Florida A & M University Law Review

Volume 3 | Number 1 Article 4

Spring 2008

"Pick"ering the Speech Rights of Public School Teachers: Arguing for a Movement by Courts Toward the Hazelwood-Tinker Standard under the First Amendment

Heather Bennett

Follow this and additional works at: http://commons.law.famu.edu/famulawreview

Part of the Constitutional Law Commons, First Amendment Commons, and the Labor and Employment Law Commons

Recommended Citation

Heather Bennett, *"Pick"ering the Speech Rights of Public School Teachers: Arguing for a Movement by Courts Toward the Hazelwood-Tinker Standard under the First Amendment*, 3 Fla. A&M U. L. Rev. (2008).
Available at: http://commons.law.famu.edu/famulawreview/vol3/iss1/4

This Comment is brought to you for free and open access by Scholarly Commons @ FAMU Law. It has been accepted for inclusion in Florida A & M University Law Review by an authorized editor of Scholarly Commons @ FAMU Law. For more information, please contact linda.barrette@famu.edu.

"PICK"ERING THE SPEECH RIGHTS OF PUBLIC SCHOOL TEACHERS: ARGUING FOR A MOVEMENT BY COURTS TOWARD THE *HAZELWOOD-TINKER* STANDARD UNDER THE FIRST AMENDMENT

Heather Bennett

I. INTRODUCTION 42
II. BACKGROUND 44
 A. *The Supreme Court's Decisions in the Government Employee Cases of* Connick v. Myers *and* Pickering v. Board of Education of Township High School 44
 B. *Circuit Court Application of the* Pickering-Connick *Test Articulated by the Supreme Court in Cases Involving Speech of Public School Teachers* 47
 C. *Supreme Court Decisions Regarding Students' Freedom of Speech Rights in Public Schools, Some of Which Form the Basis of the* Hazelwood-Tinker *Test* .. 49
 D. *Circuit Court Application of the* Hazelwood-Tinker *Test Articulated by the Supreme Court in Cases Involving Speech of Public School Teachers* 53
III. ANALYSIS 55
 A. *The District Court Incorrectly Applied the* Pickering-Connick *Standard to Lee's Classroom Postings and Instead Should Have Employed the* Hazelwood-Tinker *Standard to This Type of Teacher Speech* 55
  i. A Forum Analysis on the Bulletin Boards in Lee's Case Under *Hazelwood* Should Find That Tabb High School Created a Designated Public Forum and Should Afford the Posted Materials First Amendment Protection 55
  ii. Once the School Created This Designated Public Forum for the Teachers' Bulletin Boards, It Cannot Remove Lee's Items Based on the Viewpoint They Conveyed 57
  iii. Under an Application of the *Tinker* Standard, Lee's Postings Did Not Materially or Substantially

Disrupt the Classroom Setting or Educational Mission of the School 59
B. *Even Under the* Pickering-Connick *Approach Lee's Speech is Still Protected Because It Was Not Curricular Speech and Instead Was Speech Touching on Matters of Public Concern* 61
i. Students Were Able to Voluntarily Accept or Reject the Content of Materials Posted on Lee's Bulletin Board, thus They Were Not Curricular in Nature 61
ii. The Materials on Lee's Bulletin Boards Touched upon Matters of Public Concern and Debate and Should Have Protection Under the First Amendment 63
IV. CONCLUSION 64

I. INTRODUCTION

The Supreme Court stated on various occasions that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[1] Yet, on February 23, 2006, the United States District Court for the Eastern District of Virginia held that a public school teacher had no First Amendment rights to postings he made on a bulletin board in his own classroom.[2] In that case, *Lee v. York County School Division*, a public high school teacher, William Lee, alleged that the school violated his free speech and equal protection rights when the principal removed religious materials from the walls of his classroom.[3] In reaching its conclusion that the school did not violate Lee's rights, the district court recognized the circuit-split as to what test should apply to a public school teacher's freedom of speech claim.[4] The court settled on an application of the *Pickering-*

1. Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967).

2. Lee v. York County Sch. Div., 418 F. Supp. 2d 816, 835 (E.D. Va. 2006).

3. *Id.* at 820.

4. *See id.* at 821 (recognizing the lines at which the circuits split as to what test to apply to the speech of public schools teachers and noting that the Third, Fourth, Fifth, and D.C. Circuits apply the *Pickering-Connick* standard, while the First, Second, Seventh, Eighth, and Tenth Circuits employ the *Hazelwood-Tinker* approach); *see also* Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 16 (discussing and analyzing the confusion among the circuits as to what test to apply to teacher's First Amendment speech in public school classrooms).

Connick standard,[5] set forth by the Supreme Court, and found that the postings of religious items by Lee on the bulletin board inside his classroom were curricular speech, and thus unprotected by the First Amendment.[6] The court went on to state that such postings did not express matters of public concern under this test and that the government did not create a limited public forum in placing bulletin boards on classroom walls of the high school.[7]

This Note argues two main points. First, the district court erred in applying the *Pickering-Connick* standard to Lee's classroom speech, and instead should have applied the *Hazelwood-Tinker* test articulated by the Supreme Court for freedom of speech claims within the setting of public schools.[8] Under the *Hazelwood-Tinker* approach, the school created a designated public forum when it placed bulletin boards inside teachers' classrooms and allowed the teachers to post things without prior approval, providing them with very few guidelines on what they could not post.[9] The removal of Lee's postings, due to its religious nature, constituted viewpoint discrimination in violation of the First Amendment right to freedom of speech once the school designated the bulletin boards as a public forum.[10] Second, even if the

---

5. *See Lee*, 418 F. Supp. 2d at 821-22 (articulating the *Pickering-Connick* test by stating that if an employee's speech relates to a matter of public concern under *Connick*, it is still not absolute). If found to be of public concern, the court must then balance the teacher's right as an employee in that speech against the State's interest as an employer in regulating it under the *Pickering* balancing test. *Id.*

6. *See Lee*, 418 F. Supp. 2d at 821-22 (announcing that the Fourth Circuit has adopted the *Pickering-Connick* approach and that Lee's case was a question about what free speech rights he has as a public school teacher-employee).

7. *See id.* at 828-831 (finding that even if Lee's postings do not constitute curricular speech, they do not touch on a matter of public concern because at his deposition, Lee stated that he posted the materials because they were interesting to him, and further that the school had not created a limited public forum because the principal stated there were a lot of things that would be inappropriate to post in a public classroom and that the school simply had not given its teachers freedom to express themselves in their classrooms in any way that they please).

8. *See infra* Part III.A.

9. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998).

10. *See, e.g., id.* at 682 (1998) (asserting that the exclusion of a speaker, even from a nonpublic forum, must be reasonable in light of the purpose of the property and not based on the speaker's viewpoint); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 832 (1995) (concluding that the University's denial of funds for the third party printers of a campus newspaper based on the paper's religious outlook was impermissible viewpoint discrimination); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 393 (1993) (condemning the exclusion of a group from using school facilities after hours because of their religious point of view as unconstitutional viewpoint discrimination); Sons of Confederate Veterans v. Glendening, 954 F. Supp. 1099, 1104 (D. Md. 1997) (finding that viewpoint discrimination, even if done with noble intentions and in light of public discontent with certain speech, is nonetheless unconstitutional in any forum).

Pickering-Connick standard applied by the court was the correct approach in analyzing Lee's speech, it incorrectly found this speech to be curricular in nature.

Consequently, the court should re-analyze the freedom of speech claim under public concern analysis.[11] It should have been clear to any reasonable member of the public that the school was not speaking through the teachers' postings on the bulletin boards. The court found in previous cases that when the school is speaking its own message through another individual, it has broader discretion to limit such speech.[12] Furthermore, Lee's postings were not a private grievance against his employer and they did not fall under any portion of the school's curriculum.[13] Under this test, the court should find that the First Amendment protects Lee's postings as non-curricular speech that was closer to touching on matters of public and not private concern.[14]

II. Background

A. *The Supreme Court's Decisions in the Government Employee Cases of* Connick v. Myers *and* Pickering v. Board of Education of Township High School

The test used by the district court in *Lee* is a combination of two tests first articulated by the Supreme Court in two separate cases dealing with government employees' freedom of speech claims. The first case decided by the Court was *Pickering v. Board of Township High School.*[15] In that case, the Board of Education dismissed Marvin Pickering, a teacher at Township High School, for sending a letter to a local newspaper regarding a recently proposed tax increase, which criticized the way the Board and superintendent handled past school revenue raising proposals.[16] The Supreme Court found that the Board violated Pickering's First Amendment rights and reversed the lower court's de-

11. *See infra* Part III.B.

12. *See, e.g.*, Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 367 (4th Cir. 1998) (affirming the judgment of the district court that a teacher's selection and production of a school-sponsored play as part of the school's curriculum was not protected speech under the First Amendment).

13. Connick v. Myers, 461 U.S. 138, 154 (1983) (characterizing Myers' questionnaire as an employee grievance concerning internal office policy and thus falling outside of First Amendment protection).

14. *Id.*

15. 391 U.S. 563 (1968).

16. *Pickering*, 391 U.S. at 564.

cision that affirmed his dismissal. The lower court found that the letter was detrimental to the school system's interests, and therefore overrode Pickering's First Amendment rights.[17] In reversing the lower court, the Supreme Court announced what has become known as the "*Pickering* Balancing Test."[18] The Court stated that "[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[19]

The Court went on to apply this balancing test to the critical statements in Pickering's letter.[20] The Court noted that Pickering wrote the letter after voters rejected a proposed tax increase at the polls, and therefore his letter had no effect on the ability of the school district to raise necessary revenues.[21] More importantly, the Court found that the issue of whether a school system needs additional funds is a matter of public concern.[22] The public interest in having free and open debate on matters of public importance such as this is of great weight and is the core of the Free Speech Clause of the First Amendment.[23] Thus, the Court held that in a case such as Pickering's, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.[24]

The second important case decided by the Supreme Court dealing with government employee speech, which followed *Pickering*, was

---

17. *Id.* at 565.

18. *E.g.*, Stroman v. Colleton County Sch. Dist., 981 F.2d 152, 157-58 (4th Cir. 1992) (applying the *Pickering* Balancing Test to complaints raised in an employee letter regarding school official's alleged mismanagement of the budget); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 800 (5th Cir. 1989) (analyzing the concept of academic freedom in the realm of controlling a school's curriculum and finding under the *Pickering* Balancing Test that a teacher does not speak out as a citizen when he offers a separate body of material for his world history class readings).

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

20. *Id.* at 569-574.

21. *See id.* at 571 (rejecting the Board's allegations that the publication of the letter damaged the professional reputations of the Board and the superintendent and instigated controversy and conflict among the Board, teachers, administrators, and the residents of the district).

22. *See id.* (determining that funding amounts for the schools must be open to free public debate in order to be decided on by an informed electorate).

23. *See id.* at 573 (demonstrating the great importance given to freedom of speech on matters of public concern by pointing to the Court's holdings that said a state cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when they are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth).

24. *Id.* at 574.

Connick v. Myers. Sheila Myers was an Assistant District Attorney in New Orleans who was informed that she would be transferred to prosecute cases in a different section of the criminal court.[25] Myers strongly opposed this transfer and spoke with her superiors in the office about her opposition, along with several other areas of the job that concerned her and her coworkers.[26] In response to a suggestion that others in the office did not share her concerns, she conducted some research on the matter and prepared a questionnaire soliciting the views of her fellow staff members concerning various work-related topics that she distributed to them the next day.[27] Among these topics were: the office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns.[28] After hearing about Myer's actions, Harry Connick, the District Attorney, returned to the office and informed Myers that she was being terminated because of her refusal to accept the transfer and that he considered her distribution of the questionnaire an act of insubordination.[29] Myers filed suit contending that Connick wrongfully terminated her employment because she exercised her constitutionally protected right of free speech.[30]

After a review of the First Amendment jurisprudence that governed claims similar to Myers', the Court narrowly held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . a federal court is not the appropriate forum . . . to review . . . a personnel decision . . . by a public agency allegedly in reaction to the employee's behavior."[31] The Court distinguished this case from *Pickering* because Myers, unlike Pickering, exercised her rights to speech at the office, which supports Connick's fears that the functioning of his office was in danger.[32] Furthermore, the context of this dispute was important because this was not a case where an employee, out of purely academic interest, circulated a questionnaire to obtain useful research.[33] Myers circulated her questionnaire in response to Connick's decision in transferring her to another department.[34] The Court recognized this as

25. Connick v. Myers, 461 U.S. 138, 140 (1983).
26. *Id.*
27. *Id.* at 141.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 147.
32. *Id.* at 153.
33. *Id.*
34. *Id.*

employee speech concerning office policy arising from an application of that policy to the speaker, and so it gave more deference to the supervisor's view that the employee threatened the authority of the employer to run the office.[35] The Court concluded that "Myers' questionnaire touched upon matters of public concern in only a most limited sense" and was most accurately characterized as "an employee grievance concerning internal office policy."[36] Given the nature of the questionnaire, the First Amendment did not require Connick to tolerate actions which he reasonably thought would disrupt the office, emasculate his authority, and devastate close working relationships.[37] Concluding that Myers' speech resulted from a private grievance and not of public concern, the balance shifted towards the government in this case and the Court found no valid First Amendment claim to the protection of the speech at issue.[38]

B. Circuit Court Application of the Pickering-Connick *Test Articulated by the Supreme Court in Cases Involving Speech of Public School Teachers*

There have been numerous cases before the circuit courts dealing with the First Amendment rights of teachers in a public school setting, and some of the circuits chose to apply the *Pickering-Connick* test for government employee speech. In one case before the Fifth Circuit Court of Appeals, Timothy Kirkland served as a probationary history teacher for two academic years.[39] The administration at the high school declined to renew Kirkland's employment contract for another academic year in reaction to his "use of a nonapproved reading list in his world history class, poor supervision of a special-discipline class, substandard teaching evaluations, and poor interactions with parents, students, and fellow teachers."[40] Kirkland claimed that the school district dismissed him in order to censor the contents of his supplemental reading list.[41] The school district contended that the First Amendment did not apply to this type of dispute.[42]

35. *Id.*

36. *Id.* at 154.

37. *Id.*

38. *Id.*

39. Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 795 (5th Cir. 1989).

40. *Id.* at 795-96.

41. *Id.* at 796.

42. *Id.* at 797.

The court of appeals began by laying out the *Pickering-Connick* test, stating that if an employee's speech relates to a matter of public concern under *Connick*, it is still not absolute.[43] If found to be of public concern, the court must then balance the teacher's right as an employee in that speech against the State's interest as an employer in regulating it under *Pickering*.[44] The Court went on to dismiss Kirkland's claim with little difficulty, finding that his use of a separate reading list for world history was not a matter of public concern and that the doctrine of academic freedom never conferred upon teachers the control of public school curricula.[45]

One case decided in the Fourth Circuit Court of Appeals, *Stroman v. Colleton County School District*, held that the First Amendment did not protect a public school teacher's letter that was written and circulated to fellow teachers, which complained about a change in the method for paying teachers, criticized the school district for budgetary mismanagement, and encouraged his fellow teachers to engage in a "sick-out" during the week of final exams.[46] The court determined that the appropriate method to analyze whether the First Amendment protected the letter was to consider the letter in its entirety as a single expression of speech.[47]

The court of appeals concluded that a personal grievance prompted the letter, which Stroman wrote in response to a change in the practice of paying teachers over the summer, and that he seemed to limit the substance of the letter to that grievance.[48] Even though the court found that through some statements Stroman spoke as a citizen concerned with the Board's budgetary mismanagement, it decided to apply the approach in *Connick* and use the *Pickering Balancing Test* to

43. *See* Connick v. Myers, 461 U.S. 138, 147-48 (1983) (suggesting that courts analyze an employee's speech for matters of public concern by the content, form, and context of a given statement, as revealed by the whole record).

44. *See* Rankin v. McPherson, 483 U.S. 378, 388 (1987) (indicating that federal courts should focus upon the manner, time, and place of the employer's expression, as well as the context in which the dispute arose); Pickering v. Bd. of Educ. of Township High School, 391 U.S. 563, 568 (1968) (asserting that the state has interests as an employer in regulating the speech of its employees that differ considerably from those it possesses in relation to regulation of speech of the general public).

45. *Kirkland*, 890 F.2d at 800 (reiterating the lack of First Amendment protection for Kirkland's use of a separate reading list because he did not speak out as a citizen when he offered the separate body of material for his world history class).

46. *See* 981 F.2d 152, 159 (4th Cir. 1992) (holding that any protected speech in the letter was not a significant factor in Stroman's termination and thus he has no First Amendment claim that his rights were violated).

47. *Id.* at 157 (rejecting the district court's decision to divide Stroman's letter into discrete components to conduct a constitutional analysis on each).

48. *Id.*

see if the employee's interest in these statements outweighed the interests of the state as a provider of public services.[49] The court found that in providing public education, the State reasonably expects to enter into employer-employee relationships with teachers that permit it to ensure delivery of the service in a manner that best assists the students and the community.[50] In this case, the Board could reasonably censor Stroman's speech in light of the fact that his letter might cause strain and disruption on the employment relationships needed to ensure the value of the students' public education.[51]

C. *Supreme Court Decisions Regarding Students' Freedom of Speech Rights in Public Schools, Some of Which Form the Basis of the* Hazelwood-Tinker *Test*

The alternative test used by some other circuits in determining whether the First Amendment protects the speech of public school teachers is the *Hazelwood-Tinker* test, articulated by the Supreme Court in a string of cases dealing with the free speech rights of students attending public education institutions.[52] In the first of these student speech cases decided by the Court, *Tinker v. Des Moines Independent Community School District*, three students came to school wearing plain black armbands to show their opposition to the Vietnam War.[53] As a result, the school sent them home on suspension until they returned without their armbands.[54] In a famous opinion delivered by Justice Fortas, the Court stated that "it can hardly be argued that either students or teachers shed their constitutional rights to free-

49. *Id.* at 158.

50. *Id.* at 159 (acknowledging the school district's adoption of regulations that require teachers to remain professional in their relationships with students and to impose on teachers the duty of student supervision, permitting two days of sick leave per year, however prohibiting such leave during semester and yearly exam periods).

51. *Id.* (finding that Stroman's letter was not protected speech under a balancing test because providing a public education is one of the most important services a state provides its citizens and he practiced flawed judgment in calling for a "sick-out" during exams, which would certainly frustrate provision of the very service he is employed to provide).

52. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that educators do not offend the First Amendment by exercising editorial power 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); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 740 (1969) (finding that students' conduct, by wearing black armbands to protest the war, was closely akin to pure speech which was entitled to First Amendment protection absent facts that might reasonably have led school officials to forecast substantial disruption or material interference with school activities).

53. *Tinker*, 393 U.S. at 504.

54. *Id.*

dom of speech or expression at the schoolhouse gate."[55] The Court determined that students, as well as teachers, could express opinions, even on controversial subjects, if done without "materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others."[56] The Court then concluded that the silent and passive protest by the three students in wearing black armbands in opposition to the controversial war in Vietnam did not "substantially or materially" disrupt teachings in the classroom or order in the school, and therefore the First Amendment protected their speech.[57] Furthermore, the passive and non-disruptive expression of a political viewpoint was speech that did not intrude upon the rights of the other students.[58]

The cases that followed *Tinker* showed that the Court had merely set the ceiling to First Amendment protections within public schools; the Court lowered this ceiling in each of its following cases—beginning with *Hazelwood School District v. Kuhlmeier*.[59] In *Hazelwood*, a high school principal objected to two articles scheduled for publication in the school newspaper, which was written and edited by the school's journalism class as part of the curricula.[60] He directed the supervising teacher to withhold the two pages containing these articles from publication, which consequently also withheld publication on four additional articles.[61] The articles the principal objected to appearing in the paper addressed issues concerning three Hazelwood students' experiences with pregnancy and the impact of divorce on students at the school.[62] The Supreme Court held that school facilities were public forums "only if school officials by policy or practice opened those facilities for indiscriminate use by the general public."[63] The government

55. *Id.* at 506.

56. *Id.* at 513.

57. *Id.* at 514.

58. *See id.* at 508 (asserting that the actions taken by the students in wearing black armbands was not aggressive, disruptive or a group demonstration, but instead fell under the primary First Amendment rights akin to "pure speech"). *But see* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (referring to the sexual innuendos in a student's election speech at a school assembly as being plainly offensive to both teachers and students, who were required to attend the assembly or report to study hall).

59. *See, e.g.*, JAMIN B. RASKIN, WE THE STUDENTS: SUPREME COURT CASES FOR AND ABOUT STUDENTS 27 (2d ed., CQ Press 2003) (articulating the principles set forth by the Supreme Court in *Tinker* dealing with students' free speech rights in public schools and how *Hazelwood* sharply limited them in the area of expression within school-sponsored speech activities).

60. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 263-64 (1988).

61. *Id.*

62. *Id.* at 263.

63. *Id.* at 267.

does not create a public forum through inaction, but only by intentionally opening a nontraditional forum for public use.[64] The Court found that because the paper was part of the journalism class curriculum, the school reserved the forum for its intended purpose of providing a supervised learning experience for the journalism students.[65] Thus, the Court determined 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 reasonably relate to legitimate pedagogical concerns.[66] This case limited the standard set forth in *Tinker* and gave more deference to school officials to censor student speech if it is inconsistent with the educational mission and especially in cases of school-sponsored speech, such as the student newspaper.

Another case decided by the Supreme Court after *Tinker* and sometimes cited by courts when analyzing student free speech rights in school is *Bethel School District No. 403 v. Fraser*.[67] Matthew Fraser, a student at Bethel High School, delivered a speech nominating a fellow student for student elective office, during which he referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.[68] Approximately 600 high school students, many of whom were fourteen-year olds, attended the assembly.[69] Students were required to attend the assembly or to report to study hall and the assembly was part of a school-sponsored educational program in self-government.[70] In reversing the Ninth Circuit Court of Appeals, the Supreme Court found that it was a highly appropriate function of public schools to protect minor students by prohibiting the use of vulgar and offensive terms in public discourse.[71] The Court held that the First Amendment did not protect the pervasive sexual innuendo in Fraser's speech, which was plainly offensive to both teachers and students.[72]

The most recent Supreme Court decision limiting students' freedom of speech rights was in *Morse v. Frederick*.[73] High school principal

---

64. *Id.*

65. *Id.* at 270.

66. *Id.* at 273 (articulating the new standard governing student speech in school-sponsored activities and significantly limiting the *Tinker* standard previously applied).

67. 478 U.S. 675 (1986).

68. *Id.* at 677.

69. *Id.*

70. *Id.*

71. *Id.* at 683.

72. *Id.*

73. 127 S. Ct. 2618 (2007).

Deborah Morse decided to permit staff and students to participate in the Olympic Torch Relay, which was scheduled to pass in front of the school, as an approved social event or class trip.[74] Students were allowed to leave class to observe the relay from either side of the street; teachers and administrative officials monitored the students' actions.[75] As the torchbearers and camera crews passed by the school, senior Joseph Frederick and his friends unfurled a fourteen-foot banner bearing the phrase: "BONG HiTS 4 JESUS."[76] Morse demanded the banner be taken down.[77] When Frederick did not comply, she confiscated the banner and suspended Frederick from school for ten days.[78] Morse later explained that she told Frederick to take down the banner because she thought it encouraged illegal drug use, in violation of established school policy.[79]

The Supreme Court, reversing the Ninth Circuit decision, found that Principal Morse's determination that the banner would be interpreted by those viewing it as promoting illegal drug use was clearly a reasonable one.[80] After concluding that the phrase on the banner promoted illegal drug use, the Court moved on to decide the narrow question of whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.[81] Following a discussion of *Tinker, Hazelwood,* and *Fraser*, the Court determined that deterring drug use by school children is an "important—indeed, perhaps compelling" interest, and that Congress had in fact declared that part of a school's job was to educate students about the dangers of illegal drug use.[82] Thus, the Court held that the "special circumstances of the school environment" and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including the one in the present case—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.[83]

---

74. *Id.* at 2622.
75. Id.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 2622-23.
80. *Id.* at 2624.
81. *Id.* at 2625.
82. *Id.* at 2628.
83. *Id.* at 2629.

D. *Circuit Court Application of the* Hazelwood-Tinker *Test Articulated by the Supreme Court in Cases Involving Speech of Public School Teachers*

The Ninth Circuit chose to apply the forum analysis of the *Hazelwood-Tinker* Test to strike down a public high school teacher's claim that the school violated his First Amendment rights by asking him to remove, and then proceeding to remove, competing material that he posted in response to materials placed on bulletin boards set up by the school staff members for the purpose of recognizing Gay and Lesbian Awareness Month.[84] In that case, a teacher at the school, Robert Downs, objected to the recognition of Gay and Lesbian Awareness Month and created his own bulletin board in opposition across the hall from his classroom entitled "Redefining the Family."[85] Principal Olmstead informed Downs prior to removal of the items that he planned take them down because the items had nothing to do with school work, student work, or Board-approved information.[86] The Ninth Circuit Court of Appeals concluded that the bulletin boards contained only "government speech," and so Downs had no First Amendment right to dictate or contribute to the content of that speech.[87] The court found that the speech on the bulletin boards in the school's hallways was directly traceable to the school and was the school speaking for itself, not opening up a forum for public discussion.[88] The court concluded that the school district might formulate that message without the constraint of viewpoint neutrality and thus the principles of *Hazelwood* did not apply in this situation. The court made this conclusion by finding that the school district spoke through the bulletin boards that were not free speech zones, but instead were vehicles for conveying a mes-

84. *See* Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1005 (9th Cir. 2000) (concluding that because the bulletin boards were a manifestation of the school board's policy to promote tolerance, all speech that occurred on the bulletin boards was the school board's and school's speech and not an affirmative action to open up a forum for public discussion).

85. *Id.* at 1006 (noting the materials posted by Downs, including a portion of the Declaration of Independence, newspaper articles, various school district memoranda, and four separate excerpts about the immorality of homosexuality according to society and the Bible, the passage of anti-sodomy laws, and discussion on correct anatomical sexuality).

86. *Id.* at 1008.

87. *See id.* at 1009 (determining that the school district did not act unconstitutionally in removing Downs's materials or in ordering that the materials be removed).

88. *See id.* at 1012 (discussing the fact that the school district—by issuing Memorandum No. 111 that provided posters and materials in support of Gay and Lesbian Awareness Month—and the school—by setting up the Gay and Lesbian Awareness bulletin boards—spoke to use the bulletin boards as vehicles for their policy of "Educating for Diversity").

sage from the school district in a nonpublic forum.[89] Additionally, the court found that the items posted by Downs were directly contrary to the school's goal of promoting diversity and that the items were offensive, upsetting, and disrespectful, and thus could be disruptive to the school's educational goals.[90]

In another case in the Second Circuit Court of Appeals, *Silano v. Sag Harbor Union Free School District Board of Education*, Silano, a member of the Board and a retired filmmaker, volunteered to lecture at three high school math classes.[91] He brought various film clips that would illustrate the "persistence of vision" phenomenon, one of which, the "Birth Scene," portrayed two women and one man naked from the waist up.[92] A school principal who was present at the first lecture requested that he finish the lectures without the Birth Scene clip, with which he complied.[93] The superintendent of schools, upon hearing about the first lecture, admonished Mr. Silano's bad judgment in choosing the clips and banned him from visiting any of the Sag Harbor schools during school hours for the remainder of the academic year.[94] The court concluded that the *Hazelwood* analysis applied because Silano's lecture took place in a traditional classroom setting and he designed it to impart particular knowledge to the student participants.[95] The court found that the school officials had a legitimate pedagogical purpose in restricting the display of images of bare-chested women to a tenth-grade class, especially given the fact that the disputed clip was entirely unnecessary to the lecture.[96]

The court distinguished the clip in this case, as being part of the curriculum, from the library books that the court did not allow school officials to censor in *Pico*, because library resources are something that students may voluntarily view at their leisure, whereas curriculum

89. *See id.* at 1011 (asserting that the school board's actions in this case were not subjected to viewpoint neutrality under *Hazelwood* because this is a case of the government itself speaking).

90. *See id.* at 1007 (acknowledging various complaints by faculty members over a two-year period about the objectionable and derogatory materials posted by Downs).

91. Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 721 (2d Cir. 1994).

92. *See id.* (describing the clips Silano brought to supplement his lecture as being a variety of static and frenetic frames that would illustrate the persistence of vision phenomenon).

93. *See id.* (pointing out the fact that removal of the Birth Scene clip did not affect Silano's two remaining lectures in their message and content relating to the relevant subject matter).

94. Id.

95. *Id.* at 723.

96. Id.

consists of required material for students.[97] In the *Silano* case, the students were required to attend math class, their teacher was present, and the purpose was to impart knowledge of how filmmaking relates to the class material, thus the lectures were analogous to curriculum.[98] Similarly, the First Circuit Court of Appeals found a teacher's discussion of aborting Down's syndrome fetuses during a class instructional period to be part of the curriculum and regular class activity, and thus it was subject to reasonable regulations that related to legitimate pedagogical needs, such as sensitive age and maturity of the listeners.[99]

III. Analysis

A. *The District Court Incorrectly Applied the* Pickering-Connick *Standard to Lee's Classroom Postings and Instead Should Have Employed the* Hazelwood-Tinker *Standard to This Type of Teacher Speech*

i. A Forum Analysis on the Bulletin Boards in Lee's Case Under *Hazelwood* Should Find That Tabb High School Created a Designated Public Forum and Should Afford the Posted Materials First Amendment Protection

The government creates designated public fora only by purposeful governmental action.[100] Tabb High School could not create a designated public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for general open access.[101] One circuit court previously found that the classroom is not a traditional public forum and so a teacher's statements in class during an instructional period are part of the regular class activities, and as such are subject to reasonable speech regula-

97. *Id.* at 723; *see* Bd. of Educ. v. Pico, 457 U.S. 853, 871-72 (1982) (holding that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion").

98. Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723 (2d Cir. 1994).

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

100. *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998) (describing the three categories of fora for freedom of speech claims under the First Amendment as being traditional public fora, designated public fora, and nonpublic fora).

101. *See id.* (explaining how the government can create a designated public forum from something that is normally not considered a traditional public forum).

tion.[102] However, the bulletin boards in Lee's case are much more akin to the library books in *Pico*, and not a teacher's statements in class, because the students who entered Lee's Spanish classroom had every right to walk by the bulletin board without looking at the postings.[103] Just as easily as the students in *Pico* could walk away from the library resources, so can students in Lee's classes walk away from his bulletin board and choose not to engage in reading the materials.[104]

Lee stated that he thought the students would find the postings about the missionary who studied Spanish interesting and helpful in applying what they learned to real world situations.[105] Nevertheless, the court misconstrues how Lee used these postings in the classroom by finding that they imparted knowledge on the students. Instead, the postings are more correctly characterized as having the ability to impart knowledge, just as books in a library, but the students still had every opportunity to choose not to partake of that knowledge in both cases. Thus, it follows that here, too, the court should not allow the school to remove the postings from Lee's bulletin boards simply because someone dislikes the ideas contained in them.[106] It appears that Lee posted the materials for the students to look to for inspiration on how Spanish could be useful to their futures; be that as it may, the facts never suggested that Lee used the postings or materials as aides during his lectures.[107] Furthermore, Lee did not make the students read the postings for class or force them to listen to him read them,

---

102. *See Ward*, 996 F.2d at 453 (applying the forum analysis used in *Hazelwood* to find the classroom in which a teacher speaks analogous to the school newspaper in *Hazelwood* and thus a nonpublic forum that is subject to speech regulation related to legitimate pedagogical needs).

103. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 869 (1982) (announcing that a school board has less discretion when it reaches beyond compulsory environments found within classrooms into the school library and the voluntary inquiry that takes place there); *Ward*, 996 F.2d at 453 (describing a teacher's statements made during an instructional period in class as curricular speech and thus part of the compulsory environment of a classroom).

104. Id.

105. *See, e.g.*, Lee v. York County Sch. Div., 418 F. Supp. 2d 816, 826 (E.D. Va. 2006) (indicating that Lee specifically sought materials that engaged the students' interest and that connected Spanish to their futures).

106. *See Pico*, 457 U.S. at 872 (condemning the school board for removing library books with disfavorable ideas in order to prescribe what shall be considered orthodox in politics, nationalism, religion, or other matters of opinion).

107. *See generally Lee*, 418 F. Supp. 2d at 826 (suggesting that Lee sought materials to inspire his students to learn Spanish by demonstrating that acquiring a foreign language skill can be useful to the students' futures).

unlike the students forced to see the Birth Scene slide in their math class in *Silano*.[108]

Moreover, Tabb High School created a designated public forum when it placed bulletin boards in teachers' classrooms, which could be used as an area where teachers could post materials and items of interest without prior approval of the principal and with very wide discretion, so long as the materials were not obscene, vulgar, or opposed to the school's educational mission.[109] These bulletin boards differed from those found to be nonpublic fora in *Downs* because the boards in Lee's case were in each teacher's individual classroom, not the hallways of the school, and could easily be recognized as portraying the teacher's speech and not that of the school itself. Additionally, the bulletin boards in Lee's case were more open for individuals' interests and not as a vehicle for some purpose announced by the school or Board, unlike the bulletin boards placed in the halls in *Downs* for the Gay and Lesbian Awareness Month.[110]

ii. Once the School Created This Designated Public Forum for the Teachers' Bulletin Boards, It Cannot Remove Lee's Items Based on the Viewpoint They Conveyed

Courts presume state action that discriminates against speech because of its message to be unconstitutional.[111] No matter what forum the court finds, to be consistent with the First Amendment, the government cannot base the exclusion of a speaker on the speaker's viewpoint and the exclusion itself must otherwise be reasonable in light of the purpose of the property.[112] In Lee's case, the school did not remove his postings because of their subject matter dealing with occupations involving application of the Spanish language, but instead

108. *See* Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723 (2d Cir. 1994) (pointing out the involuntary nature of the material in Silano's lectures because the students were required to attend math class where his lecture was given to impart knowledge on them relating to the subject matter).

109. *See Lee*, 418 F. Supp. 2d at 831 (conceding that Principal Zanca gave his teachers discretion without requiring prior approval on what to post in their classroom because he believed that teachers understood what probably should and should not be posted in the classrooms).

110. *See* Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1012 (9th Cir. 2000) (deciding that because the bulletin boards were a manifestation of the school board's policy to promote tolerance, and because the school's principals had final authority over the content of the bulletin boards, all speech that occurred on the bulletin boards was the school board's speech and not that of individual teachers).

111. *See* Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 641-43 (1994).

112. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

focused on the religious viewpoint taken by Lee to convey this message.[113] Courts have found that when the government targets speech because of the view it takes, there is a blatant violation of the First Amendment rights of the speaker.[114]

Supreme Court cases on this subject are on point and extremely persuasive in Lee's case. In *Lamb's Chapel v. Center Moriches Union Free School District*, a school district opened school facilities for use during after school hours by community groups for a wide variety of social, civic, and recreational purposes.[115] The school district in *Lamb's Chapel* subsequently rejected a request from a group desiring to show a film series addressing questions about rearing children from a Christian perspective, analogous to Principal Zanca's removal of Lee's postings that exhibited Christian ideas.[116] The Court's unanimous decision in *Lamb's Chapel*, which stated that the school district discriminated on the basis of viewpoint because it did not reject all presentations of views on family issues and child rearing, but only those from a religious standpoint, should be applied to Lee's case.[117] In applying this standard, the court should find viewpoint-based discrimination in the fact that the school allowed articles on world travel and future job opportunities, but removed only those including Christian perspectives.[118] Since the Court found viewpoint discrimination based on religious perspectives in *Lamb's Chapel*, and in denying Wide Awake Productions funding for private printing costs in *Rosenberg v. UVA* because the paper avowed religious outlooks, the court should also find Principal's Zanca's actions in removing Lee's postings from his classroom bulletin board, because of their Christian point of view, unconstitutional.[119]

Additionally, even as was the case in *Sons of Confederate Veterans v. Glendening*, the strongest argument for Principal Zanca's actions constituting impermissible viewpoint discrimination is the

---

113. *See Lee*, 418 F. Supp. 2d at 820.

114. *See, e.g.*, R. A. V. v. St. Paul, 505 U.S. 377, 391 (1992) (finding the ordinance to be facially unconstitutional because it prohibited otherwise permissible speech solely on the basis of the disfavored views is expressed on sensitive subjects, such as race and religion).

115. 508 U.S. 384, 391 (1993).

116. *See id.* at 393 (indicating no evidence in the record that the school denied the facilities for any reason other than the fact that the presentation would have been from a religious perspective).

117. *See id.* (finding this blatant viewpoint discrimination unconstitutional even in the case of a nonpublic forum created by the school district).

118. *Lee*, 418 F. Supp. 2d at 820.

119. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 832 (1995); *Lamb's Chapel*, 508 U.S. at 393.

timing in which they occurred.[120] Just as the Motor Vehicle Administration ("MVA") had no opposition to the use of the Confederate Flag on license plates in the beginning, Principal Zanca did not initially object to any of Lee's postings.[121] In fact, Principal Zanca only entered Lee's classroom to review his materials and remove those that contained religious points of view after an individual complained to him about the religiosity of some of the materials.[122] The district court in *Sons of Confederate Veterans* found that revoking the use of the Confederate Flag only after a public firestorm erupted constituted clear viewpoint-based discrimination.[123] The court concluded that no matter how noble the MVA's intentions were to restrict the use of the Confederate flag on license plates, "public intolerance or animosity cannot be the basis for abridgement of constitutional freedoms."[124] In the same fashion, Principal Zanca's intentions in removing Lee's postings likely were noble and aimed to please the individual complaining about them. However, Principal Zanca's intentions to avoid the discontent of others do not justify restricting Lee's speech solely because of the religious viewpoint it espoused. In fact, the very purpose of the First Amendment is to protect the "expression of unpopular sentiments from governmental reprisals or censorship."[125]

iii. Under an Application of the *Tinker* Standard, Lee's Postings Did Not Materially or Substantially Disrupt the Classroom Setting or Educational Mission of the School

The postings by Lee on his classroom bulletin board were much more akin to the black armbands worn by the students in *Tinker* than the vulgar speech given by a student at an election assembly in

120. 954 F. Supp. 1099, 1100 (D. Md. 1997).

121. *See Lee*, 418 F. Supp. 2d at 819 (describing Tabb High School's policy as having a "custom and practice of allowing instructors to post upon the walls and bulletin boards of their assigned classrooms pictures and printed and illustrated materials that are consistent with the educational mission of the school"); *Sons of Confederate Veterans*, 954 F. Supp. . at 1104 (recognizing that the MVA voiced no opposition to the Confederate battle flag on the license plates until after the public firestorm erupted).

122. *Lee*, 418 F. Supp. 2d at 820.

123. Sons of Confederate Veterans, 954 F. Supp. at 1104.

124. *Id.*

125. *E.g., id.* (acknowledging the irony of history in the case, which shows that the struggle for freedom that opponents of the Confederacy fought for and won during the Civil War that lead to the Fourteenth Amendment, is the very vehicle that protects those who wish to preserve the history of the Confederacy from state censorship of their license plates in this matter).

Bethel.[126] As noted above, Lee's students could pass by his bulletin boards, averting their attention elsewhere, just as the Court found that the other students in *Tinker* could walk away from those wearing armbands and pay them no mind.[127] Lee wanted to get the students' attention and engage them just as the protesters did in *Tinker*, where the Court found that this did not impede on others' rights so long as the students had the option of whether to allow such actions to affect them.[128] Lee, just as the protesters in *Tinker*, gave his students the option of whether or not they wanted to pay attention to his postings and use them to supplement their application of learning Spanish to their futures in the real world and did not force such matters onto them.[129] Accordingly, in this aspect, it should be clear that Lee's postings impeded on his students' rights only as much as the protest in *Tinker* invaded the rights of other students in that instance.

Moreover, it is evident that Lee's postings on his classroom bulletin board did not reach near the level of Fraser's speech at an assembly that all of the students were required to attend and hear.[130] This argument is made stronger by the fact that one individual complained to the principal about Lee's religiously-oriented materials, whereas in *Bethel*, one factor in the Court finding a substantial and material disruption was the fact that multiple students hooted and yelled during the speech, made graphic gestures insinuating sexual activities, and one teacher even had to take class time the following day in order to discuss the speech with her students.[131]

126. *Compare* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1985) and Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 514 (1969) with *Lee*.

127. *See, e.g.*, *Tinker*, 393 U.S. at 514 (acknowledging that the protesting students wore their armbands to exhibit their disapproval of the Vietnam hostilities and their support of an armistice, to make their views known and not to influence others to espouse them).

128. *See id.* (determining that the wearing of armbands by a few students neither interrupted school activities nor sought to intrude in the school affairs or the lives of others); *Lee*, 418 F. Supp. 2d at 826 (asserting that Lee specifically sought materials that engaged the kids and inspired them to learn Spanish by demonstrating that acquiring a foreign language skill could be useful to them in the future).

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

130. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1985) (noting that 600 high school students, many of them fourteen-year olds, were required to attend the school-sponsored assembly or to report to the study hall).

131. *See id.* at 679 (referring to the Assistant Principal's meeting with Fraser about the assembly speech the following morning, where he presented him with copies of five letters submitted by teachers describing his conduct at the assembly as being in violation of the rule prohibiting the use of obscene language in the school); *Lee*, 418 F. Supp. 2d at 820 (describing the Principal's decision to remove materials in Lee's classroom that he believed to be violative of the Establishment Clause after an individual complained of their religiously-oriented nature while Lee was on sick leave from his teaching duties).

Finally, the most recent Supreme Court decision on First Amendment rights of students to free speech in public schools, *Morse v. Frederick*, does not alter this author's conclusion that Lee's postings were of the type that constitutional guarantees should protect.[132] The holding in that case rested on extremely narrow rationale, that schools may take steps to safeguard those in their care from speech that can reasonably be interpreted as encouraging illegal drug use.[133] Clearly, no one could interpret Lee's postings on his class bulletin board as encouraging illegal drug use of any kind. In addition, there was no school policy at Tabb High School against the postings made by Lee on the bulletin board, as there was in *Morse* against expressions advocating drug use. In fact, at Tabb High School, there was a "policy, custom and practice of allowing instructors to post upon the walls and bulletin boards of their assigned classrooms . . . materials that are consistent with the educational mission of the school . . . or that are consistent with the mission and/or vision of the approved club of which [the teacher is] the faculty sponsor."[134]

The school should have allowed Lee's postings under this rationale, because he was the faculty sponsor of First Priority, a praise and worship group of young Christian students.[135] With this policy in mind, it is obvious that Lee's postings, which were religious in nature, were not against stated school policy, as was the banner in *Morse* that the Supreme Court held was not protected by the First Amendment. Thus, under the *Tinker* line of student speech decisions in public schools, including the recent Court decision in *Morse v. Frederick*, Tabb High School should allow Lee's postings to remain on his bulletin board because they are speech protected by the First Amendment.

B. *Even Under the* Pickering-Connick *Approach Lee's Speech is Still Protected Because It Was Not Curricular Speech and Instead Was Speech Touching on Matters of Public Concern*

i. Students Were Able to Voluntarily Accept or Reject the Content of Materials Posted on Lee's Bulletin Board, thus They Were Not Curricular in Nature

The Fourth Circuit created a simplified approach for applying the *Pickering-Connick* standard in the context of a public school

132. *See* 127 S. Ct. 2618 (2007).

133. *See id.* at 2622.

134. *Lee*, 418 F. Supp. 2d at 819-20.

135. *See id.* at 819 n.2.

teacher's speech by holding that curricular speech does not touch on a matter of public concern, and as a consequence the First Amendment provides it no protection.[136] In conducting an analysis of Lee's postings under this standard, the court should find that these materials did not constitute curricular speech and instead were examples of Lee speaking on matters of public concern, including religion, travel, politics, and job opportunities, connected to a foreign language skill. The district court found evidence that Lee provided that the materials he posted *could* be used for instructive purposes; notwithstanding this concession, the court never points to examples of Lee actually using these materials in his classroom lessons.[137]

Lee's postings of illustrative materials on the bulletin boards inside his classroom were much more like the library books the school could not remove because of their content in *Pico*, and not the textbooks chosen for use in the classrooms in *Chiras* or the content of the materials used during the lecture in *Silano*.[138] Since it can be said that Lee could use his postings to impart knowledge, it is my contention that one could also state that the teachers in *Pico* use the library resources to impart knowledge and instruct students on curricular matters.[139] The district court should find that Lee's postings, like the library resources in *Pico*, are something that students may voluntarily view at their leisure, unlike curriculum materials required for instructing students in class.[140] The district court can additionally

136. *See* Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 368 (4th Cir. 1998) (finding that a drama teacher's transfer for producing a student play that dealt with divorce, dysfunctional families, lesbianism, and illegitimate children reasonable because the play was part of the school's curriculum and the school, not the teacher, had the right to fix the curriculum).

137. *See Lee*, 418 F. Supp. 2d at 825-26 (proffering that Lee could readily use the materials he posted as part of his methodology of instruction and to instruct students on curricular matters).

138. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 869 (1982) (finding that library resources are not included in the definition of curricular speech and thus are protected against censorship under the First Amendment); Chiras v. Miller, 432 F.3d 606, 618 (5th Cir. 2005) (concluding that the school board's selection and use of textbooks in public school classrooms is government speech and not a forum for First Amendment purposes and so a textbook author has no claim of right to access it); Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723 (2d Cir. 1994) (finding the depiction of bare-chested women completely unnecessary to Silano's lecture to a tenth grade mathematics class).

139. *See, e.g.*, Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967) (observing that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding").

140. *See Pico*, 457 U.S. at 869 (according great weight in the analysis to the nature of voluntariness inherent in school libraries and that their selection of books is entirely a matter of free choice and the opportunity from them for self-education and individual enrichment is completely optional).

distinguish Lee's materials from the textbooks chosen for use in class instruction in *Chiras* and the content of Silano's lecture during the math classes, all of which the students had to use or listen to, under the same rationale.[141]

ii. The Materials on Lee's Bulletin Boards Touched upon Matters of Public Concern and Debate and Should Have Protection Under the First Amendment

Courts often determine whether speech "fairly relates to a public concern or expresses a private grievance or a matter of immediate self-interest by the content, the form, and the context of the speech."[142] The district court incorrectly identified Lee's materials as pertaining only to matters of his own personal interest.[143] However, my belief is this directly conflicts with the court's previous conclusion that Lee posted the materials to facilitate instruction and impart knowledge.[144] The court should instead find the true resolution of Lee's interest to be in posting ideas for public school children to use, if they so choose, to help connect what they learn in Spanish class to what they may choose to do in the future. This, it seems, is in the very nature of public concern in shaping the nation's future through educating its youth. Just as the Supreme Court stated in *Keyishian*, "[t]he Nation's future depends upon leaders trained through wide exposure to . . . robust exchange of ideas . . . ."[145] Accordingly, Lee's postings are much more akin to the criticism of the Board in *Pickering* because they also touch on matters of substantial public concern, and are not the result of an employment disagreement or private grievance against the school system.[146] Although Lee's materials do not constitute pure public debate, they obviously relate to the matters of public concern, including relig-

141. *See Chiras*, 432 F.3d at 611 (recognizing the fact that the State has much broader discretionary power to decide what is proper for school curriculum, such as the textbooks and materials used for class instruction); *Silano*, 42 F.3d at 723 (asserting that since the students were required to attend math class and the purpose of the lecture was to impart knowledge of how filmmaking relates to mathematics, the lectures given by Silano were analogous to curriculum).

142. Stroman v. Colleton County Sch. Dist., 981 F.2d 152, 156 (4th Cir. 1992).

143. Lee v. York County Sch. Div., 418 F. Supp. 2d 816, 828 (E.D. Va. 2006).

144. *But see id.* at 826-27.

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

146. *See* Pickering v. Bd. of Educ. of Township High Sch., 391 U.S. 563, 571-72 (1968) (finding Pickering's subject matter on the Board's allocation of school funds to be a matter of legitimate public concern upon which free and open debate was vital to inform the electorate); *Stroman*, 981 F.2d at 157 (concluding that a personal grievance about the policy for paying teachers for summer work prompted the letter and that its substance seemed to be limited to this grievance against Stroman's employer).

ion, history, and the future job opportunities for high school students that apply the skills they presently learn in class.[147]

IV. CONCLUSION

The District Court for the Eastern District of Virginia erred in applying the *Pickering-Connick* standard for government employee's speech to the materials Lee posted on his classroom bulletin boards. The Supreme Court should re-analyze the standards used by the circuit courts to assess public school teachers' free speech claims and find the *Hazelwood-Tinker* standard a more favorable one to follow. This standard is much more workable for the unique position teachers hold in public schools, which differs significantly from that of other public government employees. The *Pickering-Connick* standard balances the rights and needs of government employers and employees.[148] However, the public school setting implicates the rights of two other groups as well: the students and their parents. Just as Justice Motz stated in her dissent in *Boring v. Buncombe County Bd. of Educ.*, courts should not try to force teachers' speech into the ordinary categories of employee workplace speech or common public debate.[149] Teachers have the unique position of standing *in loco parentis* and taking custodial control over children in order to educate, enlighten, inspire, and prepare them to take over as the next generation in the future.[150]

As noted above, if the district court would instead apply the *Hazelwood-Tinker* standard to Lee's postings, it would inevitably have to find that the school created a designated public forum for the teachers to post items of interest on their classroom bulletin boards without prior approval from the principal and with very few restrictions, except on things that the teachers knew would not be appropriate in a school, such as obscene or profane subject matter. Finding this forum, the

147. *See* Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 378 (4th Cir. 1998) (Motz, J., dissenting) (rejecting the majority's conclusion that Boring's classroom speech did not touch on matters of public concern because the play did address family life, divorce, motherhood, and illegitimacy, all subjects of substantial public concern and debate).

148. *See Lee*, 418 F. Supp. 2d at 822 (reiterating that the *Pickering-Connick* standard determines whether a government employee's speech is protected under the First Amendment by balancing the interests of the employee, as a citizen in commenting on matters of public concern, against the interests of the State, as an employer in promoting the efficiency of the public services it performs through its employees).

149. *Boring*, 136 F.3d at 378.

150. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654-55 (1995) (pointing out that when parents place minor school children in public schools for their education, the teachers and school administrators gain a degree of supervision over the children entrusted to them that is custodial and tutelary).

court should then characterize Lee's postings on his bulletin boards as not causing a material or substantial disruption to classroom instruction or the school's educational goals and clearly did not promote illegal activities such as drug use. Moreover, the items Lee posted on the boards did not interfere with the rights of others, because each person had the voluntary choice of whether to pay attention to the postings, or whether to just walk by them and avert his or her attention elsewhere. For these reasons, the district court erred in upholding the removal of items from Lee's bulletin boards and in doing so violated his First Amendment rights to freedom of speech within his own classroom, as a public school teacher.

***