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Striking an Unequal Balance: The Fourth Circuit Holds That Public School Teachers Do Not Have First Amendment Rights to Set Curricula in Boring v. Buncombe County Board of Education

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The United States Supreme Court first affirmed the existence of teachers' First Amendment rights in 1923,[1] but it has never spoken directly to the degree of protection that the First Amendment provides teachers for in-class speech.[2] The protection of in-class, curricular speech implicates at least two competing interests: a teacher's right to expression under the First Amendment, and a school system's right to set the curriculum.[3] The lower courts have struggled with the difficulty of balancing these interests for two reasons. First, the Supreme Court has created two standards under

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1. *See* Bartels v. Iowa, 262 U.S. 404, 411 (1923) (holding that state statutes that prevent the teaching of a foreign language in the public schools violate the liberty of parents, teachers, and students under the Fourteenth Amendment Due Process Clause); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (same); *see also* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.").

2. *See* Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693, 696 (1990); *see also* Scallet v. Rosenblum, 911 F. Supp. 999, 1009 (W.D. Va. 1996) ("It is axiomatic that '[a] state may not dismiss a public school teacher because of the teacher's exercise of speech protected by the First Amendment.' Determining, however, the exact scope of a teacher's first amendment protections is an intricate endeavor." (quoting Stroman v. Colleton County Sch. Dist., 981 F.2d 152, 155-56 (4th Cir. 1992))). For purposes of this Note, in-class speech encompasses curricular decisions concerning both instructional methods and instructional materials and may also include non-curricular speech.

3. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853, 864 (1982) (plurality opinion) ("[T]he discretion of . . . local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment."); James v. Board of Educ., 461 F.2d 566, 575 (2d Cir. 1972) (weighing a school board's discretion over curriculum against First Amendment rights of teachers within the classroom); Krizek v. Board of Educ., 713 F. Supp. 1131, 1137 (N.D. Ill. 1989) (explaining that schools function to "develop inquisitive minds and independent thought" and to "provide intellectual and moral guidance" to students based on community values); Clarick, *supra* note 2, at 697-98 (explaining the conflict between the interest of a school over "the content and procedures of public education" and a teacher's right to free speech and expression). Some courts have also suggested that First Amendment protection of teacher classroom speech is for the benefit of students and society rather than the teacher. *See, e.g., Krizek*, 713 F. Supp. at 1137 ("[T]he protection is primarily for the benefit of the student, and as a result, society in general.").

which a teacher's First Amendment rights may be analyzed, yet neither seems completely appropriate to evaluate the in-class rights of teachers. One line of cases provides standards to clarify the permissible scope of public speech by all government employees, including out-of-class speech by public school teachers.[4] Other cases have looked to standards promulgated by the Court to assess the extent of students' First Amendment rights within the classroom.[5] Neither analysis has proven entirely satisfactory in evaluating a teacher's right to speak in the classroom, however, because a public school teacher's in-class speech is different from both the at-work speech of a typical government employee and from student speech.[6]

The goal of a teacher's classroom speech is to educate students by exposing them to ideas that are part of the public discourse and to teach students skills necessary to allow them to participate meaningfully as members of society.[7] The cases dealing with the

4. *See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (determining that public employee speech on "matters of public concern" is protected under the First Amendment and must be balanced against the State's interest as an employer in providing effective services); *see also* Connick v. Myers, 461 U.S. 138, 146-47 (1983) (establishing a public concern test as the threshold inquiry to be followed by the *Pickering* balancing test); Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (stating that a public employee has established a prima facie case if he can show his expression was protected and that such expression was a substantial or motivating factor in the decision to discipline him). For further discussion of the *Pickering-Connick-Mount Healthy* line of cases, see *infra* notes 105-39 and accompanying text.

5. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266, 273 (1988); *Tinker*, 393 U.S. at 511-12; *see also infra* notes 140-52 (discussing *Hazelwood*); *infra* notes 169-99 and accompanying text (discussing the application of the *Hazelwood* test in the lower courts); *infra* note 9 and accompanying text (discussing the test applied in *Tinker*); *infra* notes 155-58 (same).

6. *See* Clarick, *supra* note 2, at 702 ("Teachers' in-class speech addressed to students is neither 'internal workplace speech,' ... nor explicitly a part of public debate .... [A] teacher's in-class expression has dramatic public repercussions because of its role in educating students.").

7. *See id.*; *see also* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to [the] robust exchange of ideas ...."); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."). Both *Keyishian* and *Sweezy*, however, concerned the First Amendment rights of university professors and instructors. *See Keyishian*, 385 U.S. at 591; *Sweezy*, 354 U.S. at 243 (plurality opinion). The Supreme Court has not extended the academic freedom of university professors to secondary and elementary teachers because of the countervailing weight of the school board's control of curriculum. *See* Howard O. Hunter, *Curriculum, Pedagogy, and the Constitutional Rights of Teachers in Secondary Schools*, 25 WM. & MARY L. REV. 1, 4-5 (1983); *see also* Cary v. Board of Educ., 598 F.2d 535, 539-40 (10th Cir. 1979) ("Most of the [academic freedom] cases ... have arisen at the university level ...."). Despite this fact, courts often cite cases concerning the free expression rights of college and university

internal workplace speech of other government employees, however, stress the informative nature of the protected speech to the public at large.[8] Student speech within the classroom is protected to the extent that it does not "materially and substantially disrupt the work and discipline of the school" or intrude on the rights of others;[9] neither would appear to be relevant to the purposes of teacher speech. Furthermore, to the extent that student speech might be considered to be sponsored by the school, school administrators may regulate the speech as long as such regulations are based on "legitimate pedagogical concerns."[10]

The second difficulty in determining the proper protection of curricular speech arises because most lower courts have recognized some First Amendment protection for "academic freedom" among secondary public school teachers, but they have not agreed how far this right extends when balanced against the weight of the school system's interest in establishing the curriculum.[11] The balance appears to have shifted in favor of school districts since 1988, when the Supreme Court's decision in *Hazelwood School District v. Kuhlmeier*[12] clearly established school administration control over school-sponsored student expression.[13] This result is not

professors and instructors as precedent when determining the free speech rights of secondary school teachers, and vice versa. *See, e.g.*, Miles v. Denver Pub. Schs., 944 F.2d 773, 336 (10th Cir. 1991) (citing Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991), a case that determined "the extent to which a university may restrict a professor's classroom expression"); *Scallet*, 911 F. Supp. at 1009-12 (discussing secondary school cases to determine which standard to apply in evaluating the limits of a university professor's classroom speech). Courts often take the age of the students into account, however. *See, e.g.*, *Hazelwood*, 484 U.S. at 271 ("[A] school must be able to take into account the emotional maturity of the intended audience . . . .").

8. *See Connick*, 461 U.S. at 146 (stating that internal employee speech must relate to a matter of "political, social, or other concern to the community" in order to be protected under the First Amendment).

9. *Tinker*, 393 U.S. at 513 (holding that students wearing black armbands at school to protest the Vietnam War did not substantially disrupt or materially interfere with school activities).

10. *Hazelwood*, 484 U.S. at 273.

11. *See* Hunter, *supra* note 7, at 4-5, 14-15; *see also infra* notes 224-35 and accompanying text (discussing the concept of academic freedom).

12. 484 U.S. 260 (1988).

13. *See id.* at 273 (holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns"); *see also* Clarick, *supra* note 2, at 708-09 ("In *Hazelwood School District v. Kuhlmeier*, the Supreme Court . . . dramatically expanded school boards' powers to regulate student speech. . . . [and] teachers' free speech rights are called into doubt by the *Hazelwood* opinion."). Several commentators have indicated that *Hazelwood* narrowed teachers' free speech rights in the classroom when balanced against the power of

determinative, however, since *Hazelwood* only addressed student speech.[14] It mentioned teachers' rights only in dicta, and did not address the issue of "academic freedom" at all.[15]

In *Boring v. Buncombe County Board of Education*,[16] the United States Court of Appeals for the Fourth Circuit dealt directly with the issue of how a teacher's in-class, curricular expression should be analyzed. A closely-divided en banc court held that public school teachers have no First Amendment rights to control curricular decisions.[17] The court based its holding on its determination that a school board had a "legitimate pedagogical interest" in a teacher's choice and production of a school play that was part of the school's curriculum.[18]

This Note first discusses the facts of *Boring*, followed by the Fourth Circuit's resolution of the issues presented by the case.[19] The Note reviews the background on the free speech rights of teachers established in decisions by the Supreme Court as well as by state courts and the lower federal courts.[20] The Note discusses *Boring*'s implications for future Fourth Circuit decisions governing teacher in-class speech and its possible effects on teacher and school board actions. Finally, the Note suggests a new standard by which the courts could evaluate a teacher's classroom speech.[21]

Margaret Boring, a drama teacher at Charles D. Owen High School in Black Mountain, North Carolina, had been employed as a teacher by the Buncombe County, North Carolina school system since 1979.[22] While at Owen, Boring established herself as an exceptional drama teacher.[23] Many of Boring's students went on to

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the school board to establish the curriculum. *See* Bruce C. Hafen & Jonathan O. Hafen, *The* Hazelwood *Progeny: Autonomy and Student Expression in the 1990's*, 69 ST. JOHN'S L. REV. 379, 401 (1995); E. Edmund Reutter, Sr., *Academic Freedom Advisory: Be Wary of the Long Arm of* Kuhlmeier, 89 EDUC. L. REP. 347, 353 (1994); Lee Gordon, Note, *Achieving a Student-Teacher Dialectic in Public Secondary Schools: State Legislatures Must Promote Value-Positive Education*, 36 N.Y.L. SCH. L. REV. 397, 407-08 (1991).

14. *See Hazelwood*, 484 U.S. at 273.

15. *See id.* at 267.

16. 136 F.3d 364 (4th Cir.) (en banc), *cert. denied*, 119 S. Ct. 47 (1998).

17. *See id.* at 366.

18. *See id.* at 369-70.

19. *See infra* notes 22-97 and accompanying text.

20. *See infra* notes 98-245 and accompanying text.

21. *See infra* notes 246-89 and accompanying text.

22. *See* Boring v. Buncombe County Bd. of Educ., 98 F.3d 1474, 1476 (4th Cir. 1996), *vacated en banc*, 136 F.3d 364 (4th Cir.) (7-6 decision), *cert. denied*, 119 S. Ct. 47 (1998).

23. *See id.* Margaret Boring had " 'built a national reputation for excellence in teaching drama and directing and producing theater.' " *Id.* (quoting Appellant's Complaint at 3, *Boring* (No. 95-2593)).

study drama in college, often winning scholarships to enable them to do so. In 1992 alone, her college-bound students received over $260,000 in scholarships.[24] In addition, Boring produced and directed a number of award-winning plays.[25]

In the fall of 1991, Boring selected the play *Independence* for her advanced acting class to perform in a statewide competition.[26] It depicts the story of a divorced mother and her three daughters, one a lesbian and another pregnant with an illegitimate child.[27] As she did each year, Boring notified the school principal, Fred Ivey, of the name of the play for the competition.[28] Ivey did not respond to the selection in any way.[29] Boring then sent copies of the script home with each of the four student actors so that they could discuss the play with their parents, none of whom complained.[30] At a regional drama competition, the play won seventeen of twenty-one awards.[31] After the regional competition, but before the state finals, the acting class performed a scene from the play for an English class at the English teacher's request.[32] Prior to the class performance, Boring told the teacher that the students should bring in parental permission slips to see the play due to its subject matter.[33] One of the English students, who had not received parental permission to see the scene, described its contents to his parents after watching the performance.[34] One of his parents later complained to Ivey, who subsequently read the play and notified Boring that the play could not be performed at the state finals.[35] At the urging of the parents of the actors, however, Ivey allowed the performance to continue with certain sections deleted.[36] The play won second place in the state competition.[37]

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24. *See id.*
25. *See id.*
26. *See id.*
27. *See Boring*, 136 F.3d at 366.
28. *See id.*
29. *See Boring*, 98 F.3d at 1476.
30. *See id.*
31. *See Boring*, 136 F.3d at 366.
32. *See Boring*, 98 F.3d at 1476.
33. *See id.*
34. *See id.*
35. *See Boring*, 136 F.3d at 366. Boring invited Ivey and the school system superintendent, Dr. Frank Yeager, to observe the students' performance of the play for their parents before making a decision as to whether the play could be performed in the state finals. *See Boring*, 98 F.3d at 1476. Both men declined the invitation and refused to allow the students to perform at the school. *See id.* Instead, the students performed the play for their parents at one of the student's homes. *See id.*
36. *See Boring*, 136 F.3d at 366.
37. *See id.*

Boring received her performance evaluation for the school year on June 2, 1992.[38] She received "superior" and "well above standard" evaluations in all areas, including "Interacting in the Educational Environment" and "Performing Non-Instructional Duties."[39] Nevertheless, ten days later, Ivey requested Boring's transfer from the high school due to "personal conflicts" ensuing from her actions during the 1991-92 school year.[40] The superintendent of the school system, Dr. Frank Yeager, granted the request and moved Boring to an introductory drama position at a middle school.[41] Dr. Yeager justified the transfer on the grounds that Boring, by producing the play *Independence*, had failed to comply with the school system's controversial materials policy.[42] Boring appealed her transfer to the Buncombe County Board of Education ("Board"), which upheld her transfer after a hearing.[43]

Boring then filed suit in state court against the Board members, Principal Ivey, and Superintendent Yeager,[44] alleging that the transfer violated her free speech rights under the First[45] and Fourteenth[46]

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38. *See Boring*, 98 F.3d at 1476.

39. *Id.*

40. *See Boring*, 136 F.3d at 366-67. Boring and Ivey had collided over other matters besides *Independence* during the school year, including a disagreement over the construction of sets on a new stage floor in the school auditorium. *See id.* The school had moved to a new building during the summer of 1991, and at that time, Boring spoke with Ivey about the difficulty of mounting stage sets on the new floor. *See id.* Ivey asked Boring to use plywood as a temporary surface over the stage floor and asked her first to obtain his approval before doing any construction work in the auditorium. *See id.* As they had previously agreed, Boring asked Ivey for his approval to build sets on the new floor, but was told that she did not need his approval for the construction of sets, only for fixtures on the floor. *See id.* In order to construct sets required for the production of the spring musical, Boring covered the stage floor with plywood, which she attached to the floor with screws. *See id.* After the musical ended, the plywood covering was removed, leaving holes in the floor. *See id.* The floor ultimately had to be refinished. *See id.*

41. *See Boring*, 98 F.3d at 1476.

42. *See Boring*, 136 F.3d at 367. According to Boring's brief, the controversial materials policy required prior parental consent for student exposure to controversial materials. *See* Appellant's Opening Brief at 4, Boring v. Buncombe County, 136 F.3d 364 (4th Cir. 1998) (No. 95-2593). At the time the play was performed for the English class, dramatic presentations were not included in the policy. *See id.* There is no statement as to what the term "controversial materials" encompassed. Boring did not allege, however, that the policy was vague or overbroad. *See id.*

43. *See Boring*, 136 F.3d at 367. The hearing was held in September 1992. *See id.*

44. *See Boring*, 98 F.3d at 1476.

45. *See* U.S. CONST. amend. I ("Congress shall make no law ... abridging the freedom of speech....").

46. *See id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law ...."). The Supreme Court held that the First Amendment's Free Speech Clause applied to the states by incorporation through the Fourteenth Amendment in *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

Amendments of the U.S. Constitution and Article I, Section 14 of the North Carolina Constitution.[47] Boring asserted that the transfer was ordered in retaliation for the unpopular ideas she expressed by producing the play.[48] The defendants removed the case to federal district court and then moved to dismiss for failure to state a claim.[49] The district court upheld the transfer and dismissed the federal and state law claims.[50] It held, first, that Boring's selection and production of *Independence* was not protected speech under the First Amendment.[51] Second, the court held that even if Boring's selection of the play could qualify as protected speech, such speech would not receive First Amendment protection in this case because the school system "had a legitimate interest in curbing such speech."[52]

Boring appealed the dismissal of her First Amendment claims to the Fourth Circuit Court of Appeals.[53] Judge Motz, writing for a divided Fourth Circuit panel,[54] addressed the district court's first holding—that Boring's actions did not constitute speech—by stating that plays are expressive by nature and are, therefore, deserving of First Amendment protection regardless of whether the speaker can demonstrate an intent to communicate a certain view.[55] Turning to the district court's second and alternative holding, the panel noted

47. *See Boring*, 136 F.3d at 367; *see also* N.C. CONST. art. I, § 14 (amended 1970) ("Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse."). In addition, Boring declared that her due process rights and liberty interests under the Fourteenth Amendment and Article I, § 19 of the North Carolina Constitution were violated on the grounds that the school board, in upholding her transfer, took information into account that was not provided at the hearing. *See Boring*, 136 F.3d at 367; *see also* N.C. CONST. art. I, § 19 (amended 1970) ("No person shall be ... in any manner deprived of his life, liberty, or property but by the law of the land."). The court dismissed these claims, however, and they were not pursued on appeal. *See* Appellant's Opening Brief at 2 n.2, *Boring* (No. 95-2593).

48. *See Boring*, 136 F.3d at 367.

49. *See Boring*, 98 F.3d at 1477.

50. *See id.*

51. *See Boring*, 136 F.3d at 367. The district court held that the "plaintiff's act of selecting, producing, and directing a play did not constitute 'speech' within the meaning of the First Amendment." *Id.*

52. *Boring*, 98 F.3d at 1477.

53. *See Boring*, 136 F.3d at 367.

54. The panel consisted of Judge Motz, Judge Widener, and Judge Murnaghan. *See Boring*, 98 F.3d at 1474. Judge Motz wrote the majority opinion, which reversed and remanded the case to the district court. *See id.* at 1475. Judge Murnaghan joined the majority opinion. *See id.* Judge Widener dissented. *See id.* at 1485 (Widener, J., dissenting).

55. *See id.* at 1477. The panel reasoned that the First Amendment protects speech even if it is not original expression and that the district court erred by concluding that Boring's selection of the play was not protectable speech. *See id.* at 1478.

that the district court had assumed that the Board's "legitimate pedagogical reasons" for limiting Boring's expression were valid without requiring the Board to provide any such reasons.[56] The panel stressed that, without exception, courts had required school administrators to demonstrate these concerns by affidavit or at trial and that dismissal of Boring's complaint on the pretrial motion was therefore premature.[57]

The panel concluded that the relevant issue in the case was not whether teachers have First Amendment protection in the classroom, but to what extent that protection can be limited by school officials.[58]

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56. *See id.* at 1479.

57. *See id.* As the panel emphasized, "a 'motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.' It is 'only in the unusual case where the complaint on its face reveals some insuperable bar to relief that dismissal under Rule 12(b)(6) is warranted.' " *Id.* (quoting 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1357 (2d ed. 1990)).

After rejecting the district court's rationale, the panel turned to alternative arguments put forth in defendants' briefs in support of the district court's decision to dismiss the complaint. *See id.* The defendants argued that before the "legitimate pedagogical concerns" standard of *Hazelwood* was applied, a teacher should first demonstrate that her speech deserved First Amendment protection by meeting the "public concern" test articulated by the Supreme Court in *Connick v. Myers*, 461 U.S. 138 (1983). *See id.* at 1478. A "legitimate pedagogical concern" is one that has a "valid educational purpose." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988); *see also* Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 718, 724 (8th Cir. 1998) (stating that a "legitimate academic interest" of a school board includes "teaching students the boundaries of socially appropriate behavior" and inculcating community morals).

The panel rejected this use of the *Connick* line of cases, which have examined the latitude of a public worker *outside* of the employment context to speak about employment-related matters to others or to the public. *Connick* was inapposite, the panel concluded, because a teacher's primary role in the classroom is to discuss issues of public concern with students. *See Boring*, 98 F.3d at 1480. The panel further determined that teachers do not lose all First Amendment protection by virtue of their jobs as government employees and that teachers in particular occupy a unique position within a democracy committed to the free exchange of ideas. *See id.* at 1480-81 ("The notion that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction, is 'fantastic' and stands in direct contrast to an imposing line of precedent." (quoting Scallet v. Rosenblum, 911 F. Supp. 999, 1014 (W.D. Va. 1996)). The panel emphasized that, by claiming that teachers had no First Amendment rights in the classroom, the defendants had relied on precedents that disciplined teachers for failing to follow school rules and which depended on the idea that teachers do not have the unlimited right to control the curriculum. *See id.* at 1482. Boring, however, claimed she followed the rules established by Ivey and the school board. *See id.*

58. *See Boring*, 98 F.3d at 1482. The Supreme Court has noted in several cases that the First Amendment protects a teacher's in-class speech. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion). The lower courts have also recognized that a teacher's in-class speech is protected. *See, e.g.*, Blum v. Schlegel, 18 F.3d 1005, 1012 (2d Cir. 1994) (stating that a law

The panel chose the *Hazelwood* analysis, which calls for school administrators to establish a "legitimate pedagogical concern" for limiting speech inside the classroom, as the correct test by which to determine this issue.[59] The panel therefore affirmed the district

professor's in-class speech advocating legalization of marijuana is speech on a matter of public concern); Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993) (noting that "teachers retain their First Amendment right to free speech in school"); Miles v. Denver Pub. Schs., 944 F.2d 773, 775 (10th Cir. 1991) (acknowledging both that teachers have free speech rights and that schools "may impose reasonable restrictions" on teacher speech); Dube v. State Univ., 900 F.2d 587, 598 (2d Cir. 1990) (determining that First Amendment protection of teacher speech does not allow laws that prevent free debate in the classroom); Kingsville Indep. Sch. Dist. v. Cooper, 611 F.2d 1109, 1113 (5th Cir. 1980) ("[C]lassroom discussion is protected activity."); Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577, 582 (6th Cir. 1976) (stating that the "First Amendment's protection of academic freedom" protects teachers' in-class discussions); James v. Board of Educ., 461 F.2d 566, 575 (2d Cir. 1972) (finding "no sound constitutional basis for the Board's [decision]" to discharge a teacher who wore a black armband in class to protest the Vietnam War); Keefe v. Geanakos, 418 F.2d 359, 361-62 (1st Cir. 1969) (allowing regulation of teacher classroom speech that is commensurate with the "circumstances of the utterance"); *Scallet*, 911 F. Supp. at 1013 ("[T]he First Amendment is routinely implicated in the classroom ...."); Krizek v. Board of Educ., 713 F. Supp. 1131, 1137 (N.D. Ill. 1989) ("It is beyond dispute that, to some extent, the First Amendment protects teachers' expression in the classroom."); Webb v. Lake Mills Community Sch. Dist., 344 F. Supp. 791, 799 (N.D. Iowa 1972) ("Courts have recognized ... some measure of academic freedom in the classroom ...."); Mailloux v. Kiley, 323 F. Supp. 1387, 1390 (D. Mass. 1971) ("The Fourteenth Amendment recognizes that a public school teacher has ... some measure of academic freedom as to his in-classroom teaching."), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971); Hosford v. School Comm., 659 N.E.2d 1178, 1182 (Mass. 1996) (upholding a teacher's class discussion concerning vulgar language as protected speech). *But see* Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990) ("Although a teacher's out-of-class conduct, including her advocacy of particular teaching methods, is protected, her in-class conduct is not." (citation omitted)).

59. *See Boring*, 98 F.3d at 1482; *Hazelwood*, 484 U.S. at 273. The panel also noted that several other circuits had chosen to apply the *Hazelwood* standard to teacher speech. *See Boring*, 98 F.3d at 1482 (citing Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 722-23 (2d Cir. 1994); *Ward*, 996 F.2d at 453; *Miles*, 944 F.2d at 775-76; Bishop v. Aronov, 926 F.2d 1066, 1074 (11th Cir. 1991)). The *Hazelwood* standard was deemed appropriate, in part because *Hazelwood* suggested that " 'school officials may impose reasonable restrictions on the speech of ... teachers.' " *Id.* (quoting *Hazelwood*, 484 U.S. at 267). The panel noted that the *Hazelwood* Court also directly stated that its rationale extended to school control over school-sponsored activities such as theatrical productions. *See id.* Therefore, the panel determined that the *Hazelwood* standard applied to Boring's choice of a play, since the play was sponsored by the school. *See id.*

In addition, the "legitimate pedagogical concern" standard allows the school district to limit teacher speech because it is responsible for determining what materials are appropriate for the maturity level of the students in question. *See id.* at 1482-83 (citing *Hazelwood*, 484 U.S. at 271). Finally, the panel determined that the *Hazelwood* standard was appropriate for teacher speech because it recognized that school officials have the final say over the choice of the curriculum, and that secondary teachers' First Amendment rights are quite narrow. *See id.* at 1483. The panel also declined to reach Boring's alternative argument, which stated that even if the defendants' reasons for limiting her speech related to legitimate pedagogical concerns, the district court should not have

court's application of the *Hazelwood* "legitimate pedagogical concern" standard to Boring's selection of the play for her drama class, reversed the district court's dismissal of the case, and remanded the case to the district court.[60]

The Fourth Circuit granted rehearing en banc and vacated the panel opinion on December 3, 1996.[61] A seven-to-six decision was handed down on February 13, 1998, by Judge Widener, largely duplicating his dissent in the panel opinion.[62] Judges Hamilton and Motz filed dissenting opinions.[63] Chief Judge Wilkinson and Judge Luttig wrote concurring opinions.[64] The en banc majority defined the issue as whether a secondary teacher in a public school has a First Amendment right to create the school curriculum by selecting and producing a play.[65] The court affirmed the district court and held that no such right existed.[66]

In its analysis, the court first established that the play was part of

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dismissed her complaint because she failed to receive adequate notice before her transfer. *See id.* at 1483, 1484. The panel decided not to reach this argument at the time because it remanded the case to the district court for proceedings consistent with its opinion. *See id.*

60. *See Boring*, 98 F.3d at 1484-85. In dissent, Judge Widener stated that the only question before the court was whether Boring's First Amendment rights in selecting the play were violated. *See id.* at 1485, 1486 (Widener, J., dissenting). He framed the issue as a question of who controlled the curriculum: a teacher or school officials. *See id.* at 1486 (Widener, J., dissenting). Judge Widener disagreed with the majority for two basic reasons. First, he saw the selection of the play as "nothing more than an ordinary employment dispute" under the *Connick* standard and, therefore, lacking First Amendment protection. *Id.* at 1487-88 (Widener, J., dissenting). Second, a school play is part of the school curriculum and, by definition, the curriculum is in and of itself a legitimate pedagogical concern under the *Hazelwood* standard. *See id.* at 1488 (Widener, J., dissenting). Judge Widener concluded his dissent by stating that school curricula should be established by school officials who are held publicly accountable via the electoral process rather than by teachers and federal judges. *See id.* at 1488-89 (Widener, J., dissenting).

61. *See id.* at 1474.

62. *See Boring*, 136 F.3d at 366; *see also supra* note 60 (discussing Judge Widener's dissent). Judges Wilkinson, Russell, Wilkins, Niemeyer, Luttig, and Williams joined in the en banc majority opinion. *See id.* at 366.

63. *See Boring*, 136 F.3d at 374, 375. Judge Hamilton's opinion was joined by Judge Murnaghan. *See id.* at 375. Judges Hall, Murnaghan, Ervin, Hamilton, and Michael joined Judge Motz's dissent. *See id.* at 380.

64. *See id.* at 371, 372. Judge Luttig was joined by Judges Wilkins and Williams. *See id.* at 374.

65. *See id.*

66. *See id.* De novo review is the appropriate standard of review for dismissal for failure to state a claim. *See* 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356 (2d ed. 1990). All reasonable inferences should be drawn in favor of the plaintiff, and the allegations in the complaint should be accepted as true. *See Boring*, 136 F.3d at 367.

the school curriculum.[67] It relied on definitions from Webster's Dictionary and the Supreme Court's analysis in *Hazelwood*, and concluded that there was no difference between the two definitions.[68] The court then determined that the Supreme Court's analysis in *Connick v. Myers*[69] should be applied: if the speech in question is not made by the employee on an issue of public concern, no First Amendment protections apply.[70] The majority determined that the selection of the play was not a matter of public concern, but merely "an ordinary employment dispute." As a result, the court held, Boring had no rights deserving of First Amendment protection.[71] The court cited Fourth Circuit precedent for the general proposition that *Connick* was applicable to this type of case.[72] The court then relied heavily on an "indistinguishable" Fifth Circuit case involving a teacher's unapproved reading list to support its conclusion that public school teachers have no right to control school curriculum.[73] After holding that Boring had no First Amendment rights, the court stated that even if such rights did exist, school officials had a legitimate pedagogical interest in restricting Boring's speech simply because the play was part of the school curriculum.[74]

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67. *See Boring*, 136 F.3d at 367-68.

68. *See id. Webster's Third New International Dictionary* defines curriculum as " '3: all planned school activities including besides courses of study, organized play, athletics, dramatics, clubs, and homeroom program.' " *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 557 (1971)). The Supreme Court stated in *Hazelwood* that activities such as

> school sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school . . . may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

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

69. 461 U.S. 138 (1983). For further discussion of *Connick*, see *infra* notes 120-32 and accompanying text.

70. *See Boring*, 136 F.3d at 368.

71. *Id.* When an employee is speaking as "an employee upon matters of personal interest," then there is no protected expression. *Id.* (citing *Connick*, 461 U.S. at 147).

72. *See Boring*, 136 F.3d at 368-69 (citing DiMeglio v. Haines, 45 F.3d 790, 806 (4th Cir. 1995)).

73. *See Boring*, 136 F.3d at 368-69 (citing Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794 (5th Cir. 1989)).

74. *See id.* at 369-70. According to the dictionary definition adopted by the court, pedagogical means " '2: of or relating to teaching or pedagogy. EDUCATIONAL.' " *Id.* at 370 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1663 (1971)). The majority dismissed Boring's alternative argument that she was not given notice that the selection of the play violated any school policies as being "without merit" because the

The majority then turned to the policy rationale behind its decision. The court determined that a school's curriculum should be set by its administration rather than by individual teachers, due to the malleability of young minds and the overriding public interest that they not be led astray.[75] The court based its policy rationale on the idea that local school officials are responsible to the public, whereas teachers are responsible to no one other than school officials and would be responsible only to judges if the panel's opinion was adopted.[76]

Judge Motz's dissent echoed her panel opinion[77] and added several points to that analysis. First, Judge Motz argued that the majority did not apply the correct standard of review.[78] She emphasized that Boring complied with school rules and requirements throughout the production and selection of the play, and that the school administration indicated to Boring that performance of the play at the state finals, with certain sections deleted, was acceptable.[79]

Second, Judge Motz believed that *Hazelwood*, rather than *Connick*, provided the proper standard in analyzing the speech at issue.[80] She emphasized that the school board may have had legitimate pedagogical concerns that would have justified limitations on Boring's speech, but that the Board would have had to provide evidence of such concerns before the court could take action of any sort. The Board, however, failed to provide such evidence.[81] The assertion of the majority that each and every curriculum decision is "by definition a legitimate pedagogical concern" was not in keeping

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majority asserted that Boring had "no First Amendment right to participate in the makeup of the curriculum." *Id.* at 371 n.2.

75. *See id.* at 370.

76. *See id.* at 371. The majority seems to suggest that elected school officials are responsible to the public, but may also be implying that such officials are responsible in terms of their judgment and ability to choose a suitable curriculum.

77. *See supra* notes 54-60 and accompanying text (discussing Judge Motz's panel opinion).

78. *See Boring*, 136 F.3d at 375 (Motz, J., dissenting). The proper standard is de novo, but Judge Motz believed that the majority did not draw "all reasonable inferences in favor of the plaintiff," and did not accept "the allegations that are stated in the complaint as true." *Id.* (Motz, J., dissenting).

79. *See id.* at 375-76 (Motz, J., dissenting).

80. *See id.* at 377 (Motz, J., dissenting). Judge Motz referred to *Hazelwood* as "the simpler and more rigorous" analysis. *Id.* at 378. (Motz, J., dissenting). In addition to the reasons provided in the panel opinion, Judge Motz stated that *Hazelwood* was the most recent Supreme Court decision addressing the First Amendment protections to be afforded to curricular speech. *See id.* (Motz, J., dissenting).

81. *See id.* at 376 (Motz, J., dissenting).

with the analysis set forth by the Supreme Court in *Hazelwood*.[82]

In her opinion, a *Connick* analysis is ill-suited to the "unique character of a teacher's in-class speech" because it emphasizes that some restrictions on speech are necessary to preserve workplace harmony and efficiency, and these concerns are antithetical to a teacher's role in the classroom.[83] Therefore, Judge Motz did not believe that the government interest element in *Connick* gave school officials essential control over a teacher's in-class speech.[84]

Moreover, Judge Motz believed that the majority had mischaracterized Boring's speech by holding that it was a private employment dispute, rather than speech on a matter of public concern.[85] Finally, Motz agreed that school officials must have the

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82. *Id.* (Motz, J., dissenting). As Judge Motz noted, the Court in *Hazelwood* stated that there might be times when a curriculum decision may not have a " 'valid educational purpose' " and that on such occasion " 'the First Amendment is so sharply implicate[d] as to require judicial intervention.' " *Id.* (Motz, J., dissenting) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)). Judge Motz also indicated that neither *Kirkland v. Northside Independent School District*, 890 F.2d 794 (5th Cir. 1989), nor *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989), the two cases upon which the majority relied, supported the majority's holding that all curriculum decisions are legitimate pedagogical concerns. *See Boring*, 136 F.3d at 376-77 (Motz, J., dissenting). Judge Motz distinguished *Kirkland* on the grounds that the teacher in that case openly defied school rules, whereas Boring notified Principal Ivey of her choice of the play before providing it to her students. *See id.* at 377 (Motz, J., dissenting). In addition, Judge Motz noted that Boring admitted that school officials maintain authority over the curriculum and may even discipline those teachers who follow school rules as long as such actions " 'are reasonably related to legitimate pedagogical concerns.' " *Id.* (Motz, J., dissenting) (quoting *Hazelwood*, 484 U.S. at 273). The teacher in *Kirkland*, on the other hand, declared that he had "unlimited" control of the curriculum for his class. *See id.* (Motz, J., dissenting). *Searcey* also could be distinguished from Boring's case because the school board in *Searcey* had provided no evidence to support the reasonableness of its action, thus prompting the Eleventh Circuit to hold in favor of the teacher. *See id.* (Motz, J., dissenting).

83. *Boring*, 136 F.3d at 377 (Motz, J., dissenting). A teacher's speech "is neither ordinary employee workplace speech nor common public debate. Any attempt to force it into either of these categories ignores the essence of teaching—to educate, to enlighten, to inspire—and the importance of free speech to this most critical endeavor." *Id.* (Motz, J., dissenting) (citing Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion)).

84. *See id.* (Motz, J., dissenting). In addition, Judge Motz determined that even if the *Connick* test were used in this case, it would lead to the same result as *Hazelwood*: The district court should not have dismissed Boring's complaint. *See id.* (Motz, J., dissenting). She believed that the majority erred in its reading of *Connick* because of the emphasis *Connick* put on the role of the public employee. *See id.* at 379 (Motz, J., dissenting). The Supreme Court's distinction between an employee speaking as a citizen on a matter of public concern and an employee speaking on matters of personal interest does not lead to the conclusion that public employees have no First Amendment rights, Judge Motz explained. *See id.* at 379 (Motz, J., dissenting).

85. *See id.* (Motz, J., dissenting). As in her panel opinion, Judge Motz explained that Boring claimed school officials transferred her for selecting and producing a play, actions

final voice in determining a school's curriculum in order to advance a school's pedagogical objectives, but insisted that teachers have *some* First Amendment protection for their in-class speech under Supreme Court precedent.[86]

Judge Hamilton's dissent emphasized three points.[87] First, he noted that the case was not an "ordinary employment dispute," but rather a case about a school board, superintendent, and principal who used Boring as a "shield" to protect the school from the public uproar against the production of a controversial play.[88] Judge Hamilton believed that Boring had followed all standards promulgated by the principal, superintendent, and school board but still had lost her position without explanation from the defendants.[89] Second, Judge Hamilton restated the main issue in the case as whether the school board could limit Boring's speech without providing a legitimate pedagogical concern to justify its decision.[90] Because the matter was before the court at the Rule 12(b)(6) stage, rather than on summary judgment, Judge Hamilton detected no basis for determining whether a legitimate pedagogical concern was stated by the Board.[91] Therefore, he concluded, dismissal was not appropriate. Finally, Judge Hamilton asserted that regardless of whether the Fourth Circuit agreed with the Supreme Court's standard as articulated in *Hazelwood* and whether such a standard would force the federal judiciary into making decisions as to local school curriculum, it must follow the Supreme Court's *Hazelwood* standard until the Court changes its mind or articulates a different standard that requires no federal intrusion.[92]

In his concurrence, Chief Judge Wilkinson's primary objection to the dissenting opinions was that, in his view, they considered education to be a "federal judicial enterprise" rather than a state or local function.[93] He also expressed concern that the dissents would

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that constitute speech on a matter of public concern. *See id.* at 378-79 (Motz, J., dissenting); *Boring*, 98 F.3d at 1477-78; *see also supra* notes 55 and 84 (discussing Judge Motz's characterization of Boring's speech).

86. *See Boring*, 136 F.3d. at 380 (Motz, J., dissenting).

87. *See id.* at 374-75 (Hamilton, J., dissenting). *See id.* at 366.

88. *See id.* at 374 (Hamilton, J., dissenting).

89. *See id.* (Hamilton, J., dissenting). Judge Hamilton also noted that the dispute at issue in this case arose out of public debate and furor over the content of the play. Therefore, he contended, the Board should have been required to state a legitimate, pedagogical concern for its decision to transfer Boring. *See id.* (Hamilton, J., dissenting).

90. *See id.* (Hamilton, J., dissenting).

91. *See id.* (Hamilton, J., dissenting).

92. *See id.* at 374-75 (Hamilton, J., dissenting).

93. *See id.* at 371 (Wilkinson, C.J., concurring).

provide no guidance to local school officials and would strip localities of democratic means by which to shape their curricula, such as through elected school boards and student and parent voices in the process.[94]

Judge Luttig's concurrence endorsed the *Connick* test for evaluating a teacher's in-class curricular speech and condemned the dissents' use of the *Hazelwood* student-based standard as inapplicable to teacher speech.[95] Judge Luttig also distinguished between teacher in-class curricular speech, which he declared has no First Amendment protection, and teacher in-class noncurricular speech, which he argued is protected by the First Amendment.[96] Finally, Judge Luttig expressed concern that use of the "legitimate pedagogical concern" standard of *Hazelwood* would place an enormous burden on local school officials by forcing them to anticipate the possibility of litigation in federal court when making curricular decisions and by placing decisions over school curriculum in the hands of federal judges as opposed to local parents and school boards.[97]

Since 1969, it has been a common principle of the Supreme Court's jurisprudence that teachers and students maintain a measure of their constitutional privileges within the school environment: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[98] Despite this ringing pronouncement, the Court has never directly addressed the contours of the First Amendment rights of elementary and secondary teachers in the classroom, so that the precise bounds of these rights are unclear.[99] The lower court opinions in this area of law rely on two different Supreme Court lines

94. *See id.* at 371-72 (Wilkinson, C.J., concurring).

95. *See id.* at 372-73 (Luttig, J., concurring).

96. *See id.* at 373 (Luttig, J., concurring).

97. *See id.* at 373-74 (Luttig, J., concurring).

98. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969). The Supreme Court held in *Tinker* that students had the right to wear black armbands to school in protest of the Vietnam War so long as such symbolic speech did not " 'materially and substantially interfere' " with learning or discipline in the educational environment. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). The *Tinker* Court noted that school officials "cannot suppress 'expressions of feelings with which they do not wish to contend.' " *Id.* at 511 (quoting *Burnside*, 363 F.2d at 749). The *Hazelwood* Court distinguished *Tinker* on the grounds that *Tinker* involved "a student's personal expression that happened to occur on school premises," as opposed to "school-sponsored ... activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

99. *See* Clarick, *supra* note 2, at 696.

of precedent.[100] The first line of precedent is the result of a combination of three cases: *Pickering v. Board of Education*,[101] *Connick v. Myers*,[102] and *Mount Healthy City School District v. Doyle*.[103] The second line stems from the Court's more recent decision in *Hazelwood School District v. Kuhlmeier*.[104]

The *Pickering-Connick-Mount Healthy* analysis was developed in the context of a government employee who speaks out, either in public or private, on a matter that threatens the efficiency and workings of the government employer.[105] Courts applying the

100. Some lower courts have combined the two lines of precedent, thus possibly creating yet a third line of precedent. See *infra* notes 153-58 and accompanying text for discussion of these "combination" cases.

101. 391 U.S. 563 (1968).

102. 461 U.S. 138 (1983).

103. 429 U.S. 274 (1977).

104. 484 U.S. 260 (1988).

105. *See, e.g.*, Waters v. Churchill, 511 U.S. 661, 664, 681-82 (plurality opinion) (1994) (remanding to the trial court the discharge of a nurse who allegedly commented to a co-worker that hospital policy endangered patient care and who ostensibly criticized her supervisor); *Connick*, 461 U.S. at 154 (upholding the firing of an assistant district attorney for distributing questionnaire concerning office morale and politics to colleagues); *Pickering*, 391 U.S. at 574-75 (overturning the dismissal of a teacher who sent a letter to a local newspaper that criticized school board policies). The lower courts' application of the *Connick-Pickering* test has led to conflicting results, uncertainty, and confusion as to what constitutes speech on a matter of public concern; such uncertainty is problematic because it has the effect of chilling public employee speech. *See generally* Joan M. Eagle, *First Amendment Protection for Teachers Who Criticize Academic Policy: Biting the Hand that Feeds You*, 60 CHI.-KENT L. REV. 229 (1984) (reviewing lower federal court decisions applying *Connick-Pickering* to teacher speech criticizing academic policy and evaluating the weight given to various factors in the analysis); Pengtian Ma, *Public Employee Speech and Public Concern: A Critique of the U.S. Supreme Court's Threshold Approach to Public Employee Speech Cases*, 30 J. MARSHALL L. REV. 121 (1996) (arguing that the public concern threshold step creates inconsistent results and should be replaced by a direct balancing test); R. George Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27 (1987) (acknowledging the uncertainty created by lower courts' application of *Connick-Pickering* but suggesting that a different test would lead to the same problems and that courts should approach public employee free speech more pragmatically); Mike Harper, Note, Connick v. Myers *and the First Amendment Rights of Public Employees*, 16 HASTINGS COMM. & ENT. L.J. 525 (1994) (arguing that the public concern threshold step is flawed and proposing speaker motive as a new standard); Karin B. Hoppmann, Note, *Concern with Public Concern: Toward a Better Definition of the* Pickering/Connick *Threshold Test*, 50 VAND. L. REV. 993 (1997) (criticizing the public concern threshold prong of *Pickering-Connick* and suggesting a new definition of public concern based on whether speech is made to the public); Cynthia K.Y. Lee, Comment, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 CAL. L. REV. 1109 (1988) (calling for a public concern threshold step to be replaced by a test that asks whether a government function has been impaired by employee speech); D. Gordon Smith, Comment, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249 (1990) (proposing a new threshold test based on whether public employee speech is "related to employment");

standards from these cases have determined that when a teacher—a government employee—is speaking as a citizen on a matter of public concern, her speech is protected under the First Amendment,[106] but when she is speaking as a government employee about her own personal interest, her speech is not protected.[107] *Pickering v. Board of Education*,[108] which provided the foundation for the analytical framework that the Court constructed to analyze public employee free speech cases, was augmented by the Court's decisions in *Connick* and *Mount Healthy*. The Court's framework requires that the plaintiff-employee prove both that the speech is constitutionally protected[109] and that the speech was a motivating or substantial factor in the adverse employment action.[110] If the employee can prove these elements of her case, then the employer must be allowed to demonstrate that the employee would have been fired regardless of her speech.[111]

In order to be protected under the First Amendment, the speech in question must meet two requirements: it must involve a matter of public concern[112] and the employee's interests in his speech must

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Paul Ferris Solomon, Editorial Note, *The Public Employee's Right of Free Speech: A Proposal for a Fresh Start*, 55 U. CIN. L. REV. 449 (1986) (criticizing *Connick* and suggesting that a public interest focus be added to the current balancing test).

106. *See* Blum v. Schlegel, 18 F.3d 1005, 1012 (2d Cir. 1994) (determining that a law professor's in-class speech advocating legalization of marijuana was a matter of public concern); Kingsville Indep. Sch. Dist. v. Cooper, 611 F.2d 1109, 1113-14 (5th Cir. 1980) (holding that a classroom simulation of Reconstruction Era events was protected speech); Scallet v. Rosenblum, 911 F. Supp. 999, 1011 (W.D. Va. 1996) (determining that a university professor's classroom speech advocating diversity was protected).

107. *See* Dambrot v. Central Mich. Univ., 55 F.3d 1177, 1187 (6th Cir. 1995) (holding that a basketball coach's use of the word "nigger" was not speech on a matter of public concern); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 800 (5th Cir. 1989) (stating that a high school teacher's supplemental reading list was not protected speech); Fowler v. Board of Educ., 819 F.2d 657, 663 (6th Cir. 1987) (holding that a film shown to students was unprotected speech because the film was not "expressive or communicative" in nature); Martin v. Parrish, 805 F.2d 583, 586 (5th Cir. 1986) (holding that a college professor's use of profanity in the classroom was not speech on a matter of public concern); Clark v. Holmes, 474 F.2d 928, 930 (7th Cir. 1972) (determining that disputes with colleagues about course content and counseling were not protected).

108. 391 U.S. 563 (1968).

109. *See* Rankin v. McPherson, 483 U.S. 378, 385-87 (1987); *Connick*, 461 U.S. at 146-48; *Pickering*, 391 U.S. at 568.

110. *See Mount Healthy*, 429 U.S. at 287.

111. *See id.* In addition, the employer must determine, through a reasonable investigation, what was actually said; therefore, the framework will be applied to the speech as the employer believed it to be based on his investigation. *See* Waters v. Churchill, 511 U.S. 661, 679-80 (1994).

112. *See Connick*, 461 U.S. at 146-47 (setting out public concern standard and holding that assistant district attorney's distribution of questionnaire concerning office politics and morale was not speech on an issue of public concern); *see also Rankin*, 483 U.S. 378, 386

outweigh the interests of the government employer in efficiently providing a public service and in maintaining a workplace free from disruptions.[113] The employee bears the burden of proof on both of these issues.[114]

In *Pickering*, a public school teacher was dismissed after he sent a letter to the local media denouncing the school board's decision to fund athletic programs before allotting money to academic initiatives.[115] The Court held that the discharge impermissibly infringed on the teacher's First Amendment rights, repudiating the idea that in the interest of preserving the harmony and efficiency of government as an institution, public employees should give up all free speech rights they possess as citizens to "comment on matters of public interest."[116] The Court acknowledged that the employee's right to expression must be balanced against the government agency's duties to the public in providing efficient public service.[117] Because it would be impossible for employers to anticipate all the possible circumstances in which a public employee's speech might be at issue, the Court listed three factors that should be examined in such cases.[118] These factors have been described by one commentator as: "(1) the parties' working relationship; (2) the detrimental effect of the speech on the employer; and (3) the nature of the issue on which the employee spoke and the relationship of the employee to that issue."[119]

Although *Pickering* indicated that public concern was a basis for protecting public employees' speech, *Connick* modified the Court's

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(1987) (holding that employee's comment on the attempted Reagan assassination was speech on a matter of public concern); Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 415-16 (1979) (determining that a teacher's private conversations with her principal may constitute protected speech and that the nature of the conversation is not determinative in the public concern analysis); *Mount Healthy*, 429 U.S. at 284 (stating that a teacher's call to a radio station concerning the school district's dress code for teachers was protected speech); *Pickering*, 391 U.S. at 574-75 (holding that a teacher's letter to local media criticizing school board policy was speech on a matter of public concern); *supra* notes 105-07 (discussing the lower courts' confusion as to what public concern means and providing examples of courts' public concern analyses with respect to teacher speech). *See generally* Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988) (discussing the lower courts' application of the public concern test and seeking to identify factors that courts find determinative in making a public concern evaluation).

113. *See Pickering*, 391 U.S. at 568.

114. *See Mount Healthy*, 429 U.S. at 287.

115. *See Pickering*, 391 U.S. at 564.

116. *Id.* at 568.

117. *See id.*

118. *See id.* at 569-70.

119. Stephen Allred, *The School Employee's Right of Free Speech*, *in* 2 EDUCATION LAW IN NORTH CAROLINA 29-1, 29-2 (Janine Murphy ed., 1998).

analysis to make public concern the threshold step in determining whether the speech at issue falls under First Amendment protection.[120] Shelia Myers, an assistant district attorney in New Orleans who objected to her transfer to a different section of the court, decided to investigate employee dissatisfaction within the district attorney's office.[121] She prepared and distributed a questionnaire to fifteen other assistant district attorneys.[122] Later that afternoon, the district attorney informed her that she was being dismissed because she had refused to accept the transfer and that her distribution of the questionnaire was insubordination.[123] The Supreme Court held that one of the questions in the questionnaire pertained to an issue of public concern, but that Myers' actions constituted an employee grievance.[124] Her dismissal, therefore, did not violate the First Amendment.[125]

As the Court remarked in *Connick*, speech on a matter of public concern is expression on "any matter of political, social, or other concern to the community."[126] Whether an employee's expression is considered to be a matter of public concern "must be determined by the content, form, and context" of the speech.[127] In this determination, the analysis of the speech's content generally supersedes questions of form and context.[128]

In *Connick*, the Court placed the *Pickering* test second in the analysis, after resolution of the public concern issue.[129] The Court warned that without the balancing test, employees might challenge

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

121. *See id.* at 140-41. Myers had been employed as an assistant district attorney for five and a half years at the time of her proposed transfer and had "competently performed her responsibilities." *Id.* at 140. She discussed her opposition to the transfer with Harry Connick, the district attorney, and with several other supervisors, but was told the transfer would proceed despite her concerns. *See id.*

122. *See id.* at 141. The questionnaire asked for views regarding "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." *Id.*

123. *See id.*

124. *See id.* at 154.

125. *See id.*

126. *Id.* at 146. In *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), the Court held that speech could be considered a matter of public concern even when a public employee expresses her concerns privately with her government employer rather than publicly. *See id.* at 416-17.

127. *Connick*, 461 U.S. at 147-48.

128. *See* Arvinger v. Mayor and City Council of Baltimore, 862 F.2d 75, 79 (4th Cir. 1988) ("Although the *Connick* court did not elaborate on the relative weight to be accorded these three factors, this court has held that 'content, subject-matter, is always the central aspect.' " (quoting Jackson v. Bair, 851 F.2d 714, 720 (4th Cir. 1988))).

129. *See Connick*, 461 U.S. at 146.

ordinary personnel decisions as free speech violations, restricting the ability of government agencies to function effectively.[130] The primary government interest to be weighed in the balancing test is the efficient operation of its public responsibilities.[131] To enable the government to fulfill its duties, the judiciary should refrain from intruding in the internal affairs of government offices.[132]

In *Mount Healthy*, a school board determined that an untenured public school teacher's contract would not be renewed after he called a radio station to express his displeasure with the enactment of a teacher dress code.[133] The teacher, however, alleged that the nonrenewal of his contract violated his First Amendment rights.[134] The Court held that the radio station call constituted speech on a matter of public concern and that *Pickering* applied to the case.[135] The Court then added a twist to its previous analysis, making the teacher's burden of proving a First Amendment violation more difficult. The Court established that the burden of proof falls on the employee to explain that: (1) he was practicing constitutionally protected expression; and (2) this conduct was a pivotal element in the decision to discipline him.[136] If the employee can prove both elements, he has established a prima facie case.[137] The burden then shifts to the employer to show by a preponderance of the evidence that the termination would have occurred whether or not the protected activity had taken place.[138] Thus, in order for the school board in *Mount Healthy* to win the case, it had to prove that the teacher's contract would not have been renewed regardless of

130. *See id.* at 144. The *Connick* Court emphasized that the purpose of free speech was to provide for an exchange of ideas to bring about " ' "political and social changes desired by the people." ' " *Id.* at 145 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (quoting Roth v. United States, 354 U.S. 476, 484 (1957))).

131. *See id.* at 150-51. The Court was concerned with the effect that employee speech would have on " 'discipline and morale [and harmony] in the workplace.' " *Id.* at 151 (Powell, J., concurring in part and concurring in the result in part) (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring)). The Court also noted that the employer did not need to wait for actual disruption of office efficiency to occur before taking action against the employee. *See id.* at 152.

132. *See id.* at 146. A restricted view of public concern prevents every statement made by a public employee from becoming a constitutional issue. *See id.* at 149.

133. *See* Mount Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 282 (1977). The board added that its decision also was based on the teacher's inappropriate conduct in using obscene gestures to deal with students. *See id.* at 281.

134. *See id.* at 276.

135. *See id.* at 284.

136. *See id.* at 287.

137. *See id.*

138. *See id.*

whether the teacher called the radio station because his unprofessional conduct provided the true justification for his dismissal.[139]

In contrast to the *Pickering*, *Connick*, and *Mount Healthy* line of cases that developed to analyze public employee speech rights, *Hazelwood* is the Court's definitive statement regarding the speech rights of students. The *Hazelwood* standard holds that classroom speech may be regulated by school officials as long as the regulations are reasonably related to pedagogical concerns.[140] *Hazelwood* involved school censorship of two student-written articles in a high

139. *See* Allred, *supra* note 119, at 29-3. The Supreme Court most recently added to its analytical framework in *Waters v. Churchill*, 511 U.S. 661 (1994), when it determined that an employer's reasonable investigation into the nature and content of an employee's speech should determine what the speech actually was. *See id.* at 677-78 (plurality opinion). In *Waters*, a factual dispute existed as to whether the plaintiff, a nurse who was dismissed from her job at a public hospital for negative comments to a co-worker about her working conditions, spoke out about her problems with her superior or about the quality of care provided by the hospital to its patients. *See id.* at 664-66 (plurality opinion). The Court stated in a plurality opinion that both the *Connick* public concern threshold and the *Pickering* balancing test should be applied to the speech as the government employer understood its content and meaning. *See id.* at 681-82 (plurality opinion). As Justice Souter pointed out in his concurring opinion, the plurality opinion in *Waters* may be taken to state the holding of the Court because "[a] majority of the Court agrees that employers whose conduct survives the plurality's reasonableness test cannot be held constitutionally liable" and "a majority is of the view that employers whose conduct fails the plurality's reasonableness test have violated the Free Speech Clause." *Id.* at 685 (Souter, J., concurring). Additionally, the Court held that the employer must conduct a reasonable investigation into the circumstances surrounding the employee's conduct. *See id.* at 678 (plurality opinion). When more than one course of action might be reasonable, "[o]nly procedures outside the range of what a reasonable manager would use may be condemned as unreasonable." *Id.* (plurality opinion). Whether the employer's investigation is reasonable should be determined on a case-by-case basis, considering the cost of the procedure, the relative risk of punishing protected speech, the erroneous exculpation of unprotected speech, and the employer's interest in achieving its goals as efficiently as possible. *See id.* at 677-78 (plurality opinion). Although no First Amendment cases involving teachers have applied a *Waters* analysis, *Waters* is important because the Court recognized for the first time that First Amendment protections also must be applied through reasonable procedures. *See* Stephen Allred, *Supreme Court Revises Free Speech Test for Public Employees*, 58 LOC. GOV'T BULL. 1, 1-4 (1994).

140. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988); *see also* Silano v. Sag Harbor Union Free Sch. Dist., 42 F.3d 719, 722 (2d Cir. 1994) ("[T]he Court has also recognized that public schools may limit classroom speech to promote educational goals."); Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993) (holding that a school can "regulate a teacher's classroom speech if ... the regulation is reasonably related to a legitimate pedagogical concern"); Miles v. Denver Pub. Schs., 944 F.2d 773, 775 (10th Cir. 1991) (" '[S]chool officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.' " (quoting *Hazelwood*, 484 U.S. at 267)); Webster v. New Lenox Sch. Dist. No. 122, 917 F.2d 1004, 1008 (7th Cir. 1990) ("[A]n individual teacher has no right to ignore the directives of duly appointed education authorities" concerning teaching methods.).

school newspaper. The paper was written and edited by a journalism class at the school.[141] While reviewing the newspaper prior to its spring publication, the school principal decided to remove articles concerning students' experiences with teenage pregnancy and the effects of divorce on students.[142] In holding for the school board, the Court stated that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[143] The Court based its holding on a public forum analysis,[144] determining that if school officials reserved school facilities for purposes other than general public use, no public forum has been created.[145] Once a court establishes the absence of a public forum, then school officials may place "reasonable restrictions" on the speech of both students and teachers.[146]

Because *Hazelwood* dealt with student speech, the court was primarily concerned with school officials' authority over school-

141. *See Hazelwood*, 484 U.S. at 262. The paper was distributed to school students, faculty, and staff, as well as to various members of the community. *See id.* Sales of the paper produced $1166.84, while printing the paper cost $4668.50. *See id.* The school board subsidized these printing costs in addition to providing supplies, textbooks, and a journalism teacher to teach the class. *See id.* at 262-63.

142. *See id.* at 263. The principal always received and inspected the page proofs before the newspaper was printed and distributed. *See id.* The principal objected to the pregnancy story because he was concerned that the pregnant students might be identified by other students, even though false names were used. *See id.* The divorce story featured a student interview that included negative comments by the student about her father, to which the principal thought the father should have been able to respond before the article was published. *See id.* Because the principal did not believe that students had time to make the necessary changes in order for the paper to be published before the end of the school year, he decided to pull the articles completely. *See id.* at 263-64.

143. *Id.* at 273.

144. The public forum analysis bases the government's regulation of the speech in question on the nature of the forum in which the speech takes place. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-47 (1983). If the property on which the speech took place is a public forum (e.g., public streets and parks), government restrictions on speech are subject to higher scrutiny. *See id.* at 55; *see also* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1782-84 (1987) (arguing that the public forum doctrine impedes meaningful First Amendment analysis and suggesting a reformulation of the doctrine); Marc Rohr, *Freedom of Speech After Justice Brennan*, 23 GOLDEN GATE U. L. REV. 413, 477-89 (1993) (discussing the division among the Justices over the public forum doctrine and the use of the doctrine to uphold restrictive speech); Helene Bryks, Comment, *A Lesson in School Censorship:* Hazelwood v. Kuhlmeier, 55 BROOK. L. REV. 291, 304-09 (1989) (describing the three types of public fora identified by the Court in *Perry* and arguing that public forum analysis should not be applied to curricular speech).

145. *See Hazelwood*, 484 U.S. at 267.

146. *See id.*

sponsored "expressive activities" that "the public might reasonably perceive to bear the imprimatur of the school."[147] Such activities could be considered part of the curriculum of the school whether or not the activities take place within the classroom as long as faculty members supervise the activities with the purpose of conveying certain knowledge or skills to students.[148] The Supreme Court justified greater educator control over school-sponsored student speech on the grounds that educators are empowered to insure that students understand the information the lesson is created to impart, that the material is age-appropriate, and that the individual's views are not perceived by others to be those of the school.[149] In addition, the Court specifically mentioned that a school must be allowed to censor speech that "might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order,' or to associate the school with any position other than neutrality on matters of political controversy,"[150] so that the school can meet its obligations to nurture or develop students' cultural values and to aid students in making a normal adjustment to society.[151] When a school's restriction on student speech "has no valid educational purpose," however, then the courts must intervene to provide First Amendment protection of student rights.[152]

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147. *Id.* at 271.

148. *See id.* The Supreme Court distinguished *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), recognizing that *Hazelwood* concerned student speech that others may perceive to be sponsored by the school, whereas the wearing of a black armband in *Tinker* was simply a student's personal expression that happened to occur on school grounds. *See Hazelwood*, 484 U.S. at 270-71; *infra* notes 155-58 and accompanying text (discussing *Tinker*).

149. *See id.* at 271. The Court later indicated that the school must be allowed to consider "the emotional maturity of the intended audience." *Id.* at 272. Examples of reasonable limitations on speech include speech that would substantially disrupt the school environment or affect the rights of students at the school, as well as speech that would reflect poorly on the school's teaching of written communication skills and social values. *See id.* at 271 ("[A] school may . . . 'disassociate itself' . . . from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986))).

150. *Id.* at 272 (citation omitted) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

151. *See id.* (citing Brown v. Board of Educ., 347 U.S. 483, 493 (1954)).

152. *Id.* at 273. As Justice Brennan noted in dissent, "mere incompatibility with the school's pedagogical message" was not a "constitutionally sufficient justification for the suppression of student speech." *Id.* at 280 (Brennan, J., dissenting). In addition, the " 'mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,' or an unsavory subject does not justify official suppression of student speech in the high school." *Id.* at 281. (Brennan, J., dissenting) (citations omitted)

Although some courts have used one line of precedent or the other, other courts have combined the *Hazelwood* and *Connick-Pickering-Mount Healthy* analyses, using the *Connick* "public concern" test as a threshold to determine whether teachers' curricular speech is protected under the First Amendment before moving to the legitimate pedagogical concerns analysis.[153] Cases that have involved the exercise of speech pertaining to religious beliefs have been decided by both the Supreme Court and the lower courts on religious freedom grounds.[154] Finally, some courts have relied on a rational basis test to determine whether a teacher's in-class speech is protected, asking whether the teacher's speech was a " 'material and substantial' " interference with the activity of the school.[155] This test

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(quoting *Tinker*, 393 U.S. at 509). Lower courts also have relied on earlier Supreme Court precedent to determine what types of behavior by school officials overstep First Amendment boundaries. In *Borger v. Bisciglia*, 888 F. Supp. 97 (E.D. Wis. 1995), for example, a federal district court held that school officials violate the First Amendment when access to materials is restricted because the school officials disapprove of the ideas contained within them. *See id.* at 99-100 (citing Board of Educ. v. Pico, 457 U.S. 853, 879-80 (1982) (Blackmun, J., concurring in part and concurring in the judgment)).

153. *See Boring*, 136 F.3d at 368-70; Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 797-802 (5th Cir. 1989) (applying *Connick* to determine that a teacher's supplemental reading test was not a matter of public concern and using *Hazelwood* to justify holding that teachers do not solely control the curriculum); *see also infra* notes 169-74 and accompanying text (discussing the lower courts' approaches to analyzing teacher classroom speech).

154. *See, e.g.*, Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1994). Peloza, a high school biology teacher, sued his school board for violating his First Amendment rights to freedom of speech and expression when it "forced" him to teach evolution. *See id.* at 519. Peloza characterized "evolutionism" as "an historical, philosophical and religious belief system, but not a valid scientific theory." *Id.* The Ninth Circuit determined that no Establishment Clause violation had occurred because evolutionism is not a religion. *See id.* at 521. The court also dismissed Peloza's free speech claims on the grounds that allowing him to mention his religious beliefs to students at school during school hours would be a violation of the Establishment Clause because students might consider his views to be sanctioned by the school. *See id.* at 522.

155. *See Tinker*, 393 U.S. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)); *see also* Roberts v. Madigan, 921 F.2d 1047, 1056-57 (10th Cir. 1990) (applying the *Tinker* test when in-class speech was not considered to be part of the school curriculum); James v. Board of Educ., 461 F.2d 566, 571 (2d Cir. 1972) ("Any limitation on the exercise of constitutional rights can be justified only by a conclusion ... that the interests of discipline or sound education are materially and substantially jeopardized, whether the danger stems initially from the conduct of students or teachers."); Dean v. Timpson Indep. Sch. Dist., 486 F. Supp. 302, 308 (E.D. Tex. 1979) (requiring that a teacher's classroom speech cause a "material or substantial disruption" to justify school board regulation of that teacher's academic freedom); Parducci v. Rutland, 326 F. Supp. 352, 355 (M.D. Ala. 1970) (holding that the "material and substantial disruption" test should be applied to a teacher's choice of classroom materials). One court applied a strict scrutiny standard to a school board's decision to discharge a teacher for wearing a black armband in class to protest the Vietnam War. *See* James v. Board of Educ., 461 F.2d 566, 574 (2d Cir. 1972)

was drawn from the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*,[156] which dealt with student symbolic speech.[157] In addition, the application of both types of analyses has been inconsistent since some courts using a *Connick-Pickering* analysis find classroom speech to be a matter of public concern while others do not.[158]

At least one federal district court also has suggested that a student's right to hear under the First Amendment may serve as a justification for protecting a teacher's right to speak or use certain materials in class because the protection of teacher classroom speech is primarily for the good of the student and of the community.[159] That court reasoned that a school's duty to expose students to diverse thought requires that a teacher be given some academic freedom within the classroom.[160] The court denied the teacher's motion for a preliminary injunction, however, because it determined under the legitimate pedagogical concerns test that the teacher's showing of an R-rated film would likely be considered inappropriate by the school board.[161]

Other courts, including the Supreme Court in *Board of Education v. Pico*,[162] have indicated that a student's right to be exposed to information is a factor to be considered in judging the constitutionality of a school board's actions to remove books from a

("The question we must ask in every first amendment case is whether the regulatory policy is drawn as narrowly as possible to achieve the social interests that justify it . . . .").

156. 393 U.S. 503 (1969).

157. *See id.* at 509.

158. *See* W. Stuart Stuller, *The Conundrum of Academic Freedom*, INQUIRY & ANALYSIS: BIMONTHLY PUBLICATION NSBA COUNCIL SCH. ATT'YS, May 1998, at 1, 2 (citing *Boring*, 136 F.3d at 368; Blum v. Schlegel, 18 F.3d 1005 (2d Cir. 1994)).

159. *See* Krizek v. Board of Educ., 713 F. Supp. 1131, 1137 (N.D. Ill. 1989); *cf.* Seyfried v. Walton, 668 F.2d 214, 219 (3d Cir. 1981) (suggesting that when the school superintendent banned production of a school musical, student objections to "overly narrow or ideological curriculum-related decisions" might have been justified by students' "freedom to hear" and their First Amendment rights to be exposed to ideas); Borger v. Bisciglia, 888 F. Supp. 97, 99-100 (E.D. Wis. 1995) (stating that students are free to challenge school board curriculum decisions, but in order to establish a First Amendment violation they must prove that the school officials have engaged in viewpoint discrimination).

160. *See Krizek*, 713 F. Supp. at 1137. The court also emphasized that it did not matter whether students or teachers brought a First Amendment academic freedom claim. *See id.* at 1138 n.4.

161. *See id.* at 1143. The teacher showed the film *About Last Night* to her eleventh grade English class as a modern parallel to Thornton Wilder's *Our Town*. Students were told they would be excused from the assignment if they or their parents found the film offensive. *See id.* at 1132-33.

162. 457 U.S. 853 (1982).

school library.[163] The *Pico* Court held in a plurality opinion that a school board cannot remove books from a school library simply because the board dislikes or is uncomfortable with the ideas contained in those books.[164] The Court underscored that school board control over the curriculum is subject to First Amendment limits in order to teach children the values of free speech and open debate.[165] According to the plurality, free speech includes " 'the right to receive information and ideas.' "[166] The right to receive is based on both the speaker's right to send ideas and serves as a predicate to the recipient's right to exercise his own free speech.[167] The Court in *Pico*, however, emphasized the narrowness of its holding and specifically distinguished between the school board's control over the classroom curriculum and the removal of books from the school library.[168]

Because there have been no Supreme Court cases dealing specifically with teachers' in-class speech, the lower courts have used a variety of approaches to determine the classroom speech rights of teachers. Many lower courts have embraced the "legitimate pedagogical concern" standard originally devised to deal with student speech.[169] Some courts have established a two-part test: first, the

163. *See id.* at 867-69 (plurality opinion); *see also* Zykan v. Warsaw Community Sch. Corp., 631 F.2d 1300, 1304 (7th Cir. 1980) ("Secondary school students certainly retain an interest in some freedom of the classroom, if only through the qualified 'freedom to hear' . . . ."); Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577, 583 (6th Cir. 1976) (stating that if a teacher decided to use a school library book in a classroom discussion, "the First Amendment's protection of academic freedom would protect [the teacher's right to discuss the book] and the students' right to hear").

164. *See Pico*, 457 U.S. at 872 (plurality opinion).

165. *See id.* at 863-66 (plurality opinion).

166. *Id.* at 867 (plurality opinion) (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

167. *See id.* (plurality opinion).

168. *See id.* at 862-63 (plurality opinion). Justice Stevens is the only member of the plurality who currently sits on the Court. The other Justices who remain on the Court from 1982, then-Justice Rehnquist and Justice O'Connor, dissented from the plurality opinion. *See id.* at 904 (Rehnquist, J., dissenting); *id.* at 921 (O'Connor, J., dissenting). Justice Rehnquist also stated that "the very existence of a right to receive information, in the junior high school and high school setting [is] . . . wholly unsupported by our past decisions and inconsistent with the necessarily selective process of elementary and secondary education." *Id.* at 910 (Rehnquist, J., dissenting).

169. *See* Lacks v. Ferguson Reorganized Sch. Dist. R-2, 147 F.3d 718, 724 (8th Cir. 1998); Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 722 (2d Cir. 1994); Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993); Miles v. Denver Pub. Schs., 944 F.2d 773, 778 (10th Cir. 1991); Webster v. New Lenox Sch. Dist. No. 122, 917 F.2d 1004, 1008 (7th Cir. 1990); Searcey v. Harris, 888 F.2d 1314, 1318-19 (11th Cir. 1989); Borger v. Bisciglia, 888 F. Supp. 97, 100 (E.D. Wis. 1995); Krizek v. Board of Educ., 713 F. Supp. 1131, 1143 (N.D. Ill. 1989); Board of Educ. v. Wilder, 960 P.2d 695, 701 (Colo. 1998) (en banc). *But see* Blum v. Schlegel, 18 F.3d 1005, 1011-12 (2d Cir. 1994) (applying the

school's pedagogical interests must be identified and evaluated as to their legitimacy; second, the school's actions must reasonably relate to the pedagogical interests which it has identified.[170] In addition, some courts also examine whether there is a non-public forum before applying the *Hazelwood* test.[171] Other courts have specifically stated the factors to be considered when determining whether a regulation is reasonably related to legitimate pedagogical concerns[172] and have added to the *Hazelwood* test by considering additional standards depending on the facts involved.[173] Finally, at least two courts have used the *Hazelwood* test as a replacement for the public concern threshold step in the *Mount Healthy* framework: to determine the extent to which a teacher's in-class speech is protected under the First Amendment.[174]

An example of a "typical" *Hazelwood* analysis can be shown by considering the Tenth Circuit Court of Appeals decision in *Miles v. Denver Public Schools*,[175] a case in which a tenured teacher was placed on four days paid administrative leave for comments he made to a class concerning the quality of the school.[176] The court chose to

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Connick-Pickering line of cases to a professor's in-class speech); Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990) (applying *Pickering* to a teacher's use of Learnball, a classroom management technique utilizing sports concepts, student rule-making exercises, and a rewards system); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 797 (5th Cir. 1989) (applying the *Connick-Pickering* line of cases to a teacher's use of his own supplementary reading list); Scallet v. Rosenblum, 911 F. Supp. 999, 1011 (W.D. Va. 1996), *aff'd*, 106 F.3d 391 (4th Cir. 1997) (applying *Pickering*, with reservation, to the in-class speech of a university professor).

170. *See Lacks*, 147 F.3d at 724; *Silano*, 42 F.3d at 722; *Miles*, 944 F.2d at 778; *Webster*, 917 F.2d at 1008; *Searcey*, 888 F.2d at 1318-19; *Borger*, 888 F. Supp. at 100; *Wilder*, 960 P.2d at 701.

171. *See Miles*, 944 F.2d at 775-76.

172. *See Ward*, 996 F.2d at 453 (identifying "the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation" as relevant factors).

173. *See id.* at 452 (creating a second analytical step that requires a school to provide a teacher with notice as to prohibited in-class conduct); *Krizek*, 713 F. Supp. at 1142-43 (stating that the reasonableness of a school district's action in not renewing a teacher's contract depends on a reasonable relationship of legitimate pedagogical concerns and the severity of the sanction used).

174. *See Ward*, 996 F.2d at 452; *Miles*, 944 F.2d at 775. In *Hosford v. School Committee*, 659 N.E.2d 1178 (Mass. 1996), the Supreme Judicial Court of Massachusetts determined under *Mount Healthy* that the school board impermissibly punished a teacher for a class discussion with her students, that the discussion was protected and was a motivating factor in the board's decision not to renew her contract. *See id.* at 1181-82.

175. 944 F.2d 773 (10th Cir. 1991).

176. *See id.* at 774. The speech at issue, although in class, was not considered to be curricular because it was not related to a particular lesson. The teacher stated during his ninth grade government class that the school had been declining in quality since 1967. *See id.* One of the examples the teacher gave for his statement referred to a rumor that two

use the *Hazelwood* standard to determine whether the speech was constitutionally protected under the first prong of the *Mount Healthy* analysis.[177] The court stated that the first step in the analysis required it to decide whether Miles's classroom was a public forum; the court reasoned that an ordinary classroom could not be a public forum because the Supreme Court decided in *Hazelwood* that a school newspaper was not a public forum.[178] The second step in the analysis was to ascertain whether the speech at issue " '[bore] the imprimatur of the school.' "[179] The court again analogized to *Hazelwood*: if a school newspaper " '[bore] the imprimatur of the school,' " then so must a teacher's in-class comments.[180] After proceeding through this analysis, the court determined that the *Pickering* test was not applicable because it did not address the state's interest as an educator and only dealt with the state's interest as an employer.[181] In applying the *Hazelwood* test instead, the court determined that the school had legitimate pedagogical interests in Miles's remarks and also that the paid administrative leave and letter of reprimand promoted the interests of the school system and were reasonably related to those interests.[182]

Silano v. Sag Harbor Union Free School District[183] provides an example of a court's application of the *Hazelwood* test to the use of classroom materials.[184] George Silano, a guest speaker for a tenth grade math class and also a school board member, used film clips to

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students had been engaged in sexual intercourse on the tennis court during lunch the previous day. *See id.* Parents of the alleged participants complained to the principal about the comment. *See id.* In addition to the forced administrative leave, a reprimand letter was placed in the teacher's file. *See id.*

177. *See id.* at 775-76.

178. *See id.* at 776.

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

180. *Id.* (quoting *Hazelwood*, 484 U.S. at 271). Some courts have declined to apply *Hazelwood* to professors' speech in a college or university classroom. *See* Scallet v. Rosenblum, 911 F. Supp. 999, 1011 (W.D. Va. 1996) (using the *Pickering* analysis for in-class professor speech because "the cases in which the *Hazelwood* test is employed do not address the in-class speech of teachers at the university or graduate school level"), *aff'd*, 106 F.3d 391 (4th Cir. 1997); *see also* Blum v. Schlegel, 18 F.3d 1005, 1010 (7th Cir. 1994) (applying the *Connick-Pickering* line of cases without mentioning *Hazelwood*). *But see* Bishop v. Aronov, 926 F.2d 1066, 1074 (11th Cir. 1991) (applying *Hazelwood* to a professor's in-class speech and concluding that academic freedom is not an independent First Amendment right).

181. *See Miles*, 944 F.2d at 776-77. The court noted that the special characteristics of the classroom required the application of *Hazelwood*, as did the fact that a teacher's expression in other environments might not be perceived as school-sponsored. *See id.*

182. *See id.* at 778-79.

183. 42 F.3d 719 (2d Cir. 1994).

184. *See id.* at 721.

explain the "persistence of vision" theory; one of the clips portrayed two women and one man naked above their waists.[185] The superintendent of the schools subsequently barred Silano from visiting any of the schools within the school system for the remainder of the school year, and the school board censured him.[186] Silano filed suit alleging a violation of his First Amendment free speech rights.[187] The Second Circuit Court of Appeals applied a "legitimate pedagogical concerns" analysis to Silano's use of the film clip because his lecture took place in a classroom and was intended to provide knowledge to the students in the class.[188] The court then determined that the actions of the superintendent and school board were reasonably related to legitimate pedagogical concerns.[189] The court declined Silano's invitation to apply the *Pico* test, which provided that school officials could not remove resources from the school library merely because they disagreed with the ideas contained in those materials. The court justified its decision by explaining that according to *Hazelwood*, activities supervised by school officials to provide knowledge to students are considered part of a school's curriculum.[190]

A third example of a court's application of the *Hazelwood* test can be found in *Ward v. Hickey*,[191] a First Circuit Court of Appeals case in which a school board decided not to rehire a teacher after a parent reported the teacher's discussion of abortion of Down's Syndrome fetuses in her ninth grade biology class.[192] The court determined that in order for the teacher to prove a free speech violation, she had to show that her discussion of abortion was protected under the First Amendment and that the discussion was a substantial factor in the board's decision not to renew her contract.[193] The teacher's speech was subject to school board regulation in light of the board's control over curriculum as long as the regulations were "reasonably related to a legitimate pedagogical concern" and the school gave the teacher notice of the conduct or speech that was

185. *See id.* Silano did not direct the students' attention to this particular clip. *See id.*

186. *See id.*

187. *See id.* at 722.

188. *See id.* at 722-23. The court noted that although Silano was a guest in the classroom, his speech was entitled to no greater protection than that which would be given a teacher. *See id.* at 723.

189. *See id.*

190. *See id.* Library resources, on the other hand, may be viewed by students voluntarily and are not required reading. *See id.*

191. 996 F.2d 448 (1st Cir. 1993).

192. *See id.* at 450.

193. *See id.* at 452 (citing Mount Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 287 (1977)).

prohibited.[194] The court established that a teacher's in-class speech is part of the curriculum and subject to limitations by the school board.[195] The court further noted, however, that a school board cannot take action against teacher speech that it never attempted to prevent or regulate in the first place.[196] If a school board could take action without providing notice to teachers, the court reasoned that teachers would be afraid to teach, which would chill free debate and First Amendment rights within the classroom.[197] The proper test for notice is whether a school could reasonably expect a teacher to know that his speech was prohibited "based on existing regulations, policies, discussions, and other forms of communication" between school officials and teachers.[198] The court held against the teacher in *Ward*, however, because the teacher had waived her right to a determination on the notice issue.[199]

Prior to the Supreme Court's decision in *Hazelwood*, the vast majority of teachers alleging violation of their First Amendment rights in the classroom won their claims.[200] Most pre-*Hazelwood* cases that held for teachers who had been discharged or whose contracts were not renewed as a result of inappropriate in-class behavior placed emphasis on the teachers' professional judgment and rights to academic freedom in the classroom.[201] These decisions also

194. *Id.* (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988); Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967)).

195. *See id.* at 453. The court noted that it had granted schools "great deference in regulating classroom speech." *Id.* at 452. The factors the court considered in determining the reasonableness of school regulations included "circumstances such as age and sophistication of students, relationship between teaching method and valid educational objectives, and context and manner of presentation." *Id.*

196. *See id.* at 453.

197. *See id.*

198. *Id.* at 454.

199. *See id.* at 454-55. The teacher did not argue that the school board could not limit her discussion of abortion in advance. *See id.* at 454.

200. *See* Stachura v. Truszkowski, 763 F.2d 211 (6th Cir. 1985), *rev'd on other grounds sub nom.* Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299 (1986); Kingsville Indep. Sch. Dist. v. Cooper, 611 F.2d 1109 (5th Cir. 1980); James v. Board of Educ. of Cent. Dist. No. 1, 461 F.2d 566 (2nd Cir. 1972); Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969); Dean v. Timpson Indep. Sch. Dist., 486 F. Supp. 302 (E.D. Tex. 1979); Moore v. Gaston County Bd. of Educ., 357 F. Supp. 1037 (W.D.N.C. 1973); Webb v. Lake Mills Community Sch. Dist., 344 F. Supp. 791 (N.D. Iowa 1972); Sterzing v. Fort Bend Indep. Sch. Dist., 376 F. Supp. 657 (S.D. Tex. 1972), *vacated on other grounds*, 496 F.2d 92 (5th Cir. 1974); Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971); Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970).

201. *See, e.g.*, *Keefe*, 418 F.2d at 362 (determining that assigning high school seniors to read and then discuss a magazine article containing an obscenity was within a teacher's academic freedom rights); *Dean*, 486 F. Supp. at 307 (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), for the proposition that the academic freedom concept protects a

turned on either the fact that school officials had no policy prohibiting the teacher's conduct or that the school officials were unhappy with a particular assignment or discussion that the teacher used to engage the class.[202] Some cases, particularly post-*Tinker* decisions, emphasized the appropriateness of the controversial content for the students who had heard or read it.[203] One case was upheld on the grounds that a teacher's speech in a class discussion—characterized by the school board as "private expression"—was protected.[204]

In pre-*Hazelwood* cases in which a teacher lost his claim, the school authorities had valid grounds to support the teacher's dismissal or nonrenewal.[205] One case used a *Pickering* standard to determine

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teacher's right to use the teaching method she chooses, even if the material is unpopular or controversial); *Mailloux*, 323 F. Supp. at 1390 (upholding a teacher's academic freedom to choose a teaching method that "served a demonstrated educational purpose"); *Parducci*, 316 F. Supp. at 355 (holding that a teacher's academic freedom was violated when the school board dismissed her for assigning to high school juniors a short story that contained vulgar language).

202. *See* Cary v. Board of Educ., 598 F.2d 535, 541-42 (10th Cir. 1979); *see also Stachura*, 763 F.2d at 215 (holding that a teacher's speech rights were violated when the teacher was discharged for using teacher materials and methods that previously had been approved by his principal); *Moore*, 357 F. Supp. at 1040-41 (stating that a student teacher's discharge after engaging in a spontaneous class discussion about evolution was unconstitutional because none of the school's standards prohibited such conduct); *Webb*, 344 F. Supp. at 804 (holding that a teacher could not be discharged for using an inappropriate teaching method when she was not notified by the administration that the method should not be used); *Sterzing*, 376 F. Supp. at 662 (stating that the teaching method in question was not prohibited by school regulations); *Mailloux*, 323 F. Supp. at 1392 (explaining that a state must put a teacher on notice when it prohibits a teaching method that serves a "serious educational purpose" and that is used by the teacher "in good faith"); *Parducci*, 316 F. Supp. at 357 (holding that a total absence of standards concerning a teacher's selection and assignment of outside readings deprives teachers of their First Amendment rights).

203. *See* Pratt v. Independent Sch. Dist. No. 831, 670 F.2d 771, 777 (8th Cir. 1982) (determining that showing the film adaptation of *The Lottery* was appropriate for a high school curriculum); *Keefe*, 418 F.2d at 361-62 (holding that an *Atlantic Monthly* article containing an obscenity was legitimate educational material for high school seniors when the teacher used the article to further educational goals); Bell v. U-32 Bd. of Educ., 630 F. Supp. 939, 943 (D. Vt. 1986) (discussing the maturity of children as a factor in determining whether the production of a school play is appropriate); *Parducci*, 316 F. Supp. at 356 (holding that a Kurt Vonnegut short story was appropriate reading material for high school juniors).

204. *See Cooper*, 611 F.2d at 1113 (stating that a school district's argument that a teacher's use of a simulation to teach the Reconstruction period of American history was unprotected private expression failed in light of *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 413, 415-16 (1979), in which the Court held that private expression by a public employee is protected speech).

205. *See Cary*, 598 F.2d at 542; *see also* Fowler v. Board of Educ., 819 F.2d 657, 663-64 (6th Cir. 1987) (holding that there was no free speech violation when an R-rated movie

that the state's legitimate interests in curbing teacher speech outweighed the teacher's in-class comment.[206] Although all of the cases denying protection to teacher speech emphasized local control of the schools over curriculum, only one allowed a school board's viewpoints to hold sway over the First Amendment.[207]

Although only a few courts have applied the *Pickering-Connick-Mount Healthy* standard to in-class teacher expression since the *Hazelwood* decision,[208] an application of the standard to such speech is illustrated by the Fifth Circuit's analysis in *Kirkland v. Northside Independent School District.*[209] The plaintiff, a probationary teacher[210]

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shown by a teacher was determined not to be expressive speech); Frison v. Franklin County Bd. of Educ., 596 F.2d 1192, 1194 (4th Cir. 1979) (holding that a state statute explaining the duties and the grounds for dismissal of a teacher provided a fifth grade teacher with adequate notice that discussing student notes that contained vulgar words was not protected speech); Fern v. Thorp, 532 F.2d 1120, 1131 (7th Cir. 1976) (upholding the discharge of a teacher who failed to follow a school's controversial materials policy and then did not seek a hearing concerning the discharge); Hetrick v. Martin, 480 F.2d 705, 708 (6th Cir. 1973) (upholding a university professor's discharge when she was not discharged for content of her speech but rather for her pedagogical methods); Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972) (determining that a teacher's overemphasis of sexual education in a health course and subsequent disputes with colleagues about course content were not protected speech); Parker v. Board of Educ., 237 F. Supp. 222, 228-29 (D. Md.), *aff'd*, 348 F.2d 464 (4th Cir. 1965) (holding that a teacher did not follow school regulations in choosing to have his class read *Brave New World*).

206. *See Clark*, 474 F.2d at 931-32.

207. *See Cary*, 598 F.2d at 542-44 (upholding a school board's removal of books from an approved texts list); *Mailloux*, 323 F. Supp. at 1391 n.4 ("[I]t has been suggested that state regulatory control of the classroom is entitled to prevail unless the teacher bears the heavy burden of proving that it has no rational justification, or is discriminatory on religious, racial, political, or like grounds." (citations omitted)).

208. *See* Dambrot v. Central Mich. Univ., 55 F.3d 1177, 1187-88 (6th Cir. 1995) (holding that a coach's use of racial slurs to motivate his players did not constitute speech on a matter of public concern); Blum v. Schlegel, 18 F.3d 1005, 1012 (2d Cir. 1994) (determining that a law professor's in-class speech advocating legalization of marijuana was a matter of public concern); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 800 (5th Cir. 1989) (deciding that a high school teacher's supplemental reading list was not protected speech); Scallet v. Rosenblum, 911 F. Supp. 999, 1011 (W.D. Va. 1996) (using the *Pickering* test in a case involving a university instructor because the *Hazelwood* test was applied in cases concerning the in-class speech of *secondary school* teachers), *aff'd*, 106 F.3d 391 (4th Cir. 1997).

209. 890 F.2d 794 (5th Cir. 1989).

210. A teacher has probationary status before achieving tenure. *See* 2 JAMES A. RAPP, EDUCATION LAW § 6.06[5][b][i] (1999). The probationary period provides teachers with the chance to prove themselves and gives the employer the opportunity to evaluate a teacher's performance before providing the teacher with tenure. *See id.* "As a general rule, probationary employees have no expectancy of continued employment past the term of any limited contract . . . ." *Id.* Tenure is "a status granted . . . under statute, contract or policy to continue employment subject to dismissal only for adequate cause or where required due to staff reductions, program changes or financial exigency" and provides "the most substantial property right to which employees of educational institutions may be

at a public high school, used a nonapproved reading list in his world history class, and then sued after the school district decided not to renew his contract.[211] The court determined that, in order for the teacher to win such a case, he had to establish that his supplemental reading list was constitutionally protected speech and that such speech was a motivating factor in the school district's decision not to renew his contract.[212] Assuming that Kirkland could prove these elements, the school district then would have the opportunity to show by a preponderance of the evidence that it would not have rehired Kirkland regardless of his exercise of protected speech.[213] The court dismissed the case on the grounds that Kirkland's speech was not speech on a matter of public concern; it did not conduct the remainder of the analysis.[214] Finally, the court pointed out that although academic freedom had been recognized as an important concept, it had never provided teachers with control over the curriculum;[215] therefore, under *Hazelwood*, school districts could place reasonable restrictions on a teacher's speech.[216]

The *Boring* court based its *Connick* analysis on its prior decision in *DiMeglio v. Haines*.[217] In *DiMeglio*, a zoning inspector was

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entitled." *Id.* at § 6.06[1].

211. *See Kirkland*, 890 F.2d at 795-96.

212. *See id.* at 797 (using a *Mount Healthy* test).

213. *See id.* In addition to citing the use of the nonapproved reading list in not renewing Kirkland's contract, the school district also listed the following factors: poor classroom management and discipline of a particular class, poor teaching evaluations, and mediocre relationships with teachers, parents, and students. *See id.* at 795-96.

214. *See id.* at 799-800. A key issue for the court seemed to be that Kirkland did not attend any of the public hearings that the school district held for public educators, teachers and parents to determine the reading list for each course. *See id.* at 800. In addition, Kirkland did not follow the procedures the school system had established to use supplemental reading materials: he needed only to have asked for permission to use his reading list in his classes, but he failed to do so. *See id.* The court also focused on the fact that Kirkland had remained silent as to any First Amendment violation by the school district against him until after his contract was not renewed by the school district. *See id.*

215. *See id.*

216. *See id.* at 800-01. The court made clear that its decision was not "intended to suggest that public school teachers foster free debate in their classrooms only at their own risk." *Id.* at 801. It held "only that that public school teachers are not free, under the [F]irst [A]mendment, to arrogate control of curricula" and that "[p]arents, administrators, and elected officials also have a legitimate role in the process of selecting material that will advance educational goals." *Id.* at 802.

217. 45 F.3d 790 (4th Cir. 1995); *see also Boring*, 136 F.3d at 369 (citing *DiMeglio*). A federal district court in Virginia described the Fourth Circuit's three-part public-employee free speech test: "First, the court must determine 'whether [plaintiff's] speech involved an issue of public concern.' " Scallet v. Rosenblum, 911 F. Supp. 999, 1012-13 (W.D. Va. 1996) (quoting Hall v. Marion Sch. Dist No. 2, 31 F.3d 183, 192 (4th Cir. 1994)), *aff'd*, 106 F.3d 391 (4th Cir. 1997). The *Scallet* court noted that the Fourth Circuit has held that the

reassigned to a different geographic area after providing legal advice to a citizens' group.[218] The zoning inspector sued his supervisor, alleging that his reassignment was in retaliation for his speech.[219] In its application of the *Connick* test to the inspector's speech, the court emphasized the balancing aspect of the test.[220] The court then stated two reasons why the inspector's speech was not protected under the First Amendment.[221] First, the inspector was speaking as an employee, rather than as a citizen on a matter of public concern.[222] Second, in applying the *Pickering* balancing test, the court pointed out that the interests of the state in maintaining office operations may have outweighed the inspector's speech interests.[223]

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focus of the public concern inquiry is "whether the 'public' or the 'community' is likely to be concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a 'private' matter between employer and employee." *Id.* Second, if the speech is found to be on a matter of public concern, then the court must determine "whether [plaintiff's] exercise of free speech is outweighed by the ' "countervailing interest of the state in providing the public service the teacher was hired to provide." ' " *Id.* at 1012 (quoting Berger v. Battaglia, 779 F.2d 992, 999 (4th Cir. 1985) (quoting Stroman v. Colleton County Sch. Dist., 981 F.2d 152, 156 (4th Cir. 1992))). Finally, "the court must determine 'whether [plaintiff] would have been dismissed "but for" her protected speech' " under a *Mount Healthy* analysis. *Id.* at 1013 (quoting *Hall*, 31 F.3d at 192).

218. *See DiMeglio*, 45 F.3d at 793-94. The zoning inspector, Frank DiMeglio, advised the Earl's Beach Improvement Association not to accept a settlement offer from a family who had committed several zoning violations because he felt that the offer required the Association to allow the family to continue to violate zoning requirements. *See id.* The zoning inspector was reprimanded for his behavior and allegedly was told by his supervisor that he would never be promoted. *See id.* at 794.

219. *See id.*

220. *See id.* at 806 ("[O]nly infrequently will it be 'clearly established' that a public employee's speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a 'particularized balancing' that is subtle, difficult to apply, and not yet well-defined." (quoting Connick v. Myers, 461 U.S. 138, 150 (1983); Jackson v. Bair, 851 F.2d 714, 717 (4th Cir. 1988)).

221. *See id.* at 805.

222. *See id.* Although the court did not rule out the possibility that a public employee's speech would be protected when she was speaking in her capacity as an employee, it noted that precedent indicated that speech as an employee was probably not protected. *See id.* (citing *Connick*, 461 U.S. at 147; Terrell v. University of Tex. Sys. Police, 792 F.2d 1360, 1362 (5th Cir. 1986)). Because the inspector was suing his supervisor (the Zoning Commissioner for Baltimore County) under 42 U.S.C. § 1983, the Commissioner had a defense of qualified immunity, which provides protection to officials " 'as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.' " *Id.* at 794 (quoting Anderson v. Creighton, 483 U.S. 635, 638 (1987)). Qualified immunity provides protection to those officials " 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Id.* (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Therefore, the Fourth Circuit noted that the Commissioner "reasonably could have believed that [the inspector-employee's] speech was not protected." *Id.* at 805.

223. *See id.* at 805-06. The Commissioner, therefore, had a reasonable belief that the

Although the concept of academic freedom is closely aligned with First Amendment issues, such freedom must be balanced with school board control of curriculum. The Court has long suggested that the doctrine of academic freedom provides some constitutional protection, at least for college and university professors and instructors.[224] The Supreme Court has been clear as to the importance of academic freedom within a democratic society: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is ... a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[225] In addition, in a case striking a statute requiring as a condition of employment that teachers list the organizations to which they belonged, the Court has noted that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[226]

The rationale for academic freedom was most clearly summarized in *Mailloux v. Kiley*,[227] in which a federal district court explained that society needs teachers to serve as role models of "democratic citizen[s]" and to teach students how to adapt to a continually changing environment by exposing students to new ideas and independent thought.[228] This embrace of academic freedom has

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inspector's right to speak was outweighed by the interests of the state. *See id.* at 806 ("A government employer ... is entitled to insist upon obedience to the legitimate day-to-day decisions of the office without fear of reprisal in the form of lawsuits from disgruntled subordinates who believe that they know better than their supervisors how to manage office affairs.").

224. *See* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.... Teachers and students must always remain free to inquire, to study and to evaluate ...; otherwise our civilization will stagnate and die." (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion))); *see also* Zykan v. Warsaw Community Sch. Corp., 631 F.2d 1300, 1304 (7th Cir. 1980) (questioning the "appropriate role" of academic freedom in the secondary school environment). *But see* Bishop v. Aronov, 926 F.2d 1066, 1075 (11th Cir. 1991) (stating that there is a "strong predilection for academic freedom as an adjunct of the free speech rights of the First Amendment," but that there is no "support to conclude that academic freedom is an independent First Amendment right"). *See generally* W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301 (1998) (tracing the evolution of substantive and procedural academic freedom in secondary public schools).

225. *Keyishian*, 385 U.S. at 603.

226. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

227. 323 F. Supp. 1387 (D. Mass. 1971).

228. *Id.* at 1391 ("The Constitution recognized [academic freedom] in order to foster open minds, creative imaginations, and adventurous spirits.").

not been freely extended to elementary and secondary teachers by the courts, however, due to the "special characteristics of the school environment."[229] These special circumstances include the age and maturity of elementary and secondary students as well as the dueling purposes of the public schools: the inculcation of values " 'necessary to the maintenance of a democratic political system,' " and the toleration and exploration of "unpopular and controversial [social, political, and religious] views."[230] The courts have established that the final decision as to curriculum lies with the school board, but most courts have acknowledged that school board control is not absolute.[231] Some courts, however, have refused to find a right to academic

229. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969); *see also* Webb v. Lake Mills Community Sch. Dist., 344 F. Supp. 791, 799 (N.D. Iowa 1972) (acknowledging that academic freedom extends to secondary and elementary teachers but noting that "[t]he state interest in limiting the discretion of teachers grows stronger . . . as the age of the students decreases" and, therefore, that the academic freedom of such teachers is not the same as that given to college instructors).

230. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)); *see also* Fowler v. Board of Educ., 819 F.2d 657, 661 (6th Cir. 1987) (stating that the " 'inculcation of values' is a " 'special circumstance' " to be taken into account in determining a teacher's First Amendment rights in the classroom) (quoting *Fraser*, 478 U.S. at 681); Zykan v. Warsaw Community Sch. Corp., 631 F.2d 1300, 1304 (7th Cir. 1980) (naming two factors limiting academic freedom in secondary schools: students' intellectual development and the nurturing of values as it conflicts with developing intellect); Hetrick v. Martin, 480 F.2d 705, 707 (6th Cir. 1973) ("The First Amendment guarantee of academic freedom . . . does not require a University or school to tolerate any manner of teaching method the teacher may choose to employ."); Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1971) ("[W]e do not conceive academic freedom to be a license for uncontrolled expression at variance with established curricular content and internally destructive of the proper functioning of the institution."); Keefe v. Geanakos, 418 F.2d 359, 362 (1st Cir. 1969) (stating that "the offensiveness of the language and the particular propriety or impropriety" of the speech at issue is dependent on the age of the students in question); Dean v. Timpson Indep. Sch. Dist., 486 F. Supp. 302, 307 (E.D. Tex. 1979) (stating that a teacher's academic freedom may be controlled by the school if the in-class speech disrupts classroom learning or discipline to "a material or substantial degree"); *Mailloux*, 323 F. Supp. at 1391 n.4 ("The so-called constitutional right is not absolute . . . . Analytically, . . . it is less a right than a constitutionally recognized interest. Clearly the teacher's right must yield to compelling [and possibly merely reasonable] public interest of greater constitutional significance."); Parducci v. Rutland, 316 F. Supp. 352, 355 (M.D. Ala. 1970) ("The right to academic freedom . . . is not absolute and must be balanced against the competing interest of society.").

231. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) ("[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges."); *Fraser*, 478 U.S. at 683 (holding that in cases concerning student symbolic speech, "[t]he determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board"); Board of Educ. v. Pico, 457 U.S. 853, 863-64 (1982) (plurality opinion) ("The Court has long recognized that local school boards have broad discretion in the management of school affairs."); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("[P]ublic education in our Nation is committed to the control of state and local authorities.").

freedom for secondary or elementary teachers.[232] Other courts have recognized academic freedom for elementary and secondary teachers, but have defined it in different ways.[233] One commentator's definition of academic freedom summarizes the courts' varying definitions rather well: "the right of teachers to teach as they think appropriate, to speak freely about their subjects, to experiment with new ideas, and to select the teaching methods and materials they think best suited to their instructional task."[234] Several courts, however, have expanded their conception of academic freedom to embrace two distinct academic freedom rights: a teacher's substantive right to choose classroom materials that serve an established pedagogical objective and a teacher's procedural right to notice of proscribed teaching methods.[235]

In addition to academic freedom and standards of free speech protection, the issue of notice has been compelling for all courts that have addressed it.[236] Prior notice that the conduct or speech at issue is

232. *See* Miles v. Denver Pub. Schs., 944 F.2d 773, 779 (10th Cir. 1991); Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990).

233. *See Fowler*, 819 F.2d at 661 (recognizing the academic freedom right of public school teachers "to exercise professional judgment in selecting topics and materials for use in the course of the educational process"); *Hetrick*, 480 F.2d at 707 ("The First Amendment guarantee of academic freedom provides a teacher with the right to encourage a vigorous exchange of ideas within the confines of the subject matter being taught...."); *Clark*, 474 F.2d at 931 (stating that academic freedom is "the preservation of the classroom as a 'market place' of ideas"); *Dean*, 486 F. Supp. at 307 ("[A] teacher has a constitutional right protected by the First Amendment to engage in a teaching method of his or her own choosing, even though the subject matter may be controversial or sensitive."); *Webb*, 344 F. Supp. at 805 (defining academic freedom as a teacher's "freedom to employ methods of teaching reasonably relevant to the subject matter [the teacher] was employed to teach"); *Mailloux*, 323 F. Supp. at 1390 (identifying both a substantive right and a procedural right of academic freedom); *Parducci*, 316 F. Supp. at 355 (identifying academic freedom as an unenumerated right of the First Amendment that includes "the right to teach, to inquire, to evaluate, and to study").

234. Laurie L. Mesibov, *Teacher-Board of Education Conflicts over Instructional Materials*, SCH. L. BULL., Winter 1991, at 10, 11.

235. *See Keefe*, 418 F.2d at 362-63 ("It does not follow that a teacher may not be on notice of impropriety from the circumstances of a case without the necessity of a regulation."); *Webb*, 344 F. Supp. at 799-800 (reading Eighth Circuit precedent to embrace the procedural prong of academic freedom); *Mailloux*, 323 F. Supp. at 1390 (affirming "the procedural right of a teacher not to be discharged for the use of a teaching method which was not proscribed by a regulation"); *Parducci*, 316 F. Supp. at 356-57 (holding that teachers must receive notice as to "what conduct is permissible and what conduct is proscribed").

236. *See* Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 718, 723 (8th Cir. 1998) (holding that a school district must give a teacher notice as to what expression is prohibited in class); Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993) (same) (citing Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967)); Stachura v. Truszkowski, 763 F.2d 211, 214-15 (6th Cir. 1985) (determining that a teacher's speech rights were violated

prohibited is required by the Due Process Clause of the Fourteenth Amendment.[237] The vagueness doctrine requires that a statute or regulation be definite enough so that the average person can understand what conduct is prohibited.[238] When the proscribed conduct implicates the First Amendment, the standards for judging vagueness are more stringently applied.[239] The rationale behind such

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when the teacher followed the administrator's directions but was suspended and "told that he would 'never see the inside of a Memphis classroom again' "), *rev'd on other grounds sub nom.* Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299 (1986); *Keefe*, 418 F.2d at 362 (stating that a school regulation was unclear and would probably provide inadequate notice); *Dean*, 486 F. Supp. at 309 (holding that a school district violated due process by discharging a teacher without first providing her with notice that her conduct was proscribed); Moore v. Gaston County Bd. of Educ., 357 F. Supp. 1037, 1040 (W.D.N.C. 1973) (deciding that a student-initiated discussion with a student teacher about evolution in the context of a lesson about world religions did not violate school board policy when the school board had not established any standards as to such conduct); Sterzing v. Fort Bend Indep. Sch. Dist., 376 F. Supp. 657, 662 (S.D. Tex. 1972) (ruling that the teaching method in question was not prohibited by any school regulation); *Webb*, 344 F. Supp. at 804 (stating that a teacher cannot be discharged for using an inappropriate teaching method when not notified by the administration that such method should not be used); *Parducci*, 316 F. Supp. at 357 (determining that there was a total absence of standards provided to teachers to determine which books were obscene); Board of Educ. v. Wilder, 960 P.2d 695, 706 (Colo. 1998) (stating that when a teacher is entitled to reasonable notice of prohibited materials, a published regulation filed in the school's library is adequate); Stuller, *supra* note 224, at 317-33, 339-43 (discussing the evolution of notice in secondary teacher free speech cases as a procedural academic freedom right).

237. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."); *see also Parducci*, 316 F. Supp. at 357 ("Our laws in this country have long recognized that no person should be punished for conduct unless such conduct has been proscribed in clear and precise terms.") (citing Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).

238. *See Ward*, 996 F.2d at 454 ("The relevant inquiry is: based on existing regulations, policies, discussions, and other forms of communication between school administration and teachers, was it reasonable for the school to expect the teacher to know that her conduct was prohibited?"); *Fowler*, 819 F.2d at 664 (explaining that due process rights are infringed when citizens must guess at the meaning of a written law); *Dean*, 486 F. Supp. at 305 (holding that a teacher did not receive notice that the use of certain classroom materials required prior administration approval where school administration officials "failed to agree on when a conference was held with [the teacher], where it was held, and what she was told" and where there was no written record of a conference); *Wilder*, 960 P.2d at 703 n.8 ("[A]n impermissibly vague law fails to provide fair notice of what conduct is prohibited and allows arbitrary and discriminatory enforcement.").

239. *See Parducci*, 316 F. Supp. at 357; *see also Dean*, 486 F. Supp. at 309 ("Governmental regulation of First Amendment activities has traditionally been required to be precise. An offhand comment to [a teacher], the meaning of which was likely to be vague or ambiguous, cannot pass Constitutional muster . . . ."); *Moore*, 357 F. Supp. at 1040 (stating that "no person should be punished for conduct unless such conduct has been proscribed in clear and precise terms" . . . and that "[w]hen the conduct being punished involves First Amendment rights . . . the standards for judging permissible vagueness will be even more strictly applied"); *Webb*, 344 F. Supp. at 801 (stating that "[i]t is the prevailing law of the land that no person shall be punished for conduct unless such

review is as follows: If the absence of standards or the lack of clear standards forces a teacher to guess whether subjects or materials might be appropriate, the teacher may well tend to be overly hesitant in the classroom.[240] Such reticence contradicts the purpose of academic freedom, thereby defeating the public's interest in the teacher's use of professional judgment in determining reasonable methods to teach information, values, and skills within the classroom.[241] It also allows school officials to act arbitrarily in dismissing those teachers whose methods or discussions contain controversial ideas.[242]

In some cases addressing the issue of notice, a teacher had consulted with and received approval from the principal as to her teaching methods and materials, but was disciplined despite such consultation.[243] At least one court has determined that such discipline violated First Amendment rights and therefore reinstated the teacher.[244] Even in cases where teachers have lost their claims that their free speech rights were violated, the courts have stated that the standard of review for firings after the fact should be less accommodating to the school board than in situations where the school system has given a teacher adequate prior notice.[245]

The Fourth Circuit's opinion in *Boring* illustrates the confusion faced by the lower courts in developing a standard by which to analyze in-class teacher speech. Although the court relied on *Hazelwood* to determine whether the production of a play was part of the school curriculum,[246] it then applied a *Connick* test to Boring's

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conduct has been proscribed in clear and precise terms," which "is especially true when the conduct involves First Amendment rights").

240. *See Moore*, 357 F. Supp. at 1040; *Parducci*, 316 F. Supp. at 357.

241. *See* Mailloux v. Kiley, 323 F. Supp. 1387, 1391 (D. Mass. 1971), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971); *see also Webb*, 344 F. Supp. at 805 (noting that termination without prior notice has a chilling effect on a teacher's academic freedom "to innovate and to develop new and more effective teaching methods which are reasonably relevant to the subject matter they are assigned to teach").

242. *See Parducci*, 316 F. Supp. at 357; *see also* Sterzing v. Fort Bend Indep. Sch. Dist., 376 F. Supp. 657, 661 (S.D. Tex. 1972) (stating that a teacher's academic freedom should "not be so lightly regarded that he stands in jeopardy of dismissal for raising controversial issues" in the classroom).

243. *See Boring*, 136 F.3d at 364 (transfer); Stachura v. Truskowski, 763 F.2d 211, 213-14 (6th Cir. 1985) (dismissal), *rev'd on other grounds sub nom.* Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299 (1986).

244. *See Stachura*, 763 F.2d at 213-14.

245. *See* Krizek v. Board of Educ., 713 F. Supp. 1131, 1142 (N.D. Ill. 1989). The court in *Krizek* also noted that prior restraint was more permissible than after-the-fact punishment for in-class teacher speech. *See id.* at n.5.

246. *See Boring*, 136 F.3d at 368.

conduct to determine whether her expression was constitutionally protected under the First Amendment. The court held that her transfer as a result of the selection and production of the play was not a matter of public concern, but merely an employment dispute.[247]

Boring is anomalous in several respects. First, the use of the *Connick* standard for teacher speech within the school environment ignores the "special characteristics" of the school environment.[248] It may, in fact, be more appropriate to treat the selection of the play the same way that other courts have treated the removal of books from school libraries.[249] Second, the court's interpretation of "legitimate pedagogical concerns" is so overbroad as to effectively eliminate any balance between teacher First Amendment rights and local school officials' control over the curriculum in favor of the school board.[250] Third, the court summarily dismissed the notice issue in a case where the teacher followed the rules laid out by the principal and superintendent of the school system and obtained administrative approval for her actions on several different occasions.[251] In other cases, such action by the administration has been sufficient for courts

247. *See id.*

248. *See supra* notes 149-51 and accompanying text (discussing factors of the school environment mentioned by the Court in *Hazelwood* to justify deference to school control over school-sponsored speech).

249. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853, 872 (1982) (plurality opinion) (stating that a school board may not remove books from the library "simply because they dislike the ideas contained in those books"); Pratt v. Independent Sch. Dist. No. 831, 670 F.2d 771, 776 (8th Cir. 1982) ("[A] cognizable First Amendment claim exists if the book was excluded to suppress an ideological or religious viewpoint with which the local authorities disagreed."); Zykan v. Warsaw Community Sch. Corp., 631 F.2d 1300, 1306 (7th Cir. 1980) (determining that school authorities may not "substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute"); Cary v. Board of Educ., 598 F.2d 535, 543 (10th Cir. 1979) ("Censorship or suppression of expression of opinion, even in the classroom, should be tolerated only when there is a legitimate interest of the state which can be said to require priority."); Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577, 582 (6th Cir. 1976) (refusing to allow the school board to remove books from the school library because school board members found the books socially or politically offensive); Case v. Unified Sch. Dist. No. 233, 895 F. Supp. 1463, 1468-69 (D. Kan. 1995) (citing *Pico* for the proposition that school officials may not remove a book from a school library because they disagree with ideas contained within the book).

250. *See* Perry A. Zirkel, *Boring or Bunkum?*, 79 PHI DELTA KAPPAN 791, 792 (1998).

251. *See Boring*, 136 F.3d at 371 n.3. Boring raised the issue as an alternative argument. However, the panel decided not to determine the issue because the case was before it on a motion to dismiss, and it anticipated the issue would be dealt with at trial. *See Boring*, 98 F.3d at 1484. There was a dispute between Boring and the school board as to whether she properly raised her notice argument on appeal. *See id.* The en banc majority, however, summarily dismissed the notice issue because Boring "had *no* First Amendment right to participate in the makeup of the curriculum." *Boring*, 136 F.3d at 371 n.2 (emphasis added).

to find a First Amendment violation of teacher rights.[252]

In its application of the *Connick* standard, the *Boring* court turned first to its previous application of the standard in *DiMeglio v. Haines*.[253] The rationale employed by the court in *DiMeglio* placed great emphasis on the government employer's right to conduct daily office operations without fear of lawsuits from employees who felt they understood better than their superiors how to handle the office.[254] The *Pickering-Connick-Mount Healthy* line of cases, however, was designed to apply to a teacher's out-of-class speech[255] and seems inappropriate to evaluate the protection to be afforded to in-class curricular speech. The standard does not properly consider the special nature of a teacher's in-class speech, which has significant consequences for society as a whole because teachers are the primary actors responsible for educating students.[256] The *Boring* court did not suggest any rationale for its use of the *Connick* standard, nor did it evaluate the special considerations of a teacher within the classroom.[257] Its only concern seemed to be to give as much weight as

252. *See, e.g.*, Ward v. Hickey, 996 F.2d 448, 452, 454-55 (1st Cir. 1993) (stating that a school board must provide a teacher with notice of prohibited conduct); Stachura v. Truszkowski, 763 F.2d 211, 213-14 (6th Cir. 1985) (holding that a teacher's speech rights were violated when the teacher followed an administrator's directions and was suspended nonetheless), *rev'd on other grounds sub nom.* Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299 (1986); Frison v. Franklin County Bd. of Educ., 596 F.2d 1192, 1193-94 (4th Cir. 1979) (holding that under the First and Fourteenth Amendments, a teacher was entitled to prior notice that her in-class speech was grounds for adverse employment action, but that a state law specifying the conduct of public teachers provided sufficient notice); Mailloux v. Kiley, 323 F. Supp. 1387, 1392 (D. Mass.) (determining that a teacher's First Amendment rights were violated when that teacher was not given notice that his teaching method should not have been used), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971).

253. 45 F.3d 790 (4th Cir. 1995); *see also supra* notes 217-23 and accompanying text (discussing the court's application of the *DiMeglio* standard).

254. *See Boring*, 136 F.3d at 369 (quoting *DiMeglio*, 45 F.3d at 806).

255. *See* Clarick, *supra* note 2, at 700-01.

256. *See* Miles v. Denver Pub. Schs., 944 F.2d 773, 777 (10th Cir. 1991) (stating that *Pickering* addresses a state's interests as an employer, but not as an educator); Scallet v. Rosenblum, 911 F. Supp. 999, 1011 (W.D. Va. 1996) (noting that the *Pickering* test "does not explicitly account for the . . . tradition of academic freedom"); Clarick, *supra* note 2, at 702 (noting that the *Pickering-Connick* analysis "provides an inappropriate model for the examination of teachers' in-class speech"); *cf.* J. Albert Ellis, Comment, *Public Teachers' Right to Free Speech: "A Matter of Public Concern,"* 12 S.U. L. REV. 217, 247-48 (1986) (stating that the *Connick* test chills a teacher's free speech rights and leads to government censorship); John M. Ryan, Comment, *Teacher Free Speech in the Public Schools: Just When You Thought It Was Safe to Talk*, 67 NEB. L. REV. 695, 715 (1988) (discussing the problems of the public concern and balancing tests as applied to teachers' speech). *But see* James v. Board of Educ., 461 F.2d 566, 572 n.13 (declining to distinguish *Pickering* as the test to be applied only to out-of-class speech).

257. *See Boring*, 136 F.3d at 371 n.2. The court dismissed the use of the *Hazelwood*

possible to the local school board in order to keep federal courts from interfering with school affairs.[258]

Although the school board's burden of proof is lower than that of the teacher regardless of whether a *Pickering-Connick* analysis or a *Hazelwood* analysis is used, *Hazelwood* provides more deference to the school board's actions. The main advantage to a school board in using the *Connick* analysis is that if a teacher's speech is not found to be on a matter of public concern, a First Amendment claim fails and may be dismissed at an early stage. Such a dismissal will save the school board the time and expense of litigation.[259] If the court proceeds to a balancing test, however, the school board's decision receives no deference.[260] *Hazelwood*, on the other hand, favors school officials, and the body of precedent using this analysis is quite large.[261] According to every court that has considered the issue, school boards have a "legitimate pedagogical interest" in developing the curriculum and requiring teachers to follow it, in providing that teachers utilize professional judgment, and in prohibiting the use of obscene speech.[262] A disadvantage of using the *Hazelwood* analysis for school districts has been that judges are reluctant to grant a dismissal of the case in favor of the school system before trial, thereby subjecting the school districts to higher costs of litigation even when the judge believes that the teacher is unlikely to win.[263]

The *Boring* court's holding that curriculum, by definition, constitutes a "legitimate pedagogical concern,"[264] is overbroad. Both the teacher and the school have some constitutionally protected interests in the curriculum. To hold that the school's interest automatically trumps any interest of the teacher ignores the unique characteristics of the school environment and the teacher's role within such a setting.[265] The court's decision in *Boring* seems to rest

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standard because the case did not implicate student speech. *See id.*

258. *See id.* at 370-71. Judge Luttig also was concerned with allowing local control so that the Board did not have to condone the production of "a play on lesbianism in the classrooms of the County's high school." *Id.* at 372 (Luttig, J., concurring).

259. *See* Stuller, *supra* note 158, at 2.

260. *See id.*

261. *See id.*; *see also supra* notes 169-99 and accompanying text (discussing the lower court's use and application of the *Hazelwood* standard).

262. *See id.* (citing *Miles*, 944 F.2d at 779; Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 795 (5th Cir. 1989); Virgil v. School Bd., 862 F.2d 1517, 1523 (11th Cir. 1989)).

263. *See id.*

264. *Boring*, 136 F.3d at 370.

265. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853, 864 (1982) (plurality opinion) ("[T]he discretion of . . . local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.");

primarily upon a policy determination that the curriculum of a school should be set by the local school authorities who are responsible to the public, rather than by teachers who are responsible only to judges.[266] This interpretation is further supported by Judge Luttig's assertion that in the context of teacher in-class curricular speech a teacher deserves no First Amendment protection.[267] Yet that conclusion is in direct conflict with the decisions of other federal courts of appeals and with the precedent of the Supreme Court itself.[268]

As one commentator has noted,[269] the majority in *Boring* ironically has granted students more rights than teachers within the confines of school-sponsored or curricular speech.[270] Another commentator has stated that the use of the *Hazelwood* standard to restrict teacher speech is both "ominous" and "questionable,"[271] predicting that the dangers that will result echo the Supreme Court's concerns about a lack of academic freedom in the nation's institutions of learning: A school board may intrude far beyond acceptable boundaries on teachers' professional judgment as how best to

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James v. Board of Educ., 461 F.2d 566, 575 (2d Cir. 1972) (weighing the school board's discretion over curriculum against the First Amendment rights of teachers within the classroom); Clarick, *supra* note 2, at 697-98 (discussing the balance between the "interests of the state as educator and employer, and the interests of teachers . . . to act, think, and speak free of state coercion").

266. *See Boring*, 136 F.3d at 371.

267. *See id.* at 373 (Luttig, J., concurring).

268. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) (stating that teachers possess First Amendment rights in the schools); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (explaining that teacher speech is a "special concern of the First Amendment"); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion) ("Teachers . . . must always remain free to inquire, to study and to evaluate . . . ."); Blum v. Schlegel, 18 F.3d 1005, 1011-12 (2d Cir. 1994) (noting that in-class teacher speech is protected under the First Amendment); Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993) ("[T]eachers retain their First Amendment right to free speech in school."); Miles v. Denver Pub. Schs., 944 F.2d 773, 775-77 (10th Cir. 1991) (implying that a teacher's in-class speech is protected to a very limited degree under the First Amendment); Kingsville Indep. Sch. Dist. v. Cooper, 611 F.2d 1109, 1113 (5th Cir. 1980) (ruling that "classroom discussion is protected activity"); Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577, 582-83 (6th Cir. 1976) (explaining that classroom discussions and having books in a school library are both protected under the First Amendment).

269. *See* Zirkel, *supra* note 250, at 792.

270. *See* Cary v. Board of Educ., 598 F.2d 535, 543 (10th Cir. 1979) (noting that if students have free speech rights in the classroom under *Tinker*, teachers must have some measure of protected speech with respect to teaching); Keefe v. Geanakos, 418 F.2d 359, 362 (1st Cir. 1969) ("It is hard to think that any student could walk into the library and receive a book, but that his teacher could not subject the content to serious discussion in class"). *But see Miles*, 944 F.2d at 777 (refusing "to distinguish between the classroom discussion of students and teachers" in deciding to apply *Hazelwood* analysis).

271. Reutter, *supra* note 13, at 353.

communicate materials and values to their classes.[272] In addition, teacher creativity in terms of both materials and methods may be stifled to the extent that a school board's function in inculcating values trumps free inquiry and debate.[273] *Boring* would appear to be such a case.

Although some courts have embraced deference to local school control—even going so far as to acknowledge that the fact that curriculum decisions "are usually governed by school administrators' social, political, and moral tastes is fully consistent with local control over primary and secondary education,"[274]—those same courts have also acknowledged that there is a line past which school administrators may not go.[275] The schools' purpose of value inculcation cannot prohibit viewpoints that contradict the values the school is attempting to instill in its students. The courts also have

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272. *See id.* at 354; *see also Keyishian*, 385 U.S. at 603 ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to [the] robust exchange of ideas ...."); *Sweezy*, 354 U.S. at 250 (plurality opinion) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.").

273. *See* Reutter, *supra* note 13, at 354.

274. Seyfried v. Walton, 668 F.2d 214, 218 (3d Cir. 1981) (Rosenn, J., concurring); *see also Cary*, 598 F.2d at 543 (explaining that the school curriculum serves a legitimate state interest when it reflects the value system of the community). *But see Keefe*, 418 F.2d at 361-62 ("With the greatest of respect to ... parents, their sensibilities are not the full measure of what is proper education.").

275. *See* Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 801-02 (5th Cir. 1989) (stating that teachers, parents, administrators, and school board members share a role "in the process of selecting material that will advance educational goals"); *Seyfried*, 668 F.2d at 219-20 (Rosenn, J., concurring) (acknowledging that school officials' curricular decisions "regarding grade school, and perhaps junior high school students" are entitled to "more deference" than are decisions involving high school students); Pratt v. Independent Sch. Dist. No. 831, 670 F.2d 771, 776 (8th Cir. 1982) ("[S]chool boards do not have an absolute right to remove materials from the curriculum."); Zykan v. Warsaw Community Sch. Corp., 631 F.2d 1300, 1305 (7th Cir. 1980) ("[T]he discretion lodged in local school boards is not completely unfettered by constitutional considerations."); Bell v. U-32 Bd. of Educ., 630 F. Supp. 939, 944 (D. Vt. 1986) (explaining that a school board's motivation concerning a curriculum decision must be examined to determine if the board has violated the First Amendment); Parducci v. Rutland, 316 F. Supp. 352, 357 (M.D. Ala. 1970) ("However wide the discretion of school officials, such discretion cannot be exercised so as to arbitrarily deprive teachers of their First Amendment rights."); *see also Cary*, 598 F.2d at 543 ("Censorship or suppression of expression of opinion, even in the classroom, should be tolerated only when there is a legitimate interest of the state which can be said to require priority." (citing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943))). In *Seyfried*, the court limited school board control by requiring courts to show less deference to school officials' decisions both as the age of the students involved increases and when a board "attempt[s] to exclude a particular point of view from open consideration in the school." *Seyfried*, 668 F.2d at 220 (citing Epperson v. Arkansas, 393 U.S. 97, 107 (1968)).

recognized that school officials who use the pretext of preventing students from exposure to indecent material in order to censor politically controversial ideas are overstepping their bounds.[276]

Courts that recognize a more liberal academic freedom interest for teachers have insisted that Supreme Court precedent acknowledges that viewpoint discrimination is not allowed in the classroom by the school board.[277] Under this approach, the dismissal of a teacher for presenting material that exposes students to unpopular views violates the spirit of the First Amendment and provides a greater threat to the community than does the exposure of the students to topics traditionally held to be taboo.[278] Although *Hazelwood* shifted the balance in favor of the school board, decisions decided post-*Hazelwood* also have prohibited viewpoint discrimination by school officials.[279]

The *Boring* court's reliance on the Fifth Circuit's opinion in *Kirkland* as to the notice issue seems incorrect. In *Kirkland* there were clear guidelines established for the teacher to follow that he chose to ignore.[280] In contrast, Margaret Boring notified the principal of the name of the play (as she had done each year before without issue) and modified the play according to the principal's request before the performance of the play at the state competition.[281] Boring complied with all of the guidelines that the school administration asked her to follow. Yet, reasoning that "the plaintiff had no First Amendment right to participate in the makeup of the curriculum,"

276. *See Pratt*, 670 F.2d at 776-77 (ruling against a school board that decided to remove a particular film from the curriculum when the board believed that the students' religious and family values were threatened); *Keefe*, 418 F.2d at 361 (explaining that if a teacher's use of a "dirty" word for an educational purpose would shock high school seniors, "we would fear for their future.").

277. *See* James v. Board of Educ., 461 F.2d 566, 573 (2d Cir. 1972) (explaining that more than a decade of Supreme Court precedent "causes no doubt that we cannot countenance school authorities arbitrarily censuring a teacher's speech merely because they do not agree with the teacher's political philosophies or leanings"); Dean v. Timpson Indep. Sch. Dist., 486 F. Supp. 302, 308 (E.D. Tex. 1979) ("*Epperson* teaches that a particular subject or theory may not be forbidden in the classroom simply because it offends the dominant views or beliefs of a community." (citing Epperson v. Arkansas, 393 U.S. 97, 107-09 (1968))).

278. *See Dean*, 486 F. Supp. at 308.

279. *See, e.g.*, Searcey v. Harris, 888 F.2d 1314, 1325 (11th Cir. 1989) ("Although *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*, we do not believe it offers any justification for allowing educators to discriminate based on viewpoint.").

280. *See Kirkland*, 890 F.2d at 796.

281. *See Boring*, 136 F.3d at 375 (Motz, J., dissenting).

the en banc majority dismissed Boring's claim of lack of notice.[282]

The Fourth Circuit's analysis of teacher in-class speech in cases such as *Boring* could be improved by using a balancing test that considers the unique nature of a teacher's classroom speech, acknowledges the motivation behind the school board's actions, and includes the procedural concern of notice. To achieve these goals, a two-part test could be employed. First, courts could use a reasonableness test that would consider whether the teacher's speech violated a legitimate pedagogical concern of the school in light of the school board's motivation for its action against the teacher. The second part of the test would look to whether the teacher had adequate notice that such material was prohibited.[283] The first step would combine the legitimate pedagogical concerns analysis of *Hazelwood*[284] with the *Pico* Court's insistence that viewpoint discrimination not be allowed to chill protected speech,[285] while acknowledging a teacher's substantive right to academic freedom. The second step would address the procedural aspect of academic freedom and protect those teachers who, like Boring, complied with the rules established by the school administration but who were used by the administration as shields from public protest.

The implications for the First Amendment rights of secondary public school teachers in the Fourth Circuit after *Boring* appear grim. As Jeremiah Collins, attorney for Ms. Boring, pointed out, "a good teacher will almost always be engaged in instructional activities that someone may regard as controversial, thus leading to discipline after the fact without notice or any justification."[286] The decision appears to be grounded on faith in the local electoral process and a policy rationale that embraces local control of the schools to the exclusion of teachers' constitutional rights.[287] As the dissent in *Boring* noted, "the majority eliminates all constitutional protection for the in-class speech of teachers,"[288] thereby destroying any balance between school officials and the teachers who educate our youth as to the appropriate

282. *Id.* at 371 n.2.

283. *See* Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993); *see also* Board of Educ. v. Pico, 457 U.S. 853, 863-64 (1982) (acknowledging the "broad discretion" to be accorded to local school authorities over curriculum and balancing that discretion against teachers' and students' rights under the First Amendment).

284. *See supra* notes 140-52 and accompanying text.

285. *See supra* notes 162-68 and accompanying text.

286. Zirkel, *supra* note 250, at 792.

287. *See Boring*, 136 F.3d at 371; *see also id.* (Wilkinson, C.J., concurring); *id.* at 373-74 (Luttig, J., concurring).

288. *Id.* at 380 (Motz, J., dissenting).

values of a democratic society. Stifling controversy in the name of local control and majoritarian politics does not further this end.[289]

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289. *See* Zirkel, *supra* note 250, at 792 (explaining that several vocal members of the public attended the school board meeting, alleging that the play was obscene and that Boring was immoral). In *Stachura v. Truszkowski*, 763 F.2d 211 (6th Cir. 1985), *rev'd on other grounds sub nom. Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299 (1986), the court upheld a teacher's free speech rights when public protest caused school administrators to relinquish any responsibility for the teacher's choice of teaching methods and materials, even though those same officials had approved the materials before they were used. *See id.* at 213-15.