
CONSTITUTIONAL LAW — FIRST AMENDMENT — SIXTH CIRCUIT HOLDS THAT PRIMARY AND SECONDARY SCHOOL TEACHERS’ CURRICULAR DECISIONS ARE NOT ENTITLED TO FREE SPEECH PROTECTION. — *Evans-Marshall v. Board of Education*, 624 F.3d 332 (6th Cir. 2010).

In *Pickering v. Board of Education*,¹ the Supreme Court crafted a balancing test to determine whether a public employer violates the First Amendment when it retaliates against an employee who comments on matters that are relevant to the public.² The Court added a threshold inquiry to this analysis in *Garcetti v. Ceballos*,³ in which it held that the First Amendment does not apply to statements made by public employees “pursuant to their official duties.”⁴ However, the *Garcetti* Court declined to address whether this additional consideration would apply to “speech related to scholarship or teaching.”⁵ Recently, in *Evans-Marshall v. Board of Education*,⁶ the Sixth Circuit applied *Garcetti*’s “pursuant to” test in the education context and held that public officials’ interference with a high school teacher’s curricular decisions did not violate the First Amendment.⁷ In doing so, the court ignored a key institutional feature that differentiates teachers from other public sector employees — the presence of students as a third institutional actor, alongside teachers and administrators — and overlooked the Supreme Court’s repeated endorsement of balancing tests as the appropriate free speech inquiry in comparable education cases. As a result, the court neglected the interest that students possess in being exposed to the relatively unconstrained speech of teachers. The Sixth Circuit should have recognized, consistent with the Supreme Court’s suggestion in *Garcetti*, that the test in that case does not apply to the unique context of education and should have borrowed elements from several education-related Supreme Court cases to craft a new balancing test for teachers’ curricular decisions.

In 2000, the Tipp City school board hired Shelley Evans-Marshall to teach English at Tipp High School and to advise the school’s literary magazine.⁸ During the fall semester of her second year, Evans-

¹ 391 U.S. 563 (1968).

² See *id.* at 568 (weighing the employee’s interest, “as a citizen, in commenting upon matters of public concern” against the state’s interest, “as an employer, in promoting the efficiency of the public services it performs through its employees”).

³ 547 U.S. 410 (2006).

⁴ *Id.* at 421 (explaining that in such situations “the employees are not speaking as citizens for First Amendment purposes”).

⁵ *Id.* at 425.

⁶ 624 F.3d 332 (6th Cir. 2010).

⁷ *Id.* at 334.

⁸ *Id.*

Marshall permitted two groups of students in her ninth-grade English class to lead an in-class discussion regarding why the book *Heather Has Two Mommies*⁹ appeared on the American Library Association's list "The 100 Most Frequently Challenged Books."¹⁰ Shortly thereafter, Evans-Marshall asked her class to read *Siddhartha*,¹¹ which explores themes of "spirituality, Buddhism, romantic relationships, personal growth and familial relationships."¹² Dozens of parents complained about Evans-Marshall's teaching decisions at school board meetings in October and November 2001.¹³ These and similar instances¹⁴ led the school's principal, Charles Wray, to give Evans-Marshall a poor performance evaluation in which he "criticized [her] attitude and demeanor as well as her '[u]se of material that is pushing the limits of community standards.'"¹⁵ Wray also recommended that the school board not renew her teaching contract, a recommendation that the school board approved on March 25, 2002.¹⁶

In March 2003, Evans-Marshall filed suit, alleging that the school board, Wray, and the district's superintendent violated 42 U.S.C. § 1983 by firing her in retaliation for exercising her First Amendment right to make "curricular and pedagogical choices"¹⁷ "without interference from public officials."¹⁸ At the conclusion of discovery, the defendants filed a motion for summary judgment, which the district court granted.¹⁹ The court employed a three-factor test to determine whether Evans-Marshall had established a prima facie case of First Amendment retaliation by showing (1) that she "was engaged in a con-

⁹ *Heather Has Two Mommies* depicts a lesbian couple with a young daughter named Heather. In the book, Heather joins a playgroup whose teacher explains that every family is special, regardless of the parental arrangement. LESLÉA NEWMAN, *HEATHER HAS TWO MOMMIES* (1st ed. 1989).

¹⁰ *Evans-Marshall*, 624 F.3d at 334–35. The group projects supplemented a unit on the book *Fahrenheit 451*, in which the class explored that book's theme of government censorship. *Id.*

¹¹ *Evans-Marshall v. Bd. of Educ.*, No. 3:03cv091, 2008 WL 2987174, at *3 (S.D. Ohio July 30, 2008).

¹² *Id.* at *3 n.4.

¹³ See *Evans-Marshall*, 624 F.3d at 335. In contrast, several meeting participants came to Evans-Marshall's defense. See *id.*

¹⁴ One dispute involved Evans-Marshall's making available to students writing samples that depicted "a firsthand account of a rape" and "a young boy who murdered a priest and desecrated a church." *Id.* at 335–36. Another dispute involved a screening of the movie *Romeo and Juliet*, which includes a scene containing nudity. See *Evans-Marshall*, 2008 WL 2987174, at *14.

¹⁵ *Evans-Marshall*, 624 F.3d at 336 (second alteration in original).

¹⁶ *Evans-Marshall*, 2008 WL 2987174, at *4.

¹⁷ *Evans-Marshall*, 624 F.3d at 336 (internal quotation marks omitted).

¹⁸ *Id.* at 336–37 (internal quotation mark omitted).

¹⁹ *Evans-Marshall*, 2008 WL 2987174, at *17. The defendants initially filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure; however, the district court denied the motion, and the Sixth Circuit affirmed. *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 226 (6th Cir. 2005). Between the motion to dismiss and the motion for summary judgment, the Supreme Court decided *Garcetti*. *Evans-Marshall*, 2008 WL 2987174, at *1.

stitutionally protected activity,” (2) that the defendants’ action caused her an injury that would likely have a chilling effect on an ordinary person, and (3) that the defendants’ action was “a response to the exercise of [her] constitutional rights.”²⁰ Regarding the first factor, the court found that the First Amendment protected Evans-Marshall’s curricular speech.²¹ Importantly, the court explained that *Garcetti*, which concerned statements made by public officials pursuant to their official duties, did not apply because of *Garcetti*’s “explicit caveat . . . that the Court’s decision therein did not necessarily apply ‘in the same manner to a case involving speech related to scholarship or teaching.’”²² Although the court found that Evans-Marshall also satisfied the second factor,²³ it concluded that she failed the third by not showing “a ‘causal connection’ between her teaching [decisions] and her non-renewal.”²⁴

The Sixth Circuit affirmed, but on different grounds.²⁵ Writing for a unanimous panel, Judge Sutton²⁶ disagreed with the lower court’s findings on the first and third factors.²⁷ Contrary to the district court, Judge Sutton asserted that Evans-Marshall’s speech was indeed a “motivating factor” in the school board’s decision, noting that she received poor performance reviews only after parents complained about her curricular decisions.²⁸

Judge Sutton found, however, that Evans-Marshall could not satisfy the first factor of the test. He explained that because teachers make their curricular decisions “pursuant to” their official duties, *Garcetti* instructs that these decisions fall outside the First Amendment’s protection²⁹: when a school board hires a teacher to form and execute a curriculum, the board empowers that teacher to speak on its behalf.³⁰ The board can therefore regulate that teacher’s speech because “[o]nly the school board has ultimate responsibility for what goes on in the classroom.”³¹ This responsibility, Judge Sutton emphasized, is rooted

²⁰ *Evans-Marshall*, 2008 WL 2987174, at *5 (quoting *Evans-Marshall*, 428 F.3d at 228). The Sixth Circuit established this three-factor test in *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998). See *id.* at 678.

²¹ See *Evans-Marshall*, 2008 WL 2987174, at *15.

²² *Id.* at *8 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006)).

²³ *Id.* at *15.

²⁴ *Id.* (quoting *Arnett v. Myers*, 281 F.3d 552, 560 (6th Cir. 2002)).

²⁵ *Evans-Marshall*, 624 F.3d at 334.

²⁶ Judge Sutton was joined by Judge Siler and District Judge Cleland, sitting by designation.

²⁷ See *Evans-Marshall*, 624 F.3d at 339–40.

²⁸ See *id.* (quoting *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)) (internal quotation marks omitted).

²⁹ See *id.* at 338–40 (internal quotation marks omitted).

³⁰ *Id.* at 340.

³¹ *Id.*

in Ohio law, which tasks publicly elected board members with establishing a curriculum.³²

Judge Sutton buttressed this explanation by stressing that “no other court of appeals has held that [in-class curricular] speech is protected by the First Amendment.”³³ He noted that administrative burdens would plague the judiciary if *Garcetti* were not applied: allowing teachers and school administrators to sue one another to resolve curricular disputes would further deplete the judiciary’s limited resources by “demand[ing] permanent judicial intervention in the conduct of governmental operations” and by permitting judges to disenfranchise school boards and referee intractable disputes.³⁴

Lastly, Judge Sutton addressed the *Garcetti* Court’s refusal to reach the issue of scholarship and teaching. He concluded that the Court had provided this caveat only as a response to the concerns in Justice Souter’s dissenting opinion regarding academic freedom in public colleges and universities.³⁵ Because Evans-Marshall did not teach at the collegiate level, she fell “outside of the group the dissent [in *Garcetti*] wished to protect.”³⁶ Moreover, Judge Sutton noted that the type of academic freedom *Garcetti* recognized applied only to public colleges and universities, where instructors routinely engage in scholarship and research.³⁷ Finally, he stated that academic freedom applied only to the institutions themselves (as opposed to the individual professors they employ), as the concept only “implicates ‘[t]he freedom of a university to make its own judgments as to education.’”³⁸

The *Evans-Marshall* court attempted to clarify the Supreme Court’s ambiguous doctrine³⁹ pertaining to public school teachers’ free speech rights in instances of employer retaliation. However, the court’s decision to apply *Garcetti*’s “pursuant to” test ignored an important institutional characteristic that separates teachers from other public sector workers and failed to account adequately for the Supreme Court’s repeated use of balancing tests to resolve free speech

³² See *id.* at 341.

³³ *Id.* at 343 (referencing *Panse v. Eastwood*, 303 F. App’x 933, 935 (2d Cir. 2008); *Borden v. Sch. Dist.*, 523 F.3d 153, 171 n.13 (3d Cir. 2008); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1204 (10th Cir. 2007); *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007)).

³⁴ *Id.* at 341 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006)) (internal quotation marks omitted).

³⁵ *Id.* at 343.

³⁶ *Id.*

³⁷ *Id.* at 343–44.

³⁸ See *id.* at 344 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.)) (alteration in original).

³⁹ See, e.g., Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693, 694–95 (1990).

conflicts in secondary schools.⁴⁰ Instead of applying *Garcetti*, the court should have created a new balancing test that accounts for the in-class interests of teachers, school administrators, and students.

The presence of students as a third and equal institutional actor⁴¹ differentiates the education context from the broader sphere of public employment and counsels against applying *Garcetti* to teachers' in-class curricular speech. Like most other places of public employment, the Supreme Court ruled, the district attorney's office in *Garcetti* contained only two parties whose interests needed to be balanced: supervisor and employee. To be sure, the majority in *Garcetti* briefly acknowledged the interest of a third party — the public — “in receiving the well-informed views of government employees engaging in civic discussion.”⁴² However, the public and its interests as discussed in *Garcetti* are similarly present with regard to education: regardless of whether an individual member of the public has a personal relationship with any particular student, that individual has an interest in all students' intellectual and social growth.

The presence of students alters the inquiry because of their interest in hearing speech that is vital to their intellectual and social maturation. Speech is the principal means through which public school teachers perform their workplace duties; however, such “speech is neither ordinary employee workplace speech nor common public debate.”⁴³ Teacher speech plays a vital role in transmitting the information and building the skill sets on which students will rely to adequately participate in and contribute to their communities.⁴⁴ Moreover, in executing the curricular goals established by school administrators, teachers are uniquely positioned to identify various perspectives and methods that could be augmented or introduced to enhance student learning. To be sure, courts routinely provide local school boards and their administrators with significant latitude “to operate as local democratic units transmitting the community's values to

⁴⁰ See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

⁴¹ Students are an “institutional actor” in that their collective interest in effective education remains constant over time, even though the actual students filling the seats change.

⁴² *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

⁴³ *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 378 (4th Cir. 1998) (Motz, J., dissenting).

⁴⁴ See, e.g., *Ambach v. Norwick*, 441 U.S. 68, 78–80 (1979). Several scholars have argued that certain differences between secondary and collegiate education render the application of *Garcetti*'s “pursuant to” test more problematic for the latter level than for the former. See, e.g., Kevin L. Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty After Garcetti*, 33 J.C. & U.L. 313, 314, 351–52 (2007); Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMENDMENT L. REV. 54, 54–55 (2008). The *Garcetti* majority declined to circumscribe its caveat with limiting terms such as “college” and “university,” see 547 U.S. at 425, and a more thorough discussion of this distinction is beyond the scope of this piece.

children.”⁴⁵ Nevertheless, a certain degree of discretion for teachers may be warranted to protect against the minority of school administrators who may view their “mandate to inculcate moral and political values . . . [as] a general warrant to act as ‘thought police’ stifling discussion of all but state-approved topics and advocacy of all but the official position.”⁴⁶ Indeed, “the advantage gained by knowing that the students are thinking and talking about [controversial] issues outweighs the discomfort or administrative burden involved in directly confronting the issues,” in part because such knowledge enables teachers and administrators to help students avoid further and potentially harmful exploration of these issues.⁴⁷

The Sixth Circuit’s application of *Garcetti* did more than overlook institutional distinctiveness in the education sphere; it adopted a categorical rule despite the Supreme Court’s repeated preference for balancing tests when navigating the difficult terrain of education-related speech. In *Tinker v. Des Moines Independent Community School District*,⁴⁸ the Supreme Court determined that a student’s free speech interests could be outweighed only if his or her speech “substantially interfere[d] with the work of the school or impinge[d] upon the rights of other students.”⁴⁹ Two decades later, in *Hazelwood School District v. Kuhlmeier*,⁵⁰ the Court embraced a more expansive view of education administrators’ ability to restrict certain types of student speech.⁵¹ However, in asserting that restrictions on student speech must be “reasonably related to legitimate pedagogical concerns,” the *Hazelwood*

⁴⁵ Janna J. Annet, Comment, *Only the News That’s Fit to Print: The Effect of Hazelwood on the First Amendment Viewpoint-Neutrality Requirement in Public School-Sponsored Forums*, 77 WASH. L. REV. 1227, 1248 (2002); cf. Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Incultation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 82 (2002) (arguing that a state’s decision to have a system of compulsory education permits that state to “have the final say as to what subjects are taught and what substance is conveyed about those subjects”).

⁴⁶ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 285–86 (1988) (Brennan, J., dissenting). It bears noting that private high schools remain entitled to restrict their teachers’ freedom of speech. See, e.g., *Fogarty v. Boles*, 121 F.3d 886, 890 (3d Cir. 1997) (noting that “the First Amendment applies only to public employers”). However, these schools are institutionally distinguishable from their public counterparts in part because they are often erected to inculcate a particular set of values that a fraction of community residents shares (for example, the observance of a particular religion) and because unsatisfied families are usually able to remove their students to different private schools or to local public schools.

⁴⁷ Susannah Barton Tobin, Note, *Divining Hazelwood: The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217, 243 (2004).

⁴⁸ 393 U.S. 503 (1969).

⁴⁹ *Id.* at 509.

⁵⁰ 484 U.S. 260.

⁵¹ The Court emphasized that school administrators have broader control over school-sponsored student speech that is part of a curriculum than they have over “personal expression that happens to occur on the school premises.” *Id.* at 271.

Court implicitly recognized that the interests of administrators are not so great that they render the interests of students irrelevant.⁵²

Taken together, these balancing tests and the presence of students as institutional actors underscore the idea that students are listeners who consistently derive benefit from exposure to relatively unconstrained speech. The *Garcetti* majority appropriately acknowledged that the Court's "customary employee-speech jurisprudence" might not fully account for "expression related to academic scholarship or classroom instruction," which arguably "implicates additional constitutional interests."⁵³ Indeed, applying *Garcetti*'s "pursuant to" requirement to teachers' speech may represent an "unwarranted inhibition upon the free spirit of teachers" that "has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice."⁵⁴

The *Pickering*, *Tinker*, and *Hazelwood* tests might seem to be plausible alternatives to the *Garcetti* test. However, none of these tests arose in the specific context of teachers' classroom speech. Furthermore, all address such speech imperfectly.⁵⁵ *Pickering*'s deficiencies include its inability to account adequately for the differences between teacher speech delivered outside the classroom that touches on matters of public concern and teachers' in-class curricular decisions.⁵⁶ More importantly, the *Pickering* test examines the rights of teachers and school boards without considering the interests of students.⁵⁷ This lack of attention runs the risk of "regard[ing students] as closed-circuit recipients of only that which the State chooses to communicate,"⁵⁸ which "threatens to rob a generation of the versatility that has been

⁵² *Id.* at 273. Five federal courts of appeals frequently apply *Hazelwood*'s balancing test in cases involving teachers' in-class speech. *See, e.g.,* *Vanderhurst v. Colo. Mountain Coll. Dist.*, 208 F.3d 908, 914–15 (10th Cir. 2000) (noting that the court would assume for purposes of appeal — but not decide — that the *Hazelwood* test applied to the case); *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); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990).

⁵³ *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2005).

⁵⁴ *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring).

⁵⁵ The existing balancing tests are not without their benefits. *See* Clarick, *supra* note 39, at 708 ("By scrutinizing both the purpose of any speech restriction and the availability of a less restrictive alternative, the [*Pickering* and *Tinker*] tests protect teachers from school boards wielding retributive punishments in a partisan manner.")

⁵⁶ For example, a teacher's decision to criticize school funding mechanisms by writing a letter to a newspaper has a qualitatively different impact on student learning than curricular decisions that help students hone the critical thinking skills necessary "to participate meaningfully in public debate." *Id.* at 702.

⁵⁷ *See* Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 52 (2001).

⁵⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

perhaps our greatest distinction.”⁵⁹ *Tinker*’s concern with classroom disorder⁶⁰ does not sufficiently capture the somewhat different “determination of who is to decide what is taught in the classroom.”⁶¹ Applying *Tinker* may be appropriate when a teacher’s curricular decisions disrupt the learning environment but not when a teacher and an administrator disagree about peripheral components of the curriculum. In *Hazelwood*, the Court cited student inculcation and skill development as justifications for controlling student speech; however, these goals “are more frequently achieved through the efforts of teachers than the efforts of administrators.”⁶² Teachers may therefore deserve an appreciable measure of deference regarding certain in-class decisions that only a balancing test adequately guarantees when teachers and administrators disagree.

In light of these shortcomings, the Sixth Circuit should have borrowed elements from *Tinker* and *Hazelwood* to create a new balancing test for teachers’ curricular decisions: does the teacher’s interest in choosing her desired instructional methods and materials, coupled with the students’ interest in receiving this information, outweigh the administrators’ interest in promoting effective education?⁶³ In addition to ensuring that students do not become “closed-circuit recipients” of information, this test would help remedy the circuit courts’ failure to articulate an underlying rationale for applying *Hazelwood*’s balancing test rather than *Pickering*’s (or vice versa) in a particular situation.⁶⁴

The Sixth Circuit’s application of *Garcetti* to teachers’ curricular decisions overlooks an important feature that separates education from other areas of public employment and fails to account for the Court’s repeated adoption of balancing tests in similar situations. The court should have applied a balancing test that allows school boards to determine curricular objectives, permits teachers to tailor assignments and discussions to best accomplish those goals, and accounts for students’ intellectual and social needs.

⁵⁹ *Adler v. Bd. of Educ.*, 342 U.S. 485, 511 (1952) (Douglas, J., dissenting).

⁶⁰ *See Tinker*, 393 U.S. at 513.

⁶¹ Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1323 (1976).

⁶² Daly, *supra* note 57, at 13.

⁶³ This test is derived from the work of two authors who have explicitly called for a test that accounts for the interests of all three parties. *See id.* at 53–56; Alison Lima, Comment, *Shedding First Amendment Rights at the Classroom Door? The Effects of Garcetti and Mayer on Education in Public Schools*, 16 GEO. MASON L. REV. 173, 198–201 (2008). Such a test would incorporate *Tinker*’s and *Hazelwood*’s concerns regarding classroom interference and administrators’ pedagogical preferences, respectively, while accounting for *Tinker*’s warning that the state must sufficiently accommodate viewpoints that it does not prefer.

⁶⁴ *See* Daly, *supra* note 57, at 2.