

# Restrictions on Teachers' Speech: What Does It Really Accomplish?

by Grace Kim

At the turn of the century, America realized “that public education was a necessary social investment, that popular aspirations and national social and economic well-being demanded that it also be universal.”<sup>1</sup> America’s noble experiment, universal education for all citizens, is a cornerstone of democracy.<sup>2</sup> And since the beginning, teachers have set the foundation of education, which is so central to our culture. Public school reformers who sought to develop a nationwide system of free public schools tapped into the largely under-utilized resource of female workers, willing to work for little or no pay.<sup>3</sup> The teaching profession comes with at least two centuries of gender roles and basic cultural assumptions that contributed to the community as a whole.<sup>4</sup>

These well established views of American teachers persist, and likewise, American public schools will continue to be a locus of contemporary social, political, and moral development. So it only seems natural to hold teachers, those who will become one of the most influential figures in a child’s life, to a higher standard. Even so, the fact that teachers hold a position of responsibility does not mean they enjoy cannot enjoy the full range of freedoms they have as Americans. Unfortunately, as we will see, case history suggests that teachers are often too restricted due to their unique positions, and that teachers may in fact need heightened protection to secure their rights to speech and their autonomy in the classroom.

In 1968 the U.S. Supreme Court ruled in *Pickering v. Board of Education* that public school teachers do not forfeit their First Amendment rights to engage in speech

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<sup>1</sup> *History of American Education*. PBS Online. Retrieved 5 May 2011.  
<http://www.pbs.org/kcet/publicschool/>

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

that their employer, the school district, might find disagreeable.<sup>5</sup> The following year, in *Tinker v. Des Moines Independent Community School District*, the High Court wrote that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>6</sup> These two seminal cases establish that public school teachers, as public employees, do not forfeit all of their First Amendment freedoms when they come to school. However, while America bestows upon teachers the freedom and wisdom to educate its youth, that freedom comes with significant responsibilities and restrictions, largely because of the potential impact on impressionable children. Consequently, what a teacher can or should say is often closely scrutinized, and freedom of expression is thus limited.

Just how much scrutiny or limitation a teacher's actions or words should receive was delineated by Justice Thurgood Marshall in *Pickering v. Board of Education*, a U.S. Supreme Court case that was among the first to find that teachers maintain some rights of expression within school walls.<sup>7</sup> Justice Marshall wrote that we must "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern, and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>8</sup> In the case, a teacher had written to the local newspaper criticizing the school board and superintendent for how they spent school funds.<sup>9</sup> The Court held that the teacher had the right to express views on a matter of legitimate public concern and that criticizing school policy was not adequate grounds

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<sup>5</sup> *Pickering v. Board of Education*, 391 U.S. 563 (1968).

<sup>6</sup> *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 507 (1969).

<sup>7</sup> *Pickering* at 568.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

for dismissal.<sup>10</sup> But Justice Marshall also noted that there are limits to such criticism. If, for instance, a teacher breaches a work-related confidence in his or her statements, or if the statements are merely personal attacks, they may be restricted.<sup>11</sup> If the comments are sarcastic, unprofessional, or insulting, or based on a private disagreement, a teacher may be disciplined.<sup>12</sup>

The consequences and the context of a teacher's actions or words must be factored into an equation balancing public versus private interests. Speech on behalf of the public interest can include political activity, which is at the core of the First Amendment. Teachers do not lose their rights to campaign, circulate petitions, or conduct other types of political activity.<sup>13</sup> What they cannot do is indoctrinate students through their teaching or offer generally inappropriate or disruptive political comments. Thus, a South Carolina federal district court found that a substitute teacher who had worn a button with the slogan "War is Not the Answer" and was alleged to have made other negative statements during her classes regarding American military policy in Panama and Iraq was found not to be protected by the First Amendment.<sup>14</sup> The court applied the *Pickering* test balancing the employee's interest and rights as a citizen to address public policy issues against the state's interest in promoting efficient public services.<sup>15</sup> In deciding for the school system, the court explained that the *Pickering* test "recognizes that the government may impose restraints on the First Amendment activities of its

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<sup>10</sup> *Pickering* at 569.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Calef v. Budden*, 361 F. Supp. 2d 493 (S.C. 2005).

<sup>14</sup> *Id.* at 500.

<sup>15</sup> *Id.*

employees that are job-related even when such restraints would be unconstitutional if applied to the public at large.”<sup>16</sup>

Also, restrictions on First Amendment freedoms are common in curriculum-based matters and that implicate issues of academic freedom and censorship. At the core of these disputes is the balance of power granted to teachers, particularly to direct their lessons and to comment on materials and issues related to their teaching and curriculum. The U.S. Supreme Court stated in its 1969 opinion in *Tinker v. Des Moines Independent Community School District* that “it can hardly be argued that neither students nor teachers shed their constitutional rights to freedom of speech and expression at the schoolhouse gate.”<sup>17</sup> The Court articulated that public school teachers, as public employees, do not forfeit all of their First Amendment freedoms when they come to school.<sup>18</sup> However, school districts limit teachers’ religious expression in order to avoid violating the establishment clause, which requires separation between church and state. When teachers speak to their classes, they represent the school and the school board. Teachers, as agents of the government, may not inculcate students in religious matters.<sup>19</sup> Otherwise, they run afoul of the establishment clause.

But even as teachers may comment about materials contained in the curriculum, they do not have control of that material, which belongs to school officials. One high school teacher in Virginia learned this the hard way when a court ordered him to remove pamphlets he had put outside his classroom describing a number of banned books.<sup>20</sup>

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<sup>16</sup> *Calef* at 501.

<sup>17</sup> *Tinker* at 507.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Newton v. Slye*, 116 F. Supp. 2d 677 (2000).

While designed to create discussion on an important public policy, the judge found that posting the materials was an extension of the curriculum, which, he explained, is the responsibility of school officials.<sup>21</sup> Likewise, a teacher cannot disregard a text, syllabus, or curriculum.

As a general matter, the amount of academic freedom provided to teachers varies among states and communities, and this is particularly true with religious freedom issues. Like any citizen, a teacher has the right to practice his or her religion. However, this cannot include proselytizing or indoctrinating students, a ban that may also include efforts to present a religious viewpoint outside of class but still within the school day.<sup>22</sup> By the very nature of their roles as school and state representatives, teachers do not have the same religious rights on the public school campus as do students. Therefore, a teacher's religious faith should only be expressed in instances when it is clear to the students that the teacher is expressing a personal belief and only when it can be done in a non-proselytizing manner.

The 10th U.S. Circuit Court of Appeals pointed out in *Roberts v. Madigan* that there is a "difference between teaching about religion, which is acceptable, and teaching religion, which is not."<sup>23</sup> The confusion about permissible and impermissible religious expression by teachers has led to disciplinary action and even lawsuits. Many times these lawsuits pit a teacher's free-exercise and free speech claims against a school's establishment-clause defense. The teachers claim they have a free speech and free-exercise of religion right to express their religious views, but the schools counter that

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<sup>21</sup> *Newton* at 678.

<sup>22</sup> *Id.*

<sup>23</sup> *Roberts v. Madigan*, 921 F.2d 1047, 1055 (Tenth Cir. 1990).

they teachers' religious expression must be limited to avoid establishment clause violations.

In *Roberts*, the 10th Circuit ruled that a school district could constitutionally require teacher Kenneth Roberts to remove two religious books from his fifth-grade classroom and to quit his silent reading of his Bible during a silent reading period.<sup>24</sup> Roberts sued school officials, claiming that they had violated the establishment clause by showing hostility toward religion, and also violated the teacher's rights of free speech and academic freedom.<sup>25</sup> A three-judge panel of the 10th Circuit ruled 2-1 in favor of the school district.<sup>26</sup> The majority determined that the district did not violate the establishment clause and did not show hostility toward religion. The majority reasoned that the school district acted properly in preventing a teacher from promoting Christianity.<sup>27</sup> The majority also rejected Roberts' free-speech claim, finding that under the *Tinker* standard the teacher was infringing on the rights of his students by promoting religion. "The censored conduct therefore substantially infringed on the rights of Mr. Roberts' students," the court wrote.<sup>28</sup>

The 2nd Circuit, in its 1999 decision *Marchi v. Board of Cooperative Educational Services*, ruled that school officials could order a special education teacher to refrain from using religious references in his instructional programs.<sup>29</sup> A convert to Christianity, Dan Marchi, modified his teaching program to discuss subjects like God, forgiveness and

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<sup>24</sup> *Roberts* at 1055.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Marchi v. Board of Cooperative Educational Services*, 173 F.3d 469 (2d Cir. 1999).

reconciliation.<sup>30</sup> “For his part, the employee must accept that he does not retain the full extent of free exercise rights that he would enjoy as private citizen,” the 2nd Circuit wrote.<sup>31</sup> “A school risks violation of the Establishment Clause if any of its teachers’ activities gives the impression that the school endorses religion.”<sup>32</sup> Then, in *Downing v. West Haven Board of Education* (2001), a federal district court determined that high school administrators did not violate the First Amendment rights of teacher Ella Downing when they ordered her to remove or cover up a T-shirt reading “JESUS 2000 — J2K”, because “In short, whatever First Amendment rights were implicated by Downing wearing her T-shirt must give way to the defendants’ legitimate concerns about a potential Establishment Clause violation in a public school,” the court wrote.<sup>33</sup>

No substantial collection of case law exists involving teachers’ religious liberty rights. But some religious liberty advocates claim that many teachers will not even broach the subject of religion for fear of discipline by the school or lawsuits. “There are many more incidents of censorship of teachers’ religious-liberty rights than the reported cases would indicate,” says Mathew Staver of the Liberty Institute, a Florida-based religious-liberty group.<sup>34</sup> “The majority sentiment that I see among discussion groups of teachers is that many teachers are fearful of talking about religion at all in order to avoid an establishment-clause lawsuit.”<sup>35</sup> Thus, they eliminate religion. It becomes a situation where they are not neutral toward religion. Out of an overabundance of caution, they are

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<sup>30</sup> *Marchi* at 478.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Downing v. West Haven Board of Education* (2001)

<sup>34</sup> Gow, Haven Bradford. *Students, Teachers and Religious Freedoms*. Liberty Magazine. January/February 2006.

<sup>35</sup> *Id.*



showing hostility toward the subject matter of religion.”<sup>36</sup> Staver, joined by others cite the case of *Roberts v. Madigan* as an example of a federal court unnecessarily censoring a public school teacher's religious expression and showing hostility, instead of neutrality, toward religion.<sup>37</sup>

However, school districts' desire to avoid establishment clause quandaries does not mean that teachers must never discuss religion. Religion is an important part of history, culture, social studies, and current events. U.S. Supreme Court justice Tom Clark wrote in the 1963 decision *Abington Township v. Schempp* that "it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization."<sup>38</sup> How could a history teacher effectively teach about the Crusades without some discussion of Christianity and Islam? As one federal appeals court wrote, there is a "difference between teaching about religion, which is acceptable, and teaching religion, which is not."<sup>39</sup>

The published case law appears to favor school officials who show that they acted out of establishment clause concerns. For example, federal courts have sided with school officials who: Forbade teachers from leading students in prayer;<sup>40</sup> ordered a teacher to remove a religious T-shirt;<sup>41</sup> ordered a teacher to remove a Bible from his desk and two religious books from classroom bookshelves;<sup>42</sup> and prohibited teachers from wearing

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<sup>36</sup> *Students, Teachers and Religious Freedoms*.

<sup>37</sup> *Id.*

<sup>38</sup> *Abington Township v. Schempp* , 374 U.S. 203 (1963)

<sup>39</sup> *Roberts* at 1048.

<sup>40</sup> *Breen v. Runkel*, 614 F. Supp. 355 (W.D. Mich. 1985).

<sup>41</sup> *Downing v. West Haven Board of Education.*, 162 F. Supp. 2d 19 (2001).

<sup>42</sup> *Roberts* at 1049.

Muslim garb<sup>43</sup> and Sikh clothing.<sup>44</sup> Teachers may not preach to their students, lead them in devotional Bible readings, or otherwise try to convert them to their religious faith. Instead, the Court requires neutrality of teachers on matters of religion, neither promoting nor disparaging any religion, or even non-religion.

Not surprisingly, teachers have a lower level of freedom in the classroom than they do outside of it because they have a greater influence on students in the classroom. While limited regarding the choice of curriculum, teachers should ideally enjoy the freedom over the subject matter and the form in which that subject matter is taught. But if a teacher necessarily restricts the subject of religion, or any other subject for that matter, due to fear of discipline by the school or by legal action, this ideal remains just that, an ideal.

Navigating through the precarious balance of rights between teachers and the public can be quite difficult at times, especially when they seem to conflict. This has led to administrators and teachers becoming so cautious that they eliminate all traces of potentially controversial topics like religion from their campuses and in their classrooms. This, however, is unnecessary and does not serve students, families, or communities well. Not only will strict limitations on speech prevent teachers from indoctrinating their students, it can prevent teachers from freely discussing controversial topics in class for risk of crossing the line.

In an attempt to err on the side of caution, would not a reasonable teacher stay close to the set curriculum without even considering the alternatives? If a teacher is

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<sup>43</sup> *United States v. Board of Education for the School District of Philadelphia*, 911 F.2d 882 (Third Cir. 1990).

<sup>44</sup> *Cooper v. Eugene School District No. 45*, 301 Oreg. 358, 723 P.2d 298 (1986).

afforded the freedom to teach in innovative and thought-provoking ways without fear of condemnation, the student is able to press the boundaries and explore new ways of thinking without fear of condemnation as well. And if a student can not only learn *about* subject matter but also learn *how* to think about subject matter, is not the whole of society to benefit? Indeed, a teacher's autonomy is most precious, and in order to protect such a commodity, we must err on the side of freedom, not legal restriction. As we have seen from the case law before us, society's public interests may often outweigh a teacher's private ones. But as a society, we must ask ourselves, if a teacher's interests are lost, does society lose as well?