Teachers Beware! You May Be Liable Under Proposition 227: *California Teachers Association v. State Board of Education*

By JACINTO ZAVALA*

AMANDA IS A California public school teacher. Most of her students are immigrants who lack sufficient command of the English language to be placed in English mainstream classrooms. As a teacher, she must abide by Proposition 227, the California initiative requiring that all instruction of public school students be in English.[1] She follows teaching strategies developed by her school district designed to meet the requirements of Proposition 227. To achieve this, her school district requires her to use the preview/review method to teach her class.[2] Using this method, Amanda "previews" a lesson by giving her students vocabulary words and related concepts in their native language. She then teaches the lesson in English. Afterward, Amanda "reviews" her students' comprehension of the lesson in their native language.[3]

Section 320 is the parental enforcement provision of Proposition 227.[4] It gives parents standing to sue Amanda personally if she fails to teach their child "nearly all" or "overwhelmingly" in English.[5] Regrettably, Proposition 227 fails to set a standard for defining both "nearly

* Class of 2003. The author would like to dedicate this Note to his parents, Francisco and Evelyn Zavala, his brothers, Jose, Francisco, and Carlos, and Rayna Cervantes, for all their love, support, and encouragement. He would also like to thank his editor, Elinor Leary Vallejo, for her much-appreciated assistance throughout the editing process.

1. *See* CAL. EDUC. CODE §§ 300–340 (West 2002) (Proposition 227 is codified in its entirety, beginning with section 300 of the California Education Code).

2. *See* Cal. Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1158–59 n.5 (9th Cir. 2001) (Tashima, J., dissenting).

3. *See id.*

4. *See* CAL. EDUC. CODE § 320 (West 2002); *see also Cal. Teachers Ass'n*, 271 F.3d at 1145.

5. *See* CAL. EDUC. CODE § 320 (West 2002); *see also* CAL. EDUC. CODE § 306(b), (d) (West 2002) (requiring education in the one-year structured English Immersion programs to be conducted "nearly all" in English and education in English language classrooms to be conducted "overwhelmingly" in English).

all" and "overwhelmingly." Although Amanda believes that her school district has developed teaching strategies that expose her to liability under Proposition 227, the district considers their strategies legally permissible and requires her to follow them.[6] A logical assumption is that because her school district approves this method, Amanda's liability as an educator is mitigated. However, if a parent chose to sue, Amanda would be personally liable[7] under the Ninth Circuit's holding in *California Teachers Ass'n v. State Board of Education* for failing to teach her students "nearly all" or "overwhelmingly" in English.[8] To avoid liability, Amanda is forced to forego legitimate, non-English speech while performing her teacher duties, because the court held that since "any vagueness in Proposition 227 threatens to chill only a small amount of legitimate speech,"[9] it does not "warrant the extraordinary remedy of facial invalidation."[10]

The parental enforcement provision of Proposition 227 has caused uncertainty among educators as to how much English they must use to avoid personal liability.[11] To complicate matters, the State Board of Education has refused to define "nearly all" and "overwhelmingly," giving local school districts a great deal of flexibility in defining the terms.[12] Hence, if her school district fails to clearly define "nearly all" and "overwhelmingly," a teacher has a lot at stake and very little notice because she may be held personally liable for violating a statute whose parameters have not been clearly defined.[13] In essence, the State Board of Education has allowed individual school districts to determine whether or not educators will be subject to liability for their choice of language instruction in or out of the classroom. In 1999, individual teachers, teacher organizations, and school administrator organizations ("plaintiffs") challenged Proposition 227, claiming that it was facially unconstitutional.[14] The suit challenged only the provision of Proposition 227 that "gives parents a private cause of action against teachers and school administrators who violate the law."[15] The

6. *See Cal. Teachers Ass'n*, 271 F.3d at 1159 n.5 (Tashima, J., dissenting).
7. *See id.* at 1148.
8. *See id.* at 1141.
9. *Id.* at 1155.
10. *Id.*
11. *See* Cal. Teachers Ass'n v. Davis, 64 F. Supp. 2d 945, 949 (C.D. Cal. 1999), *aff'd sub nom.* Cal. Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141 (9th Cir. 2001).
12. *See* Kirsten Gullixson, *California Proposition 227: An Examination of the Legal, Educational and Practical Issues Surrounding the New Law*, 17 LAW & INEQ. 505, 529 n.166 (1999).
13. *See id.* at 529–30.
14. *See Davis*, 64 F. Supp. 2d at 945.
15. *Id.* at 947.

district court held that the statute: (1) did not affect any protected speech under the First Amendment;[16] (2) was not vague;[17] and (3) did not violate due process.[18] Plaintiffs appealed only the vagueness issue. In affirming the lower court, the Ninth Circuit determined that the parental enforcement provision is not facially vague.[19] This decision is the focus of this Note.

Part I of this Note examines bilingual education and sheltered English Immersion programs and presents views of opponents and supporters of each system. Part I also discusses the requirements of Proposition 227. Finally, Part I provides background information on the issue of First Amendment rights for teacher speech in the classroom context. Part II examines *California Teachers Ass'n v. State Board of Education.* Part III demonstrates how the court's decision was flawed. In doing so, Part III discusses the scope of Proposition 227, First Amendment protection for teachers, and the court's application of the vagueness doctrine.

I. Background

A. Bilingual Education and Sheltered English Immersion Programs

Bilingual education programs rest on the theory that the best way for students classified as Limited English Proficient ("LEP")[20] to learn English is by learning to read in both English and their native language.[21] Under this program, a student receives subject matter instruction in his native language in addition to special English instruction.[22] The main goal is to provide content area instruction in both languages equally.[23]

In contrast, LEP students in sheltered English immersion programs are taught English by a bilingual teacher[24] who uses classroom materials that are highly structured to introduce students to the En-

16. *See id.* at 954.

17. *See id.* at 956.

18. *See id.* at 957.

19. *See Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1145 (9th Cir. 2001).

20. *See* CAL. EDUC. CODE § 306(a) (West 2002) (defining an LEP child as an English learner "who does not speak English or whose native language is not English and who is not currently able to perform ordinary classroom work in English").

21. *See* Catherine P. Johnson, *The California Backlash Against Bilingual Education:* Valeria G. v. Wilson *and Proposition 227,* 34 U.S.F. L. REV. 169, 171 (1999).

22. *See id.*

23. *See* CARLOS J. OVANDO & VIRGINIA P. COLLIER, BILINGUAL AND ESL CLASSROOMS: TEACHING IN MULTICULTURAL CONTEXTS 39 (Tom Quinn & Jim Bessent eds., 1985).

24. *See* Johnson, *supra* note 21, at 170–71.

glish language in a step-by-step fashion.[25] Students are allowed to ask questions in their native language but the teacher usually answers only in English.[26] The main goal of sheltered English immersion programs is to allow an LEP student to enter an English-only classroom as soon as his English skills are considered proficient.[27] A student is deemed proficient once a good working knowledge of English is acquired.[28]

B. Proposition 227

1. General Background

On June 2, 1998, California voters passed Proposition 227, a ballot initiative that replaced bilingual education with sheltered English immersion.[29] The initiative mandates that all children who attend California public schools be taught in English as quickly and efficiently as possible.[30] Specifically, this requires all children to be placed in English language classrooms[31] unless a parent seeks a waiver.[32] In addition, the initiative calls for LEP students to be educated through sheltered English immersion during a transition period that normally should not exceed one year.[33] Sheltered English immersion is defined as "an English language acquisition process for young children in which *nearly all* classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language."[34] These students are then moved to an English-only classroom made up solely of English proficient students.[35]

The parental enforcement provision of Proposition 227 gives all California public school children the right to an English language education. In the event a child is denied the opportunity to have an instructional curriculum in English, regardless of whether that child is an English speaker or not, the child's parent or legal guardian may sue "[a]ny school board member, or other elected official, or public

25. *See* OVANDO & COLLIER, *supra* note 23, at 44.
26. *See* Johnson, *supra* note 21, at 171.
27. *See id.*
28. *See* CAL. EDUC. CODE § 305 (West 2002).
29. *See* Jill K. Mora, *Proposition 227 is a Policy Failure,* SAN DIEGO UNION-TRIBUNE, Aug. 30, 2001, at B11.
30. *See* CAL. EDUC. CODE § 300(f) (West 2002).
31. *See id; see also* CAL. EDUC. CODE § 306(b) (West 2002).
32. *See* CAL. EDUC. CODE §§ 310–311 (West 2002).
33. *See* § 305.
34. § 306(d) (emphasis added).
35. *See* Gullixson, *supra* note 12, at 506; *see generally* § 306(b) (defining an English-only classroom as a classroom where "the language of instruction used by the teaching personnel is *overwhelmingly* the English language") (emphasis added).

school teacher or administrator"[36] for enforcement of the statute's provisions, and, if successful, is awarded attorney fees and damages.[37] In essence, if a *parent* feels that the program adopted by the school district fails to teach his or her child "nearly all" or "overwhelmingly" in English, the teacher can be liable based on the parent's subjective interpretation of the program enacted by the school district.

2. Supporters of Proposition 227

To explain his backing for the initiative, Ron Unz, the author of Proposition 227, argued that although it is helpful to speak a second language in today's global economy, the unofficial language of world business is English.[38] Moreover, "lack of literacy in English represents a crippling, almost fatal disadvantage in our global economy."[39] Unz also notes that because most LEP students enter school in kindergarten, and are thus capable of learning a new language quickly, there is no need to teach them in their native language.[40] However, this argument relies on the assumption that any academic loss is minimal.[41]

Other proponents point out that California's bilingual education program failed because there was a financial incentive to keep children in bilingual classroom settings and prevent them from entering mainstream classrooms. For example, bilingual teachers in the Los Angeles Unified School District were paid a bonus of up to $5,000 a year, and the school district received an additional $224 per year per bilingual student.[42] Also, in 1997, California allocated $368 million in supplemental funds for low-income students, and an estimated two-thirds, or $246 million, went to bilingual programs.[43] Moreover, the federal government gave California districts nearly $87.5 million in bilingual funding for fiscal year 1997.[44] Thus, bilingual education was "big business" in California, accounting for nearly $334 million per year in state and federal funds.[45] In contrast, Proposition 227 is concerned with placing children in mainstream English classrooms as

36. CAL. EDUC. CODE § 320 (West 2002).
37. *See id.*
38. *See* Ron Unz, *Bilingual Is A Damaging Myth*, L.A. TIMES, Oct. 19, 1997, at M5.
39. *Id.*
40. *See* Amy S. Zabetakis, *Proposition 227: Death for Bilingual Education*, 13 GEO. IMMIGR. L. J. 105, 115 (1998).
41. *See id.*
42. *See* William J. Gale, *Bilingual Education: Should the Traditional Approach be Abandoned in Favor of "English Immersion"?*, 19 J. JUV. L. 158, 161–62 (1998).
43. *See Bilingual Education: A Squandered Opportunity*, L.A. TIMES, Oct. 26, 1997, at M4.
44. *See id.*
45. *See* Gale, *supra* note 42, at 162.

soon as possible and is not driven by the same "big business" economics as bilingual education.

3. Opponents of Proposition 227

Opponents of the initiative argue that LEP students need to master more than the English language to become successful in the United States. Specifically, they contend that LEP students must be taught in their native language so that they do not fall behind in their academic classes.[46] They also point out that the initiative limits teaching English to LEP students to one method—structured English immersion—despite the fact that scholars recognize several other sound educational theories. These include transitional bilingual education, maintenance bilingual education, two-way enrichment education, and English as a Second Language ("ESL").[47] Thus:

> As a matter of educational policy, California's decision to limit LEP education to one method, structured English immersion, was unwise at a time when so little is known about language acquisition. There is significant debate about the effectiveness of the various methods of educating LEP students. The educational strategy under the Proposition is vague.[48]

Finally, opponents contend that the initiative's mandate of English language instruction to LEP students at all grade levels[49] increases the likelihood that upper level students will struggle to learn English after only one year of English immersion. Nonetheless, Proposition 227 is the law in California.

C. First Amendment Free Speech Rights for Teachers

The importance of free speech for teachers cannot be overstated. If a constitutional right to at least some free speech is not recognized then a teacher is compelled to follow what a school district determines is the appropriate learning modality. In such a case, a teacher who

46. *See* Zabetakis, *supra* note 40, at 115.

47. *See* Gullixson, *supra* note 12, at 520–21; *see also* Zabetakis, *supra* note 40, at 109 (defining transitional bilingual education as when "[s]tudents spend time in a class being taught in their native language, and are eventually main-streamed into English classes;" maintenance bilingual education as when "[s]tudents spend their entire education in a class taught primarily in their native language;" two-way enrichment education as when "[b]oth limited English proficient students and English speaking students spend one-half of the day learning in one language, and the other half learning in the other language;" and English as a Second Language as when "[a] group of students from different backgrounds spend part of the school day being taught by a teacher trained in ESL, but who does not necessarily speak the students' native language").

48. Gullixson, *supra* note 12, at 535.

49. *See* CAL. EDUC. CODE § 305 (West 2002).

believes the plan her school district has devised pursuant to Proposition 227 is inadequate to shield her from liability has no recourse, because she has no rights.

In contrast, if some free speech is recognized then a teacher is afforded the opportunity to employ those classroom techniques that she feels will protect her from liability under the parental enforcement provision of Proposition 227.[50]

The United States Supreme Court first affirmed the existence of teachers' First Amendment rights in 1923,[51] but it has never squarely addressed the issue of whether teachers enjoy free speech rights in the classroom.[52] However, some lower courts have relied on the Supreme Court's decisions in *Hazelwood School District v. Kuhlmeier*[53] and *Pickering v. Board of Education*[54] to address the question of how much protection, if any, a teacher's in-class speech should be afforded.[55] However, neither seems appropriate to evaluate speech that teachers use in the classroom because a public school teacher's speech is different from both the at-work speech of an average government employee and from student speech.[56]

In *Hazelwood,* student staff members of a high school newspaper filed suit against the principal, alleging a violation of free speech rights for the censure of two articles.[57] The Court held that so long as the actions of educators are reasonably related to a legitimate state pedagogical concern, they do not violate a student's First Amendment rights.[58] In operation, school administrators may place ample limits on student expression[59] since schools are nonpublic fora. Although

50. *See* Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment,* 30 J.L. & EDUC. 1, 3 (2001).

51. *See* Bartels v. Iowa, 262 U.S. 404, 411 (1923) (holding that state statutes that prevent the teaching of a foreign language in the public schools violate the liberty of parents, teachers, and students under the Fourteenth Amendment Due Process Clause); *see also* Kara Lynn Grice, *Striking an Unequal Balance: The Fourth Circuit Holds that Public School Teachers Do Not Have First Amendment Rights to Set Curricula in* Boring v. Buncombe County Board of Education, 77 N.C. L. REV. 1960, 1960 (1999).

52. *See* Daly, *supra* note 50, at 6.

53. 484 U.S. 260 (1988).

54. 391 U.S. 563 (1968).

55. *See* Daly, *supra* note 50, at 7; *see also* Grice, *supra* note 51, at 1961 (explaining that the *Pickering* line of cases provides "standards to clarify the permissible scope of public speech by all government employees, including out-of-class speech by public school teachers," and that courts following *Hazelwood* "have looked to standards promulgated by the Court to assess the extent of students' First Amendment rights within the classroom").

56. *See* Grice, *supra* note 51, at 1961.

57. *See Hazelwood,* 484 U.S. at 262.

58. *See id.* at 273.

59. *See* Daly, *supra* note 50, at 12.

Hazelwood is aimed at limiting student expression, many lower courts have applied it to teacher expression, because a teacher's in-class speech is commonly perceived as a fundamental part of the school curriculum.[60] As such, teacher speech may be misconstrued as speech made on behalf of the school.[61]

In *Pickering*, a teacher sought reinstatement after being dismissed for making critical comments about his school district.[62] The Supreme Court held that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[63] Under *Pickering*, a public employee's speech effectively "receives no First Amendment protection unless it involves a matter of public concern."[64] Where speech does involve a matter of public concern, a court decides whether the employee's interest in expression outweighs the government's interest in fostering an efficient workplace and having minimal workplace disruption.[65] Thus, *Pickering* gives a teacher the right to speak as a citizen, so long as what is said is a matter of public concern.[66] To be exact, the fact that speech occurs in the classroom does not determine whether *Pickering* applies, since a teacher may speak to students in class as a citizen, rather than as a teacher communicating a curriculum.[67] Although *Pickering* protects teachers as citizens it cannot be expanded to cover in-class speech.[68] As such, no recent circuit case applying *Pickering* has found classroom speech to "qualify as a matter of public concern."[69]

The extent to which teachers enjoy free speech rights in the classroom has never been resolved. However, some federal courts rely on precedent set by either *Hazelwood* or *Pickering* to resolve cases concerning First Amendment rights of teacher in-class speech.[70] Thus, although neither standard seems appropriate, lower courts are willing to address the issue. The Ninth Circuit should follow suit and recog-

60. *See id.* at 14.

61. *See id.*

62. *See* Pickering v Bd. of Educ., 391 U.S. 563, 566–68 (1968).

63. *Id.* at 574.

64. Cal. Teachers Ass'n. v. State Bd. of Educ., 271 F.3d 1141, 1149 n.6 (9th Cir. 2001).

65. *See id.*

66. *See* William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213, 238 (1999).

67. *See id.*

68. *See* Daly, *supra* note 50, at 11.

69. *Id.* at 18.

70. *See id.* at 1–2.

nize a legitimate First Amendment protection to teacher in-class speech rather than choosing to side-step the issue.[71]

II. The Case: *California Teachers Ass'n v. State Board of Education*

A. The Parties

A little over a year after Proposition 227 was passed, plaintiffs sought to enjoin enforcement of the parental enforcement provision, claiming it was unconstitutionally vague.[72] The State Board of Education and its members ("Defendants") responded that the terms of the initiative were not vague, and clearly applied to the language of instruction.[73]

B. Procedural History

At the district court level, plaintiffs argued that teachers are not clear as to how much use of a language other than English subjects them to liability.[74] For example, one teacher worried that "Spanish used in disciplinary situations and in instructions regarding earthquake safety procedures could subject her to liability."[75] The district court held that plaintiffs failed to show that section 320 of Proposition 227 was facially unconstitutional because section 320 is sufficiently clear.[76]

On appeal, plaintiffs challenged the vagueness holding, arguing that the terms of section 320 violate the First and Fourteenth Amendments because they fail to clearly define when and how much use of a language other than English subjects an educator to personal liability.[77]

C. The Parties' Contentions

Plaintiffs contended that the parental provision of Proposition 227 failed to make clear when teachers are required to speak English. First, plaintiffs argued that the mandate in section 320—that educa-

71. *See* Cal. Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1148 (9th Cir. 2001) (choosing to not resolve the controversy of whether and to what extent the First Amendment protects instructional speech by a teacher).

72. *See* Cal. Teachers Ass'n v. Davis, 64 F. Supp. 2d 945, 947–48 (C.D. Cal. 1999).

73. *See Cal. Teachers Ass'n* , 271 F.3d at 1146.

74. *See Davis*, 64 F. Supp. 2d at 949.

75. *Id.*

76. *See id.* at 956–57.

77. *See Cal. Teachers Ass'n*, 271 F.3d at 1145.

tors provide an "English language educational option"—is impossible to understand and leaves them in the dark as to when the language restrictions of the initiative apply.[78] In addition, plaintiffs argued that Proposition 227 fails to clearly define how much non-English instruction will expose them to personal liability under section 320.[79] As applied to public school students in general, Proposition 227 mandates that the language of instruction be "overwhelmingly" in English.[80] The requirement for LEP students is that "nearly all" classroom instruction be in English.[81] Plaintiffs argued that "nearly all" and "overwhelmingly" are imprecise words that fail to provide adequate notice of how much non-English instruction is permitted.[82]

Defendants argued that the terms of the initiative are sufficiently clear and so the statute cannot be unconstitutional.[83] Moreover, the inclusion of an intent element in the statute—teachers must "willfully" and "repeatedly" violate the law—shields the statute from a vagueness challenge.[84] Therefore, summary judgment was appropriate.[85]

D. The Court's Rationale

1. The Court's Analysis

The Ninth Circuit focused on three aspects of Proposition 227 to hold section 320 sufficiently clear to withstand plaintiffs' facial vagueness challenge.[86] First, the court addressed the scope of Proposition 227.[87] Second, the court addressed the issue of teachers' First Amendment protection, but decided it did not have to rule on the issue.[88] Finally, the court assumed that teachers have some First Amendment protection and applied the vagueness doctrine as employed by the United States Supreme Court in *Grayned v. City of Rockford*.[89]

78. *See id.* at 1146.
79. *See id.*
80. *See* CAL. EDUC. CODE § 306(b) (West 2002).
81. *See* § 306(d).
82. *See Cal. Teachers Ass'n*, 271 F.3d at 1146.
83. *See Cal. Teachers Ass'n v. Davis*, 64 F. Supp. 2d 945, 954 (C.D. Cal. 1999).
84. *See id.*
85. *See Cal. Teachers Ass'n*, 271 F.3d at 1146.
86. *See id.*
87. *See id.* at 1146–48.
88. *See id.* at 1150.
89. *See id; see also* Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972), which held that it is a violation of due process if a statute is not clearly defined. The court stated three reasons why a vague statute is objectionable: first, it may trap an innocent person by not providing a fair warning; second, a vague law enhances the chances of arbitrary and discriminatory enforcement; third, a vague law can inhibit the exercise of First Amendment freedoms.

2. Scope of Proposition 227: When Language Restrictions Apply

The Ninth Circuit Court of Appeals began by stating that when faced with a constitutional challenge of this nature, the duty of a federal court "is to employ traditional tools of statutory construction to determine the statute's 'allowable meaning.'"[90] In doing so, a federal court should look at the state court's interpretation of the same or a similar statute, as well as the words of the statute itself.[91] Section 320 provides that every California school child is entitled to an English language public education.[92] In addition, it states that a teacher who "willfully and repeatedly refuses to implement the terms of [the] statute by providing such an English language educational option at an available public school to a California school child may be held personally liable."[93] However, there is no language in Proposition 227 that excludes liability for using non-English in situations such as field trips, discipline, supervision, or an emergency.[94]

The Ninth Circuit read "English language educational option" to refer to "the option of an English language instructional curriculum in public school," since that phrase is contained in the preceding sentence.[95] The court then went on to say that although the phrase "the option of an English language instructional curriculum in public school" is not defined in the initiative, the phrase is "[clarified] in Article 2 (commencing with Section 305) and Article 3 (commencing with Section 310)."[96] The court then pointed out that both "instruction" and "curriculum" are used in Article 2.[97] Thus, it seems clear that the requirement in section 320, that educators provide an "English Language instructional curriculum," is merely a shorthand reference to the fundamental requirements of Proposition 227 found in sections 305 and 306: namely, that educators are required to use English as the language of "instruction."[98]

The court used the requirement in section 305(d) that LEP students be placed in sheltered English immersion as an example. Section 305(d) defines a sheltered English immersion classroom as one

90. Cal. Teachers Ass'n, 271 F.3d at 1147.
91. *See id.*
92. *See* CAL. EDUC. CODE § 320 (West 2002).
93. *Id.*
94. *See generally* CAL. EDUC. CODE §§ 300–340 (West 2002);*see also Cal. Teachers Ass'n,* 271 F.3d at 1156–57 (Tashima, J., dissenting).
95. *Cal. Teachers Ass'n,* 271 F.3d at 1147 (quoting CAL. EDUC. CODE § 320).
96. *Id.* (citations omitted).
97. *See id.*
98. *See id.*

where nearly all *instruction* is in English "but with the *curriculum* and presentation designed for children who are learning the language."[99] Similarly, the court explained, section 305(b) mandates that all students be placed in English language classrooms, where the language of instruction is overwhelmingly English.[100] The court then read "English language instructional curriculum" to suggest that English must be the language of instruction educators use.[101] The court also noted that *McLaughlin v. State Board of Education,*[102] a California Court of Appeal case, supported its conclusion that "under the traditional tools of statutory construction, the language restrictions of Proposition 227 apply only to the language of instruction, *i.e.*, the language teachers use to present the curriculum to students in California public schools."[103]

3. First Amendment Protection

Without resolving the issue, the Ninth Circuit assumed *arguendo* that the instructional speech covered by Proposition 227 is entitled to some protection under the First Amendment.[104] The court subjected the regulation of teacher speech to the *Hazelwood* standard—that a regulation must be "reasonably related to a pedagogical concern"[105]—because it is the test that affords speech the highest degree of protection.[106] The court went on to determine that plaintiffs could challenge section 320 because Proposition 227 clearly implicates free speech rights.[107] Additionally, the court stated that since a teacher's instructional speech enjoys First Amendment protection under *Hazelwood,* a more rigorous vagueness test governs its review.[108] "When First Amendment freedoms are at stake, courts apply the vagueness analysis more strictly, requiring statutes to provide a greater degree of specificity and clarity than would be necessary under ordinary due process principles."[109]

99. *Id.* (citations omitted).
100. *See id.*
101. *See id.*
102. 75 Cal. App. 4th 196, 201 (Ct. App. 1999) (holding that "the plain meaning of Proposition 227 was to guarantee that LEP students would receive educational instruction in the English language").
103. *Cal. Teachers Ass'n,* 271 F.3d at 1148.
104. *See id.*
105. *Id.* at 1149 (citations omitted).
106. *See id.*
107. *See id.*
108. *See id.* at 1150.
109. *Id.*

The court also noted that in order to trigger heightened scrutiny, "it is sufficient that the challenged statute regulates and potentially chills speech which, *in the absence of any regulation*, receives some First Amendment protection."[110] Since the court assumed that instructional speech has some protection, and that Proposition 227 may chill such protected speech, it applied the heightened vagueness scrutiny standard.[111]

4. Application of the Vagueness Doctrine

In determining whether section 320 was vague, the Ninth Circuit noted the concerns the Supreme Court had regarding a similarly vague statute in *Grayned v. City of Rockford*.[112] In *Grayned*, the Court stated three reasons why a vague statute may be found unconstitutional: first, it may trap an innocent person by not providing a fair warning; second, a vague law enhances the chances of arbitrary and discriminatory enforcement; third, a vague law can inhibit the exercise of First Amendment freedoms.[113]

But the court also noted that a statute does not require perfect clarity, even when it regulates protected speech.[114] In other words, the Constitution must, and does, tolerate a certain amount of vagueness.[115]

Although the court found the restrictions of Proposition 227 apply only to the language a teacher uses to present the curriculum to California public school students, plaintiffs nevertheless contended that the statute did not sufficiently inform them whether they could use non-English when disciplining a student, supervising a class field trip, tutoring an individual student, or speaking casually with a student outside of class.[116] The court determined that "instruction" and "curriculum" are words of common understanding that a teacher would know only refer to the subject matter normally taught in school, such as science and mathematics.[117] As such, activities such as field trips, student discipline, and playground supervision do not fall within this meaning.[118] However, the court noted that if a situation

110. *Id.*
111. *See id.*
112. 408 U.S. 104 (1972).
113. *See Cal. Teachers Ass'n*, 271 F.3d at 1150 (citing *Grayned*, 408 U.S. at 108–109).
114. *See* Cal. Teachers Ass'n, 271 F.3d at 1150.
115. *See id.* at 1151.
116. *See id.*
117. *See id.*
118. *See id.* at 1151–52.

arises where it is uncertain whether a teacher is providing instruction or promoting the curriculum, then it is acceptable for the teacher to forgo some amount of legitimate non-English speech (such as disciplining students or informing them about safety) given that the main issue in a First Amendment challenge is not whether *some* amount of speech will be chilled, but if a *substantial* amount will be chilled.[119]

The court took the same approach in analyzing plaintiffs' contention that the terms "nearly all" and "overwhelmingly" create uncertainty about how much non-English is permitted during activities that fall within the scope of Proposition 227. The court found both terms to be of common understanding and although both fail to provide a certain mathematical percentage, the First Amendment does not require the terms to do so.[120] Thus, as long as the vagueness of these terms does not chill a substantial amount of legitimate protected speech, heightened scrutiny is met[121] since it is not likely that the ambiguity in "nearly all" and "overwhelmingly" will chill more than a slight amount of non-English speech.[122]

III. Analysis and Criticism

The major ramification of the Ninth Circuit's holding in *California Teachers Association* is that an innocent teacher may be held liable for failing to adhere to the proposition's mandate that educators use English as the language of instruction.[123] The vagueness of the terms "nearly all" and "overwhelmingly" leaves a teacher in the dark about how much non-English she may use. As a result, this decision will undoubtedly impact teacher's speech. A teacher who fears liability will forgo using any language other than English while performing routine school duties.

Although the Ninth Circuit properly applied heightened vagueness scrutiny, the court was incorrect in concluding that section 320 was sufficiently clear. The scope of Proposition 227 is not readily apparent because the Ninth Circuit chose to define "curriculum" narrowly, despite the contrary definition provided by the Supreme Court in *Hazelwood*. Moreover, the refusal to accord teachers at least some First Amendment protection will chill a substantial amount of legiti-

119. *See id.*
120. *See id.*
121. *See id.*
122. *See id.*
123. *See id.* at 1147.

mate teacher speech. Finally, the court improperly applied the vagueness doctrine.

A. No Definite Scope of Proposition 227

Although Proposition 227 fails to clearly define "English language instructional curriculum," the court in *California Teachers Ass'n* concluded that the term is shorthand for the core requirements of the initiative, namely, that teachers must use English as their language of instruction.[124] Moreover, the court found that a teacher's use of the English language is limited to the language a teacher uses to present the *curriculum* to students in California public school classrooms.[125]

However, the court failed to take into account situations where a teacher must present a curriculum *outside* the classroom. For example, a field trip or physical education instruction may be construed as a curriculum under *Hazelwood*.[126] The court's analysis of section 320 did not address these commonplace situations. Thus, it remains unclear whether a teacher who uses a language other than English outside the classroom is subject to liability.

B. Refusal to Accord at Least Some First Amendment Protection to Teachers

The Ninth Circuit refused to resolve whether, and to what extent, the instructional speech of a teacher is protected under the First Amendment.[127] The Ninth Circuit points out that the United States Supreme Court has never definitively resolved this issue.[128] While this may be true, it is still very troubling that the court used language such as "assuming it receives any protection at all" when referring to teacher speech.[129] It is clear that teachers have been accorded at least some protection by the Supreme Court. In *Tinker v. Des Moines Independent Community School District*,[130] the Court held 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."[131]

124. *See id.*
125. *See id.* at 1148.
126. *See* Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).
127. *See* Cal. Teachers Ass'n, 271 F.3d at 1148.
128. *See id.*
129. *See id.* at 1155.
130. 393 U.S. 503 (1969).
131. *Id.* at 506.

The Ninth Circuit chose to ignore precedent set by *Tinker* and, in doing so, set incorrect precedent for district courts to follow. The amount of protected speech to which a teacher is entitled may be open to argument, but it is clear that some protection must be afforded. In fact, *Hazelwood* points out that a school may impose reasonable restrictions on a teacher's speech if its facilities have not been open to the public at large.[132] Implicitly, then, *Hazelwood* recognized some protection, since speech would be protected if school facilities were open to the public.

C. Inappropriate Application of the Vagueness Doctrine

Second, and most important, is the Ninth Circuit's flawed application of the vagueness doctrine. The Ninth Circuit has noted that "[w]here the guarantees of the First Amendment are at stake the [Supreme] Court applies its vagueness analysis strictly."[133] Remarkably, the court failed to do so in this case. In analyzing section 320 and the three concerns underlying the vagueness doctrine, the majority found that it is not likely that the ambiguity of the terms "nearly all" and "overwhelmingly" will chill a significant amount of speech.[134] In addition, the court found that these terms, as well as "curriculum" and "instruction," are of common understanding.[135] "Although they are not readily translated into a mathematical percentage, the First Amendment does not require them to be."[136]

There are many flaws in the court's reasoning. First, Proposition 227 defines English classrooms as those "in which the language of instruction used by the teaching personnel is *overwhelmingly* the English language."[137] Sheltered English immersion classrooms are defined as those where "*nearly all* classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language."[138] The court then finds that these terms are relatively concrete and specific.[139] However, it is difficult to understand how the terms "nearly all" and "overwhelmingly" clearly direct a teacher how much non-English she may use in the classroom. In other words, a

132. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988).

133. Cohen v. San Bernardino Valley Coll., 92 F.3d 968, 972 (9th Cir. 1996) (quoting Bullfrog Films Inc. v. Wick, 847 F.2d 502, 512 (9th Cir. 1988)).

134. *See Cal. Teachers Ass'n*, 271 F.3d at 1152.

135. *See id.*

136. *Id.*

137. CAL. EDUC. CODE § 306(b) (West 2002) (emphasis added).

138. *Id.*

139. *See Cal. Teachers Ass'n*, 271 F.3d at 1153.

teacher must use English all the time to avoid facing the possibility of a lawsuit.

Moreover, the United States Supreme Court has recognized activities that take place outside the classroom as curriculum.[140] Thus, a teacher implementing a curriculum outside the classroom is in violation of Proposition 227 and arguably subject to liability.

The State Board of Education allows school districts great flexibility in interpreting this broad language.[141] In fact, districts have interpreted this provision to require anywhere from sixty to ninety percent of instruction to be in English.[142] Thus, up to forty percent of protected teacher speech could be chilled by such vague terms. It is fair to assume that these unclear guidelines could unfairly expose teachers to personal liability. In addition, districts have a lot at stake when interpreting the broad language of Proposition 227 because both teachers and administrators are subject to personal liability under section 320.[143]

Also, contrary to the court's holding in this case, *Hazelwood* concluded that "curriculum" is not limited to in-class activities:

> [S]chool-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school . . . *may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.*[144]

In *Hazelwood,* the United States Supreme Court defined "curriculum" to include activities *outside* the classroom. This definition is contrary to the dicta in *California Teachers Ass'n* relating to the term "curriculum." In essence, the Ninth Circuit refused to follow Supreme Court precedent. It is clear from the Court's interpretation that those activities which "bear the imprimatur of the school" but take place outside the classroom—publications and plays, for example—are considered curriculum.[145]

Arguably, a teacher disciplining a student or supervising a tetherball game during recess can be perceived as *bearing the imprimatur* of the school: She is teaching social skills to the child, which is

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

141. *See* Gullixson, *supra* note 12, at 529.

142. *See* Louis Shagun, *Responses to Prop. 227 All Over the Map,* L.A. TIMES, Sept. 2, 1998, at B2.

143. *See* CAL. EDUC. CODE § 320 (West 2002).

144. *Hazelwood,* 484 U.S. at 271 (emphasis added).

145. *See id.*

considered part of the curriculum in most districts. Thus, there is a realistic probability that a teacher could spend a sizeable amount of the day teaching outside the classroom. In this situation, would she be required to carry on "instruction" of her "curriculum" in English? It is important to keep in mind that the Ninth Circuit held that the English instruction requirement of Proposition 227 only applies to the teaching of academic lessons, but not other forms of interaction between the student and teacher. With this in mind, one might question the clarity of the words "curriculum" and "instruction."

Conclusion

Every United States citizen has the right to know when he or she is exposed to liability. Unfortunately, the Ninth Circuit has denied this right to California schoolteachers. The court's refusal to recognize that teachers have First Amendment rights heralds a dark day for teachers, especially since the United States Supreme Court explicitly recognized such a right in both *Hazelwood* and *Pickering*. Moreover, the terms "nearly all" and "overwhelmingly" are not words of common understanding. Most people would fail to arrive at the same number when asked to define in percentages the terms "nearly all" and "overwhelmingly." The Ninth Circuit, however, did not seem to think so.

Most troubling, however, is how clearly section 320 raises all three concerns that underlie the vagueness doctrine. First, the terms "nearly all" and "overwhelmingly" back innocent teachers into a corner by not providing them with fair warning as to exactly what amount of non-English will expose them to liability. Second, when this is coupled with the fact that school districts have wide latitude in designing programs to meet the mandate of Proposition 227, it becomes virtually impossible for a teacher to protect herself against liability. Third, there is a high probability of arbitrary and discriminatory application of the initiative, because a teacher from a particular district can easily be singled out by a parent who believes that the law is being violated. In essence, Proposition 227 forces a teacher to curtail her exercise of free speech by preventing her from speaking to a student in his native language, even if she feels it is in the student's best interest to do so.