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Tinkering with the First Amendment for Teachers

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Does a public high school teacher have a First Amendment right to select books and methods of classroom instruction without interference from public officials? The U.S. Supreme Court expressly left that question open in the 2006 case of *Garcetti v. Ceballos*.

In that 5–4 decision, the Court held that public employees are not entitled to First Amendment protection when they speak in accordance with their employment responsibilities. While *Garcetti* involved an assistant district attorney second guessing the decisions of his supervisor, both Justice Kennedy writing for the majority, and Justice Souter in dissent, raised the ruling's implication on scholarship and teaching.

In the five years since the case, the federal circuit courts, including the Sixth Circuit, have applied *Garcetti* to deny constitutional protection for out-of-class speech by public school teachers to their superiors. And recently, a panel of the Sixth Circuit addressed the effect of *Garcetti* on public school teachers' in-class speech in *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*

The Sixth Circuit's answer, which has far-reaching consequences for school districts across the country, was straightforward—public school teachers have no First Amendment protection over their curriculum choices.

How *Garcetti* Affects First Amendment Rights of Public Employees

The Supreme Court's decision in *Garcetti* refines the First Amendment analysis developed in two previous decisions, *Pickering v. Bd. of Educ. of Township High Sch. Dist.* and *Connick v. Meyers*. *Pickering* can best be described as *Tinker* for teachers (*Tinker v. Des Moines Indep. Sch. Dist.* holding that students have a First Amendment right to speech in public schools).

In *Pickering*, a public high school teacher successfully asserted a First Amendment claim when he wrote a letter to the local newspaper criticizing the school board's allocation of funds between

academic and athletic programs. In the Court's view, the teacher commented on a matter of public concern, which could not be a basis for his dismissal from public employment.

Later, in *Connick*, the Court rejected an assistant district attorney's First Amendment claim after she complained to her superiors about office morale. The assistant district attorney, moreover, spoke only to her superiors, within the confines of the district attorney's office. Under those facts, the Court held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest...a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."

From the Court's decisions in *Pickering* and *Connick*, a two-step analysis emerged. The threshold question is whether the public employee discussed a matter of public concern. If the public employee discussed only a matter of personal interest, the employee does not receive First Amendment protection, and the analysis ends there. A public employee that voices displeasure with their supervisor's decisions, for example, will not receive First Amendment protection.

Assuming the threshold question is met, the second inquiry requires the court to consider "whether the government entity had an adequate justification for treating the employee differently from any other member of the general public." In other words, once the court concludes that the public employee spoke on a matter of public concern, it must then balance the government entity's justification for limiting the employee's speech versus the employee's free speech right.

But *Garcetti* adds a third consideration, whether the public employee speaks "pursuant to" his official duties. A public employee, therefore, can discuss a matter of public concern, but still may not be entitled to First Amendment protection because he discussed a matter related to his job duties. The goal underlying this additional consideration is to treat public employees "like any member of the general public." Like private sector employees, public employees do much of their talking within their place of employment, so a complete bar restricting public employees from speaking treats them differently from their private sector counterparts.

Public employees, moreover, by engaging in speech activity, promote the public interest by providing "well-informed views" necessary for an "informed and vibrant dialogue in a democratic society." Public employees can make government entities accountable by notifying the public about the behavior or policies of their elected officials.

But at the same time, a public employee "by necessity must accept certain limitations on his or her freedom."

The main task of public employees is to provide timely and efficient public service. And without a "significant degree of control over their employees' words and actions," it is unlikely that government entities can provide needed services to the public. When public employees speak publicly, they can sometimes express views contrary to government policy, or hamper the performance of government functions.

Government entities thus need some control over how public employees perform their jobs, and by affording those employees unfettered constitutional protection, every government employment decision would become the basis of a constitutional cause of action.

The *Pickering/Connick* framework, as modified by *Garcetti*, proposes to strike a balance between the free speech interests of public employees and government entities, but in the context of school districts, perhaps *Garcetti* makes the *Pickering/Connick* framework too speech-restrictive. At the very least, applying *Garcetti* to public school teachers may have unintended consequences.

Explaining Evans-Marshall

The Sixth Circuit's decision in *Evans-Marshall* now applies *Garcetti* to public school teachers' in-class speech. In the case, Shelley Evans-Marshall, a public high school English teacher, challenged her termination by an Ohio school district as a violation of the First Amendment under 42 U.S.C. §1983. Her termination came after parents complained to the school board about her book selection for students, which included *Heather Has Two Mommies* by Lesléa Newman, and *Siddhartha* by Hermann Hesse.

The district court granted summary judgment to the school district under *Pickering/Connick* balancing, which led to the Sixth Circuit's consideration of the case.

Evans-Marshall, who preceded pro se, never had a chance. While the panel recognized that "teachers, like students, do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," it nonetheless held that she was not entitled to First Amendment protection under *Garcetti*.

In the panel's view, Evans-Marshall's speech—her book selections for students—only occurred because of "the Board's decision to hire her as a public school teacher." And because the school board hired her, it had "ultimate responsibility for what goes on in the classroom...giving it a say over what teachers may (or may not) teach...." Thus, there was "no relevant analogue" between "her in-class curricular speech and speech by private citizens."

Nor were there any similarities between Evans-Marshall, as a public high school teacher, and college professors. Dismissing Justice Souter's concern about "academic freedom" in *Garcetti*, the panel noted that "[a]s a cultural and a legal principle, academic freedom was conceived and implemented in the university out of concern for teachers who are also researchers or scholars—work not generally expected of elementary and secondary school teachers."

Post-secondary institutions thus "occupy a special niche in our constitutional tradition and the constitutional rules applicable in higher education do not necessarily apply in primary and secondary schools...."

At first glance, the Sixth Circuit's analysis seems to reflect basic common sense. School boards are essentially regulatory agencies that create curriculum guidelines and monitor individual teachers' compliance with those guidelines. Because state and federal aid is often dependent on test scores in a given school district, it makes sense that a school board needs flexibility to ensure that teachers are teaching subjects in a way to maximize state and federal funding.

School board members, moreover, are elected public officials that are responsible to the parents of students. It must follow, then, that when a teacher decides to buck guidelines imposed by the school board, or acts in a way that subjects the school district to scrutiny by parents, the board can address the teacher's conduct without fear of a constitutional claim.

The school board, after all, is the teacher's employer, and can discipline the teacher accordingly.

Eliminating the Distinction

But if *Garcetti* applies to public school teachers, what about out-of-class speech by teachers related to classroom instruction and other issues affecting the school district?

After more than 40 years of being on the books, the natural inclination is to say that *Pickering* would control. We entrust public schools to teach children how to read, write and think critically—all the things necessary to make them responsible and engaged citizens.

What teachers have to say about issues affecting their instruction and the school district seem to be matters of public concern. To say, as the Sixth Circuit's straightforward application of *Garcetti* necessarily implies, that public school teachers have no First Amendment right to address those issues seems a bit extreme.

Assume that an inner-city high school principal is upset that the school board allocates more funds to schools with a majority white, upper-class student body than schools dominated by African-American and Latino students. He cannot operate his school effectively because

of the funding disparity. He wants equal funding between the schools and decides to take matters into his own hands.

The principal has two options. He can go directly to the school board and attempt to resolve the matter internally. The school board, at best, will attempt to equalize funding between the schools.

But what happens if the school board is not receptive to the idea of equalizing funding? Or worse, what if the principal is reprimanded or terminated for even raising the issue before the board? Hasn't the principal discussed a matter of public concern—differences in school funding possibly based on race—entitling him to First Amendment protection? Wouldn't the public's interest in preventing possible race discrimination outweigh the school board's interest in controlling the principal's speech?

While the answer to the latter two questions is undoubtedly yes under the *Pickering/Connick* (and now *Garcetti*) framework, the principal is still precluded from obtaining relief. This is because although the principal spoke as a public employee to his supervising authority about a matter of public concern—racially discriminatory school funding—it was still in the context of his job duties; mainly, the administrative operation of a school.

But consider the principal's second option. Now assume that he writes a letter to the local newspaper deploring how the school board uses school funds in a racially discriminatory manner. Under that scenario, he is likely entitled to First Amendment protection, because like the teacher in *Pickering*, his speech resembles that of a private citizen, rather than a public employee acting in his professional capacity.

Making the public employee's job duties the constitutional touchstone for First Amendment protection seems in some ways, as Justice Stevens described, "an odd place to draw a distinction...." If a teacher instead internally complains to the school board about racially discriminatory school funding, he would likely be entitled to constitutional protection under *Pickering/Connick*. The teacher would presumably receive First Amendment protection in that instance because his job duty of classroom instruction has only a slight relationship to the administrative operation of a school, if any at all.

This means, therefore, that school officials with the most intimate knowledge and expertise will not receive constitutional protection when they speak internally on an issue their job requires them to address.

This also assumes, of course, that the "odd" distinction of making a public employee's job duties the basis of constitutional protection noted by Justice Stevens survives after *Garcetti*.

The distinction between job duties has a direct implication on the artificial difference between in-class and out-of-class speech by public school teachers.

Four circuits—the Second, Fifth, Seventh and Tenth—have broadly read *Garcetti's* "pursuant to" language to hold that the First Amendment does not protect any speech by a public school teacher to his superiors that is "in furtherance" of his duties. And months before its decision in *Evans-Marshall*, in a case involving a public school teacher's out-of-class complaints to her supervisors, the Sixth Circuit held that "speech by a public employee made pursuant to ad hoc or de facto duties not appearing in any written job description is nevertheless not protected if it owes its existence to [the speaker's] professional responsibilities."

What the courts have done to overcome the oddity identified by Justice Stevens, is to read the job duties of public school teachers so broadly that any internal speech to their superiors will be inevitably connected to their job duties.

Under that view, the application of *Garcetti* applies equally to a public school teacher's in-class and out-of-class speech. To illustrate this point, consider the example of the teacher internally complaining to the school board about racially discriminatory school funding posed before. Under the former *Pickering/Connick* framework, there would be little question that the public school teacher would receive First Amendment protection.

But under the broad reading of *Garcetti*, where a public school teacher's internal speech to his superiors will nearly always comprise speech "in furtherance of his duties," or "pursuant to" his professional responsibilities, the teacher's out-of-class complaint about the school board's discriminatory funding will somehow relate to his ability to "properly execute his duties," (i.e., his ability to teach his class).

Public school teachers under a broad reading of *Garcetti*, therefore, have no First Amendment protection for any speech activity taken in their professional capacity, regardless of whether it is in-class or out-of-class. At the very least, the Sixth Circuit's rulings in *Fox v. Traverse Cty. Area Pub. Sch. Bd. of Educ.* and *Evans-Marshall* have that precise effect.

What Remains for Teachers After Evans-Marshall and Garcetti

The lesson of *Evans-Marshall* and *Garcetti* seems to be that if public school teachers decide to speak out, two things matter.

First is the forum for the speech. If a teacher decides to go internal with his complaints, he is, just like private citizens in other professions, subject to his employer's disciplinary actions.

Second is that information must be a true matter of public concern. If a teacher is mad about a paycheck or her relationship with fellow teachers, and goes public with that information, neither is a matter the public will be worried about; thus, she is not entitled to constitutional protection under *Connick*. But the principal, who alleges racially discriminatory school funding, does have a public concern sufficient for constitutional protection. If the school board is already acting in a racially discriminatory matter, why would an internal complaint by a principal matter? But when that concern is relayed to the public, where the school board is subject to negative publicity and electoral consequences, the school board potentially faces more pressure to modify its policy than a principal can inflict alone.

Further, *Evans-Marshall* is one step toward treating public school teachers as private employees. Teachers are not entitled to First Amendment protection because they are mere public employees; they are entitled to First Amendment protection because they engage in speech activity like any other private citizen. The closer their speech resembles that of a private citizen, the more likely public school teachers will receive First Amendment protection. And if the public finds the issue sufficiently compelling, then the public can resolve it by requesting changes from the school board or voting school board members out of office.

This does not mean, however, that whether the teacher is entitled to constitutional protection depends on the reactions of the public. It only means that if the issue is of public importance, perhaps the public should have some input in deciding how to address it before the school board reaches a final conclusion.

Imagine a scenario where the principal complains about racially discriminatory school funding internally, the school board changes its policies, but the issue never reaches the public. Shouldn't the public have that information for the next school board meeting, or better yet, for the next election? The public disclosure through the holdings of *Evans-Marshall* and *Fox* go a long way toward ensuring greater accountability by school board officials to the public.

If there is one redeeming quality of those decisions, it is that they nearly compel a public school teacher to go public with his complaints when they relate to a matter of public concern. There is a compelling argument, then, that the cases actually *increase* speech instead of curtailing it. By forcing public school teachers to raise issues in the public arena in exchange for constitutional protection, *Garcetti*, and the Sixth Circuit's interpretation of it, guarantees that the public will have well-informed information to consider and debate.

The Sixth Circuit's interpretation of *Garcetti* certainly has its flaws. On one end, the combined effect of *Fox* and *Evans-Marshall* precludes public school teachers from constitutional protection when discussing issues of vital importance with their superiors. At least internally, the Sixth Circuit's application of *Garcetti* in *Fox* and *Evans-Marshall* creates a speech-chilling rule for public school teachers. On the other hand, *Fox* and *Evans-Marshall* promote more speech by requiring public school teachers to do what any other private citizen has to do for constitutional protection: speak publicly.

But the Sixth Circuit's effort to delicately balance the constitutional rights of public school teachers versus the interests of school boards and the public may raise more questions than it answers. Will a court mechanically apply *Evans-Marshall* to academia, despite the Sixth Circuit's effort to distinguish public school teachers from college professors? And perhaps more importantly, will the Supreme Court scale back the circuit courts' broad reading of *Garcetti*'s "pursuant to" language in the near future?

The Sixth Circuit's interpretation of *Garcetti* is undoubtedly a school board-friendly rule. After *Fox* and *Evans-Marshall*, public school teachers will have a difficult time asserting their First Amendment rights regardless of where the speech occurs. But even before *Garcetti*, the likelihood of a public school teacher prevailing under the *Pickering/Connick* framework was indeed low.

The personal versus public concern distinction recognized in *Connick* alone often precludes a great majority of cases from getting to trial. Only the exceptional case has been allowed to go forward, and at least for public school teachers, *Fox* and *Evans-Marshall* will only maintain that trend.

Aside from limiting the number of suits that will proceed past summary judgment, *Fox* and *Evans-Marshall* create a legal environment where federal courts are deferential to the personnel decisions made by school boards. This deferential approach recognizes that school boards have the paramount responsibility of educating children, while remaining accountable to the public and state and federal agencies.

The approach also reflects the reality that speech activity by public school teachers, for the most part, is facilitated through the school board. As the Sixth Circuit recognized in *Evans-Marshall*, school boards enable public school teachers to speak by hiring them. Because a teacher's in-class and out-of-class speech may expose the school board to intense criticism from the public and state and federal agencies, *Fox* and *Evans-Marshall* affords school boards immense discretion to take disciplinary action.

While *Fox* and *Evans-Marshall* do not provide a clear analytical framework for school boards to

use, both cases do suggest some considerations school boards should consider in order to take advantage of *Garcetti*.

First, school boards should encourage—indeed *require*—teachers to use internal complaint and dispute resolution mechanisms. Second, school boards should adopt open-door policies that promote dialogue between public school teachers and their superiors. This, in turn, will make it more likely that a public school teacher's speech will resemble the unprotected speech in *Connick*.

Lastly, school boards should compel principals to be proactive in supervising and approving lesson plans drafted by teachers. By taking an early and proactive stand against controversial books or instruction methods, school boards and principals can minimize the risk that a teacher's in-class speech and curriculum becomes the source of intense public scrutiny and a lawsuit.

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