'Stupid but Constitutional': Courts Continue to Limit Teachers' Curricular-Related Speech*

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Education Law Into Practice
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Most secondary and elementary teachers understand that their academic freedom rights in the classroom are somewhat circumscribed. In contrast to university professors, who are "entitled to freedom in the classroom in discussing their subject" under the academic freedom standards articulated by the American Association of University Professors in 1940, K-12 teachers recognize they are constrained in the classroom by prescribed curriculum guidelines, standardized tests, and mandated textbooks.[1]

Nevertheless, most K-12 teachers probably believe they are allowed a certain amount of flexibility when instructing students and are free to go "off script" from time to time to exploit an unanticipated classroom event. A teacher in a study of academic freedom referring to the teachable moments that arise in classes, stated, "I think instructional methods should have more play."[2] They might even believe the First Amendment gives them some freedom to make pedagogical choices about the best way to interact with their students. In fact, if teachers were required to teach entirely by rote, it is debatable whether highly qualified individuals would want to be teachers. A Washington court sitting *en banc* seemed to support this proposition writing, "teachers should have some measure of freedom in teaching techniques employed." [3]

But in 2006, the United States Supreme Court issued an important decision that severely restricted the First Amendment rights of public employees. In *Garcetti v. Ceballos*, the Court plainly ruled that public employees enjoy no First Amendment rights whatsoever when they are speaking in their official capacities in the workplace.[4] In *Garcetti*, the Court explained that its decision may not apply "in the same manner to a case involving speech related to scholarship or teaching."[5] Several federal courts, however, have interpreted *Garcetti* to mean that public-school educators have no constitutional protection when they are speaking on the job, even when they are speaking in their classrooms related to pedagogical or curricular issues.[6] And last year, in a brief opinion, the Seventh Circuit Court of Appeals ruled that the Chicago Board of Education could discipline an elementary school teacher for giving an "impromptu lesson on racial epithets" to his sixth-grade class.[7] We examine the recent Seventh Circuit Court opinion and discuss some implications.

Brown v. Chicago Board of Education: "Stupid but Constitutional"

In the 2016 *Brown v. Chicago Board of Education* case, the Chicago school board suspended Lincoln Brown, a sixth-grade schoolteacher, after Brown's principal overheard him use the word "nigger" in front of students.[8] Brown had intercepted a note from a student that quoted music lyrics that included that odious word. After reading the note, Brown immediately stopped his grammar lesson to explain to his pupils just how offensive the word is.[9]

Gregory Mason, the school principal, heard Brown use the word "nigger" in front of his students and initiated disciplinary action.[10] Mason charged Brown with violating a school policy against "[u]sing verbally abusive language to or in front of students," and suspended Brown for five days. Brown appealed Mason's decision to the school board; it upheld the decision to discipline him.[11]

Brown then sued, arguing that the school board had violated his First Amendment rights. Brown lost his case at the trial court level, and the Seventh Circuit Court of Appeals affirmed the lower court's ruling. The appellate court clearly sympathized with Brown, describing the incident as "a well-intentioned but poorly executed discussion of why such words are hurtful and must not be used."[12] Nevertheless, the Supreme Court's earlier *Garcetti* decision and prior decisions in the Seventh Circuit clearly established that Brown had suffered no constitutional violation. Brown had made

his comments as a teacher, not a citizen, the court emphasized; thus, his suspension did not implicate the First Amendment.[13]

The Seventh Circuit began its opinion in this case by quoting the late Justice Antonin Scalia. Scalia had once said that he wished all federal judges were given a stamp that read "stupid but constitutional."[14] "Brown's real frustration," the court wrote, "seems to be that the policy does not distinguish between using the word [nigger] in an educational manner from its use as a racial slur directed toward a student or a colleague."[15] And while the court stated that it understood Brown's frustration, "his only solace is in Justice Scalia's stamp."[16]

Other Related Circuit Court Decisions

The Sixth and Seventh Circuits took similar approaches to teacher classroom-related speech. For example, the Sixth Circuit found that a teacher does not have a First Amendment right to curriculum choices in the classroom. In this case, a high school English teacher in Ohio assigned Ray Bradbury's *Fahrenheit 451* and then led a discussion about book censorship.[17] Within this discussion, some students analyzed and discussed banned books that were included on the American Library Association list, including *Heather has Two Mommies*. She had also assigned *Siddhartha*. Several parents complained to school officials about this banned book assignment and took particular issue with having students read *Siddhartha*

because of the book's explicit language and sexual themes.[18] After receiving these complaints, the district decided not to renew her contract. The teacher sued, alleging that school officials had violated her First Amendment rights by not allowing her to select books and methods in her courses.[19] The Sixth Circuit upheld the decision to not renew her contract because she was speaking pursuant to her official job duties and not as a citizen.

Likewise, in Indiana, a teacher's contract was not renewed when the teacher mentioned to her class during a social studies current event lesson that she was opposed to the Iraq War.[20] In her town protestors often gathered downtown to protest the war every week. When a student asked her if she participated in these rallies, she noted that when she saw protestors' signs that said "honk for peace" that she would honk.[21] She argued that school officials violated her First Amendment rights.

The Seventh Circuit Court of Appeals disagreed, ruling that she was speaking pursuant to her official job duties.[22] Because she was hired to teach the curriculum, she was not permitted to give such political opinions in class. Specifically, the court observed that when a teacher teaches, "the school system does not 'regulate' [that] speech as much as it *hires* that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary."[23] These two decisions alongside the recent *Brown* opinion in the Seventh Circuit seem to ignore the unique context of speech in an academic setting that was highlighted in the *Garcetti* decision.

Other appellate courts have applied *Garcetti* in rejecting school employees' speech claims, though not in the context of curricular and pedagogical choices. For example, in the Fifth Circuit, when an athletic director who was also the head football coach asked the school's office manager about funds that were appropriated to athletics, he was not given the information.[24] As a result, he wrote a memorandum to the school's office manager and principal to question why he was not given the information he requested.

Four days after writing the memorandum, he was removed as the athletic director and later his contract was not renewed.[25] The Fifth Circuit held that even though his speech was related to a matter of public concern, it was unprotected under the First Amendment because it was made pursuant to his official job duties.[26] The court reasoned that the athletic director's speech was made while performing his job duties. Other courts have taken a similar approach.[27]

Analysis

In our view, *Brown v. Chicago Board of Education* is significant for two reasons. First, this case is the most recent federal court decision to apply the *Garcetti* ruling with exactitude when educators claim their workplace speech is protected by the First Amendment. In fact, as the Seventh Circuit's *Brown* decision made abundantly clear, teachers who speak in their official capacities as school-district employees are not protected by the First Amendment, even when they are engaging in pedagogical speech to their students.

Even though instruction may be well-intended and designed to capture that teachable moment when it arises, it may not fall under the protection of academic freedom. The discussion and use of a highly charged, deeply offensive word in a class of sixth graders is a high bar for a teacher to meet, especially when it is arguably unrelated to the curriculum. In-class instructional comments may be weighed by such circumstances as "the age and sophistication of the students, the closeness of the relation to the specific [pedagogical] technique used and some concededly valid objective, and the context and manner of presentation."[28] All of these considerations should give a teacher pause before introducing controversial content in a public school classroom. As seen in *Brown*, teachers who rely on academic freedom to protect their questionable instructional decisions do so at their peril. Indeed, a teacher who unwisely launches upon a contentious topic in a classroom setting might experience Justice Scalia's comment turned on its head. Such speech, a judge might say, is both stupid and not constitutionally protected.

As noted, this case is consistent with two other circuit court decisions involving teacher speech in the classroom, but this one seems to raise new concerns. For example, this decision might suggest that a teacher in a school with a similar policy that prohibits racial or sexual epithets in the classroom may not have the freedom to address a student calling another a "slut" or "wet back" because such speech is prohibited under school policy. The decision might also discourage classroom debate and it might place limits on learning opportunities or teachable moments.

Secondly, the *Brown v. Chicago Board of Education* decision illustrates that a few words are so offensive that their utterance in almost any context is abhorrent and beyond protection. The Sixth Circuit, for example, ruled that a university basketball coach had no constitutional right to use the N-word as a "motivational" tool to his players even though some players testified they were not offended.[29] The N-word, the Sixth Circuit concluded, fell far outside the marketplace of ideas and did not relate to any matter of public concern. Thus, the coach could find no shelter under the First Amendment.

More recently a respected dean at Seattle University, who had enjoyed a long and distinguished career, was severely criticized for allegedly recommending Dick Gregory's autobiography, titled *Nigger*, and thus expressing that vile word.[30] A high school teacher in Utah used the N-word in class during an entire period explaining its use before watching the Civil War movie, *Glory*. He stated, "my intent has never been to offend, only to teach for understanding with historical context."[31] He was disciplined by his school district.

It is not surprising then that many people sense that the word is so toxic as to be literally unspeakable and euphemistically substitute "the N-word." The controversy is confounded by the use of the word in literature that is often required reading in schools. If it is in the adopted curriculum, is it treated differently than when the word is discussed during those teachable, unscripted moments?[32] It will be interesting to observe whether courts take the same approach with other highly offensive words that relate to gender.

ENDNOTES

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1 American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure*. Washington DC: Author. (1940),https://www.aaup.org/report/1940-

statement-principles-academic-freedom-and-tenure. For a discussion of P-12 teacher perceptions of their academic freedom, see Todd A. DeMitchell & Vincent J. Connelly, *Academic Freedom and the Public School Teacher: An Exploratory Study of Perceptions, Policy, and the Law*, 2007 BYU Educ. & L. J. 83 (2007); Kim Fries, Vincent J. Connelly, & Todd A. DeMitchell, *Academic Freedom in the Public K-12 Classroom: Professional Responsibility or Constitutional Right? A Conversation with Teachers*, 227 Educ. L. Rep. 505 (2008).

[2] Fries, et al., *supra* note 1 at 520. Teachers in the study asserted that this is a practice of deciding what instruction is best for their students at a given time, which is "informed by the context of the teaching situation." *Id.*

[3] Millikan v. Bd. of Directors of Everett Sch. Dist., 611 P.2d 414, 418 (Wash. 1980).

[4] Garcetti v. Ceballos, 547 U.S. 410 (2006).

[5] *Id*. at 425.

[6] *See* Ralph D. Mawdsley, Garcetti v. Ceballos *and Classroom Instruction: The Sixth Circuit Creates Diminished Free Speech Protection for Classroom Teachers,* 266 Educ. L. Rep. 1 (2011); Ann Hasenpflug, *Job Duties and Teacher Freedom of Speech*, 220 Educ. L. Rep. 471 (2007); Evans-Marshall v. Tipp City Exempted Village Sch. Dist., 624 F.3d 332, 261 Educ. L. Rep. 904 (6th Cir. 2010); Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477, 215 Educ. L. Rep. 626 (7th Cir. 2007).

[7] Brown v. Chicago Bd. of Educ., 824 F.3d 713, 332 Educ. L. Rep. 620 (7th Cir. 2016).

[8] *Id*.

[9] Brown v. Bd. of Educ., 84 F. Supp. 3d 784, 320 Educ. L. Rep. 925 (N.D. Ill. 2015).

[10] Brown v. Chicago Bd. of Educ., 824 F.3d at 717.

[11] *Id*. at 715.

[12] *Id*. at 714.

[13] *Id*. at 715.

[14] *Id*. at 714, quoting Jennifer Senior, *In conversation with Antonin Scalia*. NEW YORK MAGAZINE, Oct. 6, 2013.

[15] *Id*. at 717.

[16] *Id*.

[17] Evans-Marshall v. Tipp City Exempted Village Sch. Dist., 624 F.3d 332, 261 Educ. L. Rep. 904 (6th Cir. 2010).

[18] *Id*. at 335.

[19] *Id*. at 336.

[20] Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477, 215 Educ. L. Rep. 626 (7th Cir. 2007).

[21] *Id*. at 478.

[22] *Id*. at 480.

[23] *Id*. at 479.

[24] Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 217 Educ. L. Rep. 802 (5th Cir. 2007).

[25] *Id*. at 691.

[26] *Id*. at 692.

[27] *See, e.g.*, Fox v. Traverse City Area Pub. Schs. Bd. of Educ., 605 F.3d 345, 349, 257 Educ. L. Rep. 23, 27 (6th Cir. 2010); Gilder-Lucas v. Elmore County Bd. of Educ., 186 F. App'x 885, 887, 213 Educ. L. Rep. 408 (11th Cir. 2006).

[28] Mailloux v. Kiley, 448 F.2d 1242 (1st Cir. 1971).

[29] Dambrot v. Central Michigan Univ., 55 F.3d 1177, 100 Educ. L. Rep. 869 (6th Cir. 1995).

[30] Scott Jaschik, *Under Fire a Dean Departs*, Inside Higher Ed (July 25, 2016), https://www.insidehighered.com/news/2016/07/25/dean-seattle-u-subject-protests-seeking-her-ouster-and-defending-her-retires.

[31] Hallie Gordon, *Official: South Ogden Teacher Violated Policy by Using N-word Before Showing Film "Glory."* The Salt Lake Tribune (May 5, 2016), http://www.sltrib.com/home/3855962-155/official-south-ogden-teacher-violated-policy.

[32] For a discussion and guidance of using the N-word in a literature class, *see Huck Finn*: Teachers Guide, Huck Finn *in Context: The Curriculum*, PBS, http://www.pbs.org/wgbh/cultureshock/teachers/huck/section1_2.html (last visited Apr. 28, 2017).

Registration for the 2018 ELA Conference in Cleveland opens soon, featuring guest speaker Mary Beth Tinker

Mid-April is the anticipated start of accepting registrations and hotel reservations for this year's annual conference, November 7-10, 2018, to be held at the substantially remodeled Cleveland Downtown Marriott Key Center in Cleveland, Ohio (site of the 2015 conference).

Because it is home to ELA headquarters, Cleveland offers exciting partnership opportunities that will enhance the experience for attendees.

To showcase our home in Cleveland and our relationship with Cleveland-Marshall College of Law, located at Cleveland State University, the program on Friday afternoon, November 9, will be held at the law school. Transportation will be offered. This special panel presentation on the First Amendment in Education will feature Mary Beth Tinker, famed First Amendment advocate, as a speaker (the 50th anniversary of the landmark Supreme Court decision in *Tinker v. Des Moines ISD* will be celebrated in 2019.) This part of the annual conference will be open to the local education and legal communities and will be followed by a reception.

The 2018 conference team—which has been meeting since last November's conference in San Diego—is led by co-chairs Susan Bon and Joy Blanchard, serving with Cynthia Dieterich, Susan Clark, Annie Blankenship, Stephanie Klupinski, and David Nguyen. 2017 co-chairs Mark Paige and KB Melear also are aiding the team.

More than 80 proposals for presentations and panel discussions were submitted and are being reviewed. Proposals for the round table and poster sessions will be accepted April 15 - July 15, if you missed the opportunity to submit a proposal for a concurrent session.

Nominations are open for the annual ELA awards to be presented at the conference; find the forms on our website. See the article at right for more information.

Registration and hotel registration information should be available by mid-April. Watch for regular news updates as the conference program develops.

Now Accepting Nominations for 2018 ELA Awards

It's that time of year to submit nominations for Education Law Association's annual awards, to be presented at the November conference. Log in to the ELA website and you will find links to the nomination forms on the left menu of the Annual Conference landing page.

M.A. McGhehey Award
Deadline: June 30, 2018

Joseph C. Beckham Dissertation of the Year Award
Deadline: July 1, 2018

George Jay Joseph Education Law Writing Award
Deadline: July 1, 2018

Steven S. Goldberg Award for Distin-guished Scholarship in Education Law
Deadline: July 15, 2018

August Steinhilber Best Appellate Brief Award
Deadline: July 15, 2018