Free Speech in the Balance: What Do We Know About the Rights of Public School Teachers

Nancy C. Patterson
Bowling Green State University

Prentice T. Chandler
Athens State University

This paper presents an overview of what we have learned about the state of academic freedom in the public schools. It includes a rationale for the place of academic freedom in social studies classrooms, a perspective on the court system as recourse for teachers, and a call for action to protect our freedoms by alternative means. Based on a National Council for the Social Studies (NCSS) presentation by American Civil Liberties Union (ACLU) lawyer Fritz Mulhauser, the paper provides a thematic summary of case law and precedent as they stand at present, including speech outside of school, classroom materials and content, classroom discussion, and expression through dress. Finally, the paper offers suggestions of how to exercise academic freedom successfully in the classroom.

Introduction

When we ask our students — prospective secondary social studies teachers — where they get their right to free speech, they inevitably respond that the U.S. Constitution guarantees it. The majority attests we have it because it is an inviolable part of the Bill of Rights as written in the First Amendment. There is no small degree of misunderstanding — or perhaps a simple forgetting — among these prospective teachers about the origins of their rights, both that the rights they currently enjoy were hard-won and that these important rights are at risk and/or the subject of ongoing debate. Paulo Freire stated, “Citizenship is not obtained by chance: It is a construction that, never finished, demands we fight for it” (1998, p. 90). Entwined with the struggle for citizenship is the ongoing fight for academic freedom in K-12 education. It continues in this generation and has implications for preservice teacher education.

United States Supreme Court Justice David H. Souter recently recalled the court’s words 46 years earlier which stated that “the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools” (in Garcetti v. Ceballos, 2006, quoting Shelton v. Tucker, 1960). It is the need for this vigilant protection that has motivated us to write this review. We provide some background for the place of academic freedom in K-12 classrooms and summarize what we have learned about the state of academic freedom in the public schools, including a perspective on the court system as recourse for teachers and a call for action to protect our freedoms by alternative means. Finally, we offer suggestions of how to exercise academic freedom successfully in the classroom.

This freedom allegedly protects teachers’ rights to make instructional and curricular decisions in the best interest of their students and is a hotly contested right in the courts. The National Council for the Social Studies (NCSS) defined academic freedom in a 1968 position statement (revised in 2007) entitled
“Academic Freedom and the Social Studies Teacher,” which states:

A teacher’s academic freedom is his/her right and responsibility to study, investigate, present, interpret, and discuss all the relevant facts and ideas in the field of his/her professional competence. This freedom implies no limitations other than those imposed by generally accepted standards of scholarship. (p. 1)

Academic freedom is an element of social studies teaching so essential that our governing national organization has not only published this document but also has endorsed, along with other national organizations, the 1940 American Association of University Professors (AAUP) 1940 Statement of Principles on Academic Freedom and Tenure.

Thoughtful teachers of all grade levels and around the world want to be able to plan their own lessons (including goals and materials), speak to students as they think best, and encourage free-ranging discourse in their classes unfettered by interference from authorities within their institutions or beyond. In higher education (apart from sectarian schools), a cultural consensus establishes norms to protect professors at both public and private schools. For their part, public school K-12 teachers have long argued that protections in the US Constitution for free expression should cover them and yield similar protection.

The difficulty is that teachers are public employees, and as such, the government, with responsibility both for education and as an employer, also has important rights. The balance has been contested in the courts for decades. This balance and the measure of it was first articulated in the landmark case, Pickering v. Board of Education (1968), wherein a public school teacher was dismissed for having written a sarcastic letter to a local paper about school district financing. Pickering sued and won his case in the Supreme Court.

Writing for the majority, Justice Thurgood Marshall wrote:

The problem in any case is to 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.

The test of balance has been whether the teacher’s right to discuss matters of public concern outweighed the school’s interest in efficiency and avoiding disruption. As described in the case studies that follow, the Pickering balancing test has been used to weigh numerous free speech cases.

For K-12 social studies educators, the fact that courts balance individual and government rights makes for uncertain outcomes. Exploring this tension and assessing its implications for teachers are the purposes of this paper. We are writing as members of the Academic Freedom Committee of NCSS and as professors of social studies education to summarize what we have learned about the tenuous state of academic freedom. Both of us have served on this committee in varying capacities and have worked with numerous prospective teachers at our respective institutions. We have been unnerved upon learning of the challenges teachers across all grade levels and content areas face when they try to implement issues-based curriculum or engage with controversial issues. We have learned of many ways in which teacher expression and professional judgment in general can be at risk: Conflicts may arise over choices of broad topics (e.g., peace, war in Iraq, or the Arab-Israeli conflict), choices of interpretive frameworks (i.e., teaching backward from the present, using revisionist narratives, choosing materials like specific readings and plays or films with adult content), or even small-scale choices (i.e., classroom language which allows vernacular and “street” terms). Since the landmark decision of Tinker v. Des Moines Independent
Community School District (1969) that upheld students’ rights of non-disruptive expression at school, our students’ cheerful assumption that “the Constitution protects us” may actually be truer of their own speech than that of their teachers.

The Context for Academic Freedom in Social Studies

Academic freedom is the cornerstone of democratic citizenship in the public system and thus deserves a privileged place in social studies. The story line for social studies instruction has been penned in the NCSS standards (1994), where it is stated that “The primary purpose of the social studies is to help young people develop the ability to make informed and reasoned decisions for the public good as citizens of a culturally diverse, democratic society in an interdependent world” (p. vii). In other words, the social studies, as the most inclusive of all of the school disciplines (Ross, 2001), is the academic discipline in which teachers engender the growth of competent democratic citizens who can carry on the democratic traditions and institutions of the American state. It is evident that, while citizenship and training of people to play productive roles in society is a mission of the schooling at large, it is a mission that is uniquely suited to social studies.

Debate persists over the exact nature of that mission, perhaps because the meaning of “democratic citizen” is contested, giving rise to an irresolvable dialectical tension. On one end of the spectrum is the revisionist philosophical citizen who disrupts and resists all forms and systems of oppression (Ellis, 2001). On the other end of the spectrum is the more traditional, conservative citizen who accepts a given sociocultural position and provides unquestioned support to those leaders perceived as capable of preserving America’s role in the grand march of history. Westheimer and Kahne (2004) have described a continuum of citizenship orientations from personally responsible (traditional) to participatory (somewhere in the middle) to justice-oriented (revisionist philosophical). They argue that the decisions that people make as to what sort of citizen each will be as an individual have critical political implications for social studies education.

We argue that, indeed, the description of “citizen” espoused in the guiding documents of our national organization is one that aligns with the justice-oriented citizen. This citizen is not only well informed, as a personally responsible citizen might be, or simply active, as the participatory citizen might be, but active for the common good, acknowledging cultural diversity and interdependence in this citizenship role. Teachers such as these have opportunities to “analyze and understand the interplay of social economic and political forces” and bring attention to “matters of injustice and to the importance of pursuing social justice” (Westheimer & Kahne, 2004, p. 4).

This teacher-citizen is equipped and enabled to teach about controversy, offering consideration of multiple perspectives on any issue and calling students to active participation based on these understandings. She or he has great need of free speech protections described in the First Amendment and subsequently defined in the courts as academic freedom. The tension lies herein to transmit the shared knowledge of the larger cultural narrative of America by way of history, political science, sociology, geography, psychology, economics, and so forth in a context of academic freedom. Such freedom is a prerequisite to developing a citizenry who can act upon the world to change and reform it by resisting oppressive and inequitable antidemocratic conditions (Stanley & Nelson, 1994).

The tensions inherent in the discussion of whether or not a social studies teacher is justice oriented is but one marker along a complicated continuum of ways of conceptualizing the social studies. Since the inception of social studies in the early 1900s, the expressed/overt goal of the social studies has
been that of citizenship education. From the founding of the American republic until the founding of social studies more than a century later, public education was created and developed to serve the civic purpose of creating a strong electorate, one whose citizens would fulfill their civic duty to the United States (Shaver, 1981). Ross (2001) highlights the foundational concept of “Social studies, in the broadest sense,” as “the preparation of young people so that they possess the knowledge, skills, and values necessary for active participation in society” (p. 21). Of course this expressed goal can be shaped and formed to mean different things to different people in different historical eras. The meaning and mission of social studies shifts with the times. The basic dilemma outlined by Shaver (1981) in defining, teaching, learning, and thinking about social studies is “How can the school contribute to the continuity of the society by preserving and passing on its traditions and values while also contributing to appropriate social change by helping youth to question current social forms and solutions?” (p. 125).

In this reconceptualization of good citizenship, “educators should be given the opportunities to analyze and understand the interplay of social, economic, and political forces” and bring attention to “matters of injustice and to the importance of pursing social justice” (Westheimer & Kayne, 2004, p. 4). Freire (1998) probably best conceptualizes citizenship in ways that differ from the modernist notions of citizenship as given, fixed, and neutral:

*Yes, citizenship—above all in a society like ours, of such authoritarian and racially, sexually, and class-based discriminatory traditions—is really an invention, a political production. In this sense, one who suffers any (or all) of the discriminations . . . does not enjoy the full exercise of citizenship as a peaceful and recognized right. On the contrary, it is a right to be reached and whose con-
quest makes democracy grow substantively. Citizenship implies freedom. . . . It demands commitment, political clarity, coherence, and decision. For this reason, a democratic education cannot be realized apart from an education of and for citizenship. (p. 90)*

Amidst the debate, we choose to frame citizenship education in terms of social justice—a social justice whose mission is to interrupt oppressive discourses not merely celebrating the heroic meta-narrative of the past. In reference to the Shaver (1981) quote above, social studies would lean in favor of “contributing to appropriate social change by helping youth to question current social forms and solutions” more than “preserving and passing on traditions” (p. 125). This would involve a break from the way that social studies education has taken place in American schools and would have as its focus, not the creation of passive students, but active, change-oriented students. This is not to suggest that all teachers should adopt the social justice orientation, but rather that teachers taking this stance are more likely to encounter challenges related to academic freedom. Teachers who find their pedagogical strategies, content, and/or opinions about schooling to be different from the accepted schooling discourses can be reprimanded; one need not be a justice-oriented teacher to face issues of academic freedom—one need only to disagree with accepted practice and/or policy. Academic freedom is meant to protect all individuals across the continuum of citizenship, but as the following review of case law suggests, it is rare that teachers are reprimanded or disciplined for teaching in traditional ways or covering accepted content in social studies classes. Its advocacy has been marshaled in great part by teachers who challenge the status quo.

Citizenship education in justice-oriented classrooms can be the basis for healthy development of students who learn to analyze facts and values and reach well-grounded positions...
that guide their conduct as democratic citizens of the future. It is also within this context that academic freedom teeters in the balance. Evidence of the current status of academic freedom in the service of democracy is detailed in the following account of court actions related to academic freedom over the past quarter century.

**The Reality of Academic Freedom in the Balance**

Each year, our committee has sponsored a panel discussion at the annual meeting to explore yet again the contested terrain of teachers’ rights in instruction and how teachers may best avail themselves of their rights. While our understanding of the challenges many teachers face comes from engaging with teachers and reading their case transcripts, our understanding of recourse they may have has been built from talking with National Education Association (NEA) and American Civil Liberties Union (ACLU) lawyers. Both NEA and ACLU speakers at our sessions over the years, while joining us in enthusiasm about the goal of academic freedom, have warned that in any specific court test of a teacher’s instructional decisions, the results will rest on inherently unpredictable balancing of competing values and the outcome thus is never certain. At the December 2006 conference in Washington, DC, much of what we have been learning over the last few years became clearer as we listened to our guest from the ACLU present an overview of case law concerning academic freedom. From this and other sources, we have constructed our understanding of the present state of academic freedom in the public schools. It is a complicated, murky story of this generation’s struggle and a starting point for planning future courses of action.

Fritz Mulhauser (2006), staff attorney at the ACLU in Washington, DC, opened our December panel discussion with the statement that there is little certainty of a winning decision for teacher academic freedom in the courts. Mulhauser began his career in the 1960s as a social studies teacher and curriculum developer, including a period on the staff of the Harvard Social Studies Project led by Professors Donald Oliver and Fred Newmann, creating materials for teaching controversial issues in high schools. He noted that 2006 was the 40th anniversary of *Teaching Public Issues in the High School* (1966) by Oliver and James P. Shaver, and he dedicated his remarks to Oliver. Though noting that teachers retain the protection of their expression as citizens in general outside of school, he warned of the uncertainty of success in court in a fight with officials involving teaching, so he urged educators to build alternative bases of support that can be relied upon in troubled times. His rationale is built upon the following overview of salient court cases. He built the argument thematically, beginning with cases dealing with speech outside of school, then moving to cases concerning teachers’ choices regarding content of instruction, followed by teachers’ right of expression in the classroom discussion, and closing with teachers’ expression in their dress. We conclude the case law overview with a discussion of a recent pivotal Supreme Court case that appears to tip the balance against academic freedom.

**Teachers’ Speech Outside of School**

Public employees do not forfeit the right to comment publicly on matters of public concern, such that, in general, teachers cannot be fired or disciplined for statements out of school unless it can be demonstrated that speech created a substantial adverse impact on school functioning. For example, the Supreme Court held that it could be a violation of the First Amendment if an untenured Cincinnati teacher was not rehired just because he called a radio station to pass on information about an internal memo setting a dress code for teachers to spruce up the schools’ image at tax time (*Mt. Healthy City School District Board of Education v. Doyle*, 1977). Applying what has come
to be called “Pickering balancing,” the Court rejected discipline for a teacher who wrote a letter to the newspaper about a proposed tax increase for school funding, a letter that was critical of board priorities because there was no evidence that it affected his classroom work or interfered with the operation of the school system generally.

The Court explained in a 1983 decision that there are limits to the definition of speech on matters of public concern. A city prosecutor in New Orleans challenged her being fired after circulating a “survey” to other attorneys about morale and other internal topics as part of her own protest of a proposed transfer. In Connick v. Myers (1983), the Supreme Court held that her questions were “mere extensions of [her] dispute over her transfer” and hence of only personal interest. Under these rules, a teacher's off-campus statements regarding such things as war and/or participation in an off-campus political demonstration would not be a constitutionally acceptable basis for job discipline or termination. The right to comment publicly on such matters of public importance is protected.

Teacher Expression in Choosing the Content of Instruction

Once inside the school, the teacher at work in the classroom is an employee of the state; therefore choices of content and methods of teaching highlight the classic questions of Pickering balancing — the contending interests of the teacher and the employer. The longstanding claim of educators as “professionals,” in the way of doctors or lawyers, entitled by training and specialized knowledge to teach as they know best has not been consistently accepted by the courts. Courts sometimes protect the academic freedom of college and university professors to lecture as they wish, as in the Sweezy case cited above, or to pursue novel curricula or teaching methods. In Hardy v. Jefferson Community College (6th Cir., 2001), vulgar language was protected, where discipline was reversed on grounds that the professor’s street talk was relevant to instruction in his communications class.

These principles do not apply with equal force to K-12 teachers, creating an artificial separation between levels of education and roles they should play in the marketplace of ideas. Classroom speech rulings in precollege education generally follow the principle that a teacher “appears to speak for the state when he or she teaches,” and accordingly, the state has a strong interest in determining the content of the message its teachers will deliver. Tucker v. California Board of Education (9th Cir., 1996).

The critical question is at what level the teacher has some professional autonomy. In general, there would be no quarrel that a teacher must teach in the assigned subject area. It does not violate a teacher's free speech rights when the district insists, for example, that a teacher hired in the science department teach physics and not political science or that he or she should not lead students in prayer — even though both have the result of limiting what the teacher says in the classroom; however, the employer’s right to prescribe reaches further. For example, a court in Washington State, twenty years ago, summarized the case law in general as holding that “a school district has authority to prescribe both course content and teaching methods” (Millikan v. Board of Directors of Everett School District, Washington, 1980). In that case, two social studies teachers challenged the school’s refusal to let them team-teach an alternative global studies course in place of a regular history class after a pilot period showed little student interest. When the court reviewed their claim that denying them their chosen content and approach was a First Amendment violation, it began by acknowledging that the two “utilized unconventional but professionally recognized methods designed to teach the student to think,” and that this was a “worthy objective.” Even so, the court upheld the administration, reasoning that “an educational institution may require some conformity in teaching methods
.... [T]he board’s requirement that petitioners teach history classes in a conventional manner contrary to their own preferred teaching philosophy is not violative of their rights” (p. 417). Millikan essentially removes the suggestion that a teacher “appears” to speak for the state and instead mandates that teachers are agents of the state.

On even smaller scale curriculum decision-making, courts have denied teachers a right of expression that includes unilateral choice of materials. A teacher in North Carolina unsuccessfully challenged her transfer following controversy over her choice of a play with mature themes about dysfunctional families. In Boring v. Buncombe County Board of Education (4th Cir., 1998), the Court of Appeals held the teacher’s selection of the play did not involve a matter of public concern and so was not protected speech, and even if her selection of the play was protected speech, school officials had a legitimate pedagogical interest in regulating that speech. In Kirkland v. Northside Independent School District (5th Cir., 1989), the court turned away a challenge by a teacher denied reappointment for what he said was assigning a supplementary reading list that had not been approved. He argued that nonconforming views were being squelched, but the Court of Appeals saw no First Amendment issue, stating that “[a]lthough the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula.”

**Teachers’ Expression in the Classroom as Part of Classroom Discussion**

Although the boundaries are not precise, there is an outer limit to a school district’s ability to control teachers’ supposedly controversial speech in the classroom, and some speech has been protected, namely, as follows: a) if there is no pedagogical purpose for the ban, b) if the restriction is considered to be gross, or c) if the restriction harmed students’ ability to receive important ideas relevant to the curriculum. Courts have sometimes ruled that schools may not punish teachers for uttering particular concepts or words in class that are otherwise consistent with the school curriculum. In Epperson v. Arkansas (1968), the court overturned the state’s ban on teaching about evolution, arguing that the restriction harmed students’ ability to receive important ideas relevant to the curriculum. In Hosford v. School Committee of Sandwich (Mass., 1996), the Massachusetts Supreme Court upheld a special education teacher’s brief classroom discussion of vulgar words. Her superiors first suspended her and then denied her contract renewal on grounds her brief lesson was “pedagogically inappropriate” for 13-year-old boys in a special education class, but the Court reviewed the facts in detail and disagreed. The case is unusual, however, and teachers cannot count on every court taking a close look at the details of a lesson that superiors deem out of bounds.

If a teacher faces some discipline for speech in the classroom on a matter of public concern, a court would apply the *Pickering* balancing test, reviewing the teacher’s rights along with the government interest in effective and efficient fulfillment of responsibilities to the public. A difference of opinion with a school’s administration that does not interfere with school operations or discipline would probably not be a sufficient government interest to overcome teacher First Amendment rights. In Piver v. Pender County Board of Education (4th Cir., 1987), a high school social studies teacher successfully challenged a punitive transfer after he allowed discussion in his classroom of the firing of the principal. The discussions were not considered propagandizing; the retention of a principal was a matter of public concern and administration fears of disruption were insubstantial and of little weight in the balancing test.

Similarly, in Cockrel v. Shelby County School District, 270 F.3d 1036 (6th Cir., 2001), the Court of Appeals upheld a fifth-grade
teacher’s invitation to the television series *Cheers* star, actor Woody Harrelson to speak to her class about the environmental benefits of industrial hemp, an illegal substance in Kentucky, holding that the invitation was a form of protected expression as it touched on a matter of public concern — the environmental benefits of different crops in Kentucky. In analyzing the *Pickering* balance, the Court of Appeals dismissed the school’s concerns about a bit of public controversy afterwards — especially as the principal had approved the speaker — and found the teacher’s interest in her choice of topic and speaker paramount.

The Courts of Appeals have thus reached diverse conclusions in applying *Pickering* balancing to teachers’ expression at work. Compare the 6th Circuit findings in favor of the teacher’s expression touching on a “public concern” in *Cockrel* with those in the other direction by the 4th Circuit in *Boring* or by the 5th Circuit in *Kirkland*. A California court in 2001 held the law so unclear that it gave no effective guidance to educators as to when they might lawfully limit teachers’ speech, hence making them immune from any lawsuit for incorrect action (See *Debro v. San Leandro Unified School District*, N.D. Cal., 2001).

Following parent opposition to a Gay Straight Alliance, an honors English teacher discussed tolerance of gay students in class, and a few students, whose parents formed the opposition group, walked out. The school reprimanded the teacher, who sued. The court noted the general principle that teacher comments on matters of public concern are not only protected, but also there is no clear authority for the proposition a teacher may depart from classroom instruction in order to initiate discussion on such matters. The court declined to let the case against the school go forward, holding that no reasonable administrator would have clearly understood the teacher’s rights.

It may be a small consolation that limits regarding teacher expression must be clearly set forward. Thus, courts have overturned discipline for speech in violation of school or board rules where there has not been clear prior notice. In *Ward v. Hickey* (1st Cir., 1993), the Court of Appeals noted that a school is “not entitled to retaliate against speech that it never prohibited.” The Court continued, stating that “few subjects lack controversy. If teachers must fear retaliation for every utterance, they will fear teaching.” For technical reasons, the *Ward* court never reached the question whether a ninth-grade, untenured, biology teacher could be fired for discussing abortion in class where the Board had given no warning such discussion was prohibited.

### Teachers’ Expression through Their Dress

Student dress was at issue when in December 1965, when John and Mary Beth Tinker were suspended for wearing black armbands to school in Des Moines, Iowa, to protest the war in Vietnam. The most famous of all student rights cases, *Tinker v. Des Moines Independent Community School District* (1969), established that public school students may wear armbands in class as an expression of their views on topics of public concern: a right that may be limited only if there is good reason to believe that the speech would cause a substantial and material disruption to education or violate the rights of others.

The courts have differed over whether teachers have the same right as students to display personal political messages on their clothing. In *James v. Board of Education* (2nd Cir., 1972), the Court of Appeals held that a New York teacher could not be fired for wearing a black armband in protest of the Vietnam War, since the armband had caused no classroom disruption (while he taught poetry to his 11th-grade English class), was not perceived as an official statement of the school, did not interfere with instruction, and did not coerce or “arbitrarily inculcate doctrinaire views in the minds of the students” (p. 573). As conflict was building over the Vietnam War, the Court embraced at least this symbolic level of teacher dissent within the
schoolhouse walls, pointing out that “we cannot countenance school authorities arbitrarily censoring a teacher's speech merely because they do not agree with the teacher's political philosophies or leanings” and that to uphold the discipline would create the “danger that the school, by power of example, would appear to the students to be sanctioning the very pall of orthodoxy ... which chokes freedom of dissent” (pp. 573-74).

Twenty-five years later, at the height of a California statewide campaign concerning school vouchers, a school district prohibited any political activity by teachers at work, including wearing buttons in class. The court upheld the rule against a challenge by teachers in California Teachers Association v. San Diego Unified School District (Cal. Ct. App., 1996), reasoning that school districts have legitimate authority to “dissociate themselves from matters of political controversy.”

In summary, depending on the precise form of message displayed on the teacher’s clothing, a school may have legitimate concern that a teacher's display of a political message is more likely than a student’s to disrupt the school’s intended educational message. For example, a school intending to educate students about the benefits of racial tolerance would find its message disrupted by a teacher wearing a Nazi-style armband with swastika.

**Garcetti v. Ceballos and Tipping the Pickering Balance**

We close with a review of one additional case regarding free speech and the Pickering balance. The recent Supreme Court case, Garcia v. Ceballos (2006) is emblematic of an ongoing balancing act and has tipped the scales against academic freedom for teachers. The case is a whistleblower case in which the plaintiff — a district attorney — claimed that he had been passed up for a promotion for criticizing the legitimacy of a warrant. In a slim 5-4 majority, the Court upheld the power of the government to impose discipline for public employees’ statements made as part of their official duties, arguing that because Ceballos’s statements were made pursuant to his position as a public employee rather than as a private citizen, his speech had no First Amendment protection.

While this case had no direct connection to academic freedom, it is notable that Justice Souter, writing in dissent, expressed a concern that the ruling would be used as precedent in academic freedom cases. He expressed his 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’” (see Simpson, 2006, p. 2) Perhaps to emphasize that Garcia should have the least implication for higher education, Justice Souter also quoted from Sweezy v. New Hampshire (1957), an even older case from the days when states investigated “subversive” professors, in which the Court held that a governmental inquiry into the contents of a scholar’s lectures at a state university “unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread” (p. 13). Justice Stevens warned that the majority’s decision in Garcia was “mis-guided” (Hudson, 2007).

Beyond the passage Justice Souter quoted, the Sweezy court affirmed the need for free inquiry and expression because of the following:

To impose any straitjacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. 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)

More recent developments with Garcetti (2006) have given cause for concern, confirming Justice Souter’s prediction (Hudson, 2007). The case has been used as precedent in numerous cases to strike down plaintiffs in free speech cases, such as in several cases dealing with academic freedom in public schools (Houlihan v. Sussex Technical School District Board of Education and Mayer vs. Monroe County Community School Corp., 06-1657). It is reported to be having a palpable effect on public employee speech, and First Amendment expert Robert M. O’Neil, founder of the Thomas Jefferson Center for the Protection of Free Expression explains:

I’m not surprised that Garcetti has such an effect. We specifically warned in our amicus brief in the Garcetti case that its implications were potentially far-reaching. The central flaw in Garcetti is the failure to recognize that often great public interest lies in giving government employees broad latitude to speak in the areas of their expertise. In a sense Garcetti got it backwards. (see Hudson, 2007, p. 3)

Conclusion

This review of case law presents a patchwork of rulings that situate academic freedom in the balance, with the scales tipping by turns for and against. To summarize, the Constitution is commonly held to protect a teacher’s speech outside the classroom on a matter of public concern. At school, a teacher will not be heard to argue his or her right of expression extends to an individual choice of curriculum and materials. Courts have divided in their analysis of teachers’ rights when speaking in class; some broadly defining topics of public concern that at least merit analysis against the school’s asserted interest and others finding no public concern in the content or overpowering government interest in regulating classroom speech.

In short, when a teacher speaks in the classroom on matters of public concern and the court applies the Pickering balancing analysis (teacher rights versus government interest in effective and efficient fulfillment of responsibilities to the public), the outcome is difficult to predict. One constant that runs throughout the above rulings is that they seek to control and suppress the inevitable messiness of controversy. In this way, they are supporting educational philosophies that are at odds with the purpose of social studies to develop young citizens as defined in the literature (Westeimer & Kahne, 2004).

It appears that courts are calling for teachers to remain neutral in the classroom. Our review of the call for citizenship education in social studies and the current unfavorable context for enacting this mandate lead us to question the consistency with which the courts have argued for such neutral thought and action on the part of teachers. Rulings from cases such as California Teachers’ Association, wherein teachers were required to “dissociate themselves from matters of political controversy” convey confusion on the part of the courts about the nature of schooling and social studies writ large. This line of thinking is (again) the product of the modernist myth of objectivity and neutrality. There is no argument in philosophical or scholarly circles about the notion of being neutral in schooling in the 21st century. Everything is value laden, including the widely accepted purpose for social studies education as defined by NCSS.

Implications and Recommendations

The outlook may seem bleak for a teacher who would embrace controversy and open the classroom to vigorous engagement with issues of the day. Conservative majorities in many of the U.S. Courts of Appeals and a closely
divided Supreme Court will apply a body of legal doctrine on the speech rights of public employees — including teachers — that includes the inherently unpredictable balancing test from *Pickering* and dozens of cases supporting state power to control materials and teaching. It is no surprise that legal experts advise teachers not to expect protection from the courts if they face discipline for being experimental, unorthodox, or outspoken.

The following recommendations about how to fight for academic freedom outside the court system are practical ways to work toward fulfilling the mission of the democratic classroom in the current context. The source for most of these recommendations is Michael Simpson, General Counsel for the National Education Association (NEA), who has worked in legal advocacy with teachers in defense of academic freedom for many years and has had several articles published in *NEA Today* that are relevant to this topic. His recommendations include the following:

1. **Address your state tenure laws:** Each state has tenure laws designed to protect teachers from frivolous or political-related dismissal. Contact your local and/or state teachers’ union to determine how your state deals with academic freedom. If your state’s laws relative to academic freedom are weak, it is imperative that a collective effort is made to strengthen these laws. (Simpson, 1998)

2. **Look at your district’s collective bargaining agreement and due process procedures:** When your teachers’ union negotiates the next contract or collective bargaining agreement (CBA), make sure that the negotiating team presses for explicit protections for academic freedom. Note that solid contract language gives a teacher facing discipline important authority to rely on in the grievance and arbitration stages. “Arbitrators—who interpret and enforce CBAs—are much more sympathetic to teachers’ claims of academic freedom than state and federal courts.” (Simpson, 1998)

3. **Carefully review your school/district policies covering additions to the curriculum, readings, outside speakers, and controversial issues in the classroom. Challenge ambiguous or biased policies and ask for new policy to be drafted by legal counsel, who can do so thoughtfully and in line with precedent if there are hidden “rules” not reduced to clear language. It can cost tens of thousands of dollars to take a case through the courts to get discipline overturned because it was based on a vague or unpublished rule. Knowing and following the rules for advance approval of unusual material or teaching by the department head, principal, or subject matter specialist can also get school officials on your side when a student or parent complains.**

4. **Avoid certain “red flags” that may bring negative attention to your teaching:** This is essentially self-censorship. Although this is not attractive to many teachers who teach for social justice in schools, avoiding explicitly obscene or sexual content can save you a lot of trouble. (Simpson, 1998)

5. **Work with your local school board to incorporate academic freedom and teaching about controversial issues language in board policies. Form a coalition to support these values by enlisting members of the faculty at any local college or university in such advocacy, as well as ministers and members of progressive churches and staff and members of state-wide organizations such as People for the American Way or the ACLU.**

6. **Keep legal battles at the local level.** While decisions at the higher courts have been sometimes counterproductive, lower level courts have a more favorable record on academic freedom. (Mulhauser, 2006)
We call on teachers to assume a new role relative to academic freedom and social justice within the social studies—that of the “oppositional intellectual” (Giroux, 2001). In this reconceptualization of teaching, teachers do not reject authority outright; they interrogate and engage it to help students learn to govern themselves and assume the role of active and critical citizens. This active, informed, justice-oriented citizen stands in stark contrast to the personally responsible, traditional citizen. Without academic freedom in schools, the mission of social studies is dead. Without academic freedom and the ability to challenge the status quo and its “common sense” (Bourdieu, 2005) explanations of the world, society, from the standpoint of knowledge, is in trouble. It is our hope that this review will help to strengthen ways in which teachers can protect themselves in an environment in which academic freedom is in the balance.

References

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About the Author

Nancy C. Patterson is assistant professor of Social Studies Education at Bowling Green State University in Bowling Green, Ohio. She is currently teaching secondary social studies methods and graduate research courses as well as working with a neighboring urban school district on school reform. She is a past Chair of the NCSS Academic Freedom Committee.

Contact information: Bowling Green State University, 509 Education Building, Bowling Green, Ohio, 43403; phone: (419)372-7320; email: ncpatte@bgnet.bgsu.edu.

Prentice T. Chandler is an assistant professor of Social Studies Education and department head at Athens State University in Athens, Alabama. He is currently teaching secondary social studies methods and foundations courses. He is Vice Chair of the NCSS Academic freedom Committee, a member of the Rouge Forum, and recipient of the 2007 NCSS Defense of Academic Freedom Award.

Contact information: Athens State University, McCain Hall, Room 214, Athens, AL 35611; phone: 256-233-8262; email: prentice.chandler@athens.edu.