

## Democracy Education

# Teachers and Academic Freedom: Gaining Rights De Facto

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Early in my teaching career, I served on my union bargaining team. Bargaining a contract was not touted as a professional development opportunity, but looking back now—well over 20 years later—I am struck by how much I learned from the process. Without a doubt, it was the most substantive professional development experience I had as a public school teacher. Not only did it teach me about the varied and often conflicting needs and wishes of teachers, school administrators, and the school board, it provided an immersion in school law that quickly taught me that many of the things I had believed to be true were wrong.

In particular, I had thought that public school teachers were vested with academic freedom rights that, while not as robust as those in higher education, were real and rooted in either the law or state and federal constitutions. Given that I had studied the famous *Tinker* case in a college constitutional law course, it may be that I had reasoned that if students “do not shed their rights at the school-house gates,” neither do teachers.<sup>1</sup> As a member of the bargaining team, I learned that in most states in the United States (including the one I lived in), state laws and constitutions gave teachers few to no academic freedom rights, and neither did the federal Constitution or laws.

That most teachers do not have a “right” to academic freedom is a reality that is more codified now than it was in my days of bargaining teacher contracts. In a recent summary of court decisions, school law scholar Julie Mead bluntly summed up the sorry state of teachers’ rights in this area: “The belief that academic freedom provides robust protection for teacher speech cannot be sup-

ported by recent case law on the topic. The bounds of academic freedom are tightly constrained by school authority to set policy and curriculum.”<sup>2</sup> In one court decision that I find particularly worrisome, the Seventh Circuit Court of Appeals ruled in *Mayer v. Monroe County Community School Corporation* (2007) that the First Amendment does not protect a teacher’s “instructional speech.”<sup>3</sup> Because a school board hires teachers to deliver a curriculum, they are essentially hiring their speech, which obligates a teacher to support the perspectives in the curriculum. It seems that the court ruled in this circuit (which includes Illinois, Indiana, and Wisconsin) that teachers really do shed their rights (at least their speech rights) at the school-house door.

I am not suggesting that all teachers work in a legal context in which they have no rights that could be even loosely associated with academic freedom. As discussed elsewhere in this issue of *Social Education*, the legal terrain with respect to academic freedom in elementary and

secondary schools is uneven and quite dynamic.<sup>4</sup> In some circuits, teachers do have more protections than in others, and in some school districts, the negotiated contract gives teachers some control over decisions about what to teach and in what ways. For example, the academic freedom clause in the district I taught in had this language:

Teachers shall not be denied academic freedom. As used herein “academic freedom” shall mean that teachers are free to present instructional materials which are pertinent to the subject and level taught, within the outlines of appropriate course content and within the planned instructional program so determined through normal curricular channels. The teacher shall present materials on opposing sides of controversial issues in a scholarly and objective manner within the limits of appropriate pedagogical discretion and propriety.<sup>5</sup>

Despite appearances, this language is more limiting than helpful. After all, the clear and forcefully worded right granted in the first sentence is not just contextualized, but outright limited in those that follow. Moreover, the language is rife with contested concepts—one can only imagine the multiple and competing interpretations of “appropriate peda-

gological discretion” that could arise in a dispute about a teacher’s curricular decision-making. However, in this district, it would be unlikely that teachers could be banned outright from selecting resources to use in their classes (as long as they were related to a topic that was part of the course) or teaching their students about controversial issues. In fact, I think the teacher could argue that the use of the word “shall” includes an affirmative obligation for teachers to teach about controversial issues.

Many teachers are not in a school or school district with a bargained contract of any sort, and for most that are, it is doubtful their contract includes robust support for their academic freedom. The issue just does not usually emerge as a high priority during bargaining. Consequently, teachers who assume that the law, contracts, or constitutions invest them with the power to make decisions about the curriculum are skating on very thin ice. As a result, one prevailing conception of teachers these days is that they amount to little more than a “hired mouth.”

### **Opposing Conceptions of Teacher Freedom: Hired Mouth or Class Monarch**

As uncomfortable as it may make us feel, the fact remains that public school teachers are “state agents” engaged in government practice. This means that our actions are, in fact, government actions. So, for example, if a public school teacher fails a student on the sole basis that the student voiced political views with which the teacher disagreed, a constitutional violation has occurred. The teacher’s action was government action, and it effectively punished a student for speech that the First Amendment protects. Given that public school teachers are “state actors,” it is perhaps not surprising that a court could find it well within the government’s (or by extension, the school board’s) right to have considerable influence on what and how teachers teach and what they say to students. Most teachers do not question the right (or the responsibility) of the school district to determine



Middle school teachers from the Chicago Public Schools participate in a moot court simulation on *Tinker v. Des Moines* as part of a summer 2010 professional development institute of the Constitutional Rights Foundation Chicago. (Courtesy of the Constitutional Rights Foundation Chicago)

what classes students need to complete to graduate from high school, whether they will fund kindergarten for four-year-olds, or whether it is acceptable to have a policy that prevents teachers from trying to convert students to their religion.

Being a state agent, however, does not mean surrendering all rights at the schoolhouse door; a teacher is also a professional, and education carries broad responsibilities. Two polar opposite conceptions of the amount of “freedom” teachers could have as state agents and professionals are: the teacher as a “hired mouth,” and the teacher as “class monarch.”

### **Hired Mouth**

The “hired mouth” is the ridiculously thin conception of teaching that the federal court in the *Mayer* case put forward. According to this court, the curriculum is akin to a consumer product that is developed by someone other than the teachers. Teachers are then contracted to “sell” the product, not to critique it or refuse to implement it in the classroom. Teachers must not only teach the topics they are told to teach, but with the perspective the

school board wants promoted, because, as Judge Easterbrook wrote in the case:

...the school system does not “regulate” teachers’ 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. A teacher hired to lead a social-studies class can’t use it as a platform for a revisionist perspective that Benedict Arnold wasn’t really a traitor, when the approved program calls him one.<sup>6</sup>

Viewing teachers as simply hired mouths of the government strikes me as exceedingly problematic because it denigrates the root purposes of education and denies the state and students the benefit of teacher expertise and professional judgment. As students and teachers know, education differs from training. Why worry about teacher quality and content expertise if they are only delivering a script? For that role, one would need acting training, not deep knowledge of the subject and of how students learn.

Moreover, stripping teachers of curriculum decision-making extracts from their role the very thing many teachers find the most interesting because it demands their professional expertise and judgment. If the *Mayer* court's conception of what teachers should do takes hold more broadly, then some of the very strongest teachers may very well leave the profession. This is not an unwarranted fear; recent research indicates that when teachers lose the authority to make the decisions their professional training prepared them to make, they are much less likely to stay in teaching.<sup>7</sup>

### **Class Monarch**

On the opposite end of the spectrum of teacher freedom is the idea that individual teachers should have total control over the applied curriculum, not only making all decisions about what is taught, but with which perspectives, and in what ways. This vision of overly autonomous curricular “free agents” positions the teacher as the sole classroom authority. Some teachers are thrust into this position against their will and yearn for more direction about what should be the curriculum, or would relish the opportunity to work with colleagues on curriculum planning. But other teachers seem to believe that they deserve complete authority, and anyone who tells them otherwise is improperly invading their professional space, and perhaps is even acting as a curricular brown shirt. It is not uncommon to hear such teachers proclaim, “When I shut my classroom door, I should be able to do whatever I want.”

In my experience, these teachers come from across the political spectrum, and they tend to get in trouble with administrators, parents, and some students. This is especially the case if they believe that their political views are important to impart to their students—as opposed to viewing the classroom as a deliberative space where students learn how to engage thoughtfully in the analysis and evaluation of multiple and competing answers to important questions.

The conception of the role of teachers as utterly autonomous is problematic because it is based on the idea that a curriculum developed by one person is better than one developed by many—an idea which is foolish on its face. It is also very hard to be a solo reflective practitioner, which makes it more difficult for Class Monarch teachers to continually improve their practice. Finally, if teachers believe they should be able to teach any perspective they want to students, the situation is ripe for potential indoctrination.

### **Possibility of Indoctrination from Either View**

Of course, there is the potential for indoctrination in the conception of teachers as state agent automatons as well, a point the *Mayer* court addressed at length:

Education is compulsory, and children must attend public schools unless their parents are willing to incur the cost of private education or the considerable time commitment of home schooling. Children who attend school because they must ought not be subject to teachers' idiosyncratic perspectives. Majority rule about what subjects and viewpoints will be expressed in the classroom has the potential to turn into indoctrination; elected school boards are tempted to support majority positions about religious or patriotic subjects especially. But if indoctrination is likely, the power should be reposed in someone the people can vote out of office, rather than tenured teachers. At least the board's views can be debated openly, and the people may choose to elect persons committed to neutrality on contentious issues. That is the path Monroe County has chosen; Mayer was told that she could teach the controversy about policy toward Iraq, drawing out arguments from all perspectives, as long as she kept her opinions to herself. The Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials.<sup>8</sup>

Judge Easterbrook's point here merits attention. He is not pretending that the “official” curriculum is neutral, and even admits to the tendency of democratic bodies (such as elected school boards) to make decisions that do not go against the grain—even though we know that the majority can be just plain wrong. His concern is over what can be done to rectify problems in the curriculum (whether they are in the “official” curriculum, or one teacher's perspective), and suggests it is better to vest authority in bodies whose decisions are transparent and susceptible to democratic recourse than to leave such decisions to individual teachers.

### **Is There Any Hope for Academic Freedom?**

Given the problems with both visions of teacher freedom, and the reality that in many parts of the nation the teacher as an utterly autonomous being has little or no grounding in law or constitutions, it may be both helpful and necessary to frame the freedom of the teacher with respect to curriculum and pedagogy in a new way. I propose that teachers should behave *as if they have* academic freedom, and they should be treated that way as well. It has been my experience that when teachers take up these responsibilities with the professional care and dedication they deserve, they are often treated as if they are vested with formal academic freedom rights. In short, absent the rights of academic freedom *de jure*, aim for gaining them *de facto*. We need to be clear, however, about the nature of teacher freedom.

A plethora of evidence suggests that in highly effective schools, this already occurs. Such schools hire teachers with a lot of expertise, give them authority (but not complete autonomy), encourage deliberation and joint curriculum decision-making, provide high quality opportunities for professional development, and hold them accountable for the quality of their decisions and for what students are learning. Supporting teachers does not mean giving them full autonomy to do whatever they want—

that is a recipe for disaster—but it does mean treating them with the respect that someone with professional training should receive, recognizing that they have professional judgment, and doing whatever can be done to ensure that their judgment is nurtured. Ideally, this should involve creating situations in which the best possible decisions can be made. But what should teachers do?

I propose that when making and enacting curriculum decisions, teachers should act in accordance with the responsibilities that come with academic freedom rights, even though in most cases they do not formally or legally have those rights. Social studies teachers are often encouraged to teach students about their “rights and responsibilities” under the law. As odd as it sounds, here I am arguing that even though rights have not been granted (and in some cases, have been taken away) with respect to determining what is taught and in what ways, teachers have a set of crucial responsibilities that remain. I identify four primary responsibilities for teachers:

1. To refrain from indoctrination;
2. To participate;
3. To stay up to date;
4. To deliberate with others.

### **The Responsibility to Refrain from Indoctrination**

There is no stronger nor frequently mentioned reason to limit teachers’ academic freedom than concerns about whether giving free reign to teachers to determine what and how to teach will lead to the indoctrination of young people. Many people believe that there is a straight-line causative relationship between a teacher simply voicing her or his own views (especially on highly controversial political issues) and students adopting those views, even though there is virtually no empirical evidence that warrants that claim.<sup>9</sup> Moreover, we also know that people tend not to think indoctrination is occurring when it is their viewpoint being promoted in the classroom. Then, it is simply teaching.

What is clear is that defining indoctrination is incredibly difficult—in large part because it is so often used as an epithet. That being said, I define indoctrination as the deliberate attempt to cause students to adopt a belief on a subject for which there are legitimate multiple and competing views that students should deliberate.<sup>10</sup> For example, a number of years ago I met a teacher who was an extremely engaged political activist. She saw her classroom as an extension of her political work in the world outside of school, and said that in her classroom it was, “All Bush, all the time.” By way of explanation, she posited that it was her responsibility (and also, right) to teach students to support the policies of the Bush administration. I asked her whether that would be her responsibility if a Democrat became president in the future, and she said, “absolutely not.”

I was shocked by this teacher’s stance, because she was so bold about doing something that I saw as a clear case of indoctrination. Moreover, it was shocking because it is so rare. I have talked with literally hundreds of teachers about how they approach teaching highly controversial political issues, and only a handful have so boldly supported trying to inculcate students into one position on a topic for which I thought there were legitimate and competing multiple perspectives.

However, I recognize that some teachers believe (and in fact, are right) that the “official curriculum” they are expected to teach is attempting to indoctrinate students into a perspective that should be an open question. If it is wrong for teachers to indoctrinate, then isn’t it equally wrong for the state to engage in the practice through its official curriculum documents or mandates? Teachers are right to be concerned about this problem. While I think that Judge Easterbrook’s point about preventing indoctrination by investing curriculum decisions in a body that is susceptible to democratic pressure is a good one, at the end of the day, I think we need to be concerned about indoctrination regardless of its source. In other words, indoctrination by dem-

ocratically-elected bodies is still indoctrination; it doesn’t evolve onto a higher plane just because of its source. Just as we can strike democratically-enacted laws because they violate a fundamental right, we need to have some similar checks on curriculum development processes.

For teachers, there are three responsibilities related to indoctrination. The first is not to engage in it in our own classrooms. The second is to be willing to hold our colleagues accountable in order to prevent them from engaging in indoctrination. In my experience, this is one of the key reasons to engage in deliberating with our colleagues about the nature of the curriculum and how we are going to teach it to our students. We should deliberate about our views on the crucial question of what should be taught as open questions and what should be taught as closed questions. Open questions are those for which there are legitimate competing answers that students themselves should be deliberating, and closed questions are those for which there is a particular perspective that warrants inculcation. The third is to do whatever we can to ensure that the official curriculum doesn’t indoctrinate—which takes us back to why it is so critical for teachers to be involved in curriculum development processes at every level.

### **The Responsibility to Participate**

Teachers have a responsibility to recognize that as professionals, their expertise about content, pedagogy, and their students makes it not just acceptable, but mandatory, to make decisions about what and how to teach. Thus, it is professionally irresponsible to withdraw from the frequently challenging deliberative space of curricular decision-making.

I am often perplexed when I learn that some teachers who have virtually complete freedom to determine the curriculum they teach often wind up making the same choices as those who complain about being yoked to a highly prescriptive standardized curriculum. As an example, I recently talked with a teacher about the lessons she uses to teach the War of

1812. They were incredibly high quality interactive lessons, but it struck me that she was giving a lot of time to this content, and she complained that she rarely had time in her history class to deal with more current history. In other words, there was a high opportunity cost to focusing with such intensity on that particular war. I asked her why she spent so much time on the War of 1812—what made it so important? And she really did not have an answer that she found satisfactory—she had learned about it in her history classes, it was in the text, and it had just become a staple of her curriculum. The lesson here is that if you are in a teaching context in which you have the power to influence what to teach, don't simply rely on the decisions you have made in the past. The responsibility to engage in curricular decision-making is part of a larger need to continually be open to changing our practice—a call for the continual critical analysis and evaluation of what we are teaching and why.

Clearly, there are differences between and within states (and even school districts) about how much control individual teachers have over the curriculum they teach. I recognize that in some states and districts with very specific standards (and often pacing guides to go along with them) and/or with certain types of high stakes exams, teachers often have limited authority to determine what content their students will learn. But in all of these cases, some group is making a decision about what should be taught—and it is essential for teachers to participate in these processes. Doing that within a school is a lot easier than influencing what is on a state test, or in state standards. After serving on lots of curriculum decision-making committees over the years, I recognize how time consuming and frustrating it can often be. What Oscar Wilde is reputed to have said about socialism could just as well apply to participation in curricular decision-making: It takes up too many evenings.

In many schools, teachers have quite a lot of freedom to determine what to teach and in what ways. While they may be

mandated to teach a unit on the Middle East in a geography class, on civil rights movements in a history class, or on the Supreme Court in a government course, the precise nature of what they teach and how they teach it is still within their decision-making bailiwick. So, for these teachers, the challenge is not how to gain authority to influence curriculum decisions, but how to do so on a regular basis in a way that ensures that what students are taught is up to date.

### **The Responsibility to Stay Up to Date**

Knowledge is continually being constructed, and thus, all teachers need to stay abreast of what is happening in their field. In social studies, however, I think the need is even more pronounced, given our responsibility to help students “read the world.” By that I mean that much of our job is teaching students how to make sense of contemporary events and issues that are, by definition, always changing. In higher education, the notion that professors have some measure of academic freedom (although it is a lot less than many believe) is predicated at least in part on the assumption that professors are creating knowledge, which means they have to stay up to date in their field. Even though most K-12 teachers are not expected to produce scholarship that contributes in an original way to the knowledge base, it is clearly the case that they need to be critical consumers of scholarship if they are to ensure that the curriculum they teach has intellectual validity. Finally, staying up to date on issues in the field enables teachers to justify their pedagogical decisions.

### **The Responsibility to Deliberate**

It is not unusual to hear teachers argue that they either have or should have academic freedom rights that allow them to operate independently of their school colleagues. This notion of the teacher as a lone wolf is often lionized in popular films, and I am not suggesting that there aren't some teachers who operate this way effectively. I think they are few and far

between because of the strong connection between deliberating curriculum decisions with colleagues and making good decisions. It is helpful to find out how others are approaching the same content and skills that we are working on in our classes, but it is even more important to engage in real deliberation about what and how to teach with others who have professional expertise and understand your teaching context. Ideally, this deliberation is done with the benefit of some empirical evidence about what students are learning and in what ways.

### **Conclusion**

In conclusion, teachers should be aware that if they think they have academic freedom rights that are legally codified, they are misinformed. While some teachers may have more rights than others due to a bargained contract or which state or federal circuit they reside in, these rights are simply not as robust as many believe to be the case.

I have argued that even if teachers do not have legal rights to academic freedom that are as robust as they may desire, they still have a set of responsibilities. I find it foolish for society to reduce the teacher's role to one of simply enacting the curriculum decisions made by others. This will not lead to good teaching and will surely do nothing to attract and keep the strongest teachers into the profession; however, it is also unwise for teachers to think and act as if they are the only people who should influence what their students learn. Instead, there are powerful reasons to vest teachers with the freedom to engage in decision-making about what and how to teach. There is likewise a concomitant responsibility for teachers to take up that role seriously and at multiple levels. In my view, curricular decision-making is more effective when done in collaboration and by teachers who have up-to-date content and pedagogical knowledge. Moreover, there is a responsibility to avoid indoctrinating students. Responsible teaching may not lead to a change in the legal codification of academic freedom rights

for teachers, but it could well create or protect these important teacher rights *de facto*—which would be a good result for society writ large, for teachers, and for their students. ❧

#### Notes

1. Though *Tinker* is commonly pointed to as having determined that students do not shed their constitutional rights ... at the schoolhouse gate, the actual decision states, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." (*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).
2. In 2007, Professor Mead wrote *Freedom of Speech, A Primer for Students and Teachers* for a symposium at the annual meeting of the College and University Faculty Assembly of the National Council for the Social Studies that I co-facilitated with Professor Bruce Larson. For a copy of the primer, e-mail Diana Hess at dhess@wisc.edu.
3. *Mayer v. Monroe County Community School Corporation*, 474 F.3d 477 (7th Cir., 2007).
4. Michael D. Simpson, "Defending Academic Freedom: Advice for Teachers," *Social Education* 74, no. 6 (2010); Robert M. O'Neil, "Legal Issues in the Protection of Student Freedoms," *Social Education* 74, no. 6 (2010).
5. For a copy of the contract that contains this language, go to [www.csd99.org/employment/collective\\_bargaining\\_agreements.aspx](http://www.csd99.org/employment/collective_bargaining_agreements.aspx)
6. *Mayer v. Monroe County Community School Corporation*.
7. Katy Farber, *Why Great Teachers Quit: And How We Might Stop the Exodus* (Thousand Oaks, Calif.: Corwin Press, 2009).
8. *Mayer v. Monroe County Community School Corporation*.
9. D. Hess and P. McAvoy, *The Political Classroom: Ethics and Evidence in Democratic Education* (New York: Routledge, forthcoming 2011).
10. I recognize that determining what is legitimate is extremely challenging. For a discussion of what criteria could be used to make this determination, see Michael Hand, "What Should We Teach as Controversial? A Defense of the Epistemic Criterion," *Educational Theory* 58, no. 2 (2008) and Diana Hess, *Controversy in the Classroom: The Democratic Power of Discussion* (New York: Routledge, 2009).

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