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# ACADEMIC FREEDOM AND THE PUBLIC SCHOOL TEACHER: AN EXPLORATORY STUDY OF PERCEPTIONS, POLICY, AND THE LAW

by Todd A. DeMitchell\* & Vincent J. Connelly\*\*

The academic freedom of professors and teachers is much discussed, but its borders remain stubbornly indistinct and blurred. It is a constitutional right claimed by educators in schools and colleges but not consistently proclaimed by the courts. The courts' view of academic freedom impacts policy-making and practice, yet the impact is inconsistent and not easily discerned.<sup>1</sup> An educator's professional practice in both higher education and public education is often predicated upon their perception of the robustness or weakness of their right to academic freedom,<sup>2</sup> thus influencing collective bargaining agreements and board policies.

Despite academic freedom's influence on policy, there is no black letter law definition of this right. Adding to the vagueness of the situation, professors, lawyers, and judges "are not always clear whose academic freedom is at stake."<sup>3</sup> For example, an analysis by noted expert, Professor Perry A. Zirkel, finds academic freedom as a "negligible protection afforded to individual faculty members."<sup>4</sup> A

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1. *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547, 553 (5th Cir. 1982).

2. See JERRY HERMAN & GENE MEGIVERON, *COLLECTIVE BARGAINING IN EDUCATION: WIN/WIN, WIN/LOSE, LOSE/LOSE* 190-94 (1993) (citing academic freedom as an important initial contract article); Todd A. DeMitchell & Casey D. Cobb, *Teachers: Their Union and Their Profession*, 212 EDUC. L. REP. 1 (2006).

3. Robert M. O'Neil, *Academic Freedom and the Constitution*, 11 J.C. & U.L. 275, 281 (1984).

4. Perry A. Zirkel, *Academic Freedom of Individual Faculty Members*, 47 EDUC. LAW REP. 809, 824 (1988) ("The results of this analysis are sobering for the faculty members in higher education who might drink too deeply of the bottle labeled 'academic freedom' as a euphoric cure

federal district court also highlighted this disconnect when it wrote: "The concept of academic freedom. . . is more clearly established in academic literature than it is in the courts."<sup>5</sup>

While the Supreme Court has stated that academic freedom is a "special concern of the First Amendment,"<sup>6</sup> it has yet to "articulate a coherent analytical framework for protecting that concern."<sup>7</sup> The Court's pronouncements on academic freedom are majestic but not very helpful in establishing a definition.<sup>8</sup> Consequently, a case analysis reveals its tenuous rather than robust support of academic freedom.<sup>9</sup>

Despite this, those advocating a robust view of the right to academic freedom often refer to the Supreme Court's majestic language in *Keyishian v. Board of Regents*: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendental value to us all and not merely to the teachers concerned."<sup>10</sup> The Court further stated that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom" and that a professor's academic freedom is a "special concern of the First Amendment."<sup>11</sup>

It is clear from education case law and history that the genesis of academic freedom is found in higher education.<sup>12</sup> However, public

for various problems with colleagues, administrators, and external government agencies.").

5. *Cohen v. San Bernardino Valley Coll.*, 883 F.Supp. 1407, 1412 (C.D. Calif. 1995); see also *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1275 (7th Cir. 1982) ("The precise contours of the concept of academic freedom are difficult to define."); *Mahoney v. Hankin*, 593 F.Supp. 1171, 1174 (S.D.N.Y. 1984) (recognizing that the contours of academic freedom "are not well-defined, especially with regard to a teacher's speech within the classroom.").

6. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

7. Recent Case, *Fourth Circuit Upholds Virginia Statute Prohibiting Employees from Downloading Sexually Explicit Material*, 114 HARV. L. REV. 1414 (2001).

8. See J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment*, 99 YALE L.J. 251, 253 (1989) ("The problems are fundamental: There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding principle, the principle floats in the law, picking up decisions as a hull does barnacles."); W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish out of Water*, 77 NEB. L. REV. 301, 302 (1998) ("Despite the tributes, courts are remarkably consistent in their unwillingness to give analytical shape to the rhetoric of academic freedom.").

9. Many of the early Supreme Court pronouncements cited as support for academic freedom were not part of the majority decisions. Therefore, they lacked precedential value. For example, Justice Douglas' comment about loyalty oaths casting a pall of orthodoxy over the classroom—"There can be no real academic freedom in that environment"—was a dissenting opinion and consequently carries no weight in law. *Adler v. Bd. of Educ.*, 342 U.S. 485, 510 (1952) (Douglas, J., dissenting).

10. *Keyishian*, 385 U.S. at 603.

11. *Id.*

12. See WILLIAM D. VALENTE & CHRISTINA M. VALENTE, *LAW IN THE SCHOOLS* 147 (4th ed. 1998) ("Suggestions of a legal right to academic freedom first appeared in higher education cases . . .").

school teachers bring the majority of cases.<sup>13</sup> By doing so, they add to the uncertainty of and confusion over the contours of academic freedom by asking the question: "To whom does it belong?"<sup>14</sup>

This study will use the following questions to focus and frame this study of academic freedom:

1. Is there a legal basis for academic freedom for public school teachers?

2. What are the perceptions of public school teachers regarding their academic freedom rights?

This research uses a mixed methodology including legal and quantitative analysis designed to address these questions. While this methodological approach is fairly new, Stefkovich and Torres have noted that it is "strongly supported by the education law community."<sup>15</sup> Furthermore, Schimmel advocated the use of complementary methods as a means of adding depth and texture to legal research.<sup>16</sup> This methodology is employed in two phases, beginning with a legal analysis of cases and secondary sources and followed by the development of the research instrument, data gathering, and analysis.<sup>17</sup>

The paper consists of five parts. Part one will discuss the historical roots of academic freedom. Part two will review the major Supreme Court decisions on academic freedom. The third part will discuss

13. See Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1 (2001); Kara Lynn Grice, *Striking an Unequal Balance: The Fourth Circuit Holds that Public School Teachers Do Not Have First Amendment Rights to Set Curricula in Boring v. Buncombe County Board of Education*, 77 N.C. L. REV. 1960 (1999); Donna Prokop, *Controversial Teacher Speech: Striking a Balance Between First Amendment Rights and Educational Interests*, 66 S. CAL. L. REV. 2533 (1993); Merle H. Weiner, *Dirty Words in the Classroom: Teaching the Limits of the First Amendment*, 66 TENN. L. REV. 597 (1999); Perry A. Zirkel, *Boring or Bunkum?*, 79 PHI DELTA KAPPAN 791 (1998).

14. Julius Getman & Jacqueline W. Mintz, *Foreward: Academic Freedom in a Changing Society*, 66 TEX L. REV. 1247, 1249 (1988). See JOSEPH BECKHAM ET AL., CONTEMPORARY ISSUES IN HIGHER EDUCATION LAW 116 (Joseph Beckham & David Dagley eds., 2005) ("Since academic freedom involves the right of the institution and its representatives to function with reasonable independence from government interference, one might presume that the doctrine would enable a public institution to assert its prerogatives as a government employer and reasonably restrict the free speech of employees. . . . On the other hand, the doctrine as applied to faculty rights would appear to free individual faculty from interference by administrators or others within the academy. In dealing with this paradox, courts have elected to regard academic freedom as a special concern of the First Amendment and not an independent, fundamental right.").

15. Jacqueline A. Stefkovich & Mario S. Torres, Jr., *The Demographics of Justice: Student Searches, Student Rights, and Administrator Practice*, 39 EDUC. ADMIN. Q. 259, 263 (2003).

16. RESEARCH THAT MAKES A DIFFERENCE: COMPLIMENTARY METHODS FOR EXAMINING LEGAL ISSUES IN EDUCATION 1-2 (David Schimmel ed., 1996).

17. *Id.* For a discussion of quantitative analysis and legal analysis, see Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819.

academic freedom in public schools. Part four will discuss survey data addressing the perceptions of public school teachers regarding their rights to academic freedom. The last part is a conclusion.

This research is exploratory and not meant to be exhaustive of the subject of academic freedom in public schools. It is intended to provoke a dialogue as to how courts view academic freedom and how public school teachers perceive and practice it in the classrooms. Hopefully, policymakers will use the data to assist in policy formation.

## I. ACADEMIC FREEDOM: A HISTORICAL VIEW

Looking at history, the principle of academic freedom in America originated in higher education, but the emphasis developed much later than the rest of the academic world. While medieval universities had faculty guilds that shared power with student guilds, America's early institutions of higher education were characterized by legal control exercised by non-academic trustees.<sup>18</sup> The power relationship between faculty and lay trustees went virtually unchallenged until the latter half of the nineteenth century when Americans who had studied at German universities sought to remodel American universities in the German image.<sup>19</sup>

The early American model emphasized passing on received wisdom to the next generation. America's "nineteenth century colleges were not the modern research institutions of today."<sup>20</sup> However, many institutions responded to the Germanic influence by reconstituting themselves as centers of research and scholarship,<sup>21</sup> seeking new knowledge, particularly in the sciences.<sup>22</sup> The German idea of academic freedom "was premised upon the university as a self-governing body of faculty. By contrast, in America, "'the university' encompass[ed] a lay governing board and its administrative delegates to which the faculty [was] legally subordinate."<sup>23</sup> This governance pattern shifted from a lay board dominated by clergy to a board consisting of business and financial

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18. Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX L. REV. 1265, 1278 (1988).

19. *Id.* at 1269-71.

20. Stuller, *supra* note 3, at 308.

21. RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 386-87 (1955).

22. Donald J. Weidner, *Thoughts on Academic Freedom: Urofsky v. Gilmore*, 33 U. TOL. L. REV. 257, 259 (2001).

23. Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 846 (1983).

leaders.<sup>24</sup>

Although some aspects of intellectual freedom embedded in academic freedom have their roots “in antiquity, the modern development of the doctrine of academic freedom is derived largely from the nineteenth century German concepts of *lehrfreiheit* and *lernfreiheit*.<sup>25</sup> *Lehrfreiheit*, or freedom to teach, included the notion that professors “should be free to conduct research and publish their findings without fear of reproof from church or state; it further denoted the authority to determine the content of courses and lectures.”<sup>26</sup> *Lernfreiheit* was a parallel right of students to study and determine the course of studies for themselves.<sup>27</sup>

American higher education predated the ratification of the United States Constitution. However, the influence of the Germanic universities and their concept of *lehrfreiheit* did not impact American colleges and universities until almost one-hundred years after the ratification of the Constitution. In fact, academic freedom did not appear as an articulated concept in America until 1915.<sup>28</sup> Surely, when the Constitution and the Bill of Rights were drafted the concern for academic freedom did not exist.<sup>29</sup> The question then becomes, when did it become a special concern of the Constitution?<sup>30</sup>

Academic freedom as an aspect of a professor’s employment surfaced at the national level in 1915 when a committee of the American Association of University Professors (“AAUP”) issued a report on the

24. Weidner, *supra* note 22, at 259.

25. Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PENN. L. REV. 1293, 1299 (1976).

26. HOFSTADTER & METZGER, *supra* note 21 at 386–87.

27. *Id.*

28. See AM. ASS’N OF UNIV. PROFESSORS, POLICY DOCUMENTS & REPORTS 1 (9th ed. 2001) (“From its inception in 1915, the main work of the Association has been in the area of academic freedom and tenure.”).

29. “The Bill of Rights or the first ten amendments to the United States Constitution define the relationship between citizen and the federal government.” ROBERT M. HENDRICKSON, *THE COLLEGES, THEIR CONSTITUTENCIES AND THE COURTS* 4 (2d ed. 1999). Since the federal government did not run or control colleges, academic freedom could not have been a special concern of the First Amendment at the inception of the Bill of Rights. It wasn’t until after the Civil War that the Bill of Rights, including the First Amendment, was applied to the relationship of the state to the citizen through the Fourteenth Amendment. Also, consider the following from David M. Rabban, “Fitting academic freedom within the rubric of the first amendment is in many respects an extremely difficult challenge. The term ‘academic freedom,’ in obvious contrast to ‘freedom of the press,’ is nowhere mentioned in the text of the first amendment. It is inconceivable that those who debated and ratified the first amendment thought about academic freedom.” David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 237 (1990).

30. Todd A. DeMitchell, *Academic Freedom—Whose Rights: The Individual’s or the University’s?*, 168 EDUC L. REP. 1, 3 (2002).

subject.<sup>31</sup> The Report adapted *lehrfreiheit* to the American university. The AAUP focused on the professor as a teacher and investigator who had the right to interpret and communicate his or her conclusions without being subject to interference, molestation, or penalty.<sup>32</sup> Despite the AAUP's approach to academic freedom, they did not use the First Amendment as justification. Instead, they chose to justify academic freedom "on the basis of its social utility as a means of advancing the search for truth."<sup>33</sup> The 1915 AAUP principles were later codified in a 1940 Statement of Principles on Academic Freedom and Tenure.

How the AAUP defines academic freedom is important in understanding its normative, professional aspects, which may influence the legal construction of academic freedom. It should also be kept in mind that the AAUP definition of academic freedom applies equally to public and private institutions of higher education, even though the judicial application of academic freedom does not. Constitutional protections only apply to the relationship between government and the individual, therefore, the relationship between private institutions and individuals does not encompass those protections.

The AAUP 1940 Statement of Principles on Academic Freedom and Tenure along with its 1970 Interpretative Comments ("Comments")<sup>34</sup> rests on the AAUP's Statement on Professional Ethics ("Statement").<sup>35</sup> In it, the AAUP asserted that academic freedom "carries with it duties correlative with rights."<sup>36</sup> While professional associations enforce ethics in law and medicine, the individual institution of higher education assure enforcement of ethics in the academic profession.<sup>37</sup> According to the Statement, professors should: (1) be "guided by a deep conviction of the worth and dignity of the advancement of knowledge;" (2) "encourage the free pursuit of learning in their students;" (3) be obligated by a "common

31. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 28.

32. See WALTER P. METZGER, ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY 123 (1955) ("It need scarcely be pointed out," wrote the authors of the 1915 report, "that the freedom which is the subject of this report is that of the teacher."); *Id.* at 134–35 ("The professor can only be of use to the legislator and administrator if his conclusions are disinterested and his own."); AM. ASS'N OF UNIV. PROFESSORS, DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE (1915), *reprinted in* AM. ASS'N OF UNIV. PROFESSORS, *supra* note 28, at 300 ("It is, in short, not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic professional, that is asserted by this declaration of principles.").

33. HOFSTADTER & METZGER, *supra* note 21, at 398–40.

34. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 28, at 1.

35. *Id.*

36. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 28, at 3.

37. AM. ASS'N OF UNIV. PROFESSORS, STATEMENT ON PROFESSIONAL ETHICS (1987), <http://www.aaup.org/AAUP/pubsres/policydocs/statementonprofessionalethics.htm>.

membership in the community of scholars;" (4) "seek above all to be effective teachers and scholars;" and (5) be subject to the same "rights and obligations of other citizens."<sup>38</sup>

Academic freedom is cast within this mold of ethical behavior.<sup>39</sup> Academic freedom, according to the Statement, embodies the "full freedom in research and in the publication of the results, subject to the adequate performance of [the professor's] other academic duties."<sup>40</sup> It also includes professors' freedom to discuss their subject in the classroom with the warning that "they should be careful not to introduce into their teaching controversial matter which has no relation to their subject."<sup>41</sup> The Statement's emphasis that professors are citizens, members of a learned profession, and officers of an educational institution reinforces the mandate that "they should remember that the public may judge their profession and their institution by their utterances."<sup>42</sup>

The 1940 Statement and the 1970 Interpretative Comments reinforce the proposition that professors work within an institutional environment; they are officers of the institution whose actions carry the imprimatur of the institution. For example, the protection of a professor's research and publication through academic freedom is predicated upon the "adequate performance of their other academic duties."<sup>43</sup> Thus, a professor's academic freedom is based on and subject to other responsibilities associated with employment.<sup>44</sup> This is further reinforced in the Statement on Professional Ethics in which the enforcement of ethical behavior is an institutional duty.<sup>45</sup> The statements from the AAUP tend to support an argument that individual academic freedom is subordinate to the employment relationship. This begs the question: Can academic freedom be a special concern of the First Amendment if it is subordinate to the employment relationship?<sup>46</sup>

38. *Id.*

39. *See* Keen v. Penson, 970 F.2d 252 (7th Cir. 1992) (citing the University of Wisconsin-Oshkosh's use of the AAUP's Code of Ethics in an academic freedom dispute over the assignment of grades).

40. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 28, at 3.

41. *Id.*

42. *Id.* at 4.

43. *Id.* at 3.

44. *See* Wirsing v. Bd. of Regents, 739 F.Supp. 551, 553 (D. Colo. 1990) ("Further, although Dr. Wirsing may have a constitutionally protected right under the First Amendment to disagree with the University's policies, she has no right to evidence her disagreement by failing to perform the duty imposed upon her as a condition of employment."); *see also* Shaw v. Bd. of Trustees, 396 F.Supp. 872 (D. Md. 1975), *aff'd*, 549 F.2d 929 (4th Cir. 1976).

45. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 28, at 134-35.

46. DeMitchell, *supra* note 30, at 4.



Furthermore, according to the AAUP, academic freedom is contingent upon the professor meeting three requirements of the institution. These three points are predicated on the primacy of the employment relationship as opposed to the professional activity of teaching or conducting research. As already mentioned, professors meet the first of these requirements through “adequate performance of their other academic duties.”<sup>47</sup> They meet the second requirement by serving as an officer of the institution, implying a greater relationship than just employee to employer.<sup>48</sup> These first two points pertain to employment in a public institution where the state acts as employer. Professors meet the third requirement by recognizing the need to disassociate speech as private citizens from speech as university professors.<sup>49</sup> This disassociation tends to underscore that a different lens will be used for individual speech and university speech. Academic freedom may provide insulation from adverse employment decisions when the speech is extramural as opposed to speech as an employee of the university.

When the professor speaks as a citizen the state acts as a sovereign. This relationship of citizen to sovereign is the same for all individuals regardless of their employment status. In this situation, the professor cannot claim that her or his speech is a special concern of the First Amendment because First Amendment protections are available to all.<sup>50</sup> In other words, the state protection afforded a professor when speaking as a citizen is no different than the protection afforded a university custodian when speaking as a citizen. Further, this separation tends to underscore that an educational institution would distinguish between citizen and university speech. Therefore, the professor’s academic free speech rights, according to the AAUP, are determined by the professor’s adequate performance as an employee and the discharge of his or her duties as an officer of the institution.

The discussion to this point has primarily centered on academic freedom as policy. It is without constitutional teeth, and only the courts can provide that clout. The next section reviews the major Supreme Court decisions, as well as significant lower court decisions that have formed the basis for debate.

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47. *Id.* at 3.

48. *Id.*

49. *Id.*

50. AM. ASS’N OF UNIV. PROFESSORS, *supra* note 28, at 6 (“The controlling principle is that a faculty member’s expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member’s unfitness for his or her position. Extramural utterances rarely bear upon the faculty member’s fitness for the position.”).

## II. THE COURTS AND ACADEMIC FREEDOM IN HIGHER EDUCATION

The Supreme Court's pronouncements on academic freedom are majestic but not very helpful in establishing a definition. In the classic academic freedom case, *Sweezy v. New Hampshire*, the Court established that:

The essentiality of freedom in the community of American universities is almost self-evident. . . . 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.<sup>51</sup>

This language is similar to the Court's decision in *Keyishian v. Board of Regents*, which includes the most quoted statement about academic freedom:

Our Nation is 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, which does not tolerate laws that cast a pall of orthodoxy over the classroom.<sup>52</sup>

Despite the robust academic freedom language in *Keyishian*, the Court based its decision on Fourteenth Amendment vagueness and First Amendment right of association grounds rather than the free speech grounds associated with the academic freedom of professors.<sup>53</sup> The case also specifically targeted a threat from outside the university—the governmental obsession with Communism in public employment during the 1960s.<sup>54</sup> It did not concern research or teaching, the core of the AAUP argument for academic freedom.<sup>55</sup> Consequently, the decision “left open the question of what exactly constituted academic freedom.”<sup>56</sup>

The Supreme Court's vagueness toward defining a professor's academic freedom continued in *Healy v. James*, where the Court pronounced, “[W]e break no new constitutional ground in reaffirming this nation's dedication to safeguarding academic freedom.”<sup>57</sup> This decision concerned the recognition rights of student organizations at public colleges and universities and did not concern professors.<sup>58</sup>

51. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

52. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

53. *Id.* at 599–600.

54. *Id.* at 605.

55. *Id.* at 606.

56. Kate Williams, *Loss of Academic Freedom on the Internet: The Fourth Circuit's Decision in Urofsky v. Gilmore*, 21 REV. LITIG. 493, 505 (2002).

57. *Healy v. James*, 408 U.S. 169, 180–81 (1972).

58. *Id.*

Academic freedom for professors gains little ground from this decision. Perhaps *Healy*, rather than addressing *lehrfreiheit* (the educator's academic freedom) instead strengthened *lernfreiheit* (the student's academic freedom). Once again, the Court did not clearly take a stand on academic freedom for educators.

This lack of definition continued in *Minnesota State Board for Community Colleges v. Knight*<sup>59</sup> despite Justice Marshall's assertion in the concurring opinion that "we have frequently affirmed that 'the intellectual give and take of campus debate' is entitled to constitutional protection."<sup>60</sup> Marshall's comments on the intellectual give and take of the campus were incidental to the issue of whether a non-union teacher has a constitutional right to be heard in state mandated meet-and-confer sessions. Furthermore, Justice Brennan's statement in his dissenting opinion mirrored *Keyishian*: "This Court's decisions acknowledge unequivocally that academic freedom 'is a special concern of the First Amendment.'"<sup>61</sup>

Unlike the *Healy* and *State Board* decisions, *Sweezy v. New Hampshire* did not involve a professor but a one day guest lecturer who happened to be a Marxist journalist.<sup>62</sup> Despite its recognition as an academic freedom case, it is highly questionable whether this case is truly about academic freedom, which resides with the professoriate. In fact, the Court stated that the sole basis for the Attorney General's inquiry was to scrutinize *Sweezy* as a person, not as a teacher.<sup>63</sup> Consequently, the issue in the case was about the extent of permissible legislative powers as exercised in the Attorney General's line of questions posed to *Sweezy*. While the plurality mentioned academic freedom, the Court did not decide the case on First Amendment or academic freedom principles. Instead, the decision, written by Chief Justice Warren, "was part of the plurality rather than the majority opinion, based on substantive due process, and intertwined academic freedom with political expression."<sup>64</sup>

Outside of the high blown rhetoric surrounding the impact of *Sweezy*, the facts of the case and the specifics of the analysis, coupled with Justice Frankfurter's concurring opinion,<sup>65</sup> do little to support academic

59. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984).

60. *Id.* at 293 (Marshall, J. concurring).

61. *Id.* at 296 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (Brennan, J. dissenting)).

62. *Wyman v. Sweezy*, 121 A.2d 783, 788 (N.H. 1956).

63. *Sweezy v. New Hampshire*, 354 U.S. 234, 249-50 (1957).

64. *Zirkel*, *supra* note 4, at 814.

65. Justice Frankfurter's concurrence will be discussed *infra* note 72 and accompanying text. His comments form the foundation for the proposition that academic freedom is an institutional

freedom as an individual professor's right grounded in the First Amendment. Chief Justice Warren wrote "the right to lecture and the right to associate with others for a common purpose, be it political or otherwise, are individual liberties guaranteed to every citizen by the State and Federal Constitutions."<sup>66</sup> This statement appears to grant a general right available to all citizens rather than a narrow right focused on the specific class of educators.

While the plurality in *Sweezy* did provide some grand language about the importance of academic freedom, the language may restrict academic freedom to a protection from threats outside the institution. Chief Justice Warren wrote, "We believe that there unquestionably was an invasion of [Sweezy's] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread."<sup>67</sup>

Although threats from outside the university arise in higher education academic freedom cases, they are rare in K-12 cases. Thus, *Sweezy* may not provide that much protection for public school teachers. In fact, the comments of the Court on academic freedom in its opinion are considered *obiter dictum*<sup>68</sup>—an observation or remark not necessary to the case or essential to its determination.<sup>69</sup> Thus, "the plurality's use of sweeping language provides no practical insight into the doctrine."<sup>70</sup>

It is instructive to note that Justice Frankfurter in his concurrence in the *Sweezy* decision chose a normative rather than a legal basis for discussing academic freedom. He concurred with the result of the plurality's decision but disagreed with their rationale.<sup>71</sup> It is also curious that the Justice chose a conference address given in South Africa for authority and did not use the position of the AAUP. Justice Frankfurter quoted this conference as follows in his concurrence:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university – to determine for itself on academic grounds who may teach, what may be taught, how shall it be taught, and who may be admitted to study.<sup>72</sup>

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right.

66. *Sweezy*, 354 U.S. at 249.

67. *Id.* at 250.

68. HENDRICKSON, *supra* note 29, at 83.

69. BLACK'S LAW DICTIONARY 454 (6th ed. 1990).

70. Williams, *supra* note 56, at 504.

71. *Sweezy v. New Hampshire*, 354 U.S. 234, 267 (1957).

72. *Id.* at 263 (Frankfurter, J. concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH

As noted above, Justice Frankfurter's comments about speculation, experiment and creation while describing the work of the university, may not accurately describe the work of the public school.

When viewed closely, the four cases cited above, *Keyishian*, *Healy*, *State Board*, and *Sweezy*, do not lend strong support to the proposition that academic freedom is a special concern of the First Amendment. In fact, these cases do not apply the First Amendment to the AAUP-required adequate performance of professors. *Keyishian* was not concerned with a professor's teaching or scholarship. Students, not professors, were the focus of *Healy*. *State Board's* discussion of academic freedom was part of concurring and dissenting opinions. In *Sweezy*, the threat to academic freedom came from outside the academy and was not decided on free speech grounds. The academic freedom of professors receives little support from these four highly visible, major Supreme Court decisions. In fact, Justice Frankfurter's concurring opinion in *Sweezy* identifies academic freedom as a right of the institution and not the professor.<sup>73</sup>

In *Urofsky v. Gilmore*, the Fourth Circuit took up the issue *en banc* raised by Justice Frankfurter as to where academic freedom resides.<sup>74</sup> The Commonwealth of Virginia enacted "Restrictions on State Employee Access to Information Infrastructure" ("the Act").<sup>75</sup> The focus of the law is to restrict state employees from accessing sexually explicit material on computers owned or leased by the state.<sup>76</sup>

The Act defined "sexually explicit content" to include:

Content having as a dominant theme (i) any lascivious description of or (ii) any lascivious picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, sexual excitement, sexual conduct or sadomasochistic abuse, also defined in § 18.2-390, coprophilia, urophilia, or fetishism.<sup>77</sup>

The Act does not prohibit all access by state employees to such materials.<sup>78</sup> A state agency head may give permission to access such information if it is deemed by the agency head to be connected with a

AFRICA 10-12 (1957)).

73. *Id.* at 262-63 (Frankfurter, J. concurring).

74. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000).

75. VA. CODE ANN. § 2.1-804 (Michie Supp. 1999).

76. *Id.*

77. VA. CODE ANN. §§ 2.1-804 et seq. (Michie Supp. 1999).

78. *Urofsky*, 216 F.3d at 405.

bono fide research project or other such undertaking.<sup>79</sup> State employees remain free to access such information from their personal computers because the prohibition only applies to state owned or leased computers.<sup>80</sup>

Six professors employed at various public colleges and universities in Virginia brought suit challenging the constitutionality of the Act.<sup>81</sup> None of the six professors had requested or been denied access to sexually explicit material pursuant to the Act.<sup>82</sup> The plaintiff professors did not argue that they had a “First Amendment right to access sexually explicit materials on state-owned or leased computers for their personal use; rather [the professors] challenge[d] [the] restriction of access to sexually explicit materials for work related purposes.”<sup>83</sup>

The Fourth Circuit asserted the following:

Therefore, the challenged aspect of the Act does not regulate the speech of the citizenry in general, but rather the speech of state employees. . . .

It cannot be doubted that in order to pursue its legitimate goals effectively, the state must retain the ability to control the manner in which its employees discharge their duties and to direct its employees to undertake the responsibilities of their positions in a specified way.<sup>84</sup>

As state employees, the professors were denied access to information to use at their discretion within the context of the university classroom. The ruling begs the question: What role does academic freedom play within the construct of employment speech? If academic freedom is a special type of speech within an academic setting, the question becomes: Who is the speaker—the employing university or the employed professor?<sup>85</sup>

The court analyzed the Supreme Court’s major academic freedom cases and found that they supported a finding that academic freedom “inheres” with the institution and not the professor.<sup>86</sup> If *Urofsky* is

79. *Id.* at 404.

80. *Id.* at 405.

81. *Id.* at 404.

82. *Id.* at 405.

83. *Id.* at 405–06 (4th Cir. 2000).

84. *Id.* at 409.

85. The Third Circuit in *Edwards v. California University of Pennsylvania*, 156 F.3d 488, 491 (3d Cir. 1998), held that “a public university’s ability to control its curriculum is consistent with the Supreme Court’s jurisprudence concerning the state’s ability to say what it wishes when it is the speaker.” The appellate court cited the Supreme Court’s ruling in *Rosenberger v. University of Virginia*, 515 U.S. 819, 833 (1995), saying “When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker.”

86. Weidner, *supra* note 22, at 263. (“*Urofsky*’s suggestion that academic freedom rights exist in the university as an entity rather than in individual faculty is contrary to the American tradition as

accurate, and academic freedom does reside with the public institution, what impact does this have on the academic freedom rights of public school teachers who work in a more centrally regulated environment?

### III. PUBLIC SCHOOL TEACHERS AND ACADEMIC FREEDOM

As described above, professors have made a history of national policy pronouncements through the AAUP regarding the importance of academic freedom to the discharge of their duties. Public school teachers, however, have no such history. In addition, there are no majestic proclamations from the Supreme Court about the special nature of academic freedom in public schools. Instead, the justices seem reluctant to find a constitutional right of academic freedom for public school teachers, thus explaining their aversion to hear any such cases.<sup>87</sup>

Justice Brennan, who authored the memorable words in *Keyishian's* dissent describing academic freedom as a "special concern of the First Amendment,"<sup>88</sup> also wrote a noteworthy opinion in *Edwards v. Aguillard* that at least brushed on academic freedom in the public school.<sup>89</sup> In response to the creation science versus evolution controversy, Justice Brennan wrote:

[I]n the State of Louisiana, 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. 'Academic freedom,' at least as it is commonly understood, is not a relevant concept in this context.<sup>90</sup>

Justice Brennan's comment signals a reluctance of the Supreme Court to find a constitutional right of academic freedom for public school teachers, thus explaining its aversion to hear any such cases.<sup>91</sup> This decided lack of guidance from the High Court leaves lower courts, teachers, administrators, and school boards to winnow the chaff to find their own constitutional protections. Several possible reasons may

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articulated by the AAUP. It is, however, consistent with significant judicial and scholarly opinion.").

87. See *Epperson v. Arkansas*, 393 U.S. 97, 113–14 (1968) (Black, J., concurring) ("I am . . . not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed.").

88. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

89. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

90. *Id.* at 586 n.6.

91. See also *Epperson*, 393 U.S. at 113–14 (1968) (Black, J., concurring) ("I am . . . not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed.").

account individually and collectively for the absence of academic freedom in the public school classroom. This section will discuss the affect of the minor status of students, the control of curriculum through school boards, and the absence of a research and publication requirement for public school teachers as possible reasons.

Society regards university students as adults with legal autonomy, while public school students are often minors. The German model incorporated by the AAUP accentuates this chasm. First, the concepts of *lehrfreiheit* and *lernfreiheit* involve a balance of rights and power between two groups of adults. Consequently, the law provides greater protection for public school students.<sup>92</sup>

Local school boards also limit the academic freedom of teachers because the boards function to protect public school students through the curriculum they allow teachers to use within the classroom. In fact the Second Circuit in a case regarding teacher dress asserted:

[I]n secondary schools, it is true, the idea of academic freedom may be balanced to a degree by the countervailing interest of states, acting through local school boards, to inculcate basic community values in students who may not be mature enough to deal with academic freedom as understood or practiced at higher education levels.<sup>93</sup>

The courts are typically protective of the school board's authority to make curricular decisions based on the values of the community. For example, in *Zykan v. Warsaw Community School Corporation*,<sup>94</sup> the Seventh Circuit Court of Appeals stated that the school board "has a legitimate, even a vital and compelling interest 'in the choice [of] and adherence to a suitable curriculum for the benefit of our young citizens.'"<sup>95</sup>

The school board has a further motivation in exerting curricular control over teachers due to high stakes testing. In universities, professors acting in concert, design and teach the curriculum. Increasingly however, professors who attempt to teach whatever they

92. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (for the proposition that students' constitutional rights are not co-extensive with adults); *Ginsberg v. New York*, 390 U.S. 629 (1968) (in which the High Court held that minors have more restricted rights than those assured to adults).

93. *E. Hartford Educ. Ass'n v. E. Hartford Bd. of Educ.*, 562 F.2d 838, 843 (2d Cir. 1977). Public school students cannot be subjected to invocations and benedictions at high school commencement because of its coercive effect on them, *Lee v. Weisman*, 505 U.S. 577 (1992), but a similar challenge brought in a university commencement failed because adult students, the court asserted, have the maturity to choose among competing beliefs. *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997).

94. *Zykan v. Warsaw Cmty. Sch. Co.*, 631 F.2d 1300 (7th Cir. 1980).

95. *Id.* at 1304 (quoting *Palmer v. Bd. of Educ.*, 603 F.2d 1271, 1274 (7th Cir. 1979)).



want, departing from the approved curriculum, find they are not protected by academic freedom.<sup>96</sup> In contrast, the public school system places control over curriculum in the hands of the governing board. The board's interest likely resides in student test results, rather than in the classroom experience or the preferred learning objectives of the instructor.

Public school teaching also does not lend itself to the German notion of academic freedom contained in *lehrfreiheit* because there is no essential component of knowledge production and publication in public school teaching.<sup>97</sup> Paragraph (a) of the *1940 Statement of Principles on Academic Freedom and Tenure With 1970 Interpretative Comments* reads in pertinent part, "Teachers are entitled to full academic freedom in research and in publication of the results . . ."<sup>98</sup> The restrictions on a professor's academic freedom and work expectations apply to teachers in possibly a greater degree, thus further weakening the historical argument for a public school teacher's right of academic freedom.<sup>99</sup>

Therefore, history indicates that academic freedom, arguably enjoyed by college professors, does not appear to apply beyond the context of the university and into the public schools. In fact, it appears that public school teachers' academic freedom may share many of the AAUP restrictions applicable to professors, while having questionable claim to its protections. If the history of academic freedom provides questionable support for academic freedom for public school teachers, do courts

96. See, e.g., *Bishop v. Arnov*, 926 F.2d 1066, 1077 (11th Cir. 1991) ("The University's conclusions about course content must be allowed to hold sway over an individual professor's judgments."); *Lovelace v. Se. Mass. Univ.*, 793 F.2d 419, 426 (1st Cir. 1986) (The First Amendment "does not require that each non-tenured professor be made a sovereign unto himself."); *Saunders v. Reorganized Sch. Dist. No. 2*, 520 S.W.2d 29 (Mo. 1975) (junior college teacher termination predicated on failure to follow the curriculum for English courses did not infringe constitutional rights). Conversely, Fossey and Wood point out: "[o]n the broad issue of a scholar's right to speak out on important social and political questions or to propound controversial positions on scholarly topics . . . academic freedom and tenure are alive and well in the nation's colleges and universities." RICHARD FOSSEY & R. CRAIG WOOD, *ACADEMIC FREEDOM AND TENURE, LEGAL ISSUES IN THE COMMUNITY COLLEGE* 61 (Robert C. Cloud ed., 2004).

97. See Richard T. De George, *Academic Freedom and Academic Tenure*, 27 J.C. & U.L. 595, 595-96 (2001) ("The rationale for academic freedom is the preservation and development of knowledge. It is because the faculty has the appropriate knowledge in their respective fields that they need academic freedom. No one can know in advance where research will lead or what new knowledge will be. The best way to develop knowledge is to give those trained to discover it the freedom to do so." This begs the question of whether teachers are trained to discover knowledge or disseminate knowledge.)

98. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 28, at 3.

99. See Tyll Van Geel, *The Prisoner's Dilemma and Education Policy*, 3 NOTRE DAME J.L. ETHICS & PUB. POL'Y 301, 362 (1988) (questioning whether there is evidence that the framers of the Bill of Rights intended to protect academic freedom when there was no established system of public education in the original 13 states).

provide that support?

The language of academic freedom for professors in higher education, as discussed above, is grand, evoking images of a robust right. The lower courts, on the other hand, often use more qualified language when applying academic freedom to public school teachers. The Third Circuit opined, “Although a teacher’s out-of-class conduct, including advocacy of particular teaching methods, is protected, her in-class conduct is not.”<sup>100</sup> A New York federal district court wrote, “Although teachers do not relinquish their First Amendment rights at the ‘schoolhouse’ gate, their constitutional freedom may be curtailed by school policies that are reasonably designed to adjust those rights to the needs of the school environment.”<sup>101</sup> The Fourth Circuit, in the much discussed *Boring v. Buncombe Board of Education* case, in a closely-divided decision held that a teacher had no constitutional right to control curricular decisions.<sup>102</sup> Similarly, the Seventh Circuit and Fifth Circuit, respectively, determined that the First Amendment does not authorize teachers to ignore curricula or directives of supervisors and that control of the public school curriculum had never been conferred on teachers.<sup>103</sup> Although the language used by the courts in these cases varies, it is clear that academic freedom in the public school setting is limited.

Some commentators have also been highly reluctant to ascribe robust academic freedom to public school teachers. The National School Board Association in an *Amicus Curiae* brief for a Colorado school district wrote, “[T]he court misses the point. Teachers do not have First Amendment rights to exercise state power in a manner of their own choosing through their teaching methodologies.”<sup>104</sup> William G. Buss asserted that teachers “should receive only limited constitutional protection.”<sup>105</sup> Countering both the argument for expanded academic freedom and the assertion that teachers possess an authoritative voice

100. *Bradley v. Pittsburg Bd. of Educ.*, 910 F.2d 1171, 1176 (3d Cir. 1990); see also *Miles v. Denver Pub. Schs.*, 944 F.2d 773 (10th Cir. 1991) (holding that teachers do not possess the right to academic freedom). For a discussion of *Miles*, see TODD A. DEMITCHELL & RICHARD FOSSEY, *THE LIMITS OF LAW-BASED SCHOOL REFORM: VAIN HOPES AND FALSE PROMISES* 149–64 (1997).

101. *Romano v. Harrington*, 664 F.Supp. 675, 682 (E.D.N.Y. 1987).

102. 136 F.3d 364 (4th Cir. 1998).

103. *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1007–08 (7th Cir. 1990); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989).

104. Brief for Nat’l Sch. Bds. Ass’n as *Amicus Curiae* Supporting Petitioners, *Bd. of Educ. v. Wilder*, 960 P.2d 695 (Colo. 1998) (No. 97SC92292).

105. William G. Buss, *Academic Freedom & Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213, 219 (1999); see also William G. Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505, 508 (1989) (Free speech “has never been understood to create a general right to use public property or resources for speech purposes”).

regarding what knowledge is of the greatest worth, Stephen Goldstein wrote:

Although teachers' professional training and experience may give them special competency in matters of pedagogical methodology, often curricular decisions involve important value judgments concerning the proper allocation of societal resources or the aims sought to be accomplished by public education. These are ultimately political questions, which the expertise of teachers does not provide any special competency in providing.<sup>106</sup>

Thus, according to Goldstein, teachers cannot claim primacy in curriculum decisions. Goldstein's assertion, however, leaves questions regarding the protection of instructional decisions unanswered.

Despite the dubious support by courts and commentators, there are a number of other court cases that consider academic freedom to be a vigorous, if not essential, right. For example, in an early and often quoted case involving a teacher's decision to have her high school English class read Kurt Vonnegut, Jr.'s *Welcome to the Monkey House*, the teacher's decision was protected as academic freedom.<sup>107</sup> The Sixth Circuit argued that teachers have academic freedom rights "to exercise professional judgment in selecting topics and materials for use in the course of the educational process."<sup>108</sup> Furthermore, a Texas federal district court offered a strong endorsement of academic freedom when it asserted, "[A] teacher has a constitutional right protected by the First Amendment to engage in a teaching method of his or her own choosing, even though the subject matter may be controversial or sensitive."<sup>109</sup>

Several commentators have asserted that teachers not only have a right to academic freedom, but that this right is necessary as a counterbalance to the government's message communicated through its public schools. Karen C. Daly calls for a recalibration creating a new balance between teacher and school board.<sup>110</sup> Her new balance encompasses the following propositions: (1) the need for classrooms to be free from indoctrination and teachers, through their constitutional right to free speech, are the best counterbalance to a school board's monopoly;<sup>111</sup> (2) a student's right to hear, when coupled with a teacher's right to speak, acts as a powerful antidote to overbearing administrators

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106. Stephen Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1356 (1976).

107. *Parducci v. Rutland*, 316 F.Supp. 352 (D. Ala. 1970).

108. *Fowler v. Bd. of Educ.*, 819 F.2d 657, 661 (6th Cir. 1987).

109. *Dean v. Timpson Indep. Sch. Dist.*, 486 F.Supp. 302, 307 (D.C. Tex. 1979).

110. Daly, *supra* note 13.

111. *Id.* at 46.

and school boards;<sup>112</sup> (3) institutionalized protection for teachers in the form of a higher standard of proof is necessary when a school board action is in partial response to parental complaints about a teacher;<sup>113</sup> (4) a three level notice requirement is required with an accompanying sliding scale of review;<sup>114</sup> and (5) a judicial presumption that the decisions of teachers were reasonably related to legitimate pedagogical concerns completes the new balance.<sup>115</sup> Another commentator offered the following view of academic freedom: “A teacher who is conveying either substantive knowledge about our system of government, or who is trying to inculcate its merit (even if through criticism), is conveying a message that deserves protection.”<sup>116</sup>

The issue of whether and to what degree academic freedom exists in public schools is an open debate. Despite somewhat cautionary language, the courts have upheld and even defended the academic rights of public school teachers, and commentators have reinforced those rulings by professing the notion that the public school teacher’s right is an essential balance to state mandated curriculum. Still, while the courts have offered rulings and commentators have expressed their opinions, a voice that is missing is that of public school teachers. How do they conceptualize and actualize academic freedom within the walls of their classrooms?

#### IV. TEACHER PERCEPTIONS OF THEIR ACADEMIC FREEDOM

What are the perceptions of public school teachers regarding their academic freedom rights? To answer this second research question, a survey instrument was developed based on the analysis of court cases. Ninety schools nationwide (thirty each for elementary, middle, and high schools) were randomly selected from the nationwide population of public schools. The principal of each school received a letter requesting that the principal give a survey packet to the first five teachers listed alphabetically on the school roster. Each survey consisted of the research instrument, demographic information, letter of instructions, and return envelope.

The survey asked four sub-questions in an effort to answer the research question:

Is academic freedom important in providing a quality education to

112. *Id.* at 3–4.

113. *Id.* at 2.

114. *Id.* at 53.

115. *Id.* at 53–58.

116. Merle H. Weiner, *Dirty Words in the Classroom: Teaching the Limits of the First Amendment*, 66 TENN. L. REV. 597, 637 (1999).

students?

Who has academic freedom?

What constitutes academic freedom in the classroom?

What is the strength of academic freedom?

A Likert type scale was used for twelve questions. The scale for the first ten questions was a forced choice in that there was no neutral point. In addition, two open response questions were asked. The Likert type questions used six points with no neutral, thereby creating a forced choice. The first three Likert style numbers (1, 2, & 3) range from “strongly disagree” to “disagree” and the second set of three numbers (4, 5, & 6) range from “agree” to “strongly agree.” Consequently, the poles are “Strongly Disagree” (1) and “Strongly Agree” (6). The larger the mean, the greater the agreement with the question stems. In addition, the survey included two open response questions: (1) What responsibilities, if any, attach to your academic freedom; and (2) How do you exercise your academic freedom (what activities constitute academic freedom)?

#### *A. Demographics*

The survey asked demographic information in order to gain a broader and deeper perspective of the sampling of teachers. As noted below, not all of the respondents filled out the demographic categories.

Table 1

*Percentages of Teacher Respondents by Demographic Categories*

Demographic category	Valid Percent of Respondents (N=61)	N
<b>Gender</b>		
Male	31.7%	19
Female	68.4%	41
<b>Level Of School</b>		
Elementary	37.9%	22
Middle	32.8%	19
High	29.3%	17
<b>Years of Teaching</b>		
1-5	22.4%	13
6-10	5.2%	3
11-15	12.1%	7
16-20	13.8%	8
21+	46.6%	21
<b>Location of School</b>		

Demographic category	Valid Percent of Respondents (N=61)	N
Urban/Large City	11.5%	7
Suburban/Medium City	26.2%	16
Rural/Town	62.3%	38

Sixty-one teachers responded to the survey. Caution must be exercised when generalizing from this data because of the low return rate. It is unknown if the respondents differ in some significant way from non-respondents. Missing responses were not included in the analysis and are not reflected in the percentages below.

### *B. Data Analysis*

The issue of whether academic freedom is important to K-12 teachers is central to the study because if it is not important, perceptions regarding it may be interesting but of little consequence. Teachers in this study overwhelmingly believe that academic freedom is important in providing a quality education to students. Approximately ninety percent (fifty-five respondents) of the respondents agree to strongly agree with the proposition. Of the six respondents who do not agree, three are elementary school teachers, one is a middle/junior high school teacher, and two are high school teachers. All six are female teachers and five of the six have taught for over twenty-one years. There are no other variables that indicate that there is a set of characteristics or responses that indicate a pattern as to why academic freedom is not perceived as important.

Table 2

*Is Academic Freedom Important in Providing Quality Education to Students?*

Question	Mean (range= 1-6 with no neutral)	Standard Deviation	% Strongly Disagree to Disagree (n)	% Agree to Strongly Agree (n)	Did not Answer
<i>1. Academic Freedom is important in providing a quality education to students.</i>	4.82	1.06	9.8% (6)	90.2% (55)	0

Table 3 indicates to whom academic freedom applies.

Table 3

*Who Has Academic Freedom?*

Question	Mean (range= 1-6 with no neutral)	Standard Deviation	% Strongly Disagree to Disagree (n)	% Agree to Strongly Agree (n)	Did not Answer
<i>2. Academic Freedom is a constitutional right of university/college professors.</i>	4.78	0.99	5.0% (3)	95.0% (57)	1
<i>3. Academic freedom is a constitutional right of public school teachers.</i>	4.33	1.11	18.3% (11)	81.7% (49)	1

Question	Mean (range= 1-6 with no neutral)	Standard Deviation	% Strongly Disagree to Disagree (n)	% Agree to Strongly Agree (n)	Did not Answer
<i>4. Public school teachers have the same academic freedom rights as professors.</i>	3.62	1.49	60.0% (36)	40.0% (24)	1
<i>5. Public school principals have the same academic freedom rights as public school teachers.</i>	4.15	1.27	25.0% (15)	75.0% (45)	1
<i>6. Substitute teachers have the same academic freedom rights as the full time teachers they replace.</i>	3.28	1.39	61.7% (32)	38.3% (23)	1
<i>7. The academic freedom rights of public school teachers are not tied to employment; teachers retain their academic freedom</i>	4.31	1.11	25.0% (13)	75.0% (39)	9

The results indicate that the academic level in which teaching takes place, from substitute teacher to professor, influences the perception of the strength of the right to academic freedom. Only three teachers do not believe that academic freedom is a constitutional right of professors; the clear majority believe that professors possess such a right. However, teachers are less convinced that they possess such a right. They also



believe that their academic freedom is not the same as that possessed by professors. A *t*-test between responses to Questions 2 and 3 shows that the difference between the mean scores is significant ( $p < .001$ ). In other words, the level in which the teaching takes place influences the perception of the strength of the right.

Teachers at all three levels believe that the older the student taught, the stronger the right. When asked whether elementary, middle, and high school teachers have the same degree of freedom, forty-two point four percent answered “yes” while a majority of fifty-seven point six percent answered “no”. The “no” respondents rank ordered the teaching level with the highest degree of academic freedom to the lowest. High school teachers received the highest percentage of first order places (eighty-one point three percent) with high school—middle school – elementary school, the preferred ranking (seventy-five percent). A Chi-Square ( $\chi^2$ ) analysis showed no significant difference between the responses of elementary, middle, and high school teachers. In other words, teachers at all three levels believe that the older the student taught, the stronger the academic freedom. However, the second highest ranking receiving twelve point five percent of the responses was elementary – middle – high school. The most logical explanation is that the respondent reversed the order confusing the highest to lowest ranking. If this is true, then it confirms the conclusion above that a majority of the respondents believe that the older the student taught, the greater the academic freedom of the teacher.

The respondent teachers believe, by a wide margin, (sixty-one point seven percent disagree to thirty-eight point three percent agree) that substitute teachers do not have the same academic freedoms as the teachers they replace (question six). If substitute teachers have the same certification requirements as full time teachers and they teach the same students in the public school as the full time teacher, why would they not possess the same constitutional freedom associated with teaching? However, if they do possess academic freedom, what ramifications are associated with the exercise of the right? Can they only exercise academic freedom when substituting and must their exercise reflect the position of the regular teacher for whom they stand in proxy? This raises interesting questions. Educational preparation, certification, and employment by a public school district, which appear to be prerequisites to academic freedom, may apply equally to substitute and full-time teachers, but can substitutes exercise the right equally and under what circumstances? If employment status is critical to academic freedom, do part-time teachers have reduced freedom?

Question 7 further complicates the issue of who has academic

freedom. The majority of teachers (seventy-five percent) responded that teachers retain their academic freedom rights even when they are no longer teachers. This raises the question of whether or not teachers perceive academic freedom as tied to employment. Is academic freedom a right that is not contingent upon employment in public schools? If yes, can academic freedom be a "special concern" of the First Amendment if it is more generally diffused? How does a teacher exercise his or her academic freedom if he or she is not employed in a public school? It appears the teachers in this survey believe academic freedom truly is a constitutional right. If so, then once it is granted to a teacher, they cannot lose it, even if the unique relationship of employment triggered the right.

By contrast, if teachers lose their academic freedom with their employment, is academic freedom an institutional right that is granted to those individuals the institution hires but withdrawn when the institution severs employment? If this is true, then the conclusion may strengthen the position of the court in *Urofsky v. Gilmore* that academic freedom resides with the public institution, not the teacher.<sup>117</sup>

Table 4

*What Constitutes Academic Freedom in the Public School Classroom?*

Questions	Mean (range= 1- 6 with no neutral)	SD	% Strongly Disagree to Disagree	% Agree to Strongly Agree	Did not Answer
<i>8. The academic freedom rights of public school teachers allow them to decide how to teach a lesson without interference from the administration.</i>	4.16	1.02	28.3% (17)	71.7% (43)	1

117. *Urofsky v. Gilmore*, 216 F.3d 401, 409 (4th Cir. 2000).

Questions	Mean (range= 1-6 with no neutral)	SD	% Strongly Disagree to Disagree	% Agree to Strongly Agree	Did not Answer
<i>9. Academic freedom allows teachers to decide what shall be taught without interference from the administration.</i>	3.12	1.47	73.3% (44)	26.7% (15)	2
<i>10. Teacher's speech, as part of instruction, can contradict the message of the school board and be protected by academic freedom.</i>	3.39	1.15	57.9% (33)	42.1% (24)	4
<i>11. Academic freedom is intended to serve the personal speech interests of the teacher not the interests of the public school district.</i>	3.28	1.19	59.6% (34)	40.4% (23)	4

Restrictions on academic freedom received varying responses. Almost thirty percent of the respondents believe that academic freedom does not allow them to decide how to teach without interference from the administration (Question 8), and just over seventy percent believe that the administration has that right. The reverse is true when the teachers apply academic freedom to what shall be taught (Question 9). Just over one quarter of the teachers believe that they can control the curriculum. This question received the lowest mean score ( $M = 3.12$ ) for the instrument.

Similarly, teachers in the study find two other restrictions on academic freedom. The first restriction echoes Daley's thesis encouraging public school teachers to balance the school board. For example, teachers feel the pressure not to contradict the message of the

school board.<sup>118</sup> The second is that academic freedom serves the personal speech interests of the teacher and not the school board. The latter point addresses the issue of whose interests are protected by academic freedom.<sup>119</sup> Teachers do not appear to believe that academic freedom supports those actions removed from the primary task of teaching. There were no significant differences by gender, level, location, or years of service for any question in Table 4.

A Pearson Correlation for Question 8 and Question 10 found a strong significant correlation ( $r = .53, p < .01$ ).<sup>120</sup> Teachers who responded that academic freedom allows them to decide how to teach, tended to agree that a teacher's speech as part of instruction can contradict the message of the school board. The reverse is also true.

Table 5  
*What is the Strength of Academic Freedom?*

Question	Mean (range=1-6)	SD	Non-existent (n)	Weak (n)	Some (n)	Mod. (n)	Strong (n)	Very Strong (n)	No Ans (n)
11. Circle the degree of strength or robustness of your academic freedom (instructional decisions).	4.3 0	0.96	1.7% (1)	0.0% (0)	18.3% (11)	33.3% (20)	40.0% (24)	6.7% (4)	1

118. Daly, *supra* note 13.

119. See DeMitchell, *supra* note 30.

120. A Pearson Correlation is a measure of the relationship between two variables. A Pearson Correlation (called an  $r$  value) of 1.0 is a perfect correlation TIMOTHY C. URDAN, STATISTICS IN PLAIN ENGLISH (2d. ed. 2001). A weak correlation ranges between 0 to 0.2; a moderate correlation ranges between 0.2 to 0.5; and a strong correlation ranges from 0.5 and above. *Id.*

Question	Mean (range=1-6)	SD	Non-existent (n)	Weak (n)	Some (n)	Mod. (n)	Strong (n)	Very Strong (n)	No Ans (n)
12. Circle the degree of strength or robustness of your academic freedom (curricular decisions).	3.78	1.03	0	11.7% (7)	28.3% (17)	31.7% (19)	26.7% (16)	1.7% (1)	1

As seen in Table 5 and confirmed by Question 11, instruction relates to academic freedom in the K-12 schools. Eighty percent believe their academic freedom rights are moderate to very strong when making instructional decisions. There were no significant differences between ratings by gender, level, location, or years of service.

The more a respondent agrees that academic freedom is important to quality education, the more robust their academic freedom. A Pearson Correlation for Question 1 ("Is academic freedom important in providing a quality education to students?") and Question 11 found a significant moderate correlation ( $r = .44, p < .01$ ). Interestingly, even though the mean score for the strength of academic freedom regarding curricular decisions is less robust than academic freedom for instructional decisions, Question 12 and Question 1 are also significantly moderately correlated ( $r = .48, p < .01$ ).

A significant moderate correlation between Question 8 ("The academic freedom rights of public school teachers allows them to decide how to teach a lesson without interference from administration.") and Question 11 exists ( $r = .47, p < .01$ ). However, a low to moderate correlation ( $r = .280$ ) significant at the  $p < .05$  level exists between Question 9 (academic freedom allows teachers to decide what shall be taught without interference from the administration) and Question 12.

In other words, the public school teachers in this research believe that they have academic freedom and that it is important to providing quality education. While they believe they have academic freedom, they do not believe that the right is as strong or of the same quality as

university professors.<sup>121</sup> They appear to have a tacit recognition that the structure of academic freedom depends upon the context in which it is exercised. Principals, who were most likely former teachers, retain their academic freedom rights, but teachers are unsure about whether substitute teachers, who act as their proxy, have the right. This raises interesting questions. Educational preparation, certification, and employment by a public school district, which appear to be prerequisites to academic freedom may apply equally to substitute and full-time teachers, but can substitutes exercise the right equally and under what circumstances? If employment status is critical to academic freedom, do part-time teachers have reduced freedom?

The responding teachers recognize a difference in context for the robustness of academic freedom. Their decisions on how to teach a lesson receive greater protection than decisions regarding the curriculum or what shall be taught. It is unknown if professors make the same distinction.

### C. Short Answer Questions

The survey instrument included a short answer section as well. Two prompts, developed from the survey questions, provided a deeper understanding of the instrument. The prompts included: (1) What responsibilities, if any, attach to your academic freedom? and (2) How do you exercise your academic freedom (what activities constitute academic freedom)? Researchers used an iterative process of reviewing each response in a search for themes that may exist in the responses. Researchers then developed and refined categories of responses.

#### 1. *What responsibilities, if any, attach to your academic freedom?*

Forty-seven teachers (twenty elementary, fourteen middle, and thirteen high school teachers) responded to this prompt. The responses covered a series of topics, such as academic freedom must reflect the values of the community.<sup>122</sup> Three major themes emerged from the

121. See *Williams v. Vidmar*, 367 F.Supp. 1265, 1272–73 (N.D. Cal. 2005) (“In summary, there is a difference between the free speech rights of a university professor when expressing his or her point of view in Sproul Plaza and those of a fifth grade elementary school teacher in expressing a point of view as part of classroom instruction.”).

122. See *Cary v. Bd. of Educ.*, 598 F.2d 535, 543 (10<sup>th</sup> Cir. 1979) (“It is legitimate for the curriculum of the school district to reflect the value system and educational emphasis which are the collective will of those whose children are being educated and who are paying the costs.”). The responses covered topics such as “*Academic freedom restricted by Board policies, which reflect the desire of the community*”—female suburban elementary school special education teacher with sixteen to twenty years of experience and “*You need to be aware of the beliefs, values, and moral stances of your of your constituents*”—male suburban middle school science/math teacher with

analysis of this question: (a) students stand at the center of academic freedom, (b) the classroom is not a private pulpit, and (c) institutional and governmental restraints on academic freedom. Each theme is discussed below.

*a. Students stand at the center of academic freedom.*

Possibly, in the absence of *lernfreiheit* and the requirements of *in loco parentis*, teachers in this study grounded their academic freedom in what is in the best interests of their students. This theme had the largest number of responses with twenty comments. There is an acknowledgement that students are a captive audience<sup>123</sup> and that teachers must act as role models.<sup>124</sup> Age level, developmental stage, and proficiency levels structure the exercise of academic freedom.<sup>125</sup> A male middle school science/math teacher in the southwest with twenty-one plus years of experience at an urban school summed up this concern: “Along with freedom come responsibilities to know where each student stands academically and where that student needs to be at the end of the year. I have to know the student’s learning style and teach and reteach to that style and ability.” A male middle school social studies teacher (eleven to fifteen years of experience, suburban school) captured the difference between professors and teachers: “You can’t compare what a professor can say to provoke thought in an adult [versus] what should not be said to a 1st grader.”<sup>126</sup>

*b. The classroom is not a private pulpit.*

Balance is a large part of this theme in thirteen responses. An English and humanities high school teacher in the rural northeast wrote

eleven to fifteen years of experience.

123. This concern is also expressed in the following: “Teachers are not hired and appointed to proselytize at public expense, disregarding the school board’s policies. This danger is exacerbated by the fact that public elementary and secondary schools have a ‘captive’ audience, an audience that cannot easily escape a teacher’s expressed values.” MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 250 (4th ed. 2002).

124. Examples include “*Teachers have the responsibility to be role models for good moral behavior and good citizenship*” –rural female elementary school teacher with eleven to fifteen years of experience.

125. This viewpoint is shared by a number of courts. See *Webb v. Lake Cmty. Sch. Dist.*, 344 F.Supp. 791, 799 (N.D. Iowa 1972) (while teachers have academic freedom rights, the states’ “interest in limiting the discretion of teachers grows stronger . . . as the age of the students decreases.”) This adds strength to the argument that the responding teachers noted—namely, that grade-school teachers have less rights than professors and that there may be a hierarchy of rights in the public schools (high, middle, and elementary).

126. See *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1539 (7th Cir. 1996) (the need for a more structured environment is much greater with elementary school children).

that the responsibility of academic freedom requires teachers to “*serve as an impartial and unbiased representative of the school district before classes of impressionable students.*” An elementary school special education teacher with one to five years of experience wrote that to her the responsibility involved “[t]eaching a balance of information, minimizing personal bias as much as possible.” A female middle school science and math teacher with over twenty-one years of experience wrote, “*I feel that in order to be responsible I must present a balanced lesson—not one that shows only one point of view*”<sup>127</sup> In addition to striving for balance among competing views, the teachers were sensitive to their position, role, and power. A west coast elementary school teacher in a suburban school district noted, “*School is compulsory, and I must not use my position as a pulpit for my beliefs.*”<sup>128</sup>

*c. Governmental and institutional restraints on academic freedom.*

The third theme with twelve responses centered on institutional, local, state, and federal restrictions on academic freedom. This is a restraint that professors typically do not contend with except for those programs that lead to state certification or those seeking national accreditation. The responding teachers noted that they teach within a bureaucratic hierarchy that starts at the federal level with No Child Left Behind, then moves to the all important state standards, is mirrored in school district standards, and ends with compliance in their classrooms. A high school teacher noted, “*We still need to follow guidelines and policies established by the State of New York and our local school board. Academic freedom operates with established boundaries.*”

The teachers who responded to this question understand that their academic freedom has restrictions. Their right is subordinate to the needs of students; balance is important if not imperative. Teachers do not possess a bully pulpit and should be careful not let their classroom become a private enclave for their speech. These teachers also acknowledge that others have control over what they teach.

*2. How do you exercise your academic freedom (what activities constitute academic freedom)?*

Forty-six teachers, twenty-one elementary, thirteen middle, and

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127. (Emphasis in original).

128. This theme is similar to the holding in *Palmer v. Bd. of Educ.*, 603 F.2d 1271 (7th Cir. 1979), in which the appellate court found that a kindergarten teacher did not have the right to disregard the curriculum on patriotic matters because the subject matter conflicts with her religious principles.



twelve high school teachers, responded to this question. One major theme emerged from the analysis: concern for the exercise of academic freedom. The major theme reflects Table 4. The responding teachers held the position that their academic freedom was primarily exercised in the instructional decisions and to a much lesser degree curriculum decisions. A female elementary school teacher with over twenty-one years of experience stated, "*Academic freedom to me is freedom to teach course content without undue interference from any legal source (state, board, principal).*" Another elementary school teacher from the west coast with one to five years of experience succinctly wrote "*How I teach is the freedom I hold.*"<sup>129</sup> A male middle school teacher, also from the west coast, expressed the fit between curriculum and instruction in the following manner:

*Someone has said that teaching is the most private thing we do in public. I believe the state and district have responsibilities to dictate what needs to be taught. The educators need leeway (freedom) in deciding how to make the instruction happen. The instructional choices I make, within the confines of my responsibilities, constitute my academic freedom.*<sup>130</sup>

"*My own style of teaching*" and "*responding to the needs of the students in the classroom*" were comments that surfaced in several forms. Teachers are very aware of the importance of how they exercise their academic freedom. As one elementary school teacher wrote, "*I do not, however, take this lightly.*"

One-quarter of the responding high school teachers (no middle or elementary school teachers) noted that teaching controversial subjects implicates academic freedom. There is starkness to their responses; no qualifiers are used or other contexts offered for application. One female rural social studies teacher with one to five years of experience wrote that "*[b]y teaching controversial or unpopular topics*" she exercised her academic freedom. We do not consider this a theme because of the low number of responses. However, we note it because only high school teachers consider teaching controversial subjects to be central to academic freedom. It is also interesting to note that teaching controversial subjects is part of the AAUP's Statement.<sup>131</sup> It could be that because high school teachers and professors work with older students they believe that controversy plays a part in their lessons, possibly because the subject matter has less absolutes and their students

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129. (Emphasis in original).

130. (Emphasis in original).

131. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 28, at 3.

are expected to possess the maturity to handle the controversy.

There was one respondent that differed significantly from the others. A male elementary school teacher in a rural school with over twenty-one years of experience wrote: "*You don't. You keep your mouth shut and do what the district, state, and feds tell you. Our problem isn't the principal, he also teaches, it is the district, state, and feds we struggle with.*" Interestingly, this respondent strongly agreed that teachers have academic freedom and that the freedom to make instructional decisions is strong. However, this teacher considers academic freedom to be weak as applied to curricular decisions.

## V. CONCLUSION

The issue of academic freedom in public schools, in many ways, can be cast as a question of who is entitled to exercise state power,<sup>132</sup> and thereby determine what is taught within the classroom. Daly writes: "The policy question of who controls or should control what children learn is highly charged. Courts find it extremely difficult to balance the competing interests presented by school boards, school administrators, teachers, parents and students, all of whom have a valid stake in the educational process."<sup>133</sup> School boards are vested with state power to manage the schools. If academic freedom conflicts with the school board's policies and directives some mechanism must exist for a competing voice. Malcolm Stewart argues that in order to institute this First Amendment right in the public workplace three government subsidies are needed.<sup>134</sup> First, the teacher claims the right to be paid for all of his/her speech in the classroom. Second, the teacher requires the school district to provide a captive audience of school children to hear his/her speech. Third, "the teacher while defying the wishes of his[her] superiors is asserting the right to added credibility by virtue of the imprimatur of state approval."<sup>135</sup> Daly agrees with this third point for supporting academic freedom while Stewart decries it.

Academic freedom is an unusual right. While not all courts recognize that public school teachers possess academic freedom rights,<sup>136</sup> most recognize the right in some form. It is a right exercised by individuals

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132. Stuller, *supra* note 8, at 305.

133. Daly, *supra* note 13, at 1.

134. Malcolm Stewart, *The First Amendment, The Public Schools, and the Inculcation of Community Values*, 18 J.L. & EDUC. 23 (1989).

135. *Id.* at 62-63.

136. See *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 779 (10th Cir. 1991) ("[T]he caselaw does not support [the] position that a school teacher has a constitutional right to academic freedom.").

who are employed by the state, which may be used to contradict or to support the employer's message. Classrooms are the place where school boards speak; the curriculum is their message.

Public schools are considered a closed forum,<sup>137</sup> reserved for that speech or message that the state chooses to make through the adopted curriculum. Citizens do not have the constitutional right to enter the closed forum of the classroom to exercise their free speech by countering the adopted curriculum or directing the curriculum.<sup>138</sup> In other words, the classroom is not a public street corner inviting all comers to speak. For example, the First Circuit opined, "If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter."<sup>139</sup>

Similarly, the Seventh Circuit addressing the issue of whether a classroom is a public forum allowing the teacher greater freedom to discuss non-school sponsored literature, held that a "junior high school is a nonpublic forum, which may forbid or regulate many kinds of speech."<sup>140</sup>

Yet within the closed forum of the classroom, academic freedom carves out a special place for a defined group to not only raise objections but to act on those objections. The contours of how a closed forum reserved for its owner's use, yet, is open to designated others, creates a policy problem of not only definition but also of application. Academic freedom may favor the speech of a few in a closed forum while the public speech of many must be directed to a political process with a separate forum, such as the give-and-take of public school board meetings or to the ballot box to elect trustees. Academic freedom is indeed difficult to define, yet its impact on educational policy can be considerable if teachers can tailor or modify the message of the school board.

The teachers in this study recognize and reflect some of these tangled

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137. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (holding that school facilities are closed forums).

138. The classroom is considered a closed forum in that the school board reserves its use for an intended purpose—the teaching of the adopted curriculum. *Chiras v. Miller*, 432 F.3d 606, 618 (5th Cir. 2005), held that "the use of textbooks in public school classrooms is government speech and not a forum for First Amendment purposes."

139. *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 534 (1st Cir. 1995); see also *McCullum v. Bd. of Educ.*, 333 U.S. 203, 235 (1948) (Jackson, J., concurring) ("If we are to eliminate everything that is objectionable to any person or is inconsistent with any of their doctrines, we will leave public schools in shreds.")

140. *Hedges v. Wauconda Cmty. Unit Sch. Dist.*, 9 F.3d 1295, 1302 (7th Cir. 1993).

situations. They clearly perceive that academic freedom exists in the realm of instruction. They are, however, conflicted as to what degree the freedom exists in the right to choose what to teach. Teachers, courts, and commentators recognize that academic freedom is not a boundless right; it has limitations and responsibilities. Many of their views and concerns are reflected in court decisions and by commentators. The views of teachers are important. Either a robust view or a more limited view of their academic freedom leads to professional action. Because teachers stand at the crossroads of education, their actions and perceptions matter. They are the engine of educational policy.