



New Infringements on Academic Freedom: What They Mean for Institutions, Faculty, Students and Publishers

David E. Anderson
Executive Director for Higher Education
Association of American Publishers

Academic Freedom is the freedom of faculty to determine the substance of the courses they teach and the materials they use to teach those courses. Without the latitude and independence to structure a course as they like with materials they choose, faculty are greatly hindered in their ability to “be exemplars of open-mindedness and free inquiry” and to determine how best to drive their students’ academic success.¹

For some instructors, Academic Freedom may involve a choice of competing textbooks. In the field of microeconomics, for example, leading textbooks include those co-authored by Paul Samuelson (a one-time advisor to Presidents Kennedy and Johnson) and William Nordhaus (a former advisor to President Carter), another by Gregory Mankiw (a former advisor to President George W. Bush and former presidential candidate Mitt Romney) and a third co-authored by Paul Krugman (author of the *New York Times* “Conscience of a Liberal” blog) and Robin Wells (contributor to *The Occupy Handbook*). Each of these three texts covers much of the same material, but from vantage points and with styles that are strikingly different. In choosing one text over the other, faculty are making a choice that goes to the heart of what they view as “microeconomics,” what they think is most important for students to learn and how to best engage them in the learning experience.

Recently, a trend has emerged of state legislation being introduced that directly infringe the freedom of faculty to choose the learning materials they believe best suited for their classrooms. These bills offend First Amendment principles and, if enacted, would likely be struck down by the courts.² The U. S. Supreme Court has stated that a “university is

¹ *Wieman v. Updegraff*, 344 U.S. 183 (1952)

² It is important to note that academic freedom exists in higher education in a different capacity than in elementary and secondary education. In higher education, students are adults and not legally required to attain post-secondary education. These students attend college or university at their own choosing and often select courses at their own discretion. Typically, universities are not bound by common curriculum requirements. In elementary and secondary education, however, students are minors and legally required to attend school until a certain age and school districts

characterized by the spirit of free inquiry, its ideal being the ideal of Socrates – to follow the argument where it leads.”³ The selection of course materials – materials that provide the guideposts to “free inquiry” – are a very important component of Academic Freedom.

What follows is a brief discussion of the First Amendment roots of Academic Freedom, how the right to select learning materials has been recognized as a right under the First Amendment and a description of the bills introduced this year that would infringe that right.

Academic Freedom and the First Amendment

At least since the time that Socrates taught in Athens and Plato founded his academy, preserving the freedom of educators to maintain their independence and liberty to teach and inquire against unwarranted government intrusion has been an issue of critical importance. In more modern times, the focus has been on preserving the rights of institutions, faculty and students to teach and learn free from political interference.

Arguably, the first articulation of our modern concept of First Amendment free speech was made in 1919 by Justice Oliver Wendell Holmes:⁴

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution.

Years later, the Court recognized that the “classroom is peculiarly the marketplace of ideas”:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation ...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.⁵

are bound by state and federal curriculum standards. Generally speaking, the courts allow government more leeway under the First Amendment to set curriculum standards at the K-12 level and strengthen constitutional protections for post-secondary education.

³ *Sweezy v. New Hampshire*, 354 US 234, 262-263 (1957) (citations omitted).

⁴ *Abrams v. United States*, 250 US 616,630-631 (1919).

⁵ *Keyishian v. Board of Regents*, 385 US 589, 603 (1967)(citations omitted).

In his famous concurring opinion in *Sweezy v. New Hampshire*, Justice Felix Frankfurter set forth what are now the generally accepted “four essential freedoms” of the university: “to determine for itself on academic grounds *who may teach, what may be taught, how it shall be taught, and who may be admitted to study.*”⁶

Academic Freedom and Learning Materials

Textbooks and other learning materials are an essential component both of “what may be taught” and of “how it shall be taught.” Course materials are not limited to textbooks. They may also include other forms of content including literature, poetry, graphics and open access materials. Faculty in history or sociology departments may choose among competing textbooks or may assign the works of individual historians or sociologists. By the choices they make, faculty are defining the substance of their course and determining how best to communicate that content to their students. For that reason, the adoption of textbooks involves the exercise of Academic Freedom protected by the First Amendment.

As the Supreme Court has said: “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.”⁷

The *Garcia-Padilla* case⁸ is a leading decision on textbooks and Academic Freedom under the First Amendment. It involved a challenge brought by an association representing private elementary, secondary and post-secondary institutions against a regulation promulgated by Puerto Rico’s Department of Consumer Affairs designed to discourage the adoption of new editions of textbooks that did not contain “significant changes.” The regulation defined what significant changes were; it also described what significant changes were not:

Exclusion of chapter or sections, cosmetic changes and/or style, such as ... chapter or section order... does not constitute a significant change. Additions of one or several sentences to one chapter or section or through a new book edition will not be considered a significant change nor the addition of one or several drawings, graphics, tables, or photos.

The government tried to justify its intrusion into Academic Freedom on the grounds that it was responding “to complaints it received from parents regarding “the excessive cost of textbooks” and because the textbook industry was a for-profit industry. “This, without more,” the court

⁶ 354 US 234, 262-263 (1957)(citations omitted)(emphasis added).

⁷ *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967)

⁸ *Asociacion de Educacion Privada de P.R., Inc. v. Garcia-Padilla*, 490 F.3d 1, 12-13, 17-18 (2007).

stated, “cannot offend notions of justice in our free-enterprise system.” The court struck down the regulation under the First Amendment.

Generally speaking, higher education publishers issue new editions of textbooks within a three- or four-year timeframe. In fields like law, accounting, political science and computer science (to name a few), new editions may be published sooner. In these fields, changes are constant, regulations are being rewritten and technological advancements are changing the way these fields operate. Publishers update their materials and issue new editions so that students are not at risk of entering the workforce with outdated and potentially incorrect information, harming their ability to compete in the global marketplace. Without updated course materials, students would have a severe academic disadvantage.

In addressing the Department of Consumer Affairs regulation, the court asserted that textbooks “are pedagogical tools essential not only to the teaching of substantive information, but also to the development of effective curricula and lesson plans ... A school’s selection of textbooks is thus closely tied to its First Amendment right to expression.” It went on to find that the regulation violated the First Amendment because it would require “students to use textbooks with content the schools do not approve of, either because it includes information that the schools do not wish to teach or because it lacks information the schools would like to teach.”

The court reasoned that educators “may find the inclusion of new photographs and diagrams in a scientific textbook particularly helpful in teaching a particular concept” but that the regulation specifically targeted such changes as “not significant.” The court went on to explain how even seemingly small changes can be very significant:

[T]he exclusion or inclusion of even one sentence or phrase may very well be considered a significant change by a private school for either teaching purposes or in light of the school’s academic philosophy or mission. In fact, seemingly minor changes in text may be precisely what makes a book’s new edition acceptable to a school and consistent with the message the school wishes to convey.

2015 Legislation Offending First Amendment Academic Freedom

In the last two years, there has been a rise in legislation that would infringe the freedom of instructors to choose course materials best suited to meet the needs of their students. Most often, these bills violating Academic Freedom are justified as an attempt to reduce the cost of textbooks and other course materials. While the intention is to be helpful, many of the spending arguments are factually incorrect and the price on Academic Freedom is steep.

The rate of increase in the costs of textbooks and supplies is much lower than the rate of increase for other costs in higher education. The National Center for Education Statistics reports that between academic year 2009-2010 and 2012-2013, the average total cost of attendance for first-time, full-time in-state public school undergraduates living on campus increased by approximately 11 percent over all and their tuition and required fees increase by approximately 14 percent. The rate of increase for books and supplies was far less at approximately 7 percent.

Whatever the justification, bills interfering with the ability of faculty or institutions to select the most appropriate learning materials always impose government restrictions between authors, publishers and their readers that are forbidden by the First Amendment and make it more difficult for faculty to provide the best possible education for their students. From both the perspective of civil liberties and educational policy, such bills are woefully misguided. Below are some examples:

Connecticut: Senate Bill 931, a committee bill, would prohibit professors from adopting any book when the previous edition is less than three years old. This bill goes much further than the regulations that were struck down in the *Garcia-Padilla* case. It would effectively ban many books from campuses in Connecticut, and would likely also be struck down under the First Amendment. The bill was reported out of the Higher Education and Employment Advancement Committee (Senator Dante Bartolomeo and Representative Roberta Willis, Co-Chairs).

Florida: Governor Scott's proposed college affordability legislation, Senate Bill 938, included provisions that would prohibit faculty from adopting learning materials for less than a three year period unless certain conditions were met and they first obtain permission from the university or college president or designee. Part of a larger education package, the book adoption provisions were stripped out in Committee. This is the second year in a row that Governor Scott has offered this legislation.

New York: Assembly Bill 1274, introduced by Assemblyman Kevin Cahill, would "require that all publishing companies planning to introduce a new edition of an existing textbook shall first justify, based on academic review board criteria, the necessity of a new edition prior to such new textbook edition being sold, purchased, or used for academic purposes by any state university of New York." This bill would essentially require government approval before books could be sold or used for academic purposes in New York State – a very clear infringement of First Amendment freedoms.

Ohio: House Bill 160, introduced by Representative Anthony DeVitis, would prohibit the adoption of custom textbooks and faculty-authored books except in very limited circumstances. This bill constitutes an effective ban on certain books and certain authors in Ohio and cannot be reconciled with the First Amendment. Representative DeVitis offered this bill last year, as well.

South Carolina: Senate Bill 528, introduced by Senator Nikki Setzler, would require course books for lower-division courses to be adopted for a minimum of three years and course books

for upper-division courses to be adopted for four years. This bill presents the similar issues that were involved in the *Garcia-Padilla* case, as well as in the Connecticut and Florida bills.

Washington: House Bill 1958, introduced by Representative Hans Zeiger, would cap the price of textbooks at \$100, effectively banning many textbooks from Washington campuses.

The right of faculty and institutions to select the digital learning platforms, textbooks or other course materials that are most appropriate and serve to provide students with the best possible learning experience is fundamental. Efforts to curtail these freedoms not only chill civil liberties, they threaten to degrade the quality of our institutions of higher learning.

Students from around the globe come to the U.S. to attend our colleges and universities; they do so because our institutions of higher learning are among the best in the world. If we want to maintain our global leadership in post-graduate education, we must preserve the freedom and independence of faculty to teach courses in ways they believe are most effective.

As the Association of American Publishers, we are dedicated to the advancement of learning, the propagation of ideas, and the robust exchange of opinion. That a new wave of infringement of First Amendment liberties is targeted at the academy is both unfortunate and alarming. We hope that it is short-lived. In the meantime, AAP stands in support of the rights of institutions of higher learning, faculty and students to have available to them the very best learning materials our members and other publishers and the rights of authors to have access to readers both on and off campus.