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# Academic freedom in U.S. public schools[1]

## *Liberdade acadêmica em escolas públicas dos Estados Unidos*

## *Libertad académica en las escuelas públicas de los Estados Unidos*

**Suzanne E. Eckes**[2]
University of Wisconsin-Madison (Madison, WI, United States of America)
*E-mail*: seeckes@wisc.edu

**Janet R. Decker**[3]
Indiana University (Bloomington, IN, United States of America)
*E-mail*: deckerjr@indiana.edu

## Abstract

In this article, we examine several of the legal issues involving academic freedom in K-12 public schools. To begin, we set the context in the United States, where each state and its respective local school boards greatly impact the academic freedom of elementary and secondary school teachers. We next describe the trends in the U.S. Supreme Court precedent related to this topic in order to provide the necessary background. After explaining how some of these landmark cases apply to public elementary and secondary schools and how legal research methods were employed, we examine several illustrative court opinions to demonstrate the legal landscape of this topic. The findings from these court decisions support our conclusion that teachers have limited academic freedom in public school settings. The article closes with some general implications and recommendations for practice.

## Keywords

Academic freedom; First Amendment; Legal; Curricular Challenges.

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[2] Suzanne E. Eckes is the Susan S. Engeleiter Professor of Education at the University of Wisconsin-Madison, WI (U.S.A.). She researches civil rights laws and their impact on schools. She holds a J.D. and Ph.D. from the University of Wisconsin-Madison.

[3] Janet R. Decker is an associate professor at Indiana University (U.S.A.). She researches the legal literacy of educators and school leaders. She holds a J.D. and Ph.D. from Indiana University.

## Contents



## Resumo

Neste artigo, examinamos várias questões jurídicas envolvendo liberdade acadêmica em escolas públicas K-12. De início, examinamos o contexto dos Estados Unidos, onde cada estado e seus respectivos conselhos escolares locais exercem uma grande influência na liberdade acadêmica de professores do ensino fundamental e médio. Em seguida, descrevemos as tendências nos precedentes da Suprema Corte dos Estados Unidos relacionados a este tópico, com o propósito de fornecer o panorama necessário. Após explicar como alguns desses casos marcantes se aplicam a escolas públicas de ensino fundamental e médio e como foram empregados os métodos de pesquisa jurídica, examinamos várias decisões judiciais para ilustrar o cenário jurídico deste tópico. As análises dessas decisões judiciais subsidiam nossa conclusão de que professores têm liberdade acadêmica limitada em escolas públicas. O artigo se encerra com algumas implicações gerais e recomendações para a prática.

## Palavras-chave

Liberdade acadêmica; Primeira Emenda; Estrutura e cenário jurídicos; Desafios curriculares.

## Sumário



## Resumen

En este artículo, examinamos varios de los problemas legales relacionados con la libertad académica en las escuelas públicas K-12. Para empezar, establecemos el contexto en los Estados Unidos, donde cada estado y sus respectivos consejos escolares locales tienen un gran impacto en la libertad académica de los maestros de escuelas primarias y secundarias. A continuación, describimos las tendencias

en los precedentes de la Corte Suprema de los Estados Unidos relacionados con este tema, para proporcionar los antecedentes necesarios. Después de explicar como algunos de estos casos históricos se aplican a las escuelas primarias y secundarias públicas y como se emplearon los métodos de investigación jurídica, examinamos varias decisiones judiciales ilustrativas para demostrar el panorama jurídico sobre este tema. La observación de estas decisiones apoya nuestra conclusión de que los maestros tienen una libertad académica limitada en los entornos de las escuelas públicas. El artículo se cierra con algunas implicaciones generales y recomendaciones para la práctica.

## Palabras clave

Libertad académica; Primera Enmienda; Panorama jurídico; Desafíos curriculares.

## Índice



## 1. Introduction

A high school teacher in the United States shows her class a movie based on a book her students had recently read and was disciplined because the movie included some profanity. Another teacher was disciplined after he told his high school students that building Trump's wall was both "immoral and a waste of taxpayer money." These examples illustrate that teachers might mistakenly believe that they have more leeway with curricular-related expression than they actually do in the classroom. The litigation on teachers' academic freedom supports this point. Although courts have recognized the rights of teachers to have some flexibility with the teaching techniques or curricular-related commentary (*Cockrel v. Shelby Cty. Sch. Dist.*, 2001; *Millikan v. Bd. of Dirs.*, 1980), more recent litigation suggests these rights have become more limited (*Mayer v. Monroe Cty. Cmty. Sch. Corp.*, 2007). To be certain, striking a balance between what is and what is not permissible in the public school classroom can be challenging during these highly charged political times (Rogers et al., 2017; Walker, 2018).

In this article, we first set the context in the United States, where each state and its respective local school boards greatly impact the academic freedom of elementary and secondary school teachers. Next, we describe the trends in the U.S. Supreme Court precedent related to this topic in order to provide the necessary background. After explaining how some of these landmark cases apply to public elementary and secondary schools, we describe the legal methods that we employed. The purpose of our research was to identify the general legal landscape of academic freedom in U.S. public schools. After analyzing several illustrative court opinions, we concluded that that K-12 teachers have limited academic freedom in public school settings. To support this finding, we discuss four themes that arose in the case law: 1) controversial lesson plans, 2) classroom speech, 3) curriculum selection, and 4) refusal to teach prescribed curriculum. The article closes with some general implications and recommendations for practice.

## 2. The role of the state and local school boards

In the United States, each state serves as the employer of the public school employees within its boundaries, which also allows each state to control the curriculum in public schools. Most U.S. children attend public, as opposed to private, schools. Namely, in 2015-2016, there were an estimated 98,000 public schools and 34,600 private schools in operation (U.S. Department of Education, 2019). Further, private school students only comprised 10 percent of all elementary and secondary students. Private schools are either sectarian or non-sectarian; whereas, public schools are always non-religious because they receive government funds.

The U.S. Constitution does not provide a federal right to a public education, and therefore, states and local school boards govern public schools. Although the U.S. Supreme Court has repeatedly confirmed this comprehensive authority, states and local school boards must also adhere to federal civil rights laws (e.g., anti-discrimination legislation), as well as constitutional guarantees (e.g., freedom of speech) (McCarthy, Eckes, & Decker, 2019).

As such, each state's legislature has absolute power to make laws governing education. States have the legal authority to impose curricular restrictions, but state laws often delegate considerable authority to local school boards to make instructional and curricular decisions. If an educational decision is not outlined in state law, it is often left to local school boards to regulate. School

board members are typically elected and voted in by citizens of each local school district. States, therefore, have broad authority to impose curriculum directives about what *must* be taught; whereas local school boards have discretion to make curricular decisions that have not been dictated by the state. For example, school boards often determine the type of sex education that students in their local district will receive. U.S. courts do not interfere with state and local curricular decisions unless such decisions violate the U.S. Constitution or are clearly arbitrary (McCarthy, Eckes, & Decker, 2019).

Thus, this authority from the state and local level often results in required curriculums, textbooks, and standardized tests that teachers must follow (McCarthy, Eckes, & Decker, 2019). The U.S. Supreme Court has recognized the power of the state and local school board to exercise reasonable control over the public school curriculum and teachers' academic freedom (Uerling, 2000). Of course this power must be exercised in a way that is consistent with the U.S. Constitution. Indeed, teachers play an important role in challenging students to think critically about the underpinnings of our democratic society, and they have some flexibility when engaging their students in these discussions. Indeed, in its 1978 opinion in *Ambach v. Norwick*, the U.S. Supreme Court observed that schools are charged with the important task of "inculcating fundamental values necessary to the maintenance of a democratic political system" (pp. 76-77).

## 3. The legal framework: The U.S. Constitution and academic freedom

In the U.S., the discussion surrounding academic freedom was heightened during a timeframe from 1945 until 1970, which has been referred to as an "academic revolution" (Hutchens, Fernandez, & Hulbert, 2016, p. 1027). During this time, there was a large increase in the number of institutions of higher education. College and university faculty advocated for greater job security and more independence. As a result, some of today's faculty are able to earn tenure status which affords them increased due process protections if they are dismissed and the ability to share in the governance of the institution. In addition to tenure, college and university faculty have advocated for and earned academic freedom. In general terms, academic freedom refers to faculty members' right to choose, without outside interference, their scholarly pursuits as well as their course content. The justification behind why tenure and academic freedom are necessary is to provide higher education faculty with a safe haven where they

can challenge conventional assumptions and where they can freely exchange ideas, that sometimes, may be unpopular.

Disagreement exists over whether academic freedom is merely an academic tradition or whether it is explicitly protected by the U.S. Constitution (Byrne, 1989; Spurgeon, 2013). Although the U.S. Supreme Court has referred to academic freedom as "a special concern of the First Amendment," confusion remains about the extent of First Amendment protections due to the academy (*Keyishian v. Bd. of Regents*, 1967, p. 603). One federal district court noted that the concept of academic freedom "is more clearly established in academic literature than it is in the courts" (*Cohen v. San Bernardino Valley Coll.*, 1995, p. 1412). Disagreement has also ensued about whether it is an individual or an institution that is entitled to academic freedom (Hutchens, Fernandez, & Hulbert, 2016). Despite these debates, it is clear that academic freedom is rooted in the First Amendment's Free Speech Clause, which states that the U.S. government cannot abridge the freedom of speech.

The U.S. courts have offered decades of guidance about how the First Amendment applies in a variety of situations involving academic freedom. While the U.S. Supreme Court is the only court whose decisions apply to the entire country, there are additional influential cases that have been decided by the lower federal courts of appeal and district courts. Importantly, however, these lower federal court decisions are only binding within their respective jurisdictions. For example, decisions rendered by the Seventh Circuit Court of Appeals would only be binding in Wisconsin, Indiana, and Illinois (McCarthy, Eckes, & Decker, 2019).

## 4. The legal landscape: the U.S. Supreme Court and academic freedom

Most of the U.S. Supreme Court cases have focused on academic freedom in American universities. Professors have advocated for academic free speech rights since the early twentieth century when the American Association of University Professors (AAUP) was founded. In subsequent years, scholars have recognized shifts in the level of academic freedom afforded to university professors. While professors may have felt more protections from 1940 until 1970, the extent of protections has been questioned more recently (Hutchens, Fernandez, & Hulbert, 2016).

*Sweezy v. New Hampshire* (1957) is often recognized as one of the classic academic freedom opinions that provided the rationale for this legal protection (DeMitchell, Eckes, & Fossey, 2016). In this case, the U.S. Supreme Court observed,

> [t]he essentiality of freedom in the community of American universities is almost self-evident.... Scholarship cannot flourish in an atmosphere of suspicion and mistrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. (*Sweezy v. New Hampshire*, 1957).

*Sweezy* occurred during a unique time in U.S. history known as McCarthyism. It was during the Cold War era when government officials were actively searching for educators who were Communist sympathizers.

Five years prior to *Sweezy*, however, the U.S. Supreme Court was not as concerned about academic freedom. In *Adler v. Bd. of Education* (1952), the Court upheld the dismissal of a public school teacher who had been fired due to a state law that prohibited public educators from being members of subversive organizations. Yet, in the dissenting opinion, one Justice argued against the existence of state loyalty laws, explaining that they were a threat to academic freedom. This dissent paved the way for the Court's anti-McCarthyism decision in *Sweezy.*

In fact, the state law that was at issue in Adler was eventually ruled unconstitutional by the Court in *Keyishian v. Bd. of Regents* (1967). In striking down the loyalty provision, the Court explained that the United States was "deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment." (p. 603). The Court continued to specify that educational communities were deserving of "vigilant protection" emphasizing that,

> [t]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.' (p. 603).

Thus, the *Keyishian* decision signaled "strong judicial endorsement of First Amendment protection for academic freedom" (Hutchens, Fernandez, & Hulbert, 2016, p. 1033).

In the decades that followed, the Court consistently recognized the importance of expression in higher education and in society. For example, it stated, "We have recognized that the university is a traditional sphere of free expression... fundamental to the functioning of our society" (*Rust v. Sullivan*, 1991, p. 200). The U.S. Supreme Court also stated that "academic freedom thrives not only on the independent and uninhibited exchanges of ideas among teachers and students... but also, and somewhat inconsistently on autonomous decision-making by the academy itself (*Regents of the Univ. of Mich. v. Ewing*, 1985, p. 226). As one scholar suggested, "[f]ew places exist where free speech is more important than in the nation's universities. Freedom of expression is essential to higher education because it is through the free and open exchange of ideas that universities meet their societal purpose of training individuals to become good citizens and public contributors" (Magnusson, 2010, p. 432).

In recent years, however, scholars question the level of academic freedom that professors in higher education settings possess (Hutchens, Fernandez, & Hulbert, 2016). Some scholars believe the First Amendment speech rights afforded to college and university faculty are commensurate with public employees outside of higher education. Others argue that professors are entitled to unique academic freedom protections beyond what other public employees are guaranteed. The disagreement may be the result of the failure of the courts to develop a "coherent legal framework to delineate First Amendment academic freedom protections for faculty" (Hutchens, Fernandez, & Hulbert, 2016, p. 1033).

Uncertainties about academic freedom were further complicated in 2006, when the U.S. Supreme Court issued a decision that greatly limited the free speech rights of all public employees. In *Garcetti v. Ceballos,* the Court held that public employees enjoy no First Amendment rights when they are speaking in their official capacities in the workplace. Prior to the *Garcetti* decision, the U.S. Supreme Court recognized that public employees have a First Amendment right to speak about matters of public concern if the employee speech outweighed "the interest of the state as an employer, in promoting the efficiency of the public services it performs through its employees" (*Pickering v. Board of Education*, 1968, p. 568). *Pickering* is still a relevant case, but the *Garcetti* decision added a

new threshold question about speech that is directly related to an employee's official job duties.

Interestingly, the dissent in *Garcetti* cautioned against extending this ruling to public university professors. Justice Souter explained, "I have hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to…official duties'" (p. 438). The majority also recognized that the decision "may have important ramifications for academic freedom"; yet, stated that issue was not before the Court (p. 425). The Court cautioned that its decision may not apply "in the same manner to a case involving speech related to scholarship or teaching," but provided no further clarification (p. 425).

As a result, the lower courts have grappled with whether and how *Garcetti* should apply to higher education cases, as well as secondary and elementary school settings (see, e.g., *Demers v. Austin*, 2013; *Evans-Marshall v. Tipp City Exempted Village Sch. Dist.*, 2010; *Piggee v. Carl Sandburg Coll.*, 2016). The lower courts have issued conflicting opinions, meaning that the current state of *Garcetti's* application to educators remains uncertain and in flux (Flarherty, 2018; Fossey, Eckes, & DeMitchell, 2017; Strasser, 2018). In addition to *Garcetti*, the U.S. Supreme Court's *Hazelwood v. Kuhlmeier* (1988) decision has sometimes been relied on to regulate teachers' curricular-related speech in the public school classroom (*Lee v. York Cnty. Sch. Div.*, 2007; *Ward v. Hickey*, 1993). The standard set forth in *Hazelwood* allows school officials to regulate "school-sponsored expressive activities" (such as a student newspaper or a school play) as long as their actions are "reasonably related to legitimate pedagogical concerns" (p. 273). Courts continue to examine which case might best apply to academic freedom cases in public elementary and secondary school classrooms (see *Panse v. Eastwood*, 2008).

## 5. The limits on academic freedom in K-12 schools

One area of clarity, however, is that university faculty have much more freedom in the classroom than do elementary and secondary teachers who teach kindergartener to twelfth-grade students (K-12). While the university classroom has been described as the marketplace of ideas (*Keyishian v. Bd. of Regents*, 1967), this has not necessarily been the case in K-12 schools. Justice Brennan wrote that "courses in public schools are prescribed by the State Board of Education and teachers are not free, absent permission, to teach courses different from

what is required" (*Edwards v. Aguillard*, 1987, p. 640). More recent court decisions underscore the fact that there is less academic freedom in the classroom at this age-level (*Brown v. Chic. Bd. of Educ.*, 2016). One reason for this limit relates to K-12 students having more impressionable minds than university students.

There is no U.S. Supreme Court case that directly addresses teachers' curricular-related speech in the classroom. As mentioned, court decisions related to K-12 academic freedom or teachers' curricular-related speech often reference the *Garcetti* (2006) and *Hazelwood* (1988) decisions. The lower courts continue to wrestle with how the decisions should apply to K-12 schools. Specifically, several federal courts 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 (*Evans-Marshall v. Tipp City Exempted Village Sch. Dist.,* 2010; *Mayer v. Monroe Cty. Cmty. Sch. Corp.,* 2007), but other courts have questioned the decision's applicability to teachers' curriculum-related speech (*Lee-Walker v. N.Y.C. Dep't of Educ.*, 2017).

Even after the *Garcetti* decision, lower courts relied on the *Hazelwood* opinion in some K-12 academic freedom cases (*Kramer v. N.Y.C. Bd. of Educ.*, 2010; *Lee v. York Cnty. Sch. Div.*, 2007), but courts have questioned *Hazelwood's* applicability as well (see *Lee-Walker v. N.Y.C. Dep't of Educ.*, 2017).

## 6. Legal methods

Within the U.S., court opinions influence education policy and practice in schools (Chemerinsky, 2003; Superfine, 2009). The purpose of our research was to identify the general legal landscape of academic freedom in U.S. public schools. In this analysis, we used legal research methods (see First, Vines, Elue, & Pindar, 2015; McCarthy, 2010; Russo, 2006; Schimmel, 1996) to identify K-12 academic freedom court cases. Thus, the data that we analyzed included the case law relevant to this issue. After conducting a legal analysis of these court decisions, we generated four themes (see 6.1-6.4) that support our overall conclusion that teachers have limited academic freedom. For each theme, we also selected an illustrative sample of cases which are described in this article.

Legal research analysis has been compared to historical research because it often involves identifying trends in the law after a court has ruled on a matter.

For example, Russo (2006) suggests that legal research methodology is "a form of historical-legal research that is neither qualitative nor quantitative . . . it is a systemic investigation involving the interpretation and explanation of the law" (p. 6). Similarly, legal scholars Beckham, Leas, Melear, and Mooney (2005), highlight that these methods combine elements of legal reasoning with an evolutionary perspective on the genesis and development of particular judicial issues relevant to education.

While employing legal research methods to identify illustrative cases involving academic freedom in K-12 schools, we used two major legal databases, LexisNexis and Westlaw, to retrieve multiple primary data sources. We first used various search terms within these databases related to academic freedom to locate the court decisions. We then analyzed each case to learn the key issues involved and the case outcomes. After this examination we grouped the court decisions according to theme (see 6.1-6.4). It is important to note that the purpose of this study was not to identify every court decision that has addressed a matter involving a K-12 academic freedom issue. Instead, the goal was to present a few illustrative cases to demonstrate how courts have ruled on a few key issues about academic freedom in the K-12 context. The primary sources of data (i.e., case law) analyzed for this study are discussed below by theme.

## 7. Findings and discussion: illustrative cases

To demonstrate how lower courts have applied *Garcetti* and *Hazelwood* to teachers' curricular-related expression and academic freedom, this section highlights some illustrative cases. And although these cases are only binding in their respective jurisdictions, some general themes have emerged. First, the public school curriculum is often at the center of public debate across the United States. Teachers have been challenged for choosing widely read and respected books like, *To Kill a Mockingbird*, *A Wrinkle in Time*, and *Harry Potter*, and they have been disciplined by school officials for their commentary related to their lessons (Fetter-Harrott, Irwin, & Eckes, 2016).

The court opinions suggest also that public school teachers may not ignore or exclude prescribed course content under the guise of academic freedom (McCarthy, Eckes, & Decker, 2019). When teachers do take this approach or choose instruction approaches that conflict with school officials' directives, these controversies sometimes lead to legal challenges. The following cases reveal four

areas where teachers typically have not prevailed. Specifically, educators have generally been unsuccessful when challenging their discipline that resulted from their controversial lesson plans, classroom speech, and curriculum selection. Teachers were also unsuccessful when they claimed that they had a legal right to refuse to teach prescribed curriculum or follow school policy.

### 7.1 Controversial lesson plans

In a New York case, a teacher disregarded her assistant principal's instruction to not teach a lesson to her ninth-grade class centered around the Central Park Five attack in which five Black teenagers were wrongfully convicted of raping a White woman (*Lee-Walker v. N.Y.C. Dep't of Educ.*, 2017). The teacher wanted to use the incident to teach about the dangers of rushing to judgment. Specifically, she hoped it would highlight "an American societal tendency to rush to adverse legal conclusions against black males" (*Lee-Walker v. N.Y.C. Dep't of Educ.*, 2016, p. 488). The assistant principal disagreed with the teacher. He stated it would "unnecessarily 'rile up' black students" and instructed her to provide a more balanced lesson. When the teacher's contract was not renewed, she claimed she had been retaliated against due to the disagreement about her Central Park Five lesson. The Second Circuit Court of Appeals observed that neither *Garcetti* or *Hazelwood* clearly governed this case, and the decision to dismiss the case was affirmed in favor of the school district based on qualified immunity grounds.

In another case involving a controversial lesson, 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 (*Brown v. Chi. Bd. of Educ.*, 2016, p. 714). In this case, the Chicago school board suspended the sixth-grade teacher after his principal overheard him trying to teach his students not to use the n-word. The teacher had intercepted a note from a student that quoted music lyrics that included this highly offensive word. After reading the note, the teacher immediately stopped his grammar lesson explaining just how offensive the word is and why it should not be used. As a result, the principal charged the teacher with violating a school policy against "[u]sing verbally abusive language to or in front of students," and suspended Brown for five days. The teacher appealed the principal's decision to the school board and the board upheld the decision to discipline him (p. 715).

The teacher then sued, arguing that the school board had violated his First Amendment rights. He lost his case at the trial court level, and the circuit court affirmed the lower court's ruling. The circuit 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" (p. 714). More specifically, the Supreme Court's *Garcetti* decision and prior decisions in the Seventh Circuit clearly established that Brown's free speech rights had not been violated. The court emphasized that Brown had made his comments in his official capacity as a teacher; thus his suspension was constitutional. The teacher claimed that he used the word in an educational manner in order to explain why the word was hurtful, but the school's discipline was nonetheless upheld.

### 7.2 Classroom speech

In Indiana, a teacher's contract was not renewed when the teacher mentioned to her class that she was opposed to the Iraq War (*Mayer v. Monroe Cty. Cmty. Sch. Corp.*, 2007). Specifically, the seventh-grade teacher was conducting a social studies current event lesson. During the lesson, the class discussed how local members of the community 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 (p. 478). After her contract was not renewed, she argued that school officials were retaliating against her based on her classroom speech which she claimed violated her First Amendment rights.

The Seventh Circuit Court of Appeals disagreed, ruling that she was speaking pursuant to her official job duties. The Court applied *Garcetti* by finding that public schools could limit teacher speech if the speech was made in connection with their role as a teacher. Because this teacher 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" (p. 479).

Similarly, another teacher's contract was not renewed after she made controversial statements in class. The ninth-grade biology teacher led a class discussion about the abortion of fetuses with Downs Syndrome (*Ward v. Hickey*,

1993). The First Circuit Court of Appeals determined that the school had not violated the law. It reasoned that while teachers retain some free speech protections, public schools are permitted to limit classroom speech in order to promote educational goals. The court relied on *Hazelwood* (1988) by explaining that school officials have a responsibility in ensuring that students "are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school" (p. 271). Thus, the school officials had not violated the First Amendment when censoring the content of the teacher's speech.

### 7.3 Curriculum selection

Similarly, the Sixth Circuit Court of Appeals found that a teacher does not have an unrestricted First Amendment right to curriculum choices in the classroom. In this case, an Ohio high school English teacher assigned Ray Bradbury's *Fahrenheit 451* and then led a discussion about book censorship (*Evans-Marshall v. Tipp City Exempted Village Sch. Dist.*, 2010). Within this discussion, some students analyzed and discussed banned books that were included on the American Library Association list, including *Heather Has Two Mommies*. The teacher 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 (p. 335). After receiving these complaints, the district decided not to renew the teacher's 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 (p. 336). When analyzing the case, the Sixth Circuit discussed two competing issues at hand:

> On the one side, doesn't a teacher have the First Amendment right to choose her own reading assignments, decide how they should be taught and above all be able to teach a unit on censorship without being censored or otherwise retaliated against? On the other side, doesn't a school board have the final say over what is taught, and how, in the public schools for which it is responsible? Who wins depends on which line of legal authority controls. (p. 337).

Ultimately, the court found that the law was on the side of the school board and it upheld the school board's decision to not renew the teacher's contract. It applied *Garcetti* explaining that this teacher's curricular choices were pursuant to her official job duties and not made in her role as a citizen. Therefore, the employer could discipline the teacher for her curricular speech.

In a similar case, the Fourth Circuit ruled that a high school teacher did not have complete discretion to select the plays performed by her acting class students (*Boring v. Buncombe Cty. Bd. of Educ.,* 1998). The teacher had selected a play, *Independence*, that depicted a character who was a lesbian and another who was pregnant with a child out of wedlock. Before performing at a state-level competition, the play was performed to an English class at the school. A parent complained to the principal who then told the teacher that the students were no longer permitted to perform the play at the state competition. However, other supporters convinced the principal to allow the students to perform a censored version of the play. The students won second place in the state competition.

Nonetheless, a lawsuit ensued because the principal transferred the teacher to another school, citing conflicts surrounding the controversial play. The teacher claimed the transfer was an illegal retaliation based on her protected freedom of speech. Yet, the Fourth Circuit Court disagreed, recognizing that school officials had legitimate pedagogical interests in regulating the curriculum. The court highlighted *Hazelwood's* reference to theatrical productions. The court explained that plays were school-sponsored curriculum "whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences" (p. 271).

### 7.4 Refusal to teach prescribed curriculum or follow school policy

Teachers have also been unsuccessful in their lawsuits claiming that they should not be forced to teach the schools' chosen curriculum. In Oklahoma, a teacher who had been employed by the district for over thirty years, had refused to teach a newly adopted inquiry-based school district science curriculum because she believed that the prior curriculum was superior. After she refused to teach the new lessons, school officials issued a memo outlining why her teaching performance was unsatisfactory. The teacher filed a lawsuit and sought a declaratory

judgment that her teaching contract and the U.S. Constitution guaranteed her academic freedom. The Tenth Circuit Court of Appeals affirmed the lower court's decision granting the school district's motion for summary judgment (*Greenshields v. Indep. Sch. Dist.*, 2006).

In another case involving a teacher who failed to follow the prescribed curriculum, the Supreme Court of Ohio upheld the teacher's dismissal after he repeatedly infused his teaching with his Christian faith in contradiction to proscribed curriculum (*Freshwater v. Mt. Vernon Cty. Sch. Dist.*, 1989). The teacher was hired to teach science to eighth-grade students. Although the course content included teachings about evolution, the teacher continuously inserted his anti-evolution beliefs about creationism and intelligent design. For example, he secretly distributed religious-based handouts, displayed religious materials in the classroom, and referred to the Bible in class discussions.

The district terminated the teacher, citing his insubordination to follow directives to follow the prescribed curriculum. Although the teacher argued that his termination was in violation of his academic freedom, the court disagreed. It explained that the teacher did not have a free exercise or free speech right to ignore his supervisors' directives to stop proselytizing to his students. Interestingly, the courts in *Freshwater* and *Greenshields* did not rely on *Garcetti* or *Hazelwood* in reaching their decisions.

The cases discussed above suggest that teachers' classroom expression can be limited. Teachers may not select their own curriculum and are responsible for teaching the school district's prescribed curriculum. Also, although teachers can speak about political and social issues in class, they will cross the line when they push their opinions on their students. These decisions also demonstrate that lower courts are not applying a consistent standard from the Supreme Court. In the absence of a U.S. Supreme Court decision that directly addresses the matter of teacher instructional speech in the K-12 context, this issue will continue to evolve.

## 8. Conclusions and recommendations

Academic freedom is often at the center of complex controversies involving teachers, their classroom speech, and the curriculum they choose for their students. School boards have a lot of discretion to oversee teachers, which does

not leave much space for teachers to exercise academic freedom in K-12 public schools. This limitation is drastically different from the academic freedom that university professors enjoy in higher education settings.

At the K-12 level, courts approach issues of academic freedom on case-by-case basis where they often balance the teacher's interests in academic freedom against the school board's interests in ensuring an efficient and appropriate instructional program (McCarthy, Eckes, & Decker, 2019). In the cases reviewed, teachers did not prevail. Instead, the court precedent surrounding academic freedom in U.S. public schools favors the schools' authority above teachers' curricular choices. In sum, restrictions may be placed on teachers' curricular-related speech and decisions in class. Courts have consistently recognized that the K-12 classroom is a unique context. In this environment, teachers have a captive audience of impressionable minds. They may not use their public positions to influence their students about controversial issues relating to religion, politics, or other matters.

Yet, if educators are concerned about academic freedom, they can ensure that school districts adopt written policies to address the issue of academic freedom. Such policies would require transparency and should be made in consultation with legal counsel. In doing so, school officials should inform teachers about what the policy entails and how it would be applied in specific situations (i.e., when creating controversial lesson plans, when facilitating classroom discussions on sensitive topics, or when choosing books and other curriculum). School officials might also offer professional development sessions on topics related to academic freedom for both teachers and administrators. Importantly, school officials should acknowledge the professional expertise and good judgment that teachers exhibit in curricular choices. If teachers are disciplined for reasonable curricular-related choices that have educational value (e.g., reading *The Great Gatsby*), teachers may not choose this worthy profession if their creativity is chilled. To be certain, when questioning teachers about their curricular-related choices, administrators should be sure to respect teachers' unique talents and training.

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