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# **Keep The Poking To Yourself, Mrs. Robinson: The Missouri Facebook Statute And Its Implications For Teacher Free Speech Under the First Amendment**

**Alexander Lehrer**

## **I. ABSTRACT**

This paper will analyze the Amy Hestir Student Protection Act, a recently enacted statute passed by the State of Missouri, prohibiting public school teachers from utilizing any form of social media that grants them exclusive access to students. This paper will first explain the two approaches courts may take in determining the constitutionality of the Missouri ban and will then discuss the likely outcomes under each model. Additionally, potential solutions and alternatives to the Missouri statute will be offered to illustrate how the statute might be able to survive a First Amendment free speech challenge.

## **II. INTRODUCTION**

Not too long ago, bumping into a teacher at the grocery store or the post office shocked most young students. Students found it hard to believe that their teachers had a life outside of the classroom that didn't involve lesson plans and conservative work attire. With the advent of social media, however, the gap between the classroom and a teacher's private life has nearly vanished. Teachers, like other public employees, are finding it increasingly difficult to keep their private lives separate from work.<sup>1</sup> Social media outlets such as Facebook and Myspace have recently been adopted by educators to post

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<sup>1</sup> Rachel Miller, Comment, *Teacher Facebook Speech: Protected Or Not?*, 2011 B.Y.U. Educ. & L.J. 637 (2011).

homework assignments for school, plan school events, and facilitate classroom discussion.<sup>2</sup> While social media has been used for educational purposes, it has also allowed students and teachers to interact on an unprecedented personal level like never before outside of the classroom.

Social networking sites such as Facebook have become exceedingly popular, attracting users of all ages.<sup>3</sup> Facebook is currently the world's largest and most popular social networking site.<sup>4</sup> Presently, over 400 million people use Facebook and half of those users log in daily.<sup>5</sup> The fastest growing demographic on Facebook is users thirty years of age or older with approximately sixty-percent of Facebook accounts and seventy-percent of all Myspace accounts owned by individuals twenty-five years of age and older.<sup>6</sup>

With the explosion of social media, many school districts and states have passed policies and regulations designed to limit teacher-student interactions on Facebook and/or to curb sexual misconduct between teachers and students.<sup>7</sup> States and school districts have varied in their approach to limiting teacher-student social media interaction. For example, Louisiana enacted legislation that would make teacher-student interaction on

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

<sup>3</sup> Amy Estrada, *Saving Face From Facebook: Arriving At A Compromise Between Schools' Concerns With Teacher Social Networking and Teachers' First Amendment Rights*, 32 T. Jefferson L. Rev. 283, 286 (2010).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Patricia Nidiffer, *Tinkering With Restrictions On Education Speech: Can School Boards Restrict What Educators Say On Social Networking Sites?*, 36 U. Dayton L. Rev. 115, 116 (2010).

<sup>7</sup> Rachel Miller, 2011 B.Y.U. Educ. & L.J. 637 (2011).

Facebook illegal.<sup>8</sup> The Utah Board of Education mandated that every school district have its own policy on social networking. School districts in Texas, focusing on a “professional code of ethics,” encourage teachers to maintain a proper social distance between their students.<sup>9</sup>

Missouri recently enacted the Amy Hestir Student Protection Act (hereinafter “Missouri Facebook Statute”). The Missouri Facebook Statute is the most restrictive and controversial of the Facebook bans on teachers. The Missouri Facebook Statute forbids teachers from having “exclusive online access” with current and former students who remain minors.<sup>10</sup> The law was proposed after an Associated Press investigation found eighty-seven Missouri teachers had lost their teaching licenses between 2001 and 2005 because of sexual misconduct, including many instances of exchanging explicit online messages with students.<sup>11</sup> The State ban has raised concerns by teachers over their First Amendment rights. The pertinent part of the statute states that:

Every school district shall, by January 1, 2012, promulgate a written policy concerning teacher-student communication and employee-student communication.

No teacher shall establish, maintain, or use a non-work related Internet site, which allows exclusive access with a current or former student.<sup>12</sup>

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<sup>8</sup> *Id.* at 638.

<sup>9</sup> *Id.*

<sup>10</sup> Alan Schier Zagier, Mo. Teachers Protest Social Media Crackdown, ABC News, Aug. 5, 2011, <http://abcnews.go.com/Technology/wireStory?id=14238838>.

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

<sup>12</sup> Amy Hestir Student Protection Act, § 162.069, 2011 Mo. Laws 54.

The Missouri Facebook Statute goes on to define “former student,” as being any person who was at one time a student at the school at which the teacher is employed and who is eighteen years of age or less and who has not graduated.<sup>13</sup>

While the law is designed to protect students from sexual misconduct and abuse, it has been argued that the measures taken by the State of Missouri stifle Missouri teachers’ First Amendment rights by excessively restricting communication with their students. For example, the law would have a chilling effect upon free speech by effectively prohibiting online communication between parents who are teachers and have children enrolled in the Missouri public school system. The law would also prove detrimental to the learning process by impeding student discussion and the oversight of school assignments. Case law regulating teacher speech should give teachers the maximum freedom of expression possible, while still protecting students from potentially inappropriate teacher-student interaction.

### **III. TEACHER’S FREE SPEECH RIGHTS UNDER THE PUBLIC OFFICIAL DOCTRINE**

Generally, the government may not regulate the speech of private citizens, however, greater latitude is given to regulating the speech of public employees who provide a public service.<sup>14</sup> Throughout much of American history, the courts held that public employees relinquished their constitutional rights simply by choosing to work in the public sector.<sup>15</sup> It is now widely accepted that public employment may not be contingent

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<sup>13</sup> Amy Hestir Student Protection Act, § 162.069, 2011 Mo. Laws 54.

<sup>14</sup> *Pickering v. Bd. Of Educ.*, 391 U.S. 563, 568 (1968).

<sup>15</sup> *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517(Mass. 1892).

upon the surrendering of one's First Amendment rights.<sup>16</sup> The courts have developed a formal analysis in determining whether the First Amendment protects a public employee.

One of the Supreme Court's first cases concerning the extent of a public employee's First Amendment rights was *Pickering v. Board of Education*. In *Pickering*, an Illinois school board dismissed Marvin Pickering, a high school teacher, after he sent a letter to a local newspaper editor criticizing the school board's allocation of tax revenues raised through local bond elections.<sup>17</sup> The school board dismissed Pickering because his criticism of the allocation of funds was detrimental to the efficient operation and administration of the school, was damaging to the reputation of the board of education, and was disruptive of faculty discipline because it created conflict and dissension among teachers.<sup>18</sup> Pickering filed a claim against the school board alleging his termination was a violation of his First Amendment rights.<sup>19</sup>

The United States Supreme Court ruled in favor of the teacher, holding that teacher speech on matters of public concern, which is not knowingly false and not directed at persons where personal loyalty is needed, could not be a cause for dismissal even when the speech is critical of school authorities.<sup>20</sup>

The Court additionally held that one must weigh both the interest of the teacher speaking as a citizen on a matter of public concern and the interest of the state as an

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<sup>16</sup> *Keyishian v. Bd. Of Regents*, 385 U.S. 589, 605-06 (1967).

<sup>17</sup> *Pickering*, 391 U.S. 563 (1968).

<sup>18</sup> *Id.* at 564.

<sup>19</sup> *Id.* at 567.

<sup>20</sup> *Id.* at 569-70.

employer attempting to maintain order in the workplace.<sup>21</sup> The Court established a balancing test which takes into account whether the speech interferes with the teacher's daily duties in the classroom, the regular operation of the schools generally, and the working relationship between the teacher and the institution at which the speech is directed.<sup>22</sup>

Following *Pickering*, the Supreme Court added another dimension to the public employee free speech analysis. In *Connick v. Myers*, an Assistant District Attorney, sued her employer, the District Attorney in New Orleans.<sup>23</sup> Myers was employed as an Assistant District Attorney in New Orleans with the responsibility of trying criminal cases.<sup>24</sup> Myers' employer, the District Attorney of New Orleans, proposed to transfer her to a different section of the criminal court to prosecute cases.<sup>25</sup> Myers strongly opposed the transfer and expressed her disagreement by informing her superiors that she preferred to stay in her current section.<sup>26</sup> When her superiors did not alter their decision to transfer Myers, she prepared a questionnaire that was distributed to other Assistant District Attorneys in the office concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns.<sup>27</sup> Myers was then terminated from employment with the District Attorney for refusal to accept the transfer and for her distribution of the

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<sup>21</sup> *Id.* at 573.

<sup>22</sup> *Id.*

<sup>23</sup> *Connick v. Myers*, 461 U.S. 138, 140 (1983).

<sup>24</sup> *Id.* at 138.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

questionnaire on the grounds that both acts constituted insubordination.<sup>28</sup> Myers then filed suit alleging that she was wrongfully discharged because she had exercised her constitutionally protected right to free speech under the First Amendment.<sup>29</sup>

The Court upheld the termination, reasoning that Myers did not speak as a citizen on a matter of public concern but as an employee on a matter of personal interest regarding internal personnel decisions.<sup>30</sup> However, the Court cautioned that personal matters discussed privately were not beyond First Amendment free speech protection.<sup>31</sup> The Court did not suggest that speech on private matters categorically fell into narrow and well-defined classes of expression that carries so little social value that the State can prohibit and punish such expression by all persons in its jurisdiction.<sup>32</sup> Instead, the Court held that only when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interests, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.<sup>33</sup>

The standard set by the *Connick* Court has been difficult to apply. The Court clarified the *Connick* standard somewhat in *Rankin v. McPherson*.<sup>34</sup> The issue in *Rankin* was whether a public employee's speech was protected for communicating with a co-

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<sup>28</sup> *Id.* at 142.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 146.

<sup>31</sup> *Id.* at 147.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Rankin v. McPherson*, 483 U.S. 378 (1987).

worker that she wished the assassination attempt on President Ronald Reagan would be successful and subsequently divulged her disapproval of the President's fiscal policies, suggesting that his policies disproportionately and adversely affected the African American community.<sup>35</sup> Another co-worker overheard the remark and McPherson was reported to her superior.<sup>36</sup> McPherson was subsequently terminated and filed suit alleging that her freedom of speech had been violated.<sup>37</sup>

The Court applied the *Connick* "public concern" test and found that McPherson's statements clearly touched upon a matter of public concern.<sup>38</sup> Although a threat to kill the President would not be protected under the First Amendment, the Court found that McPherson's statement did not constitute an actual threat but was merely an opinion.<sup>39</sup> The Court held that an inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern.<sup>40</sup> Quoting *New York Times Co. v. Sullivan*, the Court reiterated that "debate on public issues should be uninhibited, robust, and wide-open, and...may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."<sup>41</sup> The Court further held the State had failed to demonstrate how McPerson's statement as a clerical

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<sup>35</sup> *Id.* at 381.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 386.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*; See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686(1964).

employee interfered with work, personal relationships, or the speaker's job performance and that such a statement would detract from the public employer's function.<sup>42</sup>

The Supreme Court added a final element to the public employee free speech analysis in *Garcetti v. Ceballos*. Ceballos was employed as a deputy district attorney for the Los Angeles County District Attorney's Office.<sup>43</sup> A defense attorney contacted Ceballos and indicated that there were several inaccuracies in an affidavit used to obtain a critical search warrant.<sup>44</sup> After examining the affidavit and visiting the location it described, Ceballos determined the affidavit did in fact contain serious misrepresentations as indicated by the defense attorney.<sup>45</sup> Ceballos spoke on the telephone to the warrant affiant but did not receive a satisfactory explanation for the perceived inaccuracies.<sup>46</sup> Displeased with the response, he relayed his findings to his supervisors and prepared a disposition memorandum.<sup>47</sup> Despite Ceballos's concerns over the affidavit, his superiors decided to proceed with the prosecution and in the aftermath of the trial he was subjected to a series of retaliatory employment actions.<sup>48</sup> Ceballos filed suit alleging his employer violated the First Amendment by retaliating against him based on his memo concerning the inaccurate affidavit.<sup>49</sup>

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<sup>42</sup> *Rankin*, 483 U.S. 378, 390 (1987).

<sup>43</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2007).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

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

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

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

The *Ceballos* Court stated that when a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.<sup>50</sup> The Court further acknowledged that employee-speech jurisprudence protects, of course, the constitutional rights of public employees and realizes that the First Amendment interests at stake extended beyond the individual speaker.<sup>51</sup> Following earlier decisions, the Court reiterated that employees in some cases may receive First Amendment protection for expressions made at work.<sup>52</sup> The Court held that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communication from employer discipline.<sup>53</sup> Thus, if an employee makes a statement pursuant to their official duties then the Constitution does not afford protection, while an employee who making a statement outside his official duties would be provided Constitutional protection.

#### **IV. CURRENT APPLICATION OF THE PICKERING/CONNICK/GARCETTI ANALYSIS TO TEACHER-STUDENT SOCIAL MEDIA INTERACTION**

The most recent case concerning a teacher's First Amendment right to interact with students utilizing social media was heard in *Spanierman v. Hughes*. In that case, the State of Connecticut, Department of Education hired Spanierman to be an English teacher at one of the district's high schools.<sup>54</sup> Spanierman was a registered member of Myspace, a

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<sup>50</sup> *Id.* at 419; *See also*, e.g., *Waters c. Churchill*, 511 U.S. 661, 671, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994).

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

<sup>52</sup> *Id.* at 421; *See also*, e.g., *Givham v. Western Line Consol. School Dist.*, 439 U.S. 410, 414, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979).

<sup>53</sup> *Garcetti*, 547 U.S. 410, 413 (2007).

<sup>54</sup> *Spanierman v. Hughes*, 576 F.Supp.2d 292, 297 (2008).

website that allows its users to create an online community where they can meet fellow users.<sup>55</sup> He originally began to use Myspace because his students asked him to look at their Myspace pages.<sup>56</sup> Spanierman subsequently opened his own Myspace account and used it to communicate with students about homework, to learn more about the students so he could relate to them better, and to conduct casual, non-school related discussions.<sup>57</sup> A fellow teacher informed a guidance counselor at the high school that Spanierman had a profile on Myspace and that she had received several student complaints about Spanierman’s Myspace page.<sup>58</sup> The guidance counselor subsequently investigated Spanierman’s conduct and found that his Myspace page was “very peer-to-peer like,” with students talking to him about what they did over the weekend at a party, or about their personal problems.<sup>59</sup> The School board asked Spanierman to delete his Myspace account.<sup>60</sup> Spanierman failed to remove himself from Myspace following the investigation and the school board refused to renew his contract for the following year.<sup>61</sup> In retaliation for not renewing his contract, Spanierman unsuccessfully brought an action against the school board alleging they had violated his First Amendment right to free speech.<sup>62</sup>

In applying *Pickering*, *Connick*, and *Garcetti*, the Connecticut court initially determined that *Garcetti* did not usurp Spanierman’s First Amendment rights. The *Spanierman* court said, pursuant to *Garcetti*, “employees who make public statements

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

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

<sup>58</sup> *Id.*

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

<sup>60</sup> *Id.* at 299.

<sup>61</sup> *Id.*

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

outside the course of performing their official duties retain some possibility of First Amendment protection,” and the holding is limited only to expressions an employee makes pursuant to his or her official responsibilities, not to statements or complaints...that are made outside the duties of employment.<sup>63</sup> Applying *Garcetti*, the court reasoned that Spanierman, when using his Myspace account, was not acting pursuant to his responsibilities as a teacher and that as a teacher, was under no obligation to make the statements he made on Myspace.<sup>64</sup> Thus *Garcetti* did not control.

The court then applied the *Connick* “public concern” test. Quoting *Connick*, the court found that “in general, the First Amendment protects speech of any matter of political, social, or other concern to the community.”<sup>65</sup> Additionally, the court focused on the motive of the speaker and attempted to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose.<sup>66</sup> Spanierman’s Myspace page contained nothing that touched upon a matter of public concern except an anti-war poem written in protest to the Iraq War.<sup>67</sup> The court found that although his Myspace page contained the poem touching on a matter of public concern, the remainder of his profile did not.<sup>68</sup> Because Spanierman presented no evidence of retaliatory animus, and there was nothing in the record to indicate that the school board intended to retaliate against him because of his political views expressed in his poem, he had not established a

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<sup>63</sup> *Id.* at 309.

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

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

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

<sup>67</sup> *Id.*

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

causal connection between his termination and the content of his Myspace page directly.<sup>69</sup>

The court also held that Spanierman's conduct on Myspace, as a whole, was disruptive to school activities.<sup>70</sup> Because Spanierman antagonized students and engaged in non-academic related conversations with his students on his Myspace page it was reasonable for the school board to expect Spanierman, a teacher with supervisory authority over students, to maintain a professional, respectful association with those students.<sup>71</sup>

## **V. TEACHER'S FREE SPEECH RIGHTS UNDER THE STUDENT SPEECH MODEL**

A second model followed by the First, Second, Eighth, and Tenth Circuits has been used to decide whether schools can regulate teacher speech.<sup>72</sup> The student-speech model articulates that a school district can regulate teacher-student speech if it bears the "imprimatur of the school" will "substantially interfere...with the operations of the school," and the regulation has a reasonable relationship to a "legitimate pedagogical concern."<sup>73</sup> Two Supreme Court decisions form the backbone of the student-speech model.

In *Tinker v. Des Moines Independent Community School Dist.*, a group of students and adults in Des Moines, Iowa, decided to publicize their objections to the Vietnam War

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<sup>69</sup> *Id.* at 311.

<sup>70</sup> *Id.* at 312.

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

<sup>72</sup> Kimberly Lee, Establishing a Constitutional Standard that Protects Public School Teacher Classroom Expression, 38 *J.L. & Educ.* 409 (2009).

<sup>73</sup> *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 271-73 (1988).

and their support for a truce by wearing black armbands.<sup>74</sup> Principals of the Des Moines schools became aware of the plan to wear the armbands and adopted a preventative policy stating that any student wearing an armband to school would be asked to remove it, and if met with refusal, would be suspended until the student returned to school without the armband. Three students wore the armbands to school and were suspended for violating the ban.<sup>75</sup>

The Court held that to censor speech a school must show that it based the regulation on more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.<sup>76</sup> The Court noted that a student's rights do not merely embrace the classroom hours and that a student may express his opinions if it does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others.<sup>77</sup> The Court further held that conduct by a student that involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.<sup>78</sup>

The second case forming the foundation of the student-speech model is *Hazelwood v. Kuhlmeier*. In *Hazelwood*, three former Hazelwood high school students contended that school officials had violated their First Amendment rights by deleting two

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<sup>74</sup> *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 504 (1969).

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

<sup>76</sup> *Id.* at 509.

<sup>77</sup> *Id.* at 513.

<sup>78</sup> *Id.*

pages of an article from an issue of the school newspaper.<sup>79</sup> The school newspaper was written and edited by the Journalism class at the high school.<sup>80</sup> The deleted articles were written about students at the school dealing with teenage pregnancy and coping with divorce.<sup>81</sup> The principle believed that the articles' references to sexual activity and birth control were inappropriate and that parents were not given an adequate opportunity to respond to the article written on divorce.<sup>82</sup> The principle thus had the newspaper published without either article.<sup>83</sup> The respondents commenced an action seeking a declaration that their First Amendment rights had been violated.

The Supreme Court added to the *Tinker* doctrine that a school can regulate speech that students, parents, or the public might reasonably perceive to bear the imprimatur of the school if the censorship is related to a legitimate pedagogical concern<sup>84</sup> and if the location of the speech is not a traditional public forum.<sup>85</sup> The Court thus held that a principal could delete articles from a school newspaper because the school newspaper bore the imprimatur of the school, was not a traditional public forum, and because protecting the students from viewing non-age appropriate material was a legitimate pedagogical concern.<sup>86</sup>

The Tenth Circuit case, *Miles v. Denver Public Schools*, provides greater understanding of the *Hazelwood* and *Tinker* student-speech doctrine. In *Miles*, a ninth

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<sup>79</sup> *Hazelwood*, 484 U.S. 260, 262 (1988).

<sup>80</sup> *Id.*

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

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

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 271.

<sup>85</sup> *Id.* at 273.

<sup>86</sup> *Id.* at 274.

grade government teacher stated that the quality of the school had declined since 1967.<sup>87</sup> Qualifying his belief that the quality of the school had deteriorated, the teacher referred to an incident that had allegedly occurred the previous day and was a topic of rumor throughout the school.<sup>88</sup> The rumor was that two students were observed having sexual intercourse on the tennis court during lunch hour.<sup>89</sup> The teacher stated to his class that he didn't think that two students would make out on the tennis court in 1967.<sup>90</sup> The teacher's comments about the rumor led parents of the alleged tennis court participants to complain to the principal.<sup>91</sup> The teacher was placed on administrative leave and a letter of reprimand was placed in his file.<sup>92</sup> After his reinstatement, the teacher filed a lawsuit alleging that his administrative leave and the letter of reprimand violated his free speech rights.<sup>93</sup>

The *Miles* court, using the *Hazelwood* student-speech model found that the school had identified a legitimate educational interest it sought to protect and had shown its reprimand of the teacher was reasonably related to those interests.<sup>94</sup> The *Miles* court clarified the holding in *Hazelwood* that educators do not offend the First Amendment by exercising editorial control over school-sponsored expression so long as their actions are reasonably related to legitimate pedagogical concerns by illustrating examples of what

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

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

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

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 779.

constituted a pedagogical concern.<sup>95</sup> The *Miles* court reasoned that if student expression in a school newspaper bears the imprimatur of the school under *Hazelwood*, then a teacher's expression in the traditional classroom setting also bears the imprimatur of the school.<sup>96</sup> Additionally, the court found that the school had effectively asserted legitimate pedagogical concerns in reprimanding the teacher for his speech by stating that it had an interest in preventing its teachers from using their position of authority to confirm unsubstantiated rumors, ensuring teacher employees exhibit professionalism and sound judgment, and in providing an educational atmosphere where teachers do not make statements about students that embarrass those students among their peers<sup>97</sup>

## **VI. THE MISSOURI FACEBOOK STATUTE UNDER THE PUBLIC OFFICIAL DOCTRINE ANALYSIS**

To properly assess whether the Missouri Facebook Statute violates a teacher's First Amendment right to friend students on social media networking sites, one must analyze the statute under the standards set forth in the aforementioned case law. It is likely that judicial scrutiny of the Missouri Facebook Statute under the public official doctrine would benefit many Missouri teachers who believe their First Amendment rights have been violated because the doctrine protects speech made in the context of one's employment. Although teacher-student social networking communication may not necessarily fall under the realm of speech that touches upon a matter of public concern, it

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<sup>95</sup> *Id* at 775-78.

<sup>96</sup> *Id.* at 776.

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

can be argued that an analysis of the Missouri Facebook Statute under the *Pickering* balancing test would grant teacher's Constitutional First Amendment protection.

The Missouri Facebook Statute does not limit or prohibit Missouri teacher speech entirely, but rather relegates teacher speech to social media sites that do not allow exclusive access with a current or former student. The Missouri Facebook Statute is exceedingly restrictive in scope, effectively preventing any teacher from using a social media website unless it is available to school administrators and student's legal custodians. Beginning with *Pickering*, a court would not likely find that teacher-student communication to be a communication touching on a matter of public concern. In looking at the content, form, and context of social networking speech, it is unlikely that this type of speech would meet the test for speech touching on a matter of public concern because unlike the speech in *Rankin*, the speech does not necessarily involve a legitimate news interest. In addition, the court in *Spanierman* did not find teacher-student communication to be speech that touched on a matter of public concern, but instead focused on Spanierman's political poetry. This might suggest that a court would not find teacher-student communication under the Missouri Facebook statute to be speech touching on a matter of public concern. Moreover, the Missouri Facebook statute does not merely prevent a teacher from posting political speech on his or her social media site, but rather prevents all speech and any communication between teachers and students, effectively preventing any speech that would even attempt to touch on a matter of public concern.

Although a major component of the *Pickering* holding involved whether speech touched upon a matter of public concern, the *Pickering* balancing test may prove effective in demonstrating the unconstitutionality of the Missouri Facebook Statute. The balancing test takes into account whether the speech interferes with the teacher's daily duties in the classroom, the regular operation of the school generally, and the working relationship between the teacher and the institution at which the speech is directed.

Prohibiting teacher-student speech through social media may have an adverse impact on the regular operation of the school generally because it has been argued that social media has played a significant role in the learning process of young students struggling with material in the classroom.<sup>98</sup> Social media has proven to be an effective tool in promoting student understanding of material.<sup>99</sup> Facebook and other social media sites are widely used by students to interact and communicate, making it an alternative for students who may be too shy to raise their hands in class and might prefer messaging their teacher, but might not feel comfortable knowing his or her parents or a member of the administration might be reading the message as well.<sup>100</sup> Facebook is an effective mode of communication that can establish immediacy, approachability, availability, and warmth with students that may not be achievable solely through classroom instruction. The Missouri Facebook Statute will lead to teachers erring on the side of caution, forcing them to communicate less with students, resulting in weaker relationships.<sup>101</sup> Thus,

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<sup>98</sup> Timothy Stenovek, *Missouri 'Facebook Law' Limits Teacher-Student Interactions Online, Draws Criticism and Praise*, Huffington Post, Oct. 3, 2011, [http://www.huffingtonpost.com/2011/08/03/missouri-facebook-law\\_n\\_916716.html](http://www.huffingtonpost.com/2011/08/03/missouri-facebook-law_n_916716.html).

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

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

limiting the gap between teachers and students only furthers the gap between a student's in-school life and his or her life outside of the school and would have an adverse effect on a teacher's routine duties in administering classroom instruction.<sup>102</sup>

The Missouri Facebook Statute may be found to rob teachers of their First Amendment rights under the holding in *Garcetti*. The drafters of the Missouri Facebook law drafted the law intending to prevent sexual misconduct between teachers and students. The law, however, views all teachers as potential sexual predators, failing to take into account teachers who are parents and have children in the Missouri public school system. The holding articulated in *Garcetti* may prove effective in finding the Missouri law unconstitutional because parents employed by the state of Missouri as teachers and who have children in the Missouri public school system are guaranteed First Amendment free speech protection to make statements outside the scope of their official duties as teachers. It is only when a public employee makes statements pursuant to their official duties that they are not speaking as citizens for First Amendment purposes and are not guaranteed protection under the Constitution.<sup>103</sup> The holding in *Garcetti* suggests that a teacher making a statement outside his or her official duties as a teacher would be granted First Amendment free speech Constitutional protection. Thus, prohibiting a teacher who is a parent from befriending their own child in the Missouri public school system would be a violation of that teacher's First Amendment rights. Any private communication between a teacher-parent and their child is likely to be deemed protected

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

<sup>103</sup> *Garcetti*, 547 U.S. 410, 413 (2007).

speech under the First Amendment, effectively deeming the Missouri Facebook Statute unconstitutional.

## **VII. THE MISSOURI FACEBOOK STATUTE UNDER THE STUDENT SPEECH MODEL**

Under the student-speech model, a school board can regulate teacher speech if the speech would substantially interfere with the operation of the school and if the school has a reasonable pedagogical concern to censor the speech.<sup>104</sup> Under this approach, it is likely that Missouri teachers would not be permitted to befriend their students or utilize social media providing exclusive access to their students. Student-teacher online communication would likely fail under the student speech doctrine because it has a huge potential to create interruptions at the school as teachers lose the professional distance between themselves and their students.<sup>105</sup>

The Tenth Circuit, in which Missouri is included, has upheld the student-speech model to decide whether schools can regulate teacher speech.<sup>106</sup> The aim of the Missouri Facebook statute is to prevent sexual misconduct between students and teachers initiated over the Internet and outside of the classroom atmosphere. The law was proposed after an Associated Press investigation found eighty-seven Missouri teachers had lost their teaching licenses between 2001 and 2005 because of sexual misconduct, including many instances of exchanging explicit online messages with students.<sup>107</sup>

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<sup>104</sup> *Hazelwood*, 484 U.S. 260, 271 (1988); *Tinker*, 393 U.S. 503, 504 (1969).

<sup>105</sup> Rachel A. Miller, Comment, *Teacher Facebook Speech: Protected Or Not?*, 2011 B.Y.U. Educ. & L.J. 637, 663 (2011).

<sup>106</sup> *Id.* at 653.

<sup>107</sup> *Id.*

The *Hazelwood* and *Tinker* holdings allow a school district to regulate speech if students, teachers of the public might reasonably perceive the speech to bear the imprimatur of the school and if the speech is related to a legitimate pedagogical concern.<sup>108</sup> It is likely that a court would find teacher communication with a student to bear the imprimatur of the school because students and the public associate teacher communication with the school the teacher is employed. Missouri, much like the school district in *Miles*, has demonstrated it has a pedagogical interest in prohibiting its teachers from utilizing social media that would give them exclusive access to students. A teacher is a representative of a school and thus any communication made by a teacher in or out of the classroom might lead many to affiliate the teacher's speech through social media with the school that the teacher is employed.

Under the student-speech model, Missouri's decision to protect its students from sexual misconduct by restricting teacher's access to social media may be deemed a reasonable pedagogical concern. Exclusive and private contact with students through social media may not be deemed educationally necessary because American public school teachers have successfully taught students for decades without the use of social media. It can be argued that the Missouri Facebook Statute is analogous to the school board preventing a teacher from locking his or herself into a room with a student.<sup>109</sup> Preventing teachers from accessing social media websites would still allow students to have a valuable educational teacher-student experience because the Missouri Facebook

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<sup>108</sup> *Hazelwood*, 484 U.S. 260, 271 (1988).

<sup>109</sup> Timothy Stenovek, *Missouri 'Facebook Law' Limits Teacher-Student Interactions Online, Draws Criticism and Praise*, Huffington Post, Oct. 3, 2011, [http://www.huffingtonpost.com/2011/08/03/missouri-facebook-law\\_n\\_916716.html](http://www.huffingtonpost.com/2011/08/03/missouri-facebook-law_n_916716.html).

Statute would allow students the opportunity to log on to social media sites to communicate with teachers so long as parents can log on as well.<sup>110</sup> Because the Internet is a highly utilized medium for those who prey on students, Missouri school boards may have a reasonable pedagogical concern in restricting teacher access to social media.

### VIII. SOLUTION

The Missouri Facebook Statute is excessively restrictive and limiting in scope, effectively treating all Missouri public school teachers as potential sexual predators.

Missouri's current solution to curtail teacher-student sexual misconduct through social media is violative of a teacher's First Amendment free speech rights under the First Amendment. While Missouri's attempt to prevent sexual misconduct within its public school system is bold, there may be alternatives to achieve the same end.

One potential alternative would be to allow Missouri teachers to utilize social media websites such as Myspace and Facebook but implement a code of ethics that would prohibit teachers from befriending or communicating with students enrolled in the Missouri public school system. By establishing consequences for teacher-student social media communication rather than an outright ban might be an effective deterrent for teachers thinking of contacting their students while allowing teachers to maintain their First Amendment right to free speech under the Constitution.

A second alternative would be the creation of a school district run website that would allow for teacher-student communication while still prohibiting teacher-student communication through social media websites. Using this method, a teacher would be

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<sup>110</sup> *Id.*

permitted to use social media but would prohibit teacher-student communication in a social media forum while allowing such communication to take place on a district-run website. This would provide oversight of all teacher-student communication while still allowing teachers to utilize social media on a limited basis.

A third alternative would be to maintain the current Missouri Facebook Statute but permit teachers who are parents with children enrolled in the Missouri public school system to communicate with their children through social media. Such an alteration in the current statute might allow Missouri to satisfy both the public official doctrine because parental speech is outside of the scope of one's employment as a teacher and the student speech model because the school would have a pedagogical concern in protecting its students from potential sexual predators.

## **IX. CONCLUSION**

The Missouri Facebook Statute has been a highly contentious issue in Missouri public debate. Courts will have to wrestle between Missouri public school teachers' right to free speech under the First Amendment of the Constitution and the state's interest in protecting its students from potential sexual misconduct. Because two models exist to determine the constitutionality of the Missouri Facebook Statute, the outcome is uncertain. It is likely that under the public official doctrine, a court would find the Missouri Facebook Statute unconstitutional because it may have an adverse impact on a teacher's ability to teach students and because private communication outside the scope of one's official duties is protected speech. While the public official doctrine would

likely find the Missouri Facebook Statute unconstitutional, it is likely that the student speech model would find it constitutional because the state has a reasonable pedagogical concern in protecting its students from potential sexual misconduct initiated through social media.