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### First Amendment Protection of Teachers' Instructional Speech: Extending *Rust v. Sullivan* to Ensure That Teachers Do Not Distort the Government Message

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# FIRST AMENDMENT PROTECTION OF TEACHERS’ INSTRUCTIONAL SPEECH: EXTENDING *RUST V. SULLIVAN* TO ENSURE THAT TEACHERS DO NOT DISTORT THE GOVERNMENT MESSAGE

EMILY WHITE KIRSCH\*

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#### I. INTRODUCTION

The emergence of political activism in the 2008 presidential election extended throughout the country and even to where partisan politics have no place: the public school classroom. In 2004, the New York City Board of Education enacted a regulation that prohibited teachers from wearing any material supporting political candidates or organizations.<sup>1</sup> During the 2008 election, teachers who wanted to wear partisan political buttons in the classroom while teaching claimed that the regulation violated their First Amendment rights.<sup>2</sup> Although the Southern District of New York ultimately held that the teachers had no First Amendment claim, the court's decision, which involved sorting out three different tests and the variations of those tests, demonstrated the inconsistency between the courts' approaches to determining the First Amendment protections of teachers' in-class speech.<sup>3</sup> Some courts allow teachers to undermine decisions made by elected officials at the state and local levels about what should be said in the classroom.<sup>4</sup> These decisions often take weeks, months, or even years to make. In these jurisdictions, teachers can interject their personal views, which may be inconsistent with those of the local community and school board, and then hide behind the First Amendment as a grant of authority to do so.<sup>5</sup> The Supreme Court has not definitively determined to what extent teachers' instructional speech is protected by the First Amendment, and the circuits are currently split on this question.

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<sup>1</sup> Weingarten v. Bd. of Educ., 591 F. Supp. 2d 511, 514 (S.D.N.Y. 2008) (mem).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 515-20.

<sup>4</sup> This Note explains how by applying either the *Hazelwood* or *Pickering* tests, courts will sometimes protect teachers' speech in the classroom, and by doing this, courts allow teachers to undermine curricular decisions made by state and local governments. *See infra* note 65 (discussing which courts apply the *Hazelwood* or *Pickering* tests).

<sup>5</sup> *Infra* note 65.

The majority of the circuits<sup>6</sup> apply either the precedent set forth in *Hazelwood School District v. Kuhlmeier*<sup>7</sup> or *Pickering v. Board of Education*<sup>8</sup> to determine whether or not, and to what extent, teachers' instructional speech is protected by the First Amendment. Neither of these tests are appropriate for teachers' instructional speech, though, as the context in which these tests were developed is not analogous to that of teachers' speech in public schools. Recognizing the pitfalls of the other two tests, the Third Circuit relied on *Rust v. Sullivan*<sup>9</sup> to develop a third test.<sup>10</sup> *Rust* provides a better framework for instructional speech because the *Rust* line of precedent stands for the proposition that when the government is the speaker, the person conveying the message for the government has no First Amendment protection.<sup>11</sup> Under this analysis, when teachers are teaching, they are conveying the message prescribed by the state and local governments, and as such, teachers have no First Amendment protection in the classroom.

Section II of this Note begins by giving an overview of how public education is funded and how national, state, and local governments control instructional speech based on funding. Section III of this Note examines the three tests currently used to determine the extent that the First Amendment protects teachers instructional speech: *Hazelwood*, *Pickering*, and *Rust*. This synopsis will include the facts and holdings of the cases that laid the framework for each test, the test itself, and how the test is applied to teachers' instructional speech. Section IV will then show why the *Hazelwood* and *Pickering* tests are not optimal for instructional speech cases. Once it is established that these tests have no application in the teachers' instructional speech cases, Section IV will show how and why the *Rust* test best promotes the interests of the government and teachers in the classroom. This Note concludes that teachers' freedom of expression is limited only during actual in class speech, and by requiring this, the government is merely "insisting that public funds be spent for the purposes for which they were authorized."<sup>12</sup>

## II. CREATING AND FUNDING THE CURRICULUM

Because *Rust* stands for the proposition that when the government funds a program, the government can insist that funds are being spent for the purposes they were authorized,<sup>13</sup> it is important to show how the federal, state, and local governments fund public education and how, through funding, the government controls what is said in the classroom.

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<sup>6</sup> See *Cal. Teachers Ass'n v. Bd. of Educ.*, 271 F.3d 1141, 1149 n.6 (9th Cir. 2001) (explaining that all but one of the circuits use either the *Hazelwood* test or the *Pickering* test).

<sup>7</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

<sup>8</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

<sup>9</sup> *Rust v. Sullivan*, 500 U.S. 173 (1991).

<sup>10</sup> See *Cal. Teachers Ass'n*, 271 F.3d at 1149 n.6 (explaining that the Third Circuit uses a third test, the *Rust* test (citing *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491-92 (3d Cir. 1998))).

<sup>11</sup> *Id.*

<sup>12</sup> *Rust*, 500 U.S. at 196.

<sup>13</sup> *Id.*

### A. Federal Level

Although historically, the financing and control of public education belonged to the state and local governments,<sup>14</sup> the federal government's presence in this area is constantly expanding.<sup>15</sup> The federal government's role in public education commenced in 1965 when President Lyndon Baines Johnson signed the Elementary and Secondary Education Act (ESEA)<sup>16</sup> into law as a response to the perceived failings of the states in education.<sup>17</sup> Although the ESEA was originally meant to help economically disadvantaged children, the bill "became the foundation of modern education policy."<sup>18</sup> The ESEA remained untouched for over 35 years until President George W. Bush signed the No Child Left Behind Act (NCLB),<sup>19</sup> an Act which greatly increased federal spending on public education.<sup>20</sup> Even though federal support began in 1965 with a single act, the federal government now has a Department of Education,<sup>21</sup> thirty agencies, and over one hundred programs, all of which supplement the state and local governments' role in public education.<sup>22</sup>

The federal government has a very limited role in public education, as federal funds and control of those funds only provide *assistance* to the states.<sup>23</sup> States do not have to accept federal funds; however, acceptance of certain funds is conditioned on the states' compliance with the federal law for which the funds were allocated.<sup>24</sup>

<sup>14</sup> Brandi M. Powell, Comment, *Take the Money or Run?: The Dilemma of the No Child Left Behind Act for State and Local Governments*, 6 LOY. J. PUB. INT. L. 153, 155 (2005). In *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), the Court recognized that "education is perhaps the most important function of state and local governments." Mildred Wigfall Robinson, *School Finance Reform: Financing Adequate Educational Opportunity*, 14 J.L. & POL. 483, 484 (1998) (quoting *Brown*, 347 U.S. at 493).

<sup>15</sup> For example, between 1965 and 2007, federal funding for public education for grades K-12 increased five-fold from \$11.8 billion dollars per year to \$70.6 billion dollars per year. Dan Lips, *Focus on Education Policy: The Next Chapter in the Tragic History of Federal Education Policy*, 6 GEO. J.L. & PUB. POL'Y 27, 29 (2008).

<sup>16</sup> Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. § 6301 (2006)); see also Lips, *supra* note 15, at 28.

<sup>17</sup> Powell, *supra* note 14, at 156.

<sup>18</sup> Lips, *supra* note 15, at 28.

<sup>19</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended at 20 U.S.C. § 6301 (2006)).

<sup>20</sup> Lips, *supra* note 15, at 31.

<sup>21</sup> President Jimmy Carter created the Department of Education in 1979. *Id.* at 28.

<sup>22</sup> Powell, *supra* note 14, at 158-59. See generally U.S. DEP'T OF EDUC., 10 FACTS ABOUT K-12 EDUCATION FUNDING 4 (2005), <http://www.ed.gov/about/overview/fed/10facts/10facts.pdf> (last visited Mar. 25, 2010) (listing some of the major programs, as well as the amount of money the federal government contributed to each program in 2006).

<sup>23</sup> U.S. DEP'T OF EDUC., *supra* note 22, at 1.

<sup>24</sup> Powell, *supra* note 14, at 155-56. The U.S. Department of Education even notes that following federal programs' "requirements" is voluntarily done by the state, and if the state does not want to abide by the requirements, the state should not accept the funds. U.S. DEP'T OF EDUC., *supra* note 22, at 4.

Under Title I of NCLB, for example, states must meet federally mandated timelines of students' achievements and progress or states could lose federal funding;<sup>25</sup> however, it is the states, and not the federal government, that control the standards that the students have to maintain under the Act.<sup>26</sup> Therefore, even though receipt of federal funds is condition on federal control of funds, the federal government still does not have nearly as much control on specific school matters as the state and local governments.<sup>27</sup> Not only does the federal government have very little control over the curriculum, but federal spending accounts for less than ten percent<sup>28</sup> of the total funds for public education, with over ninety percent of funding for public schools coming from the state and local governments.<sup>29</sup>

### B. State and Local Level

Because the United States Constitution does not mention public education, the duty of public education rests with the states by virtue of the Tenth Amendment.<sup>30</sup> Almost every state constitution includes language that guarantees some form of public education,<sup>31</sup> and while the states' plenary power over public education derives from state constitutions, the method of implementation is specified in state statutes.<sup>32</sup> In most states, statutes create and delegate powers to administrative agencies, such as state boards of education or state departments of education.<sup>33</sup> These agencies and departments adopt policies, rules, and regulations needed to conform with statutory and constitutional requirements.<sup>34</sup> Along with creating agencies and departments, state statutes also regulate the teaching of certain subjects, develop testing programs, and establish minimum requirements for high school graduation.<sup>35</sup>

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<sup>25</sup> 20 U.S.C. § 6301 (2006); *see also* Powell, *supra* note 14, at 159-65 (discussing specifics of NCLB).

<sup>26</sup> Lips, *supra* note 15, at 32.

<sup>27</sup> *See infra* text accompanying notes 30-57 (discussing state and local government control of specific school matters).

<sup>28</sup> Lips, *supra* note 15, at 31 (noting that federal spending for public education has reached historic highs under NCLB, but only accounts for nine percent of total funding); Powell, *supra* note 14, at 158 (explaining that between 1965 and 1997 federal spending was between four and seven percent).

<sup>29</sup> Lips, *supra* note 15, at 31; Powell, *supra* note 14, at 158.

<sup>30</sup> NATHAN L. ESSEX, *SCHOOL LAW AND THE PUBLIC SCHOOLS: A PRACTICAL GUIDE FOR EDUCATIONAL LEADERS* 2 (3d ed. 2005).

<sup>31</sup> STUART BIEGEL, *EDUCATION AND THE LAW* 428 (2006); ROBERT H. PALESTINI & KAREN F. PALESTINI, *LAW AND AMERICAN EDUCATION: A CASE BRIEF APPROACH* 5 (2d ed. 2006).

<sup>32</sup> PALESTINI & PALESTINI, *supra* note 31, at 5-6.

<sup>33</sup> MICHAEL IMBER & TYLL VAN GEEL, *EDUCATION LAW* 4 (3d ed. 2004).

<sup>34</sup> PALESTINI & PALESTINI, *supra* note 31, at 6.

<sup>35</sup> For a more comprehensive list of what state statutes generally specify, *see* ESSEX, *supra* note 30, at 3-4, IMBER & VAN GEEL, *supra* note 33, at 3-4, and PALESTINI & PALESTINI, *supra* note 31, at 5-6.

As the educational duty rests with the states, so does the duty to fund public education. While the federal government contributes some funds to public education, over ninety percent of the funding derives from the state and local governments.<sup>36</sup> Most states raise capital for education through a “multifaceted finance system,” with money coming from a combination of the state and local governments.<sup>37</sup> The primary source of state funding derives from sales tax,<sup>38</sup> whereas property tax is the primary source of funding for the local districts.<sup>39</sup> Although local districts are responsible for levying property taxes, they have the ability to do so only based on a grant of authority, expressed or implied, from the state.<sup>40</sup> While the amount of interaction between the states and their political subdivisions can vary,<sup>41</sup> the state is chiefly responsible for financing public education.<sup>42</sup>

Along with funding, state legislatures have the primary responsibility to specify the curriculum.<sup>43</sup> The most common way the state controls the curriculum is by mandating specific courses required for high school graduation.<sup>44</sup> In most states, statutes either authorize or prohibit the teaching of certain subjects and topics.<sup>45</sup> Some state legislatures provide even more specific and detailed requirements of course content.<sup>46</sup> For example, some “[s]tate testing requirements, such as the statewide final exams used in New York, create an implicit syllabus” that all districts

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<sup>36</sup> Lips, *supra* note 15, at 31; Powell, *supra* note 14, at 158-59.

<sup>37</sup> IMBER & VAN GEEL, *supra* note 33, at 307.

<sup>38</sup> Jeffrey D. Van Volkenburg, *What Public Education Should Learn from Major League Baseball: Spending Caps, Luxury Taxes and Fiscal Accountability*, 32 T. MARSHALL L. REV. 237, 242 (2007).

<sup>39</sup> Funding through property taxes imposed by the local districts usually accounts for thirty to fifty percent of public education funds. *Id.*

<sup>40</sup> IMBER & VAN GEEL, *supra* note 33, at 307.

<sup>41</sup> Van Volkenburg, *supra* note 38, at 242 (noting that “local school systems receive anywhere between 27 and 77 percent of their funding from the state”).

<sup>42</sup> IMBER & VAN GEEL, *supra* note 33, at 307.

<sup>43</sup> *Id.* at 62.

<sup>44</sup> ESSEX, *supra* note 30, at 4. In Ohio, for example, the Ohio Department of Education specifies that seniors graduating prior to 2013 must take the following: four units of English language arts; half a unit of Health; three units each of Math, Science, and Social Studies; half a unit of Physical Education; and six units of Electives. OHIO BD. OF EDUC., GRADUATION REQUIREMENTS, <http://ode.state.oh.us/> (follow “Teaching” hyperlink; then follow “Instruction” hyperlink; then follow “Graduation Requirements/Ohio Core” hyperlink; then follow “Graduation Requirements” hyperlink) (last visited Mar. 25, 2010). The ODE further specifies that the science units must include one unit of biological studies and one unit of physical sciences; the social studies units must include half a unit of American history and half a unit of American government; and the electives must include one unit or two half units in business, technology, fine arts or foreign language. *Id.*

<sup>45</sup> IMBER & VAN GEEL, *supra* note 33, at 64-65. For example, some states will require that the curriculum include patriotic themes and topics. *Id.* at 65.

<sup>46</sup> *Id.* at 64.

in the state must follow.<sup>47</sup> Testing requirements are not the only way states control the curriculum. In more than half of the states, the text-book selection process is done by the state legislatures or through text-book commissions appointed by the state legislatures.<sup>48</sup> While the primary authority of public school curriculum belongs to the states, all but one<sup>49</sup> of the states have voluntarily entrusted local school boards to fill in the remaining curricular gaps.<sup>50</sup>

Although minimum standards are developed by state statute, local school boards establish the specifics concerning the curriculum.<sup>51</sup> For example, even when the states require teaching of a specific course, states usually allow school boards to construct their own syllabi for that course.<sup>52</sup> Furthermore, in states that do not have a state wide text-book selection process, the selection power belongs to the local districts.<sup>53</sup> More so than the state legislatures, local school boards “affect the political and cultural perspectives of school programs” by determining specific courses and topics in the curriculum.<sup>54</sup> In some situations, local schools even have the authority to specify the type of methods of instruction in the schools.<sup>55</sup> All stages of the curriculum, from broad graduation requirements to specific course content,<sup>56</sup> are determined through complex methods involving state and local governments.<sup>57</sup>

While the state and local governments prescribe the curriculum, teachers are responsible for its implementation.<sup>58</sup> Constitutional issues arise when teachers in the classroom attempt to speak outside of the curriculum.<sup>59</sup> Many teachers feel as though they have a constitutional right to control their own curriculums and instructional methodologies, a constitutional right known as “academic freedom.”<sup>60</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 64-65.

<sup>49</sup> Hawaii is the only state where the schools are entirely state-run. *Id.* at 307.

<sup>50</sup> *Id.* at 62.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 66.

<sup>53</sup> *Id.* at 65.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 64-65.

<sup>56</sup> *Id.* at 112-13.

<sup>57</sup> *Id.* at 113.

<sup>58</sup> William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213, 256 (1999).

<sup>59</sup> *Id.* at 214.

<sup>60</sup> In Rebecca Gose Lynch, Comment, *Pawns of the State or Priests of Democracy? Analyzing Professors' Academic Freedom Rights Within the State's Managerial Realm*, 91 CAL. L. REV. 1061, 1066 (2003), the author notes that:

The term [academic freedom] actually refers to two different concepts: “professional” academic freedom and “constitutional” academic freedom. The professional notion centers on professional ethics of self-governance and autonomy. . . . The constitutional notion, on the other hand, is legal rather than ethical and was developed



No court has recognized that teachers have an absolute constitutional right to control the curriculum,<sup>61</sup> as what is taught in the classroom is matter of state and local control.<sup>62</sup> The issue, however, is not as clear when it comes to the First Amendment rights of teachers in the classroom.

### III. TEACHERS' INSTRUCTIONAL SPEECH AND FIRST AMENDMENT PROTECTION: TESTS APPLIED

The Supreme Court has never specifically addressed to what extent public teachers are entitled to First Amendment protection in the classroom.<sup>63</sup> The circuits are split on which test should be applied when answering this question,<sup>64</sup> and the majority use either the *Hazelwood* test or the *Pickering* test to reach a conclusion.<sup>65</sup> A third test, the *Rust* test, has been applied in at least one case involving teachers' instructional speech.<sup>66</sup> Very little judicial reasoning exists in the circuits concerning why a circuit applies one test over another,<sup>67</sup> and further confusion arises as the application of the tests varies among the circuits.<sup>68</sup>

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by courts after professors began to sue for academic speech rights under the First Amendment.

*Id.* (footnote omitted). See generally Buss, *supra* note 58 (focusing on whether academic freedom is an independent ground for teachers' free speech under the First Amendment); Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 39-41 (2001) (discussing academic freedom and the right to speak); Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L. J. 37, 56-62 (2008) (looking at academic freedom as a constitutional concern).

<sup>61</sup> Daly, *supra* note 60, at 40-41; Lynch, *supra* note 60, at 1068. Although no court has found teachers have a constitutional right to academic freedom, academic freedom may nonetheless be used as a defense only when teachers can show "that [they] did not defy legitimate state and local curriculum directives, followed accepted professional norms for that grade level and subject matter, discussed matters that were of public concern, and acted professionally and in good faith when there was no precedent or policy." PALESTINI & PALESTINI, *supra* note 31, at 73-74.

<sup>62</sup> ESSEX, *supra* note 30, at 279.

<sup>63</sup> Cal. Teachers Ass'n v. Bd. of Educ., 271 F.3d 1141, 1148 (9th Cir. 2001); see also Walter E. Kuhn, Note, *First Amendment Protection of Teacher Instructional Speech*, 55 DUKE L.J. 995, 997 (2006).

<sup>64</sup> Cal. Teachers Ass'n, 271 F.3d at 1149 n.6.

<sup>65</sup> *Id.* (explaining that the First, Second, Seventh, Eighth, and Tenth Circuits use the *Hazelwood* test, whereas the Fourth, Fifth, and Ninth Circuits use the *Pickering* test); Daly, *supra* note 60, at 16 ("The Third, Fourth, Fifth, Ninth and D.C. Circuits apply *Pickering*, while the First, Second, Seventh, Eighth, and Tenth Circuits employ *Hazelwood* in their analysis of teachers' in class speech." (footnotes omitted)); Kuhn, *supra* note 63, at 1001.

<sup>66</sup> Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998); see also Cal. Teachers Ass'n, 271 F.3d at 1149 n.6 (explaining that the Third Circuit uses a third test, the *Rust* test).

<sup>67</sup> Daly, *supra* note 60, at 17.

<sup>68</sup> *Id.*

### A. *The Hazelwood Test*

The *Hazelwood* test originates from the student speech case *Tinker v. Des Moines Independent Community School District*.<sup>69</sup> Although the test, set out in *Tinker* and later refined by *Hazelwood*, examines the protections of students' speech in public schools, the courts have, nonetheless, extended this test to teachers' speech.

#### 1. *Tinker*: Laying out the Framework for *Hazelwood*

In *Tinker*, the Supreme Court addressed the protections of students' speech in public schools.<sup>70</sup> After the school administration became aware that a group of students were planning to wear black armbands to school to protest the Vietnam War, the school principals of the Des Moines public schools adopted a policy, which mandated that any student wearing an armband to school would be asked to remove it and would be suspended for failure to do so.<sup>71</sup> When two students were suspended from school for refusing to remove their armbands,<sup>72</sup> the father of the two students filed a complaint claiming the schools' regulation violated the First Amendment.<sup>73</sup> Emphasizing that there was no evidence that the schools' regulation was necessary to avoid a material and substantial interference with school work or discipline,<sup>74</sup> the Court concluded that the regulation violated the students' constitutional rights to free speech under the First Amendment.<sup>75</sup> The Court also acknowledged that "*First Amendment* rights, applied in light of the special characteristics of the school environment, are available to *teachers* and students."<sup>76</sup>

#### 2. *The Hazelwood Case*

Almost twenty years after *Tinker*, the Supreme Court once again examined the First Amendment protections of students' speech in *Hazelwood*.<sup>77</sup> The dispute in *Hazelwood* arose when school officials for Hazelwood East High School deleted two articles from the student-run school newspaper.<sup>78</sup> Three former staff members of the

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<sup>69</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); see also Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 70 (2008) (explaining that the Supreme Court in *Hazelwood* relied on *Tinker* to reach their decision).

<sup>70</sup> *Tinker*, 393 U.S. at 506.

<sup>71</sup> *Id.* at 504.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 504-05.

<sup>74</sup> *Id.* at 509-10.

<sup>75</sup> *Id.* at 514.

<sup>76</sup> *Id.* at 506 (second emphasis added).

<sup>77</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

<sup>78</sup> *Id.* at 262. One article, which discussed students' experience with pregnancy, was removed to keep the identity of the pregnant girls a secret; in addition, the references to sexual activity and birth control were deemed inappropriate for the younger students. *Id.* at 263. The other article, which discussed the impact of divorce and included many quotes from students

newspaper brought suit claiming that removal of the articles constituted a violation of the First Amendment.<sup>79</sup> At the start of the opinion, the Court famously acknowledged that “[s]tudents in the public schools do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”<sup>80</sup> The Court held that because the newspaper was not a forum for public expression, the school officials were entitled to regulate the paper’s contents in any “reasonable” manner.<sup>81</sup> The Court also set up the framework for the *Hazelwood* test by holding that educators do not offend the First Amendment by exercising editorial control over the style and content of school sponsored speech, so long as regulations reasonably relate to legitimate pedagogical concerns.<sup>82</sup>

### 3. *Hazelwood* Test and Application to Teachers’ Instructional Speech

Even though *Hazelwood* involved students’ speech, it has also been extended to teachers’ instructional speech. In circuits that use the *Hazelwood* test,<sup>83</sup> a regulation of teachers’ in-class speech is valid only when the regulation reasonably relates to legitimate pedagogical concerns.<sup>84</sup>

The Tenth Circuit was the first court to apply *Hazelwood* to a public school teacher by upholding the actions of school authorities in forbidding a fifth grade teacher from keeping two religious books in his classroom and reading the Bible during silent reading time.<sup>85</sup> Interestingly enough, the court extended *Hazelwood* to create a new standard for teachers’ speech without reasoning, analysis, or precedent.<sup>86</sup> One year later, the Tenth Circuit relied on *Hazelwood* again to hold that a high school teacher had no First Amendment claim for comments that he made in class concerning a widely known rumor that two students had sex on the school’s tennis courts.<sup>87</sup> The Tenth Circuit found “no reason to distinguish between the classroom discussion of students and teachers in applying *Hazelwood* here. A school’s interests in regulating classroom speech . . . are implicated regardless of

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concerning their parents, was removed because the principal believed that the parents should have an opportunity to respond or consent to the publication. *Id.*

<sup>79</sup> *Id.* at 262.

<sup>80</sup> *Id.* at 266 (quoting *Tinker*, 393 U.S. at 506).

<sup>81</sup> *Id.* at 270.

<sup>82</sup> *Id.* at 273.

<sup>83</sup> See *supra* note 65.

<sup>84</sup> Kuhn, *supra* note 63, at 1010.

<sup>85</sup> *Roberts v. Madigan*, 921 F.2d 1047, 1049 (10th Cir. 1990); see also Kuhn, *supra* note 63, at 1010.

<sup>86</sup> Kuhn, *supra* note 63, at 1020 (“Indeed, the first court to apply the *Hazelwood* standard to teachers engaged in only the most cursory analysis, and failed to cite any First Amendment precedent involving teachers. Creating a new standard out of a case with dissimilar facts should be done with careful explanation and thoughtful analysis of the connections between the different contexts, but instead, the predominant test for deciding instructional speech cases was tailored in response to student speech concerns and applied to teachers with little regard for the consequences.” (footnote omitted)).

<sup>87</sup> *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 774 (10th Cir. 1991).

whether that speech comes from a teacher or student.”<sup>88</sup> Subsequently, many circuits followed the Tenth Circuit in applying the *Hazelwood* test to teachers’ instructional speech.<sup>89</sup> The circuits that do not use the *Hazelwood* test<sup>90</sup> primarily rely on the *Pickering* test.

### B. The Pickering Test

Whereas the *Hazelwood* test derives from student speech, the *Pickering* test focuses on the speech of teachers as public employees.<sup>91</sup> In *Pickering*, the Supreme Court created a test to protect teachers’ speech made outside of classroom,<sup>92</sup> and fifteen years later in *Connick v. Myers*,<sup>93</sup> the Court modified *Pickering* into a two-step analysis for all public employee speech.<sup>94</sup>

#### 1. The *Pickering* Case

In *Pickering*, a public school teacher was dismissed after writing a letter that attacked the school board’s handling of financial resources to the editor of the local newspaper.<sup>95</sup> The teacher brought suit claiming that his letter was protected by the First Amendment.<sup>96</sup> The Court began its analysis by noting the difficulty in finding “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.”<sup>97</sup> The Court reasoned that the teacher’s comments were shown not to impede the performance of the teacher’s duties in the classroom nor to interfere with the operation of the school.<sup>98</sup> Because the school board’s interest in limiting the teacher’s opportunity to contribute to the matter of public concern was not significantly greater than the board’s interest in limiting a similar contribution by any other member of the general public, the teacher’s letter was protected by the First Amendment.<sup>99</sup>

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<sup>88</sup> Waldman, *supra* note 69, at 80 (quoting *Miles*, 944 F.2d at 777).

<sup>89</sup> See *supra* note 65.

<sup>90</sup> *Id.*

<sup>91</sup> Kuhn, *supra* note 63, at 1001-02.

<sup>92</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968).

<sup>93</sup> *Connick v. Myers*, 461 U.S. 138 (1983).

<sup>94</sup> Elizabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of Garcetti v. Ceballos*, 29 BERKELEY J. EMP. & LAB. L. 175, 182 (2008).

<sup>95</sup> *Pickering*, 391 U.S. at 566.

<sup>96</sup> *Id.* at 567.

<sup>97</sup> *Id.* at 568.

<sup>98</sup> *Id.* at 572-73.

<sup>99</sup> *Id.* at 573.

## 2. *Connick*: Refining the *Pickering* Test

Fifteen years after *Pickering*, the Supreme Court again balanced the interests of an employee as a citizen and the state as an employer.<sup>100</sup> In *Connick v. Myers*, the district attorney's office terminated an assistant to the district attorney after the assistant distributed a questionnaire to solicit the views of other employees regarding the office transfer policy.<sup>101</sup> The employee brought suit, claiming that her termination was wrongful as it violated her First Amendment right to free speech.<sup>102</sup> The Court held that the employee's limited First Amendment interest did not require the employer to tolerate the employee's actions because the employer reasonably believed the actions would disrupt the office, undermine authority, and destroy the close relationships within the office.<sup>103</sup> The *Connick* decision increased attention to public employer interests and also turned the flexibility of *Pickering* into a rigid, two-step test.<sup>104</sup>

## 3. *Pickering* Test and Application to Teachers' Instructional Speech

The *Pickering* test, also known as the balancing test, consists of a two-step analysis.<sup>105</sup> First, the court must decide whether the speech involves a matter of public concern,<sup>106</sup> which must be determined by the content, form, and context of the speech in question.<sup>107</sup> If the matter does not touch on a matter of public concern, then the First Amendment inquiry stops because the speech is not constitutionally protected.<sup>108</sup> When the speech does touch on a matter of public concern, the court must then weigh the teachers' interest in expression against the government's interest in workplace efficiency and avoidance of disruption.<sup>109</sup> The focus of this test is

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<sup>100</sup> *Connick v. Myers*, 461 U.S. 138, 142 (1983).

<sup>101</sup> *Id.* at 140-42.

<sup>102</sup> *Id.* at 141.

<sup>103</sup> *Id.* at 154.

<sup>104</sup> Dale, *supra* note 94, at 182-83.

<sup>105</sup> Cal. Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1149 n.6 (9th Cir. 2001); Daly, *supra* note 60, at 17; Kuhn, *supra* note 63, at 1001-02; *see also* Mitchell J. Michalec, *The Classified Information Protection Act, Killing the Messenger or Killing the Message*, 50 CLEV. ST. L. REV. 455, 460-61 (2002).

<sup>106</sup> Cal. Teachers Ass'n, 271 F.3d at 1149 n.6; Daly, *supra* note 60, at 17; Kuhn, *supra* note 63, at 1001-02.

<sup>107</sup> *Connick*, 461 U.S. at 147-48. As to content of the speech, matters that relate to "political, social, or other concern to the community," as opposed to matters "only of personal interest," are usually held to be matters of public concern. *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 229 (6th Cir. 2005) (quoting *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1052 (6th Cir. 2001)). The Fifth Circuit has also noted that "issues do not rise to a level of 'public concern' [merely] by virtue of the speaker's interest in the subject matter." *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 798 (5th Cir. 1989).

<sup>108</sup> *Connick*, 461 U.S. at 147.

<sup>109</sup> Cal. Teachers Ass'n, 271 F.3d at 1149 n.6 (citing *Brewster v. Bd. of Educ.*, 149 F.3d 971, 978 (9th Cir. 1998)).

more on the nature of the teachers' speech,<sup>110</sup> whereas the *Hazelwood* test focuses on the reasonableness of the administration in regulating the speech.<sup>111</sup>

Although *Pickering* was developed in the context of a teacher's out-of-class speech and *Connick* was developed in the public employer's setting, the test has, nonetheless, been extended to teachers' in-class speech. The Fifth Circuit first applied the *Pickering* test in *Kirkland v. Northside Independent School District*, when a teacher claimed he had been dismissed for using an unapproved reading list.<sup>112</sup> Although the Court mentioned *Hazelwood*, the Court applied *Pickering* by holding that the teacher's use of an unapproved reading list did not rise to the level of public concern.<sup>113</sup> Even though other circuits have followed the Fifth Circuit in applying *Pickering* to teachers' classroom speech,<sup>114</sup> the Fourth Circuit was the only court to explain its reasoning for using *Pickering* rather than *Hazelwood* by clarifying that with teachers' instructional speech: "This is not a case concerning pupil speech, as in *Hazelwood*, either classroom or otherwise. This case concerns itself exclusively with employee speech, as does *Connick* [and *Pickering*]."<sup>115</sup> Despite extending *Pickering* to teachers' classroom speech, a recent change to the test has created another split among courts already applying *Pickering*.

#### 4. *Garcetti*: Creating a Split Among the Split

In 2006, the Supreme Court refined the *Pickering* analysis once again by examining whether or not a government employee's speech is protected by the First Amendment when made pursuant to the employee's official duties.<sup>116</sup> In *Garcetti v. Ceballos*, a calendar deputy employed by the county district attorney's office discovered that an affidavit used to secure a search warrant contained serious misrepresentations, and the deputy wrote a disposition memorandum to one of his supervisors recommending dismissal of the case.<sup>117</sup> After allegedly being subjected to a series of retaliatory employment actions as a result of the memorandum, the deputy brought suit claiming that his supervisors' alleged retaliation violated his First Amendment rights.<sup>118</sup> The Court explained that while employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection, when a public employee speaks within his or her official employment duties, "there is no relevant analogue to speech by citizens who are not government employees."<sup>119</sup> Ultimately, the Court held that the

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<sup>110</sup> Daly, *supra* note 60, at 17.

<sup>111</sup> *Id.*

<sup>112</sup> *Kirkland*, 890 F.2d at 795-96.

<sup>113</sup> *Id.* at 800-01.

<sup>114</sup> *See supra* note 65.

<sup>115</sup> *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 371 n.2 (4th Cir. 1998).

<sup>116</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006).

<sup>117</sup> *Id.* at 413-14.

<sup>118</sup> *Id.* at 415.

<sup>119</sup> *Id.* at 423-24.

First Amendment does not prohibit an employer's discipline based on an employee's expressions made pursuant to official duties and responsibilities.<sup>120</sup>

Currently, only two Circuits have addressed whether or not *Garcetti* applies to teachers' instructional speech,<sup>121</sup> and each has reached different conclusions.<sup>122</sup> The Fourth Circuit determined that the court should continue to apply the traditional *Pickering* test because the Supreme Court did not explicitly extend *Garcetti* to teachers.<sup>123</sup> The Seventh Circuit, however, determined that *Garcetti* applies to teachers' instructional speech and that the First Amendment does not entitle teachers to speak outside of the curriculum adopted by the school system.<sup>124</sup> Under the *Garcetti* test, the Seventh Circuit noted that because school systems pay teachers' salaries, school systems could, therefore, regulate the speech.<sup>125</sup> The principles underlying *Garcetti* reflect the same underlying principles of the *Rust* test, namely that teachers in the classroom have no First Amendment protections.

### C. The Rust Test

Instead of looking at teachers' speech in the context of public employees as the *Pickering* test does, the *Rust* test examines teachers' speech in the context of government speech.<sup>126</sup> Originally created for abortion-related speech made by doctors using government funds to provide family-funding services,<sup>127</sup> the *Rust* test has been used to prohibit First Amendment claims in the arts<sup>128</sup> and public libraries.<sup>129</sup>

#### 1. *Rust v. Sullivan*: Government Speech

In 1970, Congress passed Title X, under which federal funds would be provided for family-funding services.<sup>130</sup> In an attempt to ensure that the funds were used for Congress's intended purposes,<sup>131</sup> the Act specified that Title X funds could not be

<sup>120</sup> *Id.* at 424.

<sup>121</sup> *Evans-Marshall v. Bd. of Educ.*, No. 3:03CV091, 2008 U.S. Dist. LEXIS 58202, at \*26 (S.D. Ohio July 30, 2008); *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007); *Lee v. York County Sch. Div.*, 484 F.3d 687, 694 (4th Cir. 2007).

<sup>122</sup> *Evans-Marshall*, 2008 U.S. Dist. LEXIS 58202, at \*26; *Mayer*, 474 F.3d at 477; *Lee*, 484 F.3d at 687.

<sup>123</sup> *Evans-Marshall*, 2008 U.S. Dist. LEXIS 58202, at \*26-27; *Lee*, 484 F.3d at 695.

<sup>124</sup> *Evans-Marshall*, 2008 U.S. Dist. LEXIS 58202, at \*26; *Mayer*, 474 F.3d at 480.

<sup>125</sup> *Mayer*, 474 F.3d at 479; Dale, *supra* note 94, at 201.

<sup>126</sup> See *Rust v. Sullivan*, 500 U.S. 173 (1991).

<sup>127</sup> *Id.*

<sup>128</sup> *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

<sup>129</sup> *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003).

<sup>130</sup> *Rust*, 500 U.S. at 178.

<sup>131</sup> *Id.* at 178-79 (explaining that the funds were intended "to support preventive family planning services, population research, infertility services, and other related medical, informational, and education activities" (quoting H.R. Rep. No. 91-1667, at 8 (1970) (Conf. Rep.))).

used to provide abortion counseling as a family planning method; Title X projects could not encourage or promote abortion as a family method; and Title X projects had to be organized so that they were financially and physically separated from abortion activities.<sup>132</sup> Several Title X grantees and doctors brought suit, claiming that the abortion related regulations violated the First Amendment rights of the clients and healthcare providers.<sup>133</sup> The Court noted that when the government funds a program, it is entitled to both define the limits of the program<sup>134</sup> and insist that those “public funds be spent for the purposes for which they were authorized.”<sup>135</sup> The Court ultimately held that the regulations did not violate the First Amendment because the regulations did not force the employees to give up abortion related speech, and the regulations merely required that abortion activities be kept distinct from the activities of the Title X project, which the employees were *voluntarily* employed to do.<sup>136</sup>

## 2. *Rust* Line of Precedent

Over the past twenty years, the Supreme Court has expanded *Rust*’s reach. One of the most notable cases where *Rust* was applied is *Rosenberger v. Rector & Visitors of the University of Virginia*,<sup>137</sup> in which students from the University of Virginia brought suit claiming a First Amendment violation when university guidelines prohibited the allocation of student funds for religious activities.<sup>138</sup> The Court extensively quoted *Rust* and noted that when the government appropriates public funds to promote a particular message, it is entitled to take legitimate and reasonable steps to ensure the message is not distorted.<sup>139</sup> Although the *Rust* holding ultimately was not extended to the facts of the case, as the funds in question were student funds and not government funds,<sup>140</sup> the case is still commonly cited to for its approving analysis of *Rust*.<sup>141</sup>

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<sup>132</sup> *Id.* at 179-80.

<sup>133</sup> *Id.* at 181. The specific issue before the Court was whether the regulations violated the First Amendment by impermissibly discriminating on viewpoint because the regulations prohibited all speech concerning abortion as a lawful option. *Id.* at 182.

<sup>134</sup> *Id.* at 194.

<sup>135</sup> *Id.* at 196.

<sup>136</sup> *Id.* at 198-99.

<sup>137</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

<sup>138</sup> *Id.* at 827. Specifically, the guidelines stated that Student Activity Funds could not be used to support the following: “religious activities, philanthropic contributions and activities, political activities, activities that would jeopardize the University’s tax-exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses.” *Id.* at 825. The students who brought suit were in charge of a Christian newspaper and claimed the school’s failure to authorize printing costs for the religious newspaper violated the First Amendment. *Id.* at 827.

<sup>139</sup> *Id.* at 833 (citing *Rust*, 500 U.S. at 194, 196-200).

<sup>140</sup> *Id.* at 834, 836.

<sup>141</sup> See generally *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998).



Three years after *Rosenberger*, the Supreme Court expanded *Rust*'s holding to reach the arts. In *National Endowment of the Arts v. Finley*,<sup>142</sup> Congress allocated subsidies to fund the arts, and with these funds, Congress imposed certain criteria restricting the type of art the funds could be used to create.<sup>143</sup> Relying on *Rust*, the Court held that because Congress funded the art projects, Congress's determination to favor certain beliefs expressed, through funding restrictions, did not infringe on anyone's freedom of speech.<sup>144</sup> Five years after *Finley*,<sup>145</sup> the Court again applied *Rust* in *United States v. American Library Ass'n*<sup>146</sup> to hold that government restrictions, which forbade public libraries from receiving federal funding for internet access unless the libraries installed a filter software on the internet, did not violate library patrons' First Amendment rights.<sup>147</sup> Even though the majority recognized that public libraries provide internet access to encourage diversity and to facilitate research and learning,<sup>148</sup> the Court, nonetheless, found that the government could impose restrictions because it was merely insisting that "funds be spent for the purposes for which they were authorized."<sup>149</sup> The *Rust* line of precedent stands for the proposition that by restricting government-funded speech, "the [g]overnment is

<sup>142</sup> *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

<sup>143</sup> *Id.* at 575. After the subsidies were used for what Congress described as obscene and pornographic art, Congress imposed the restrictions on the art. The restrictions stated that the funds may not be used to:

[P]romote, disseminate, or produce materials which in the judgment of [the NEA] may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.

*Id.* (quoting Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. 101-121, 103 Stat. 701, 741 (1989)).

<sup>144</sup> *Id.* at 587-88.

<sup>145</sup> It is important to note that three years after *Finley* and two years before *American Library Ass'n*, the Court appeared to curtail *Rust*'s reach in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). Under the Legal Services Corporation Act, Congress appropriated funds to local organizations for the purpose of providing legal assistance to indigent clients. *Id.* at 536. Congress imposed a restriction that prohibited LSC lawyers from providing legal representation with LSC funds if the representation involved an effort to change existing welfare law. *Id.* at 536-37. Lawyers employed by the LSC grant brought suit claiming the restrictions violated the First Amendment. *Id.* Noting that "an LSC-funded attorney speaks on behalf of the client in a claim against the government for welfare benefits," the Court found that *Rust* was not applicable because the government program in question was not intended to promote a government message but to promote private speech. *Id.* at 542-43. Although *Velazquez* is important for its discussion of *Rust* and *Rosenberger*, this decision does not stand in the way of applying *Rust* to instructional speech, because in *Velazquez*, the very essence of the program required that the government not be the speaker, which is not the case in public education.

<sup>146</sup> *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 206-07.

<sup>149</sup> *Id.* at 211-12 (quoting *Rust v. Sullivan*, 500 U.S. 173, 196 (1991)).

not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized.”<sup>150</sup> As the Supreme Court has gradually and continually expanded the *Rust* reasoning to the arts and public libraries, at least one lower court has extended *Rust* to teachers’ speech in the classroom.<sup>151</sup>

### 3. *Rust* Test and Application to Teachers’ Instructional Speech

Under the test developed by the Court in *Rust*, “when the government is the speaker, in the sense that the government is conveying a particular message through a person, that person receives no First Amendment protection.”<sup>152</sup>

The Third Circuit is the only circuit to apply this test to teachers’ instructional speech and has only done so in the university setting.<sup>153</sup> In *Edwards v. California University of Pennsylvania*, quoting *Rosenberger*, the Third Circuit stated the following: “When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.”<sup>154</sup> Applying *Rust* and *Rosenberger*, the Third Circuit held “that a public university professor does not have a First Amendment right to decide what will be taught in the classroom.”<sup>155</sup> Since the Third Circuit applied the *Rust* test in *Edwards*, it has been extended to other cases involving teachers’ curricular speech.<sup>156</sup> Despite the original application to a university setting, it is well accepted that K-12 teachers should receive less First Amendment protection than university professors.<sup>157</sup> *Edwards* and *Rust*, at the very least, show the ceiling rather than the floor for teachers’ First Amendment protections.

The *Rust* test is ideal for teachers’ instructional speech as the state and local governments, through their curriculums, are conveying a particular message. The state and local governments should be able to ensure that their message is not distorted, and therefore, teachers should have no First Amendment right to speak outside of the prescribed curriculum.<sup>158</sup> Because “school system[s] [do] not ‘regulate’ teachers’ speech as much as it hires that speech,”<sup>159</sup> the power to control

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<sup>150</sup> *Rust*, 500 U.S. at 196.

<sup>151</sup> *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488 (3d Cir. 1998).

<sup>152</sup> *Cal. Teachers Ass’n v. Bd. of Educ.*, 271 F.3d 1141, 1149 n.6 (9th Cir. 2001).

<sup>153</sup> *Edwards*, 156 F.3d at 488.

<sup>154</sup> *Id.* at 491-92.

<sup>155</sup> *Id.* at 491.

<sup>156</sup> See *Brown v. Armenti*, 247 F.3d 69 (3d Cir. 2001) (holding that a university professor did not have a First Amendment right to expression via the school’s grade assignment procedures).

<sup>157</sup> See *infra* text accompanying notes 202-13.

<sup>158</sup> See *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007).

<sup>159</sup> *Mayer*, 474 F.3d at 479.

the subjects and viewpoints that are being expressed in the classroom should rest with state and local governments, not teachers.<sup>160</sup>

#### IV. TESTS APPLIED: WHY COURTS SHOULD RELY ON *RUST* FOR TEACHERS' INSTRUCTIONAL SPEECH

The current split that exists in the circuits regarding which of the three available tests to apply can be difficult to analyze, especially in light of the fact that even the courts themselves have not examined the advantages or disadvantages of using one test over the other.<sup>161</sup> Further confusion arises when the courts combine the tests or apply variations of a test.<sup>162</sup> This section examines the reasons for and against using the *Hazelwood* and *Pickering* tests and shows why *Rust* and its line of precedent best protect the core interests of public schools.

##### A. Analysis of the Hazelwood Test

The *Hazelwood* test is used by an overwhelming majority of the courts<sup>163</sup> mainly because, of the three tests, *Hazelwood* is the only one that was created in a school environment.<sup>164</sup> The *Hazelwood* test focuses on the interests of the state as an educator, and thus it is more tailored to the school environment than the *Pickering* test, which focuses on the state as an employer, or the *Rust* test, which focuses on the state as the speaker.<sup>165</sup> By focusing on the state as an educator, the *Hazelwood* test ensures that teachers' speech is not mistakenly attributed to the views of the school by making certain that students learn mandated curriculum without being exposed to unsuitable material.<sup>166</sup> The Court in *Hazelwood* emphasized that a school does not have to tolerate student speech when other students, parents, and members of the public may reasonably perceive the speech in question to bear the imprimatur of the school.<sup>167</sup> As such, the extension of *Hazelwood* to teachers seems appropriate because speech by teachers may reasonably be perceived to bear the imprimatur of the school more than student speech.<sup>168</sup> This logic, however, does not take into consideration the fact that nothing in the *Hazelwood* opinion shows an intent to apply the same standards equally to students and teachers.<sup>169</sup>

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<sup>160</sup> *Id.* at 479-80.

<sup>161</sup> Daly, *supra* note 60, at 17.

<sup>162</sup> *Id.* This is especially true for the *Hazelwood* and *Pickering* tests, which inherently, leave a lot of room for inconsistent application. See *infra* text accompanying notes 175-84, 190-98.

<sup>163</sup> See *supra* note 65.

<sup>164</sup> Kuhn, *supra* note 63, at 1014.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

<sup>168</sup> Daly, *supra* note 60, at 14.

<sup>169</sup> *Id.* at 12. One commentator described this over-extension of *Hazelwood* as "[t]rying to fit the square peg of a teacher's in class speech into the round hole of *Hazelwood*" and by

Under the *Hazelwood* test, courts routinely find that there is no First Amendment protection of teachers' speech when a public school *reasonably* believes that the speech would undermine pedagogical concerns.<sup>170</sup> In that sense, the *Hazelwood* test is analogous to the rational basis test, in that so long as there is some rational basis between regulating the teachers' speech and a legitimate pedagogical concern, the regulation will be upheld.<sup>171</sup> Even though teachers have the burden of persuasion in *Hazelwood* cases, because of this broad definition of "reasonably related to pedagogical concerns," school boards are more successful than teachers.<sup>172</sup> While the *Hazelwood* test is less protective of an individual's speech,<sup>173</sup> the test prevents individual judges from intruding on the school board's authority, as courts rarely find a government action unconstitutional under such standard.<sup>174</sup>

Despite the seemingly predictable nature of *Hazelwood*, a common problem of the test's application is the definition of "pedagogical."<sup>175</sup> Some courts have adopted a very broad definition of "pedagogical," under which schools have unlimited authority to regulate teachers' speech, sometimes without even showing that the restriction relates to a *legitimate* pedagogical concern.<sup>176</sup> Alternatively, other courts have no definition of pedagogical, and instead determine the definition on a case by

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doing so, courts "distort[ed] *Hazelwood* itself, undermining its utility in the student speech context for which it was actually designed." Waldman, *supra* note 69, at 108.

<sup>170</sup> Kuhn, *supra* note 63, at 1017; see also Elizabeth Decoux, *Does Congress Find Facts or Construct Them? The Ascendancy of Politics Over Reliability, Perfected in Gonzales v. Carhart*, 56 CLEV. ST. L. REV. 319, 366 (2008) (explaining that the rational basis test leads to the regulation being upheld, whereas "when the rational basis is not the test, legislatures tend to fair poorly").

<sup>171</sup> It is important to note that because of the rational basis-type analysis under *Hazelwood*, the outcome of *Hazelwood* cases and *Rust* cases will almost always be the same. The difference is the way of reaching the outcome. Under the *Hazelwood* test, the school board must make a showing of a reasonable relation to pedagogical concerns. Kuhn, *supra* note 63, at 1010. Also, as discussed below, other problems could arise under *Hazelwood*, thus making it unpredictable and inconsistent. See *infra* text accompanying notes 175-84.

<sup>172</sup> Jason R. Wiener, Note, *The Right to Teach, the Right to Speak, and the Right to be a Valuable Contributor to a Child's Upbringing: Public School Teachers' First Amendment Right to Free Speech and Expression*, 32 W. ST. U. L. REV. 105, 117-18 (2004).

<sup>173</sup> Heather M. Good, Comment, "*The Forgotten Child of our Constitution*": *The Parental Free Exercise Right to Direct the Education and Religious Upbringing of Children*, 54 EMORY L.J. 641, 645 (2005) (explaining that rational basis type scrutiny "is less protective of individual rights and liberties").

<sup>174</sup> *Id.*

<sup>175</sup> Kuhn, *supra* note 63, at 1017-19 (describing various pedagogical concerns).

<sup>176</sup> *Id.* at 1018. The Fourth Circuit held that anything educational is pedagogical, thus including all speech relating to the curriculum. *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998). The Sixth Circuit expanded the definition even more by finding that "legitimate pedagogical concerns is by no means confined to the academic." *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989). These broad definitions of pedagogical show a moving trend towards the justifications underlying *Rust* in that public schools can regulate teachers' instructional speech.

case basis.<sup>177</sup> This “undefined nature of ‘legitimate pedagogical concerns,’ coupled with judicial deference to the judgment of school officials, creates the potential for abuse,”<sup>178</sup> as well as inconsistency.

Another problem under *Hazelwood* deals with the requirement of notice, as set forth in the Due Process Clause of the Fourteenth Amendment.<sup>179</sup> A notice requirement is constitutionally fulfilled when it adequately informs the average teacher of what kind of speech is prohibited.<sup>180</sup> Although some courts have outright rejected a notice requirement,<sup>181</sup> the plurality of courts do call for notice.<sup>182</sup> Some courts that have a notice requirement create leeway for the schools by not mandating that there be an express prohibition of every imaginable speech, but rather, that there only be policies and regulations in place to give teachers a reasonable expectation of prohibited speech.<sup>183</sup> Other courts, however, simply weigh adequate notice as a factor in the determination of reasonableness of the regulation.<sup>184</sup> These different requirements for notice, as well as the undefined nature of pedagogical concerns, have led to unpredictability and inconsistency among the courts applying *Hazelwood*.

### B. Analysis of the Pickering Test

Whereas under the *Hazelwood* test the government regulations are rarely struck down, in *Pickering* cases, speech involving public concern is rarely found to cause work interferences.<sup>185</sup> As a result, unless special circumstances exist, such as the need for confidentiality or special obligations, the teachers’ speech is usually protected by the First Amendment.<sup>186</sup>

<sup>177</sup> Ward v. Hickey, 996 F.2d 448, 454 (1st Cir. 1993).

<sup>178</sup> Daly, *supra* note 60, at 13.

<sup>179</sup> Kuhn, *supra* note 63, at 1012-13.

<sup>180</sup> *Id.*

<sup>181</sup> Boring, 136 F.3d at 364.

<sup>182</sup> Daly, *supra* note 60, at 23 (explaining that the First, Second, and Eighth Circuits have some type of notice requirement). When the courts find that there is inadequate notice, the regulation will be unconstitutional on vagueness grounds. Kuhn, *supra* note 63, at 1012.

<sup>183</sup> Daly, *supra* note 60, at 23 (citing Ward v. Hickey, 996 F.2d 448, 454 (1st Cir. 1993)).

<sup>184</sup> *Id.* (citing Webster v. New Lenox Sch. Dist. No. 122, 917 F.2d 1004 (7th Cir. 1990); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 796 (5th Cir. 1989)).

<sup>185</sup> Kuhn, *supra* note 63, at 1007; see also William P. Barnette, *The Run for the Roses Meets the First Amendment: An Examination of Desormeaux v. Kentucky Racing Commission and the Constitutionality of Prohibitions on Jockey Advertising*, 52 CLEV. ST. L. REV. 371, 379 (2004).

<sup>186</sup> *Id.* at 1007-08. As Justice White noted in his opinion in *Pickering*:

The State may not fire the teacher for making [false statements on a matter of public concern] unless, as I gather it, there are special circumstances, not present in this case, demonstrating an overriding state interest, such as the need for confidentiality or the special obligations which a teacher in a particular position may owe to his superiors.

*Pickering v. Bd. of Educ.*, 391 U.S. 563, 582 (1968) (White, J., concurring in part and dissenting in part).

Under the *Pickering* test, courts recognize that the essence of the relationship between teachers and schools is that of employer-employee.<sup>187</sup> When teachers speak, they are doing what they were hired and paid to do, which is why courts use the *Pickering* test for in-class speech.<sup>188</sup> The underlying rationale for extending *Pickering* to this context is that teachers, as public employees, should not give up their right to speak on matters of public concern solely because of the fact that they are public employees.<sup>189</sup>

Despite accounting for the employer-employee relationship of teachers and schools, a common criticism of the *Pickering* test is that the “public concern” standard is not tailored for instructional speech.<sup>190</sup> Because “the essence of a teacher’s role in the classroom, and therefore as an employee, is to discuss with students issues of public concern,”<sup>191</sup> the *Pickering* test fails to account for the unique environment of public school teachers.<sup>192</sup> For example, under the *Pickering* test, the right to speak outside of the curriculum is non-existent for some teachers, such as math teachers, while other teachers, such as social studies or literature teachers, regularly touch on matters of public concern.<sup>193</sup> Because of this, some teachers enjoy protection on most of their speech, as they can claim their speech touched on matters of public concern, while other teachers receive no protection.<sup>194</sup> Further inconsistencies are present with the “public concern” standard, as courts have the authority to determine “public concern” by focusing on the role of the speaker or the context, form, and content of the speech in question.<sup>195</sup> Because it is “within a court’s discretion to choose which of these factors to focus on most heavily,”<sup>196</sup> there is no uniformity among the courts when determining matters of public concern.<sup>197</sup>

The test is also ill-suited for instructional speech because the speech in *Pickering* was created by examining speech spoken *outside* of the classroom. Instructional speech, however, is spoken *inside* the classroom. The *Pickering* test, “designed and developed to address one paradigm of expression, cannot be stretched in an intellectually honest manner to cover in-class speech, no matter how deserving of

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<sup>187</sup> Waldman, *supra* note 69, at 102.

<sup>188</sup> *Id.*

<sup>189</sup> Kuhn, *supra* note 63, at 1002.

<sup>190</sup> *Id.* at 1008-09.

<sup>191</sup> Waldman, *supra* note 69, at 103 (quoting *Boring v. Buncombe County Bd. of Educ.*, 98 F.3d 1474, 1479-80 (4th Cir. 1996)).

<sup>192</sup> *Id.*

<sup>193</sup> Vikram Amar & Alan Brownstein, *Academic Freedom*, 9 GREEN BAG 2d 17, 19 (2005).

<sup>194</sup> *Id.*

<sup>195</sup> Emily Holes Davis, Note & Recent Development, *Protecting the “Marketplace of Ideas”: The First Amendment and Public School Teachers’ Classroom Speech*, 3 FIRST AMEND. L. REV. 335, 361-62 (2005).

<sup>196</sup> *Id.* at 361.

<sup>197</sup> *Id.* at 361-63.

constructional protection.”<sup>198</sup> As instructional speech is made pursuant to teachers’ job descriptions, *Pickering*, standing alone, is not applicable; however, the changes *Garcetti* made to the traditional *Pickering* test are applicable to teachers’ instructional speech.

*Garcetti* was important not only for the change it made to the *Pickering* test, but also for affirming the relevance of *Rust* by concluding that the “public has the right to expect its government to work towards ends that have been ‘democratically agreed upon.’”<sup>199</sup> This analogy can be easily extended to public schools because when teachers are speaking as the government, the public has the right to expect that teachers will instruct according to what the state and local governments have agreed upon. The analysis under *Garcetti* is more straightforward than both *Pickering* and *Hazelwood* because this test contains a “*per se* rule categorizing official duty speech as government expression.”<sup>200</sup> Furthermore, the application of the *Garcetti* test and the *Rust* test are very similar in that, with public employee speech (*Garcetti*) and governmental speech (*Rust*), the government has in a sense purchased, through salary or funding, the speech, and therefore, has a right to regulate the content of that speech.<sup>201</sup>

Whether the *Garcetti* test or *Rust* test is applied to teachers’ instructional speech, the outcome is the same in that the teachers have no First Amendment protection. *Rust*, however, is more applicable to instructional speech as teachers’ speech in the classroom is that of the government and not of public employees.

### C. Extending *Rust* to Teachers’ Instructional Speech

Courts may hesitate to extend *Rust* to teachers’ instructional speech because the dicta in *Rust* expressed reservations about broadening *Rust*’s reach to universities; therefore, by showing that K-12 schools are too dissimilar to universities, the *Rust* dicta presents no problem in extending *Rust* to public schools. Second, by showing that instructional speech is really government speech, the necessary foundation will be laid to then show that the government has First Amendment protections of instructional speech, not teachers. Although there are some problems legally and realistically with the *Rust* test, the underlying rationale of *Rust*, as well as policy concerns, support *Rust*’s application over the *Hazelwood* and *Pickering* tests.

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<sup>198</sup> Daly, *supra* note 60, at 11.

<sup>199</sup> Andrew Bernie, Recent Development, *A Principled Limitation on Judicial Inference: Garcetti v. Ceballos*, 30 HARV. J.L. & PUB. POL’Y 1047, 1056 (2003).

<sup>200</sup> Nicole B. Cásarez, *The Student Press, the Public Workplace, and Expanding Notions of Government Speech*, 35 J.C. & U.L. 1, 50 (2008). This *per se* rule in turn leads to judicial economy. *Id.* For example, under the *Hazelwood* test there are requirements of a reasonable relationship to pedagogical concerns. *Id.* Although this “reasonable relation” is not a hard standard to meet, certain factors, such as notice, can lead to a lengthy analysis. *See supra* text accompanying notes 175-84. The *Garcetti* test, however, does not even require a bare reasonableness showing, and as such, the only showing necessary is that the speech is instructional.

<sup>201</sup> Donald J. Weidner, *Thoughts on Academic Freedom: Urofsky and Beyond*, 33 U. TOL. L. REV. 257, 261 (2001).

1. *Rust* Dicta: Universities vs. Public Schools

The majority in *Rust* had specific reservations about extending the decision to public forums and public universities,<sup>202</sup> and as a result, courts may be hesitant in applying *Rust* to teachers' instructional speech. Recognizing that a university is a "traditional sphere of free expression so fundamental to the functioning of our society," the *Rust* majority reasoned that the government does not have free reign to control speech merely because it subsidizes universities.<sup>203</sup> Despite singling out universities, the decision makes no reference to whether public schools are in a traditional sphere of expression, and thus, exempt from *Rust*'s reach as well.<sup>204</sup> "A reasonable implication of this omission is that since public elementary and secondary schools receive federal funding, the federal government may condition its grants on content-based regulation of the messages purveyed by the schools."<sup>205</sup>

The Supreme Court has traditionally viewed public universities and public schools as being so "fundamentally different from each other"<sup>206</sup> that there is no reason to believe that the Court would refrain from applying *Rust* to public schools. Established precedent recognizes that state legislatures have the "undoubted right to prescribe the curriculum for its public schools,"<sup>207</sup> whereas the Court has never held that legislatures have that same right as to universities.<sup>208</sup> Not only do universities and public schools differ in the amount of control the government exerts on the curriculum, but the purposes and functions of universities<sup>209</sup> are significantly different from the purposes and functions of public schools.<sup>210</sup>

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<sup>202</sup> *Rust v. Sullivan*, 500 U.S. 173, 199-200 (1991).

<sup>203</sup> *Id.*

Similarly, we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.

*Id.* at 200 (citation omitted).

<sup>204</sup> See Danielle E. Caminiti, Comment, *Brooklyn Institute of Arts & Sciences v. City of New York: The Death of the Subsidy and the Birth of the Entitlement in Funding of the Arts*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 875, 896 (2000) (noting that "[t]he decision in *Rust* notably made no reference to museums or public elementary and secondary schools").

<sup>205</sup> Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Incultation in the Public Schools*, 70 NOTRE DAME L. REV. 769, 822 n.282 (1995).

<sup>206</sup> Laura A. Jeltema, Comment, *Legislators in the Classroom: Why State Legislatures Cannot Decide Higher Education Curricula*, 54 AM. U.L. REV. 215, 229 (2004).

<sup>207</sup> *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968).

<sup>208</sup> Jeltema, *supra* note 206, at 229.

<sup>209</sup> *Id.* at 227-31. The underlying purposes of universities are to "expose students to new ideas and to allow for the critical questioning of these ideas," as well as encourage diversity in education. *Id.* at 230. Although there are limitations on what can be taught to K-12 students, as prescribed through the legislature, universities "are free to offer religious, theological, or political courses." *Id.* at 231. Most importantly, "educational experts maintain that the curricular inclusion of controversial issues and experience with diversity [in the university



The differences between university professors and K-12 teachers further illustrate differences between the two educational spheres. Whereas parents and students depend on teachers to follow the curriculum designed by the local governments, professors in universities have more autonomy in choosing teaching and research topics, and as such, professors have stronger First Amendment protections.<sup>211</sup> Furthermore, because of a higher level of student maturity in universities, the need to protect students from controversial or insensitive methods diminishes.<sup>212</sup> Professors in universities have more flexibility and authority than public teachers; therefore, whatever constitutional principles govern professors do not apply to K-12 teachers.<sup>213</sup> The aspects of universities that the majority in *Rust* was trying to preserve by shielding universities from the holding are not applicable to public schools; therefore, the dicta in *Rust* presents no problem for applying the *Rust* test to situations involving public schools.

## 2. The Government is the Speaker in Public Schools

Teachers' speech inside the classroom is government speech,<sup>214</sup> therefore, the government may take legitimate steps to ensure that the messages are not distorted.<sup>215</sup> Determining to whom a speech belongs to is "admittedly . . . difficult once we recognize that the state cannot literally speak, but can speak only through the voices of others, others who have their own First Amendment rights in many other

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setting] promotes the development of necessary life skills." *Id.* at 230-31. Students in universities also have total autonomy in choosing which school to enroll in, what classes to take, and which professors to select; in addition, whether or not to pursue higher education in the first place is a matter of choice. *Id.* at 230.

<sup>210</sup> *Id.* at 230. The purposes and functions of K-12 schools are to prepare "individuals for participation as citizens," and as such, states have an interest in ensuring that certain values are included in the curriculum, an interest that is not present in universities. *Id.*; see also Nathaniel J. McDonald, Note, *Ohio Charter Schools and Educational Privatization: Undermining the Legacy of the State Constitution's Common School Approach*, 53 CLEV. ST. L. REV. 467, 5000 (2005). Also, "[w]hile secondary schools are not rigid disciplinary institutions, neither are they open forums in which mature adults, already habituated to social restraints, exchange ideas on a level of parity." W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 335 (1998).

<sup>211</sup> Jeltema, *supra* note 206, at 247.

<sup>212</sup> Buss, *supra* note 58, at 274.

<sup>213</sup> *Id.* at 277.

<sup>214</sup> As states and local governments make decisions about the curriculum, "[t]he speech of a public school teacher is unquestionably an exercise of state power." Stuller, *supra* note 210, at 332. For example, when teachers use the classroom to push religious beliefs, there will be a violation of the Establishment Clause. *Id.*

<sup>215</sup> *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995); see also Helen Norton, *Not for Attribution: Government's Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. DAVIS L. REV. 1317, 1341 (2004) (noting that when the speech is categorized as government speech, the First Amendment allows the government to protect and control the speech).

contexts.”<sup>216</sup> Whether or not speech belongs to the government is something the courts constantly wrestle over;<sup>217</sup> however, the lower courts rely on four factors when determining whether the speech belongs to the government: (1) who is the literal speaker; (2) who exercises editorial control; (3) what is the purpose of the program; and (4) whether the government or the private entity bears the ultimate responsibility.<sup>218</sup>

It is not uncommon for the government to use a private speaker to bolster ideas, issues, values, and subjects,<sup>219</sup> and when doing so, “it should be permitted to decline to serve as the ‘dummy’ through which a private ventriloquist projects her views.”<sup>220</sup> When teachers speak in the classroom they appear to be literal speakers; however, teachers are only acting as representatives of the school board and the state legislatures.<sup>221</sup> For example, one way the state may speak is by requiring teachers to present only specified state viewpoints on social policy matters, and these requirements that the state places on teachers are characterized as government speech.<sup>222</sup> Even though teachers physically speak in the classroom, the government is the literal speaker.<sup>223</sup>

The government exercises editorial control over a certain program when the speech goal is not to promote specific viewpoints, but rather to allow a limited, government-approved range of viewpoints.<sup>224</sup> In public education, *someone* must control what ideas, issues, values, and subjects will be taught and what method or materials will be used to convey those ideas, issues, values, and subjects.<sup>225</sup> Not only do most states statutorily express that the government is that *someone*,<sup>226</sup> but as a

<sup>216</sup> Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 100 (1998).

<sup>217</sup> Norton, *supra* note 215, at 1329 (“Determining whether certain expression belongs to the government or to private speakers . . . can be tricky—so tough, in fact, that courts wrestling with these questions have generated inconsistent and often unsatisfying opinions.”).

<sup>218</sup> Caroline Mala Corbin, *Mixed Speech: When Speech is both Private and Governmental*, 83 N.Y.U. L. REV. 605, 627 n.118 (2008).

<sup>219</sup> See Helen Norton, *The Measure of Government Speech: Identifying Expression’s Source*, 88 B.U. L. REV. 587, 617 (2008).

<sup>220</sup> Norton, *supra* note 215, at 1334.

<sup>221</sup> Buss, *supra* note 58, at 256.

<sup>222</sup> Schauer, *supra* note 216, at 101.

<sup>223</sup> See Corbin, *supra* note 218, at 629-30.

<sup>224</sup> *Id.* at 634-35.

<sup>225</sup> Buss, *supra* note 58, at 241 (“What is taught at any level has to be based on some plan. Education in the classroom, particularly over a semester or an extended period of time, cannot simply be open-ended, allowing all ideas to come in at any time. Curriculum decisions entail deciding which ideas, which issues, which subjects will be dealt with at what time. . . . Someone must have an agenda; someone must have some control on relevance. Deciding whether the teacher or the school board has control of the curriculum is deciding who gets to make the determination of what agenda will be and through what materials and what method the agenda will be pursued.”).

<sup>226</sup> Stuller, *supra* note 210, at 333 (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

matter of public policy, the government should control public school curriculum.<sup>227</sup> The limited range of approved viewpoints is prescribed by the government through state legislatures and local governments in the form of the curriculum; therefore, the local governments, not the teachers, exercise the editorial control.<sup>228</sup>

When determining the purpose of a program, the focus is “the speech goal of the government program (if any) in which the speech appears.”<sup>229</sup> Many purposes of public education exist,<sup>230</sup> and local governments set the curriculum in a manner that will promote the purposes it wants to achieve. Although public education is theoretically meant to be the “marketplace of ideas,”<sup>231</sup> realistically the purpose of public education is to ensure that students learn ideas, issues, values, and subjects defined by the state.<sup>232</sup> While the goals of public education may suggest teachers’ speech is actually mixed speech,<sup>233</sup> the primary purpose of the speech in school is to convey the government-approved curriculum.<sup>234</sup>

The government bears the ultimate responsibility financially and politically in public education. As public education is wholly funded by the government, “it is a logical default position that speech belongs to whoever pays for it.”<sup>235</sup> The government is responsible politically for the messages conveyed in the classroom.<sup>236</sup> For example, not only can local officials be voted out of office, but parents and

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<sup>227</sup> Waldman, *supra* note 69, at 84 (citing *Boring v. Bd. of Educ.*, 136 F.3d 364, 371 (4th Cir. 1998) (en banc)).

<sup>228</sup> See Corbin, *supra* note 218, at 633.

<sup>229</sup> *Id.*

<sup>230</sup> See *supra* note 210.

<sup>231</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

<sup>232</sup> Alexis Zouhary, Note, *The Elephant in the Classroom: A Proposed Framework for Applying Viewpoint Neutrality to Student Speech in the Secondary School Setting*, 83 NOTRE DAME L. REV. 2227, 2254 (2008); see also *infra* notes 274-76 and accompanying text.

<sup>233</sup> Corbin, *supra* note 218, at 634.

Under current free speech doctrine, speech made to advance a specific viewpoint (the first possibility) is generally treated as government speech, while speech made in the context of a government program to promote wide-ranging discussion (the second possibility) is generally treated as private speech. It is the third possibility – speech made within the context of a government program to promote only certain views – that is the subject of considerable debate (and litigation). So while the first type points to government speech and the second to private speech, the third, most contested, suggests mixed speech.

*Id.* (citations omitted).

<sup>234</sup> *Id.* at 634 n.148 (“noting that subsidized speech is treated more like government speech if government expression is primary purpose of program and is treated more like private speech if purpose is to create forum for private speech” (citing Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1358-59 (2001))).

<sup>235</sup> *Id.* at 631.

<sup>236</sup> See *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1016 (9th Cir. 2000). Through the political process, members of the board and state legislatures can be voted out of office, and until they are voted out, they are the speakers. See *id.*

community members also can hold local officials responsible for what happens in public schools, usually by expressing dissatisfaction at publicly-held meetings.<sup>237</sup> The government is not just accountable at the local level, but accountability is seen on the state level (through assessment movements) and on the federal level (through acts, such as No Child Left Behind).<sup>238</sup> All of these mandated guidelines are in place to ensure that the government remains accountable and bears the ultimate responsibility for speech in the classroom.<sup>239</sup>

Applicability of *Rust* hinges on the fact that when the government uses private speakers to convey a particular message, that speech is government speech. In public education, the government does not create a program to encourage private speech,<sup>240</sup> but rather, the government uses private speakers (teachers) to convey the particular message prescribed by the government (curriculum), such that teachers' speech in the classroom *is* government speech.<sup>241</sup>

### 3. State and Local Governments Control Instructional Speech, Not Teachers

The responsibility of formulating and executing a curriculum is vested with local school boards and state legislatures,<sup>242</sup> while the responsibility of implementing the curriculum is vested with teachers.<sup>243</sup> The government regulates educational institutions by selecting moral values and theories and by imposing restrictions on teachers and students.<sup>244</sup> Consequently, the content of public education is attributed to "constitutional, statutory, and regulatory provisions at the state level [and] curricular decisions of local school boards."<sup>245</sup> When school boards prescribe the way the curriculum is taught, individual teachers do not have a First Amendment

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<sup>237</sup> *Id.*

<sup>238</sup> See Todd A. DeMitchell & Terri A. DeMitchell, *Statutes and Standards: Has the Door to Educational Malpractice Been Opened?*, 2003 BYU EDUC & L.J. 485, 486 & n.6 (2003).

<sup>239</sup> See *id.* at 486. State legislators and the federal government put into place these standardized tests because legislators felt that this would be the best way to ensure that schools were doing their job. *Id.* If the student individually fails, that student will not be promoted, so in a sense, each individual can be held accountable for his/her own scores. *Id.* at 487. Speaking as a general matter though, the school board bears the ultimate responsibility because if too many students fail and the school gets a failing grade, then it is the responsibility of the school to make changes and restructure the school. *Id.* But see Susan P. Stuart, *Citizen Teacher: Damned if You Do, Damned if You Don't*, 76 U. CIN. L. REV. 1281, 1337 (2008), for an argument that there is no reason to hold teachers accountable for test results, as teachers do not have control or discretion over the curriculum they teach.

<sup>240</sup> See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

<sup>241</sup> See *Rosenberger*, 515 U.S. at 833 (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

<sup>242</sup> DeMitchell & DeMitchell, *supra* note 238, at 509.

<sup>243</sup> Buss, *supra* note 58, at 256.

<sup>244</sup> John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1138 (2005).

<sup>245</sup> Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1420 (2001).

right to “preempt the decisions of their superiors” and speak outside the curriculum.<sup>246</sup>

When the educational institution decides the content of the education it prescribes, it is the government speaking through the state and school board, and the government is thus entitled to regulate the content of that speech when it enlists private speakers (i.e., teachers) to convey that message.<sup>247</sup> The government usually relies upon the credibility of third-party sources to illustrate, bolster, and explain the government’s position,<sup>248</sup> and school systems are no different. When school systems hire teachers, they are entrusting those teachers to teach the set state-defined ideas, issues, values, and subjects;<sup>249</sup> therefore, it follows that teachers’ instructional speech is a function of employment.<sup>250</sup> When teachers speak in a way that does not meet government approval, the school systems’ educational missions are not only undermined, but teachers are also interfering with the school boards’ managerial authority and responsibilities.<sup>251</sup> Under *Rust*, when the government makes a choice about what is or is not to be said in the classroom, the government is allowed to enforce that choice.<sup>252</sup> Furthermore, “because K-12 schools ‘speak’ more on the government’s behalf than independently, there are limitations on what the state can teach in K-12 schools because the state must remain neutral.”<sup>253</sup> It is important to ensure that the state stay neutral. To ensure neutrality, teachers should have no right to speak outside of the limitations placed on them by the government.

Teachers are not subjected to the certain safeguards in the educational system of school boards and state legislatures. Specifically, school boards and state legislatures are held accountable through the democratic process, whereas teachers are not.<sup>254</sup> Through elections, those who prescribe the curriculum answer to the

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<sup>246</sup> Waldman, *supra* note 69, at 87 (“Although a teacher’s First Amendment right allows him to say what he wishes outside the classroom, the inmates do not run the asylum. If a school board or principal decides that a particular subject is to be taught in a particular way, individual teachers do not have a constitutional right in the classroom to preempt the decisions of their superiors.” (citing Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Incultation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 67 (2002))).

<sup>247</sup> *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491-92 (3d Cir. 1998) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833-34 (1995)).

<sup>248</sup> Norton, *supra* note 219, at 617.

<sup>249</sup> *Id.*; Zouhary, *supra* note 232, at 2256.

<sup>250</sup> Stuart, *supra* note 239, at 1337 (“[T]eachers’ curriculum delivery has become a function of employment not a function of education. Instead, the teachers are now just government speakers, and the rigor required of the curriculum lies entirely with the school board.”).

<sup>251</sup> Buss, *supra* note 58, at 242.

<sup>252</sup> Stuller, *supra* note 210, at 331.

<sup>253</sup> Jeltema, *supra* note 206, at 231 (footnote omitted).

<sup>254</sup> *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1016 (9th Cir. 2000) (quoting *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)); *see also supra* notes 236-58 and accompanying text.

people, so that what the government decides should be taught and said in the classroom does not go unchecked.<sup>255</sup> “Moreover, it cannot be accepted as a premise that the student is voluntarily in the classroom and willing to be exposed to a teaching method which, though reasonable, is not approved by the school authorities.”<sup>256</sup> Although it is impossible for teachers to educate without speaking,<sup>257</sup> it does not follow that teachers have a constitutional right to present personal views against the directions of elected officials.<sup>258</sup> It would be illogical to allow teachers to “get the last word in” the curriculum.<sup>259</sup>

Many proponents of the *Hazelwood* and *Pickering* tests believe that these tests ensure some form of academic freedom, which is questionably an essential part of the educational process.<sup>260</sup> There is much debate among scholars on the importance of academic freedom and whether or not academic freedom should be a constitutional right or whether it can be raised as a defense in legal proceedings.<sup>261</sup> Even assuming there is some right to academic freedom, that right does not belong to teachers, but rather the right belongs to institutions.<sup>262</sup> The *Rust* test ensures that teachers cannot speak their own views outside of the government prescribed curriculum in the name of academic freedom, regardless of whether the speech is related to pedagogical or public concerns.<sup>263</sup>

#### 4. *Rust*’s Application: The Problem with Specifics

Although teachers’ convey government messages when they are teaching in the classroom,<sup>264</sup> the lack of specificity in the messages presents an obstacle in applying the *Rust* test. In *Rust* and its line of precedent, the content of the government speech has a very narrow focus.<sup>265</sup> Conversely though, in instructional speech, the

<sup>255</sup> *Downs*, 228 F.3d at 1016. The Supreme Court has recognized this concept as well, noting that: “When the government speaks . . . to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.” *Fee*, *supra* note 244, at 1168 n.295 (quoting *Southworth*, 529 U.S. at 235).

<sup>256</sup> *Stuller*, *supra* note 210, at 335 (quoting *Mailloux v. Kiley*, 323 F. Supp. 1387, 1392 (D. Mass. 1971)).

<sup>257</sup> *Bezanson & Buss*, *supra* note 245, at 1420.

<sup>258</sup> *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007).

<sup>259</sup> *Buss*, *supra* note 58, at 241-49.

<sup>260</sup> R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793, 799 (2007); *see generally* Stuart, *supra* note 239 (explaining that when academic freedom is examined under curricular issues, teachers’ academic freedom, which is vital to the educational process, will be threatened).

<sup>261</sup> *See supra* note 60.

<sup>262</sup> *Weidner*, *supra* note 201, at 263.

<sup>263</sup> *Id.*

<sup>264</sup> *Bezanson & Buss*, *supra* note 245, at 1421.

<sup>265</sup> *Buss*, *supra* note 58, at 260. For example, doctors could not engage in speech specifically about “abortion-related activities” in *Rust v. Sullivan*, 500 U.S. 173, 175 (1991),

government controls the broad, or macro message, but it does not exert control on the specific, or micro message.<sup>266</sup> Even though the government controls the subjects that are taught in the classroom, as well as the point of views presented in those subjects,<sup>267</sup> it stops quite short of providing teachers' with a "script" of what to say in the classroom.<sup>268</sup> A problem with the *Rust* test is that when applying it to teachers' speech, the test would allow the government to ensure that teachers' do not distort a particular government message, even though no government message is specifically laid out.<sup>269</sup> A further problem arises in the absence of specific guidelines about what teachers can and cannot say in the classroom: it can be difficult to "disentangle what . . . [teachers] say[] on the basis of delegated authority from that which reflects [the teachers'] personal views."<sup>270</sup> The realities of teaching, such as unanticipated questions or comments from students, make it hard for the government to regulate teachers' speech, which the *Rust* test does not take into account.<sup>271</sup> Despite these limitations, the *Rust* test is still a better fit for instructional speech cases as the ability of local and state governments to effectively control the subjects and point of views that are taught in the school "is largely measured by [the government's] ability to control teacher speech."<sup>272</sup>

##### 5. Promoting Judicial and Political Economy with the *Rust* Test

The authority to determine whether or not and to what extent teachers' speech is protected should *not* be in the hands of judges, but rather in the hands of professional educators, such as the school and state, as well as the general public.<sup>273</sup> The decision-making process for determining what is permissible to say in the classroom involves issues, which are more "subjective and evaluative than typical issues presented in disciplinary decisions and . . . such academic judgments should be left to professional educators."<sup>274</sup> Judges should, therefore, leave these types of decisions to educational experts: the state legislatures and school boards.<sup>275</sup> Although courts

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and artists could not use funds to create art that violated "standards of decency and respect" in *National Endowment of the Arts v. Finley*, 524 U.S. 569, 573 (1998).

<sup>266</sup> Bezanson & Buss, *supra* note 245, at 1422.

<sup>267</sup> *Id.* at 1421-22 ("With education, the message is selected by a government agent and is channeled from the beginning: the selection process starts, at least generally, with a pre-existing set of messages, first in predetermined categories (history, philosophy, etc.) and second in predetermined points of view within those categories (Aristotle and Kant).").

<sup>268</sup> Buss, *supra* note 58, at 259 (commenting that the distinction between a doctor's speech and a professor's speech is that a professor's speech is not scripted).

<sup>269</sup> *See Rust*, 500 U.S. at 178.

<sup>270</sup> Buss, *supra* note 58, at 261.

<sup>271</sup> *Id.* at 261.

<sup>272</sup> DeMitchell & DeMitchell, *supra* note 238, at 512.

<sup>273</sup> ESSEX, *supra* note 30, at 294.

<sup>274</sup> *Id.* (citing Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978)).

<sup>275</sup> DAVID C. BLOOMFIELD, AMERICAN PUBLIC EDUCATION LAW 66 (2007).

traditionally decline to “micromanage” educational decisions,<sup>276</sup> lawsuits are constantly filed concerning what teachers can and cannot say in the classroom.<sup>277</sup> *Rust* ensures a straight-forward and uncomplicated test, which would in turn cut down on the number of lawsuits filed and heard against schools that are “already over-burdened and cash-strapped.”<sup>278</sup> Realistically, the only time judges should intervene into educational matters is to protect *students* rights;<sup>279</sup> otherwise, the primary educational authority rests with state and local governments.

Along with the professional educators, decisions of what should be said in the classroom should belong to the local communities. Local control of public education is in place to promote the values of the local communities.<sup>280</sup> As the Supreme Court has recognized, school boards have a “legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral or political.”<sup>281</sup> The public has an interest in ensuring that certain values are promoted and local officials carry the risk of being voted out of office for failure to promote those values.<sup>282</sup> When teachers talk in the classroom, they are speaking on behalf of the government; therefore, what the government can say is *not* a constitutional issue left to judges to determine but should be left to the public and the political process.<sup>283</sup>

#### V. CONCLUSION

Teachers may not necessarily “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”<sup>284</sup> but they do shed their constitutional rights to freedom of speech the moment they start teaching in the classroom. Although the *Hazelwood* and *Pickering* tests ensure this in *some* situations, the *Rust* test is the only test that will consistently result in teachers having no First Amendment protections in the classroom.

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<sup>276</sup> *Id.* at 65-66.

<sup>277</sup> Zouhary, *supra* note 232, at 2258.

<sup>278</sup> *Id.* (discussing how an application of strict scrutiny on view-point based restrictions of school-sponsored speech would increase “the number of frivolous lawsuits filed ‘against our already overburdened and cash-strapped public schools’” (quoting Petition for Writ of Certiorari *Baldwinsville Cent. Sch. Dist. v. Peck ex rel. Peck*, 547 U.S. 1097 (2006) (No. 05-899))).

<sup>279</sup> *BLOOMFIELD*, *supra* note 275, at 66.

<sup>280</sup> *IMBER & VAN GEEL*, *supra* note 33, at 65.

<sup>281</sup> *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982).

<sup>282</sup> *See Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1013-14 (9th Cir. 2000); Fee, *supra* note 244, at 1168 n.295.

<sup>283</sup> Stuller, *supra* note 210, at 331-32 (“The process of deciding what the government shall say is not a constitutional issue, but is left to the political process.”); *see also* Weingarten v. Bd. of Educ., 591 F. Supp. 2d 511, 517 (S.D.N.Y. 2008) (mem.) (quoting *Hazelwood*, the Court recognized that whether classroom speech is or is not appropriate should be left for the school board to decide rather than the courts).

<sup>284</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).



When the government funds a program, such as public education, the government has a right to ensure that the message is not distorted by teachers' personal views and beliefs. This is not to say that teachers can *never* express personal views. Outside of the classroom, teachers' rights are protected by the First Amendment;<sup>285</sup> however, no such protection exists in the classroom. Students in elementary and secondary schools are very impressionable, and because of this, state and local governments must take many measures to ensure that the messages that students receive are appropriate and reflect the views of the public as a whole. It is illogical that teachers can present completely biased views not reflective of the state and local governments' views' and then claim that the First Amendment permits them to do so.

The application of the *Rust* test will not only force teachers to be more conscious of what they say, but it will also free state and local governments from the fear that teachers will constantly undermine the government's authority. Although the *Rust* test is not perfect, it is the most logical test to apply in terms of the context behind the development of the test. As such, the question as to the extent of teachers' First Amendment protections of instructional speech does not even need to be examined because application of the *Rust* test will always result in teachers having *no* First Amendment protection in the classroom.

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<sup>285</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573-74 (1998).