

SHEDDING FIRST AMENDMENT RIGHTS AT THE
CLASSROOM DOOR?:
THE EFFECTS OF *GARCETTI* AND *MAYER* ON
EDUCATION IN PUBLIC SCHOOLS

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INTRODUCTION

In the landmark 1969 case of *Tinker v. Des Moines Independent Community School District*,¹ the Supreme Court famously declared, “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”² At the time, this had been the “unmistakable holding” of the Court for almost fifty years.³ Nearly four decades later, no Supreme Court decision has purported to overrule that proclamation. However, recent case law suggests that public school teachers may indeed lose their First Amendment rights upon entering their classrooms.

First Amendment rights for students and teachers have always been more limited in schools than in public generally, as schools have legitimate interests in maintaining order, discipline, and productive pedagogical environments. As is often the case with First Amendment disputes, courts employ balancing tests to determine the circumstances under which schools may regulate expression. Over the last four decades, various tests have been applied to student and teacher speech. Within the regulation of teacher speech, courts have used at least two approaches, both of which balance the rights of the teacher against the interests of the school.

In *Garcetti v. Ceballos*,⁴ a 2006 case concerning public employees generally, the Supreme Court declined to perform any balancing of interests, and instead laid down a bright-line rule.⁵ The Court held that when public employees make statements pursuant to their official duties, they do not speak as citizens for First Amendment purposes and consequently have no First Amendment protection from adverse employment actions prompted

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¹ 393 U.S. 503 (1969).

² *Id.* at 506.

³ *Id.*

⁴ 547 U.S. 410 (2006).

⁵ *Id.* at 421.

by their speech.⁶ The Court refused to decide whether its holding should apply to teachers,⁷ thus providing little guidance to lower courts that would inevitably face this question. The Seventh Circuit confronted the issue in 2007 and held in *Mayer v. Monroe County Community School Corp.*⁸ that *Garcetti* does indeed apply to public school teachers,⁹ thereby strictly limiting the ability of public school teachers to voice their opinions at school.

Part I of this Comment briefly describes the seminal Supreme Court decisions prior to *Garcetti* and *Mayer* analyzing both student and teacher speech and sets forth the approaches that various courts have employed in teacher speech cases. Part II explains the Supreme Court's holding in *Garcetti*, and Part III details the Seventh Circuit's decision to apply the bright-line rule of *Garcetti* to teacher speech in *Mayer*. Part IV explains how the Seventh Circuit's *Mayer* decision will deprive teachers of their rights and students of essential learning opportunities. Part V sets forth an alternative approach for teacher speech cases, recommending that courts apply the balancing test from *Pickering v. Board of Education*¹⁰ and *Connick v. Myers*¹¹ to cases of teacher speech outside the classroom, but that they use the analysis traditionally reserved for student speech cases when examining teacher speech inside the classroom. This approach results in a more equitable balancing of teachers' First Amendment rights against the interests of schools, while considering the realities of the educational system and the interests of students.

I. BACKGROUND: THE PIVOTAL SCHOOL SPEECH CASES

A. *Landmark Student Speech Cases*

The Supreme Court decided *Tinker v. Des Moines Independent School District* in 1969.¹² The controversy in *Tinker* arose when middle and high schools in Des Moines, Iowa forbade students from wearing black armbands in silent protest of the Vietnam War.¹³ When the schools suspended students for violating the policy, the students filed a complaint against the school district, alleging violations of their constitutional right to free expression.¹⁴ The district court dismissed the complaint, determining that the

⁶ *Id.*

⁷ *Id.* at 425.

⁸ 474 F.3d 477 (7th Cir. 2007).

⁹ *Id.* at 480.

¹⁰ 391 U.S. 563 (1968).

¹¹ 461 U.S. 138 (1983).

¹² 393 U.S. 503 (1969).

¹³ *Id.* at 504.

¹⁴ *See id.*

prohibition was constitutional because of the need to maintain school discipline, and the Eighth Circuit affirmed without opinion.¹⁵

The Supreme Court reversed, holding that “the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating.”¹⁶ Accordingly, the schools’ interest in maintaining order could not outweigh the interest of the students in expressing their views, especially because their political expression was “closely akin to pure speech,” and thus “entitled to comprehensive protection under the First Amendment.”¹⁷ The Court held that school districts can rightfully restrict student speech only if the speech interferes with (1) the discipline or operation of the school or (2) the rights of others.¹⁸ This speech did neither.¹⁹

While the holding of *Tinker* applied explicitly to students, the Court did implicitly recognize similar free speech rights for teachers. Justice Fortas, writing for the Court, stated that “[i]t 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.”²⁰ *Tinker* is a student speech case and courts almost exclusively apply it in that context, but occasionally courts have used the *Tinker* analysis in teacher speech cases.²¹

Another pivotal student speech case came to the high court in 1986. In *Bethel School District v. Fraser*,²² the Supreme Court held that a school could censor a student’s speech when the student used lewd sexual metaphors while speaking during a school assembly.²³ High school student Matthew Fraser delivered a speech nominating a fellow student for elective office at the school and referred to the candidate repeatedly in terms of “an elaborate, graphic, and explicit sexual metaphor.”²⁴ Fraser served a two-day suspension from school.²⁵

The Ninth Circuit held that Fraser’s speech was indistinguishable from the armbands in *Tinker*, but the Supreme Court disagreed.²⁶ The Court held that the school’s punishment of Fraser was not related to his advocacy of

¹⁵ *Id.* at 504-05.

¹⁶ *Id.* at 505.

¹⁷ *Id.* at 505-06.

¹⁸ *Tinker*, 393 U.S. at 513-14.

¹⁹ *Id.* at 514 (“They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others.”).

²⁰ *Id.* at 506 (emphasis added).

²¹ See, e.g., *James v. Bd. of Educ.*, 461 F.2d 566, 571 (2d Cir. 1972) (discussed *infra* in text accompanying notes 93-106); *Wilson v. Chancellor*, 418 F. Supp. 1358, 1363 (D. Or. 1976).

²² 478 U.S. 675 (1986).

²³ *Id.* at 685.

²⁴ *Id.* at 677-78.

²⁵ *Id.* at 679.

²⁶ *Id.* at 679-80.

any political viewpoint, while the students in *Tinker* were punished for expressing a distinct political opinion.²⁷ Indecent speech is not entitled to the same level of First Amendment protection as political speech.²⁸ The Court held that it was “perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct [are] wholly inconsistent with the ‘fundamental values’ of public school education.”²⁹

Just two years later, in *Hazelwood School District v. Kuhlmeier*,³⁰ the Supreme Court held that a school could properly restrict student expression that is school-sponsored, in this case through a school newspaper.³¹ Students in a journalism class at Hazelwood East High School regularly published a newspaper, and the principal approved issues prior to publication.³² He objected to two articles written for a particular edition, one about pregnant students and one describing the effect of their parents’ divorces on specific students.³³ The principal decided there was not enough time prior to publication to make adjustments to the stories, so he withheld two pages of the paper from publication.³⁴ Student members of the newspaper staff brought suit against the school district for allegedly violating their First Amendment rights.³⁵

The district court found no violation of the students’ rights, concluding that the school district had a “substantial and reasonable basis” for restraining student speech that was part of the educational process.³⁶ The Eighth Circuit reversed, holding that although the newspaper was part of the curriculum, it was also a public forum; therefore, the school district could restrict the student speech only if it interfered with school discipline or the rights of others.³⁷ The Supreme Court reversed the Eighth Circuit’s decision, explaining that, “[t]he question whether the First Amendment requires a school to tolerate particular student speech—the question . . . addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech.”³⁸ The Court held that a school is justified in regulating speech that people “might reasonably perceive to bear the imprimatur of the school” if the restrictions

²⁷ *Id.* at 685.

²⁸ *Fraser*, 478 U.S. at 685 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

²⁹ *Id.* at 685-86.

³⁰ 484 U.S. 260 (1988).

³¹ *Id.* at 270-71, 276.

³² *Id.* at 262-63.

³³ *Id.* at 263.

³⁴ *Id.* at 263-64.

³⁵ *Id.* at 262.

³⁶ *Hazelwood*, 484 U.S. at 264-65.

³⁷ *Id.* at 265 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969)).

³⁸ *Id.* at 270-71.

relate to “legitimate pedagogical concerns.”³⁹ The principal’s decision to withhold two pages of the newspaper did not violate the students’ free speech rights because the school sponsored the newspaper.⁴⁰

When courts are faced with student speech cases today, all of these decisions may provide the relevant rules, depending on the facts of the case. Courts generally look to the test established in *Tinker* and decide whether the speech in question interferes with (1) the discipline and working of the school or (2) the rights of other people.⁴¹ If so, the balancing of interests will likely favor the school. If the student speech is lewd and inappropriate, schools have a heightened ability to restrict it under *Fraser*,⁴² and if the speech is school-sponsored or if legitimate pedagogical concerns urge restriction, schools have broad regulatory authority under *Hazelwood*.⁴³ A number of courts also apply *Hazelwood* to teacher speech cases.⁴⁴ As described in further detail below, these courts focus on whether the teacher’s speech could be seen as representing the viewpoint of the school, and whether the school has “legitimate pedagogical interests” in restricting the speech.⁴⁵

B. *Case Law Traditionally Applied to Public Employee Speech*

Teachers in public schools are public employees,⁴⁶ and much of the case law governing teacher speech is that of public employee speech more broadly. One of the most crucial Supreme Court cases concerning public employee speech is *Pickering v. Board of Education*, decided in 1968.⁴⁷ Marvin Pickering, a high school teacher in Will County, Illinois, sent a letter to a local newspaper criticizing the school board’s handling of past proposals to raise revenue and the board’s budget allocation.⁴⁸ The school board fired Mr. Pickering after finding that his letter was detrimental to the operation of the schools, and the Supreme Court of Illinois agreed with the school board’s determination.⁴⁹

The Supreme Court of the United States reversed, holding that a school district cannot properly dismiss a teacher for writing a critical letter

³⁹ *Id.* at 271, 273.

⁴⁰ *Id.* at 273.

⁴¹ *See, e.g.*, *Morse v. Frederick*, 127 S. Ct. 2618, 2625-26 (2007).

⁴² *See, e.g., id.* at 2626 (citing *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986)).

⁴³ *See, e.g., id.* at 2627 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)).

⁴⁴ *See infra* notes 84-90 and accompanying text.

⁴⁵ *Id.*

⁴⁶ 68 AM. JUR. 2D *Schools* § 134 (2007).

⁴⁷ *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

⁴⁸ *Id.* at 564.

⁴⁹ *Id.* at 564-65.

to the editor.⁵⁰ The Court explained that “[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”⁵¹ While the Court found that it was not “appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged,” factors to consider in balancing these interests include whether there is: (1) disruption in discipline by immediate supervisors; (2) disruption of harmony among coworkers; (3) interference with the employee’s duties; or (4) interference with the regular operation of the workplace (in this case, the school).⁵²

The balance of interests in this case favored the teacher because Pickering spoke as a private citizen on a matter of public concern, so the school did not have a greater interest in limiting his contribution to public debate than it would any other member of the public.⁵³ Pickering did not direct any of his comments toward his immediate supervisors or coworkers, and his letter did not interfere with either his duties in the classroom or the school’s operation.⁵⁴ The Court also noted that it is in the public interest to allow teachers, who are most likely to have informed opinions about school funding decisions, to speak out about their concerns.⁵⁵

In the 1983 case of *Connick v. Myers*, assistant district attorney Sheila Myers learned that her superiors planned to transfer her to a different section of the New Orleans court in which she worked.⁵⁶ Myers was unhappy with this news, delayed accepting the transfer, and distributed a questionnaire to fellow employees that asked, among other things, about office morale and the fitness of their supervisors.⁵⁷ Myers was fired that day for refusing to accept the transfer, and supervisors told her that distributing the questionnaire was an act of insubordination.⁵⁸ Myers claimed that she was fired for exercising her right to free speech.⁵⁹ The district court and the Fifth Circuit agreed, determining that the questionnaire involved matters of public concern and so Myers could speak about these issues without fear of retaliation.⁶⁰

⁵⁰ *Id.* at 574-75.

⁵¹ *Id.* at 568.

⁵² *Id.* at 569-70, 572-73.

⁵³ *Pickering*, 391 U.S. at 573.

⁵⁴ *Id.* at 569-70, 572-73.

⁵⁵ *Id.* at 572.

⁵⁶ 461 U.S. 138, 140 (1983).

⁵⁷ *Id.* at 140-41.

⁵⁸ *Id.* at 141.

⁵⁹ *Id.*

⁶⁰ *Id.* at 142.

The Supreme Court reversed, holding that the lower courts misapplied the *Pickering* balancing test.⁶¹ The Court's opinion turned on its finding that Myers's questionnaire actually contained very little speech on matters of public concern.⁶² The "content, form, and context of a given statement" determine whether an employee speaks on a matter of public concern, and the Court found that, in Myers's case, only one question focused on a matter of public concern.⁶³ Justice White explained that, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."⁶⁴

The lower courts determined as a threshold matter that Myers's expression related to matters of public concern, and this triggered a high burden for the government, which had to show that her speech substantially interfered with the running of the district attorney's office.⁶⁵ However, the Supreme Court made clear that under *Pickering*, the state's burden in justifying its employment actions varies depending on the overall nature of the employee's speech.⁶⁶ Because in the Supreme Court's view very little of Myers's questionnaire related to matters of public concern, the state's burden should have been less demanding.⁶⁷ That lower burden, paired with a finding by the Supreme Court that the questionnaire *would* interfere with working relationships, meant that the state's interests in efficiently carrying out its responsibilities prevailed over Myers's interest in speaking on matters largely of private concern.⁶⁸ While it found for the government in this case, the Court echoed its refusal in *Pickering* to lay down a general standard for cases involving public employee speech:

Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not

⁶¹ *Id.*

⁶² *Connick*, 461 U.S. at 147-48.

⁶³ *Id.* One question on the questionnaire asked whether attorneys felt pressured to support particular political candidates because of their work. *Id.* at 149. The Court found this was the only question relating to a matter of public concern, while questions regarding office morale, confidence in supervisors, and a grievance committee related only to Myers's internal dispute. *Id.* at 148-49.

⁶⁴ *Id.* at 146.

⁶⁵ *Id.* at 149-50.

⁶⁶ *Connick*, 461 U.S. at 150.

⁶⁷ *Id.* at 150-52.

⁶⁸ *Id.* at 154. The *Connick* Court was careful to point out that "[a]lthough today the balance is struck for the government, this is no defeat for the First Amendment. For it would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance that we see presented here." *Id.*

deem it either appropriate or feasible to lay down a general standard against which all such statements may be judged.⁶⁹

Before the recent *Garcetti* and *Mayer* decisions added another possibility for how courts might deal with cases of public school teacher speech, many courts approached these cases by combining the holdings of *Pickering* and *Connick*.⁷⁰ These courts asked first whether the public school teacher spoke on a matter of public concern under *Connick*.⁷¹ If the answer was yes, they moved on to apply the factors listed in *Pickering* as part of a balancing test.⁷²

C. *Approaches to Teacher Speech Cases Prior to Garcetti and Mayer*

As discussed, prior to the Supreme Court's 2006 decision in *Garcetti v. Ceballos* and the Seventh Circuit's *Mayer v. Monroe County* opinion in 2007, many courts faced with cases involving adverse employment actions and teacher speech used the *Pickering/Connick* approach.⁷³ Several others focused on the Supreme Court's *Hazelwood* student speech decision,⁷⁴ and still other courts combined *Pickering/Connick* and the *Hazelwood* decision.⁷⁵ Finally, in one of the few cases involving purely political expression by a teacher in a classroom, a court used the *Tinker* approach to find the teacher's speech protected.⁷⁶

Those courts following *Connick* and *Pickering* have first determined whether the teacher's expression related to a matter of private or public concern.⁷⁷ If the teacher spoke only on a matter of private concern, under *Connick* there was no need to apply *Pickering* balancing. However, if the teacher spoke on a matter of public concern, courts had to weigh the interest of the government in efficiently carrying out its responsibilities against the interest of the teacher in speaking freely.⁷⁸ "Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests."⁷⁹ Several courts have employed the

⁶⁹ *Id.* at 154 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569 (1968)) (internal quotation marks omitted).

⁷⁰ See *infra* notes 80-83.

⁷¹ See Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 9, 17 (2001).

⁷² See *id.* at 17; see also *infra* notes 80-83.

⁷³ See, e.g., *infra* notes 80-83.

⁷⁴ See, e.g., *infra* notes 85-90.

⁷⁵ See, e.g., *infra* notes 91-92.

⁷⁶ See *infra* notes 93-106 and accompanying text.

⁷⁷ Daly, *supra* note 71, at 17.

⁷⁸ *Id.*

⁷⁹ *Connick v. Myers*, 461 U.S. 138, 150 (1983).

Pickering/Connick approach, including the Third,⁸⁰ Sixth,⁸¹ Ninth,⁸² and D.C. Circuits.⁸³

Many courts have extended the reasoning of the *Hazelwood* student speech decision to cases involving teacher speech and based their decisions on whether the school district had a legitimate pedagogical interest in restricting a teacher's speech, or on whether the speech could reasonably be seen as "bear[ing] the imprimatur of the school."⁸⁴ Courts that have relied primarily on *Hazelwood* include the First,⁸⁵ Second,⁸⁶ Seventh,⁸⁷ Eighth,⁸⁸ Tenth,⁸⁹ and Eleventh Circuits.⁹⁰ Still other courts have combined *Pickering*

⁸⁰ See *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (interpreting *Pickering* to protect teachers' behavior outside the classroom, but not in-class conduct).

⁸¹ See, e.g., *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 229-32 (6th Cir. 2005) (holding that teacher's use of novels and movies could not justify her dismissal because curricular speech does have some First Amendment protection, and the school's interests could not outweigh the teacher's under *Pickering* when the school approved the books and films); *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1050-51, 1054-55 (6th Cir. 2001) (finding that teacher's retaliatory discharge claim should survive summary judgment after district fired her for encouraging discussion of the environmental benefits of industrial hemp because the issue was a matter of public concern under *Connick*, and the teacher's interests outweighed the school district's where there was no meaningful interference with teaching duties). The *Cockrel* court recognized that several other circuits had applied *Hazelwood* in the context of teacher speech, but it preferred the *Pickering/Connick* approach, followed previously in the Sixth Circuit. *Id.* at 1055 n.7.

⁸² See, e.g., *Nicholson v. Bd. of Educ.*, 682 F.2d 858, 865 (9th Cir. 1982) (holding that district could fire journalism teacher who refused to allow principal to approve school newspaper articles in part due to the effect of the teacher's actions on close working relationships with his supervisor and coworkers).

⁸³ See, e.g., *Goldwasser v. Brown*, 417 F.2d 1169, 1176-77 (D.C. Cir. 1969) (holding that *Pickering* balancing favored the Air Force when it fired a teacher charged with training foreign officers in basic English due to the uniqueness of the teacher's assignment and the teacher's volunteering "views on subjects of potential explosiveness in a multi-cultural group").

⁸⁴ *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 271, 273 (1988).

⁸⁵ See, e.g., *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993) (holding that teacher speech may be restricted so long as the regulation is reasonably related to legitimate pedagogical concerns under *Hazelwood*, and the teacher has notice that her conduct is prohibited).

⁸⁶ See, e.g., *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 722-23 (2d Cir. 1994) (holding that teacher had no First Amendment right under *Hazelwood* to invite guest speaker to show films with partial nudity due to school's legitimate pedagogical concerns and desire to keep public from believing that films bear the imprimatur of the school).

⁸⁷ See, e.g., *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990) (finding that school had legitimate pedagogical interest in forbidding the teaching of creationism).

⁸⁸ See, e.g., *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 724 (8th Cir. 1998) (holding that school board had legitimate pedagogical interest in prohibiting profanity in school and could punish teacher who allowed students to write plays and poems laden with profanity).

⁸⁹ See, e.g., *Vanderhurst v. Colo. Mountain Coll. Dist.*, 208 F.3d 908, 914 (10th Cir. 2000) ("[W]hether Vanderhurst's termination reasonably related to the College's legitimate pedagogical interests is the test for determining whether his speech fell within the ambit of First Amendment protection."); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 776 (10th Cir. 1991) (holding that, under *Hazelwood*, the classroom is not a public forum, and teacher speech is school-sponsored expression). The *Miles* court acknowledged that it could have chosen to use the *Pickering* balancing test, but said that while that

ing/*Connick* balancing with elements of the *Hazelwood* case. These include the Fourth⁹¹ and Fifth Circuits.⁹²

Finally, in a case of teacher political speech at school, the Second Circuit in *James v. Board of Education*⁹³ used the *Tinker* Court's approach.⁹⁴ In this case, decided not long after *Tinker*, an eleventh grade English teacher wore a black armband to school in silent protest of the Vietnam War.⁹⁵ James wore the armband to school a second time after the Board of Education forbade it and was subsequently fired.⁹⁶ The Second Circuit acknowledged the factual similarity with *Tinker*, which focused on whether the students' expression (wearing armbands) interfered with the "work and discipline of the school" or the rights of others.⁹⁷ The court found that maintaining the operation and discipline of the school is an important interest worthy of consideration regardless of whether potentially disruptive speech comes from a student or a teacher: "Any limitation on the exercise of constitutional rights can be justified only by a conclusion . . . that the interests of discipline or sound education are materially and substantially jeopardized, whether the danger stems initially from the conduct of students or teachers."⁹⁸ However, the court found no evidence that James's conduct threatened to disrupt classroom or other school activities.⁹⁹

The school district argued that *Tinker* was inapplicable because of the difference in potential influence of a student and a teacher.¹⁰⁰ The court rejected this notion, finding that although a teacher may have more influence over a student than would another student, that assumption "merely

test accounts for the school district's interests as employer, it does not address the interests of the district as educator. *Id.* at 777.

⁹⁰ See, e.g., *Bishop v. Aronov*, 926 F.2d 1066, 1075-77 (11th Cir. 1991) (holding that public university could prohibit professor from sharing religious views in class and presenting "optional" religious lectures, largely because the professor's speech may be coercive and appear to be speech by the school).

⁹¹ See, e.g., *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 368-70 (4th Cir. 1998) (upholding transfer of teacher who chose controversial student play, in part because curricular choices bear on the imprimatur of the school and schools have a legitimate interest in controlling curriculum under *Hazelwood*, and in part because the teacher did not speak on a matter of public concern under *Connick*).

⁹² See, e.g., *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 799-801 (5th Cir. 1989) (affirming decision not to rehire teacher who used his own supplemental reading list without school approval, relying on both the interest in controlling curriculum as bearing on the imprimatur of the school under *Hazelwood* and the lack of speech on a matter of public concern under *Connick*).

⁹³ 461 F.2d 566 (2d Cir. 1972).

⁹⁴ *Id.* at 571-72.

⁹⁵ *Id.* at 568-69.

⁹⁶ *Id.* at 569.

⁹⁷ *Id.* at 571 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

⁹⁸ *Id.*

⁹⁹ *James*, 461 F.2d at 572.

¹⁰⁰ *Id.* at 573.

weighs upon the inferences which may be drawn.”¹⁰¹ In the balancing of interests, the court may consider a teacher’s potential influence over students, but a teacher’s status does not end the inquiry.¹⁰² The school district further urged that any threat of disruption was enough to justify restricting James’s speech, but the court disagreed, recognizing that “if anything is clear from the tortuous development of the [F]irst [A]mendment right, freedom of expression demands breathing room.”¹⁰³

The Second Circuit recognized that schools have valid interests in more than securing orderly classrooms.¹⁰⁴ The court discussed the school district’s interest in preventing coercion of students by teachers, ultimately finding that while some restraints are appropriate because students are a “captive” group, school authorities cannot censor teachers simply because they disagree with the teachers’ views, especially when “speech does not interfere in any way with the teacher’s obligations to teach, is not coercive and does not arbitrarily inculcate doctrinaire views in the minds of the students.”¹⁰⁵

In holding for James on his retaliatory discharge claim, the Second Circuit explained, “[t]he question we must ask in every [F]irst [A]mendment case is whether the regulatory policy is drawn as narrowly as possible to achieve the social interests that justify it, or whether it exceeds permissible bounds by unduly restricting protected speech.”¹⁰⁶ The school’s interests were not strong enough in this case to justify forbidding James’s political statement.

Courts have clearly taken varied approaches to teacher speech cases, but each method described has something in common: it attempts to weigh the interests of the school district employer against the First Amendment rights of the public school teacher. Every court started from the premise that the teacher’s First Amendment rights must enter the equation in some way. The Supreme Court called that fundamental assumption into question in 2006 when it decided *Garcetti v. Ceballos*.¹⁰⁷

II. *GARCETTI V. CEBALLOS*: PUBLIC EMPLOYEES LOSE FIRST AMENDMENT PROTECTION WHEN SPEAKING IN OFFICIAL CAPACITY

Garcetti v. Ceballos changed the landscape of First Amendment retaliation claims for public employees generally and created additional am-

¹⁰¹ *Id.* at 571.

¹⁰² *Id.* (stating that the assumption that a teacher has more influence does not “relieve the school of the necessity to show a reasonable basis for its regulatory policies”).

¹⁰³ *Id.* at 572.

¹⁰⁴ *Id.* at 573.

¹⁰⁵ *James*, 461 F.2d at 573.

¹⁰⁶ *Id.* at 574.

¹⁰⁷ 547 U.S. 410 (2006).

biguity for public school teachers specifically.¹⁰⁸ Richard Ceballos was a deputy district attorney in Los Angeles.¹⁰⁹ In March 2000, Ceballos wrote a memorandum to his superiors recommending dismissal of a case because he believed a sheriff's affidavit contained serious misrepresentations.¹¹⁰ His superiors proceeded with the prosecution, and at a hearing challenging the warrant, Ceballos testified as to his doubts about the affidavit.¹¹¹ He was subsequently reassigned to a new position, transferred to another courthouse, and denied a promotion.¹¹²

Ceballos filed suit, alleging violations of his First and Fourteenth Amendment rights due to retaliatory employment actions.¹¹³ The district court granted summary judgment for the defendants, holding that Ceballos's memorandum was not entitled to First Amendment protection because he wrote it pursuant to his employment.¹¹⁴ The Ninth Circuit reversed, finding that Ceballos spoke on a matter of public concern under *Connick* (potential governmental misconduct), and thus *Pickering* balancing was necessary.¹¹⁵ The court found the balance in favor of Ceballos, in part because of the lack of disruption to the efficient workings of the district attorney's office.¹¹⁶

In 2006, the Supreme Court reversed by a five to four vote, holding that *Pickering* balancing should occur only when an employee speaks as a *private citizen* on a matter of public concern, and not when he speaks as a *public employee*.¹¹⁷ The Court held that when public employees speak pursuant to their official duties they do not speak as citizens; therefore, the Constitution does not protect their expression from employer discipline.¹¹⁸ Justice Kennedy wrote, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."¹¹⁹ That Ceballos expressed his views inside the office was not dispositive, nor was the fact

¹⁰⁸ See Ronald D. Wenkart, *Public School Curriculum and the Free Speech Rights of Teachers*, 214 EDUC. L. REP. 1, 5-7 (2006).

¹⁰⁹ *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006).

¹¹⁰ *Id.* at 414.

¹¹¹ *Id.* at 414-15.

¹¹² *Id.* at 415.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Garcetti*, 547 U.S. at 415-16.

¹¹⁶ *Id.* at 416. In a special concurrence, Judge O'Scannlain of the Ninth Circuit concluded that Ninth Circuit law should be revisited. He would emphasize the distinction between "speech offered by a public employee acting *as an employee* carrying out his or her ordinary job duties and that spoken by an employee acting *as a citizen* expressing his or her personal views on disputed matters of public import." *Id.* (quoting *Garcetti v. Ceballos*, 361 F.3d 1168, 1187 (9th Cir. 2004) (O'Scannlain, J., specially concurring)).

¹¹⁷ *Id.* at 421-22, 424.

¹¹⁸ *Id.* at 421.

¹¹⁹ *Id.* at 421-22.

that his communication concerned the subject matter of his employment.¹²⁰ The controlling factor was that Ceballos communicated pursuant to his duties as a deputy district attorney.¹²¹ The Court cited the government's need for a degree of control over employees' words and actions to provide public services efficiently,¹²² and it held that when an employee speaks pursuant to his duties, "there is no relevant analogue to speech by citizens who are not government employees."¹²³ The Supreme Court recognized the value in employees bringing governmental inefficiency and misconduct into the public light, but concluded that whistleblower statutes and rules of professional conduct offer adequate protections to public employees.¹²⁴

Justice Stevens dissented, disagreeing with the Court's per se rule because of the difference between inflammatory, misguided speech by an employee and speech about facts the employer would simply prefer the public not discover.¹²⁵ Justice Souter also dissented broadly, joined by Justices Stevens and Ginsburg.¹²⁶ Justice Souter's opinion advocated for upholding the *Pickering* balancing test in all cases of public employee speech:

As all agree, the qualified speech protection embodied in *Pickering* balancing resolves the tension between individual and public interests in the speech, on the one hand, and the government's interest in operating efficiently without distraction or embarrassment by talkative or headline-grabbing employees. The need for a balance hardly disappears when an employee speaks on matters his job requires him to address; rather, it seems obvious that the individual and public value of such speech is no less, and may well be greater, when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties.¹²⁷

Justice Breyer also dissented, saying he would employ *Pickering* balancing when a public employee speaks in his official capacity and on a matter of public concern in some cases, namely when there is an "augmented

¹²⁰ *Garcetti*, 547 U.S. at 420-21.

¹²¹ *Id.* at 421.

¹²² *Id.* at 418.

¹²³ *Id.* at 424.

¹²⁴ *Id.* at 425-26. All fifty states have some form of a whistleblower law. DAVID SCHIMMEL, LOUIS FISCHER & LESLIE R. STELLMAN, *SCHOOL LAW: WHAT EVERY EDUCATOR SHOULD KNOW* 54 (2008). Though whistleblower statutes are often available, many argue that First Amendment protections should not depend on whether other avenues are available to protect speech. *See, e.g.*, Robert J. Rabin, *A Review of the Supreme Court's Labor and Employment Law Decisions: 2005-2006 Term*, 22 *LAB. LAW.* 115, 148 (2006) ("The founders did not write that Congress shall make no law infringing speech unless there is some other forum that can redress the infringement.").

¹²⁵ *Garcetti*, 547 U.S. at 426 (Stevens, J., dissenting).

¹²⁶ *Id.* at 427 (Souter, J., dissenting).

¹²⁷ *Id.* at 430-31 (Souter, J., dissenting).

need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public's affairs."¹²⁸

The *Garcetti* majority expressly refused to decide whether its holding, that public employees have no First Amendment protection for speech made pursuant to their employment duties, would apply to teachers in public schools.¹²⁹

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.¹³⁰

Justice Souter prompted this comment by the Court's majority, as his dissent noted his hope that the Court's holding would not apply to speech made in schools and universities.¹³¹ The majority's refusal to address how the *Garcetti* holding should impact schools inevitably left lower courts to struggle with the question.

III. *MAYER*: THE SEVENTH CIRCUIT EXTENDS *GARCETTI* TO TEACHER SPEECH

In 2007, the year after *Garcetti*, the Seventh Circuit had occasion to consider the question the Supreme Court left unanswered: whether the holding in *Garcetti* should apply to public school teachers. In *Mayer v. Monroe County Community School Corp.*, the Seventh Circuit answered that question with a resounding "yes."¹³²

In that case, teacher Deborah Mayer was leading a class discussion with fourth, fifth, and sixth grade students about current events and the war in Iraq.¹³³ After students read an article in a *Time for Kids* newsletter (part of the school's curriculum) about peace marches, a student asked Mayer whether she would take part in a peace demonstration.¹³⁴ Mayer responded that when she passed demonstrators with a "Honk for Peace" sign, she

¹²⁸ *Id.* at 449-50 (Breyer, J., dissenting). Justice Breyer found those conditions met in this case because Ceballos, as a district attorney, was subject to the canons of his profession and had a duty to communicate exculpatory and impeachment evidence to the defense. *Id.* at 447, 450.

¹²⁹ *Id.* at 425 (majority opinion).

¹³⁰ *Id.*

¹³¹ *Garcetti*, 547 U.S. at 438-39 (Souter, J., dissenting).

¹³² 474 F.3d 477, 480 (7th Cir. 2007).

¹³³ *Id.* at 478; *Mayer v. Monroe County Cmty. Sch. Corp.*, No. 1:04-CV-1695, 2006 WL 693555, at *2 (S.D. Ind. Mar. 10, 2006).

¹³⁴ *Mayer*, 474 F.3d at 478; *Mayer*, 2006 WL 693555, at *2.

honked her car horn to show her support.¹³⁵ She told her students that resolving problems peacefully is important and that schools train students to be “mediators on the playground so that they can seek out peaceful solutions to their own problems . . . so they won’t fight and hurt each other.”¹³⁶ This portion of the class discussion did not last more than a few minutes.¹³⁷

One student’s parents complained to the school about Mayer’s expression of her beliefs in class.¹³⁸ In response, the school principal forbade Mayer from discussing peace in her classroom, circulated a memorandum to teachers cautioning them against advocating any particular view on foreign policy, and cancelled the school’s annual Peace Month.¹³⁹ Mayer was a probationary teacher,¹⁴⁰ and the school district subsequently declined to renew her contract.¹⁴¹ Mayer sued the district, alleging it violated her First Amendment rights by retaliating against her for expressing political views.¹⁴²

When the district court heard Mayer’s case, it concluded that military action in Iraq is an issue of public concern, about which Mayer would normally have a right to speak freely.¹⁴³ However, because Mayer spoke as a teacher and not as a private citizen, the district court determined that no *Pickering* balancing was required, and it found the school was entitled to summary judgment.¹⁴⁴ The district court grounded its decision in *Connick*’s holding that an employee is entitled to First Amendment protection if speaking as a citizen on matters of public concern.¹⁴⁵ The district court

¹³⁵ *Mayer*, 474 F.3d at 478.

¹³⁶ *Mayer*, 2006 WL 693555, at *2.

¹³⁷ *Id.*

¹³⁸ *Id.* at *3.

¹³⁹ *Id.* The memorandum to teachers, from the principal, stated in part: “Do we talk about peace at school? Yes, as a general approach to solving problems at Clear Creek. Please do not confuse that educationally sound goal with a stance on foreign policy.” *Id.*

¹⁴⁰ A probationary teacher is a non-tenured teacher typically employed for a school year. 68 AM. JUR. 2D *Schools* § 190 (2008).

¹⁴¹ *Mayer*, 474 F.3d at 478.

¹⁴² *Mayer*, 2006 WL 693555, at *1. The Indiana district court’s opinion discussed evidence presented by the school district of a handful of other, unrelated complaints about Mayer’s teaching style and classroom management. *Id.* at **4-7. The Seventh Circuit however, focused solely on Mayer’s classroom expression, as it provided the grounds for her First Amendment claim, and the lower court granted summary judgment for the school district. *Mayer*, 474 F.3d at 478-79.

¹⁴³ *Mayer*, 2006 WL 693555, at **11-12.

¹⁴⁴ *Id.* at *12. Judge Easterbrook, in the Seventh Circuit’s opinion, characterized the district court as having simply “conclud[ed] that the employer’s interests predominate” under *Pickering*. *Mayer*, 474 F.3d at 478. However, the district court opinion states that because “Ms. Mayer expressed her views to her students at a time and place and as part of her official classroom instruction, she was acting as an ‘employee,’ rather than as a ‘citizen,’ so that her speech was not constitutionally protected. Thus, we do not need to undertake the kind of balancing called for in *Pickering*.” *Mayer*, 2006 WL 693555, at *12.

¹⁴⁵ *Mayer*, 2006 WL 693555, at *10, *12.

made no mention of *Garcetti*, as the Supreme Court decided *Garcetti* after the Indiana district court handed down its decision in *Mayer*.¹⁴⁶

Mayer appealed to the Seventh Circuit, which issued its opinion after the Supreme Court decided *Garcetti*.¹⁴⁷ Because the district court granted summary judgment for the defendants below, the Seventh Circuit accepted Mayer's version of the events, and assumed that the district did not rehire her due to her political speech.¹⁴⁸ Mayer conceded on appeal that if *Garcetti* applied to her case, "the school district prevail[ed] without further ado."¹⁴⁹ She argued however, that *Garcetti* should not apply due to academic freedom in the classroom.¹⁵⁰ The court rejected that argument, relying on two Seventh Circuit cases, one in which a school prohibited the teaching of creationism, and one in which a teacher lost her job for refusing, on religious grounds, to teach any subject having to do with love of country, patriotism, or the flag.¹⁵¹

The court rejected Mayer's contentions that *Garcetti* should not apply and affirmed the district court's result.¹⁵² In so doing, the Seventh Circuit went beyond a mere affirmance of the result below, and instead held that public school teachers within the circuit have no First Amendment protection against adverse employment actions for speech made in the classroom.¹⁵³ Writing for the court, Judge Easterbrook explained that "Mayer's current-events lesson was part of her assigned tasks in the classroom," and so "*Garcetti* applie[d] directly."¹⁵⁴ The Seventh Circuit did not decide whether *Garcetti* applied to postsecondary educators' teaching or scholarship, or to publications or statements made by primary and secondary school teachers outside the classroom.¹⁵⁵ "It is enough to hold that the [F]irst [A]mendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system."¹⁵⁶

¹⁴⁶ Compare *Mayer v. Monroe County Cmty. Sch. Corp.*, No. 1:04-CV-1695, 2006 WL 693555 (S.D. Ind. Mar. 10, 2006) with *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (opinion dated May 30, 2006).

¹⁴⁷ *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 477 (7th Cir. 2007) (opinion dated Jan. 24, 2007).

¹⁴⁸ *Id.* at 478.

¹⁴⁹ *Id.* at 479.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*; *Webster v. New Lenox Sch. Dist.* No. 122, 917 F.2d 1004, 1008 (7th Cir. 1990) (school could require teacher to teach evolution and not creationism); *Palmer v. Bd. of Educ.*, 603 F.2d 1271, 1274 (7th Cir. 1979) ("Plaintiff's right to her own religious views and practices remains unfettered, but she has no constitutional right to require others to submit to her views and to forego a portion of their education they would otherwise be entitled to enjoy.").

¹⁵² *Mayer*, 474 F.3d at 480.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

The court opined that school districts hire teachers to speak, and so districts may control the speech of teachers.¹⁵⁷ The opinion further emphasized that teachers cannot force their points of view on captive audiences and dismissed the use of the balancing tests in *James* and *Cockrel v. Shelby County School District*¹⁵⁸ as inconsistent with other authority and “unpersuasive.”¹⁵⁹

Mayer filed a petition with the Supreme Court for a writ of certiorari on June 8, 2007, urging that “[t]eachers need to know if their in-class speech is ever entitled to First Amendment protection, and if so, when.”¹⁶⁰ The Supreme Court declined to hear her appeal on October 1, 2007.¹⁶¹

IV. LACK OF TAILORING AND THE PALL OF ORTHODOXY

A. *Disproportionate Restrictions on First Amendment Rights*

While the case law applicable to teacher speech was not straightforward prior to *Garcetti* and *Mayer*,¹⁶² one theme did clearly emerge among the various approaches: “[W]hen constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake.”¹⁶³ As the Second Circuit explained in *James*,

The question we must ask in every [F]irst [A]mendment case is whether the regulatory policy is drawn as narrowly as possible to achieve the social interests that justify it, or whether it exceeds permissible bounds by unduly restricting protected speech to an extent “greater than is essential to the furtherance of” those interests.¹⁶⁴

Whether applying the *Pickering/Connick* analysis or looking to the *Hazelwood* decision for instruction, no court in the last four decades had flatly declared that teachers have no First Amendment rights in their classrooms.

¹⁵⁷ *Id.* at 479 (“[A] high-school teacher hired to explicate *Moby-Dick* in a literature class can’t use *Cry, The Beloved Country* instead, even if Paton’s book better suits the instructor’s style and point of view; a math teacher can’t decide that calculus is more important than trigonometry. . . .”).

¹⁵⁸ 270 F.3d 1036, 1050, 1053 (6th Cir. 2001).

¹⁵⁹ *Mayer*, 474 F.3d at 479-80. *See supra* notes 81, 93-106. *James* used the *Tinker* approach, while *Cockrel* relied primarily on the *Pickering/Connick* balancing test. *See supra* notes 81, 93-106.

¹⁶⁰ Petition for Writ of Certiorari at 13, *Mayer v. Monroe County Cmty. Sch. Corp.*, 128 S. Ct. 160 (2007) (No. 06-1657), 2007 WL 1707922.

¹⁶¹ *Mayer v. Monroe County Cmty. Sch. Corp.*, 128 S. Ct. 160, 160 (2007).

¹⁶² *See supra* Part I.C.

¹⁶³ *Garcetti v. Ceballos*, 547 U.S. 410, 434 (2006) (Souter, J., dissenting).

¹⁶⁴ *James v. Bd. of Educ.*, 461 F.2d 566, 574 (2d Cir. 1972) (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

Previous courts, in fact, were careful to avoid smothering First Amendment rights in schools.¹⁶⁵

The First Amendment is critical to both the history of the United States and to Americans' continuing personal freedoms.¹⁶⁶ While most expression is protected under the First Amendment to some extent, not all speech is entitled to the same amount of protection. For example, because indecent speech contributes little to public discourse, it is deserving of less First Amendment protection than political speech.¹⁶⁷ Private speech is also often accorded less protection than speech on matters of public concern: "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."¹⁶⁸

Speech on matters of public concern, like Mayer's comment about seeking peaceful solutions, is at the other end of the spectrum, garnering a great deal of First Amendment protection. As the Supreme Court recognized in *Connick*, "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values.'"¹⁶⁹ This is because "speech concerning public affairs is more than self-expression; it is the essence of self-government."¹⁷⁰ When teachers speak on matters of public concern, their speech should be accorded greater protection in the First Amendment hierarchy than speech on a private matter or indecent speech. After the *Mayer* decision, however, the Seventh Circuit refuses to consider the nature of the teacher's speech, and it has seemingly done away with the hierarchy of First Amendment expression altogether for teachers in classrooms. The bright-line rule that teachers have no First Amendment rights when speaking in their classrooms thus lacks any semblance of tailoring to the interests of school districts.

School districts certainly have a legitimate interest in regulating the curriculum in schools. While it "cannot be left to individual teachers to

¹⁶⁵ See, e.g., *supra* notes 20, 51, 79, *infra* notes 177, 181, 190, 195, 204 and accompanying text.

¹⁶⁶ The First Amendment was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

¹⁶⁷ See, e.g., *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) ("We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission.").

¹⁶⁸ *Connick v. Myers*, 461 U.S. 138, 146 (1983).

¹⁶⁹ *Id.* at 145 (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

¹⁷⁰ *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

teach what they please,”¹⁷¹ Mayer’s classroom conduct was notably different from that of the teacher in *Webster* who taught creationism in violation of the school’s curriculum (and likely the Establishment Clause),¹⁷² and the teacher in *Palmer* who refused to teach subjects set out in the school’s curriculum.¹⁷³ Mayer taught her class using articles from *Time for Kids* that were expressly *part* of her school’s curriculum.¹⁷⁴ Her comment revealing her personal views on the article is not akin to a refusal to follow the school’s curriculum.

Public school students are a “captive audience,” as they are compelled to attend school until they reach a particular age,¹⁷⁵ and schools accordingly have a valid interest in protecting children from coercive teacher expression. While this is an important concern when weighing the interests of the school district against those of the teacher, courts before *Garcetti* and *Mayer* still found it necessary to engage in that balancing. For example, courts that looked to the *Hazelwood* decision for guidance often focused on the fact that teacher speech is more likely to be seen as bearing the imprimatur of the school, but that inference simply weighed in favor of the state in the balancing of interests.¹⁷⁶ The *James* court, which relied on *Tinker*, addressed the balance to be struck regarding the potential for coercion:

When a teacher is only content if he persuades his students that his values and only his values ought to be their values, then it is not unreasonable to expect the state to protect impressionable children from such dogmatism. But, just as clearly, those charged with overseeing the day-to-day interchange between teacher and student must exercise that degree of restraint necessary to protect [F]irst [A]mendment rights.¹⁷⁷

It does not appear that Mayer presented an extensive lecture to convince her students to agree with her views about the war in Iraq. Rather, she gave an

¹⁷¹ *Webster v. New Lenox Sch. Dist.* No. 122, 917 F.2d 1004, 1007 (7th Cir. 1990) (quoting *Palmer v. Bd. of Educ.*, 603 F.2d 1271, 1274 (7th Cir. 1979)).

¹⁷² *Id.* at 1008 (“Given the school board’s important pedagogical interest in establishing the curriculum and legitimate concern with possible establishment clause violations, the school board’s prohibition on the teaching of creation science to junior high students was appropriate.”).

¹⁷³ *Palmer*, 603 F.2d at 1272 (stating the issue as whether “a public school teacher is free to disregard the prescribed curriculum concerning patriotic matters when to conform to the curriculum she claims would conflict with her religious principles”).

¹⁷⁴ *Mayer v. Monroe County Cmty. Sch. Corp.*, No. 1:04-CV-1695, 2006 WL 693555, at *2 (S.D. Ind. Mar. 10, 2006).

¹⁷⁵ *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 479-80 (7th Cir. 2007).

¹⁷⁶ See *supra* notes 85-90 and *supra* text accompanying note 101.

¹⁷⁷ *James v. Bd. of Educ.*, 461 F.2d 566, 573-74 (2d Cir. 1972). At least one district court has held that teacher speech could not be restricted when it neither “one, materially and substantially interfered with appropriate discipline, nor, two, subjected students unfairly to indoctrination and influence.” *Sterzing v. Fort Bend Indep. Sch. Dist.*, 376 F. Supp. 657, 662 (S.D. Tex. 1972), *vacated*, 496 F.2d 92, 93 (5th Cir. 1974) (vacated on grounds that the district court did not apply the proper remedy by only awarding monetary damages and not reinstating the teacher).

honest answer to a student's question.¹⁷⁸ In her case, Mayer did speak beyond a quick "yes" in response to the question posed, but the Seventh Circuit's per se rule seemingly disallows any First Amendment protection for even a passing "yes" or "no" answer to a student's question.

Schools also have an important interest in maintaining order and discipline in classrooms. The Seventh Circuit decided Mayer's case on the assumption that the Monroe County Community School Corporation chose not to rehire Mayer after a single student's parents complained about her discussion of peace in class.¹⁷⁹ At no level of the proceedings did a court find that the complaint of one student's parents impacted order or discipline in the school. Additionally, speech cannot be chilled simply because people disagree with one another. As the Supreme Court explained in *Tinker*, "for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."¹⁸⁰ To suppress free speech, a school district must have a legitimate reason beyond disagreement among parents or administrators with the particular point of view expressed. As one district court has noted, "neither fear of voter reaction nor personal disagreement with views . . . justifies a suppression of free expression, at least in the absence of any reasonable fear of material and substantial interference with the educational process."¹⁸¹ In Mayer's case, it is unlikely that the complaint of a single student's parents substantially disrupted the educational process. The *Mayer* court's rule however, precludes any consideration of whether speech disrupts order, discipline, or the educational process.

While school districts clearly have legitimate interests in regulating curriculum, protecting children from coercive teachers, and maintaining order in schools, the per se rule in *Mayer* leaves no room to consider teachers' interests in speaking about matters of public concern in their classrooms. Threatening a teacher with terminating her employment, especially with no thoughtful analysis of whether her speech may have disrupted the school environment, infringed on the rights of others, or appeared coercive,

¹⁷⁸ In *Bishop v. Aronov*, in which the Eleventh Circuit decided a university could restrict a professor's religious speech, the court noted that, "[o]f course, if a student asks about his religious views, he may fairly answer the question." 926 F.2d 1066, 1076 (11th Cir. 1991).

¹⁷⁹ The Indiana district court discussed unrelated parent complaints, but "it appears that only one . . . complained of Ms. Mayer's discussion of the Iraq war and peace protests." *Mayer*, 2006 WL 693555, at *3. The Seventh Circuit focused only on the complaint regarding Mayer's political speech. *Mayer*, 474 F.3d at 478 ("Mayer believes that this incident led the school system to dismiss her; we must assume that this is so.")

¹⁸⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969); see also *infra* text accompanying note 197.

¹⁸¹ *Wilson v. Chancellor*, 418 F. Supp. 1358, 1364 (D. Or. 1976).

is a “potent means of inhibiting speech.”¹⁸² It offends notions of fundamental fairness if school boards become “free to fire teachers for every random comment in the classroom.”¹⁸³ In light of the *Mayer* decision, school boards in the Seventh Circuit are free to do just that. The *Mayer* court eliminated any semblance of tailoring restrictions on teacher speech to the interests that those restrictions serve.

The *Mayer* decision leaves no room for considering whether teachers engage in purely political speech or inappropriate and vulgar expression and does not allow for weighing the First Amendment rights of teachers against the interests of their school districts. A first grade teacher who preaches to students about the virtues of white supremacy during reading time is subject to the same test as a political science teacher who discusses with high school seniors his support for funding health insurance for the poor. As long as a teacher’s speech occurs while carrying out duties as a public school teacher, that expression lacks any First Amendment protection.

This per se rule flies in the face of all prior jurisprudence, which pointed to engaging in some type of balancing to account for the important interests of both teacher and school. As the *Cockrel* court opined, “if an employee’s speech substantially involve[s] matters of public concern, an employer may be required to make a particularly strong showing that the employee’s speech interfered with workplace functioning before taking action.”¹⁸⁴ The issue in the *Mayer* case was the same as that in *James*: whether “a Board of Education may forbid a teacher to express a political opinion, however benign or noncoercive the manner of expression.”¹⁸⁵ The Seventh Circuit in *Mayer* did not adequately explain why it found the *Cockrel* and *James* decisions unpersuasive.¹⁸⁶ This lack of explanation is particularly suspect because *James* is one of the few prior cases of pure political speech by a teacher in a classroom.¹⁸⁷

While the Seventh Circuit’s bright-line rule stripping teachers of any First Amendment protection for classroom speech may be easy for courts to apply, ease of administration is no justification for disregarding essential constitutional rights. Rather, courts are obligated to wrestle with the “diverse facts and analyses [of First Amendment cases, which] reveal but one

¹⁸² *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968).

¹⁸³ *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300, 1305 (7th Cir. 1980).

¹⁸⁴ *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1053 (6th Cir. 2001) (quoting *Leary v. Daeschner*, 228 F.3d 729, 737-38 (6th Cir. 2000) (alteration in original)).

¹⁸⁵ *James v. Bd. of Educ.*, 461 F.2d 566, 568 (2d Cir. 1972).

¹⁸⁶ *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007) (stating simply that “[t]o the extent that [*James*] and [*Cockrel*] are to the contrary, they are inconsistent with later authority and unpersuasive” (citations omitted)).

¹⁸⁷ *See supra* text accompanying notes 93-106.

consistent truth with respect to the amendment—each case is decided on its own merits.”¹⁸⁸

B. *Teachers Discuss Controversial Subjects at Their Own Risk*

As the Supreme Court has recognized, “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”¹⁸⁹ It is in these schools that young Americans are taught the values of exercising their constitutional rights and engaging in discourse beneficial to democracy. The Supreme Court stated forty years ago that “the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom.”¹⁹⁰ The Seventh Circuit ignored both the Supreme Court’s mandate against the “pall of orthodoxy” and the realities of the education system when it proclaimed in *Mayer* that because school districts pay for teacher speech, the districts can exercise complete control over that speech.¹⁹¹ Teachers “cannot be made to simply read from a script prepared or approved by the [school] board.”¹⁹² When that becomes the extent of a teacher’s duties, a “pall of orthodoxy” does indeed fall over classrooms, and the educational experience of students suffers as a result.

“Rightly called the ‘cradle of our democracy,’ our schools bear the awesome responsibility of instilling and fostering early in our nation’s youth the basic values which will guide them throughout their lives.”¹⁹³ One of the essential functions of the school system is to encourage independent thought.¹⁹⁴ If schools forbid teachers from discussing certain points of view or revealing their own opinions in a non-coercive manner, schools will often deprive students of the chance to engage in open-ended discourse and debate. Classroom discussions of current events or controversial topics will become stunted or one-sided; or worse, teachers will shy away from expos-

¹⁸⁸ *Bishop v. Aronov*, 926 F.2d 1066, 1070 (11th Cir. 1991).

¹⁸⁹ *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

¹⁹⁰ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

¹⁹¹ *Mayer*, 474 F.3d at 479. The *Mayer* court declared that schools pay teachers for their expression, and as such all speech made in their classrooms is pursuant to official duties and without First Amendment protection. *Id.* There is an equally strong argument, however, that speech like *Mayer*’s does not “owe[] its existence to a public employee’s professional responsibilities” under *Garcetti*. *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006). The district attorney in *Garcetti* formed his views on the accuracy of an affidavit solely because it was his job to investigate the allegations of the case. *See id.* at 420-22. *Mayer*, on the other hand, formed her opinions on the war in Iraq not as a teacher, but as a citizen of the United States and a mother with a son serving in the military. Brief for the Plaintiff-Appellant Deborah A. Mayer at 22, *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007) (No. 06-1993), 2006 WL 2024105.

¹⁹² *Krizek v. Bd. of Educ.*, 713 F. Supp. 1131, 1138 (N.D. Ill. 1989) (quoting *Carey v. Bd. of Educ.*, 598 F.2d 535, 543 (10th Cir. 1979)).

¹⁹³ *James v. Bd. of Educ.*, 461 F.2d 566, 568 (2d Cir. 1972).

¹⁹⁴ *Krizek*, 713 F. Supp. at 1137.

ing students to controversial topics at all. As the First Circuit astutely observed years before *Garcetti* and *Mayer*, “[f]ew subjects lack controversy. If teachers must fear retaliation for every utterance, they will fear teaching. . . . ‘The 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.’”¹⁹⁵

A school that censors a teacher’s speech without substantial, legitimate support for the restriction risks setting a far worse example for students than it would by allowing the teacher to speak. In the situation that faced the *James* court, in which a school acted to prohibit a teacher’s expression of political views, “there was a greater danger that the school, by power of example, would appear to the students to be sanctioning the very ‘pall of orthodoxy,’ condemned [by the Supreme Court].”¹⁹⁶

[A] course designed to teach students that a free and democratic society is superior to those in which freedoms are sharply curtailed will fail entirely if it fails to teach one important lesson: that the power of the state is never so great that it can silence a man or woman simply because there are those who disagree. Perhaps that carries with it a second lesson: that those who enjoy the blessings of a free society must occasionally bear the burden of listening to others with whom they disagree, even to the point of outrage.¹⁹⁷

The Seventh Circuit’s rule, instead of encouraging teachers to present students with tough questions and controversial viewpoints, cautions teachers that attempts to do so could cost them their jobs. Professor of constitutional law Stanley Ingber suggests that a teacher who fails to answer a student’s controversial question teaches students “more about subservience than about participation and civic courage.”¹⁹⁸

Schools and courts must consider the possibility of coercion when examining a teacher’s actions and expression in class.¹⁹⁹ However, they should not assume that anything a young person receives into his mind is “likely to become indelible and unalterable.”²⁰⁰ The age and impressionability of students should be considered, but so must the possibility (and at some levels of schooling, the likelihood) that students can discern between fact and opinion and are capable of forming views of their own. Sheltering

¹⁹⁵ *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993) (quoting *Keyishian*, 385 U.S. at 604) (citation omitted).

¹⁹⁶ *James*, 461 F.2d at 574.

¹⁹⁷ *Wilson v. Chancellor*, 418 F. Supp. 1358, 1368 (D. Or. 1976).

¹⁹⁸ Stanley Ingber, *Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue*, 46 RUTGERS L. REV. 1473, 1575-77 (1994). Ingber’s article specifically addresses school-imposed limitations on student speech, *id.*, but similar limits on teacher speech also send a strong message to students.

¹⁹⁹ See *supra* text accompanying notes 175-178.

²⁰⁰ *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998) (quoting PLATO, REPUBLIC: BOOK II 281 (Benjamin Jowett trans., Walter J. Black, Inc. 1942) (360 B.C.)).

students so that they have no opportunity to benefit from the classroom's "marketplace of ideas"²⁰¹ defeats one of the purposes of education, to "foster attitudes and skills consonant with democratic values."²⁰² "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'"²⁰³

When the Fifth Circuit decided that a teacher's refusal to use an approved reading list was not protected speech, it was careful to explain that its "decision should not be misconstrued as suggesting that a teacher's creativity is incompatible with the [F]irst [A]mendment, nor . . . that public school teachers foster free debate in their classrooms only at their own risk or that their classrooms must be 'cast with a pall of orthodoxy.'"²⁰⁴ The Fifth Circuit's decision in that case was based on the teacher's attempt to "arrogate control" of the curriculum.²⁰⁵ When Mayer spoke about peace to her class, neither the curriculum nor the principal had explicitly forbidden any discussion of peace. When the principal did forbid this topic, Mayer obliged.²⁰⁶ Her honest response to a student question cannot be equated with a true attempt to "arrogate control" of the curriculum,²⁰⁷ and the *Mayer* court's comparison to teachers who substitute their own books for those prescribed by the curriculum or choose to teach calculus instead of trigonometry²⁰⁸ is misplaced. Teachers should be allowed to engage in mutually respectful conversations with students about various viewpoints on class-

²⁰¹ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

²⁰² Gregory A. Clarick, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693, 720 (1990) (quoting RICHARD DAWSON & KENNETH PREWITT, *POLITICAL SOCIALIZATION* 165-66 (1969)).

²⁰³ *Keyishian*, 385 U.S. at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

²⁰⁴ *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 801-02 (5th Cir. 1989).

²⁰⁵ *Id.* at 802.

²⁰⁶ The parties presented conflicting evidence to the district court about whether Mayer ceased to talk about peace after the principal forbade it. *Mayer v. Monroe County Cmty. Sch. Corp.*, No. 1:04-CV-1695, 2006 WL 693555, at *4 (S.D. Ind. Mar. 10, 2006). However, the Seventh Circuit based its decision on Mayer's claim that the single, initial incident spurned her dismissal. *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 478 (7th Cir. 2007). Even if Mayer's curriculum or principal had forbidden the discussion of peace prior to Mayer's comments, she may have argued that the restriction unconstitutionally chilled her speech or was not reasonably related to any interest of the school district. See SCHIMMEL ET AL., *supra* note 124, at 56 ("It would probably be unconstitutional for administrators to order teachers of history, civics, or current events not to discuss controversial questions. However, teachers should be careful not to 'subject students to indoctrination.'" (citing *Sterzing v. Fort Bend Indep. Sch. Dist.*, 376 F. Supp. 657, 662 (S.D. Tex. 1972), *vacated*, 496 F.2d 92, 93 (5th Cir. 1974))). See also Clarick, *supra* note 202, at 716-17 (noting that courts should ask, as *Hazelwood* suggests, whether the restriction at issue promotes a legitimate pedagogical concern, and secondly whether the restriction is "reasonably related to that educational concern").

²⁰⁷ See *Kirkland*, 890 F.2d at 802.

²⁰⁸ *Mayer*, 474 F.3d at 479.

room material, so long as teachers do not directly contradict the curriculum or act to coerce students.

Meaningful discussions with students are often part and parcel of effective teachers' strategies. The relationship between student and teacher can encourage students to work harder in the classroom and lead to academic growth.²⁰⁹ Further, often "that one-to-one learning relationship is the elixir that keeps teachers showing up for work."²¹⁰ To run classrooms based on mutual respect, teachers should have some leeway, both to challenge students' views in an effort to encourage clearly articulated reasoning, and to discuss teachers' own views with students, especially in response to student questions.²¹¹

In his dissenting opinion in *Garcetti*, Justice Souter said that "[t]he very idea of categorically separating the citizen's interest from the employee's interest ignores the fact that the ranks of public service include those who share the poet's 'object . . . to unite [m]y avocation and my vocation.'"²¹² This observation may ring most true for teachers, who often welcome the opportunity to teach and inspire young people for relatively low pay.²¹³ Furthermore, teachers are often expected to foster debate and lead classroom discussions; society expects few other public servants to "stir the pot." These expectations become unreasonable when teachers can lose their jobs because of anything they say in class that might be construed as controversial or not explicitly dictated by the curriculum. Accordingly, "[t]he freedom of speech of a teacher and a citizen of the United States must not be so lightly regarded that he stands in jeopardy of dismissal for raising controversial issues in an eager but disciplined classroom."²¹⁴

²⁰⁹ See Neil R. Hufton, Julian G. Elliot & Leonid Illushin, *Teachers' Beliefs About Student Motivation: Similarities and Differences Across Cultures*, 39 COMP. EDUC. 367, 372 (2003) (teachers interviewed in the United States, England, and Russia agreed that "students worked harder, in and out of class, where they liked and/or respected the teacher, also where they thought that the teacher liked them as a person, recognised and valued their efforts and respected their aspirations and feelings"); see also *Ambach v. Norwick*, 441 U.S. 68, 78 (1979) ("Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school.").

²¹⁰ MARY ANN MANOS, *KNOWING WHERE TO DRAW THE LINE: ETHICAL AND LEGAL STANDARDS FOR BEST CLASSROOM PRACTICE* 106 (2006).

²¹¹ "[S]uccessful education requires that teachers act as critics of the ideas which the give-and-take process elicits from students." Clarick, *supra* note 202, at 725.

²¹² *Garcetti v. Ceballos*, 547 U.S. 410, 432 (2006) (Souter, J., dissenting) (quoting ROBERT FROST, *Two Tramps in Mud Time*, in COLLECTED POEMS, PROSE, & PLAYS 251, 252 (Richard Poirier & Mark Richardson eds., 1995)).

²¹³ See Mary Ellen Slater, *Teachers' Low Pay is a Lesson in Disparity*, WASH. POST, Sept. 26, 2004, at K1.

²¹⁴ *Sterzing v. Fort Bend Indep. Sch. Dist.*, 376 F. Supp. 657, 661 (S.D. Tex. 1972), *vacated*, 496 F.2d 92, 93 (5th Cir. 1974).

V. A MORE TAILORED, REALISTIC APPROACH TO CLASSROOM SPEECH

As previously discussed, public school teachers face different challenges than do other public employees. American society asks teachers to encourage debate in their classrooms and charges them with playing a “central role in preparing their students to think and analyze.”²¹⁵ It is unfair to charge teachers with this awesome responsibility while simultaneously denying them any protection for their classroom expression.²¹⁶ In addition, as explained above, it is contrary to First Amendment jurisprudence to lay down bright-line rules that bypass any weighing of the interests at stake.²¹⁷ For these reasons, any of the approaches used to evaluate teacher speech prior to *Garcetti* and *Mayer* are preferable to the Seventh Circuit’s recent approach. However, the most principled approach is to apply the *Pickering/Connick* analysis to teacher speech *outside* of the classroom, but to use the traditional *student* speech cases when evaluating teacher speech *inside* the classroom.

A. *Application of Pickering/Connick Analysis to Teacher Speech Outside the Classroom*

For teacher expression outside of the classroom, as was the speech at issue in *Pickering*, there is no need to disturb the Supreme Court’s application of a balancing test that considers the government’s interest in maintaining the efficient operation of the school while protecting the teacher’s right to speak out.²¹⁸ Accordingly, if a teacher speaks out about a matter of public concern under *Connick*, that teacher’s right to do so must be balanced against the harm the teacher’s speech may cause to the school’s efficient operation. The *Pickering* Court instructed future courts to look for any disruption in discipline by supervisors or harmony among coworkers, and any interference with the teacher’s duties or the regular operation of the school.²¹⁹ Absent any of these concerns, there is no reason for a school dis-

²¹⁵ *James v. Bd. of Educ.*, 461 F.2d 566, 574 (2d Cir. 1972).

²¹⁶ See *Sterzing*, 376 F. Supp. at 662 (“A responsible teacher must have freedom to use the tools of his profession as he sees fit.”). See also *supra* note 211.

²¹⁷ See generally *supra* Part IV.A.

²¹⁸ See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (“To the extent that the Illinois Supreme Court’s opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.”).

²¹⁹ *Id.* at 569-70, 572-73.

strict to restrict a teacher's ability to contribute to public debate outside of school.²²⁰

B. *Application of the Student Speech Framework to Teachers' In-Class Expression*

Additional concerns present themselves when evaluating teachers' speech inside classrooms, due largely to the presence of students. As attorney Karen Daly has recognized, "*Pickering* balances the rights of school boards as employers against teachers as employees, ignoring the students' place in the equation. The constellation of interests in public schools demands a test that is sensitive to the interests of all three."²²¹ While Daly recommends that courts use a variation of *Hazelwood* to assess most in-class teacher speech cases,²²² another feasible method is to combine the approaches illustrated by the Supreme Court's analysis in the student speech cases of *Tinker*, *Fraser*, and *Hazelwood*. This approach considers the interests of the school board, teacher, and students, while allowing courts to begin every analysis of in-school speech, whether by teacher or student, with the same set of questions.

First, under *Tinker*, does the teacher's speech interfere with the discipline and operation of the school or with the rights of others? If so, the school's interests would likely prevail over those of the speaker, as they currently do in student speech cases.²²³ In *James*, which borrowed from the analysis in *Tinker*, the Second Circuit recognized that regardless of whether a student or teacher speaks, any interference with the discipline and operation of the school or the rights of others is significant, and should weigh against the speaker.²²⁴ In Mayer's particular case, the court made no finding that her speech interfered with the ability of supervisors to discipline her, the operation of the school, or the rights of others.²²⁵

²²⁰ Under *Pickering* balancing courts also may weigh, when appropriate, the public interest served by teachers speaking out about their particular knowledge of what goes on in schools. *See id.* at 571-72.

²²¹ Daly, *supra* note 71, at 52.

²²² Daly would use *Hazelwood* to analyze cases in which teachers have "ambiguous notice" that the school board objects to their teaching methods or content and would add a presumption of legitimacy for the teacher's conduct. *Id.* at 53-62.

²²³ *See, e.g.,* Lowery v. Euverard, 497 F.3d 584, 591-93, 601 (6th Cir. 2007) (granting summary judgment to school district because petition written by student athletes who wanted their coach fired threatened to disrupt school activities under *Tinker*); Boim v. Fulton County Sch. Dist., 494 F.3d 978, 985 (11th Cir. 2007) (upholding suspension of high school student where student's writing of violent story was likely to cause disruption in school).

²²⁴ *See supra* note 98 and accompanying text.

²²⁵ As previously noted, the complaint of one student's parents likely does not amount to an interference with the operation of the school. *See supra* notes 179-181 and accompanying text.

Second, under *Fraser*, is the teacher's speech lewd, obscene, or similarly inappropriate? If so, this step of the test would allow the school to prevail easily. Certainly showing films containing nudity in a math class²²⁶ or blatantly violating a ban on the use of profanity²²⁷ would constitute vulgar expression. Mayer's speech, however, cannot be considered lewd or obscene.

Finally, under *Hazelwood*, would a reasonable person view the teacher's speech as bearing the imprimatur of the school, and are there other legitimate pedagogical concerns that justify restricting the teacher's speech? Those courts that decided, prior to *Garcetti* and *Mayer*, to rely on *Hazelwood* to analyze cases of teacher speech often did so because *Hazelwood* better accounts for the interests of the school district in regulating the curriculum and protecting students from coercion.²²⁸ This step of the test makes it more difficult for a teacher's, rather than a student's, First Amendment rights to prevail over the school's interests, because there is little worry of students controlling the curriculum, and teacher speech is more likely than student speech to be seen as bearing the "imprimatur of the school."²²⁹

The school's interest in preventing coercion must be addressed under this step of the analysis, as the teacher is indeed a representative of the school with a captive audience of students during classroom time.²³⁰ Because the worry of coercion is increased inside the classroom, several courts have "distinguish[ed] between teachers' classroom expression and teachers' expression in other situations that would not reasonably be perceived as school-sponsored."²³¹ A careful analysis that focuses on this potential problem allows a school to take action against a teacher who speaks in a truly coercive manner. However, it also bars retaliatory action against a teacher who, without representing a viewpoint as the official position of the school, encourages debate and respectful discussion with and among students in a

²²⁶ See *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994) ("Given that the disputed film clip was entirely unnecessary to the subject matter of Silano's lecture, the school officials had a legitimate pedagogical purpose in restricting the display of photographs of bare-chested women in a tenth-grade classroom.").

²²⁷ See *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 724 (8th Cir. 1998) (holding that the school district rightfully terminated a teacher who violated a ban on profanity in the classroom by allowing students to perform plays containing obscene language).

²²⁸ See, e.g., *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 777 (10th Cir. 1991) ("Although the *Pickering* test accounts for the state's interests as an employer, it does not address the significant interests of the state as educator. The Court in *Hazelwood* recognized that a state's regulation of speech in a public school setting is often justified by peculiar responsibilities the state bears in providing educational services . . .").

²²⁹ See *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991) ("While a student's expression can be more readily identified as a thing independent of the school, a teacher's speech can be taken as directly and deliberately representative of the school.").

²³⁰ *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007).

²³¹ *Miles*, 944 F.2d at 777.

non-coercive way. In a case like Mayer's, in which a student asks a teacher for her personal opinion and the teacher responds, it is obvious that the teacher is not presenting the viewpoint of the school but answering a student's question about her personal views.

In light of the "special characteristics of the school environment,"²³² schools must allow teachers to engage with students in open and honest discussion. The balancing of interests recommended here for in-class teacher speech cases may be labor-intensive for courts, but it is preferable to the Seventh Circuit's bright-line rule affording teachers no protection for any in-class speech regardless of the character or nature of that speech.²³³

CONCLUSION

The *Tinker* Court proclaimed that neither students nor teachers abandon their constitutional rights at the schoolhouse gate.²³⁴ As the Sixth Circuit opined in 2005, to "draw a distinction between the schoolhouse gate and the doors of the classroom is counterintuitive. . . . 'In light of [Supreme Court] precedent, the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction, is totally unpersuasive.'"²³⁵ The Seventh Circuit's *Mayer* decision goes too far in stripping teachers of all First Amendment protection within their classrooms. Other courts forced to decide whether *Garcetti*'s rule should apply to public school teachers' speech should decline to follow the Seventh Circuit's per se rule.

If teachers must shed their First Amendment rights at the classroom door, as the Seventh Circuit's application of *Garcetti* instructs, they will be unnecessarily deprived of their constitutional rights and rendered unable to provide students with the best possible educational experience. Teachers are expected to challenge students to analyze, debate, and participate in democracy. If teachers know they can lose their jobs for any classroom comment, they will be less likely to perform those jobs well, and students will become the unintended victims of the courts. When teachers speak in classrooms, the tests set forward in *Tinker*, *Fraser*, and *Hazelwood* are best suited to effectively balance the interests of teacher, school, and students.

²³² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969).

²³³ See generally *supra* Part IV.

²³⁴ *Tinker*, 393 U.S. at 506.

²³⁵ *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 229 (6th Cir. 2005) (quoting *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001)) (citation omitted) (alteration in original).