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Academic Freedom for Teachers

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In speaking of Constitutional Rights, Archibald MacLeash once said, “The one certain and fixed point in the entire discussion is this: that freedom of expression is guaranteed to citizens in a liberal democracy not for the pleasure of the citizens but for the health of the state.” (Alexander and Alexander, 2000) To most, the concept of academic freedom is a basic right, if not a Constitutional right, of educators in the classroom and in research. While freedom in research and teaching has traditionally been assumed to be more in the realm of higher education, the ability to make reasonable decisions related to presentation of academic content has been accepted at the K-12 levels as a basic responsibility of instruction. If the textbooks, or tradition, were unclear, misleading, or wrong concerning an event, the classroom teacher (as subject matter expert) was expected to correct or clarify the mistake.

In 2010, however, a Federal Appeals Court effectively changed the teachers’ roll from being subject matter experts to being implementation facilitators for whatever the curriculum guide required to be taught. In *Evans-Marshall v. Board of Education of the Tipp City Exempted Village School District* (2010), the U. S. 6th Circuit Court of Appeals unanimously upheld the firing of a teacher who had taught material not included in the curriculum in her school. In the state of Ohio where the case was decided, “State law gives elected officials--the school board--not teachers, not the chair of the department, not the principal, not even the superintendent, responsibility over the curriculum. This is an accountability measure, pure and simple, one that ensures the citizens of a community have a say over a matter of considerable importance to many of them--their children’s education--by giving them control over membership on the board.” The opinion of the court not only allowed the school board to prevent the teacher from teaching what was not in the curriculum, but also to regulate what was in the curriculum and how it was presented.

Normally, this would be seen as an isolated instance that would have little impact on schools beyond the district involved. However, at almost the same time, the State Board of Education in Texas was involved in a required 10-year review of social studies curriculum for the state. New standards, which would become the guiding principles of curriculum and textbook design for the next ten years, would be developed and would be legally required in Texas schools. These standards were approved on a party-line vote (10 Republicans approved and 5 Democrats opposed the standards) and were, to many critics, more reflective of ideology than of sound history. For example, a major criticism of the new Texas standards was that they required inclusion of historical Republican Party leaders, while not requiring that Democratic Party leaders be included in the curriculum. Additionally, the new guidelines were accused of explicitly endorsing political conservatism and banning political liberalism.

The debate around the new standards, which began before they were adopted, centered primarily on questions of partisan politicization of content, the role of minorities in the curriculum, and the place of religion in the social studies curriculum. While some of the new standards attempted to redefine commonly held interpretations of the U.S. Constitution (e.g., First Amendment Religious Freedoms), other parts of the standards seemed to re-write history.

For example, one portion of the new standards requires that students be taught that “conservatives were responsible for” the civil rights legislation of the 1960’s and 1970’s. In that same section is a requirement that the curriculum include information about important conservative individuals (e.g., Ronald Reagan) and groups (e.g., The Eagle Forum) from the 1980’s and 1990’s. The standards include no similar guidance related to inclusion of liberal individuals or groups (Stutz, 2010). And, in an even more blatant partisan act, the Board seemed to require that Joseph McCarthy, the Senator whose claims regarding large numbers of

communist sympathizers led to his being censured by the Senate in 1954, be rehabilitated by requiring a statement concerning “how the later release of the Venona papers confirmed suspicions of communist infiltration in the U.S. government (Schneider, 2010).” While the Venona papers do confirm, to a certain extent, the general thesis of McCarthy’s charges, Harvey Klehr points out that “virtually none of the people that McCarthy claimed or alleged were Soviet agents turn up in Venona....the new information from Russian and American archives does not vindicate McCarthy. He remains a demagogue, whose wild charges actually made the fight against Communist subversions more difficult (Schneider, 2010).”

The standards were also criticized for their treatment of minorities. While the 2010 census showed that the number of Hispanics in Texas was growing at twice the rates of any other ethnicity, the State Board rejected a proposal in the new standards that would require mentioning “Tejanos were among the fallen heroes of the Alamo (Texas Textbook Massacre, 2010).” The rejection of this proposal led to a walk-out by the Democratic members of the board. Saying “I’ve had it. This is it. I’m leaving for the evening. The board is pretending this is white America, Hispanics don’t exist. I’ve never seen a rewrite like this. This is a step backward,” Mary Helen Berlanga joined other Democrats in leaving the meeting. The vote also led the NAACP and the Texas League of United Latin American Citizens to call for a Federal review to determine if Texas was failing to provide equal educational opportunity to all of its citizens (Graczyk, 2010). The board also required that all references to slave trading be referred to as “Atlantic Triangular Trade,” and that references to American imperialism be described as “expansionism.”

As one would also expect, the treatment of religion in the new standards was also fodder for controversy. David Bradley, a Republican board member, was successful in blocking a requirement that students be taught to examine the reasons the Founding Fathers protected religious freedom in America by barring government from promoting or disfavoring any particular religion over all others. According to Bradley, “I reject the notion by the left of a constitutional separation of church and state. I have \$1000 for the charity of your choice if you can find it in the Constitution (Schneider, 2010). There was some speculation that this concern about teaching separation of church and state also lead to one of the more widely reported incidents: Removing Thomas Jefferson from the list of important influences on the Enlightenment. National media attention resulted in a reversal of the preliminary decision (Jefferson was left in), but brought to the forefront the attempt by some board members to control the treatment of religion in Texas schools.

The revised standards were the subject of intense debate, both in Texas and in other states. For example, shortly after the new standards were approved by the Texas State Board, a bill was introduced in the California legislature that required the State Board of Education to report any curriculum changes in textbooks or other materials to the state legislature and to the California Secretary of Education (Strauss, 2010). And, in January 2011, the Tea Party of Tennessee issued a list of demands for changing textbooks, strikingly similar to the new Texas standards.

Reports issued after adoption were critical of the new standards. The Thomas B. Fordham Institute, a conservative think-tank, gave the standards a “D” grade, stating, “The conservative majority on the Texas State Board of Education (SBOE) has openly sought to use the state curriculum to promote its political priorities, molding the telling of the past to justify its current views and aims (Bathija, 2011).” The Texas Higher Education Coordinating Board (the main oversight board for higher education in Texas) also issued a report saying the new standards in history are “inadequate, ineffective, and fail to meet the state’s college readiness standards.” The

report also was very critical of the process, from board approval to the curriculum itself (Texas History Education Standards, 2011).

As mentioned earlier, the classroom teacher has traditionally been the final arbiter of the soundness of the content. If the specified content was inaccurate or suspect, the classroom teacher was the “court of last resort” and was expected to make a professional judgment concerning what to teach. The Evans-Marshall case though, seems to remove that authority from teachers.

Though Evans-Marshall was decided at the Appellate level it remains to be seen if the decision will be supported by the U. S. Supreme Court. Tea Party supporters and conservative legislatures, in their efforts to return to an earlier time, may find their solutions to be neither democratic nor consistent with the principles embodied in the U.S. Constitution. In the meantime however, social studies teachers will be limited.

Many social studies teachers will find themselves between a rock and a hard place. Will they risk censure if they continue to teach a balanced approach to history (basically flouting the new guidelines) or do they teach the new guidelines (knowing they are teaching an incorrect interpretation of history)? Can a teacher disregard the advice of a principal who has implemented a new instructional plan and defend his or her opposition on the grounds of free speech?

To answer these questions, we must first understand the legal relationship between a teacher and the school board. Alexander and Alexander (2001) cite three sources of law:

“(1) constitutional rights and freedoms of the teacher as citizen; (2) statutory relationships that govern the conduct of public schools; and (3) contract conditions of employment that may be created and agreed to by both the teacher and the employer” (p. 718). As we will see, these sources are not wholly independent of each other but, rather, are interdependent.

Supreme Court Cases:

The issue of Academic Freedom is, at its core, a question of free speech. The Supreme Court has consistently supported teacher’s claims to First Amendment protections. Two cases involving higher education, one at the University of New Hampshire and the other at the University of Buffalo speak to this issue. “Although academic freedom is not one of the enumerated rights of the First Amendment, the Supreme Court on numerous occasions emphasized that the right to teach, to inquire, to evaluate and to study is fundamental to a democratic society (*Sweezy v. New Hampshire*, (1967).” In *Keyishan v. Board of Regents*, the Court concluded “The classroom is peculiarly the ‘market place of ideas.’ (1967).” Cases such as *Sweezy* and *Keyishan* recognize that teachers are citizens who are employed in public institutions and, because of this a teacher enters the school with constitutional freedoms of speech and association the school must demonstrate a compelling public reason to overcome the teacher’s academic freedom.

In 1961, Marvin L. Pickering was dismissed from his teaching position for writing a letter to the local newspaper critical of the school boards handling of a bond issue and the allocation of financial resources between the school’s educational and athletic programs. The U.S. Supreme Court reversed the Illinois State Supreme Court’s decision, which had upheld Pickering’s firing from his job as a teacher and held for Pickering:

“To the extent that the Illinois Supreme Court’s opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the

operation of public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this court (Essex, p.206).”

The findings in *Pickering* were used as precedent in *Connick v. Myers* (1983) to argue that an Assistant District Attorney in New Orleans could not have her employment terminated. While the Court did not find the facts in *Connick* to be congruent with those in *Pickering*, the Court did use the findings from the two cases to form what became known as the Pickering-Connick Balancing Test. This test holds that:

When a public employee makes a statement, its content, form and context is examined in the totality of the record to determine if it is a matter of public concern, and the employee’s expression cannot be reasonably believed to cause harm to workplace harmony, discipline or operations. Because of the many forms employee speech and matters of public concern may take, the Supreme Court did not deem it appropriate or feasible to promulgate a general standard by which all statements are judged. (DeVoy, 2010)

The U.S. Supreme Court applied Pickering-Connick balancing test in a case (*Mt. Healthy v. Doyle*, 1977) where a teacher’s employment was terminated for insubordination, negligence of duty, and failure to follow directives of the school principles (Alexander and Alexander, p. 718).” Failure to follow directives of the school principal is pertinent in curriculum cases. The waters get very muddy between following directives and the role of the teacher. “Further, the nature of the teacher’s job is vital to analysis of appropriate legal constraints on her conduct of speech. Teachers are paid to communicate, to pass on knowledge to the young, to explore issues critically, and to promote understanding. In this sense, the job of teaching is closely connected to the freedoms of speech, belief, and association: a connection often referred to by the vague phrase ‘academic freedom’ (Kirp and Yudof, p. 199).”

Speech and the Connick Rule:

Connick and *Pickering* combined to form a two-step free speech test. First the initial inquiry is whether the speech is a matter of public concern; in this regard, *Connick v. Myers* (1983) states:

“When expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”

Second, if the speech is found to be a matter of public concern, the court must apply the *Pickering* balancing test. The interest of the public employee as a citizen in commenting on matters of public concern must be weighed against the interest of the state as an employer to promote effective and efficient public service (p. 724). The Sixth Circuit therefore concluded that the proper reading of *Connick* should include consideration of the following:

“Even if a public employee were acting out of a private motive (and/or as an employee of a school district) as long as the speech relates to matters of ‘political, social or other concern to the community,’ as opposed to matters ‘only of personal interest,’ it shall be considered as touching upon matters of public concern (Alexander and Alexander, p. 710).”

In a 1994 decision, *Waters v. Churchill* the court reaffirmed its conclusion in previous cases that separated employee speech in to that which is a matter of “public concern” and that which is a matter of “personal interest” (Alexander and Alexander, p. 710).

Since 1967, it has been settled that a State cannot condition employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression. *Keyishian*

v. Board of Regents, 385 U.S. 589, 605-606 (1967); *Pickering v. Board of Education*, 391 U.S. 563 (1958); *Perry v. Sindermann*, 408 U.S. 593 (1972); and *Branti v. Finkel*, 445 U.S. 507, 515-516 (1980) The court's task, as it defined *Pickering*, was to strike a balance between the interests of the employee, as a citizen, in commenting upon public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

In *Garrison v. Louisiana*, the court stated, "Speech concerning public affairs is more than self-expression; it is the essence of self-government." (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of the First Amendment values," and is entitled to special protection.

According to the Harvard Law Review (2011), there are still legal questions to be addressed regarding *Evans-Marshall*, including the fact that the ruling ". . . overlooks an important feature that separates education from other areas of public employment and fails to account for the [Supreme] 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."

In a best-case scenario, the impact of *Evans-Marshall* is benign. School Boards, the sole authorities over curriculum, according to the judges, will adopt broad goals and will leave implementation of those goals to teachers and administrators at the school level. However, in a worst-case scenario, a school board can use the curriculum to further a political agenda by requiring that teachers present information that could, very possibly, be slanted toward a particular view, or that could even be untrue. As shown by the new Texas Social Studies Standards, the Texas State Board of Education, this danger is not just a possibility, but is, indeed, already in place.

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