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## **MAYER V. MONROE: THE SEVENTH CIRCUIT SHEDS FREEDOM OF SPEECH AT THE CLASSROOM DOOR**

JUSTIN NEMUNAITIS\*

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### INTRODUCTION

The Supreme Court has had a difficult time resolving First Amendment disputes in the public school setting. The Court has frequently reiterated that teachers and students do not “shed their Constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>1</sup> Nonetheless, schools must be able to maintain some control over their classrooms because “[i]n no activity of the State is it more vital to keep out divisive forces than in its schools.”<sup>2</sup> Not surprisingly, lower courts have had trouble navigating these conflicting interests, and as a result, this area of the law can be quite difficult to predict.<sup>3</sup>

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<sup>1</sup> *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>2</sup> *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948).

<sup>3</sup> See Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 4-6 (2001).

In *Mayer v. Monroe County Community School Corp.*, the Seventh Circuit recently scaled back the protection afforded to the classroom speech of public school teachers.<sup>4</sup> A school dismissed a teacher, after she mentioned to her students that she honked her horn while driving past individuals protesting the war in Iraq.<sup>5</sup> The court ruled that teachers' opinions are not protected by the First Amendment when expressed in the classroom.<sup>6</sup> This decision implicitly overruled previous precedent by applying a stricter test to teacher classroom speech.<sup>7</sup>

Federal courts are currently split over what test to apply when evaluating a teacher's classroom speech. The First, Second, Eighth, and Tenth Circuits<sup>8</sup> treat this speech as classroom speech governed by *Hazelwood School District v. Kuhlmeier*.<sup>9</sup> The Third, Fourth, Fifth, Sixth, D.C., and now Seventh Circuits<sup>10</sup> treat this speech as public employee speech governed by *Pickering v. Board of Education of Township High School District 205*.<sup>11</sup> The Supreme Court has not yet

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<sup>4</sup> (*Mayer II*), 474 F.3d 477 (7th Cir. 2007), *reh'g en banc denied*, *Mayer v. Monroe County Cmty. Sch. Corp.*, No. 06-1993, 2007 U.S. App. LEXIS 7157 (7th Cir. Mar. 12, 2007).

<sup>5</sup> *Mayer II*, 474 F.3d at 478.

<sup>6</sup> *Id.* at 480.

<sup>7</sup> *See, e.g.*, *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990).

<sup>8</sup> *See Lacks v. Ferguson Reorganized Sch. Dist., R-2*, 147 F.3d 718, 724 (8th Cir. 1998); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994); *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 755-79 (10th Cir. 1991).

<sup>9</sup> 484 U.S. 260 (1988).

<sup>10</sup> *See Mayer II*, 474 F.3d at 478; *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1053 (6th Cir. 2001); *Boring v. Buncombe Bd. of Educ.*, 136 F.3d 364, 372-73 (4th Cir. 1998); *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989); *Goldwasser v. Brown*, 417 F.2d 1169, 1176-77 (D.C. Cir. 1969). Some of these decisions do not cite directly to *Pickering*. Rather, they cite to some other case in that line such as *Connick v. Meyers*, 461 U.S. 138 (1983).

<sup>11</sup> 391 U.S. 563 (1968).

resolved this split—although it could have addressed the issue in its recent decision *Garcetti v. Ceballos*.<sup>12</sup>

Despite the controversy surrounding this issue, the Seventh Circuit has not explained why it prefers one test over the other. This Note will attempt to fill that gap. Part I will explain how a circuit split has developed around these three Supreme Court decisions. Part II will explain what the Seventh Circuit has contributed to this debate with *Mayer*. Part III will examine practical problems created by *Mayer*. Part IV will analyze the various tests that the Seventh Circuit could have applied in *Mayer*. Finally, Part V will argue that the court should have maintained its earlier practice of evaluating teacher classroom speech under *Hazelwood*.

## I. LEGAL BACKGROUND

### A. Supreme Court Precedents

When analyzing teacher classroom speech, courts must choose between two different lines of Supreme Court precedent. The first focuses on public employee speech, and the second focuses on school speech.

#### 1. The *Pickering* Line of Cases

In *Pickering*, a public high school teacher wrote a letter to the local newspaper opposing a bond proposal to raise school funds.<sup>13</sup> The letter accused the school board of diverting too much money to athletics and threatening teachers who opposed the bond proposal.<sup>14</sup> After the school board fired the teacher, he filed a § 1983 action against the school board claiming that his First Amendment right to expression had been infringed.<sup>15</sup> The Supreme Court explained that

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<sup>12</sup> 126 S. Ct. 1951 (2006).

<sup>13</sup> 391 U.S. 563, 566 (1968).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 564-65.

government employees do not lose their Constitutional rights simply by accepting government paychecks.<sup>16</sup> Nonetheless, the government needs some control over the speech of its employees to promote the efficiency of public services.<sup>17</sup>

The Supreme Court developed a two part test to resolve this tension: (1) a court must determine whether a public employee's speech touches upon "matters of public concern;" (2) if so, the court must balance the free speech interests of the employee against the government's interest as an employer.<sup>18</sup> If the speech does not touch on a matter of public concern it is unprotected, and the employee's claim will fail.<sup>19</sup>

The bond issue in *Pickering* was the subject of considerable public debate at the time, so the Court moved on to the second part of the test, balancing the interests of the teacher and the school board. The teacher had an interest in contributing his opinion to the public debate, and the public had an interest in receiving as much information as possible regarding this important decision.<sup>20</sup> The school board, on the other hand, suffered no detriment because of the letter. It was written after the proposal had been defeated at the polls and, as far as the Court could tell, the public greeted it with "massive apathy and total disbelief."<sup>21</sup> Since the school board brought forth no evidence that the letter created any disruption, or hindered the school's attempt to raise funds, the teacher's speech was protected.<sup>22</sup> Accordingly, he had been wrongfully discharged.<sup>23</sup>

Subsequent decisions have clarified this complicated test. For example, the government may still retaliate against the protected

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<sup>16</sup> See *id.* at 568.

<sup>17</sup> *Id.*

<sup>18</sup> See *id.* at 572-73. This second step is commonly referred to as the "*Pickering* balancing test."

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

<sup>20</sup> *Id.* at 571-72.

<sup>21</sup> *Id.* at 570.

<sup>22</sup> *Id.* at 572-73.

<sup>23</sup> *Id.* at 574-75.

speech of a public employee if it has an independent basis for discharge.<sup>24</sup> In addition, the speech need not be broadcast to the public; speech directed only toward supervisors may also be protected.<sup>25</sup>

The Supreme Court's next major decision in this area, *Connick v. Myers*,<sup>26</sup> narrowed the definition of "public concern."<sup>27</sup> An assistant district attorney was upset about being transferred to a different division. She circulated a questionnaire soliciting the views of her colleagues concerning office transfer policy, office morale, the level of confidence in supervisors, and whether they felt pressured to work in political campaigns.<sup>28</sup> The trial court had held that this questionnaire addressed matters of public concern, but the Supreme Court reversed.<sup>29</sup> After considering the "content, form, and context" of the employee's speech, the Supreme Court concluded that the questionnaire was an outgrowth of a personal dispute.<sup>30</sup> Although it addressed matters of public concern, the purpose of the questionnaire was simply to frustrate her supervisors.<sup>31</sup> The Court refused to "constitutionalize" this employee grievance to discourage public employees from litigating minor personal disputes.<sup>32</sup> Because Myers could not pass the first step of the *Pickering* test, the Court did not address the second step.<sup>33</sup>

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<sup>24</sup> See *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1976) (explaining that the school board could not fire a teacher for distributing a memo to a local radio station, but it could fire him for obscene conduct directed toward faculty, staff, and students).

<sup>25</sup> *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979) (explaining that private speech between teacher and principal may be protected after the teacher criticized the school's implementation of a desegregation order).

<sup>26</sup> 461 U.S. 138 (1983).

<sup>27</sup> See *Daly*, *supra* note 3, at 9.

<sup>28</sup> *Connick*, 461 U.S. at 141-42.

<sup>29</sup> *Id.* at 152.

<sup>30</sup> *Id.* at 148.

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

<sup>32</sup> *Id.* at 154.

<sup>33</sup> See *id.*

Most recently, in *Garcetti*, the Supreme Court further narrowed the first step of the *Pickering* test.<sup>34</sup> A deputy district attorney examined an affidavit used to procure a search warrant.<sup>35</sup> He wrote a memo to his supervisor detailing serious misrepresentations made in the affidavit, but his supervisor refused to dismiss the case.<sup>36</sup> After a heated discussion of this decision, the deputy was transferred to a different division; in response, the deputy sued.<sup>37</sup> The Court ruled that although the memo touched upon matters of public concern, it was not protected because it was written pursuant to the employee's duty as a calendar deputy.<sup>38</sup> When a government employee is speaking within the scope of his employment duties, he is not speaking as a citizen, and hence has no First Amendment protection.<sup>39</sup>

In light of *Connick* and *Garcetti*, a government employee must now satisfy a new test to prevail on a First Amendment claim. The employee must show that (1) the speech, considered in context,<sup>40</sup> touches upon "matters of public concern," *and* is outside the scope of employment;<sup>41</sup> (2) if so, the free speech interests of the employee must outweigh government's interest as an employer.<sup>42</sup> Although the language of *Garcetti* is broad enough to apply to all public employees, the Court explicitly declined to decide if this same test applies to cases involving "speech related to scholarship or teaching."<sup>43</sup>

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<sup>34</sup> See Krystal LoPilato, *Garcetti v. Ceballos: Public Employees Lose First Amendment Protection for Speech Within Their Job Duties*, 27 BERKELEY J. EMP. & LAB. L. 537 (2006).

<sup>35</sup> *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1955 (2006).

<sup>36</sup> *Id.* at 1955.

<sup>37</sup> *Id.* at 1956.

<sup>38</sup> *Id.* at 1960.

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

<sup>40</sup> *Connick v. Myers*, 461 U.S. 138, 148 (1983).

<sup>41</sup> *Garcetti*, 126 S. Ct. at 1960.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1962.

## 2. The *Hazelwood* Line of Cases

The Supreme Court has consistently applied specialized analysis for speech occurring in school settings.<sup>44</sup> The seminal case on school speech is *Tinker v. Des Moines Independent Community School District*, in which the Court protected students' right to wear black armbands protesting the Vietnam War.<sup>45</sup> Justice Fortas famously proclaimed "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>46</sup> School authorities may censor classroom speech, but only after showing that the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."<sup>47</sup>

*Tinker* was a first attempt at balancing free speech rights against the practical need to maintain discipline in an educational institution. The Court's strong rhetoric against authoritarian limits on teacher and student expression encouraged lower courts to protect First Amendment rights in schools.<sup>48</sup>

Subsequent decisions have tipped the scales further in favor of school authorities.<sup>49</sup> For example, the Court elaborated in *Bethel v. Fraser* that a school may prevent a student from giving an obscene speech, and emphasized a school's need to disassociate itself from inappropriate speech.<sup>50</sup>

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<sup>44</sup> See Frederick Schauer, *The Thirteenth Ira C. Rothgerber, Jr., Conference On Constitutional Law: Horowitz, Churchill, Columbia—What Next For Academic Freedom?: Is There A Right To Academic Freedom?*, 77 U. COLO. L. REV. 907, 908-09 (2006).

<sup>45</sup> 393 U.S. 503 (1969).

<sup>46</sup> *Id.* at 506.

<sup>47</sup> *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

<sup>48</sup> See *id.* ("[i]n our system, state-operated schools may not be enclaves of totalitarianism").

<sup>49</sup> See Daly, *supra* note 3, at 9.

<sup>50</sup> 478 U.S. 675, 686 (1986).

The Supreme Court's most recent decision in this line, *Hazelwood*, significantly narrowed the holding in *Tinker*.<sup>51</sup> In *Hazelwood*, a high school principal removed several controversial articles from the student-written school newspaper.<sup>52</sup> One article was removed because it discussed students' experiences with pregnancy, and the principal worried that the article did not sufficiently conceal the students' identities. The other article criticized a student's father during divorce proceedings without giving the father a chance to explain his behavior.<sup>53</sup>

Rather than simply applying the *Tinker* test, the Court used "forum analysis" to determine what test to apply.<sup>54</sup> The Court first considered whether the school had opened up the newspaper as a public forum; if so, it would apply the *Tinker* test.<sup>55</sup> It concluded that because the school reserved editorial control over the newspaper, it was a non-public forum for "school-sponsored" expression.<sup>56</sup> It determined that a new test was necessary for this speech which "the public might reasonably perceive to bear the imprimatur of the school."<sup>57</sup>

The new test allowed the school to censor school-sponsored speech so long as its actions are "reasonably related to legitimate pedagogical concerns."<sup>58</sup> The Court found that the school board had a legitimate interest in teaching appropriate journalism practice, i.e. protecting confidentiality of sources and allowing for even-handed debate. Because the articles deviated from that practice, the principal did not violate the First Amendment by removing them from the

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<sup>51</sup> See Daly, *supra* note 3, at 11.

<sup>52</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263 (1988).

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

<sup>54</sup> *Id.* at 267. The Court had recently elaborated on this concept of differentiating between First Amendment claims based on the forum of the speech. See *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 47 (1983); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

<sup>55</sup> *Hazelwood*, 484 U.S. at 270-73.

<sup>56</sup> *Id.* at 270.

<sup>57</sup> *Id.* at 271.

<sup>58</sup> *Id.* at 273.

school newspaper.<sup>59</sup> The Court further explained that school authorities have a legitimate pedagogical interest in protecting students from speech that advocates drug use, irresponsible sex or conduct “inconsistent with ‘the shared values of a civilized social order.’”<sup>60</sup>

Although *Hazelwood* dealt with student speech, the test the Court articulated is broad enough to include teacher speech which is school-sponsored.<sup>61</sup> Accordingly, lower courts have disagreed over whether teacher classroom speech should be analyzed as government employee speech under *Pickering*, or school sponsored speech under *Hazelwood*.<sup>62</sup>

### B. Circuit Court Responses

Although few courts have had the chance to address *Garcetti*, the *Hazelwood/Pickering* distinction has provided ample ground for disagreement between the circuits.<sup>63</sup> Both lines of cases provide different tests for evaluating teacher classroom speech. *Pickering* protects teacher classroom speech that addresses matters of public concern.<sup>64</sup> *Hazelwood* protects teacher classroom speech when the school board has no legitimate pedagogical reason for preventing the speech.<sup>65</sup> These two very different tests do not always return the same results.<sup>66</sup> While most circuits have decided to apply one test or the other, few have explained why.<sup>67</sup>

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<sup>59</sup> *Id.* at 272.

<sup>60</sup> *Id.* at 272 (quoting *Bethel v. Fraser*, 478 U.S. 675, 683 (1986)).

<sup>61</sup> See Daly, *supra* note 3, at 62; Walter E. Kuhn, *First Amendment Protection of Teacher Instructional Speech*, 55 DUKE L.J. 995, 1024 (2006).

<sup>62</sup> See Daly, *supra* note 3, at 16.

<sup>63</sup> See Daly, *supra* note 3, at 16-17.

<sup>64</sup> See 391 U.S. 563, 572-73 (1968).

<sup>65</sup> See 484 U.S. 260, 273 (1988).

<sup>66</sup> See Daly, *supra* note 3, at 16-17. For example, suppose a math teacher asks students to identify practical uses for algebra in their everyday lives. Certainly there is a pedagogical reason for this assignment, but it does not touch upon matters of public concern. Alternatively, suppose that math teacher decides to discuss the war in Iraq instead of math. While this topic is a matter of public concern, the math

## 1. Circuit Courts that Apply *Pickering*

At least two courts applying *Pickering* have determined categorically that classroom speech is never protected.<sup>68</sup> In *Boring v. Buncombe*, a drama teacher directed a school play which the school principal felt violated the controversial materials policy.<sup>69</sup> Although he initially approved the play, the principal later decided that the play was inappropriate. At the end of the year he requested that the teacher be transferred because of “personal conflicts.”<sup>70</sup> The Fourth Circuit reasoned that disputes over classroom speech are inherently private employment disputes.<sup>71</sup> Thus, classroom speech never touches upon matters of public concern.<sup>72</sup> This ruling effectively created a per se rule that teacher classroom speech is unprotected. While this decision creates a clear rule, it did not properly analyze whether the teacher’s speech touched upon matters of public concern.<sup>73</sup>

The Sixth Circuit applied the *Pickering* test more faithfully in *Cockrel v. Shelby*.<sup>74</sup> An elementary school teacher invited Woody Harrelson to discuss legalization of industrialized hemp in her

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teacher would have no legitimate pedagogical reason for refusing to teach math in math class.

<sup>67</sup> See *Lacks v. Ferguson Reorganized Sch. Dist., R-2*, 147 F.3d 718, 724 (8th Cir. 1998); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994); *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 755-79 (10th Cir. 1991); *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989); *Goldwasser v. Brown*, 417 F.2d 1169, 1176-77 (D.C. Cir. 1969).

<sup>68</sup> See *Boring v. Buncombe Bd. of Educ.*, 136 F.3d 364, 369 (4th Cir. 1998); *Kirkland*, 890 F.2d at 798.

<sup>69</sup> 136 F.3d at 366.

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

<sup>71</sup> See *id.* at 369.

<sup>72</sup> See *id.*

<sup>73</sup> See *id.* at 378-79 (Motz, J. dissenting).

<sup>74</sup> 270 F.3d 1036, 1052 (6th Cir. 2001).

classroom.<sup>75</sup> The principal initially approved this decision, but after several visits by the famous actor, national media attention, and numerous parents' complaints, the principal fired the teacher.<sup>76</sup> The court applied *Pickering* and first determined that because the controversial topic of industrialized hemp generated substantial public debate, it is a matter of public concern. The court recognized that a teacher may still speak about matters of public concern within the classroom, and criticized *Boring* for focusing on the location of the speech rather than the content of the speech.<sup>77</sup>

The court next applied the second step of the *Pickering* test—balancing the interests of the employee and the school.<sup>78</sup> The court ruled that the balancing test weighed heavily in favor of the teacher. The teacher's speech addressed a matter of significant public concern and the speech did nothing to hurt the efficiency of the workplace, or create disharmony among employees. Although several parents complained, these complaints had minimal impact on workplace efficiency.<sup>79</sup> At least one Judge was particularly influenced by the fact that the school had initially authorized the visits.<sup>80</sup> Thus, under *Pickering*, the teacher's speech was protected.

The Fourth Circuit will likely read *Garcetti* as validating its earlier decision because classroom speech is part of a teacher's official duties. The Sixth Circuit may join the Fourth Circuit by adopting a per se rule that teacher classroom speech is unprotected, or it may focus on *Garcetti*'s statement that the school setting is unique.<sup>81</sup>

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<sup>75</sup> *Id.* at 1042-43.

<sup>76</sup> *Id.* at 1042-45.

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

<sup>78</sup> *Id.* at 1054.

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

<sup>80</sup> *Id.* at 1060 (Siler, J. concurring).

<sup>81</sup> *See id.* at 1962.

## 2. Circuit Courts that Apply *Hazelwood*

Courts applying *Hazelwood* have done so uniformly, i.e. there is no comparable split like the one between the Fourth and Sixth Circuits. Under *Hazelwood*, a school may restrict teacher classroom speech to advance “legitimate pedagogical concerns.”<sup>82</sup> Preservation of the school board’s accepted curriculum is one such concern, so a teacher has no First Amendment right to deviate from the curriculum.<sup>83</sup> Teacher speech may be protected when it does not contradict the school’s curriculum.<sup>84</sup> Thus, Courts applying *Hazelwood* have generally concluded that school boards have wide latitude to set curricula, but must give teachers adequate notice of speech restrictions.<sup>85</sup>

In *Ward v. Hickey* a ninth grade biology teacher started a discussion over whether Down’s syndrome fetuses should be aborted.<sup>86</sup> After a parent notified the school board of the discussion, the board voted to deny the teacher tenure, and he sued. The First Circuit ruled that the school board had a legitimate pedagogical interest in prohibiting such a controversial discussion.<sup>87</sup> Nonetheless, the school board could only punish the teacher after notifying him that such a discussion is prohibited.<sup>88</sup> In contrast, courts applying *Pickering* are not usually concerned with notice to the teachers.<sup>89</sup>

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<sup>82</sup> See *Lacks v. Ferguson Reorganized Sch. Dist., R-2*, 147 F.3d 718, 724 (8th Cir. 1998); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994); *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 755-79 (10th Cir. 1991); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (1990).

<sup>83</sup> See *Ward*, 996 F.2d at 452.

<sup>84</sup> See *Lacks*, 147 F.3d at 723; *Ward*, 996 F.2d at 454; *Webster*, 917 F.2d at 1007.

<sup>85</sup> See *Lacks*, 147 F.3d at 723; *Ward*, 996 F.2d at 452.

<sup>86</sup> 996 F.2d at 450.

<sup>87</sup> *Id.* at 453.

<sup>88</sup> *Id.* at 452.

<sup>89</sup> See *Mayer v. Monroe (Mayer II)*, 474 F.3d 477, 478 (7th Cir. 2007); *Boring v. Buncombe Bd. of Educ.*, 136 F.3d 364, 372-73 (4th Cir. 1998); *Bradley v.*

### *C. The Seventh Circuit Response*

The Seventh Circuit initially followed those courts applying *Hazelwood* to teacher classroom speech. In *Webster v. New Lenox School District No. 122*, a teacher refused to teach evolution and chose to teach creation science instead.<sup>90</sup> Despite complaints from school authorities, the teacher simply refused to follow the curriculum.<sup>91</sup> The Seventh Circuit analyzed his claim under *Hazelwood*. Like the other courts applying *Hazelwood*, it ruled that a school board has a legitimate pedagogical interest in ensuring that teachers do not create their own curricula.<sup>92</sup> Accordingly, the teacher had no First Amendment right to discuss creation science in the classroom.<sup>93</sup> While school authorities may not fire teachers for “random classroom comments,” they may fire a teacher who refuses to teach the set curriculum.<sup>94</sup>

The Seventh Circuit applied *Pickering* in employment dispute cases involving non-classroom teacher speech. The court applied this analysis when a university professor sexually harassed female students at a conference off campus,<sup>95</sup> and when a high school teacher wrote articles for a local newspaper criticizing the school board.<sup>96</sup> In both those cases the teachers had claimed First Amendment protection for their speech.<sup>97</sup>

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Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 798 (5th Cir. 1989); *Goldwasser v. Brown*, 417 F.2d 1169, 1176-77 (D.C. Cir. 1969); *but see Cockrel v. Shelby*, 270 F.3d 1036, 1060 (6th Cir. 2001) (Siler, J. concurring).

<sup>90</sup> 917 F.2d 1004, 1008 (7th Cir. 1990).

<sup>91</sup> *Id.* at 1006.

<sup>92</sup> *Id.* at 1008.

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

<sup>94</sup> *Id.* at 1007-08.

<sup>95</sup> *See Trejo v. Shoben*, 319 F. 3d 878, 881-84 (7th Cir. 2003).

<sup>96</sup> *See Dishnow v. Sch. Dist. of Rib Lake*, 77 F.3d 194 (7th Cir. 1996).

<sup>97</sup> *Trejo*, 319 F. 3d at 884; *Dishnow*, 77 F.3d at 197.

The Seventh Circuit recently had an opportunity to re-visit teacher classroom speech in *Piggee v. Sandburg*.<sup>98</sup> Piggee, a cosmetology teacher at a community college, placed anti-homosexual pamphlets in the pocket of one student at the end of class. The student, who was homosexual, was deeply offended by the pamphlets.<sup>99</sup> At the end of the year, the teacher's contract was not renewed.<sup>100</sup> Ignoring *Webster*, the court discussed the first step of the *Pickering* test—whether or not the speech touched upon a matter of public concern, and was outside the scope of her employment.<sup>101</sup> The court determined that the discussion of homosexual behavior “richly deserves public attention.”<sup>102</sup> Furthermore, the speech was outside the scope of Piggee's employment because she was hired to teach cosmetology not proselytize against homosexuality.<sup>103</sup> Nonetheless, the court refused to move onto the second step of the *Pickering* test.<sup>104</sup> Instead, it decided that the *Pickering* test was simply inappropriate for teacher classroom speech. The court described a new test: a school can prohibit “nongermane” speech that “could impede the school's educational mission.”<sup>105</sup>

This decision is difficult to interpret in light of the circuit split surrounding this issue. The Seventh Circuit seems to have rejected its earlier decisions and aligned itself with the circuits that apply *Pickering* to cases involving teacher classroom speech. However, *Piggee* does not follow *Boring v. Buncombe* because it refused to

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<sup>98</sup> See 464 F.3d 667 (7th Cir. 2006).

<sup>99</sup> *Id.* at 669 (Specifically, he “did not appreciate being called an abomination, a child molester, or a rapist and a deviant”).

<sup>100</sup> *Id.* at 669.

<sup>101</sup> *Id.* at 670-71.

<sup>102</sup> *Id.* at 671-72.

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

<sup>104</sup> *Id.* at 672 (“The real question, however, is whether the college had a right to insist that Piggee refrain from engaging in that particular speech while serving as an instructor of cosmetology”).

<sup>105</sup> *Id.* at 672. The court offered little explanation of where this test comes from, and it does not cite to any previous opinion. See *id.*

create a per se rule that teacher classroom speech is unprotected.<sup>106</sup> It does not follow *Cockrel v. Shelby* because it refused to move onto the second step of the *Pickering* test.<sup>107</sup> Although much of the discussion in *Piggee* concerns *Pickering*, the holding of the case is consistent with the Seventh Circuit's earlier precedent applying *Hazelwood*, i.e. the court required the school to justify its employment decision by showing some sort of educational concern.<sup>108</sup>

## II. *MAYER V. MONROE COUNTY COMMUNITY SCHOOL CORP.*

If *Piggee* left doubts about which line of Supreme Court precedent to apply in cases involving teacher classroom speech, *Mayer v. Monroe* answered them. This decision firmly aligns the Seventh Circuit with those courts that have created a per se rule that teacher classroom speech is unprotected.<sup>109</sup> The case is very short, and the compelling story leading up to the litigation is condensed into a paragraph. Luckily, the district court preserved much of the factual background.<sup>110</sup>

### A. *The District Court Opinion*

In August of 2002, Mayer signed a one-year contract with the Monroe School Board to teach a current events class for fourth-sixth graders.<sup>111</sup> She relied on approved material such as the current events

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<sup>106</sup> *Piggee*, 464 F.3d at 671 (“[c]lassroom or instructional speech, in short, is inevitably speech that is part of the instructor’s official duties, even though at the same time the instructor’s freedom to express her views on the assigned course is protected”).

<sup>107</sup> *Id.* at 672.

<sup>108</sup> Compare *id.*, with *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990).

<sup>109</sup> *Mayer v. Monroe County Cmty. Sch. Corp (Mayer II)*, 474 F.3d 477, 478 (7th Cir. 2007).

<sup>110</sup> *Mayer v. Monroe County Cmty. Sch. Corp (Mayer I)*, 1:04-CV-1695-SEB-VSS, 2006 U.S. Dist. LEXIS 26137, at \*1, \*4-\*27 (S.D. Ind. Mar. 10, 2006).

<sup>111</sup> *Id.* at \*5 n.1.

magazine, “Time for Kids” (“TFK”), to teach the class. On January 10, 2003, TFK contained information on the war in Iraq and related protests.<sup>112</sup> After discussing the article, one student asked Ms. Mayer if she would ever march in a protest. She responded that peace protests are going on all over the country including Bloomington, and “[w]hen I drive past the courthouse square and the demonstrators are picketing I honk my horn for peace because their sign says ‘Honk for Peace.’”<sup>113</sup> She further explained that it is important for everyone to seek out peaceful solutions even on the playground. The class then moved on to discuss other material.<sup>114</sup>

Soon afterward, one parent complained and the school principal held a meeting with the parent and Ms. Mayer. All three agreed that Ms. Mayer should “not mention peace in her class again.”<sup>115</sup> The next day, the principal circulated a memo to the school teachers informing everyone that the school had no official stance on the war in Iraq. He also cancelled “Peace Month,” an annual tradition supporting peaceful resolution of problems.<sup>116</sup> After the school district refused to renew her contract, Mayer sued.<sup>117</sup> The district court engaged in *Pickering* analysis and granted summary judgment for the school board after it determined that Mayer was speaking as a public employee rather than a citizen.<sup>118</sup>

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<sup>112</sup> *Id.* at \*5.

<sup>113</sup> *Id.* at \*6.

<sup>114</sup> *Id.* at \*6.

<sup>115</sup> *Id.* at \*7.

<sup>116</sup> *Id.* at \*9.

<sup>117</sup> *Id.* at \*26. Although both *Mayer I* and *Mayer II* focused on the First Amendment issue, the district court detailed numerous other complaints against Ms. Mayer which, if true, could have independently justified her termination. *Id.* at \*9-\*26. Because Mayer disputed these complaints, the court ignored them at the summary judgment stage.

<sup>118</sup> *Id.* at \*39.

### *B. The Seventh Circuit Opinion*

Less than a month after the district court issued its opinion, the Supreme Court decided *Garcetti*, which denies First Amendment protection to public employees acting pursuant to official duties.<sup>119</sup> The Seventh Circuit reasoned that if *Garcetti* applies then “the school district prevails without further ado.”<sup>120</sup> Thus, the Seventh Circuit’s opinion focuses on whether Mayer’s speech occurred pursuant to an official duty.<sup>121</sup>

The court first looked at its earlier teacher classroom speech case, *Webster*.<sup>122</sup> It mentions this case simply for the proposition that teachers must follow the rules set by school authorities.<sup>123</sup> A teacher must stick to the prescribed curriculum, so a literature teacher cannot choose what books to teach and a math teacher cannot decide to teach calculus in place of trigonometry.<sup>124</sup> Part of the rationale for this rule is that teachers can be powerful influences in students’ lives; the power to decide what students hear must rest in the hands of elected officials.<sup>125</sup> The court concluded that Mayer presented “personal views to captive audiences against the instructions of elected officials.”<sup>126</sup>

This comment is unusual because no elected official instructed Mayer that her comments were outside the curriculum until after she made them.<sup>127</sup> In fact, since she was commenting on approved material, her comments were likely within the prescribed curriculum.

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<sup>119</sup> *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960-61 (2006).

<sup>120</sup> *Mayer v. Monroe County Cmty. Sch. Corp (Mayer II)*, 474 F.3d 477, 479 (7th Cir. 2007).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 479 (“This is so in part because the school system does not “regulate” teachers’ speech as much as it *hires* that speech”).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 480.

<sup>126</sup> *Id.*

<sup>127</sup> *Mayer v. Monroe County Cmty. Sch. Corp (Mayer I)*, 1:04-CV-1695-SEB-VSS, 2006 U.S. Dist. LEXIS 26137, at \*1, \*4-\*7 (S.D. Ind. Mar. 10, 2006).

While this point is arguable, the court simply assumes that Mayer disobeyed school authorities.<sup>128</sup>

The court next distinguished *Piggee* by stating that proselytizing was not part of Piggee’s teaching duties, but Mayer’s current events class was an assigned task.<sup>129</sup> Thus, the court need not apply *Piggee*’s “germaneness” test because *Garcetti* applies directly—Mayer had no first amendment right to express an opinion on current events in current events class. The court concluded by holding, “the first amendment 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.”<sup>130</sup> Although the court qualified its holding by stating that teacher speech is only proscribed when it departs from the curriculum, this qualification is meaningless because the court never explained why Mayer’s comments departed from the curriculum. She covered a topic adopted in the school curriculum—the Iraq war—and advocated a position which the school had annually celebrated until the day after her comments—peaceful resolution of conflicts. Even if Mayer’s statements did depart from the curriculum, they did so only after the school informed Mayer that her statements were inappropriate.<sup>131</sup> Thus, the Seventh Circuit allows school boards to change the curriculum *post hoc*, and then fire a teacher for making comments that were acceptable at the time they were made.

### III. PROBLEMS WITH *MAYER V. MONROE COUNTY COMMUNITY SCHOOL CORP.*

The Seventh Circuit has created a *per se* rule that teachers have no right to express opinions in the classroom, even if the school board

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<sup>128</sup> *Mayer II*, 474 F.3d at 480.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See *Mayer I*, 2006 U.S. Dist. LEXIS 26137, at \*1, \*37-\*38 (stating that it is irrelevant when the school board prohibited Mayer’s speech because she never had a First Amendment right to express any opinion in the classroom).

initially approves the opinions. This rule creates numerous practical problems.<sup>132</sup> The court intended that this bright-line rule minimize costly litigation over employment disputes, and clarify that school boards, not teachers, control the curriculum.<sup>133</sup> Unfortunately, the rule favors school boards too much: it encourages school boards to bend to the whims of vocal parents and use teachers as scapegoats; it discourages teachers from developing creative lesson plans; and it threatens teachers' rights outside the classroom.

As *Mayer* illustrates, school boards are bombarded by constant pressure from parents.<sup>134</sup> While the school board has a responsibility to respect the wishes of the community, it must do so in a way consistent with the Constitution.<sup>135</sup> For example, a school board cannot decide to teach creationism instead of evolution simply because a vocal group of parents complain.<sup>136</sup> Similarly, a school board should not dismiss good teachers simply because a handful of parents have idiosyncratic objections. Other circuits protect teachers from this sort of whimsical removal by requiring school boards to offer some sort of

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<sup>132</sup> See, e.g., Daly, *supra* note 3, at 28-31 (discussing problems created by the per se rules of *Boring v. Buncombe* and similar cases).

<sup>133</sup> See *Mayer II*, 474 F.3d at 478-79.

<sup>134</sup> *Mayer I*, 2006 U.S. Dist. LEXIS 26137, at \*4-\*27; Liz Babiarz, *School Board to study turnover; Board wants to learn why superintendents do not stay*, SARASOTA HERALD-TRIBUNE, Oct. 31, 2006 at BS1 (noting that community pressure is one of the primary reasons superintendents have been leaving the local school board).

<sup>135</sup> See, e.g., Bd. of Educ. Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 872 (1982) (plurality opinion) (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("Local School Boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion'"); *Stachura v. Truszkowski*, 763 F.2d 211, 214-15 (6th Cir. 1985) (*rev'd on other grounds by Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986) (criticizing a school board for not defending a teacher against parents protesting the school board's curriculum).

<sup>136</sup> See *Edwards v. Aguillard*, 482 U.S. 578, 596 (1987).

justification for their employment decisions.<sup>137</sup> In these circuits, school boards must explain to even the most irate parents that they cannot arbitrarily remove teachers.<sup>138</sup> Under *Mayer*, teachers no longer have this protection because a school board can justify any employment decision by pointing to a teacher's classroom speech, even if the speech was pre-approved.<sup>139</sup> District courts in these circuits are left with no choice but to dismiss the teachers' claims.<sup>140</sup>

Because pre-approval confers no protection on teachers, *Mayer* actually encourages school boards to use teachers as scapegoats when parents object to classroom speech.<sup>141</sup> Suppose a teacher seeks approval for discussing a certain topic in class, which might upset a small minority of parents in the community. A principal outside the Seventh Circuit would have to weigh the educational benefits of the discussion against the potential parental backlash. If the backlash will be substantial, the principal will protect the reputation of the school by disallowing the discussion. In the Seventh Circuit, a principal could approve the discussion, and then if the parents become upset, the

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<sup>137</sup> *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1053 (6th Cir. 2001); *Lacks v. Ferguson Reorganized Sch. Dist., R-2*, 147 F.3d 718, 724 (8th Cir. 1998); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994); *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 755-79 (10th Cir. 1991).

<sup>138</sup> *See, e.g., Stachura*, 763 F.2d at 214-15.

<sup>139</sup> *See Mayer v. Monroe County Cmty. Sch. Corp (Mayer II)*, 474 F.3d 477, 480 (7th Cir. 2007).

<sup>140</sup> *Lee v. York County Sch. Div.*, 418 F. Supp. 2d 816, 825 (D. Va. 2006) (granting summary judgment to school after applying *Boring*); *Erskine v. Bd. of Educ.*, 207 F. Supp. 2d 407, 410 (D. Md. 2002) (dismissing teacher's claim); *Newton v. Slye*, 116 F. Supp. 2d 677, 684 (D. Va. 2000) (refusing to grant preliminary injunction to keep teacher's pamphlets available to students).

<sup>141</sup> *See, e.g., Stachura*, 763 F.2d at 214-15; *cf. 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, 2005-06 (1999) (arguing that excessive deference granted to school boards destroys the balance between school authorities and teachers).

principal could fire the teacher as a scapegoat.<sup>142</sup> Even worse, the school board could fire a teacher who simply taught the prescribed curriculum, which happens to upset a group of parents.

While this example may seem far-fetched, a few district courts have already allowed this to happen. In *Stachura v. Truszkowski*, a teacher taught a sex education course approved by the principal and school board.<sup>143</sup> After a few parents complained, the school board suspended the teacher, ignoring the fact that it had created the class. A district court upheld the school board's decision, and as a result, the teacher suffered through years of harassment from the community and enmity from the national media.<sup>144</sup> The Sixth Circuit later reversed the district court and ruled that the school board could not fire him for simply doing his job.<sup>145</sup> In *Erskine v. Board of Education* a teacher was fired for writing the Spanish word for black, "negro," on the board during a Spanish lesson on colors.<sup>146</sup> A district court in the Fourth Circuit, reasoned that under, *Boring v. Buncombe*, the word was a part of the lesson plan, thus it was per se unprotected speech.<sup>147</sup> Teachers in the Seventh Circuit can now look forward to a similar fate.

While some teachers may feel the sting of *Mayer* after they have been fired, most teachers will feel its effects in the classroom. Most schools encourage teachers to develop creative lesson plans and find new ways to connect with students.<sup>148</sup> Historically, courts have granted limited protection to these efforts by requiring schools to justify

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<sup>142</sup> See *Mayer II*, 474 F.3d at 480.

<sup>143</sup> *Stachura v. Truszkowski*, 763 F.2d 211, 213 (6th Cir. 1985) (*rev'd on other grounds* by *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986)).

<sup>144</sup> *Stachura*, 763 F.2d at 213-14.

<sup>145</sup> *Id.* at 214-15.

<sup>146</sup> 207 F. Supp. 2d 407, 410 (D. Md. 2002)

<sup>147</sup> *Id.* The court expressed doubt that the teacher was actually dismissed for this incident, but it assumed the truth of the teacher's assertion for purposes of summary judgment. *Id.* at 409-410.

<sup>148</sup> See *Magnet School a Family Affair*, HERALD & REVIEW, Apr. 3, 2007; *Give Teachers Flexibility*, BANGOR DAILY NEWS, Mar. 28, 2007 at A8.

actions against teachers.<sup>149</sup> Because *Mayer* completely removes this protection, it strongly discourages teachers from developing creative teaching methods or even explaining difficult concepts in their own words.<sup>150</sup>

Teachers may even experience this chilling effect outside the classroom.<sup>151</sup> *Mayer* holds that the First Amendment does not protect a teacher's speech when the teacher is "conducting the education of captive audiences."<sup>152</sup> Just when does a teacher stop teaching? May a teacher express an opinion to students who linger in the classroom after hours? During lunch break? During a school event such as a sporting event or reception? While the court need not answer these questions now, the prospects for teachers do not look promising.<sup>153</sup>

To some extent, these questions are natural reactions to the Supreme Court's *Garcetti* decision,<sup>154</sup> rather than to *Mayer*. But the line between personal and professional life is much blurrier for teachers than for district attorneys.<sup>155</sup> Society encourages teachers to connect with their students and inspire them, and popular culture celebrates teachers with creative and inspirational methods.

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<sup>149</sup> Donald F. Uerling, *Academic Freedom in K-12 Education*, 79 NEB. L. REV. 956, 966 (2000) (listing cases).

<sup>150</sup> Merle H. Weiner, *Dirty Words In The Classroom: Teaching The Limits Of The First Amendment*, 66 TENN. L. REV. 597, 600 (1999).

<sup>151</sup> See *Piggee v. Sandburg*, 464 F.3d 667, 671 (2006) (explaining that the instructor/student relationship does not end the moment class is over).

<sup>152</sup> *Mayer v. Monroe County Cmty. Sch. Corp (Mayer II)*, 474 F.3d 477, 480 (7th Cir. 2007).

<sup>153</sup> See Tracy F. Mendonides, *Speak No Evil? The Seventh Circuit Limits Speech Rights of Government Employees*, 2 SEVENTH CIRCUIT REV. 667 (2007), at <http://www.kentlaw.edu/7cr/v2-2/mendonides.pdf> (arguing that the Seventh Circuit's broad interpretation of *Garcetti* threatens the First Amendment rights of public employees).

<sup>154</sup> See *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1968 (Souter, J. dissenting) (arguing that the majority opinion invites litigation over whether an employees comments were made pursuant to official duties).

<sup>155</sup> See *id.* at 1970 (Souter, J. dissenting); *Piggee*, 464 F.3d at 671.

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#### IV. ANALYSIS OF TESTS AVAILABLE TO THE *MAYER* COURT

*Mayer* ignores several judicial tests that it could have applied. Besides *Garcetti*, the Seventh Circuit could have applied traditional *Pickering* analysis, *Hazelwood* analysis, *Piggee* analysis, or some other test.

##### A. *The Garcetti Rule*

Although *Garcetti* preserves the opportunity for circuit courts to apply different tests in the school setting,<sup>156</sup> the Seventh Circuit adopts it without much discussion. The Supreme Court was concerned that the school setting presents different interests which may require further analysis,<sup>157</sup> but *Mayer* does not address this concern. Unfortunately, this concern is well founded because teacher-student communication is very different from communication between fellow employees.

*Garcetti* attempts to resolve a conflict between an employee's right to criticize an employer, and the government's need to operate effectively and efficiently.<sup>158</sup> It promotes workplace efficiency by minimizing the government's role in employment litigation. The Supreme Court did not want to chill supervisors from terminating incompetent or uncooperative employees out of fear that termination would lead to a time consuming lawsuit.<sup>159</sup> Suppose a police officer expresses to her supervisor that his plan for allocating officers will fail, and the supervisor immediately fires the officer for doubting him.<sup>160</sup> While termination in this case may be a petty managerial decision, *Garcetti* over-protects the supervisor.<sup>161</sup> Without *Garcetti*, the supervisor might be forced to work with uncooperative officers out

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<sup>156</sup> See *Garcetti*, 126 S. Ct. at 1962.

<sup>157</sup> See *id.* at 1969-70 (Souter, J. dissenting).

<sup>158</sup> See *id.* at 1958.

<sup>159</sup> See *id.* at 1961.

<sup>160</sup> See *Mills v. City of Evansville*, 452 F.3d 646, 647 (7th Cir. 2006).

<sup>161</sup> See *id.* at 648.

of fear that termination could lead to a lawsuit. *Garcetti* over-protects supervisors from retaliation for petty employment decisions so they don't need to justify every employment decision to a court.

There is no comparable need for over-protection in the education context. While an employer may need to promote workplace efficiency by removing uncooperative employees, school boards can protect students by setting the curriculum and explaining it to teachers.<sup>162</sup> They should not be chilled from firing teachers for inappropriate classroom expression because they can protect students by first instructing teachers to remain on topic.<sup>163</sup> If a teacher ignores the school board and continues to expose children to inappropriate material, the school board can fire the teacher for insubordination.<sup>164</sup>

*Mayer* also ignores key legal distinctions in *Garcetti*. The Supreme Court stated that “[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.”<sup>165</sup> This pronouncement is inappropriate in an academic context. In the university setting, a political theory professor's writings and speeches may be made pursuant to official duties. Nonetheless, that professor still has a First Amendment right to criticize the government.<sup>166</sup> While this argument is less persuasive for primary and secondary teachers,

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<sup>162</sup> See *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990).

<sup>163</sup> This argument relies on the fact that almost all schools maintain conduct guidelines. For example, the biology curriculum need not specify that the teacher should not use profanity because this obvious rule is in the school's code of conduct. See, e.g., *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 723-24 (8th Cir. 1998) (finding that the school had given the teacher sufficient notice of proscribed conduct by specifying conduct in the “Student Discipline Code,” among other things).

<sup>164</sup> See *Webster*, 917 F.2d at 1008.

<sup>165</sup> *Garcetti*, 126 S. Ct. at 1960.

<sup>166</sup> See *id.* (Souter, J. dissenting) at 1969-70.

the Seventh Circuit does not always distinguish between these two settings.<sup>167</sup>

By applying *Garcetti*, the Seventh Circuit has given school authorities an axe where a scalpel would be more appropriate. School authorities may now remove any teacher without cause simply by stating that classroom speech was the reason for removal.<sup>168</sup> While this axe may be used to protect impressionable children, it may also have the undesirable effect of discouraging any teacher creativity or spontaneity.<sup>169</sup>

Because *Garcetti* is not concerned with protecting students from inappropriate material, it is completely inappropriate for teacher classroom speech cases. Nonetheless, the Supreme Court's language in *Garcetti* is broad enough to apply in these cases.<sup>170</sup> Because this case is a natural extension of *Pickering*, most courts that apply *Pickering* will probably adopt *Garcetti* for teacher classroom speech cases.

### *B. The Pickering Public Concern Test*

Because *Pickering* dealt with substantially similar facts, it presents the same difficulties as applying *Garcetti* to teacher classroom speech. Nonetheless, four circuits have already decided to apply *Pickering* in this setting.<sup>171</sup> Unfortunately, only the Fourth

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<sup>167</sup> See Julia R. Lissner, *Stop the Presses! Seventh Circuit Censors College Student Media*, 1 SEVENTH CIRCUIT REV. 182, 182-83 (2006), at <http://www.kentlaw.edu/7cr/v1-1/lissner.pdf>.

<sup>168</sup> See *Mayer v. Monroe County Cmty. Sch. Corp (Mayer II)*, 474 F.3d 477, 479 (7th Cir. 2007).

<sup>169</sup> See *Weiner*, *supra* note 150, at 600.

<sup>170</sup> See *Garcetti*, 126 S. Ct. at 1962.

<sup>171</sup> *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1053 (6th Cir. 2001); *Boring v. Buncombe Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998); *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 797 (5th Cir. 1989); *Goldwasser v. Brown*, 417 F.2d 1169, 1176-77 (D.C. Cir. 1969).

Circuit has acknowledged the circuit split and offered reasons for its decision to apply *Pickering*.<sup>172</sup>

The Fourth Circuit's decision in *Boring v. Buncombe* involved a drama teacher who was punished for producing a school play that violated the school's controversial materials policy.<sup>173</sup> The court categorically denied protection to official teacher speech. The *Boring* majority explained that its primary concern was to ensure that the school board, not teachers, controlled the curriculum.<sup>174</sup> The court applied *Pickering* because it specifically dealt with public employee speech, while *Hazelwood* dealt with student speech.<sup>175</sup> In addition, *Hazelwood* would force courts to make curricular decisions which should rest with the school board.<sup>176</sup> The court worried that teachers could harass school officials by requiring them to justify every curricular decision in court. This result would be un-democratic because each judge would have a different opinion about what a legitimate pedagogical concern is.<sup>177</sup> This argument is not specific to *Hazelwood* because school boards may be equally burdened by arguing that a teacher's speech is not a matter of public concern.<sup>178</sup>

The *Pickering* test is inappropriate in a school setting because it focuses on the wrong elements. The "public concern" element is ill suited for teacher classroom speech.<sup>179</sup> This speech is neither ordinary workplace speech, nor public debate. It is not difficult to imagine such a test casting a "pall of orthodoxy over the classroom"<sup>180</sup> such that a teacher may only discuss well known issues or opinions. The "workplace efficiency" element is also inappropriate because it

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<sup>172</sup> See *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998).

<sup>173</sup> *Id.* at 366-67.

<sup>174</sup> *Id.* 370-71.

<sup>175</sup> See *id.* at 373 (Luttig, J. dissenting).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 371 (Wilkinson, J. concurring).

<sup>178</sup> See *id.* at 378-79 (Motz, J. dissenting); see, e.g., *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036 (6th Cir. 2001).

<sup>179</sup> See *Boring*, 136 F.3d at 378 (Motz, J. dissenting).

<sup>180</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

focuses on the effect of the speech on fellow teachers rather than students.<sup>181</sup> For example, because drug legalization is a hotly debated topic it is certainly a matter of public concern. If an elementary school teacher raises this topic in class it should not prevent other teachers from teaching their students. Accordingly, under *Pickering* a teacher may discuss the merits of drug legalization in an elementary school class.<sup>182</sup> The *Pickering* test was simply not designed for teacher classroom speech because it does not account for the fact that classroom speech involves young students.<sup>183</sup>

If the Seventh Circuit had applied *Pickering*, it would have likely concluded that Mayer's speech was protected. It would have to conclude that the war in Iraq is a matter of public concern.<sup>184</sup> It would next have to apply the *Pickering* balancing test, which weighs Mayer's free speech interest against the school's interest as an employer.<sup>185</sup> Because the school board did not bring forth any evidence that Mayer's comments hurt teacher efficiency or the workplace environment, the court would be hard pressed to rule that Mayer's speech was not protected.

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<sup>181</sup> See *Boring*, 136 F.3d at 378 (Motz, J. dissenting).

<sup>182</sup> See *Cockrel*, 270 F.3d at 1051.

<sup>183</sup> See Daly, *supra* note 3, at 52; Emily Holmes Davis, Note and Recent Development, *Protecting the "Marketplace of Ideas": The First Amendment and Public School Teachers' Classroom Speech*, 3 FIRST AMEND. L. REV. 335, 361-64 (2005); *Piggee v. Sandburg*, 464 F.3d 667, 672 (2006).

<sup>184</sup> The parties agreed as much. *Mayer v. Monroe County Cmty. Sch. Corp (Mayer I)*, 1:04-CV-1695-SEB-VSS, 2006 U.S. Dist. LEXIS 26137, at \*1, \*33 (S.D. Ind. Mar. 10, 2006).

<sup>185</sup> The district court avoided this step by ignoring the "public concern" part of the *Pickering* test, and ruling that Mayer was speaking as a public employee, rather than a private citizen. *Id.* at \*39.

### C. *The Hazelwood Legitimate Pedagogical Concern Test*

Four circuits apply *Hazelwood* to teacher classroom speech.<sup>186</sup> Unfortunately, none offers reasons for this preference. Although *Hazelwood* dealt with student speech, it is the Supreme Court's most recent case dealing with classroom speech.<sup>187</sup> Unlike *Pickering*, it accounts for school boards' needs to protect students from inappropriate material.<sup>188</sup>

Under *Hazelwood*, a school could prevent a student from expressing disapproval of the war in Iraq if it had a legitimate pedagogical reason.<sup>189</sup> The Supreme Court designed this test to balance the speaker's right to self expression against the school's need to protect students from speech "inconsistent with 'the shared values of a civilized social order.'"<sup>190</sup> When a teacher speaks in the classroom the same conflict of interests arises.<sup>191</sup>

The Fourth Circuit has criticized courts applying *Hazelwood* to teacher classroom speech because these courts force judges to monitor school board decisions.<sup>192</sup> This result is un-democratic because judges must determine what a "pedagogical concern" is rather than the school board.<sup>193</sup> The Fourth Circuit's argument ignores the fact that courts already monitor school board decisions. In *Hazelwood*, the Supreme

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<sup>186</sup> See *Lacks v. Ferguson Reorganized Sch. Dist.*, R-2, 147 F.3d 718, 724 (8th Cir. 1998); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994); *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 755-79 (10th Cir. 1991).

<sup>187</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-274 (1988).

<sup>188</sup> See Kuhn, *supra* note 61, at 1014 (asserting that Courts apply *Hazelwood* to teacher classroom speech because it better recognizes the interests of the state as educator, while *Pickering* focuses on the state as employer).

<sup>189</sup> *Hazelwood*, 484 U.S. at 271-72.

<sup>190</sup> *Id.* at 272 (citing *Bethel v. Fraser*, 478 U.S. 675, 683 (1986)).

<sup>191</sup> See Kuhn, *supra* note 61, at 1014-15 (explaining why the *Hazelwood* test is an appropriate test for teacher classroom speech).

<sup>192</sup> See *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 371 (4th Cir. 1998) (Wilkinson, J. concurring).

<sup>193</sup> See *id.*

Court rejected the argument that courts can never interfere with school boards' curricular decisions; a school board must justify any curricular decision with some legitimate pedagogical reason.<sup>194</sup> It should not matter if a curricular decision is challenged by a student or a teacher. The Supreme Court was likely motivated by the belief that unbounded discretion to school boards is far more dangerous than occasionally forcing schools to justify curricular decisions.<sup>195</sup>

Suppose a school board decided that all teachers must teach creation science rather than evolution, and it fired a teacher and expelled a student for discussing evolution in the classroom.<sup>196</sup> The teacher and student sue. In this case, the Fourth Circuit would reach a bizarre result. It would invalidate the school board's curricular decision because it violated the Establishment clause,<sup>197</sup> and would reinstate the student because the school board violated his First Amendment right to expression.<sup>198</sup> Nonetheless, it would uphold the school board's decision to fire the teacher because it would be undemocratic to monitor school board decisions.<sup>199</sup> There is no principled reason for not applying *Hazelwood* uniformly and avoiding this bizarre result.

Under *Hazelwood*, the Seventh Circuit would probably conclude that the school board violated Mayer's rights. The court would probably explain that a school board may prevent teachers from expressing political opinions in the classroom because the Supreme Court has stated that schools may refuse to sponsor speech that "associate[s] the school with any position other than neutrality on matters of political concern."<sup>200</sup> The Seventh Circuit has interpreted

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<sup>194</sup> See *Hazelwood*, 484 U.S. at 273.

<sup>195</sup> See *id.* (explaining that although educators, not judges, should educate the nation's youth, courts may still need to intervene to protect First Amendment rights).

<sup>196</sup> This hypothetical is based on *Edwards v. Aguillard*, 482 U.S. 578 (1987).

<sup>197</sup> See *id.* at 596-97.

<sup>198</sup> See *Hazelwood*, 484 U.S. at 273.

<sup>199</sup> See *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 371 (4th Cir. 1998) (Wilkinson, J. concurring).

<sup>200</sup> *Hazelwood*, 484 U.S. at 272.

this language to mean that a school can maintain neutrality by censoring controversial viewpoints in school-sponsored speech.<sup>201</sup> Nonetheless, because there is no evidence that the school board gave Mayer prior notice that she could not express her opinion, it could not fire her. If she had later expressed a similar controversial opinion the school board could have fired her.

#### *D. Distinguishing Piggee*

The *Mayer* Court could have decided not to distinguish *Piggee*.<sup>202</sup> The court based its distinction on the fact that *Piggee* was not hired to preach against homosexuality, but Mayer was hired to discuss current events.<sup>203</sup> While this distinction is factually accurate, giving it legal significance leads to bizarre results.

Because Mayer expressed her disapproval of the war in Iraq during a current events class, her speech is categorically unprotected.<sup>204</sup> Suppose Mayer had expressed her opinion during math class. Since Mayer's opinion was outside the scope of her duty to teach math, her speech would not be categorically unprotected.<sup>205</sup> The court would have to apply the *Piggee* test: the school could punish her only if her opinion was "nongermane" speech that "impede[d] the school's educational mission."<sup>206</sup> Because her comments were very brief and not overbearing, a court might conclude that her speech should be protected.<sup>207</sup> This result would be especially bizarre if Mayer actually taught both classes—she could opine on the war in the morning during math class, but she will be fired if she opines on the

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<sup>201</sup> See *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1542 (7th Cir. 1996) (explaining that schools can suppress some viewpoints).

<sup>202</sup> *Piggee v. Sandburg*, 464 F.3d 667 (2006).

<sup>203</sup> *Mayer v. Monroe County Cmty. Sch. Corp (Mayer II)*, 474 F.3d 477, 480 (7th Cir. 2007).

<sup>204</sup> See *id.*

<sup>205</sup> See *id.* at 480 (explaining that *Garcetti* did not apply in *Piggee* because the teacher was discussing an unassigned topic).

<sup>206</sup> See *Piggee*, 464 F.3d at 672.

<sup>207</sup> See *id.*

war in the afternoon during current events class. The court could have avoided this situation if it had consistently applied either the *Piggee* or *Hazelwood* test, i.e. explain that the school must provide a legitimate pedagogical reason for firing Mayer regardless of whether the speech occurred in math class or current events class.

### *E. Other Tests*

Commentators have offered several different tests which the *Mayer* could have applied. While these tests have less support from case law, there may be policy reasons for adopting one of these tests.

Walter Kuhn has proposed a hybrid *Pickering/Hazelwood* test that is designed to maximize protection afforded to teachers.<sup>208</sup> Restrictions on process are evaluated under *Hazelwood*, and restrictions on content are evaluated under *Pickering*.<sup>209</sup> For example, Mayer's decision to discuss the war in Iraq was a content based decision so the school can only punish her for the speech if it does not touch on a matter of public concern. Since the war in Iraq is a matter of public concern, the school could not punish the speech. Mayer's structuring of the class consists of process decisions which the school may punish if it has a legitimate pedagogical reason. Kuhn's test has two main problems: the distinction between content and process restrictions is frequently vague,<sup>210</sup> and it is far too deferential to teachers. If the Seventh Circuit adopted the test, it would have to reverse *Webster* and rule that teachers may refuse to teach content specified in the curriculum so long as they discuss other content which touches upon matters of public concern.<sup>211</sup>

Karen Daly has proposed a more moderate mixed procedural-substantive test which accounts for the amount of notice school boards

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<sup>208</sup> See Kuhn, *supra* note 61, at 1020-21.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 1023.

<sup>211</sup> See *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990).

provide to teachers.<sup>212</sup> When a school has explicitly prohibited specific speech, the teacher has no protected right to engage in that speech. When a school has explicitly authorized specific speech, the teacher is immunized from action. In the great majority of cases where notice is ambiguous, courts should apply a modified *Hazelwood* test.<sup>213</sup>

When a reasonable teacher should have known that the school board has prohibited certain speech, courts should presume that the school board has a legitimate pedagogical reason for prohibiting the speech.<sup>214</sup> When a reasonable teacher would expect certain speech to be protected, the judicial presumption would shift in favor of the teacher. The school can rebut this presumption by presenting evidence that the speech had no educational purpose, or had a detrimental effect on students' Constitutional rights.<sup>215</sup> This test might also be too deferential to teachers. By categorically protecting approved teacher speech this test prevents school boards from re-evaluating decisions.

#### V. WHY *MAYER* SHOULD HAVE APPLIED *HAZELWOOD*

Under *Mayer*, public schools now have carte blanche to fire any teacher who expresses an unpopular opinion.<sup>216</sup> This is a very powerful tool for protecting children from inappropriate material. Unfortunately, this tool is unnecessary and creates numerous practical problems.<sup>217</sup>

The court applied *Garcetti* because it wanted to ensure that school boards, not teachers or judges, make decisions about the school curriculum. However, this concern does not justify a per se rule that teacher classroom speech is unprotected. If the school had also suspended a student for discussing the war in Iraq in class, the court

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<sup>212</sup> See Daly, *supra* note 3, at 53-54.

<sup>213</sup> *Id.* at 54-55.

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

<sup>215</sup> *Id.*

<sup>216</sup> See *Mayer v. Monroe County Cmty. Sch. Corp (Mayer II)*, 474 F.3d 477, 480 (7th Cir. 2007).

<sup>217</sup> See *supra* sec. III.

would evaluate whether this constraint on student speech is justified under *Hazelwood*, i.e. a judge would evaluate whether the school board had a legitimate pedagogical reason for censoring discussion of the war in Iraq.<sup>218</sup> Thus, *Mayer* provides no added immunity to school boards, it just encourages students to challenge school board decisions rather than teachers.<sup>219</sup> The Seventh Circuit has created no benefit for school boards, but it has created numerous problems for teachers, students, and schools as outlined above in Section III.

Because *Garcetti* and *Pickering* dealt with significantly different concerns, the Seventh Circuit should not have applied that line of cases in *Mayer*. The court should have maintained its earlier distinction between teacher employee speech which is evaluated under the *Pickering* line,<sup>220</sup> and teacher classroom speech which is evaluated under *Hazelwood*.<sup>221</sup>

This approach avoids the numerous problems created by a per se rule against protecting classroom speech.<sup>222</sup> In addition, the *Hazelwood* test more appropriately balances parents' interests in protecting students from inappropriate material, and teachers' interests in protecting their First Amendment rights.<sup>223</sup> Although it may import some judicial oversight into school boards' curricular decisions, the modest requirements of the test should not be burdensome.

Furthermore, the court should consider the amount of notice provided to teachers regarding prohibited speech.<sup>224</sup> While there is

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<sup>218</sup> See note 196 and accompanying text.

<sup>219</sup> The next case in this line may be brought by a student claiming a First Amendment right to hear from and discuss with a teacher. See *Daly*, *supra* note 3, at 31 (discussing the concept of a student's right to hear).

<sup>220</sup> See *Trejo v. Shoben*, 319 F. 3d 878 (7th Cir. 2003); *Dishnow v. Sch. Dist. of Rib Lake*, 77 F.3d 194 (7th Cir. 1996).

<sup>221</sup> *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990).

<sup>222</sup> See *supra* note 119 and accompanying text.

<sup>223</sup> See *Daly*, *supra* note 3, at 53.

<sup>224</sup> See *Lacks v. Ferguson Reorganized Sch. Dist., R-2*, 147 F.3d 718, 723 (8th Cir. 1998); *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Daly*, *supra* note 3, at 53.

little case law to support Karen Daly's shifting presumption test, courts should consider notice when evaluating schools' pedagogical concerns.<sup>225</sup> Some notice to teachers is prima facie evidence that the school does in fact have a legitimate pedagogical interest in censoring the speech. When the school retaliates without any prior notice, as in Mayer's case, the school will probably have a more difficult time explaining its pedagogical interest.

Under this approach, the court should have remanded the case to the trial court to determine if the school had a legitimate pedagogical interest in terminating Mayer. While the school may have strong arguments to support its decision, the Seventh Circuit should require the school to explain them in court. Mayer and her students are at least entitled to know why the short classroom discussion was so devious that it rendered Mayer unfit for teaching.

#### CONCLUSION

The Seventh Circuit has overruled the balance struck in *Webster v. New Lenox* between a teacher's rights and a school board's power to control the curriculum. While its opinion is literally consistent with *Garcetti v. Ceballos*, it completely ignores the fact that discussions between teachers and students are very different from discussions between fellow employees. *Mayer v. Monroe* is so deferential to school boards that few teachers will even attempt to challenge school board decisions in the future. Thus, the Seventh Circuit will probably not have an opportunity to revisit this decision any time soon. In the meantime, teachers in the Seventh Circuit will have to shed the freedom of speech at the classroom door.

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<sup>225</sup> See Daly, *supra* note 3, at 53.