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The primary purpose of the Illinois State School Law Quarterly is to provide a forum for the interchange of ideas, theories, and issues on various aspects of school law among practitioners, professors, and attorneys. The emphasis is on analyzing issues in school law for the purposes of developing new theories to explain current and past developments in the law and to provide the theoretical framework which can be used to anticipate and predict future developments in school law.

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Protected Classroom Speech of Public School Teachers:

Pickering, Its Progeny, Its Conflicts and Policy Issues*

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The concept of academic freedom, the concept that constitutes the theoretical underpinning in suits brought by teachers who oppose retaliation by boards of education for what teachers have said or done, originated in situations related to higher education. Only decades after academic freedom became broadly accepted as protection for professors did public school teachers seek to apply to themselves what the courts had yielded to professors as scholars and researchers.[1] Although academic freedom may apply to professors, as somewhat autonomous scholars within their specific disciplines in a university setting, it is far from clear as to what extent, and even why, academic freedom applies to classroom K-12 teachers.

The issue of First Amendment protection for in-class speech of public school teachers was admittedly not the most pressing or burning policy issue facing American schools in the second half of 2002, as the members of the Education Law Association met. After all, within the last week in the month of June three separate school law court decisions appeared on the first pages of our daily newspapers: the Supreme Court decision permitting the use of vouchers to pay for tuition in religious schools;[2] the Supreme Court decision permitting random drug testing of students in all competitive extracurricular activities;[3] and the Ninth Circuit Appellate Court decision[4] that held "(1)the

1954 Act[5] adding the words 'under God' to the Pledge [of Allegiance], and (2) EGUSD's[6] policy and practice of teacher-led recitation of the Pledge, with the added words included, violate the [constitution's First Amendment] Establishment Clause."[7] Even though concern for the academic freedom of public school teachers does not out-shine the concern for vouchers, or drug testing of students participating in extracurricular activities, or the contents of the Pledge of Allegiance, the issue of teacher in-class free speech significantly affects the lives of millions of teachers and students daily.

In this article I shall treat the balancing of teacher and school district rights in suits brought by teachers who have claimed that their school districts have retaliated against them, thereby violating the teachers' First Amendment academic freedom rights. I shall utilize the most recent, but not final, decision in *Cockrel v. Shelby County School District* (*Cockrel II*)[8] as an excellent example of the K-12 academic freedom cases that follow the *Pickering v. Board of Educ.*[9] line of analysis. I shall also offer commentary on the topic at hand, including my idea about what is the primary policy issue on K-12 public school teachers' in-class free speech.

I. Setting Today's Context for Teachers' In-Class Free Speech Claims[10]

Despite the many Supreme Court cases dealing with claims by plaintiffs that their speech deserved constitutional protection under the First Amendment provision that "Congress shall make no law ... abridging the freedom of speech," the Supreme Court has not yet dealt directly with the claims that in-class speech of public school teachers deserves constitutional protection. Therefore, the lower courts, at both the district level and the appellate level, must rely on Supreme Court decisions that are in one way or another off-point when they deal with in-class free speech claims. A few courts have relied on *Tinker v. Des Moines Indep. Sch. Dist.*,[11] which focused on in-school student speech about the controversial issue of support for the war in Vietnam.[12] In *Tinker* the Court ruled that the students' armband "speech" was protected. The Court declared, but did not specify anything regarding teachers, that

> First Amendment rights, applied in light of the special characteristics

> of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.[13] (emphases added).

Even though the Court recognized that teachers do have First Amendment rights, the application of *Tinker* to cases involving teacher rights has not been widespread. The key standard that the Court supported in *Tinker* deals with disruption in a school. To prohibit an expression of opinion the school must show that the "forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline." (citation omitted).[14]

Most courts have relied on either *Pickering* (as clarified substantively primarily by *Connick v. Myers*[15] 15 years later) or *Hazelwood Sch. Dist. v. Kuhlmeier*[16]. *Pickering* dealt with a teacher's out-of-class speech when he wrote to a local newspaper criticizing his board of education and superintendent for the way they "had handled past proposals to raise new revenue for the schools."[17] The Court ruled that teacher Marvin Pickering's speech was constitutionally protected because that speech dealt with a matter of general public interest. In balancing Pickering's interest “as a citizen in commenting upon matters of public concern” with the school district’s interest “as an employer in promoting the efficiency of the public services it performs through its employees,” the Court ruled that Pickering's interest was greater than the school district's.[18]

Connick dealt with the actions of Sheila Myers, an Assistant District Attorney in New Orleans, who distributed a questionnaire to "her fellow staff members 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." District Attorney Harry Connick fired Myers because Myers refused to accept a transfer within the D.A.’s office and because Connick considered "the distribution of the questionnaire as an act of insubordination."[19]

In considering Myers's suit claiming protected free speech, the Supreme

Court clarified *Pickering* on two points. First, the Court clarified the definition of matters of public concern to be those that can be "fairly considered as relating to any matter of political, social, or other concern to the community."[20] Second, the Court declared that, in deciding whether an employee's speech addresses a matter of public concern rather than a matter of personal interest, a court must look at the "content, form, and context of a given statement, as revealed by the whole record.[21] Based on these clarifications, the Court supported the government rather than Myers when it performed the "*Pickering* balance" of the parties' interests.[22]

The other Supreme Court decision on which some lower courts have relied is *Hazelwood School Dist. v. Kuhlmeier*.[23] *Hazelwood* dealt with the claim, brought by student editors of the high school newspaper, that Principal Robert Reynolds violated their First Amendment free speech rights. The principal removed two pages from the school-supported newspaper, *Spectrum*, before it went to press. The Court held that the newspaper was not a public forum but a component of the school's curriculum. (*Spectrum* was written and edited by students in a course entitled Journalism II.) Hence, readers of the newspaper "might reasonably perceive [it] to bear the imprimatur of the school."[24] The Court established a test for the limitation of the students speech: school officials may regulate school sponsored student speech and expression as long as their "actions are reasonably related to legitimate pedagogical concerns."[25]

Both *Pickering* and *Hazelwood* have a limited relationship to teacher in-class free speech lawsuits in that the former case deals with teacher's out-of-class speech as a citizen and the latter case deals with student speech in school-sponsored activities. Neither precedent deals directly with teacher in-class speech. Thus, no Supreme Court case exists that covers the dynamic triadic classroom relationships that exist among teacher, student, and the curriculum.

One result of the limited relationship of current Supreme Court decisions is that at this time there is no agreement among the appellate courts as to which Supreme Court decision, *Pickering* or *Hazelwood*, should guide the lower courts' examinations of teacher in-class controversies or whether either should do so. The split among circuits appears to be as

follows:[26] the Third, Fourth, Fifth, Sixth, Ninth, and District of Columbia circuits use *Pickering*;[27] the First, Second, Seventh, Eighth, Tenth, and Eleventh circuits use *Hazelwood*.[28]

The split among circuits means that *Pickering* and *Hazelwood* lead the judges to undertake different analytical approaches as they deal with teacher free speech cases. *Pickering* leads judges to decide whether the plaintiff teacher's action constitutes speech, whether the speech is protected in that it was on a matter of public concern, and whether the teacher's interest as a citizen outweighs the school board's interest as the employer. If all of these questions are answered Yes, then the defendant school board must show that it would have penalized the teacher in any case. On the other hand, *Hazelwood* leads the judges to decide, first, whether the plaintiff teacher's action, which qualifies as speech, is curricular and, second, whether the defendant school board's punishment for that speech is reasonably related to legitimate pedagogical concerns. In essence, then, the split among the appellate courts today centers on which analytic test to apply to disputed speech.

The various decisions by the lower courts indicate that neither *Pickering* nor *Hazelwood* offers much protection to teachers in spite of the rhetoric of the Supreme Court and the lower courts about the centrality of academic freedom to the education of students living in a dynamic democracy. Recall the timely and deservedly oft-quoted statement in *Keyishian v. Board of Regents*:

> Our Nation is deeply committed to safe-guarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore of a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, [364 U.S. 479,487 (1960)]. The classroom is peculiarly the "marketplace of ideas."[29]

While most courts currently rely on *Pickering* or *Hazelwood* when deciding on a plaintiff teacher's claim of violation of academic freedom under the

First Amendment, some other courts rely mainly on yet another approach. That is, whether with or without a grounding in the substantive First Amendment right of free speech, some courts primarily take a Fourteenth Amendment procedural route. These courts ask whether the teacher had notice from the school board that the teacher's speech fell into the category of prohibited speech. Two First Circuit cases stand out as the chief exemplars of the procedural approach to academic freedom disputes.

In *Keefe v. Geanakos*[30] a tenured high school teacher of English, Robert Keefe, discussed an article that appeared in the September, 1969 issue of *Atlantic Monthly* magazine with his students. The article, written by Robert Lifton, a psychiatrist and professor at a noted medical school, included a "dirty" word, which the court described as, "admittedly highly offensive [and] is a vulgar term for an incestuous son."[31] The court, after questioning the school board's action on substantive grounds, said, "We believe it equally probable that the plaintiff will prevail on the issue of lack of any notice that a discussion of this article with the senior class was forbidden conduct."[32]

The second case, *Ward v. Hickey*,[33] dealt with a nontenured biology teacher, Toby Klang Ward, whose contract was not renewed after "a discussion in Ward's ninth grade biology class concerning abortion of Down's Syndrome fetuses."[34] Although the court ultimately did not support Ward on technical grounds, the court did find that "a school committee may regulate a teacher's classroom speech if: (1) the regulation is reasonably related to a legitimate pedagogical concern...; and (2) the school provided the teacher with notice of what conduct was prohibited...."[35]

Keefe and *Ward*, though precedent only in the First Circuit, have served to support an array of claims of retaliation by school boards from around the country. One excellent example of a court relying on notice to teachers is *Cowan v. Strafford R-VI School Dist.*,[36] a case more well known as "The Magic Rock" case than by its official name. In *Cowan* the district court judge took a simple approach. First he stated that the Supreme Court in *Keyishian* recognized academic freedom as a special concern of the First Amendment. He then quoted from *Ward*, stating that local boards of education may proscribe certain speech provided they communicate their decisions to teachers. He went

on to find that the Magic Rock letter sent by Cowan to her second grade students was properly classified as classroom speech and that Cowan's school district "could not reasonably expect Cowan to know that references to magic were prohibited."[37] At trial the jury subsequently found in favor of Cowan's First Amendment claim even though she was a probationary, nontenured teacher without a Fourteenth Amendment property right derived from being tenured. (Earlier the judge had declared in his denial of summary judgment to the defendant school board that "classroom speech related to classroom activity or curriculum made by a teacher is protected speech unless the teacher knows what speech is prohibited.")[38]

Thus, courts have agreed that teachers deserve some notice that certain conduct is prohibited and that it is unreasonable for the school to expect teachers to know, without notice, what is proscribed. The due process requirement of the Fourteenth Amendment applied to teacher in-class speech cases comes to support academic freedom claimed under the First Amendment.

With the conclusion of this brief presentation of today's legal context for examining the in-class free speech claims of public school teachers, let us turn now to an ongoing case that had the potential in 2002 to be used by the Supreme Court to set forth its views, for the first time, on in-class K-12 teacher free speech.

II. *Cockrel*[39]

Donna Cockrel was a tenured fifth grade teacher in Shelby County (KY) School District. The School District dismissed Cockrel on July 15, 1997, listing 17 specific instances of misconduct amounting to insubordination, conduct unbecoming a teacher, inefficiency, incompetency, and neglect of duty. Cockrel filed suit, however, claiming that the District dismissed her in violation of her "First Amendment right of speech when discussing the potential environmental benefits of industrial hemp" as an alternative fiber source to wood pulp in making paper. Cockrel had on two occasions invited actor Woody Harrelson into her classroom to speak about industrial hemp, an illegal substance in Kentucky.

The district court[40] on January 28, 2000 granted the School District's motion for summary judgment on Cockrel's First Amendment retaliation claim.

Citing *Connick*, the court held that Cockrel's selection of industrial hemp as part of her unit on Saving The Trees was not protected citizen speech but private speech in her role as an employee. The court also held that Cockrel's conduct did not constitute expressive speech and did not send a "particularized message," citing *Spence v. Washington*.[41] Thus, because Cockrel had no protected First Amendment right to speak, the district court ruled that Cockrel had no retaliation claim. Cockrel then appealed to the Sixth Circuit Court of Appeals.

The appellate court reviewed de novo the district court's grant of summary judgment to the defendant school district. The appellate court's decision, *Cockrel II*, is a classic, casebook example of a *Pickering* analytic approach to a teacher's in-class free speech claim. It deserves attention not only as an indication of the court's substantive position but equally as a step-by-step description of the *Pickering* analytic approach.[42]

Step 1. Was Cockrel's activity speech? The Sixth Circuit began its analysis with this threshold question about Cockrel's role in her classroom. Citing two non-education Supreme Court decisions,[43] the court recognized that Cockrel did not generate her own ideas on industrial hemp but invited an outside speaker to advocate the use of that plant as the source for an alternative to wood pulp. The court ruled that Cockrel's conduct, like that of newspaper and cable television operators, was a form of speech. That is, the teacher's selection of a speaker for an in-class presentation is as much a form of speech as a cable operator's decision as to which programs to present to its viewers. Thus, according to the appellate court, the district court's negative answer to this question was an error as to what qualifies as speech in the first place.

Step 2. Is Cockrel's Speech Constitutionally Protected? To answer this question the court broke the issue into two parts; an affirmative answer to each part is required in order to label Cockrel's speech as constitutionally protected.

Step 2A. Does Cockrel's Speech Touch on a Matter of Public Concern? Relying on the *Connick* modification of *Pickering,* which set the boundaries of what is a matter of public concern, the court held that there was "no question" that the issue of industrial hemp was "a matter of great political

and social concern to many citizens of Kentucky."[44]

Step 2B. In Light of a *Pickering* Balancing of Interests, Does Cockrel's Interest in Speaking on Industrial Hemp Outweigh the School District's Interest in Promoting the Efficiency of Its Public Services? Citing *Pickering* and *Leary v. Daeschner,*[45] which quoted *Pickering*, the court ruled after balancing the parties' interests that, "on balance, the defendants' interests in an efficient operation of the school and a harmonious workplace do not outweigh the plaintiff's interest in speaking about the benefits of industrial hemp, an issue of substantial political and economic concern in Kentucky."[46] Thus, Cockrel's speech was deemed to be constitutionally protected.

Step 3. Did Cockrel Suffer an Injury as a Result of Her Speech That Would Chill an Ordinary Person from Continuing to Engage in Such Speech? Citing *Leary* as precedent for its circuit, the court quickly and simply answered this question in the affirmative, too. After all, Cockrel surely suffered by losing her tenured job as a teacher.

Step 4. Was the Decision to Terminate Cockrel Motivated, at Least in Part, by Cockrel's Decision to Speak About Industrial Hemp? The court relied on *Bailey v. Floyd County Bd. of Educ.* to set up the criterion for Cockrel to meet: "the employee must link the speech in question to the defendant's decision to dismiss her."[47] The court held that Cockrel had presented enough evidence that "a reasonable jury could find that the defendants, in terminating her, were at least partially motivated by her decision to speak on industrial hemp."[48] With this decision by the court, Cockrel satisfied her burden of proof before the court.

Step 5. Did the School District Present Evidence Such That Every Reasonable Juror Would Conclude That the District Has Met Its Burden of Showing That Cockrel Would Have Been Terminated Even Had She Not Spoken to Her Class About the Merits of Industrial Hemp? This question deals with the burden of proof under *Pickering* set for the District after Cockrel had met her burden of proof in a claim of First Amendment retaliation. Therefore, because this appellate situation dealt with summary judgment, the court decided that the defendant had the heavy burden to show that *"every"*[49] (emphasis in original) juror would decide in its favor. This is a heavier burden than the burden the District would have to meet when facing a jury

during a trial on the merits of the case. To rule in favor of the District on summary judgment the court held that it had to be "confident that the defendant's decision to terminate the plaintiff was not based in part upon the plaintiff's decision to speak."[50] The court ruled that it was not confident in this regard. Therefore, the court on November 9, 2001 reversed the district court's grant of summary judgment and remanded the case to the district court to resolve the factual issues at trial rather than decide the case at the summary judgment stage.

In sum, the Sixth Circuit supported Cockrel substantively and procedurally, substantively in that the court said that Cockerel proved that a reasonable jury could find that the District was motivated at least in part by her industrial hemp activity and procedurally in that the court remanded the case to the district court for a trial. These were two significant victories for Cockrel. Nevertheless, Cockrel still might lose on the merits of the case if a trial does take place and if a jury decides by a preponderance of the evidence that the District would have dismissed Cockrel even if she had not engaged in her constitutionally protected speech.

The School District petitioned the Supreme Court for certiorari in April, 2002. On October 7, 2002 the Supreme Court denied the petition. A trial is now set for June, 2003. Cockrel has sued for damages under 42 U.S.C. §1983 for the District's violation of her civil rights. The District has filed motions for summary judgment and res judicata based on other aspects of the case. In short, the case is continuing toward a trial at this point.

Perhaps the Supreme Court will deal with *Cockrel* again if that case percolates up to the Court after lower court decisions on the merits of the case present a full array of adjudicated facts and interpretations. Or, perhaps the Court will establish new law and bring order to this constitutional matter of teacher in-class free speech if it does grant certiorari to a different case in the future.

With the exception of one point -- the Sixth Circuit did not comment on the loss by Cockrel of her teaching certificate even before the Superintendent of Schools sent his letter terminating Cockrel's employment[51] -- I believe that *Cockrel II* is a clear and well-reasoned analysis of law. The District raised this point about Cockrel's loss of her certificate in its petition for

certiorari. It is not clear at all why *Cockrel II* did not deal with this matter clearly.

I believe that the Sixth Circuit was correct when it referred to its disagreement with the Fourth and Fifth Circuits regarding the intent of the Supreme Court in *Connick*. In regard to this intra-*Pickering* conflict, the Sixth Circuit wrote, "We believe that the Fourth and Fifth Circuits have extended the holding of *Connick* beyond what the Supreme Court intended....The facts of *Connick* indicate that Fourth and Fifth Circuits have read the Supreme Court's language too broadly."[52] (This is not the conflict among the circuits that is discussed in the legal literature, which is between the application of *Pickering* rather than *Hazelwood*.) The Sixth Circuit believes that the Fourth and Fifth Circuits interpreted *Connick* to mean that anything a plaintiff said while speaking as an employee would be unprotected speech. Yet the Supreme Court ruled that one part of Myers's questionnaire in *Connick* was protected speech because it did deal with a matter of public concern, namely, the pressure on an assistant district attorney to work in political campaigns.[53] However, the Court ruled against Myers because her questionnaire "touched upon matters of public concern in only a most limited sense."[54]In contrat, Cockrel's speech on industrial hemp deserved protection because it dealt mainly, not in "a most limited sense," with a matter of public concern.

III. Commentary

The issue concerning the in-class free speech rights of public school teachers is still unsettled at this time. It is unsettled in part because the Supreme Court has never ruled substantively on a case dealing with a teacher's claim of violation of First Amendment in-class free speech rights. It will not do so in its 2002-2003 session unless it changes its current agenda. Until the Court speaks, matters remain unsettled on such questions as: What is the Court's view on the concept of academic freedom as it concerns K-12 public school teachers? Given that there is no direct, on-point Supreme Court decision to guide the lower courts, what analytic approach should judges employ when deciding a K-12 teacher's free-speech claim? To what extent is the role of a teacher to inculcate fundamental values, and to what extent is

it to teach critical thinking in the marketplace of ideas? Is there some way to lower the tension between a board of education and the teachers who object to tight control of in-class speech?

Despite the attention in the legal literature given to the split of the appellate circuits in regard to the use of *Pickering* or *Hazelwood* as the preferred Supreme Court precedent for analyzing a public school teacher's free-speech claim, I believe that the split between the circuits is actually of secondary concern. Either *Pickering* or *Hazelwood* will allow judges sufficient analytic leeway to support a given decision. For example, Judge Motz in *Boring v. Buncombe County* used *Hazelwood* to support her panel's decision in favor of plaintiff Boring.[55] However, when the en banc Fourth Circuit applied *Pickering* to reverse her panel's decision, Judge Motz pointed out that Boring herself and the two school board associations supporting the Buncombe County school board preferred *Hazelwood*. The judge then went on in her dissent in *Boring II* to apply *Connick* to support Boring's complaint again.[56] Thus, in *Boring* both *Pickering* and *Hazelwood* served the majority and the dissent in supporting their positions. In *Cockrel II*, although the majority used only *Pickering*, it acknowledged that other circuits use *Hazelwood,* but it never criticized *Hazelwood* nor stated that *Pickering* was superior. It only stated that *Pickering* was used "consistently" in the Sixth Circuit.[57]

Having said that the split in circuits constitutes only a secondary issue in dealing with teachers' in-class free speech and having raised the question earlier about the role of the teacher regarding the teaching of critical thinking (which is often at the root of First Amendment free speech teacher claims), I shall turn to what I consider the major issue in this area.

The Supreme Court has stated explicitly in *Bethel School District v. Fraser* that it believes that a primary role and purpose of the public school system is inculcative. The public schools

> "must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." [citations omitted]....we echoed the essence of this statement of the objectives of public education as the "inculcat[ion of] fundamental values necessary

to the maintenance of a democratic political system."[58]

I call attention to the deliberate use of inculcate rather than teach as a key verb of action to be performed by teachers when the Court refers to the main objectives of public education. Though the staff members are commonly called teachers, their job may rightly be in large measure to inculcate.

Furthermore, the Court pointed out in *Milliken v. Bradley* that schools are under the close supervision of local citizens:

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.... [L]ocal control over the educational process affords citizens an opportunity to participate in decision making....[59] [citations omitted].

Added to this situation that involves the inculcation of values as a main objective of public education, which is under local control, is the double recognition that (1) academic freedom, the key concept supporting teacher in-class free speech, derives from efforts to protect university professors who are concerned with challenging current knowledge and creating new knowledge and (2) faculty members in the public schools have a quite different job description from university professors. In deciding *Mailloux v. Kiley*,[60] a K-12 academic freedom case, Judge Wyzanski explicitly pointed out a series of essential differences between the university model of education and the public high school model of education. Among other differences the judge correctly noted, "Most parents, students, school boards, and members of the community usually expect the secondary school to concentrate on transmitting basic information, teaching 'the best that is known and thought in the world,' trained by established techniques, and, to some extent at least, indoctrinating in the mores of the surrounding society."[61] It is on this basis that Yudof, in his insightful examination of the concept of academic freedom, states that there is an "ill fit" between academic freedom in universities and the public schools and that in general the early, notable attempt to apply academic freedom to the public schools [that is, *Parducci*]

"never became the law of the land."[62]

Given the combination of factors mentioned above -— role and purpose of the public schools, close control of public schools by local citizens, and the concept of academic freedom being an ill-fit with the public schools -— I believe that the essential issue in K-12 academic freedom situations involves a pair of related questions: (1) To what extent will local boards of education moderate their tight control of their schools so as to create greater leeway for their teachers? (For example, to what extent will a board allow a 22-year old just-out-of-college teacher to determine what books students will read, what films students will view, and what topics students will discuss under the label of in-class academic freedom? To what extent will a local board allow a senior tenured teacher to supplement course approved reading lists, film lists, and topics for discussion?) (2) To what extent will the Supreme Court support local boards of education when they exercise their control, tight or moderated, over teacher speech and the curriculum that they have set for their students? These are the questions that educators, lawyers, judges, and board of education members need to address.

Recall here the Supreme Court's pronouncement in *Bethel* regarding the power of the local school boards, "The determination of what manner of speech in the classroom or in school assembly is appropriate properly rests with the school board."[63] While some university scholars might argue with the Supreme Court on this point about control in regard to the university, virtually everyone involved with K-12 education, except some teachers, agrees with board control of the K-12 classroom.

The primary issue, then, is not whether *Pickering* or *Hazelwood* applies in any given case because both offer much leeway to presiding judges to frame their decisions. The criteria generated by *Pickering* and *Hazelwood* for guiding judges in deciding future cases appear to be so elastic as to allow for diverse interpretations, especially when applied to situations of teacher in-class speech. To put it another way, the four criteria of "reasonably related to legitimate pedagogical concerns," "matters of public concern," "the content, form, and context of the speech," and the "balancing of the teacher's interest as citizen with the government's interest as employer," that derive

from *Pickering* and *Hazelwood,* offer such a wide latitude of interpretation that they can serve to support virtually any judge's particular view of the current scenario before the bench. In this way, *Pickering* and *Hazelwood* are amazingly flexible and applicable in that defendant boards of education, plaintiff teachers, and judges can all use and rely on them legally to support whichever positions they advocate in a case at bar.

Academic freedom in a K-12 classroom is not a Yes/No matter. Just as judges need some leeway to decide court cases and just as boards of education need some leeway to operate their schools, teachers need some leeway as they teach because teachers are not robots whose speech can be programmed ahead of time and because a teacher-proof curriculum cannot be designed so that it will be transmitted precisely and correctly all the time.[64] Judge Logan in *Cary v. Bd. of Educ.*[65] put it succinctly and wisely when he wrote, "We think teachers do have some rights to freedom of expression in the classroom, teaching high school juniors and seniors. They cannot be made to simply read from a script prepared or approved by the board."[66] This remark, I believe, applies to all K-12 teachers and not just to teachers of juniors and seniors. We must recognize that a tension exists between the local board's control and a teacher's desire and professional commitment to go beyond inculcation. A teacher rightly needs to open up the classroom to creative and critical thinking in the spirit of making the classroom a marketplace of ideas, so as to motivate students and to promote the preparation of students to participate fully in a democratic government.[67]

IV. Conclusion

Boards of education, as well as professional educators' organizations, must continuously discuss the tension between appropriate board (that is, community) control and appropriate teacher fostering of diverse viewpoints. The results of such discussion will be several. By way of ongoing professional in-service discussions teachers will become sensitive to legitimate issues in their communities. They will also become notified about legitimate local proscriptions. Teachers will be able to avoid potential penalties; boards will be able to minimize future lawsuits; teachers will be able to teach without always looking over their shoulders; and all parties

involved in education will be able to clarify their thoughts about some critical matters in our society. Judge Torruella in *Ward* was correct in reminding everyone that:

> Few subjects lack controversy. If teachers must fear retaliation for every utterance, they will fear teaching. As the Supreme Court warned us in *Keyishian*, 385 U.S. at 604, 87 S.Ct. at 684, "[t]he danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed."[68]

In sum, I believe that the split among the circuits as to whether *Pickering* or *Hazelwood* is the appropriate precedent for adjudicating claims of violation of public school teachers' free speech is of secondary importance. To an even lesser extent so is the call by some critics for a new Supreme Court decision.[69] Rather than focus on the split among circuit courts, we need to concentrate our efforts on the prevention of lawsuits, recognition of the current power of local school boards, and the promotion of understanding by all parties concerned, including board members, parents, students, teachers, and community members, about the nature of classroom teaching within and for a democratic society. The presence of fear rather than trust impedes everyone involved in education for a democracy. The search for a legal decision from the Supreme Court to the primary issue concerning in-class free speech will not lead to a solution that of necessity must involve a combination of educational, political, and legal aspects. This is true of all cases dealing with the eternal conflict between government rights and individual rights, of which the issue of teacher in-class free speech is but one part. A solution to this particular educational policy issue concerning teacher in-class free speech must inevitably involve adjustments by all parties. Free speech in the classroom is too important an issue to be left solely to any legal body, including the Supreme Court.

Endnotes

1. For an examination of the history and types of academic freedom see Mark G. Yudof, *Three Faces of Academic Freedom*, 32 Loyola L. Rev.831 (1987).

2. *Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002).

3. *Board of Educ. of Indep. School Dist. No. 92 of Pottawatomie County* v. Earls,122 S.Ct. 2559 (2002).

4. *Newdow v. U.S. Congress*, 292 F.3rd 597 (9th Cir. 2002).

5. The 1954 Act was an Act of Congress, Pub. L. No. 396, Ch. 297, 68 Stat. 249 (1954). *Id.* at 9111.

6. EGUSD stands for Elk Grove Unified School District, the district in which Plaintiff Newdow's daughter attends school. *Id.* at 9110.

7. *Id.* at 9131.

8. *Cockrel v. Shelby County School Dist.*, 270 F. 3d 1036 (6th Cir. 2001). (*Cockrel II*.)

9. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

10. For anyone who wishes to read in depth about the many court decisions as well as some relatively recent reviews of the literature on this topic, I recommend the following lengthy and detailed journal articles: G.A. Clarick, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. Rev. 693 (1990); K.C.Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.of Law & Educ. 1 (2001); W.S. Stuller, *High School Academic Freedom: The Evolution of a Fish out of Water*, 77 Neb. L. Rev. 301 (1998); M.H. Weiner, *Dirty Words in the Classroom: Teaching the Limits of the First Amendment*, 66 Tenn. L. Rev. 597 (1999); and K.G. Welner, *Locking up the Marketplace of Ideas and Locking out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. Rev., (in press, issue #4, April, 2003).

11. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969)

12. See, for example, *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala., 1970).

13. *Tinker*, 393 U.S. at 506.

14. *Id.* at 509, quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966).

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

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

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

18. *Id.* at 568.

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

20. *Id.* at 146.

21. *Id.* at 147-48.

22. The Supreme Court also clarified *Pickering* in two other cases. The points clarified in those cases are not primary here. In *Mt. Healthy City Board of Educ. v. Doyle*, 429 U.S. 274 (1977) the Court established a process for deciding a claim that has a mixed set of factors. In *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410 (1979) the Court decided that First Amendment protection applies even when a public employee confers privately with the employer rather than expressing her views in public.

23. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

24. *Id.* at 271.

25. *Id.* at 273.

26. This breakdown originally appears in Weiner, supra, at 625-627 and Daly, supra, at 16-17. For citations of the leading cases for each circuit see Daly at 16.

27. See, for example, *Boring v.Buncombe County Bd. of Educ.*, 136 F.3rd 364 (4th Cir. 1998). (*Boring II*).

28. See, for example, *Lacks v. Ferguson Reorganized School Dist. R-2*, 147 F. 3rd 718 (8th Cir. 1998).

29. *Keyishian v. Board of Regents*, 385 U.S. 589,603 (1967).

30. *Keefe v. Geanakos,* 418 F. 2d 359 (1st Cir. 1969).

31. *Id.* at 361.

32. *Id.* at 362. See also (1) *Mailloux v. Kiley,* 436 F. 2d 565,566 (1st Cir. 1971), where the court referred to its prior decision in *Keefe*; and (2) *Parducci v. Rutland,* 316 F. Supp. 352 (M.D. Ala., 1970), where the judge cited Supreme Court First Amendment decisions in *Tinker*, *Keyishian*, *Sweezy v. New Hampshire,* 354 U.S. 234 (1957), *Shelton v. Tucker,* 364 U.S. 479 (1960), and

Wieman v. Updegraff, 344 U.S. 183 (1952); the *Parducci* court also cited *Keefe.*

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

34. *Id.* at 450.

35. *Id.* at 452 (citations of *Hazelwood* and *Keyishian* omitted).

36. *Cowan v. Strafford R-VI School Dist.,* No. 94-3217-CV-S-4, 1995 U.S. Dist. Ct. (W. Mo., June 14, 1995), slip op. (order denying summary judgment for defendants) *aff'd,* 140 F. 3d 1153 (8th Cir. 1998).

37. *Id.* at 8.

38. *Id.* at 7.

39. Facts derive from the federal district and appellate court decisions, from the briefs of the parties, and from other court documents.

40. *Cockrel v. Shelby County School Dist.*, 81 F. Supp. 2d 771 (E.D. Ky. 2000). (*Cockrel I*).

41. *Spence v. Washington*, 418 U.S. 405, 411 (1974). *Spence* involved the prosecution of a man who displayed an American flag upside down with a peace symbol taped to it to send the message that America stood for peace. Spence was protesting the then-recent actions in Cambodia and the fatal events at Kent State University in Ohio. The Supreme Court held in favor of Spence, reversing the State of Washington Supreme Court conviction and holding that the Washington statute "contravened the First Amendment" and "impermissibly infringed protected expression." *Id.* at 406.

42. I shall restrict my description of *Cockrel II* to the First Amendment claim though other, procedural elements of the case also exist.

43. *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group*, 515 U.S. 557,570 (1995) and *Schad v. Borough of Mount Ephraim*, 452 U.S. 61,65 (1981).

44. *Cockrel II*, 270 F.3d at 1051.

45. *Leary v. Daeschner,* 228 F. 3d 729, 737 (6th Cir. 2000).

46. *Cockrel II*, 270 F. 3d at 1055.

47. *Bailey v. Floyd County Bd. of Educ.,* 106 F. 3d 135, 145 (6th Cir. 1997).

48. *Cockrel II*, 270 F. 3d at 1056.

49. *Id.* at 1057.

50. *Id.* at 1059.

51. The superintendent's letter terminating Cockrel's employment is dated July 15, 1997. By written agreement between Cockrel and the Kentucky Education Professional Standards Board on March 11, 1999 Cockrel's teaching certificate was voluntarily surrendered for two years retroactive to June 30, 1997 and suspended for two years from July 1, 1999 through June 30, 2001. (Photocopies of the Termination Letter and the Agreed Order given to me by the District's attorney.)

52. *Cockrel II*, 270 F.3d at 1050-1051.

53. *Connick*, 461 U.S. at 149.

54. *Id.* at 154.

55. *Boring v. Buncombe County Bd. of Educ., 98 F.3rd 1474* (6th Cir. 1996). (*Boring I*). This panel decision was subsequently overturned by the en banc Sixth Circuit in *Boring II*.

56. *Boring II*, 136 F. 3d at 377-379.

57. *Cockrel II*, 270 F. 3d at 1055.

58. *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 681 (1986), quoting historians C.Beard and M. Beard and then *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1079).

59. *Milliken v. Bradley,* 418 U.S. 717, 741-742 (1974).

60. *Mailloux v. Kiley,* 323 F. Supp. 1387 (D. Mass. 1971), aff'd mainly on lack of notice rather than on right to academic freedom, 448 F. 2d 1242 (1st Cir. 1971).

61. *Id.* at 1392.

62. Yudof, *supra*, at 844-846.

63. *Bethel,* 478 U.S. at 683.

64. Consider the fate of the many curriculum reform packages, especially those of the 1960s and 1970s, that were designed by university experts to teach the new social studies, the new biology, the new physics, and the like. The experts' conception of the role and function of pre-packaged curriculum units was way off the market. These experts initially held the belief that they could design a teacher proof curriculum. They failed, of course. What success the reformers then had, however, was directly related to their subsequent inclusion of classroom teachers into the reform process. The reform projects

abandoned the idea that teachers are mere consumers and implementers of the knowledge and wisdom of university experts.

65. *Cary v. Bd. of Educ.*, 598 F. 2d 535 (10th Cir. 1978).

66. *Id.* at 543.

67. Some troublesome teacher remarks do not reflect professional commitment to discuss issues. Some comments are merely inadvertent or are attempts to control the classroom without much thought of alternatives or the rights of the duly elected or appointed board of education.

68. *Ward,* 996 F. 2d at 453.

69. For example, see Note, *Constitutional Law -- First Amendment -- Fourth Circuit Rules That a Teacher's Selection of School Curriculum Is Not Protected Speech -- Boring v. Buncombe County Board of Education*, 112 Harv. L. Rev. 982,987 (1999), "Given the profound impact of these questions on the future of American democracy, the Supreme Court should clarify the muddied jurisprudence and render explicit the underlying values that have led courts prior to *Boring* to grant limited deference to teachers' curricular speech."