



# Broaching the subject: Developing law-based principles for teacher free speech in the classroom

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## HIGHLIGHTS

- The analysis revealed four principles that set limits on teachers' right to classroom free speech.
- The first two principles are curriculum alignment and even-handedness.
- The second two principles are age appropriateness and avoidance of inflammatory material.
- These four principles are a useful guide for teachers and teacher educators.
- The protections afforded to teacher free speech remain limited, so caution is warranted.

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## 1. Introduction

The aim of this paper is to put forward a set of law-based principles which define the limits of educators' free discretion to address contested social and political issues in the classroom. The specific type of case we have in mind arises when teachers' purpose is to use the classroom as a place to help young people learn how to discuss controversial matters, and where the choice of topic or pedagogical approach meets with resistance and disagreement from employers, pupils' parents or other stakeholders. Teachers face multiple barriers when dealing with controversial issues in class. These include a sense that students lack the ability or maturity to engage in meaningful political discussions, concerns about creating situations in which some students might feel uncomfortable or unsafe, and teachers' lack of confidence in their own ability to manage the uncertainties that arise when students are invited to air multiple and competing views about controversial

questions (Donnelly, 2004; Galston, 2004; Hess, 2009; Hess & McAvoy, 2015; Oulton et al., 2007). However, the specific barrier with which this paper is concerned is the possibility of sanctions in the workplace as a result of raising controversial issues in class. The threat or imposition of sanctions is sometimes necessary, but it can also have a chilling effect on the reasonable exercise of teachers' professional autonomy and their capacity to provide their students with educational experiences favorable to the development of democratic values and competencies. As scholars who are committed to teacher autonomy and the levels of teacher curricular free speech that accompany it, we deplore what we see as the ongoing erosion of these prerogatives. Hence, our aim in what follows is to chart the current limits and possibilities of teachers' discretion to broach controversial topics.

Methodologically, we applied qualitative content analysis (see Krippendorff, 1989; Stemler, 2001) to key U.S. and Canadian jurisprudence and secondary legal writings on teacher free speech to uncover patterns in judges' views on the considerations that need to be taken into account when thinking about whether pedagogical discretion has been exercised in a reasonable and responsible way. We found judges returning consistently to four rights and interests that need to be balanced with teachers' constitutional right to free expression—namely, the State's interest in determining the content taught in schools, the rights of pupils as a captive audience, the right of students to benefit from a stable learning environment, and the interest of maintaining public confidence in the public school system. We argue that these considerations entail four corresponding principles that set reasonable limits on teachers' right to curricular free speech: alignment with the official curriculum, even-handedness, age appropriateness, and avoidance of inflammatory material. Within these limits, however, there is also space

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for teacher autonomy. We argue that it is not legitimate to prevent teachers from raising and discussing a sensitive topic with their students in class as long as it is done in a way that respects these guiding principles.

Before we begin this exercise, a word of caution is in order. For reasons discussed in detail below, adherence to these principles on the part of a teacher by no means guarantees legal protection in the case of a conflict between a teacher and their employer over a choice to raise a controversial issue in the classroom. The use-value of the principles we put forward in this paper lies, rather, in their potential to help teachers and administrators more clearly perceive the various interests that are at stake when thinking about what teachers have the right to do and say in class. Just as importantly, greater sensitivity to these principles promises to take the chill off teaching controversial issues by providing some common points of reference that teachers, administrators, parents and other parties can refer to when faced with having to negotiate disagreements in this delicate area.

## 2. Civic education, controversial issues and free speech in the classroom

For many teachers, the choice to engage their students with controversial political issues in class is a fraught one.

Prominent educationalists from John Dewey (1916/2004) to Amy Gutmann (Gutmann & Thompson, 1996), Diana Hess (2009) and Joel Westheimer (2015) all passionately urge teachers not to shy away from doing so, on the grounds that learning to discuss controversial political issues is crucial for developing students' capacities for critical thinking. One strand of this argument focusses on the benefits of addressing controversial issues in terms of citizenship education. In democratic societies, proponents argue, deliberation about disputed public matters is supposed to be open and inclusive, rights-respecting and fair, informed and rational. The educational interest of tackling sensitive public issues in class is that it can create authentic experiences that illustrate how this process works. By leading young people to practice democratic values and virtues like equality, tolerance, rational autonomy, recognition of reasonable disagreement, and respectful political engagement, they will come to appreciate how these things contribute to decision-making that promotes the common good (Kunzman, 2006). Although these practices are still far from being a reality in many schools (Kahne, Rodriguez, Smith, & Thiede, 2000), significant efforts have been made to articulate best practices for discussing controversial issues in the classroom (Bickmore & Parker, 2014; Hess, 2002; Kelly, 1986; Larson, 1997; Marchman, 2002; Misco, 2011). Scholars have also worked to understand the way in which particular controversial issues are actually dealt with by teachers on the ground, both in America (Journell, 2011) and in other cultural contexts like Singapore (Ho & Seow, 2015; Ho, Alviar-Martin, & Leviste, 2014) and Northern Ireland (Donnelly, 2004; King, 2009).

Some of these same authors, however, also recognize that even teachers who recognize the important contribution that deliberating about controversial issues makes to education for democratic citizenship can have good reasons to avoid dealing with these issues in class (Zembylas & Kambani, 2012). Hess and McAvoy (2015) have found, for instance, that one of the reasons teachers frequently cite for preferring not to raise politically sensitive matters is to avoid creating situations that certain students may find uncomfortable or difficult (see also Hess, 2009; Misco & Patterson, 2007). Teachers worry that discussions about hot-button issues will degenerate into shouting matches and that students who take a stand on an issue that the majority disagrees with will become the targets of insults or social exclusion (Hess & McAvoy, 2015; see also

Oulton et al., 2007). They are also concerned that students may voice unacceptable and disturbing views that risk upsetting other students (Beck, 2013; Yeager Washington & Humphries, 2011). No less daunting is the fact that teachers' pedagogical decision-making is under constant scrutiny, particularly when a controversy is currently politicized in the local community (Camicia, 2008; Swalwell & Schweber, 2016). As Westheimer (2006, 2015) points out, many teachers live in fear that if they are perceived as inviting criticism of views that are cherished by certain students, their families, school administrators or other members of the school community, they could face disciplinary action at work.

Thus, teachers who believe in the educational value of controversial issues face a dilemma. They are placed in the unenviable position of having to weigh their students' educational interests against their own (perfectly legitimate) interest in job security. Particularly when one considers how difficult it must be at times for teachers to predict which issues might turn out to be especially sensitive for which students (cf. Hess & McAvoy, 2015), one could hardly blame a teacher for erring on the side of caution by avoiding controversial issues in class. At the same time, the deleterious implications of the need for such avoidance for the teacher's role as agents of democratic citizenship education are regrettable.

This dilemma generates a need for clarification. Considering that teachers, like all citizens of constitutional democracies, have a legally recognized right to free expression, it seems reasonable to ask whether this right justifies granting teachers a degree of discretion to use teaching material. When can they raise topics and make statements in class that may be considered offensive or inappropriate by some and, most importantly, what are the limits of the power of state agents (school boards, principals, etc.) to prevent teachers from exercising this discretion?

These questions become particularly salient when one takes into account the standard justification for the importance of free speech in liberal democracies—namely, that it is conducive to open truth-seeking in the marketplace of ideas, that a flourishing democracy depends on the unrestrained exchange of ideas among citizens, and that free speech is favorable to individual self-fulfillment in the sense that being exposed to the widest possible range of viewpoints facilitates the exercise of the other basic right to pursue the kind of life that seems good to them (Bilgrami & Cole, 2016; Mill, 1859/1991; Kindred, 2006). The feature of the right to free speech that makes it directly applicable to the work that teachers do to promote reflection, exchange and critical thinking around contested social and political questions, that is, is that the primary beneficiaries of its exercise are those who are exposed to it. Teachers' putative right to create pedagogical spaces where students discuss and deliberate about sensitive public issues, then, would seem to derive from their students' right not only to have access to free expression of their teachers and their peers through vigorous debate and the exchange of ideas but also from the benefits for society and the individual of learning to participate effectively and meaningfully in public life.

U.S. and Canadian jurisprudence on free expression rights in the public education system provides an important basis for more clearly defining the contours of educators' right to free speech when broaching controversial questions in class. As it happens, parallel jurisprudence exists in both countries in which judges, over several decades and in a wide range of cases, have affirmed the constitutionally protected right to free speech for public school teachers, while also imposing limits on the exercise of this right. Closer examination of the arguments supporting teachers' right to free speech in the course of their work, as well of the arguments adduced in favor of limiting this right, affords educators with a clearer sense of what it means to exercise this right in a pedagogically responsible way.

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