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THE ASSERTED CONSTITUTIONAL RIGHT OF PUBLIC SCHOOL TEACHERS TO DETERMINE WHAT THEY TEACH

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I. INTRODUCTION

Recent years have seen a tremendous growth in litigation, particularly constitutional litigation, concerning public education. Along with the well-publicized cases concerning such areas as students' rights,¹ financing,² and desegregation,³ there has developed a group of cases concerning the alleged federal constitutional right of public school teachers to teach what they desire in their individual classrooms, despite the contrary wishes of their administrative superiors, school boards, or legislatures.⁴

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¹ See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

² See, e.g., *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

³ See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

⁴ See *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Brubaker v. Board of Educ.*, 502 F.2d 973 (7th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); *Ahern v. Board of Educ. School Dist. of Grand Island*, 456 F.2d 399 (8th Cir. 1972); *Mailloux v. Kiley*, 448 F.2d 1242 (1st Cir.), *aff'g* 323 F. Supp. 1387 (D. Mass. 1971); *Keefe v. Geanakos*, 418 F.2d

One such case involved a teacher's insisting on teaching Darwinian evolution to a high school biology class despite a state statute prohibiting such teaching in the state's public schools;⁵ another involved a high school English teacher's insisting on assigning Kurt Vonnegut, Jr.'s *Welcome to the Monkey House* to her English class over the objection of her principal and associate superintendent.⁶

This Article is devoted to an analysis of the theory, recently espoused by some of these cases and the related legal literature, that public school teachers have a federal constitutional right to determine what they teach despite the contrary views of superiors vested with decision making authority under state law.⁷

359 (1st Cir. 1969); *Webb v. Lake Mills Community School Dist.*, 344 F. Supp. 791 (N.D. Iowa 1972); *Calvin v. Rupp*, 334 F. Supp. 358 (E.D. Mo. 1971), *aff'd*, 471 F.2d 1346 (8th Cir. 1973); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970); *Opinion of the Justices*, 337 A.2d 777 (N.H. 1975). *Cf.* *Birdwell v. Hazelwood School Dist.*, 491 F.2d 490 (8th Cir. 1974), *aff'g* 352 F. Supp. 613 (E.D. Mo. 1972); *Moore v. School Bd.*, 364 F. Supp. 355 (N.D. Fla. 1973); *Moore v. Gaston County Bd. of Educ.*, 357 F. Supp. 1037 (W.D.N.C. 1973); *Lindros v. Governing Bd. of Torrance Unified School Dist.*, 9 Cal. 3d 524, 510 P.2d 361, 108 Cal. Rptr. 185, *cert. denied*, 414 U.S. 1112 (1973); *Celestine v. Lafayette Parish School Bd.*, 284 So. 2d 650 (La. Ct. App. 1973); *Board of Educ. v. Rockaway Township Educ. Ass'n*, 120 N.J. Super. 564, 295 A.2d 380 (1972). *See also* *Presidents Council v. Community School Bd.*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972); *Manarcini v. Strongsville City School Dist.*, 384 F. Supp. 698 (N.D. Ohio 1974).

These cases have also been the subject of scholarly writing. *See* S. GOLDSTEIN, *LAW AND PUBLIC EDUCATION* 71-110 (1974); Kutner, *The Freedom of Academic Freedom: A Legal Dilemma*, 48 CHL-KENT L. REV. 168 (1971); Nahmod, *Controversy in the Classroom: The High School Teacher and Freedom of Expression*, 39 GEO. WASH. L. REV. 1032 (1971); O'Neil, *Libraries, Liberties and the First Amendment*, 42 U. CIN. L. REV. 209, 244-45 (1973); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841 [hereinafter cited as Van Alstyne, *Constitutional Rights*]; Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U.L. REV. 1176 (1973). For more generalized discussion of the issues involved in these cases, see ACADEMIC FREEDOM AND TENURE (L. Joughin ed. 1969); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 593-626 (1970); R. HOFSTADTER & W. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955); Goldstein, *Academic Freedom, Its Meaning and Underlying Premises as Seen Through the American Experience*, 11 ISRAEL L. REV. 52 (1976); Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberties*, 404 ANNALS 140 (1972) [hereinafter cited as Van Alstyne, ANNALS]; Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969); Note, *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

⁵ *Epperson v. Arkansas*, 393 U.S. 97 (1968). *Cf.* *Moore v. Gaston County Bd. of Educ.*, 357 F. Supp. 1037 (W.D.N.C. 1973).

⁶ *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970).

⁷ Legal aspects of the factual situations discussed in this Article other than those involving the Constitution are beyond the scope of this Article. The reader should be aware, however, that other issues do exist. For example, a teacher's use of classroom materials over the objections of his administrative superiors might raise the question whether such action constitutes cause for dismissal under the relevant state law. *See, e.g.,*

The analysis will begin with an examination of a number of older constitutional decisions relevant to the issue.

II. FREEDOM OF EXPRESSION AND "EXTRAMURAL" ACTIVITIES OF EDUCATORS

A. *Loyalty Oath Cases*

The anti-Communist movement in the United States after the Second World War resulted in federal and state activity, including the passage of loyalty oath requirements, aimed at purging public agencies and private associations or activities of members involved with "subversive organizations."⁸ Public education, particularly higher education, was a prime target of such governmental activity. In a number of cases the Supreme Court held these measures to be unconstitutional, primarily on the grounds that the legislative terms used were too vague or would punish "innocent" as well as "knowing" membership in subversive organizations.⁹ Many of these cases involved statutes covering other public employees in addition to teachers and were decided without reference to any special constitutional status of teachers, even when the plaintiffs themselves were college or university professors.¹⁰ But language in other majority opin-

Lindros v. Governing Bd. of Torrance Unified School Dist., 9 Cal. 3d 524, 510 P.2d 361, 108 Cal. Rptr. 185, *cert. denied*, 414 U.S. 1112 (1973). See also notes 142-43 *infra* & accompanying text on the issue of the relationship between teacher collective bargaining and curricular determinations.

⁸ See generally R. BROWN, *LOYALTY AND SECURITY* (1958); W. GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS* (1956); MORRIS, *Academic Freedom and Loyalty Oaths*, 28 LAW & CONTEMP. PROB. 487 (1963). The federal government instituted loyalty tests as a condition for employment for federal civil servants, government contractors and their employees, labor leaders, seamen, and others. States prescribed similar tests for teachers, lawyers, doctors, clergymen, social workers, librarians, veterinarians, and state and local civil servants. R. BROWN, *supra* at 21-118, 164-82. One state even went so far as to require loyalty oaths of professional boxers and wrestlers. *Id.* 118.

⁹ See, e.g., *Whitehill v. Elkins*, 389 U.S. 54 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278 (1961); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

¹⁰ See *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278 (1961); *Wieman v. Updegraff*, 344 U.S. 183 (1952). Similarly, where the Court upheld an anti-subversion statute directed at teachers in *Adler v. Board of Educ.*, 342 U.S. 485 (1952), Justice Black's forceful dissent did not rely on a special status for teachers. *Id.* at 496-97. See also *Kleindienst v. Mandel*, 408 U.S. 753, 770, 774 (1972) (Douglas & Marshall, JJ., dissenting in separate opinions).

ions,¹¹ concurrences,¹² and dissents¹³ suggests that the involvement of university professors provided an academic freedom element which heightened the interests in expression and association otherwise present in the cases.

For example, in *Keyishian v. Board of Regents*,¹⁴ in which the Supreme Court invalidated a New York State loyalty oath requirement for teachers, Justice Brennan, after discussing the unconstitutional vagueness of the oath in terms not peculiarly applicable to teachers, added the following:

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 classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers

¹¹ See *Whitehill v. Elkins*, 389 U.S. 54, 60 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion). Cf. *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972).

¹² *Wieman v. Updegraff*, 344 U.S. 183, 194 (Frankfurter, J., concurring); *Sweezy v. New Hampshire*, 354 U.S. 234, 261-62 (1957) (Frankfurter, J., concurring). Justice Frankfurter, a former law professor, was the principal exponent of academic freedom in the cases in which he participated. In *Shelton v. Tucker*, 364 U.S. 479 (1960) Justice Frankfurter dissented from a majority decision that relied in part on his own language in *Wieman v. Updegraff*, *supra*, to invalidate a state statute compelling every teacher in a state supported school or college to file an annual affidavit listing organizations to which he had belonged or regularly contributed within the past five years. Justice Frankfurter felt compelled in his dissent to state that he is "one who has strong views against crude intrusions by the state into the atmosphere of creative freedom in which alone the spirit and mind of a teacher can fruitfully function." 364 U.S. at 490. He went on to conclude, however, that in his judgment the particular statute involved in this case was valid:

If I dissent from the Court's disposition in these cases [which he did], it is not that I put a low value on academic freedom. [Citing his concurrences in *Wieman* and *Sweezy*.] It is because that very freedom, in its most creative reaches, is dependent in no small part upon the careful and discriminating selection of teachers. This process of selection is an intricate affair, a matter of fine judgment, and if it is to be informed, it must be based upon a comprehensive range of information. *Id.* at 495-96.

¹³ See *Adler v. Board of Educ.*, 342 U.S. 485, 508 (1952) (Douglas, J., dissenting). But note Justice Black's dissent in the same case which does not rely on any special status for teachers. *Id.* at 496. In Justice Black's vigorous and lengthy dissent in *Barenblatt v. United States*, 360 U.S. 109 (1959), there is also a brief reference to a special status for academicians. *Id.* at 144.

¹⁴ 385 U.S. 589 (1967).

truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."¹⁵

In analyzing the significance of this language and of similar language in other cases, it must first be recognized that these cases generally involved higher education, and that the discussions of education, such as that quoted above, seem to be predicated on archetypes of higher education, not lower public education. The significance of the differences between higher and lower education for purposes of the issues examined in this Article will be developed below.¹⁶ It should be noted here, however, that historically higher and lower education in the United States have been viewed as quite different processes:

To oversimplify, education can be divided, for analytical purposes, into two models: prescriptive and analytic. In the prescriptive model, information and accepted truths are furnished to a theoretically passive, absorbent student. The teacher's role is to convey these truths rather than to create new wisdom. Both teacher and student appear almost as automatons. Analytic education, however, signifies the examination of data and values in a way that involves the student and teacher as active participants in the search for truth. While these polar models represent only a theoretical paradigm that can never exist in pure form, we have traditionally conceived of pre-college public education as essentially prescriptive, and college and post-graduate studies as analytic.¹⁷

Related to these different pedagogical models is the traditional view of the different goals of higher and lower education. Historically, the inculcating of values has been viewed as a greater component of lower education than of higher education. Again, this aspect of education is crucial to an analysis of the central issues of this Article and thus will be discussed at greater length below.¹⁸

¹⁵ *Id.* at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

¹⁶ See text accompanying notes 158-66 *infra*.

¹⁷ Goldstein, *Reflections on Developing Trends in the Law of Student Rights*, 118 U. PA. L. REV. 612, 614 (1970). See also, Note, *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045, 1049-50 (1968).

¹⁸ See text accompanying notes 158-66, 184-200 *infra*.

Even in the context of higher education it is difficult to characterize the language in *Keyishian* quoted above. The fact that similar cases were decided by the Court on similar grounds, only some of which contain such language about education, suggests that the language should be viewed as unnecessary dictum. On the other hand, it appears that at least some Justices considered it relevant that teachers and education were involved in a particular case and took this into account in the process of determining the balance between the governmental intrusion on freedom of speech and association and the governmental interest furthered by the legislation. The ambiguous and erratic use of such language, however, has produced agreement, even among commentators who favor the concept of a constitutional right of academic freedom, that these cases created no such right.¹⁹

The fact that almost none of the cases in which this language was used truly involved academic freedom reinforces this view. Interference with academic freedom entails governmental intrusion into the teaching or research activities of professors. Instead, these cases involved attempted governmental regulation of political or social activities of professors and other employees that were unrelated to their professional activities.²⁰ The concept that professors, or more generally teachers, have a unique academic freedom right to engage in extramural political and social activities that are unrelated to their professional activities of teaching and research does not seem to be well founded in policy, even aside from issues concerning the constitutional status of such a doctrine.²¹

¹⁹ See, e.g., T. EMERSON, *supra* note 4, at 610; Van Alstyne, *ANNALS*, *supra* note 4, at 143-45.

²⁰ See generally cases cited in note 9 *supra*. The only exception to this norm is the case of *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) which involved the constitutionality of the questioning of an individual by state authorities concerning, among other things, the content of a guest lecture he had delivered to a class at the state university. The unique nature of *Sweezy* in this regard does not seem to have had any significant influence on the further development of the law in this area. Rather, *Sweezy* and its language concerning academic freedom seem to have been assimilated into the line of cases discussed above that do not involve governmental intrusion into teaching or research activities. See cases cited in note 9 *supra*, decided after *Sweezy*; T. EMERSON, *supra* note 4, at 602-10; Van Alstyne, *ANNALS*, *supra* note 4, at 143 n.6.

²¹ The following discussion is taken in part from Goldstein, *supra* note 4, which examines more fully the theoretical structure of the doctrine of academic freedom at the university level.

B. *Modern Development of Academic Freedom*

Although some aspects of intellectual freedom embodied in the concept of academic freedom find their sources in antiquity, the modern development of the doctrine of academic freedom is derived largely from the nineteenth century German concepts of *lehrfreiheit* and *lernfreiheit*—freedom of teaching and learning. The basic concepts were that a university faculty member was free to teach what and how he thought best, and a student was free to learn what and how he thought best, with university authorities or external agencies, such as government, imposing only the most minimal restraints on either teacher or student.

This German concept of academic freedom underwent a number of changes when it crossed the Atlantic. The principal change was the development of the concept that a professor was protected by academic freedom from sanction by his university or by external agencies not only for conduct connected with his professional roles as teacher and scholar, but also for his extramural conduct associated with his role as “private” citizen. Indeed, despite its lack of precedent in the German doctrine, the protection of a professor against sanctions for extramural activities has become in the United States probably the predominant aspect of academic freedom, at least at the university level.

This surprising occurrence has developed primarily because of the historical accident that attacks on university professors by government, as exemplified in the cases discussed above, have focused almost exclusively on the professors’ extramural, rather than professional, conduct. As a defense against such attacks, the academic profession seized upon the available tool of academic freedom because there was an absence of a more generalized civil libertarian doctrine that would restrict a government’s interference in the speech or conduct of its citizens or an employer’s interference in the non-work-related activities of his employee.

Historically, the principal professional organization dedicated to the protection of academic freedom at American colleges and universities has been the American Association of University Professors (AAUP).²² *The 1915 Declaration of Princi-*

²² The author served as General Counsel of the AAUP from 1972-1974. Since many of the ideas contained in this Article may be in conflict with some AAUP positions, it is imperative to emphasize that the views expressed herein are the personal views of the author and in no way reflect those of the AAUP.

ples issued by the AAUP at its founding clearly demonstrated its concerns:

The term "academic freedom" has traditionally had two applications—to the freedom of the teacher and to that of the student, *Lehrfreiheit* and *Lernfreiheit*. It need scarcely be pointed out that the freedom which is the subject of this report is that of the teacher. Academic freedom in this sense comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action. The first of these is almost everywhere so safeguarded that the dangers of its infringement are slight. It may therefore be disregarded in this report. The second and third phases of academic freedom are closely related, and are often not distinguished. The third, however, has an importance of its own, since of late it has perhaps more frequently been the occasion of difficulties and controversies than has the question of academic freedom of intra-academic teaching.²³

The present AAUP view of academic freedom, as set forth in its 1940 *Statement of Principles on Academic Freedom and Tenure*,²⁴ is fundamentally the same as that stated in the 1915 *Declaration*.

The development of the doctrine that academic freedom includes rights of extramural expression has also been aided by the judicial statements in the cases discussed above. Yet, despite this history and judicial language, the argument that academic freedom gives to professors a unique protection for their non-work-related activities does not appear to be well founded. A plausible doctrine of a unique freedom for teachers would necessarily be linked to some unique qualities of teachers. To put it simply, why should a university chemistry professor enjoy greater rights to engage in political activities free from restraints imposed by his employer or government than are en-

²³ AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *The 1915 Declaration of Principles*, in ACADEMIC FREEDOM AND TENURE, *supra* note 4, at 157.

²⁴ AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *The 1940 Statement of Principles on Academic Freedom and Tenure*, in AAUP POLICY DOCUMENTS AND REPORTS 1-4 (1971) [hereinafter cited as *1940 Statement*]. The *1940 Statement* was a joint product of the AAUP and the Association of American Colleges and was endorsed by both organizations in 1941. In subsequent years it has been endorsed by nearly 100 other organizations involved with higher education.

joyed by other citizens and employees? I have not been able to conceive of an adequate justification for such a result. Nor have I discovered such a justification in the literature on academic freedom which, for the most part, postulates this unique status for extramural faculty expression without attempting to justify it.

One such attempt has, however, been made by Professor Fritz Machlup:

Against the restrictionist view [that academic freedom should be limited to professionally related activities], let us recall that almost all great thinkers, originators, and developers of great ideas were polyhistor, not narrow specialists. Will anyone seriously contend that Leibnitz should have "specialized" instead of freely holding forth on philosophy, mathematics, law and theology? . . .

It is not only difficult but dangerous to define a scholar's "area" of competence, because such an area ought not to be a static but a continually enlarging one. Interdisciplinary thinking and discussion, on problems for which perhaps no one has a satisfactory answer, is precisely what is most needed in our time, it not at all times. Progress is chiefly made by those who continually press forward to enlarge their areas of competence and to question all certified competences.

All this, perhaps, will be thought by many to be beside the point, for what the limitists nowadays really have in mind when they object to extensions of academic freedom beyond the area of competence is the scholar's taking part in public discussions of current political problems. For several centuries it was the area of religious controversy which many wanted to declare as "out of bounds"; now it is chiefly the area of social, economic, and political controversies from which the professors are to be scared away. And for professors not in the fields of social, economic or political science, this would be achieved through the area-of-competence clause in the definition of academic freedom.²⁵

While the rhetoric of this statement is attractive, particularly

²⁵ Machlup, *On Some Misconceptions Concerning Academic Freedom*, in *ACADEMIC FREEDOM AND TENURE*, *supra* note 4, at 177, 194-95.

to a professor, it is unpersuasive as a justification for academic freedom protection for non-professionally-related activity. Of course, if a faculty member is professionally involved in more than one field, his activity in each field will be professionally related. Also, the determination of what, in a given case is professionally related and not extramural conduct may be difficult. Yet this hardly seems a sufficient reason to provide special academic freedom protection to all extramural activities of professors or other teachers.²⁶

Professor Machlup, himself, recognizes that his argument in the first two quoted paragraphs does not address the real issue. The real issue is the freedom of an academician to express himself where he clearly is not acting in a professionally related area—for example, the chemistry professor engaging in political activity. The essence of Professor Machlup's position is that such activity should not be declared "out of bounds." Yet, that is not the question. Rather, the question is whether or not chemistry professors ought to have greater rights of political expression than those enjoyed by other employees and citizens. To conclude that they should not, is not to declare such activity out of bounds. Rather it is only to shift the focus to the proper issue of the rights of all citizens and employees vis-a-vis their governments and employers to be free from restraints on political or other non-employment-related speech or conduct.²⁷

²⁶ It has also been suggested that academic freedom of teachers, including presumably special rights of extramural expression or association, may be justified as a valuable fringe benefit of a low-paid but socially important profession. See Jones, *The American Concept of Academic Freedom*, in *ACADEMIC FREEDOM AND TENURE*, *supra* note 4, at 224, 233. One might concede the social importance of teaching and the poorly paid status of teachers. One might also concede that teachers should therefore receive fringe benefits in addition to their salaries, either because fringe benefits serve as an incentive to enter into and remain in teaching or because the fringe benefits are in some sense deserved. It is clear, however, that the special status generally attributed to academic freedom cannot be based on this fringe benefit rationale. If viewed as a mere fringe benefit, academic freedom could be traded for higher salaries, better medical plans, or even greater use of a secretary. There would be no obligation on either a teacher or an educational institution to continue this fringe benefit. This is a far cry from the classic AAUP statement that "[a]cademic freedom is essential" to the "purposes" of institutions of higher education that "are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole." 1940 *Statement*, *supra* note 24, at 2. Indeed, it was partly the fear that academic freedom might become a negotiable item if professors engaged in collective bargaining under the auspices of other organizations that induced the AAUP to engage in greater collective bargaining activities itself. For discussion of other possible justifications for academic freedom for teaching and research in higher education, see Goldstein, *supra* note 4, at 65-76. See also note 118 *infra* and text accompanying notes 131-56 *infra*.

²⁷ The question of the proper relationship between citizens and their government

C. *The First Amendment Rights of Citizens
Applied to Extramural Activities of Teachers*

The above analysis is consistent with the anti-subversion or loyalty oath cases that were decided without special reference to academic freedom or rights of teachers.²⁸ It is also consistent with another series of cases concerning teachers' activities not directly connected with their teaching. In these latter cases, in complete contrast to the cases discussed above in which teacher involvement added weight to the freedom of speech side of the balance, the fact that teachers were involved was argued to justify greater governmental restrictions on freedom of speech. Examples of such cases are the recent decisions of *Pickering v. Board of Education*,²⁹ *James v. Board of Education*,³⁰ and *Russo v. Central School District*.³¹

In *Pickering* a local school board attempted to dismiss a teacher for sending to a local newspaper a letter that was critical of the way in which the school board and the district superintendent of schools had handled past proposals to raise revenues for the schools. In asserting that this dismissal violated his first amendment rights of freedom of speech and the press, *Pickering* did not assert any peculiar rights as a teacher. To the contrary, he relied upon the well-accepted doctrine that public employment may not be unjustifiably conditioned on the employee's relinquishment of his constitutional rights as a citizen,³² and he asserted that his status as a teacher did not provide a basis for depriving him of those constitutional rights. The school board, on the other hand, asserted that *Pickering's* status as a teacher was relevant and in fact justified restricting his rights as a citizen. In rejecting the school board's argument, the Court once again reasserted the basic constitutional proposition that government employment, or other governmental benefits, may not unjustifiably be conditioned on the relinquishment of one's general

in regard to their political activities involves basic issues of civil and political rights, about which much has been written. For a more specific discussion of the relationship between employers and employees regarding political or other non-employment-related speech or conduct, see Goldstein, *supra* note 4, at 59-65.

²⁸ See text accompanying notes 8-21 *supra*.

²⁹ 391 U.S. 563 (1968).

³⁰ 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

³¹ 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973).

³² 391 U.S. at 568. See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

constitutional rights as a citizen.³³

In apparent contrast to *Pickering*, both *James* and *Russo* involved teacher conduct which took place in the classroom. This contrast, however, is only superficial. As in *Pickering*, these cases both involved the assertion by teachers of constitutional rights generally belonging to citizens, and not rights peculiar to teachers. In *James* a teacher was dismissed for wearing a black armband to school on a moratorium day to express his disapproval of American involvement in the war in Vietnam. *Russo* involved a teacher who was dismissed for failure to lead or join the daily flag salute in school. In both cases the teachers expressly disavowed any attempt on their parts to teach their students anything. Rather they were asserting rights applicable to all citizens; they just happened to be serving as teachers when the time arrived for the assertion of such rights. Mr. James wore the armband to school on moratorium day because it was the designated day and school was in session. He would have worn the same armband if he had worked in a store or office.³⁴ Similarly, Ms. Russo would have refused to salute the flag at any flag salute ceremony.

As astutely noted by the Court of Appeals for the Second Circuit, the problem in both *James* and *Russo*, was to

ascertain, and ultimately assess, the sometimes conflicting interests of the state on the one hand, in maintaining and promoting the discipline necessary to the proper functioning of schools, and the interest of the teacher, on the other, freely to exercise fundamental rights of expression and belief guaranteed by the Bill of Rights.³⁵

In other words, the issue was whether the needs of the school justified restricting the rights that James and Russo otherwise had as citizens. Of course, in deciding this issue the fact that James and Russo were teachers exercising these rights in school within the view of their possibly impressionable students was

³³ 391 U.S. at 568, 572-73.

³⁴ For a full discussion of the history of the James incident, see *Annals of Law: A Scrap of Black Cloth*, THE NEW YORKER, June 17, 1974, at 37.

³⁵ *Russo v. Central School Dist.*, 469 F.2d 623, 625 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973). For an excellent discussion of the issues involved in this assessment process see Van Alstyne, *Constitutional Rights*, *supra* note 4, at 850-54.

quite relevant.³⁶ The key construct, however, was the determination of whether the needs of the school justified restricting the rights of its teachers as citizens. Cases presenting a sharp contrast to this construct—cases with which this article is primarily concerned—are those in which teachers assert rights to teach that are unique to them as teachers.

III. THE LEGACY OF *MEYER* AND *PIERCE*

In 1923, the Supreme Court in *Meyer v. Nebraska*³⁷ held that a state could not constitutionally punish a private school teacher

³⁶ An important issue in this regard is the extent to which the traditional view that teachers serve as role models for students is still considered a legitimate basis for restricting teacher activity that would otherwise be beyond the legitimate concern of an employer. It was not too long ago that school boards had rules whereby female public school teachers who married were automatically dismissed. See generally E. BOLMEIER, *SEX LITIGATION AND THE PUBLIC SCHOOLS* 96-117 (1975); R. HAMILTON & P. MORT, *THE LAW AND PUBLIC EDUCATION* 399-400 (2d ed. 1959). A court has also upheld the discharge of a tenured teacher on the statutory grounds of "incompetency" based on the fact that she was employed part time as a waitress, and on occasion as a bartender, in her husband's bar, and that she had taken, in the bar and in the presence of several students an occasional drink of beer, served beer to customers, rolled dice with customers for drinks, and taught customers how to play a pin-ball machine. *Horosko v. Mount Pleasant Township School Dist.*, 335 Pa. 369, 6 A.2d 866, cert. denied, 308 U.S. 553 (1939). In so holding, the court stated:

It has always been the recognized duty of the teacher to conduct himself in such a way as to command the respect and good will of the community, though one result of the choice of a teacher's vocation may be to deprive him of the same freedom of action enjoyed by persons in other vocations. Educators have always regarded the example set by the teacher as of great importance, particularly in the education of the children in the lower grades such as those attending the school in which this teacher had been employed; it was a country school with eighteen pupils classifying into eight grades.

Id. at 371, 6 A.2d at 868.

Currently, a more general legal trend to confine legitimate employer interest in employee activities to those that are directly work related, see, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-2 to e-3 (1970), as amended, 42 U.S.C. §§ 2000e-2 to e-3 (Supp. II, 1972); Goldstein, *supra* note 4, at 63-65, has restricted to a greater extent the ability of school authorities to control teacher extramural conduct in this way. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Fisher v. Snyder*, 476 F.2d 375 (8th Cir. 1973); *Doherty v. Wilson*, 356 F. Supp. 35 (M.D. Ga. 1973); *Burton v. Cascade School Dist.*, 353 F. Supp. 254 (D. Ore. 1973). Cf. *Wiethoff v. St. Veronica School*, 48 Mich. App. 163, 210 N.W.2d 108 (1973). The concept of the teacher as a role model, however, continues to be upheld by many courts as a basis for school authority restrictions on teacher extramural activities. See, e.g., *Pordum v. Board of Regents*, 491 F.2d 1281 (2d Cir.), cert. denied, 419 U.S. 843 (1974); *Wishart v. McDonald*, 367 F. Supp. 530 (D. Mass. 1973), *aff'd*, 500 F.2d 1110 (1st Cir. 1974); *Cook v. Hudson*, 365 F. Supp. 855 (D. Miss. 1973), *aff'd*, 511 F.2d 744 (5th Cir. 1975), cert. granted, 96 S. Ct. 1408 (1976); *Acanfora v. Board of Educ.*, 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), cert. denied, 419 U.S. 836 (1974); *In re Grossman*, 127 N.J. Super. 13, 316 A.2d 39 (1974). See also note 118 *infra*.

³⁷ 262 U.S. 390 (1923).

for violating a state statute that prohibited the teaching of any language other than English to a child who had not completed the eighth grade.³⁸ The defendant, a teacher in a Lutheran parochial school, had been convicted of teaching German to a ten-year old child in violation of the statute.

In overturning the conviction, the majority of the Court recognized the legitimacy of Nebraska's desire "to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals"³⁹ The Court also recognized the validity of the state supreme court's finding that "the foreign born population [of Nebraska] is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type"⁴⁰ In short, the Court recognized the legitimacy of an integrationist policy. It held, however, that the means employed to effectuate the policy violated Meyer's "right thus to teach and the right of parents to engage him so to instruct their children,"⁴¹ both of which were protected liberties under the fourteenth amendment.⁴²

³⁸ The Nebraska Supreme Court had interpreted the statute as only applying to modern, foreign languages. The statute also required that the teaching of other subjects be in the English language throughout a child's school career. Although this section of the statute was not directly involved in this case, the Court's opinion might be construed to suggest that it viewed it as constitutionally permissible. See *id.* at 402; note 50 *infra* & accompanying text. With the rise in recent years of a movement for greater bilingual education, the wisdom, if not the constitutionality, of such provisions have come under increasing attack. See generally S. GOLDSTEIN, *supra* note 4, at 692-718.

³⁹ 262 U.S. at 401.

⁴⁰ *Id.*

⁴¹ *Id.* at 400.

⁴² There were arguably two other grounds present in the facts of *Meyer*, and its companion cases, *Bartels v. Iowa*, *Bohning v. Ohio*, *Pohl v. Ohio*, and *Nebraska Dist. of Evangelical Lutheran Synod v. McKelvie*, all at 262 U.S. 404 (1923), that might have provided alternative bases for the Court's result. First, there is reason to believe that the Nebraska statute in *Meyer*, as well as similar statutes of other states, was specifically aimed at the German-American community as a part of the anti-German feeling aroused by the First World War, thus possibly giving rise to an equal protection interpretation of the decision. These statutes were enacted in midwestern states which contained substantial German minority communities. In *Meyer* as well as in two of its companion cases, *Bartels v. Iowa* and *Bohning v. Ohio*, both at 262 U.S. 404 (1923), the statutes were enforced against people teaching German in Lutheran parochial schools. The Nebraska Supreme Court's construction of its statute as not forbidding the teaching of "dead" languages such as Latin, classical Greek, or Hebrew may also have had the effect of disfavoring German Lutherans as compared to other religious groups. Finally, an explicit anti-German language provision was contained in the Ohio statute

Meyer, a substantive due process case typical of its time, included a persuasive dissent by Justice Holmes. He said simply that because the aim of the legislation was legitimate and the means of attempting to effectuate such aims were reasonable, the statute did not violate the due process clause.⁴³

With the demise of the substantive due process theory on which the case was based, and particularly in today's post-*Brown v. Board of Education*⁴⁴ integrationist constitutional environment, one might expect *Meyer* to have little present precedential vitality.⁴⁵ Yet, that has not been true. *Meyer* and its 1925 sibling, *Pierce v. Society of Sisters*,⁴⁶ survived the decline of substantive due process and have blossomed in the renaissance of the substantive due process doctrine in recent years.⁴⁷ This has occurred, however, in a way that is very significant for our purposes. *Meyer* has generally come to be viewed as a parental rights case, and as

involved in *Bohning v. Ohio*, 262 U.S. 404 (1923). This Ohio statute required that instruction in all courses be in English, but freely permitted the teaching of foreign languages in all grades, "provided, that the German language shall not be taught below the eighth grade in any of the elementary schools of this State." *Id.* at 410 n.2; *see also id.* at 412-13 (Holmes, J., dissenting).

Yet, the Court clearly did not decide *Meyer* and its companion cases on an equal protection basis. Even the Ohio statute was stricken down without any reliance on its singling out of the German language. Except for the Ohio statute, the Court would have had to base an equal protection decision on a determination of the legislature's unconstitutional "motivation," a most difficult ground on which to rest constitutional adjudication. *See generally* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

Nor did the Court decide *Meyer* and its companion cases on the ground that the statutes, at least as applied, violated the parties' free exercise of religion, despite the general religious overtones of the situation and the fact that the parties involved all were affiliated with parochial schools. *See also* *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), discussed in text accompanying notes 51-53 *infra*, which followed *Meyer* and also involved a parochial school. However, *Pierce v. Hill Military Academy*, the companion case to *Pierce v. Society of Sisters*, decided in the same opinion, did not involve a parochial school, and the fact that it was decided solely on the authority of *Meyer* reinforces the fact that *Meyer* was not decided on a religious ground. *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁴³ 262 U.S. at 412 (Holmes, J., dissenting).

⁴⁴ 397 U.S. 483 (1954).

⁴⁵ Even when compared with other substantive due process cases, the opinion is poorly written; the Court analogizes this relatively simple statute to a Platonic vision in which all children are involuntarily removed from their parents at birth and raised by the state. *Id.* at 401-02.

⁴⁶ 268 U.S. 510 (1925), discussed in text accompanying notes 51-53 *infra*.

⁴⁷ *See* *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *id.* at 488 (Goldberg, J., concurring). *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 231-34 (1972). *See generally* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

such, to stand for the proposition that parents have certain constitutional rights to raise their children as they desire,⁴⁸ including in this particular case, the right to hire a teacher to teach the children a foreign language before they have completed the eighth grade. An economic due process right of teachers to practice their profession without governmental restriction seems to have gone the way of other economic due process rights.

Meyer is not authority, however, for a right of public school teachers to determine what they teach for a more fundamental reason. *Meyer* did not address the issue of public school teachers determining what they teach over the objections of superiors. Although the statute in *Meyer* included both public and private schools in its prohibitions on teaching languages, the defendant in *Meyer* was convicted of teaching German in a private school and the Court clearly decided the case on that basis. The Court stated:

The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports. . . . Our concern is with the prohibition approved by the Supreme Court.⁴⁹

The meaning of the quoted passage is quite apparent. The following issues were viewed by the Court as not being involved in *Meyer*: (a) the right of the state to compel attendance at some school, *public* or *private*; (b) the right of the state to make "reasonable regulations" for all schools, *public* or *private*; and (c) the right of the state to "prescribe a curriculum" for *public* schools. What was involved in *Meyer* was the right of the state to "prescribe a curriculum" for private schools, and this right was rejected by the Court, at least with regard to the particular curriculum prescription involved in the case.⁵⁰

⁴⁸ See cases cited note 47 *supra*; Tribe, *supra* note 45, at 34-38, 42-44. *But cf.* Epperson v. Arkansas, 393 U.S. 97, 105 (1968), discussed in text accompanying notes 53-73 *infra*. For the possible conflict between such a parental right and a right of teachers to determine what they teach, see note 94 *infra*.

⁴⁹ 262 U.S. at 402.

⁵⁰ The statement in the text is based on a narrow construction of the Court's language that certain issues are not "questioned" or subject to "challenge." *Id.* These are taken simply as statements that these issues are not involved in the case. The language,

The limitation of the *Meyer* holding to private schools, as well as its emphasis on parental rights, was reinforced by the Supreme Court's decision only two years later in *Pierce v. Society of Sisters*.⁵¹ In *Pierce* the Court invalidated an Oregon statute which required children between the ages of eight and sixteen to attend public schools. The court referred in language almost identical to that used in *Meyer* to the legitimacy of the state's reasonably regulating all schools, public and private, but concluded that "[u]nder the doctrine of *Meyer v. Nebraska* . . . the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."⁵² The preceding sentence constitutes almost the entire opinion in *Pierce*, aside from the statement of facts and history of the litigation, and indeed, that was all the Court need have stated. *Meyer* held that parents have a constitutional right to have their children taught German in a private school. A fortiori, parents have a constitutional right to send their children to a private school, subject to reasonable state regulations.

To emphasize that *Meyer* is clearly limited by its own terms to private schools would seem to belabor the obvious. Yet, the obvious was not so clear to Mr. Justice Fortas when he wrote the majority opinion in *Epperson v. Arkansas*.⁵³ *Epperson*, a 1969 counterpart to the celebrated *Scopes* "monkey trial" case of 1927,⁵⁴ involved a 1928 Arkansas anti-evolution statute which made it unlawful for a teacher in any state-supported school or university "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals" or "to adopt or use in any such institution a textbook that teaches" this theory.⁵⁵ Violation was made a misdemeanor, subjecting the violator to a fine of up to \$500, and to dismissal from his position. The Arkansas Supreme Court upheld the constitutionality of the statute in a two sentence per curiam opinion.⁵⁶

However, could be read to suggest that not only are these not questioned or challenged in this case, but the state's power to act is so clear as not to be subject to question or challenge. On such a reading, the language would stand as authority, albeit dictum, in support of a state's power to prescribe a curriculum for institutions which it supports.

⁵¹ 268 U.S. 510 (1925).

⁵² *Id.* at 534-35.

⁵³ 393 U.S. 97 (1968).

⁵⁴ *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927).

⁵⁵ *Epperson v. Arkansas*, 393 U.S. 97, 98-99 & n.3 (1968).

⁵⁶ Upon the principal issue, that of constitutionality, the court holds . . . [the statute] is a valid exercise of the state's power to specify the curriculum in

The Supreme Court, in an opinion by Mr. Justice Fortas, struck down the statute as violative of the first amendment prohibition of the establishment of religion on the ground that the enactment of the statute was motivated by religious considerations. The opinion and decision on this point are quite unsatisfactory.⁵⁷ Of more immediate concern here, however, is Justice Fortas' dictum concerning teachers' rights in the classroom:

[A]s early as 1923, the Court [in *Meyer*] did not hesitate to condemn under the Due Process Clause "arbitrary" restrictions upon the freedom of teachers to teach and of students to learn. In that year, the Court, in an opinion by Justice McReynolds, held unconstitutional an Act of the State of Nebraska making it a crime to teach any subject in any language other than English to pupils who had not passed the eighth grade. The State's purpose in enacting the law was to promote civic cohesiveness by encouraging the learning of English and to combat the "baneful effect" of permitting foreigners to rear and educate their children in the language of the parents' native land. The Court recognized these purposes, and it acknowledged the State's power to prescribe the school curriculum, but it held that these were not adequate to support the restriction upon the liberty of teacher and pupil. The challenged statute, it held, unconstitutionally interfered with the right of the individual, guaranteed by the Due Process Clause, to engage in any of the common occupations of life and to acquire useful knowledge.

For purposes of the present case, we need not re-enter the difficult terrain which the Court, in 1923, traversed without apparent misgivings. . . . Today's problem is capable of resolution in the narrower terms of the First Amendment's prohibition of laws respecting

its public schools. The court expresses no opinion on the question whether the Act prohibits any explanation of the theory of evolution or merely prohibits teaching that the theory is true; the answer not being necessary to a decision in the case, and the issue not having been raised.

242 Ark. 922, 416 S.W.2d 322 (1967), *rev'd*, 393 U.S. 97 (1968).

⁵⁷ First, the Court, for very sound reasons, has rarely struck down a statute, otherwise valid, because of the legislative motivation in enacting it. See Ely, *supra* note 42, at 1315-27; cf. Brest, *supra* note 42. Second, the religious motivation of the Arkansas legislature was not so evident. Indeed, in terms of affirmative evidence of motivation which

an establishment of religion or prohibiting the free exercise thereof.⁵⁸

The preceding statement of *Meyer* contains many difficulties. One notes first that Justice Fortas discusses the case in terms of "arbitrary" restrictions upon the freedom of teachers to teach and of students to learn," ignoring completely the parental rights aspect of the decision. This is in complete contrast to the generally accepted current understanding of *Meyer*; indeed, in his emphasis on teachers' rights "to engage in any of the common occupations of life," Justice Fortas seems to resurrect long-discarded notions of economic due process. Even more significantly, the quoted statement completely ignores the fact that *Meyer* involved teaching in a private school⁵⁹ and that the Court in *Meyer* contrasted the State's unchallenged power to prescribe a curriculum for public schools with the State's unconstitutional action in restricting teaching in private schools. Moreover, while ignoring the private school context of *Meyer*, Justice Fortas misuses the language about prescribing a school curriculum for public schools⁶⁰ in asserting the clearly erroneous proposition that *Meyer* held that the state could not restrict the teaching of foreign languages in the very same schools for which it could generally prescribe the curriculum. Finally, the statement that

could be found within the statute itself, the Court relied not on the Arkansas statute involved in *Epperson*, but on the Tennessee statute involved in *Scopes* which contained explicit religious references not present in the Arkansas statute, 393 U.S. at 108-09. In addition, the Court never adequately answered Justice Black's contention, in his concurring opinion, that it was quite possible that the motivation for the statute was "merely that it would be best to remove this controversial subject from [the] schools." 393 U.S. at 112-13. Finally, the Court never adequately explained the constitutional vice of legislative enactments motivated by religious concerns. It is surely not unconstitutional for legislators to vote in favor of such legislation as civil rights laws, or American withdrawal from foreign wars, because they are motivated by religious convictions. While there may be differences between these examples and the situation in *Epperson*, see Tribe, *supra* note 47, at 18-25, it is hard to understand the Court's failure even to discuss the problem.

⁵⁸ 393 U.S. at 105-06 (footnotes and citations omitted).

⁵⁹ This distinction had been recognized and relied upon by the Tennessee Supreme Court in its opinion upholding the constitutionality of the Tennessee statute in *Scopes v. State*, 154 Tenn. 105, 111-15, 289 S.W. 363, 364-66 (1927). See also the opinion of the Arkansas Supreme Court in *Epperson v. Arkansas*, 242 Ark. 922, 416 S.W.2d 322 (1967), *rev'd*, 393 U.S. 97 (1968). The citation of *Meyer* in disregard of its private school context was repeated by Justice Fortas in his opinion for the Court in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506-07, 511-12 (1969).

⁶⁰ Compare the use of similar language by the Arkansas Supreme Court in its opinion in *Epperson v. Arkansas*, 242 Ark. 922, 416 S.W.2d 322 (1967), *rev'd*, 393 U.S. 97 (1962).

the Court traversed the terrain in *Meyer* "without apparent misgivings" ignores the significant dissent of Justice Holmes in that case.⁶¹

Mr. Justice Black concurred in the *Epperson* result on the ground, not relied on at all in the majority opinion, that the statute was unconstitutionally vague because it did not make clear whether a teacher "is forbidden to mention Darwin's theory at all or only free to discuss it as long as he refrains from contending that it is true."⁶² In his concurring opinion, Justice Black disagreed with both the establishment of religion basis for the majority decision and its academic freedom dictum. On the later point, he stated:

I am also 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. . . . I question whether it is absolutely certain, as the Court's opinion indicates, that "academic freedom" permits a teacher to breach his contractual agreement to teach only the subjects designated by the school authorities who hired him.⁶³

Justice Black's view is clearly based on the employee status of a teacher who is thereby subject to the directions of his employers, the public school authorities. This is the distinction drawn in *Meyer* between public and private schools. Yet, curiously enough, Justice Black never takes issue with the majority on its reading of *Meyer*. Rather he limits himself to this affirmative statement of his position, and ignores the *Meyer* decision.

Justice Stewart's concurring opinion, however, squarely relies on a teacher's rights theory:

⁶¹ The quoted discussion of *Meyer* also confuses the two provisions of the Nebraska statute: one forbidding the instruction in general subjects in any language other than English throughout a student's school career and the other forbidding the teaching of a foreign language to a student who has not completed the eighth grade. See note 38 *supra* & accompanying text.

⁶² 393 U.S. at 112. As an alternative to reversing the judgment below on this ground, Justice Black would have remanded the case to the Arkansas Supreme Court for a clarification of its opinion. He also expressed doubt as to the justiciability of the case since the state was apparently making no effort to enforce the statute. Cf. *Poe v. Ullman*, 367 U.S. 497 (1961).

⁶³ 393 U.S. at 114. See also Justice Black's reference to *Meyer* in his dissent in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 522 (1969).

The States are most assuredly free "to choose their own curriculums for their own schools." A state is entirely free, for example, to decide that the only foreign language to be taught in its public school system shall be Spanish. But would a State be constitutionally free to punish a teacher for letting his students know that other languages are also spoken in the world? I think not.

It is one thing for a State to determine that "the subject of higher mathematics, or astronomy, or biology" shall or shall not be included in its public school curriculum. It is quite another thing for a State to make it a criminal offense for a public school teacher so much as to mention the very existence of an entire system of respected human thought. That kind of criminal law, I think, would clearly impinge upon the guarantees of free communication contained in the First Amendment, and made applicable to the States by the Fourteenth.

The Arkansas Supreme Court has said that the statute before us may or may not be just such a law. The result, as MR. JUSTICE BLACK points out, is that "a teacher cannot know whether he is forbidden to mention Darwin's theory at all." Since I believe that no State could constitutionally forbid a teacher "to mention Darwin's theory at all," and since Arkansas may, or may not, have done just that, I conclude that the statute before us is so vague as to be invalid under the Fourteenth Amendment.⁶⁴

Many different strands of thought are intertwined in Justice Stewart's short concurrence, and it is difficult to identify his principal objection to a law that would forbid the teaching of the existence of Darwin's theory of evolution. At its broadest, Justice Stewart's opinion may be viewed as drawing a distinction between a state's right to prescribe the subjects (curriculum) to be taught, but not the particular topics to be taught within each subject area.⁶⁵ Under this view, state authorities, other than the classroom teacher, could determine whether or not biology is taught. Once having determined that biology is to be taught,

⁶⁴ 393 U.S. at 115-16. Justice Harlan concurred in the decision and in that part of the Court's opinion based on establishment of religion grounds. He expressly disassociated himself from the "possible implications" of the unnecessary teachers' rights dictum. *Id.* at 115.

⁶⁵ *Id.* at 115-16.

however, state authorities could not determine the specifics of what is to be taught within the biology course, such as whether or not the origin of man is to be part of the course. Yet it is clear that school curricular subjects, such as biology, are not self-defining. Biology could include or not include the topic of the origin of man, and its inclusion must be determined by some decision maker. A constitutional allocation of this decision to the classroom teacher would have to rest on some basis other than a general-specific dichotomy standing alone.

A close examination of Justice Stewart's opinion also reveals that he does not seem to be relying on such a general-specific dichotomy. Rather, he seems to be relying on a dichotomy between "teaching" a "subject" and "mentioning" the "very existence of an entire system of respected human thought," coupled with the existence of a criminal penalty for violating the Arkansas statute.⁶⁶ To address the latter point first, the existence of the criminal penalty in the Arkansas statute clearly seems to trouble Justice Stewart, and his opinion may rest ultimately on a view that the criminal penalty aspect of the statute is arbitrary and therefore unconstitutional. It would certainly make more sense for the penalty to consist only of the violator being fired, and, indeed, that would seem to be the usual result of willful failures to follow legitimate instructions of one's employers. On the other hand, if in Mr. Justice Stewart's view the constitutional vice of the statute consisted only of the criminal sanction, he should have voted to strike down only that aspect of the statute, or, at least, to remand the case to the Arkansas Supreme Court to determine if the criminal sanction was severable from the rest of the statute.⁶⁷

It would appear, therefore, that the key to Justice Stewart's view is the dichotomy between teaching a subject and mentioning the existence of a body of knowledge. In analyzing his short and cryptic statement of this dichotomy, the use of the contrasting terms "be taught" and "letting his students know" (or

⁶⁶ *Id.*

⁶⁷ Criminal penalties were also involved in the *Meyer* and *Pierce* statutes. In those statutes, however, such penalties were more appropriate because the statutes in *Meyer* and *Pierce* applied to private schools as well as to public schools, and the sanction of a legally required discharge would not generally be expected in the case of private employment. It is, indeed, the restriction of the Arkansas statute to public schools that creates the difficulty with the criminal sanction, because the discharge alternative was available.

"mention") is quite striking.⁶⁸ Mr. Justice Stewart's apparent dichotomy between "mention" and "teach" might suggest that in his view the statute is unconstitutional because it precludes a teacher from mentioning things to people, who happen to be his students, outside the context of his teaching. If this were true, the case could be analyzed similarly to *Pickering*, *Russo*, and *James*, discussed above.⁶⁹ This does not seem likely, however, because all of Justice Stewart's examples and uses of language seem to apply to a teacher talking with students in his role as teacher.

More likely, Justice Stewart is suggesting that if the statute were to forbid a teacher from even making the statement that "there is a doctrine of Darwinian evolution," as distinguished from teaching the doctrine, it would be irrational and therefore unconstitutional. One does not have to postulate a special theory of teachers' rights to hold that particular governmental action is so irrational that it is unconstitutional.⁷⁰ Justice Stewart's example of mentioning the existence of languages in the world other than Spanish reinforces the impression that he is discussing unconstitutional irrationality.

The difficulty with this view, however, is that it does not fit the facts of *Epperson*. The Arkansas statute does not use the phrases "mention," "letting . . . know" or even "discuss," but rather uses exclusively the word "teach." Justice Stewart was apparently led to the view that the statute possibly outlawed the mentioning of Darwinian theory, as distinguished from teaching it, by the opinion of the Arkansas Supreme Court.⁷¹ For purposes of the issues with which we are now concerned, however, the opinion of the Arkansas Supreme Court is clear. The Court is talking only about teaching, and it is contrasting teaching the facts of the doctrine with teaching that the doctrine is true. Re-

⁶⁸ 393 U.S. at 115-16. Justice Black also uses the term "mention," although he couples it with "discuss." *Id.* at 112. Such language, however, does not seem significant to his point concerning the contrast between teaching the facts of a doctrine and teaching that the doctrine is true. *Id.* at 111-12. See also text accompanying notes 71-73 *infra*; *Epperson v. Arkansas*, 242 Ark. 922, 416 S.W.2d 322 (1967), *rev'd*, 393 U.S. 97 (1968).

⁶⁹ See text accompanying notes 29-36 *supra*.

⁷⁰ See Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-24, 37-48 (1972). But cf. Tribe, *supra* note 45, at 5-10; Ely, *supra* note 41, at 1224-28; Note, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L.J. 123 (1972).

⁷¹ The two-sentence opinion of the Arkansas Supreme Court is reproduced in note 56 *supra*.

garding the former it introduces the word "explanation," but in context that word appears to be synonymous with teaching the facts of the doctrine. It does not seem to suggest the concept of mentioning Darwinian theory outside a teaching context.

When the statute is viewed as prohibiting the teaching or explanation of Darwinian theory, it is clearly not irrational. This is true whether the statute's objective is viewed as the prohibition of exposing students to Darwinian theory because the legislature believed that the theory is wrong, or because, as stated by Justice Black, the legislature thought that "it would be best to remove this controversial subject from its schools."⁷² On the first hypothesis, it would seem to be rational to attempt to prevent students from being exposed to erroneous doctrines as a means of preventing the students from accepting them. On the second hypothesis, it is also clearly not irrational to believe that the introduction of a subject as emotional and controversial in Arkansas as Darwinian evolution would disrupt the school in an undesirable way. Both of these views may possibly be wrong. But they are not irrational.

Indeed, even if the statute were interpreted as prohibiting the mere mentioning of Darwinian evolution, it would be difficult to conclude that it is irrational. Unlike Justice Stewart's hypothetical statute that would proscribe the mentioning of the existence of languages other than Spanish, a statute which would never be enacted, the Arkansas statute was enacted precisely because the theory of Darwinian evolution was not viewed by the Arkansas population as a neutral fact, but rather as a value laden and emotionally charged one. Restrictions on the teaching or even mentioning of Darwinian evolution by teachers in the public schools do not truly raise issues of rationality, but rather of legitimacy: legitimacy of means and ends.⁷³ It is perhaps because the real issues of legitimacy were not addressed in *Epperson*, either in the dictum of the majority that misstated *Meyers* or in Justice Stewart's cryptic concurrence, that *Epperson* has not been significantly relied upon by the lower courts on the issue of a teacher's right to control his classroom teaching.

⁷² 393 U.S. at 112-13.

⁷³ See Tribe, *supra* note 47, at 5-10; Ely, *supra* note 42, at 1224-28.

IV. CONSTITUTIONAL PROTECTION FOR TEACHING CONTRARY TO PREFERENCES OF SUPERIORS

A. *Recent Decisions Recognizing a Substantive Right of Teachers to Determine What They Teach*

The first of the recent decisions holding that a teacher does have some type of a constitutional right to teach contrary to the wishes of superior school authorities is that of the First Circuit in *Keefe v. Geanakos*.⁷⁴ Mr. Keefe, head of the English Department and a teacher of English in a Massachusetts Public School System, distributed to each member of his twelfth grade English class a copy of the September, 1969 *Atlantic Monthly* magazine, and assigned the reading of the first article therein. This issue of the *Atlantic Monthly* was the so-called education issue, and the school authorities had supplied seventy-five copies of it to the school. Keefe discussed the article and the recurring word "motherfucker"; a word that the court euphemistically called "a vulgar term for an incestuous son."⁷⁵ Keefe's discussion included an explanation of the word's origin and context and the reasons for its use in the article by the author. He stated that any student who found the article personally distasteful could read an alternative one. The following evening, Keefe was called to a meeting of the school committee where he was asked to defend his use of the word in question. Following his explanation, a majority of the committee asked him informally if he would agree not to use the word again in the classroom. He replied that he could not in good conscience agree, although he apparently did not use the word again. At a subsequent meeting of the school committee, Keefe was suspended and it was proposed that he be discharged.

Keefe thereupon brought this action in a federal district court to enjoin his discharge. The district court refused his request for a preliminary injunction *pendente lite*. On appeal, the First Circuit reversed the refusal of the preliminary injunction, holding that the preliminary injunction should have been granted as it was probable that the plaintiff would prevail on the merits.

In so holding, the court noted that it had read the article in

⁷⁴ 418 F.2d 359 (1st Cir. 1969).

⁷⁵ *Id.* at 361.

its entirety and found it "in no sense pornographic."⁷⁶ The court also referred approvingly to a description of the article "as a valuable discussion of 'dissent, protest, radicalism and revolt.'"⁷⁷ With regard to the offending word itself, the court stated that "we cannot think that it is unknown to many students in the last year of high school No doubt its use genuinely offends the parents of some of the students—therein, in part, lay its relevancy to the article."⁷⁸

The court then stated that the central issue of the case

is whether a teacher may, for demonstrated educational purposes, quote a "dirty" word currently used in order to give special offense, or whether the shock is too great for high school seniors to stand. If the answer were that the students must be protected from such exposure, we would fear for their future. We do not question the good faith of the defendants in believing that some parents have been offended. With the greatest of respect to such parents, their sensibilities are not the full measure of what is proper education.⁷⁹

Accepting the conclusion of the district court that some public regulation of classroom speech inheres in every provision of public education, the court held that the application of that principle in this case would demean any proper concept of education. It also expressed concern for the chilling effect that might result from "such rigorous censorship."⁸⁰ The court went on to hold alternatively that it was "equally probable" that Keefe would prevail on the issue that he had not received constitutionally adequate notice that a discussion of the disputed article with his class was forbidden conduct.⁸¹

The opinion in *Keefe* was expanded upon by the district court's decision in *Parducci v. Rutland*,⁸² which also involved an action by a high school English teacher to enjoin her superiors from firing her because she assigned allegedly offensive reading

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 361-62.

⁸⁰ *Id.* at 362.

⁸¹ *Id.* This conclusion was reached despite the uncontested fact that Keefe had refused to agree that he would not use the offensive word again in the classroom. For further discussion of this issue, see note 123 *infra*.

⁸² 316 F. Supp. 352 (M.D. Ala. 1970).

material to her students. This case involved the assignment to an eleventh grade English class of Kurt Vonnegut, Jr.'s *Welcome to the Monkey House*. On the morning following the assignment, the teacher, Mrs. Parducci, was informed by the principal and school system's associate superintendent of their displeasure with the content of the Vonnegut story, which they described as "literary garbage," and with the story's "philosophy," which they interpreted as condoning, if not encouraging, the "killing off of elderly people and free sex."⁸³ They also expressed concern over the fact that three of Parducci's students had asked to be excused from the assignment and that several parents had complained to the school. Finally they told her not to teach the story in any of her classes.

Parducci responded that she was bewildered by their interpretation of the story, that she still thought it to be a good literary work, and that while not desiring to cause any trouble, she felt that she had a professional obligation to teach the story. She also reportedly stated to them that regardless of their counseling she " 'would continue to teach the eleventh grade English class at the Jeff Davis High School by the use of whatever material' " she wanted " 'and in whatever manner' " she thought best.⁸⁴

As a consequence of this meeting, Parducci was dismissed by the school board after a full hearing. The school board stated that the basis for its action was her assignment of materials which had a "disruptive" effect on the school, and her refusal to follow "the counseling and advice of the school principal."⁸⁵ It also explicitly noted that one of the bases of her dismissal was her "insubordination" in stating that she would continue to disregard the counseling of the principal and associate superintendent.⁸⁶

In discussing plaintiff's assertion that her firing violated her first amendment "right to academic freedom," the court first noted that the fact that "teachers are entitled to First Amendment freedoms is an issue no longer in dispute," and that a teacher's first amendment rights "are unaffected by the presence or absence of tenure under state law."⁸⁷ The court then observed

⁸³ *Id.* at 353-54.

⁸⁴ *Id.* at 354.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 354.

that although academic freedom is not an enumerated first amendment right, the Supreme Court has indicated⁸⁸ that the right to teach and to inquire is fundamental to a democratic society, and that the classroom is a market place of ideas. Yet the court acknowledged a competing interest of the state in shielding impressionable minds from extreme propagandism in the classroom. Finding the work in question not obscene, and therefore not inappropriate reading for high school juniors, and concluding that the assignment was not shown to have created a significant "disruption" of the educational process under the standards articulated in *Tinker v. Des Moines Independent Community School District*⁸⁹, the court held that Parducci's dismissal was an impermissible invasion of her first amendment right to academic freedom.⁹⁰ The district court, as in *Keefe*, then went on to hold alternatively that Parducci's due process rights had also been violated because she had not been given prior notice that the conduct for which she was punished was prohibited.⁹¹

These two decisions were the first attempts to create a theory of constitutional protection of a public school teacher's choice of teaching material. The courts never adequately explained, however, the basis for such a doctrine, and their reasoning, such as it is, appears quite weak. The issue as stated by *Keefe*—whether the use of the "dirty" word would be too great a shock for the students to bear—fails to pose the basic question who, or what agency, is the decider of what is taught in a public school classroom. It may be conceded, in the language of the court, that the sensibilities of the parents "are not the full measure of what is proper education,"⁹² yet the issue is why the "sensibilities" of the classroom teacher, or the courts, are such a measure.

The court's reference to the parents might be more apposite if the legal action were brought by a group of parents to enjoin the school board from effectuating one of its curricular decisions

⁸⁸ The court referred to *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). See 316 F. Supp. at 355.

⁸⁹ 393 U.S. 503 (1969).

⁹⁰ 316 F. Supp. at 355-56.

⁹¹ *Id.* at 357. In reaching this alternative holding the court completely ignored the fact that one ground of the school board's action was plaintiff's "insubordination" in insisting that she "would continue to teach the eleventh grade English class . . . by the use of whatever material' she wanted 'and in whatever manner' she thought best" regardless of the views of her administrative superiors. *Id.* at 354. For further discussion of this issue, see note 123 *infra*.

⁹² 418 F.2d at 362.

that these parents felt was offensive or otherwise wrong.⁹³ Yet, that was not the posture of *Keefe*, in which the school board had made a curricular decision that the teacher-plaintiff was challenging. Nowhere in the opinion does the court explain the grounds on which a teacher's curricular decisions take constitutional precedence over those of the school board or other school authorities superior to the teacher under state law.⁹⁴

Equally unenlightening is the concern of both the *Keefe* and *Parducci* courts with the possible pornographic or obscene nature of the material.⁹⁵ A concern with obscenity suggests a construct in which state authorities are interfering with the decisions of private citizens about what they or their children should read. This is the normal censorship problem, but it is not the correct construct when dealing with public education. In the classrooms involved in *Keefe* and *Parducci*, some public official—a person

⁹³ See, e.g., *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Wright v. Houston Independent School Dist.*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974); *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340 (D. Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970); *Hobolth v. Greenway*, 52 Mich. App. 682, 218 N.W.2d 98 (1974); *Todd v. Rochester Community Schools*, 41 Mich. App. 320, 200 N.W.2d 90 (1972). Cf. *Mitchell v. McCall*, 273 Ala. 604, 143 So.2d 629 (1962); *State ex rel. Andrews v. Webber*, 108 Ind. 31, 8 N.E. 708 (1886); *State ex rel. Kelley v. Ferguson*, 95 Neb. 63, 144 N.W. 1039 (1914); *Valent v. New Jersey State Bd. of Educ.*, 114 N.J. Super. 63, 274 A.2d 832 (1971), *dismissed on other grounds*, 118 N.J. Super. 416, 288 A.2d 52 (1972); *School Bd. Dist. v. Thompson*, 24 Okla. 1, 103 P. 578 (1909). See generally S. GOLDSTEIN, *supra* note 4, at 110-57.

⁹⁴ The language of the court also exhibits an unwarranted antipathy to two concepts that have been traditionally and rightly accepted components of educational decision making in this country: the participation of parents in the process and the political responsiveness of school authorities to the wishes of constituent groups. As exemplified by the discussion of the *Pierce* and *Meyer* cases above, not only has parental participation in the process of educating their children been viewed traditionally as legitimate, it has at times been accorded special legal status. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *State ex rel. Kelley v. Ferguson*, 95 Neb. 63, 144 N.W. 1039 (1914); *Valent v. New Jersey State Bd. of Educ.*, 114 N.J. Super. 63, 274 A.2d 832 (1971), *dismissed on other grounds*, 118 N.J. Super. 416, 288 A.2d 52 (1972); *School Bd. Dist. v. Thompson*, 24 Okla. 1, 103 P. 578 (1909).

Equally legitimate is the responsiveness of school authorities to wishes of constituent groups, such as parents or community organizations. Approximately 85 percent of all local school board members are elected. See R. CAMPBELL, L. CUNNINGHAM & R. MCPHEE, *THE ORGANIZATION & CONTROL OF AMERICAN SCHOOLS* 164-70 (1965). See generally Cunningham, *Community Power: Implications for Education*, in *THE POLITICS OF EDUCATION IN THE LOCAL COMMUNITY* (R. Cahill & S. Hencley, eds. 1964). This election of school board members is indicative of the societal desire for popular lay control of education, a desire that dates back to the 17th-century beginning of the American system of public education. See R. CAMPBELL, L. CUNNINGHAM & R. MCPHEE, *supra*, at 157-60. See also text accompanying notes 139-43 *infra*. In recent years there has been an increase in the demand for school authorities to be politically responsive. See generally S. GOLDSTEIN, *supra* note 4, at 801-23.

⁹⁵ 418 F.2d at 361; 316 F. Supp. at 355-56.

employed by state or holding a state office—must decide what the students will be exposed to or taught by the school as part of its educational process. The classroom teacher is one such person, as are the principals, assistant superintendents, and school board members. A theory of a constitutional right of classroom teachers to make such decisions cannot be based on a model in which a classroom teacher is acting in a private citizen's capacity and is being censored by governmental action initiated by school administrators or school boards. Yet, neither *Keefe* nor *Parducci* develops another theory to support their holdings on their issue.

The inadequacy of the reasoning in these cases is also demonstrated by the discussion in *Parducci* of the disruption limitations on its postulated doctrine of academic freedom in classroom teaching.⁹⁶ It bases this limitation on the guidelines of *Tinker v. Des Moines Independent Community School District*.⁹⁷ *Tinker* involved an attempted prohibition by a school board of the wearing of black armbands to school by students as part of a general moratorium protest against American involvement in the Vietnam War. The Supreme Court held that the prohibition violated the first amendment rights of the students. *Tinker* and its deeper meaning for the problem of this Article will be discussed in further detail below.⁹⁸ At this point, however, it should be noted that the court in *Parducci* attempted to apply the *Tinker* disruption limitation on student rights to the case before it involving teacher classroom teaching.

This disruption limitation of *Tinker* has many problems, both theoretical and practical, in its own context of student expression.⁹⁹ Whatever its status in that context, however, it is clearly inappropriate to the situations in *Parducci* and *Keefe*. The disruption test envisages a legitimate, ongoing event or series of events that some outside force may disrupt by its speech or presence. The constitutional analysis, therefore, involves the determination of the proper balance between the expression rights of the outside force and the disruptive effect of their exercise on the ongoing event. Such an analysis has been employed by the Supreme Court in determining the validity of governmental at-

⁹⁶ 316 F. Supp. at 356.

⁹⁷ 393 U.S. 503 (1969).

⁹⁸ See text accompanying notes 190-207 *infra*.

⁹⁹ See S. GOLDSTEIN, *supra* note 4, at 293-355.

tempts to prohibit demonstrations in close proximity to jails,¹⁰⁰ libraries,¹⁰¹ courthouses,¹⁰² and schools.¹⁰³ Thus the disruption test seeks to balance the free speech rights of an external agency against the possible disruptive effects of this agency on an ongoing public function being conducted nearby.

As discussed above, such a construct is applicable to such cases as *Russo* and *James* where a teacher is asserting citizen free speech rights that school authorities claim are disrupting their planned curriculum.¹⁰⁴ But it is clearly inapplicable to cases like *Parducci* and *Keefe* where the asserted teacher right is a right to determine the components of the curriculum itself. It is not at all helpful to talk about disruption of the classroom when the real issue is the determination of who is to decide what is taught in the classroom.

The disutility of the disruption test is demonstrated by the difficulties confronted by the *Parducci* court in its attempt to use the test. The court first shifted from the question of disruption to the question whether the assigned material was "appropriate reading for high school juniors" without explaining the connection between these two issues. When it again discussed the disruption test, the court stressed the lack of hostile student reaction to the material. Yet, surely the superior school authorities have legitimate interests in the outcome of the classroom education process beyond the minimal one of protecting the classroom from disruption. These authorities surely have an affirmative interest in what is taught and in the effects of the teaching. The lack of hostile student response may be just the reason not to teach this material—material which the students seem all too ready to accept. If the decision of the teacher regarding what is taught is to be deemed superior to the decision of the other school authorities as a matter of constitutional law, such a constitutional doctrine must rest on something more substantial than the negative assertion that the students did not react adversely to the material.

¹⁰⁰ *Adderley v. Florida*, 385 U.S. 39 (1966).

¹⁰¹ *Brown v. Louisiana*, 383 U.S. 131 (1966).

¹⁰² *Cox v. Louisiana*, 379 U.S. 559 (1965).

¹⁰³ *Police Dept. v. Mosley*, 408 U.S. 92 (1972); *Grayned v. Rockford*, 408 U.S. 104 (1972).

¹⁰⁴ See text accompanying notes 29-36 *supra*.

B. *Decisions Questioning the Existence of a
Substantive Right*

The inadequacy of the reasoning of the *Keefe* and *Parducci* courts supporting their alternative holdings on teacher control of curriculum perhaps explains the difficulties encountered by the First Circuit in its attempt to work with *Keefe* in the later *Mailloux* series of cases,¹⁰⁵ and the rejection of the *Keefe* and *Parducci* substantive-right doctrines by the Second Circuit in *Presidents Council v. Community School Board*.¹⁰⁶

Mailloux also involved an attempted dismissal by school authorities of a high school English teacher, this time an eleventh grade teacher in Lawrence, Massachusetts. The teacher had led a class discussion on that portion of a novel describing the difficulties encountered by a young country school teacher who attempted to intermingle the previously segregated seating of boys and girls in a one-room school house. During the class discussion, some of Mailloux's students stated that they thought the parental protest against this seating change was ridiculous. Mailloux then stated that other things today are just as ridiculous and attempted to illustrate this point by a discussion of taboo words. He wrote the word "goo" on the board and asked the class to define it. When no one could do so, he stated that such a word did not exist in English, but in another culture it could be a taboo word. He then wrote the word "fuck" on the board and asked for volunteers to define it. After a couple of minutes a boy volunteer defined the word as "sexual intercourse." Mailloux, without using the word orally, then stated: "'we have two words, sexual intercourse, and this word on the board . . . one . . . is acceptable by society . . . the other is not accepted. It is a taboo word.'" ¹⁰⁷ After a brief discussion of other aspects of taboos, Mailloux went on to other matters. Neither the subject of taboo words nor the word "fuck" appeared in the novel which was the basic subject under consideration in the class.

After a parental complaint, and an investigation by the head of the English department, Mailloux was suspended for seven days with pay. He then engaged counsel and demanded a hearing before the school committee. After the hearing, he was dis-

¹⁰⁵ *Mailloux v. Kiley*, 436 F.2d 565 (1st Cir.), *after dismissal*, 323 F. Supp. 1387 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971) (per curiam).

¹⁰⁶ 457 F.2d 289, 293-94 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

¹⁰⁷ 323 F. Supp. at 1388.

missed on the grounds of "conduct unbecoming a teacher" without further specification.¹⁰⁸ He then brought an action in the Massachusetts federal district court for a temporary and permanent injunction. After a two day hearing, the district court, "regarding itself as bound by" the First Circuit's opinion in *Keefe*, granted a preliminary injunction.¹⁰⁹

The school authorities appealed the granting of the preliminary injunction and requested a stay pending appeal. The Court of Appeals for the First Circuit denied the stay and dismissed the appeal, but indicated that it was troubled by the case and the possible implications of its opinion in *Keefe*. In its per curiam opinion, the Court stated:

The court in no way regrets its decision in *Keefe v. Geanakos*, but it did not intend thereby to do away with what, to use an old-fashioned term, are considered the proprieties, or to give carte blanche in the name of academic freedom to conduct which can reasonably be deemed both offensive and unnecessary to the accomplishment of educational objectives. Here, particularly, such questions are matters of degree involving judgment on such factors as the age and sophistication of students, relevance of the educational purpose, and context and manner of presentation.

. . . [W]e see possible differences between an English teacher discussing the content and meaning of a serious piece of writing, and engaging in a discussion of social mores in the use of language with the chalking of a socially taboo word on the blackboard. . . . We do suggest the fact that there was no regulation proscribing the use of particular language does not alone compel a conclusion that due process was violated.¹¹⁰

As the appellate court instructed, the district court entered into a full trial on the merits. On the basis of the trial testimony the district court found the following "facts":

1. The topic of taboo words had only a limited relevance to the novel discussed in class, but it had a high degree of relevance to the teaching of eleventh grade English.

¹⁰⁸ *Id.* at 1389.

¹⁰⁹ *Id.*

¹¹⁰ 436 F.2d at 566 (citations omitted).

2. The use of the word "fuck" is relevant to a discussion of taboo words and illustrates how such words function.

3. Eleventh grade students are sufficiently sophisticated to treat the word from a serious educational viewpoint. While at first they may be surprised and self-conscious, they are not likely to be embarrassed or offended by discussion of the word.

4. Mailloux's writing the word on the blackboard did not have a disturbing effect. A class might be less disturbed to have the word written than spoken.

5. Mailloux's calling on volunteers to explain the word was in accord with his usual methodology and was reasonable here. It avoided implicating anyone who did not want to participate.

6. The word "fuck" was in books in the school library.¹¹¹

In what it viewed as a crucial issue, however, the court found the expert testimony to be in conflict on whether or not Mailloux's conduct was appropriate and reasonable under the circumstances and served a serious educational purpose. Testimony from university educational experts generally supported what Mailloux had done. But other expert witnesses, chiefly persons with experience as high school principals and the head of the English department at Mailloux's school, testified that in their opinions it was inappropriate to use the particular word in question. Thus, although the court stated that the weight of the evidence supported an ultimate finding that Mailloux's methods served an educational purpose in that they were relevant to the teaching of eleventh grade English and had professional endorsement from experts of significant standing, it could not find on the basis of the evidence presented that the weight of opinion in the teaching profession as a whole, or the weight of opinion among English teachers as a whole, would support what Mailloux had done.

This factual setting was the basis for an extensive legal opinion. The court first stated the basic legal proposition that a teacher has not only a constitutionally protected "civic right" to freedom of speech both outside the schoolhouse (citing *Pickering*) and inside the schoolhouse (citing *Tinker*), "but also some measure of academic freedom as to his in-classroom teaching" (citing *Keefe* and *Parducci*).¹¹² The court added that the *Keefe* and *Parducci* cases had "upheld two kinds of academic freedom":

¹¹¹ 323 F. Supp. at 1389.

¹¹² *Id.* at 1390.

the *substantive right* of a teacher to choose a teaching method which in the court's view served a demonstrated educational purpose; and the *procedural right* of a teacher not to be discharged for the use of a teaching method which was not proscribed by a regulation, and as to which it was not proven that he should have noticed that its use was prohibited.¹¹³

The court then held that Mailloux's conduct had not met the substantive-right test of having "served a demonstrated educational purpose." It noted first that the teaching was not necessary to the subject matter in the sense that reference to Darwinian evolution might be thought necessary to the teaching of biology, citing Justice Stewart's concurrence in *Epperson*. The two main tests employed by the court, however, to determine whether Mailloux's teaching served a demonstrated educational purpose were whether the teaching served such a purpose according to the weight of opinion of the teaching profession, or alternatively, whether the court on its own could conclude that the teaching "*plainly*" served such a purpose.¹¹⁴

The court concluded on the facts of the case that it could not state that the weight of opinion in the teaching profession as a whole or the weight of opinion among English teachers as a whole would support Mailloux's conduct. Nor could the court determine on its own that the teaching plainly served a demonstrated educational purpose. The court did find that Mailloux had acted in good faith and stated that there was no evidence that he had transcended a legitimate professional purpose. It also read *Keefe* to indicate that use of the word "fuck" in class is sometimes permissible, at least in the context of an assigned reading. The court felt, however, that a teacher asking a mixed class to define the word presented too great a risk of abuse for it to find that such a method was "*plainly* permissible."¹¹⁵

Thus, the court concluded that the facts of the case did not come within its interpretation of the substantive academic freedom right upheld in *Keefe* and *Parducci*. The court considered at length, however, whether Mailloux's conduct was protected by substantive constitutional academic freedom rights beyond those

¹¹³ *Id.* (emphasis supplied).

¹¹⁴ *Id.* at 1390-91.

¹¹⁵ *Id.* at 1391.

already endorsed by *Keefe* and *Parducci*. It stated that it was "a heretofore undecided question" whether a teacher had a substantive constitutional right to use a teaching method

that is not necessary for the proper instruction of his class, that is not shown to be regarded by the weight of opinion in his profession as permissible, that is not so transparently proper that a court can without expert testimony evaluate it as proper, *but that is relevant to his subject and students and, in the opinion of experts of significant standing, serves an educational purpose . . .*¹¹⁶

The argument in support of such a right was said to be the central rationale of academic freedom at the university level: that academic freedom was necessary "in order to foster open minds, creative imaginations, and adventurous spirits."¹¹⁷ The court was quite uninformative about how academic freedom accomplishes these results¹¹⁸ and did not address the issue of why such results, even if produced by academic freedom, are constitutionally compelled. The court, however, did not need to address these issues on the university level, because it concluded that the doctrine of academic freedom on the university level should not be applied to secondary education:

The secondary school more clearly than the college or university acts *in loco parentis* with respect to minors. It is closely governed by a school board selected by a local community. The faculty does not have independent traditions, the broad discretion as to teaching methods, nor usually the intellectual qualifications, of university professors. Among secondary school teachers

¹¹⁶ *Id.* (emphasis supplied).

¹¹⁷ *Id.*

¹¹⁸ The court apparently states that academic freedom accomplishes this result not directly through enhancing the instructional process, *cf.* text accompanying notes 152-89 *infra*, but rather by the indirect route of creating teacher role models for students, which role models embody these virtues. This attempt to premise academic freedom on its effect in creating role models for emulation is, to the best of my knowledge, unique. For a discussion of the more usual attempts to justify academic freedom in teaching, see Goldstein, *supra* note 4, at 62-76; text accompanying notes 132-89 *infra*. The *Mailloux* approach contrasts sharply with the more common view that the role model status of teachers serves to justify restrictions on their freedom. See note 35 *supra*. Of course, the real issue is who is to decide what role model the schools want to encourage. This unique role model concept suggested by the *Mailloux* court seems completely incapable of supporting a doctrine of academic freedom as a matter of social policy, let alone as a matter of constitutional law. See Goldstein, *supra* note 4, at 62-65.

there are often many persons with little experience. Some teachers and most students have limited intellectual and emotional maturity. Most parents, students, school boards, and members of the community usually expect the secondary school to concentrate on transmitting basic information, teaching "the best that is known and taught in the world," training by established techniques, and, to some extent at least, indoctrinating in the *mores* of the surrounding society. While secondary schools are not rigid disciplinary institutions, neither are they open forums in which mature adults, already habituated to social restraints, exchange ideas on a level of parity. Moreover, it cannot be accepted as a premise that the student is voluntarily in the classroom and willing to be exposed to a teaching method which, though reasonable, is not approved by the school authorities or by the weight of professional opinion. A secondary school student, unlike most college students, is usually required to attend school classes, and may have no choice as to his teacher.¹¹⁹

On the basis of these considerations, the court concluded that the substantive constitutional academic freedom right of secondary school teachers extends only so far as already approved by *Keefe* and *Parducci*: to choice of materials that have the support of the predominant opinion of the teaching profession or the discipline to which the teacher in question belongs, or that the court can itself conclude are plainly permissible. The court went on to hold, however, that the attempted dismissal of Mailoux violated the constitutional procedural right recognized by *Keefe* and *Parducci*—the right of a teacher not to be dismissed for using a "reasonable" teaching method unless he or she has been put on notice not to use that method.

The court's arguments for refusing to extend the substantive right of *Keefe* and *Parducci*, as it understood these cases, are very persuasive. Indeed, they would seem to compel a rejection of the substantive academic freedom rights of secondary school teachers purportedly established by *Keefe* and *Parducci*. The court itself states that substantive academic freedom is more of a constitutional "interest" than a "right" and might be limited to

¹¹⁹ 323 F. Supp. at 1392.

freedom from discriminatory racial, religious, political, and like measures, or clearly unreasonable action.¹²⁰ In addition, although the district court otherwise adopts the proposition that *Keefe* and *Parducci* uphold two separate constitutional rights, one substantive and the other procedural, at one point in its opinion the court indicates that these cases might be narrowly construed as resting only on the procedural ground.¹²¹

Yet, despite the natural consequence of its own reasoning in refusing to extend *Keefe* and *Parducci*, and its suggestions that these cases could well be restricted even further by the force of Supreme Court statements,¹²² their own factual situations, and the hints contained in the prior First Circuit opinion in *Mailloux*, the district court refused to consider *Keefe* and *Parducci* as being so limited. Rather, it attempted to restate the legal propositions it saw in these cases in a comprehensible form, while at the same time suggesting to the court of appeals ways of effectively retracting the substantive-right basis of the cases if it so desired.

Unfortunately, the court of appeals did not respond effectively to these opportunities. Rather, in a short per curiam opin-

¹²⁰ The so-called constitutional right [of academic freedom of a secondary school teacher regarding classroom material] is not absolute. It is akin to, and may, indeed, be a species of, the right to freedom of speech which is embraced by the concept of the "liberty" protected by the Fourteenth Amendment. Analytically, as distinguished from rhetorically, it is less a right than a constitutionally-recognized interest. Clearly, the teacher's right must yield to compelling public interests of greater constitutional significance. It may be that it will be held by the Supreme Court that the teacher's academic right to liberty in teaching methods in the classroom (unlike his civic right to freedom of speech) is subject to state regulatory control which is not actuated by compelling public interests but which, in the judiciary's opinion is merely 'reasonable'. [Citing *Epperson* and *Tinker*.] Indeed it has been suggested that state regulatory control of the classroom is entitled to prevail unless the teacher bears the heavy burden of proving that it has no rational justification, (See Mr. Justice Black dissenting in *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 519-521) 189 S. Ct. 733, or is discriminatory on religious, racial, political, or like grounds. See *Epperson v. Arkansas*, 393 U.S. 97, 89 S. Ct. 266.

Id. at 1391 n.4.

¹²¹ The court stated:

Nor is this case, like *Keefe* or *Parducci*, one where the court, from its own evaluation of the teaching method used, may conclude that, even if the court would not use the method, it is plainly permissible for others to use it, *at least in the absence of an express proscription*.

Id. at 1390 (emphasis supplied). At this point the court added, in a footnote: "[P]erhaps, though *Keefe* and *Parducci* do not say so, the school authorities there involved were constitutionally free by express proscription to forbid the assignment of outside reading of magazine articles and novels of undoubted merit and propriety for which the teacher had not secured advance approval." *Id.* at 1390 n.3.

¹²² *Id.* at 1391 n.4.

ion, it affirmed the district court's holding only on the procedural issue. With regard to the substantive right, the court observed in dictum:

With all respect to the district court's sensitive effort to devise guidelines for weighing these circumstances, we suspect that any such formulation would introduce more problems than it would resolve. At present we see no substitute for a case-by-case inquiry into whether the legitimate interests of the authorities are demonstrably sufficient to circumscribe a teacher's speech. Here, however, in weighing the findings below we confess that we are not of one mind as to whether plaintiff's conduct fell within the protection of the First Amendment.¹²³

The difficulties encountered by the First Circuit in these cases did not seem to affect the Second Circuit's disposition of a similar problem in *Presidents Council v. Community School Board*.¹²⁴

¹²³ 448 F.2d at 1243. Thus *Mailloux* ultimately was affirmed only on the procedural issue, with *Keeffe* and *Parducci* containing alternative holdings on this procedural ground. See also *Webb v. Lake Mills Community School Dist.*, 344 F. Supp. 791 (N.D. Iowa 1972). Although this Article is concerned with the substantive issue explored in these cases and by the commentators, it should be noted that in both *Keeffe* and *Parducci* the teachers were dismissed not only after teaching the offensive material but also after refusing to agree to conform their conduct in the future to the wishes of their superiors. *Parducci's* "insubordination" in refusing to accept "the counseling and advice of the school principal" was explicitly stated as a basis for the school board's action in dismissing her. 316 F. Supp. at 354. Yet this was not discussed at all by the court when it reached its conclusion that she had been dismissed without sufficient notice that her conduct was prohibited.

The lack of a specific preexisting rule in these cases did not have the undesirable effect of delegating the determination of what may be taught from one type of school authority to another. It would appear that the same authorities who would be expected to promulgate preexisting rules made the decisions in these cases. On the other hand the lack of preexisting standards may undesirably deter teacher creativity as well as enhance the possibility of arbitrary action by school authorities. See generally Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). These factors do not seem, however, to compel a constitutional demand for explicit preexisting rules in this area unless the activity of classroom teaching is itself constitutionally protected. This question returns us to the central problem of this Article. On the question of the need for preexisting standards governing student conduct in school, see generally *Soglin v. Kauffman*, 418 F.2d 163 (7th Cir. 1969); *Esteban v. Central Mo. State College*, 415 F.2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970); *Hasson v. Boothby*, 318 F. Supp. 1183 (D. Mass. 1970).

¹²⁴ 457 F.2d 289 (2d Cir.), cert. denied, 409 U.S. 998 (1972). See also *Adams v. Campbell County School Dist.*, 511 F.2d 1242, 1247 n.2 (10th Cir. 1975); *Birdwell v. Hazelwood School Dist.*, 491 F.2d 490 (8th Cir. 1974), aff'g 352 F. Supp. 613 (E.D. Mo. 1972); *Ahern v. Board of Educ.*, 456 F.2d 399 (8th Cir. 1972); *Minarcini v. Strongsville*

That case involved the decision of a New York City Community School Board to remove from all junior high school libraries in the district all copies of *Down These Mean Streets*, an autobiographical account of a Puerto Rican youth growing up in Spanish Harlem. The books were removed by a vote of the school board after parents complained¹²⁵ that the book would have an adverse moral and psychological effect on their eleven- to fifteen-year-old children, principally because of obscenities and explicit sexual representations in the book. On the other hand, at trial affidavits were introduced by psychologists, teachers, and children that the book would have no such effect.

Unlike the *Keefe*, *Parducci*, and *Mailloux* courts, however, the Second Circuit upheld the action of the school board, without discussing the value or harm of the book. The court viewed the case as requiring determination of which authority has the responsibility, which inevitably must be lodged somewhere, of selecting books for school libraries:

Since the Legislature of the State of New York has by law determined that the responsibility for the selection of materials in the public school libraries in New York City is to be vested in the Community School Board, and the Commissioner of Education of that State has defined the purposes of the public school library . . . we do not consider it appropriate for this court to review either the wisdom or the efficacy of the determinations of the Board. Our function is purely one of constitutional adjudication on the facts and the record before us: has the Board transgressed the first amendment rights of the plaintiff teachers, parents, librarian and children. . . .

After a careful review of the record before us and the precedents we find no impingement upon any basic constitutional values. Since we are dealing not with the collection of a public book store but with the library of a public junior high school, evidently some authorized person or body has to make a determination as to what the library collection will be. It is predictable that no matter what choice of books may be made by whatever

City School Dist., 384 F. Supp. 698 (N.D. Ohio 1974); *Nigosian v. Weiss*, 343 F. Supp. 757 (E.D. Mich. 1971).

¹²⁵ See generally note 94 *supra*.

segment of academe, some other person or group may well dissent. The ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions.¹²⁶

The court went on to state that in this case, unlike *Epperson*, there was no issue of religious motivation for the board's decision. The court also rejected the argument that the constitutional prohibition against the government's banning books that are not obscene means that school authorities may not remove non-obscene books from the public school library. Such an argument

equates the public school library, which has a function as an adjunct to the educational venture, with the entrepreneur seller of books who has no comparable responsibility. The public school library obviously does not have to become the repository, at public expense, for books which are deemed by the proper authorities to be without merit either as works of art or science, simply because they are not obscene within the statute.¹²⁷

The court added that it did not see the relevance of *Tinker* to the case at bar, and then it dealt explicitly with *Keefe* and *Parducci*:

To the extent that these cases hold that first amendment rights have been violated whenever a district court disagrees with the judgment of school officials as to the propriety of material assigned by a teacher to students, we are not in accord. In any event, both cases involved the discharge of teachers with concomitant issues of procedural due process which are not present here and therefore the cases are not controlling.¹²⁸

¹²⁶ 457 F.2d at 291-92 (footnotes omitted).

¹²⁷ *Id.* at 292-93.

¹²⁸ *Id.* at 293-94. The court in a footnote also observed that "[w]hile the First Circuit has indicated that it does not 'regret' its decision in *Keefe v. Geanakos*, *supra*, its enthusiasm for intrusion into academic issues seems to be lessening," citing the two opinions of the First Circuit in *Mailloux*. *Id.* at 294 n.7. Note that the Second Circuit does not attempt to draw a distinction between teachers and librarians in distinguishing *Keefe* and *Parducci*, although earlier in its opinion the court notes that the subjects discussed in the book "have not been placed off limits by the Board. A book has been removed but the librarian has not been penalized, and the teacher is still free to discuss the Barrio and its problems in the classroom." *Id.* at 292.

Minarcini v. Strongsville City School Dist., 384 F. Supp. 698 (N.D. Ohio 1974), also

The position of the Second Circuit in *Presidents Council*, therefore, is based on the realization that in a public school, unlike a private school, some public official or body—such as a state legislature, local school board, superintendent, principal, librarian, or teacher—must make book selections and other curricular determinations. Thus, the situation should not be viewed in terms of a state authority censoring a teacher or librarian, but rather in terms of whether the Constitution, in opposition to the state sanctioned hierarchy, somehow makes the teacher or librarian the proper selector of a curriculum or books or otherwise restricts the ability of school authorities to make particular curricular decisions. This Second Circuit position is so clearly correct that it is difficult to understand how the *Keefe* and *Parducci* courts, as well as many commentators, have not recognized its merit.¹²⁹ Even the district court in *Mailloux*, although suggesting that a teacher's right to choose teaching methods is more of a "constitutionally-recognized interest" than a "right" and may be restricted more than a teacher's civic right to freedom of speech, persisted in speaking of the restriction of a teacher's rights by governmental authorities as if the case involved governmental censorship of private conduct.¹³⁰ Perhaps, this persistent misunderstanding of the real problem has resulted from attempts by courts and commentators to reach their desired results by casting the cases in the familiar mold of cen-

involved book selection in that the school board refused to purchase three novels which the school's English teachers had recommended for classroom use. In upholding the action of the school board and distinguishing *Keefe*, *Parducci*, and *Mailloux*, the court attempted to distinguish book purchasing from classroom teaching:

Factually the cited cases are distinguishable from the case at bar for the reason that . . . no teacher was discharged or threatened with discharge nor were any members of the Strongsville teaching staff instructed not to discuss the novels or utilize them as outside or supplemental reading. Additionally, the Court is in complete accord with the underlying principles of plaintiffs' authority, namely, the professional teacher's obligation to utilize individual teaching methodology, which was not violated by the Board's action herein.

384 F. Supp. at 707.

In contrast, Professor O'Neil equates teachers and librarians for purposes of arguing that the Second Circuit is wrong in not recognizing that librarians have a constitutionally protected right of academic freedom. O'Neil, *supra* note 4, at 244-47. If public school teachers have a constitutionally protected right to determine what they teach, and this right also extends to public school librarians, the question necessarily arises as to what other groups might also be said to enjoy such a right—for example, a programmer of a teaching machine; an author of an educational television program shown in schools; a performer in such a program; the writer of a textbook used in school.

¹²⁹ See text accompanying note 122 *supra*.

¹³⁰ 323 F. Supp. at 1391 n.4.

sorship. Or perhaps they have been genuinely confused. In either event, proper analysis of these cases must begin with acceptance of the Second Circuit's position.

Viewed in this way, the issue becomes one of determining whether the Federal Constitution supplants the accepted state hierarchy of curricular decision making and bestows upon the classroom teacher the right to make certain curricular decisions contrary to the wishes of superiors, or otherwise to invalidate certain types of curricular decisions made by the school authorities in the cases under consideration.

C. *Inadequate Bases for a Teacher's Constitutional Right to Teach Contrary to Preferences of Superiors*

1. Professionalism

Among the bases that have been proposed to support a teacher's constitutional right to make curricular decisions contrary to the wishes of superiors is that of professionalism. For example, the plaintiff teacher in *Parducci* cited her "professional obligation" as the basis for her refusal to abide by the directives of the superior school authorities.¹³¹ The American Civil Liberties Union has stated:

The professional staff, by virtue of its training and experience, has the right and responsibility to establish the curriculum, subject to the approval of boards of education and state departments of education. It is expected that members of the staff will be guided at all times by the highest professional standards of scholarship and methodology, applied with an appropriate sensitivity to the community's educational needs and the expressed views of its citizens. Their professional preparation, however, qualifies them to establish what shall be included in the curriculum and when and how it shall be taught, free from dictation by community groups or individual citizens.¹³²

Professionalism has also been invoked by Professor Robert O'Neil, in an article sharply critical of *Presidents Council*, as a

¹³¹ 316 F. Supp. at 354.

¹³² AMERICAN CIVIL LIBERTIES UNION, ACADEMIC FREEDOM IN THE SECONDARY SCHOOLS 7 (1971).

justification for a librarian's right of book selection contrary to the wishes of the school board.¹³³ Finally, professionalism appears to be a central aspect of the *Mailloux* district court's understanding of *Keefe* and *Parducci* as upholding curricular decisions of teachers over those of superior school authorities if the decisions are shown to be regarded by the weight of opinion in the profession as permissible.¹³⁴

Those arguing that teachers' professionalism should entitle them to control their own work product have compared teachers to physicians and attorneys.¹³⁵ There is, of course, considerable force to the argument that individual professionals—people who have acquired a unique and valuable skill or body of knowledge—should be, and are, generally allowed considerable discretion in determining how to perform their tasks and even in defining the tasks to be performed. Our society usually recognizes that to do otherwise would be counterproductive in terms of obtaining the best work product from professionals. Additionally, views of professional associations or the prevailing standards in a profession are often accorded great weight in determinations concerning that profession. For example, the district court's use in *Mailloux* of the weight of professional opinion as a standard for evaluating proper teacher conduct finds a strong parallel in the common law use of prevailing professional standards in determining whether an attorney or a physician has violated the standard of care required of him by the law of torts.¹³⁶

Using professionalism to support a constitutional right of teacher control of curriculum creates many difficulties, however, even assuming that teachers are "professionals" in the same sense as physicians and attorneys. First, and most significantly, these examples of general societal and legal deference to professional opinion involve policy choices, not constitutional commands. It could hardly be suggested that it would be unconstitutional for a state to decide that the tort standard of care it requires of physicians is higher or otherwise different than the standard prevailing in the profession. Indeed, the Supreme

¹³³ O'Neil, *supra* note 4, at 246-47.

¹³⁴ 323 F. Supp. at 1390-91.

¹³⁵ Jones, *supra* note 26, at 224, 233. Note that this argument is made in the context of a discussion of university professors, not teachers in lower education.

¹³⁶ See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 161-64 (4th ed. 1971).

Court has recently held that even in the area of freedom of the press, an area at the heart of constitutional concern, the Constitution does not require legal deference to the professional standards of journalists concerning the nondisclosure of the source of confidential information.¹³⁷

Moreover, even as a policy matter, professionalism is not persuasive as a basis for a doctrine of teacher control of curriculum. The arguments supporting such a view usually attempt to assimilate a teacher to the archetypal professional, such as a physician, attorney, or artist. Such arguments, however, generally fail to note that the archetypal professional is an independent contractor who sells his skills or work product to clients on the open market. This, of course, is not true of public school teachers, who are dependent on the government for their salaries. In seeking the right to determine what they teach within this context, public school teachers do not set forth the typical *laissez-faire* contention that one should be free to sell his goods or services in the open market without undue restraints; they advance the extraordinary contention that teachers should be free of the usual obligations of employees to their employers. Even when archetypal professionals serve as salaried employees, the type of work they do, and to some extent the method and manner of its performance, may well be regulated by their employers. Perhaps in recognition of this fact, even the forceful statement of the American Civil Liberties Union supporting teacher control of curriculum on the ground of professionalism makes such teacher control "subject to the approval of boards of education and state departments of education."¹³⁸

Finally, one must be very careful in deciding precisely what kinds of decisions a professional's unique training and experience qualify him to determine. Presumably the special training and experience of a teacher have equipped him to decide issues of pedagogical methodology. But issues of what should be taught, as distinguished from those concerning how to teach, may involve completely different kinds of considerations. For example, important value judgments concerning the proper allocation of societal resources or the aims sought to be accomplished by public education may be relevant. Such judgments are not of the type which the prior training and experience of

¹³⁷ *Branzburg v. Hayes*, 408 U.S. 665 (1972).

¹³⁸ AMERICAN CIVIL LIBERTIES UNION, *supra* note 132, at 7.

teachers have uniquely equipped them to answer definitively for society, either as individual teachers or as an organized faculty or profession. These are truly political questions that should be determined by instruments of societal will rather than by professional experts.¹³⁹

The fact that the majority of local school boards in this country is elected by the voters reflects the political nature of much of educational decision making.¹⁴⁰ The political nature of curricular decision making is further evidenced by the fact that, in contrast to the cases and commentators discussed above that support a teacher's right to determine curriculum,¹⁴¹ courts¹⁴²

¹³⁹ Of course, teachers are members of society who may, individually or collectively, properly contribute to the determination of the societal will in such matters.

¹⁴⁰ See note 94 *supra* & accompanying text.

¹⁴¹ See text accompanying notes 74-96, 109-13 *supra*; Van Alstyne, *Constitutional Rights*, *supra* note 4; Nahmod, *supra* note 4.

¹⁴² Board of Educ. v. Rockaway Township Educ. Ass'n, 120 N.J. Super. 564, 295 A.2d 380 (1972); cf. West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 295 A.2d 526 (1972); Chicago Div. of Ill. Educ. Ass'n v. Board of Educ., 76 Ill. App.2d 456, 222 N.E.2d 243 (1966). See generally S. GOLDSTEIN, *supra* note 4, at 746-801. This position was well expressed by the New Jersey Superior Court in *Board of Educ. v. Rockaway Township Educ. Ass'n*, *supra*, in which the court held that a provision of a teacher collective bargaining agreement providing for arbitration of grievances could not be applied to curricular determinations:

The selection of courses to be presented to students and the subjects to be presented or discussed cannot be a "term or condition of employment." Defendants argue "there can be no doubt that the methods of selecting courses and even more clearly, the procedures and methods by which these courses are to be presented, may be negotiated at least in broad terms." This proposition is untenable.

The Board is responsible for the production of a "thorough and efficient" school system (*N.J. Const.* (1947), Art. VIII, § IV, par. 1) and particularly the statutory obligation to provide "courses of study suited to the ages and attainments of all pupils." *N.J.S.A.* 18A:33-1. The Board has a continuing obligation placed upon it by the Legislature to adopt and alter courses of study.

120 N.J. Super. at 569-70, 295 A.2d at 383-84.

Quoting from a decision by the Commissioner of Education, the court in *Rockaway* made clear that the New Jersey school law gave the local boards management of the public schools. According to the Commissioner, local boards are able and expected to look to teachers for professional input into the decision making process; however, the board is not obligated to follow teacher suggestions in its ultimate determinations. Teachers, far from being a special interest class with regard to the operation of public schools, are, as forcefully stated in *Porcelli v. Titus*, 108 N.J. Super. 301, 312, 261 A.2d 364, 370 (App. Div. 1970), *cert. denied*, 55 N.J. 310, 261 A.2d 355 (1969), merely employees who run the schools for the benefit of pupils, parents, and the community. Therefore, according to the *Rockaway* court, the board cannot make certain issues subject to bargaining, let alone be forced to do so:

The courts have recognized that public employees cannot make contracts with public agencies that are contrary to the dictates of the Legislature. Nor can public agencies such as a board of education "abdicate or bargain away their continuing legislative or executive obligation or discretion."

and commentators¹⁴³ have been most reluctant to permit curricular decisions to become the subject of collective bargaining between school boards and teachers' associations even when the school board so desires.

Yet, as the cases discussed above illustrate, the arguments for a constitutional right of teacher control of curriculum, or more generally, a policy doctrine of academic freedom, are not limited to nonpolitical issues of methodology.¹⁴⁴ Rather they are concerned with issues that require difficult judgments as to the kind of education and educational environment a community desires. With regard to such issues, professionalism is an insufficient basis for a doctrine of teacher supremacy over the authorized, societal decision making structure.

2. Freedom of Expression

Professor Thomas Emerson offers a different justification for academic freedom in the chapter entitled "Academic Freedom" of his book, *The System of Freedom of Expression*.¹⁴⁵ As the

It is concluded, therefore, that if the contract is read to delegate to a teacher or to a teacher's union the subject of courses of study, the contract in that respect is *ultra vires* and unenforceable.

120 N.J. Super. at 570, 295 A.2d at 384 (citations omitted).

¹⁴³ See H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* 7-32, 59-65, 137-53 (1971); Goldstein, *Book Commentary: The Unions and the Cities*, 22 BUFFALO L. REV. 603 (1972); Hazard, *Collective Bargaining and School Governance*, 5 SW. U.L. REV. 83 (1973). It is startling that the issue of delegation of school board authority over curricular decisions which so disturbs the courts and commentators cited in this and the preceding footnote are never discussed by the cases supporting a constitutional right of teachers to determine what they teach. Apparently, despite the reference to individual teachers in *Board of Educ. v. Rockaway Township Educ. Ass'n*, 120 N.J. Super. 564, 570, 295 A.2d 380, 384 (1972), the issue of delegation of school board powers to teachers is generally perceived only when the situation involves teachers as a group rather than as individuals. Only then are teachers seen as competing with other groups, such as parents, students and community organizations, for educational decision making power. Yet, the problem of giving preferred status to teachers in this competition clearly applies to situations in which teachers are acting as individuals as well as in a group. See also note 94 *supra*.

Arguments for teacher control of curriculum based on professionalism sometime refer to the individual "professional" teacher, but at other times to larger groups, up to and including the entire "profession."

¹⁴⁴ This is not to imply that there is any basis for a constitutional right of teachers to determine pedagogical methods, even if methodology can be distinguished from curriculum in a policy sense. In many cases what is taught is indistinguishable from how it is taught. For example, a choice to use a textbook depicting the founding fathers in an extremely favorable light might be inconsistent with a teacher's desire to use the Socratic method, a pedagogical device. Cf. *Ahern v. Board of Educ.*, 456 F.2d 399 (8th Cir. 1972).

¹⁴⁵ T. EMERSON, *supra* note 4, at 593.

title of the book suggests, Professor Emerson attempts to justify individual teacher control of the classroom as an aspect of freedom of expression protected by the first amendment. Both the *Keefe* and *Parducci* courts apparently considered their substantive holdings to be applications of the first amendment to the situation of public schools. Yet Professor Emerson is troubled by the complications involved in applying concepts of freedom of expression to a public school teacher's decisions of what and how to teach.¹⁴⁶ The district court in *Mailloux* was equally troubled by this problem and resorted to saying that academic freedom "is akin to, and may indeed be a species of, the right to freedom of speech which is embraced by the concept of the 'liberty' protected by the Fourteenth Amendment [*sic*]. Analytically, as distinguished from rhetorically, it is less a right than a constitutionally-recognized interest."¹⁴⁷ The meaning of this statement is quite obscure. What is clear, however, is the reluctance of the court to accept academic freedom as simply an aspect of freedom of expression protected by the first amendment.

This reluctance is well founded. As stressed above,¹⁴⁸ the traditional construct to which the first amendment has been applied is that of the government's attempting to restrain or censor the speech of its citizens. It has not generally been applied to a governmental or nongovernmental employer's attempting to control the work product of its employees, as employers normally do, merely because that work product happens to be speech or expression. Indeed, no one would suggest that a governmental employee, such as a clerk in a government office, could not be directed by his superiors to respond to citizens' questions in a certain manner, despite the fact that his responses would consist of speech.

The extraordinary nature of claims for teacher control of curriculum, based on the assertion that teaching consists of expression, can be seen quite clearly when academic freedom is compared with freedom of the press, a central first amendment concern. Academic freedom claims, unlike those of freedom of the press, demand subsidized speech. They are claims to be hired and retained on a public school payroll in order to engage

¹⁴⁶ *Id.* 616.

¹⁴⁷ *Mailloux v. Kiley*, 323 F. Supp. 1387, 1391 n.4 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971).

¹⁴⁸ See text accompanying notes 95, 130 *supra*.

in speech (consisting of teaching) free from normal employment restraints on work product. No such claims have been vindicated for freedom of the press.¹⁴⁹

Rather, freedom of the press consists of the negative right to be free from governmental restraints if the economic or other means necessary to publish one's thoughts are available. Freedom of the press is essentially the freedom of the publisher, not the staff writer or editor. It would not appear to violate freedom of the press for a publisher to fire writers and editors with whom he disagrees.¹⁵⁰ Indeed, not only does freedom of the press not include a right to subsidized speech, but, as recently held by the Supreme Court, freedom of the press is actually violated by a state law that requires newspapers to grant a political candidate equal space to answer attacks on him by the newspaper.¹⁵¹

Thus, the concept of freedom of expression cannot, on the ground that teaching consists of spoken and written words, support teacher control of curriculum. Indeed, Professor Emerson¹⁵² and other writers¹⁵³ recognize this fact and ultimately base their positions not on the simple fact that teaching consists of expression or speech, but rather that it consists of a special kind of speech that is inherent in the concepts of teaching or education.

The theoretical basis for the doctrine of academic freedom of classroom teaching has generally been developed in the context of higher education. Because traditionally academic freedom has been spoken and written of in terms of higher education, the doctrine has developed on premises that are thought to be inherent in the concepts of teaching and academic research at the university level. A full development of the premises of academic freedom of teaching and research at the university

¹⁴⁹ A confused exception to this statement appears to exist in a number of lower court cases concerning the rights of student editors of university newspapers. See, e.g., *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973); *Panarella v. Birenbaum*, 32 N.Y.2d 108, 343 N.Y.S.2d 333 (1973). But cf. *Close v. Lederle*, 424 F.2d 988 (1st Cir.), cert. denied, 400 U.S. 903 (1970). See also *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969). The cases are conflicting, however, and the rationale for supporting the right of editors to subsidized speech is not convincing. See S. GOLDSTEIN, *supra* note 4, at 383-414.

¹⁵⁰ But see note 149 *supra*.

¹⁵¹ *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); cf. *Columbia Broadcasting System v. Democratic Nat'l Committee*, 412 U.S. 94 (1973). But see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

¹⁵² T. EMERSON, *supra* note 4, at 618-26.

¹⁵³ See, e.g., Van Alstyne, *Constitutional Rights*, *supra* note 4; Nahmod, *supra* note 4.

level is beyond the confines of this Article.¹⁵⁴ A brief investigation is necessary, however, because the development of those concepts in higher education has come to influence the views of courts and commentators concerning teacher control of curriculum in lower education.

The basic premise underlying the doctrine of academic freedom of teaching and research at the university level is that truth is discovered through research and inquiry, that there are no revealed truths or dogmas that are not subject to question through research. Equally important is the concept that the function of education is to open the minds of the students, a function best accomplished by bombarding students with all conceivable ideas, from which they may discern truth, if it exists, by and for themselves. Indeed, in the analytic model of education previously described,¹⁵⁵ the student, even while still a student, is a participant in this search for truth. Any restriction on the ideas that may be communicated to students, therefore, is an impermissible restriction on their right to learn. Under this concept, as stated by Justice Brennan in *Keyishian*, "[t]he classroom is peculiarly the 'marketplace of ideas' . . . [in which occurs a] robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' "¹⁵⁶

The problems with such a premise for a constitutional or policy norm of academic freedom in higher education are beyond the scope of this Article,¹⁵⁷ but it is clear that the premises which underlie academic freedom in higher education have not historically been compatible with the American concept of lower education. The major difference between the university and secondary school situations was well stated by the district court in *Mailloux* in that portion of its opinion explaining its refusal to extend the academic freedom doctrines of *Keefe* and *Parducci*.¹⁵⁸

The central fact in the distinction between higher and lower

¹⁵⁴ My views on this subject have been developed in my recent article, *Academic Freedom: Its Meaning and Underlying Premises as Seen Through the American Experience*. Goldstein, *supra* note 4.

¹⁵⁵ See text accompanying note 17 *supra*.

¹⁵⁶ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

¹⁵⁷ For a discussion of this issue, see Goldstein, *supra* note 4.

¹⁵⁸ 323 F. Supp. at 1392.

education is the role of value inculcation in the teaching process. The public schools in the United States traditionally have viewed instilling the young with societal values as a significant part of the schools' educational mission.¹⁵⁹ Such a mission is directly opposed to the vision of education that underlies the premises of academic freedom in higher education. If the purpose of teaching is to instill values, there would seem to be little reason for the teacher, rather than an elected school board or other governmental body ultimately responsible to the public, to be the one who chooses the values to be instilled.

Thus, in order to support teacher control of curriculum as a constitutional norm, one must argue that the market place of ideas vision of education espoused in *Keyishian*, rather than one focusing on value inculcation, is constitutionally required for lower public education in the United States. Before entering into a discussion of such arguments,¹⁶⁰ however, it is necessary to explore further the concepts underlying a construct of education that does not accept value inculcation as a legitimate part of its function, because the problems of value inculcation intrude into the process even if one does not accept them as a legitimate part of education.

A true market place of ideas should be totally free, and ideally no limits should be placed on those who have the opportunity to expose their ideas to students. Obviously, however, only a limited number of people may be employed as teachers by a public school. In order to try to obviate this fundamental difficulty with the free market concept, students may be exposed to outside lecturers and encouraged to join in the educational process themselves by developing their own means of expression through, for example, student newspapers. Yet, these additional elements cannot change the fact that only certain people are employed to teach and evaluate the students, thus giving them a unique position in the market place. Moreover, the conflict between this unique position of teachers and the ideal of the market place is much more pronounced at the secondary school level than it is at the university level.

This difference is caused by the nature of the students, the teachers, and the institutions. The students in public high

¹⁵⁹ See text accompanying notes 185-89 *infra*.

¹⁶⁰ See text accompanying notes 185-207 *infra*.

schools, as noted by the district court in *Mailloux*,¹⁶¹ are generally less mature than their university counterparts. In *Tilton v. Richardson*,¹⁶² the plurality opinion written by Chief Justice Burger relied on the difference in impressionability and susceptibility¹⁶³ to indoctrination between lower education and college students in holding that governmental grants to sectarian colleges were constitutional even though those to sectarian lower schools were not.

Moreover, while one might question the validity of the district court's comments in *Mailloux* concerning the lesser intellectual qualifications, experience, and emotional maturity of public school teachers as compared to their university counterparts,¹⁶⁴ university professors probably do feel greater professional restraints imposed on their teaching by their disciplines than are felt by public school teachers.

Finally, the nature of the two types of institutions differs. As noted by the district court in *Mailloux*, "it cannot be accepted as a premise that the [public school] student is voluntarily in the classroom A secondary school student, unlike most college students, is usually required to attend school classes, and may have no choice as to his teacher."¹⁶⁵ In contrast, a college student often has considerable choice regarding the college he attends, his courses, and his teachers. The much larger faculty of colleges, as compared to those of high schools, and the prevailing system of electives, allows colleges to mitigate the problem of the teacher's unique position in the market place by purposely hiring professors in the same field who have conflicting views.¹⁶⁶

Advocates of public school teacher control of classroom curriculum decisions have recognized and attempted to resolve the inconsistency of the teacher's position as an authority figure and the ideal of education on which their system is based. Professor Sheldon H. Nahmod, for example, would restrict teacher control of curriculum by, among other things, requiring a "balanced"

¹⁶¹ 323 F. Supp. at 1392.

¹⁶² 403 U.S. 672 (1971).

¹⁶³ *Id.* at 686.

¹⁶⁴ 323 F. Supp. at 1392.

¹⁶⁵ *Id.*

¹⁶⁶ These distinctions between colleges and high schools are, of course, premised on archetypes of each. In reality, colleges, and to a lesser extent high schools, vary among themselves on many of these points, with some aspects of "higher education" more closely approaching a high school situation than others.

presentation.¹⁶⁷ In this manner he seeks to effectuate what he recognizes as the state's interest in preventing "the indoctrinating effect which a teacher's one-sided presentation is thought to have on his students who are, in a real sense, his captive audience."¹⁶⁸ Professor Nahmod's commitment to teacher control of curriculum, however, leads him to conclude that after a teacher has made a balanced presentation he has a constitutional right to express his own opinion on the subject.¹⁶⁹

There are substantial difficulties with Nahmod's resolution of the conflict between the market place of ideas concept and the authority figures status of the teacher. First, in practice it would seem quite difficult to separate a teacher's balanced presentation from his subsequent assertion of his own opinions, and it is not clear why this subsequent assertion of opinion would not often cancel out the effect of the previous balanced presentation. More fundamentally, there is a serious question whether teaching, particularly in the humanities and social sciences, can be balanced or neutral. In recent years, so-called radical historians have argued forcefully that in the field of history traditional scholarship has been neither balanced nor neutral, nor what one might call objective.

Moreover, the concept of the balanced presentation has no meaning when the argument is that certain material should not be presented at all because the mere exposure of the students in school to the material is not educationally sound. This, in fact, was the argument of the school authorities in *Keefe*, *Parducci*, *Mailloux*, *Presidents Council*, and perhaps *Epperson*; all cases in which the school authorities did not want the students exposed in school to the language or the ideas involved in the assigned readings or classroom discussion. A balanced discussion of such language or ideas would not have met these concerns. Nor can it be concluded, a priori, that the problem of the authority figure status of the teacher is not relevant when the issue is pure exposure. The mere presentation of language or ideas by a teacher under the auspices of the school may give an appearance of legitimacy to the use of such language or ideas, which is precisely what the authorities wish to prevent. Indeed, a failure to understand the desire of school authorities to prevent the legitimiza-

¹⁶⁷ Nahmod, *supra* note 4, at 1042-50.

¹⁶⁸ *Id.* 1048.

¹⁶⁹ *Id.* 1049.

tion of language usage or ideas that may occur through their mere presentation in school, may result in the *non sequitur* argument that the school has no real interest in preventing the use of "street language" in school, because the students are probably already familiar with the words from the street.¹⁷⁰

A more radical attempt to resolve this conflict between the market place ideal and the authority position of the teacher was made by Professor William Van Alstyne¹⁷¹ in his discussion of Justice Black's concurring opinion in *Epperson*.¹⁷² While recognizing that there are many groups which arguably should have input into curricular decisions, Van Alstyne realizes that someone must have the power to make the final decision, and he believes that the legislature or school board are the most logical choices because they are democratically constituted, politically responsible, and subject to constitutional constraints. Van Alstyne rejects the view that the classroom is a completely free and voluntary public forum in which "the remunerated teacher may appropriately assert the same full measure of his own freedom of speech available to him as a citizen in private life."¹⁷³ Citing the compulsory nature of classroom attendance, the inability of students to offer dissenting views for fear of teacher sanctions, and the role of the teacher as employee, Van Alstyne strongly questions both the existence and wisdom of complete freedom for teachers:

[The teacher] is insulated within his classroom even from the immediate competition of different views held by others equally steeped in the same academic discipline. Indeed, the use of his classroom by a teacher or professor deliberately to proselytize for a personal cause or knowingly to emphasize only that selection of data best conforming to his own personal biases is far beyond the license granted by the freedom of speech and furnishes precisely the just occasion to question his fitness to teach.¹⁷⁴

Van Alstyne then notes that the above factors that support limiting teacher freedom

¹⁷⁰ See *Keefe v. Geanakos*, 418 F.2d 359, 361 (1st Cir. 1969).

¹⁷¹ Van Alstyne, *Constitutional Rights*, *supra* note 4, at 855-58.

¹⁷² See text accompanying notes 62-64 *supra*.

¹⁷³ Van Alstyne, *Constitutional Rights*, *supra* note 4, at 856.

¹⁷⁴ *Id.*

apply with equal force when the prescription for biased treatment of a given subject or the mandate to use the classroom as an instrument of ideological proselytism is fashioned by a legislature or a school board instead—a legislature or school board that so rigidly determines the exact and preselected details of each course that in fact it employs the teacher as a mere mechanical instrument of its impermissible design. For instance, it may be relatively unimportant that Commager's high school text on American history is uniformly purchased in bulk and prescribed as the basic text in high schools civics in lieu of a similar text by Jones or Smith unless its particular selection *plus* detailed proscriptions of any classroom reference to other texts, other impressions, and other historical ideas cumulatively combine to describe a process of unfree education and academic indoctrination. Indeed, arbitrary restrictions on alternative sources of information or opinion, resulting not from understandable budgetary constraints or the restraints upon the time available for study by teachers and students, are precisely what the first amendment disallows. Against a school board decree requiring the inculcation of one theory and forbidding mention or examination of another, for instance, a mere taxpayer should have standing to contest his compelled financial support for the propagation of ideas to which he is opposed Correspondingly, neither must teachers or professors endure similarly arbitrary restrictions in the course of their own inquiries or *upon their own communicated classroom references*. One may not, as a condition of his employment, be made an implement of governmental practices which are themselves violative of the first amendment.¹⁷⁵

Superficially, Professor Van Alstyne's theory might seem to be another argument for the academic freedom of teachers to make curricular choices. This appearance is strengthened by the title of the article from which the above quotation is taken, *The Constitutional Rights of Teachers and Professors*, and the general tenor of the remainder of the article. The impression is further reinforced by the fact that in all the cases under discussion,

¹⁷⁵ *Id.* 856-57.

Professor Van Alstyne's theory leads him to support the teacher's right in the same manner as do the advocates of the constitutional right of teachers to control their classroom teaching.

Yet this appearance is truly only superficial. Professor Van Alstyne's theory does not depend at all on a right of teachers to decide what they teach. Rather, it is based on the concept that all curricular decision makers, including teachers, state legislatures, school boards, and school administrators, are precluded by the Constitution from making certain types of curricular decisions. The fact that such a theory may generally be viewed as supporting teachers' rights is based on the preconception that it is usually the other types of curricular decision makers that make the kinds of curricular decisions that Professor Van Alstyne believes are constitutionally objectionable.

Indeed, the full ramifications of this approach are not completely analyzed by Professor Van Alstyne himself. He discusses a teacher's imposition of his orthodoxy on his students as forbidden in terms of its providing a constitutionally legitimate basis for the school authorities to take action against the teacher. The full implications of his argument, however, go much further. Impermissible teacher curricular decision making, like impermissible legislative or school board curricular decision making, not only justifies school-authority action to counter it, but is itself unconstitutional, and therefore justifies judicial relief at the request of taxpayers or citizens, as Professor Van Alstyne himself argues in relation to school board or legislative action.

These implications may be illustrated by the following examples. The Supreme Court has held that ceremonial *Bible* reading authorized by the legislature is unconstitutional as violative of the first amendment's establishment clause.¹⁷⁶ Pursuant to both the logic of the Supreme Court opinion and Professor Van Alstyne's argument, ceremonial *Bible* reading decided upon by an individual classroom teacher would be equally unconstitutional on the same ground.¹⁷⁷ It would also appear, again both by the logic of the *Epperson* opinion¹⁷⁸ and the Van Alstyne theory, that a teacher's refusal to teach evolution based on his

¹⁷⁶ *School Dist. v. Schempp*, 374 U.S. 203 (1963).

¹⁷⁷ See generally S. GOLDSTEIN, *supra* note 4, at 355-64.

¹⁷⁸ See text accompanying notes 53-73 *supra*.

religious convictions would be as unconstitutional as the Arkansas statute invalidated in *Epperson*.¹⁷⁹

The essence of the Van Alstyne approach, therefore, is not directed at determining who is the decision maker, but rather what kinds of curricular decisions are constitutionally prohibited to all decision makers. One can easily agree that such decisions include those that violate a specific constitutional prohibition such as the establishment of religion clause, although one may doubt that *Epperson* is really such a case.¹⁸⁰ Also one could accept the proposition that truly arbitrary curricular decisions are constitutionally prohibited, although other than an example such as Justice Stewart's in which the mentioning of the existence of other languages besides Spanish is forbidden,¹⁸¹ it is difficult to conceive of any cases that would belong in this category. Surely, *Epperson* does not, and the absurdity of Justice Stewart's example indicates that probably no real-life examples do fall within the category of truly arbitrary curricular decisions.¹⁸²

When Professor Van Alstyne, however, uses the term "arbitrary restrictions," he apparently does not mean truly "arbitrary" in the sense of having no basis in reason, but rather, as is often the case in the use of this term, having no reasonable relationship to what he considers the legitimate ends of curricular decision making. Under the Van Alstyne view such legitimate ends apparently do not include value inculcation or "indoctrination."¹⁸³

¹⁷⁹ Note that although this proposition correctly follows from *Epperson* and the Van Alstyne theory alone, the first amendment free exercise rights of the teacher not to teach evolution might, as an outside factor, change this result.

¹⁸⁰ See note 57 *supra*.

¹⁸¹ *Epperson v. Arkansas*, 393 U.S. 97, 116 (1968) (concurring opinion).

¹⁸² See notes 70-73 *supra* & accompanying text.

¹⁸³ The Van Alstyne argument becomes somewhat confused at this point by his ambiguous statement that "arbitrary restrictions [imposed by school authorities superior to teachers] on alternative sources of information or opinion, resulting not from understandable budgetary constraints or the restraints upon the time available for study by teachers and students, are precisely what the first amendment disallows." Van Alstyne, *Constitutional Rights*, *supra* note 4, at 857. The basic problem with this statement is the possibility that it is drawing a dichotomy between "arbitrary restrictions" and budgetary or time constraints. That no such dichotomy can be drawn, however, is clear. Budgetary or time constraints generally do not dictate choices; rather they require the making of choices, which are in turn based on other, more substantive, factors related to the goals sought to be achieved within the time and budgetary constraints.

Reading the term "arbitrary restrictions" in the above quoted sentence to mean "indoctrination," thus permitting higher school authorities to make all kinds of other substantive curricular decisions, would be consistent with the rest of the Van Alstyne

3. Market Place of Ideas Model Not Constitutionally Compelled

Thus, both the teacher control of curriculum theory and the Van Alstyne theory depend ultimately on the view that the federal constitution compels the states to accept a market place of ideas model rather than a value inculcation model of public education.¹⁸⁴ Yet, such a constitutional doctrine is at clear variance with the historically accepted societal view that the deliberate inculcation of the right societal values is a major function of American public education. This has been evident in the United States since 1647, the year in which the first education act in the American colonies was passed. The Massachusetts Education Act

thesis. The sentence can also be read, however, as prohibiting higher school authorities from placing negative restrictions on teachers except for reasons of time and budget. Such a reading apparently would give to teachers a constitutional right of curricular determination, at least in terms of an affirmative right to teach material disapproved by superiors. Yet, such a right of teacher control of curriculum is not supported by the reasoning of the Van Alstyne thesis.

Alternatively, the sentence might be read to suggest a right of all curricular decision makers, including the classroom teacher, to make determinations in favor of specific teaching material. Thus, if any possible curricular decision maker decided that certain material should be taught, no other decision maker could overrule that decision, except for reasons of budget and time. Such a position would be quite consistent with an extreme view of the market place of ideas ideal of education. Yet, it does not seem likely that Van Alstyne was espousing it. As noted above, the essence of his position is that of anti-indoctrination, not anti-educational decision making by superior school authorities, and it is clear that he favors the politically responsible board as the primary decision maker. All curricular decisions are necessarily bounded by budget and time considerations since both are finite. The essence of curricular decision making is the making of value judgments within those constraints. As long as these value judgments do not include attempts at value inculcation or indoctrination, it would seem that Van Alstyne would not object, as a constitutional matter at least.

Finally, there is one further possible reading of the sentence in question. This reading would emphasize the wording "arbitrary restrictions on *alternative* sources of information or opinion" (emphasis supplied). That is, what is forbidden to superior school authorities is to order the teaching of one view of a subject while prohibiting the teaching of contrary positions on that same subject. Such a prohibition would be viewed as a clear instance of attempted indoctrination. Such a limited reading of the sentence is consistent with the rest of the Van Alstyne thesis and also with Van Alstyne's depiction of indoctrination as the combination of ordering the teaching of one view of a subject while proscribing other views. Indeed, one might conclude that, to Van Alstyne, this was the only situation to which his doctrine was applicable. That this is not true, however, is seen by the fact that Van Alstyne is using his doctrine to answer Justice Black's concurrence in *Epperson* and to support the *Epperson* result on a basis other than that of the establishment clause. *Epperson* was not a situation where the legislature ordered the teaching of the origin of man but prohibited the teaching of Darwinism. Where the Arkansas law was being observed, it was likely that the whole subject of the origin of man was not being taught.

¹⁸⁴ See generally text accompanying note 17.

of 1647¹⁸⁵ explicitly sets forth its purpose to thwart "Satan" by teaching children to read the *Bible* and to educate the youth "not only in good literature, but in sound doctrine."¹⁸⁶ This vision of public education has continued over the years, though the views of what is "sound doctrine" may have varied from time to time and place to place.¹⁸⁷ This fact was recognized by the Supreme Court in the well-known case of *West Virginia State Board of Education v. Barnette*,¹⁸⁸ in which the Court, while holding unconstitutional a state-required compulsory flag salute, contrasted the flag salute with the constitutionally valid route to accomplishing the same end of "inspir[ing] patriotism and love of country" through "teaching by instruction and study."¹⁸⁹

Thus, no sound theoretical basis exists for the view that the Constitution precludes value inculcation as a function of public education. Yet, the supporters of this view are not entirely without precedent for their position. The precedent relied upon by both Professor Nahmod and Professor Van Alstyne is the well-known case of *Tinker v. Des Moines Independent Community School District*,¹⁹⁰ discussed above,¹⁹¹ in which the Supreme Court held that it was unconstitutional for a local school board to have prohibited the wearing of black arm bands to school by students on a Vietnam War moratorium day. This reliance on *Tinker* is not the superficial reliance of *Parducci* on the inapplicable disruption test. Rather *Tinker* is said to support the proposition fundamental to the views of Nahmod and Van Alstyne—that the

¹⁸⁵ CHARTERS & LAWS OF MASSACHUSETTS BAY, Ch. 88, §§ 1-2 (1814) (originally enacted in 1647).

¹⁸⁶ *Id.* § 3 (originally enacted in 1671).

¹⁸⁷ See generally, e.g., B. BAILYN, EDUCATION IN THE FORMING OF AMERICAN SOCIETY (1972); L. CREMIN, AMERICAN EDUCATION: THE COLONIAL EXPERIENCE 1607-1783 (1970); L. CREMIN, THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION 1876-1957 (1962); J. DEWEY, DEMOCRACY & EDUCATION (1966); J. DEWEY & E. DEWEY, SCHOOLS OF TOMORROW (1962 ed.); I. ILLICH, AFTER DESCHOOLING, WHAT? (A. Gartner, C. Greer & F. Riessman eds. 1973); I. ILLICH, DESCHOOLING SOCIETY (1972); Jefferson, *Notes on Virginia*, in 4 WORKS OF THOMAS JEFFERSON 60-65 (Fed. ed. 1904).

¹⁸⁸ 319 U.S. 624 (1943).

¹⁸⁹ *Id.* at 631 (quoting with approval the dissent of Chief Justice Stone in *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 604 (1940)). See also *James v. Board of Educ.*, 461 F.2d 566, 573 (2d Cir.), cert. denied, 409 U.S. 1042 (1972) ("a principal function of all elementary and secondary education is indoctrinative—whether it be to teach the ABC's or multiplication tables or to transmit the basic values of the community").

¹⁹⁰ 393 U.S. 503 (1969).

¹⁹¹ See text accompanying notes 97-104 *supra*.

Constitution requires the adoption of the market place of ideas model of public school education.

The following language from the opinion of the Court, written by Justice Fortas, is relevant here:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. *In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.* In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.¹⁹²

This language in *Tinker* may be seen as an adoption by the Supreme Court of the "analytic model," of the "analytic"-"prescriptive" dichotomy discussed above,¹⁹³ as a constitutional requirement of public school education in the United States.¹⁹⁴ In a similar vein, Professor Nahmod has read *Tinker* as holding that a public high school is constitutionally required to be an "educational public forum."¹⁹⁵ Professor Nahmod has explicitly invoked his interpretation of *Tinker* as major support for the correctness of the substantive holdings of *Keefe* and *Parducci* and his view that teachers have a constitutional right to teach what they desire in the classroom, subject only to limitations concerning relevance and balance:

The student interest in learning, and thus in access to classroom discussion of controversial subjects may be analogized to a college student's right to hear controversial speakers on campus—a right which recent decisions have consistently held may not be regulated arbitrarily. Such an interest in receiving information was

¹⁹² 393 U.S. at 511 (emphasis supplied).

¹⁹³ See text accompanying note 17 *supra*.

¹⁹⁴ Goldstein, *supra* note 17, at 614-15.

¹⁹⁵ Nahmod, *Beyond Tinker: The High School as an Educational Public Forum*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 278, 294 (1970).

couched in first amendment terms in *Lamont v. Postmaster General*¹⁹⁶ where the Supreme Court held unconstitutional a federal statute requiring the Postmaster General to deliver unsealed foreign mailings of "communist political propaganda" *only* upon the addressee's request. The majority determined that the statute imposed an affirmative obligation on addressees amounting to an unconstitutional burden on their first amendment rights. In a concurring opinion, Justices Brennan and Goldberg reasoned that the first amendment includes those fundamental personal rights necessary to make it meaningful. "[T]he right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."

It is true that *Lamont* and the cases on controversial campus speakers involve adults or college students who are generally more mature than high school students. Moreover, a high school classroom would seem to be a more controlled and restricted marketplace of ideas than the mails or college campuses, if only because of compulsory attendance and, frequently, a uniformly required curriculum. *Nevertheless, after Tinker, it is clear that students cannot be insulated from controversial subjects in school.* If this applies to student expression through worn symbols, underground newspapers, and even school newspapers, then it would seem both inconsistent and educationally unworkable to prohibit student access to controversial subjects through supervised classroom presentations.¹⁹⁷

Yet even if Professor Nahmod's views of *Tinker* are valid, his conclusion that "it would seem both inconsistent and educationally unworkable" to draw distinctions between student input into

¹⁹⁶ 381 U.S. 301 (1965).

¹⁹⁷ Nahmod, *supra* note 4, at 1055 (emphasis supplied). See also Justice Douglas' dissent from the denial of certiorari in *Presidents Council v. Community School Bd.*, 409 U.S. 998 (1972): "Are we sending children to school to be educated by the norms of the School Board or are we educating our youth to shed the prejudices of the past, to explore all forms of thought, and to find solutions to our world's problems?" *Id.* at 999-1000.

the educational process—the context of *Tinker* and the commentaries on it—and teacher control of curriculum seems questionable. For the reasons discussed above regarding the authority position of the teacher,¹⁹⁸ one might well conclude that a constitutional requirement that students be permitted to exploit the captive audience status of their fellow students by exposing them to their opinions is more acceptable than a constitutional requirement that teachers be permitted to do so.

There are, however, additional reasons to reject the view that *Tinker* controls the result in the teacher control of curriculum cases. The *Tinker* opinion may well reflect Justice Fortas' impatience with a prescriptive (as contrasted with analytic) model of education¹⁹⁹ and, indeed, the opinion is most internally consistent and logically satisfying when viewed as based on pedagogical doctrines similar to the marketplace of ideas model of education. Yet the first amendment does not contain such judgments. As demonstrated above,²⁰⁰ even if the marketplace of ideas model is desirable from a policy standpoint, *Barnette* suggests that value inculcation is a constitutionally valid approach to public education. Thus it should not be a matter of first amendment concern if a school system were to determine that it wanted to control, as far as possible, all inputs into a student's learning process while he is in school and therefore did not want the students to be active participants in the process. Nor would it seem to be a matter of concern to any other section of the Constitution. Thus, a decision that *Tinker* rests on such a basis is a decision that *Tinker* is wrong. If *Tinker* is a wrong decision, its error should not be compounded by extending its doctrine to the area of teacher control of curriculum.

One does not necessarily have to conclude, however, that *Tinker* was wrongly decided to deny that it supports teacher control of curriculum. *Tinker*, on its facts, is similar to *James*,²⁰¹ which held it to be unconstitutional for school authorities to prohibit the wearing of a black armband to school by a teacher on a Vietnam War moratorium day.²⁰² Unlike the Court in

¹⁹⁸ See text accompanying notes 107-83 *supra*.

¹⁹⁹ Goldstein, *supra* note 17, at 615.

²⁰⁰ See text accompanying notes 188-89 *supra*.

²⁰¹ *James v. Board of Educ.*, 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

²⁰² See text accompanying notes 30-36 *supra*.

Tinker,²⁰³ the court in *James* did not rely on a pedagogical model to reach its result. To the contrary, it upheld the right of teachers to assert their rights as citizens despite the fact that they happened to be in school.²⁰⁴ Similarly, the students in *Tinker* could be viewed as citizens asserting their rights to wear black armbands on the day that all citizens with their political viewpoints had planned to wear them, despite the fact that the students had to be in school at that time. Under this rationale, students might be in an even stronger position than teachers as they are compelled by law to attend school and do not have the same authority-figure influence on their fellow students.²⁰⁵

Moreover, statements in the opinion support such an analysis of the case. The limitation of the *Tinker* doctrine to student expression which does not materially disrupt the educational process is much more consistent with the view that the student expression is an outside force intruding into the school than with the view that it is an integral part of the educational process itself.²⁰⁶ Reinforcing this idea is the Court's reference to other cases involving outside demonstrations "disrupting" ongoing state activities, such as hospitals or jails.²⁰⁷

Thus *Tinker* is not controlling in the teacher control of curriculum cases for several different reasons. First, even reading *Tinker* as requiring a market place of ideas model of public education in terms of student participation in their own education, teachers may be distinguished from students in this regard. Second, *Tinker* is not correct if it rests on such a model and its error should not be compounded by extending it. Finally, *Tinker* can be reanalyzed as resting on citizen's rights, thus making it irrelevant to the issue of teacher control of curriculum.

V. CONCLUSION

Neither sound constitutional analysis nor authoritative precedent support a federal constitutional right of teachers to determine what they teach contrary to the desires of school authorities superior to teachers within the state-sanctioned chain of

²⁰³ See text accompanying notes 190-92.

²⁰⁴ 461 F.2d at 571-72.

²⁰⁵ Such a view of *Tinker* would, of course, greatly limit its precedential value for other issues of student rights in school.

²⁰⁶ Cf. text accompanying notes 97-104 *supra*.

²⁰⁷ 393 U.S. at 512 n.6.

command. The cases involving restrictions on teachers' rights of curricular control are often erroneously viewed as censorship cases when the real issue is who should make curricular choices given the fact that someone has to make the choices. With regard to this issue, the arguments that the Constitution allocates curricular decisionmaking authority to the teacher are not persuasive. Professionalism is rejected as a basis for such a right because, *inter alia*, teachers are not independent contractors but are part of a conventional employer-employee relationship, and because the only supportive reasons are policy, not constitutional, arguments. Likewise, the freedom of expression rationale does not support a constitutional mandate of teacher curricular control. The freedom of expression justification for teacher control is premised on an analytical model of education which views school as a market place of ideas. There is no historical or precedential basis, however, for concluding that the market place of ideas model is constitutionally compelled over the traditional value inculcation model. Thus, in the final analysis, teachers' constitutional rights, in and out of the classroom, do not extend beyond the first amendment rights of all citizens.

It should be noted that this result does not seem undesirable as a matter of general policy. 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 answering.²⁰⁸

Moreover, in a democratic society it would seem desirable that politically responsive groups have the power to effect the public will concerning the structure and content of public education.²⁰⁹ Traditionally, parental participation in the educational process has been favored; the norm of the elected school board reflects this view. Allowing parents and community groups, as well as teachers, to have input into educational decisions comports more closely with the societal desire for lay control of education than does the more autocratic teacher control theory.

²⁰⁸ See text accompanying note 139 *supra*.

²⁰⁹ See note 94 *supra*.

Of course, this does not and cannot mean that all the day-to-day curricular decisions that a classroom teacher makes can or should be dictated by higher authorities. The issue is not whether either the teachers or the board will make all decisions, but only who will have the final say in case of conflict. As a practical matter, higher authorities are unable to control all policy decisions. The teachers' daily presence in their classrooms gives them significant power in the decision making process.²¹⁰ Furthermore, this teacher power in the decision making process is augmented by collective bargaining.²¹¹ Although some teachers input into the educational process is certainly desirable, it would not be sound policy to increase this presently substantial power by adopting a constitutional right of teacher curricular control.²¹²

²¹⁰ Goldstein, *Book Commentary: The Unions and the Cities*, 22 BUFFALO L. REV. 603, 606-07 (1972).

²¹¹ See *id.*

²¹² Note also that most of the cases discussed in this Article present fact situations in which a "liberal" position taken by the teacher is challenged by the more "conservative" school authorities; a belief that as a matter of educational policy the teachers in these particular cases are correct may influence one's conclusion about where final decision making authority should be vested. It is not at all clear, however, that teachers generally take the "liberal" or educationally "progressive" position when conflicts with higher authorities arise. In fact, giving final decision making authority to individual teachers could make it much more difficult for educational reform to take place. Presently a new school board or an individual principal may be able to produce significant changes in the policy of a school. Query whether this could be accomplished if each individual teacher had a constitutional right to resist all intended reforms. In terms of activity within the classroom, teachers in many situations are likely to have more of an interest in the status quo than will other interest groups involved. Thus the recognition of teacher control of curriculum as a constitutional right may impede rather than promote educational reform.