The First Amendment and the Modern Classroom

By Maclain Conlin

In 1968, the Supreme Court held that an Arkansas law prohibiting the teaching of evolution in public schools placed an undue restriction on the liberty of teachers and violated the Establishment Clause. While he would have struck down the statute on separate procedural grounds, Justice Hugo Black disagreed with the Court's conclusion that this law infringed on personal freedom. Teachers, when in their official capacity, speak from a position of great authority, he pointed out, and anything they say in the context of classroom instruction will be interpreted by students as either a command or an undisputed fact. Any law, therefore, that expands the purview of public school teachers to decide what they will teach in the classroom necessarily curtails the freedom of students. "A [key] question," he said, "that arises for me is whether this Court's decision forbidding a State to exclude the subject of evolution from its schools infringes the religious freedom of those who consider evolution an anti-religious doctrine. If the theory is considered anti-religious, as the Court indicates, how can the State be bound by the Federal Constitution to permit its teachers to advocate such an 'anti-religious' doctrine to schoolchildren?" *Epperson* was a special case, dealing primarily with the Establishment Clause, and not the Free Speech Clause. Regarding the latter, the Court has consistently adopted Justice Black's view, recognizing that voters have the authority to decide what will be taught in public school classrooms. Below, we will (1) examine the Court's precedents regarding the free speech rights of public school teachers; (2) use these precedents to extrapolate a general rule which can be used to decide similar cases going forward; and (3) apply this rule to contemporary restrictions on teachers' authority.

The first time that the Supreme Court addressed the free speech rights of public school teachers was in *Meyer v. Nebraska,* 262 U.S. 390 (1923). In that case, during a time of national anti-German hysteria, twenty-one states passed laws prohibiting *any person*, "individually or as a teacher," from teaching any language besides English while on school grounds to a student below eighth grade. Robert Meyer, a teacher at Zion Parochial School, privately read aloud several Bible passages to a student in German. This was not in a public school, and was not even in the context of classroom instruction. Nevertheless, he was prosecuted, and the Court ruled that this statute, "as applied," violated Meyer's free speech rights. But the Court was clear to limit its reasoning to the particulars of that case, saying that it did not question "the State's power to prescribe a curriculum for the institutions it supports." In subsequent rulings, the Court has clarified this distinction between government speech and private speech. In *Pickering v. Board of Education*, 391 U.S. 563 (1968), a public school teacher was punished for writing a letter to his local newspaper criticizing the school board's annual budget. The Court held in an 8-1 decision that this violated the Free Speech Clause, because Marvin Pickering's comments were outside of his official duties and therefore qualified as private speech. On the other hand, in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), when a prosecutor was disciplined for criticizing his superiors *while speaking in his official capacity,* the Court said that the First Amendment did not apply.

These rulings draw a clear line when it comes to speech by public employees, including teachers: When a teacher is speaking as a private individual, he is engaged in constitutionally protected speech, but when he is

speaking as an official of the state, especially in the context of classroom instruction, the state may regulate the content of his statements, as with any other government speech. The Free Speech Clause does *not* state that "a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed."[1]

Over the past two years, many states have passed laws to prevent teachers from offering opinions to their students during class-time about race-related issues. For example, Florida has barred professors at its public universities from "endorsing the proposition that…a person's moral character is necessarily determined by his or her race."[2] Discussion of such topics is permitted among students, but professors are barred from advocating for them during classroom instruction. Applying the test laid out above, Florida's statute easily passes First Amendment scrutiny. In *Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819 (1995), the Supreme Court, anticipating the standards laid out by *Garcetti,* said that, "When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." The State of Florida, in defending its decision, explained the consequences of the opposing view:

> The First Amendment does not compel Florida to pay educators to advocate ideas, in its name, that it finds repugnant. Nor does it anoint individual professors as universities unto themselves, at liberty to indoctrinate college students in whatever views they please, no matter how contrary to the university's curriculum or how noxious to the people of Florida.[3]

The distinction between government and private speech is not an arbitrary or technical one. It protects the ability of teachers to express their views as American citizens,[4] while at the same time shielding students from indoctrination in positions that do not conform with their community's values, and allows taxpayers to choose what messages their dollars will be used to support. As Justice Black concluded in *Epperson,* "However wise this Court may be or may become hereafter, it is doubtful that, sitting in Washington, it can successfully supervise and censor the curriculum of every public school in every hamlet and city in the United States." Such decisions are best left to the people and their elected representatives. That has been the consistent view of the Court for over a century, and should continue to be applied today.

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[1] *Epperson v. Arkansas*, 393 U.S. 97, 113-114, (1968), Black, J., concurring.
[2] *Leroy Pernell, et al., v. Florida Board of Governors of the State University System, et al*, Case No. 4:22-cv-304-MW-MAF, United States District Court for the Northern District of Florida, Tallahassee Division, Defendant's Response in Opposition to Plaintiff's Motion for a Preliminary Injunction, September 22, 2022, p. 1.
[3] *Id.* at 2. An argument could be made that there is a substantive difference between college classrooms and secondary school classrooms. But for the latter, Florida's argument seems to be ironclad under the Court's precedents.
[4] *Loudoun County School Board, et al., v. Byron Tanner Cross,* Record No. 210584, Supreme Court of Virginia, Maj. Op., Kelsey, McCollough, and Chafin, J.J, p. 9. In this recent case, a public school teacher in Virginia was disciplined for expressing his political opinions at a school board meeting, an action that was later found to be unconstitutional by the Virginia Supreme Court.