



THE FREE SPEECH AND ACADEMIC FREEDOM OF TEACHERS IN PUBLIC SCHOOLS

This memorandum analyzes the free speech and academic freedom protections of public school teachers both inside and outside the classroom.¹ Other state and federal laws may provide teachers additional protection against religious discrimination.²

Alliance Defending Freedom is an alliance-building legal ministry that advocates for the right of people to freely live out their faith. We frequently assist students, faculty, staff, and administrators at public schools in understanding their rights and responsibilities concerning religious expression. Each legal situation differs, so the information provided below should be used only as a general reference and should not be considered legal advice.³ If you think your rights have been violated as a result of a restriction on your religious expression at a public school or if you want to protect students' religious expression on campus, please contact our Legal Intake Department so that we may review your situation and possibly assist you. You can reach us at 1-800-835-5233, or visit our website at www.ADFLegal.org and select the "RequestLegal Help" button to submit a request for legal assistance.

I. There Is No "Right" to Academic Freedom, But There Is a Right to Free Speech for Public Schools and Teachers

The "term academic freedom 'is used to denote both the freedom of the academy to pursue its end without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy; and these two freedoms are in conflict.'" *Parate v. Isibor*, 868 F.2d 821, 826 (6th Cir. 1989) (quoting *Piarowski v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 629 (7th Cir. 1985)). Despite popular belief, no court has ever held academic freedom to be a constitutional right per se.⁴ Instead, academic freedom embodies the best of what the First Amendment seeks to protect in institutions of higher education.⁵

¹ For a discussion of First Amendment protections available to public university professors, please consult our memorandum on "The Free Speech and Academic Freedom of Faculty in Public Universities."

² For a discussion of these protections, please consult our memorandum on "Religious Employees in the Workplace."

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⁴ *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000); see *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991) ("we do not find support to conclude that academic freedom is an independent First Amendment right.").

⁵ See *Omosehbon v. Wells*, 335 F.3d 668, 676 (7th Cir. 2003) ("Academic freedom rights are rooted in the First Amendment."); *Parate*, 868 F.2d at 827 (discussing the *First Amendment* concept of academic freedom).



Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”

Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). “Because academic freedom rights must ultimately flow from the First Amendment, claims of their violation are subject to all the usual tests that apply to assertions of First Amendment rights.” *Omosegbons*, 335 F.3d at 676-77.

Academic freedom is a principle that both teachers and public schools claim – a principle that requires balance.⁶ While teachers retain some free speech rights at work, the public schools they serve retain their own freedom to select curriculum, hire teachers, and set academic standards.⁷ The balancing of an institution’s academic freedom with that of teachers naturally spans a spectrum, with higher education on one end where public college professors retaining the broadest First Amendment rights, and public elementary schools on the other end where teachers have the least freedom.⁸ If employed to teach elementary school, for example, the teacher must teach the prescribed material and not discuss events related to the Iraq war that are unrelated to the curriculum, especially when her school told her to avoid that topic.⁹ However, so long as the teacher stays on germane topics, the First Amendment gives her the creative ability to communicate the curriculum to her students.¹⁰ “A teacher’s teaching is expression to which the First Amendment applies.” *Wilson v. Chancellor*, 418 F. Supp. 1358, 1362 (D. Or. 1976).

⁶ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

⁷ *Id.* at 263 (Frankfurter, J., concurring); see also *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 344 (6th Cir. 2010) (“[I]t is the educational institution that has a right to academic freedom, not the individual teacher.”); *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 172 n.14 (3d Cir. 2008) (same). The “four essential freedoms” that constitute academic freedom have been described as the school’s freedom to choose “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.).

⁸ See *Developments In The Law: Academic Freedom*, 81 HARV. L. REV. 1048, 1050 (1968) (“The principal reason for this is the vast difference between the functions performed by the school and by the university. The function of the school has traditionally been viewed as the transmission, rather than the discovery, of knowledge.”).

⁹ *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007).

¹⁰ See *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1055 (6th Cir. 2002) (holding elementary school teacher’s instruction in uses of industrial hemp was protected by First Amendment even though the topic was not contained in the curriculum).



II. The First Amendment Protects Teachers' Speech

The following legal analysis provides a technical background for the conclusions in this memorandum. If you are only interested in the practical applications of the law to teacher expression, please skip to Part II(C) below, or simply refer to our shorter resource on teacher expression.¹¹ Public school teachers do not abandon “their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). As the Supreme Court said so eloquently:

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion . . . They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.

Wieman v. Updegraff, 344 U.S. 183, 196-97 (1952) (Frankfurter, J. concurring). “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.” *Keyishian*, 385 U.S. at 603 (quoting *Sweezy*, 354 U.S. at 250) (internal quotation marks omitted).

Generally, the First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). But the government may regulate the speech of its employees because of its interest in performing its functions efficiently and effectively. *Garvetti v. Ceballos*, 547 U.S. 410, 420 (2006); *Connick v. Myers*, 461 U.S. 138, 147 (1983). To receive First Amendment protection a public school teacher must show (1) she was speaking as a citizen; (2) “on a matter of public concern;” and (3) when balancing the school’s interest in efficiency and effectiveness against her speech, her right to speak wins out. *Connick*, 461 U.S. at 142.¹²

¹¹ Please consult our FAQ, “Teachers’ Religious Expression in Public Schools.”

¹² Typically, public employees punished for their speech make free speech retaliation claims against their employers. In these cases, the courts ask (1) was the teacher engaged in constitutionally protected activity; (2) would the employer’s conduct discourage employees of ordinary firmness from continuing to do what they were doing; and (3) was the teacher’s exercise of constitutionally protected rights a motivating factor behind the employer’s conduct? See, e.g., *Evans-Marshall*, 624 F.3d at 337. Some courts add a fourth step that considers whether the employer would have made the same employment decision in the absence of the protected activity. *Powell v. Gallentine*, 992 F.2d 1088, 1090 (10th Cir. 1993); accord *Eng v. Cooley*, 552 F.3d 1062, 1070-72 (9th Cir. 2009).



A. Speaking as a Citizen on a Matter of Public Concern

When a teacher speaks outside the workplace on an issue affecting society she is speaking as a citizen on a matter of public concern. *Pickering*, 391 U.S. 563. But “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” *Garcetti*, 547 U.S. at 421. “[W]hen the State is the speaker, it may make content-based choices.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833-34 (1995).

It is unclear whether teachers engaged in classroom teaching receive First Amendment protection. In *Garcetti*, the Court said it was not deciding whether this general job duties rule applies to “scholarship and teaching” by teachers, 547 U.S. at 425, and the lower federal courts have come to varying conclusions on what constitutes “scholarship or teaching” and whether this exception even applies to public school teachers.¹³

The courts divide on teacher free speech in the classroom because teachers’ speech differs remarkably from the typical government employee. One does not stand in line at the Department of Motor Vehicles to receive science lectures from desk clerks. Teachers, however, are hired precisely to teach a subject and answer students’ questions—and in many cases effective teaching requires discussion of diverse topics. While “a teacher’s in-class speech deserves constitutional protection,” *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001), “[c]ourts have generally recognized that the public schools possess the right to regulate speech that occurs within a compulsory classroom setting, and that a school board’s ability in this regard exceeds the permissible regulation of speech in other governmental workplaces or forums,” *Lee*, 484 F.3d at 695.¹⁴

Assuming that a teacher’s speech falls outside of *Garcetti*’s scope or is the speech of a citizen, the next inquiry is whether the teacher is speaking on a matter of public concern. A public employee receives greater speech protection when speaking “as a citizen upon matters of public concern” than he does when commenting on employment matters of personal or internal interest. *Connick*, 461 U.S. at 147. Courts must look to the “content, form, and context of a given statement” to determine whether a public employee has spoken as a citizen on a matter of public concern. *Id.* at 147-48. A matter of public concern is one that touches upon “any matter of political, social, or other concern to the community.” *Id.* at 146. The quintessential example of protected speech is the

¹³ Compare *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007) (holding *Garcetti* does not apply to public school teachers); and *Caruso v. Massapequa Union Free Sch. Dist.*, 478 F. Supp. 2d 377, 383 (E.D.N.Y. 2007) (suggesting *Garcetti* does not apply to teachers); with *Evans-Marshall*, 624 F.3d at 343-44 (holding high school teacher’s speech is not protected); and *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 967-68 (9th Cir. 2011) (finding in-class speech of teacher does not fall within *Garcetti*’s exception).

¹⁴ See *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 n.1 (3d Cir. 1998) (“a public school teacher’s in class conduct is not protected by the First Amendment”); *Bishop*, 926 F.2d at 1073 (“[W]here the in-class speech of a teacher is concern, the school has an interest not only in preventing interference with the day-to-day operations of its classrooms . . . , but also in scrutinizing expressions that the public might reasonably perceive bear its imprimatur.”).



teacher who criticizes her public school's policies and reveals official misconduct, like criticizing the school's misinformation about and mismanagement of public funds.¹⁵ The federal courts have found that such matters also include topics ranging from academic freedom,¹⁶ curriculum changes,¹⁷ race discrimination,¹⁸ and violations of civil rights,¹⁹ to sex and gender,²⁰ hemp,²¹ abortion,²² homosexuality, and religion.²³

But, importantly, the federal courts disagree on whether curricular speech is a public concern. Some courts have held that curricular speech is not a public concern.²⁴ As the Seventh Circuit said:

the school system does not “regulate” teachers’ speech as much as it *hires* that speech. Expression is a teacher’s stock in trade, the commodity she sells to her employer in exchange for a salary. A teacher hired to lead a social-studies class can’t use it as a platform for a revisionist perspective that Benedict Arnold wasn’t really a traitor, when the approved program calls him one; a high-school teacher hired to

¹⁵ *Pickering*, 391 U.S. at 569-70; see *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (college administration and policies).

¹⁶ See *Keyishian*, 385 U.S. at 603 (“[A]cademic freedom . . . is of transcendent value to all of us and not merely to the teachers concerned.”).

¹⁷ See *Edwards*, 156 F.3d at 491 (stating a teacher “has a right to advocate outside of the classroom for the use of certain curriculum materials”).

¹⁸ See *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 412-13 (1979) (racial discrimination); *Love-Lane v. Martin*, 355 F.3d 766, 782 (4th Cir. 2004) (“[P]rotesting race discrimination in a public school, [is] speaking out on a matter of public concern.”).

¹⁹ See *Campbell v. Galloway*, 483 F.3d 258, 270 (4th Cir. 2007) (holding First Amendment protections not limited to conduct that violates Title VII).

²⁰ See *Roth v. United States*, 354 U.S. 476, 487 (1957) (stating that “sex . . . is one of the vital problems of . . . public concern.”); see *Hardy*, 260 F.3d at 679 (gender is public concern).

²¹ See *Cockrel*, 270 F.3d at 1049-51 (guest speaker on hemp is teacher’s protected speech).

²² See *Hennesy v. City of Melrose*, 194 F.3d 237, 246 (1st Cir. 1999) (holding that the appellants’ anti-abortion sentiments “clearly related to a subject of . . . public concern.”).

²³ See *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 257 (6th Cir. 2006) (ruling plaintiffs “speech on his religious views and on homosexuality are matters of public concern . . .”).

²⁴ See *Lee*, 484 F.3d at 697-98 (holding teacher’s posting of materials in classroom was curricular speech and not protected by First Amendment); *Mayer*, 474 F.3d at 480 (holding teacher’s discussion of Iraq war during current events class session was not protected by First Amendment); *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.2d 364, 369 (4th Cir. 1998) (en banc) (finding teacher’s selection of a school play was curricular and not protected by First Amendment); *Pelozo v. Capistrano United Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994) (suggesting that teacher’s in-class speech is school-sponsored and not protected); *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993) (finding teacher’s in-class speech was school-sponsored and not protected); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 777-78 (10th Cir. 1991) (holding teacher’s discussion of school rumor during class was school-sponsored speech and not protected); *Kirkland v. Northside Indp. Sch. Dist.*, 890 F.2d 794, 800 (5th Cir. 1989) (finding teacher’s use of alternate, unapproved materials for history course were not protected by First Amendment).



explicate *Moby-Dick* in a literature class can't use *Cry, The Beloved Country* instead, even if Paton's book better suits the instructor's style and point of view; a math teacher can't decide that calculus is more important than trigonometry and decide to let Hipparchus and Ptolemy slide in favor of Newton and Leibniz.

Mayer, 474 F.3d at 479. Curricular speech is (1) school-sponsored expression bearing the imprimatur of the school, and (2) supervised by faculty members and designed to impart particular knowledge to the students. *Lee*, 484 F.3d at 697. For example, a teacher “must stick to the prescribed curriculum – not only the prescribed subject matter, but also the prescribed perspective on that subject matter.” *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004 (7th Cir. 1990); *see id.* (holding teacher could not teach creation science as alternate view of origin theory).

On the other hand, some courts, and sometimes the same courts that ruled curricular speech is not a public concern, have found that teachers are entitled to First Amendment protection so long as they accurately teach the curriculum.²⁵ As the Tenth Circuit explains:

We think teachers do have some rights to freedom of expression in the classroom, teaching high school juniors and seniors. They cannot be made to simply read from a script prepared or approved by the board. As Mr. Justice Stewart noted in *Epperson*, the teacher cannot be punished for letting students know other languages are spoken in the world, or mentioning the existence of a system of respected human thought.

Cary v. Bd. of Educ. of Adams-Arapahoe Sch. Dist. 28-J, 598 F.2d 535, 543 (10th Cir. 1979). In general, courts give the least amount of First Amendment protection to elementary school teachers because the education is compulsory and instructive in basic knowledge. While high school students are more capable of handling critical thinking, elementary school students are not.

²⁵ *See Evans-Marshall*, 624 F.3d at 338-39 (“A teacher’s curricular speech” covers matters of public concern); *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300, 1305–06 (7th Cir. 1980) (“School boards are for example not free to fire teachers for every random comment in the classroom. . . .” or “from placing a flat prohibition on the mention of certain relevant topics in the classroom . . .” as that would constitute a “pall of orthodoxy. . . .”); *Keefe v. Geanakos*, 418 F.2d 359, 361–62 (1st Cir. 1969) (finding First Amendment protected high school teacher’s use of extra-curricular reading assignment that contained “dirty” word); *Wilson*, 418 F. Supp. at 1363 (holding high school violated teacher’s First Amendment rights when it punished him for inviting a Communist as guest speaker); *Sterzing v. Fort Bend Indep. Sch. Dist.*, 376 F. Supp. 657, 662–63 (S.D. Tex. 1972), *rev’d as to remedy not merits*, 496 F.2d 92, 93 (5th Cir. 1974) (finding high school teacher’s answer to student’s question stating he opposed interracial marriage in civics course was protected speech); *Mailloux v. Kiley*, 323 F. Supp. 1387, 1391–92 (D. Mass. 1971), *aff’d*, 448 F.2d 1242 (1st Cir. 1971) (holding it violated First and Fourteenth Amendment rights of teacher for high school to fire him for using a taboo word); *Parducci v. Rutland*, 316 F. Supp. 352, 356 (M.D. Ala. 1970) (holding high school violated First and Fourteenth Amendments by firing teacher after she assigned a Kurt Vonnegut, Jr. story to her class).



B. Balancing a Teacher’s Right to Speak Against a Public School’s Efficiency and Effectiveness

If a teacher’s speech relates to a matter of public concern, then the courts balance “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.” *Pickering*, 391 U.S. at 568. Balancing the teacher’s and the public school’s interest is called *Pickering* balancing, which derives from the seminal case on public employee free speech. The Ninth Circuit applies *Pickering* balancing by analyzing five factors:

- (1) whether the employee’s speech disrupted harmony among co-workers;
- (2) whether the relationship between the employee and the employer was a close working relationship with frequent contact which required trust and respect in order to be successful;
- (3) whether the employee’s speech interfered with performance of his duties;
- (4) whether the employee’s speech was directed to the public or the media or to a governmental colleague; and
- (5) whether the employee’s statements were ultimately determined to be false.

Bauer v. Sampson, 261 F.3d 775, 785 (9th Cir. 2001).²⁶

Two cases are illustrative of how *Pickering* balancing affects teachers. In *Cockrel v. Shelby County School District*, a fifth-grade teacher invited Woody Harrelson to speak about the environmental benefits of industrial hemp. 270 F.3d at 1041-42. The Sixth Circuit ruled that the teacher’s presentation of an outside speaker on industrial hemp was speech of a public concern, curricular, and protected by the First Amendment. *Id.* at 1052. When performing the *Pickering* balancing the court said “it will consider whether an employee’s comments meaningfully interfere with the performance of her duties, undermine a legitimate goal or mission of the employer, create disharmony among co-workers, impair discipline by superiors, or destroy the relationship of loyalty and trust required of confidential employees.” *Id.* at 1053 (internal quotation marks omitted). The court ruled that while the school had a strong interest in avoiding disruption of the work environment, the fact that the school gave the teacher permission to bring the speaker to campus undercut its argument. On balance, the teacher’s speech was constitutionally protected. *Id.* at 1054.

But in *Johnson v. Poway Unified School District*, a high school math teacher posted in his class large banners declaring “IN GOD WE TRUST,” “ONE NATION UNDER GOD,” “GOD BLESS AMERICA,” and other similar statements. 658 F.3d at 958. The Ninth Circuit held that the

²⁶ The Eighth Circuit balances the *Pickering* factors in a slightly different fashion:

- (1) the need for harmony in the office;
- (2) whether the government’s responsibilities require a close working relationship;
- (3) the time, manner, and place of the speech;
- (4) the context in which the dispute arose;
- (5) the degree of public interest in the speech; and
- (6) whether the speech impeded the employee’s ability to perform his or her duties.

Hall v. Mo. Highway & Transp. Comm’n, 235 F.3d 1065, 1068 (8th Cir. 2000).



teacher’s speech was unquestionably on a matter of public concern, but that he spoke as a public employee, not a private citizen, so his speech was not protected by the First Amendment. *Id.* at 965-66. “Certainly, Johnson did not act as a citizen when he went to school and taught class, took attendance, supervised students, or regulated their comings-and-goings; he acted as a teacher—a government employee.” *Id.* at 967; *see also Bishop*, 926 F.2d at 1068-69 (holding public university did not violate First Amendment by instructing professor to stop interjecting his religious beliefs into exercise physiology course).

C. Common Issues Concerning Teachers’ Freedom of Speech.

The contrast between *Cockrel* and *Johnson* shows that a teacher may not use the classroom to indoctrinate students or advance one religion over another, but a teacher may disseminate information in an objective manner so long as the information is reasonably related to the curriculum. Moreover, a teacher must heed the indications of his or her principal and board of trustees. If they permit broad discussion of subjects, then the teacher has more freedom. But if they do not, then the teacher has less freedom.

1. Teaching the Bible in class

A teacher may objectively teach the Bible in a history of religions class or study the Bible as part of a literature course.²⁷ The Bible can be taught in a school for its historical, cultural, or literary value, but not in a devotional or doctrinal manner. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963).

2. Teaching about human origins

Teachers also have some ability, though limited, to discuss alternatives to the theory of evolution, such as intelligent design.²⁸ The Supreme Court has observed that “teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of scientific instruction.” *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987). Thus a discussion on intelligent design would be appropriate, whereas a presentation on the biblical account of creation would not be allowed in a science classroom.²⁹ To best serve the student, a variety of scientific perspectives may be presented, keeping in mind that the

²⁷ Books studying the Bible as literature include: LELAND RYKEN, *HOW TO READ THE BIBLE AS LITERATURE* (1984); JOHN B. GABEL, ET AL., *THE BIBLE AS LITERATURE: AN INTRODUCTION* (2005); and JAMES S. ACKERMAN, ET AL., *THE BIBLE AS/IN LITERATURE* (1976). *The Chronicles of Narnia* is an excellent example of religious literature.

²⁸ A recommended two volume series on this topic has been published by Wendell Byrd, entitled *The Origin of the Species Revisited*.

²⁹ *See e.g.*, Francis Beckwith, *Public Education, Religious Establishment, and the Challenge of Intelligent Design*, 17 NOTRE DAME J.L. ETHICS & PUB. POL’Y 416 (2003); *Pelozo*, 37 F.3d at 522 (holding school district may prohibit teacher from discussing religious views on evolution); *C.F. v. Capistrano Unified Sch. Dist.*, 615 F. Supp. 2d 1137, 1146 (C.D. Cal. 2009), *vacated in part & rev’d on other grounds*, 654 F.3d 975 (9th Cir. 2011) (finding teacher may not tell students that creationism is a superstition).



nomenclature of “intelligent design” is the best way to discuss alternatives to evolution in a science class. A teacher may also overview various religious viewpoints regarding the origin of the universe. However, this should be done in a world religions or philosophy class and may be problematic if done in a science class.³⁰

3. Teaching about religious influences on the humanities

When studying art, music, drama, or literature a teacher may objectively discuss, perform, critique, and overview religious music, composition, and history.³¹ “Music without sacred music, architecture minus the cathedral, or painting without the Scriptural themes would be eccentric and incomplete, even from a secular view.” *McCullum v. Bd. of Educ.*, 333 U.S. 203, 206 (1948) (Jackson, J. concurring). The Bible can objectively be used “for its literary and historic qualities.” *Schempp*, 374 U.S. at 225. Teachers must simply mix the secular and the sacred. In other words, if a public school teacher presents a secular aspect along with the religious art, music, drama, or literature, then the presentation should be constitutional.

Teaching about a religious holiday is permitted if it is part of a program of education which is presented objectively, and does not have the effect of advancing or inhibiting religion.³² For example, a teacher may explain that Easter is a religious holiday celebrated by Christians who believe that the person of Jesus Christ was raised from the dead. Historically, Easter celebrates the resurrection of Christ, whom Christians believe to be God. Done in an objective and educational manner, teachers can speak about religious holidays.

Similarly, religious Christmas carols may be sung in public schools without offending the Constitution. A school Christmas program may include Christian and Jewish songs so long as they are presented “in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday.” *Florety*, 619 F.2d at 1314. There is no magical formula between the balance of the secular versus the religious song. The main issue is that secular songs must be within the context of the Christian songs just like a secular symbol must be in the context of a Christian symbol.

4. Discussing one’s faith with other faculty and staff

Teachers may discuss their religious beliefs with other faculty and staff members. In 2003, the U.S. Department of Education issued a memorandum regarding religious expression at school that discussed the rights of teachers to engage in religious expression with other staff members:

³⁰ *Pelozza*, 37 F.3d at 522; *C.F.*, 615 F. Supp. 2d at 1146.

³¹ See U.S. Dep’t of Educ., *Religious Expression in Public Schools* 128, at <http://www.freedomforum.org/publications/first/findingcommonground/B10.USDeptGuidelines.pdf> (last visited Feb. 18, 2013).

³² See *Florety v. Sioux Falls Sch. Dist.* 49-5, 619 F.2d 1311 (8th Cir. 1980) (upholding school policy that taught secular and religious information about holidays).



Teachers may, however, take part in religious activities where the overall context makes clear that they are not participating in their official capacities. Before school or during lunch, for example, teachers may meet with other teachers for prayer or Bible study to the same extent that they may engage in other conversation or nonreligious activities.³³

Likewise, if teachers are permitted to post or distribute flyers for non-curricular activities or announcements in the faculty lounge or in teachers' school mailboxes, then religious events and activities may be publicized to other staff members in the same manner.³⁴

Some schools allow teachers to utilize a classroom or a lounge to meet with other teachers. If the school allows teachers to use school facilities for secular meetings, then the school must also allow teachers to use school facilities for religious meetings. The school may restrict the use of its facilities by teachers for only class-related meetings or topics. If the school allows teachers to use its facilities for non-curriculum related matters such as socialization and entertainment, then teachers should also be able to use the same facilities for Bible study and prayer. In this case only teachers should be in the meeting, not students.

III. A Public School May Not Censor a Teacher's Speech Based on a Vague Policy

Nearly every public school enforces policies that regulate teacher conduct and speech. Sometimes these policies use vague and overbroad words that give administrators virtually unlimited discretion. A government policy is unconstitutionally vague when it (1) denies professors fair notice of the standard of expression to which they are accountable; (2) permits unrestricted enforcement against any professor at anytime, thereby inviting arbitrary, discriminatory and overzealous enforcement; and (3) chills the exercise of First Amendment freedoms. *City of Chi. v. Morales*, 527 U.S. 41, 56 (1999); *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). “When a teacher is forced to speculate as to what conduct is permissible and what conduct is proscribed, he is apt to be overly cautious and reserved in the classroom.” *Parducci*, 316 F. Supp. at 357.

Various attempts by schools to limit teacher expression through broad policies have failed the vagueness inquiry. See *Keefe*, 418 F.2d at 362 (finding school failed to provide the teacher with adequate notice that using certain supplemental resources was impermissible); *Dean v. Timpson Indep. Sch. Dist.*, 486 F. Supp. 302, 309 (E.D. Tex. 1979) (holding that “a warning to Mrs. Dean . . . not to bring material like the Ethics Survey into the classroom . . . would not give a reasonably prudent person knowledge of what conduct it sought to prohibit. The alleged warning . . . could have a number of logical meanings.”); *Mailloux*, 323 F. Supp. at 1392 (school violated Constitution by

³³ U.S. Dep't of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, February 7, 2003, at http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (last visited Feb. 18, 2013).

³⁴ See *Brown v. Polk Cnty.*, 61 F.3d 650, 658-59 (8th Cir. 1995) (holding held that prohibiting a county employee from engaging in activities that could be considered religious proselytizing, witnessing, or counseling while he was on the job violated his First Amendment rights).



punishing teacher who assigned supplemental reading material without notice that such materials were prohibited). Public schools must use clear standards to control teacher conduct and speech.

IV. Conclusion

While there is no independent right to academic freedom for public school teachers, they enjoy First Amendment protection outside the classroom, and some protection inside the classroom. The Constitution also protects them from vague speech-restrictive policies.