup>56</sup> whether working relationships requiring “personal loyalty and confidence”<sup>57</sup> were at issue; and whether the employee’s action “impeded . . . the . . . proper performance of his daily duties . . . or . . . interfered with the regular operation of the schools generally.”<sup>58</sup> Here, the Court found that the teacher’s speech did not impede the performance of his duties or cause a disruption to the operation of the school.<sup>59</sup> Since teachers were “the members of a community most likely to have informed and definite opinions” on the public issue in question, the Court viewed the teacher’s comments in the social discourse as a positive influence.<sup>60</sup>

Although *Pickering* was a victory for public employee speech rights, the Court soon restricted that right by adding steps needed to attain the protected speech status. In *Connick v. Myers*, the Supreme Court affirmed the use of the *Pickering* balancing test, but added a new layer: speech that does not comment on a matter of public concern is not protected by the First Amendment.<sup>61</sup> The Court has traditionally protected speech on matters of public concern because of the idea that speech on matters of public concern, such as politics, are essential to democratic governance.<sup>62</sup> In contrast, speech on matters unrelated to the public concern has not been protected. The *Connick* case involved a former district attorney who brought suit contending that she was terminated because she exercised her right to free speech when she distributed a questionnaire to

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55. *Id.* at 569–70.

56. *Id.* at 570.

57. *Id.*

58. *Id.* at 572–73; Donna Prokop, Note, *Controversial Teacher Speech: Striking a Balance Between First Amendment Rights and Educational Interests*, 66 S. CAL. L. REV. 2533, 2561 (1993) (“Provided that their projections are reasonable, courts should in some cases allow schools to presume harm to the effective functioning of the school or the teacher from looking at the statements themselves . . .”).

59. *Pickering*, 391 U.S. at 572–73.

60. *Id.* at 572.

61. *Connick v. Myers*, 461 U.S. 138, 146 (1983) (“[I]f Myers’ questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge.”).

62. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (explaining that there is a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”).

her fellow staff members.<sup>63</sup> The questionnaire concerned the “office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns.”<sup>64</sup>

The Court held in *Connick* that while a public employee does have rights as a citizen, when the employee’s speech as a citizen addresses a matter of *private concern* rather than a matter of “political, social, or other concern to the community,” the employee has no First Amendment protection.<sup>65</sup> Whether speech addresses a matter of public concern is determined by considering the “content, form, and context of a given statement.”<sup>66</sup> In *Connick*, the time and location of the speech were important, as the Court emphasized the fact that the district attorney who distributed the questionnaires “exercised her rights to speech *at the office* [which] support[ed] . . . fears that the *functioning of his office* was endangered.”<sup>67</sup> Because of the location of the speech, there was a more immediate fear about the functionality of the workplace.<sup>68</sup> The Court did not require an actual disruption, seeing no need for the employer to wait for disruption to occur at the office and cause “destruction of working relationships.”<sup>69</sup> *Connick* narrows the circumstances when the *Pickering* balancing test will apply, by limiting the applicability of the balancing test to cases involving employee speech about matters of public concern.<sup>70</sup>

Before a court can consider whether speech is a matter of public concern and whether to apply the *Pickering* balancing test, there is an initial hurdle for the plaintiff. When public employees “make statements *pursuant to their official duties*, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>71</sup> As a result, when an employee speaks pursuant to his official duties, even if the

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63. *Connick*, 461 U.S. at 141.

64. *Id.*

65. *Id.* at 146.

66. *Id.* at 147–48.

67. *Id.* at 153 (emphasis added).

68. *Id.*

69. *Id.* at 151–52.

70. *Id.* at 147; Papandrea, *supra* note 42, at 2125.

71. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (emphasis added) (holding that a district attorney who wrote a memo recommending dismissal of a case due to government misconduct was speaking pursuant to official duties, and was unprotected by the First Amendment).

speech is on a matter of public concern, the employee has no First Amendment protection.<sup>72</sup> This limit is acceptable because when a public employer restricts an employee's speech about professional duties or responsibilities, the employer "does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."<sup>73</sup>

### C. BORROWING FROM STUDENT SPEECH DOCTRINE

As a public employer, schools can regulate employee speech.<sup>74</sup> Schools are also permitted to restrict student speech.<sup>75</sup> An explanation of the student speech doctrine is relevant here, as some courts have looked to student speech cases for guidance as to what constitutes speech on a matter of public concern.<sup>76</sup> In the landmark case *Tinker v. Des Moines Independent Community School District*, the Supreme Court held that the First Amendment protected high school students who wore black armbands to school in an effort to protest the Vietnam War.<sup>77</sup> *Tinker* entrenched the rule that "to justify prohibition of a particular expression of opinion," the school must show that the conduct could "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."<sup>78</sup> When dealing with student speech the school does not need to prove that a substantial disruption has actually occurred, just that the school reasonably believes the speech would substantially disrupt the school or classroom.<sup>79</sup>

Student speech is regulated differently than adult speech. The Court in *Bethel School District No. 43 v. Fraser* explained this difference by comparing student speech with that of ordi-

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72. *See id.*

73. *Id.* at 421–22.

74. *See supra* Part I.B.

75. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (1969).

76. *See, e.g., Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 693 (4th Cir. 2007).

77. *See Tinker*, 393 U.S. at 514.

78. *Id.* at 509.

79. *Doninger v. Niehoff*, 527 F.3d 41, 51 (2d Cir. 2008) ("The question is not whether there has been actual disruption, but whether school officials 'might reasonably portend disruption' from the student expression at issue." (quoting *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001))).

nary adult citizens.<sup>80</sup> The Court held that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”<sup>81</sup> Even non-disruptive school speech can be restricted if it is lewd, vulgar, or offensive.<sup>82</sup> In *Fraser*, the offensive speech occurred at a high school assembly and the Court explained that the school setting was “no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students,” so the school did not infringe the student’s speech rights.<sup>83</sup> Significantly, several courts agree that *Fraser* only applies to on-campus speech—that is, speech that occurs on school grounds.<sup>84</sup>

Schools have wide-ranging control over student speech when the speech occurs either at school or pursuant to a school-sponsored activity. *Hazelwood School District v. Kuhlmeier*<sup>85</sup> involved a challenge to censorship of a high school paper published by a journalism class.<sup>86</sup> The Court ruled in favor of the school and held that a school could exercise control over the “style and content of student speech” where the speech involves “school-sponsored expressive activities,” as long as the school’s restrictions are “reasonably related to legitimate pedagogical concerns.”<sup>87</sup>

From this line of cases, there have emerged several types of regulations that schools can use to limit student speech. If speech is lewd, vulgar, or offensive, schools can prohibit the speech, and the school does not need to show its potential for disruption.<sup>88</sup> For speech that is not deemed lewd, vulgar, or offensive, the school can restrict it if the school reasonably predicts a substantial disruption.<sup>89</sup>

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80. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

81. *Id.*

82. *Id.* at 685.

83. *Id.*

84. *See id.* at 688 n.1 (Brennan, J., concurring in judgment); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932 (3d Cir. 2011) (stating that *Fraser* does not apply to off-campus speech and finding that simply because a student printed the plaintiff’s offensive Facebook profile and brought it to the school did not transform the off-campus speech into on-campus speech that the school could punish).

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

86. *Id.* at 263–64.

87. *Id.* at 273.

88. *Fraser*, 478 U.S. at 682.

89. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

## D. PUBLIC EMPLOYEE SPEECH ON THE INTERNET

While no cases have been decided that deal with Facebook posts by teachers, there are several cases involving teachers who are disciplined, transferred, or terminated for other online activities. In all of these cases, the teachers lost, and the courts have declined to extend First Amendment protection to teacher online speech.<sup>90</sup>

One case, *Richerson v. Beckon*, involved a teacher's personal blog, where she wrote rude and insulting comments about people she worked with.<sup>91</sup> The teacher filed suit, alleging that she was transferred to a new position in retaliation for speech on her personal blog.<sup>92</sup> The blog was publicly available and included "several highly personal and vituperative comments about her employers, union representatives, and fellow teachers."<sup>93</sup> The appellate court upheld the transfer as appropriate under the *Pickering* balancing test and concluded that the teacher's speech had the potential to disrupt co-worker relations, erode close working relationships, or interfere with the teacher's performance of her duties.<sup>94</sup> Significantly, this case involved speech written outside the workplace, but the speech directly discussed other coworkers, so the school's interest in maintaining an efficient workplace overpowered the teacher's First Amendment rights.<sup>95</sup>

Several cases have revolved around MySpace, an online social network community where users can create profiles to communicate with "friends" and share photographs.<sup>96</sup> In *Snyder v. Millersville University*, a student teacher who was teaching through a public university teacher program maintained a MySpace webpage.<sup>97</sup> The student teacher informed her students

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90. See *Richerson v. Beckon*, 337 F. App'x 637, 638 (9th Cir. 2009); *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 297–98 (D. Conn. 2008); *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at \*5 (E.D. Pa. Dec. 3, 2008).

91. *Richerson*, 337 F. App'x at 638.

92. *Id.*

93. *Id.*

94. *Id.* at 638–39 (finding based on testimony that Richerson's blog demonstrated an "actual injury to the school's legitimate interests").

95. See *id.*

96. *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 297–98 (D. Conn. 2008) (defining the social networking website MySpace.com).

97. *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at \*5 (E.D. Pa. Dec. 3, 2008).

during class that she had a MySpace page.<sup>98</sup> On her MySpace page, Snyder posted a photograph showing her wearing a pirate hat and holding a plastic cup with the caption “drunken pirate.”<sup>99</sup> The court held that the MySpace posting was not protected by the First Amendment because the posting was not a matter of public concern, particularly since the plaintiff conceded at trial that her post only dealt with “personal matters.”<sup>100</sup> As a result, the school was able to discipline the teacher’s speech by refusing to allow her to complete student teaching at the school.<sup>101</sup>

The speech in *Snyder* did not meet the threshold test of public concern because the MySpace page only involved personal matters, yet a different teacher was unsuccessful in protecting his First Amendment rights even when some of his speech *was* of public concern. In *Spanierman v. Hughes*, Jeffrey Spanierman, a high school teacher, brought suit alleging that his First Amendment rights were violated when his contract was not renewed and he lost his teaching job.<sup>102</sup> Spanierman had created a MySpace website and used it to communicate with students about homework and about non-school topics.<sup>103</sup> Unlike the teacher in *Snyder*, who merely informed her students about her MySpace page,<sup>104</sup> Spanierman actually interacted with his students via MySpace—a notable concern for parents.<sup>105</sup> A guidance counselor at Spanierman’s school received complaints from students about Spanierman’s MySpace profile.<sup>106</sup> The profile was listed under the username “Mr. Spiderman” and contained many casual conversations with students.<sup>107</sup> In addition, Spanierman’s profile included a poem in opposition to the Iraq war.<sup>108</sup> As a result, the court found that Spanierman’s profile included both personal, unprotected speech, and protected speech (the war poem, because it dealt with a matter of public, political concern).<sup>109</sup> The issue in this

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98. *Id.*

99. *Id.* at \*6.

100. *Id.* at \*16.

101. *Id.* at \*11, \*16.

102. *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 297 (D. Conn. 2008).

103. *Id.* at 298.

104. *Snyder*, 2008 WL 5093140, at \*5.

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

106. *Id.*

107. *Id.*

108. *Id.* at 310.

109. *Id.* at 310–11.

case was whether the adverse employment action resulted from the protected speech or the unprotected speech.<sup>110</sup> The court decided that the decision not to renew Spanierman's contract did not result from the protected speech, but the unprotected speech.<sup>111</sup> Since the teacher presented no evidence that the school retaliated against him for his political views, the school was able to fire him without violating his First Amendment rights.<sup>112</sup>

For an employee to succeed on a claim of First Amendment retaliation, a plaintiff must establish that: "(1) his speech was constitutionally protected, (2) he suffered an adverse employment decision, and (3) a causal connection exists between his speech and the adverse employment determination against him, so that it can be said that his speech was a motivating factor in the determination."<sup>113</sup> Even if a plaintiff establishes a prima facie case, the school can escape liability by demonstrating that it would have taken the adverse action anyway, even without the protected speech.<sup>114</sup> In *Spanierman*, the teacher did not show that the war poem was the reason why the school terminated his contract.<sup>115</sup> As a result, his termination was upheld.<sup>116</sup>

As made evident by recent First Amendment cases involving Internet speech, it is difficult under the current standards for a teacher to succeed on a First Amendment claim where online speech is at the center of the dispute.<sup>117</sup> In the line of cases since *Pickering*, it has become an uphill battle for a teacher to win on a First Amendment claim due to the high standard for public concern,<sup>118</sup> the causality requirement the teacher must establish,<sup>119</sup> and the possibility that the school can prove it would have taken the same adverse employment

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110. *Id.* at 311.

111. *See id.* at 312 (finding that the school would have taken the same adverse action against the teacher even without the protected speech war poem).

112. *Id.*

113. *Id.* at 308.

114. *Id.*

115. *Id.* at 312.

116. *Id.* at 313.

117. *See Richerson v. Beckon*, 337 F. App'x 637, 638 (9th Cir. 2009); *Spanierman*, 576 F. Supp. 2d at 297–98; *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at \*5 (E.D. Pa. Dec. 3, 2008).

118. *See Papandrea*, *supra* note 42, at 2159–61.

119. *See, e.g., Spanierman*, 576 F. Supp. 2d at 308.

action against the teacher even without the protected speech.<sup>120</sup> As one scholar explains the evolution of the public employee speech doctrine,

[P]ublic employees went from having no First Amendment rights to having hardly any: from the regime described by Justice Holmes, in which they had a right to speak, but no right to a job, to the regime recently created by the Supreme Court, in which they have a right to speak, but no right to be free from employer discipline if they do so as part of their job.<sup>121</sup>

Under the current doctrine, teachers have a right to speak, but they are currently not free from employer discipline—even if the speech has nothing to do with the teacher’s work (for example, the speech occurs off-duty and does not actually affect the school or classroom).

## II. PROBLEMS WITH THE CURRENT PUBLIC EMPLOYEE SPEECH DOCTRINE AND LIMITATIONS OF PREVIOUSLY PROPOSED ALTERNATIVES

This Part argues that the traditional public employee speech doctrine provides too little protection for teacher speech on online social networking websites by discussing the weaknesses in the traditional *Pickering* analysis. Next, this Part evaluates solutions proposed by other commentators who purport to resolve the issues surrounding teacher use of social networking websites. Although the *Pickering* balancing test sets forth a framework for analyzing public employee speech, as courts have applied this test critics have exposed problems with the public employee speech doctrine. Most importantly, these standards create unpredictability and give schools leeway to discipline and suppress speech that should be protected by the First Amendment.

### A. PROBLEMS WITH THE PICKERING BALANCING TEST

The *Pickering* balancing test<sup>122</sup> results in uncertainty for public employees because even if the employee is speaking on a matter of public concern, the balancing of interests between the employer and the employee can still leave the employee with no remedy.<sup>123</sup> Using a balancing test to decide issues of free speech

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120. See, e.g., *id.*

121. George Rutherglen, *Public Employee Speech in Remedial Perspective*, 24 J.L. & POL’Y 129, 129 (Spring 2008).

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

123. See *id.*; Papandrea, *supra* note 42, at 2119 (“[A] public employee’s speech is not entitled to any First Amendment protection unless it is deter-

means that a teacher could be speaking on a matter of public concern and the court could find that the balancing of interests weighs in favor of the school district. Right now the balance has a strong disposition in favor of the school district.<sup>124</sup> Because applying a balancing test makes it difficult to know what kind of speech is protected and when, teachers may be silenced from speaking out about important matters in an online forum.<sup>125</sup> While these concerns are not unique to teachers, when these shortcomings are considered in conjunction with the moral expectations the public has for teachers, they require adjusting the *Pickering* balancing test to better protect teacher speech.

Because the current standards for First Amendment protection are somewhat vague, there is no exact definition of speech that is protected and speech that is unprotected.<sup>126</sup> As a result, public employees cannot always predict whether or not their speech is protected by the First Amendment. Having some degree of certainty within categories of speech is “critical to the soundness of any First Amendment doctrine assigning different levels of protection to different categories of speech.”<sup>127</sup> Uncer-

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mined, as a threshold matter, that the speech involves a matter of public concern, and, even if that requirement is satisfied, the speech is protected only if the value of the speech outweighs the government employer’s interests in restricting or punishing it.”).

124. Rutherglen, *supra* note 121, at 142 (“[T]he *Pickering* balance was almost always struck in favor of the employer. The employee’s side of the balance, limited to interests in speech on matters of public concern, rarely plays a decisive role.”); *see also* Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 4 (1987) (explaining that the public employee speech test results in courts deferring broadly to the government employer).

125. Rutherglen, *supra* note 121, at 144 (explaining that when employees cannot “easily ascertain what speech is protected,” they may be deterred from speaking at all); Steven J. Stafstrom, Jr., Note, *Government Employee, Are You a “Citizen”?: Garcetti v. Ceballos and the “Citizenship” Prong to the Pickering/Connick Protected Speech Test*, 52 ST. LOUIS U. L.J. 589, 624–25 (2008) (explaining that a public employee will have to undertake the same inquiry that a court does in determining whether speech is protected, and noting that most employees will have a difficult time making this determination); *see also* Andrew C. Alter, Note, *Public Employees’ Free Speech Rights: Connick v. Myers Upsets the Delicate Pickering Balance*, 13 N.Y.U. REV. L. & SOC. CHANGE 173, 195 (1984) (asserting that the *Pickering* balancing test does not provide public employees with adequate First Amendment protection because the balancing test is capricious and provides too easy a burden for the employer).

126. *See* Rutherglen, *supra* note 121, at 143 (explaining that while *Pickering* recognized that public employees had free speech rights, those rights were not clearly defined).

127. Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 42 (1990).

tainty about the level of protection a category of speech will receive can result in mistakenly characterizing speech or suppressing speech that should be protected.<sup>128</sup>

Second, critics have attacked the use of the current public employee standards to evaluate “non-work-related, off-duty speech.”<sup>129</sup> Scholars have argued that the *Pickering* balancing test might not apply when an employee’s speech occurs during non-work hours and when the employee’s speech has no obvious connection to his employment.<sup>130</sup> The Supreme Court has also suggested its support for this argument. For example, the majority in *Connick* stated that employee speech which “transpires entirely on the employee’s own time, and in nonwork areas of the office” could lead to a different conclusion.<sup>131</sup> Taking this argument further, the dissent in *Connick* asserted that when a public employee engages in “expression unrelated to their employment *while away from the work place*, their First Amendment rights are, of course, no different from those of the general public.”<sup>132</sup> Several of the limitations that critics have noted about the *Pickering* balancing test are particularly relevant to Internet speech. For example, Facebook (or sites with similar features) provides a convenient forum for off-duty speech. In addition, the type of speech an individual expresses on the Internet is often varied, giving rise to uncertain predictions about whether the speech is protected.

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128. *Garcetti v. Ceballos*, 547 U.S. 410, 428 (2006) (Souter, J., dissenting) (“Open speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection by the First Amendment.”); see Estlund, *supra* note 127, at 46.

129. See, e.g., Papandrea, *supra* note 42, at 2144–59 (discussing confusion and criticism related to the public concern test); see also D. Gordon Smith, Comment, *Beyond “Public Concern”: New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 266 (1990) (proposing a threshold test for public employee speech where the speech must be sufficiently related to employment before the *Pickering* balancing test will apply to off-duty speech).

130. Papandrea, *supra* note 42, at 2153; see also Norton, *supra* note 28, at 54 (stating that the circumstances when the government should be permitted to control off-duty speech of its workers to protect the government’s own or official expression should be limited to those employees considered “quintessentially public servants”).

131. *Connick v. Myers*, 461 U.S. 138, 153 n.13 (1983).

132. *Id.* at 157 (Brennan, J., dissenting) (emphasis added).

B. SOCIAL NETWORKING SPEECH IS DIFFERENT FROM TRADITIONAL SPEECH AND CREATES PROBLEMS WHEN APPLYING THE TRADITIONAL PUBLIC EMPLOYEE SPEECH DOCTRINE

There are problems with applying the traditional public employee speech doctrine to speech by teachers on social media sites such as Facebook. This section analyzes the features that make Internet speech inherently different from speech in traditional forums and explains why these distinctions require a new standard for speech that occurs on Facebook.<sup>133</sup> Speech on Facebook can occur during non-work hours and users can manage privacy settings to control access. There are uncertainties about whether or not speech is protected when there are different types of content on one individual's profile. Due to these uncertainties, there is a risk of a "chilling effect" that would deter teachers from engaging in expressive activities.

First, a teacher who posts something on Facebook can do so during non-work hours and off of school grounds.<sup>134</sup> Although there are other types of speech that can occur during a teacher's non-working hours, such as writing a letter to a newspaper,<sup>135</sup> attending a public meeting, or participating in a public event, Facebook speech is unique because the user can control who has access by setting up privacy filters.<sup>136</sup> When a teacher participates in a public activity or writes an editorial to a newspaper, the teacher cannot choose who views the teacher engaging in such conduct or who reads the editorial. In contrast, Facebook allows for direct communication with a single individual or groups of individuals.<sup>137</sup> The teacher can choose the size of his or her audience and set limits on who can view Facebook posts.<sup>138</sup> These filters are not foolproof and not all teachers use them.<sup>139</sup> Some teachers may have an entirely public profile while others may only allow personal friends to view their profiles.<sup>140</sup> It is also possible that a person who has access will share the post with someone who does not have access—

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133. As mentioned above, these same problems could exist with other social networking sites with the same features as Facebook.

134. Miller, *supra* note 15, at 652.

135. Pickering v. Bd. of Educ., 391 U.S. 563, 566 (1969) (involving a teacher's letter to the editor in a local newspaper).

136. *How to Post & Share*, *supra* note 26.

137. *Id.*

138. *Id.* (explaining the audience selector feature).

139. See Estrada, *supra* note 37, at 284.

140. *Id.*

which is one reason why teachers should not be punished for speech they intended to keep private.<sup>141</sup> Compared with a teacher who writes an editorial in the newspaper and wants to share his or her opinion with the public, Facebook posts are not always meant for public eyes. Unlike an editorial, which students may read, a teacher can choose to prevent students from seeing her Facebook page.<sup>142</sup> It creates an absurd result when schools can punish teachers for sharing their opinions on a topic via Facebook, when overhearing a teacher's public remark or observing a teacher at an event for a political cause would likely not raise the same concerns among the public.<sup>143</sup> The current speech standards may force teachers to the extreme of using "fake profiles, fake name[s] . . . and a cloud of other minor lies to keep their profiles safe."<sup>144</sup>

All of the public employee free speech cases heard by the Supreme Court involved on-the-job speech at work, off-hours speech that was discussed at work, or speech in publicly accessible mediums such as a newspaper.<sup>145</sup> In earlier eras, "teachers might have commented in person to each other, their friends, or neighbors . . . and because those conversations remained private, teachers did not suffer adverse employment actions."<sup>146</sup> While things posted on Facebook or other social media may wind up on the "metaphorical front page of the *New York Times*," most do not.<sup>147</sup> Many of a teacher's comments or posts on Facebook may qualify as a matter of public concern, but are

141. See *id.* at 287 (suggesting that teachers must worry about the public gaining access to a private Facebook profile through other users or even hackers).

142. See *How to Post & Share*, *supra* note 26.

143. See John Pierce, *Wisconsin Teacher Fired for Facebook Firearm Picture*, MONACHUS LEX (Feb. 10, 2009), <http://monachuslex.com/?p=357> (arguing that teachers should not be disciplined for displaying photos of themselves engaging in legal behavior).

144. See James Grimmelmann, *Privacy as Product Safety*, 19 WIDENER L. J. 793, 799–800 (2010) (discussing Facebook privacy and referring in this instance to children who hide their Facebook profiles from their parents).

145. See, e.g., *Connick v. Myers*, 461 U.S. 138, 141–46 (1983) (involving a questionnaire distributed to staff members at the office); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968) (involving an employee letter to a local newspaper). See generally Joseph O. Oluwole, *Eras in Public Employment—Free Speech Jurisprudence*, 32 VT. L. REV. 317 (2007) (discussing the Court's free speech jurisprudence).

146. Miller, *supra* note 15, at 652.

147. Grimmelmann, *supra* note 144, at 804–05 (explaining that Facebook facilitates conversation between small groups, social contexts not intended for outsiders or the full public, and bounded spaces).

only shared with one or two people, much like a direct conversation. When posting to Facebook, it is more likely that a teacher is acting as an ordinary citizen. The Supreme Court has held that the First Amendment protects the “private expression of one’s views” from retaliation in employment.<sup>148</sup> Yet courts have not considered applying this standard to social media speech, even though some social media speech is more private than public, due to privacy filters and posts during non-work hours.<sup>149</sup> This factor presents a strong case for placing the weight on the teacher’s side of the scale when the court balances the interests of the teacher, as a citizen, with the interests of the school as an employer.<sup>150</sup> One of the fundamental principles that permits speech restrictions is the idea that public employers need to maintain an efficient operation of government offices.<sup>151</sup> Yet speech that occurs in private, outside of work, and which is unrelated to the job the teacher does in the classroom is not relevant to efficient operations or a well-functioning school. As Justice Brennan argues in his dissent in *Connick*,<sup>152</sup> the school’s interest in restricting speech as an employer should not come into play when employees engage in expression that is unrelated to their employment and engaged in outside of work.

Second, when a teacher posts something on Facebook, the page will likely contain numerous postings, some of which may be personal and some of which may relate to a public concern.<sup>153</sup>

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148. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 412–14 (1979) (holding that statements made in private conversation between plaintiff and the school principal could support claim of unconstitutional employment action).

149. See Grimmelman, *supra* note 144, at 804 (“Although it may be wise to remember that anything posted to the site could become public knowledge, it does not follow that full and open publicity is natural, desirable, or inevitable.”); Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Boundaries*, 31 PACE L. REV. 228, 246–47 (2011) (“Social media is different from traditional mail, electronic mail, telephone calls, and telefacsimiles” and to answer whether content was meant to be private, the “terms of service, user expectations, webware, and current practices must all be examined.”).

150. Seog Hun Jo, *The Legal Standard on the Scope of Teachers’ Free Speech Rights in the School Setting*, 31 J.L. & EDUC. 413, 417–19 (2002) (opining that when a teacher speaks as a citizen, the school’s interests in limiting the teacher’s speech should be no different than when any other citizen speaks).

151. *Connick v. Myers*, 461 U.S. 138, 151–52 (1983) (emphasizing the need for an efficient operation of the district attorney’s office and focusing on the fact that the speech occurred in the workplace).

152. See *id.* at 157 (Brennan, J., dissenting).

153. Estrada, *supra* note 37, at 307.

As a result, a teacher's Facebook profile likely includes speech that is protected under the First Amendment and speech that is likely not entitled to protection.<sup>154</sup> In comparison, when an individual writes an editorial to the newspaper or stands up to speak at a public meeting, it is easier to determine if those comments, as a whole, are public concern.<sup>155</sup> Just because a teacher speaks on both protected and unprotected matters does not mean that the teacher's speech should receive more deference; a court can analyze both types of speech separately.<sup>156</sup> However, when a teacher has several types of speech on her Facebook page, there is more uncertainty about which speech is protected and which speech is the reason for the school's discipline. In theory, a teacher can be fired for protected speech, but as long as the school can use the teacher's unprotected speech to provide a legitimate reason for termination, the school can prevail in a subsequent lawsuit.<sup>157</sup> This "same-decision-anyway defense" could encourage schools to fabricate reasons for disciplining teachers based on unprotected speech when in reality schools are disciplining teachers based on protected speech.<sup>158</sup>

While a teacher can be fired for unprotected speech on matters of private concern, a teacher who is concerned about the ramifications of online speech may be less likely to engage

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154. See Paul Forster, *Teaching in a Democracy: Why the Garcetti Rule Should Apply to Teaching in Public Schools*, 46 GONZ. L. REV. 687, 712–13 (2010–2011) (noting that a teacher's Facebook page will likely include speech on a matter of public concern and other speech on private matters).

155. See Massaro, *supra* note 124, at 24 ("Examples of fairly clear cases of free speech violations might be terminating a public worker for complaints made at a public meeting or in the local newspaper about race discrimination . . .").

156. *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 310–12 (D. Conn. 2008) (finding that except for a war poem, the majority of plaintiff's MySpace page was not of public concern and explaining that the plaintiff would need to prove a causal relationship between the protected speech and the adverse employment action by showing that he was fired for his protected speech).

157. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 274, 287 (1977); see also Anthony N. Moshirnia, *The Pickering Paper Shield: The Erosion of Public School Teachers' First Amendment Rights Jeopardizes the Quality of Public Education*, 16 B.U. PUB. INT. L.J. 313, 324 (2007) ("If the plaintiff proves only that the conduct was a contributory cause, the government may nonetheless prevail. This may mean that, in practice, only plaintiffs with extraordinarily strong evidence of a causal connection between their speech and the government's retaliatory decision will file suit to vindicate their First Amendment rights.")

158. Oluwole, *supra* note 145, at 335–36; Alter, *supra* note 125, at 195 (explaining that relying on the employer's view that an employee's actions could disrupt the workplace gives too much freedom to the employer).

in speech at all.<sup>159</sup> By doing so, the teacher might avoid unprotected speech but also refrain from engaging in important speech regarding matters of public concern that would be protected. Matters of public concern are more likely to be considered controversial or unpopular viewpoints.<sup>160</sup> These are the types of speech that the First Amendment should protect.<sup>161</sup> However, because teachers are held to a higher moral standard, members of the public who disagree with a statement that is controversial are most likely to complain to the school district, and the school might restrict speech that would not even affect its operations. Just as the Internet and social networking sites have “made it easier for school administrators to find objectionable student speech and punish it,”<sup>162</sup> these sites have made it easier for school districts to find what they consider objectionable teacher speech and punish it. As a result, a teacher might be less willing to engage in what could be protected speech under the First Amendment, due to concerns about being subject to discipline by the school district or fears of complaints from parents who somehow gain access to the speech.<sup>163</sup> Teachers’

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159. See *Gooding v. Wilson*, 405 U.S. 518, 521 (1972) (stating that persons whose expression is protected “may well refrain from exercising their rights” for fear of punishment); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (discussing the danger of the chilling effect on teachers’ exercise of First Amendment rights that arises when it is uncertain what speech is protected); Zachary Martin, *Public School Teachers’ First Amendment Rights: In Danger in the Wake of “Bong Hits 4 Jesus”*, 57 CATH. U. L. REV. 1183, 1184 (2008) (stating that if teachers feel their speech is constantly monitored, they may ultimately chill their speech); Rutherglen, *supra* note 121, at 144 (discussing the potential for chilling of speech); see also Jonsson, *supra* note 18.

160. See *Rankin v. McPherson*, 483 U.S. 378, 387–88 (1987) (holding that a public employee’s statement expressing her desire that the next assassination attempt on President Reagan would be successful touched on a matter of public concern, and concluding that the “inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern”); see also D. Duff McKee, *Termination or Demotion of a Public Employee in Retaliation for Speaking out as a Violation of Right of Free Speech*, 22 AM. JUR. PROOF OF FACTS 3D 203, 227 (1993) (“The subject matter of speech that has been held to qualify as matters of public concern can be categorized into three general classifications: (1) controversial speech on matters of current public debate, (2) criticism of the agency or its administrators, and (3) whistleblowing.”).

161. Estlund, *supra* note 127, at 13 (explaining that the Supreme Court has a history of protecting speech on “public issues” and “public affairs”).

162. Motion for Leave to File Brief as Amici Curiae and Brief for the Alliance Defense Fund and Liberty Institute as Amici Curiae in Support of Petitioner, *Kowalski v. Berkeley Cnty. Schs.*, 132 S. Ct. 1095 (2012) (No. 11-461), 2011 WL 5548730, at \*11.

163. See Moshirnia, *supra* note 157, at 332 (arguing that the current lack

fears about discipline for their online activities, coupled with their knowledge that their speech will receive little protection, is likely to cause teachers to self-censor and refrain from engaging in speech on important societal concerns.<sup>164</sup> These differences require refining the current public employee speech doctrine for online speech by teachers.

Underlying the concerns with social media speech is the way new technology affects old standards for constitutional protections. While the privacy of social networking “has not yet been clearly assigned a specific level of First, Fourth, or Fifth Amendment protections,” courts have reconsidered longstanding precedent because of new technologies, whether to increase protections or adjust standards.<sup>165</sup> Courts have differentiated a GPS tracking device from earlier devices such as beepers,<sup>166</sup> have applied a new sliding scale for personal jurisdiction based on an entity’s presence on the Internet,<sup>167</sup> the National Labor Relations Board (NLRB) has extended the National Labor Relations Act protections to social media by striking down employer policies on social media use,<sup>168</sup> states have enacted legislation that prohibits requesting or requiring an employee or applicant to disclose their user name or password for personal social media accounts,<sup>169</sup> and most significantly, a growing

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of First Amendment protections for teachers could result in a “chill’ on public educators’ exercise of their First Amendment rights” and could have a “terrible impact on the quality of public education” by influencing teachers wary of the risk of losing their jobs from exercising their First Amendment rights to select careers in the private sector).

164. See, e.g., Rosalie Berger Levinson, *Superimposing Title VII's Adverse Action Requirement on First Amendment Retaliation Claims: A Chilling Prospect for Government Employee Speech*, 79 TUL. L. REV. 669, 685 (2005) (stating that the potential loss of employment in retaliation for speech may chill speech on matters of public concern); Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 558 (1998) (“Even an employee who wishes to speak out on matters of public concern in a non-disruptive manner will pause if she is not sure whether it will cost her her job.”).

165. See Strutin, *supra* note 149, at 242.

166. See *United States v. Jones*, 132 S. Ct. 945, 952 (2012).

167. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1126–27 (W.D. Pa. 1997).

168. MICHAEL J. EASTMAN, U.S. CHAMBER OF COMMERCE, *A SURVEY OF SOCIAL MEDIA ISSUES BEFORE THE NLRB 1* (2011), available at <http://www.uschamber.com/sites/default/files/reports/NLRB%20Social%20Media%20Survey.pdf> (noting that the NLRB reviewed more than 100 complaints related to social media speech).

169. For a summary of state legislation on this issue, see *Employer Access to Social Media Usernames and Passwords*, NAT’L CONF. ST. LEGISLATURES

number of courts have held that Internet speech by *students* often cannot be regulated by schools so long as it takes place off campus, unless it creates an on-campus disruption.<sup>170</sup>

C. PREVIOUSLY PROPOSED SOLUTIONS WOULD NOT BE AS EFFECTIVE AS AN ACTUAL DISRUPTION STANDARD

Commentators have proposed various solutions to the problem of regulating online teacher speech. This section discusses the shortcomings of various solutions to the problem of teacher speech on Facebook. There are two popular solutions for regulating online teacher speech: first, apply the framework that is used for analyzing student speech to analyze teacher speech;<sup>171</sup> second, retain the *Pickering* framework but regulate speech or use of Facebook or other social networking sites through legislative action.<sup>172</sup> Ultimately, neither of these two options is a sufficient framework for protecting teacher speech while maintaining consideration for a school's need to operate effectively.

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(Jan. 7, 2013), <http://www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords.aspx>.

170. See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011) (holding that the school district violated the high school student's First Amendment rights by suspending him for creating a fake Internet profile of the school principal on Facebook that he created during non-school hours and at home, explaining the school could not punish the out of school expressive conduct based on the circumstances, and declined to define precise parameters for when schools can discipline off-campus speech); *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1374 (S.D. Fla. 2010) (holding that the creation of a group on Facebook expressing dislike for a teacher was off-campus speech, and was protected where the student created the group off campus, creation did not occur at school sponsored activity, and the group was not accessed at school); *Emmett v. Kent Sch. Dist.*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (granting a motion for a temporary restraining order prohibiting the school from suspending a student for creating a web page from his home because the student had a likelihood of success on the merits of his claim that the school violated his First Amendment rights); see also *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 619 (5th Cir. 2004) (declining to apply the traditional *Tinker* standard to a student who drew an offensive photo at home and kept it there because *Tinker* only applies to student expression that "occur[s] on the school premises").

171. E.g., Miller, *supra* note 15, at 663–64 (proposing that the student speech doctrine should apply to teacher Internet speech).

172. Estrada, *supra* note 37, at 303 (proposing a state statute to address the problems of teacher social networking); Fulmer, *supra* note 19, at 65–69 (proposing state legislation or, alternatively, that courts address the problem of Internet speech by public educators).

## 1. School Speech Doctrine

Some commentators propose that the framework for regulating student speech should provide the standard for evaluating teacher speech.<sup>173</sup> Applying the student-speech doctrine would consider whether speech is lewd, offensive, or vulgar; and if not, the doctrine would ask whether the speech would potentially disrupt the functioning of the school.<sup>174</sup> There are significant flaws in applying the student speech protections to teacher speech. Student speech caselaw has evolved separately from teacher speech with a distinct doctrine. Because the concerns with student speech are different from those underlying speech by teachers, applying the student speech standards to teachers could be overly protective of speech. Finally, before stripping away longstanding caselaw and precedent on the First Amendment, it is more practical to consider adjusting the current standards as a solution.

One reason why the student speech cases should not apply to teacher speech is because cases involving student speech were never meant to address teacher speech.<sup>175</sup> Speech by adults has always been treated differently than speech by children.<sup>176</sup> In addition, *Tinker* was not meant to apply to all off-campus speech, as recently discussed by the Third Circuit: “[I]f *Tinker* were applied to off-campus speech, there would be little reason to prevent school officials from regulating *adult* speech uttered in the community. Adults often say things that give rise to disruptions in public schools . . . [T]he prospect of using *Tinker* to silence such speakers is absurd.”<sup>177</sup> The Third Circuit implied that if *Tinker* applied to off-campus speech, it would regulate not just teachers and students, but non-public employ-

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173. *E.g.*, Karen C. Daly, *Balancing Act: Teachers’ Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 41 (2001) (discussing the rationale that teachers should have the same rights to free speech as do students); Miller, *supra* note 15, at 663–64 (proposing that the student speech doctrine should apply to teacher Internet speech, provided that teachers and students are not friends on Facebook and that students should not have access to a teacher’s profile or website).

174. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969); *see Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 n.1 (1986) (Brennan, J., concurring in judgment).

175. Wohl, *supra* note 31, at 1309–10.

176. *Id.* at 1310 (“While there are numerous overlapping interests and applications between teachers and students, applying one analysis to both is like trying to fit a square peg into a round hole.”).

177. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 940 (3d Cir. 2011).

ees as well. This would result in an overly broad First Amendment restriction, effectively restricting any speech by any individual that could result in a school disruption.<sup>178</sup> Considering that the problematic speech by teachers frequently originates off-campus, applying standards for student speech that do not apply to off-campus speech would not be an effective solution.

Regulating teacher speech in the same way as student speech would overly protect teacher speech in that it would protect the wrong kinds of speech—speech that could harm the educative purpose of the school. Applying the student speech framework, it is possible that a teacher’s Facebook postings on matters of political or social concern would be protected, but so might teacher criticism of the school, criticism of students, or posting photos that could be deemed inappropriate.<sup>179</sup> This type of content that would be protected under the student-speech test would likely be *unprotected* under the teacher-speech doctrine because it would probably not qualify as a public concern.<sup>180</sup> Allowing teachers to be free from adverse action for posts that criticize the school or specific students is not the type of speech that needs greater protection, because protecting it does not serve the interests underlying the First Amendment.<sup>181</sup>

Applying the student speech framework to teacher online speech would strip away years of public employee speech precedent because it would entirely disregard the public concern test and the *Pickering* balancing test.<sup>182</sup> Simply applying the student speech doctrine overlooks the roles teachers have as educators who are in a position to influence and shape their students’ minds.<sup>183</sup> It would also ignore the fact that teachers are employees who must function with others in the workplace. As a result of a teacher’s role as public employee and educator, courts can justify controlling teacher speech under different

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178. *See id.*

179. Miller, *supra* note 15, at 657; *see also* Papandrea, *supra* note 39 at 1634–35 (suggesting that courts should discard the public concern requirement).

180. *See Connick v. Myers*, 461 U.S. 138, 146–47 (1983).

181. SULLIVAN & GUNTHER, *supra* note 29, at 763 (discussing historical reasons why free speech has been protected, such as advancing knowledge and truth, facilitating democracy and self-government, and “promoting individual autonomy, self-expression and self-fulfillment”).

182. Miller, *supra* note 15, at 660–64.

183. Fulmer, *supra* note 19, at 27 (“Teachers are in a position to influence their students’ behavior.”).

standards than those used to control student speech.<sup>184</sup> The student speech doctrine primarily considers the potential disruption to the classroom, which is an important factor. However, since schools are both educators and employers, the employer's interest in an efficient and functional workplace also needs to be part of the analysis.

Additionally, applying the student speech doctrine to teacher speech would place teachers in a different category than other public employees, who would remain bound by the *Pickering* analysis. While teachers work in a position that carries distinct concerns, there is not a good reason to depart from the entire public employee speech doctrine when regulating teacher speech. For example, a teacher's speech that occurs in class or is pursuant to official duties should still be regulated according to the employee speech doctrine.<sup>185</sup> A better approach to dealing with the problems with the *Pickering* balancing test and public employee speech doctrine is not to disregard the doctrine itself, but to make adjustments to the standard it provides. The distinct issues with social networking websites can be addressed by refining the *Pickering* standard for those instances, instead of applying an entirely different framework.

## 2. Legislative Solutions

Many commentators who propose changing the *Pickering* standard also suggest some type of statutory prohibition on teacher social networking use.<sup>186</sup> However, when application of a First Amendment standard is contingent upon restricting student-teacher interactions on social media, the solution is not ideal. Prohibiting teacher-student interaction is problematic because speech on social networking websites can trigger the First Amendment freedom of speech along with the freedom of

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184. Daly, *supra* note 173, at 13 (arguing that subjecting teachers and students to an identical standard for free speech is unjustifiable and flawed).

185. For a discussion of whether the *Pickering* and *Garcetti* framework for analyzing public employee speech should apply to the in-class speech of teachers, see generally Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L.J. 37 (2008).

186. Estrada, *supra* note 37, at 303 (proposing a state statute that punishes irresponsible use of a social networking site, with provisions that define irresponsible use); Fulmer, *supra* note 19, at 29 (proposing that state legislation would be an effective way of protecting a public educator's free speech on social networking websites or, alternatively, suggesting that courts could address the problem of protecting Internet speech by public educators).

association.<sup>187</sup> Resolving the First Amendment issue by restricting association only shifts the problem to a different constitutional right.

Although waiting for courts to reevaluate the First Amendment as it applies to new technology may not be an immediate solution, allowing each state to legislatively create First Amendment standards is not an efficient solution. Since each state would need to enact legislation individually, state legislation may not be consistent from state to state, and some states may impose stricter standards than others.<sup>188</sup> In addition, because teachers are often held to a higher moral standard by the public (at least compared with other public employees), it is likely that legislators could be hesitant to increase speech protections for teachers. On the contrary, legislators might tend to restrict speech rather than protect it.<sup>189</sup> What teachers need is one clear and consistent approach to social networking websites. Given the importance of this issue, it should be decided by courts, not state legislatures.

Another possibility is for Congress to take action by enacting a federal statute addressing the unpredictability of the *Pickering* balancing test.<sup>190</sup> For example, writing about personal blogs, one author proposes a federal statute that would prohibit a federal government employer from discharging an employee or taking other adverse action because of an “individual’s off-duty electronic communications” unless the employer “demonstrates a showing of actual disruption to the workplace caused by the off-duty electronic communications.”<sup>191</sup> This solution has promise, but would only be able to protect federal employees, instead of all public employees<sup>192</sup>—meaning that it would provide little relief for teachers, who are not usually federal employees. As the author explains, it would be very unlikely that a federal statute applying an actual disruption standard to states would be upheld under the Fourteenth Amendment.<sup>193</sup> Since a federal statute could only address federal employees, teachers would likely not be protected by such a statute.

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187. Estrada, *supra* note 37, at 297.

188. Fulmer, *supra* note 19, at 29 (noting several limitations to state legislation, but ultimately deciding in favor of using state legislation).

189. *See, e.g.*, S.B. 54, 96th Gen. Assemb., First Reg. Sess. (Mo. 2011).

190. Hitz, *supra* note 17, at 1193–95.

191. *Id.* at 1195.

192. *See id.*

193. *Id.* at 1193–94 n.220.

While adopting the standard used to evaluate student speech or enacting legislation are both options for regulating public employee speech, they are not the best options. The most efficient and ideal standard is for courts to give schools a greater burden to meet under the current *Pickering* balancing test by imposing a showing of actual disruption requirement.

### III. SOLVING THE FACEBOOK DILEMMA: SOLUTIONS TO PROTECT STUDENTS, AND PRESERVE TEACHERS' FREEDOM OF SPEECH

This Part argues that an actual disruption standard should be a required component of the *Pickering* balancing test once a court has determined that the speech in question addresses a matter of public concern. Because *Pickering* leaves open the element of a balancing test, courts can continue to follow *Pickering* but can apply it in a different way. This solution better protects teacher speech without the need to overrule *Pickering* or its progeny. This Part sets forth a proposed solution that balances teachers' First Amendment rights with schools' educational concerns.

#### A. AN ACTUAL DISRUPTION STANDARD SHOULD APPLY TO FACEBOOK SPEECH BY TEACHERS

Facebook speech can easily include protected speech (comments about gay rights, presidential elections, or politics) and unprotected speech (personal information that is not relevant to the general public, such as music taste). The protected nature of speech is less certain when posted on a personal Facebook page, and speech is often posted from the privacy of one's home; therefore schools should have to satisfy a higher standard in order to take adverse action against a teacher. A stricter standard for schools will provide more certainty for teachers to predict in advance whether or not their speech could be protected, and will better serve to protect the First Amendment interest in robust public debate. In turn, refining the *Pickering* balancing test will also provide more certainty to school districts and administrators regarding when it is appropriate to discipline and manage employees (and when doing so might be eroding employees' free speech rights).<sup>194</sup>

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194. See Rutherglen, *supra* note 121, at 144 (describing the benefits of added certainty for employees and employers if the *Pickering* balancing test was

When speech meets the standard for public concern, an actual disruption standard should be a required element of the *Pickering* balancing test when applied to teachers' speech online. An actual disruption standard would mean that, as a court weighs the teacher's interest in freedom of speech with the school's interest as an employer, a school would need to allege that an actual disruption occurred as a result of the teacher's speech.<sup>195</sup>

### 1. An Actual Disruption Standard Provides Much Needed Protection for Teacher Speech

By retaining the *Pickering* framework for evaluating teacher speech, a teacher's post on Facebook must meet the public concern test before a court will consider a balancing of interests.<sup>196</sup> The public concern test is narrowly construed and will likely exclude most types of inappropriate speech that schools dislike such as inappropriate or scandalous photos, insults about particular students or coworkers, and flirtatious contact with students.<sup>197</sup> Once a teacher passes the threshold element of speech on a matter of public concern, the teacher has already established that the speech is not frivolous, but serves an important purpose or interest to society.<sup>198</sup> Once the speech in question meets the public concern threshold, it should be entitled to a presumption of protection. Then, the school can rebut this presumption with a showing of an actual disruption.<sup>199</sup>

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more structured).

195. See *Birdwell v. Hazelwood Sch. Dist.*, 491 F.2d 490, 494 (8th Cir. 1974) (summarizing teacher's arguments that there must be an actual disruption before the school could take adverse action against the teacher).

196. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570 (1968).

197. See Patricia M. Nidiffer, Comment, *Tinkering with Restrictions on Educator Speech: Can School Boards Restrict What Educators Say on Social Networking Sites?*, 36 U. DAYTON L. REV. 115, 141 (2010) (explaining that protecting only speech that relates to a matter of public concern eliminates a majority of speech on social networking sites).

198. *Connick v. Myers*, 461 U.S. 138, 146 (1983) (explaining that speech is a matter of public concern when it relates to "any matter of political, social, or other concern to the community").

199. This is much like the standard for employment discrimination claims, which requires an employee to show prima facie evidence of discrimination, allows the employer to rebut the claim with proof of a legitimate nondiscriminatory reason, and permits the employee to present evidence that the employer's reason is merely pretext for a discriminatory motive. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

The nature of Facebook speech makes it more susceptible to over-regulation when a school district dislikes the viewpoint of the protected speech or the unprotected speech that exists alongside the protected speech. This is more likely when one considers the high moral standard the public expects of teachers at all times.<sup>200</sup> These high expectations may cause a school district or concerned parent to be more likely to decide that a disruption is foreseeable when a disruption is not really imminent.<sup>201</sup> A school could quickly discover a teacher's Facebook speech, and just as quickly terminate the teacher, unless an actual disruption standard is required.<sup>202</sup> Because of the defenses available to the school district, even where an employee engages in protected speech, the school is still justified in taking adverse action against that employee where it can point to legitimate reasons for termination, such as unprotected speech.<sup>203</sup> It is not unlikely that a school district could allege facts that suggest the termination is for unprotected speech (which is likely to exist on someone's Facebook page), when the reason is simply pretext for disliking the protected speech.<sup>204</sup> As one scholar explains, using the mere "substantial disruption" test, which is the current standard only serves to "constitutionalize the heckler's veto" and makes unpopular speech (which warrants greater protection) most vulnerable to attack.<sup>205</sup> Without an actual disruption standard, all speech can be theoretically disruptive, and thus potentially punishable.

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200. Norton, *supra* note 28, at 53 (explaining that teachers "face strong public role expectations that they may not escape even when away from work"); Fulmer, *supra* note 19, at 69 ("[B]ecause of their interaction with parents and students, public school teachers are singled out from among public employees and held to arbitrary standards of conduct").

201. See *Connick*, 461 U.S. at 166 (Brennan, J., dissenting) ("[T]he Court misapplies the *Pickering* test and holds—against our previous authorities—that a public employer's mere apprehension that speech will be disruptive justifies suppression of that speech when all the objective evidence suggests that those fears are essentially unfounded.").

202. See Hitz, *supra* note 17, at 1162–63 (explaining that one public employee was dismissed almost simultaneous to the discovery of her blog so it was highly unlikely that any actual disruption would have occurred before her dismissal).

203. *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 313 (D. Conn. 2008).

204. See Hitz, *supra* note 17, at 1196 (explaining that the "off-duty public employee blog is particularly susceptible to manipulation in the context of the *Pickering* balancing test").

205. Paul M. Secunda, *Blogging While (Publicly) Employed: Some First Amendment Implications*, 47 U. LOUISVILLE L. REV. 679, 691 (2009).

## 2. An Actual Disruption Standard Is Appropriate Considering the Practical Realities of Disruptive Speech

Opponents may argue that schools should not have to wait until an actual disruption occurs before doing something about the speech.<sup>206</sup> However, there are practical realities that negate this argument. First, most of these teacher posts are often brought to the school's attention by parents or outsiders, not students.<sup>207</sup> The disruption is not occurring in the classroom but in the principal's office, as parents or other community members make complaints about teachers. A disruption in the community due to concern by outsiders is not the same as a disruption that affects the functioning of the classroom or the functioning of the workplace.<sup>208</sup> Because the reaction of the public and the media can adversely affect the outcome of a free speech case under *Pickering*, coupled with the high moral standard for teachers, there is a real concern about unfairly predicting disruption when speech is unpopular with the community.<sup>209</sup> If teachers are to feel comfortable speaking online about matters of public concern, teachers need certainty in the standards a court will consider before they take the risk of engaging in speech that might represent an unpopular viewpoint.<sup>210</sup> Second, any disruption that *does* occur due to a teach-

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206. See *Connick*, 461 U.S. at 152 (“[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. We caution that a stronger showing may be necessary if the employee’s speech more substantially involved matters of public concern.”).

207. See *Rundquist*, *supra* note 8; see also *Papandrea*, *supra* note 42, at 2165 (explaining that if there is an adverse public reaction to the employee’s speech, the employee is likely to lose constitutional protection for his speech, but if the public does not learn about the employee’s speech or “does not react strongly to the employee’s speech, then the employee has a stronger chance of winning”).

208. See generally *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (Smith, J., concurring) (discussing the differences between off-campus and on-campus speech).

209. See Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1018 (2005) (explaining that sources of disruption depend on the “perceived political or social reprehensibility” of the speech and that statements which are less socially reprehensible tend to result in less public outcry and will more likely receive First Amendment protection, compared with speech that is considered repulsive—which will create more outcry and receive less protection); *Papandrea*, *supra* note 42, at 2165.

210. See *Hitz*, *supra* note 17, at 1190–96 (“Balancing tests, by their very nature, come with a level of uncertainty in application. Although this uncertainty is, in ways, viewed positively for providing flexible application of legal rules to specific facts, it is important to maintain firm guidelines within the

er's online speech is likely to occur sooner rather than later. Incidents that create a disruption within a school community or a workplace are probably events that happen quickly. A school might not discover a teacher's Facebook post until the disruption has already occurred. As New Jersey Board of Education President Theodore Best explained, a teacher was suspended "because the incident created *serious problems at the school* that impeded the functioning of the building."<sup>211</sup> These practical realities about speech likely to cause disruption make the "potential for disruption" standard meaningless. An actual disruption standard is a better alternative.

The standard for disruption should require actual proof of disruptive events that occur *at school* and disrupt the classroom or the operation of the school. The standard for a disruption could be satisfied by a high volume of student complaints or actual incidents that take place at the school, between teachers and students or between teachers and other staff. The court should look carefully at the complaints or incidents to make sure that they are genuine. The decisions in earlier Internet speech cases do not preclude applying an actual disruption test.<sup>212</sup> For example, in *Spanierman*, the teacher's speech was at issue because he corresponded with students and *students* brought complaints to the school.<sup>213</sup> Once a student has made a complaint about a teacher's online posts or interactions, this could satisfy the actual disruption standard.

To avoid a chilling effect that silences teachers from speaking on issues of public concern, an actual disruption test should apply to the public employee speech doctrine.<sup>214</sup> An actual dis-

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tests in order to ensure that rights—particularly constitutional rights—are adequately protected.”).

211. *1st-Grade Teacher Suspended for 'Derogatory' Facebook Posts About Her Students*, *supra* note 2 (emphasis added). Best added, “[y]ou can't simply fire someone for what they have on a Facebook page, also stated if that spills over and affects the classroom, *then* you can take action.” *Id.* (emphasis added).

212. See, e.g., Alter, *supra* note 125, at 184 (noting that the majority of public employee dismissal cases involve speech “causing some degree of disruption”).

213. *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 297–98 (D. Conn. 2008).

214. Hitz, *supra* note 17, at 1154 (explaining that an actual disruption standard within the *Pickering* balance test would prevent unnecessary chilling of a valuable form of speech); Rebecca L. Zeidel, Note, *Forecasting Disruption, Forfeiting Speech: Restrictions on Student Speech in Extracurricular Activities*, 53 B.C. L. REV. 303, 335 (2012) (arguing that applying a “forecast of disruption” standard to student speech in extracurricular activities would create a chilling effect on speech because “it provides unclear or no notice of what

ruption standard would allow certainty, predictability, prevent overly hasty or broad decisions by school districts, and most importantly, encourage teachers to engage in speech about matters of public concern.

#### B. COURTS SHOULD ADOPT AN ACTUAL DISRUPTION STANDARD

The judiciary is in the best position to adopt this standard. Due to the weaknesses discussed in Part II.C.2, state or federal legislation would be ineffective. Courts should adopt a clear standard requiring actual disruption as a component of the *Pickering* balancing test when off-duty social networking speech is at issue. This new standard will allow courts to apply the *Pickering* standard consistently and uniformly.<sup>215</sup> Since the potential for disruption is already one of several factors to be considered, creating a higher threshold standard to show actual disruption will enable teachers to receive adequate First Amendment protection without changing the entire framework for public employee speech. Federal courts are in the best position to apply this standard as an interpretation of *Pickering*, until the Supreme Court addresses the issue. Although no cases are currently pending before the Supreme Court, it is possible that the Supreme Court may hear the issue at some point in the near future.<sup>216</sup>

Courts are likely to adopt this standard. As the Supreme Court itself forecasted in *Connick*, a different result was a possibility if the speech transpired on the employee's own time and outside of work.<sup>217</sup> This kind of fact pattern has increasingly emerged, and this proposed solution takes account of those new facts.

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speech may be restricted").

215. Hitz, *supra* note 17, at 1191.

216. Nidiffer, *supra* note 197, at 140 (suggesting that cases such as *Spanierman* and *Synder* indicate that the Supreme Court may soon decide a case involving teacher social networking speech). Just recently, the Supreme Court denied certiorari to review *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011), a case involving a San Diego teacher who was ordered to remove religious banners from his classroom walls. This case does not foreclose the possibility that the Court will hear a teacher speech case involving speech outside the classroom and suggests that teacher speech is a significant issue that will not disappear. See *Johnson v. Poway Unified Sch. Dist.*, No. 11-910, 2012 WL 296110, at \*1 (U.S. Mar. 26, 2012) (denying petition for writ of certiorari).

217. *Connick v. Myers*, 461 U.S. 138, 153 n.13 (1983).

CONCLUSION

Engaging in speech on Facebook has led teachers to be investigated, suspended, and even fired. The nature of online speech on social networking websites like Facebook presents novel concerns in First Amendment law. As schools and states seek to regulate employee speech, particularly teacher speech, this is an area of the law that needs to be addressed. The standard for determining whether speech will be protected under the First Amendment is unclear, and even more ambiguous when applied to Facebook speech. Teachers need consistency and certainty if they are to freely engage in speech that addresses matters of public concern. In order to avoid a chilling effect on teacher speech, the *Pickering* standard must be reconsidered. By retaining the public concern inquiry, and mandating that an actual disruption is necessary to take action against Internet speech, both teachers' interests and schools' interests will be adequately balanced.